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Editorial

In this second edition of the CAS Bulletin for 2025, a few amendments to the Code of Sports-related Arbitration (the CAS Code) and to the schedule of costs adopted by the International Council of Arbitration for Sport (ICAS) at its last meeting on 28 May 2025 are highlighted. These new rules entered into force on 1 July 2025 (https://www.tas-cas.org/fileadmin/user_upload/CAS_Code_2025_EN__amendments_.pdf & https://www.tas-cas.org/fileadmin/user_upload/Schedule_of_costs_2025_EN__amendments_.pdf).

In a nutshell, (i) the use of facsimile communication is no longer considered and has been removed from the CAS Code; (ii) The role of CAS in-house clerks is formally included alongside ad-hoc clerks in both ordinary and appeal proceedings. Except for procedures free of charge, their fees, whether for in-house or ad-hoc clerks, will now be part of arbitration costs and calculated according to the CAS fee scale; (iii) Expedited procedures for ordinary cases have been clarified, notably agreements between parties on procedural time limits must receive prior approval from the Division President or the Panel; (iv) Article R59 has also been clarified and the maximum 4-month time limit to render awards has been confirmed. Importantly, the general 3-month time limit, which could be extended indefinitely, between the constitution of the Panel and the notification of the award, has been abolished and replaced by a general duty for the Panel to conduct the procedure within a reasonable time frame (also applicable to ordinary procedures); (v) A contribution requirement for CAS-related expenses has been introduced, including travel and accommodation costs for CAS counsels. These charges will be applied in accordance with the CAS Schedule of Arbitration Costs, with parties receiving prior notice. This change applies exclusively to new cases registered from 1 July 2025; ongoing cases will continue under the current fee structure.

Beyond these amendments to the CAS Code, a new effort will be made with respect to training and information dedicated to CAS members. In addition to the existing CAS seminars and workshops, the CAS will organize regular workshops/webinars for current CAS arbitrators/mediators. Four workshops will be organized every year (one every quarter) with the possibility to attend in person or live via internet.

Moreover, except for national football disputes, which remain covered by the Football Legal Aid Fund (FLAF), Legal Aid is now available exclusively for international cases.

From a digital perspective, a new CAS website will be launched soon, along with a dedicated CAS App that offers direct access to recent arbitral awards and complementary information beyond the CAS website.

Furthermore, the second edition of the Commentary "The Code of the Court of Arbitration for Sport" is now available (https://law-store.wolterskluwer.com/s/product/the-code-of-the-court-of-arbitration-for-sport-2e/01tPg00000BQkqdIAD?srsltid=AfmBOoo86n75xy_h9SbASuR_PSMWPiqgvpI6JnesI5GMY-tWzVJBjSr).

On 10 July 2025, the Grand Chamber of the European Court of Human Rights issued its final decision in the case Caster Semenya v/ Switzerland. The ECHR Grand Chamber has rendered a judgment at the opposite of the ECHR first instance:

1. The claim filed by Caster Semenya is declared inadmissible with respect to discrimination issues (due to the absence of any direct link between Semenya and Switzerland).

2. The Court considers that the Swiss Federal Tribunal (SFT) violated Art. 6 §1 of the Convention (right to a fair hearing) because it did not make a "particularly rigorous examination of the case".

This judgment creates a new jurisprudence on Article 6 § 1 ECHR, concerning the right to a fair hearing, which normally relates exclusively to procedural rights; now, there is a duty for national courts to make a particularly rigorous examination of the case (which means analyzing the merits of the case) when the fundamental civil rights of a person are affected.

Importantly, on 1 August 2025, the International Council of Arbitration for Sport (ICAS) acknowledged the ruling by the Court of Justice of the European Union (CJEU) in the case Royal Football Club Seraing v. FIFA et al (Case C-600/23), confirming the review of CAS arbitral awards that concern rules of EU public policy by European state courts. The Seraing decision is in continuation of previous CJEU jurisprudence and in line with the International Convention on the Recognition and Enforcement of Foreign Arbitral Awards (i.e. The New York Convention). ICAS also acknowledged recognition by the CJEU that sports arbitration is a legitimate mechanism ensuring a uniform treatment of sporting disputes and a consistent application of sporting rules. CAS resolves sporting disputes worldwide and already applies EU law when required. In fact, whilst most cases before CAS concern contractual and disciplinary issues not governed by EU law, matters related to EU competition law can already be challenged before EU state courts following a previous CJEU judgement (Case International Skating Union C-124/21).

This edition of the Bulletin features four scholarly articles. The first, "The United Nations Guiding Principles on Business and Human Rights and Their Impact on the World of Sport," is authored by CAS arbitrator Sylvia Schenk. The second, by CAS arbitrator Giulio Palermo and Panagiotis Kyriakou, provides an analysis of the implications of Swiss law in international sports disputes. The third, co-authored by Salvatore Civale and Roberto Terenzio, examines the FIFA Clearing House under CAS scrutiny. The fourth, "Sport Arbitration Under Threat", by Ulrich Haas, Heiner Kahlert and Antonio Rigozzi, notably criticize the Advocate General's Opinion in the Seraing case as incompatible with the New York Convention.

Twelve significant cases have been selected in this issue, including eight football-related disputes and four related to other sports.

In football, case 10050 (VšĮ Telšių Futbolo Ateitis v. FK Arsenal, OFK Grbalj, FK Budva & FIFA) examines the Electronic Player Passport (EPP) procedure and establishes that the consequences of non-compliance with the FIFA Clearing House Regulations must be clearly articulated and communicated to clubs. Case 10514 (Sporting du Pays de Charleroi v. FIFA) addresses the issue of standing to be sued in the context of training compensation claims. In 10207 (SC Dnipro-1 LLC v. Igor Jovicevic), the validity of unilateral contract extension clauses is analyzed and criteria to assess their enforceability are set out. In case 9827 (Hapoel Tel Aviv FC v. Vasilije Bakic), the legal status of employment contracts' offers, and the implications of non-compliance are explored. Case 10001 (Fotbal Club CFR 1907 Cluj S.A. v. Roger Junio Rodrigues Figueira, St. Lörinc KFT & FC Uta Arad) deals with clubs' rights related to squad selection and just cause for contract termination. Case 10431 (Yeni Mersin Idmanyurdu Futbol A.S. v. Milan Mitrovic & FIFA) presents an in-depth analysis of the principle of sporting succession, outlining key factors and their legal hierarchy. In 10090 (Ferencvárosi Torna Club v. HNK Rijeka) the implications of a wire fraud scheme in the context of a player transfer are considered. Finally, in case 8070 (Gabriel Girotto Franco v. Al Hilal S.FC), the formation of employment contracts and the doctrine of

culpa in contrahendo (pre-contractual liability) are addressed.

Notable decisions were issued in other sports. In case 9806 (Santo Condorelli v. World Aquatics), the Panel addresses for the first time World Aquatics' new regulations on changes of sporting nationality, particularly the mandatory waiting period. The boxing case 10570 (RUSADA v. Albert Batyrgaziev) clarifies the athlete's status in a doping context for the purposes of CAS jurisdiction. Governance-related case 10129 (General Souhail Khoury & General Mowafak Jomaa v. Olympic Council of Asia) assesses the validity of the election process for the presidency of the Olympic Committee of Asia, while also addressing procedural concerns. The doping case 10831 (Antani Ivanov v. Anti-Doping Centre of the Republic of Bulgaria) examines violations involving competition participation during periods of ineligibility.

This issue also includes excerpts from recent Swiss Federal Tribunal (SFT) rulings on CAS decisions. In judgments 4A_372/2024 and 4A_374/2024, the appeals were declared inadmissible due to the appellants' failure to elect a Swiss address for service (Article 39 para. 3 LTF) and to pay the advance court costs within the grace period. In judgment 4A_28/2025, the appeal - based on an alleged violation of the right to be heard (Article 190 para. 2(d) PILA) due to the Panel's refusal to hear additional potential victims - was also dismissed.

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 FIFA Clearing House Under the Scrutiny of CAS Panels

Salvatore Civale* and Roberto Terenzio**

I. Introduction
II. How does the FCH work?
III. CAS jurisprudence relating to FCH and waiver of training compensation
IV. Analysis and Conclusions

I. Introduction

In 2018, the *Fédération Internationale de Football Association* ("FIFA") reformed the transfer system (which relates to training compensation and solidarity mechanism) in order to promote and protect the integrity of professional football, a crucial aspect of which was the introduction of the FIFA Clearing House ("FCH").[1] The FCH is a payment institution established in Paris (France), which began its operations on 16 November 2022. It acts as an intermediary for payments related to training compensation and the solidarity mechanism ("Training Rewards"), as regulated by Articles 20 and 21, and Annexes 4 and 5 of the FIFA Regulations on the Status and Transfer of Players ("RSTP").

More precisely, training compensation and solidarity contribution must be paid when an international transfer of a player occurs. More precisely:

(a) Training compensation refers to the fees paid by the new club to the former club(s) which trained a player between the ages of 12 and 21. This concept aims to maintain a competitive balance between clubs and allows the training clubs to continue to select, instruct and promote the professional career of youth talents, knowing that they will be fairly compensated for their efforts.[2]

(b) Solidarity mechanism refers to the payment made on a player's transfer (before expiry of the contract) by a new club to the player's former clubs which contributed to that player's training and education between the ages of 12 and 23. Such clubs are rewarded with a portion of the relevant transfer fee.[3]

FCH's specific objectives *inter alia* are to: *(i)* process and centralise specific payments related to the transfer of football players between clubs;[4] *(ii)* protect the integrity of the football transfer system; *(iii)* enhance and promote financial transparency in the

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[1] FIFA already started a process of automation of the proceedings related to solidarity contribution and training compensation by approving an innovative electronic system through the TMS, at that time, to manage such kind of disputes. The Circular letter n. 1500 dated 4 September 2015 defined the new procedural framework. This review analysed it in: (i) Salvatore Civale, "L'Indennità di formazione e il contributo di solidarietà nei trasferimenti internazionali dei calciatori alla luce della Circolare FIFA n. 1500", RDES 2/2015, p. 117-16; and (ii) Jan Kleiner, César Chaparro Yedro, Vincenzo Sarcì, Rodrigo Tittoto,"FIFA Clearing House: Una Pietra Miliare Per il Sistema di Trasferimento dei Calciatori", RDES XIX/2023, p. 79-91.

[2] CAS 2017/A/5103 *Valletta FC v. Apollon Limassol*, award of 12 June 2018, para. 50.

[3] *See*, Articles 20 and 21 and Annexes 4 and 5 of the FIFA RSTP; Achta Mahamat Saleh, Omar Ongaro & Marko Lavs, "The FIFA Clearing House", *Morgan Sports Law*, 6 November 2023.

[4] This purpose was highlighted in CAS 2023/A/9682 *Tuzlaspor A.S. v. FIFA, US Thionville Lusitanos et al*, award of 22 April 2024, para. 12.

football transfer system;[5] and *(iv)* prevent fraudulent conduct in this system.[6]

The FCH framework is governed by the FIFA Clearing House Regulations ("FCHR"), the RSTP, and the FCH Terms and Conditions (which a club is deemed to accept while receiving / paying the Training Rewards).[7] FIFA has also developed its FCH website to assist its member associations and clubs to streamline and adhere to the obligations and processes contained therein,[8] as well as released Explanatory Notes on the FCH.[9]

II. How does the FCH work?

Since the introduction of the FCHR — unlike the previous rules — the obligation to pay Training Rewards lies strictly with the new club (engaging club), even if there are agreed contractual provisions to the contrary. This position is codified in Article 1 para. 5 of Annex 5 to the RSTP and Article 13 of the FCHR, and confirmed by FIFA jurisprudence.[10]

Essentially, the FCH is a simplified joint-stock company[11] registered in the National Business Register of France,[12] that started its activity on 6 December 2021.[13] It functions as a centralised intermediary (independent to FIFA)[14] with respect to processing of payments related to Training Rewards. The functioning of FCH relies on rules and procedures provided by the FIFA's Transfer Matching System ("TMS") and the national federations' electronic transfer and registration systems – which are required to be integrated to the TMS. Accordingly, the FCHR obliges FIFA's associations and clubs to provide the necessary information. In particular they *"shall use an electronic player registration system, an electronic domestic transfer system, TMS, the FIFA Connect ID Service, and the FIFA Connect Interface to communicate registration and transfer information electronically to FIFA"*.[15]

The FCH's functions can be divided into four stages: *(i)* identification of the entitlement to training bonuses; *(ii)* creation of an electronic player passport ("EPP"); *(iii)* compliance checks; and *(iv)* transfer of payments between clubs via the FCH.[16]

The starting point is when these Training Rewards get triggered, which is in one of the

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[5] This purpose was highlighted in CAS 2023/A/9730 *FK Erzeni v. FC 2Korriku & FIFA*, award of 22 April 2024, para. 73.

[6] Article 1.2 of the FIFA Clearing House Regulations.

[7] FIFA Clearing House Terms and Conditions, November 2022 edition.

[8] FIFA Clearing House website.

[9] Explanatory Notes on the FIFA Clearing House, October 2024 edition.

[10] PSC, FPSD-14102 dated 25 June 2024, DRC, TMS 9640 dated 11 February 2024.

[11] "Société par actions simplifiée (SAS)" in French. Its legal structure is provided for under articles L227-1 to L227-20 of the French Commercial Code.

[12] French Republic National Business Register *L'Annuaire des Entreprises https://annuaire-entreprises.data.gouv.fr/dirigeants/908028715*. *See* also, National Institute of Industrial Property (INPI) data on FCH https://data.inpi.fr/entreprises/908028715.

[13] It has two establishments, out of which one is active – and currently has 7 directors.

[14] Article 3.1 of the FIFA Clearing House Regulations.

[15] See articles 4 and 5 of the FIFA Clearing House Regulations. In particular, article 4 *"4.3 Each member association shall: a) use an electronic player registration system, integrated with the FIFA Connect ID Service and FIFA Connect Interface, to register players; and b) use an electronic domestic transfer system, integrated with the FIFA Connect Interface, to process national transfers.*
4.4 Each member association shall maintain accurate and up-to-date player registration data in its electronic player registration system and the FIFA Connect ID Service at all times, including, without limitation, the following information: a) the status of the player in accordance with article 2 of the RSTP; b) the type(s) of football (11-a-side football, futsal, and/or beach soccer) that the player is registered to participate in; and c) the category of the club(s) with which the player is registered.
4.5 Each member association shall maintain accurate and up-to-date data regarding its affiliated clubs (whether current or former) in its electronic player registration system and the FIFA Connect ID Service at all times, including, without limitation, the following information: a) address and contact details; b) current and historical data regarding club categorisation; and c) current and historical data regarding the affiliation to the member association".

[16] *See*, Alessia Murgia, "FIFA Clearing House: How does the new training rewards distribution system work?", https://regoledelgioco.gazzetta.it/2022/11/26/fifa-clearing-house-come-funziona-il-nuovo-sistema-di-distribuzione-dei-premi-di-formazione/.

following instances: *(a)* first registrations as a professional at domestic level; *(b)* first registrations as a professional arising from an international transfer; *(c)* national transfers of players with transfer compensation; *(d)* payments of transfer compensation in national transfers of players; and *(e)* international transfers.[17]

Once the Training Rewards are triggered, TMS will identify the player transfers that may qualify for Training Rewards under the regulation of the RSTP. Following this, TMS will generate a provisional EPP for the relevant player.[18] During this timelapse, a member association may request to include an affiliated club in the review process, following which the FIFA General Secretariat ("Secretariat") will assess the EPP for accuracy and relevance.[19] Subsequently, the Secretariat will open an EPP review process on TMS and invite the relevant member associations and\or clubs to participate and provide necessary documentation to sustain their right to Training Rewards and/or waivers obtained for such claims.[20] In complex cases, the Secretariat will refer the matter to FIFA's Dispute Resolution Chamber ("DRC").[21] The Secretariat will then evaluate any request to amend registration information. Post such evaluation, an allocation statement ("Allocation Statement") is automatically calculated by TMS based on the final EPP, including the amount(s) to be distributed to training clubs, following which the Secretariat will notify the final EPP and the Allocation Statement to all parties in the EPP review process.[22]

The relevant member associations and clubs have an opportunity to appeal such notification to the Court of Arbitration for Sport ("CAS") within 21 days.[23] At this stage, the new club is required to attach its proof of payment(s) of the national or international transfer on TMS, and such amount shall be assumed (for the purpose of the Allocation Statement) by the TMS to reflect the transfer compensation or the instalment thereof.[24]

While the abovementioned process is ongoing, the Secretariat also sends the final EPP and the Allocation Statement (including bank details) to the FCH, which will conduct a compliance assessment (which is mandatory for all parties involved) for payment processing in order to ensure that national and international financial regulations are observed – including any applicable anti-money laundering (AML) checks.[25] The FCH will make a first assessment and determination on whether a party passes or fails the first compliance assessment. If a party fails such assessment, it will be notified by the FCH of the same. The Secretariat thereafter will submit the transaction to the FCH for a second compliance assessment after 6 months from the date of notification.[26] For any non-compliance, such non-compliant party may be subject to disciplinary proceedings and sanctions as provided in Article 17 of the FCHR.

Now, after the compliance assessment is complete and notification is final, i.e. no appeal has been lodged or if so, a decision has been rendered, the FCH sends a payment notification to the new club, which has 30 days to make such payment.[27] Finally, upon

[17] *See*, 4a of the Explanatory Notes on the FIFA Clearing House.
[18] Article 8.1 of the FIFA Clearing House Regulations.
[19] Articles 8.2, 8.3 and 8.4 of the FIFA Clearing House Regulations.
[20] Article 9 of the FIFA Clearing House Regulations.
[21] Article 10.3 of the FIFA Clearing House Regulations.
[22] Article 10 of the FIFA Clearing House Regulations.
[23] Article 10.5 of the FIFA Clearing House Regulations. Timelines are connected to the FIFA Statutes, which allow an appeal within 21 days of notification of the decision (Article 50.1).
[24] Article 11 of the FIFA Clearing House Regulations.
[25] Trevor Watkins & Conall Ennis, "FIFA's Clearing House rules are a double-edged sword for football clubs", *Pinsent Masons*, 24 February 2023.
[26] Article 16 of the FIFA Clearing House Regulations.
[27] Articles 13.1 and 13.2 of the FIFA Clearing House Regulations.

receipt of payment, FCH will generate a distribution statement based on the final and binding EPP and Allocation Statement, which shall include the purpose and source of each payment, to make payment(s) to the training club(s).[28]

The FCH is designed to ensure the transparency and fairness of financial transactions in football. Clubs, which are obligated to act in good faith, are required to participate in the FCH's processes as part of their adherence to FIFA regulations. If a club fails to participate in or comply with the assessment or operations of the FCH, it could face several disciplinary sanctions risks.[29]

The 2-year period of operations of the FCH has showed difficulties that clubs face in completing the registration process and regular compliance, mainly due to lack of information and qualified training of the club's 'TMS Manager',[30] as well as the need of the FCH to further investigate on the documentation required. Such documentation include financial statements, extract of trade registers, certificate of incorporation, articles of association / statutes / bylaws, extracts from the official UBO register or equivalent (certified copy of shareholders table with full names and ownership percentage), organisation chart (which must include ownership % between legal entities) for companies, management organisational chart, last general meeting minutes (dated /signed) for associations, bank reference letter of less than 3 months, which must be provided with certified translation in one of the official languages of FIFA.[31] Further complexity arises where the football club in question lists other company(ies), among its shareholders, resulting in the compliance process being scrutinized to a further and deeper level.

III. CAS jurisprudence relating to FCH and waiver of training compensation

Following the start of the operation of the FCH, several appeals against its decisions were brought before the CAS, which has jurisdiction pursuant to Article 18.1 of the FCHR.

The CAS Panels issued awards in which they analyzed and applied the FCHR based on their discretion — more precisely, their *de novo* power - and in accordance with Swiss Law, amending – sometimes – the FCH "decision" on the matter.

In accordance with the FCHR, clubs have to tread carefully with respect to procedures and deadlines therein provided. There was however a first exception in the *FK Erzeni v. FC 2Korriku & FIFA case*,[32] wherein the appellant club raised a dispute concerning its failure to upload the translated version (in English, Spanish or French) of the original waiver of training compensation received from the training club, which was only uploaded in Albanian language, within the timelines stipulated by FIFA.[33] The Sole Arbitrator, admitting the waiver under the *de novo* powers available to CAS,[34] held that FIFA was entitled to apply the FCHR and its related process in a strict manner, and was not obligated to refer the matter to the DRC. That said, the CAS still allowed the waiver as: *(i)* there was nothing on file indicating that the waiver was invalid; *(ii)* it was possible to waive a claim for training compensation under the rules; and *(iii)* FIFA did not challenge the authenticity of the waiver.[35]

[28] Article 14 of the FIFA Clearing House Regulations.
[29] Article 17 of the FIFA Clearing House Regulations.
[30] *See*, 7d of the Explanatory Notes on the FIFA Clearing House.
[31] Article 15.5 of the FIFA Clearing House Regulations – which require documents translated in English, Spanish or French.
[32] *Supra 5*, *Erzeni*, para. 73.
[33] *Ibid*, see paras. 10-13.
[34] *See in contrast*, *Ateitis*, *infra 40*, para.105, where a waiver submitted as part of an EPP procedure is neither a piece of evidence nor a submission.
[35] *Ibid*, see paras. 78-79.

A similar case is *1927 FK Shkupi v. FIFA & FC Aarau & FC Baden*,[36] where, the appellant club failed to upload waivers for claims for training compensation received from two clubs. Such waivers were nevertheless accepted (because of the negligence of the appellant club that failed to upload them),[37] giving weight to the existence of the waiver already at the time the first instance decision was passed.

However, in *Tuzlaspor A.S. v. FIFA, US Thionville Lusitanos et al*,[38] involving the failure to upload waivers for claims for training compensation received from three clubs, it was held (in contrast to the decision in *Shkupi*)[39] that such failure to upload waivers being due to the negligence of the appellant club, it should not be permitted to remedy its culpable inaction by filing an appeal accompanied by the missing waivers.[40] Interestingly, the Sole Arbitrator additionally remarked as follows:"[…] *on the basis of the wording of the FCHR, he cannot confirm that he would reach to the same conclusion if the new club had not been negligent, had requested an extension of the regulatory deadline for reasonable reasons, had been unable to obtain in a timely manner the waivers for reasons beyond its control, expressly objected to measures taken by the FIFA secretariat general during the EPP Review Process and/or had done its utmost to meet the imposed deadlines but had been unsuccessful*".[41]

In that regard, it is worth noticing that in *Klubi I Futbollit Vllaznia Shkodër v. Valletta FC* [42] have been expressly indicated the waiver's requirements established by Swiss law, namely *"a. the waiver is not contrary to law, public policy or good morals; b. the person making the waiver has the capacity/authority to do so; c. the waiver is made clearly; and d. the person has the right he is renouncing. However, besides the formal prerequisites described in the previous paragraph, the waiver must also be valid at the time of the Player's registration with Vllaznia, in order for such waiver to take effect"*. In fact, the Sole Arbitrator deemed that the validity of the waiver was revoked following the signature of the new employment contract of the Player with the Maltese Club and that it was therefore not a valid waiver anymore at the time the player registered with Vllaznia.

Furthermore, in *VSI Telsiy Futbolo Ateitis v. FK Arsenal, OFK Grbalj, FK Budva & FIFA*,[43] where again, the appellant club failed to provide the FCH with waivers obtained from the training clubs, the Sole Arbitrator held that the late submission of a waiver may be permitted: *(i)* if there are factors which exceptionally excuse a club's non-compliance with Article 9.7 of the FCHR or another procedural direction; and *(ii)* there is no substantial prejudice to those who benefit from the requirement of compliance or no serious inconvenience caused.[44]

In addition, CAS deems that the waiver to the training compensation can be agreed by the parties in the transfer agreement. In the case *JK Narva Trans v. Hawks FC & FIFA*, the Sole Arbitrator emphasized that *"On a plain reading of the above provision, it can be held that Hawks agreed that the Player would be transferred to Narva free of charge and without the payment of any FIFA training compensation, in return for Hawks receiving 40% of the net transfer fee that Narva*

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[36] CAS 2023/A/9940 & 9941 *1927 FK Shkupi v. FIFA & FC Aarau & FC Baden*, award of 6 May 2024.

[37] *Ibid*, see paras. 97-99. The reasoning for acceptance was similar to the one provided in the above mentioned *Erzeni* case.

[38] *Supra 4*, *Tuzlaspor*.

[39] *Supra*, *Shkupi*.

[40] *Supra 4*, *Tuzlaspor*, see paras. 90-92. See also general unanswered questions in relation to the FCHR at para. 84.

[41] *Ibid*, see para. 94.

[42] *CAS 2023/A/9976 Klubi I Futbollit Vllaznia Shkodër v. Valletta FC*, award of 22 November 2024, para. 92-93, *ex plurimis CAS 2023/A/9775 C.D. Tenerife SAD v. Waa Banjul FC & Banjul Football Academy & FIFA*, whose Award reinforced the strict formalistic approach regarding the requirements of the FIFA Clearing House system. The precise and unambiguous drafting of a waiver is therefore essential for procedural compliance as clubs cannot rely on informal or implied understandings in formulating the contents of its text

[43] CAS 2023/A/10050 *VSI Telsiy Futbolo Ateitis v. FK Arsenal, OFK Grbalj, FK Budva & FIFA*, award of 12 November 2024.

[44] *S*ee para. 107.

would receive in case of a possible future transfer of the Player from Narva to a third club. The above thus amounts to a waiver by Hawks to receive training compensation in return for getting a high-stake in a potential future transfer fee and it should be noted that these agreements are common practice in the football market".[45]

Finally, in addition to the points mentioned above, CAS jurisprudence highlights certain discrepancies and ambiguity in the FCHR itself. For example, in *Ateitis*, it was stated that the FCHR do not expressly permit or exclude the late submission of a waiver, nor do the FCHR expressly provide for the consequences of non-compliance with a procedural direction issued during the EPP procedure.[46] In *Tuzlaspor*, it was asserted that the FCHR are unclear on: *(i)* what are the exceptional circumstances under which the Secretariat may extend the duration of the EPP review process and how will the principles of fairness, impartiality, equal treatment and uniformity be respected; and *(ii)* whether the decisions/measures taken by the Secretariat during the EPP review process can be challenged and if yes, how.[47]

Moreover, CAS jurisprudence underlines the necessity to sue in the appeal proceedings all the clubs involved in the Training Rewards and not only FIFA. In fact, in the cases *FK Liepaja v. FIFA*[48] and *KAA Gent v. FIFA,*[49] in which the appellants objected that EPP contained wrong information as well as the training clubs were not entitled to receive training compensation, the Sole Arbitrators stated that *(a)* the appellant must identify the correct respondents; *(b)* the training clubs have a direct interest at stake; *(c)* FIFA alone cannot defend the existence of a waiver or of a professional contract; *(d)* Training clubs must be included among the respondents. In the same perspective the case *Hapoel Tel Aviv FC v. FIFA*[50] under which the Sole Arbitrator decided that the player's former club was a mandatory respondent (i.e. mandatory *litisconsortium*) and, therefore, taking into account that *(i)* appellant's prayers for relief directly affected the former club's rights; and *(ii)* the appellant did not include the former club as a respondent; dismissed the appeal. In addition, the Sole Arbitrator specified that the CAS Code provisions regarding joinder and intervention were not relevant to the dispute.

The above legal analysis has been partially modified in the case *Right to Dream FC v. FIFA*[51] in which *"The Sole Arbitrator can only agree with FIFA in that he should not delve into the merits, as there would be the risk that any decision taken on the merits without the GFA would violate the GFA's right to be heard and could well impact on its financial position too. However, this does not necessarily mean that the Appeal must be rejected. Article R57 of the CAS Code provides the Sole Arbitrator with alternative powers…"*, namely to send back the case to FIFA. In this way, the mandatory respondent that has not been sued in the proceedings of appeal can safeguard its rights.

IV. Analysis and Conclusions

The authors duly recognize the intended benefits of the FCH, which promotes the training of young players, guarantees solidarity between elite and grassroots football, protects minors, maintains competitive balance and ensures regularity of sports competitions. Thanks to up-to-date EPP data, the FCH certainly safeguards the integrity of the football transfer system,

[45] CAS 2023/A/9995 *JK Narva Trans v. Hawks FC & FIFA*, award of 12 November 2024, see para. 103-104.
[46] *Supra 40*, *Ateitis*, para. 103.
[47] *Supra 4*, *Tuzlaspor*, para. 84.
[48] CAS 2023/A/10002, 10009, 10010 FK Liepaja v. FIFA.
[49] CAS 2024/A/10718 KAA Gent v. FIFA.
[50] CAS 2024/A/10478 Hapoel Tel Aviv FC v. FIFA. The same legal analysis has been made in the cases CAS 2024/A/10453 Hapoel Tel Aviv FC and TAS 2024/A/11050 Lyon La Duchère c. Fédération Internationale de Football Association (FIFA)
[51] CAS 2024/A/10427 Right to Dream FC v. Fédération Internationale de Football Association

enhances and promotes financial transparency and reduces the risks of fraud,[52] such as the issuance of several different and unreliable player passports by a confederation.[53]

In fact, as per *FIFA's Clearing House Report 2024*,[54] more than 36,000 EPPs have been generated (a final determination has been reached for almost 10,000 EPPs), recording the career history of more than 32,000 players worldwide. To date, around USD 156,6 million have been distributed in training rewards out of approximately USD 350 million of entitlements for training clubs – which constitutes a striking increase and is commendable. However, there are several issues and challenges that the FCH and the FCHR are currently facing.

The entire FCH mechanism is heavily dependent on the accuracy of information and the eventual receipt of the Training Rewards payment from the new club. In fact, only after actually receiving the proof of payments relating to the transfer of a player, will the Distribution Statement be generated and the training clubs be rewarded.[55]

In light of jurisprudence on the FCHR and the existing "administrative challenges" for implementing a system that deals with over thousands of EPPs every year, as recognised by CAS,[56] the authors deem that FIFA might consider a comparative club-based approach and, hence, should accept undisputedly valid waivers (filed a few days late or if sent in another language), avoiding unnecessary claims before CAS.[57]

Preventing such acceptance constitutes excessive formalism and is detrimental to smaller clubs, which often cannot afford to pay large Training Rewards (which is exactly why they obtained such waivers in the first place).

Therefore, the authors advocate that FIFA and the FCH may, after considering all facts and circumstances, admit late filing of waivers (using for e.g. its powers to reopen the provisional EPP "*at any time*"),[58] provided that such omission of the concerned club is not abusive.

The general, almost uniform, approach expressed by the CAS awards considers a waiver granted by the training club that was not uploaded or translated by the Club as valid, upon the condition that such a waiver is genuine and did exist at the time of the FCH process. In fact, the introduction of new evidence by the parties, which could and should have been provided during the administrative EPP process, is considered admissible by the CAS in the decision-making process on appeal.[59]

Assuming that the sole right holder to receive the training award is the club (and not the FCH itself, which is just the processing tool for the payment), is there a limitation for the creditor to exercise its right to waive the entitlement for the Training Rewards?

The rules are silent and the logical answer to the question should be, that at any point in time, the beneficiary club is entitled to

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[52] *See*, A.L. (Arne) Al, "Solidarity mechanism in light of the FIFA Clearing House Regulations and the recent jurisprudence of the FIFA DRC and the CAS", *Football Legal#18*, 12 May 2023, p. 7-17.

[53] CAS 2020/A/7517 *Antalyaspor A.Ş. v. Green Horse Football Academy & Fédération Internationale de Football Association (FIFA)*, award of 1 September 2021, see paras. 10-17.

[54] FIFA Clearing House Report: The first 24 months, November 2024.

[55] *See*, Clause 5.2 of the FIFA Clearing House Terms and Conditions, November 2022 version; 'Payments' under the FIFA Clearing House website.

[56] *Supra 5*, *Erzeni*, para. 73.

[57] This is more relevant since the FCHR do not expressly permit or exclude the late submission of a waiver, nor do the FCHR expressly provide for the consequences of non-compliance with a procedural direction issued during the EPP procedure. See, *supra 40*, *Ateitis*, para. 103.

[58] *See*, Article 8.4 of the FIFA Clearing House Regulations.

[59] CAS 2023/A/9895 & 9917 SSU Politehnica Timisoara v. FIFA et al., award 16 December 2024.

legitimately reach an agreement with the debtor club to negotiate such entitlement, waive it, partially or totally, exchange it with a percentage on the future sell of the player by agreeing a sell-on clause, accepting payment in instalments and so on.

Such contractual freedom of the Parties, highlighted above, was already in place before the FCH started its operations, and it is now suppressed or even nullified by FCH practice which pushes for "round-tripping" of the Parties by not allowing them to further negotiate their rights after the deadline is expired.
Additionally, FIFA also does not account for the possible roadblocks, including the practical challenge of retrieving money paid to a club in another country, delay in processing payments through the FCH, or the likelihood that a small club in receipt of the training compensation may change its mind, have an ownership turnover or go into bankruptcy. This "round-tripping" does not benefit the new club or the training clubs, as it just increases the administrative burden on the training clubs and further delays receipt of payment to the new club.

In that regard, the authors underline that, sometimes, some smaller clubs become aware of the international transfers of their former players only when the EPP process has been closed, without the possibility to reopen the proceedings with the high risk to lose the due Training Rewards.

In fact, the only way to appeal is before the CAS. The absence of an internal (and free of charge) remedy against the decision passed by the FCH may result in a denial of justice for smaller clubs which do not have sufficient financial resources (for paying CAS procedural costs and engaging experienced sports lawyers) to allocate for initiating proceedings related to Training Rewards. In that regard, the same FIFA signed an agreement with the International Council for Arbitration for Sport (ICAS) for 2023-2026, under which they have established a specific legal aid fund for football ("FLAF"), in order to provide assistance to football stakeholders appealing cases before the CAS.[60] In particular, it ensures that CAS proceedings involving the FLAF will: *(i)* be available to any natural persons, including agents with a FIFA licence, without sufficient financial means to proceed at the CAS; *(ii)* be free of any Court Office Fee; *(iii)* be free of any administrative and procedural costs, including arbitrator fees; *(iv)* exceptionally and only once per calendar year, be available to football clubs affiliated to a member association of FIFA and belonging to the club category IV of the FIFA table on the categorization of clubs for training compensation, which is published each year; [61] and *(v)* be decided by a Sole Arbitrator from the specialized CAS Football List, who will carry out such work on a *pro bono* basis.[62] The legal Aid foreseen by CAS and FIFA for the benefit of category IV clubs in order to avoid the procedural costs is certainly helpful, but on the one hand, the administrative process to obtain such legal aid is very complicated, and on the other hand, to limit such legal aid only to the lowest category clubs, excludes all the other clubs over the world, which constitute the majority.

Practically, as also noted by CAS,[63] many smaller clubs still have serious difficulties in understanding, applying and using the FCH

[60] The FLAF, which began operating as from 1 February 2023 until the end of the year 2026, is the first such fund exclusively dedicated to football-related matters, either at national or international level.
[61] FIFA classifies club in categories I, II, III and IV based on the continental association, the national federation and the league of participation. The latest FIFA Circular available is the no. 1885 published on 30 May 2024 at https://digitalhub.fifa.com/m/15e4befc3478484f/original/Circular-1885_Training-compensation-system-for-women-s-football.pdf.
[62] See FIFA official press release *https://inside.fifa.com/legal/media-releases/cas-football-legal-aid-fund-launched-and-funded-by-fifa*
[63] *Supra 40*, *Ateitis*, para. 114.

and TMS platforms and need due guidance and support from FIFA.[64]

Although the Sole Arbitrator in the *Erzeni* case did not address the issue directly, a significant concern was raised regarding the use of the TMS itself.[65] Specifically, FIFA's practice of sending official notices exclusively through the 'message box in the EPP' section within the TMS, rather than via email, creates challenges for smaller clubs with limited resources. These clubs struggle to access and manage official FIFA communications efficiently, particularly when they lack dedicated staff or systems to monitor the TMS regularly. As a result, FIFA's reliance on the TMS as the exclusive communication tool, without supplementary means like email notifications and clearer timelines, risks creating an environment where smaller clubs are unfairly burdened and unable to engage fully with the formalities required by FIFA regulations. In that regard also the term of 10 days[66] guaranteed to Federations and Clubs to review the EPP appears not sufficient. Another potential issue of the FCHR concerning the absolute discretion of the FIFA General Secretariat to admit or not a federation or a club that requested to participate as well as in the evaluation of the complexity of the cases that could be submitted to the FIFA DRC

[64] *See*, Frans De Weger and Mart Meijer, "A legal tour through the new FIFA Clearing House", *NOLOT Sports Law and Taxation*, June 2023.

[65] *Supra*, *Erzeni*, see para. 51.

[66] *See art. 8.2 FCHR*

Sports Arbitration Under Threat*

Ulrich Haas, Heiner Kahlert and Antonio Rigozzi**

The Advocate General's Opinion in the Seraing case challenges dispute resolution by the CAS, arguing its awards should not have res judicata effect in the EU and must be subject to full judicial review as regards EU law. The authors criticize this stance as incompatible with the New York Convention and argue that access to justice according to Article 19 TEU can be ensured through declaratory relief in the country where recognition of the foreign award is sought. They warn that adopting the Advocate General's Opinion will destabilize sports arbitration, reopen past cases and threaten the level playing field in organized sport.

I. Introduction
II. The factual and procedural background of the Seraing case
III. The reasoning of the Advocate General
IV. Analysis
A. The "self-enforcing" character of CAS awards
B. The mandatory character of CAS arbitration
V. Summary

I. Introduction

[1] Unlike in other areas of life, the use of arbitral tribunals is the rule rather than the exception in sports-related disputes. This applies in particular to elite sport, which is dependent on uniform rules and their harmonized application in order to ensure fair competition. In practice, there are numerous institutional sports arbitral tribunals. Some of these are based in an EU member state (e.g. the DIS Deutsches Sportschiedsgericht), but the one playing the most important role in international sports, i.e. the Court of Arbitration for Sport ("CAS"), is seated outside the European Union, in Lausanne, Switzerland. With a caseload of almost 1,000 cases a year,[1] the CAS plays a central role for organized sport, by furthering the development of sports law, ensuring uniform jurisprudence and application of the law, and by offering legal protection for the benefit of stakeholders worldwide.

[2] CAS is recognized by the Swiss Federal Tribunal ("SFT") and the European Court of Human Rights ("ECtHR") as a valid alternative to state court jurisdiction. Both courts value the advantage of a specialized arbitral tribunal able to give a ruling swiftly and inexpensively, open to athletes from all over the world and guaranteeing a certain level of procedural uniformity.[2] In a well-known decision by the Court of Justice of the European Union ("CJEU"),[3] the latter has

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[1] https://www.tas-cas.org/en/general-information/statistics.html.

[2] ECtHR (2 October 2018) *Mutu and Pechtstein v. Switzerland* (application no. *40575/10 et 67474/10*), no. 98; SFT (27 May 2003 – 4P.267/2002) 129 III 445, consid. 3.3.3.3.

[3] CJEU (21 December 2023 – C-124/21 P), ECLI:EU:C:2023:1012, no. 184 et seq.

criticized that arbitration before the CAS does not allow for effective review of compliance with EU competition law, which is part of EU public policy. This decision and the reasons why it is not entirely convincing are beyond the scope of this contribution. What we intend to address in this article is the more recent Opinion of the CJEU Advocate General in the "Seraing" case,[4] which, if followed by the CJEU, would jeopardize the functioning of dispute resolution in the world of sport. We argue that the AG's Opinion is based on legal considerations that are not convincing, and its conclusions should thus not be followed.

II. The factual and procedural background of the Seraing case

[3] In 2015, the Disciplinary Committee of the Fédération Internationale de Football Association ("FIFA") found the Belgian football club Royal Football Club Seraing ("Seraing") guilty of a breach of the FIFA rules on Third-Party Influence and Ownership. These rules prohibit certain types of football club financing agreements where these would have the effect of enabling a third party to acquire the ability to influence a club's independence in employment and transfer-related matters, as well as its policies or the performance of its teams. Furthermore, the rules prohibit a club or player from entering into an agreement with a third party whereby the latter is entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of the player, or is assigned any rights in relation to a future transfer or transfer compensation. FIFA sanctioned Seraing for the breach of the aforementioned rules with a ban from registering players for four registration periods and a fine of CHF 150'000. After exhausting the means of internal recourse within FIFA, Seraing lodged an appeal before the CAS. CAS concluded that Seraing breached the relevant FIFA rules (which the CAS panel found to be lawful), but reduced – on grounds of proportionality – the transfer ban to three periods. Seraing then applied for the annulment of the CAS award to the SFT, which rejected the action on the ground that, *inter alia*, EU competition law does not form part of Swiss public policy within the meaning of Article 190(2) lit. e of the Swiss Private International Law Act ("PILA"). Seraing subsequently started proceedings afresh, in the courts of Charleroi, in Belgium, during which FIFA claimed that the matter was *res judicata* following the rejection of the action to set aside the CAS award by the SFT. The Belgian proceedings ended up before the Belgian Cour de Cassation, which referred the following two questions to the CJEU:

- Does Article 19(1) of the Treaty on the European Union ("TEU"), read in conjunction with Article 267 of the Treaty on the Functioning of the European Union ("TFEU") and Article 47 of the Charter of Fundamental Rights of the European Union ("the Charter"), preclude the application of provisions of national law such as Article 24 and Article 171[3](9) of the Belgian Judicial Code, laying down the principle of *res judicata*, to an arbitral award the conformity of which with EU law has been reviewed by a court of a State that is not a Member State of the European Union, which is not permitted to refer a question to the Court of Justice of the European Union for a preliminary ruling?

- Does Article 19(1) TEU, read in conjunction with Article 267 TFEU and Article 47 of the Charter, preclude the application of a rule of national law according probative value visà-vis third parties, subject to evidence to the contrary which is for them to adduce, to an arbitral award the conformity of which with EU law has been reviewed by a court of a State that is not a Member State of the European Union, which is not permitted

[4] Case C-600/23, 16 January 2025, Royal Football Club Seraing v. Fédération Internationale de Football Association (FIFA), Union Royale Belge des Sociétés de Football Association ASBL (URBSFA), Union européenne des Sociétés de Football Association (UEFA), joined party: Doyen Sports Investment Ltd.

to refer a question to the Court of Justice of the European Union for a preliminary ruling?

[4] In accordance with the rules of the CJEU, an Advocate General ("AG"), here Ms. Ćapeta, has been asked to assist the court by writing an impartial and independent opinion on a case that the judges consider before giving judgment. On 16 January 2025 Ms. Ćapeta released her opinion (the "Opinion"). While not binding, an AG's opinion is influential and is often followed by the court. In providing her views on the referred questions, the AG launched what has been considered a heavy attack on the resolution of sports-related disputes by the CAS. In particular the following two findings, which are at the center of the Opinion, are potentially fatal for the CAS system:

- Firstly, awards rendered in Switzerland by CAS should not have *res judicata*-effects in an EU Member State. In this respect, the Opinion states the following:

  "107. A national rule such as the one at issue in the main proceedings, which attaches the force of res judicata to a CAS arbitral award, must, therefore, be set aside to give way to the possibility of a national court to exercise its power of judicial review of FIFA's rules against EU law."

- Secondly, CAS awards should be subject to a full substantive review with regard to EU law.

In this respect, the Opinion states:

"113. Therefore, the reasons that justify a limited scope of judicial review in commercial arbitration cannot readily be applied to mandatory arbitration.

114. A national court must, therefore, be able to conduct the review of FIFA rules against any and all rules of EU law, any CAS award notwithstanding."

[5] Ultimately, the AG's Opinion reduces the CAS to an association tribunal[5] whose decisions do not enjoy *res judicata*-effects[6] and which are subject to full substantive review by state courts.[7]

III. The reasoning of the Advocate General

[6] The AG derives her above conclusions from the right to access to justice in Article 19(1) TEU. In her view, it follows from this provision that "*the Member States ... must ensure that an individual who claims that his or her EU-based right is infringed has access to an independent court previously established by law, and with the power to make a reference to the Court under Article 267 TFEU.*"[8] The AG considers this right to access to justice to be impaired in the present case, for the following reasons:

- In the AG's view, there is no effective post-arbitral review of a CAS award, at least as far as the application of EU law is concerned. Indeed, a CAS award can only be challenged in Switzerland before the SFT. However, as highlighted by the AG, the SFT would not measure the arbitral award against EU public policy, let alone EU law, and is also not entitled to refer legal questions to the CJEU under Article 267 TFEU. In addition, while a post-arbitral review of a CAS award could be conducted in the recognition and enforcement phase by a court of a EU member state, which would have a right of referral to the CJEU, this is considered insufficient by the AG as CAS awards are – according to the AG – "self-enforcing" and would therefore escape judicial review

[5] Cf. also MICHAEL KINTRUP, Note to the Opinion of Advocate General Capeta, SpuRt 2025, 154, 162.

[6] From a Swiss perspective, see SFT (26 April 2024) 4A_486/2023, consid. 6.4; see from a German perspective, BGH (27 May 2004 – III ZB 53/03) NZG 2005, 358, 359; Peter Schlosser, in Friedrich Stein (ed), Kommentar zur Zivilprozessordnung, 23th ed. 2014, Vor § 1025 no. 11.

[7] See from a Swiss perspective, Hans-Michael Riemer, in Berner Kommentar ZGB, 2nd ed. 2023, Art. 75 no. 2; see from a German perspective, BGH (27 May 2004 – III ZB 53/03) NZG 2005, 358, 359; Peter Schlosser, in Friedrich Stein (ed), Kommentar zur Zivilprozessordnung, 23th ed. 2014, Vor § 1025 no. 11 seq.

[8] Cf. no. 42 of the Opinion.

by a court of a member state. In this respect, the Opinion states:

"78. ... if a party refuses to implement a CAS award because it considers it to be in breach of EU law, it cannot simply refuse to comply with such an award, nor does FIFA need to initiate an enforcement procedure before the national court. FIFA can enforce the award on its own. Indeed, in the present case, it was able to enforce the penalties and the prohibition on the registration of players without recourse to a court.
79. In such a self-enforcing system, it is unlikely that the question of compatibility of the arbitral award with EU law will reach a ‹court or tribunal› in the sense of Article 267 TFEU in enforcement proceedings."

- According to the AG, this impairment of the right to access to justice is particularly serious because the parties to the dispute generally do not voluntarily waive state court jurisdiction and thus the protection afforded by EU law. Rather, the CAS operates within a framework of compulsory arbitration, in which the international sports federations impose arbitration agreements on the parties subject to their rules. In this respect, the AG's Opinion states the following:

"75. Thus, for players and clubs, CAS's jurisdiction is mandatory and not chosen of their own free will. It therefore does not reflect their own choice to exclude access to a court and to prevent the applicability of certain legal rules to the dispute between them."

IV. Analysis

A. The "self-enforcing" character of CAS awards

[7] The description of CAS awards as "self-enforcing" by the AG is somewhat misleading. The reason why CAS awards often do not require enforcement is that their content is not enforceable – apart from the conclusions related to costs. The vast majority of CAS awards are issued in socalled "appeals arbitration proceedings".[9] This type of proceedings is regulated separately in the Code of sports-related Arbitration ("CAS Code") (cf. Articles R47 et seq CAS Code). The procedure is characterized by the fact that the subject matter of the dispute concerns the legality or illegality of a measure or decision issued by a sport governing body. These disputes are therefore generally based either on a request for the modification of rights ("to set aside" the measure of the sports governing body)[10] or on a request for (negative) declaratory relief ("to declare null and void" the measure of the sports governing body).[11] The matter underlying the Seraing case is no exception. Before the CAS, Seraing's main prayer for relief was for the CAS panel to declare that "*the sanctions imposed by the contested decision [the FIFA DC] are unlawful*". Judgments or awards rendered following such requests – even if successful – do not have an enforceable content and thus do not need to be enforced (leaving aside the conclusions on costs).

[8] According to the AG this "self-enforcing" character distinguishes sports arbitration fundamentally from commercial arbitration and would thus warrant some sort of special treatment of CAS awards. In this respect, the AG's Opinion states the following:

"77. If one of the parties to commercial arbitration refuses to implement an arbitral award, the other party will have to turn to ordinary courts to enforce it. As the Court explained in Nordsee ... , when enforcement is required within the European Union,

[9] See the CAS Statistics, https://www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2023.pdf.

[10] From a Swiss perspective, the challenge of a measure under association law pursuant to Article 75 CC is an action for formation, HANS MICHAEL RIEMER, in Berner Kommentar ZGB, 2nd ed. 2023, Art. 75 no. 87.

[11] From a German perspective, the unlawfulness of a measure under association law is to be asserted by way of a negative declaratory action, BGH (2 July 2007 – II ZR 111/05) NJW 2008, 69 no 35 et seq.; CHRISTIAN DECKENBROCK, in Reichert (ed.), Vereins- und Verbandsrecht, 15th ed. 2024, ch. 6 no. 76.

a Member State court will have the opportunity to review the conformity of the arbitral award with EU law and submit, if necessary, a preliminary reference to the Court.
78. In contrast, if a party refuses to implement a CAS award because it considers it to be in breach of EU law, it cannot simply refuse to comply with such an award, nor does FIFA need to initiate an enforcement procedure before the national court. FIFA can enforce the award on its own. Indeed, in the present case, it was able to enforce the penalties and the prohibition on the registration of players without recourse to a court."

[9] These statements must be taken with a grain of salt. Actions for declaratory relief or for the modification of rights are not specific to sports arbitration, but are also common in commercial arbitration. Furthermore, the AG overlooks the fact that a decision on a claim for performance can also have a non-enforceable content. "Self-enforcing" in the aforementioned sense is also an arbitral award that rejects a claim for performance, in particular a claim for payment. In this case, too, the arbitral award – apart from the conclusions on costs – does not have an enforceable content. The AG's thesis that commercial arbitration awards – unlike arbitration awards in sports arbitration – are subject to leave of enforcement by a state court is therefore on shaky ground. If one assumes a success rate of 50% for the plaintiff, this means that in 50% of all claims for specific performance, and in all cases involving requests for modification of rights or for declaratory relief, i.e. in the majority of cases, the award does not have an enforceable content (apart from the cost decision).

[10] However, the AG's comments are also unconvincing in other respects. The assumption that the losing party in foreign arbitral proceedings does not enjoy any effective post-arbitral legal protection in an EU Member State according to Article 19(1) TEU is incorrect. In Germany, for example, the losing party in CAS proceedings can seek a declaration of (non-)enforceability of the arbitral award by a state court. Ultimately, this is a type of negative declaratory action to which the losing party in the foreign arbitration proceedings is entitled, irrespective of whether the foreign arbitration award has an enforceable content or not. Thus, also "self-enforcing" awards can be scrutinized by state courts on the initiative of the losing party in a foreign arbitral proceeeding. In this respect, the German Federal Court ("BGH") recently stated the following:[12]

"The prevailing opinion in the legal literature rightly assumes that a party that has lost in a foreign arbitration must have a legal remedy available to it with which it can have the question of the recognizability of the foreign arbitral award clarified in its home country. This follows from the guarantee of effective legal protection (see on this BVerfGE 88, 118 [para. 21]; ...)."

[11] Such an action for (negative) declaratory relief – insofar as it is granted – makes it clear, with effect for the state where recognition is sought, that the foreign arbitral award is not capable of producing any effects. The losing party in the foreign arbitration proceedings is, thus, not without access to justice – at least in Germany – and can pursue these proceedings on its own initiative. It goes without saying that the court of competent jurisdiction for this action for a declaratory relief is also entitled to refer the matter in accordance with Article 267 TFEU to the CJEU. Furthermore, the legal protection afforded by such an action for negative declaratory relief (against a foreign arbitral award) is not "inferior" to an action for annulment (available against domestic arbitral awards). In most states, the grounds for challenging a domestic arbitral award are modeled on the grounds for refusal of recognition and enforcement under the New York Convention on the recognition and enforcement of foreign arbitral awards of 1958 ("NYC"), so that the standard of review will often be similar. This follows

[12] German BGH (9 March 2023 – I ZB 33/22) SchiedsVZ 2023, 228, no. 93.

from a reading of Articles 34 and 36 of the UNCITRAL Model Law on International Commercial Arbitration of 1985. The latter is the basis for a lot of arbitration laws around the world.

[12] The two procedures (annulment of domestic awards and declaratory relief against a foreign award) also do not differ with regard to the (European) freedom of circulation of judgments. Both the judgment rendered in an action to set aside a domestic arbitral award and a declaratory judgment that a foreign arbitral award cannot be recognized are excluded from the material scope of application of the Brussels Ia Regulation (Article 1 II lit. d) and therefore, from EU perspective, only have effects in the state in which the judgment was rendered.[13] At least from a German perspective, therefore, the legal protection gap described by the AG does not exist.

[13] The AG could now be credited with the fact that Belgian law may not provide for a (negative) declaratory action comparable to German law. Then, of course, there would be a prima facie gap in legal protection from a Belgian perspective. Even if this were the case, however, the question arises as to why the AG does not close such a gap in relation to the EU law requirement of effective legal protection (Article 19 (2) TEU) with the help of a negative declaratory action instead of opening up the legal route to the state courts (even in EU member states in which negative declaratory action is available) by denying the foreign arbitral award *res judicata* in the EU, irrespective of whether the conditions for non-recognition and/or negative declaratory relief are met. The AG's approach goes far beyond the goal of effective legal protection and ignores the NYC, which has been ratified by over 170 countries (including all EU member states). Article III NYC obliges the contracting states to "*recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon under the conditions laid down in the following Articles.*" Thus, NYC contracting states have a fundamental obligation to recognize foreign arbitral awards.[14] Recognition or a declaration of enforceability of a foreign arbitral award may only be refused subject to the grounds listed exhaustively in Articles IV and V of the NYC.

[14] The fact that an arbitral award is "self-enforcing" clearly does not constitute a ground for refusal of recognition and enforcement under the NYC. The AG's Opinion is therefore irreconcilably at odds with the duty of recognition under international law resulting from the NYC. Contrary to the AG's proposed solution, effective legal protection in the form of a negative declaratory action by the unsuccessful party in the foreign arbitration proceedings in the exequatur state is indeed compatible with Article III of the NYC;[15] because according to this provision, the *procedure* for recognition and enforcement is governed by the (procedural) law of the State where recognition and enforcement is sought. In this respect, the NYC contracting states have a wide margin of autonomy. Article III NYC merely imposes a prohibition against discrimination on the contracting states, according to which "[t]*here shall not be imposed substantially more onerous conditions or higher fees and charges on the recognition and enforcement of arbitral awards to which this Convention applies than are imposed on the recognition and enforcement of domestic arbitral awards.*" Allowing an action for negative

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13 CHRISTOPH THOLE, in Stein/Jonas (eds), Kommentar zur Zivilprozessordnung, 23th ed. 2022, Art. 1 Brussels I Regulation no. 65; Peter Gottwald, in Münchener Kommentar zur Zivilprozessordnung, 6th ed. 2022, Art. 1 Brussels Ia Regulation no. 36.

14 ULRICH HAAS/HEINER KAHLERT, in Weigand/Baumann (eds.), Practitioner's Handbook on International Commercial Arbitration, 3rd ed. 2019, no. 21.289.

15 Cf. French TGI (22 November 1989) 1991 (XVI) YCA 543; ANDREAS BÖRNER, in Kronke and others (ed.), Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, 2010, p. 133; ULRICH HAAS/HEINER KAHLERT, in Weigand/Baumann (eds.), Practioner's Handbook on International Commercial Arbitration, 3rd ed. 2019, no. 21.303.

declaratory relief is clearly a procedural question that falls within the autonomy of the NYC contracting states, provided that the standard of judicial review applied in the context of such action does not go beyond Articles IV and V NYC.

[15] The AG's allusion to the possibility that the NYC may not be applicable to CAS arbitration to start with is even more misconceived and indeed based on no authority whatsoever. First of all, the NYC makes no difference between voluntary and mandatory arbitration with respect to its scope of application. The lack of consent to arbitration can and should be considered as a potential reason to find the arbitration agreement invalid under Article V(I)(a) NYC according to which recognition and enforcement of an award may be refused if the arbitration agreement is "*not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made*". As we will see in the next section, this is not the case for CAS awards.

B. The mandatory character of CAS arbitration

[16] The AG also considers the EU law right to access to justice to be particularly endangered by the fact that CAS arbitration is mandatory, i.e. that the stakeholders who submitted to the rules and regulations of the sports governing bodies have not voluntarily renounced to state courts and the protection afforded by EU law.

[17] The AG's observation that "compulsory arbitration proceedings" are often to be found in organized sport is certainly correct.[16] The fact that the autonomy of the parties is somehow restricted in organized sport is, of course, nothing new. The SFT already stated this many years ago as follows:[17]

"Competitive sport is characterized by a highly hierarchical structure, both at international and national level. Established on a vertical axis, the relations between the athletes and the organizations that occupy the various sporting disciplines are thus distinguished from the horizontal relations between the parties to a contractual relationship (ATF 129 III 445 consid. 3.3.3.2 p. 461). This structural difference between the two types of relationship has an influence on the volitional process leading to the formation of any agreement. In principle, when two parties negotiate on a basis of equality, each of them expresses its will without being subject to the good intentions of the other. This is generally also the case within the framework of international commercial relations. The situation is quite different in the field of sport. If one excepted the case – quite theoretically – where a renowned athlete, due to his notoriety, would be able to dictate his conditions to the international federation regulating the sport he practises, experience shows that, for most of the time, a sportsman does not have the franchises of his federation and that he has to comply, good and bad, with the latter's requirements. Thus, the athlete who wishes to participate in a competition organized under the control of a sports federation whose regulations provide for recourse to arbitration has no other choice than to accept the arbitration clause, in particular by adhering to the statutes of the sporting federation in question in which this clause has been inserted, especially if it is a professional sport. He would be confronted with the following dilemma: to consent to arbitration or to practise his sport as a dilettante (on the problem of forced arbitration, see Antonio Rigozzi, L'arbitrage international en matière de sport, n. 475 ss et n. 811 ss, with numerous references to the various opinions expressed on this subject). Given the choice of submitting to an arbitral tribunal or practising their sport ‹in their own back yard› (François Knoepfler/Philippe Schweizer, Arbitrage international, p. 137 i.f.), watching competitions ‹on television› (Rigozzi, op. cit, p. 250, note 1509 and the first author cited), the athlete who wishes to compete against real competitors or who has to do so because it is his only source of income (prizes in cash or in kind, advertising revenue, etc.) will be forced, in reality, to choose, nolens volens, the first term of this alternative".

[16] It is to be noted, however, that there are many exceptions to this rule.

[17] SFT (22 March 2007) 4P.172/2006, consid. 4.3.2.1.

[18] The European Court of Human Rights ("ECtHR") in Strasbourg has also correctly described this phenomenon as follows.[18]

"113. In the present case, the Court takes the view that the choice before the second applicant had not been whether to take part in one competition rather than another, depending on whether or not she had accepted the arbitration clause. Unlike the choices before the applicants in the Tabbane, Eiffage S.A. and Others, ... – which had been in a position to enter into an agreement with one commercial partner rather than another –, the only choice in the second applicant's case was between accepting the arbitration clause and thus earning her living by practising her sport professionally, or not accepting it and being obliged to refrain completely from earning a living from her sport at that level.

114. Having regard to the restriction that non-acceptance of the arbitration clause would have entailed for her professional life, it cannot be asserted that she had accepted that clause freely and unequivocally."

[19] The AG sees the obligation to conclude an arbitration agreement as a loss of rights for those subject to the rules, which can only be compensated for by a *révision au fond* of the arbitral award.

In this respect the Opinion states:

"112. However, in mandatory arbitration, such as the CAS arbitration under the FIFA Statutes, the parties do not freely choose to exclude the application of some EU rules to their situation.
113. Therefore, the reasons that justify a limited scope of judicial review in commercialarbitration cannot readily be applied to mandatory arbitration.
114. A national court must, therefore, be able to conduct the review of FIFA rules againstany and all rules of EU law, any CAS award notwithstanding
115. It should be able to conduct such a review regardless of how a case arrives before it: be it directly as an enforcement action or indirectly, as incidental to a different action (as is the situation in the present case)."

[20] The conclusion is surprising in several respects. From a procedural point of view, legal protection before the CAS (in the case of compulsory arbitration) is in principle not inferior to state court proceedings. Indeed, as the ECtHR – to which the AG refers several times in her Opinion – held in the Mutu and Pechstein case that the guarantees of Article 6(1) ECHR applicable to state court proceedings apply in full to compulsory arbitration. In this respect, the decision of the ECtHR states:[19]

"115. ... even though [CAS arbitration] ... *had not been imposed by law but by the ISU regulations, the acceptance of CAS jurisdiction by the second applicant must be regarded as ‹compulsory› arbitration within the meaning of its case-law ... The arbitration proceedings therefore had to afford the safeguards secured by Article 6 § 1 of the Convention."*

[21] A procedural deficit for the parties concerned, therefore, hardly results from CAS arbitration. Should the AG see a disadvantage to be compensated for in compulsory arbitration proceedings in the fact that no EU substantive law is applied, it should first be noted that compulsory jurisdiction in favour of CAS has nothing to do with the law applicable before that forum. Both questions are independent of each other. A (compulsory) concentration of jurisdiction with the CAS in Lausanne says nothing about the law applicable to the merits in such a case. Of course, the substantive law of an EU member state can also apply in CAS arbitration proceedings. If this is true, this evidently also includes EU law.

[22] The thesis raised by the AG that an involuntary opting out of EU law must be compensated for by a stricter control of the arbitral award is also questionable for other

[18] ECtHR (2 October 2018) *Mutu and Pechtstein v. Switzerland* (application no. *40575/10 et 67474/10*).

[19] ECtHR (2 October 2018) *Mutu and Pechtstein v. Switzerland* (application no. *40575/10 et 67474/10*).

reasons. It blows the distinction between voluntary and mandatory arbitration out of proportion.[20] There are plenty of examples, where a party does not opt out of the EU or European legal framework entirely voluntarily. For instance, the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of October 30, 2007 ("Lugano Convention") regulates international jurisdiction among the contracting states (the "Lugano judicial area"). The Lugano Convention provides, for example, for a choice between different fora for certain types of disputes, some of which may be within an EU contracting state and others outside. If, in such a case, one of the parties to the dispute brings an action in one of the optional fora, this leads, according to the so-called core theory of the CJEU,[21] to a concentration of all disputes related to the "core" of the first action at the place of jurisdiction of the first action.[22] This applies regardless of whether the other party agrees or not. This means that by bringing the first action at a forum outside of the EU, the defendant can be deprived of a forum within the EU – without or against his or her will – with the result that a different law, namely a non-EU law, is applied to the case. However, it would be untenable and completely incompatible with the Lugano Convention if an EU member state wanted to compensate for this supposed "disadvantage" of a non-EU jurisdiction by means of a *révision au fond* in the context of the recognition and enforcement of the foreign court judgment.[23] Rather, a rational system of jurisdiction, as provided for by the Lugano Convention, establishes mutual trust in the respective jurisdiction, which is the basis for the free circulation of court decisions within the Lugano judicial area (subject to Article 43 et seq. of the Lugano Convention).

[23] The concentration of sports-related disputes at the seat of the CAS in Lausanne is also based on a rational system of jurisdiction. This was also recognized by the ECtHR in the Mutu and Pechstein case. The decision states the following:[24]

"98. In the specific case of sports arbitration, the Court takes the view that it is certainly of interest for the settlement of disputes arising in a professional sports context, especially those with an international dimension, to refer them to a specialised body which is able to give a ruling swiftly and inexpensively. High-level international sports events are held in various countries by organizations based in different States, and they are open to athletes from all over the world. Recourse to a single and specialized international arbitral tribunal facilitates a certain procedural uniformity and strengthens legal certainty; all the more so where the awards of that tribunal may be appealed against before the supreme court of a single country, in this case the Swiss Federal Court, whose ruling is final.
On that point the Court thus agrees with the Government and acknowledges that a nonState mechanism of conflict resolution at first and/or second instance, with the possibility of appeal, albeit limited, before a State court at last instance, could be an appropriate solution in this field."

[24] In addition, all EU member states have undertaken under Article III NYC to recognize the free movement of arbitral awards rendered abroad (subject to Articles IV, V NYC). It is true that Article V(2)(b) NYC provides that recognition of a foreign arbitral award may be refused if the award violates the public policy of the state in which recognition and enforcement is sought. The AG wishes to rely on this public policy exception in order to justify a *révision au fond* of a non-EU arbitral award within an EU

[20] FELIX DASSER, President's message CJEU: Get off that slippery slope, before it's too late, please!, Bull. ASA 2025/1.
[21] CJEU (14 November 1994 – C-39/02), *Maersk/de Haan*, no. 34 et seq.; (6 December 1994 – C-406/92), *Tatry/Maciej Rataj*, no. 6 et seq.
[22] FELIX DASSER, in Dasser/Oberhammer (ed.), Lugano Convention, 3rd ed. 2021, Art. 27 no. 17; HEIMO SCHACK, Internationales Zivilverfahrensrecht, 9th2025, § 16 no. 906 seq.
[23] Heimo Schack, Internationales Zivilverfahrensrecht, 9th ed. 2025, § 17 no. 1019 seq.
[24] ECtHR (2 October 2018) *Mutu and Pechtstein v. Switzerland* (application no. *40575/10 et 67474/10*).

member state. In this respect, the Opinion states:

"121. Article V(2)(b) of the New York Convention limits judicial review of arbitral awards to public policy issues. That provision does not have an autonomous meaning in the convention, but is, rather, subject to the laws of its signatories.
122. One way of approaching the possible applicability of the New York Convention is thus to interpret as part of public policy, for the purposes of that convention, the EU principle of effective judicial protection, which, in cases of mandatory arbitration, requires full judicial review. That principle would therefore serve as a gateway to a full review of the arbitral award in respect of the applicable EU law."

[25] According to the AG, a member state should therefore be able to override the express limitation to *public policy control* and the obligation to recognize and enforce the arbitral award (Art. III NYC) provided for in the NYC by simply declaring its entire (or at least the EU) legal system to be part of its *public policy*.

[26] This clearly and unambiguously contradicts the meaning and purpose of the NYC. According to Art. 31 para. 1 of the Vienna Convention on the Law of Treaties of 23 May 1969, an international instrument – such as the NYC – must be interpreted according to good faith.[25] This principle has in any case been expressly recognized by the CJEU in the past as customary international law and in this capacity as part of the legal order of the European Union.[26] The AG's view that any EU member state could disregard its international legal obligations under the NYC by invoking its domestic law is incompatible with such an interpretation of the NYC in good faith. Equating the *ordre public* with an entire legal system (or even only with its non-dispositive components) is tantamount to a *révision au fond*, which is excluded by the NYC, and is therefore incompatible with it.[27] Above all, however, the concept of *ordre public* cannot cover and ban an entire group of widely used international arbitration proceedings (in this case sports arbitration proceedings seated abroad).[28] In this respect, the standard book on international commercial arbitration by Gary Born rightly states the following with reference to public policy control within the meaning of the NYC:[29]

"Although Article V(2)(b)'s public policy exception focuses on national public policy, the structure and objectives of the Convention (and other international arbitration instruments) must also be interpreted as imposing some international limits on Contracting States ‹applications of national public policy, extending beyond the general concept of national self-restraint (discussed above). The Convention's structure and objectives argue strongly against the notion that Contracting States would be free to define national public policy expansively, in such a manner as to effectively repudiate their obligations under Articles III and V, without any international limitation. Rather, the Convention imposes restrictions, albeit limited ones, on the character of the national public policies that may properly be invoked by Contracting States under Article V(2)(b). There should be little question but that the Convention imposes some limits on Contracting States› application of public policy under Article V(2)(b). It would make no sense to interpret Article V(2)(b) as permitting a Contracting State to require that all commercial disputes be resolved in local courts or in

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[25] ULRICH HAAS/HEINER KAHLERT, in Weigand/Baumann (eds.), Practioner's Handbook on International Commercial Arbitration, 3rd ed. 2019, N. 21.15: Michele Patocchi/Cesare Jermini, in Basler Kommentar zum IPRG, 4thed 2021, Art. 194 N. 38.

[26] CJEU (20 October 2022 – C-111/21), *BT/Laudamotion GmbH*, no. 22 ; cf also CJEU (27 February 2018 – C-266/16), *Western Sahara Campaign UK et al/Commissioners for Her Majesty's Revenue and Customs et al*, no. 58.

[27] REINMAR WOLFF, in Wolf (ed), New York Convention, 2nd ed. 2019, Art. V no. 19, 504, 561; ULRICH HAAS/HEINER KAHLERT, in Weigand/Baumann (eds.), Practioner's Handbook on International Commercial Arbitration, 3rd ed. 2019, no. 21.354 and no. 21.420; Felix Dasser, President's message CJEU: Get off that slippery slope, before it's too late, please!, Bull. ASA 2025/1; Michael Kintrup, Note to the Opinion of Advocate General Capeta, SpuRt 2025, 154, 164.

[28] PETER SCHLOSSER, in Friedrich Stein (ed.), ZPO, 23rd ed. 2014, Anhang zu § 1061 Art. V UNÜ no. 315.

[29] GARY BORN, International Commercial Arbitration, 3rd ed. (updated March 2024), § 26.05 (C) (9).

accordance with local substantive laws or local procedural rules ..."

[27] Making the entirety of EU law part of the *ordre public* is not only preposterous,[30] but will entail bandwagon effects encouraging other jurisdictions to make their whole national law part of their *ordre public* as well, be it in general or in sports-related disputes. Ultimately, the AG sees and feels the contradiction between her Opinion and the obligation under the NYC and therefore speculates whether the NYC is applicable to sports arbitration at all. In this respect, the Opinion states:

"116. A final question that cannot be ignored, and that was raised at the hearing, is the applicability of the New York Convention, to which all the Member States are parties. While the New York Convention does not bind the European Union, in line with the customary principle of good faith, the Court has previously also taken into account the international obligations of the Member States.
117. All the parties at the hearing agreed that the New York Convention applies to CAS awards.
118. That is not self-evident. Rather, it is possible to conclude that mandatory arbitration does not meet the requirement of Article II(1) of the New York Convention. Put simply, the parties did not ‹undertake›, which I understand to mean freely and consensually, to submit any or all of their disagreements to arbitration."

[28] This is also untenable. The NYC does not define the term "award".[31] Since the main aim of the NYC, however, is to standardize the various national practices for the recognition and enforcement of arbitral awards, it is widely accepted that the term "award" ought to be determined by an autonomous and, thus, internationally uniform interpretation.[32] Apart from the wording and legislative history of the Convention, an interpretation of the term "award" should in particular reflect the goal and purpose of the Convention, which is to draw up a legal framework for the free circulation of "private decisions" that are functionally equivalent to dispute resolution by state courts.[33] A further goal of the NYC is "*to draw as many arbitral awards as possible into its range of applicability*".[34] In principle, thus, the term "award" should be interpreted in an arbitration-friendly manner.[35] This is all the more true where arbitration is the standard means of dispute resolution in a particular industry such as organized sport. Only

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[30] FELIX DASSER, President's message CJEU: Get off that slippery slope, before it's too late, please!, Bull. ASA 2025/1.

[31] CHRISTIAN KOLLER, in Christoph Liebscher/Paul Oberhammer/Walter H. Rechberger (eds.), Schiedsverfahrensrecht, Vol. II, 2016, no. 12/31; Dennis Solomon, in Stephan Balthasar (ed.), International Commercial Arbitration, 2016, no. 38.

[32] Cf. Italian Corte Cass. (6 July 1982 – no. 4039) RDIPP 1983, 854, 858; Italian Corte Cass. (7 June 1995 – no. 6426) (1997) XXII YCA, 727, 730; German BGH (8 October 1981 – III ZR 42/80) NJW 1982, 1224, 1225; cf. also REINMAR WOLF, in Wolf (ed.), New York Convention, 2nd ed. 2019, Art. II no. 47; ULRICH HAAS/HEINER KAHLERT, in Weigand/Baumann (eds.), Practioner's Handbook on International Commercial Arbitration, 3rd ed. 2019, no. 21.78; CHRISTIAN KOLLER, in Christoph Liebscher/Paul Oberhammer/Walter H. Rechberger (eds.), Schiedsverfahrensrecht, Vol. II, 2016, no. 12/31; JENS ADOLPHSEN, in Münchener Kommentar zur ZPO, 6th ed. 2022, Anhang 1 zu § 1061 Art. I no. 3; DENNIS SOLOMON, in Stephan Balthasar (ed.), International Commercial Arbitration, 2016, no. 39; GABRIELLE KAUFMANN-KOHLER/ANTONIO RIGOZZI, International Arbitration, 2015, no. 8.241.

[33] Cf. Austrian OGH (25 June 1992 – Ob 545/92) IPRax 1994, 139, 140; German BGH (8 October 1981 – III ZR 42 /80) NJW 1982, 1224, 1225; BGH (23 May 1960 – II ZR 75/58) NJW 1960, 1462; see also Domenico Di Pietro, in Gaillard/di Pietro (eds.), Enforcement of arbitration agreements and international arbitral awards: the New York convention in practice, 2008, p. 139, 142 seq.; Ulrich Haas/ Heiner Kahlert, in Weigand/Baumann (eds.), Practioner's Handbook on International Commercial Arbitration, 3rd ed. 2019, no. 21.78.

[34] Cf. Austrian Supreme Court (25 June 1992 – Ob 545/92) IPRax 1994, 138, 140.

[35] Cf. Austrian Supreme Court (30 November 1994 – 3 Ob 165/94, 3 Ob 164/94) (1997) XXII YCA 619, 624 *seq.*; ANTONIO RIGOZZI, L'arbitrage en matière de sport, 2005, n. 611; Jens Adolphsen in Münchener Kommentar zur ZPO, 6th ed. 2022, Anhang 1 zu § 1061 Art. I no. 3; Ulrich Haas, Die Sportschiedsgerichtsbarkeit des Tribunal Arbitral du Sport (TAS), ZEuP 1999, 355, 356; Michael Kintrup, Note to the Opinion of Advocate General Capeta, SpuRt 2025, 154, 163.

decisions that do not qualify as arbitral awards under their home jurisdiction (i.e. at the seat of the arbitration) do not participate in the NYC's freedom of circulation.[36]

[29] One of the requirements for an arbitral award to be determined autonomously under the NYC is that the arbitral tribunal derives its mandate from the autonomy of the parties.[37] The prevailing opinion applies a very broad standard in this respect.[38] Only if the mandate of the arbitral tribunal is based on a statutory basis is the scope of application of the NYC not open.[39] It is therefore not surprising that the prevailing view in the legal literature[40] and in legal practice[41]includes arbitral awards by sports arbitral tribunals such as the CAS in the scope of application of the NYC, even if they are based on mandatory arbitration.

V. Summary

[30] The AG's Opinion in the "Seraing" case is to be followed to the extent it derives from the right to access to justice in Article 19 TEU a right for the losing party in foreign arbitral proceedings to subject recognition of the foreign arbitral award to a review by a court of an EU member state. However, it overshoots the mark when she seeks to establish access to an EU court by denying the *res judicata* effect of the foreign arbitral award. This is contrary to and incompatible with the NYC, which is the most important international instrument in the field of international arbitration. In contrast, the losing party in the foreign arbitral proceeding should have access to an action for negative declaratory relief, with which the (non-)recognizability of the foreign arbitral award can be sought before a court within the meaning of Article 267 TFEU. Such legal protection is sufficiently effective and easily compatible with the requirements of the NYC (as long as the review does not exceed

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[36] CHRISTIAN KOLLER, in Christoph Liebscher/Paul Oberhammer/Walter H. Rechberger (eds.), Schiedsverfahrensrecht, Vol. II, 2016, no. 12/31; Ulrich Haas/ Heiner Kahlert, in Frank-Bernd Weigand/Antje Baumann (eds.), Practitioner's Handbook on International Commercial Arbitration, 3rd ed. 2019, N. 21.79;.

[37] BERND EHLE, in Reinmar Wolff (ed.), New York Convention, 2nd ed. 2019, Art. I no. 29; Dennis Solomon, in Stephan Balthasar (ed.), International Commercial Arbitration, 2016, no. 46; ULRICH HAAS/ HEINER KAHLERT, in Frank-Bernd Weigand/Antje Baumann (eds.), Practitioner's Handbook on International Commercial Arbitration, 3rd ed. 2019, N. 21.84 et seq.

[38] DENNIS SOLOMON, in Stephan Balthasar (ed.), International Commercial Arbitration, 2016, no. 46; ULRICH HAAS/HEINER KAHLERT, in Frank-Bernd Weigand/Antje Baumann (eds.), Practitioner's Handbook on International Commercial Arbitration, 3rd ed. 2019, n. 21.86; MICHAEL KINTRUP, Note to the Opinion of Advocate General Capeta, SpuRt 2025, 154, 163 seq.

[39] DENIS SOLOMON, in Stephan Balthasar (ed.), International Commercial Arbitration, 2016, no. 48; Ulrich Haas/ Heiner Kahlert, in Frank-Bernd Weigand/Antje Baumann (eds.), Practioner's Handbook on International Commercial Arbitration, 3rd ed. 2019, N. 21.86 seq.; Bernd Ehle, in Reinmar Wolff (ed.), New York Convention, 2nd ed. 2019, Art. I no. 29 et seq.

[40] ULRICH HAAS/ HEINER KAHLERT, in Frank-Bernd Weigand/Antje Baumann (eds.), Practitioner's Handbook on International Commercial Arbitration, 3rd ed. 2019, N. 21.88; JENS ADOLPHSEN, International Doping Penalties, 2003, p. 504; DANIEL GIRSBERGER/NATHALIE VOSER, International Arbitration, 5th ed. 2024, no. 2361 and 2643; JENS ADOLPHSEN, in Münchener Kommentar zur Zovilprozessordnung, 6th ed. 2022, Anhang 1 zu § 1061 Art. I NYC no. 4: «*The voluntary nature of the arbitration agreement and the superiority of a party with regard to the selection of the arbitrators are prerequisites for effectiveness, but not a constitutive feature of an arbitral award*»; GÖTZ SCHULZE, in Athanassios Kaissis/Roderich Thümmel (eds.), Ars aequi et boni in mundo, Festschrift für Rolf A. Schütze, 2014, Präklusion von Grundrechtsverstössen bei Anerkennung ausländischer Schiedssprüche, p. 527, 532 seq.; Jan F. Orth, in Rainer T. Cherkeh/Carsten Momsen/Jan F. Orth (eds.), Handbuch Sportstrafrecht, 2021, no. 434 et seq.; Thomas Summerer, in Jochen Fritzweiler/Bernhard Pfister/Thomas Summerer (eds.), Praxishandbuch Sportrecht, 4th ed. 2020, no. 254.

[41] OLG Düsseldorf (15 November 2017 – VI-U (Kart) 8/17) BeckRS 2017, 140328, no. 34 et seq.; OLG Koblenz (6 November 2014 – 2 U 1560/13) SpuRt 2015, 29, 30; OLG Munich (26 October 2000 – U (K) 3208/00) NJW-RR 2001, 711, 712; LG Cologne (13 September 2006 – 28 O (Kart) 38/05) SpuRt 2007, 30, 31; LG Munich (26 February 2014 – 37 O 28331/12) SpuRt 2014, 113, 116.

the grounds listed in Article IV and V of the NYC).

[31] Insofar as the AG wants to subject CAS awards in the EU to a *révision au fond* under EU law, this must be firmly rejected. This is simply incompatible with the requirements of the NYC and fails to recognize that concentrating the jurisdiction at CAS for sports-related disputes is not only accompanied by restrictions on legal protection, but also by a gain for those involved in the practice of organized sport, as this is the only way to ensure equal treatment of those subject to the applicable sporting rules. The standard of review should therefore be – as in commercial arbitration – the grounds for refusal of recognition under the NYC.

[32] Should the CJEU follow the AG's Opinion, the consequences would be far-reaching. The legal consequences proposed by the AG (no *res judicata* effect and a *révision au fond* of CAS arbitral awards) would not only apply to the future, but of course also to the past. This would mean, for example, that athletes, coaches, sports officials or clubs found guilty by the CAS (possibly many years ago) for breaching rules on anti-doping, match-fixing, safeguarding of minors or integrity would be able to reopen their case before an EU court to their liking. Such an approach would have serious repercussions for big sporting events such as – e.g. – the Olympic Games in Paris. The AG also overlooks the fact that one of the reasons for the creation of the CAS was the realization that there is unfortunately no mutual trust in the proper decision-making of state courts in relation to "their" athletes, clubs and officials.

Swiss Law in International Sports Disputes: Practical Examples and Outlook

Giulio Palermo* and Panagiotis A. Kyriakou**

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E. Application of general rules of association law and wide autonomy for associations
F. Definition of what qualifies as bankruptcy and articulation of a due diligence requirement in sport succession
G. Application of the *lex mitior*, *tempus regit actum* and *reformatio in peius* principles
H. Limited review of field-of-play decisions, except in cases of disproportionality
I. Availability and conditions of declaratory relief under stringent conditions
J. Unavailability of loss of chance
V. Appraisal

I. Swiss law as a driver of harmonization

The sports industry is characterized by a high degree of human mobility, with top-level athletes competing, and often residing, in various jurisdictions throughout their careers. This highly mobile and multi-jurisdictional environment entails transactional fragilities and competitive mismatch risks, subjecting athletes to diverging laws and contractual customs. This environment also means that jurisdictions with relaxed integrity standards may afford their clubs and athletes a competitive edge at the international level.

The sports industry is aware of these fragilities. It has long understood that predictability and integrity (in the sense of "*having a level playing field*" and generally *"doing the right thing"* in competitions)[1] require that

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[1] C. Abanazir, "Normative Pluralism and Sporting Integrity", Sport, Ethics and Philosophy (2024), p. 1.

similar disputes be resolved in similar ways, *i.e.,* the existence of a "harmonized" substantive and procedural legal framework. The harmonization safeguards developed to preserve predictability and integrity include the Court of Arbitration for Sport ("**CAS**"), which, especially in light of its appellate function in matters involving sports federations, is the "go-to" forum for most international sports disputes.[2]

Other developments include the adoption by CAS panels of transnational sports law principles *(lex sportiva)*,[3] as well as the frequent invocation of harmonization as an overarching principle[4] and use of "*universalistic*" vocabulary[5] to cultivate a spirit of legal unity in sports. More recently, the proliferation of cases heard by the Basketball Arbitral Tribunal ("**BAT**"), and their consistent resolution under the *ex aequo et bono* standard, have also been hailed as contributors to harmonization,[6] given the standard's ability to eliminate jurisdictional mismatches.

A less celebrated yet significant aspect of harmonization, which this paper explores, is the role of Swiss law as a provider of "fallback" rules. Swiss law initially became important in the sports industry by offering basic association rules, due to the establishment of sports governing bodies such as the *Fédération Internationale de Football Association* ("**FIFA**"), the Union of European Football Associations ("**UEFA**"), the World Anti Doping Agency ("**WADA**"), and the International Olympic Committee ("**IOC**") in Switzerland.[7] This utility of Swiss law is encapsulated in CAS 2006/A/1025, where the panel noted, concerning WADA, that "*the rules of a Swiss private law entity should comply with Swiss law. If they do not do so, there is a risk that the Swiss Courts will declare them to be non-compliant*".[8]

Over time, Swiss law expanded its influence beyond merely providing association rules; it now permeates various aspects of sports disputes, even those without geographical connections to Switzerland and those involving no Swiss-based parties. It is the most frequently referenced legal framework in CAS appeal proceedings,[9] and provides a familiar space to which CAS tribunals tend to retreat when facing normative uncertainty.[10]

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[2] One of busiest sports associations globally, FIFA, has expressly declared that it resorts to the CAS precisely in order "*to ensure a harmonized approach to the different football-related disputes worldwide*". See FIFA's "CAS and Football Annual Report 2022", p. 4.

[3] L. Casini, "The Making of a *Lex Sportiva* by the Court of Arbitration for Sport", German Law Journal (2011), p. 1326. *Lex sportiva* is, according to its narrow conception, the result of the selection of "*the best examples*" of "*legislative codes*" by the CAS precisely in order to ensure the adoption by the industry of "*a set of harmonised 'best practice' standards*" (K. Foster, "*Lex Sportiva* and *Lex Ludica*: the Court of Arbitration for Sport's Jurisprudence", Entertainment and Sports Law Journal (2006), para. 6).

[4] Notably, one CAS panel has perceived its role as that of a guarantor of "*normative uniformity*", in justifying its authority to overrule decisions of national authorities (CAS 2006/A/1119, UCI v. L. & RFEC, para. 30).

[5] C. Abanazir notes recurring concepts such as "*the spirit of the sport*" ("Normative Pluralism and Sporting Integrity", Sport, Ethics and Philosophy (2024), p. 2).

[6] H. Radke, "Basketball Arbitral Tribunal (BAT) as a 'Lawmaker': the Creation of Global Standards of Basketball Contracts through Consistent Arbitral Decision-making", International Sports Law Journal (2019), p. 65.

[7] Many of these organizations relocated to Switzerland amidst an uncertain geopolitical climate in the 1910s and 1930s, see J. Chappelet, "Switzerland's Century-Long Rise as the Hub of Global Sport Administration", The International Journal of the History of Sport (2021), pp. 575 *et seq*.

[8] CAS 2006/A/1025, Mariano Puerta v. International Tennis Federation (ITF), Award of 12 July 2006, para. 15.

[9] N. Erbeyin, "Applicable Law in CAS Appeal Proceedings", Türkiye Adalet Akademisi Dergisi (2024), p. 335.

[10] In CAS proceedings, "*Swiss procedural law is always applicable and quite often the substantive law is Swiss*", and as a result there is a high number of lawyers based in Switzerland on CAS' lists of

A prominent example of this tendency of CAS tribunals can be found, again, in CAS 2006/A/1025, where the panel held:

"[...] to construe the [World Anti Doping Code (WADC)] in a manner which is consistent with Swiss law, as the law with which the WADC must comply. Construing the WADC in that way means that the WADC is not subject to the vagaries of myriad systems of law throughout the world, but is capable of a uniform and consistent construction wherever it is applied. Any other construction would negate, or, at the very least, seriously weaken, the purpose and objective of the WADA and its signatories".[11]

In the current landscape of sports dispute settlement, as shaped by years of interaction between the CAS and the Swiss legal system, "*there is a significant possibility a dispute before the CAS having little or nothing to do with Swiss law will nonetheless be resolved under Swiss law*".[12] This "*systematic application*" of Swiss law by CAS panels "*assures coherence and a certain consistency*" by "*simplistically resolv*[ing] *problems and questions related to private international law*".[13] Moreover, it "*provides greater legal predictability in cases where the parties do not make an express choice of law applicable to the merits*", compared to the intricate conflict-of-law processes non-CAS tribunals must follow in such cases.[14]

Much as its integrationist "*acquis*" is, as seen above, generally acknowledged, Swiss law has not been subject to a mapping exercise highlighting its use-cases across the wider procedural and substantive spectrum of a sports dispute.[15] But the moment now appears opportune for such an exercise: harmonization is under pressure, with scepticism growing about the consensual nature of CAS arbitration,[16] new jurisdictions gaining importance in the global regulation of sports,[17] national sports dispute settlement

arbitrators (L. Reilly, "Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes, A Symposium", Journal of Dispute Resolution (2012), fn 12).

[11] CAS 2006/A/1025, Mariano Puerta v. International Tennis Federation (ITF), Award of 12 July 2006, para. 16.

[12] L. Ferrer de Robles, "Applicable Law in Sport-related Disputes and the influence of Swiss Law" (2015).

[13] D. Mavromati & M. Reeb, "Commentary on the CAS Procedural Rules, Article R45 [Law Applicable to the Merits]", in D. Mavromati & M. Reeb, The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials (2015), para. 69.

[14] W. Sternheimer & H. Le Lay, "Arbitrages ordinaires pouvant être soumis au Tribunal Arbitral du Sport", CAS Bulletin (2012), pp. 53, 54.

[15] Existing studies either focus only on procedural law or discuss isolated aspects of substantive law (such as association rules). See contributions such as M. Perruchoud, "Application of Swiss law and Influence of Swiss Protection of Legal Personality in International Sport: A Necessity to Ensure Equality of Treatment among Competitors?", The International Sports Law Journal (2023); J. Chappelet, "Switzerland's Century-Long Rise as the Hub of Global Sport Administration", The International Journal of the History of Sport (2021); D. Girsberger and N. Voser, "Chapter 10: Sports Arbitration", in D. Girsberger and N. Voser, International Arbitration: Comparative and Swiss Perspectives (Schulthess 2021); F. Robert-Tissot, "Enforcement of monetary claims in football-related matters – a practitioner's view: Available remedies to obtain the payment of monetary claims, in particular based on Court of Arbitration for Sport (CAS) awards", Football Legal (2016); A. Rigozzi, "International Sports Arbitration: Why does Swiss Law Matter?", in A. Rigozzi et al. (eds.), Citius, Altius, Forties – Mélanges en l'honneur de Denis Oswald (Helbing & Lichtenhahn, 2012).

[16] *E.g.,* Bundesverfassungsgericht, Beschluss vom 3.6.2022, 1 BvR 2103/16, paras. 115 and 178-183, where the German Federal Constitutional Court characterized CAS proceedings as forced and deemed the lack of a public hearing requirement inconsistent with Article 6(1) of the ECHR.

[17] As noted by J. Grix and D. Lee, "[u]*ntil very recently, the key sports mega-events (the World Cup and the Olympic Games) were predominantly staged by wealthy Western states. Not anymore; large developing states have successfully entered the fray*" (J. Grix & D. Lee, "Soft Power, Sports Mega-Events and Emerging States: The Lure of the Politics of Attraction", Global Society (2013), p. 522). More recently,

bodies proliferating,[18] e-sports bringing complications for territorial jurisdiction,[19] and the Court of Justice of the European Union ("**CJEU**") along with the European Court of Human Rights ("**ECtHR**") increasing their scrutiny of the CAS and sports governing bodies.[20] Predictability and integrity, once taken for granted, now seem to be in need of re-affirmation.

This paper provides a non-exhaustive yet representative overview of how Swiss law, as a key driver of harmonization, governs international sports disputes. It does so by identifying the legal bases for its application (II), and presenting ten characteristic examples of its use in preliminary issues (relating to the jurisdictional, institutional or "threshold" aspects of a dispute, and arising primarily due to the selection of Switzerland as the seat of the arbitration) (III), followed by ten examples of matters of liability or interpretation (IV). The paper concludes with reflections about Swiss law's past utility and future outlook (V).

II. Legal bases for the application of Swiss law

A. Swiss law as *lex arbitri*

Swiss law is the most common law governing the proceedings of an international sports dispute (*lex arbitri*). The prevalence of Swiss law in this regard is helpful in safeguarding "*procedural consistency and predictability*",[21] but also in ensuring that annulment and other post-award remedies are pursued before the same authorities; namely, by the Swiss Federal Tribunal ("**SFT**")[22] and ultimately the ECtHR,[23] which together with Swiss-seated tribunals have come to form a "constitutional triangle" of sports dispute settlement bodies.

The simplest basis for the application of Swiss law as *lex arbitri* is its direct selection by the parties. This is the case in certain disputes heard by traditional arbitral institutions, such as the International Chamber of Commerce ("**ICC**") or the World Intellectual Property Organization ("**WIPO**")'s Arbitration and Mediation Center. Unlike the CAS or BAT

Mexico, Saudi Arabia, Qatar and the UAE, among others, organized or were awarded major events, generating legal disputes in these emerging jurisdictions (see, *e.g.,* the dispute between Budweiser and FIFA).

[18] Even in Switzerland, the jurisdiction under focus in this article, a new Swiss Sports Tribunal was recently set up to adjudge doping and ethics disputes.

[19] E-sports have also brought new international dispute settlement bodies, such as IGET and Riot Games' ADRM.

[20] See the Opinion of Advocate Ćapeta in Case C-600/23, suggesting that the CAS system, even with the guarantees of the Swiss judicial system, does not satisfy the requirement of effective legal protection under EU law; the CJEU's Judgment in Case C-650/22 suggesting that certain aspects of one of FIFA's most important regulations, namely the Regulations on the Status and Transfer of Players ("**RSTP**") may not be compatible with the principle of freedom of movement and EU competition law; and the ECtHR's Judgment in Semenya v. Switzerland (sitting as Chamber), suggesting that the applicant had not been afforded sufficient institutional and procedural safeguards by Swiss courts which reviewed discrimination complaints previously dismissed by the CAS.

[21] L. Reilly, "Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes, A Symposium", Journal of Dispute Resolution (2012), p. 68.

[22] CAS awards, like all Swiss-seated arbitral awards, are solely and directly appealable to the SFT (see Article 191 of the PILA: "[t]*he Swiss Federal Supreme Court is the sole judicial authority for recourse against an award*").

[23] Switzerland, where the SFT is based, is a party to the ECHR. The ECtHR has reasoned in this regard that "[r]*ecourse to a single and specialised international arbitral tribunal facilitates a certain procedural uniformity and strengthens legal certainty; all the more so where the awards of that tribunal may be appealed against before the supreme court of a single country, in this case the Swiss Federal Court, whose ruling is final*" (Mutu and Pechstein v. Switzerland App. Nos. 40575/10 and 67474/10, Judgment of 2 October 2018, para.98).

(as seen below), such institutions do not pre-define the seat of the arbitration, leaving this choice to the parties.[24]

When the parties to ICC, WIPO and other non-CAS or non-BAT arbitrations choose Switzerland as the seat of the arbitration, the tribunal must apply the Swiss Private International Law Act ("**PILA**") as the main body of Swiss rules governing the arbitration proceedings. Article 176(1) of the PILA indeed provides as follows: "[t]*he provisions of this Chapter shall apply to arbitrations with their seat in Switzerland if at least one of the parties to the arbitration agreement, at the time of its conclusion, did not have its domicile, habitual residence or seat in Switzerland*". Along with the PILA, Swiss-seated tribunals occasionally apply principles of Swiss procedural law derived from domestic civil law.[25]

More often than being directly chosen, however, Swiss law will constitute the *lex arbitri* due to the designation of the CAS or the BAT as arbitral institutions.[26] The CAS and the BAT, which administer a large number of disputes, are seated in Switzerland by default, and are the reason why Swiss law is the most common *lex arbitri* in international sports overall.[27]

B. Swiss law as *lex causae*

Swiss law is frequently applicable to the merits of sports disputes (*lex causae*), though not as prominently as it applies to the procedure. The choice of Swiss law as *lex causae* is often direct; Swiss law is commonly stipulated, for instance, in labour and agent contracts,[28] which in turn comprise a significant portion of CAS ordinary disputes.

The frequency of the direct selection of Swiss law is likely due to the importance of Switzerland as a hub of sports governance,[29] as well as the need to ensure that the same laws will apply to the federations governing the sport in question (which will often be Swiss-based) and the contracts performed within their ambit (such as player transfer contracts, in the case of FIFA).

Faced with a direct choice of Swiss law as *lex causae*, a Swiss-seated tribunal will honour the parties' will pursuant to the principle of party autonomy, enshrined in Article 187(1) of the PILA, which reads: "[t]*he arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence thereof, according to the rules of law with which the dispute has the closest connection*". The rule of party autonomy can in fact be found in most jurisdictions; if Swiss

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[24] Indicatively, according to Article 18(1) of the ICC Rules, "[t]*he place of the arbitration shall be fixed by the Court, unless agreed upon by the parties*", whereas according to Article 38(a) of the WIPO Arbitration Rules, "[u]*nless otherwise agreed by the parties, the place of arbitration shall be decided by the Center, taking into consideration any observations of the parties and the circumstances of the arbitration*".

[25] See *e.g.,* CAS 2023/O/10000 Lia Thomas v. World Aquatics, para. 66, applying Article 125 of the Swiss Code of Civil procedure. Tribunals are empowered to apply such rules by Article 182(2) of the PILA, according to which "[i]*f the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a law or to arbitration rules*".

[26] In the case of the CAS, this indirect designation occurs through Article R28 of the CAS Code, according to which "[t]*he seat of CAS and of each Arbitration Panel ("Panel") is Lausanne, Switzerland*", whereas in the case of the BAT, it occurs through Article 2(1) of the BAT Rules, which similarly states that "[t]*he seat of the BAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland, even if hearings, if any, are held in another place*".

[27] Switzerland is so common as *lex arbitri* in sports law that 46% of all awards challenged before the SFT between 2010 and 2019 were sport-related. See F. Dasser and P. Wójtowicz, "Swiss International Arbitral Awards Before the Federal Supreme Court. Statistical Data 1989-2019"", ASA Bulletin (2021), p. 12.

[28] S. Gosain, "What should you know before entering into representation agreements under Swiss law?", LawInSport (2024).

[29] Owing to the establishment of federations such as FIFA, UEFA, the IOC and FIBA, as well as the presence of institutions such as the CAS and BAT.

law is directly chosen by the parties, it will invariably apply.

In addition to the cases where it is directly selected, Swiss law may apply when an instrument other than the contract at stake, such as the CAS Code of Sports-related Arbitration ("**CAS Code**") or the FIFA Statutes, refers to it. CAS panels have held in that regard that an indirect selection of a given body of laws, such as through a reference to a document that is itself governed by that body of laws, is a valid selection within the sense of Article 187(1) of the PILA.[30]

One form of such an indirect designation of *lex causae* invariably leading to Swiss law is Article R58 of the CAS Code,[31] which is automatically triggered whenever the parties resort to CAS appeal proceedings. This provision reads as follows:

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

By consenting to CAS appeal proceedings, and consequently accepting Article R58 of the CAS Code, parties will often indirectly select Swiss law as *lex causae* in two ways: first, many sports regulations and statutes are governed by Swiss law (whether subsidiarily[32] or on an equal footing with the regulations themselves[33]); in such cases, Swiss law can be considered either as part of the "*regulations*" referred to in the first sentence of Article R58 of the CAS Code, or as a law "*chosen by the parties*" (albeit very indirectly) within the second sentence. Second, when there is truly no choice of law because the regulations are fully silent (which is rare), yet the dispute involves a Swiss association, Swiss law can be considered as the law where the federation is "*domiciled*" pursuant to the last sentence of Article R58 of the CAS Code.

CAS panels have not been entirely consistent in how they have tended to fit Swiss law within the mechanism of Article R58 of the CAS Code. What is in any case clear is that, for the majority of CAS formations, Article R58 of the CAS Code effectively imposes a "*hierarchy of norms*",[34] favouring the application of Swiss law over any law (other than the applicable regulations themselves).

CAS panels have thus applied Swiss law even over contractually chosen laws, particularly in football disputes; as noted by U. Haas, "*most CAS formations ignore the (explicit) choice of law of the parties and focus solely on Swiss law as the subsidiarily applicable law*".[35] The justifications given by tribunals for this primacy have ranged from the "*international*" nature of the dispute at stake to a more general need to be

30 CAS 2004/A/574 Associação Portuguesa de Desportos v. Club Valencia CF SAD, para. 42.
31 As held in CAS 2006/A/1024 FC Metallurg Donetsk v. Leo Lerinc, para. 14.
32 As in the case of Article 56(2) of the FIFA Statutes, which reads as follows: "[t]*he provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law*".
33 As in the case of Article 14(3)(e) of the International Hockey Federation' Statutes, which reads as follows: "[t]*he appeal shall take place in private at the CAS offices in Lausanne before a panel of three (3) CAS arbitrators. The appeal proceedings shall be conducted in English and unless otherwise agreed Swiss law shall apply*".
34 CAS 2014/A/3527 Football Federation of Kazakhstan (FFK) v. Oliver Pelzer, para. 57.
35 U. Haas, "Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law", CAS Bulletin (2015), p. 14. See *e.g.* the case of Frank Ribéry v. Galatasaray, which involved a contract governed by Turkish law while also referring to the "*rules* [of] *FIFA*"; the CAS applied Swiss law and ignored Turkish law. CAS 2006/A/1180 Galatasaray SK v. Frank Ribéry & Olympique de Marseille, para. 13.

"*restrictive in applying national provisions other than Swiss law*", likely in the interest of harmonization.[36]

Some scholars have argued for a more limited application of Swiss law under Article R58 of the CAS Code, namely solely as a means of clarifying issues already governed by the referring instrument, and not as a filler of gaps.[37] A similar view holds that the "*regulations*" and their governing law are only a "*partial*"[38] choice of law, with the rules chosen by the parties completing this partial choice. Some tribunals have followed this logic, considering Swiss law as co-existent with the law contractually chosen by the parties, and as applicable to specific issues.[39] What is certain, in any event, is that Swiss law holds a prominent place as a *lex causae* in CAS appeal proceedings, whether alongside the *lex contractus* or as hierarchically superior.

In ordinary CAS proceedings, on the other hand, Swiss law is only applicable when the parties have made neither a direct nor an indirect choice of another law. Pursuant to Article R45 of the CAS Code, "[t]*he Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law*". In most CAS ordinary cases, it is reported that the parties will have made a direct or indirect choice;[40] yet, there are cases where such a choice is either not made or cannot be safely determined. In such cases, even if the dispute presents no link to Switzerland, CAS panels will apply Swiss law,[41] in line with Article R45 of the CAS Code.

C. Swiss law as the "post-award" legal framework

Finally, Article 190 of the PILA provides the grounds of an annulment request against a Swiss-seated award before the SFT. One of these grounds is the incompatibility of the award with procedural or substantive public policy (Article 190(e) of the PILA); public policy is here understood as the "*essential and widely accepted values which, pursuant to the concepts that prevail in Switzerland, should constitute the fundament of any legal system*".[42]

Such "*values*" are often applied by tribunals to the arbitral proceedings themselves, to ensure that the award will not eventually be subject to annulment; one CAS formation has held that, even "*when foreign law is applicable to the merits, the fundamental principles of law recognised in Switzerland must be respected*" by the tribunal.[43]

III. Examples related to preliminary issues

A. "Autonomous" approach to legal characterization

The first important consequence of selecting Switzerland as the seat of the arbitration is

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36 U. Haas, "Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law", CAS Bulletin (2015), p. 11.

37 U. Haas, "Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law", CAS Bulletin (2015), p. 17.

38 A. Rigozzi and E. Hasler, "Chapter 15, Part II: Commentary on the CAS Procedural Rules, Article R58 [Law applicable to the merits]", in M. Arroyo (ed.), Arbitration in Switzerland: The Practitioner's Guide (2nd ed., Kluwer 2018), p. 1049, para. 8.

39 CAS 2013/A/3383-3385 Volga Nizhniy Novgorod v. Levan Silagadze, Award of 13 November 2014, paras. 49-51.

40 D. Mavrommati and M. Reeb, The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials (Kluwer 2015), p. 354, para. 69.

41 See D. Mavrommati and M. Reeb, The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials (Kluwer 2015), p. 354, para. 69, and in particular the examples provided in fn 30 (*ex multis*).

42 SFT 4P.278/2005, c. 2.2.3.

43 CAS 2010/A/2128 CS Chimia Brazi v. SCCS Unirea Urziceni, Award of 15 November 2010, para. 45.

that the characterization of an issue arising before the tribunal as procedural or substantive may be made "autonomously";[44] *i.e.*, whereas international arbitral tribunals often characterize issues based on the *lex fori*,[45] in Switzerland, a popular view is that tribunals should not superimpose the "domestic" characterization ascribed by the Swiss legal order.[46]

Somewhat uniquely, in case of doubt, a Swiss-seated tribunal will consider the issue at stake as being of substance, rather than procedural.[47] In Swiss-seated proceedings, therefore, a significant number of issues which in non-Swiss proceedings may be deemed procedural are substantive, such as the prescription of claims and legal standing.[48]

The practical importance of characterization relates to applicable law: if the issue requiring characterization is eventually deemed procedural, Swiss law will apply to it, whereas the *lex causae* will apply to issues characterized as substantive. To be sure, in CAS appeal proceedings, this will often not matter, since Swiss law will be the *lex arbitri* while also forming part of the *lex causae* alongside the applicable regulations.

B. Limited scope for a finding of invalidity of the arbitration agreement

A second important consequence of selecting Switzerland as the seat of the arbitration is that such a choice will entail a broad scope of jurisdiction for the arbitral tribunal,[49] as well as the application of two principles safeguarding the validity of the arbitration agreement: *favor validitatis* and separability. Overall, Swiss courts are deemed highly arbitration-friendly, and it will take much to invalidate an arbitration agreement in a Swiss-seated sports dispute.[50]

The *favor validitatis* principle is enshrined in Article 178(2) of the PILA, according to which an arbitration agreement is valid if it meets the requirements of the law chosen by the parties, or the law governing the subject matter of the dispute and, in particular, the law applicable to the main contract or Swiss law. This is a relatively unique feature of Swiss law, which notably differs from the UNCITRAL Model Law, according to which invalidity is judged under the law of the parties' selection or the law of the seat.[51]

The separability principle, in turn, is enshrined in Article 178(3) of the PILA, according to which the invalidity of the main

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[44] See D. Mavrommati and M. Reeb, The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials (Kluwer 2015), p. 537, para. 77.

[45] G. Kaufmann-Kohler, "La qualification en arbitrage commercial international", Droit international privé: travaux du Comité français de droit international privé (2013), p. 305.

[46] G. Kaufmann-Kohler, "La qualification en arbitrage commercial international", Droit international privé: travaux du Comité français de droit international privé (2013), p. 305.

[47] See D. Mavrommati and M. Reeb, The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials (Kluwer 2015), p. 537, para. 78.

[48] See SFT 4A_428/2011, c. 4.1.1 for standing, and SFT 4A_396/2024, c. 5.4 for prescription, where the SFT refused to impose Swiss prescription law over *ex aequo et bono* (which governed the substance of the original case before the BAT).

[49] SFT 4A_438/2013, c. 3.3.2.

[50] As the authors have noted elsewhere, this is also what "*affords arbitrators a relative peace of mind*" to decide fast and sensitive sports disputes under the standard of *ex aequo et bono* without a palpable fear of annulment. See G. Palermo and P. A. Kyriakou, "Leveraging the Standard of Ex Aequo et Bono to Increase Diversity, Flexibility and Efficiency: Insights from the Basketball Arbitral Tribunal", 38 ASA Bulletin 2020, p. 877.

[51] See Article 34(2)(a)(i) of the 2006 UNCITRAL Model Law: "[a]*n arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State*".

contract does not automatically impact the arbitration agreement. The principle has been deemed applicable to CAS arbitration proceedings.[52] While this principle is a common feature of most arbitration statutes, there are jurisdictions where it is not recognized as a stand-alone doctrine, leading to uncertainties in its application.[53] Moreover, Swiss courts strongly enforce it; the SFT, for instance, has upheld an arbitration agreement contained in a draft and eventually unsigned contract.[54]

To briefly exemplify Switzerland's overall restrictive approach to the invalidation of arbitration agreements, the SFT has upheld the validity of arbitration agreements in cases where the arbitral institution had been misspelled or where the arbitration agreement was to be found in an instrument not directly signed onto by the parties, as is the case of the FIFA Statutes.[55]

C. Strict enforcement of deadlines and procedural duties

A third important consequence of selecting Switzerland as the seat of the arbitration is that deadlines and procedural duties will be enforced strictly. In this regard, while the SFT recognizes that the rejection of certain procedural rights on overly formalistic grounds may constitute a denial of justice,[56] it has notably upheld the refusal by the CAS to open appeal proceedings in a case where the appellant had filed its appeal electronically but not by courier, as required by R31(3) CAS Code,[57] as well as an order terminating the arbitration pursuant to R64(2)(2) of the CAS Code due to a failure to pay the advance on costs.[58]

More generally, the SFT is of the view that "[f]*ormalism is considered to be excessive when the strict application of the rules is not justified by an interest worthy of protection and unsustainably complicates the realization of substantive law or restricts access to courts*"; "*procedural formalities*" are worthy of protection since they are "*necessary to ensure effective legal recourse*".[59]

Relatedly, it is noteworthy that Swiss-seated tribunals are expressly required to reject belated jurisdictional objections. Pursuant to Article 186(2) of the PILA, "[t]*he objection of lack of jurisdiction must be raised prior to any defense on the merits*". Naturally, the rejection of an objection as belated when the dispute has entered the merits cannot be deemed as excessive formalism, being mandated by the PILA.

The SFT has relied on the principle of good faith, derived from Article 2 of the Swiss Civil Code ("**CC**"), to extend a similar limitation to procedural objections more generally; it has held, in particular, that good faith applies to international arbitration seated in Switzerland and that any procedural objection must accordingly be raised "*as soon as possible*".[60]

In another case, the SFT referred to the Swiss Code of Civil Procedure ("**CCP**")'s express provision on procedural good faith, namely its Article 52, which it considered expressive of a principle applicable to arbitration proceedings, both domestic and international. Applying this principle, the SFT held that, by complaining before it about the allegedly excessive severity of a disciplinary sanction, while having failed to

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[52] CAS 2006/O/1127, I. & F. v. C., Preliminary Award of 7 March 2007, para. 65, and more recently CAS 2016/A/4450 Iván Bolado Palacios v. PFC CSKA Sofia, Award of 24 January 2017, para. 120.

[53] Notably, in Austria, separability is a matter to be determined by examining the intentions of the parties, see F. Haugeneder, "A 07 – Separability Doctrine", in Vienna International Arbitral Centre of the Austrian Federal Economic Chamber (ed.), VIAC Selected Arbitral Awards, Vol 1. (Verlag 2015), pp. 401 – 403, fn 3.

[54] SFT 4A_84/2015, c. 3.3.1.

[55] SFT 4A_460/2008, c. 6.2.

[56] SFT 4A_692/2016, c. 6.1.

[57] SFT 4A_54/2019, c. 4.2.2. See also SFT 4A_346/2024, c. 5.2.

[58] SFT 4A_692/2016, c. 6.3.

[59] SFT 4A_692/2016, c. 6.2.

[60] SFT 130 III 66, c. 4.3.

raise the matter during the CAS proceedings for which the annulment request was being placed, the appellant had adopted a contradictory behaviour which was incompatible with the notion of *venire contra factum proprium*; thus, the appellant was precluded from raising the matter before the SFT.[61]

D. Restrictive approach to jurisdictional conflicts, *lis pendens* and *res judicata*

A fourth consequence of designating Switzerland as the arbitral seat is that the tribunal will disclaim its jurisdiction in favour of other fora in limited cases. To begin with, a Swiss-seated tribunal has the competence to rule on its own jurisdiction under the principle of *Kompetenz-Kompetenz*.[62]

Further, pursuant to Article 186(1bis) of the PILA, the tribunal "*shall rule on its jurisdiction irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless serious grounds require a suspension of the proceedings*".[63] This provision "*basically excludes the lis pendens rule*";[64] the existence of proceedings on the same matter between the same parties in another forum, indeed, are not deemed a serious ground for suspension per se.[65] A CAS sole arbitrator accordingly held that the existence of local court proceedings disputing his jurisdiction could not justify a suspension of CAS proceedings.[66]

Selecting Switzerland as the seat will also lead to the application of the Swiss version of the principle of *res judicata* to a defence that the same or a related dispute has been decided in another forum.[67] This is important, since *res judicata* differs, notably, from the common law notion of issue estoppel;[68] under *res judicata*, a claim is inadmissible when "*a party seizes an arbitral tribunal with its seat in Switzerland with an identical claim between the same parties that has already been the subject of a court judgment made in a country other than Switzerland, provided that the foreign court judgment can be recognized in Switzerland*".[69]

Applying this principle, a CAS arbitrator dismissed an objection grounded on the existence of previously concluded local court proceedings, which were allegedly relevant to the matter at hand, reasoning that the appellant had not been a party to such proceedings.[70] Further, a CAS arbitrator held that decisions by association tribunals do not

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[61] SFT 4A_542/2021. Note, also, Article 182(4) of the PILA, according to which "[a] *party that proceeds with the arbitration without immediately raising an objection to a violation of procedural rules which it knew or, exercising due diligence, ought to have known, may not subsequently raise such objection*".

[62] See Article 186(1) of the PILA: "*the arbitral tribunal shall rule on its own jurisdiction*".

[63] Similarly, Article R55 of the CAS Code stipulates that "[t]*he Panel shall rule on its own jurisdiction irrespective of any legal action already pending before a state court or another arbitral tribunal relating to the same object between the same parties, unless substantive grounds require a suspension of the proceedings*".

[64] M. Noth and U. Haas, "Chapter 15, Part II: Commentary on the CAS Procedural Rules, Article R32 [Time limits]" in M. Arroyo (ed.), Arbitration in Switzerland: The Practitioner's Guide (2nd ed., Kluwer 2018), para. 18.

[65] M. Noth and U. Haas, "Chapter 15, Part II: Commentary on the CAS Procedural Rules, Article R32 [Time limits]" in M. Arroyo (ed.), Arbitration in Switzerland: The Practitioner's Guide (2nd ed., Kluwer 2018), para. 16.

[66] CAS 2021/A/8390 Albanian Football Association v. Albanian National Olympic Committee, Award of 17 June 2024, paras. 141-147.

[67] CAS 2021/A/8390 Albanian Football Association v. Albanian National Olympic Committee, Award of 17 June 2024, para. 152.

[68] N. Voser and J. Raneda, "Recent Developments on the Doctrine of Res Judicata in International Arbitration from a Swiss Perspective: A Call for a Harmonized Solution", 33 ASA Bulletin (2015), fn 83. Issue estoppel focuses less on the content of a previous decision and more on the previous conduct of the parties.

[69] CAS 2021/A/8390 Albanian Football Association v. Albanian National Olympic Committee, Award of 17 June 2024, para. 153.

[70] CAS 8390 Albanian Football Association v. Albanian National Olympic Committee, Award of 17 June 2024, para. 154.

enjoy *res judicata* effects before the CAS, lacking the adversarial nature of court and arbitration proceedings required by Swiss law.[71] Finally, a CAS arbitrator held that decisions of a judicial body of a sport federation, which are not arbitral tribunals, are mere embodiments of the will of the federations concerned, and as such do not give rise to *res judicata*.[72]

E. Strict probatory rules

A fifth consequence of designating Switzerland as the arbitral seat is that the question of the burden of proof will be governed by the *lex causae*, since the SFT considers it substantive.[73] When, whether through Article R58 of the CAS Code or otherwise, the *lex causae* is Swiss law, the burden of proof will be regulated by Article 8 of the CC; pursuant to this rule, the burden of proof for establishing an alleged fact rests on the person deriving rights from it.

Applying this provision, one CAS panel found that an agent had sufficiently proven that he was not the player's representative by filing a witness statement by the player; the Club, in turn, had not substantiated its own positive assertion that the agent was the player's representative, having filed no supporting statement or document, and as such having fallen short of the Swiss standard.[74]

More generally, in Swiss legal culture, where evidence must usually be "frontloaded", references in support of each allegation are required and discovery is limited,[75] there is an expectation that parties will sufficiently prove their case and courts/ tribunals themselves will interfere in the evidentiary process only minimally.

F. Broad procedural powers for the arbitral tribunal

A sixth consequence of selecting Switzerland as the arbitral seat is that the arbitral tribunal will enjoy large procedural freedom. One key aspect of this freedom is the availability of bifurcation and partial awards more generally. In CAS 2023/O/10000, the CAS panel referred to Article 125(a) of the CCP, which provides that a court may, *"[i]n order to simplify the proceedings* […] *limit the proceedings to individual issues or prayers for relief*", as well as Article 237 of the CCP, according to which a court "*may issue an interim decision*";[76] based on these provisions, the panel issued a bifurcated decision dealing with the appellant's standing to appeal.

Another aspect of this freedom is the ability of arbitral tribunals to assume jurisdiction for interim measures to the exclusion of courts. In principle, Article 183(1) of the PILA provides that the "*arbitral tribunal may* […] *order interim measures*", a wording which affords concurrent jurisdiction to courts and the tribunal for interim measures.[77] However, notably, Article R37 of the CAS Code waives this concurrency, establishing the CAS panel (and the President of the relevant division where the panel has not been constituted) as exclusively competent. Swiss courts have held that this provision constitutes a valid

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71 CAS 2021/A/7915 Javier González López v. Hapoel Tel Aviv FC & Fédération Internationale de Football Association (FIFA), Award of 7 November 2022, para. 84.

72 CAS 2021/A/7807 Sport Lisboa e Benfica v. FIFA, Award of 28 September 2021, paras. 75, 76.

73 See, *e.g.,* T. Zuberbühler et al., Swiss Rules of International Arbitration: Commentary (Kluwer 2005), p. 209.

74 CAS 2014/A/3742 US Città di Palermo S.p.A. v. Goran Veljkovic, Award of 7 April 2015, para. 73.

75 T. Weibel, "Evidence rules in Swiss proceedings" (2021), available at https://www.vischer.com/en/knowledge/blog/evidence-rules-in-swiss-proceedings-39423/.

76 CAS 2023/O/10000 Lia Thomas v. World Aquatics, Award of 10 June 2024, para. 66.

77 A. Rigozzi and E. Hasler, "Chapter 5: Sports Arbitration under the CAS Rules (2013)", in M. Arroyo (ed.), Arbitration in Switzerland: The Practitioners' Guide (Kluwer 2013), p. 937.

waiver of court jurisdiction over interim measures.[78]

To be sure, the types of measures the CAS and any Swiss-seated tribunal may order are still subject to restrictions which may be imposed under Swiss law. A notable measure which Swiss-seated tribunals are not capable of issuing is a freezing order; as held by one CAS panel:

"In any event, under the CAS jurisprudence and in accordance with Swiss Federal Law, the Loi sur la poursuite pour dettes et faillites, only a judge responsible for the enforcement of claims can make freezing orders, which orders cannot be made by ordinary civil courts or arbitral tribunals (see Preliminary Decision issued in CAS 2004/A/568). It follows that, in the absence of any agreement by the parties, CAS has no jurisdiction to make such an order and that the application of [the club] must be dismissed in that respect".[79]

Still, according to Article 185 of the PILA, Swiss courts shall have jurisdiction over interim measures if their assistance is requested by the tribunal. Moreover, Swiss courts can and should assert jurisdiction over a given type of measure when it is clear that the tribunal does not have the authority to order it.[80]

G. Requirement of close legal interest and standing to appeal

A seventh important consequence of designating Switzerland as the arbitral seat is that the parties' legal standing before the tribunal will be governed by the *lex causae*. According to the SFT, the issue is indeed substantive and does not affect the jurisdiction of the arbitral tribunal.[81] Importantly, this also means that an appeal before the SFT for reasons of standing cannot be made pursuant to Article 190(2)(b) of the PILA.[82]

In CAS 2013/A/3301, it was held that, according to Swiss law, a defending party has standing to be sued only if it is "*personally obliged*" by the "*disputed right*" at stake.[83] Similarly, with reference to Article 75 of the CC, the panel in CAS 2016/A/4602 stated that an appellant has standing to challenge the decision of an association when this decision "*personally affects* [the appellant's] *membership rights as to their substance*".[84]

Related to the issue of standing is that of legal interest; as one CAS panel has held, interest is a condition of admissibility which is explicitly provided for in Art. 59(2) lit. a of the CCP, and "*is a condition for access to justice. A court shall only be bothered to decide the merits of a request, if the applicant has a sufficient legal interest in the outcome of the decision. If – on the contrary – the request is not helpful in pursuing the applicant's final goals, the scarce judicial resources shall not be wasted on such matter*".[85]

Several CAS panels have also considered legal interest as part of the question of standing; standing to appeal for such panels is demonstrated if a person has "*sufficient legal interest in the matter being appealed*", in the sense of being "*factually and directly affected* [...] *in a*

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78 Decision by the Obergericht of the Canton of Bern of 19 April 2012.

79 CAS 2004/A/780 Christian Maicon Henning v. Prudentopolis Esporte Clube & FIFA, Order of 6 January 2005, para. 26.

80 A. Rigozzi and E. Hasler, Article R37: "Provisional and Conservatory Measures" in M. Arroyo (ed.), Arbitration in Switzerland: The Practitioner's Guide (2013), pp. 936-1083, para. 11.

81 CAS 2013/A/3301 FC Red Bull Salzburg v. UEFA, Arsenal FC & Fenerbahçe Kulübü, Award of 7 March 2014, para. 69.

82 A. Rigozzi, "Challenging Awards of the Court of Arbitration for Sport", Journal of International Dispute Settlement (2010), p. 244.

83 CAS 2013/A/3301 FC Red Bull Salzburg v. UEFA, Arsenal FC & Fenerbahçe Kulübü, Award of 7 March 2014, para. 93.

84 CAS 2016/A/4602 Football Association of Serbia v. UEFA, Award of 24 January 2017, para. 66.

85 CAS 2016/A/4602 Football Association of Serbia v. UEFA, Award of 24 January 2017, para. 48.

manner that can be eliminated" by the decision's annulment.[86] Referring to an SFT decision, one CAS panel reasoned in that regard that a non-addressee of a first-instance sports decision will rarely have standing to appeal.[87]

Finally, a CAS panel referred to Article 221(1) of the CCP, SFT case law and Swiss academic sources when reasoning that, under Article R48 of the CAS Code, "[o]*nce the claimant has identified the respondent, he or she is not allowed to substitute the original respondent by another respondent", unless "real respondent could be identified on the basis of elements of the file or if the claim could not refer to any subject other than the real respondent and not to the respondent mentioned by mistake*".[88]

H. Broad conception of arbitrability

An eighth consequence of selecting Switzerland as the arbitral seat is that any dispute involving an economic interest may be the subject matter of arbitration, pursuant to Article 177(1) of the PILA. Swiss law has a broad conception of arbitrability, with only limited matters, such as those related to insolvency law, being non-arbitrable.[89]

It is this broad conception of arbitrability that has permitted the CAS to hear disputes related to competition law and sporting sanctions; the SFT has held that, even if disciplinary proceedings are functionally similar to criminal law, they remain arbitrable,[90] having a financial value.[91] Notably, the SFT has held that mandatory provisions of a foreign law which interpret the term "arbitrability" more narrowly must not necessarily be taken into account.[92]

That said, deviating from its generally broad conception of arbitrability, the SFT has clarified that a claim against an insolvent Swiss party, even if not arising out of insolvency proceedings per se, is not arbitrable under Swiss law if it is closely connected to such proceedings.[93] This means that an arbitral award obtained against a Swiss party that was already subject to bankruptcy proceedings when arbitration was initiated is not enforceable in Switzerland, or that it can be annulled, since lack of arbitrability constitutes a ground for annulment and refusal of enforcement alike.

I. Efficiency-oriented approach to independence and impartiality

A ninth consequence of designating Switzerland as the arbitral seat is an efficiency-oriented approach to independence and impartiality. To be sure, in its basic definition of independence and impartiality, Swiss law does not differ from other European jurisdictions; in Swiss-seated proceedings, arbitrators are subject to an objective standard.

Specifically, according to Article 180(1)(c) of the PILA, "[a]*n arbitrator may be challenged* [...] *if circumstances exist that give rise to justifiable doubts as to that arbitrator's independence or impartiality*". In defining these standards of

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[86] CAS 2021/A/8329 Ismael López Blanco v. FIFA & SC Dinamo 1948, Award of 2 December 2022, para. 73. See also CAS 2019/A/6181 FRBG v. FIG & JGA, Award of 24 September 2019, para. 74: "[t]*he Tribunal underlines that standing to sue (or to appeal) is attributed to a party which can validly invoke the rights which it puts forward, on the basis that it has a legally protectable and tangible interest at stake in litigation. This corresponds to the Swiss legal notions of "légitimation active" or "qualité pour agir", as confirmed by the case-law of the Swiss Federal Tribunal*".

[87] CAS 2021/A/8329 Ismael López Blanco v. FIFA & SC Dinamo 1948, Award of 2 December 2022, para. 74.

[88] CAS 2018/A/5621 Nicolas Gabriel Franco v. FIFA & Sportovni Klub Slavia Praha, Award of 11 June 2019, paras. 131, 132.

[89] B. Berger and F. Kellerhals, International and Domestic Arbitration in Switzerland (3rd ed., Stämpfli Verlag AG 2015), paras. 238 *et seq*. This has not, however, precluded CAS panels from hearing disputes related to sports succession, as discussed in the next section.

[90] SFT 4P.149/2003 p. 177.

[91] SFT 4P.230/2000, p. 526.

[92] SFT 4A_388/2012, c. 3.3.

[93] SFT 5A_910/2019, c. 3.6.

independence and impartiality, Swiss courts, bound by the ECHR, defer to the ECtHR's definition, and in particular the analysis presented in *Mutu and Pechstein v. Switzerland*. In 4A_318/2020, the SFT noted, while citing this decision, that:

"[I]mpartiality must be assessed not only from a subjective point of view, taking into account the personal conviction and conduct of the person called upon to rule on a given occasion, but also by following an objective approach, consisting in asking whether the tribunal offered, independently of a judge's personal conduct, sufficient guarantees to exclude any legitimate doubt as to its impartiality [...] [J]ustice must not only be done: it must also be seen to be done".[94]

Switzerland's particularities on questions of independence and impartiality lie primarily in the requirements and consequences it ascribes to disclosure, as well as the timing it requires for a possible challenge of an arbitrator on independence and impartiality-related grounds.

In particular, first, under Article 179(6) of the PILA, arbitrators are subject to a duty of disclosure of "*any circumstances that may give rise to justifiable doubts as to his or her independence or impartiality*". The most common circumstance presented by parties as disclosable in sports proceedings is that of repeat appointments of an arbitrator by one party; in this regard, Swiss courts acknowledge Section 3.1.3 of the IBA Guidelines, according to which situations where "[t]*he arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties*" are considered as a "*previous service*" for one of the parties, falling within the "*orange list*" of issues which an arbitrator may be required to disclose.[95]

However, Swiss courts will require a corroborating "*indication that this practice* [of repeat appointments]*, although inappropriate and contrary to the requirements of the duty of disclosure, was the result of a deliberate attempt by the arbitrator to conceal certain information from the parties*", in order to deduce from such practice any conclusions about independence and impartiality.[96] The SFT is of the view that "*sports arbitration instituted by CAS has particularities* […], *such as the closed list of arbitrators*", which may justify non-disclosure.[97] It thus ascribes a rather literal meaning to fn 3 of the IBA Guidelines, according to which, "[i]*n certain types of arbitration, such as* [sports] [...], *the scope of disclosure and consequences of repeat appointments may differ from those set forth in these Guidelines*". Disclosure, in all, has a "*softened*" effect in Switzerland.[98]

Second, according to Article 180(2) of the PILA, "[a] *party may challenge an arbitrator whom it has appointed or in whose appointment it has participated only for reasons of which, despite having exercised due diligence, it became aware of only after the appointment*". According to Article 180a, the party has 30 days to file a challenge from the moment in which it became aware of the ground, "*or* [by] *exercising due diligence* [it] *ought to have become aware, of the ground*". Article R34 of the CAS Code reduces this limit to seven days for CAS proceedings.

Switzerland's particularity here is that, from these provisions, the SFT has extrapolated a "*duty of curiosity*"; to fulfil this duty and thus possess an admissible ground for challenge, parties must perform basic online research into the proposed arbitrator's profile, even into social media platforms (although this research need not be exhaustive and parties are not expected to navigate the myriad social

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94 SFT 4A_318/2020, c. 7.3.
95 SFT 4A_520/2021, c. 5.5.
96 SFT 4A_520/2021, c. 5.5.
97 SFT 4A_520/2021, c. 5.5.
98 As one of the authors has noted elsewhere with F. M. Pavía, "[i]*n essence, the SFT appears to suggest that, to be considered "corroborating", the relevant circumstance must warrant a finding of bias in itself; in other words, that it must be decisive, as opposed to merely confirmatory*" (F. M. Pavía and P. A. Kyriakou, "Has the SFT "Toughened" the Duty of Curiosity while "Softening" the Duty of Disclosure?", Kluwer Arbitration Blog (2022)).

media posts),[99] as well as "*formally request the CAS, within the said time limit, to provide further details*" the moment the arbitrator is proposed,[100] especially when the party's lawyer could have been aware of the relevant doubtful circumstances by inquiring with other lawyers within the same firm.[101]

More generally, the SFT discourages arbitrator challenges, in the interest of procedural efficiency, and places particular importance on the relevant party's individual ability and obligation to raise the problematic circumstances at its earliest opportunity.

That said, Swiss courts will not hesitate to either disqualify an arbitrator or at least sound the bells of caution in compelling cases, such as the case of *Sun Yang* (which involved racist comments in old social media posts)[102] or even the case of *Gundel* (where the SFT reasoned that several financial and political links between the IOC and the CAS were capable of casting doubt on the latter's institutional independence), as a result of which the CAS underwent major structural reforms in 1994.[103]

J. Application of the principle of *jura novit curia*

A final consequence of selecting Switzerland as the arbitral seat is that tribunals are presumed to know the law. The SFT has held that the principle of *jura novit curia*, according to which the court is deemed to know the law and must apply it *ex officio*, applies not only to courts but also Swiss-seated arbitrations; accordingly, it also applies to the CAS.[104]

While this principle is common in most civil law jurisdictions, the SFT is particularly liberal in applying it. Indicatively, while in the event the arbitrators intend to rely on legal rules which were not addressed by the parties, they must give them the opportunity to set out their views on them,[105] this obligation will only concern an issue the application of which is "*so out of the ordinary that the parties were not reasonably able to consider its relevance*".[106]

IV. Liability and interpretation-related examples

A. Anti-formalistic interpretation

Among the most important principles of Swiss law impacting the substance of sports disputes are those of interpretation. In this regard, Article 18 of the Swiss Code of Obligations ("**CO**") states that, *"*[w]*hen assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by design".*

This means, as noted in CAS 2017/A/5172, that *"the parties' subjective will has priority over any contrary declaration in the text of the contract. In case a common subjective will of the parties cannot be ascertained, the contents of the contract must be determined by application of the principle of mutual*

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99 SFT 4A_318/2020, c. 6.5.
100 SFT 4A_520/2021, c. 5.4.2.
101 SFT 4A_520/2021, c. 5.4.2.
102 Analysed in P. A. Kyriakou and C. Thommen, "The Revision of Arbitral Awards on Independence and Impartiality-Related Grounds: Delimiting the Parties' "Duty of Curiosity" in the Age of Social Media", Kluwer Arbitration Blog (2021).
103 For a description of these reforms and their background see D. Mavrommati and M. Reeb, "Introduction: The International Council of Arbitration for Sport (ICAS) and the Court of Arbitration for Sport (CAS): 30 Years of History" in D. Mavrommati and M. Reeb, in D. Mavromati and M. Reeb, The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials (Kluwer 2015).
104 CAS 2005/A/983 984, Club Atlético Peñarol v. Carlos Heber Bueno Suarez, Cristian Gabriel Rodriguez Barrotti & Paris Saint-Germain, Award of 12 July 2006, para. 13.
105 SFT 130 III 35, c. 6; SFT 4P.260/2000, c. 6a.
106 B. Berger and F. Kellerhals, International and Domestic Arbitration in Switzerland (3rd ed., Stämpfli Verlag AG 2015), para. 1435.

trust".[107] The same tribunal further summarized the anti-formalistic approach of Swiss courts to contract interpretation as follows:

"[T]he meaning of a text, even a clear one, is not necessarily determining and that the purely literal interpretation is on the contrary prohibited. Even if a contractual clause appears clear at first view, it can result from the conditions of the contract, from the objectives sought by the parties or from other circumstances that the text of such contractual clause does not convey exactly the content of the agreement that was concluded".[108]

The tribunal thus took into account the possible existence of a language barrier in the parties' communications, as well as the principle of good faith, rather than accepting the contract's stated term on its literal terms.[109]

When, on the other hand, the instrument to be interpreted is a regulation or statute, interpretation under Swiss law will be "*rather objective and always to start with the wording of the rule,* [*i.e.*] [...] *the language used, and the appropriate grammar and syntax*".[110] In a dispute relating to the interpretation of the Olympic Charter, a CAS panel accordingly performed an identification of "*the intentions (objectively construed) of the association which drafted the rule*" and *"any relevant historical background which illuminates its derivation, as well as the entirely* [sic] *regulatory context in which the particular rule is located*".[111] However, when the statutes involved are those of smaller federations, the SFT prefers an interpretation akin to that applied to contracts.[112] Moreover, in practice, the SFT is not particularly textualistic, regardless of whether it is interpreting a statute or a contract.

Finally, the application of Swiss law to contract or statute interpretation also means a limited scope for the principle of *contra proferentem* or *contra stipulatorem*, which applies "*if the primary interpretation in application of the principle of good faith does not lead to a clear result*".[113]

B. Contractual security and harmony through gap-filling with Swiss rules on validity and performance

Besides interpretation, the most important function of Swiss law as a provider of substantive norms is contractual gap-filling. As reasoned by one CAS panel, "[a]*ccording to Swiss law, there are two alternatives to close* [a contractual] *lacuna: the first one is the so-called "subjective amending", i.e. amending the agreement by relying on the hypothetical intention of the parties, the second alternative would be to close the gap by referring to any legal disposition or regulation*".[114]

In practice, in the presence of uncertainty on a litigious issue, and provided this uncertainty cannot be remedied after exhausting the canons of interpretation, CAS panels typically apply the CO, CC and other general sources of Swiss contract law, or at least consult them by analogy. Such sources have been applied to a wide range of issues, from determining the nature and validity of a

[107] CAS 2017/A/5172 Real Club Celta de Vigo v. Olympique Lyonnais, Award of 15 December 2017, para. 73.
[108] CAS 2017/A/5172 Real Club Celta de Vigo v. Olympique Lyonnais, Award of 15 December 2017, para. 69.
[109] CAS 2017/A/5172 Real Club Celta de Vigo v. Olympique Lyonnais, Award of 15 December 2017, para. 71.
[110] CAS 2010/A/2071 Irish Football Association (IFA) v. Football Association of Ireland (FAI), Daniel Kearns and FIFA, Award of 27 September 2010, para. 20.
[111] CAS 2010/A/2071 Irish Football Association (IFA) v. Football Association of Ireland (FAI), Daniel Kearns and FIFA, Award of 27 September 2010, para. 20.
[112] SFT 2C_863/2021, c. 5.1.
[113] CAS 2017/A/5172 Real Club Celta de Vigo v. Olympique Lyonnais, Award of 15 December 2017, para. 84.
[114] CAS 2018/A/5950 Valencia Club de Fútbol, S.A.D. v. Fenerbahçe Spor Kulübü, Award of 14 August 2019, para. 73.

contract to the consequences of its breach and termination.

At the level of contract formation and validity, Swiss law has notably been relied upon to determine whether a "*contract in writing*" exists, when establishing whether a player is a "*professional*" under FIFA's Regulations on the Status and Transfer of Players ("**RSTP**").[115] It has also been applied in distinguishing between a promise of a contract and an actual contract,[116] as well as in determining whether an error occurred in the contract's formation[117] and whether the contract establishes an employment relationship that would be subject to the RSTP.[118]

Swiss law has also been consulted in determining whether the contract has been terminated, and whether this has occurred with just cause, especially in disputes under Article 14 of the RSTP (which expressly specifies that "*a contract may be terminated by either party without consequences of any kind* [...] *where there is just cause*").[119] It has also been applied when calculating damages following a termination without just cause under Article 17 of the RSTP,[120] as well as in upholding a rule under the same provision of "*joint liability between a professional player terminating his employment contract and his new club as to the payment of compensation for breach of contract without cause*", with the SFT noting that "*Article 145 CO allows a joint debtor to raise the defences arising from the cause of the joint obligation against a creditor*".[121]

Finally, Swiss law has been applied to reduce the amount of penalties following a contractual breach, with a CAS panel reasoning that it may "*reduce penalties that it considers excessive at its discretion* [pursuant to] *Article 163 (3) CO*".[122] As another notable example relating to contract execution, Article 112(2) of the CO has been employed by a CAS panel to determine the legal nature of a buy-out clause and its effects on third parties.[123] CAS panels have also applied Swiss law to determine the appropriate interest following non-performance,[124] while the SFT has used Swiss law to reduce excessive agent commission fees.[125]

The most frequent issue-areas where such general Swiss rules on contract formation, validity, execution and termination are applied are labour relationships and agent contracts.

With respect to labour disputes, the applicability of Swiss law is crucial since, while being arbitrable under Swiss law, such disputes are generally not arbitrable under the laws of some of the major football jurisdictions.[126] In fact, according to the prevailing view in Switzerland, even if labour disputes are non-arbitrable under the *lex causae*, Swiss-seated tribunals should still exercise jurisdiction over them, unless this

115 CAS 2013/A/3207 Tout Puissant Mazembe v. Alain Kaluyituka Dioko & Al Ahli SC, Award of 31 March 2014, para. 61.
116 CAS 2008/A/1589 MKE Ankaragücü Spor Külübü v. J., Award of 20 February 2009, para. 13.
117 CAS 2009/A/1909 RCD Mallorca SAD & A. v. FIFA & UMM Salal SC, Award of 25 January 2010, para. 33.
118 CAS 2016/A/4843 Hamzeh Salameh & Nafit Mesan FC v. SAFA Sporting Club & FIFA, of 24 November 2017, para. 12.
119 CAS 2014/A/3527 Football Federation of Kazakhstan (FFK) v. Oliver Pelzer, Award of 31 July 2015, paras. 64 *et seq*. More recently in CAS 2023/A/9444 U Craiova 1948 SA v. Marko Gajic, Award of 27 October 2023, paras. 58-60.
120 CAS 2014/A/3527 Football Federation of Kazakhstan (FFK) v. Oliver Pelzer, Award of 31 July 2015, paras. 77 *et seq*.
121 SFT 4A_304/2013, c. 3.
122 CAS 2018/A/5807 Fenerbahce Futbol AS v. Gregory van der Wiel, Award of 13 February 2019, para. 65.
123 CAS 2018/A/5950 Valencia Club de Fútbol, S.A.D. v. Fenerbahçe Spor Kulübü, Award of 14 August 2019, para. 70.
124 CAS 2010/A/2128 C.S Chimia Brazi v. S.C. C.S. Unirea Urziceni S.A., Award of 15 November 2010, paras. 45 and 46.
125 SFT 4A_312/2017, c. 3.3.3.
126 L. Lévy and F. Robert-Tissot, "L'interprétation arbitrale", Revue de l'Arbitrage (2013), p. 938.

would lead to a violation of public policy within the sense of Article 190(2)(e) of the PILA.[127]

CAS panels have thus admitted labour disputes and made several labour-related pronouncements under Swiss law; indicatively, they have held that labour contracts, in principle, "*cannot be terminated by the parties before the fixed term expires*",[128] that "[i]*mmediate termination of the contract for just cause"* is an *"exceptional measure"* which *"must be accepted only under a narrow set of circumstances*",[129] and that a duty to mitigate the damage (*ex* Article 337c(2) of the CO) is imposed on an employee who is unjustifiably dismissed and seeks compensation.[130] Moreover, referring to SFT case law, they have held that the parties "*may agree to reduce the salary during the contractual relationship and they may do so by tacit acceptance or by conclusive acts*".[131]

C. Protection of personality rights and requirement of proportionality for sanctions

According to Article 27(2) of the CC, "[n]*o person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals*", whereas according to Article 28(2), "[a]*n infringement is unlawful unless it is justified by the consent of the person whose rights are infringed or by an overriding private or public interest or by law*". These articles establish what is known under Swiss law as the protection of "personality rights", which are akin to human rights under the ECHR as applied to private-to-private relationships,[132] including relationships between sports federations and clubs or athletes.[133]

Given persisting uncertainties about the extent to, and conditions under which, human rights under the ECHR apply "horizontally" (*i.e.,* in relationships between private entities and individuals), it is important that Swiss law offers this protection; common law, for instance, does not recognize such a broadly protective notion as personality rights, although it sets out a related notion in the economic sphere, known as "*restraints of trade*".[134]

The role of personality rights in sports disputes is significant. Among the issue areas they have found application are questions of health, the right of movement, professional and economic freedom, the right to actively practice a profession, the right to honour, image rights and issues of privacy.[135] As a notable example, in the landmark case of *Matuzalem*, the SFT relied upon Article 27(2) of the CC in establishing that "[a] *contractual curtailment of economic freedom is considered excessive* [...] *when the obligee is subjected to another person's arbitrariness, gives up his economic freedom or curtails it to such an extent that the foundations of his*

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127 A. Johnson, "Chapter 9: Arbitrating Labor Disputes" in M. Arroyo (ed.), Arbitration in Switzerland: The Practitioner's Guide (2nd ed., Kluwer 2018), pp. 1193 – 1248, para. 118.

128 CAS 2017/A/5402 Club Al-Taawoun v. Darije Kalezic, Award of 7 June 2018, paras. 113, 115.

129 CAS 2020/A/7175 Al-Arabi Sporting Club v. Juan Ignacio Martínez, Award of 29 January 2021, para. 74.

130 CAS 2015/A/4206 Hapoel Beer Sheva FC v. Ibrahim Abdul Razak & CAS 2015/A/4209 Ibrahim Abdul Razak v. Hapoel Beer Sheva FC, Award of 29 July 2016, paras. 235 *et seq*.

131 CAS 2021/A/8022 Muangthong United v. Cezar Diniz Pereira Roque, Award of 21 April 2022, para. 104.

132 M. Perruchoud, "Application of Swiss law and Influence of Swiss Protection of Legal Personality in International Sport: A Necessity to Ensure Equality of Treatment among Competitors?", The International Sports Law Journal (2023), p. 349.

133 SFT 136 III 296. The CAS has also held that the autonomy of a federation is not absolute and is particularly limited by Article 27(2) of the CC, see CAS 2017/A/5003 Jérôme Valcke v. FIFA, Award of 27 July 2018, para. 157.

134 M. Morgan, "The Relevance of Swiss Law in Doping Disputes" (2013), p. 4.

135 *Ex multis*: SFT 4A_2478/2019; CAS 2013/A/3091, 3092 & 3093; CAS 2018/A/5607; CAS 2016/A/4560; CAS 2010/A/2261 & 2263; SFT 129 III 715; CAS 2011/A/2425.

economic existence are jeopardized".[136] Relatedly, the CAS has formulated a principle of proportionality, whereby "*a sanction must not exceed that which is reasonably required in the search of the justifiable aim*";[137] when determining whether a sanction is proportionate, "*various benchmarks seem appropriate i.e. the gravity of the illegal act, the power to dissuade the offender from repeating the same illegality in the future, and the importance of the rule of law that is protected*".[138]

Personality rights and the principle of proportionality are also notably applied in doping cases. In its Advisory Opinion in CAS 2005/C/976 & 986 FIFA & WADA, the panel held that a general principle "*which pervades Swiss jurisprudence and the Swiss legal system* [...] *is the principle of proportionality, a principle which has its roots in constitutional and administrative law*".[139] Even following the adoption of express sanction reduction mechanisms in various doping codes, the CAS clarified that the general obligation of proportionality persisted, and that these reduction mechanisms would need to ensure adherence to it.[140]

D. Application of the Swiss definition of a "decision"

A recurring issue in disputes involving decisions by sports federations communicated by mere emails or other informalized means is whether a decision, to be challengeable before the CAS or the internal bodies of a federation, presupposes a specific content and structure. This determination is relevant in establishing possible deadlines for a challenge.

In cases involving a Swiss-based federation, whether a given communication amounts to a challengeable decision must naturally be ascertained by reference to Swiss association law. In CAS 2004/A/659, the panel used as the basis of its definition of a decision the SFT's ruling in case 101 Ia 73, according to which "*the decision is an act of individual sovereignty to an individual, by which a relation of concrete administrative law, forming or stating a legal situation, is resolved in an obligatory and constraining manner. The effects must be directly binding both with respect to the authority as to the party who receives the decision*".[141]

Subsequent panels have expanded upon this definition, adding several elements from SFT jurisprudence on Article 75 of the CC, which "*is the general basis in Swiss law to appeal against a decision of an association*".[142] Notably, Swiss law has served in this regard to broaden the scope of association organs whose decisions are appealable, with CAS 2020/A/7590 and 7591 finding that "*the challenged decision can be the one of the general meeting or any other organ within the limits of its powers in last resort*".[143]

E. Application of general rules of association law and wide autonomy for associations

When a dispute arises in relation to a decision made by a governing body constituted under Swiss law, a CAS panel will invariably apply Swiss association rules to determine matters such as the challengeable nature, validity and consequences of the decision. As already observed, in CAS 2006/A/1025, the panel noted in that "*the rules of a Swiss private law entity should comply with Swiss law. If they do not do so,*

136 SFT 4A_558/2011, c. 4.3.2.
137 CAS 2013/A/3297 Football Club Metalist v. UEFA & PAOK FC, Award of 29 November 2013, para. 8.26. Proportionality also has a direct statutory basis in Article 28(2) of the CC.
138 CAS 2020/A/7369 Cruzeiro Esporte Clube v. FIFA, Award of 7 September 2021, para. 123.
139 CAS 2005/C/976 & 986 FIFA & WADA, Opinion of 21 April 2006, para. 13.
140 CAS 2005/A/830 Squizzato v. FINA, Award of 15 July 2005, the CAS, para. 48.
141 CAS 2004/A/659 Galatasaray v. FIFA & Club Regatas Vasco da Gama & F. J., Award of 17 March 2005, para. 9.
142 CAS 2020/A/7590 HCF v. ICF, CAS 2020/A/7591 RCF v. ICF, Award of 23 December 2021, para. 75.
143 CAS 2020/A/7590 HCF v. ICF, CAS 2020/A/7591 RCF v. ICF, Award of 23 December 2021, para. 75.

there is a risk that the Swiss Courts will declare them to be non-compliant".[144]

The application of association law in this regard means, first, that the challenged decision in question will constitute a declaration of intent that is fully subject to judicial review, rather than a decision by an arbitral tribunal that would be limited to the appeal grounds under the PILA and could possibly create *res judicata* effects.[145]

Second, it will mean the application of nuanced concepts regarding the decision-making processes of sports federations. Besides Article 75 of the CC and the various implications it entails for legal standing and the preconditions of a challengeable decision, particular concepts of Swiss association law finding application in CAS disputes include, notably, Article 66(2) of the CC, according to which an association's general assembly can issue a resolution by correspondence only if all members vote in favour of said resolution (unless the statutes indicate otherwise), such that "*a single member can prevent the General Assembly from taking a resolution by correspondence*".[146]

Lastly, the application of Swiss association law affords wide freedom for federations to enact and enforce sanctions, eligibility regimes and principles on the assumption of debt. The flexibility of Swiss law in this regard is among the key reasons why Switzerland is the world's capital of sports governance.[147]

Specifically, according to the SFT, "[i]*f a private association (such as FIFA) establishes provisions to which its members are subject in order to achieve its purpose, it is generally permissible for it to impose sanctions in order to secure the obligations of its members* [...] *The fact that the sanctioning option provided for within an association structure can have an enforcement-like effect is not objectionable if there is a sufficient statutory basis and does not bring the sanctions under association law into conflict with the state's monopoly on coercion*".[148]

Moreover, Swiss-based associations do not need to model their rules after any general principles of Swiss civil law, but only to obey mandatory principles of Swiss association law. This is so, according to the SFT, because of the principle of autonomy enshrined in Article 63 of the CC; based on this principle, the SFT has held, for instance, that FIFA's principles on sports succession would be permissible even if they were considered contrary to the general principle of "*transparency*".[149]

F. Definition of what qualifies as bankruptcy and articulation of a due diligence requirement in sport succession

144 CAS 2006/A/1025, Mariano Puerta v. ITF, Award of 12 July 2006, para. 15.

145 See 4A_476/2020, c. 3.2, stating that decisions by associations are not arbitral decisions. This is not necessarily the case in other jurisdictions; D. Girsberger and N. Voser point out, indicatively, that "[i]n England, […] *an appeals court ruled that the appeal procedure in Art. 10 Cricket Discipline Commission Regulations constituted an arbitral tribunal within the meaning of the English Arbitration Act because the Cricket Discipline Commission was reasonably independent of the England and Wales Cricket Board and the necessary characteristics of arbitration as supplied by previous jurisprudence had been met*". See D. Girsberger and N. Voser, "Chapter 10: Sports Arbitration", in D. Girsberger and N. Voser, International Arbitration: Comparative and Swiss Perspectives (Schulthess 2021), p. 662, para. 1897.

146 CAS 2013/A/3272 Ik-Jong Kim v. Fédération Internationale de Luttes Associées (FILA), Award of 28 February 2014, para. 86.

147 D. Girsberger and N. Voser, "Chapter 10: Sports Arbitration", in D. Girsberger and N. Voser, International Arbitration: Comparative and Swiss Perspectives (Schulthess 2021), paras. 1880-1882.

148 SFT 4A_616/2021, c. 5.5.

149 SFT 4A_246/2022, c. 6.3.1. See also CAS 2017/A/5003 Jérôme Valcke v. FIFA, Award of 27 July 2018, para. 157, stating that mandatory provisions of Swiss employment law do not necessarily limit the autonomy of sports associations, unless this autonomy is used to "*circumvent*" labour law.

Among the most heavily litigated issues producing divergent jurisprudential results before the CAS is that of the obligations of a bankrupt club, as well as those of its successor.

Within the broader disharmony noted in this regard, there are instances of application of Swiss law; in CAS 2011/A/2646, the panel noted that, "[i]*n accordance with Swiss Law, and in particular with article 333 para. 3 of the Swiss Code of Obligations, the new employer (acquirer) and the former employer (transferor) are joint and severally liable for any claims of an employee which fell due prior to the transfer of the company or of part of it*".[150] Effectively, the panel deduced a rule of club succession for debts subject to the FIFA Disciplinary Code from general rules of Swiss employment law.

Further, in CAS 2020/A/6846, the panel articulated a due diligence requirement for creditors seeking to recover debts from new clubs without having claimed creditor rights against the original club, reasoning that "*a creditor has a duty to make its best efforts and at least try to register his credit if he is, de facto, aware of insolvency proceedings. Anything else could be considered as a violation of the principle of good faith according to Article 2 of the Swiss Civil Code*".[151] This requirement has also been applied to cases originating after 2019, when FIFA introduced an express provision on succession (what is now Article 24(4) of the FIFA Disciplinary Code).[152]

Finally, and relatedly, Swiss law has been relied upon to determine the meaning of the term "*bankruptcy*" in (what is now) Article 59(b) of the FIFA Disciplinary Code, which affords FIFA discretion to close disciplinary proceedings if a party declares bankruptcy. A panel reasoned in this regard that, under Swiss law, "*bankruptcy" must extend to all collective enforcement proceeding (independently of their final goal)*", *i.e.,* both proceedings aimed at liquidation and the restructuring of the debtor.[153]

G. Application of the *lex mitior*, *tempus regit actum* and *reformatio in peius* principles

CAS panels have relied on Swiss law when formulating principles governing the temporal scope of disciplinary sanctions. In CAS 2009/A/1918, the panel reasoned that "*the prohibition against the retroactive application of Swiss law is well established. In general, it is necessary to apply those laws, regulations or rules that were in force at the time that the facts at issue occurred*".[154]

The same panel reasoned that this principle, also known as *tempus regit actum*, was mitigated by the principle of *lex mitior*, which is recognized among others in Article 2(2) of the Swiss Criminal Code and holds that the person on whom a disciplinary sanction is imposed must be able to "*benefit from the new provisions assumed to be less severe*".[155]

Relatedly, in CAS 2014/A/3944, the sole arbitrator noted that, while Swiss law recognizes the principle of *non reformatio in peius* (which precludes a reviewing court from handing a higher sanction on appeal than at the lower instance), it also *"recognizes the cross-appeals as a valid institution under Swiss law and, therefore, if a cross-appeal is accepted, such acceptance does not breach the principle of reformatio in peius*".[156]

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[150] CAS 2011/A/2646 Club Rangers de Talca v. FIFA, Award of 30 April 2012, para. 14.
[151] CAS 2020/A/6846 Dimitar Makriev v. FIFA & Pécsi MFC, Award of 24 May 2021, para. 209.
[152] *E.g.,* CAS 2020/A/6941 Youness Bengelloun v. FIFA & PFC CSKA-Sofia, Award of 10 November 2021, para. 93.
[153] CAS 2020/A/6900 & 6902 Fotbal Club CFR 1907 Cluj S.A. v. Ronny da Silva & Edimar Curitiba Fraga & FIFA, Award of 5 May 2021, para. 122.
[154] CAS 2009/A/1918 Jakub Wawrzyniak v. HFF, Award of 21 January 2010, para. 18.
[155] CAS 2009/A/1918 Jakub Wawrzyniak v. HFF, Award of 21 January 2010, para. 19.
[156] CAS 2014/A/3944 Galatasaray Sportif Sinai A.S. v. UEFA, Award of 30 July 2015, para. 69.

H. Limited review of field-of-play decisions, except in cases of disproportionality

Field-of-play decisions, *i.e.,* decisions by officials relating to an athlete's actions occurring during a game or event, have traditionally been subject to limited review by arbitral tribunals (unless the relevant rules provide otherwise), under the "field of play" doctrine. This doctrine has its origin in Swiss law, and in particular the case of CAS OG 96/006, where the panel reasoned, referring to SFT jurisprudence, that:

"Traditionally, doctrine and judicial practice have always deemed that game rules, in the strict sense of the term, should not be subject to the control of judges, based on the idea that "the game must not be constantly interrupted by appeals to the judge" [...] The traditional theory is thus that only sports decisions "which damage the personality or property of the athlete" should be reserved for the ordinary or arbitral courts".[157]

In a more recent decision, a CAS panel referred to SFT jurisprudence in distinguishing between field-of-play decisions and "*rules of law*", understanding the formers as "*sanction*[s] *aiming to insure the correct running of a game*".[158] Moreover, in articulated in clear terms an exception to the distinction, also based on SFT jurisprudence, according to which field-of-play decisions are reviewable "*in case of adverse effect of a party's rights of personality*";[159] it proceeded on that basis to review a two-month suspension handed to an athlete, which "*had an impact on his economic/professional activity*".[160]

I. Availability and conditions of declaratory relief under stringent conditions

Various CAS panels have approached the possibility of awarding declaratory relief from the perspective of Swiss law.[161] Most notably in CAS 2013/A/3272, the panel made extensive references to SFT jurisprudence in setting out the conditions of declaratory relief, concluding that Swiss law is "*stringent*" on the matter.[162]

The key conditions the panel extrapolated from Swiss law were that a "*judgement* [must be] *necessary to resolve a legal uncertainty that threatens the Claimant*", the "*uncertainty must relate to the existence or non existence of a claim or a defined legal relationship between the parties to the dispute*", and there must be "*urgency*" to resolve this uncertainty to protect a right.[163] The CAS, in that sense, appears to have relied on Swiss law in order to protect itself from "advisory" requests that could overload it.

J. Unavailability of loss of chance

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157 CAS 96/006 M. v. Association Internationale de Boxe Amateur (AIBA), Award of 1 August 1996, paras. 5, 6.

158 CAS 2022/A/9018 UAE Equestrian and Racing Federation & Ismail Mohd v. Fédération Equestre Internationale, Award of 15 March 2023, para. 62.

159 CAS 2022/A/9018 UAE Equestrian and Racing Federation & Ismail Mohd v. Fédération Equestre Internationale, Award of 15 March 2023, para. 63.

160 CAS 2022/A/9018 UAE Equestrian and Racing Federation & Ismail Mohd v. Fédération Equestre Internationale, Award of 15 March 2023, para. 66.

161 *Ex multis*: CAS 2013/A/3272 Ik-Jong Kim v. Fédération Internationale de Luttes Associées (FILA), Award of 28 February 2014; CAS 2011/A/2612 Liao Hui v. IWF, Award of 23 July 2012; CAS 2009/A/1870 WADA v. Jessica Hardy & USADA, Award of 21 May 2010.

162 CAS 2009/A/1870 WADA v. Jessica Hardy & USADA, Award of 21 May 2010, para. 132.

163 CAS 2009/A/1870 WADA v. Jessica Hardy & USADA, Award of 21 May 2010, para. 132. Similarly, in CAS 2011/A/2612 Liao Hui v. IWF, Award of 23 July 2012, para. 52, it was stated that "[a] *request for declaratory relief is – in line with the Article 182 PILA - only admissible under two conditions. First, the purpose of the declaratory relief must be aimed at clarifying the (non-)existence of a legal relationship between the parties. Declaratory relief sought in relation to facts or general questions of law are, therefore, not admissible. In addition, the party requesting declaratory relief must show a special legal interest to obtain the respective declaration from the arbitral tribunal*".

Jurisdictions such as France and the UK recognize the loss of chance doctrine when calculating damages in civil cases; loss of chance is understood as:

"[T]he lost chance to have a profit or to avoid a loss. The peculiarity of the loss of a chance is thus that there is no certainty that the beneficial event would have indeed occurred. The aggrieved party receives compensation based on the likelihood of the chance taking place, which is calculated by quantifying said likelihood as a percentage".[164]

In disputes governed by Swiss law, generally, loss of chance cannot be claimed;[165] tribunals will be limited to the recovery of damages understood to be certain, even if the calculation of damages and the estimation of their certainty entails a considerable amount of discretion. Importantly, since the RSTP is silent on the issue of loss of chance and Swiss law applies to it subsidiarily, this means that athletes should not be able to claim loss of chance under Article 17(1) of the RSTP on contract termination.[166]

V. Appraisal

As explored in this article, Switzerland's impact on both procedural and substantive sports law is profound, and largely positive. While Swiss law is strict in areas such as enforcing deadlines and assessing the timeliness of objections, which are critical for maintaining the efficiency and expediency required in sports, it is flexible in matters such as availability of procedural tools and contractual interpretation. This does not harm legal security; CAS case law and SFT decisions have so far provided a significant body of precedent, contributing to transactional certainty in the sports industry.

Further, Swiss law has preserved the autonomy of sports associations, with the SFT having generally refrained from interfering in internal governance matters. Where necessary, Swiss law has still provided safeguards of proportionality; *Matuzalem*, as a representative case, set an important precedent for player rights in international sports.

Yet, as discussed in Section I, Swiss law is now being confronted with new realities: increased scrutiny by the CJEU and ECtHR, discontent with the SFT's limited control over federations, the growth of e-sports and of new jurisdictions, and the emergence of new sports tribunals would seem to suggest a less Swiss-centric legal framework in the coming years.

This could be reinforced by the realization that the socio-economic landscape in Switzerland, which boasts an efficient labour market, does not necessarily align with the "*context of international football*"[167] or sports at large. More generally, there are justified calls for legal pluralism in global sports regulation.[168] Plainly, it appears likely that Swiss law will soon need to accommodate

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[164] M. Vedovatti and T. Isler, "Article 17(1) RSTP and recoverability of the loss of a chance under Swiss Law", 1 ECA Legal Journal (2021), p. 32.

[165] SFT 4A_61/2007, c. 4.3.3. See also CAS 2014/A/3647 Sporting Clube de Portugal SAD v. SASP OGC Nice Côte d'Azur & CAS 2014/A/3648 SASP OGC Nice Côte d'Azur v. Sporting Clube de Portugal SAD, Award of 11 May 2015, para. 119: "[a]*lthough compensation for loss of a chance might be due in certain countries in certain exceptional circumstances, it is recognised under Swiss law that there must be a logical nexus between the damage allegedly suffered and the lost chance, for example, if there was a concrete offer capable of acceptance by the parties*".

[166] Contrary views exist based on the specificity of sports, see M. Vedovatti and T. Isler, "Article 17(1) RSTP and recoverability of the loss of a chance under Swiss Law", 1 ECA Legal Journal (2021), p. 38.

[167] J. F. Vandellos Alamilla, "Why FIFA needs to provide a specific regulatory framework for football coaches (the difficulties in resolving club-coach disputes and the application of Swiss law)", LawInSport (2019).

[168] See *e.g.,* A. Dulitzky, "Redressing the Eurocentric Approach of the Court of Arbitration for Sports to Human Rights Law", 34 Marquette Sports Law Review (2024).

competing legal systems in specific areas more than it currently does.

Would a more diverse legal framework de-harmonize the sports industry? Not necessarily; new jurisdictions and legal tendencies might, like Swiss law before them, eventually feed into *lex sportiva*, contributing to its modernization. This process should, however, be organic and selective: new jurisdictions and tendencies should be leveraged where and when appropriate, rather than for the pure sake of innovation or due to "fatigue" with legacy norms. Whichever order emerges from this process should always uphold transactional predictability, sports integrity and the well-being of athletes, values which Swiss law has helped affirm for decades.

The United Nation Guiding Principles on Business and Human Rights and their Impact on the World of Sport

Sylvia Schenk*

I. Introduction
II. The Three Pillars of the UNGP
III. The Scope of Responsibility under the UNGP
IV. The UNGP Approach
V. How the UNGP were adopted to Sport
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VII. Remedy, Sport Arbitration and CAS
VIII. What next?

I. Introduction

In June 2011, two developments with a considerable long-term impact on the agenda of international sport coincided:

- The United Nation Human Rights Council unanimously approved the United Nation Guiding Principles on Business and Human Rights (UNGP)[1], for the first time establishing a concept of human rights responsibility for private enterprises, above all global players, domestically and in international business.

- The President of the Fédération Internationale de Football Association (FIFA), Joseph Blatter, was re-elected amid corruption allegations as well as increasing criticism for a lack of human rights considerations regarding the awarding of the FIFA World Cup 2018 to Russia and 2022 to Qatar[2].

While Blatter promised *"We will put Fifa's ship back on the right course in clear, transparent waters. We need some time to do it, but we shall do it"*.[3] the UNGP slowly but steadily started to influence national approaches to global human rights challenges, namely with National Action Plans[4] and specific laws[5]. Switzerland, host country of many international sport organisations, published its first National Action Plan in 2016[6]. Step by step, and with advocacy efforts from civil society organisations, the problems FIFA was struggling with at the time and the spreading of the UNGP led to a new approach of Sport Governing Bodies' (SGB) to their specific responsibility towards human rights.

This article gives a short overview on the requirements of the UNGP, describes how the UNGP found their way into international sport and briefly summarizes reactions by and implications for sport arbitration and the Court of Arbitration for Sport (CAS).

II. The Three Pillars of the UNGP

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[1] https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights

[2] https://www.bbc.com/sport/football/13610973

[3] See Footnote 2

[4] https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights

[5] https://www.business-humanrights.org/en/big-issues/corporate-legal-accountability/frances-duty-of-vigilance-law/; https://www.bmas.de/EN/Europe-and-the-World/International/Supply-Chain-Act/supply-chain-act.html;

[6] https://globalnaps.org/country/switzerland/

The overarching idea of the UNGP is the extension of human rights responsibility, according to the Universal Declaration on Human Rights primarily a duty of states[7], to the business or private sector. From a legal perspective, this can be compared to implementing a "third party effect"[8], that for instance has been confirmed in German law by the Bundesverfassungsgericht (German Constitutional Court - BVerfG) in its famous "Lüth decision", dated 15 January 1958[9]. The BverfG held that the fundamental rights in the German constitution – so called "Grundrechte", comparable to internationally acknowledged human rights – not only protect individual rights and freedoms of the citizens against the state but have a third-party impact on private law.

The UNGP are not binding, but soft law, nevertheless with a considerable effect on the development of national and supranational (e.g., by the European Union[10]) policies and legislation, international activism[11] as well as voluntary business' responses. The awareness for continuous human rights violations all over the world had risen drastically and the UNGP were "just in time" to offer an instrument to combat them.

The UNGP are based on three pillars:

- The State Duty *to protect* Human Rights (UNGP I.),
- The Corporate Responsibility *to respect* Human Rights (UNGP II.), and
- Access to Remedy (UNGP III.)

To make private companies accountable, the UNGP in Principle # 2 stipulate the obligation of states to *"set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations"*.

The access to effective remedy lies in the responsibility of both: Business enterprises have to *"provide for or cooperate in their remediation through legitimate processes"* (UNGP Principle # 22), while the states *"must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy"*. (UNGP Principle # 25). Remediation can be achieved by state-based judicial or non-judicial as well as by non-state-based grievance mechanisms (UNGP Principles # 27 + 28).

III. The Scope of Responsibility under the UNGP

The UNGP Principle # 13 clearly defines what the responsibility to respect human rights requires from business enterprises.

They must

a. *"Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;*

b. *Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts"*.

While *"causing or contributing"* under UNGP Principle # 13 a. relates to full and direct responsibility for an enterprise's own core business, UNGP Principle # 13 b. is about the additional leverage especially global players with high investments, visibility and thus power can have – an important point when it comes to the role major sport events (MSE) may play or are perceived to play with regard to human rights in the host country.

7 https://lawexplores.com/state-responsibility-for-human-rights/

8 https://www.researchgate.net/publication/228177883_Third_Party_Effect_of_Fundamental_Rights_Drittwirkung

9 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1958/01/rs19580115_1bvr040051.html

10 https://www.eeas.europa.eu/eeas/business-and-human-rights_en

11 https://www.coe.int/en/web/compass/human-rights-activism-and-the-role-of-ngos

According to this approach, a company is fully responsible for its own actions, i.e., it must prevent any infringement of human rights by its staff and/or business operations. Neglecting safety requirements in its facilities or exploiting its own workers falls under this alternative. The same grade of responsibility applies when a contracted partner of a company breaches human rights, e.g., a service provider exploits its workers executing the contract with the company. To deal with human rights risks a company may contribute to it needs a comprehensive human rights due diligence process regarding its business partners and based on that, specific contract clauses, control measures and grievance mechanisms to gather information. Thus, risks in the supply chain can be prevented and managed.

UNGP Principle # 13 b. requires companies even beyond their own activities, i.e., beyond their immediate (contractual) influence and responsibility, to exercise their leverage in any business relationship.

This graduated approach ensures that the business sector's responsibility to respect human rights is limited to its direct sphere of influence, i.e., where it has an impact or is connected to an impact, with clear expectations of which actions to take. Whereas *leverage* opens opportunities for additional approaches with which a company may try to address a situation of human rights harm[12].

IV. The UNGP Approach

According to UNGP Principle # 15 *"business enterprises should have in place policies and processes appropriate to their size and circumstances, including:*

(a) A policy commitment to meet their responsibility to respect human rights;

(b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;

(c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute".

The commitment should be approved by the *"most senior level*[13]*"* of the business enterprise to underline the seriousness of the approach and made publicly available to ensure that all stakeholders, especially own staff, and business partners are informed.

A thorough risk analysis should identify the most salient risks and lead to prevention and mitigation measures fit for purpose. The due diligence should be ongoing[14] to respond to a changing environment.

For a thorough risk analysis knowledge on the ground, i.e., about the specific conditions and challenges especially in foreign countries, is decisive. Therefore, to identify and assess human rights risks and develop suitable preventive as well as mitigating measures business enterprises shall not only include independent human rights expertise but also involve *"meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation".* (UNGP Principle # 18 b). The importance of consulting and informing affected groups and external stakeholders is reiterated in UNGP Principle # 21 and fully in line with the approach of the UN Sustainable Development Goals (SDG)[15], building on multi-stakeholder partnerships in SDG #17[16].

V. How the UNGP were adopted to Sport

[12] Quoted from the Independent Experts Report on Recommendations for an IOC Human Rights Strategy, https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/News/2020/12/Independent_Expert_Report_IOC_HumanRights.pdf, page 12

[13] UNGP Principle # 16

[14] UNGP Principle 17 (c)

[15] https://sdgs.un.org/goals

[16] https://sdgs.un.org/topics/multi-stakeholder-partnerships

Back in June 2011, two strings of developments were kicked off. While FIFA in order to implement a compliance system first negotiated with the anti-corruption organisation Transparency International[17] to finally hire anti-corruption expert Mark Pieth to oversee the reform[18], non-governmental organisations (NGO) on anti-corruption and human-rights as well as trade unions working on sport, especially FIFA, reached out to one another to join forces. Finally, in August 2014, the Sport and Rights Alliance (SRA)[19] was founded. The SRA partners aimed to advocate for compliance and human rights in the context of major sport events (MSE), later extended its scope on the daily work of SGB. In 2015, when FIFA was struck by another corruption scandal[20], the SRA discussed whether and how to use the UNGP for its advocacy. Addressing expressively the business sector, the UNGP could be rejected by SGB as an instrument not applicable to autonomous sport organisations despite the FIFA World Cup and the Olympic Games obviously being big businesses. Additionally, the non-binding character of the UNGP was seen as a deterrent, too, to succeed in the adoption by FIFA and the International Olympic Committee (IOC). Despite these doubts, the SRA decided to rely on the UNGP and, as well as other actors in the growing human rights community, started advocating on implementing the UNGP at FIFA and the IOC. The increased pressure on FIFA especially regarding the situation of migrant works in Qatar but also in Russia, publicly supported even by some of its top sponsors[21] resulted in autumn 2015 in Joseph Blatter asking Harvard Professor John Ruggie, who had led the multi-stakeholder group developing the UNGP, to write a report on FIFA's responsibility on human rights under the UNGP. In anticipation of this report, the extraordinary FIFA congress in February 2016, where Gianni Infantino was elected as successor of Joseph Blatter, added a new Article 3 to the FIFA Statutes stating, *"FIFA is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights"*.[22], thus fulfilling the UNGP requirement of a policy commitment by the most senior level.

The final report by John Ruggie, "For the Game. For The World".[23] was handed out to FIFA President Gianni Infantino in April 2016[24].

In the follow-up, FIFA hired a human rights manager[25], established an independent Human Rights Advisory Board (existing 2017 – 2020)[26] and published a human rights policy in 2017[27][28].

In parallel, the IOC in January 2017 included compliance and human rights clauses, based on the UNGP, in its Host City Contract for

17 https://www.insideworldfootball.com/2011/10/22/blatter-plans-for-reform-welcomed-by-transparency-international/

18 https://www.bbc.com/news/world-europe-15996806

19 https://sportandrightsalliance.org/

20 https://www.bbc.com/news/world-europe-32897066.amp

21 https://apnews.com/fifa-sponsors-adidas-coke-visa-express-concern-over-qatar-088c6789d5d444b282d777bf00a266de

22 https://www.icsspe.org/system/files/FIFA%20Statutes.pdf

23 https://www.hks.harvard.edu/centers/mrcbg/programs/cri/research/reports/report68

24 https://inside.fifa.com/transfer-system/media-releases/report-by-harvard-expert-professor-ruggie-to-support-development-of-fi-2781111

25 See comprehensive Factsheet with FIFA's activities on human rights, dated November 2016: https://digitalhub.fifa.com/m/12269f1e918a0e1c/original/ejuza88lgohexxlazdys-pdf.pdf

26 https://www.sporthumanrights.org/about-us/who-we-are/fifa-human-rights-advisory-board/

27 https://inside.fifa.com/organisation/news/fifa-publishes-landmark-human-rights-policy-2893311

28 An in-depth analysis on the developments at FIFA can be found in the Research Article" Constitutionalizing FIFA: Promises and Challenges" by Bodo P. Bützler and Lisa Schöddert, published in June 2020: https://tilburglawreview.com/articles/192/files/submission/proof/192-1-491-1-10-20200622.pdf

the Olympic Games 2024[29]. Likewise, in May 2017, the Union of European Football Associations (UEFA) added compliance and human rights requirements to its bidding criteria for the UEFA EURO 2024[30].

Thus, within little more than one year, the UNGP were adopted by three of the main actors in international sport.

Many others have followed suit, with different in-depth approaches, as can be seen on the database of the Centre for Sport and Human Rights[31].

In March 2019, the IOC asked two international human rights experts, the former UN High Commissioner for Human Rights, Prince Zeid Ra'ad Al Hussein[32], and Rachel Davis from Shift[33] to deliver recommendations for an IOC human rights strategy. The respective report, dating March 2020, was published in December 2020[34] and has shaped the IOC's progress on the issue ever since. The IOC adopted a Progress Report on its Human Rights Strategic Framework[35] in May 2022, established a Human Rights Advisory Committee[36] at the end of the year, and at its session in October 2023 added a human rights commitment to the Fundamental Principles of the Olympic Charter, stating in Fundamental Principle # 1 *"Olympism is a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind. Blending sport with culture and education, Olympism seeks to create a way of life based on the joy of effort, the educational value of good example, social responsibility and* ***respect for internationally recognised human rights*** *and universal fundamental ethical principles* ***within the remit of the Olympic Movement***".[37] (emphasis by the author).

VI. The Impact of the UNGP on Sport

For a long time, sport had relied on its inherent power to be a force for good[38], praised by officials at all levels as well as politicians, and sought by companies and host countries alike to benefit from a positive image transfer. But sport is not good per se, there is no automatism in achieving "the good". On the contrary – relying on the positive impact sport can have may result in neglecting – or even denying - its dark sides. In sport, too, individuals make mistakes, they can fail, misuse their power, breach sporting rules and laws. Additionally, awarding MSE to countries with considerable human rights challenges, increases the risks a SGB faces. The UNGP allow a systematic approach to manage these risks and to avoid any harm done by a SGB, be it in event organization or daily operations. The main shift in the understanding of sport organizations' responsibility towards MSE comes with expanding it beyond the short time of event-

[29] https://gamesbids.com/eng/featured/ioc-includes-human-rights-protection-in-revised-host-city-agreement/#:~:text=The%20IOC%20adopted%20new%20procedures%20and%20made%20changes,related%20to%20the%20organization%20of%20the%20Olympic%20Games.

[30] https://www.sportspro.com/news/uefa-outlines-euro-2024-bid-requirements/#:~:text=For%20the%20first%20time%2C%20Uefa%20has%20added%20specific,bids%20must%20also%20meet%20compliance%20and%20anti-corruption%20measures.

[31] https://lookerstudio.google.com/reporting/922aba0c-3dd3-4705-922c-c80b0f701183/page/vZBxC

[32] https://www.ohchr.org/en/about-us/high-commissioner/past/zeid-raad-al-hussein

[33] https://shiftproject.org/person/rachel-davis/

[34] https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/News/2020/12/Independent_Expert_Report_IOC_HumanRights.pdf

[35] https://stillmed.olympics.com/media/Documents/Beyond-the-Games/Human-Rights/Introduction-IOC-Human-Rights-Strategic-Framework.pdf

[36] https://www.olympics.com/ioc/human-rights/ioc-advisory-committee-rights?displayAsWebView=true%2Ctrue

[37] https://stillmed.olympics.com/media/Documents/International-Olympic-Committee/IOC-Publications/EN-Olympic-Charter.pdf?displayAsWebView=true%3FdisplayAsWebView%3Dtrue

[38] See for example https://library.olympics.com/Default/doc/SYRACUSE/2954314/the-role-of-sport-in-society-international-olympic-committee

delivery to the entire lifecycle of the event – from the bidding phase until the final reporting. E.g., working conditions on construction sides for sport venues, hotels etc. needed for the event fall under the contractual responsibility of the SGB as awarding the event to a specific national federation, i.e., a respective host country, can "contribute" to related human rights violations. Therefore, bidding criteria as well as host contracts for MSE need to contain specific guarantees and/or clauses on human rights to manage these risks. The adoption of the UNGP by FIFA in 2016 even led retrospectively to the inclusion of far reaching human rights considerations into the sustainability strategy for the FIFA World Cup Qatar 2022[39] despite the host contract having already been signed just after the awarding in December 2010.

The UEFA EURO 2024 in Germany[40] and the Summer Olympic Games Paris 2024[41] were the first MSE with a UNGP approach from the outset.

Nevertheless, with the evolving human rights landscape on the one hand and increased geopolitical tensions and conflicts on the other, sport – like any other sector - is still far from being perfect in delivering what the UNGP require. It is a long journey affording the development of practical solutions on the ground for nearly any possible human rights challenge – from inclusion of transgender athletes, participation in competition with a hijab, athletes' rights, sexual abuse, anti-discrimination, workers rights to freedom of expression and the media, just to name some - within a demanding ever-changing environment.

It is important to state, that under the UNGP no country is excluded from bidding for and staging of a MSE nor are SGB expected to tackle all human rights challenges a host country may pose. To manage the risks that come with the preparation – including construction of sport venues and other infrastructure needed - and the delivery of the event in a responsible way, i.e., putting preventive and mitigating measures corresponding to the severity of the risks in place, will be sufficient to abide by the UNGP.

An example for the leverage a MSE can have, is the progress on labor rights in Qatar achieved in the uprun to the FIFA World Cup 2022. Facilitated mainly by the International Labor Organisation (ILO) in cooperation with the state of Qatar, FIFA and the trade union Building and Woodworkers International (BWI), far reaching changes have been made – not just for those migrant workers on World Cup construction sides, but also for among others domestic workers who were not connected to the event in any way[42].

VII. Remedy, Sport Arbitration and CAS

For affected groups and their representatives, e.g., trade unions, athletes' organisations, NGO engaged in human rights, remedy is the most important one of the three pillars of the UNGP. Thus, from the very beginning of the UNGP being discussed and then implemented in sport, sport arbitration and especially CAS came under scrutiny. John Ruggie in his report for FIFA in 2016 recommended:

"FIFA should review its existing dispute resolution system for football-related issues to ensure that it does not lead in practice to a lack of access to effective remedy for human rights harms.
• FIFA should ensure that its own dispute resolution bodies have adequate human rights expertise and procedures to address human rights claims, and urge

[39] https://publications.fifa.com/en/final-sustainability-report/sustainability-at-the-fifa-world-cup/alignment-with-the-un-sdgs/
[40] https://de.uefa.com/news-media/news/028e-1b18f84e0244-2a6337fd188c-1000--upholding-and-protecting-human-rights-at-uefa-euro-2024/
[41] https://www.theworkersrights.com/human-rights-at-the-heart-of-olympic-games-paris-2024/
[42] https://webapps.ilo.org/infostories/en-GB/Stories/Country-Focus/world-cup-qatar#landing

member associations, confederations and the Court of Arbitration for Sport to do the same;
• The review should involve independent experts as well as representatives of players and other users of the system".[43]

On 15 October 2018, the Institute for Human Rights and Business (IHRB)[44] hosted a "Strategic Dialogue on Remedy in the Sport and Human Rights Context" in The Hague that resulted in a background paper on "Mapping Accountability and Remedy Mechanisms for sport-related Human Rights Grievances", published by the Centre for Sport and Human Rights[45] in April 2019.[46]

Also, from the states' side the sport arbitration system – increasingly under pressure anyhow with spectacular cases like on Claudia Pechstein, Caster Semenya and in the aftermath of the doping scheme at the Winter Olympics Sochi 2014 – was challenged. In February 2017, the Monitoring Group on the Anti-Doping Convention (T-DO)[47] of the Council of Europe (CoE) published a "Recommendation on ensuring the independence of hearing panels (bodies) and promoting fair trial in anti-doping cases"[48] followed in August 2020 by a Reference Document on Human Rights in Sport[49].

While the focus here lay on the procedural side and the requirements of the *ordre public*, a literature discussion started on the direct applicability of human rights in sport arbitration based for example on FIFA's human rights commitment in Article 3 of its Statutes. Bützler/Schöddert in their article in June 2020[50] put forth *"…now that human rights no longer apply just indirectly but directly, appellants are explicitly encouraged to make human rights violations a central topic of discussion during arbitration, thus proliferating the inclusion and discussion of human rights standards in sports-related disputes before the CAS".*

In the light of these developments, also, the Independent Expert Report to the IOC contains a respective recommendation on review of the remedy system for the IOC human rights strategy:

"2. The strategy should provide for a review in the second and third phases of the IOC's own grievance mechanisms that could be relevant to human rights and identify how they can be strengthened in line with the effectiveness criteria in the UN Guiding Principles. This should include the Ethics Commission.

3. The strategy should commit the IOC to begin a review in the second phase of how to ensure that the operation of existing arbitration and dispute resolution mechanisms in sports do not lead in practice to a lack of access to effective remedy for human rights harms – for example, through commissioning an expert study informed by the perspectives of the users of these mechanisms. This should include requesting ICAS to carry out a review of the competencies and preparedness of CAS to handle human rights cases".[51]

Expectations went even further, especially from athletes' side. Based among others on an article published in 2020[52], the World

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[43] https://www.hks.harvard.edu/centers/mrcbg/programs/cri/research/reports/report68 , Recommendation 6.2, page 35

[44] https://www.ihrb.org/

[45] https://www.sporthumanrights.org/about-us/

[46] https://www.sporthumanrights.org/media/dsflbmtq/mapping_accountability_remedy_mechanisms_cshr_april_2019.pdf

[47] https://www.coe.int/en/web/sport/t-do

[48] https://rm.coe.int/recommendation-on-ensuring-the-independence-of-hearing-panels-bodies-a/1680735159

[49] https://rm.coe.int/msl16-08rev1-theme-2-reference-doc-270820-en/1680a02a0f

[50] See footnote 27, https://tilburglawreview.com/articles/192/files/submission/proof/192-1-491-1-10-20200622.pdf - page 47

[51] See page 39, https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/News/2020/12/Independent_Expert_Report_IOC_HumanRights.pdf

[52] Brendan Schwab, Protect, Respect and Remedy. Global Sport and Access to Justice, https://www.academia.edu/72838447/Protect_Respect_and_Remedy_Global_Sport_and_Access_to_Justice

Players Association (WPA) developed a strategic plan "Ensuring Access to Effecitve Remedy" in 2022[53] and even proposed an alternative "Sport and Human Rights Dispute Resolution Mechanism (SHDR)"[54].

Analysing CAS jurisprudence, Marcus Mazzucco and Hilary Findley discussed in "From Sagen to Henriques: Legal Challenges to Olympic Event Selection Decisions and the Role of the Court of Arbitration for Sport"[55], published in 2022, which paths athletes could take to challenge decisions of the IOC regarding the selection of Olympic sports or disciplines.

An overview on Sport and Human Rights from a CAS Perspective has been published on 22 June 2022[56]. Nevertheless, in a presentation at the CAS seminar in September 2022 in Lausanne doubts were raised regarding the responsibility of private organisations like SGB for human rights, referring especially to FIFA, and wondering what its commitments to human rights in its statutes should imply.

The CAS overview was updated on 28 November 2023[57]. It lists CAS jurisprudence related to human rights considerations with regard to procedural law, mainly based on Article 6(1) of the European Convention on Human Rights (ECHR), as well as substantive law with a wide range of different fundamental rights being affected.

Given the increasing number of safeguarding cases in international sport, CAS in December 2023 as a part of its human rights approach regarding fair trials launched *"Guidelines for the hearing of vulnerable witnesses and testifying parties in CAS Procedures"*[58].

VIII. What next?

As sport is struggling again and again with cases of sexual abuse all over the world and in all sports, threats to athletes' welfare, especially regarding minors, and serious dilemmas resulting from transgender athletes and athletes with Differences in Sexual Development (DSD) participation in female competition, to name just some of the issues, the human rights challenges in sport arbitration will not diminish. Activism by athletes and NGO will continue and set SGB under pressure to not only commit to respect human rights but also to have rules in place that ensure remediation to victims. In countries with deficiencies in the judicial system athletes may prefer to bring their case to the international level, i.e., the respective International Federation or CAS. This may happen as strategic litigation[59], often with the primary aim to raise public awareness on the problem even if there are no or only little chances to win the case. All this will further fuel the discussion on the role of sport arbitration with regard to human rights and access to effective remedy.

Additionally, the Olympic Movement and its constituents are amid (nearly) all geopolitical tensions, conflicts, and wars. Thus, in the current state of the world, human rights

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53 https://uniglobalunion.org/wp-content/uploads/WPA-Ensuring-Access-to-Effective-Remedy-The-Players-Strategic-Pathway-to-Justice-2022.pdf

54 https://uniglobalunion.org/wp-content/uploads/WPA-SHR-DRM-FAQ-tool.pdf#:~:text=It%20provides%20a%20framework%20for%20mediation%20and%20arbitration,Hague%20Rules%20on%20Business%20and%20Human%20Rights%20Arbitration.

55 https://www.researchgate.net/publication/365771369_From_Sagen_to_Henriques_Legal_Challenges_to_Olympic_Event_Selection_Decisions_and_the_Role_of_the_Court_of_Arbitration_for_Sport

56 https://www.tas-cas.org/fileadmin/user_upload/2022.06.20_Human_Rights_in_sport__20_June_2022_.pdf

57 https://www.tas-cas.org/fileadmin/user_upload/CAS_Human_Rights_in_Sport__November_2023_.pdf

58 https://www.tas-cas.org/fileadmin/user_upload/ICAS_Guidelines_on_Protection_of_Witnesses__FINAL_.pdf

59 https://www.amnesty.org/en/strategic-litigation/ https://archive.crin.org/en/guides/legal/guide-strategic-litigation/what-strategic-litigation.html

challenges in sport will surely increase rather than lose importance.

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 2021/A/8070
Gabriel Girotto Franco v. Al Hilal SFC
28 March 2023

Panel: Mr Rui Botica Santos (Portugal), Sole Arbitrator

Football
Contractual dispute
Burden and standard of proof
Existence of an employment contract
Culpa in contrahendo
Compensation for damages in cases of pre-contractual liability

1. A player who brings financial claims towards a club in a contractual dispute bears the burden of proving them to the standard of comfortable satisfaction.

2. The existence of an employment contract requires evidence of a binding offer including all relevant essential elements (date, name of the parties, duration of the relationship, remuneration and signature) as well as valid mutual acceptance.

3. The concept of *culpa in contrahendo* presupposes a negligent or intentional breach of pre-contractual obligations. It requires the occurrence of contractual negotiations, a trust worth protection, a breach of duty, harm, causal connection, and fault. At the contractual negotiation stage, it includes certain duties of care, considerateness, good faith and information, including the duty to negotiate seriously and in a fair manner.

4. The breach of contractual obligations results in the payment of compensation based on the residual value of the contract (positive interest), whereas pre-contractual liability is limited to the payment of direct damages (negative interest).

I. PARTIES

1. Gabriel Girotto Franco (the "Appellant" or the "Player") is a Brazilian professional football player, born on 10 July 1992 in Brazil, currently playing for the Sport Clube Internacional, Brazil.

2. Al Hilal Saudi Football Club ("Al Hilal", the "Club" or the "Respondent") is a professional football club incorporated and registered in accordance with the laws of the Kingdom of Saudi Arabia ("KSA"), with its registered head office in Riyadh, KSA, affiliated to the Saudi Arabian Football Federation (the "SAFF"), which is a member association of the Fédération Internationale de Football Association ("FIFA"). FIFA is the international governing body of football and exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials, and players belonging to its affiliates. FIFA is an association under Articles 60 et seq. of the Swiss Civil Code with headquarters in Zurich, Switzerland.

3. The Player and the Club are collectively referred to as the "Parties".

II. INTRODUCTION

4. The Appellant is challenging the decision rendered by the FIFA Dispute Resolution Chamber (the "FIFA DRC")

passed on 6 May 2021 (case ref. 20-00786), which grounds were communicated to the Parties on 1 June 2021 (the "FIFA Decision" or the "Appealed Decision"), in accordance with Article R55 of the Code of Sports-related Arbitration (the "CAS Code").

5. The dispute between the Parties concerns the legal consequences in result of their contacts and negotiations to conclude an employment relation, i.e. whether the employment proposal/offer sent by the Club to the Player is to be considered a valid and biding contract on them, as well as the alleged Player's response and actions were sufficient to trigger the consequences of (i) an employment relationship between the Parties or (ii) the right to be compensated for the breach of the rules of good faith and for the expectations generated during the negotiations (*"culpa in contrahendo"*).

III. FACTUAL BACKGROUND

6. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this award (the "Award") only to the submissions and evidence it considers necessary to explain its reasoning.

A. The Club's expression of interest in signing the Player and the mandate granted to the Club's intermediary

7. On 25 August 2019, the intermediary Mr El Yaagoubi Mohammed (the "Club's Intermediary") directly contacted the Player's intermediary Mr Guilherme Miranda (the "Player's Intermediary", the Parties' intermediaries are collectively referred to as the "Intermediaries") with the aim to submit an offer to contract the Player (the "Employment Proposal" or the "Offer"). The Player was employed by the Sport Club Corinthians Paulista ("Corinthians") since 13 January 2017.

8. The Club's Intermediary informed the Player's Intermediary that it had addressed a formal offer to the Colombian football professional Gustavo Cuellar (the "Player Cuellar"), but he did not accept the offer and for this reason the Club decided to open negotiations to hire the Player.

9. The Club's Intermediary was authorized to negotiate – on Club's behalf – the *"possible transfer agreement of the (…) [P]layer (…)"* with Corinthians (the "Mandate").

10. The Mandate, *inter alia*, established the following: *"this mandate is only limited to negotiate on behalf of Al Hilal SFC with (…) Corinthians (…). Any and all documentations and/or agreements without the signature of Al Hilal SFC shall be deemed as invalid and null. This exclusive mandate to the Intermediary is valid until 30 August 2019"*.

B. The signature of the Transfer Agreement between Al Hilal and Corinthians

11. On 28 August 2019, upon several discussions and negotiations, the Club and Corinthians entered into a transfer agreement by means of which the Player should be transferred to Al Hilal (the

"Transfer Agreement"). The Player has not signed the Transfer Agreement (at least on this date) and, if it was signed, such fact was never properly communicated to the Club. The agreed transfer fee was USD $5.500.000.

12. The Transfer Agreement was subject to the execution of the *"relevant employment contract to be executed between [Al Hilal] and the [P]layer"* (Article 9 of the Transfer Agreement).

13. With relevance to the present appeal, we also highlight the content of Article 12.3 of the Transfer Agreement: *"notwithstanding anything to the contrary, the Parties hereby expressly and irrevocably agree that nothing herein shall oblige [Al Hilal] to enter into an employment contract with the [P]layer and in the event that [Al Hilal], for any reason, does not enter into an employment contract with the [P]layer, this agreement shall become null and void".*

C. The negotiations between the Intermediaries with the aim to transfer the Player to the Club

14. On 28 August 2019, after several discussions between Intermediaries, the Player received from Al Hilal the "Employment Proposal", containing the main terms and conditions of their eventual employment relationship (seasons 2019-21). On this same date, the Intermediaries exchanged some WhatsApp messages regarding the duration of the proposed Offer. The Employment Proposal was signed by the Club's CEO.

15. In accordance with the Employment Proposal *"[Al Hilal is] looking forward (…) [the Player's response] to this letter by no later than 29 August 2019 at 22:00 (KSA hrs). Should we not receive any response (sic), this letter shall be deemed as terminated".* The Employment Proposal specified that it was a *"non-binding offer"* which should be considered as a letter that *"is not intended to be legally binding and Al Hillal* (…) *may withdraw from negotiations at any time without liability and without prior written notice".*

16. On 29 August 2019, the Intermediaries exchanged via WhatsApp the following messages:

- at 1:17 AM Brazilian Time ("BRT time"), the Player's Intermediary wrote to the Club's Intermediary, *in verbis*: *"2 years ok for Gabriel. I manage that".*
- at 5:38 PM BRT time the Club's Intermediary sent the Player the air tickets to travel São Paulo to Riyadh with a stopover in Dubai. The plane tickets were for the Player and the Player's Intermediary to fly on 29 August 2019 at 21:40 BRT time and arrive in Dubai on 30 August 2019 at 22:55 United Arab Emirates time ("UAE time").
- at 7:16 PM BRT time, the Club's Intermediary asked the Player's Intermediary if everything was okay with the flight and the latter replied only *"yes"*. Subsequently, the Club's Intermediary wrote *"let me know when about to leave".*

17. On 29 August 2019, the Player played an official match for Corinthians in Rio de Janeiro, Brazil, valid for the 2019 CONMEBOL Sudamerica, against Fluminense FC. The Player did not take the flight to Riyadh to meet Al Hilal and, after the match with Fluminense FC, gave the following interview:

"Good night. We came to know at the end of the night that there would be an inquire, an interest from Al Hilal, but I was focused on the match. Now that the match is over, I am happy about the qualification, I don´t know to say what is right and what is wrong. I will meet with my agents and with Corinthians in order to know the decision taken. But irrespective of anything, I am happy for the match and the qualification. When I will know 100% what will happen, I will speak. Corinthians is my home. I am happy. (…) what's really missing is signing. Everything happened very fast today. Because I was concentrated, focused on the match, I could not stop to think about it. Now the adrenaline will low down, I will meet with my agents, Corinthians and family in order to take a decision. In a few hours or at least in one day, the windows will close, it will be defined".

D. The Cub's lack of interest in signing the Player

18. On 30 August 2019, the Club officially announced that had concluded an employment contract with the Player Cuellar.

19. On 31 August 2019, the Player sent a formal notice to Al Hilal, in which stated that the Parties had signed an employment contract and requested Al Hilal to confirm within the following 24 hours if *"the Club has decided to breach the Employment Contract"*.

20. On 7 September 2019, the Player played an official match for Corinthians in the staring eleven.

21. On 9 September 2019, Al Hilal replied to the Player's notice refusing the existence of any employment relationship and highlighted the clear terms of the non-binding letter of intention of 28 August 2019 – the Employment Proposal.

22. On 6 January 2020, the Player and Corinthians amended the terms and conditions of the Corinthians' Employment Contract. In essence, the amendment extended the employment relation until 31 December 2022, as well as it established that the latter became entitled to receive monthly salaries amounting to BRL 500,000 and Corinthians has acquired 100% of the Player's image rights for the amount of BRL 2,000,000.

E. The Player's claim before the FIFA

23. On 27 May 2020, the Player filed before FIFA a claim against the Club under Article 17 of the Regulations on the Transfer of Players (the "FIFA RSTP" or the "RSTP"), requesting the following:

    a. To order Al Hilal to pay him USD 1,957,866.04 as compensation for breach of contract, plus 5% interest *p.a* as from 2 September 2019 until the date of effective payment;

    b. To impose a transfer ban on Al Hilal for two entire and consecutive registration periods;

    Alternatively,

    c. To confirm that by breaching the Employment Proposal, Al Hilal violated the principle of *culpa in contrahendo* and as such, shall pay a compensation to the Player amounting USD 1,957,866.04, plus default interest at the rate of 5% *p.a* as from 2 September 2019 until the effective date of payment.

24. The Club was invited to reply to the Player's claim and in its reply / counterclaim requested the following:

    a. To dismiss the Player's claim for lack of jurisdiction because it is not an employment-related matter;

    Alternatively, in the event that FIFA determines that it has jurisdiction:

    b. To dismiss the Player's claim in the merits and to admit the counterclaim to decide that the Player breached the employment contract with Al Hilal and that the Player should pay a compensation of USD 10,500,000 and SAR 75,809, plus 5% interest p.a. on all the due amounts as from the due dates and util the effective payment;

    c. To impose sporting sanctions on the Player, restricting him from playing official matches for at least four months; and

    d. To order the Player to pay Al Hilal EUR 50,000 as legal expenses and costs, as well as to deem the Player liable for any procedural costs.

25. On 6 May 2021, the FIFA DRC passed the Appealed Decision. The operative part of the Appeal Decision states the following:

    "(…)
    1. *The claim of the [Player] (…) is admissible.*
    2. *The* claim of *the [Player] (…)* is rejected.
    3. *The counter-claim of the [Club] is rejected.*

    (…)".

26. On 1 June 2021, the grounds of the Appealed Decision were communicated to the Appellant.

27. In summary, the FIFA DRC concluded and rejected both the Player's claim and the Club's counterclaim. The main grounds of the Appealed Decision are the following:

    "(…) the [P]layer did not meet his burden of proof in order to demonstrate that he dully accepted Al Hilal's offer".
    "(…) in accordance with the documentation brought forward by the [P]arties (…)", the Employment Proposal was delivered by the Club's Intermediary to the Player's Intermediary via WhatsApp, but the copy of this documents signed by the Player was never delivered to Al Hilal, nor to the Club's Intermediary.

    "(…) In view of the above, the [FIFA DRC] highlighted that the [P]layer's consent was only limited to a WhatsApp message sent by [the Player's Intermediary to the Club's Intermediary] after the formal expiry of the deadline settled by the [C]lub (i.e. in the early morning of 29 August 2019, at 1:17 AM, Brazilian time)".

    "(…) Consequently, (…) the [P]layer did not provide any evidence that confirms that he formally answered the [E]mployment [P]roposal within the deadline".

    "(…) the consent provided via WhatsApp by a third person other than the player himself – and also to a third person to Al Hilal (…) shall not be deemed as a valid manner to accept an employment proposal and, hence, to trigger the consequences of a labour relationship. (…) the message in question was dubious and unclear, and does not clearly state an acceptance on the player's part".

"(…) the issuance of the plane tickets by Al Hilal to the [P]layer cannot supplement the fact that the [P]layer did not validly accept the employment proposal under the perspective of the long-standing jurisprudence of [the FIFA DRC]".

"(…) the signature of the transfer agreement by the clubs do not impact the conclusion above since the transfer agreement expressly set forth that the "execution" of "an employment agreement" between Al Hilal and the [P]layer should be considered as a condition precedent to the enforcement of the contract".

"(…) Al Hilal engaged the services of a different player and expressed to the player that it was no longer interested in his services as no confirmation had been received from him. Therefore, (…) no compensation (…)" should be awarded to the Parties.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

28. On 23 June 2021, in accordance with Article R47 of the CAS Code, the Appellant filed its statement of appeal (the "Statement of Appeal") with the Court of Arbitration for Sport ("CAS") challenging the Appealed Decision and requested the matter to be decided by a Sole Arbitrator.

29. On 27 July 2021, in accordance with Article R51 of the CAS Code and within the previously extended relevant time-limit, the Appellant filed his Appeal Brief.

30. On 17 August 2021, the Parties informed the CAS Court Office of their agreement to jointly nominate Mr Rui Botica Santos, Attorney-at-Law, Lisbon, Portugal, as Sole Arbitrator and, in consequence, suggested his appointment by the CAS Appeals Arbitration Division.

31. On 18 August 2021, the CAS Court Office informed the Parties that pursuant to Article R54 of the CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, it was confirmed the joint appointment by the Parties of Mr Rui Botica Santos as Sole Arbitrator.

32. On 26 October 2021, the Respondent filed its Answer, pursuant to Article R55 of the CAS Code. The Appellant initially objected to the admissibility of the Answer, however, during a case management conference promoted by the Sole Arbitrator and which was held on 11 November 2021, ultimately withdrew his challenge and accepted its inclusion in the file.

33. On 2 September 2022, the CAS Court Office issued the Order of Procedure, which was duly signed by the Parties.

34. On 9 November 2022, a hearing was held in Rio de Janeiro, Brazil, as per the Parties' agreement after extended discussions commenced in November 2021. The following persons attended the hearing, in addition to the Sole Arbitrator and Mr Giovanni Maria Fares (remotely):

1. <u>For the Appellant</u>
   <u>In person</u>
   - Mr Gabriel Girotto Franco – the Appellant
   - Mr Breno Costa Ramos Tannuri – Counsel
   - Mr André Oliveira de Meira Ribeiro – Counsel

- Mr Somaiah Mandepansa Jaya – Consul
- Ms Gwenn Le Garrec – Counsel

By videoconference

- Mr Carlos Gilberto Nascimento Silva – Witness
- Mr Guilherme Miranda – Witness
- Mr Mohamed Chrif Zorai – Interpreter

2. For the Respondent

- Mr Stefano Malvestio – Counsel
- Mr Gustavo Awad – Counsel
- Ms Ariadna Mendoza – Intern
- Ms Georgia Wray – Intern
- Mr Rahul Raj – Intern

By videoconference

- Mr Sami Alaskari – Representative of the Respondent
- Mr El Yaagoubu Mohammed – Witness
- Mr Turki Khalid Almesned – Witness

3. As observer:

- Ms Fernanda Szyszka – lawyer at the BMA Law Firm /host of the venue for the hearing (invited by the Sole Arbitrator)

35. As a preliminary remark, the Parties were requested to confirm not having any objection to the appointment of the Sole Arbitrator, and they so confirmed.

36. The Parties were given the opportunity to present their case and make their submissions and arguments. After the Parties' closing submissions, the hearing was closed, and the Sole Arbitrator reserved its decision to this Award.

37. Before the hearing concluded, the Parties expressly stated that they had no objection to the way that these proceedings have been conducted and that the equal treatment of the Parties and their right to be heard had been respected.

V. THE PARTIES' SUBMISSIONS

38. The following summary of the Parties' positions is illustrative and does not necessarily comprise each contention put forward by the Parties. The Sole Arbitrator, however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in what immediately follows:

A. The Appellant's submissions

39. The Appellant prayed the below reliefs in its Appeal Brief:

"(…)
FISRT – To uphold the present appeal;
SECOND – To order the Club to pay to the Player USD 1,957,866.04 due as compensation for the breach of the [Employment] Contract, plus default interest at the rate of 5% per annum as from 2 September 2019 until the effective date of payment; or
Alternatively and only, if the above is rejected:
THIRD – To order the Club t pay to the Player USD 1,249,999 due as compensation for the breach of the [Employment] Contract, plus default interest at the date of 5% per annum as from 2 September 2019 until the effective date of payment;

FOURTH – To order the Club to pay all arbitration costs and be ordered to reimburse the Player the minimum CAS court office fee of CHF 1,000 and any other advance of costs paid to the CAS; AND
FIFTH – To order the Club to pay the Player a contribution towards the legal and other costs incurred and regarding the ongoing proceedings in the amount of CHF 20,000".

40. The Appellant advanced the following grounds in support of its appeal:

A.1. The Offer contained all essentialia negotii

41. In accordance with the long-standing understanding of the *lex sportiva*, a document that contains (i) date; (ii) the name of the parties; (iii) the term; (iv) the remuneration; and (v) the signature of the parties is considered to include all *essentialia negotii* and is therefore a valid and binding agreement.

42. It is undisputed that the Offer is dated "28/08/2019" and was sent to the Player on the same day. It is also undisputed that the Offer contains the identification of the Parties (*"Player and the Club"*), the object of the contract (*"employment"*), its term (*"2 seasons"*), the remuneration of the Player and the starting of the employment relationship (*"… to be commenced as of the date of signature"*). All elements of the *"essentialia negotii"* were met. It is also important to highlight that the Offer also guarantee certain additional perks and benefits that the Player was entitled to receive: (i) transportation; (ii) accommodation; and (iii) medical insurance.

43. FIFA DRC righty concluded that the Offer contained the *essentialia negotii*, which is crucial for a contract (and/or a pre-contract) to be valid and binding. This is also supported by Article 2.1 of the Swiss Code of Obligations (the "SCO"): *"[w]here the parties have agreed on all the essential terms, it is presumed that the contract will be binding notwithstanding and reservation or secondary terms".*

A.2. The Player's acceptance of the Offer

44. In case a football club presents a player with an offer, which contains the essential elements of a football player's contract, and this offer is subsequently accepted by the player, it is presumed that this offer becomes a valid and binding employment contract.

45. The Player expressly and/or implicit accepted the Offer and such acceptance was communicated to the Club's Intermediary. As per Article 1 of the SCO the conclusion of a contract requires a mutual expression of intend by the parties and the expression of intent may be express or implicit. Moreover, Article 10.1 and 2 of the SCO establishes that: *"[a] contract concluded in the parties' absent takes effect from the time acceptance is sent"* and *"[w]here express acceptance is not required, the contract takes effect from the time the offer is received".*

46. The Club's Intermediary – based on the Mandate – was the only person exclusively entitled to represent the Club during any negotiations related to the deal and such powers were valid until 30 August 2019. Article 32.1 of the SCO provides that: *"[t]he rights and obligations arising from a contract made by an agent in the name of another person accrue to the person represented, and not to the agent".*

47. As very well stressed by FIFA DRC, the Player's Intermediary communication to the Club's Intermediary about the acceptance and agreement of the Player – in relation to the Offer – was sent at 1:17 AM BRT time on 29 August 2019. Hence, approximately 15 hours before (and not "after" as mistakenly affirmed by the Appealed Decision) the time limit determined by the Club.

48. It is undisputed that the time zone difference between Brazil and the KSA during the time of the year is 6 hours meaning that the time in KSA is 6 hours ahead of Brazil. As such, the referenced time limit was going to expire at 4 PM BRT on 29 August 2019.

49. The conclusion that the Player failed to comply with the time limit imposed by the Club must be set aside in full.

50. The FIFA RSTP does not provide any eventual provisions established by Swiss Law which prohibited a contract offered by an employer to be accepted by an employee through a messaging application for instance WhatsApp. Swiss law grants the parties the liberty to conclude a contract within a very informal and practical manner if necessary.

51. It is undisputed that the Players' Agent only forwarded the WhatsApp message with an "ok" to the Offer, after having discussed its terms and conditions with the Player and having obtained the Player's agreement to it. This conversation between the Player's Intermediary and the Player was necessary because the Player had first to agree to reduce the term of the employment relationship from 3 to 2 seasons. Only after, the Player's Intermediary was in position to send the WhatsApp message with the "ok" regarding the Offer. This "ok" WhatsApp message – the communication of the acceptance of the Offer – provided legal effects and any eventual attempt to ignore or minimize it is legally groundless – Article 32 of the SCO.

52. The Player's Intermediary did not sign the Offer on behalf of the Player but simply communicated that the latter had agreed with its terms and conditions as such fulfilled with the time limit set out by the Club to receive a positive or negative answer regarding its contents. The Club's behavior confirmed this understanding because a few hours later the Club forwarded the Player the plane tickets to travel to KSA. The issue of the tickets is clear evidence that the Club knew and received the acceptance from the Player regarding the Offer and that the Club's Intermediary had the powers to represent the Club towards Corinthians and the Player.

53. The FIFA DRC's finding that the Player's message was dubious and unclear is wrong.

54. The Parties have chosen an extremely informal means of communication (WhatsApp) that is simple and direct. It is in this context that the messages have to be understood. By the exchange of messages, it is clearly understood that the only open negotiation point was the term of the contract (two or three seasons). Once the two seasons are clarified and accepted, this acceptance must be understood as the acceptance of the Offer. This is also the reason why the Club forwarded the plane tickets to the Player. The Player and the player's

Intermediary were not going to travel to KSA if they were not accepted the Offer.

55. Another argument used by the FIFA DRC to reject the Player's claim was that *"...a copy of the said document signed by the Player was never delivered to Al Hilal (nor to Mr. Mohammedi)"*.

56. The FIFA DRC wrongly understood that the Offer had to be signed by the Player was a mandatory procedure to consider valid the existence of an employment relationship. However, this understanding has no support in the FIFA RSTP, as this regulation does not provide any clarification regarding the matter. Under Swiss law the validity of a contract is not subject to the compliance with any particular form unless a particular form is prescribed by law. Moreover, the Offer does not require that the Player had to forward a signed copy of the document. The Club only wanted a simple response nothing else, without any formality whatsoever. The Offer refers to the receipt of "any respond", which clearly provides broad meaning to what is was effectively looking from the Player. The response "ok" was good enough to revert the Offer into a valid and binding agreement.

57. As per CAS 2007/A/1213; 2013/A/3133 and CAS 2013/A/3054:

> *"In determining the intent of the parties, or the intent which a reasonable person would have had in the same circumstances, it is necessary to look to the words used or conduct engaged by the parties. However, the investigation is not to be limited to those words or the conduct even if they appeal to give a clear answer to the question. In order to go beyond the apparent meaning of the words or the conduct of the parties, due consideration is to be given to all relevant circumstances of the case. This includes the negotiations, any subsequent conduct of the parties and usages".*

A.3. The Club's contractual breach

58. The contractual parties must respect the principle of *pacta sunt servanda* and, whenever there is a unilateral termination of a contract without valid reason for just cause, the party in breach will have to pay compensation and may be subjected to sporting sanctions. This understanding is not only supported by the principle of respect of contracts but also on other fundamental principles such as good-faith, party autonomy, freedom of contract, prohibition of abuse of right, etc.

59. Any eventual presumption that the Club had the unilateral right to cancel (or disregard) the terms and conditions of the Offer at any time must be considered invalid. It is undisputed the Offer's clause mentioned in para. 15 above. Only the Club had the right to cancel the Offer at any time. These types of clauses are contrary to the general principles of contractual stability as well as labor law as it gives to the Club undue control over the Player without granting the same right to the Player. These types of clauses are also contrary to the fundamental principles of law and FIFA RSTP. Article 335a no. 1 of the SCO provides that: *"[n]otice periods must be the same for both parties; where an agreement provides for different notice periods, the longer period is applicable to both parties"*.

60. The Club did not have the alleged right to cancel the Offer after the Player had provided his acceptance to its terms and conditions to the Offer. After this

moment was no pending negotiations anymore.

61. Moreover, and as per Article 3.1 of the SCO *"[a] person who offers to enter into a contract with another person and sets a time limit for acceptance is bound by his offer until the time limit expires"*.

62. Therefore, the Club breached the employment relationship with just cause and for this reason must compensate the Player under Article 17 para. 1 and 2 of the FIFA RSTP.

63. FIFA DRC ignored several pieces of evidence, disregarded fundamental principles of Swiss law, the various rules, regulations and guidelines established by FIFA and for this reason the Player should be compensated for the breach of his employment agreement with the Club.

A.4. As to the so-called "culpa in contrahendo" (in subsidiary analysis)

64. FIFA RSTP does not provide any definition or proper clarification regarding pre-contracts. This lacuna shall be filled by Swiss law – Article 22 of the SCO establishes:

> *"1. Parties may reach a binding agreement to enter into a contract at a later date.*
>
> *2. Where in the interests of the parties the law makes the validity of a contract conditional on observance of a particular form, the same applies to the agreement to conclude a contract".*

65. According to general principles of law – SFT 113 II 31 p. 35; SFT 118 II 32 p. 33 – a preliminary contract is a contract that obligates the contracting parties to conclude another contract under the law of obligations, which is then called the main contract (CAS 2016/A/4489). Under this context, it is important to stress that letters of intent are often considered as pre-contracts, as the parties agree on some important elements in view of the negotiation of the final contract and may provide for sanctions to be imposed in case of violation of specific commitments.

66. From the moment when the parties enter into contract negotiations, they are in special legal relationship with each other. That pre-contractual relationship involves certain reciprocal obligations, in particular, the parties must negotiate in a serious manner and accordance with their actual intentions. A party that terminates contractual negotiations in violation of these principles may become liable to the other party based on the *culpa in contrahendo* doctrine.

67. Under Swiss law, *culpa in contrahendo* means the negligent/intentional breach of pre-contractual duties. A finding of culpa *in contrahendo* requires the existence of contractual negotiation, trust that merited protection, a breach of a duty, harm, a casual connection, and fault. The breach of a duty in particular derives from the principle of good faith which includes the duty to negotiate seriously and in a fair manner. The parties must negotiate in good faith and should not abandon the negotiations without compelling reason for doing so.

68. The Offer contained an indication that it was non-binding but also makes the indication that such condition remained valid but only during the period of negotiations between the Parties. CAS needs to take into consideration that the

Player accepted the Offer within the required deadline.

69. The validity of the employment relationship cannot be subject to a successful medical examination (Article 18. 4 FIFA RSTP).

70. Only when the Player and the Player's Intermediary arrived in Dubai, this latter received a call from the Club's Intermediary informing that the Club had signed Player Cuellar since the latter had changed his mind after the failure of the negotiations with Bologna FC 1909.

71. The decision to breach the employment relationship few hours before the Player had travelled in a 15-hour flight from Rio de Janeiro to Dubai and few hours before landing Riyadh is a typical case of *culpa in contrahendo*.

A.5. As to the legal consequences

72. The breach of a contract shall be compensated and calculated under Article 17.1 FIFA RSTP. This provision sets the principles and method of calculation of the compensation (positive interest doctrine). The primary role is the parties' autonomy (*"… unless otherwise provided for in the contract"*). In the case at hand there is no indication of compensation is case of breach.

73. The other criteria set out in the same relevant provision that provides guidelines to be applied with the purpose to fix a just and fair compensation is *"the specific circumstances of the case into consideration"*. Within this context, it is applicable the *"… so-called "positive interest" (or "expectation interest") i.e. it will aim at determining an amount which shall basically put the injury party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur"* (CAS 2006/A/106).

74. The Player's loss of earnings and loss of gains result from the breach of the contract by the Club. The Player's remuneration during the relevant period should also be considered as mitigation factor. This should be the criteria to be followed to determine the compensation due for the Club's breach.

75. Considering the Player's remuneration set out in the Offer, minus the remuneration received from Corinthians during equivalent period, the compensation amount should be USD 1,957,866.04. The calculation is as follows:

    a. As per the Offer, the Club undertook to pay the Player the total remuneration of USD 2,500,000 net per season, which represents the monthly salary of USD 208,333 (USD 2,500,000: 12 months) as from September 2019.

    b. In turn, the Player received from Corinthians the gross monthly salary of BRL 280,000 (clause 10 of the Corinthians Contract). This contract was amended on 6 January 2020 and it was extended until 31 December 2022. The Player's increased monthly gross salary to BRL 500,000 and the additional remuneration received from the Corinthians for his image rights – in the total amount of BRL 2,000,000 – must also be considered.

c. In line with the above, the following amounts should be deducted:

(i) BRL 1,400,000.00 (BRL 280,000 x 5 months) related to the gross salaries from August 2019 to December 2019;
(ii) BRL 9,500,000 (BRL 500,000 x 18 months) related to the gross salaries from January 2020 to July 2021;
(iii) BRL 1,333,333,32 (two installments of BRL 666.666,66) related to the player's image rights.
(iv) Total: BRL 12,233,333.30.

d. Considering the exchange rate established by the Brazilian Central Bank on 2 January 2020 (a more favorable exchange rate to the Club), the Player received during the term of his employment relation with Corinthians the amount of BRL 12,233,333.30, equivalent to USD 3,042,133.96.

e. So, the Player had a loss of USD 1,957,866.04 (USD 5,000,000 – USD 3,042,133.96).

76. In relation to the compensation for breach of a pre-contract (subsidiary request), the amount should be USD 1,249,999.00 correspondent to 6 gross monthly salaries (USD 5,000,000.00: 24 months = USD 208,333. X 6). In the Appellant's opinion the compensation shall be never lower than USD 1,249,999.00.

A.6. Payment of Default Interest

77. The compensation shall be subjected to legal interest due for late payment of 5% - Article 104.1 of the SCO. According to Swiss jurisprudence and doctrine, in case of a claim for compensation for a premature, unjustified termination of an employment agreement, interest shall start to accrue immediately, i.e. as per the date of the termination of the agreement.

78. On 31 August 2019, the Player sent to the Club a notification with the purpose to remind the latter about the existence of the employment relationship – Article 102.1 of the SCO – and granted the Club a deadline of 24 hours to reply. The calculation of the 5% interest *p.a* shall start from 2 September 2019 until the effective date of payment.

B. The Respondent's submissions

79. The Respondent filed its Answer to the Appeal Brief and made the following prayers for relief:

"a) Dismiss all the allegations put forward by Mr. Gabriel Girotto Franco;
b) Dismiss the present appeal and confirm the decision rendered by the FIFA Dispute Resolution Chamber on 6 May 2021 in totum;
c) Order Mr. Gabriel Girotto Franco to bear any and all CAS administrative and procedural costs, which have already been incurred or may eventually be incurred in connection with this arbitration; and
d) Grant Al Hilla SFC a contribution towards its legal fees and other expenses incurred in connection with the proceedings, pursuant to Article R64.5 of the CAS Code, in an amount to be

fixed by this honourable Court at its discretion but in no event lower than CHF15,000 (fifteen thousand Swiss Francs)".

80. The Respondent advanced the following grounds in support of its position:

B.1. The Respondent is in line with the main grounds of the Appeal Decision

81. The dispute between the Parties is related to an offer of employment, which was expressly stated to be non-bidding.

82. The Respondent fully agrees with the FIFA Decision rejecting the claim on the grounds that *"the [P]layer did not meet his burden of proof in order to demonstrate that he dully accepted Al Hilal's offer"*. Moreover, *"as a consequence, the Chamber decided that by not manifesting his acceptance as established under the employment offer, the player withdrew his will in rendering services to Al Hilal, hence triggering the termination of the offer"*.

83. The Player is not presenting any new evidence which could materially challenge any fact or considerations established in the FIFA Decision.

84. The Respondent does not deny that the message sent at 1:17 AM BRT time on 29 August 2019 was before the expiry of the Offer but denies the Player's consequences in relation to this fact. This observation is irrelevant and must be considered moot, since the Player failed to comply with the time limit imposed by Al Hilal.

85. As highlighted in the FIFA Decision *"the message [from the Player] was dubious and unclear, and does not clearly state an acceptance on the [P]layer's part"*.

86. The consent provided via WhatsApp by a third person other than the Player himself – and also to a third person to Al Hilal – shall not be deemed as a valid manner to accept an employment proposal and, hence, to trigger the consequences of a labor relationship.

B.2. The main facts show that there was no acceptance of the Offer by the Player

87. Al Hilal was looking for a central defensive midfield and identified two profiles who may fit the position. The options were the Player (who was playing for Corinthians) and the Player Cuellar (who was playing for Clube de Regatas do Flamengo).

88. The Mandate was expressly *"(…) limited to negotiate on behalf of Al Hilal SFC with Sport Club Corinthians Paulista"* and related to *"the possible transfer agreement"*. The Mandate did not authorize the Club's Intermediary to negotiate with the Player and/or the terms of any employment contract.

89. The Mandate was also clear stating that *"[a]ny and all documentation and/or agreements without the signature of Al Hilal SFC shall be deemed as invalid and null"* and that *"[n]otwithstanding anything to the contrary, this letter is not intended to be legally binding, and we may withdraw from negotiations at any time without liability and without prior written notice"*.

90. The Mandate only entitled the Club's Intermediary to engage in discussion with Corinthians in relation the possible transfer of the Player. It is a fact that the Transfer Agreement was signed, but its validity was *"subject to the relevant*

employment contract to be executed between Al Hilal (…) and the Player".

91. The Club's offer sent on 28 August 2019 was a *"non-binding offer"* of *"employment proposal"* that contained the main terms of a possible employment relationship. In this "non-binding offer" was mentioned that the Club was "looking forward" for the Player to respond by no later than 29 August 2019 at 22:00 (KSA hrs) and that *"Should we not receive any respond, this letter shall be deemed as terminated".*

92. No response from the Player was received within the granted deadline.

93. Al Hilal sent to the Player a flight ticket for him to fly to Riyadh, via Dubai on 29 August 2019 at 21:40 (BRT time) and arriving in Dubai on 30 August 2019 at 22:55.

94. On 29 August 2019, Al Hilal received the Transfer Agreement signed by Corinthians, but without the Player's signature.

95. On 29 August 20219 (by 22:00 KSA time), Al Hilal received no answer from the Player.

96. On 30 August 2019, the Player played an official match for Corinthians, gave the interview described in para. 17 above and missed the flight booked by the Club.

97. On 30 August 2019 at 20:25, Al Hilal officially announced having signed the Player Cuellar and thus closed its transfer deals for the 2019 summer transfer window.

98. The summer registration period in Saudi Arabia was closing on 31 August 2019.

B.3 No valid and binding Employment Agreement between the Parties

99. The Player has never accepted the Offer. The Player has neither provided any handwritten signed version nor send any WhatsApp message accepting the (non-binding) Offer. The handwritten signed version of the (non-binding) Offer filed before the FIFA DRC was done in bad faith. It seems that the Appellant no longer relies in this argument.

100. An employment agreement is only valid with the signature of both parties (FIFA Circular 1171 of 24 November 2008). The FIFA and CAS jurisprudence establish that the *essentialia negotii* for an employment contact or precontract to be valid and binding must have: (i) the name of the parties; (ii) the subject matter of the contract; (iii) the duration of the relationship (iv) the Player's remuneration; and (v) the signature of both parties (CAS 2015/A/3953 & 3954, preamble para. 1; CAS 2017/A/5164, preamble, para. 4 and CAS 2018/A/5628, para. 81). This understanding is also supported by the scholar Frans de Weber (DE WEGER, Fras, The Jurisprudence if the FIFA Dispute Resolution Chamber, ASSER International Sports Law Series. 2nd Edition, page 146).

101. The WhatsApp message from the Player's Intermediary – in reply to the message *"2 years ok for Gabriel"* cannot be considered as an acceptance of the Offer, since it is a response to the duration of the contract.

102. The Offer is defined as a "non-binding offer" and no acceptance has been sent by the Player within the required deadline. Moreover, the Offer is called "Employment Proposal" and not "Employment Contract". Article 7 para. 1 of the SCO admits non-binding offer*: "[a]n offeror is not bound by his offer if he has made express declaration to that effect or such a reservation arises from the circumstances or from the particular nature of the transaction".*

103. Furthermore, the Offer was addressed to the Player and the response (which is not considered as an acceptance) was sent by the Player's Intermediary.

104. The Player failed to communicate his alleged acceptance to the Offer (non-binding) within the granted deadline, but he also played an official match for his club Corinthians. The Player's interview after this match is also evidence that he never considered himself as part of the Al Hilal football family.

B.4 The Club's Intermediary had no authority to bind the Club

105. The Mandate did not grant the Club's Intermediary with powers to negotiate with the Player and/or the terms of any employment contract (cf. para. 10). The Mandate simply entitled the Club's Intermediary to engage in discussions with Corinthians (only) in relation the possible transfer agreement without any powers to represent or bind the Club. This is the reason why all letters exchanged between the Club, the Player and Corinthians were signed by the Club's representative and not by the Club's Intermediary. This was also the findings of FIFA DRC.

B.5 The Player did not terminate his employment agreement with Corinthians

106. The Player did not terminate his employment relationship with Corinthians and in January 2019 it was extended the contractual relationship for 2 years. The renewal of the Player's employment contract with Corinthians involved a significant revision of his remuneration conditions.

B.6. Subsidiarily – Al Hilal and not the Player has a claim for culpa in contrahendo

107. The Club has all times acted in good faith, transparently and expeditiously.

108. The Club has made no representations so as to cause the Appellant to inadvertently terminate his employment contract with Corinthians. In fact, the Player remained employed with Corinthians.

109. The Club's decision not to hire the Player was nothing more than the exercise of its freedom (not) to contract.

110. The following facts are relevant to support this understanding: (i) the Player failed to send his acceptance within the granted time-limit; (ii) the Player failed to embark using the flight tickets provided by the Club; (iii) the Player played an official match for Corinthians in the night when he was supposed to travel to Dubai/Saudi Arabia; and (iv) the Player gave an interview stating that Corinthians was his "home".

B.7. Subsidiarily – The compensation requested by the Appellant is baseless

111. The Player's claim of compensation (USD 1,957,866.04) shall be rejected as groundless.

112. As per Article 44.1 SCO, CAS should reject the claim or, alternatively, reduce it at least by 80%.

113. The co-responsibility of the Player in the events leading up to alleged breach of contract is manifestly higher than that of the injured party in CAS 2014/A/3647-3648 and CAS 2014/A/3735.

114. The same considerations above shall also lead to the rejection of the Appellant's claim for compensation (USD 1,249,999.00) based on the principle of *culpa in contrahendo*.

115. The Player wrongly invokes the application of the principle of the positive interests for the assessment of the compensation eventually due, but only the negative damage can be compensated in the event of liability arising out of *culpa in contrahendo*. This is confirmed by the jurisprudence of the Swiss Federal Tribunal ("SFT"): *"In the event of liability arising from culpa in contrahendo, the negative interest shall be compensated. The aggrieved party is entitled to compensation for the damage which he has suffered as a result of the trust placed in the conclusion of a contract by the other party"*. This means that the creditor is to be placed in the same financial position it would be if it had never negotiated the contract. This includes only losses suffered and costs incurred by the creditor as a result of the negotiations of the envisaged contract.

116. The Player never terminated his contract with Corinthians and continued playing and training for this club. Moreover, the Player renewed his employment contract with Corinthians on 6 January 2020 and his remuneration was increased. Therefore, the Player suffered no losses.

117. *Ad argumentandum*, and in the unlikely event that CAS considers that any compensation for *culpa in contrahendo* is due, the amount sought by the Appellant (*i.e* the residual value of his potential contract with Al Hilal) is excessive/disproportionate and must be mitigated by the salaries paid by his subsequent clubs (CAS 2016/A/4489, para. 109, 111 and 112 and CAS 2014/A/3573).

118. In conclusion, any potential compensation to the Player based on the Club's *culpa in contrahendo* shall be reduced on the following grounds; (i) Al Hilal has always acted in good faith on the conviction that the Offer was non-binding and could not constitute a valid employment contract; (ii) when the alleged employment pre-contract was alleged breached, the Parties were still negotiating crucial terms of the employment agreement; (iii) the Player was not a free agent, but had a valid contract with Corinthians – the Player was not unemployed one single day; (iv) the Player continued his carrier with Corinthians; and (v) the execution of the employment relationship with Al Hilal never took place and the Player has never played for it.

VI. JURISDICTION OF THE CAS

119. Article R47 of the CAS Code provides as follows:
"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have

concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body. An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".

120. The jurisdiction of CAS is based on Articles 56 para 1 and 57 para. 1 of the FIFA Statutes and Article 24 para. 2 of the RSTP.

121. The CAS jurisdiction is not disputed by the Parties, and it was further confirmed by the Order of Procedure duly signed by the Parties.

122. It follows that the CAS has jurisdiction to hear this dispute.

VII. ADMISSIBILITY

123. Article R49 of the Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late".

124. Article 58 of the FIFA Statutes read as follows:

"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question".

125. The Panel notes that the admissibility of the Appeal is not contested by the Respondent. The grounds of the Appealed Decision passed on 6 May 2021 were notified to the Appellant on 1 June 2021 and the Statement of Appeal was filed on 22 June 2021, *i.e.* within the 21-day deadline fixed under Article 58 of the FIFA Statutes.

126. It follows that the Appeal is admissible.

VIII. APPLICABLE LAW

127. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS:

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

128. In addition, Article 57.2 of the FIFA Statutes (2019 edition) stipulates the following:

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

129. Furthermore, Article 25 para. 6 of the RSTP provides as follows:

"The relevant FIFA decision-making body shall, when making its decision, apply these regulations (…)".

130. The Sole Arbitrator is satisfied that the various regulations of FIFA constitute the applicable law to the matter in dispute – namely, if applicable, the FIFA RSTP – and that, subsidiarily, Swiss law shall be applied should the need arise to fill a possible gap or *lacuna* in the various regulations of FIFA. Since the Appellant's claim before FIFA was initiated on 27 May 2020, the March 2020 edition of the RSTP is applicable.

IX. MERITS

A What is this case about?

131. Prior to assessing the legal issues at stake, the Sole Arbitrator deems it useful to clarify the scope of the Appeal – what is this case about?

132. The present case, as framed by the Appellant, concerns a claim for compensation by breach of contract and, subsidiarily, a claim for compensation as per the doctrine of *culpa in contrahendo*. The principal claim is based on the fact that the Club disrupted the negotiations with the Player and that there was, at that stage, a valid employment agreement between the Parties. As such, the Appellant feels he is entitled to a compensation as per Article 17 of the RSTP. The subsidiary request is based on an alleged violation of pre-contractual duties by the Club, making it liable as per the doctrine of *culpa in contrahendo*.

133. Considering the above, the sole arbitrator is satisfied that the issues for determination consist of the following:

(i) Was there a valid employment agreement between the Player and the Club?

(ii) If the Sole Arbitrator determines that the Parties have not concluded an employment contract, is there a case of liability as per the doctrine of *culpa in contrahendo*?

134. The Panel will address the above issues below, starting by pointing out the applicable rules of burden of proof.

B. The burden of proof

135. Before entering in the analysis of the merits, the Sole Arbitrator notes that the burden of proof lies, in accordance with Article 12.3 of the FIFA Rules Governing the Procedures of the Player's Status Committee and the Dispute Resolution Chamber (Edition January 2021) and in accordance with Article 8 of the Swiss Civil Code (the "SCC"), with the Appellant, which is the party deriving a right from the alleged employment agreement.

136. It is also important to establish the applicable standard of proof, as applicable per longstanding jurisprudence of the CAS (see, *ex plurimis*, RIGOZZI/QUINN, *"Evidentiary Issues Before the CAS"* in: International Sports Law and Jurisprudence of the CAS, Bern 2014, p. 24-25).

137. In the present case, the Sole Arbitrator sees no reason to impose a higher standard of proof than comfortable satisfaction (see CAS 2020/A/7503, para. 95; CAS 2018/A/6075, para. 46), seeing as the case at hand concerns essentially matters of contractual nature.

138. The "comfortable satisfaction" standard of proof may be defined *"*(…) *as being greater than a mere balance of probability but less than proof beyond a reasonable doubt (CAS 2014/A/3625, with further reference to CAS 2009/A/1920, CAS 2013/A/3258, CAS 2010/A/2267, CAS*

2010/A/2172). In particular, CAS jurisprudence clearly established that to reach this comfortable satisfaction, the Panel should have in mind "the seriousness of the allegation which is made" (CAS 2014/A/3625, with further reference to CAS 2005/A/908, CAS 2009/A/1902)" (CAS 2016/A/4558, para. 70)

139. In light of the above, the Sole Arbitrator concludes that the burden of proving that there was in fact a valid and binding employment agreement, as well as a breach of such contract, lies with the Appellant, which should be able to prove its allegations to the "comfortable satisfaction" of the Sole Arbitrator. The same applies in relation to the subsidiary claim, i.e on the alleged violation of pre-contractual duties by the Club, making it liable as per the doctrine of *culpa in contrahendo*.

C. The merits of the dispute

C.1 Did the Player and the Club conclude an employment agreement?

140. In order to determine whether there is a valid employment contract between the Parties, the Sole Arbitrator must consider the following issues: (i) the presence in the Offer of the *essentialia negotii* elements of an employment contract, (ii) whether there was a valid acceptance of the Offer by the Player and (iii) whether it was a binding Offer.

(i) As to the essentialia negotii elements

141. The Sole Arbitrator will start by considering whether the Offer contains all the *essentialia negotii* elements of an employment contract according to FIFA regulations, the applicable law and CAS case law.

142. The Offer, duly signed by the Club´s CEO, contained the following elements:

- It is in writing: i.e. it was sent, as an attachment, via WhatsApp;
- It is a proposal: it contains an offer of employment (an intention to negotiate), although it is entitled a *"non-binding offer"*;
- It is dated: 28 August 2019;
- It identifies the Parties: i.e. the "sender" "Al Hilal SFC" and the "addressee" "Mr Gabriel Girotto Franco Professional Football Player";
- It states the contractual term: 2 seasons (2020-21 and 2021-22);
- It states the commencement date of the employment relationship: *"… to be commenced as of the date of signature"*.
- It states the location of the employment: *"Riyadh, Kingdom of Saudi Arabia, which is the hometown of Al Hilal SFC"*; and
- It states the remuneration: USD 2,500,000 per season, plus transportation, accommodation, and medical insurance.

143. While there is no specific provision in the regulations regarding the minimum requirements for the existence of a valid employment contract, apart from the requirement of written form in Article 2.2 of the FIFA RSTP, there is substantial CAS case law regarding this issue. The following is a citation from one of the many decisions concerning this issue, in the extensive CAS case law, i.e. case CAS 2015/A/3953 & 3954, para. 44:

"Considering the document in question, the Panel considers that it includes: i) a date, ii) the

name of the parties, iii) the duration of the contract, iv) the amount of remuneration, and v) the signature of the parties. According to CAS jurisprudence, such text includes all essentialia negotii and is therefore considered a valid and binding agreement (amongst others, CAS 2013/A/221)".

144. Considering the above, the Sole Arbitrator is sufficiently satisfied that the Offer contained all the main *essentialia negotii* elements, from the substantive point of view, to trigger the existence of an employment relationship between the Parties.

(ii) Did the Player accept the Offer?

145. The answer to this question requires the analysis of two other issues. (i) was the Player's response to the Offer given within the required timeframe? and, (ii) can the content of the Player's response be considered a valid acceptance of the Offer.

146. The Offer was sent to the Player's Intermediary on 28 August 2019, and expressly stated that the Player should give an answer *"by no later than 29 August 2019 at 22:00 (KSA hrs)"*. Considering that the time zone difference between Brazil and KSA is 6 hours, the time limit in the Offer ended on 29 August 2019 at 4PM (BRT time).

147. On 29 August 2019 at 1:17AM (BRT time) the Player's Intermediary sent the Club's Intermediary a WhatsApp message with the following content: *"two years ok for Gabriel"*.

148. The Sole Arbitrator acknowledges that the said message was sent within the timeframe stipulated in the Offer, however, the Parties differ regarding the content and relevance of the said "message". The Player claims that it was a valid acceptance of the Offer; and the Club claims that the said "message" is merely an acceptance of the proposed term of the employment relationship (i.e. a reduction of the term from 3 seasons to 2 seasons).

149. Article 1 of the SCO provides that *"[t]he conclusion of a contract requires a mutual expression of intent by the parties"* and that the expression of intent *"(…) may be express or implied"*.

150. In line with the decision of the FIFA DRC in the decision now under appeal, the Sole Arbitrator considers the message *"two years ok for Gabriel"* to be related to the term of the contract. In reaching this conclusion, the Sole Arbitrator resorts to Swiss law, according to which contractually significant statements are to be interpreted and given effect in the manner in which their recipient was and ought to have understood them in good faith (so called *Vertrauensprinzip*: in this respect see *ex plurimis* Decision of the Swiss Federal Tribunal 143 III 157). The Sole Arbitrator therefore considers that the wording of the message could not, in good faith, be understood in a different way as referring to the duration of the contract, and not to the contract as a whole.

151. The conclusion of the Sole Arbitrator is also reinforced by the circumstances surrounding the "message", i.e., (i) the Player's interview (see para. 17); (ii) the Player's subsequent actions, namely regarding his travel to Dubai; and (iii) the non-termination of the Player's employment contract with Corinthians.

152. The Sole Arbitrator considers that the following statements made during the Player's interview are relevant: *"I will meet with my agents, Corinthians and family in order to take a decision. In a few hours or at least in one day, the windows will close, it will be defined"*. At no point in the interview was the Player clear that he had accepted the proposal to go and play for Al Hilal. Quite the opposite. In the interview the Player was very cautious in the way he approached the subject.

153. An equally non-committal position was also assumed by the Player when he accepted and managed his trip to Dubai. The Sole Arbitrator finds that the Player did not make use of the air tickets provided by the Club and did nor ask the Club to alter the itinerary to a flight with a more convenient schedule and connections, as could be expected. On the contrary, the Player and his Intermediary ended up traveling with tickets paid for by the latter, as was confirmed by the Player's Intermediary at the hearing. This attitude, combined with the other circumstances already analysed, reveals that the Player did not want to demonstrate a definitive commitment.

154. Moreover, it is also noted that the Player did not terminate his employment contract with Corinthians, or initiate formal negotiations to do so, or, as least, the Player has not proved that he did so.

155. The Sole Arbitrator does not question the evident interest of the Player in concluding the negotiations, but it seems clear that the negotiations were not yet concluded.

156. Another issue that could be discussed, for more academic purposes, is whether the signing of the Offer by the Player was a required condition. The Sole Arbitrator has in mind the provisions of Article 2.2 of the FIFA RSTP and FIFA Circular 1171 dated 24 November 2008, which reads as follows: *"(…) [t]he contract must be in writing, duly signed by both parties with the necessary legal binding power of signature. It also includes indications with regard to place and date of when the contract was duly signed. In the case of a minor the parent/guardian must also sign the contract"*.

157. It has been proved, by both the evidence adduced and the examination of the witnesses El Yaagoubu Mohammed and Turki Khalid Almesned, that no signed version of the Offer was ever sent to the Club by the Player. Contrary to the arguments presented before the FIFA DRC, the Player no longer relies on the allegation that he sent a signed version of the Offer to the Club.

158. In light of the above, the Sole Arbitrator considers that there was neither an express nor an implied acceptance of the Offer.

(iii) As to the binding nature of the Offer

159. The Offer is expressly stated to be non-binding *"[n]otwithstanding anything to the contrary, this letter is not intended to be legally binding, and we may withdraw from negotiations at any time without liability and without prior written notice"*.

160. Swiss law permits the making of non-binding offers. Article 7.1 of the SCO states that: *"[a]n offeror is not bound by his offer if he has made express declaration to that effect, or such a reservation arises from the circumstances or from the particular nature of the transaction"*. Furthermore, Article 2.1 of the SCO clearly states: *"[w]here the*

parties have agreed on all the essential terms, it is presumed that the contract will be binding notwithstanding any reservation on secondary terms".

161. The argument of the Player that "non-binding offers" are abusive does not apply to the pre-contractual stage. We know from experience that it is common for players and clubs to negotiate with more than one party at the same time. The transfer window is short and very competitive. As part of the exercise of their autonomous will, both players and clubs understandably always try to maximize and exploit their best opportunities. In this context, it is usual and understandable that the parties keep their options open, i.e. their freedom to contract or not to contract, until the most advantageous moment. This makes sense as long as negotiations are conducted with the clear awareness that they are only conclusive once the final contract has been signed. If this was not the case, there would be a clear and unacceptable limitation of the parties' freedom to negotiate.

162. Even if there was some doubt regarding the issues considered above, the Sole Arbitrator also stresses the fact that the Parties were aware that the conclusion of the negotiations was, in practice, dependent on the medical examination of the Player. The medical examinations were scheduled to take place in Dubai on 30 August 2019. As confirmed by the witnesses, Guilherme Miranda and El Yaagoubu Mohammed, the medical examination was the main reason why the Player had to make a stopover in Dubai. We know that the validity of an employment contract cannot be subject to a satisfactory medical examination. However, we also know, from practical experience of the hiring players, that the negotiations only conclude with the completion of medical examinations that confirm the satisfactory physical condition of the player.

163. In light of the above, the Sole Arbitrator concludes that the Offer was clearly and expressly non-binding in nature. Regardless of the non-binding nature of the Offer, the Sole Arbitrator further determines, as explained above, that there was no valid formal acceptance of the Offer. It follows therefore that there is no valid employment contract between the Parties.

164. A final consideration is necessary regarding the Player's claim that the Offer can be considered to be a pre-contract, and that, according to the Player, it therefore has the same effects as a valid employment contract. The Sole Arbitrator stresses in this regard what he has already stated above, i.e. that regardless of the nature of the Offer, it was clearly non-binding. The classification of the Offer as a pre-contact is irrelevant.

C.2 Is there a case of liability as per the doctrine of culpa in contrahendo?

165. The Player believes that the negotiations gave rise to *reliance* that an employment contract would be concluded and signed, and that said *reliance* merits protection. The Player was surprisingly informed of the termination of negotiations and of the Club's loss of interest in signing him, when he arrived in Dubai and, when he was, furthermore, surprisingly informed that the Club had decided to sign the Player Cuellar. As such, the Player feels that the Club violated the pre-contractual duties imposed by the

principle of good faith when it called off the negotiations at their final stage.

166. The Club contested the above allegations and states, amongst other arguments, that it was always clear to both Parties that the Offer was non-binding and that the Club could withdraw from negotiations at any time.

167. The Sole Arbitrator will address the issue below.

168. The concept of ***culpa in contrahendo*** under which the Player submitted his alterative claim is embodied in the pre-contractual duties imposed by Article 2 para. 1 of the SCC, which reads as follows:

"Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations".

169. Regarding the *culpa in contrahendo* concept, the Sole Arbitrator also notes the position adopted by CAS in case CAS 2016/A/4489 (para 6. of the preamble):

"Under Swiss Law culpa in contrahendo means the negligent/intentional breach of pre-contractual duties. A finding of culpa in contrahendo requires the existence of contractual negotiations, trust that merited protection, a breach of a duty, harm, a causal connection, and fault. The breach of a duty in particular derives from the principle of good faith. At the contractual negotiation stage it includes – regardless of whether a contract is concluded later on – certain duties of care, considerateness, good faith, and of providing information, including the duty to negotiate seriously and in a fair manner".

170. In essence, the duties that derive from the principle of good faith aim to avoid the formation of intent or reliance based on incorrect or incomplete information, the intentional or negligent frustration of reliance, by either party, and, conduct of any party that can cause damage to a counterparty. *Contrario sensu*, the purpose of these duties is to ensure that the parties act in good faith, always provide truthful and complete information whenever it is asked for, and, refrain from acting so as to cause damage to the other party.

171. It is therefore necessary to determine whether the Club violated any of its pre-contractual duties when it unexpectedly terminated the negotiations, and if the Player had developed a believe in, or reliance on, the completion of the employment contract that merits protection.

172. The negotiations between the Parties commenced on 25 August 2019 with the message sent by the Club's Intermediary to the Player's Intermediary via WhatsApp (see para. 7 above). In this message, the Club's Intermediary was very open in stating that the Club's interest in the Player had arisen because its negotiations with the Player Cuellar had failed.

173. The negotiations started with the assistance of the Parties' Intermediaries and on 28 August 2019 the Club's Intermediary sent the Offer (non-binding offer). The Player's Intermediary must have been aware that the entire negotiations were being conducted on the assumption that the Club had the right to terminate negotiations at any time and that the Offer submitted was non-binding. The Player and the Player's

Intermediary were aware of this negotiating condition and never called it into question.

174. On 29 August, after the player travelled to Dubai, he received an unexpected phone call informing him that the negotiations were terminated because the Club had managed to sign Gustavo Cuellar.

175. The Club claims that the negotiations were terminated because (i) the Club's Intermediary had no power to bind the Club; (ii) the Player played for Corinthians in a football match on 29 August 2019 therefore risking injury; (iii) the Player did not use the plane tickets bought by the Club to travel to Dubai; and (iv) the Player did not arrive in Dubai on time to perform the necessary medical examinations.

176. The Sole Arbitrator understands that the Player's expectations that he would be signed by the Club were frustrated and notes the less than positive nature and timing of the communication of the Club's decision to end the negotiations.

177. The Sole Arbitrator is also not convinced by the arguments presented by the Club and fails to understand their relevance in terms of the abrupt termination of negotiations.

178. As far as the Player's participation in a football match is concerned, it is relevant that the Player was still legally bound by his employment contract with Corinthians. Furthermore, the participation of the Player in the match on 29 August 2019 was never discussed by the Parties. Moreover, the match was very important as it was a quarter-finals match in the "Copa Sudamericana". The risk of the Player being injured was understandable, but he was not in fact injured and played well in the match, which had a positive effect on the Player's image.

179. The fact that the Player did not use the tickets provided by the Club in order to travel to Dubai is also irrelevant, because the Player arrived in Dubai on 30 August 2019 at about 05:10am (UAE Time) instead of arriving in Dubai on 29 August 2019 at 10.55pm (UAE Time). The small time difference between the actual and original times of the Player's arrival in Dubai (i.e. he arrived 6 hours and 5 minutes later than he would have arrived on the flight booked by the Club) cannot be an acceptable reason for loss of interest in the Player, particularly as both flights arrived in Dubai at night.

180. The difference between the flight arrival times is irrelevant in terms of the conduct of the medical examinations, which were schedule to take place on 30 August 2019. According to the witness El Yaagoubu Mohammed, the Club had booked facilities at the clinic for the medical exams for the entire day. The Sole Arbitrator therefore considers that the change of the flight and the resulting change of arrival times is immaterial.

181. In the Sole Arbitrator's opinion, the manner in which the Club terminated the negotiations was not in line with good practices, particularly as the Player had agreed to travel to Dubai for the medical examinations requested by the Club. The Club should, considering the advanced stage of the negotiations and the specific circumstances of the case, have received the Player in Dubai and have explained the situation to him. The Club should have behaved with greater

transparency and have explained to the Player that it had (expectedly or unexpectedly) found a more satisfactory solution, and had therefore decided to terminate the negotiations.

182. The Sole Arbitrator notes regarding the violation of pre-contractual duties, that, in this case, the negotiations were called off by the Club, which did so at an unexpected time (i.e. immediately upon the Player's arrival in Dubai) and in an unexpected way (by a mere telephone call, as the Sole Arbitrator confirmed from the evidence of the witnesses Guilherme Miranda and El Yaagoubu Mohammed).

183. There is no doubt that the negotiations were terminated at the instance of the Club, in a surprising and improper manner, i.e. by a mere telephone call, which, in the opinion of the Sole Arbitrator, is, to some extent, a failure to comply with the ethical standards required in negotiations.

184. Regardless of the non-binding nature of the Offer, the Parties' conduct shows that the negotiations were well underway, and that agreement had been reached regarding the main terms of the employment contract. This was demonstrated by the Club when it sent the air tickets to the Player and scheduled the medical examinations in Dubai; and, by the Player when he travelled to Dubai and arrived in time for the medical examinations on 30 August 2019, regardless of the travel vicissitudes noted.

185. Nevertheless, the Sole Arbitrator notes that, notwithstanding the improper way in which the Club terminated the negotiations, the situation is not such as to give rise to pre-contractual liability. Moreover, even if this case did involve precontractual liability, the liability in question would be limited to the reimbursement of expenses incurred in relation to the negotiations, because the Club always stressed the non-binding nature of both the Offer, and the ongoing negotiations.

186. Considering the above, the Sole Arbitrator considers that the Club (and the Player) were entitled to terminate the negotiations at any time.

187. Although the Player had expectations of being hired, it is nevertheless clear that he did not accept the entire Offer unconditionally. The Sole Arbitrator notes that (i) the Player did not terminate his contract with Corinthians; (ii) did not stop playing matches for Corinthians, e.g. the match on August 29, 2019; (iii) gave an interview in which he was not conclusive about his future; (iv) avoided using the tickets sent by the Club on his trip to Dubai, to ensure that he had a broad autonomy regarding the decision to sign with the Club.

188. The Players comments in the said interview are particularly noteworthy:

"What's really missing is signing. Everything happened very fast today. Because I was concentrated, focused on the match, I could not stop to think about it. Now the adrenaline will low down, I will meet with my agents, Corinthians and family in order to take a decision. In a few hours or at least in one day, the windows will close, it will be defined" (emphasis added by the Sole Arbitrator).

189. Despite the statement of the witness Carlos Gilberto Nascimento Silva that the Player said goodbye to his teammates

after the football match on 29 August 2019, the post-match interview transcribed above appears to contradict the witness' evidence, and does not reflect a fully formed intention, or reliance.

190. While the Sole Arbitrator recognises that the Club did not behave correctly when it terminated the negotiations, it is also true that the Player's expectations could not have amounted to the absolute belief that he would be signed. The Player's belief in (or reliance on) the making of the employment contract does not merit protection, as it was always limited by the non-binding nature of the Offer, as the Player's actions show. Had this not been the case, the Player would not have left for Dubai without first ending his contractual relationship with the Corinthians and would have done everything possible to request the issue of new tickets or requested an immediate refund of the tickets the Player's Intermediary had paid for.

191. In any case, and even if the Player was entitled to compensation for the abrupt and surprising manner in which the Club ended the negotiations, this would only result in the payment of direct damages, as if there had been no negotiations, as established by the decision of the Swiss Supreme Federal Court ("SFT"), ATF 105 II 75, consid. 3:

"Bei Haftung aus culpa in contrahendo ist das negative Interesse zu ersetzen. Der Geschädigte hat Anspruch auf Ersatz des Schadens, der ihm aus dem von der Gegenpartei erweckten Vertrauen auf das Zustandekommen eines Vertrages erwachsen ist (…) Entgegen der Auffassung der Klägerin geht es daher nicht an, die schuldige Partei so zu behandeln, wie wenn ein Vertrag mit ihr abgeschlossen worden wäre, sie also zum Ersatz des positiven Vertragsinteresses zu verpflichten".
FREE TRANSALTION FROM GERMAN
"In the case of liability from culpa in contrahendo, the negative interest is to be compensated. The injured party is entitled to compensation for the damage that he has suffered as a result of the trust placed in the conclusion of a contract by the other party (…) Contrary to the plaintiff's view, it is therefore not a question of treating the party at fault as if a contract had been concluded with it, i.e. of obliging it to compensate for the positive interest in the contract".

192. According to the case law of the SFT and CAS, in cases of *culpa in contrahendo* only the negative interest, i.e. the losses sustained and costs incurred, deserve protection. Therefore, the Player would only be entitled to be compensated for the damage caused by the Club to him. Damages are therefore limited to quantifiable losses as if there had been no negotiations (e.g. costs incurred such as travelling expenses, legal fees, etc.). The concept of *"negative interest"* does not include loss of profits (as claimed by the Player), i.e. the amounts that the Player would have earned if the negotiations had been successfully concluded.

193. Moreover, the Sole Arbitrator notes that the Player did not submit any expenses that could be considered in this regard. In fact, it was clarified by the Player's Intermediary, at the hearing, that the travel costs to Dubai were borne by him.

194. The Sole Arbitrator concludes, in the light of all of the above, that the prerequisites of liability based on *culpa in contrahendo* are not met in this case and that no compensation is therefore owed by the Club to the Player on that basis.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Gabriel Girotto Franco on 23 June 2021 against the decision issued by the FIFA Dispute Resolution Chamber Judge passed on 6 May 2021 is dismissed.

2. The decision of the FIFA Dispute Resolution Chamber Judge passed on 6 May 2021 is confirmed in full.

3. (…).

4. (…).

5. All other motions or prayers for relief are dismissed.

CAS 2023/A/9806
Santo Condorelli v. World Aquatics
10 June 2024

Panel: The Hon. Annabelle Bennett AC SC (Australia), Sole Arbitrator

Aquatics (swimming)
Change of sport nationality
Interpretation of the waiting period requirement for a change of sport nationality under the new rules
Conditions for a change of nationality under the new rules
Condition of application of the transitional provision under the new rules
Exception to the normal operation of the new rules

1. **Article I.3.3.1 of the World Aquatics Competition Regulations of 21 February 2023 (the "New Rules"), in line with the by-law to Rule 41 of the Olympic Charter, provides that an athlete seeking a change of sport nationality *"shall not be entitled to represent any World Aquatics Member at International Competitions during"* a three-year waiting period. Properly construed, the New Rules apply to a waiting period of three years between representation of the relevant existing Aquatics Member and the proposed new Aquatics Member. The three-year waiting period starts from the last day that the athlete wishing to change sport nationality represented the existing Member and precludes a change in sport nationality taking effect within three years from that date.**

2. **Under Article I.3.3.1 of the New Rules, the application to change sport nationality should be granted if: (i) the waiting period is complied with; (ii) the applicant has the citizenship of the new Aquatics Member and (iii) the applicant resided for at least three years prior to the athlete's first International Competitions or demonstrated by the end of the waiting period at the latest, that s/he has a genuine, close and established link to the country or Sport Country the applicant will represent. Thus, at the expiration of the waiting period, where there is no challenge to the satisfaction of the other requirements in Article I.3.3.1 of the New Rules (citizenship of the new Member and uninterrupted residence), the application to change sport nationality should be granted by World Aquatics.**

3. **The transitional provisions of the New Rules (Article I.3.6) provide that, to be able to rely upon the previously enforced 2019 FINA General Rules which only required a one-year waiting period, an applicant is required to demonstrate that s/he has initiated the process of change of sport nationality before the entry into force of the New Rules (21 February 2023). Absent any evidence in this respect, the athlete cannot avail himself of the transitional provisions of the New Rules.**

4. **The requirement of 'exceptional and unforeseen circumstances' provided for in Article I.3.4 of the New Rules is conjunctive rather than disjunctive. Both need to be satisfied. In addition, it should be noted that if the IOC had wished to include a general exception to the three-year waiting period to account for the delayed 2020 Olympic Games – that took**

place in 2021 –, it could have done so. Therefore, the postponed 2020 Olympic Games should not be considered as an exception for the purposes of Article I.3.4 of the New Rules warranting a departure from the normal application of the New Rules.

I. PARTIES

1. Mr Santo Condorelli ("Mr Condorelli" or the "Appellant") is a 29-year-old elite swimmer. He represented the United States in the early stages of his career, from 2012 to 2014. He then represented Canada from 2015 to 2016, including at the 2015 World Championships and 2016 Olympic Games in Rio de Janeiro. In 2018, he began competing for Italy, based on his father's Italian heritage. He competed for Italy at the 2020 Olympic Games, held in Tokyo in 2021.

2. World Aquatics (the "Respondent") is the international federation recognised by the International Olympic Committee for administering international competitions in water sports.

3. Mr Santo Condorelli and World Aquatics are referred hereinafter as the "Parties".

II. FACTUAL BACKGROUND

A. Application for change of sport nationality

5. The Appellant was born in Japan to a Canadian mother and an American father. He was raised and attended school in the United States. As mentioned above, he has, at different times, represented the United States, Canada and Italy.

5. He seeks to change his sport nationality back to the United States prior to the 2024 Olympic Games. He has resided in the United States for more than three years, having lived there for most of 2020 and 2021 and having trained there prior to the 2020 Olympic Games and since that event. The asserted reasons given by the Appellant for this change back to a United States sport nationality relate to personal and family matters.

6. On 12 June 2023, USA Swimming submitted a request to World Aquatics for a change of sport nationality in respect of the Appellant in favour of the United States.

B. Decision of World Aquatics

7. On 22 June 2023, World Aquatics notified USA Swimming that it had denied the application. The stated basis for World Aquatic's refusal to grant the request was that Article I.3.3.1 of the World Aquatics Competition Regulations of 21 February 2023 (the "New Rules") provides that an athlete shall observe a waiting period of three years between the last representation for the existing World Aquatics Member and the first representation for the new World Aquatics Member.

8. World Aquatics noted that the Appellant had represented Italy internationally on 30 July 2021 at the Tokyo Olympic Games and that the application did not, as at 22 June 2023, comply with the waiting period requirement.

C. Decision of the Bureau

9. On 14 July 2023, the Appellant expressed interest in having the decision of World Aquatics consulted by the World Aquatics Bureau (the "Bureau"). He filed a request for Bureau consultation on 4 August 2023.

10. By its decision of 3 October 2023 (the "Bureau Decision"), the Bureau denied the Appellant's request. The Appellant's personal circumstances in support of the requested change were expressly acknowledged by the Bureau as justifying the application, which notes that the Appellant is *"nearly obliged to reside in the United States for family reasons"*. Nonetheless, the basis of the denial was, as stated above, the three-year waiting period as provided in Article I.3.3.1 of the New Rules.

11. The Bureau also noted the following matters:

    - The transitional provisions of the New Rules (Article I.3.6) provide that, to be able to rely upon the previously enforced 2019 FINA General Rules which only required a one-year waiting period, an applicant was required to demonstrate that they had initiated the process of change of sport nationality before the entry into force of the New Rules (21 February 2023). The Bureau Decision stated that the Appellant did not establish that he had expressed an intent to change his sport nationality before that date.

    - The fact that the Appellant could be prevented from taking part in an edition of the Olympic Games by applying the New Rules was not a decisive factor. The new provisions, as well as transitional arrangements, operated so as to make the applicable rules clear from the beginning of 2024 (before the World Aquatics Championships in Doha).

    - The newly-defined waiting period of three years is consistent with the by-law to Rule 41 of the Olympic Charter. That by-law provides that a competitor who has represented one country in the Olympic Games, and who has changed his/her nationality or acquired a new nationality, may participate in the Olympic Games to represent a new country, provided that at least three years have passed since the competitor last represented his/her former country.

    - There is a distinction between an athlete's sport nationality and the place of living and training. Nothing prevents the Appellant from continuing to take part in international competitions while representing Italy and training and residing in the United States.

    - If the application were granted, the Appellant could be the first swimmer to represent three different countries at three consecutive Olympic Games. This, the Bureau determined, is a kind of 'forum shopping' which warrants regulation.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT (THE "CAS")

12. By a Statement of Appeal dated 13 July 2023, the Appellant appealed the 22 June 2023 decision of World Aquatics to the CAS.

13. On 19 July 2023, the Appellant informed the CAS Court Office that World Aquatics had agreed that the Bureau would be consulted in respect of the Appellant's case pursuant to Article I.3.4 of the New Rules. The Parties agreed that, subject to approval by the CAS, this appeal would be stayed pending the decision of the Bureau. On 20 July 2023, the CAS granted the Appellant's request to stay this appeal.

14. The Bureau delivered its decision on 3 October 2023, affirming the denial of the national transfer request.

15. On 13 October 2023, the Appellant filed his Appeal Brief.

16. On 17 October 2023, the stay of the appeal procedure was lifted.

17. On 27 October 2023, World Aquatics requested an extension of its deadline to file its Answer, to 13 November 2023. That extension was granted, and World Aquatics subsequently filed its Answer on 13 November 2023.

18. On 15 and 21 November 2023 respectively, World Aquatics and the Appellant informed the CAS Court Office that they did not consider a hearing to be necessary and that the appeal could be determined on the papers.

19. On 7 December 2023, the Appellant informed the CAS Court Office that he agreed to have the matter heard by a sole arbitrator.

20. On 14 December 2023, the Parties advised that they had agreed to the appointment of the Hon. Dr. Annabelle Bennett AC SC as the Sole Arbitrator.

21. On 12 March 2024, the CAS Court Office informed the Parties that pursuant to Article R54 of the Code of Sports-related Arbitration ("CAS Code"), and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the Panel appointed to decide this proceeding is constituted as follows:

    Sole Arbitrator: The Hon. Dr. Annabelle Bennett AC SC, Barrister in Sydney, Australia

22. On 13 March 2024, the CAS Court Office, on behalf of the Sole Arbitrator, who had considered the Parties' recent exchange of submissions and their respective positions to a hearing, informed the Parties that, pursuant to Article R57 of the CAS Code, the Sole Arbitrator deemed herself sufficiently well-informed to decide this case based solely on the Parties' written submissions, without the need to hold a hearing. Accordingly, unless there was anything further that either Party wished to put before the Sole Arbitrator by way of evidence or submission, in which case they should submit a request to that effect on or before 20 March 2024, the Sole Arbitrator would proceed with the drafting of the Award.

23. On 14 March 2024, the CAS Court Office acknowledge receipt of the Respondent's correspondence of the same date, whereby it alleged that it does not have anything further to contribute.

24. On 18 March 2024, the CAS Court Office requested on behalf of the Sole Arbitrator that the Parties provide further submissions concerning the relevance of whether the Appellant may be eligible to represent the United States as at the 2024 Olympic Games, which was initially agreed as being in excess of the three year period from the last event in which he had competed in Tokyo, noting that World Aquatics submitted that the US Olympic Trials will take place within the three year period. The Parties provided their responses to that request on 29 March 2024.

25. Mr Condorelli's submissions included a recognition that a decision might be made by the Sole Arbitrator that he would be deemed eligible to compete for the United States at some point between 25 and 30 July 2024 and therefore, he asserted, he would be eligible to compete for the United States in some portion of the swimming events at the 2024 Olympic Games. In its submissions, World Aquatics acknowledged Mr Condorelli's submission as to such an expiry date for the three-year waiting period and eligibility to compete at the Olympic Games. World Aquatics' submissions in this regard referred to eligibility to compete at the Qualifying Competition, that is the USA Swimming Trials, as not being within those dates and repeated its submissions as to the timing of the application to change nationality and the fact that Mr Condorelli has changed nationality a number of times.

26. The Sole Arbitrator was provided by Mr Condorelli with an email dated 27 March 2024 that confirmed that USA Swimming would abide by whatever decision World Aquatics made on eligibility, including any decision that the CAS makes regarding his eligibility, as the CAS decision would be binding on World Aquatics.

27. On 13 May 2024, the CAS Court Office, on behalf of the Sole Arbitrator, submitted an Order of Procedure to the Parties, which they returned and signed respectively on 17 and 22 May 2024.

IV. SUBMISSIONS OF THE PARTIES

28. The Sole Arbitrator has read and takes into account all of the submissions of the Appellant and Respondent and refers here to the salient matters in order set out the gravamen of the submissions. The Sole Arbitrator will refer in the merits section of the Award to those matters necessary, in the opinion of the Sole Arbitrator, to explain her reasoning.

A. Summary of the Appellant's submissions

29. The Appellant's initial argument is that he is able to take advantage of one-year waiting period in the 2019 FINA General Rules because he satisfied the transitional requirements of the New Rules. That is, he had initiated his process of change of sport nationality before the entry into force of the New Rules and had relied on the old rules in planning his 2023-2024 competitive season. He relies on an email between the wife of his former coach and the North Texas Swimming LSC Services Manager which noted that he was no longer representing Italy.

30. The Appellant points to the timing of the publication of the New Rules, in that their announcement and publication took place on 22 March 2023. He says

that USA Swimming administrators have confirmed that they did not receive notice of the potential rule change until mid-February 2023.

31. He submits that enforcing the amended rule immediately from its enactment date makes it *"virtually impossible"* for an athlete who competed in the 2020 Olympic Games (held in 2021) to meet the three-year waiting period prior to the 2024 Olympic Games. That is, had the Covid pandemic not resulted in a year's delay of the holding of the 2020 Olympic Games, the Appellant would have satisfied the three-year waiting period before the commencement of the 2024 Olympic Games.

32. Further, the Appellant relies on Article I.3.4 of the New Rules which provide that in *"exceptional and unforeseen circumstances"*, the Executive Director may consult the Bureau on the application of the rules to an athlete's particular case. In support of such an application, the Appellant submits that his father's serious illness makes it exceedingly difficult if not impossible for him to live or train outside the United States. He has also provided evidence to the effect that he has resided in the United States through *"most of"* 2020 and 2021 and that his permanent mailing address, such as for mail, driving licence, healthcare providers and insurance are all in the Portland, Oregon metropolitan area.

33. The Appellant also responded to the Bureau's conclusion that he could still take part in international competitions representing Italy. The Appellant submits that this ignores the need to travel, including to foreign selection competitions, required training camps and other obligations. He also submits that an application of Article I.3.4 of the New Rules in his circumstances would not divert from the stated intended purposes of the amendment such as the need to have a genuine, close and established link to the country or sport country that he will represent. He says that such a link is clearly present in his case, including by reason of him growing up and being educated in the United States and his residence in the United States for the previous three years.

B. Summary of the Respondent's submissions

34. World Aquatics contends that the legal scope of this appeal is concerned with the Bureau's decision to reconsider the initial decision based on exceptional circumstances under Article I.3.4 of the New Rules. However, World Aquatics does not rely on this procedural limitation and does not object to an examination of its 22 June 2023 decision on the merits.

35. With respect to the 22 June 2023 decision, World Aquatics submits that the Appellant did not initiate his change in nationality proceedings before the New Rules came into effect and, accordingly, he must satisfy the three-year waiting period. His application was first submitted to World Aquatics on 12 June 2023, some four months after the New Rules came into effect on 21 February 2023. It says that the Appellant has failed to meet the mandatory three-year waiting period between the last representation for Italy and the requested representation for the United States, which means that he does not satisfy the requirements in Article I.3.3.1 of the New Rules and therefore, subject

to Article I.3.4, it was correct to reject the change of sport nationality application.

36. With respect to the Bureau's Decision, World Aquatics submits that, if the Executive Director does consult the Bureau under Article I.3.4 of the New Rules, the Bureau has *"complete discretion and flexibility"* in determining the application of the New Rules to an athlete's case. It says that CAS jurisprudence affords deference to the autonomy of a sports federation in that:

    - The Sole Arbitrator is to determine whether the decision violates the association's statutes or mandatory legal rules or amounts to an improper use of the association's discretionary power: CAS 2022/A/8708 at para 111.

    - It is not the Sole Arbitrator's role to 'second guess' a sports federation's decision: CAS 2020/A/7090 at paras. 147-151.

37. In the present case, World Aquatics draws attention to the purpose behind the New Rules, namely to preserve integrity and fairness and to ensure a genuine and thoughtful connection to the country chosen by the athlete to represent and to prevent 'forum shopping'.

38. World Aquatics points out that the process for an application to change sports nationality did not change with the New Rules. Indeed, the process and the initiating form were nearly identical to that completed by the Italian Swimming Federation in connection with the Appellant's previous nationality transfer from Canada to Italy on 17 September 2018.

39. World Aquatics submits that there is nothing to prevent the Appellant from continuing to reside and train in the United States while continuing to represent Italy. In that regard, it submits that he will be required to travel for training and competition regardless of the country that he represents. Recognising that the Appellant may have a personal preference to abstain from travel and reside in the United States, especially to be with, and care for, his father, World Aquatics says that 'inconvenient' circumstances are not to be conflated with 'exceptional' circumstances. It submits that the illness of the Appellant's father does not constitute an exceptional circumstance that warrants deviation from the sport nationality regulations.

40. In any event, World Aquatics contended that, while the swimming events at the Paris Olympics will begin on 27 July 2024, the Olympic trials for the United States will occur from 15 June 2024 until 23 June 2024 and there was no question that the trials would be within the three-year waiting period. Thus, it says, the timing of participation in those trials is incompatible with the New Rules.

C. Requests for relief

41. The Appellant's requests for relief set out in his Appeal Brief of 12 October 2023 are as follows:

    "7.1.1 That the denial of the World Aquatics Bureau be set aside; and
    7.1.2 That Appellant's request for transfer of nationality be granted so that he may train and complete as a member of USA Swimming".

42. World Aquatics' requests for relief set out in its Answer of 13 November 2023 were as follows:

"1. The Appeal of Mr. Condorelli is dismissed. 2. The Appealed Decision by the Bureau of 3 October 2023 denying a request for a change of sport nationality of Mr. Condorelli is upheld. 3. Mr. Condorelli shall bear the costs of the present arbitration and reimburse World Aquatics' outside counsel legal fees and other expenses".

V. JURISDICTION

43. Article R47 para. 1 of the CAS Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".

44. Article 31 of the World Aquatics Constitution provides for the jurisdiction of the CAS to resolve disputes between World Aquatics and, *inter alia*, athletes in respect of decisions of World Aquatics. Article 31.2 provides:

"31.2 Provided no internal legal remedy is available, any appeal against a final decision of World Aquatics shall be submitted to the exclusive jurisdiction of CAS within twenty-one (21) Days from the date of the decision being appealed. Unless otherwise specified in the applicable World Aquatics Rules, an appeal shall not have suspensive effect: subject to any other decision by CAS, the decision being appealed shall therefore remain in full force. World Aquatics is entitled to file an appeal to CAS against any final and binding decision of a body of World Aquatics".

45. There was no dispute that the Sole Arbitrator had jurisdiction to hear the present appeal. Each party fully participated in these proceedings without objection as to jurisdiction.

46. The Sole Arbitrator is satisfied that she has jurisdiction over the appeal.

VI. ADMISSIBILITY

47. Article R49 of the CAS Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late".

48. Article 31.2 of the World Aquatics Constitution (extracted above) provides a 21-day deadline for a party to file an appeal to the CAS.

49. As mentioned above, the Appellant filed his Statement of Appeal in respect of the 22 June 2023 decision of World Aquatics on 13 July 2023. That was within the 21-day deadline in Article 31.2 of the World Aquatics Constitution. The 22 June 2023 decision made by World Aquatics was a final decision, in the sense that neither the World Aquatics Constitution nor the New Rules provided for an internal legal remedy or appeal as of right. The decision of the Executive Director whether or not to consult the Bureau is

not, under the New Rules, capable of appeal.

50. Following referral of the Appellant's case to the Bureau, and the Bureau's 3 October 2023 decision denying the Appellant's nationality transfer, the stay of this appeal was lifted. The appeal proceeded thereafter as an appeal of the decision of the Bureau.

51. There is no challenge by World Aquatics to the admissibility of the appeal. The appeal is admissible.

VII. APPLICABLE LAW

52. Article R58 of the CAS Code provides as follows:

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

53. In this proceeding, the 'applicable regulations' are the World Aquatics Constitution and the New Rules.

54. Article 31.3 of the World Aquatics Constitution provides:

> *"31.3 The CAS shall resolve any dispute in accordance with the Code of Sports-related Arbitration (the "CAS Code"), this Constitution, the applicable World Aquatics Rules and subsidiarily Swiss law".*

55. Accordingly, Swiss law applies subsidiarily to the World Aquatics Constitution and the New Rules.

VIII. MERITS

A. Applicable Provisions of relevant rules

a) New Rules

56. World Aquatics' current rules with respect to change of nationality are found in the New Rules. The New Rules were approved on 21 February 2023 with immediate entry into force.

57. Articles I.3.3.1, I.3.4 and I.3.6 of the New Rules provide (emphasis added):

> *"3.3. Change of Sport Nationality*
>
> *3.3.1 Any Athlete that intends to change his/her Sport Nationality from one World Aquatics Member to another ("New World Aquatics Member") shall request World Aquatics' approval, which will be granted under the following requisites:*
> - *the Athlete shall observe a waiting period of three years between the last representation for the Member and the first representation for the New World Aquatics Member. The Athlete shall not be entitled to represent any World Aquatics Member at International Competitions during this waiting period; and*
> - *the Athlete shall be a citizen by birth or naturalization of the country or Sport Country he/she will represent; and*
> - *the Athlete shall have uninterrupted residence in the country or Sport Country of the*

New World Aquatics Member for at least three years prior to his/her first International Competitions or shall be able to demonstrate by the end of the waiting period at the latest, that he/she has a genuine, close and established link to the country or Sport Country he/she will represent.

…

3.4. Bureau Consultation

In a case of eligibility or Sport Nationality possessing exceptional and unforeseen circumstances, the Executive Director may consult the Bureau on the application of these rules to an Athlete's particular case. The Executive Director's decision to not consult the Bureau is not appealable.

…

3.6 Enforcement

The present rules will come into force immediately on 21 February 2023 and will not have retroactive effect. They will apply to all eligibility and change of sport nationality matters filed with World Aquatics as from 21 February 2023. The World Aquatics Office may apply the previously enforced rules on sport nationality during a transitory period until 31 December 2023 at the latest, if the World Aquatics Member and/or Athlete demonstrates that the Athlete had initiated his/her process of eligibility or change of sport nationality before the entry into force of these new rules and that he/she relied upon the old rules on eligibility and sport nationality to organize his/her career. Such evidence may notably consist of correspondence related to an Athlete's change of sport nationality exchanged between the World Aquatics Member and World Aquatics before the entry into force of these new rules".

b) 2019 FINA General Rules

58. World Aquatics' previously enforced rules on sport nationality were the 2019 FINA General Rules. The requirements for a change of sport nationality, contained in Article GR 2 of those rules, were less demanding. In substance, they required the relevant athlete to be a citizen of the new country and have resided in the territory of, and been under the jurisdiction of, that country for at least 12 months prior to the first representation for that country. Under Article GR 2.6.2, athletes were not permitted to represent either country during their transfer period.

59. Relevantly, Articles GR 2.5, 2.6 and 2.7 of the 2019 FINA General Rules provided (emphasis added):

*"**GR 2.5** When a competitor or competition official represents his/her country in a competition, he/she shall be a citizen, whether by birth or naturalisation, of the nation he/she represents, provided that a naturalised citizen shall have lived in that country for at least one year prior to that competition. Competitors, who have more than one nationality according to the laws of the respective nations must choose one "Sport Nationality". This choice shall be exercised by the first representation of the competitor for one (1) of the countries.*
As an additional requirement for the Sport Countries, when a competitor or competition official is eligible to represent a Sport Country (within the meaning of FINA rule C 3.17), the Competitor or competition official shall establish the specific link with the Sport Country by one (1) of the following documents: (i) Birth certificate of the Competitor or competition

official in the Sport Country; or (ii) Proof of current residency for at least twelve (12) months in the Sport Country (as provided in FINA Rule GR 2.6.1); or (iii) Birth certificate of the mother, father, grandmother or grandfather of the Competitor or competition official in the Sport Country.

GR 2.6 *Any competitor or competition official changing his sport nationality from one national governing body to another must have resided in the territory of and been under the jurisdiction of the latter for at least twelve months prior to his first representation for the country.*

…

GR 2.6.2 *Proof of Jurisdiction*

1) Certified membership in a club of the new country

2) Confirmation from the FINA Member of that country

3) Official result lists from national championships, national, regional or international club competitions in which the applicant has participated for his/her "new" club during the GR 2.6 requested time.

4) *Applicants cannot represent any of the countries during the "transfer period"*

5)

GR 2.7 *Any application for change of affiliation must be approved by FINA".*

c) Olympic Charter

60. The provisions of the Olympic Charter concerning the nationality of competitors at Olympic Games was also raised by the Bureau and in this appeal. The current version of the Olympic Charter is in force as from 15 October 2023. That version post-dates World Aquatics' and the Bureau's consideration of the Appellant's application. The version in force at the times of those decisions was the 8 August 2021 version.

61. The relevant rule concerning nationality of competitors – Rule 41 – is identical in each version of Olympic Charter and provides (emphasis added):

41 Nationality of competitors*

1 Any competitor in the Olympic Games must be a national of the country of the NOC which is entering such competitor.

2 All matters relating to the determination of the country which a competitor may represent in the Olympic Games shall be resolved by the IOC Executive Board.

Bye-law to Rule 41

1 A competitor who is a national of two or more countries at the same time may represent either one of them, as he may elect. However, after having represented one country in the Olympic Games, in continental or regional games or in world or regional championships recognised by the relevant IF, he may not represent another country unless he meets the conditions set forth in paragraph 2 below that apply to persons who have changed their nationality or acquired a new nationality.

2. A competitor who has represented one country in the Olympic Games, in continental or regional games or in world or regional championships recognised by the relevant IF, and who has changed his nationality or acquired a new nationality, may participate in the Olympic Games to represent his new country provided that at least three years have passed since the competitor last represented his former country. This period may be reduced or even cancelled, with the agreement of the NOCs and IF concerned, by the IOC Executive Board, which takes into account the circumstances of each case.

3 If an associated State, province or overseas department, a country or colony

acquires independence, if a country becomes incorporated within another country by reason of a change of border, if a country merges with another country, or if a new NOC is recognised by the IOC, a competitor may continue to represent the country to which he belongs or belonged. However, he may, if he prefers, elect to represent his country or be entered in the Olympic Games by his new NOC if one exists. This particular choice may be made only once.

4 Furthermore, in all cases in which a competitor would be eligible to participate in the Olympic Games, either by representing another country than his or by having the choice as to the country which such competitor intends to represent, the IOC Executive Board may take all decisions of a general or individual nature with regard to issues resulting from nationality, citizenship, domicile or residence of any competitor, including the duration of any waiting period.

62. The Sole Arbitrator notes that paragraph 2 of the by-law to Rule 41 of the Olympic Charter has required a three-year waiting period (with the discretion for reduction or cancellation) since at least the version effective from 8 July 2011. The evidence was that the Appellant first represented the United States in 2012. Therefore, the three-year waiting period in the Olympic Charter has been in force throughout the Appellant's entire international swimming career.

B. Matters not in dispute

63. There is no dispute as to the following:

- The Appellant has resided in, and trained in, the United States for at least the last three years.
- The New Rules, which mandated a waiting period of three years between the last representation for a country and the first representation for a new country, came into force on 21 February 2023.
- The New Rules provide that the previously enforced rule (2019 FINA General Rules), requiring a waiting period of one year, may be applied during a transitory period that expired on 31 December 2023.
- The Appellant competed in the 2020 Olympic Games for Italy. His first event in Tokyo was on 25 July 2021. His last event was on 30 July 2021.
- USA Swimming's application to World Aquatics for a change of sport nationality for the Appellant was first submitted to World Aquatics on 12 June 2023. This was clearly after the New Rules came into effect but before the 31 December 2023 deadline for any application of the transitory period.
- The application was denied by World Aquatics by letter dated 22 June 2023.
- The denial was confirmed by the Bureau on 3 October 2023.

C. The date at which expiry of the three-year waiting period is determined

64. In its decision by letter dated 22 June 2023, World Aquatics stated the following (emphasis added):

"In particular, according to Art. 3.3.1 of the Competition Regulations, an athlete shall observe a waiting period of three years between the last representation for the Member and the first representation for the New World Aquatics Member. The Athlete shall not be entitled to represent any World Aquatics Member at International Competitions during this waiting period. In the present case, we note that the Athlete represented Italy internationally on 30 July 2021 at the occasion of the Olympic Games Tokyo 2020. Therefore, the Athlete does not comply at the current time with the waiting period requirement".

65. This letter is somewhat ambiguous as to the date at which the three-year period is to be determined. World Aquatics rejected the Appellant's request without reference to the date on which it was proposed that he would first represent the United States in an international competition. The letter is also unclear as to whether the consideration was as at the date of the application for a change of sport nationality or the proposed first representation of the United States. Again, there was no reference in the letter to the dates of the 2024 Olympic Games.

66. From the New Rules, the period of time for the prescribed waiting period is *"between the last representation for the Member and the first representation for the New World Aquatics Member"* (Article I.3.3.1).

67. The proper interpretation of this phrase was the subject of a request by the Sole Arbitrator for further information and submissions which, in turn, elicited a detailed response about the Appellant's ability to take part in the trials for the selection of athletes to represent the United States for the 2024 Olympic Games. Those trials are to be conducted in June 2024. That will be fewer than three years after the Appellant last competed for Italy.

68. Article I.3.3.1 of the New Rules also provides that an athlete seeking a change of sport nationality *"shall not be entitled to represent any World Aquatics Member at International Competitions during"* the three-year waiting period. It has not been asserted that the USA Olympic trials, of themselves, are an 'international competition' within the meaning of the New Rules. The Sole Arbitrator notes that that term is defined in Article I.2.1 of the New Rules as follows:

2.1 An International Competition shall refer to any competition organised or sanctioned by World Aquatics, any Continental or Regional Organisation or any Member in which other World Aquatics-recognised Federations, clubs or individuals participate.

69. The Sole Arbitrator is of the opinion that, properly construed, the New Rules apply to a waiting period of three years between representation of the relevant World Aquatics Members. Here, the relevant Members are Italy as the existing Member and the United States as the proposed new Member. The Sole Arbitrator is of the view that the three-year waiting period dates from the last day that the Appellant represented Italy and precludes a change in sport nationality taking effect within three years from that date.

70. The last competition at which the Appellant represented Italy was the 2020 Olympic Games. His first event in Tokyo was on 25 July 2021. His last event was on 30 July 2021.

71. It is to be noted that the 2024 Olympic Games are scheduled from 26 July to 11 August 2024, during which the three-year waiting period expires. The Parties did not make submissions as to whether the calculation of the three-year waiting period is inclusive or exclusive of the date on which the Appellant last competed for Italy. In the absence of such analysis, the waiting period would seem to continue until 11.59 pm on 29 July 2024.

D. Satisfaction of Article I.3.1.1 of the New Rules

72. The New Rules provide that, at the expiration of the waiting period, unless there is another impediment, World Aquatics will grant the application to change sport nationality. There has been no challenge to the satisfaction of the other requirements in Article I.3.3.1 of the New Rules (citizenship of the United States and uninterrupted residence).

E. Whether the Appellant initiated any process before 21 February 2023

73. The Appellant says that he is able to avail himself of the less demanding one-year waiting period contained in the 2019 FINA General Rules because he initiated his process of change of sport nationality before the New Rules entered into force (i.e. before 21 February 2023).

74. Relevantly, he says that he made his intention to change his sport nationality clear as early as 23 May 2022 and that this is supported by an email from the wife of his former coach to the North Texas Swimming LSC Services Manager on 23 May 2022. That email states that the Appellant *"is no longer representing Italy"* but does not state which country he intends to represent.

75. There is no suggestion that the above correspondence was sent to World Aquatics or that World Aquatics was aware of it at the time, or that the Appellant had made some inquiry of World Aquatics as to his nationality transfer following this email and prior to the application by USA Swimming of 12 June 2023. The email did not include the requisite forms to apply for a change of sport nationality, nor did it refer to a change in sports nationality. World Aquatics submits that the email *"can hardly be considered an affirmative initiation by Mr Condorelli to change his sporting nationality"*. World Aquatics rejects the suggestion that this email was effective to initiate change in nationality proceedings such as to take advantage of the transitional provisions in Article I.3.6 of the New Rules.

76. World Aquatics points out in its submissions that the filing process for a change of sporting nationality did not change with the introduction of the New Rules. The World Aquatics website chronicles the required process, which is commenced when World Aquatics receives a series of documents from an athlete's new national federation (here, USA Swimming) or from the athlete himself/herself. The first document to be submitted to World Aquatics is the official request template titled *"Application for a change of Sport Nationality -Official request of the new World Aquatics Member"*. This form existed prior to New Rules coming into effect.

77. Article I.3.6 of the New Rules provides that the New Rules apply to all eligibility and change of sport nationality matters

"filed with World Aquatics" as from 21 February 2023. However, the World Aquatics Office *"may"* apply the previously enforced rules until 31 December 2023 if:

- the relevant World Aquatics Member and/or athlete demonstrates that the athlete had initiated his/her process of eligibility or change of sport nationality before the entry into force of the New Rules; and
- that the athlete relied upon the old rules on eligibility and sport nationality to organise their career.

78. The Article identifies evidence which may be relied upon to prove these matters, including correspondence exchanged with World Aquatics before the New Rules came into force.

79. The Sole Arbitrator considers that the references to *"filed with World Aquatics"* and correspondence exchanged with World Aquatics indicates that an 'initiation' of a process to enliven the transitional provisions of Article I.3.6 of the New Rules requires initiation of the relevant process with World Aquatics.

80. As to the Appellant's reliance on the email, there are a number of problems in considering it as the initiation of the process of a change of sport nationality:

- The email was not sent to World Aquatics.
- There is no evidence that the email was brought to the attention of World Aquatics or that World Aquatics otherwise had knowledge of the email or its contents.
- The email only states that the Appellant is no longer representing Italy. Other than an inference arising from the nationality of the sender and recipient of the email (both, presumably, United States), there is no statement as to the country which the Appellant sought to represent.
- The email does not state, by fact or inference, that it represents an application to change sport nationality, or the initiation of that process.
- There was no communication from the Appellant or USA Swimming to World Aquatics in connection with an application to change sport nationality until 12 June 2023, when USA Swimming filed a formal application.
- There was no communication seeking to follow up on, or any reference to, any earlier initiation of the process.
- The onus to establish that the initiation of the process took place prior to the coming into effect of the New Rules lies on the Appellant.

81. The evidence does not establish that the Appellant made an application to World Aquatics, or notified World Aquatics of his intention to apply, for a change of sport nationality prior to 21 February 2023, when the New Rules came into force. The Sole Arbitrator concludes that the Appellant cannot avail himself of the transitional provisions of the New Rules (Article I.3.6).

F. Article I.3.4 of the New Rules

82. The next question is whether an exception to the normal operation of the New Rules should be made pursuant to Article I.3.4 of the New Rules, which provides:

"In a case of eligibility or Sport Nationality possessing exceptional and unforeseen circumstances, the Executive Director may consult the Bureau on the application of these rules to an Athlete's particular case. The Executive Director's decision to not consult the Bureau is not appealable".

a. Proper interpretation of the provision

83. As a first comment, the Sole Arbitrator notes that there is some ambiguity in this provision. In that regard:

- The provision could be construed to suggest that the Executive Director is only able to consult the Bureau where exceptional and unforeseen circumstances have been established (which, if correct, would suggest that by in fact consulting the Bureau, the existence of such circumstances has been admitted).
- The provision does not make clear what the Bureau's function is to be when it is 'consulted' on the application of the rules. For example, it is not clear on the face of the provision whether consultation involves the Bureau making an entirely new decision or simply providing a view (so that World Aquatics may reconsider its original decision in light of any guidance from the Bureau). If the former, the provision is also ambiguous as to whether the Bureau is empowered to determine 'whether' the rules should be applied or only 'how' they should be applied.

84. It is evident that the Bureau made a new decision. The letter of 3 October 2023 notifying the Appellant of the Bureau's decision stated:

Based on the foregoing, the Bureau confirmed the decision rendered by the World Aquatics Office on 22 June 2023 and rejected the Athlete's request on 12 June 2023 to change his Sport Nationality in favour of the United States of America.

85. The Appellant has submitted that his exceptional circumstances *"warrant"* the grant of his request for a change of nationality. It is implicit in this submission that the Appellant's position is that there is an element of discretion and evaluative analysis of the circumstances relied upon by the Appellant.

86. The position taken by World Aquatics is that Article I.3.4 of the New Rules gives the Bureau *"complete discretion and flexibility in its recognition of such circumstances"* but that the 'exceptional' circumstance relied upon by the Appellant is not one which *"warrants deviation from World Aquatics' change in sport nationality regulations"*.

87. The Sole Arbitrator understands these submissions to mean that, at least for the purposes of this appeal, the Parties accept that Article I.3.4 of the New Rules requires:

- consideration of whether 'exceptional and unforeseen circumstances' have been established; and
- if so, an evaluation of such circumstances and whether they

warrant a departure from the normal application of the New Rules in the manner requested by the applicant.

b. Existence of 'exceptional and unforeseen circumstances'

88. The Appellant submits that the circumstances of his father's serious illness – which would make it exceedingly difficult if not impossible for him to live or train outside the United States at this time, present 'exceptional and unforeseen circumstances' under which his request for change of nationality should be granted.

89. The Sole Arbitrator does not accept this submission. The Sole Arbitrator acknowledges the gravity of the Appellant's father's health issues, and it is possible that health issues such as these could be considered 'exceptional' for the purposes of Article I.3.4 of the New Rules. However, that provision also requires the relevant circumstances to be 'unforeseen'. The requirement of 'exceptional and unforeseen circumstances' is conjunctive rather than disjunctive. Both need to be satisfied.

90. The Appellant has not demonstrated – in either his submissions or his evidence – how his father's illness was unforeseen in the relevant sense. There is no evidence of the timing of diagnosis of particular health conditions or how they relate to the timing of the Appellant's application to change sport nationality. The Appeal Brief indicated that it was language difficulties along with his father's illness that motivated the Appellant to seek to change his sporting nationality back to the United States.

c. Evaluation of circumstances

91. Even if the Appellant's father's health issues were considered 'exceptional and unforeseen' in the relevant sense, the Sole Arbitrator does not consider that they warrant departure from the normal application of the New Rules. The Sole Arbitrator would therefore reject the Appellant's application in any event.

92. The Sole Arbitrator acknowledges the Appellant's evidence that he has established genuine, close and established links with the United States and that he has lived in the United States since at least 2020. The Sole Arbitrator understands that these matters were not raised by the Appellant as their own 'exceptional and unforeseen circumstances', but in support of a submission that granting him an exception to the normal application of the New Rules would not subvert their intended purpose. Indeed, these are included as prerequisites to a change of sport nationality and are not exceptional or unforeseen circumstances in themselves.

93. Nonetheless, they are relevant in evaluating the Appellant's case. Relevantly, the negative effects of the increased three-year waiting period could have been avoided if the Appellant had filed his application for change of sport nationality with World Aquatics in a timelier fashion. No good reason, other than an apparent belief that he could avail himself of a one-year waiting period, was given for the delay. Notably:

- As mentioned above, the Olympic Charter rules in force since at least 2011 have provided for a three-year waiting period. When the

Appellant changed his sports nationality from Canada to Italy, he did so via a request by the Italian Swimming Federation (Federazione Italiana Nuoto) to FINA made on 17 September 2018. That application indicated that the Appellant's last representation for Canada was on 12 August 2016, being the 50 metres freestyle semi-final at the 2016 Rio de Janeiro Olympic Games. It appears reasonably likely that the Appellant would have become aware during this process of the three-year waiting period in the Olympic Charter rules relating to change of sport nationality.

- Similar to the circumstances of his previous transfer, the Appellant has not represented Italy since his last event at the 2020 Tokyo Olympic Games, on 30 July 2021. The evidence does not indicate whether his non-representation of Italy at any subsequent competitions was a conscious decision so that the Appellant might be able to change sport nationality for the 2024 Olympic Games. The 23 May 2022 email on which the Appellant has relied at least suggests that he had formed a decision no longer to represent Italy from that date. The Appellant could have made an application for change of sport nationality at any time from that date.

- Finally, it appears that, even if the Appellant's transfer application were granted, the three-year waiting period contained in the Olympic Charter would still apply. The Sole Arbitrator acknowledges, in the Appellant's favour, that the Olympic Charter retains a discretion for the IOC Executive to reduce or cancel that waiting period with the agreement of the National Olympic Committees and International Federation concerned. It would not be appropriate to speculate on whether that might occur.

94. As World Aquatics points out, irrespective of the country to be represented, Mr Condorelli would be obliged to leave his home to train and to compete between now and when the waiting period expires.

95. Mr Condorelli says that the waiting period means that no athlete who competed in the 2020 Olympic Games held in 2021 can complete the waiting period prior to the enabling of that athlete to compete in the 2024 Olympic Games. He says that this supports his case for a deviation from the normal application of the New Rules. However, this must have been in the contemplation of World Aquatics in drafting the New Rules taking effect in 2023 and applies to all athletes. The amendments to the rules brought the World Aquatics rules in line with those under the Olympic Charter. It is noted that the three-year waiting period in the Olympic Charter was also affirmed in the 8 August 2021 version – shortly after the completion of the 2020 Tokyo Olympic Games. If the International Olympic Committee had wished to include a general exception to the three-year waiting period to account for the delayed 2020 Olympic Games, it could have done so.

96. There has been some reference, for example in the Bureau Decision, to a possibility of 'forum shopping' and that the Appellant could be the first swimmer to represent three different countries at three consecutive Olympic Games. While the Bureau has suggested that this warrants regulation, no relevant regulation was cited. Neither the New Rules nor the Olympic Charter place any limitation on the number of countries an athlete may represent throughout their career. This matter has no bearing on the Sole Arbitrator's evaluation of circumstances to determine whether or not the New Rules should be applied to the Appellant.

G. Eligibility to compete at the US Olympic Team Trials

97. The remaining matter to be mentioned concerns the Appellant's ability or inability to participate in the US Olympic Team Trials Swimming on 15-23 June 2024, in light of the fact that he will be eligible to represent the United States part way through the upcoming Olympic Games. The Parties have provided the Sole Arbitrator with correspondence and information concerning those trials.

98. The USA Swimming 2024 Rulebook (the "Rulebook") relevantly provides at Rule 207.5:

> *"Only United States citizens eligible to represent the United States on the Olympic or World Championship teams may compete in these Trials".*

99. This suggests that the US Olympic Team Trials are not an 'international competition' within the definition of Article I.2.1 of the New Rules.

100. The USA Swimming Athlete Selection Procedures for the 2024 Olympic Games (the "Selection Procedures") provide at Section 1 and 1.1 (emphasis added):

> *"1.1. Provide the minimum eligibility requirements for an athlete to be considered for Nomination to the Team: To be considered for Nomination to the Team, an athlete must, at the beginning of the Qualifying Competition and at the time of Nomination to the Team, meet the following criteria:*
> *1.1.1. Nationality/Passport requirements:*
> *(a) Athlete must be eligible to represent the United States in the Olympic Games; and Athlete must hold a valid U.S. passport and be able to represent the U.S. in an international competition at the time of the Qualifying Competition. That passport must not expire for six months after the conclusion of the Olympic Games".*

101. The 'Official Event Information' of the US Olympic Team Trials states on page 5:

> *Eligibility*
> *All athletes who compete at the Trials should have a U.S. passport valid through January 31, 2025, so please plan accordingly.*
> *To compete in the Trials, a swimmer must also:*
> - *be a U.S. citizen who is eligible to represent the USA in the 2024 Olympic Games, and;*
> - *be a currently registered Premium member of USA Swimming in good standing, and;*
> - *have achieved a qualifying time standard between November 30, 2022, through the entry deadline (qualifying time standards are published in this document). Qualifying time standards*

are long course only. All entry times must be proven through the USA Swimming SWIMS Database.

Any athlete who has represented another country must submit change of sport nationality approved by World Aquatics to [...]@usaswimming.org) prior to the entry being accepted.

102. World Aquatics submits that, without its approval of the Appellant's nationality change, the Appellant does not have the requisite standing to compete in the US Olympic Team Trials. World Aquatics submits that the effect of the Rulebook and Selection Procedures is that the Appellant must be eligible to represent the United States in international competitions at the time of the trials, i.e. from 15 to 23 June 2024. Those dates are over one month prior to the end of the Appellant's designated three-year waiting period as determined by the Sole Arbitrator above.

103. The Appellant draws attention to correspondence from USA Swimming: *"if World Aquatics determines that the athlete is eligible to represent the US in international competition as of the US Olympic Team trials - Swimming, we will allow him to enter the competition"*.

He submits that, should the Sole Arbitrator set aside the decision of the Bureau and grant his transfer request such that he will be deemed eligible to compete for the United States at some point between 25 and 30 July 2024 (and therefore be eligible to compete for the United States in some portion of the swimming events at the 2024 Olympic Games), his understanding is that USA Swimming will not permit him to compete in the Olympic Trials in June 2024. The Appellant advises that he does not accept that decision (by USA Swimming) and, if that decision were made, he would appeal a negative decision.

104. Mr Condorelli has outlined the matters that he would put to USA Swimming in that circumstance.

105. The decision of USA Swimming whether to permit Mr Condorelli to participate in the Trials, following a decision of the Sole Arbitrator that Mr Condorelli is entitled to change his sport nationality as of 30 July 2024, is not the subject of this proceeding and the Sole Arbitrator does not have the requisite jurisdiction to make that decision.

H. Conclusion

106. For the foregoing reasons, the decision of World Aquatics, affirmed by the Bureau should be set aside. The application by USA Swimming to change the Appellant's sport nationality to the United States is granted, with effect from 30 July 2024 (inclusive).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr. Santo Condorelli on 13 July 2023 against the decision of World Aquatics of 22 June 2023, affirmed by the World Aquatics Bureau on 3 October 2023, is admissible and partially upheld.

2. The decision of World Aquatics of 22 June 2023, affirmed on 3 October 2023

by the World Aquatics Bureau, is set aside.

3. The application submitted by USA Swimming to World Aquatics, and also submitted by Mr. Santo Condorelli to the World Aquatics Bureau, to change his sport nationality to the United States of America is granted, with effect from 30 July 2024 (inclusive).

4. (…)

5. (…)

6. Any other or further requests for relief are dismissed.

CAS 2023/A/9827
Hapoel Tel Aviv FC v. Vasilije Bakic
26 November 2024

Panel: Mrs Carmen Núñez-Lagos (Spain), Sole Arbitrator

Football
Breach of the offer to conclude an employment contract by the offeror club
Legal nature of an offer to conclude an employment contract and consequences of the failure to comply with it
Methodology of calculation of the compensation
Reduction of the compensation based on Article 44 CO
Period of payment of salaries

1. **The offer of a club to engage a player containing all essential requirements, i.e. the fact that it is in writing, the date, the identity of the player, the duration of the contract and the remuneration as well as the validity period of the offer, is a unilateral promise of an employment contract. If such offer was signed and accepted by the player within the period laid down by the club, in the event of the club's failure to comply with the unilateral promise of contract, the club's failure maybe regarded as a wrongful dismissal, which entitles the player to compensation.**

2. **Even though a club's failure to comply with the unilateral promise of contract is not the breach of an employment contract without just cause but is to be considered as a wrongful termination of a promise, the damages caused can be calculated under different methodologies, including the one foreseen under article 17 of the FIFA Regulations on the Status and Transfer of Players when a contract is terminated without just cause.**

3. **Article 44 of the Swiss Code of Obligations (SCO) allows the reduction of compensation if there are circumstances attributable to the injured party that helped to give rise to or increase the damage. However, if the failure to comply with the unilateral promise of contract is only due to the club's fault and not to the player's behaviour, there are no grounds to reduce the compensation based on Article 44 SCO.**

4. **In the context of an employment relationship in football, it is expected that the employer pays not only for competition months, but also preseason and vacation period (*i.e.*, a period of twelve months).**

I. PARTIES

1. Hapoel Tel Aviv FC, (hereinafter the "Appellant" or the "Club") is an Israeli football club affiliated to the Israel Football Association ("IFA"), which in turn is a member of the Fédération International de Football Association ("FIFA").

2. Mr Vasilije Bakic (hereinafter the "Respondent" or the "Player") is a professional football player of Serbian nationality.

3. The Appellant and the Respondent are jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts and allegations based on the Parties' submissions and evidence. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, the Sole Arbitrator refers only to the submissions and evidence it considers necessary to explain its reasoning.

A. Background of the dispute

5. On 23 January 2023, the Club sent to the Player's previous club FK Kolubara Lazarevac ("Kolubara") a letter of interest to engage the Player for the 22/23 and 23/24 seasons, against the payment of a transfer fee of EUR 100,000. The offer was subject to the execution of a valid employment contract between the Club and the Player.

6. On the same date, the Club sent the Player an "Official Offer" (the "Offer") according to which the Club offered to engage the Player for the 22/23 and the 23/24 football season and until 10 January 2025, for a monthly net salary of:

   i. EUR 7,000 for the 2022/2023 football season (January-May 2023);

   ii. EUR 11,500 for the 23/24 season; and

   iii. EUR 12,500 for the 24/25 football season.

7. In addition, the Club agreed to pay a signing fee of EUR 7,500 *"on date of signature contract"*.

8. The Player was also offered a bonus of one-month net salary, in case the Club: (i) won the championship of the Israeli League; (ii) qualified to European competitions; or (iii) won the State Cup of Israel. Finally, the Offer stated that the Club *"will provide the Player apartment, car and medical insurance, flight tickets for the player and his family, all according to its* [sic] *own discretion (round trip)"*.

9. The Offer was subject to three conditions stated in Clauses 8 and 10:

   "8. This is subjected [sic]to the execution of a valid employment agreement between Hapoel and the Player for the seasons 22/23 and 23/24, and for a valid transfer agreement between Hapoel and Tobol Kostanay FC".

   "10. This agreement is subjected [sic] to Player successfully passes medical examinations and Physiological tests in Israel".

10. The Offer was to expire on 25 January 2023.

11. The Player signed the Offer and stated that he *"officially accept[s] and confirm[s] the above"*.

12. On 24 January 2023, the Club and Kolubara entered into an *"Agreement for the Permanent Transfer of Professional Football Player"* (the "Transfer Agreement") according to which Kolubara permanently transferred the entirety of the Player's economic and federative rights to the Club, for EUR 100,000. The Transfer Agreement explicitly stated in its Clause 5 that:

   5.1 Notwithstanding anything to the contrary in this Agreement, the permanent transfer of the Player as contemplated by this Agreement shall be subject to and conditional upon the Accepting

Club having signed a contract of employment with the Player.

5.2 In the event no employment contract between the Player and the Accepting Club was not conclude [sic] and not come into force, this Transfer Agreement will be void and with no effect and the Transferring Club will have no compensation's entitlement and it will have no claims and/or demands".

13. On 26 January 2023, the Player arrived to Israel and was subject to a medical examination in Medix Medical Centre. The cardiac examination report certified that the Player was *"fit to engage in activities under some restrictions"* and was *"[r]eferred to a cardiac consultation, including echo-stress test, Holter and Cardiac in order to evaluate and rule out a cardiac structural or electrical abnormality"*. On the same day, according to the Player, an *"echo-stress test, Holter and Cardiac MRI"* was conducted on the Player at the Sourasky Medical Center.

14. On 27 January 2023, the Club sent to the Player a draft of a "Player Agreement Form" (the "Agreement Form") for the Player's review and approval. In accordance with its Preamble, *"the Team and the Player are signing or will sign concurrently on the Association's Players Agreement Form (hereinafter: the "Agreement Form") that is submitted for the Authority's approval"*.

15. On the same day, the Player replied through his counsel that the Agreement Form included the following fundamental differences with the Offer which were not acceptable to the Player:

    1. The Club's option to terminate the employment contract with immediate effect prior to 31 May 2023, with just cause in case of *"any change to the corporate and/or ownership structure of the owner of the Club Poealy Tel Aviv Holdings LTD"* (clauses 1.6-1.7 of the Agreement Form)

    2. The Player's obligation to pay by himself any mount of training compensation, financial claims or demands by any third party that may be imposed on the Club related to his transfer to the Club and any such obligations shall be deducted unilaterally from his salaries (clause 2.4 and 2.6 of the Agreement Form)

    3. Any alleged not accurate medical representation to be considered as a fundamental breach that shall entitle the Club to unilaterally terminate the employment contract with "just cause" (clause 9.1 of the Form).

16. The Club responded that *"most of the remarks are not accepted and in particular when it comes to fundamental clauses"*.

17. A meeting took place on 29 January 2023 between the Parties, to no avail.

18. On 31 January 2023, the Club informed the Player that *"the Club decided not to conclude an agreement and no valid (or any) employment agreement was signed"*. The Club argued that the Player had refused to perform the additional tests required to complete the medical examinations:

"The MRI's test were not clear and unequivocal, and they were according to the report the Club asked you to perform another tests – Echo and Holter monitor. Due to your sole circumstances you refused to do such medical tests and alongside, to the best of the Club's knowledge, your former club demanded from you to return back, and therefore the Club was prevented to

complete its medical examinations and was not able to ensure you are healthy and in proper medical activity sate (sic), before signing valid employment agreement".

19. On 9 February 2023, the Player responded through his counsel that the Offer contained each and every essential details to conclude a final and binding contract but *"unfortunately, upon the Player's arrival in Israel, Hapoel demanded to change essential parts in the Contract"*. The Player informed the Club that *"due to Hapoel's refusal to accept the Player's services despite that a valid Contract was signed by the Parties, Hapoel is hereby liable for the early and unilateral termination of the Contract without just cause during the protected period"* and claimed the payment of EUR 223,270 at 5% annual interest from 1 February 2023 until the date of effective payment.

20. On 13 February 2023, the Club rejected the Player's arguments regarding the existence of a valid and binding contract between the Parties and refused to pay the amounts claimed by the Player.

21. The Respondent returned to its former club Kolubara and played for the remaining of the 22/23 season, earning a monthly salary of RSD 200,000 (the "Kolubara Contract").

22. Later on, on 16 June 2023, the Player signed a *"Professional Playing Agreement"* with the Serbian club, FK Radnički Niš, from 26 June 2023 to 31 December 2025, for a monthly net salary of EUR 350, a special monthly wage of EUR 1,310 per month, based on the Player's experience, and "special fees" during the performance of the agreement, for a total of EUR 70,000, to be paid in 8 instalments (the "Radnički Contract").

B. Proceedings before the FIFA's Dispute Resolution Chamber (Ref. n. FPSD-9718)

23. On 23 March 2023, the Player lodged a claim before the FIFA Dispute Resolution Chamber (the "FIFA DRC" or the "Chamber") based on the Club's unilateral termination of the employment agreement without just cause and claimed the payment of compensation. In essence, the Player requested:

"1. FIFA DRC shall accept the claim of the Claimant.

2. FIFA DRC shall order the Respondent to pay to the Claimant ***EUR 221,631 net*** *as Compensation, plus 5% interest p.a. as from 1 February 2023 until the date of effective payment.*

3. FIFA DRC shall impose sportive sanctions on the Respondent".

24. In its answer, the Club requested:

"1. To declare that the Respondent and the Claimant did not enter in to a binding and valid employment contract.

2. Accordingly, to dismiss the Claimant's Claim in its entirety.

3. ***Alternatively****, and even if the DRC finds that the Respondent had a final, binding and valid employment contract - to declare that Player breached the contract by refusing to complete the medical tests in order to receive a permit to participate in football activities organized by IFA, allowing the Club to terminate the agreement with just cause;*

Or to decide that the contract was null and void since the Player did not pass the mandatory

medical examination and could not be registered in IFA.

4. ***Alternatively to the alternative****, decide that the Player is not entitled to any compensation further than the compensation for the 2022/23 season and that he is also not entitled to any interests.*

5. ***In any event****: to Order the Claimant to reimburse the Respondent all and any amount of legal fees and any other costs and expenses incurred by the Respondent in these proceedings".*

25. On 22 June 2023, the FIFA DRC rendered its Decision (the "Appealed Decision") and decided that:

"1. The claim of the Claimant, Vasilije Bakic, is partially accepted.

2. The Respondent, Hapoel Tel Aviv Football Club, must pay to the Claimant the following amount(s):

- ***EUR 211,796.70 as compensation for breach of contract without just cause*** *plus 5% interest p.a. as from 1 February 2023 until the date of effective payment.*

3. Any further claims of the Claimant are rejected.

4. Full payment (including all applicable interest) shall be made to the bank account indicated in the ***enclosed*** *Bank Account Registration Form.*

5. Pursuant to art. 24 of the Regulations on the Status and Transfer of Players, if full payment (including all applicable interest) is not made ***within 45 days*** *of notification of this decision, the following* ***consequences*** *shall apply:*

1. The Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid. The maximum duration of the ban shall be of up to three entire and consecutive registration periods.

2. The present matter shall be submitted, upon request, to the FIFA Disciplinary Committee in the event that full payment (including all applicable interest) is still not made by the end of the three entire and consecutive registration periods.

6. The consequences ***shall only be enforced at the request of the Claimant*** *in accordance with art. 24 par. 7 and 8 and art. 25 of the Regulations on the Status and Transfer of Players.*

7. The decision is rendered without costs".

26. The grounds of the Appealed Decision were notified to the Parties on 7 July 2023. With regards to the merits, the FIFA DRC determined that:

- The Offer indeed represents a valid and binding employment contract, since it contains the *essentialia negotii* specific to this type of contracts: (i) duration of the agreement; (ii) subordination of the employee to the employer; (iii) personal performance; (iv) wages; and (v) the signature of both Parties.

- The validity of an employment agreement shall not be subject to a successful medical examination, as stated in Article 18(4) of FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP"). Consequently, the FIFA DRC rejected the arguments of the Respondent related to the non-signature of the final contract.

- The FIFA DRC ruled that the Club had terminated the Contract without just

cause, by its correspondence of 1 February 2023.

27. With regards to compensation, the FIFA DRC decided that the Club was liable for a total of EUR 242,838.70, from the date of its unilateral termination until its end date

28. In addition, as the Player found employment with Kolubara, with an approximate total salary of RSD 3,640,000 for the overlapping period, the Player mitigated damages in the total amount of EUR 31,042. Therefore, the Club must pay the amount of EUR 211,796.70 to the Player (*i.e.*, EUR 242,838.70 minus EUR 31,042), as a reasonable and justified amount of compensation for breach of contract in the present matter.

29. An interest on said compensation at the rate of 5% p.a. as of 1 February 2023 until the date of effective payment.

30. The FIFA DRC concluded that the Player was entitled to receive an amount of EUR 211,796.70 as compensation for breach of contract without just cause plus the annual interest of 5% from 1 February 2023 until the date of the effective payment.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

31. On 19 June 2023, in accordance with Article R48 of the Code of Sports-related Arbitration (the "Code") (2023 edition), the Appellant filed its Statement of Appeal before the Court of Arbitration for Sport ("CAS") against the Respondent with respect to the Appealed Decision.

32. On 25 July 2023, the CAS Court Office acknowledged receipt of the Statement of Appeal and, *inter alia,* also invited the Respondent to inform whether he agrees to the appointment of a sole arbitrator.

33. Still on 25 July 2023, pursuant to Article R41.3 of the Code, the CAS Court Office invited FIFA to inform whether it intended to participate as a party in the present arbitration, within ten (10) days.

34. On 27 July 2023, the Respondent informed that he did not object to submit the case a sole arbitrator, and to English as the language of the procedure.

35. On 2 August 2023, the CAS Court confirmed that the sole arbitrator would be appointed by the Division President, or her Deputy, pursuant to Article R54 of the Code, as indicated in the letter dated 25 July 2023.

36. On 3 August 2023, FIFA informed CAS that it would not intervene in the proceedings.

37. On 16 August 2023, the Appellant filed its Appeal Brief within the previously extend deadline.

38. On 5 October 2023, the Respondent filed his Answer within the previously extended deadline.

39. On 9 October 2023, the CAS Court Office invited the Parties to inform by 16 October 2023 whether they preferred for a hearing to be held or for the Sole Arbitrator to issue an award solely based on the Parties' written submissions.

40. On the same date, the CAS Court Office also informed the Parties that pursuant to Article R54 of the Code, and on

behalf of the Deputy President of the CAS Appeals Arbitration Division, that the Panel appointed in the present dispute had been constituted as follows:

Sole Arbitrator: Ms Carmen Núñez-Lagos, Attorney-at-law in Paris, France.

41. On 16 October 2023, the Respondent informed that it was unnecessary to hold a hearing.

42. On 26 October 2023, the Appellant requested to hold a hearing in the present matter.

43. On 8 January 2024, the CAS Court Office informed that the Sole Arbitrator considered herself sufficiently well-informed to render an Award based on the Parties' submissions, without the need to hold a hearing. In addition, the CAS Court Office sent the Order of Procedure to the Parties and invited them to send it signed by 15 January 2024.

44. On 9 January 2024, the Appellant requested a second round of written submissions.

45. On 12 January 2024, the CAS Court Office invited the Respondent to file his comments on the Appellant's request on a second round of written submissions no later than 17 January 2024.

46. On 16 January 2024, the Respondent opposed to the second round of submissions requested by the Appellant.

47. On 17 January 2024, the CAS Court Office informed that the Sole Arbitrator had decided to grant the Appellant's request on a second round of written submissions. Accordingly, the Appellant was invited to file its Reply, of maximum 3 pages, which it did on 7 February 2024, within the deadline granted.

48. On 20 March 2024, the Respondent filed his Rejoinder, within the relevant deadline granted.

49. On 12 April 2024, the CAS Court Office informed that the Sole Arbitrator confirmed her previous decision to render an Award based on the Parties' submissions, without the need to conduct a hearing. In addition, the CAS Court Office sent an updated Order of Procedure to the Parties and invited them to send it signed by 17 April 2024.

50. On 14 April 2024, both the Appellant and the Respondent returned a signed copy of the Order of Procedure.

IV. THE PARTIES' SUBMISSIONS

A. The Appellant's submissions and requests for relief

51. The Appellant argues that the Appealed Decision should be overturned in full as a binding employment contract was not concluded nor signed by the Parties and the Offer was subject to mandatory conditions that were not fulfilled. Consequently, the Appellant did not terminate an employment contract without just cause, and the Respondent was not entitled to receive compensation. As an alternative, the Appellant claims the amount due should be reduced.

52. The Appellant sustains that a final and binding employment contract was not concluded nor signed, considering that:

- The Offer is not a valid and binding employment contract, at most, it is a precontract. Even if it contains the

essentialia negotii, the Offer was subject to: (i) the Player's medical examination; and (ii) the signing of an Employment contract.

- The Transfer Agreement was also subject to the signing of a valid employment agreement. Therefore, the Parties expressly agreed that the Offer does not represent a final employment contract, in accordance with Article 7.1 Swiss Code of Obligations ("SCO").

- The Parties never reached an agreement on the final draft of the employment contract, and consequently the first pre-condition was not fulfilled. The signature of an Agreement Form is a necessary step to complete the registration of a player, and such document must be approved by the IFA Budgetary Control Authority. The Offer is therefore not a valid employment contract in Israel since it does not fulfil the requirements of the Agreement Form.

- The Player refused to complete his medical examinations in violation of the condition stated in the Offer, Israeli law and FIFA Regulations, according to which, medical are mandatory. Since the Player only completed part of the mandatory tests required by the corresponding cardiologist, the employment contract could not be entered into.

- Article 18(4) FIFA RSTP is not applicable in this case since the Offer was not an employment contract, but a precontract. In accordance with the Commentary on the FIFA RSTP, as well as FIFA and CAS jurisprudence, a medical examination is a legitimate condition to conclude a final employment contract between the Parties.

- The Club acted in good faith and wanted to close the transfer of the Player. The Club invested thousands of dollars in expenses, in order to sign a binding employment contract with the Player. Nevertheless, the Player acted in bad faith and refused to complete the medical examinations, as it was agreed in the Offer.

53. For all the above reasons, the FIFA FDRC wrongly concluded that the Contract was terminated without just cause. The Club was not bound to the Offer without the prior fulfilment of the valid conditions agreed between the Parties. As a result, it was entitled not to proceed with the transaction.

54. In the alternative, the Appellant asserts that the Player breached the employment contract, based on the Player's refusal to complete further medical tests. As a consequence, the Appellant concludes that it was entitled to terminate the employment contract with just cause:

    - In accordance with FIFA RSTP, a player cannot refuse the employer's demand to undergo medical tests. Such behaviour from a player entitles the employer to terminate the employment contract, under Article 11(1) RSTP.

    - The tests were necessary for the Player's registration before IFA, and his participation in training and football games.

55. As a second alternative, the Appellant argues that the compensation granted by

the FIFA DRC must be amended, in accordance with two different grounds.

56. First, the Appellant considers that the compensation shall be reduced in accordance with the general principle of damage mitigation and Article 17(1)(ii) FIFA RSTP:

- FIFA DRC only deduced the amounts that the Player would have earned from Kolubara from February 2023 to 30 June 2024. However, days prior to the issuance of the Appealed Decision, the Player joined the Serbian club FK Radnički Niš, for a remuneration in the overlapping period of EUR 77.885 (i.e. until 10 January 2025). As a consequence, CAS shall deduce these new amounts from the compensation granted by the FIFA DRC. The Club estimates such compensation in the amount of EUR 130.099.

- CAS case law allows arbitrators to deduct any new playing contracts entered into after the FIFA DRC from the compensation awarded. Due to the *de novo* power of review provided for by Article R57 of the Code, the Sole Arbitrator shall reduce the compensation awarded by the FIFA DRC.

57. Second, the Appellant sustains that the Respondent's conduct during the execution of the medical examination justifies the reduction of the compensation:

- The Appellant explains that CAS panels tend to mitigate the amounts of compensation based on Article 44 SCO, upon the specific. The Respondent's refusal to cooperate with the medical examinations justifies an adjustment of the compensation.

- The Player was accompanied by experienced lawyers during the negotiations of the Offer. Still, the Player accepted that the employment contract was subject to two conditions. If these two conditions had not been agreed by the Parties, no damages would have occurred. Consequently, the Respondent contributed to his own damage.

58. The Appellant also requests to overturn the Appealed Decision regarding the payment of interests. The Appellant explains that FIFA DRC ordered to pay interests from 1 February 2023 until the effective payment date, even though most of the sums awarded as compensation would have been paid in 2024 and 2025. The Appellant sustains that interest shall be paid from the date each payment was due in accordance with the Offer, instead of from 1 February 2023.

59. Finally, the Appellant opposes to the additional compensation requested by the Respondent in his Answer. The Appellant explains that the Respondent did not appeal the Appealed Decision, and consequently he is not entitled to claim an additional compensation at this stage of the proceedings. The Appellant recalls that CAS is prevented from granting compensation beyond what was decided in the Appealed Decision.

60. In its Statement of Appeal, the Appellant submits the following requests for relief:

"8.1. ***As a primary requests****:*

a. To annul and set aside the Decision passed on 22 June 2023 by the DCR.

b. To declare that under the circumstances, that the parties did not enter into a binding and valid employment contract.

c. Accordingly, to decide that the Respondent is not entitled to any compensation from the Appellant

*8.2. **Alternatively**: If the CAS finds that the Appellant and the Respondent had a final, binding and valid employment contract – then CAS is requested to declare that:*

a. the Respondent breached the contract, by refusing to complete the medical tests in order to receive a permit to participate in football activities organized by the Israeli Football Association. His failure and refusal to complete the medical tests, allowed the Club to terminate the agreement with just case; Or:

b. To decide that the contract was frustrated and could not be implemented and could not executed since the Respondent did not pass the mandatory medical examinations and could not be registered with Club (due to his intentional omission) under the Israeli Football Association.

c. Accordingly, to decide that the Respondent is not entitled to any compensation from the Appellant.

*8.3. **Alternatively to the alternative**: In case the CAS shall decide that the parties concluded a valid and binding employment contract that was terminated by the Respondent without just cause, the CAS is required to:*

a. Reduce the compensation awarded to the Player in the Appealed Decision, by mitigating the value of his employment agreement/s for the 2023/24 season and for the 2024/25 season until 1 February 2025.

b. Decide that interests shall be added to the amount awarded to the Player, only from the date each payment was due in accordance with the agreement and not from 1 February 2023.

*8.4. **In any case**:*

The CAS is required to order the Respondent to pay the Appellant a contribution towards its legal and other costs, in an amount to be determined at the discretion of the Panel or of the Sole Arbitrator".

61. In the Appeal Brief, the Appellant amended its requests for relief, in the following terms:

*"**As a primary requests**:*

114.1. To annul and set aside the Decision passed on 22 June 2023 by the DCR.

114.2. To declare that under the circumstances, that the parties did not enter into a binding and valid employment contract.

114.3. Accordingly, to decide that the Respondent is not entitled to any compensation from the Appellant

***Alternatively**: If the Sole Arbitrator finds that the Appellant and the Respondent had a final, binding and valid employment contract – he is requested to declare that:*

*114.4. the Respondent breached the contract, by refusing to complete the medical tests in order to receive a permit to register with the Appellant and participate in football activities organized by the Israeli Football Association. His failure and refusal to complete the medical tests, allowed the Club to terminate the agreement with just case; **Or**:*

114.5. To decide that the contract was frustrated and could not be implemented and

could not executed since the Respondent did not pass the mandatory medical examinations and could not be registered with Club (due to his intentional omission) under the Israeli Football Association.

114.6. Accordingly, to decide that the Respondent is not entitled to any compensation from the Appellant.

***Alternatively to the alternative**: In case the CAS shall decide that the parties concluded a valid and binding employment contract that was terminated by the Respondent without just cause, the Sole Arbitrator is required to:*

114.7. Reduce the compensation awarded to the Player in the Appealed Decision, by mitigating the value of his employment agreement/s for the 2023/24 season and for the 2024/25 season until 1 February 2025.

114.8. To further reduce the compensation awarded to the Player based on the merits of the case and Article 44 SCO.

114.9. Decide that interests shall be added to the amount awarded to the Player, only from the date each payment was due in accordance with the agreement and not from 1 February 2023.

*8.4. **In any case**:*

The Sole Arbitrator is required to order the Respondent to pay the Appellant a contribution towards its legal and other costs;"

B. The Respondent's submission and request for relief

62. The Respondent refutes the Appellant's allegations regarding the grounds for reduction of the compensation awarded by the FIFA DRC.

63. The Respondent insists that the Offer is a valid and binding employment contract between the Parties, as decided by the FIFA DRC. In addition, the Respondent denies that this contract was subject to the conclusion of any further agreement, and sustains that the medical examination does not affect its validity:

- The Offer is an employment contract since it contains the *essentialia negotii* and the Parties' signatures. In accordance with CAS and FIFA jurisprudence, the *essentialia negotii* of a valid employment contract shall include: (i) name of the parties; (ii) an object; (iii) duration of the employment relationship; (iv) a salary; and (v) signatures. The Offer fulfils such requirements.

- The Offer is not a precontract. According to case law, a precontract exists when the parties have not yet agreed on the essential elements of the contract. In consequence, the Appellant is expected to provide factual evidence that demonstrates the Parties intention to conduct further negotiations after the Player's medical examination and before the final contract was concluded. However, the Appellant failed to do so.

- The employment contract was valid and binding. The Parties relied on the signature of the Offer as a valid contract. During the negotiations between the Parties, the Club never mentioned the IFA standard contract, nor other "budgetary control" documents. The Club required to sign the

Agreement Form after the signature of the Offer, with significant amendments to the fundamental contractual terms previously agreed in the Offer.

- Clause 8 of the Offer is ambiguous and invalid. The phrase *"[t]his is subjected to the execution of a valid employment agreement"* is unclear since it is unknown what the word *"this"* refers to. In addition, this clause pertains to the execution of a valid transfer agreement between the Club and Tobol Kostanay FC, a football club from Kazakhstan that was not involved in this transaction. Therefore, the Offer shall be interpreted against the Club in application of *in dubio contra proferentem* principle.

- The medical examination did not affect the validity of the contract. In accordance with Article 18(4) FIFA RSTP, a contract's validity may not be subject to a successful medical examination. According to the Commentary on the FIFA RSTP, clubs must undertake all appropriate steps before concluding a contract. This is not contradicted by Israeli law nor UEFA Medical Regulations. Therefore, clause 10 of the Offer is illegal.

- Nevertheless, the Player successfully passed all medical examinations, including the additional heart tests mentioned by the Appellant, on 26 January 2023. The evidence of the record supports such circumstance, with no complaints from the Appellant related to this matter. Conversely, the Club sent the Agreement Form on 27 January 2023, the day after all tests were completed.

- As a result, the Appellant terminated the employment contract without just cause, and the Player is entitled to receive compensation.

64. The Respondent also considers that the Sole Arbitrator must uphold his rights to be compensated for the residual value of the employment contract, deducting the Radnicki contract and a further additional compensation to the Player equal to six months' salaries, as the Club is a repeating offender in 9 prior cases before FIFA.

65. In his Answer, the Respondent requested the Sole Arbitrator to decide:

"1. Dismiss the appeal filed by the Appellant against the decision FPSD-9718 passed on 22 June 2023 by the FIFA Dispute Resolution Chamber insofar it is admissible.

2. Confirm the decision FPSD-9718 passed on 22 June 2023 by the FIFA Dispute Resolution Chamber.

3. In the alternative, order the Appellant to pay the Respondent the amount of EUR 170,020.

4. Order the Appellant to bear all the costs incurred in connection with the present procedure.

5. Order the Appellant to pay to the Respondent a contribution towards its legal fees and other costs, in the amount to be determined a t the discretion of the Sole Arbitrator".

V. JURISDICTION OF THE CAS

66. Article R47 of the CAS Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body".

67. With respect to the Appealed Decision, the jurisdiction of the CAS derives from Article 57 para. 1 of the FIFA Statutes, which provides that *"Appeals against final decisions passed by FIFA's legal bodies and against decision passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question".*

68. In addition, the Respondent did not object to the jurisdiction of the CAS, and the Parties furthermore confirmed the CAS jurisdiction when signing the Order of Procedure.

69. Considering the above, the Sole Arbitrator finds that CAS has jurisdiction to decide on the present appeal.

VI. ADMISSIBILITY

70. The grounds of the Appealed Decision were notified to the Appellant on 7 July 2023 and the Statement of Appeal was filed on 19 July 2023, *i.e.* within the statutory time limit of 21 days set out in Article 57 para. 1 of the FIFA Statutes.

71. The Statement of Appeal complied with all the requirements of Articles R48 and R51 of the CAS Code.

72. It follows that the appeal is admissible, which is not disputed by the Respondent.

VII. APPLICABLE LAW

73. Article R58 of the CAS Code provides as follows:

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

74. Pursuant to Article 56 para. 2 of the FIFA Statutes:

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

75. The Sole Arbitrator notes that both the Appellant and the Respondent applied in these proceedings, for the purpose of Article R58 of the Code, the rules and regulations of FIFA.

76. Based on the above, the Sole Arbitrator is satisfied to apply the various rules and regulations of FIFA, and when necessary Swiss law to fill a possible gap in the various regulations of FIFA.

VIII. MERITS OF THE APPEAL

77. In light of the Parties' submissions, the Sole Arbitrator shall examine whether the conditions of the Offer were complied with, and if not, whether the

Player is entitled to compensation for the damages suffered and in which amount.

78. The Sole Arbitrator will address the following issues:

- Whether the conditions of the Offer were complied with
- Whether a wrongful dismissal took place
- The compensation under article 17 of the FIFA RSTP
- The calculation of the compensation
- The interests

A. Whether the Conditions of the Offer were complied with

79. The Sole Arbitrator observes that the Club sent an employment offer to the Player on 23 January 2023.

80. According to the Offer, the Club *"offers to engage the Player for the 2022/23 and for 2023/24 seasons and until 10 of January 2025"* for a monthly net salary of: (i) EUR 7,000 for the 22/23 football season (January-May 2023); (ii) EUR 11,500 for the 23/24 season; and (iii) EUR 12,500 for the 24/25 football season (from July 2024). In addition, the Club proposed to pay a signing fee of EUR 7,500 *"on date of signature contract"*, as well as performance bonuses. The Offer was accepted by the Player before the expiring date foreseen as 25 January 2023.

81. The Offer was expressly made subject to three conditions:

Clause 8 provides that:

"This is subjected to ***the execution of a valid employment agreement*** *between Hapoel and the Player for the seasons 22/23 and 23/24,* ***and for a valid transfer agreement*** *between Hapoel and Tobol Kostanay FC".*

Clause 10 provides that:

"this agreement is subjected to Player ***successfully passes medical examinations*** *and Physiological tests in Israel".*

82. As a result, the Sole Arbitrator will analyse whether the three conditions included in aforementioned Clauses 8 and 10 of the Offer, a) Transfer Agreement, b) Medical examination and c) Employment agreement, were complied with:

a) Transfer Agreement

83. The Parties required the execution of a transfer agreement between the Club and the Player's former club Kolubara. The Sole Arbitrator observes that the Club and Kolubara entered into the Transfer Agreement on 24 January 2023 in order to permanently transfer of the Player's economic and federative rights to the Club, for a transfer fee of EUR 100,000. Consequently, the first of the conditions set out in the Offer was fully met.

84. The Sole Arbitrator considers that the reference to a transfer from "Tobol Kostanay FC" in Clause 8 of the Offer was a clerical error. The subsequent conclusion of the Transfer Agreement between the Club, the Player and Kolubara on 24 January 2023 proves that the Parties intended to refer to Kolubara instead of Tobol Kostanay.

b) Medical Examination

85. The Offer also required the Player to complete and pass the medical examination and the physiological tests in Israel.

86. The Sole Arbitrator notes that the Parties dispute whether the Player completed and passed the medical examinations upon its arrival to Israel. Whilst the Appellant sustains that the Player refused to complete the echo-stress test, Holter and Cardiac MRI that he was referred to, the Respondent insists that he completed and passed them over the course of 26 January 2023.

87. The Sole Arbitrator observes that the Player was subject to a medical examination in Medix medical centre, at 8:14 on 26 January 2023. The results of the medical examination were submitted on the same day, at 8:43. According to these results, the Player was *"referred to cardiac consultation, including echo-stress test, Holter and Cardiac MRI in order to evaluate and rule out a cardiac structural or electrical abnormality"* (Exhibit A8, Appeal Brief).

88. On the same day, at 16:39, an employee of the Club contacted the Player's agent to communicate that he would *"come to pick you at 18:15* [t]*o MRI"*. One minute later, the Player's agent responded to the Club's representative with a check mark.

89. From that moment onwards, the communications between the Parties refer to the negotiations of the draft Agreement Form, or the Player attendance to a Club's league game on 28 January 2023.

90. There is no reference to the Player's refusal to complete the medical examinations nor any pending medical issues. The Sole Arbitrator notes that according to the Offer, the Parties were to enter into the Agreement Form once the medical examinations were completed. It was reasonable to expect that this matter would have been raised in the communications between the Parties whilst starting to negotiate the terms of the Agreement Form. On the contrary, the Club only complained about the lack of medical examinations on 1 February 2023, when the Player was back to Serbia and the Club had already decided not to continue with the transfer of the Player.

91. As a result, the Sole Arbitrator concludes that from the Parties' behaviour that the Club had accepted the Player's medical condition. Under this scenario, the second of the conditions set out in the Offer was also met.

c) Employment Agreement

92. Once these conditions were met, the Parties expected to enter into the Agreement Form according to the terms promised in the Offer. The Sole Arbitrator notes in addition that during the negotiations of the Offer, the Club's CEO said that they would *"write all this in the final contract"*, referring to some observations of the Offer made by the Player's agent. Consequently, the Sole Arbitrator finds that the Parties' intention was to conclude an employment contract as the final step set out in the Offer. The Sole Arbitrator also notes that the signing of an Agreement Form is compulsory under IFA and that the Agreement Form must be approved by the Budget Control Authority of IFA, *conditio sine qua non*, the Player may not be registered in IFA and compete.

93. It is undisputed by the Parties that the subsequent employment contract, by the means of the Agreement Form, was not concluded.

B. Whether a wrongful dismissal took place

94. The Parties and the FIFA DRC discussed whether the Offer was a valid employment contract or a precontract.

95. In the Appealed Decision, the FIFA DRC concluded that the Offer represents a valid and binding employment contract between the Parties. The FIFA DRC ruled that the Offer was a valid employment contract *"by recalling the well-established jurisprudence which dictates that, in order for an employment contract to be considered valid and binding, apart from the signature, it should contain the* essentialia negotii *of an employment contract"*. Thus, the Chamber concluded that the Club terminated the contract without just cause and declared that the Club must compensate the Player.

96. The Appellant opposes to the FIFA DRC conclusion and considers that the Offer *"includes nothing but the outlines of a financial offer and pre-conditions to the engagement of the Player"*. For the Appellant, if the Parties had intended the Offer to be an employment contract, they would not have explicitly stipulated that the Offer was subject to the signature of a further contract. Therefore, the Appellant concludes that the Offer's conditions were not fulfilled, and subsequently an employment contract was not concluded between the Parties. Since a contract cannot be terminated before it was even concluded, the Appellant concludes that the Player's claim concerning the termination of a contract without just cause must have been rejected.

97. The Respondent insists that the Offer contains all essential requirements of an employment agreement and reflects the common intent of the Parties. For the Respondent, the Offer represents a valid and binding employment contract between the Parties. Consequently, the Respondent concludes that the Appellant unilaterally terminated the employment contract without just cause and the Respondent is entitled to receive compensation for breach of contract.

98. Notwithstanding the foregoing, the Sole Arbitrator concludes that the question is not whether the Offer was a valid employment contract or a precontract. The Sole Arbitrator considers that the Offer is a unilateral promise of an employment contract, subject to a time limit and to three conditions precedent. Therefore, in the event of the Club's failure to comply with the unilateral promise of contract, the Club's failure maybe regarded as a wrongful dismissal. Likewise, should the Player's fail to comply with his commitments he may be subject to pay damages to the Club.

99. The Offer contains all essential requirements of an offer, including the fact that it is in writing, contains the date, the identity of the Player, the duration of the contract and the remuneration as well as the validity period of the offer. In addition, the Offer was signed and accepted by the Player within the period laid down by the Club and could not therefore be withdrawn by the Club.

100. The Sole Arbitrator clarifies that article 18 (4) of the FIFA RSTP (*"[t]he validity of a contract may not be made subject to a successful medical examination …")* does not

apply, as suggested by the FIFA Chamber to an employment offer, which is not an employment contract.

101. Since one of the conditions precedents was not met (i.e. the signature of an employment contract by means of a Player's Agreement Form, as required by IFA, and its Budget Control Authority), the Sole Arbitrator will address whether the failure to fulfil the aforementioned condition is due to one of the Parties conduct and what are the legal consequences of such conduct.

102. The Sole Arbitrator notes that the Parties engaged in negotiations to enter into a Player's Agreement Form, through legal counsel. During the negotiations, the Club requested to modify the Offer in the following items:

- First salary to be paid in August, instead of July as originally foreseen in the Offer.

- Payment of bonuses limited to only one per season, instead of by specific achievements.

- The duration of the contract: the Club's option to terminate the contract with just cause on 31 May 2023, in case of *"any change to the corporate and/or ownership structure of Poaley Tel Aviv Holding LTD, a company incorporated under the laws of the state of Israel (the "Corporation") (the corporation that controls the Club) by providing written notice to the Player"* (Clause 1.6 of the draft Agreement Form).

103. With regards in particular to the duration of the contract, the Player alleges that this clause was the main reason for not signing the Agreement Form. The clause was never previously discussed by the Parties, and when the Player opposed to its inclusion in the draft of the Agreement Form, on 27 January 2023 the Club considered it a *"fundamental clause"* and refused to erase it.

104. The Sole Arbitrator notes that on 31 May 2023, a new group of investors took control of the Club. Consequently, the inclusion of this last provision would eventually have represented the reduction of 75% of the duration of the contract to the detriment of the Player.

105. The Sole Arbitrator finds that Clause 1.6 of draft of the Agreement modified the terms of the Offer and prevented the Parties from concluding the Agreement From.

106. The Club did breach the promise to contract made in the Offer since it was unwilling to conclude the subsequent employment contract in line with the terms that were already set out in the Offer. The breach of the Offer ultimately occurred when the Club, by its letter of 1 February 2023, informed the Player that it *"decided not to conclude an agreement and no valid (or any) employment agreement was signed"*.

107. In light of the foregoing, the Sole Arbitrator concludes that the Club failed to comply with the third and last condition of the Offer, *i.e.*, the signature of the Agreement Form.

108. The Club's breach of the Offer is to be regarded as a wrongful dismissal, which entitles the Player to compensation.

C. The compensation under article 17 of the FIFA RSTP

109. Both Parties have relied on article 17 of the FIFA RSTP to calculate the compensation due. The Sole Arbitrator will apply the compensation provided for under article 17 of the FIFA RSTP even though, as previously explained, the Club's failure to comply with the unilateral promise of contract is not the breach of an employment contract without just cause but is to be considered as a wrongful termination of a promise. In this regard, the damages caused can be calculated under different methodologies, including the one foreseen under article 17 of the FIFA RSTP when a contract is terminated without just cause. As the Parties have chosen to rely on the aforementioned article 17 for the compensation calculation, the Sole Arbitrator will follow that methodology.

110. In the Appealed Decision, the FIFA DRC ordered the Club to pay the amount of EUR 211,796.90 to the Player plus 5% interest *per annum* as from 1 February 2023 until the date of effective payment. Such compensation was calculated in accordance with Article 17(1)(ii) FIFA RSTP which states as follows:

> *"The following provisions apply if a contract is terminated without just cause:*
>
> *1. In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period.*
>
> *Bearing in mind the aforementioned principles, compensation due to a player shall be calculated as follows:*
>
> *[…]*
>
> *ii. In case the player signed a new contract by the time of the decision, the value of the new contract for the period corresponding to the time remaining on the prematurely terminated contract shall be deducted from the residual value of the contract that was terminated early (the 'Mitigated Compensation'). Furthermore, and subject to the early termination of the contract being due to overdue payables, in addition to the Mitigated Compensation, the player shall be entitled to an amount corresponding to three monthly salaries (the 'Additional Compensation'). In case of egregious circumstances, the Additional Compensation may be increased up to the maximum of six monthly salaries. The overall compensation may never exceed the rest value of the prematurely terminated contract".*

111. The Appealed Decision granted the Player the residual value of the contract at the time of termination (EUR 242,838.70) minus the value of the contract the Kolubara Contract for the overlapping period (EUR 31,042).

112. At the time of the rendering of the Appealed Decision, the FIFA Chamber was not made aware that a new contract had been entered into with the Serbian club FK Radnički Niš on 18 June 2023. The Appellant sustains that the Sole Arbitrator should take into account for the calculation of the compensation the

value of the Radnicki Contract (CAS 2021/A/7714).

113. The Respondent admits that he signed an employment agreement with FK Radnički Niš and that the value of the new contract for the overlapping period should be taken into account to calculate the payable compensation. Notwithstanding, the Respondent considers that the value of the new contract shall be calculated only taking into account its salary components, and not the payment of rent.

114. The Sole Arbitrator notes that it is undisputed that the value of the Radnicki Contract for the overlapping period should be taken into account to calculate the compensation. The Player concluded the Radnički Contract on 16 June 2023, i.e. six days before the FIFA DRC rendered the Appealed Decision, reason why the FIFA DRC could not take it into consideration.

115. Accordingly, the Sole Arbitrator has the power to take into account this new fact and the new evidence when assessing the compensation (see CAS 2021/A/7714).

116. In addition, the Appellant requests to further reduce the compensation awarded based on Article 44 SCO. The Appellant considers that the Respondent's refusal to cooperate and continue with the medical examinations is a circumstance that contributed to Player's own damage.

117. Article 44 SCO provides as follows:

"1. Where the person suffering damage consented to the harmful act or circumstances attributable to him helped give rise to or compound the damage or otherwise exacerbated the position of the party liable for it, the court may reduce the compensation due or even dispense with it entirely.

2. The court may also reduce the compensation award in cases in which the damage was caused neither wilfully nor by gross negligence and where payment of such compensation would leave the liable party in financial hardship".

118. The aforementioned provision allows the reduction of compensation if there are circumstances attributable to the injured party that helped to give rise to or increase the damage. As previously decided, the failure to sign the Agreement Form is only due to the Club's fault and not to the Player's behaviour during the medical examinations. The Player cooperated and eventually completed the medical examinations to the satisfaction of the Club.

119. The Sole Arbitrator does not find grounds to reduce the compensation on the basis of Article 44 SCO, as requested by the Appellant.

120. Finally, the Respondent considers that the Sole Arbitrator shall grant additional compensation to the Player equivalent to six months' salaries. The grounds for such petition are the criterion of "specificity of sport" and the existence of aggravating factors. According to the Respondent, CAS jurisprudence has described as aggravating factor of terminating an employment contract without just cause when the club is a repeating offender. The Respondent informs that the Club has previously been sanctioned by FIFA nine times after failing to respect contractual obligations with other players and clubs. For the Respondent, such circumstance was publicly acknowledged by the Club's

councils through a press release issued on its website.

121. The Sole Arbitrator considers that the Respondent is not entitled to an additional compensation equal to six months' salaries worth up until the amount awarded in the Appealed Decision, as requested by the Respondent. The Respondent failed to prove that the Club is a repeating offender for the purposes of this case. Therefore, the Player shall not be entitled to claim for an additional compensation based on aggravating factors.

122. In sum, the Sole Arbitrator finds grounds to modify the compensation granted by the FIFA RSTP due to the Radnicki Contract entered into by the Player after the issuance of the Appealed Decision.

D. The compensation calculation

123. The Parties disagree with the residual value of the Offer, the value of the Kolubara Contract for the relevant period as decided by the FIFA RDC, and the value of the Radnick Contract.

124. The Sole Arbitrator finds that the Appealed Decision performed its calculation of compensation as follows:

- **EUR 242,838.70** (residual value of the Offer) minus **EUR 31,042** (value of the Kolubara Contract for the overlapping period (remaining of the 22/23 and 23/24 seasons) = **EUR 211,796.70**

a) The residual value of the Offer

125. The Parties dispute the calculation of the residual value of the Offer in the Appealed Decision. The Appellant considers that the correct amount should be EUR 217,160 while the Respondent considers a residual value of EUR 252,666.

126. The Sole Arbitrator notes that the differences between the Parties derive from the calculation of a different number of monthly salaries per season:

Appellant	**Appellant**	**Respondent**	**Respondent**
Signing fee	EUR 7,500		EUR 7,500
4 months salary 2022/2023 season	EUR 28,000		EUR 28,000
10 months salary 2022/2023 season	EUR 115,000	**12 months**	EUR 138,000
5 months and 10 days 2024/2025	EUR 66,600	**6 months and 10 days**	EUR 79,166.67
TOTAL	**EUR 217,160**		**EUR 252,666**

127. The Sole Arbitrator calculates the residual value of the Offer in **EUR 252,666.67**, from 1 February 2023 until 10 January 2025, with the following breakdown:

(i) **EUR 7,500**: signing fee

(ii) **EUR 28,000**: four months of salary for the 22/23 season

(iii) **EUR 138,000**: 12 months of salary for the 23/24 season. The Sole Arbitrator finds that Clause 3 of the Offer states that the Club *"shall pay 11,500 EURO net salary per month to the*

player at the 2023/24 season" without specifying the payable months of the season. In the context of an employment relationship in football, it is expected that the employer pays not only for competition months, but also preseason and vacation period (*i.e.*, a period of twelve months). The Sole Arbitrator did not find any grounds to conclude that the Player was entitled to receive just ten months of salary for the 23/24 season under the terms of the Offer.

(iv) **EUR 79,166.67**: 6 months and 10 days of salary for the 24/25 season (*i.e.*, from 1 July 2024 until 10 January 2025) for an amount of EUR 79,166.67. Clause 3 of the Offer stipulate that the Club was supposed to pay *"12,500 EURO net per month until January 10, 2025 – during the 2024/25 season (from the month of July 2025)"*. Since the Parties included the phrase *"from the month of July 2025"*, the Sole Arbitrator finds it as an express reference of the starting month of payment for the 24/25 season. The Sole Arbitrator also considers that the reference to the year 2025 was a clerical error and it was supposed to be 2024, considering that it was not possible to start paying a specific amount of salary *"from the month of July 2025"* when the salaries for this season were supposed to be paid *"until January 10, 2025"*.

b) The Kolubara Contract

128. The Parties dispute the calculation of the value of the Kolubara Contract for the relevant period, as follows:

	Appellant	**Respondent**
4.8 months of salary	RSD 960,000	5 months of salary (RSD 1,000,000)
4.8 months of rent	RSD 115,200	Not included
Exchange rate	1 RSD per 0.00853423 EUR	1 RSD per 0.008516 EUR
TOTAL	**RSD 1,075,200 = EUR 9,176**	**RSD 1,000,000 = EUR 8,516**

129. The Sole Arbitrator calculates the value of the Kolubara Contract in RSD 1 075 200 (EUR 9,159.70) for the period between 1 February 2023 and 25 June 2023, with the following breakdown:

(i) **RSD 960,000**: 4.8 months of salary for the 22/23 season, calculated from 1 February 2023 (start of the overlapping period) until 25 June 2023 (date of termination of the employment contract). The Sole Arbitrator dismisses the Respondent's consideration of 5 months of salary when the Player could not legally be paid by Kolubara from 26 June 2023 onwards. The new employment contract was *"concluded for the period from June 26, 2023"* and consequently Kolubara was released from the obligation to pay salary from that moment onwards.

(ii) **RSD 115,200**: 4.8 months of rent. The Sole Arbitrator considers that the rent should also be included as part of the compensation as it was part of the Player' remuneration under that Contract.

The applicable exchange rate to the value of the Kolubara Contract is 1 RSD per 0.008519 EUR as of 1 February 2023 (date of the Club's breach (*i.e.*, 1 February 2023).

c) The Radnicki Contract

130. The Parties dispute the calculation of the value of the Radnicki Contract for the relevant period, as follows:

	Appellant	**Respondent**	**Respondent**
18.5 months of minimum net salary (350 EUR per month)	EUR 6,475	18 months	EUR 6,300
18.5 months as "special monthly wage for the Player's experience"	EUR 24,235	18 months	EUR 23,580
special fees based on a monthly amount (EUR 2,400) multiplied by 18.5	EUR 44,400		EUR 44,250
included in the calculation the monthly payment for rent	EUR 2,775	Not included	
TOTAL	**EUR 77,885**		**EUR 74,130**

131. The Sole Arbitrator calculates the value of the Radnicki Contract in **EUR 77,553.38** for the period between 26 June 2023 and 10 January 2025, with the following breakdown:

(i) **EUR 6,475**: eighteen months and fifteen days of net salary;

(ii) **EUR 2,775**: eighteen months and fifteen days of rent.

(iii) **EUR 24,235**: 18 months and 15 days of minimum net salary and special monthly wage (from 26 June 2023 (conclusion of the Radnicki contract) until 10 January (end of the overlapping period). The Sole Arbitrator notes that the Respondent did not consider in his assessment the periods between: (i) 26 and 30 June 2023 (5 days); and (ii) 1 and 10 January 2025 (10 days). The Player was due to receive payment from Radnicki in these two periods, and therefore must be considered in the valuation.

(iv) **EUR 44,068.38:** special fees to be calculated until 10 January 2025:

- EUR 10,000 due on 30 June 2023;
- EUR 10,000 due on 31 December 2023;
- EUR 8,000 due on 30 June 2024;
- EUR 10,000 due on 31 October 2024 and
- EUR 6,068.37, due from 1 November 2024 till 25 February 2025. Both Parties have excluded the period between 11 January and 25 February 2025, as this period is outside of the overlapping period. Therefore, the Sole Arbitrator will consider only an amount of EUR 6,068.37, out of the EUR 10,000 due on 25 February 2025.

132. Based on the above, the Sole Arbitrator decides that the Appellant must pay the

amount of **EUR 165,953.59** to the Player as compensation for the wrongful dismissal.

133. The calculation was as follows: the residual value of the Offer at the time of the offer's breach (**EUR 252,666.67**) minus the value of the new contracts for the overlapping period (**EUR 9,159.70** and EUR **77,553.38**).

E. Interests

134. Finally, the Sole Arbitrator does not find any grounds to amend the FIFA DRC decision with regard to interests. The FIFA DRC condemned the Appellant to pay the Respondent interest as of 1 February 2023, as a compensation for all the amounts the player would have been paid in accordance with the Offer.

135. The Appellant considers that no interest can be due since the date to pay the outstanding amounts is yet to come. The Sole Arbitrator recalls that the obligation to pay compensation exists since the breach occurred. Consequently, the Sole Arbitrator considers that the Offer's dates of payment of the monthly salaries are irrelevant for the determination of the date on which the compensation becomes payable.

136. The Sole Arbitrator decides that the starting date for calculating the interest period corresponds to the date on which the compensation becomes due. Considering the Player is entitled to be compensated since the date of the Offer's breach (*i.e.*, from 1 February 2023), the Club is liable to pay interest thereafter.

137. In view of the above, the Appealed Decision is partially confirmed, and the Player is entitled to receive an amount of **EUR 165,953.59** as compensation for the breach of the Offer, plus the annual interest of 5% as from 1 February 2023 until the date of the effective payment.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Hapoel Tel Aviv FC against the Decision of the FIFA Dispute Resolution Chamber, passed on 22 June 2023 (Decision FPSD-9718), is partially accepted.

2. The Decision of the FIFA Dispute Resolution Chamber passed on 22 June 2023 (Decision FPSD-9718) is confirmed saved for paragraph 2 of the operative part, which shall provide as follows:

   "The Respondent, Hapoel Tel Aviv Football Club, must pay to the Claimant the following amount(s): ***EUR 165,953.59*** *as compensation for wrongful termination plus 5% interest p.a. as from 1 February 2023 until the date of effective payment".*

3. (…).

4. (…).

5. All other motions or prayers for relief are dismissed.

CAS 2023/A/10001
Fotbal Club CFR 1907 Cluj S.A. v. Roger Junio Rodrigues Figueira & St. Lörinc KFT & FC Uta Arad
24 September 2024

Panel: Mr Olivier Carrard (Switzerland), Sole Arbitrator

Football
Termination of contract without any just cause by a player
Scope of review and legal principle of ne ultra petita
Ruling on the basis of implicit conclusions
Deregistration from a list of players as just cause for a player to unilaterally terminate his employment contract
Compensation owed to a club by a player who terminated his employment contract without any just cause
Ruling extra petita

1. **According to Article R57 of the CAS Code: *"*[t]*he Panel has full power to review the facts and the law of the case. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance"*. However, the panels are also bound to the limits of the parties' motions, since the arbitral nature of the proceedings obliges panels not only to decide on all claims submitted by the parties but also prevents panels from granting more than the parties are asking by submitting their requests for relief to the CAS (principle of *ne ultra petita*).**

2. **CAS panels may rule on the basis of implicit conclusions. This is the case when they are virtually contained in those that are formally expressed and can be deduced from them. This is notably the case in matters of damages, and especially when the judge proceeds to a compensation in matters of employment law. The fact that an appeal brief does not contain precise quantified submissions on the merits of a case does not contravene the principle of the prohibition of formal denial of justice. On the one hand, the application of the principle of reliance requires that the submissions be interpreted in the light of the grounds on which they are based. On the other hand, the prohibition of excessive formalism requires that the wording of the submissions not be too strict if, on reading the appeal brief, it is clear what the appellant is seeking, or where the amount claimed is apparent from the grounds of appeal, at least in relation to the operative part of the contested decision. *In casu*, it is found that by stating in its request for relief to set aside the disputed decision, to rule that the player did terminate the employment relationship without any just cause and therefore to confirm that the appellant shall not be liable to pay any amount to the player, the appellant addressed, at least implicitly, the amounts due to the player according to the disputed decision. This assessment is further confirmed by the fact that the appellant stated its position regarding the compensation in its appeal brief. Given the above, it is found that this Panel has the full power to review the questions relating to the outstanding remunerations as well as the compensation due in case of**

termination without just cause by the player.

3. Faced with a player's argument that by refusing to register him on the players' list of players able to participate in the domestic top league, a club violated one of said player's fundamental rights as a football player, *i.e.* the right to compete and exercise his profession, an examination of the parties' employment contract and of the circumstances of the dispute shows *inter alia* that the club was entitled to not register the player on the players' list at stake and that the player did not have an absolute right to be included in said list. Accordingly, it is concluded that the player's argument that the club violated his right to compete and to exercise his profession has to be rejected.

4. While assessing the consequences of a player's wrongful termination of contract based on art Article 17 of the FIFA Regulations on the Status and Transfer of Players (RSTP) and in order to assess the value of the player's services at the time the contract is terminated prematurely, it is the FIFA Dispute Resolution Chamber's approach to take the residual value of the contract that was prematurely terminated, to apply the value of the new contract to the period during which the prematurely terminated contract would have been valid, and to take the average of these two figures. To this, any non-amortized fees and expenses relating mainly to transfers and agents paid or incurred by the former club are added to the value of the average contract. However, the CAS's approach on the calculation of compensation due to a club in the event of a breach of contract regularly stresses a wide margin of appreciation when applying Article 17 FIFA RSTP. *In casu*, weight is given to the residual value of the contract if the player had remained with the appellant, to the value of the contracts signed by the player following his departure from the appellant, to the unamortised amounts of the transfer and agent costs *pro rata*, but also to the (dis)proportionality of the sum resulting of these calculations in view of the circumstances of the case and of the aim of Article 17 to adequately compensate for the damage suffered.

5. An appellant who presented a request for relief that a club be found to be a player's new club and shall be jointly and severally liable to pay compensation and, in the alternative, that another club be found to be said player's new club and shall be jointly and severally liable to pay compensation for the same reasons cannot have a decision then made on its request made on a subsidiary basis that both clubs be considered as the player's new club, for examining such possibility would amount to a ruling *extra petita*.

I. PARTIES

1. Fotbal Club CFR 1907 Cluj S.A. (hereinafter: "CFR Cluj" or the "Appellant") is a football club, affiliated to the Romanian Football Federation (hereinafter: the "FRF"), with its headquarters in Cluj-Napoca, Romania.

2. Roger Junio Rodrigues Figueira (hereinafter: the "Player" or the "First Respondent") is a Brazilian professional football player.

3. St. Lörinc KFT (hereinafter: "St. Lörinc" or the "Second Respondent") is a football club affiliated to the Hungarian Football Federation (hereinafter: the "MLSZ"), with its headquarters in Szentlörinc, Hungary.

4. Fotbal Club Uta Arad (hereinafter: "Uta Arad" or the "Third Respondent") is a football club, affiliated to the FRF, with its headquarters in Arad, Romania.

5. In the present award, the Appellant, the First Respondent, the Second Respondent and the Third Respondent will jointly be designated as the "Parties" and the First Respondent, the Second Respondent and the Third Respondent as the "Respondents".

II. FACTUAL BACKGROUND

A. Facts in dispute

6. Below is a summary of the main relevant facts, as submitted by the Parties in their written submissions and adduced at the hearing. Additional facts may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in his award only to the submissions and evidence he considers necessary to explain his reasoning.

7. On 19 January 2022, CFR Cluj and the Player concluded a *"Contrat for sporting activity"* for the period between 1 July 2022 until 31 May 2025 (hereinafter: the "Contract").

8. According to Article 2.1. of the Contract:

"the scope of this Agreement shall consist in the supply of specific sport services by the Player AS A PROFESSIONAL PLAYER (NON-AMATEUR), for the benefit of FOTBAL CLUB CFR 1907 CLUJ S.A. for a remuneration established according to this Agreement".

9. Article 2.4. of the Contract provides that:

"The sports activity is to be carried out by the PROFESSIONAL FOOTBALLER at a high professional level, in order to achieve the sports performance objectives established and communicated by the Club's management before each competitive season for which the sports activity contract was concluded".

10. Article 2.5. of the Contract further provides that:

"The sports activity of the PROFESSIONAL FOOTBALLER will be evaluated by the Head Coach at the end of each competition season for which the sports activity contract was concluded, as well as constantly, during the season".

11. With regard to the Player's *"Compensation for sports activity"*, the Contract provides in Article IV for the following remuneration:

- 01.07.2022 – 30.06.2023: EUR 152'000.- payable as follows:
  - EUR 20'000.- on 5 February 2022;
  - EUR 132'000.- in 12 monthly instalments of EUR 11'000.- from 25 August 2022 (payable on the 25th of each month).

- 01.07.2023 – 30.06.2024: EUR 144'000.- payable in 12 monthly instalments of EUR 12'000.- (payable on the 25th of each month);

- 01.07.2024 – 30.05.2025: EUR 143'000.- payable in 11 monthly instalments of EUR 13'000.- (payable on the 25th of each month).

12. According to Article 5.1. of the Contract, the Player has the following rights:

"A) The right to remuneration for the activity submitted;

B) The right to specific training conditions for the team's participation in competitions;

C) The right to periodic rest (daily, weekly, annually) in accordance with the schedule established by the technical staff;

D) The right to periodical medical examination".

13. Article 5.3. of the Contract provides that CFR Cluj has the following rights:

- *"The right to take the administrative and organizational measures it deems appropriate for the conduct of sports activities within the CLUB, in compliance with the relevant legislation, rules, statutes and regulations FRF, LPF, FIFA and UEFA, meaning that it will issue binding provisions for THE PROFESSIONNAL PLAYER";*

- *"The right to exercise control over the fulfilment of the obligations of the PROFESSIONAL FOOTBALLER, to evaluate his/her sports performance and the degree of observance of the game instructions given by the CLUB team coach";*

- *"The right to ascertain the commission of disciplinary offenses, to establish and apply sanctions for non-fulfilment or improper fulfilment of the obligations of the PROFESSIONAL FOOTBALLER";*

- *"The right to use the skills of the professional footballer on any of the football teams within the Club";*

- *"To modify at any time its Internal Instructions within the limits allowed by the sports regulations in force, the modifications being opposable to the Payer from the date their display in the team locker room. The amendment to the Bonuses Rules may not reduce, without the written consent of the Player, the maximum total amount to which he would be entitled in the event of the achievement of all performance objectives related to season".*

14. Article 5.4. of the Contract also provides that CFR Cluj has in particular the following obligations:

- *"The obligation to comply with the FIFA / UEFA / FRF / LPF Statutes, Regulations and Directives as well as the legislation in force".*

- *"To ensure the conditions and facilities for training (instruction, training, physical recovery) and participation in competitions at the standards corresponding to the competitive level in which the group of players of which the PROFESSIONNAL FOOTBALLER is a member".*

15. According to Article XII:

- *"The Parties shall, in good faith, make every effort to resolve amicably any dispute, controversy or misunderstanding arising out of controversy or misunderstanding arising out of or in connection with this Agreement.*

- *The parties undertake, by mutual agreement, to settle amicably any disputes arising in connection with the conclusion, validity and/or execution of the contract, before initiating any other legal action, meaning that the other party will be invited to negotiations by granting a minimum 15 days. If negotiations will not have a successful result within maximum 60 days after notification, the unsatisfied party may address the competent jurisdictional bodies".*

16. On 14 February 2022, CFR Cluj, Uta Arad and the Player entered into a Transfer Agreement in which they *inter alia* agreed that the Player would be transferred from Uta Arad to CFR Cluj starting from 14 February 2022 against payment of a transfer fee of EUR 50'000.- plus EUR 25'000.- in case CFR Cluj wins the 21/22 Championship.

17. On the same date, CFR Cluj and the Player signed an *Addendum* to the Contract in which they agreed that the starting date of the Contract would be 14 February 2022, the ending date remaining 31 May 2025.

18. In addition, the parties amended the remuneration of the Player as follows:

    - *"The remuneration for the activity carried out under the contract is, for the period between: 14.02.2022 – 30.06.2023, in the net amount of 201.500 euros, which will be paid as follows: the amount of 20.000 euros , as payment in advance – 15.02.2022; 1 (one) instalment in the net amount of 5.500 euros for February 2022 (due on 25/03/2022), followed by 16 equal monthly instalments in the net amount of 11.000 euros, starting with March 2022 (due dates 25/04/2022, 25/05/2022, etc.)".*

19. The remaining provisions of the Contract were left unchanged.

20. During the 2021/2022 season, running from 1 July 2021 to 30 June 2022, the Player participated in the following matches with the CFR Cluj:

    - Superliga: 4 matches, two of which on the bench;

    - Liga 3: 4 matches.

21. The Player participated for the Appellant in the following matches during the 2022/2023 season:

    - UEFA Europa Conference League: 6 matches, one of which on the bench;

    - UEFA Champions League Qualifying: 2 matches;

    - UEFA Europa Conference League Qualifiers: 5 matches;

    - Superliga: 17 matches, two of which on the bench;

    - Cupa României: 3 matches;

    - Supercupa României: 1 match

22. On 17 January 2023, the Appellant registered a player from Kosovo with the RFF and, on 24 January 2024, the Player found out that he was not part of the A-List of CFR Cluj Club preventing him from taking part in the Superliga matches organised by the Romanian

Professional Football League (hereinafter: "LPF").

23. On 20 January 2023, the Romanian Football League published a circular letter informing Romanian clubs that football players from Kosovo would be considered as European and not non-European player as in the past.

24. On 25 January 2023, the Player sent a letter to CFR Cluj in which he stated that he had been excluded from the A-list which he considered a breach of the Contract. He requested to be registered on the A-List no later than 27 January 2023, failing which he would terminate the employment contract.

25. On 26 January 2023, a Romanian media published an article in which the coach of Uta Arad, Laszlo Balint, praised the sporting skills of the Player.

26. At the same time, CFR Cluj also received a request from AFC Hermannstadt, a Romanian Football club, stating it would be interested in a temporary transfer of the Player to its club starting from 1 February 2023.

27. The next day, CFR Cluj responded to the Player's letter stating that it was not in breach of the Contract. In fact, the Player was still part of the CFR Cluj squad list for training schedule with the first team as well as part of the UEFA Players list for the remaining matches of the European competition and part of the second team playing for CFR Cluj in the third division of the Romanian Championship.

28. On 29 January 2023, the Player reiterated its request, giving CFR Cluj until 30 January 2023 to be registered on the A-list. In the same letter, the Player indicated that if CFR Cluj did not proceed with his request until 30 January 2023, he would consider the contract terminated for just cause, as CFR Cluj refused to fulfil its obligations assumed within the contract.

29. On 31 January 2023, the Player requested from CFR Cluj, until latest 2 February 2023 12 am, to take all necessary steps for the registration of the Player in the A-List. The First Respondent specified that this communication would be the last notification sent to CFR Cluj. Should the latter not comply with this request, the Player will consider the Contract as terminated for just cause, following the fact that CFR Cluj refused to fulfil its obligations assumed within it.

30. On 1 February 2023, CFR Cluj answered to the Player and invited him the next day at 9 am at its headquarters in order to discuss and review the necessary documents for the implementations of one of the three options that were given to the Player:

- The registration of the Player in the A-list;

- The conclusion of a temporary transfer contract until the end of the current competitive season to one of the two clubs that have expressed interest in the Player's transfer;

- Maintaining the current situation, meaning the Player continues to be registered with CFR Cluj to play the European competition as well as the Romanian Championship, until the end of the current season, considering that these competitions

are considered equally important from the perspective of sporting performance goals, assuring furthermore the same training conditions.

The Player was given a deadline until end of the day to communicate the chosen option.

31. The same day, the Player answered to the Appellant's last letter, informed CFR Cluj that he wished to continue the collaboration with them, and requested them to proceed urgently, *i.e.* no later than 2 February 2023 12 am, with the registration of the Player on the A-list. The Player furthermore stated that this procedure did not require signing any documents as CFR Cluj had registered the Player on the A-list in 2022 based on the contract the parties had signed.

32. On 1 February 2023, CFR Cluj received an inquiry from Romanian Footbal Club FC Universitatea Cluj informing them that they were interested in negotiating a transfer of the Player during the winter transfer window.

33. On 2 February 2023, CFR Cluj addressed a letter of response to the Player in which it thanked the Player for its prompt request. However, CFR Cluj stated that the Player did not comply with its request, as he did not show up at the headquarters on that day as requested by CFR Cluj. It further referred to the provisions of the Romanian football Federation regarding the registration of Players to the A-list and informed the Player that they had already submitted to the PFL the intention to re-register the Player on the A-list. It further confirmed that the Player had always remained registered with the FRF and the LPF along the list of players registered with CFR Cluj. The Appellant finally stated it had continuously respected its obligations towards the Player, meaning that any of the Player's intentions to unilaterally terminate the contract would be considered without just cause.

34. On 2 February 2023, the Player responded to CFR Cluj's letter and stated that considering that until 2 February 2023 12 am CFR Cluj did not provide the Player with a proof that it had communicated to the LPF the intention the register the Player on the A-List. Therefore, as of 2 February 2023, the Player terminated the Contract with just cause, considering that CFR Cluj violated its obligations towards the Player. In the same letter, the Player already announced that he will be claiming compensation in accordance with Article 17 of the FIFA Regulations on the Status and Transfer of Players (hereinafter: FIFA RSTP).

35. On 2 February 2023, local media *"Live Arad"* posted an article regarding the chances of seeing the Player returning to former club Uta Arad.

36. The same day, the Player entered into a new employment contract with Hungarian football club St. Lörinc. The duration of the contract was set from 2 February 2023 until 30 June 2024 for a monthly net salary of HUF 300'000.- (approximately EUR 778.80 on 2 February 2023).

37. On 6 February 2023, the FRF requested CFR Cluj's view of the Players International Transfer Certificate (hereinafter: "ITC") from CFR Cluj to St. Lörinc.

38. On 9 February 2023, CFR Cluj rejected the release of the Player's ITC stating that the Player had unilaterally terminated the contract between the parties without just cause.

39. On 10 February 2023, CFR Cluj addressed a response letter to the Player in which it stated that the Player had terminated the contract without just cause causing them severe damage. Furthermore, CFR Cluj stated that the Player's previous communications were used merely as a pretext to gain time while, on the same time, engaging contractual negotiations with other clubs. This was in fact evidenced by St. Lörinc requesting for the Player's ITC and the Player seen training with a third club, Uta Arad. CFR Cluj therefore already informed the Player that it would file a claim before the competent authorities requesting the payment of compensation as well as sporting sanctions.

40. On 13 February 2023, the Players' Status Chamber of the Football Tribunal of the FIFA granted with immediate effect the request of the Hungarian Football Federation to register the Player for its affiliated club, St. Lörinc.

41. On the same day, the Player signed a sports activity agreement with Uta Arad for the following period: 13.02.2023 to 30.06.2023. The parties agreed on a monthly net salary of LEI 30'870 (approximately EUR 6'300.57 on 13 February 2023).

42. On 1 July 2023, the Player entered into a new employment contract with Saudi Arabian Club Al Taraji initially for the following period: 01.07.2023 until 30.06.2024. The monthly salary of the Player was fixed at USD 16'666 (approximately EUR 15'267.72 on 30 June 2023) to which an additional advance payment of USD 50'000.- (approximately EUR 47'150 on 10 October 2023) on the 10 October 2023 was agreed upon.

43. On 31 December 2023, the Player entered into a new contract with Romanian Club FC Universitatea Cluj for the following period: 03.01.2024 until 31.05.2025. The monthly salary of the Player amounts to EUR 5'000.-.

B. Proceedings before the FIFA Dispute Resolution Chamber

44. On 2 February 2023, the Player lodged a claim against CFR Cluj before the FIFA Dispute Resolution Chamber (hereinafter: "FIFA DRC") arguing that the Appellant incurred in an abusive conduct towards him and forcing him to terminate the contract by which they were bound for just cause.

45. The Player requested to be awarded the following amounts:

- EUR 53'036.- plus LEI 1'521 as outstanding remuneration;
- EUR 342'000.- as compensation for breach of contract corresponding to the residual value of the Employment Contract;
- *"Default interest of 5% per year on the aforementioned amounts until the effective date of payment".*

46. On 15 March 2023, CFR Cluj filed its reply to the claim of the Player and

lodged a counterclaim against him, Uta Arad and St. Lörinc requesting:

- EUR 342'000.- as compensation for terminating the contract without just cause corresponding to the residual value of the Employment Contract;

- EUR 116'493.86 as the non-amortized transfer and agency fees paid to Uta Arad to hire the Player in February 2022;

- Sporting sanctions to be imposed to the Player, Uta Arad and St. Lörinc.

47. Alternatively, CFR Cluj argued that no compensation should be awarded to any of the parties.

48. On 3 August 2023, the FIFA DRC issued a decision (hereinafter: "Appealed Decision") on the claim brought by the Player and the counterclaim brought by CFR Cluj, which operative part reads as follows:

"1. The Claim of the Claimant / Counter-Respondent 1, Roger Junio Rodrigues Figueira, is partially accepted.

2. The Respondent / Counterclaimant, FC CFR 1907 Cluj, must pay to the Claimant / Counter-Respondent 1 the following amount(s):

- *EUR 3,367.78 net as outstanding remuneration plus 5% interest p.a. as from 1 February 2023 until the date of effective payment;*

- *EUR 3,625 net as outstanding remuneration plus 5% interest p.a. as from 2 February 2023 until the date of effective payment; and*

- *EUR 96,617.89 net as compensation for breach of contract without just cause plus 5% interest p.a. as from 2 February 2023 until the date of effective payment.*

3. Any further claims of the Claimant / Counter-Respondent 1 are rejected.

4. The counterclaim of the Respondent / Counterclaim is rejected.

5. Full payment (including all applicable interest) shall be made to the bank account indicated in the enclosed Bank Account Registration form.

6. Pursuant to art. 24 of the Regulations on the Status and Transfer of Players, if full payment (including all applicable interest) is not made within 45 days of notification of this decision, the following consequences shall apply:

1. The Respondent / Counterclaimant shall be banned from registering any new players, either nationally of internationally, up until due amount is paid. The maximum duration of the ban shall be of up to three entire and consecutive registration periods.

2. The present matter shall be submitted, upon request, to the FIFA disciplinary Committee in the event that full payment (including all applicable interest) is still not made by the end of the three entire and consecutive registration periods.

7. The consequences shall only be enforced at the request of the Claimant / Counter Respondent 1 in accordance with art. 24

par. 7 and 8 and art. 25 of the Regulations on the Status and Transfer of Players.

8. This decision is rendered without costs".

49. The grounds of the Appealed Decision were issued on 24 August 2023 and read, in the pertinent portions, as follows:

"79. In view of the dissent between the parties, the DRC acknowledged that its task was to determine (i) whether the player had just cause to terminate the Employment Contract; and (ii) the consequences that follow".

1. just cause to terminate the Employment Contract

"84. Against this background, the DRC firstly stated that, by not including the player in the A-List at its first opportunity, CFR Cluj already incurred in a violation of the employment Contract namely of the player's right to fully exercise its profession and participate in the national championship.

85. The DRC added, nonetheless, that after being aware of the exclusion from the A-List, the player granted CFR Cluj multiple opportunities to remedy the breach and to re-integrate him to the main squad, to no avail. The Chamber found it true that the deadlines granted by the player were not long, however it stressed that not only there were multiple warning from the player but also that CFR Cluj was the party in breach, hence liable to diligently adopt the necessary measures to re-include the player in the A-List and/or to demonstrate that it adopted all the adequate steps to do so.

86. Contrario sensu, the DRC considered essential that neither during the exchange of correspondences nor in the context of these proceedings CFR Cluj produced any type of evidence suggesting that it effectively filed a request with the Romanian PFL in order to re-register the player in the A-list. Whilst CFR Cluj alleged that it requested this on 2 February 2023, no evidence whatsoever was provided.

87. In the Chamber's view, all the above was even more critical when considering that the registration period in Romania was soon to be closed (i.e., on 13 February 2023), hence the player needed a fast replay to protect his career.

88. Consequently, bearing the jurisprudence of the Football Tribunal in mind, the Chamber was of the opinion that CFR Cluj's initial breach and subsequent inertia to remedy the situation could generate the player's legitimate expectation that his services would not be retained (or, at least, that he would not be reintegrated to the A-List). Put differently, the DCR was convinced that the documentation on file sufficiently corroborated the player's position that he was genuinely led to believe that CFR Cluj lost interest on his services.

89. In conclusion, the DRC decided that the player terminated the Employment Contract with just cause, and CFR Cluj should be liable to the consequences that follow. It followed that the counterclaim of CFR Cluj was rejected, and thus the Chamber does not need to examine any aspect regarding the alleged bridge transfer raised by the Respondent / Counterclaimant".

2. Consequences

"91. Firstly and foremost, the Chamber referred to the general legal principle of pacta sunt servanda, and determined that CFR Cluj is liable to the player the amounts which were outstanding under the Employment Contract at the moment of the termination plus default interest as from the corresponding due dates, as follows:

a. EUR 3,367.78 as the balance of salaries, plus 5% interest as from 1 February 2023;

b. EUR 3,625 as match bonuses, plus 5% interest as from 2 February 2023 (…).

95. In application of the relevant provision, the Chamber held that it first of all had to clarify as to whether the employment contract contained a provision by means of which the parties had beforehand agreed upon an amount of compensation payable by the contractual parties in the event of breach of contract. In this regard, the Chamber established that no such compensation clause was included in the employment contract at the basis of the matter at stake.

96. As a consequence, the members of the Chamber determined that the amount of compensation payable by CFR Club to the player had to be assessed in application of the other parameters set out in art. 17 par. 1 of the Regulations. The Chamber recalled that said provision provides for a non-exhaustive enumeration of criteria to be taken into consideration when calculating the amount of compensation payable.

97. Bearing in mind the foregoing as well as the claim of the player, the Chamber proceeded with the calculation of the monies payable to the player under the terms of the Employment Contract and its Addendum from the date of its unilateral termination until its end date. Consequently, the Chamber concluded that the amount of EUR 364,000 serves as the basis for the determination of the amount of compensation for breach of contract, broken down as follows:

a. EUR 77,000 as the instalments due from February until August 2023 (i.e. 7 months à EUR 11,000 each)

b. EUR 144,000 as the entire remuneration for the season 2023/2024; and

c. EUR 143,000 as the entire remuneration for the season 202[4]*/202*[5].

98. In continuation, the Chamber verified as to whether the player had signed an employment contract with another club during the relevant period of time, by means of which he would have been enabled to reduce his loss of income. According to the constant practice of the DRC as well as art. 17 par. 1 lit. ii) of the Regulations, such remuneration under a new employment contract shall be taken into account in the calculation of the amount of compensation for breach of contract in connection with the player's general obligations to mitigate his damages.

99. Indeed, the player found employment with St. Lörinc, Uta Arad, and Al Taraji. In accordance with the pertinent employment contracts, the player was entitled to approximatively the following amounts, converted to Euros in

accordance with exchange rates of the dates of signature of each contract:

a. *St. Lörinc: EUR 274.30 as the pro rata salary of February 2023 (i.e., 10 days, from 2 until 12 February 2023);*

b. *Uta Arad: EUR 37,461.51 being (i) EUR 3,595.91 as the pro rate salary of February 2023 (i.e., 16 days, from 13 until 28 February 2023); (ii) EUR 25,171.40 as the salaries from March until June 2023; and (iii) EUR 8,694.20 as advance payment;*

c. *Al Taraji: EUR 229,646.30 being (i) EUR 183,717 as the remuneration payable in instalments; and (ii) EUR 45,929.30 as advance payment.*

TOTAL: EUR 267,382.11

100. *Subsequently, the Chamber referred to art. 17 par. 1 lit. ii) of the Regulations, according to which a player is entitled to an amount corresponding to three monthly salaries as additional compensation should the termination of the employment contract at stake be due to overdue payables. In the case at hand, the Chamber confirmed that the Employment Contract termination did not take place due to said reason, and therefore decided that the player should not be entitled to additional compensation.*

101. *Consequently, on account of all the above-mentioned considerations and the specificities of the case at hand, the Chamber decided that CFR Cluj must pay the amount of EUR 96,617.89 net to the player (i.e., EUR 364,000 minus EUR 267,382.11), which was to be considered a reasonable and justified amount of compensation for breach of contract in the present matter.*

102. *Lastly, taking into consideration the player's request as well as the constant practice of the Chamber in this regard, the latter decided to award the player interest on said compensation at the rate of 5% p.a. as of the date of termination (i.e., 2 February 2023) until the date of effective payment".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

50. The Appellant filed a statement of appeal (hereinafter: "Statement of Appeal") with the Court of Arbitration for Sport (hereinafter: "CAS"), pursuant to Article R48 of the Code of Sports-related Arbitration (hereinafter: "CAS Code") against the Respondent, on 14 September 2023 by email as well as by courier, to challenge the Appealed Decision.

51. The Appellant requested the appointment of a Sole Arbitrator in the person of Mr Rui Botica Santos, Attorney-at-law in Lisbon, Portugal.

52. On 20 September 2023, the Appellant requested the CAS Court office a 30-day extension to file its Appeal brief.

53. On 21 September 2023, the CAS Court Office acknowledged receipt of the Statement of Appeal submitted by the Appellant as well as the letter dated 20 September 2023 and forwarded the respective copies to the Respondent. The CAS Court Office:

- informed that the Appellant was automatically granted a 10-day extension further to Article R32 and asked the Respondents whether they agree to an additional 20-day extension;

- invited the Respondents to inform the CAS Court Office whether they agree to the appointment of a Sole Arbitrator and/or to the Sole Arbitrator suggested by the Appellant;

- noted that the Appellant had chosen to proceed in English.

54. On 27 September 2023, the CAS Court Office:

- acknowledged receipt of the First Respondent's email of 22 September 2023;

- noted that the Respondents, expressly or tacitly, agreed to the Appellant's additional 20-day extension to file its Appeal brief, therefore the new deadline to submit the Appeal Brief was 24 October 2023;

- noted that the First Respondent objected to the case being referred to Mr Rui Botica Santos and proposed the appointment of Mr Olivier Carrard;

- invited the Appellant, the Second Respondent and the Third Respondent to inform by 4 October 2023, whether they agree: (a) to the appointment of a Sole Arbitrator, (b) to the nomination of Mr Carrard as sole Arbitrator, or (c) to request the appointment of an arbitrator with Swiss nationality.

55. On 17 October 2023 and after having consulted the Parties, Mr Carrard was nominated as Sole Arbitrator by the Deputy President of the CAS Appeals Arbitration Division and were informed about a disclosure made by Mr Carrard.

56. On 24 October 2023, the Appellant filed its Appeal Brief.

57. On 25 October 2023, the CAS Court Office:

- took note that none of the Parties filed a challenge of Mr Carrard's appointment;

- acknowledged receipt of the Appel Brief, forwarded a copy of it to the Respondents and granted the Respondents a 20-day deadline to file their Answer.

58. On 26 October 2023, the Respondents requested the CAS Court Office to set aside the deadline to file their answer until payment of the advance of costs by the Appellant. This was accepted by the CAS Court Office on the same day.

59. On 29 November 2023, the CAS Court Office informed the Parties that the Appellant had paid its share of the advance of costs and therefore granted the Respondents a 20-day deadline to file their Answer.

60. Upon request dated 1st December 2023, the Respondents requested the CAS Court Office an extension to file their Answer until 12 January 2024 which had been accepted beforehand by the

Appellant and was then confirmed by the CAS Court Office.

61. On 6 December 2023, the Parties were informed of the constitution of the Panel.

62. On 10 January 2024, the Respondents requested "*a final continuance to file their answer*" by 19 January 2024, which, with the Appellant's agreement, was granted.

63. On 14 January 2024, the Respondents requested from the CAS Court Office to provide them with the award in case CAS 2016/A/4590, this was done on 16 January 2024 by the CAS Court Office.

64. The Respondents filed a joint Answer on 19 January 2024.

65. On 31 January 2024, the CAS Court Office *inter alia*:

- acknowledged receipt of the joint Answer filed on 19 January 2024 and sent a copy of it to the Appellant;

- informed the Parties that, on the basis of Article R56 of the CAS Code, the parties shall not be authorized to supplement or amend their requests of their argument, nor to produce new exhibits, not to specify further evidence on which they intend to rely, after the submission of the Appeal Brief and of the Answer;

- informed the parties that the Sole Arbitrator however took note of the Respondents' comments with respect to his scope of review as well as the Respondents' Requests to Produce" and invited the Appellant to submit its observations strictly limited to these issues;

- invited the Parties to inform the CAS Court Office whether they prefer a hearing to be held in this matter.

66. On 1st February 2024, the Respondents requested not to have a hearing and for the Sole Arbitrator to issue an award based on the Parties' written submissions, while, on 6 February 2024, the Appellant expressed its preference for a hearing to be held in this matter.

67. On 14 February 2024, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to hold a hearing.

68. On 15 February 2024, the Appellant filed its observations as well as new evidence on the issues specified in the letter dated 31 January 2024.

69. After having consulted the Parties, the CAS Court Office confirmed on 20 February 2024 that the hearing would be held on 19 March 2024 in Lausanne.

70. On 6 March 2024 and following the Appellant production request, the CAS Court Office invited the First Respondent to provide by 11 March 2024 a copy of his contract covering the period from 1 July 2024 until 31 May 2025 should such document exist.

71. On 7 March 2024, the Respondents filed with the CAS Court Office the Employment Contract the Player signed with FC Universitatea Cluj covering the period from 3 January 2024 until 31 May 2025.

72. On 11 March 2024, the CAS Court Office sent a copy of the employment contract to the Appellant and invited the latter to respect the confidentiality of this document and to comment on it, should it wish to do so, until 15 March 2023.

73. On 12 March 2024, the Appellant's counsel requested re-consideration of the hearing date for personal reasons.

74. On 14 March 2022, the CAS Court Office decided to reschedule the hearing on 16 April 2024 in Lausanne and issued an Order of Procedure, which was duly signed by the Parties, on 14, respectively 24, March 2024.

75. On 15 March 2024, the Appellant filed its comments regarding the employment contract filed with the CAS Court Office on 7 March 2024.

76. On the same day, the CAS Court Office sent a copy of the Appellant's letter to the Respondents and invited them to comment on it, should they wish to do so. The Respondents however did not use this opportunity.

77. On 11 April 2024, the Respondents filed a recent decision of the FIFA Dispute Resolution Chamber FPSD-12576 with the CAS Court Office which they intended to rely on during the hearing.

78. On 12 April 2023, the CAS Court Office acknowledged receipt of said email and appendix and forwarded it to the Appellant, informing the latter that it will have the opportunity to express its position at the hearing.

79. A hearing was held in Lausanne on 16 April 2024. The Sole Arbitrator was assisted at the hearing by Ms Pauline Pellaux, Counsel at the CAS.

80. The hearing was attended, remotely, by:

- For the Appellant: Martin Cockburn, Ettore Mazzilli and Konstantinos Antoniou, Counsel; Adrian Barstan and Simona Sferle, representatives of CFR Cluj.

- For the Respondent: Georgi Gradev, Márton Kiss, Drago Balta, Counsels; Krasimir Todorov, Counsels' assistant; Roger Junio Rodrigues Figueira, Player.

81. Marius Bilasco, vice-president of CFR Cluj, and Bogdan Mara were heard as witnesses, called by the Appellant, during the hearing.

82. At the beginning of the hearing, the Parties confirmed that they had no objections to the composition of the Panel.

83. During the hearing, the Parties had full opportunity to make submissions in support of their respective cases and they all confirmed that their rights to be heard had been respected.

IV. SUBMISSIONS OF THE PARTIES

84. This section of the award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this award, the Sole Arbitrator has accounted for, and carefully considered all the submissions made and evidence adduced by the Parties, even if there is no specific

reference to them in the following summary.

A. The Appellant

85. The Appellant's submissions, in essence, may be summarized as follows:

1. The Player terminated the contract without just cause

a) The Player was never confronted with any sort of abusive behavior from the side of CFR Cluj

- *"The Player was hired (and expressly agreed thereto), at the time of the Employment Contract's conclusion, to play for either the first and/or the second team of Cluj, which is clearly confirmed by the unambiguous provisions of the employment Contract"*;

- The Player knew that he had the obligation to play for the second team of CFR Cluj as – during the 2021/22 sporting season – he played in at least 4 official matches for the second team of CFR Cluj in the third Romanian league and never filed a complaint with regard to his participation in matches with the second team;

- The First Respondent was able and eligible to perform his activity as a professional football player as, during his time with CFR Cluj, he was continuously registered with the FRF and the LPF;

- CFR Cluj ensured that the Player had full access to competitive football at the highest level as he had access and was eligible to play official matches in the Romanian Cup Competition as well as in the UEFA Conference League;

- There was in fact a slot for the Player in the A-List for the remainder of the 2022/23 sporting season in Superliga matches on the day the Player unilaterally decided to terminate the contract without just cause as the regulations of the FRF and the PFL regarding Kosovo nationals changed enabling the First Respondent to reintegrate the A-List, however the Player decided not to attend the meeting that would have allowed to arrange the administrative aspects of his re-inclusion in the A list;

- Furthermore, the Player always received regular payments of his remuneration;

- At all times, the Player was a full member of the first team squad of CFR Cluj and received the same treatment as the other players from the first team squad with regards to training, medical and all other relevant aspects. The First Respondent was treated in the same way as the other players of the team and was never isolated.

- *"The potential access to bonuses when reaching targets with the first team of Cluj cannot be considered as argument that the playing opportunity with the second team of Cluj would constitute abusive behavior".*

b) The Player was never forced to change or terminate the contractual relationship

- CFR Cluj intended to continue the execution of the Employment Contract during the remaining

2022/23 sporting season and in accordance with the Employment Contract's terms;

- Following the Player's letters, CFR Cluj took his wishes into consideration and offered to discuss several options assuring the Player that his financial remuneration would not change regardless of the option chosen;

- The Player did not attend the meeting at the headquarters of CFR Cluj on 2 February 2023.

c) *The Player had no other evidence to support a just cause*

- The alleged argument that the salary for January 2023 was outstanding at the time the contract was terminated is false, since the salary was not yet due on that date.

- The amount of EUR 17'500 to be outstanding at the time the contract was terminated for alleged bonus payments are not considered within the scope of Art. 14bis of the FIFA RSTP.

- The alleged amount of LEI 129'910 for outstanding salaries for 2022 is contested by CFR Cluj and not sufficiently substantiated.

- During the contractual relationship, the Player never contested outstanding salaries.

d) *The Player's termination does not constitute an ultima ratio event*

- The Player ignored the provisions of the Contract according to which he should play for any team of CFR Cluj;

- The Player did not look for an amicable solution with CFR Cluj;

- The Player was aiming at rejoining Uta Arad as soon as possible.

2. Compensation to be paid by the Player to CFR Cluj

- EUR 342'000.- corresponding to the residual value if the Employment Contract from 2 February 2023 until 31 May 2025;

- EUR 116'493.86 corresponding to the unamortized payment of agent services related to the Player's transfer from Uta Arad to CFR Cluj;

- An interest rate of 5% *per annum* shall apply on the aforesaid amount from 15 March 2023 corresponding to the date CFR Cluj filed its answer and counterclaim with the FIFA Football Tribunal until the date of effective payment.

3. Consequences for the Player's new club

- In accordance with Art. 17 para. 2 of the FIFA RSTP, the "signing club" shall be jointly and severally liable to pay compensation to CFR Cluj;

- Hence, the Second Respondent, respectively the Third Respondent, shall be jointly and

severally liable to pay EUR 458'493.86 to CFR Cluj.

4. Alternatively: no compensation in favor of the Player

- Should the Player be deemed to have had just cause to terminate the Employment Contract, no compensation shall be awarded to the Player.

- In the alternative and should compensation still be awarded to the Player taking the principle of mitigated compensation into account.

- In this case, regarding the mitigated compensation until 30 June 2024, the compensation should not exceed EUR 74'617.89 and the amount of EUR 144'602.02 should be taken into account as average income for the period covering July 2024 until May 2025.

86. In light of the above, the Appellant filed the following requests for relief in its Appeal Brief:

"1. To fully accept the present appeal.

2. To set aside the Decision.

3. To rule that the Player terminated the employment relationship with the Appellant without just cause.

4. Consequently, to confirm that the Appellant shall not be liable to pay any amount to the Player.

5. In turn, to condemn the Player to pay to the Appellant the amount of EUR 458,493.86 (Four Hundred Fifty-Eight Thousand and Ninety-Three Euro and Eighty-Six Cents Only) net plus interest at a rate of 5 percent per annum on the aforesaid amount for the period from 15 March 2023 until the date of effective payment.

6. To hold that the Third Respondent (Uta Arad) as the Player's new club shall be jointly and severally liable to pay the aforesaid net amount of EUR 458,493.86 (plus interest) to the Appellant.

in the alternative to request 6 only

7. To hold that the Second Respondent (the Hungarian Club) as the Player's new club shall be jointly and severally liable to pay the aforesaid net amount of EUR 458,493.86 (plus interest) to the Appellant.

8. For the effect of the above, to state that the Player, the Third Respondent and/or the Second Respondent shall be condemned to pay any and all costs of the present proceedings, if any.

9 To condemn the Respondents, individually and/or jointly, to contribute an amount of not less than CHF 40,000.00/- (Forty Thousand Swiss Francs Only) to the Appellant's expenses related to the present proceedings including, without limitation, attorney's fees (legal fees, travel and accommodation costs in case of a hearing, etc.) as well as any further costs and expenses for witnesses and experts".

87. In its letter dated 15 February 2024, the Appellant confirmed that the Sole Arbitrator shall not be limited to amend the findings of the Appealed Decision

regarding already paid remuneration and the Sole Arbitrator shall have the full power to review and amend the awarded outstanding remuneration and compensation under the Appealed Decision.

88. In said letter, the Appellant also provided the CAS Court Office with an e-mail of 17 January 2023 to the LPF by means of which the Appellant requests changes to the *"A-List"* of its team.

89. By communication of 15 March 2024 and after having received a copy of the latest Employment contract avec the Player, the Appellant reviewed its calculation regarding the mitigated compensation and concluded, should a compensation be awarded to the Player, that said compensation should not exceed EUR 19'617.89 respectively EUR 41'617.89 (should the CAS follow the calculation as per the Appealed Decision).

90. At the hearing on 16 April 2024 and upon request of the Sole Arbitrator, the Appellant produced a letter as well as an email dated 2 February 2023 by means of which CFR Cluj asked the PFL to register the Player on the A-List of its club.

B. The Respondent

91. The Respondents' submissions, in essence, may be summarized as follows:

1. The Player terminated the contract with just cause

- The Respondents consider that by refusing to register the Player on the A-List of CFR Cluj with the LPF in order to participate in the Superliga, the Appellant barred, in an absolute manner, the Player's potential access to the national championship and the possibility to play his trade for the rest of the 2022/2023 season;

- CFR Cluj violated one of the Player's fundamental rights as a football player, *i.e.* the right to compete and exercise his profession;

- The Appellant failed to discharge its burden to prove any legitimate reason to deregister the Player from the A-List in LPF leading the Player to believe that CFR Cluj was no longer interested in his services and the performance of the Contract;

- CFR Cluj also failed to provide evidence that the decision to deregister the Player from the A-List with the LPF was a provisional measure, especially as the Appellant could not have registered the Player on the A-List in LPF until the end of the 2022/2023 season due to the limitation provided in Article 19bis (5) ROFA;

- It also failed at providing a proof that it tried to file a reregistration of the Player on the A-List with LPF, which it could have made without the need of the Player's signature;

- CFR Cluj failed at notifying the Player about his deregistration or at asking his consent;

- The Player's decision to terminate the Contract was an *ultima ratio* measure, which was justified and did not require a warning.

2. The Player is entitled to a compensation

- CFR Cluj did not dispute the Football Tribunal's conclusion or file any specific request for relief against the outstanding remuneration and therefore, considering the prohibition of *ne ultra petita*, the Sole Arbitrator does not have the power to amend the Appealed Decision regarding the outstanding remuneration of EUR 3'367.78 and EUR 3'625 plus 5 % interest *per annum* as from 1 February 2023, respectively 2 February 2023, until the date of effective payment;

- Failing to submit a specific request for relief regarding mitigation of the amount of compensation adjudicated by the Football Tribunal to the Player, CFR Cluj is barred by the time limit set out in Article R56 of the CAS Code and therefore cannot request said mitigation;

- As CFR Cluj failed at requesting a specific request for relief regarding the mitigation for breach of contract, the Sole Arbitrator has no power to amend the amount of compensation granted by the Appealed Decision.

3. CFR Cluj is not entitled to a compensation

- Assuming the Player terminated the Contract without just cause, which is disputed in the case at hand, CFR Cluj is not entitled to a compensation for damages given its contributory fault;

- Based on Articles 44 para. 1 and 42 para. 1 of the Swiss Code of Obligations, the Respondents consider that CFR Cluj did not prove it sustained any damage as it easily gave up the Player's service by deregistering him and offering him to move to another club without asking for a loan fee;

- CFR Cluj significantly contributed to the situation it created and therefore its claim for compensation and damages must fail;

- As no compensation should be awarded to CFR Cluj, the Respondents left aside the question regarding the joint and several liability of the Second and Third Respondents.

92. In light of the above, the Respondents filed the following requests for relief in their Answer:

"1. Dismiss the appeal.

2. Confirm the Appealed Decision.

3. Order the Appellant to pay the Respondents a contribution towards their legal and other costs in an amount to be determined at the Sole Arbitrator's discretion".

V. LEGAL ANALYSIS

A. Jurisdiction

93. The jurisdiction of the CAS, which is not disputed by the Parties, derives from Article R47 of the CAS Code and Article 58 para. 1 of the FIFA Statutes.

94. Article R47 para. 1 of the CAS Code provides as follows:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".*

95. Article 57 para. 1 of the FIFA Statutes reads as follows:

> *"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question".*

96. Furthermore, the Contract signed by the Player and the Appellant provides as follows:

> *"Disputes concerning the conclusion, execution, modification, suspension or termination of this contract will be resolved by the jurisdictional bodies of the FIFA/UFA, respectively the Court of Arbitration for Sport from Lausanne, or by the competent courts materially and territorially, when the above-mentioned courts do not have jurisdiction to resolve the dispute".*

97. Also, the jurisdiction of the CAS was accepted by the Respondents and the Order of Procedure was signed by all Parties.

98. Therefore, the CAS has jurisdiction to decide the present dispute between the Parties.

B. Admissibility of the Appeal

99. According to Article R49 of the CAS Code:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against".*

100. According to Article 57 para. 1 of the FIFA Statutes, the Statement of Appeal must be filed within 21 days.

101. The grounds of the Appealed Decision were notified to the Parties on 24 August 2023.

102. The deadline for the Appellant to file the Statement of Appeal was therefore on 14 September 2023. Filed by email and by courier on that date, the appeal was timely filed.

103. The appeal further complies with all the formal requirements and is thus admissible, which is not contested by the Respondents.

C. Scope of review

104. According to Article R57 of the CAS Code:

> *"The Panel has full power to review the facts and the law of the case. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance".*

105. However, the Panel is also bound to the limits of the Parties' motions, since the arbitral nature of the proceedings obliges the Panel not only to decide on all claims submitted by the Parties but also prevents the Panel from granting more than the Parties are asking by submitting their requests for relief to the CAS, according to the principle of *ne ultra petita* (CAS 2016/A/4384, para. 120).

106. This principle also derives from Swiss law, which stipulates in Article 58 para. 1 of the Swiss Code of Civil Procedure that the court may not award a party more or less than what is requested, nor less than what is acknowledged by the opposing party.

107. The judge may, however, rule on the basis of implicit conclusions. This is the case when, without being formally expressed, they are virtually contained in those that are and can be deduced from them. This is notably the case in matters of damages, and especially when the judge proceeds to a compensation in matters of employment law (F. HOHL, *Procédure civile, Tome I, Introduction et théorie générale*, 2e éd., Berne, 2016, para. 1200 and following).

108. In this context, reference should be made to the case law of the Swiss Federal Tribunal, according to which the fact that the appeal brief does not contain precise quantified submissions on the merits of the case does not contravene the principle of the prohibition of formal denial of justice. On the one hand, the application of the principle of reliance requires that the submissions be interpreted in the light of the grounds on which they are based; on the other hand, the prohibition of excessive formalism requires that the wording of the submissions not be too strict if, on reading the appeal brief, it is clear what the appellant is seeking, or where the amount claimed is apparent from the grounds of appeal, at least in relation to the operative part of the contested decision (Decision of the Swiss Federal Tribunal 5A_645/2021 para. 3.3 of 2 February 2022).

109. In the case at hand, the Respondents consider that the Sole Arbitrator does not have the power to review the questions relating to the outstanding remuneration as well as to compensation as the Appellant *"did not dispute the Football's conclusion or file any specific request for relief against it"*.

110. In fact, the Sole Arbitrator is of the opinion that by stating in its request for relief to set aside the disputed decision, to rule that the Player did terminate the employment relationship without just cause and therefore to confirm that the Appellant shall not be liable to pay any amount to the Player, the Appellant addressed, at least implicitly, the amounts due to the Player according to the disputed decision.

111. This assessment is further confirmed by the fact that the Appellant stated its position regarding the compensation in its appeal brief.

112. Given the above, the Sole Arbitrator has the full power to review the questions relating to the outstanding remunerations as well as the compensation due in case of termination without just cause by the Player.

113. Whether the Appellant's subsidiary requests to reduce the amount due in case of termination of the Contract with

just cause by the Player, expressly formulated in its requests for relief in its letter of 15 March 2024, falls within the scope of the Sole Arbitrator's power of review is maybe more sensitive. In view of the outcome of the present case, it may however remain unanswered in the present case.

D. Applicable law

114. In CAS Appeal Arbitration Proceeding, the question of applicable law to the dispute is regulated by Article R58 of the CAS Code, which reads as follows:

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

115. Article 56 para. 2 of the FIFA Statutes indicate that:

> *"CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".*

116. As a result, the various FIFA regulations, including FIFA regulations on the Status and Transfer of Players (edition 2022) apply and secondarily Swiss law.

E. Admissibility of document filed on 11 April 2024

117. Before dealing with the merits of the present dispute, the Sole Arbitrator needs to examine a procedural issue, namely the admissibility of the FIFA Decision the Respondents wished to produce on 11 April 2024.

118. According to Article R56 of the CAS Code, *"Unless the parties agree otherwise or the President of the Panels orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer".*

119. As a general rule, the other party is first called to express its view on the admissibility of the late filing of the documents based on Article R56 of the CAS Code. If the other party agrees, the Panel will accept the late submissions and include them to the file (MAVROMATI/REEB, *The Code of the Court of Arbitration for Sport/Commentary, Cases and Materials*, 2015, p. 497 f.).

120. In the case at hand, neither the Sole Arbitrator nor the Appellant raised any objections regarding the admissibility of the Decision FPSD-12576 of the Dispute Resolution Chamber of the FIFA rendered on 25 January 2024, sent by the Respondents by email dated 11 April 2024 and which was discussed by both Parties at the hearing. Said document, which is further of a legal nature, is accepted and added to the file.

F. Merits

121. The Sole Arbitrator is of the opinion that the present dispute can be solved by answering the following questions:

    1. Whether the Player had a just cause to terminate the Contract;

2. Whether there is any outstanding remuneration;

3. Whether any of the parties is entitled to a compensation.

1. Termination of the contract with just cause

122. Article 14 FIFA RSTP provides that *"a contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause (para. 1). Any abusive conduct of a party aiming at forcing the counterparty to terminate or change the terms of the contract shall entitle the counterparty (a player or a club) to terminate the contract with just cause (para. 2)"*.

123. When assessing whether a unilateral contract termination is justified, the following general criteria must be applied, considering the specific circumstances of each individual matter (*FIFA Commentary on the Regulations on the Status and Transfer of Players*, 2021 Edition (hereinafter: "FIFA Commentary on RSTP"), p. 107):

- Only a sufficient serious breach of contractual obligations by one party qualifies as a just cause for the other party to terminate the contract;

- In principle, the breach is considered sufficiently serious when there are objective circumstances that would render it reasonable to expect the employment relationship between the parties to continue, such as a serious breach of trust;

- The termination of a contract should always be an *ultima ratio*.

124. With regard to the abusive conduct as set out in para. 2 of Article 14 FIFA RSTP, such behavior will entitle the counterparty to terminate the contract with just cause. This paragraph does not address all kinds of *"abusive conduct"*; rather it confines itself to a specific behavior aimed at forcing the counterparty to terminate the contractual relationship or to change the terms of the contract (FIFA Commentary on RSTP, p. 109).

125. The Appellant claims that the Player did not have just cause to terminate the Contract because:

- The Player knew he was hired to play for either the first and/or the second team of Cluj;

- The Player was continuously registered with the FRF and the LPF;

- The Player had full access to competitive football at the highest level;

- There would have been a slot in the A-List for the Player for the remaining season;

- The Player received regular payment of his remuneration at all times;

- The Player was at all time a full member of the first team squad of CFR Cluj with regards to training, medical and all other relevant aspects;

- The potential access to bonuses when reaching targets with the first team of CFR Cluj cannot constitute an abusive behavior.

126. The Sole Arbitrator will therefore examine whether (*a)*) CFR Cluj was entitled to not register the Player on the A-List; (*b)*) CFR Cluj complied with the Players rights and its own obligations; (*c)*) the Player complied with the general obligations set out in the Contract.

a) Was CFR Cluj entitled to not register the Player on the A-List?

127. The main disagreement between the Parties is whether CFR Cluj had the right to use the Player's skills within all teams of the club. To answer this question, the Sole Arbitrator first relies on the Contract signed between the Parties.

128. As a preliminary point, it should be remembered that the scope of the Contract *"shall consist in the supply of specific sports services by the Player as a professional player (non-amateur), for the benefit of"* CFR Cluj (Article 2.1. and 2.4. of the Contract).

129. In this context, the Player has the obligation to comply with the decisions of the Appellant (Article 5.2. b) of the Contract) and to follow the instructions of the coaches (Article 5.2. g) of the Contract). Furthermore, the Player has the obligation *"to provide football services, at a high professional level, (…) and thus to contribute through its performance within the Club's football teams"* (Article 5.2. c) of the Contract).

130. CFR Cluj in turn has *"the right to take administrative and organizational measures it deems appropriate for the conduct of sports activities within the Club"* and *"the right to exercise control over the fulfillment of the obligations of the Professional Footballer"*. With regard to the skills of the Player, the Contract provides that CFR Cluj has the right to use them within any of CFR Cluj's football teams (Article 5.3. of the Contract).

131. Thus, given that the Player had to comply with the Appellant's instructions and was, according to the Contract, obliged to play for all the teams and that, conversely, CFR Cluj was entitled to use the Player's skills within each of its teams, it appears that the Appellant could unilaterally decide whether the Player should play with the first or the second team of CFR Cluj.

132. This furthermore results from the written submissions of the Player and CFR Cluj, as both Parties unanimously state that the Player played for both the first and the second team of the club during the 2021/2022 season.

133. Given the above, the Sole Arbitrator still needs to determine whether CFR Cluj had the right not to register the Player on the A-List.

134. First, the Sole Arbitrator notes that the Contract is silent in this respect.

135. To answer this question, it appears necessary to explain what the A-List is about and in what it consists of. In order to do so, the Sole Arbitrator recalls that it appears from the documents produced in the proceedings that the player was registered with the FRF as well as with the PFL for CFR Cluj throughout the duration of the Contract, it being specified that the PFL is the Romanian governing body that manages the first

professional league of the Romanian football championship system.

136. In this context, it is clear from Article 19bis of the Regulation of the Organization of Football activity of the FRF (hereinafter: "ROAF") that for first league matches, *i.e.* those organized by the PFL, teams are limited to 25 players making up the *"A-List"*, which must include a maximum of 4 non-European players.

137. The Sole Arbitrator also refers to the Club's statements at the hearing, which explained that CFR Cluj had two professional teams: one team playing in the Romanian 1st league and one team playing in the Romanian 3rd league.

138. In view of the above and given that the Player has been registered as a professional player with the FRF and the FLP during the full duration of the Contract, CFR Cluj was entitled to not include the Player in the A-List as it was free to have the Player play within all of the teams of the club. In this respect, the Sole Arbitrator notes that the Player could play with the second team of CFR Cluj in the 3rd Romanian professional league.

139. As a result, CFR Cluj was entitled to not register the Player on the A-list, and the Player did not have an absolute right to be included in said list.

b) Did CFR Cluj comply with the Player's rights and its own obligations?

140. Having considered that CFR Cluj did have the right to choose on which of its teams the Player could play and therefore was not obliged to include him in the A-List, the question arises as to whether CFR Cluj complied with the Player's rights under the Contract.

141. In this respect, the Player had notably the right to be paid for his sporting activities as well as the right to specific training conditions for the team's participation in competitions (Article 5.1. A) and B) of the Contract).

142. In this context, CFR Cluj also had to *"ensure the payment of the Professional Footballer's remuneration in the amount and conditions established in his contract"* and *"to ensure the conditions and facilities for training (…) and participation in competitions at the standards corresponding to the competitive level in which the group of players of which the professional footballer is a member"* (Article 5.4. of the Contract).

143. FIFA regulations do include as just cause to terminate a contract with immediate effect the fact of de-registering or not registering a player in order to play for his club. This right derives from the fact that one of a player's fundamental rights is to have access to training and competitions. By de-registering a player, even for a very short period, the club is absolutely preventing a player from taking part in competitions, thereby violating one of his fundamental rights. In this context, the FIFA DRC as well as the CAS (CAS 2014/A/3643) held that by preventing a player from taking part in a national championship, the player could legitimately terminate the contract for just cause (FIFA Commentary on RSTP, p. 114 f.).

144. In the case at hand, the Player exclusively based his right to prematurely terminate the Contract as a result of his de-registration from the A-List.

145. With regard to the Player's right to take part in competitions, it appears from the file that, despite the fact that the Player was no longer on the A-List, with the consequence of not being able to take part in matches in the Romanian 1st League, the Player was nonetheless able to take part in matches in the Romanian 3rd League with the second team of CFR Cluj, as well as matches of the UEFA Conference League.

146. In this respect, it is true that the FIFA DRC (DRC decision of 31 October 2019) considers that competitions operating on the knock-out system, such as the UEFA Conference League, prevents a player from having access to competitions, which could therefore prevent a player who only participates in this type of competition from playing the rest of the season and constitute a fair reason for him to terminate his contract with immediate effect.

147. In the present case, however, the Romanian 3rd League does not operate according to the knock-out structure. The Player could have therefore participated throughout the season in competitions at the standards corresponding to the competitive level of CFR Cluj's second team, once again bearing in mind that the Player had already taken part in matches of the Romanian 3rd League during the 2021/2022 season and failed to establish that he would ever have complained about it to the Appellant.

148. Furthermore, the evidence on file shows that the Player's non-inclusion within the A-List was only temporary.

149. On 20 January 2023, *i.e.* 3 days after the Player discovered he was not part of the A-List anymore, the FRF issued a circular stating that Kosovo players were no longer considered as non-European players. As a result, and as it appeared that the Player had been replaced on the A-List by a Kosovar player, the First Respondent could have regained his place on said list. At this stage, it is irrelevant whether the Player could have been immediately reintegrated on the A-List or only at the end of the season, since the Player did not have an unconditional right to be on the A-List and CFR Cluj had the right to use his sporting skills within all of its teams.

150. Finally, the present case is not comparable to the one that emerges from the FIFA decision accepted at the beginning of the hearing. In that case, the player was not retained in the club's A-List and not included in a training camp. The FIFA DRC found that the club had not explained why the player had not been included in the A-List and that there was no evidence that the player would have the opportunity to play official matches. As a result, the FIFA DRC ruled in favor of the player (DRC Decision of 5 March 2024, Stark). However, the aforementioned case is not comparable to the present case as the First Respondent was not prevented from playing in competitions and had the opportunity to train and benefit from the same conditions as the players of the A-List.

151. Consequently, by allowing the player to take part in the Romanian 3rd league championship, and offering him unchanged training conditions, CFR Cluj has respected the Player's rights and its own obligations.

c) Did the Player comply with the general obligations set out in the Contract regarding dispute regulation?

152. Having deemed above that the Player did not have a right to a place of the A-list and that CFR Cluj had respected the Player's rights, the question finally arises as to whether the Player himself respected the obligations of the Contract regarding dispute regulation.

153. In this respect, Article 10 of the Contract provides that *"the Parties shall, in good faith, make every effort to resolve amicably any dispute, controversy or misunderstanding arising out of or in connection with this Agreement"*. The Parties therefore *"undertake, by mutual agreement, to settle amicably any disputes arising in connection with the conclusion, validity and/or execution of the contract, before initiating any other legal action, meaning the other party will be invited to negotiations by granting a minimum 15 days. If the negotiations will not have successful result within the maximum 60 days after notification, the unsatisfied party may address the competent jurisdictional bodies"*.

154. In this case, the Player discovered on 24 January 2023 that he was no longer part of the A-List, enabling him to take part in matches in the Romanian 1st League. One week later only, he sent a letter to CFR Cluj stating that he considered the Club to have failed in its obligations and breached the contract. Despite daily exchanges between the parties, including a letter dated 1 February 2023 in which the Club made several offers to the Player, the latter unilaterally decided to terminate the Contract for just cause just 9 days after his first complaint to the Club.

155. It this respect, CFR Cluj did respond to the Player's complaint in timely manner. It disputed his complaint and suggested meeting at the Club's premises to discuss different possibilities CFR Cluj was offering to the Player, including a temporary transfer to another club, given that CFR Cluj had received several offers of intent from other Romanian clubs. The Player however never attended said meeting even though he confirmed at the hearing that he was only fifteen minutes away from said premises on the day the meeting should have taken place.

156. In addition, the Romanian sports media quickly relayed the news that the Player was eventually subject to a transfer and, according to the file, the Player signed a new contract on 2 February 2023, the day the Club proposed meeting him, which suggests that the Player's real aim was to leave CFR Cluj before the end of his contract.

157. Given the above, the Player did not comply with the dispute regulations of the Contract and particularly with the provision stating that the Parties shall give themselves a minimum of 15 day to negotiate the issue.

158. Under those circumstances, the Sole Arbitrator deems that the Player terminated the Contract without just cause.

2. Outstanding remuneration

159. With regard to the outstanding salaries, the Appellant challenged the outstanding remuneration awarded to the Player in the Appealed Decision, *i.e.*:

- EUR 3'367.78 as the balance of salaries, plus 5% interest *p.a.* as from 1 February 2023 until the date of effective payment;

- EUR 3'625 as match bonuses, plus 5% *p.a.* as from 2 February 2023 until the date of effective payment.

160. While the Player alleged that these amounts would still not have been paid, CFR Cluj has not established that it would ever have paid these amounts and did not bring any elements that would justify reversing the Appealed Decision on this point. The Sole Arbitrator further notes that as the Player neither alleged nor established that these outstanding remunerations would have justified his termination of the Contract, the fact that they would not have been due when the Contract was terminated is irrelevant.

161. In view of the foregoing, the Sole Arbitrator confirms the Appealed FIFA Decision with regard to the outstanding remuneration due by CFR Cluj to the Player.

3. Compensation due to either of the parties and liability

162. The question arises as to whether CFR Cluj should be entitled to a compensation since the Sole Arbitrator considers that the Player terminated the Contract without just cause.

163. The consequences of terminating a contract without just cause are dealt in Article 17 FIFA RSTP which provides:

"The following provisions apply if a contract is terminated without just cause:

1. *In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within the protected period.*

(…)

2. *Entitlement to compensation cannot be assigned to a third party. If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties".*

164. The CAS case law abides with the principle of "positive interest", *"the harmed party should be restored to the position in which the same party would have been had the contract been properly fulfilled"* (CAS 2005/A/801, para. 66).

165. However, *"the aim of compensating the damaged party should always be to arrive at an amount of compensation that adequately compensates for the damage suffered. The process of calculating compensation due for a contractual breach must not lead to the injured party obtaining benefits or gain that compensates it*

over and above the harm it sustained because of the unlawful behavior of the other party" (Commentary on the FIFA RSTP, p. 141).

166. The first element to be considered under Article 17 para. 1 of the FIFA RSTP *"is whether any contractual clauses exist to establish in advance an amount due from the party in breach of contract"* (Commentary on the FIFA RSTP, p. 141).

167. In the case at hand and subject to Article 7.3. of the Contract, which provides that *"in the event of unilateral termination of the contract without just cause or without just cause for sport, the guilty party must pay pecuniary damages and incur sports penalties provided for in the applicable regulations in question"*, the Parties have not incorporated any specific provision regarding the compensation due in the event of a termination without just cause of the Contract. Compensation must therefore be calculated on the basis of Article 17 FIFA RSTP.

168. According to the FIFA DRC, to assess the value of the player's services at the time the contract is terminated prematurely, it takes the residual value of the contract that was prematurely terminated, applies the value of the new contract to the period during which the prematurely terminated contract would have been valid, and takes the average of these two figures. To this, any non-amortized fees and expenses relating mainly to transfers and agents paid or incurred by the former club are added to the value of the average contract (Commentary of the FIFA RSTP, p. 153 f.).

169. However, the CAS jurisprudence on the calculation of compensation due to a club in the event of a breach of contract regularly stresses a wide margin of appreciation when applying Article 17 FIFA RSTP. In fact, *"Article 17 para. 1 RSTP does not require the judging authority to necessarily evaluate and give weight to any and all factors listed therein. Depending on the particular circumstances of each case and on the submissions of the parties, any of those factors may be relevant or irrelevant to the final decision, influencing or not the discretionary assessment of the compensation due. (…) A CAS panel has no duty to analyse and give weight to any specific factor listed in Article 17 para. 1 if the parties did not actively substantiate their allegations with evidence and arguments based on such factor"* (CAS 2009/A/1880 & 1881, para. 78 and CAS 2018/A/5607 & 5608, para. 110 and the references mentioned).

170. *"In practice, the majority of CAS panels tend to use the "residual value" method (…) as a starting point (…). They then pay due consideration to other substantiated elements listed in Article 17 RSTP and/or raised by the parties, if any (…). Some panels, however, departed from this method, on the grounds that it did not allow for the salary savings made by the club, and/or the specifics of the case submitted to them. In rare cases, no compensation was awarded at all, as the club did not prove its damage"* (CAS 2023/A/9578, 9579 & 9590, para. 158 and the references mentioned).

171. Considering the above, the Sole Arbitrator must first determine the residual value of the Contract if the Player had remained with CFR Cluj; the value of the contracts signed by the Player following his departure from CFR Cluj; and the amount of the transfer and agent costs alleged by CFR Cluj.

172. If the Contract would have been performed until its "natural" expiration

(*i.e.* end of May 2025), the Player would have earned the residual amount of EUR 342'000, *i.e.*:

- EUR 55'000.-: from February to June 2023 (5x EUR 11'000.-);
- EUR 144'000.-: 2023/2024 season (12x EUR 12'000.-);
- EUR 143'000.-: 2024/2025 season (11x EUR 13'000.-).

173. The Player signed several contracts after having terminated its initial contract with CFR Cluj and the total value of said contracts amount to EUR 252'612.82 and can be summarized as follows:

- St. Lörinc: EUR 278.20[1] from 2 February until 12 February 2023;
- Uta Arad: EUR 28'578.30[2] from 13 February until 30 June 2023;
- Al Taraji: EUR 138'756.32[3] from 1st July 2023 until 31 December 2023 including an advance payment of EUR 47'150.-;
- F.C. Universitatae Cluj: EUR 85'000[4] from 3 January 2024 until 31 May 2025.

174. Regarding the transfer and agent fees alleged by CFR Cluj, which have not been disputed by the Player, they should be taken into account *pro rata* to the extent to which they were not amortized (12 out of 40 months in total), *i.e.* in total EUR 116'493.86:

- EUR 52'500.- (EUR 75'000.- / 40 months x 28 months);
- EUR 63'993.86 (EUR 91'419.80 / 40 months x 28 months).

175. If the Sole Arbitrator were to adhere to the strict application of Article 17 FIFA RSTP, the compensation owed to the CFR Cluj by the Player who terminated the Contract without just cause would amount to EUR 413'800.27[5]. However, the Sole Arbitrator considers that this sum is disproportionate in view of the circumstances of the case and of the aim of Article 17 FIFA RSTP to adequately compensate for the damage suffered (cf. supra para. 165).

176. While it is true that in an award better known as the "Webster" case (CAS/2007/A/1298), the CAS considered that the residual value of the contract at the time of the disputed termination should be considered at the fairest compensation, the CAS Panel, in the "Matuzalem" award (CAS 2008/A/1519), however deducted the residual value of the contract from the amount due by way of compensation since this was in fact an expense saved by the player's former club.

[1] Daily salary for February (28 days): EUR 27.82 (778.80/28 = 27.82); From 2 to 12 February = EUR 278.20 (27.82 x 10 = 278.20);

[2] Daily salary for February (28 days): EUR 225.02 (6300.57/28 = 225.02); From 13 to 28 February = EUR 3'375.30 (225.02 x 15 = 3375.30); From March to June 2023: EUR 25'203 (4 x 6300.57 = 25203).

[3] Monthly salary: EUR 15'267.72; From July to December 2023: EUR 91'606.32 (6x 15267.72 = 91606.32) to which should be added EUR 47'150 = EUR 138'756.32.

[4] Monthly salary: EUR 5'000: From January 2024 to May 2025: EUR 85'000.

[5] (342'000.- + 252'612.82) / 2 + 116'493.86 = 413'800.27

177. In light of the foregoing, the Sole Arbitrator deems that it would be disproportionate to award CFR Cluj the entire average residual value of the Contract. The Sole Arbitrator justifies its decision by noting that the Player's salary has fallen significantly following his departure from CFR Cluj. He is therefore self-punished, bearing in mind that he himself left the club without just cause.

178. The Sole Arbitrator also considers that the payment of compensation equivalent to the residual value of the contract would constitute an unjustified enrichment of the Club vis-à-vis the Player as CFR Cluj no longer had to pay the Player's salary after his termination.

179. CFR Cluj further did not allege that it had suffered any damage resulting from the absence of the Player from its team, since it did not allege that it needed to recruit a replacement for the Player. In this context, the Sole Arbitrator notes that CFR Cluj recruited a new player in the person of Mr Ermal Krasniqi before the Player's termination, who seems to have replaced the Player in the A-List. Accordingly, the Sole Arbitrator deems that the Club does not evidence any damages that would be consecutive to the Player's absence.

180. As positive damage, CFR Cluj claims it has suffered damage following the Player's departure without just cause due to the fact that CFR Cluj had paid a transfer fee of EUR 75'000.- as well as EUR 91'419.80 in agent fees. The agent's fees as well as the transfer fee should be taken into account for the duration of the Contract, which means only EUR 52'500 and EUR 63'993.86 could be taken into account.

181. With regard to these fees, the Sole Arbitrator considers that, although the Club would thus in principle be entitled to an amount of EUR 116'493.85, this would be inappropriate in the present case.

182. Indeed, the Sole Arbitrator deems that, while the Club was entitled to register the Player with its second team and may have obtained a fee for his potential transfer, the Club cannot, in good faith, claim for a linear consideration of costs incurred for hiring a Player initially registered on the A list. The Sole Arbitrator further points out that CFR Club, by deciding not to include the Player in the A-List, inherently reduced the Player's value, and of a potential fee consecutive to his transfer, as the Player would no longer be considered as a top player of CFR Cluj's first team.

183. Having *de facto* replaced him by Mr Krasniqi before the end of his contract, the Appellant can thus not validly claim damages for non-return on investment on a *pro rata* basis and the Sole Arbitrator deems that only one third of the amount requested as allegedly non-amortized fees, *id est* EUR 38'831.28, shall be granted.

184. In view of the above, of both parties' position in this respect and of the specificity of sport, the Sole Arbitrator thus concludes that the total amount of compensation due by the Player is of EUR 38'831.28.

185. Pursuant to Article 339 para. 1 SCO, 5% interest *p.a.* as from the last day of the contractual relationship, *i.e.* 2 February 2023, is further due on the compensation.

186. Therefore, CFR Cluj should be entitled to a compensation of EUR 38'831.28 plus 5% interest *p.a.* as from 2 February 2023.

187. This being said, the question now arises as to whether the Player and his new club could be jointly and severally liable as Article 17 para. 2 of the FIFA RSTP provides that *"if a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment"*.

188. According to the FIFA Commentary on the RTSP (edition 2023), the Player's new club is *"the first Club for which the Player registers"* and the CAS has further also consistently followed this approach to identify the club with which the player was first registered following the breach of contract (cf. CAS 2013/A/3149, CAS 2015/A/4262 & 4264, CAS 2016/A/4408).

189. In this case and as pointed out by the Appellant the facts however show that the Player first signed a contract with St. Lörinc, and only approximately two weeks later, a contract with Uta Arad. There are as well several factual elements allowing for some suspicions that the Player's intention from the outset was to join Uta Arad. In practice, this type of transfers is generally referred to as a "bridge transfer". Arguing that *"the aims of sporting justice shall not be defeated by an overly formalistic interpretation of the FIFA Regulations which would deviate from their original intended purpose"*, the Appellant thus considers that Uta Arad should be considered as the Player's new club.

190. While having taken due note of this line of argumentation, the Sole Arbitrator however also notes that not only it is temporally correct to consider that St. Lörinc should be regarded as the first club with which the Player was registered after leaving CFR Cluj since it requested the Player's ITC on 10 February 2023, but that it further appears that St. Lörinc played a dangerous game by recruiting a Player that actually never played for its team and by registering him. The Sole Arbitrator thus does not consider that a literal interpretation of Article 17 para. 2 of the FIFA RSTP would defeat the aim of such regulations and thus considers that St. Lörinc, which shall be liable for its acts, shall be considered as the Player's new club.

191. For the sake of completeness, the Sole Arbitrator further notes that while the Appellant argued, on a subsidiary basis, that nothing would prevent him to consider both Uta Arad and St Lörinc as the Player's new clubs, there is no need to examine such possibility, since, in view of the Appellant's requests for reliefs (cf. supra para. 86 ch. 6 and ch. 7) the Sole Arbitrator could in any event not do so without ruling *extra petita*.

192. Accordingly, the Sole Arbitrator considers that St. Lörinc must be declared liable for the compensation owed to CFR Cluj, together with the Player. Therefore, the Player and, St. Lörinc shall jointly and severally pay to Fotbal Club CFR 1907 Cluj S.A. EUR 38'831.28.- plus 5% interest as of 2 February 2023 as compensation for breach of contract.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Fotbal Club CFR 1907 Cluj S.A. on 14 September 2023 is partially admitted against the Decision FPSD-9136 rendered by the Dispute Resolution Chamber of the FIFA on 3 August 2023.

2. The items 1 to 4 of the Decision FPSD-9136 rendered by the Dispute Resolution Chamber of the FIFA on 3 August 2023 are therefore set aside and replaced by the following decisions:

3. Fotbal Club CFR 1907 Cluj S.A. shall pay to Roger Junio Rodrigues Figueira the following amounts as outstanding remuneration:

   - EUR 3'367.89 net plus 5% interest *p.a.* as from 1 February 2023 until the date of effective payment;

   - EUR 3'625 net plus 5% interest *p.a.* as from 2 February 2023 until the date of effective payment.

4. Roger Junio Rodrigues Figueira and St. Lörinc KFT shall jointly and severally pay to Fotbal Club CFR 1907 Cluj S.A. EUR 38'831.28.- plus 5% interest as of 2 February 2023 as compensation for breach of contract.

5. (…).

6. (…).

7. All other motions or prayers for relief are dismissed insofar as they are admissible.

CAS 2023/A/10050
VšĮ Telšių Futbolo Ateitis v. FK Arsenal, OFK Grbalj, FK Budva & Fédération Internationale de Football Association (FIFA),
12 November 2024

Panel: Mrs Leanne O'Leary (United Kingdom), Sole Arbitrator

Football
Training compensation
Methods of interpretation of sports regulations
Stages of the EPP procedure
EPP Review Process
Late submission of a waiver

1. **Sports regulations are subject to methods of interpretation applicable to statutory provisions rather than contracts. The starting point is the wording of the sport's regulation and there is no reason to depart from the plain text, unless there are objective reasons to think that it does not correspond in all respects to the true meaning of the provision under review. This may result from the drafting history of the provision, from its purpose, or from the systematic interpretation of the law. Where the text is not entirely clear and there are several possible interpretations, the true scope of the provision will need to be narrowed by taking into account all the pertinent factors, such as the relationship with other legal provisions and its context (systematic interpretation), the goal pursued (teleological interpretation), especially the protected interest among others, from the drafting history of the piece of legislation in question (historical interpretation).**

2. **The process for determining a club's entitlement to training compensation is prescribed in the Electronic Player Passport (EPP) procedure that is outlined in Articles 8, 9 and 10 of the FIFA Clearing House Regulations (FCHR). The EPP procedure consists of three stages, namely: the Provisional EPP and Inspection Period (Article 8 FCHR), the EPP Review Process (Article 9 ECHR) and the Determination of the Final EPP (Article 10 FCHR). It is conducted entirely through the FIFA Transfer Matching System (TMS) communication platform and a club and association is obliged to review TMS daily to check whether there are any communications from FIFA during the EPP procedure.**

3. **The EPP Review Process endures for ten days unless extended at the FIFA general secretariat's discretion, and involves information being submitted and challenged by the participants, reviewed by the FIFA general secretariat, with it making further information requests if required, and the FIFA general secretariat notifying all participants when the EPP Review Process has concluded. In the context of the EPP Review Process, Article 9.7 FCHR is directive, i.e. it is a procedural direction to the new club to submit a waiver at a point in the EPP procedure should a former club have waived its right to receive training rewards and should the new club be in possession of one. The deadline for compliance with the procedural direction in Article 9.7 FCHR is set out in Article 9.2 FCHR, with a club able to make a request to extend the**

duration of the EPP Review Process and therefore extend the deadline to comply with Article 9.7 FCHR. FIFA general secretariat may also direct a club to submit a waiver at other points in the EPP procedure, including during the EPP Review Process itself (Article 9.9 FCHR) or during the Determination of the Final EPP (Articles 10.1 and 10.2 FCHR).

4. **The FCHR do not expressly permit or exclude the late submission of a waiver, nor do the FCHR expressly provide for the consequences of non-compliance with a procedural direction issued during the EPP procedure. Although there might be some administrative inconvenience when documents are submitted late and the significant volume of transactions that FIFA is faced with may necessitate a procedure designed for efficiency, this administrative inconvenience does however not outweigh the prejudice caused to a club if it is not permitted to rely on a valid waiver subsequently. The financial consequences for a club of a valid waiver not being accepted can be significant, and if the intention is to deprive a club of the opportunity to rely on a contractual agreement that limits its liability for training compensation because of non-compliance with a procedural direction, then that consequence must be clearly stated in the FCHR and communicated to the clubs. Moreover, as desirable as compliance with a procedural direction is, a breach or non-compliance with a procedural direction may be permitted if there is no substantial prejudice to those who benefit from the requirement of compliance or if there is no serious inconvenience caused. Accordingly, the late submission of a waiver may be permitted, if i) there are factors which exceptionally excuse a club's non-compliance with Article 9.7 FCHR or another procedural direction, and ii) there is no substantial prejudice to those who benefit from the requirement of compliance or no serious inconvenience caused.**

I. PARTIES

1. VšĮ Telšių Futbolo Ateitis (the "Appellant" or the "Club") is a professional football club situated in the city of Telšiai in Lithuania which trades under the sporting name of "FK Džiugas". It is affiliated to the Lithuanian Football Federation ("LFF"), which, in turn, is a member of the Fédération Internationale de Football Association ("FIFA").

2. FK Arsenal (the "First Respondent") is a football club situated in the city of Tivat in Montenegro. It is affiliated to the Football Association of Montenegro (the "Montenegro FA") which, in turn, is a member of FIFA.

3. OFK Grbalj (the "Second Respondent") is a football club situated in the town of Kotor in Montenegro. It is affiliated to the Montenegro FA.

4. FK Budva (the "Third Respondent") is a football club situated in the town of Budva in Montenegro. It is affiliated to the Montenegro FA.

5. FIFA (or the "Fourth Respondent") is an association incorporated under Swiss

law with its registered office in Zurich, Switzerland. FIFA is recognised as the international federation for football by the International Olympic Committee. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players worldwide.

6. VšĮ Telšių Futbolo Ateitis, FK Arsenal, OFK Grbalj, FK Budva and FIFA shall be referred to collectively as "the Parties".

7. FK Arsenal, OFK Grbalj, FK Budva and FIFA shall be referred to collectively as "the Respondents".

II. INTRODUCTION

8. This dispute concerns an appeal against a determination of the FIFA general secretariat dated 15 September 2023 regarding the Electronic Player Passport (the "EPP") [xxxxx] for the Montenegrin football player, A. (the "Player") (the "EPP Determination") and the associated Allocation Statement TC-2226 also dated 15 September 2023 (the "Allocation Statement"). Although issued as separate decisions, the EPP Determination and the Allocation Statement will be jointly referred to as the "Appealed Decision".

9. At issue in the present proceedings is the amount of training compensation that is recorded in the Appealed Decision and the amount that the Appellant is required to pay to the First, Second and Third Respondents as a consequence of the Player's registration. The Appealed Decision also directed the Appellant to pay training compensation to the club, Sloga Radovići, situated in Montenegro and the Montenegro FA, which the Appellant does not appeal.

III. FACTUAL BACKGROUND

A. Background Facts

10. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced at the hearing held by videoconference on 13 June 2024. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, she refers in her Award only to the submissions and evidence she considers necessary to explain her reasoning.

11. On 23 February 2023 and in anticipation of signing the Player, the Appellant obtained a written waiver from FK Bodkelj (the "FK Bodkelj Waiver"), a football club situated in Montenegro and with whom the Player had been registered previously. The FK Bodkelj Waiver stated the following:

"TRAINING COMPENSATION WAIVER

Player name: A.

Date of birth: […]

Passport No: […]

FK Bokelj herewith explicitly confirms that it renounces and waives any possible right to training compensation as mentioned in Article 20 and Annex 4 of the FIFA Regulations on the Status and Transfer of Player.

Therefore, FK Bokelj will not, neither now nor in the future, claim any amount of training compensation from FC Dziugas Telsiai for the player concerned in case the player signs a professional contract with FC Dziugas Telsiai".

12. The Appellant also obtained a written waiver from the First Respondent dated 27 February 2023 (the "Arsenal Waiver"), with whom the Player had been registered previously and which stated the following:

"TRAINING COMPENSATION WAIVER

Player name: A.

Date of birth: […]

Passport No: […]

FK "Arsenal" Tivat herewith expilicitly (sic) confirms that it renounces and waives any possible right to training compensation as mentioned in Article 20 and Annex 4 of the FIFA Regulations on the Status and Transfer of Player.

Therefore, FK "Arsenal" Tivat will not, neither now nor in the future, claim any amount of training compensation from FC "Dziugas Telsiai" for the player concerned in case the player signs a professional contract with FC Dziugas Telsiai".

13. On 2 March 2023, the Club's TMS Manager, Mr Vacys Butkus, registered the Player as a professional with the Appellant. It is not disputed that this was the Player's first professional registration, and that the registration was at a different member association to that with which the Player had been registered previously as an amateur. The Player's registration was entered into the FIFA Transfer Matching System (the "TMS") as an international transfer and as required under the FIFA Regulations on the Status and Transfer of Players (the "RSTP").

14. The Player's first professional registration triggered the provisions of the FIFA Clearing House Regulations (the "FCHR") and a provisional EPP[1] was automatically generated in the FIFA Transfer Matching System (the "TMS") on 2 March 2023. Between 2 March 2023 and 13 March 2023 the provisional EPP was available for inspection (also known as the Inspection Period under Article 8.1 FCHR).

15. On 3 March 2023, the Appellant obtained a written waiver from the Second Respondent (the "Grbalj Waiver") which stated the following:

"TRAINING COMPENSATION WAIVER

Player name: A.

Date of birth: […]

Passport No: […]

OFK "Grbalj" herewith explicitly (sic) confirms that it renounces and waives any possible right to training compensation as mentioned in Article 20 and Annex 4 of the FIFA Regulations on the Status and Transfer of Player.

[1] The Electronic Player Passport or EPP is an electronic document containing all registration information for a player throughout their career, including the relevant member association, their status as amateur or professional, the type of registration whether permanent or a loan, and the club or clubs with which the player has been registered since the calendar year of their 12th birthday (*see* Definition section of the FCHR).

Therefore, OFK "Grbalj" – Grbalj will not, neither now nor in the future, claim any amount of training compensation from FC "Dziugas Telsiai" for the player concerned in case the player signs a professional contract with FC Dziugas Telsiai".

16. On 14 March 2023 and in accordance with Article 9 FCHR, the EPP Review Process[2] commenced and the FIFA general secretariat invited the Appellant, the LFF, the Montenegro FA, the First, Second and Third Respondents, Bokelj FK, and Sloga Radovići to participate in the EPP Review Process.

17. On 23 March 2023, the LFF submitted copies of the Player's registration and employment contract through the FIFA TMS.

18. On 25 March 2023, the Player's EPP was *"moved into validation"* and remained *"in validation"* for over four months.

19. On 15 August 2023, FIFA approved the registration information provided by the LFF and informed the participants, including the Appellant, that the EPP Review Process had been completed, and requested further information under Article 10.2 FCHR as follows:

"Subject: IMPORTANT: Request for submission of documentation in the EPP

Message: Dear TMS user,

Please note that your club or member association is participating in this electronic player passport (EPP) and that its review phase is now closed.

We notice that new registration information regarding the player in question has been included in the EPP by the participating member association(s) during the review process, in line with article 9 of the FIFA Clearing House regulations.

Based on the above, please be informed that the said new registration information is now available to you in the EPP.

In accordance with art. 10 par. 1 and 10 par. 2 of the FIFA Clearing House regulations, we kindly ask you to provide any documentation relevant to the entitlement to training rewards of any relevant club in the EPP, including but not limited to waivers or contract offers provided by the training clubs of the player, by no later than the end date of the ongoing completion phase as currently displayed in TMS.

In particular, in case of an international transfer of a player between two clubs affiliated to different member associations (before and/or after the end of the calendar year of the 23rd birthday of the player) against compensation, we wish to draw your attention to the fact that should any training rewards due to the former club be included within the said compensation paid by the new club, the new club shall upload the transfer agreement of reference under in the applicable "waiver" section in relation to the registration of the player at the former club.

Thank you for taking note of the above and for your collaboration" (emphasis added).

20. On 23 August 2023, the FIFA general secretariat moved the FK Bodkelj Waiver from the registration process to the EPP Review Process through TMS.

21. Also, on 23 August 2023, the FIFA general secretariat wrote to FK Bokelj inviting it to comment on the validity of

[2] The EPP Review Process is described in Article 9 FCHR during which participants in the EPP procedure are invited to submit information regarding a player's registration and which the FIFA general secretariat then uses to determine a player's final EPP pursuant to Article 10 FCHR.

the waiver and wrote to the Montenegro FA inviting its comments in relation to a club that appeared to be disaffiliated. FK Bokelj did not reply to the correspondence and between 23 August 2023 and on 8 September 2023, the FIFA general secretariat corresponded with the Montenegro FA through the FIFA TMS.

22. On 15 September 2023, the final EPP was approved and concluded as follows:

"15. In consideration of the above and in accordance with the FCHR and annexes 4 and 5 to the RSTP, the FIFA general secretariat has determined the entitlement of clubs to training rewards for the above trigger as follows.

16. Bokelj would in principle be entitled to training compensation for having registered the player at some point in time between the start of the calendar year of player's 12th birthday and the end of the calendar year of player's 21st birthday, but has waived its training compensation entitlement in relation to the registration of reference; therefore, no training compensation is due to this training club.

17. Arsenal is entitled to training compensation for having registered the player at some point in time between the start of the calendar year of the player's 12th birthday and the end of the calendar year of the player's 21st birthday.

18. Sloga Radovići is entitled to training compensation for having registered the player at some point in time between the start of the calendar year of the player's 12th birthday and the end of the calendar year of the player's 21st birthday.

19. Budva is entitled to training compensation for having registered the player at some point in time between the start of the calendar year of the players 12th birthday and the end of the calendar year of the players 21st birthday.

20. Grbalj is entitled to training compensation for having registered the player at some point in time between the start of the calendar year of the player's 12th birthday and the end of the calendar year of the player's 21st birthday.

21. FSCG is entitled to training compensation for the time that the player was registered with the disaffiliated club Mogren at some point in time between the start of the calendar year of the player's 12th birthday and the end of the calendar year of the player's 23rd birthday.

22. No other club is entitled to training compensation".

23. Also on 15 September 2023 and consequent on the final approval of the Player's final EPP, Allocation Statement TC-2226 was automatically generated, which concluded that the following amounts were due to each of the clubs and member associations identified in the Player's final EPP:

"Conclusion

8. The new club FK Džiugas (LFF) shall pay training compensation to the training club(s) of the player in the total amount of EUR 202,027.39.

9. The following training club(s) shall receive the following payment (s).

9.1 The training club Arsenal (FSCG) shall receive training compensation payments from the new club of the player in the amount of EUR 30,000.00.

9.2 The training club Sloga Radovići (FSCG) shall receive training compensation payments from the new club of the player in the amount of EUR 82.19.

9.3 The training club Budva (FSCG) shall receive training compensation payments from the new club of the player in the amount of EUR 22,657.08.

9.4 The training club Grbalj (FSCG) shall receive training compensation payments from the new club of the player in the amount of EUR 123,890.86.

9.5 The member association Football Association of Montenegro on the basis of the registration of the player with the disaffiliated training club Mogren (FSCG) shall receive training compensation payments from the new club of the player in the amount of EUR 25,397.26.

9.6 The payments defined in this Allocation Statement shall be made through the FIFA Clearing House entity (FCH), in accordance with articles 12, 13 and 14 of the FCHR. The FCH will contact the new club, the relevant training clubs and the relevant member associations to process these payments.

…".

24. On 15 September 2023, FIFA notified the Appellant and all other participating entities, including the First, Second and Third Respondents of the Appealed Decision.

25. On 18 September 2023, the Appellant obtained a written waiver from the Third Respondent (the "Budva Waiver") which stated the following:

"TRAINING COMPENSATION WAIVER

Player name: A.

Date of birth: […]

Passport No: […]

FK Budva herewith expilicitly (sic) confirms that it renounces and waives any possible right to training compensation as mentioned in Article 20 and Annex 4 of the FIFA regulations on the Status and transfer of Player.

Therefore, FK Budva will not, neither now nor in the future, claim any amount of training compensation from FC Dziugas Telsiai for the player concerned in case the player sing (sic) a professional contract with FC Dziugas Telsiai".

26. On 19 September 2023, the Appellant sent an email to the FIFA general secretariat, attaching: the Arsenal Waiver, the Grbalj Waiver and the Budva Waiver (collectively the "Three Waivers"); a written statement from the Appellant's Director dated 18 September 2023 which explained why it had not submitted the waivers and a statement from Mr Butkus, the Appellant's TMS Manager (collectively the "Two Statements"); and an extract from TMS. The email requested the following:

"Good morning,

According to 15 Sep 2023 Determination of the FIFA general secretariat on EPP[xxxxx] player A., we kindly ask you to familiarize with the additional material (attached) and clarify the situation of the financial obligation, which we believe must be recalculated.

Thank you for your time.

Best regards/pagarbiai".

27. On 20 September 2023 and following receipt of an email from FIFA directing the club to email the FIFA Clearing House, the Appellant sent a second email to FIFA, attaching all documents that it included with its email of 19 September 2023, and repeating its request for FIFA to consider the documents and *"clarify the situation"*.

28. On 26 September 2023, the Appellant obtained an amended written waiver from the Third Respondent which provided as follows:

"TRAINING COMPENSATION WAIVER

Player name: A.

Date of birth: […]

Passport No: […]

FK Budva herewith explicitly confirms tahtt (sic) it renounces and waiver any existing and/or potential right to training compensation as mentioned in Article 20 and Annex 4 of FIFA regulations on the Status and Transfer of Player, including the training compensation as stipulated in the determination of the FIFA general secretariat on EPP [xxxxx] for the player A. date 15 September 2023 and the determination of the FIFA general secretariat regarding the allocation statement TC-2226 corresponding to the electronic Player Passport [xxxxx] for the player A. date 15 September 2023.

Therefore, FK Budva will not, neither now nor in the future, claim any amount of training compensation from FC "Dziugas Telsiai" for the player concerned".

29. On 29 September 2023, the Appellant wrote to FIFA through the TMS and submitted the Three Waivers and the Two Statements. The message to FIFA read as follows:

"Dear sir,

On 20th September to e-mail: clearinghouse@fifa.org we already were sending information according to 15th September 2023 Determination of the FIFA general secretariat on EPP[xxxxx] player A.

We kindly would like to ask you to familiarise with the additional material (attached) and clarify the situation of the financial obligation, which we believe must be recalculated.

We understand that you very busy and it is impossible to respond to everyone quickly, but as soon as you have a chance, please let us know that the information has arrived and will be reviewed

Thank you a lot.

Best regards

Director of Club".

30. The Appellant also sought assistance from the LFF and on 5 October 2023, the LFF sent an email to the FIFA Clearing House on behalf of the Appellant seeking a review of the Allocation Statement, although neither the Appellant nor the LFF appear to have received a substantive reply to their communications.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

31. On 6 October 2023, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS")

pursuant to Article R48 of the Code of Sports-related Arbitration (the "Code") against the Respondents and regarding the Appealed Decision. The Appellant requested the appointment of a sole arbitrator to determine the matter.

32. On 16 October 2023, in accordance with Article R51 of the Code, the Appellant filed its Appeal Brief.

33. On 24 October 2023, the CAS Court Office invited the Respondents to reply to the Appellant's request that the matter be determined by a sole arbitrator.

34. On 30 October 2023, the Fourth Respondent requested that the case be submitted to a panel of three arbitrators because of the novelty of the FCHR and the absence of CAS jurisprudence.

35. Still on 30 October 2023, the CAS Court Office informed the Parties that owing to the different views regarding the arbitral tribunal's composition, the issue would be determined by the Division President pursuant to Article R50 (1) of the Code.

36. On 7 November 2023, the Appellant informed the CAS Court Office that an amicable settlement had been reached with the Second Respondent on 26 October 2023, the Third Respondent on 26 October 2023 and that a similar agreement was in the process of being signed by the First Respondent (collectively the "Settlement Agreements"). It requested that the settlement agreements be embodied in an arbitral award in accordance with Article R56 of the Code and that the Fourth Respondent be excluded from the proceedings because *"it acted in this matter in its capacity as the competent deciding body and is not a party to the relationship concerning the payment of training compensation"*.

37. On 7 November 2023, the CAS Court Office acknowledged receipt of the Settlement Agreements and the Appellant's requests and invited the Appellant to confirm whether its appeal against the Fourth Respondent shall be deemed withdrawn.

38. On 8 November 2023, the First Respondent submitted a copy of a settlement agreement dated 26 October 2023 to the CAS Court Office.

39. On 9 November 2023, the Fourth Respondent informed the CAS Court Office that it objected to the Appellant, and the First, Second and Third Respondents attempting to settle the dispute, and since the dispute included a horizontal element (financial dispute) and a vertical element (validation under the FCHR of the EPP and the Allocation Statement), the removal of the Fourth Respondent from the proceedings would prevent CAS from issuing a decision on the EPP and the Allocation Statement, and the appeal would have to be rejected (*cf:* CAS 2020/A/6694, para 82). The Fourth Respondent further submitted that considering the objectives of the FCHR, the FIFA Clearing House System required all payments to be made through the FIFA Clearing House in compliance with Articles 1.2, 1.3, 12, 13 and 14 FCHR. The Settlement Agreements circumvented the FCHR and undermined the integrity of the system, obstructed financial transparency and gave *"rise to fraudulent conduct, which the system is designed to prevent"*. The Fourth Respondent confirmed that it did not object to the Appellant, First

Respondent, Second Respondent and Third Respondent agreeing to the partial or total reimbursement of amounts paid after the training compensation payments were processed in accordance with the FIFA Clearing House payment process.

40. Still on 9 November 2023, the CAS Court Office invited the Appellant to comment on the Fourth Respondent's letter of 9 November 2023.

41. On 14 November 2023, the Appellant informed the CAS Court Office that if the current dispute was horizontal in nature, FIFA's position regarding the Settlement Agreements and their incorporation into a consent award was irrelevant and lacked legal merit, and the Appellant repeated its requests for the Settlement Agreements to be embodied in a consent award.

42. On 15 November 2023, the CAS Court Office acknowledged receipt of the Appellant's letter of 14 November 2023 and again requested the Appellant to confirm whether it withdrew the appeal against the Fourth Respondent.

43. On 16 November 2023, the Appellant informed the CAS Court Office that it would in principle agree to the Fourth Respondent's exclusion, if CAS either acknowledged that the Fourth Respondent lacked standing to be sued or permitted the Settlement Agreements to be embodied in an arbitral award *"without FIFA's participation as a respondent in the present proceedings"*.

44. On 16 November 2023, the CAS Court Office confirmed that *"as it is still unclear whether FIFA shall be removed from these proceedings"*, the Fourth Respondent remained a party to these proceedings.

45. On 24 April 2024, in accordance with Article R55 of the Code and within a previously agreed time extension, the Fourth Respondent submitted its Answer. The First, Second and Third Respondents did not file an Answer and otherwise have not participated in these proceedings.

46. Still on 24 April 2024, the CAS Court Office acknowledged receipt of the Answer and informed the Parties that pursuant to Article R56 they were not permitted to supplement or amend their requests or their argument, nor to produce new exhibits, nor to specify further evidence on which they intended to rely. The Parties were also invited to inform the CAS Court Office of whether they preferred a hearing to be held or for the Sole Arbitrator to issue an award based solely on the Parties' written submissions, and whether they preferred a case management conference to be held.

47. On 29 April 2024, CAS Court Office informed the Parties that pursuant to Article R54 of the Code, the Panel had been appointed as follows:

    Dr Leanne O'Leary, Solicitor in Liverpool, United Kingdom sitting as Sole Arbitrator.

48. On 30 April 2024, the Fourth Respondent informed the CAS Court Office of its preference for the Sole Arbitrator to decide the matter based on the Parties' written submissions.

49. Still on 30 April 2024, the Appellant informed the CAS Court Office of its request for a second round of written submissions to enable the Appellant to respond to the Answer, and further informed, in the absence of a second

round of submissions, of its preference for a hearing to be held and for a case management conference to be held to discuss various procedural matters, including the rendering of a consent award and the potential resolution of the dispute with FIFA by conciliation.

50. Also on 30 April 2024, the CAS Court Office invited the Respondents to comment on the Appellant's request for a second round of written submissions.

51. On 6 May 2024, the Fourth Respondent notified the CAS Court Office of its objection to the Appellant's request for a second round of submissions.

52. On 10 May 2024, the CAS Court Office informed the Parties of the Sole Arbitrator's decision pursuant to Article R57 of the Code to hold a hearing by videoconference. It also informed of the Sole Arbitrator's decision pursuant to Article R56 of the Code to reject the Appellant's request for a second round of written submissions on the basis that the Appellant's request did not disclose any exceptional circumstances that warranted a second round of written submissions, and the Appellant would have the full opportunity to rebut the Fourth Respondent's arguments during the hearing.

53. On 22 May 2024 and following consultation with the Parties, a hearing by videoconference was set down for 13 June 2024.

54. On 30 May 2024, the Appellant notified the CAS Court Office of its attendees at the hearing and that it would refer in the hearing to CAS 2023/A/9730, which decision was rendered on 22 April 2024.

55. Still on 30 May 2024, the First, Second and Third Respondents informed the CAS Court Office that they had voluntarily waived their rights to training compensation, had signed the Settlement Agreements to resolve the dispute, acknowledged the Appellant's administrative error during the Player's registration, confirmed that they were *"ready to respect the final decision of the court"*, and requested the CAS Court Office to let them know of the final outcome.

56. On 31 May 2024, the CAS Court Office invited the Parties to sign the Order of Procedure which was duly returned in signed copy by the Fourth Respondent on 3 June 2024 and by the Appellant on 6 June 2024.

57. On 3 June 2024, the CAS Court Office informed the Parties of the Sole Arbitrator's request for the Parties to address a specific legal point in their closing submissions during the hearing, and requested the First, Second and Third Respondents to inform the CAS Court Office of their attendance at the hearing.

58. On 6 June 2024, the Second Respondent informed the CAS Court Office that it would not attend the hearing.

59. On 13 June 2024, a hearing was held by way of videoconference. Besides the Sole Arbitrator and Mr Fabien Cagneux, CAS Managing Counsel, the following people were in attendance:

<u>For the Appellant:</u>
Mr Martynas Kalvelis, Legal Counsel
Mr Martynas Armalis, Club Director
Mr Vacys Butkus, TMS Manager, Witness
Ms Žaneta Reliūgaitė, Interpreter

For the Fourth Respondent:
Mr Miguel Liétard Fernández-Palacios, Director of Litigation
Ms Christina Pérez González, Senior Legal Counsel

60. The First, Second and Third Respondents did not attend the hearing.

61. At the outset of the hearing, the Parties confirmed that they had no objections with respect to the Sole Arbitrator. The Parties also confirmed that they accepted the jurisdiction of the CAS to decide the dispute.

62. The Fourth Respondent commented that while it had no objection to the Appellant's witness, Mr Butkus, providing evidence, it wished to remind the Sole Arbitrator that as an employee of the Appellant, Mr Butkus was, in its view, a party representative and that affected the weight to be placed on his evidence. The Appellant was invited to provide its comments in reply. The Sole Arbitrator noted the Appellant's and Fourth Respondent's positions and has taken these into consideration when weighing Mr Butkus' evidence.

63. In their opening statements, the Parties reiterated the arguments already put forward in their respective written submissions. The Appellant's witness, Mr Butkus, provided evidence through an interpreter regarding the circumstances specified in his witness statement and to the other circumstances related to the dispute. The Parties and the Sole Arbitrator had the full opportunity to examine the witness.

64. Mr Butkus' evidence may be summarised as follows:

- In his witness statement, he confirmed that he made a mistake when the waivers were not uploaded to TMS. He stated that the mistake was due to his limited English language skills and lack of knowledge, his confusion regarding the specific steps to taken in TMS, and that he missed the message in March 2023 that informed him of the period for uploading the waivers into TMS. He stated that he regrets the problem that he has caused for the club and that when the club received the FIFA decision, it was no longer possible to upload the documents. Mr Butkus apologised for the mistake and stated that the club was willing to take the necessary steps to prevent similar mistakes from occurring in the future.

- When asked supplementary questions during the hearing by the club's legal counsel and in re-examination, Mr Butkus confirmed his witness statement and stated that he uploaded a waiver with all other documents during the very initial stage of registering the Player and not during the EPP Review Process. Mr Butkus explained that the club was not sure of how the new system worked and that he did not know how, what, when or where to upload something. He stated that the club requested help from the LFF, but it seemed that the LFF did not fully understand the process themselves. Mr Butkus explained that before the club registered a player it collected waivers from previous clubs so that there were no claims about the

training compensation, but that the club did not fully understand the procedure at the time. He further explained that he requested help from the LFF about the FIFA Clearing House requirements but that the club received the help and explanations only after the deadlines had expired and the LFF organised the training around November 2023.

- Mr Butkus explained that before the Player's registration, he did not have any training or attend any workshops on the new process. The LFF only organised the workshops after the summer transfer window in 2023 and several Lithuanian clubs found themselves in the same position. He confirmed that the Player's registration was the first one in which the club was involved in the new process and that it is now very careful and cautious about it especially after the training organised by the LFF. Mr Butkus also explained the process for payment of the amounts that the club had not challenged in the Allocation Statement. He stated that despite receiving confirmation from the FIFA Clearing House that it was undergoing a compliance assessment, it had not been able to make the payments yet; the Appellant had not received any instruction from the FIFA Clearing House to make any payment. It had only received a letter from the FIFA Clearing House that the club, Sloga Radovići, was not providing any information so that the payment could be made and the FIFA Clearing House had asked the Appellant to assist.

- Under cross-examination, Mr Butkus confirmed that he had been the TMS Manager for three or four years, that he is the only person in the club with logins to access the TMS, that the club is a small club with a few people in its administration office, and that when the EPP Review Process started in March he did not know the procedure well and he forwarded the first letter received to the Appellant's administration without reading it very thoroughly. Mr Butkus stated that he had not read the FIFA Procedural Rules because they are in English and he is not very good at English and the LFF had not made any translation into the Lithuanian language, and that the importance of signing into the TMS on a daily basis was emphasised only during the LFF training and that he now knows to log in daily to keep track of the emails.

- In reply to the Sole Arbitrator's questions, Mr Butkus stated that he was not involved with obtaining the waivers directly from the club; the club director obtains the waivers and sends them to him. Mr Butkus again confirmed that he did not upload any waiver to TMS during the EPP Review Process, just the Bokelj Waiver when he registered the Player. When asked whether he had the Three Waivers to upload before the FIFA decision, Mr Butkus stated that as far as he could remember, *"we found out about the clear rules of the FIFA*

Clearing House, there were written procedures for it and we were unable to upload the waivers for the others because the deadline had expired so there was only one waiver that I uploaded that related to the registration".

65. The Parties provided their closing submissions orally and before the hearing concluded, the Parties expressly stated that they did not have any objection to the procedure adopted by the Sole Arbitrator and that their rights to be heard and to be treated equally had been duly respected.

V. SUBMISSIONS OF THE PARTIES

66. The following outline is a summary of the Parties' arguments, submissions and oral witness testimony which the Sole Arbitrator considers relevant to decide the present dispute and does not necessarily comprise each and every contention put forward by the Parties. The Sole Arbitrator has, nonetheless, carefully considered all the submissions made by the Parties, even if no explicit reference has been made in the following summary. The Parties' written and oral submissions, documentary and oral evidence and the content of the Appealed Decision were all taken into consideration.

A. The Appellant's Position

67. The Appellant's submissions, in essence, may be summarized as follows:

- The Player was registered as a professional football player with the Appellant on 2 March 2023. Prior to the Player's registration and subsequently, the Appellant acquired four waivers: the Bokelj Waiver, the Arsenal Waiver, the Grbalj Waiver and the Budva Waiver.

- During the EPP Review Process only the Bokelj Waiver was submitted through the TMS. The other valid waivers that it obtained prior to the EPP Review Process (namely, the Arsenal Waiver and the Grbalj Waiver) were not uploaded by the Appellant's TMS Manager, Mr Vacys Butkus, due to a lack of experience, language barriers and limited knowledge of the recently introduced FCHR.

- Considering that at the time the Appealed Decision was rendered, the First and Second Respondents had already waived their rights to training compensation, the order in the EPP and Allocation Statement to pay EUR 30,000 and EUR 123,890.96 to the First Respondent and Second Respondent respectively should be amended to show that both had waived their training compensation entitlements.

- Following the notification of the EPP and the Allocation Statement, the Third Respondent waived its rights to training compensation.

- Pursuant to Article R57 of the Code, a CAS Panel conducts a *de novo* examination of both the facts and the law, and the Sole Arbitrator is not restricted to the facts and legal arguments presented in the first instance.

- The principle of freedom of contract allows the parties to voluntarily enter into agreements

and modify rights and obligations. The waiver is essentially a contract where a party relinquishes a right or privilege and which can be provided at any time. The Budva Waiver should be considered and given effect to at any time irrespective of when it was obtained. The EPP and Allocation Statement should be amended to reflect the valid waiver of the Third Respondent's rights.

- The Appellant took steps to resolve the issue amicably with FIFA before filing these proceedings by: emailing FIFA on 19 and 20 September 2023, attaching the waivers and statements and seeking modification to the Allocation Statement; following up with FIFA on 29 September by email and through TMS; and seeking assistance from the LFF who in turn enquired of FIFA regarding the Appellant's requests for modification. Neither the Appellant's communications, nor to the best of the Appellant's knowledge, the LFF's communication, received a reply from FIFA.

- In the Appeal Brief, the Appellant submitted the following requests for relief:

  "The Appellant hereby respectfully requests CAS:

  1) to amend para 17 of the Appealed Decision1 as follows:

  - *The First Respondent would in principle be entitled to training compensation for having registered the Player at some point in time between the start of the calendar year of player's 12th birthday and the end of the calendar year of player's 21st birthday, but has waived its training compensation entitlement in relation to the registration of reference; therefore, no training compensation is due to this training club;*

  2) to amend para 19 of the Appealed Decision1 as follows:

  - *The Third Respondent would in principle be entitled to training compensation for having registered the Player at some point in time between the start of the calendar year of player's 12th birthday and the end of the calendar year of player's 21st birthday, but has waived its training compensation entitlement in relation to the registration of reference; therefore, no training compensation is due to this training club;*

  3) to amend para 20 of the Appealed Decision1 as follows:

  - *The Second Respondent would in principle be entitled to training compensation for having registered the Player at some point in time between the start of the calendar year of player's 12th birthday and the end of the calendar year of player's 21st birthday, but has waived its training compensation entitlement in relation to the registration of reference; therefore, no training compensation is due to this training club;*

  4) to amend para 8 of the Appealed Decision2 as follows:

- *The Appellant shall pay training compensation to the training club(s) of the Player in the total amount of EUR 25,479.45;*

5) to declare invalid and annul para 9.1 of the Appealed Decision2;

6) to declare invalid and annul para 9.3 of the Appealed Decision2;

7) to declare invalid and annul para 9.4 of the Appealed Decision2;

8) to order the Respondents to pay all the arbitration costs and to reimburse the Appellant for the CAS Court Office fee of CHF 1,000 and advance of costs (if applicable) paid to CAS;

9) to order the Respondents to pay the Appellant any contribution towards its legal and any other costs incurred in connection with the arbitration proceedings before CAS".

B. The Fourth Respondent's Position

68. The Fourth Respondent's submissions, in essence, may be summarized as follows:

- As the club with whom the Player was registered for the first time as a professional, the obligation was on the Appellant to pay training compensation to the clubs that trained the Player at an amateur level i.e. the First, Second and Third Respondents, amongst others. Pursuant to Article 9.7 FCHR, the obligation was also on the Appellant to submit through TMS any waiver of an entitlement to training compensation. The Appellant submitted only the Bokelj Waiver during the EPP Review Process despite having been expressly invited to submit all waivers.

- The Appellant claims that the reason for not submitting the waivers was due to the *"lack of experience, language barriers, and limited knowledge"* of the Appellant's TMS Manager, Mr Vacys Butkus, and now requests that CAS annul the Appealed Decision. The rules concerning the EPP procedure are clear and need to be applied strictly and the Appellant cannot rely on its own negligence to excuse its non-compliance with the procedure.

- The rationale for a strict application of the FCHR derives from the objectives of the Clearing House and the significant volume of cases with which it deals. The FIFA Clearing House was created because the mechanism previously used to distribute training compensation was not sufficiently effective to ensure that all clubs were receiving rewards for training players. The objectives of the FIFA Clearing House are described in Article 1.2 FCHR as being to: process specific payments; protect the integrity of the football transfer system; enhance and promote financial transparency in the football transfer system; and prevent fraud. The FCHR procedures are fully automated and involve consultation with relevant stakeholders.

- The FIFA Clearing House deals with a significant number of

transactions. Between 16 November 2022 and 30 August 2023 more than 14,500 Electronic Player Passports were generated, and it was anticipated that 25,000 Electronic Player Passports would be produced during the first year of FIFA Clearing House operations. Around 300 to 400 Electronic Player Passports are determined each week, including those that are "discarded".

- Considering the volume of determinations, there is a need for a strict application of the rules. From an administrative point of view, it would be *"extremely complicated"* for FIFA to allow exceptions to the rules every time a club does not respect the decision, and in any event, the Appellant has not justified why FIFA should make an exception e.g. no objective criteria to confirm why it missed the deadline, and in any event it is an automated process and creating exceptions would lead to inefficiencies in the system.

- The FIFA Clearing House Entity (FCH Entity) is an independent and regulated payment service institution, situated in France, licensed and supervised by the French Prudential Supervision and Resolution Authority in accordance with the EU Payment Service Directive and relevant French regulation. The FCH Entity performs a diligence and compliance assessment on all parties involved before any payments are processed and there are sanctions which apply to a party that fails a compliance assessment (Article 17 FCHR). There is no impediment to the parties agreeing to the total reimbursement of amounts paid after a payment has been processed pursuant to the FCHR.

- The Appellant acknowledges that it filed only the Bokelj Waiver during the EPP Review Process, and it cannot now rely on its negligence to excuse its non-compliance with the EPP procedure. The FCHR need to be applied rigorously and FIFA's approach of not accepting late documents has been endorsed in CAS 2023/A/9682, which confirms that *"if a negligent club through its own fault fails to comply with the time limits set forth in Article 9.2 FCHR, it should not be permitted to remedy its culpable action by filing an appeal accompanied by the missing waivers. This would constitute an abuse of right and compromise the efficiency and reliability of the entire process"* and *"could also expose training clubs to abusive litigants"* (CAS 2023/A/9682, paras 90-91). The Appellant requests the annulment of the Appealed Decision based on its lack of experience and limited knowledge of the system and seeks to belatedly rectify a negligent stance against the principle of *ignoranti legis neminem excusat* (i.e. ignorance is no excuse).

- The Appellant filed the waivers after the Appealed Decision was rendered. It is precluded from submitting new documents (or any document that should have been presented during the

administrative EPP procedure). Any other approach would constitute a circumvention of the applicable rules and the FCH system.

- The Sole Arbitrator must ultimately decide whether the Appealed Decision is correct in accordance with the information given by the Parties during the relevant EPP procedure. According to Article R57 of the Code, the Panel has the discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. Even though a strict approach to excluding evidence is applied under Article R57 of the Code, FIFA submits that when it comes to cases relating to the EPP procedure, any evidence that could and should have been submitted during that stage is no longer acceptable in an appeal instance i.e. the Sole Arbitrator is prevented from "re-opening" the EPP procedure at a CAS level. The Fourth Respondent submits that this approach is justified for the following reasons:

  a) The FCHR objectives require the procedures contained therein to be followed strictly to achieve the goals and objectives;

  b) The administrative process provides reasonable deadlines and opportunities for the relevant parties to file any documents which could be relevant to the issue of the final EPP and Allocation Statement. The Appellant was expressly invited to submit a waiver, yet it submitted only one which the Fourth Respondent considered; and

  c) Permitting documents not submitted during the EPP procedure might very well open the door to fraud, backdated agreements and other fraudulent activities. It also creates an opportunity for clubs to bypass the system and avoid using the FCH Entity for payments, including undergoing the relevant compliance assessment.

- A parallel can be drawn between the EPP procedure and the process for an international player's transfer. It is well-known that a player's international transfer is processed through TMS where the relevant clubs need to submit several documents to obtain the player's International Transfer Certificate ("ITC") during the relevant registration period or *"transfer window"*. CAS has repeatedly confirmed the strict application of transfer window deadlines because of the need for strict compliance to avoid any unequal treatment, and because no rule exists in the FIFA RSTP or its annexes that allows for a late transfer of a player who is not a free agent (CAS 2017/A/5368, para 44 etc.). Applying this jurisprudence to the case at hand, it must be concluded that i) the Appealed Decision cannot be

modified at CAS level because (ii) the Three Waivers were only filed after the issue of the EPP and Allocation Statement; (iii) such an approach does not involve excessive formalism because the relevant EPP procedure requires a strict approach to avoid, *inter alia*, unequal treatment and fraudulent conduct and (iv) no rule in the FCHR permits the late filing of waivers.

- The Fourth Respondent submits that admitting the waivers at this stage would *de facto* "re-open" the EPP administrative process after its closure, despite there being no rule allowing it to do so. This would be tantamount to allowing a player's registration even when his ITC has been requested after the closure of the registration period. Consequently, the Appellant's opportunity to file the waivers is precluded at this stage and the Appealed Decision is final under Article 10.5 FCHR and the new documents of the Appellant cannot modify the Appealed Decision.

- Should the Sole Arbitrator find that the Appellant succeeds with its appeal and the reasons for the Appellant' success are because of information that was not made available to FIFA during the EPP procedure, the Fourth Respondent requests that it be excluded from paying any arbitration costs or a contribution to legal expenses.

- In the Answer, the Respondent submitted the following requests for relief:

  "Based on the foregoing, FIFA respectfully requests the Sole Arbitrator to issue an award:

  b. Rejecting the requests for relief sought by the Appellant;

  c. Confirming the Appealed Decision;

  d. Ordering the Appellant to bear the full costs of these arbitration proceedings".

VI. JURISDICTION

69. Article R47 of the Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".

70. Pursuant to Article 56 (1) of the FIFA Statutes, FIFA recognises the jurisdiction of CAS to resolve disputes:

"FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, football agents and match agents".

71. Pursuant to Article 57 (1) of the FIFA Statutes:

"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question".

72. This dispute arises under the FCHR which provides in Article 10.5 (b) as follows:

> *"10.5 The FIFA general secretariat will notify the final EPP and the allocation Statement to all parties and the EPP review process.*
>
> …
>
> *b) This notification shall be considered a final decision by the FIFA general secretariat for the purposes of article 57 paragraph 1 of the FIFA Statutes and may be appealed to the Court of Arbitration for Sport (CAS)".*

73. Article 18 (1) FCHR provides:

> *"Any final decision, as identified in these Regulations, may be appealed to CAS in accordance with the FIFA Statutes, unless otherwise specified in these Regulations".*

74. The Appellant relies on Article 57 (1) of the FIFA Statutes, and Article 10.5(b) FCHR and Article 18 (1) FCHR as conferring jurisdiction on the CAS. The Fourth Respondent does not dispute the jurisdiction of the CAS, and the jurisdiction is further confirmed by the Parties' signatures on the Order of Procedure.

75. Accordingly, for the foregoing reasons, the Sole Arbitrator is satisfied that she has jurisdiction to adjudicate the present dispute.

VII. ADMISSIBILITY

76. Article R49 of the Code provides as follows:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against […]".*

77. The Appellant relies on Article 57 (1) of the FIFA Statues and Article 10 FCHR which provide that an appeal may be made to CAS within 21 days of receipt of the decision. The Appellant further submits that the Appealed Decision was received on 15 September 2023 and that the deadline for filing the Statement of Appeal was 6 October 2023. The Fourth Respondent does not challenge the admissibility of the appeal.

78. The Sole Arbitrator observes that the FIFA general secretariat rendered the Appealed Decision on 15 September 2023 and notified it through the FIFA TMS portal on the same day. The Sole Arbitrator further observes that the Statement of Appeal was filed on 6 October 2023 and within the deadline of 21 days prescribed in the FIFA Statutes and the Code. The Statement of Appeal also complies with the requirements of Article R48 of the Code. The Appeal Brief was filed on 16 October 2023 in accordance with Article R51 of the Code.

79. Accordingly, for the foregoing reasons, the Sole Arbitrator is satisfied that the Appeal was filed in time and is admissible.

VIII. APPLICABLE LAW

80. Pursuant to Article R58 of the Code, the Sole Arbitrator is required to decide the dispute:

> *"[According] to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the [Sole Arbitrator] deems appropriate. In the latter case, the [Sole Arbitrator] shall give reasons for [her] decision".*

81. Furthermore, Article 56 (2) of the FIFA Statutes provides that:

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

82. The Appellant does not refer to the applicable law in its submissions. The Fourth Respondent relies on Article 56 (2) of the FIFA Statutes and Article R58 of the Code and submits that because the decision is rendered by the FIFA general secretariat in accordance with the FCHR, the FIFA Statues and regulations, specifically the FCHR constitute the applicable law to the matter at hand, with Swiss law applying subsidiarily.

83. The Sole Arbitrator notes that there is no agreement on the applicable law and that FIFA is domiciled in Switzerland. She further notes that the Appealed Decision was notified on 15 September 2023, that it was made under the FCHR and that at the time the appeal was filed on 6 October 2023, the October 2022 edition of the FCHR was in effect. The merits of the dispute also touch on matters pertaining to the FIFA RSTP and the Sole Arbitrator considers that the October 2022 edition of the FIFA RSTP is also relevant.

84. Accordingly, for the foregoing reasons, the Sole Arbitrator determines that the FIFA RSTP (October 2022 edition), the FCHR (October 2022 edition) and any other relevant FIFA regulations constitute the applicable law to the matter at hand. Swiss law applies subsidiarily.

IX. MERITS

85. This dispute concerns the amount of training compensation that the Appellant should pay to the First, Second and Third Respondents. The Appellant obtained Three Waivers from the Player's former clubs, and it is undisputed that the Appellant failed to submit the Three Waivers during the EPP procedure, despite two requests from the FIFA general secretariat to do so, and prior to the determination of the Player's final EPP and the associated Allocation Statement on 15 September 2023.

86. Instead, the Appellant submitted the Three Waivers to FIFA on 19, 20 and 29 September 2023, with a request for them to be taken into consideration and when it received no substantive reply, it filed an appeal and submitted the Three Waivers during these proceedings. Also on file in these proceedings, are three Settlement Agreements that the First, Second and Third Respondents entered with the Appellant in October 2023. The Settlement Agreements confirm that each of the First, Second and Third Respondents have waived their rights to training compensation, either before the Player was registered or after, and that

the Appellant is *"exempt from"* and *"holds no responsibility"* to pay the First, Second and Third Respondents the training compensation that the FIFA general secretariat has calculated as owed to the respective clubs.

87. The validity of the waivers is not contested, and the Fourth Respondent does not object to the First, Second and Third Respondents reimbursing the training compensation to the Appellant after the payments have been made through the FIFA Clearing House. The First, Second and Third Respondents have indicated that they forgo the training compensation and are likely, therefore, to return the payments to the Appellant, although the Appellant submits that this scenario presents a number of challenges, including the practical challenge of retrieving money paid to a club in another country, the apparent delay with processing payments through the FCH Entity, and the likelihood that a small club in receipt of the training compensation may change its mind, have a change in ownership or go into bankruptcy, all factors which the Appellant submits make retrieval of the training compensation problematic.

88. Having considered the Parties' oral and written submissions, the Sole Arbitrator considers that the issue for determination is whether the Appellant's non-compliance with the EPP procedure preclude it from relying on the Three Waivers subsequently. The Sole Arbitrator considers that the issue is primarily a procedural one and requires consideration of whether the FCHR permit the late submission of a waiver after the final EPP and allocation statement have been generated.

89. In dealing with the issue, the Sole Arbitrator recalls that:

"[I]n CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them (see also article 8 of the Swiss Civil Code, ATF 123 III 60, ATF 130 III 417). The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some fact and persuade the deciding body, it must actively substantiate its allegations with convincing evidence" (e.g. CAS 2020/A/6796, para 98 and CAS 2009/A/1810 & 1811).

90. Before turning to a discussion of the legal issue, and based on the available evidence, the Sole Arbitrator makes the following findings of fact in relation to the EPP procedure that was undertaken in the present dispute:

- The EPP procedure was triggered when Mr Butkus entered the Player's registration into TMS, which, in turn, generated the Player's provisional EPP on 2 March 2023.

- The Player's provisional EPP was made available for inspection in TMS and no requests to participate were submitted during the Inspection Period.

- The FIFA general secretariat opened the EPP Review Process on 14 March 2023, and invited the Appellant, the First, Second and Third Respondents, the Montenegro FA, the LFF, Bokelj

FK, and Sloga Radovići to participate.

- During the EPP Review Process, the LFF submitted proof of the Player's registration, uploading into TMS, a copy of the Player's (sport) passport and a copy of the Player's employment contract. No other information was submitted during the EPP Review Process, which appears to have moved into *"validation"* on 25 March 2023.

- For a reason that was not explained during these proceedings, the Player's EPP remained *"in validation"* for *over four months* until 15 August 2023.

- The date on which the EPP Review Process ended is not clear and may have occurred on 25 March 2023 when the EPP is marked as *"in validation"* on TMS or may have occurred when the FIFA general secretariat sent an electronic message through TMS to the Appellant on 15 August 2023, informing the Appellant that the EPP Review Process was *"now closed"*. The electronic message also drew the Appellant's attention to the information uploaded by the LFF and requested that the Appellant provide any documents that were relevant to the entitlement of any club identified in the EPP to training rewards, *"including but not limited to waivers"*. The message requested that the documents were to be provided *"by no later than the end date of the ongoing completion phase as currently displayed in TMS"*. The completion date recorded on the TMS screenshot that was provided as evidence in these proceedings, was 21 August 2023.

- The Appellant did not reply to the message of 15 August 2023. Importantly, it did not submit the Three Waivers.

- On 23 August 2023, the Player's EPP was moved *"into validation"* and it is now accepted by the Appellant and the Fourth Respondent that the FIFA general secretariat (and not the Appellant) moved the Bokelj Waiver from the registration procedure to the EPP procedure. On the same day, the FIFA general secretariat invited Bokelj FK to comment on the Bokelj Waiver, but the club did not reply.

- Between 23 August 2023 and 15 September 2023, the FIFA general secretariat appears to have moved the EPP from *"completion"* to *"in validation"* to *"completion"* to *"in validation"* to *"completion"*. Its status changed to *"approved"* on 15 September 2023. The movement in and out of the different statuses was because of correspondence between the Montenegro FA and the FIFA general secretariat regarding a disaffiliated club.

- The Player's final EPP and Allocation Statement were determined on 15 September 2023 and notified to the participants in the EPP procedure on that date.

- On 19 September 2023, *four days* after notification of the Appealed Decision, the Appellant emailed the Three Waivers and Two

Statements to FIFA and asked for these to be taken into consideration. No explanation was provided during these proceedings of why it took the Appellant four days to make the request by email to FIFA. The Appellant sent a second email on 20 September 2023 together with all attachments, and a third email was sent on 29 September 2023 with a copy of the amended Budva Waiver only. The Appellant also posted a message on the FIFA TMS with copies of the Three Waivers, including the amended Budva Waiver on 29 September 2023.

- The FIFA general secretariat did not reply substantively to the Appellant's email communications. The Sole Arbitrator accepts that FIFA replied to the 19 September 2023 email and provided a different email address for the Appellant to contact.

- The Appellant also contacted the LFF, seeking its assistance and the LFF emailed FIFA on 5 October 2023, but appears not to have received a reply.

- The Appellant did not engage at all with the EPP procedure and only contacted the FIFA Clearing House after it received notification of the Appealed Decision.

- The Sole Arbitrator accepts Mr Butkus' evidence that this was the first time the Appellant had been involved in an EPP procedure under the FCHR. Mr Butkus had been the Appellant's TMS Manager for between three to four years; he was familiar with the way TMS worked, but unfamiliar with the EPP procedure and the requirement to check TMS daily. The Sole Arbitrator also accepts that Mr Butkus did not receive training on the EPP procedure until it was organised by the LFF in November 2023. The Appellant did not reply to information requests or submit the Three Waivers because Mr Butkus and others in the Appellant's administration were not familiar with the EPP procedure, for which the Sole Arbitrator accepts that Mr Butkus is now contrite.

91. The Sole Arbitrator recalls that sports regulations are subject to methods of interpretation applicable to statutory provisions rather than contracts (*cf*: SFT 4A_600/2016, 3.3.4; CAS 2023/A/9682, para 86; and CAS 2020/A/7356, para 75). According to the SFT, the starting point is the wording of the sport's regulation and that there is no reason to depart from the plain text, unless there are objective reasons to think that it does not correspond in all respects to the true meaning of the provision under review (*cf*: SFT 4A_600/2016, 3.3.4.2). This may result from the drafting history of the provision, from its purpose, or from the systematic interpretation of the law. Where the text is not entirely clear and there are several possible interpretations, the true scope of the provision will need to be narrowed by taking into account all the pertinent factors, such as the relationship with other legal provisions and its context (systematic interpretation), the goal pursued, especially the protected interest among

others, from the drafting history of the piece of legislation in question (historical interpretation) (ATF 132 III 226, 3.3.5; ATF 131 II 361, 4.2; CAS 2023/A/9682, para 86).

92. The process for determining a club's entitlement to training compensation is prescribed in the EPP procedure that is outlined in Articles 8, 9 and 10 FCHR. The EPP procedure consists of three stages, namely: the Provisional EPP and Inspection Period (Article 8 FCHR), the EPP Review Process (Article 9 ECHR) and the Determination of the Final EPP (Article 10 FCHR). It is conducted entirely through the FIFA TMS communication platform and a club and association is obliged to review TMS daily to check whether there are any communications from FIFA during the EPP procedure (Article 21 FCHR and Article 10.3 of the Procedural Rules of the FIFA Tribunal (the "Procedural Rules")).

93. The EPP procedure commences when a player registration request is entered into the electronic player registration system. TMS identifies whether the registration is one to which a training rewards trigger arises[3], and if one is identified, then TMS automatically generates a provisional EPP that is made available for inspection by clubs and associations for ten days (known as the Inspection Period - Article 8.1 FCHR). During the Inspection Period, a club or association may request to be included in the EPP Review Process. At the end of the Inspection Period, the FIFA general secretariat reviews the provisional EPP and any requests to be included in the EPP procedure and then, pursuant to Article 9 FCHR, opens the EPP Review Process. The Sole Arbitrator observes that FIFA may discard a provisional EPP where the registration information available shows that the player was not registered with a different member association but that it also has a discretion under Article 8.4 to open a provisional EPP *"at any time"* upon the substantiated request for a provisional EPP.

94. The Sole Arbitrator considers that in the present dispute, nothing turns on the provisional EPP and Inspection Period stage of the procedure. The EPP procedure was triggered when Mr Butkus entered the Player's registration into TMS, which, in turn, generated the Player's provisional EPP on 2 March 2023. The Player's provisional EPP was made available for inspection in TMS and there were no requests made to participate in the procedure during the Inspection Period.

95. The next stage of the EPP procedure is the EPP Review Process which is described in Article 9 FCHR as follows:

> *Article 9: EPP review process*
>
> *9.1 Upon completion of the inspection period and after assessment by the FIFA general secretariat as per article 8, the FIFA general secretariat will open an EPP review process in TMS and invite the following parties to participate:*
>
> *a) the member associations that have provided registration information relating*

[3]. Training rewards triggers are described in Articles 5 to 7 FCHR and include the first registration of a professional player at a different member association to that which the player was most recently registered as an amateur, or the first registration of a player as a professional, amongst others.

to the player through the FIFA Connect interface;

b) their relevant affiliated club(s);

c) the new club and its member association;

d) any member association that has requested or been requested to be included (cf. article 8 paragraph 3) and their relevant affiliated club(s), at the discretion of the FIFA general secretariat; and

e) any other member association(s) deemed relevant by the FIFA general

9.2 The EPP review process shall last ten (10) days. The FIFA general secretariat may, at its discretion, exceptionally extend its duration.

9.3 Member associations may review and/or request the amendment of any registration information.

9.4 Any request to amend registration information shall be submitted in TMS by the relevant member association. Such requests shall include, without limitation:

a) a document corroborating the registration of the player, issued by the member association;

b) a copy of any relevant International Transfer Certificate, if applicable; and

c) a copy of any relevant employment contract, if applicable.

9.5 Where a former club is required to have offered a contract to a player to retain its entitlement to training compensation in accordance with the RSTP, proof of that offer and its notification shall also be uploaded in TMS by the former club.

9.6 Where a former club did not offer a contract to a player and it believes that it is still entitled to training compensation, a request shall be submitted in TMS by the club or its member association, including written reasons for the request and supporting evidence.

9.7 Where a training club has waived its right to receive training rewards, proof of a valid waiver shall be uploaded in TMS by the new club.

9.8 A training club that believes that a waiver submitted by the new club in relation to the registration of the player at the training club is not valid may challenge the validity of the waiver by submitting a written notice in TMS.

9.9 The FIFA general secretariat may request any party involved in an EPP review process to provide further information at any time.

9.10 The FIFA general secretariat will notify all parties in TMS when the EPP review process has been completed" (emphasis added).

96. The third stage of the EPP procedure, is the Determination of the Final EPP which is described in Article 10 FCHR as follows:

"Article 10: FIFA determination

10.1 After completion of the EPP review process, the FIFA general secretariat will evaluate any requests to amend registration information.

a) Where a request is unclear or incomplete, the FIFA general

secretariat may request the relevant party to provide further information within five (5) days.

b) Failure to comply with FIFA's request within the time limit shall result in the request being disregarded.

10.2 The FIFA general secretariat may request any party involved in an EPP review process, whether during or after the EPP review process, to provide its position as to the entitlement of a club to receive training rewards (e.g. with respect to the alleged registration of a player, the validity of a waiver or a contract offer).

10.3 Following the completion of its evaluation, the FIFA general secretariat will decide on the registration of information to be incorporated and amended and the final EPP. In situations of legal or factual complexity, the following shall apply:

a) The FIFA general secretariat shall refer the matter to the Dispute Resolution Chamber in accordance with the Procedural Rules.

b) The complete file is transferred to the Dispute Resolution Chamber and the EPP review process is paused pending a decision.

c) The Dispute Resolution Chamber will decide on the final EPP in accordance with the Procedural Rules.

10.4 An Allocation Statement will be automatically calculated by TMS based on the final EPP, including the amount(s) to be distributed to training clubs.

10.5 The FIFA general secretariat will notify the final EPP and the Allocation Statement to all parties in the EPP review process.

a) This notification will include the decision of the Dispute Resolution Chamber and its grounds for cases covered under Article 10 paragraph 3.

b) This notification shall be considered a final decision by the FIFA general secretariat for the purposes of article 57 paragraph 1 of the FIFA Statutes and may be appealed to the Court of Arbitration for Sport (CAS).

c) Failure to appeal by the time limit in the FIFA Statutes shall result in the EPP and the Allocation Statement becoming final and binding.

d) A valid and timely appealed to CAS shall suspend the legal effects of an EPP and of the corresponding Allocation Statement for the duration of the respective proceedings before CAS.

10.6 A final EPP for each training rewards trigger will be permanently available in TMS for inspection by all member associations and clubs.

a) The registration information contained in the first final EPP of a player is binding on any future EPP of a player.

b) Where the first final EPP of a player is created before the calendar year of the player's 23rd birthday, the addition of registration information by a member association for subsequent years will be only

considered for future final EPP processes.

c) Where a decision of the Dispute Resolution Chamber in relation to an EPP is made, the decision shall be binding on any future final EPP of a player as from the date on which the decision becomes final and binding.

d) Where a future final and binding EPP of a player contains different registration information than that which is binding in accordance with paragraph (a), (b), or (c), the member association that failed to provide accurate registration information shall be sanctioned in accordance with article 17".

97. Article 21 FCHR is also relevant to the EPP procedure and provides that:

"Articles 10 and 11 of the Procedural Rules regarding communication and time limits shall apply to articles 9 and 10 of these Regulations".

98. Articles 10 and 11 of the Procedural Rules provide that:

"Article 10: Communications

1. All communications shall be undertaken via the Legal Portal operated by FIFA (Legal Portal) or the Transfer Matching System (TMS).

2. The specific procedural rules shall define which method of communication must be used for the procedure in question. Communications from FIFA to a party by any such method is considered a valid means of communication and sufficient to establish time limits and their observance.

3. Parties must review TMS and the Legal Portal at least once per day for any communications from FIFA. Parties are responsible for any procedural disadvantages that may arise due to a failure to properly undertake such review. The contact details indicated in TMS a binding on the party that provided them.

4. Any communication submitted in TMS by a member association on behalf of an affiliated club shall:

a) not be subject to the fulfilment of any conditions by the respective club;

b) be undertaken by the member association without delay, regardless of whether it agrees with the merits of the communication.

Article 11: Time Limits

1. For a party that directly receives a communication, the time limit will commence the day after receipt of the relevant communication.

2. For a party that receives a communication via its member association, the time limit will commence four calendar days after receipt of the communication by the member association to which it is affiliated or registered, or on the date of notification of the party by the member association, whichever is sooner.

3. If the last day of a time limit coincides with an official public holiday or a non-working day in the place of domicile of the party required to comply, the time limit will expire at the end of the next working day.

4. A time limit is deemed to have been complied with if the action required or

requested has been completed by latest the last day of the time limit at the location of the party's domicile or, if the party is represented, of the domicile of its main legal representative. Submissions and evidence filed outside the relevant time limit shall be disregarded.

5. Time limits are paused from 20 December to 5 January inclusive.

6. Regulatory time limits fixed in these Rules will not be extended. Time limits set by the FIFA general secretariat may be extended upon substantiated request submitted before the expiry of the relevant time limit".

99. The Sole Arbitrator considers that Article 9 FCHR outlines a stage of the EPP procedure, namely the EPP Review Process, that endures for ten days unless extended at the FIFA general secretariat's discretion, and involves information being submitted and challenged by the participants, reviewed by the FIFA general secretariat, with it making further information requests if required, and the FIFA general secretariat notifying all participants when the EPP Review Process has concluded.

100. In the context of the EPP Review Process, Article 9.7 FCHR is directive, i.e. it is a procedural direction to the new club to submit a waiver at a point in the EPP procedure should a former club have waived its right to receive training rewards and should the new club be in possession of one. The Sole Arbitrator finds that the deadline for compliance with the procedural direction in Article 9.7 FCHR is set out in Article 9.2 FCHR, with a club able to make a request to extend the duration of the EPP Review Process and therefore extend the deadline to comply with Article 9.7 FCHR. A request to extend time must be submitted to the FIFA general secretariat before the expiry of the relevant time limit (Article 21 FCHR and Article 11.6 of the Procedural Rules). Since no request to extend time was made, the Appellant's opportunity to submit a waiver pursuant to Article 9.7 FCHR passed when the deadline in Article 9.2 FCHR expired.

101. The Sole Arbitrator observes that the FIFA general secretariat may also direct a club to submit a waiver at other points in the EPP procedure, including during the EPP Review Process itself (Article 9.9 FCHR) or during the Determination of the Final EPP (Articles 10.1 and 10.2 FCHR). On 15 August 2023, over four months after the EPP Review Process appears to have concluded, the FIFA general secretariat issued a further procedural direction for the Appellant to provide documentation, including any waivers, stating that:

"In accordance with art.10 par 1 and 10 par 2 of the FIFA Clearing House regulations, we kindly ask you to provide any documentation relevant to the entitlement to training rewards, including and not limited to waivers or contract offers by no later than the end date of the ongoing 'completion' phase as currently displayed in TMS.

…".

102. The Appellant did not submit any waivers in accordance with the procedural direction dated 15 August 2023 and the FIFA general secretariat subsequently issued the Appealed Decision based on the available information on TMS, as it was entitled to do. The Sole Arbitrator finds that the FIFA general secretariat correctly issued the Appealed Decision; after all, it is the

responsibility of a club to comply with the procedural directions that form part of the EPP procedure (*cf.* CAS 2023/A/9682). The Appellant is also responsible for any procedural disadvantage that is consequent on its failure to review TMS (Article 21 FCHR and Article 10.3 of the Procedural Rules).

103. The Appellant contacted the Fourth Respondent three times and within a short period of time after the Appealed Decision was issued, requesting the Three Waivers to be considered outside the prescribed procedural deadlines. The Sole Arbitrator observes that the FCHR do not expressly permit or exclude the late submission of a waiver, nor do the FCHR expressly provide for the consequences of non-compliance with a procedural direction issued during the EPP procedure. The explanatory guidance that accompanies the FCHR also does not refer to the consequences of failing to submit a waiver in time and if an intended consequence is that the club cannot rely on a valid waiver subsequently, then the financial costs to a club may be significant.

104. Article 11.6 of the Procedural Rules applies to the EPP procedure through Article 21 FCHR, and provides that:

> *"*[…] *Submissions and evidence filed outside the relevant time limit shall be disregarded".*

105. The terms "submissions" and "evidence" are used during an adversarial procedure. The EPP procedure is not an adversarial procedure, but an administrative procedure that is undertaken to confirm the distribution and allocation of training rewards. A waiver submitted as part of an EPP procedure is neither a piece of evidence nor a submission and the Sole Arbitrator considers that a waiver filed out of time is not disregarded under Article 11.6 of the Procedural Rules.

106. The Sole Arbitrator notes that an EPP and allocation statement does not become final and binding until after a club has failed to appeal (Article 10.5(c) FCHR) or later if it appeals to CAS (Article 10.5(d) FCHR), and that the Appellant's request to the FIFA general secretariat for the late submission of the Three Waivers was made before the Appealed Decision became final and binding, and within a short period of time after receipt of the Appealed Decision.

107. Accordingly, based on the points highlighted in paragraphs 103 to 106 above, the Sole Arbitrator considers that the late submission of a waiver may be permitted, if i) there are factors which exceptionally excuse a club's non-compliance with Article 9.7 FCHR or another procedural direction, and ii) there is no substantial prejudice to those who benefit from the requirement of compliance or no serious inconvenience caused.

108. The Sole Arbitrator recalls that the FCHR underpin the operations of the FIFA Clearing House and that the FIFA Clearing House acts as an intermediary for the payment of training rewards in the football transfer system that fall due pursuant to the FIFA RSTP (Article 1.1 FCHR). The FIFA Clearing House protects the core objectives of the football transfer system e.g. contractual stability, encourage training of young players, promote solidarity between elite and grassroots football, protect minors, maintain competitive balance and ensure

regularity of sports competitions (Article 1.1 FCHR). More specifically, the objectives of the FIFA Clearing House are to process payments related to the transfer of football players, protect the integrity of the football transfer system, enhance and promote financial transparency, and prevent fraudulent conduct (Article 1.2 FCHR).

109. The Fourth Respondent submits that the EPP procedure provides sufficient opportunities for the parties to submit a document for consideration in the Determination of the Final EPP, and that the EPP procedure must be strictly followed, and deadlines adhered to in order to achieve the objectives of the FIFA Clearing House. It further submits that permitting the submission of a waiver outside the prescribed deadlines would *"open the door for potential forgery of waivers, backdated agreements and other potentially fraudulent activities"* (Answer, para 80). It would also *"create an opportunity for clubs to bypass the system and avoid using the FCH for payments, including undergoing the relevant compliance assessment"* (Answer, para 80). During the hearing, the Fourth Respondent emphasised that a concern with accepting a waiver outside the prescribed deadline was that it could lead to circumvention of the FCHR, through side deals and that it wished to ensure that training compensation payments were made through the FIFA Clearing House to those who were entitled to receive them.

110. The Appellant disputes the Fourth Respondent's position, submitting during the hearing that the Fourth Respondent had failed to demonstrate that a strict application of the deadlines is required to achieve the FIFA Clearing House objectives.

111. Based on the available evidence, the Sole Arbitrator is not persuaded that the late submission of the Three Waivers in the circumstances of the present case would have the detrimental effects that the Fourth Respondent states (e.g. open the door for potential forgery, backdated agreements and other fraudulent activities) or that it would undermine the objectives of the FIFA Clearing House.

112. First, a valid waiver removes the payment of training compensation from the FIFA Clearing House System irrespective of the timing at which it is submitted so there is no payment for the FIFA Clearing House to process when a valid waiver is submitted and accepted before the EPP and allocation statement become final and binding. Secondly, the Fourth Respondent anticipates that clubs will agree waivers and permits a club to waive training compensation within the football transfer system. It is not clear how the requirement to submit a valid waiver at a particular point in time during the EPP procedure must be so rigorously maintained to discourage side deals, forgery of waivers or backdated agreements, or to protect the integrity of the football transfer system, or ensure financial transparency, when waivers are permitted in the system and can be obtained in dubious circumstances, and yet still accepted during the EPP procedure if filed in accordance with a procedural direction.

113. Thirdly, the Fourth Respondent suggested during the hearing that there was no independent evidence that the waivers were agreed prior to the end of the EPP procedure which may be indicative of an abusive practice; it has not contested the validity of the waivers *per se*. The Sole Arbitrator accepts that

there is no other evidence other than the actual date on the Bokelj Waiver and the Arsenal Waiver to confirm when the waivers were obtained; the Budva Waiver was clearly obtained after the Appealed Decision. On the other hand, there is no evidence at all in this case of forgery, backdated agreements or any other fraudulent activity.

114. The evidence shows that the Appellant did not engage with the EPP procedure because it did not understand the EPP procedure, whether because the FCHR had not been translated into the Lithuanian language by the national association, the TMS Manager had not received training on the EPP procedure, or because the Appellant did not appreciate the importance of submitting the Three Waivers during the EPP procedure for them to be taken into consideration in the final determination until it actually received the notification on 15 September 2023, or, more likely, a combination of all these factors. The Sole Arbitrator notes that following notification of the Appealed Decision, the Appellant immediately wrote to FIFA on 19, 20 and 29 September 2023 submitting the Three Waivers with an explanation as to why they were not submitted during the EPP procedure and requesting that they be taken into consideration, and it contacted the LFF, seeking its assistance to obtain a response from FIFA. The Sole Arbitrator considers that all these factors point more towards a club that is unfamiliar with a new regulatory process which it had not used before, acting in good faith, rather than an errant club intent on circumventing FIFA Regulations or engaging in fraudulent or abusive practices.

115. The Appellant obtained waivers from four of the six clubs with whom the Player had previously trained, but did not obtain a waiver from the club, Sloga Radovići. The Appealed Decision directed the training amount owed to the disaffiliated club, Mogren, to be paid to the Montenegrin FA. No explanation was provided as to why a waiver was not obtained from Sloga Radovići and FIFA did not comment on the different treatment of these entities. The low amount concerned (i.e. EUR 82.19) may have been a reason why the waiver was not obtained from Sloga Radovići. The different treatment of entities to whom training compensation is owed may be a factor affecting the perception of a club's good faith, depending on the reason advanced for the different treatment, but was not at issue in these proceedings.

116. The Fourth Respondent submits that the automated nature of the EPP procedure, the significant volume of transactions that it deals with, and the efficiency of the process, preclude the late submission of the Three Waivers and that the EPP procedure is not sufficiently flexible for it to make exceptions for clubs that do not comply with deadlines, regardless of the club's size. The Sole Arbitrator does not consider that the automated nature of the EPP procedure on the TMS is so inflexible as to not permit the late submission of a waiver or that it would have the consequences that the Fourth Respondent avers. The Sole Arbitrator notes that no explanation was provided as to how or why the automation affects the flexibility of the procedure. It is evident from the TMS screenshot that the Fourth Respondent can extend time or pause the procedure, and there was a delay of over four months while the Player's EPP sat *"in validation"*. The Sole

Arbitrator considers that none of these actions are consistent with an automated procedure that the Fourth Respondent is unable to control or override, or that processes transactions efficiently.

117. The Sole Arbitrator accepts that there is some administrative inconvenience when documents are submitted late and that the significant volume of transactions that the Fourth Respondent is faced with may necessitate a procedure designed for efficiency, however, the Fourth Respondent is a well-resourced sports association and its administrative inconvenience does not outweigh the prejudice caused to a club if it is not permitted to rely on a valid waiver subsequently. The Sole Arbitrator considers that the financial consequences for a club of a valid waiver not being accepted can be significant, and if the intention is to deprive a club of the opportunity to rely on a contractual agreement that limits its liability for training compensation because of non-compliance with a procedural direction, then that consequence must be clearly stated in the FCHR and communicated to the clubs.

118. The Fourth Respondent further submits that the Appellant's justification for non-compliance with the procedural request (i.e. human error, language barriers, and absence of knowledge of the procedure) is insufficient to excuse the Appellant from the consequences of failing to submit the waiver. The Sole Arbitrator accepts that the Appellant is obliged to be familiar with all aspects of the regulatory framework, including the FCHR, in which it operates. However, as desirable as compliance with a procedural direction is, a breach or non-compliance with a procedural direction may be permitted if there is no substantial prejudice to those who benefit from the requirement of compliance or if there is no serious inconvenience caused.

119. The Sole Arbitrator considers that none of the Respondents would be substantially prejudiced if the Appellant's procedural failure were to be excused and the Appellant permitted to rely on the Three Waivers now. The First, Second and Third Respondents have provided valid waivers and clearly confirmed in the Settlement Agreements that they forgo the training compensation. The Fourth Respondent has no financial interest in the horizontal transaction and as discussed above, the Sole Arbitrator does not consider that the Fourth Respondent's regulatory objectives would be substantially prejudiced or harmed by permitting the Appellant to rely on the waivers. On the other hand, the prejudice and inconvenience caused to the Appellant would be significant. It is a small club situated in Lithuania which, in the absence of reliance on the Three Waivers, would be required to make a significant payment in training compensation to clubs in Montenegro that have clearly indicated their preference to forgo the payments, and then face the challenge of retrieving the training compensation subsequently.

120. The Fourth Respondent urges the Sole Arbitrator to apply the same strict approach that CAS Panels adopt in claims relating to the request of a player's ITC. It refers to several CAS cases which it submits confirms the strict approach taken by CAS Panels to avoid unequal treatment and because there is no rule in the FIFA RSTP or its Annexes that

permits the late transfer of a player who is not a free agent, and no excessive formalism on FIFA's part. The Fourth Respondent refers to a case in which it was decided that a player was not eligible to play in official matches for their new club when the player's ITC was requested 14 seconds after a transfer window closed (CAS 2017/A/5368, para 44). During the hearing, the Appellant submitted that the comparison with the ITC procedure was a *"poor comparison"* to make because the regulations were drafted differently. The Sole Arbitrator is not persuaded in the present case to follow the approach of CAS Panels that arises in relation to a procedure that while conducted through the TMS, fulfils different aims and objectives and is underpinned by regulations that may be drafted in a different way. The procedural and/or mandatory requirements of each regulatory procedure should be assessed separately.

121. Accordingly, for all the above reasons, the Sole Arbitrator determines that the Appellant is able to rely on the Three Waivers in the circumstances of the present case, owing to factors which very exceptionally excuse their late submission (e.g. a small club using a new regulatory process for the first time; FCHR not translated into the club's native language and no training on the EPP procedure provided by the national association prior to the point that compliance with the EPP procedure was required; request for consideration of the Three Waivers made within a short period of time after the Appealed Decision was issued; and no evidence of fraud, forgery, backdated agreements or any other fraudulent activity), and the absence of any substantial prejudice to the Respondents or any serious inconvenience.

122. The Fourth Respondent also relies on Article R57 (3) of the Code and requests that the Three Waivers be excluded from the file on the basis that they could and should have been submitted during the EPP procedure. The Sole Arbitrator observes the consistent line of CAS jurisprudence which confirms that the discretion to exclude evidence under Article 57 (3) should be exercised with caution so as not to undermine the *de novo* power of review and appears limited to those circumstances where the new material is adduced with a measure of bad faith or would amount to an abuse of process (e.g., where the evidence is in hand at the first instance but was withheld for strategic purposes and adduced for the first time on appeal) (*cf*: CAS 2021/A/8012, para 116; CAS 2021/A/8344, para 84; and CAS 2017/A/5090, paras 55 - 56; see also MAVROMATI D., The CAS Panel's Right to Exclude Evidence Based on Article R57 Para 3 CAS Code; A Limit to CAS' Full Power of Review? CAS Bulletin/Bulletin TAS (2014); and MAVROMATI/REEB, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*, pp. 515 to 523). In the absence of any evidence of bad faith or abuse of process, the Sole Arbitrator admits the Three Waivers (*cf*: CAS 2023/A/9730, paras 75-77 and CAS/A/9940 & 9941, paras 95-97).

123. The Sole Arbitrator notes that the First, Second and Third Respondents have had the opportunity to challenge the validity of the Three Waivers through these proceedings and observes that the Settlement Agreements submitted in these proceedings, and the joint letter of

30 May 2024 to the CAS Court Office, confirms their agreement to waive the training compensation payments. As the validity of the Three Waivers is not contested by any of the Respondents and noting that a waiver is permitted under the FCHR, the Sole Arbitrator determines that no training compensation is owed to the First, Second and Third Respondents.

124. Accordingly, for all the foregoing reasons, the Sole Arbitrator upholds the appeal.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by VšĮ Telšių Futbolo Ateitis on 6 October 2023 against the Determination issued on 15 September 2023 by the FIFA general secretariat on the Electronic Player Passport [xxxxx] and Allocation Statement TC-2226 corresponding to Electronic Player Passport [xxxxx] is upheld.

2. The Determination issued on 15 September 2023 by the FIFA general secretariat on the Electronic Player Passport [xxxxx] is amended to show that no training compensation is owed to FK Arsenal, OFK Grbalj and FK Budva.

3. The Allocation Statement TC-2226 corresponding to the Electronic Player Passport [xxxxx] for the Player A. issued by the FIFA general secretariat on 15 September 2023 is amended to show that no amount of training compensation is owed to FK Arsenal, OFK Grbalj and FK Budva.

4. (…).

5. (…).

6. All other motions or prayers for relief are dismissed.

CAS 2023/A/10090
Ferencvárosi Torna Club v. HNK Rijeka
21 October 2024

Panel: Mr Manfred Nan (The Netherlands), President; Mr Michele Bernasconi (Switzerland); Prof. An Vermeersch (Belgium)

Football
Claim for damages in the context of Transfer Agreement
Obligation to make amends for damage, Article 97 Swiss Code of Obligations (SCO)
Contributory negligence, Article 44(1) SCO

1. **Article 97(1) SCO contains a rebuttable presumption that an obligor who fails to discharge an obligation at all or as required for the obligor to be at fault and therefore the obligor must make amends for the resulting damage. The conditions for the application of Article 97(1) SCO are as follows: (i) breach of duty; (ii) damage; (iii) adequate causal nexus between the breach of duty and the damage; and (iv) presumed fault.**

2. **In case liability under Article 97(1) SCO is established, the concept of contributory negligence potentially comes into play based on Article 44(1) SCO, which may have an impact on the compensation payable. Articles 43(1) and 44(1) SCO - primarily applicable to liability in tort – may, pursuant to Article 99(3) SCO, also be applied to a situation of breach of contract. According to those provisions, the form and extent of the compensation due under Article 97(1) SCO have to be determined *"with due regard to the circumstances and the degree of culpability"*. Furthermore, when determining the compensation, "circumstances attributable" to the person suffering damage may be taken into account and the compensation due may be reduced or even dispensed with entirely. Accordingly, if *e.g.* in the context of a transfer, payment of an instalment of the transfer fee is made on a wrong banc account, and if both clubs, parties to the transfer agreement, have contributed to the use of the wrong banc account, the extent of the contributory conduct may be taken into when determining the compensation payable for the resulting damage.**

I. PARTIES

1. Ferencvárosi Torna Club (the "Appellant" or "Ferencvárosi") is a professional football club with its registered office in Budapest, Hungary. Ferencvárosi is registered with the Hungarian Football Association (the "MLSZ"), which in turn is affiliated to the *Fédération Internationale de Football Association* ("FIFA").

2. HNK Rijeka (the "Respondent" or "Rijeka") is a professional football club with its registered office in Rijeka, Croatia. Rijeka is registered with the Croatian Football Federation (the "HNS"), which in turn is also affiliated to FIFA.

3. Ferencvárosi and Rijeka are hereinafter jointly referred to as the "Parties".

II. INTRODUCTION

4. The present appeal arbitration procedure revolves around a transfer

agreement (the "Transfer Agreement") concluded between the Parties for the transfer of Mr Stjepan Loncar (the "Player") from Rijeka to Ferencvárosi, in particular about whether Ferencvárosi still owes Rijeka the first instalment of the transfer fee in the amount of EUR 997,500 despite the fact that Ferencvárosi already transferred such amount to a Spanish bank account which it believed to belong to Rijeka.

6. Following a claim lodged by Rijeka, the Players' Status Chamber of FIFA's Football Tribunal (the "FIFA PSC") decided that Ferencvárosi was liable to pay Rijeka an outstanding amount of EUR 997,500, plus interest (the "Appealed Decision").

7. Ferencvárosi is challenging the Appealed Decision before the Court of Arbitration for Sport ("CAS") arguing that Rijeka's claim is to be rejected in full, whereas Rijeka requests the Appealed Decision to be confirmed in full.

III. FACTUAL BACKGROUND

8. Below is a summary of the main relevant facts, as established on the basis of the submissions of the Parties, the hearing and the evidence examined in the course of the proceedings. This background information is given for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.

A. Background Facts

9. On 11 June 2021, Ferencvárosi made an offer to Rijeka for the possible transfer of the Player to Ferencvárosi. Since then, the Parties were in regular contact by email, using the extensions *"@fradi.hu"* (Ferencvárosi) and *"@nk-rijeka.hr"* (Rijeka).

10. On 14 July 2021 at 19:13, Ferencvárosi received an email from Mr Robert Palikuca, Rijeka's Sporting Director, whereby the latter indicated that Rijeka would review the draft Transfer Agreement shortly.

11. After the above-mentioned email, the email correspondence between the Parties appears to have been intercepted somehow by a third-party impostor. In particular, the email correspondence between the Parties was separated into two parallel sets of communication with identical content and included identical attachments. Ferencvárosi communicated with the third-party imposter which it believed to be Rijeka and Rijeka communicated with the same third-party impostor which it believed to be Ferencvárosi. The only difference was that the email addresses used by the third-party impostor had the European extension, *i.e. ".eu"*:

	Correct email addresses	Incorrect email addresses
Appellant	xxx@fradi.hu	xxx@fradi.eu
Respondent	xxx@nk-rijeka.hr	xxx@nk-rijeka.eu

12. On 14 July 2021 at 22:50, Ferencvárosi received an email identical to the one it had received at 19:13. The only differences were the time and that it was not sent from the email account

*"robertpalikuca@nk-rijeka.**hr**"*, but from *"robertpalikuca@nk-rijeka.**eu**"*.

13. On 15 July 2021 at 08:19, Mr Attila Berzeviczi, Chairman of the Board of Ferencvárosi, replied to the "fake" email of 14 July 2021 at 22:50 and therefore did not respond to Rijeka, but to the third-party impostor. Accordingly, Rijeka did not receive this email.

14. On 15 July 2021 at 09:33, Rijeka received an email identical to the one sent by Mr Berzeviczi at 08:19. The only differences were the time and that it was not sent from the email account *"attila.berzeviczi@fradi.**hu**"*, but from *"attila.berzeviczi@fradi.**eu**"*. Accordingly, this email was not sent by Mr Berzeviczi.

15. On 15 July 2021 at 10:05, Mr Palikuca replied to the "fake" email of 15 July 2021 at 09:33 and therefore did not respond to Ferencvárosi, but to the third-party impostor. Accordingly, Ferencvárosi did not receive this email.

16. On 15 July 2021 at 10:42, Mr Tamás Hajnal, Ferencvárosi Sports Director, had a conversation by WhatsApp with Mr Palikuca. It derives from such WhatsApp conversation (translated into English from the original German) that Mr Palikuca indicated that he had replied by email to Mr Berzeviczi's email of earlier that morning at 10:04 and that the email appeared in his *"Sent Mail mailbox"*, but Mr Hajnal indicated that he had still not received such email from Mr Palikuca.

17. On 15 July 2021 at 11:12, Mr Hajnal indicated by WhatsApp that he was receiving emails, but that he had still not received the email from Mr Palikuca.

18. On 15 July 2021 at 11:27, following Mr Hajnal's request, Mr Palikuca forwarded his email of 15 July 2021 at 10:05 to a private email address provided by Mr Hajnal.

19. On 15 July 2021 at 11:31, Mr Hajnal indicated that he had received Mr Palikuca's email on his private email account and that *"our e-mail addresses end with hu instead of eu"*, following which Mr Palikuca indicated that he had *"just pressed the Reply All button"* and that he had *"not entered anything by hand"*.

20. On 15 July 2021 at 11:35, Ferencvárosi received an email identical to the one sent by Mr Palikuca at 10:05. The only differences were the time and that it was not sent from the email account *"robertpalikuca@nk-rijeka.**hr**"*, but from *"robertpalikuca@nk-rijeka.**eu**"*.
Accordingly, this email was not sent by Mr Palikuca.

21. On 15 and 16 July 2021, further email correspondence was exchanged that was intercepted and forwarded without amendments by the third-party impostor. This correspondence ultimately resulted in the conclusion of the Transfer Agreement on 16 July 2021. Pursuant to Article 2(a) of the Transfer Agreement, Ferencvárosi committed itself to paying a fixed transfer fee of EUR 2,050,000 to Rijeka. The first instalment of such amount comprised a net sum of EUR 997,500, corresponding to 95% of the gross first transfer fee instalment of EUR 1,050,000 (which amount includes 5% solidarity contribution). Article 13 of the Transfer Agreement

further provides as follows with respect to notifications:

"FERENCVAROSI and RIJEKA represent and warrant unconditionally that they are fully entitled and authorised to sign and execute the terms of this Agreement. UNLESS otherwise specified elsewhere herein any notice to be given pursuant to this Agreement shall be given in writing and addressed to the party concerned at the address shown herein (or such other addresses as notified by the parties in writing from time to time) and may be left at or sent by: (i) air mail; and/or (ii) personal by hand delivery or courier service: and/or (iii) electronic mail. Any such notice shall be deemed duly given as follows: (1) in the case of registered mail on the 5th (fifth) business day from the date of posting; (ii) in the case of personal by hand delivery or courier service at the time of delivery; or, in the case the addressee rejects to receive the notice, at the day of such rejection; or in case none of those events or the date of them can not be proven then on the 5th (fifth) business day from the date of posting; (iii) in the case of electronic mail at the time of receiving at the addressee's system or in case this receipt or the date thereof can not be proven then on the 5th (fifth) business day from the date of sending the email. In proving the giving of a notice it shall be sufficient to prove that the dispatch containing such notice was properly addressed and posted or sent. Where notice is served by electronic mail, the addresses for service are as follows:

If to Ferencvarosi: +36 1 2153698 attila.berzeviczi@fradi.hu

If to RIJEKA: +385 51563632 nk-rijeka@ri.t-com.hr".

22. On 16 July 2021 at 14:00, Rijeka requested Ferencvárosi the following (this email was sent to a *"fradi.hu"* extension and was not intercepted by the third-party impostor):

"Please send me transfer instruction for Player, that I can match it …".

23. On 16 July 2021 at 14:03, Ferencvárosi informed Rijeka as follows (this email appears to have been sent to a *"nk-rijeka.hr"* extension and was not intercepted by the third-party impostor):

"Transfer reference:

395859

Thank you ☺".

24. On 16 July 2021, the Parties entered transfer instructions in FIFA TMS for the transfer of the Player to Ferencvárosi (Rijeka: *"Release against payment"* – Ferencvárosi: *"Engage against payment"*). The information entered by Rijeka included its Croatian bank account *"HR3224020061100134749"*. The transfer instructions were matched by both Parties.

25. On 16 July 2021 at 17:16, Ferencvárosi informed Rijeka as follows:

"thank you so much for your prompt cooperation. Could you please ask the Federation to deliver the ITC if they agree with the transfer. Thank you!"

26. On 19 July 2021 at 08:55, the MLSZ confirmed receipt of the Player's ITC, following which the Player was registered by the MLSZ for Ferencvárosi.

27. On 19 July 2021 at 14:34, Ferencvárosi requested Rijeka for an invoice for the first instalment of the transfer fee. This email was addressed to three recipients: *"mcesarac.dorcic@nk-rijeka.**eu**"*, *"alenrivetti@nk-rijeka.**hr**"* and *"nk-*

*rijeka@ri.t-com.**hr**"*. Accordingly, this email was received by Rijeka through two email addresses belonging to Rijeka, including the official email address listed in the Transfer Agreement, but the third-party impostor using the email address with the extension *".eu"* also received the email.

28. On 19 July 2021 at 16:45, Rijeka received an email from the third-party impostor, requesting to be provided with an invoice for the first instalment of the transfer fee, but with a content different from the email sent by Ferencvárosi on 19 July 2021 at 14:34.

29. On 19 July 2021 at 17:04, Rijeka sent an email to *"ftc@fradi.**eu**"*. Accordingly, this email was not received by Ferencvárosi. Attached to this email was an invoice for the first instalment of the transfer fee in the amount of EUR 997,500, referring to the following bank account (IBAN): *"HR32 2402 0061 1001 34749"* and SWIFT code *"ESBOHR22"*.

30. On 19 July 2021 at 17:34, Ferencvárosi received an email from the third-party impostor, confirming that the invoice would be provided as soon as possible. There is no indication on file suggesting that an email with such content was ever sent by Rijeka.

31. On 20 July 2021 at 13:58, Ferencvárosi received an email from the third-party impostor, apologising for the delay and indicating that the invoice would be issued the next day. There is no indication on file suggesting that an email with such content was ever sent by Rijeka.

32. On 26 July 2021 at 8:12, Ferencvárosi received an email from the third-party impostor, with an invoice attached thereto. The invoice is identical to the invoice issued by Rijeka on 19 July 2021 at 17:04, but importantly, the banking details differ. The invoice refers to the following Spanish bank account (IBAN): *"ES68 0049 1441 0724 1003 8425"* and SWIFT code *"BSCHESMM"*. Furthermore, in comparison with the invoice issued by Rijeka on 19 July 2021 at 17:04, the following information is added at the bottom of the invoice beneath the seal and signature.

BANK NAME: BANCO SANTANDER
BANK ADDRESS: CALLE LOPE DE RUEDA 108, 29190 MALAGA
SWIFT CODE: BSCHESMM
IBAN(EURO): ES68 0049 1441 0724 1003 8425
BENEFICIARY NAME: GRUPO HNK RIJEKA S.D.D

33. On 26 July 2021 at 09:38:21, Ferencvárosi sent an email to *"mcesarac.dorcic@nk-rijeka.**eu**"*. Accordingly, this email was not received by Rijeka. In this email, Ferencvárosi requested its name in the invoice to be corrected and to be provided with an amended invoice. Ferencvárosi further indicated as follows:

"May I ask you to consign an official statement regarding the bank account marked in the invoice to clarify the following:

The bank account of Rijeka in the FIFA TMS is not a Spanish one, so we need a declaration that the account provided in the invoice is also an official account of the club HNK Rijeka".

34. On 26 July 2021 at 11:52, Ferencvárosi received an email from the third-party impostor, with an invoice amended as per Ferencvárosi's request and an *"official declaration of bank account per your request"* (the "Declaration") attached thereto. There is no indication on file suggesting that an email with such content and/or attached invoice and/or Declaration was ever issued by Rijeka. The Declaration provides as follows:

"DECLARATION: BANK ACCOUNT

This is to declare that the bank account herein stated below and on our official invoice is an official bank account of HNK Rijeka s.d.d.

The bank details are stated below for your reference:

BANK NAME: BANCO SANTANDER

BANK ADDRESS: CALLE LOPE DE RUEDA 108, 29190 MALAGA

SWIFT CODE: BSCHESMM

IBAN (EURO): ES68 0049 1441 0724 1003 8425

BENEFICIARY NAME: GRUPO HNK RIJEKA S.D.D.

Kindly remit all payments accruing to HNK Rijeka s.d.d. through this bank account.

Thank you for your cooperation with us".

35. On 30 July 2021, Ferencvárosi transferred an amount of EUR 997,500 to the Spanish bank account in accordance with the invoice received on 26 July 2021 at 11:52 from the third-party impostor.

36. On the same day, 30 July 2021 at 15:16, Ferencvárosi uploaded proof of payment of the first instalment of the transfer fee in FIFA TMS.

37. On the same day, 30 July 2021 at 16:26, Mr Alen Rivetti, Rijeka's TMS Manager, accessed FIFA TMS, but he did not download the proof of payment uploaded by Ferencvárosi.

38. Between 3 August and 7 September 2021, various emails were exchanged between Rijeka and the email address *"accounts@fredi.**eu**"*. Accordingly, these emails were not received by Ferencvárosi. The content of these emails is largely that the third-party impostor indicated to Rijeka that the transfer of the first instalment of the transfer fee was unsuccessful and that the amount transferred was returned to it three times. These series of emails comprised the final active behaviour of the third-party impostor in the matter at hand.

39. On 22 September 2021 at 16:04, Rijeka sent an invoice for interest on late payment to *"accounts@fredi.**eu**"*. Accordingly, this email was not received by Ferencvárosi and it was not forwarded by the third-party impostor.

40. On 23 September 2021 at 10:58, Rijeka forwarded the email of 22 September 2021 at 16:04 to various email addresses of Ferencvárosi with the extension *".hu"*.

41. On 27 September 2021, Ferencvárosi informed Rijeka as follows:

"We were highly surprised when we received your notice.

The first part of [the Player's] transfer fee, 997.500 EUR has been already paid on 30th July 2021 to the bank account of HNK Rijeka based on the invoice received from You, and confirmed by a bank account declaration sent by You to us on 26th July 2021. We sent to you the payment confirmation on 30th July 2021.

So we refused your groundless invoice about the interest for late payment. (invoice with number ES 66/HNKR/20)

Therefore You do not have any ground to claim anything from our club concerning the first instalment of [the Player's] transfer fee.

Furthermore, we are also highly surprised by the previous e-mails of You because mr Antal Kökény has not sent to you any email. Kokeny Antal is not the member of our accounts / finance department, he has no email ending with .eu, and the phone number in his signature does not belong to him".

42. On 30 September 2021, Rijeka responded to Ferencvárosi's letter dated 27 September 2021, basically denying any wrongdoing, indicating that it had involved the police due to suspicions of a criminal act of internet fraud and reiterating its claim to receive the outstanding first instalment of the transfer fee in the amount of EUR 997,500.

43. On 6 October 2021, Ferencvárosi responded to Rijeka's letter dated 30 September 2021, basically also denying any wrongdoing, claiming that it had duly paid the first instalment of the transfer fee in the amount of EUR 997,500 and indicating that it *"would fully co-operate with any competent authority* […] *to assist their inquiry".*

B. Criminal law proceedings in Croatia

44. On 5 October 2021, Rijeka lodged a criminal complaint with the Croatian authorities.

45. On an unknown date, Ferencvárosi also lodged a criminal complaint with the Croatian authorities.

46. On 8 February 2022, the Municipal State Attorney's Office in Rijeka requested the following information from the Spanish authorities:

"It is necessary to deliver the data about owner or the owners of the accounts and about all the persons who are authorized to dispose with it, opened at 'Banco Santander' Calle Lope de Rueda 108, 29190 Maloga [sic!], IBAN numbers: IBAN: ES68 0049 1441 072410038425 and ES61 0049 0670 312711158881, as well as the data about all the transactions effected from that accounts both incoming invoices and outgoing invoices, starting from 21st July 2021 and further on".

47. On 17 October 2022, the Croatian authorities informed the Spanish authorities that it had received from Banco Santander a list of transactions on the bank account (IBAN) *"ES68 0049 1441 0724 1003 8425"* between 10 March 2021 and 1 July 2021, however not, as previously requested, as from 1 July 2021, reiterating such request. The Croatian authorities also requested further detailed information about the company *"Grupo de Restauradores El Molinillo SL"* and its representative Mr Manuel Carlos Frias Rubia.

48. On 21 November 2022, a Croatian investigating judge granted a request

from the Municipal State Attorney's Office in Rijeka, pursuant to which Banco Santander was required:

"To deliver within the three (3) days the data about the owner and user of the account no:

ES68 0049 1441 072410038425 and ES61 0049 0670 312711158881,

as well as the data about the owner and user of the bank account authorised to dispose with the means on the above-mentioned account from 21st July 2021 and further on with the data about all the transactions in that period, as well as the data when the account was created/opened and who opened it".

49. On 29 November 2022, the Deputy of the Municipal State Attorney's Office in Rijeka issued a *"European Investigation Order"* to Prosecutor's Office in Malaga, reiterating the request to receive bank documents *"from 21st July 2021 and onwards".*

C. Proceedings before the FIFA PSC

50. On 10 March 2023, Rijeka filed a claim against Ferencvárosi before the FIFA PSC, claiming an outstanding amount of EUR 997,500, plus interest.

51. Ferencvárosi disputed Rijeka's claim.

52. On 13 September 2023, the FIFA PSC rendered the Appealed Decision, with the following operative part:

"1. The claim of [Rijeka] *is accepted.*

2. [Ferencvárosi] *must pay to* [Rijeka] *the following amount(s):*

- *EUR 997,500 as outstanding amount plus 5% interest p.a. as from 10 March 2023 until the date of effective payment.*

3. Any further claims of [Rijeka] *are rejected.*

4. Full payment (including all applicable interest) shall be made to the bank account indicated in the enclosed Bank Account Registration Form.

5. Pursuant to art. 24 of the Regulations on the Status and Transfer of Players, if full payment (including all applicable interest) is not made within 45 days of notification of this decision, the following consequences shall apply:

1. [Ferencvárosi] *shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid. The maximum duration of the ban shall be of up to three entire and consecutive registration periods.*

2. The present matter shall be submitted, upon request, to the FIFA Disciplinary Committee in the event that full payment (including all applicable interest) is still not made by the end of the three entire and consecutive registration periods.

6. The consequences shall only be enforced at the request of [Rijeka] *in accordance with art. 24 par. 7 and 8 and art. 25 of the Regulations on the Status and Transfer of Players.*

7. The final costs of the proceedings in the amount of USD 25,000 are to be paid by [Ferencvárosi] *to FIFA. FIFA will reimburse to* [Rijeka] *the advance of costs paid at the start of the present proceedings (cf. note relating to the payment of the procedural costs below)".* (emphasis omitted)

53. On 16 November 2023, the grounds of the Appealed Decision were communicated to the Parties, determining, *inter alia*, as follows:

- *"*[…] [T]*he foregoing having been established, the Single Judge moved to the substance of the matter and took note of the fact that* [Rijeka] *sustains that the amount claimed has been paid by* [Ferencvárosi] *in a bank account which does not belong to* [Rijeka] *and therefore it is entitled to request the amount in dispute. Moreover,* [Rijeka] *sustains that the communications between the parties had been hacked by third parties which in turn have intercepted the communications and modified the details for criminal purposes.*

- *On its side, the Single Judge noted that* [Ferencvárosi] *sustains that it paid the amount in the bank account provided in the email correspondence between the parties and that it has acted with the required degree of diligence throughout the process.*

- *Firstly, the Single Judge emphasised that this claim is of rather exceptional nature since based on the information available on file and the submissions of the parties it is plausible that a sophisticated scheme by third parties has taken place in order to achieve illegal objectives.*

- *Notwithstanding the parties' submissions, the Single Judge underscored that in the case at hand the onus is on* [Ferencvárosi] *to demonstrate that it paid the amount agreed or, in the alternative, that it had sufficient arguments for failing to comply with its contractual obligations.*

- *In this regard,* [Ferencvárosi] *points out that it noticed that the bank account in the invoice was a Spanish bank account and that it did not match the one available in TMS, for this reason it contacted* [Rijeka] *in order to have a confirmation that it wished the amount to be paid in such account.*

- *Conversely,* [Rijeka] *argues that all these communications never took place since* [Ferencvárosi] *was allegedly communicating with a third party which had hacked its communications.*

- *Notwithstanding the above, the Single Judge was convinced that, from the information on file, the bank account in which* [Ferencvárosi] *paid the amount in dispute does not belong to* [Rijeka]. *Therefore, the Single Judge found that* [Ferencvárosi] *has not fulfilled its obligations arising out of the* [Transfer Agreement].

- *Having established the above, the Single Judge addressed the matter of the diligence of* [Ferencvárosi] *and proceed to assess if* [Ferencvárosi] *had acted with the required degree of diligence which could exonerate it from liability.*

- *In this respect, the Single Judge observed that based on* [Ferencvárosi's] *own admissions,* [Ferencvárosi] *found out of the ordinary that* [Rijeka] *requested payment to be made in a bank account in a different country. Moreover,* [Ferencvárosi] *realized that the bank account provided in the invoice and in the Declaration did not match the one available in TMS. Hence, the Single Judge was convinced that, by its own actions,* [Ferencvárosi] *confirms that the information provided was at the very least suspicious.*

- *The Single Judge was not convinced by the argument of* [Ferencvárosi] *that it had 'acted with outmost caution and due*

diligence'. The Single Judge underlined that this appear [sic] *not to be the case, since* [Ferencvárosi] *could have taken higher precautions before making the payment of such considerable amount as the one in dispute.* [Ferencvárosi] *could have even rejected to make the payment until it was satisfied with the assurances provided. However,* [Ferencvárosi] *was 'satisfied' with the Declaration, which consists of a pdf document (allegedly) drafted by* [Rijeka].

- *Since* [Ferencvárosi] *had demonstrated to be already surprised by the bank in a foreign country, it could have taken additional measures to protect itself and ensure it was making the payment in the right bank account. The Single Judge emphasised that in bilateral pecuniary obligations, the debtor bears the risk of loss until the amount is credited in the creditor's bank account. In order to demonstrate an adequate degree of diligence,* [Ferencvárosi] *could have taken additional measures such as requesting a certificate issued by the bank or contacting* [Rijeka] *via different means to ensure the veracity of the information.*

- *Lastly, the Single Judge underlined that the fact that* [Ferencvárosi] *has filed a criminal complaint at its own jurisdiction shows that* [Ferencvárosi] *itself deems that* [Rijeka's] *argumentation regarding the alleged hacking of the correspondence between the parties, is a plausible scenario.*

- *In conclusion, the Single Judge found that* [Ferencvárosi] *had not acted with the required degree of diligence to exempt itself from liability and therefore,* [Ferencvárosi] *has to pay the amount claimed.*

- *In view of the foregoing and bearing in mind the basic legal principle of pacta sunt servanda, which in essence means that agreements must be respected by the parties in good faith,* [Ferencvárosi] *is held liable to pay* [Rijeka] *the outstanding amounts deriving from the contract concluded between the parties, namely EUR 997,500.*

- *Lastly, taking into consideration* [Rijeka's] *request as well as the constant practice of the Single Judge in this regard, the latter decided to award* [Rijeka] *interest on the aforementioned amount at the rate of 5% p.a. as of the date of claim until the date of effective payment.*

- […]*".*

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

54. On 31 October 2023, Ferencvárosi filed a Statement of Appeal with CAS, challenging the Appealed Decision, in accordance with Articles R47 and R48 of the 2023 edition of the Code of Sports-related Arbitration (the "CAS Code"). Ferencvárosi called Rijeka as the sole respondent. Furthermore, in this submission, Ferencvárosi also nominated an arbitrator and applied for a stay of execution of the Appealed Decision pending the proceedings before CAS.

55. On 7 November 2023, Rijeka nominated Prof. Dr An Vermeersch, Professor of Law in Ghent, Belgium, as arbitrator.

56. On the same date, 7 November 2023, the CAS Court Office informed the Parties that Rijeka's request for a stay of execution of the Appealed Decision, which, in accordance with CAS' longstanding jurisprudence, cannot be

enforced during the CAS appeal due to its purely financial nature and issuance by a Swiss association (as correctly submitted by counsel for Rijeka), was considered moot.

57. On 13 November 2023, FIFA renounced its right to request its possible intervention in the proceedings pursuant to Article R52.2 and R41.3 CAS Code and indicated that it *"will remain at disposal of the* [CAS] *and the relevant Panel in order to answer to specific questions regarding the case at issue"*.

58. On 20 November 2023, the CAS Court Office informed the Parties that the arbitrator nominated by Ferencvárosi had declined his nomination.

59. On 21 November 2023, Ferencvárosi nominated Mr Michele A.R. Bernasconi, Attorney-at-Law in Zurich, Switzerland, as arbitrator.

60. On 4 December 2023, Ferencvárosi filed its Appeal Brief in accordance with Article R51 CAS Code. In this submission, Ferencvárosi requested that an in-person hearing be held, and it filed the following document production requests:

"From FIFA […]*:*

i. Provide the following log details of [Rijeka's] *TMS users into the club's TMS account to confirm:*

a) When was the proof of payment that had been uploaded by [Ferencvárosi] *on 30 July 2021 opened and/or downloaded by a TMS user of* [Rijeka].

b) How many times and on which dates did the TMS users of [Rijeka] *log into TMS between 30 July and 23 September 2021.*

From the Banco Santander SA […]*:*

i. List of all movements between 24 June 2021 and 31 December 2021 on the accounts with IBAN numbers ES68 0049 1441 0724 1003 8425 and ES61 0049 0670 3127 1115 8881;

ii. Clarification whether the amount transferred from [Ferencvárosi] *on 30 July 2021 in an amount of EUR 997,500 was received on the account ES68 0049 1441 0724 1003 8425*

iii. Clarification whether the amount transferred from [Ferencvárosi] *on 30 July 2021 in the amount of EUR 997,500 is still on the account ES68 0049 1441 0724 1003 8425;*

iv. In the negative, provide the information on where the amount of EUR 997,500 has been transferred to and/or withdrawn.

From the Croatian State Attorney office, public prosecutor office […]*:*

i. Same questions as above under para. 141.2 (i) to (iv);

ii. Information on the status of the complaint lodged by [Ferencvárosi] *against* [Rijeka]*, Grupo de Restauradores el Molinillo FIG, Mr Manuel Carlos Frias Rubia and an unknown party".*

61. On 21 December 2023, Rijeka filed its Answer in accordance with Article R55 CAS Code. With respect to Ferencvárosi's document production requests, Rijeka submitted the following:

"[Rijeka] *believes that* [Ferencvárosi's] *request under 141.1 is unnecessary and redundant; it is irrelevant in deciding this matter.*

[Rijeka] *does not object to obtaining the proposed data from the Banco Santander SA.*

[Rijeka] *does not object to obtaining the proposed data from the Croatian State Attorney's office".*

62. On 9 January 2024, further to an enquiry from the CAS Court Office, Rijeka indicated that it did not consider it necessary for a hearing to be held.

63. On 12 January 2024, Ferencvárosi informed the CAS Court Office that it considered it necessary to hold a case management conference to, inter alia, exchange views on its document production request. Ferencvárosi also reiterated that it requested a hearing to be held.

64. On the same date, the CAS Court Office informed the Parties that, pursuant to Article R54 CAS Code and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the Arbitral Tribunal appointed to decide the procedure was constituted as follows:

> President: Mr Manfred Nan, Attorney-at-Law, Amsterdam, The Netherlands;
>
> Arbitrators: Mr Michele A.R. Bernasconi, Attorney-at-Law, Zurich, Switzerland;
>
> Prof. Dr An Vermeersch, Professor of Law, Ghent, Belgium.

65. On 17 January 2024, the CAS Court Office informed the Parties that the Panel had decided to hold a case management conference.

66. On 29 January 2024, the CAS Court Office informed the Parties that Mr Dennis Koolaard, Attorney-at-Law in Amsterdam, The Netherlands, had been appointed as Ad hoc Clerk.

67. On the same date, a case management conference was held by videoconference.

68. On 30 January 2024, the CAS Court Office informed the Parties as follows:

> *"As discussed during the CMC earlier today* [sic]*, the Parties are invited to reserve 16 April 2024 for the hearing in this matter, to be held in person in Lausanne.* […]
>
> *Furthermore, I confirm that while the Panel has rejected* [Ferencvárosi's] *evidentiary requests related to Banco Santander SA* […] *and the Croatian State Attorney office* […]*, FIFA is being requested to provide information sought ad para. 141.1 i) of the Appeal Brief.* […]
>
> *Finally,* [Ferencvárosi] *is invited to file, by 29 February 2024, at the latest, a summary of Mr Kálmán Faur's expected testimony".*

69. On the same date, 30 January 2024, the CAS Court Office referred to FIFA's letter dated 13 November 2023 and requested FIFA to provide the information requested by Ferencvárosi.

70. On 28 February 2024, FIFA provided the CAS Court Office with the following information:

> ***"Q: When was the proof of payment that had been uploaded by***

[Ferencvárosi] ***on 30 July 2021 opened and/or downloaded by a TMS user of*** **[Rijeka]*?***

There are five logs regarding downloading proofs of payment in TMS regarding transaction 395859, on the following dates and times:

- *19.01.2022 14:26:58*
- *09.03.2022 11:54:22*
- *09.03.2022 11:54:22*
- *09.03.2022 11:55:38*
- *13.09.2022 10:27:03*

Q: How many times and on which dates did the TMS users of **[Rijeka]** ***log into TMS between 30 July and 23 September 2021.***

The relevant TMS users logged into TMS on the following dates and times in the relevant period:

- *User Alen RIVETTI: Twice; accessed on 30.07.2021 first at 14:21:47, then at 16:26:10, and then only on 12.10.2021 at 09:45:46*
- *User Marina CESARAC DORCIC: None; accessed on 17.06.2021 at 16:06:16 and then only on 03.11.2021 at 11:08:59".*

71. On 29 February 2024, Ferencvárosi provided the CAS Court Office with a summary of Mr Kálmán Faur's expected testimony.

72. On 5 March 2024, the CAS Court Office informed the Parties that, following consultation of the Parties, the hearing would be held on 22 May 2024.

73. On 8 March 2024, upon being invited by the Panel to do so, both Ferencvárosi as well as Rijeka provided their comments on the information provided by FIFA on 28 February 2024.

74. On 13 and 15 March 2024 respectively, Rijeka and Ferencvárosi returned duly signed copies of the Order of Procedure provided to them by the CAS Court Office on 13 March 2024.

75. On 13 May 2024, Rijeka informed the CAS Court Office that *"*[t]*he State Attorney office in Croatia requested again, for the third time, from Spanish authorities the bank documents for the period after 01st July 2021 and further, but the Spanish authorities delivered the bank documents for the period until 01st July 2022, and not for the period after 01st July 2022"* and evidence thereof.

76. On 20 May 2024, following an invitation from the CAS Court Office to comment, Ferencvárosi indicated that the information provided by Rijeka on 13 May 2024 did not bring any new or different elements to the information that was already on record.

77. On 22 May 2024, a hearing was held at the CAS Court Office in Lausanne, Switzerland. At the outset of the hearing, both Parties confirmed that they had no objection to the constitution and composition of the Arbitral Tribunal.

78. In addition to the members of the Panel, Mr Björn Hessert, CAS Counsel, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the hearing:

a) For the Appellant:

1) Mr Marc Cavaliero, Counsel;

2) Mr Jaime Cambreleng Contreras, Counsel;

3) Mr Alex Bramah-Lawani Alex.

b) For the Respondent:

1) Mr Danijel Beljan, Counsel;

2) Mr Anton Denona, Counsel.

79. The following persons were heard, in order of appearance:

4) Mr Tamás Hajnal, Ferencvárosi Sports Director, witness called by Ferencvárosi;

5) Dr Marta Mohacsi, Ferencvárosi TMS Manager, witness called by Ferencvárosi;

6) Mr Branko Kovacs, Ferencvárosi CFO, witness called by Ferencvárosi;

7) Mr Kálmán Faur, employee of the company entrusted by Ferencvárosi with the monitoring of its server since 2011, expert witness called by Ferencvárosi.

80. The Panel heard evidence from the witnesses and the expert called by Ferencvárosi. The witnesses and the expert were invited by the President of the Panel to tell the truth subject to the sanctions of perjury under Swiss law. The Parties and the members of the Panel had full opportunity to examine and cross-examine the witnesses and the expert.

81. Both Parties were given full opportunity to present their cases, submit their arguments and answer the questions posed by the members of the Panel.

82. Before the hearing was concluded, the Parties confirmed that they had no objection to the procedure adopted by the Panel and that their right to be heard had been respected.

V. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

83. The Panel confirms that it carefully considered in its decision all of the submissions, evidence, and arguments presented by the Parties, even if they have not been specifically summarised or referred to in the present arbitral award.

A. The Appellant

84. Ferencvárosi's submissions in its Appeal Brief, in essence, may be summarised as follows:

- In a nutshell, Ferencvárosi's primary position is that it does not owe any amount to Rijeka absent any contractual violation and fault from its part.

- In the unlikely event that the honourable Panel would disagree with Ferencvárosi's primary position, Ferencvárosi will demonstrate that Rijeka did not take all the measures required by the circumstances, was not diligent and therefore contributed decisively to the occurrence of the damage. Based on the serious contributory conduct of Rijeka, Ferencvárosi shall be

exempt of any payment towards Rijeka.

- According to Article 97(1) of the Swiss Code of Obligations (the "SCO"), an obligor who fails to discharge an obligation at all or as required must make amends for the resulting damage unless he can prove that he was not at fault. Liability under such provision is subject to four conditions: i) breach of contract; ii) damage; iii) causal nexus between the breach of contract and the damage; and iv) fault. Ferencvárosi did not breach the Transfer Agreement and it did not commit any fault.

Absence of any contractual breach from the part of Ferencvárosi

- For this requirement to be satisfied, Ferencvárosi should have acted in an *illicit manner* in contradiction with the conduct it had committed to.

- According to the Transfer Agreement, Ferencvárosi agreed to pay the relevant transfer compensation following the fulfilment of several conditions, including the receipt of an invoice, which never occurred from Rijeka to Ferencvárosi in the relevant period.

- Ferencvárosi paid the amount due, *i.e.*, the first instalment of the transfer fee, to the bank account it had received after following all the necessary steps. Absent any contractual breach, Ferencvárosi cannot be ordered to pay any amount to Rijeka, bearing in mind that it had already undertaken that very same payment of EUR 997,500.

Absence of any fault from the part of Ferencvárosi

- Ferencvárosi cannot be deemed to have acted without the required level of diligence.

- Ferencvárosi followed all the aforementioned necessary steps prior to executing the relevant payment. These steps are equally relevant in the assessment of the possible fault of Ferencvárosi and shows the very high level of diligence displayed by Ferencvárosi and its lack of fault.

- For these reasons, Ferencvárosi shall not be held liable for any damages and shall not be ordered to pay the sum of EUR 997,500 a second time.

Rijeka's contributory conduct

- It is common ground under the SCO that any liability – whether based on torts or breach of contract – requires causation, *i.e.*, any tortious conduct or contractual breach must be a necessary and adequate condition to the occurrence of a damage/harm sustained by the aggrieved person. As a corollary, a person's liability is per se limited to the damage that this person himself has inflicted on the aggrieved party. At the same time, the requirement of causality implies that if the conduct of the aggrieved person himself caused part or all of the damage/harm sustained, the tortfeasor or party in breach will not be liable for this part of the damage for lack of causality. This intelligible concept is enshrined in Article 44(1) SCO, which applies likewise to matters of tort, breach of contract

and disciplinary issues within associations.

- As put forward by Rijeka, a fraudulent, even criminal act took place and deceived the Parties. Against this background, it is inconceivable that Ferencvárosi shall bear the full responsibility and be ordered to pay an amount equal to approximately EUR 1 million a second time. It is all the more inconceivable considering that Rijeka is liable for a serious contributory conduct.

- First, Rijeka never communicated from its official email address mentioned in the Transfer Agreement.

- Second, according to Clause 2(a)(iv) combined with Clause 13 of the Transfer Agreement, it is the obligation of Rijeka to *"duly address"* an invoice to Ferencvárosi's email address, *"attila.berzeviczi@fradi.hu"*. Rijeka simply did not do so, which constitutes an evident contractual breach.

- Third, Rijeka failed to respond and react, when it received the request for an invoice from Ferencvárosi on 19 July 2021 at 14:34 on its official email address.

- Fourth, Rijeka, via Mr Palikuca, had been expressly informed and warned on 15 July 2021 already that Ferencvárosi did not own any email address ending with *"@fradi.hu"*. Rijeka's officials simply ignored this warning and continued to communicate with an invalid address. This was the case when Rijeka sent the invoice to the fake Ferencvárosi.

- Fifth, Rijeka failed to check on FIFA TMS the status of the transfer and consequently failed to identify that Ferencvárosi had, as early as 30 July 2021, uploaded the relevant proof of payment on the system. This is a clear breach of Article 3(2) of Annexe 3 to the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP"), which requires FIFA TMS to be checked at regular intervals on a daily basis. On the other hand, if it would follow from FIFA's production of evidence that Rijeka did check FIFA TMS, they must have seen and been aware of the proof of payment being uploaded and therefore by not reacting immediately contributed to more extreme level to the events occurred.

- Based on these considerations, Rijeka's contributory conduct is evident and serious and undeniably contributed to the occurrence of the damage, to the extent that any causal nexus between Ferencvárosi's contractual violation, if any (quod non), and the occurrence of the damage appears totally remote and irrelevant.

- For that reason, Ferencvárosi shall not be held responsible for any payment to Rijeka. In the event the Panel considers that Ferencvárosi's liability does not appear entirely remote and legally irrelevant, Ferencvárosi's liability cannot be higher than 10%. In the very alternative, any amount that Ferencvárosi would be ordered to

pay shall be lower than EUR 997,500.

85. Furthermore, with respect to the information provided by FIFA on 28 February 2024, Ferencvárosi submitted, *inter alia*, as follows by letter dated 8 March 2024:

- Rijeka logged in twice on FIFA TMS on 30 July 2021, once before and once after Ferencvárosi had uploaded proof of payment, from which it could have learned that a payment was made to a Spanish bank account.

- By not reacting immediately and by ignoring the information uploaded in FIFA TMS, Rijeka undoubtedly contributed to the damage that occurred at a very significant level. If Rijeka had complied with its obligations and reacted immediately, the payment order could have been annulled and the money sent back to Ferencvárosi's account.

- Furthermore, even if Rijeka had missed the information on 30 July 2021, *quod non*, by failing to enter FIFA TMS for another two months and a half, it evidently and continuously failed to comply with its regulatory obligations and contributed to the damage occurred at a very significant level.

- On 3 and 9 August 2021, when the third-party impostor informed Rijeka that it had paid the relevant amount, Rijeka also did not log in to FIFA TMS. Rijeka's nonchalant attitude is also demonstrated by the fact that while Ferencvárosi indicated on 27 September and 6 October 2021 to have paid the relevant amount already in July 2021 to a bank account in Spain, Rijeka did not verify this information in FIFA TMS, but it only logged in 15 days later and downloaded the relevant proof of payment only three months later.

- Finally, contrary to Rijeka's allegation that it only found out about the transfer to a Spanish bank account on 6 October 2021, it is now established that Rijeka had access to such information as early as 30 July 2021.

86. On this basis, Ferencvárosi submits the following requests for relief:

"Prayer 1: Set aside the decision of the FIFA Players' Status Chamber in its entirety.

Prayer 2: In the alternative to Prayer 1, reduce the amount that Ferencvárosi Torna Club must pay to HNK Rijeka and order Ferencvárosi Torna Club to pay to HNK Rijeka an amount that shall not be higher than EU [sic!] *97,500.00.*

Prayer 3: In the further alternative to Prayers 1 and 2, reduce the amount that Ferencvárosi Torna Club must pay to HNK Rijeka and order Ferencvárosi Torna Club to pay any amount that the Hon. Panel deems appropriate, and which shall be lower than EUR 997,500.00.

Prayer 4: HNK Rijeka shall be ordered to bear the costs of the arbitration and to contribute substantially to the legal fees

incurred by Ferencvárosi Torna Club".

B. The Respondent

87. Rijeka's submissions, in essence, may be summarised as follows:

- The FIFA PSC gave clear and justified reasons for the Appealed Decision.

- Rijeka fulfilled its contractual obligations set forth in the Transfer Agreement, *i.e.*, it allowed the registration of the Player with Ferencvárosi, but Rijeka did not receive transfer compensation from Ferencvárosi, which is not Rijeka's fault. The payer, here Ferencvárosi, bears the risk of payment until the payment is settled on the account of the recipient, here Rijeka. Rijeka cannot be held responsible for Ferencvárosi's wrong payment.

- Based on the emails received by Ferencvárosi on 15 July 2021 at 11:05 and 11:35, Ferencvárosi could and should have noticed that the first email was sent from the real address of Mr Robert Palikuca of Rijeka, which ends with *"hr"* and that the second was sent from the fake email address of a fake Mr Palikuca, ending with *"eu"*. Ferencvárosi completely ignored this, and now tries to shift the blame to Rijeka.

- It is unclear how checking the payment confirmation in FIFA TMS by Rijeka is indicative of Rijeka's fault that Ferencvárosi made a payment to the wrong account. The payment confirmation shows that the payment had already been made to the wrong account. Ferencvárosi never paid Rijeka the amount of EUR 997,500.

- On 23 September 2021, Dr. Marta Mohacsi of Ferencvárosi requested information about the bank account number of Rijeka from the HNS, which responded the same day. Ferencvárosi could have done this earlier in July 2021 already when it doubted the correctness of the bank account and payment data of the Spanish bank. Although Ferencvárosi considered it strange and unusual, it made the payment anyway.

- On 26 July 2021, Ferencvárosi received a revised invoice as well as the Declaration from the fake email address *"mcesarac.dorcic@nk-rijeka.eu"*. Rijeka never created or sent the Declaration, and it is evident that it was sent to Ferencvárosi from a fake email address.

- However, the correct IBAN account number of Rijeka is also visible in the letterhead on the bottom of the Declaration, but Ferencvárosi ignored this too.

- Ferencvárosi also completely disobeyed the provisions of the FIFA RSTP, especially Annexe 3. According to Article 4(1) of Annexe 3, clubs must ensure that their banking details are valid and kept up to date at all times. Rijeka complied with Article 4(3) of Annexe 3 by entering in its transfer instructions its own banking details (name of bank or bank code; account number or IBAN; bank address; account

holder). However, Ferencvárosi made the payment without considering the information available in FIFA TMS. The information available in FIFA TMS was matched by Ferencvárosi, including the bank details of Rijeka, but Ferencvárosi did not comply with the data specified in the FIFA TMS instruction entered by Rijeka.

- Despite its doubts about the Spanish bank account, Ferencvárosi also paid the relevant amount without calling anyone at Rijeka by telephone to check the data.

88. Furthermore, with respect to the information provided by FIFA on 28 February 2024, Rijeka submitted, *inter alia*, as follows by letter dated 8 March 2024:

- The issue of checking the existence of a payment confirmation in FIFA TMS is not relevant to deciding this matter. Rijeka did not check the information, because it knew that no payment was made.

- FIFA refers to transaction number *"395859"* and this is important, because this transfer instructions was matched with transaction number *"395963"* entered by Rijeka, including its bank account. Despite being aware of this information and having suspicions on the Spanish bank account, Ferencvárosi transferred the relevant amount to the Spanish bank account.

- It is also irrelevant whether and how many times Rijeka logged into FIFA TMS between 30 July and 23 September 2021. If Rijeka had logged in, how would that affect the fact that Ferencvárosi refused to act according to FIFA TMS instruction 395859 / 395963? The situation would be the same because the amount was already transferred to the Spanish bank account.

89. Rijeka did not file any specific separate requests for relief, but it concluded the substantive part of its Answer as follows:

"For this reason, the Panel is requested to reject the Appellant's Appeal as unfounded on all counts of the Appeal and to reject all the Appellant's prayers for relief as not grounded.

The esteemed Panel is further requested to issue an award to the Respondent".

VI. JURISDICTION

90. Article R47 CAS Code provides the following:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".

91. The jurisdiction of CAS, which is not disputed, derives from Article 57(1) FIFA Statutes (May 2022 Edition), as it determines that *"*[a]*ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question"*, and Article R47 CAS Code. The jurisdiction of CAS is not contested and is further confirmed by

the Order of Procedure duly signed by the Parties.

92. It follows that CAS has jurisdiction to adjudicate and decide on the present dispute.

VII. ADMISSIBILITY

93. The appeal was filed within the deadline of 21 days set by Article 57(1) FIFA Statutes. The appeal complied with all other requirements of Article R48 CAS Code, including the payment of the CAS Court Office fee.

94. It follows that the appeal is admissible.

VIII. APPLICABLE LAW

95. Ferencvárosi submits that, considering that the Transfer Agreement is governed by Swiss law and FIFA Regulations, no other law is applicable to the matter at hand.

96. Rijeka did not make any specific submissions with respect to the law to be applied, but it relies on general principles of law as well as on the FIFA RSTP in its submissions.

97. Article R58 CAS Code provides as follows:

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

98. Article 56(2) FIFA Statutes provides the following:

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

99. With reference to Article R58 CAS Code and Article 56(2) FIFA Statutes, the Panel finds that the present dispute shall be decided by applying the FIFA RSTP (October 2022 edition) and, additionally, Swiss law.

IX. MERITS

100. Based on the evidence on record, the Panel is satisfied to accept that Ferencvárosi paid an amount of EUR 997,500 to a Spanish bank account of the third-party impostor and not to any bank account belonging to Rijeka. Rijeka did not receive the amount of EUR 997,500 directly and there are no indications on file suggesting that Rijeka may somehow have collaborated with the third-party impostor and received the relevant amount or a part thereof indirectly. Accordingly, the Panel considers it to be clear that the damage incurred by Rijeka is EUR 997,500.

101. The Panel finds that this case has all elements of a typical wire fraud scheme, *i.e.*, the use of electronic communication with the intent to commit financial fraud.

102. The identity of the third-party impostor that was responsible for the wire fraud is unknown and the scope of the present appeal arbitration proceedings is limited to the consequences of the fraud for the Parties and, more specifically, whether Ferencvárosi or Rijeka shall bear the

consequences thereof or to what extent this responsibility shall be shared between them.

103. Under the Transfer Agreement, it was Ferencvárosi's duty to pay the amount of EUR 997,500 to Rijeka. The Panel accepts that Ferencvárosi indeed paid such amount, but not to a bank account held by Rijeka. There is therefore a clear causal nexus between Ferencvárosi's payment of the relevant amount to a bank account of the third-party imposter and its lack of payment to a bank account of Rijeka. On this basis, the Panel finds that it cannot be said that Ferencvárosi complied with its contractual duties towards Rijeka in accordance with the Transfer Agreement and that Ferencvárosi is therefore presumed to be in default. However, this is a rebuttable presumption.

104. This presumption follows from Article 97(1) SCO, which provision the Panel accepts is subsidiarily applicable in the matter at hand, as argued by Ferencvárosi:

"An obligor who fails to discharge an obligation at all or as required must make amends for the resulting damage unless he can prove that he was not at fault".

105. The Panel also accepts Ferencvárosi's submission based on jurisprudence of the Swiss Federal Tribunal (the "SFT") that the application of Article 97(1) SCO is subject to four conditions: (i) breach of duty; (ii) damage; (iii) adequate causal nexus between the breach of duty and the damage; and (iv) presumed fault (4A_178/2019, consid. 6.2).

106. In case such liability of Ferencvárosi is established, the concept of contributory negligence potentially comes into play on the basis of Article 44(1) SCO, which may have an impact on the compensation payable. Article 44(1) SCO provides as follows:

"Where the person suffering damage consented to the harmful act or circumstances attributable to him helped give rise to or compound the damage or otherwise exacerbated the position of the party liable for it, the court may reduce the compensation due or even dispense with it entirely".

A. The Main Issues

107. Based on the above, the main issues to be resolved by the Panel are the following:

i) Is Ferencvárosi liable towards Rijeka on the basis of Article 97(1) SCO?

ii) If Ferencvárosi is liable, is there any contributory negligence of Rijeka?

iii) What are the consequences thereof?

i) Is Ferencvárosi liable towards Rijeka on the basis of Article 97(1) SCO?

108. As indicated *supra*, since the Transfer Agreement, in relation with the first instalment, provides for a payment obligation of Ferencvárosi towards Rijeka in the amount of EUR 997,500, there is a presumed breach of the Transfer Agreement by Ferencvárosi, based on the fact that the amount had not been paid on the bank account of Rijeka. However, this is a rebuttable presumption, and Ferencvárosi maintains that (i) it did not breach any duty under the Transfer Agreement; and (ii) that there was no fault on its side.

109. The Panel will address these two arguments in turn.

a. Alleged absence of any breach of duty

110. Ferencvárosi maintains that it had agreed to pay the relevant amount following the fulfilment of several conditions, including the receipt of an invoice from Rijeka, which was never sent by Rijeka to Ferencvárosi.

111. Ferencvárosi further indicates that, upon registration of the Player by the MLSZ, it requested an invoice from Rijeka by email on 19 July 2021 at 14:34. This email was sent, *inter alia*, to the official email address mentioned in Clause 13 of the Transfer Agreement. Upon receipt of an invoice, Ferencvárosi did not merely pay it, but it requested additional documentation to ensure that the bank account belonged to Rijeka. Only then Ferencvárosi ordered the transfer of the relevant amount and uploaded proof of payment on FIFA TMS. Ferencvárosi maintains that, on such basis, it cannot be said that it breached any duty.

112. Clause 2(a) of the Transfer Agreement provides as follows:

> *"IN* [sic] *consideration of the transfer of the Player's permanent registration from* [Rijeka] *to Ferencvarosi, Ferencvarosi agrees to pay to* [Rijeka] *subject to and in accordance with the terms hereof,*
>
> *(a) as a first instalment of the basic transfer fee, the net sum of EUR 997,500.-* […]*, which corresponds to the 95% of the gross first transfer fee instalment of EUR 1,050,000.-* […] *(which is the gross first transfer fee instalment includes FIFA Solidarity Contribution) within 14* […] *calendar days reckoned from the day of satisfaction of all the following conditions:*
>
> *(i) the Player's International Transfer Certificate (the 'ITC') being requested and received and confirmed by HFF during the Hungarian transfer period on behalf of Ferencvarosi from the HNS;*
>
> *(ii) the transfer being matched and authorised by the FIFA Transfer Matching System ('TMS') during the Hungarian transfer period; and the "NO-TPO declaration" has been duly filed into TMS by* [Rijeka] *and sent to Ferencvarosi;*
>
> *(iii) the Player being registered with, and granted eligibility to play for, Ferencvarosi under the Contract by the HFF; and*
>
> *(iv) receipt by Ferencvarosi of a valid invoice from* [Rijeka] *such invoice to be addressed duly to Ferencvarosi".*

113. There are no issues with requirements (i), (ii) and (iii), but Ferencvárosi contends that Rijeka never provided it with an invoice, and that, as a consequence of the non-fulfilment of requirement (iv), no payment obligation towards Rijeka ever arose.

114. As indicated *supra*, on 19 July 2021 at 17:04, Rijeka sent an email to *"ftc@fradi.**eu**"*. Accordingly, this email was not received by Ferencvárosi. Attached to this email was an invoice for the first instalment of the transfer fee in the amount of EUR 997,500, referring to Rijeka's banking details.

115. This email was sent by Rijeka. However, it was not sent to

Ferencvárosi, but to the third-party imposter.

116. It was only one week later, on 26 July 2021 at 8:12, that Ferencvárosi received an email from the third-party impostor with an invoice attached thereto. This invoice was identical to the invoice issued by Rijeka on 19 July 2021 at 17:04, but importantly, the banking details differ, referring to a Spanish bank account.

117. On 26 July 2021 at 11:52, following a request for an amendment to be made to the invoice, Ferencvárosi received another email from the third-party impostor with an invoice amended as per Ferencvárosi's request. There is no indication on file suggesting that an email with such content and/or attached invoice was ever issued by Rijeka.

118. Based on the above facts, the Panel finds that Ferencvárosi was not provided with an invoice by Rijeka between 19 and 26 July 2021 or around these dates. Accordingly, no payment obligation for Ferencvárosi arose at that point in time, as the provision of an invoice was a clear precondition for the payment obligation to arise.

119. However, Ferencvárosi was eventually provided with a valid and official invoice by Rijeka on 23 September 2021:

    a. On 22 September 2021 at 16:04, Rijeka sent an invoice for interest on late payment to *"accounts@fredi.**eu**"*. Accordingly, this email was not received by Ferencvárosi and it was not forwarded by the third-party impostor in its original form.

    b. On 23 September 2021 at 10:58, Rijeka forwarded the email of 22 September 2021 at 16:04 to various email addresses of Ferencvárosi with the extension *".hu"*.

    c. On 27 September 2021 at 14:10, Ferencvárosi acknowledged receipt of Rijeka's email and invoice of 23 September 2021.

120. Accordingly, the Panel finds that, in accordance with the terms agreed upon in the Transfer Agreement and since all prerequisites set forth in Clause 2 were satisfied on 23 September 2021, Ferencvárosi's payment obligation towards Rijeka arose on 24 September 2021.

121. In any event, the invoice issued by Rijeka on 19 July 2021 at 17:04 eventually came into Ferencvárosi's possession at the latest during the proceedings before the FIFA PSC and it is clear from the context of the claim filed by Rijeka that it sought performance by Ferencvárosi of its payment obligations pursuant to the Transfer Agreement.

122. On this basis, the Panel finds that, regardless of whether Ferencvárosi was at fault (which is assessed below), Ferencvárosi was in breach of its contractual duty to pay Rijeka the amount of EUR 997,500, as a consequence of which the Panel finds that this prerequisite for the application of Article 97(1) SCO is satisfied.

b. The alleged absence of fault

123. Ferencvárosi submits that it cannot be deemed to have acted without the required level of diligence, but that it acted with the highest level of diligence.

124. The Panel finds that Ferencvárosi clearly did not act with the highest degree of diligence. It paid an amount of EUR 997,500 based on an invoice received from an email address that was not listed as the official email address of Rijeka in the Transfer Agreement. Ferencvárosi also does not appear to have been in contact with the bank to verify the accuracy of the Declaration before paying the relevant amount. Ferencvárosi paid the relevant amount while the bank account on the invoice differed from the official bank account registered by Rijeka in FIFA TMS and was located in a different country.

125. The aforementioned elements are assessed in more detail below, but with respect to the fault of Ferencvárosi, the Panel finds that there is no doubt that Ferencvárosi did not act with the highest degree of diligence and therefore failed to rebut the presumption pursuant to Article 97(1) SCO that it acted with fault.

c. Conclusion

126. On the basis of the above considerations, the Panel finds that Ferencvárosi is liable towards Rijeka on the basis of Article 97(1) SCO. As indicated *supra*, the Panel is satisfied to accept that Rijeka incurred damages in an amount of EUR 997,500 and that Ferencvárosi's payment of the same amount to a bank account belonging to the third-party impostor has a clear causal nexus to the damages incurred by Rijeka. Accordingly, all prerequisites for the application of such provision are satisfied.

127. However, this does not mean that Ferencvárosi is eventually liable towards Rijeka for the full amount of EUR 997,500.

128. Articles 43(1) and 44(1) SCO (which provisions are primarily applicable to liability in tort, but pursuant to Article 99(3) SCO they may be applied to a situation of breach of contract as well) provide respectively as follows:

"The court determines the form and extent of the compensation provided for damage incurred, with due regard to the circumstances and the degree of culpability".

"Where the person suffering damage consented to the harmful act or circumstances attributable to him helped give rise to or compound the damage or otherwise exacerbated the position of the party liable for it, the court may reduce the compensation due or even dispense with it entirely".

129. CAS jurisprudence has held the following with respect to the application of Article 44(1) SCO:

"In this regard and pursuant to Article 41 of the SCO (in conjunction to its Article 99(3), the Sole Arbitrator wishes to emphasise that the party that has caused a damage to the other party, either by negligence or imprudence, shall compensate it. In particular […] *'[w]here the exact value of the loss or damage cannot be quantified, the court shall estimate the value at its discretion in the light of the normal course of events and the steps taken by the injured party'. At the same time, also pursuant to Article 44 (1) SCO* […] *'[w]hen the injured party consented the action which caused the loss or damage or circumstances attributable to him helped to give rise to or to increase the loss or damage or otherwise to make worse the position of the party liable for it, the court may reduce the compensation due or even exempt it entirely"* (CAS 2020/A/6784, para. 151).

130. The Panel agrees with this interpretation. Accordingly, the Panel will assess to what extent Ferencvárosi acted faulty, negligently or otherwise helped to give rise to the damage. The Panel will take this into account in awarding compensation for damages. Furthermore, the Panel will assess to what extent there was contributory negligence on the side of Rijeka, because if there was any such contributory negligence, the amount of compensation payable is to be reduced, requiring a detailed assessment to determine to what extent the Parties shall share the total damage of EUR 997,500.

ii) If Ferencvárosi is liable, is there any contributory negligence of Rijeka?

131. The Panel finds that Rijeka was clearly in part responsible for the fact that it was not paid by Ferencvárosi in accordance with the Transfer Agreement.

132. Rijeka did not correspond with the official email address of Ferencvárosi set forth in the Transfer Agreement. Had Rijeka sent the relevant invoice to the official email address of Ferencvárosi, the entire wire fraud scheme would likely never have taken place. Furthermore, despite the fact that one of its employees was warned that the email addresses of Ferencvárosi did not end with the extension *".eu"*, Rijeka continued replying to emails coming from *".eu"* email addresses. Rijeka also failed to regularly check the entries in the FIFA TMS. If it had done so, it could have downloaded the payment confirmation uploaded by Ferencvárosi immediately after payment, which would have revealed the wire fraud at a very early stage and that would potentially have allowed Ferencvárosi to recall the payment instruction.

133. While the above elements are addressed in more detail below, the Panel finds that there is clearly contributory negligence of Rijeka.

iii) What are the consequences thereof?

134. The Panel finds that the consequence of the above conclusions is that both Parties are in part responsible for the fact that wire fraud could take place which resulted in Ferencvárosi's non-compliance with its payment obligations towards Rijeka.

135. As indicated *supra*, the Panel finds that, on the basis of Article 44(1) SCO, a more detailed assessment is required to determine to what extent the Parties shall share the total damage of EUR 997,500.

136. To do so, the Panel will first address the elements where it finds that Ferencvárosi acted below the standard that may have been expected from it in the circumstances, before engaging into the same exercise with respect to Rijeka. After having done so, the Panel will draw a final conclusion with respect to how the damage of EUR 997,500 is to be shared between the Parties.

137. However, before engaging into such exercise, the Panel finds that there are certain circumstances where both Parties are equally negligent. Indeed, both Parties corresponded with one another without using the email addresses designated for official notifications in the Transfer Agreement

and they frequently replied to email addresses with a *".eu"* extension. Both Parties accuse one another of not having used the email addresses required to be used.

138. In this respect, Article 13 of the Transfer Agreement provides as follows with respect to notifications:

"FERENCVAROSI and RIJEKA represent and warrant unconditionally that they are fully entitled and authorised to sign and execute the terms of this Agreement. UNLESS otherwise specified elsewhere herein any notice to be given pursuant to this Agreement shall be given in writing and addressed to the party concerned at the address shown herein (or such other addresses as notified by the parties in writing from time to time) and may be left at or sent by: (i) air mail; and/or (ii) personal by hand delivery or courier service: and/or (iii) electronic mail. Any such notice shall be deemed duly given as follows: (1) in the case of registered mail on the 5th (fifth) business day from the date of posting; (ii) in the case of personal by hand delivery or courier service at the time of delivery; or, in the case the addressee rejects to receive the notice, at the day of such rejection; or in case none of those events or the date of them can not be proven then on the 5th (fifth) business day from the date of posting; (iii) in the case of electronic mail at the time of receiving at the addressee's system or in case this receipt or the date thereof can not be proven then on the 5th (fifth) business day from the date of sending the email. In proving the giving of a notice it shall be sufficient to prove that the dispatch containing such notice was properly addressed and posted or sent. Where notice is served by electronic mail, the addresses for service are as follows:

If to Ferencvarosi: +36 1 2153698 attila.berzeviczi@fradi.hu

If to RIJEKA: +385 51563632 nk-rijeka@ri.t-com.hr".

139. Although the Panel considers it relevant that neither of the Parties consistently corresponded in accordance with Article 13 of the Transfer Agreement and that both frequently sent emails to email addresses with *".eu"* extensions, these failures can basically be set-off against one another, as both Parties engaged in the same negligent conduct. The Panel finds that in such circumstances, the English proverbial saying *"the pot calling the kettle black"* applies in full, as a consequence of which the Panel finds that this is not a distinguishing feature in assessing the Parties' negligent/culpable behaviour.

140. Furthermore, on 15 July 2021, both Parties realised something was *"strange"* in the communication by email, as an email sent by a representative of Rijeka had not been received by a representative of Ferencvárosi. The Panel finds that this should have alerted both Parties and set off alarm bells. At the very least, the Panel finds that it could have been expected of both Parties that after such moment, they would all the more have strictly complied with the means of communications prescribed in the Transfer Agreement or at least that they would no longer send emails to email addresses with *".eu"* extensions, but they did not. Also in this respect, the Panel finds that the negligence of the Parties can be set-off against one another and should not be used against either of them.

a. The negligence of Ferencvárosi

1. Replying to emails received twice

141. The first element the Panel wishes to highlight with respect to Ferencvárosi

is that the wire fraud was facilitated by the fact that it was Ferencvárosi that for the first time replied to an email of the third-party imposter on 15 July 2021 at 08:19. This was an important moment in the wire fraud scheme, because it allowed the third-party impostor to intercept Ferencvárosi's reply email without Rijeka already having received such reply.

142. Although the Panel has sympathy for the difficulty in distinguishing "real" from "fake" emails, particularly in view of the sophistication of the wire fraud scheme and because the only distinguishing feature between the two emails was the extension of the email address used, this does not set the behaviour of Ferencvárosi's representatives apart from that of Rijeka, because Rijeka's representatives did just the same.

143. However, the email of 15 July 2021 at 08:19 is different in the sense that Ferencvárosi had received two identical emails on 14 July 2021 at 19:13 and at 22:50 respectively. The first from Rijeka directly and the second from the third-party impostor. The Panel finds that this should reasonably have raised some suspicion on the side of Ferencvárosi, requiring it to verify the origin of such emails. Had Ferencvárosi done so, it would have observed that the emails were in fact not identical, but that the time the emails were sent was different and that the email addresses of the senders had different extensions. In turn, this could or should have resulted in a verification with Rijeka as to what extension it was actually using. None of this happened, as Ferencvárosi simply replied to the email of the third-party impostor sent at 22:50 and ignored the email sent by Rijeka at 19:13.

144. Something similar happened again to Ferencvárosi later that day. On 15 July 2021 at 10:05, Rijeka sent an email to the third-party impostor that was intended to be sent to Ferencvárosi. This email was eventually forwarded to a private email account of Mr Hajnal of Ferencvárosi by Mr Palikuca of Rijeka on 15 July 2021 at 11:27.

145. However, on 15 July 2021 at 11:35, Ferencvárosi received an email from the third-party imposter that was identical to the email sent on 15 July 2021 at 10:05, except for the time that it was sent and that it was not sent from the email account *"robertpalikuca@nk-rijeka.hr"*, but from *"robertpalikuca@nk-rijeka.eu"*.

146. The Panel finds that this should also have set off alarms for Ferencvárosi, but notes that no particular measures were taken.

147. While Rijeka also replied to emails with *".eu"* extensions, it does not appear to have received double emails like the emails received by Ferencvárosi addressed here and that could or should have set off alarm bells.

2. Not using Rijeka's bank account registered in FIFA TMS

148. The Panel finds that Ferencvárosi should reasonably have been alarmed by the fact that the invoice it received from the third-party impostor referred to a different bank account than the one registered by Rijeka in FIFA TMS.

149. Ferencvárosi had matched its own transfer instruction with the transfer

instruction entered by Rijeka, which included a reference to the real bank account of Rijeka.

150. The Panel finds that Ferencvárosi acted negligently by transferring the relevant amount to a bank account different from the one mentioned in the matched transfer instruction registered in FIFA TMS.

151. Pursuant to Annexe 3 to the FIFA RSTP *"clubs must ensure that their* […] *banking details are valid and kept up to date at all times"*. Rijeka appears to have complied with such duty, but Ferencvárosi nonetheless transferred the relevant amount to a different bank account.

152. The Panel finds that FIFA TMS is there to enhance transparency in the football industry. Facing a situation where a football club requests a payment to be made to a bank account different from the one registered in FIFA TMS should set off alarm bells and could arguably even be a legitimate basis to refuse to make a payment to such bank account.

3. Insufficient verification of the Declaration

153. The Panel finds that the suspicion of Ferencvárosi with respect to the bank account referred to in the invoice received from the third-party impostor should have exacerbated Ferencvárosi's suspicions because the bank account on the invoice from the third-party impostor was not a Croatian bank account, but a Spanish bank account. At the same time, taking note of the fact that at the relevant point in time the Euro had not yet been introduced in Croatia, the Panel accepts Ferencvárosi's contention that it was not particularly suspicious that Rijeka requested to be paid on a Euro bank account in an EU member state.

154. This, in combination with the fact that the Spanish bank account was different from the bank account registered by Rijeka in FIFA TMS, was apparently indeed a red flag for Ferencvárosi as it requested additional safeguards to ensure that this was indeed a bank account belonging to Rijeka. This shows vigilance and Ferencvárosi deserves credit for this.

155. However, the Panel finds that Ferencvárosi fell short in verifying the authenticity of the Declaration received from the third-party impostor in response.

156. The Declaration refers to the Spanish bank account. However, in the letterhead on the bottom of the Declaration reference is made to the bank account belonging to Rijeka. Accordingly, the information provided on the Declaration provided contradictory information, an aspect Ferencvárosi appears to have overlooked.

157. Moreover, the Panel finds that a careful and vigilant party would not only have contacted Rijeka by email but would also have contacted the relevant bank and the HNS (as Ferencvárosi eventually did after it had realised that its payment had not reached Rijeka), particularly in a situation where Ferencvárosi apparently already had doubts about the Spanish bank account that did not match with the information registered in FIFA TMS.

158. Furthermore, Ferencvárosi could or should have reached out to Rijeka by

different means of communication, *i.e.*, not only by email, but for example by telephone or WhatsApp. Although maybe customary, communicating only by email of course increases the risk of wire fraud and Ferencvárosi failed in mitigating such risk.

159. Overall, the Panel finds that Ferencvárosi fell short in verifying the accuracy of the Declaration before making the payment.

4. Failure to communicate as required by Transfer Agreement with respect to the Declaration

160. As indicated above, the Panel finds that it could be expected of both Parties to communicate in accordance with Article 13 of the Transfer Agreement. It may be customary to deviate from such method of communication, but in case problems arise like in the matter at hand, a failure to act in accordance with the terms of the Transfer Agreement is demonstrative of the lack of diligence applied.

161. This is particularly true for important communications like with Ferencvárosi's correspondence related to the Declaration. Indeed, especially when there are apparently already certain suspicions or doubts, one should be particularly strict in complying with the terms of a contract, also with respect to communication.

162. Ferencvárosi did not. It neither communicated from its own formal email address listed in Article 13 of the Transfer Agreement, nor to Rijeka's formal email address, which is especially negligent after it already had certain doubts after being confronted with a Spanish bank account that did not match the bank account registered by Rijeka in FIFA TMS and after having reminded Rijeka that its representatives did not use email addresses with the extension *".eu"*. Warning Rijeka that it should comply with its obligations is one thing, but Ferencvárosi should then of course also comply with such requirements itself, which it did not consistently do.

163. Accordingly, also in this respect the Panel finds that Ferencvárosi fell short of applying the level of diligence that could reasonably have been expected from it in the circumstances.

b. The negligence of Rijeka

1. The warning received by Ferencvárosi

164. The Panel finds that Mr Palikuca of Rijeka was put on notice by Mr Hajnal of Ferencvárosi that Ferencvárosi's representatives did not use email addresses with the extension *".eu"*.

165. Although Ferencvárosi did not specifically demand that communication should take place in accordance with Article 13 of the Transfer Agreement, the Panel finds that Mr Palikuca should have shared such warning internally and Rijeka should have been particularly careful to avoid sending emails to email addressing ending with *".eu"* extensions.

166. However, Rijeka continued sending emails to email address with a *".eu"* extension, which the Panel considers negligent. Had Rijeka taken heed of Mr Palikuca's notice, the entire fire fraud scheme would likely never have taken place.

2. Checking payment confirmation in FIFA TMS

167. The Panel accepts Ferencvárosi's argument that Rijeka was and is required to regularly check FIFA TMS. Ferencvárosi uploaded a payment confirmation in FIFA TMS immediately after having transferred the relevant amount to the Spanish bank account belonging to the third-party impostor. This information was accessible to Rijeka, but Rijeka failed to verify the payment confirmation.

168. On 30 July 2021, Ferencvárosi transferred the amount of EUR 997,500 and proof of payment was uploaded to FIFA TMS later that same day. The value date of the payment was 2 August 2021, *i.e.*, three days after the payment order had been executed.

169. Had Rijeka immediately verified the payment confirmation uploaded to FIFA TMS, it could have alarmed Ferencvárosi that it had transferred the relevant amount to a wrong bank account. The wire fraud scheme could potentially still have been prevented had Ferencvárosi quickly withdrawn the payment order through its bank. Ferencvárosi was however not able to do so, because Rijeka did not inform it about the incorrect bank account used, which the Panel considers to be negligent on the side of Rijeka.

3. Failure to communicate as required by Transfer Agreement with respect to the invoice

170. Although both Parties failed to comply with the requirement to communicate from and to the official email addresses indicated in the Transfer Agreement, the Panel finds that this is particularly reproachable with respect to official important communications like with the sending of an invoice.

171. On 19 July 2021 at 17:04, Rijeka sent an email to *"ftc@fradi.eu"*. Accordingly, this email was not received by Ferencvárosi. Attached to this email was an invoice for the first instalment of the transfer fee in the amount of EUR 997,500.

172. Just like the Panel considers it reproachable to Ferencvárosi that it failed to use the formal means of communications with respect to the Declaration, the Panel also find it reproachable that Rijeka failed to send the official invoice to the email address of Ferencvárosi indicated in the Transfer Agreement.

c. Conclusion

173. Turning to an overall assessment of the circumstances set out above, it should be made clear that, based on the submissions of the Parties, neither Ferencvárosi nor Rijeka is the perpetrator here. Neither of the Parties had the intention of inflicting harm on one another. The Parties are insofar in agreement that they both appear to have fallen victim to a sophisticated wire fraud scheme, resulting in a damage of EUR 997,500. From that perspective, neither of the Parties was significantly or solely at fault.

174. The Panel notes that criminal proceedings are still ongoing. Accordingly, one can only hope that either Ferencvárosi or Rijeka, or better both collectively, will finally succeed in locating and retrieving the amount of EUR 997,500 from the third-party

impostor, through criminal proceedings or otherwise.

175. Whether either or both the Parties may also have recourse against the banks involved in the transaction, is an additional legal issue that was not debated in the present proceedings and is therefore not a matter to be commented by this Panel.

176. To sum up, the extent to which the Parties may have recourse against the third-party impostor or any of the banks involved in the execution of the payment transaction, is not for this Panel to decide. The Panel is only mandated to adjudicate and decide on the appeal against the Appealed Decision and, accordingly, on the contractual dispute between the Parties. Accordingly, and in line with the legal framework set forth above, the Panel is faced with the task of determining what should be the consequences in the relationship between the Parties based on the level of fault and/or negligence attributable to both of them.

177. The wire fraud scheme to which the Parties fell victim may have been relatively difficult to detect as it was quite sophisticated. However, the Panel finds that it was not impossible for the Parties to detect it and prevent the fraud. The wire fraud scheme was only possible because neither of the Parties had appropriate security measures in place aimed at mitigating the risk of falling into such trap. Further, in several points of time the Parties did not act with the level of diligence that could be expected of football clubs engaging into a Transfer Agreement worth millions of Euros.

178. Although certain elements addressed above suggest more negligence on the side of Ferencvárosi, other elements suggest more negligence on the side of Rijeka.

179. On this basis, the Panel finds Ferencvárosi's specific prayer for relief that it can only be required to pay damages in an amount of EUR 97,500 to Rijeka to be clearly inappropriate, as it does not do justice to the negligence displayed by Ferencvárosi in comparison with the negligence displayed by Rijeka.

180. The Panel identified four specific negligible acts on the side of Ferencvárosi and three on the side of Rijeka. However, the Panel finds that it would be artificial to engage into a strict mathematical exercise.

181. What is more, the Panel finds that it is also to be taken into account that Mr Hajnal of Ferencvárosi took a good faith initiative by warning Mr Palikuca of Rijeka that the latter was sending emails to wrong email addresses, *i.e.*, *"our e-mail addresses end with hu instead of eu"*. However, this act should also not be exaggerated, as this warning was sent in a private WhatsApp message. Although this does not negate the fact that Mr Palikuca's message is praiseworthy, it is only an informal message to one person in Rijeka's organisation. It is not as significant as a formal notification of the same content from Ferencvárosi's official email address to Rijeka's official email address would have been.

182. Furthermore, although Ferencvárosi did not use the email addresses indicated in the Transfer Agreement with respect to the Declaration as it

should have done, the Panel finds that Ferencvárosi deserves some credit for the fact that it sent the important email with its request to be provided with an invoice to the official email address of Rijeka. Finally, true is that the fraud could have been prevented at several stages of the process: in other words, it has been demonstrated that at different times each of the Parties had in the hand the possibility to avoid the fraud and/or its consequences.

183. On balance, the Panel finds that the negligence displayed by both Parties is very similar and that it would be artificial to attribute more fault or negligence to Ferencvárosi or to Rijeka in a situation where their behaviour did not differ significantly.

184. Consequently, based on the level of negligence displayed by both Parties, the Panel finds it reasonably and fair that both Parties shall bear the consequences of the wire fraud scheme in equal shares.

185. Therefore, instead of being required to pay the full amount of EUR 997,500 originally due, Ferencvárosi shall pay to Rijeka only half of this amount, *i.e.*, EUR 498,750.

186. Although the Panel finds that such payment obligation actually arose on 24 September 2021, since the FIFA DRC only awarded interest as from 10 March 2023 and because only Ferencvárosi challenged the Appealed Decision, the Panel is barred from awarding interest as from 24 September 2021, as doing so would violate the principle that an arbitral tribunal shall not award more or something different than what was requested. Such an award would be *ultra petita* and could be challenged before the SFT, based on Article 190(2)(c) of the Swiss Private International Law Act.

187. Consequently, the Panel finds that Ferencvárosi shall pay Rijeka an amount of EUR 498,750, plus interest at a rate of 5% *per annum* as from 10 March 2023 until the date of effective payment.

B. Conclusion

188. Based on the foregoing, the Panel holds that:

i) Ferencvárosi is liable towards Rijeka on the basis of Article 97(1) SCO.

ii) There is contributory negligence of Rijeka.

iii) Both Parties shall equally share the damage of EUR 997,500.

iv) Ferencvárosi shall pay Rijeka an amount of EUR 498,750, plus interest at a rate of 5% *per annum* as from 10 March 2023 until the date of effective payment.

189. Accordingly, Ferencvárosi's appeal is partially upheld.

190. The above conclusion, finally, makes it unnecessary for the Panel to consider the other requests submitted by the Parties. Accordingly, all other and further motions or prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 31 October 2023 by Ferencvárosi Torna Club against the decision issued on 13 September 2023 by the Players' Status Chamber of the Football Tribunal of the *Fédération Internationale de Football Association* is partially upheld.

2. The decision issued on 13 September 2023 by the Players' Status Chamber of the Football Tribunal of the *Fédération Internationale de Football Association* is confirmed, save for paragraph 2, which shall read as follows:

   Ferencvárosi Torna Club must pay to HNK Rijeka the following amount:

   - EUR 498,750 (four hundred ninety-eight thousand seven hundred fifty Euros) as outstanding amount plus 5% (five per cent) interest *per annum* as from 10 March 2023 until the date of effective payment.

3. (…).

4. (…).

5. All other and further motions or prayers for relief are dismissed.

CAS 2023/A/10129
General Souhail Khoury & General Mowafak Jomaa v. Olympic Council of Asia (OCA),
16 December 2024

Panel: Mr Jacques Radoux (Luxembourg), President; Mr Olivier Carrard (Switzerland); Prof. Luigi Fumagalli (Italy)

Governance
Validity of the electoral process for the presidency of the Olympic Council of Asia
Withdrawal of the appeal and consequences
Distinction between principal and accessory intervention
Right of the intervenor to oppose itself to the withdrawal of the appeal

1. **The unilateral unconditional withdrawal of the appeal amounts to a waiver of claim (*"désistement d'action"*). According to Swiss law, which is applicable on a subsidiary basis pursuant to article R58 of the CAS Code, the waiver of a claim foreseen in Article 241 al. 2 of the Swiss Code de procédure civile (CPC), is an act by which the claimant abandons the requests for relief that he or she submitted all along the proceedings. It is directed to the claim and has *res judicata* effects. It follows that, regarding the appeal filed by the appellants, the CAS no longer has jurisdiction and that, as a result, the appealed decision became final and binding upon the appellants.**

2. **As evident from the wording of Article 73 of the CPC, in cases of principal intervention, the intervenor's claims must be directed against both parties. However, this does not apply when the third party shares the same position as the appellant. Furthermore, in the absence of any reference to Article 73 or Article 74 of the CPC by the third party and where the intervention request is granted by the CAS panel under Article R41.4 of the CAS Code as invoked by the third party, the application of this provision does not justify classifying the intervention as "principal". Moreover, Article R41.4 (al. 5) of the CAS Code states that *"the Panel shall determine the status of the third party and its rights in the procedure".* This suggests that the provision's scope is not restricted to principal interventions but also extends to accessory interventions, where the intervenor retains the status of a third party (*tiers intéressé*).**

3. **Except in case of an "independent accessory intervention" (*"intervention accessoire indépendante", "unabhängige Nebenintervention"* or *"streitgenössische Nebenintervention"*), Article 76 of the CPC prevents an intervenor from submitting claims or requests which would extend the scope of the proceedings and even adopting a position or submitting a claim or request which are contrary to the position adopted by the party it is supporting by its intervention. Further, pursuant to this provision, the intervenor cannot oppose itself to the withdrawal or waiver of the claim pursuant to Article 241 of the CPC by**

the party on the side of which it intervenes. Therefore, in a case concerning an "accessory intervention", the third party cannot validly oppose itself to the withdrawal of the appeal by the appellants. Thus, notwithstanding the objection raised by the third party, the withdrawal of the appeal by the appellant and its acceptance by the respondent mark the end of the appeal proceedings.

I. THE PARTIES

A. The Main Parties

1. General Souhail Khoury and General Mowafak Jomaa (the "Appellants") are members of the Executive Board of the Olympic Council of Asia (the "OCA EB").

2. The Olympic Council of Asia (the "OCA") is the continental governing body of sports in Asia recognized by the International Olympic Committee (the "IOC"). It has its headquarters in Kuwait City, Kuwait.

3. The OCA – as represented by Mr Raja Randhir Singh (the "Respondent") is the entity that adopted the decision appealed by the Appellants.

4. Together, the Appellants and the Respondent will be referred to as the "Main Parties".

B. The Third Party

5. The OCA – as represented by Sheikh Talal Fahad Al-Ahmad Al-Sabah has, by an order on request for intervention dated 23 April 2024, been admitted to the present proceedings as a Third Party (the "Third Party"). Sheikh Talal Fahad Al-Ahmad Al-Sabah was elected President of the OCA by the OCA General Assembly ("OCA GA") on 8 July 2023.

6. The Main Parties and the Third Party will be referred to collectively as the "Parties".

II. THE FACTUAL BACKGROUND

7. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions and the evidence adduced. Additional facts and allegations found in the Parties' submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has carefully considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, in refers, in this Award only to the submissions and evidence it considers necessary to explain its reasoning.

8. On 29 June 2023, in view of the upcoming presidential elections to be held by the OCA GA, the Chairman of the OCA Electoral Commission and the Chairman of the OCA Ethics Committee sent a letter to all the National Olympic Committees (NOCs) members of the OCA reminding them not to contact or meet with persons outside the election or government agencies.

9. On 4 July 2023, still in view of these upcoming elections, the OCA Ethics Committee reminded these NOCs to comply with the OCA and the IOC Ethics Codes.

10. On 8 July 2023, the OCA GA held presidential elections in which Sheikh Talal Fahad Al-Ahmad Al-Sabah, in competition with Mr Husain Al-Musallam, was elected President of the OCA by 24 votes to 20. During this OCA GA, no objections or accusations were raised by the NOCs regarding the validity of the electoral process.

11. On 11 July 2023, the NOC of the Philippines sent an email to the Chairman of the OCA Ethics Committee, Mr Jihzong Wei, to complain about an alleged government interference during the electoral campaign. Amongst other individuals, Mrs Pâquerette Girard Zappelli, IOC Chief Ethics and Compliance Officer, was in copy of this email.

12. On 14 July 2023, the new members of the OCA Executive Board ("OCA EB") were elected for the period 2023-2027.

13. On 22 July 2023, following an email exchange between them, Mr Jihzong Wei informed Mrs Pâquerette Girard Zappelli that *"after the clear investigations, the OCA Ethics Committee didn't find any indication for any violations before, during and after the elections"*.

14. On 24 July 2023, Mr Jihzong Wei, in an email addressed to Mrs Pâquerette Girard Zappelli, stated, amongst others, *"[i]n these cases, OCA election committee and ethics committee have no reason to conduct investigation so far"*.

15. In her answer of the same day, Mrs Pâquerette Girard Zappelli noted that *"[c]onsidering your letter dated 26 June 2023, to the NOCs of OCA and candidates for the OCA elections, in particular the reference to article 8 of the Elections Process and Procedure, it can only be concluded that the OCA Ethics Committee carried out a thorough investigation, in particular regarding the potential interference of governmental institutions such as Embassies to support one of the candidates to the OCA presidential elect. In order to inform the IOC Ethics Commission, I would appreciate to receive a copy of the grounded decision into the above mentioned investigation by the end of today, 24 July 2023"*.

16. On 27 July 2023, the IOC Executive Board, following the recommendations made by the IOC Ethics Commission in a decision of the same day, adopted the following decision:

"1) To confirm the seriousness of the breach of the provisional suspension imposed on Sheikh Ahmad Al-Sabah, in particular regarding his involvement in the Olympic Council of Asia's activities;

2) Consequently, to sanction Sheikh Ahmad Al-Sabah by suspending all the rights, prerogatives and functions deriving from his quality as an IOC Member for a period of three (3) years, starting from the date of the decision by the IOC Executive Board;

3) To recommend, as a consequence of this sanction, the Olympic Parties, including the IOC Members, to refrain from interacting with Sheikh Ahmad Al-Sabah, in particular to avoid any risk of any perception of influence on any decisions regarding the Olympic Movement;

4) To note that the IOC Ethics Commission reserves its right to review the individual situation of Sheikh Ahmad Al-Sabah as an IOC Member following the decision by the Court of Appeal of Geneva;

5) To consider the undeniable impact on the OCA's elections of Sheikh Ahmad Al-Sabah's behaviour, and consequently not to recognise these elections until a full review of the OCA's elections process is carried out at a later stage;

6) To ensure that the Olympic contributions to the OCA, such as, but not limited to, the Olympic Solidarity Funds, to be distributed to the Asian NOCs directly by the IOC (and not through the OCA) until the OCA's elections have been recognised by the IOC".

17. On 27 July 2023, Mr James Macleod, Director of NOC Relations and Olympic Solidarity at the IOC, in a letter addressed to Mr Raja Randhir Singh in his capacity as *"Acting President"* of the OCA, notified the IOC Executive Board decision of the same day to the OCA and emphasized points 5 and 6 of this decision.

18. On 30 July 2023, Mr James Macleod provided the following clarifications to Mr Raja Randhir Singh:

"Seeing as the IOC [investigation into the OCA elections] is likely not to be concluded before October 2023 and since the IOC has not recognised the election of Sheikh Talal Al-Sabah, the IOC will continue to work with you as OCA's acting President and with the OCA Executive Board that was in place prior to the Bangkok General Assembly.

We expect that you continue to direct the OCA administration in all matters, including the calling of any Executive Boards, General Assemblies and any other meetings needed for the governance of the OCA. We would also appreciate it if you could confirm to whom the IOC should address itself for daily administration business.

Following the outcome of the IOC investigation, we will work with you to implement the next steps of a roadmap to ensure the continued functioning of the OCA according to the basic principles of good governance".

19. On the same day, Mr Raja Randhir Singh forwarded Mr Macleod's letter to the OCA EB members and the NOCs members of the OCA.

20. On 9 August 2023, Mrs Pâquerette Girard Zappelli, in a letter addressed to Mr Raja Randhir Singh in his capacity as OCA Acting President, informed the latter that until the outcome of the OCA's elections process review by the IOC is finalised, *"the two candidates for the presidential election shall not be involved in any activities which might influence the ongoing OCA's elections review process or give the perception thereof, in particular by abstaining from engaging in any communication with OCA's voting members or participating in any OCA's events. In addition, as a consequence of the non-recognition by the IOC of the elections which took place on 8 July 2023, the limitations mentioned above apply to all the persons appointed in any positions within the OCA after this date. We are confident that, as OCA Acting President, you will find solutions to ensure that the OCA's daily activities are conducted within the framework of the OCA's Constitution and rules. If any difficulties or challenges arise, Mr McLeod and myself will remain available".*

21. On 17 August 2023, the OCA as represented by Sheikh Talal Fahad Al-Ahmad Al-Sabah filed, before the District Court of Lausanne, Switzerland, an application for super-provisional and provisional measures as well as a request for conciliation against the IOC. On the same day, the same petitions were filed by Sheikh Talal Fahad Al-Ahmad Al-Sabah on his own behalf. Also on the same date, the OCA as represented by Sheikh Talal Fahad Al-Ahmad Al-Sabah Sheikh filed an appeal against the IOC with the Court of Arbitration for Sport in Lausanne, Switzerland (the "CAS"). All of these proceedings are still pending.

22. On 10 October 2023, Mrs Pâquerette Girard Zappelli rendered her report on the OCA's Election Process Review in which she concluded, amongst others, the following:

"Considering all the objective elements analysed above, it appears that the OCA regulations, in particular article 8 of the Election Procedure & Process – Guidelines and articles 8, 9 and 10 of the OCA Ethics Guidelines for the OCA Election, were breached due to the undue interference from Sheikh Ahmad personally and as Deputy Prime Minister and Minister of Defence of the Government of Kuwait, in particular via the Kuwaiti Embassies abroad. Such interference has been accepted by Sheikh Talal, as a candidate to the election.

The OCA election process review did not make it possible to clarify whether the Government of Kuwait had approved the use of government agencies to interfere in the OCA's elections. However, the fact that Sheikh Ahmad intervened personally, by using governmental means of support, gave such a perception. Furthermore, he claimed publicly to be the President of the OCA.

Such interference from a third party, in particular using the means of governmental entities, should have had an impact on the eligibility of the candidate, pursuant to article 10 of the OCA Ethics Guidelines for the OCA Elections. However, such an assessment was never made at the time, and the conclusion as to the candidate's ineligibility was never drawn.

Considering the above, it is the responsibility of the OCA's bodies to draw their conclusions from such interference and breach of the OCA Constitution and rules, in particular by preventing all individuals involved in the breach of the OCA rules, as well as all individuals who may be linked to them, from being part of the OCA's next elections.

It also appears from the review that the text of the current OCA Constitution contains some contradictions and lack of clarity, in particular with regard to the election process, which shall be corrected.

Therefore, it is the responsibility of the OCA's bodies to draw their conclusions from such interference and to take the appropriate actions and decisions, in particular but not limited to the following:

1. To declare the elections held on 8 July 2023 as invalid (null and void);

2. To review the OCA Constitution, in particular to make it compliant with the recently reviewed Basic Universal Principles of Good Governance within the Olympic Movement, including with regard to the election process, transparency, and checks and balances;

3. To convene a General Assembly to approve the new Constitution and to organise new elections in compliance with this new Constitution and the Election Rules; and

4. As part of the duty of care, to take every possible measure to protect the OCA administration and assets from any type of interference.

For the above reasons, the IOC Executive Board is informed that this Report on the OCA's Election Process Review is being shared with the OCA and its Acting President and Executive Board for their consideration".

23. On 12 October 2023, Mrs Pâquerette Girard Zappelli (i) informed Mr Raja Randhir Singh of the outcome of the OCA's Election Process Review, in particular that Sheikh Talal Fahad Al-Ahmad Al-Sabah did not fulfil the eligibility conditions defined by the OCA Constitution and should have been declared ineligible from the outset and

that third parties interfered in favour of Sheikh Talal Fahad Al-Ahmad Al-Sabah, which also constitutes a breach of the OCA's election rules, without any action having been taken by the OCA in this regard; (ii) pointed out that it *"is now the OCA's responsibility and duty to take appropriate decisions, in particular with regard to the four points of action mentioned in the Report. We understand that you will convene an OCA Executive Board meeting as soon as possible in order to approve and implement these steps"*; and (iii) requested Mr Randhir Singh to share *"this letter and its attachment with all the members of the OCA Executive Board (composition before the 8 July 2023 elections) and with all Asian NOCs members of the OCA"*.

24. On 14 October 2023, after forwarding Mrs Pâquerette Girard Zappelli's letter to the Members of the OCA EB, as well as to the Member NOCs of the OCA, Mr Raja Randhir Singh invited the members of the OCA EB to a virtual meeting to be held on the 19 October 2023. In its relevant parts, this letter reads as follows:

*"**Agenda***

To review and approve the IOC Chief Ethics & Compliance Officer report on the OCA elections held on 8th July 2023 in Bangkok and action thereof.

A copy of the report as well as the letter from IOC Chief Ethics and Compliance Officer is enclosed herewith, for ready reference.

As per Article 19 of the OCA Constitution, the following delegates will be allowed to vote, if required:

i) President

ii) Five Zonal Vice Presidents, elected by the GA.

iii) Chair of Standing Committees, nominated by President and ratified by General Assembly.

As per Article 19 & 22, the Hony Life Vice Presidents, Hony. Vice President, Executive Board Members will be invited to attend the meeting but without any voting rights.

The Executive Board invitation is not being forwarded to Sheikh Talal Al-Sabah and Mr. Husain Al-Musallam, as they are both parties to the matter being discussed".

25. On 16 October 2023, Sheikh Talal Fahad Al-Ahmad Al-Sabah send letters respectively to Mr Raja Randhar Singh, to the members of the former OCA EB (2019-2023) and to the NOCs member of the OCA stating in substance, *inter alia*, that the IOC does not have the authority to declare the elections of 8 July 2023 invalid; that these elections were not validly challenged; that Mr Raja Randhir Singh had not been validly appointed as "OCA Acting President" and could, accordingly, not validly convene an OCA EB meeting.

26. On 18 October 2023, Mrs Pâquerette Girard Zappelli and Mr James Macleod informed Mr Raja Randhir Singh that, contrary to what Sheikh Talal Fahad Al-Ahmad Al-Sabah argued in his letter dated 16 October 2023, *"the IOC had the authority to refuse the recognition of the OCA's elections and there is nothing illegal in you inviting the OCA Executive Board members to meet in order to decide on the consequences of the interferences in the recent elections"*.

27. On 24 October 2023, Mr Raja Randhar Singh send a letter to the Member NOCs of the OCA informing them about the decisions adopted in the OCA EB

meeting of 19 October 2023 (the "Appealed Decision"). The relevant parts of the Appealed Decision read as follows:

"As you probably have already read on OCA's Website, on Thursday 19 October 2023 the OCA Executive Board met (virtually) and discussed the Report of the IOC Chief Ethics and Compliance Officer dated 10 October 2023 on the OCA elections which were held in Bangkok on 8 July 2023 as well as the letter of the IOC of 12 October 2023.

The OCA Executive Board has decided to approve the said Report of the IOC Chief Ethics and Compliance Officer along with the Conclusions and the Recommendations made therein, with a majority of 14 to 4 votes, with one recuse.

In addition, the OCA Executive Board unanimously reconfirmed the undersigned as OCA Acting President and requested me to continue with the diligence and prudence demonstrated until now in the running the affairs of the OCA [...]".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

28. On 9 November 2023, the Appellants filed a Statement of Appeal with the CAS pursuant to Article R47 of the Code of Sports-related Arbitration (the "Code") against the OCA with respect to the Appealed Decision. Together with their Statement of Appeal, the Appellants filed a Request for Provisional Measures according to Article R37 of the Code.

29. In their Statement of Appeal, the Appellants requested the following reliefs from the CAS:

"(a) To declare null and void the decisions taken on 19 October 2023 by the members of the former Executive Board of the Olympic Council of Asia, in office between the years 2019 and 2023.

(b) To annul the *decisions taken on 19 October 2023 by the members of the former Executive Board of the Olympic Council of Asia, in office between the years 2019 and 2023.*

(c) an order *for the Respondent to bear the entire costs of the Appellants legal costs and expenses with the present arbitration proceedings".*

30. The Appellants further indicated that they were seeking a procedural order from the CAS granting *"the enclosed provisional measures to the Appellants".*

31. On 17 November 2023, the CAS Court Office initiated the present appeals arbitration procedure and notified the Statement of Appeal as well as the Request for Provisional Measures to the Respondent and invited it, *inter alia*, to state whether it agreed to the Appellants' request to have the time limit to file their Appeal Brief set out in Article R51 of the Code extended.

32. On 17 November 2023, Mr Alexandre Zen-Ruffinen, Attorney-at-law in Neuchâtel, Switzerland, and Mr Shahram Dini, Attorney-at-law in Geneva, Switzerland, informed the CAS Court Office, amongst others, of fact that there *"is currently an uncertainty as to who is entitled to represent the OCA"*; that there *"are two people [i.e. Sheikh Talal Fahad Al- Ahmad Al-Sabah, on the one side, and Mr. Raja Randhir Singh, on the other side] claiming to be the President of the OCA and that the question is who has the capacity to represent it"* and that *"the President-elect, Sheikh Talal, has mandated us to defend the*

OCA in this procedure [...] and will not accept that the OCA be represented by Mr. Singh".

33. On 22 November 2023, the Appellants informed the CAS Court Office that they nominated Mr Olivier Carrard, Attorney-at-law in Geneva, Switzerland, as arbitrator.

34. On 27 November 2023, the Respondent informed the CAS Court Office that it was represented by Mr Jean-Pierre Morand and Mr Riccardo Coppa, Attorneys-at-law in Lausanne, Switzerland, and that it had not received all of the documents submitted by the Appellants with their Statement of Appeal and their Request for Provisional Measures.

35. On 29 November 2023, the Respondent informed the CAS Court Office that it did not object to the Appellants' request to extend the time limit to file their Appeal Brief.

36. On 11 December 2023, the Respondent informed the CAS Court Office that it nominated Prof. Luigi Fumagalli, Professor of Law and Attorney-at-law in Milan, Italy, as arbitrator in the present proceedings.

37. On 4 January 2024, the CAS Court Office informed the Parties that the Panel appointed to resolve this dispute was constituted as follows: Mr Jacques Radoux, Référendaire in Luxembourg, Luxembourg (President), Mr Olivier Carrard, Attorney-at-law in Geneva, Switzerland and Prof. Luigi Fumagalli, Attorney-at-law and Professor in Milan, Italy (arbitrators).

38. On 15 January 2024, the Appellants filed their Appeal Brief and the CAS Court Office invited the Respondent to submit its Answer within the deadline set out in Article R55 of the Code, highlighting that if it failed to do so, the Panel may nevertheless proceed with the arbitration and deliver an award.

39. On 18 January 2024, the Third Party informed the CAS Court Office that it had lodged an appeal before the Swiss Federal Tribunal (SFT) against the decision of the CAS Court Office to consider that, in the present matter, the OCA – as represented by Mr Raja Randhir Singh was the Respondent and that the OCA was validly represented by Kellerhals Carrard, *i.e.* by Mr Morand and Mr Riccardo Coppa; and requested a stay of the procedure.

40. The Main Parties agreed to the requested stay of the procedure under certain conditions.

41. On 25 January 2024, the Third Party informed the CAS Court Office that the SFT had rejected its appeal and, consequently, it withdrew its request for a stay of the proceedings.

42. On the 4 February 2024, the Respondent filed submissions requesting the bifurcation of the procedure for lack of standing to sue and/or legal interest of the Appellants.

43. On 5 February 2024, the CAS Court Office invited the Appellants to comment on the Respondent's request for bifurcation by 12 February 2024.

44. On 12 February 2024, the Appellants filed their submissions with regards to the Respondent's request for bifurcation. In these submissions, they argued that they both have a personal legal interest worthy of protection and, thus, have standing to sue in the present

proceedings. Consequently, they considered that there was no reason to bifurcate the present proceedings on the grounds raised by the Respondent.

45. On the same day, the Third Party filed a submission in which it agreed with the Appellants on the question of bifurcation of the proceedings and informed the CAS Court Office that, *"in view of the 30-day extension of the time limit you granted to the Respondent to file its Answer in your letter of 5 February 2024, and in accordance with the principles of equality of arms, and the right to be heard in the proceedings, we hereby inform you, that the OCA duly represented by its President Sheikh Talal Fahad Al-Ahmad Al-Sabah will file its Answer within the same time limit"*.

46. On 13 February 2024, the Respondent responded to the Third Party's submission filed on 12 February and, *inter alia*, reiterated its request for bifurcation of the proceedings and, pending the decision of the Panel on that request, asked that its time limit to file its Answer be suspended until 6 March 2024, *i.e.* the time limit granted to the Third Party to file its written submissions, and re-fixed after that date or, in the alternative, to be afforded the opportunity to formally express its position and exercise its right to be heard in respect of these submission through an additional brief.

47. On 29 February 2024, the CAS Court Office informed the Parties, on behalf of the Panel, that the Respondent's request for bifurcation and request for suspension of the time limit to file its Answer until the Panel decided on the request for bifurcation were denied and that the said time limit was extended until 18 March 2024.

48. On 4 March 2024, the Third Party informed the CAS Court Office that, *"in accordance with the principles of equality of arms and the right to be heard in the proceedings"*, it would file its *"Answer"* by 18 March 2024.

49. On 15 March 2024, the Respondent requested an extension of the time limit to file its Answer until 25 March 2024. The same day, the requested extension was granted to the Respondent and the Third Party.

50. On 22 March 2024, the Respondent informed the CAS Court Office, that the Parties had agreed to a further extension of the time limit to file the Answer until 2 April 2024.

51. On 2 April 2024, the Respondent and the Third Party filed their respective Answers.

52. On 9 April 2024, the Appellants informed the CAS Court Office that they had a preference for a hearing to be held in the present proceedings.

53. On 10 April 2024, the Respondent informed the CAS Court Office that it did not consider a hearing necessary in the present proceedings. On the same day, the Third Party stated that it requested a hearing to be held in this matter.

54. On 15 April 2024, the CAS Court Office informed the Parties that the Panel had decided to hold a hearing in the present matter.

55. On 23 April 2024, as mentioned above, the Panel issued an Order on Request for Intervention holding as follows:

"1. The request for intervention filed by the "Olympic Council of Asia as represented by Sheikh Talal Fahad Al-Ahmad Al-Sabah" is granted.

2. The "Olympic Council of Asia as represented by Sheikh Talal Fahad Al-Ahmad Al-Sabah" is granted the status of third party in the present proceedings.

3. The costs of the present order shall be determined in the final award or in any other final adjudication of this arbitration".

56. In support of such Order (§21), the Panel considered, inter alia, that *"in the present proceedings the" OCA as represented by Sheikh Talal Fahad Al-Ahmad Al-Sabah", on the one side, has divergent interests from the Respondent, i.e. the OCA as represented by Mr Ranja Randhir Singh, and, on the other side, has the same or similar interests as the Appellants".*

57. On 26 April 2024, the CAS Court Office informed the Parties that a hearing would be held on 25 June 2024 at the CAS headquarters in Lausanne, Switzerland.

58. On 5 June 2024, the Appellants informed the CAS Court Office that they had *"decided to withdraw the present appeal".*

59. On 7 June 2024, the Third Party argued that given the fact that it had been awarded the status of Third Party and that it had presented its own submissions – which were entirely independent of those of the Appellants – the withdrawal of the appeal by the Appellants cannot terminate the proceedings between the Respondent and the Third Party. It further specified that it wished the proceedings to continue.

60. On 14 June 2024, the Respondent asked the CAS Court Office to confirm that the hearing scheduled for the 25 June 2024 was cancelled and that the Panel would render a Termination Order based on the Appellant's withdrawal of the Appeal. In this regard, the Respondent noted that the withdrawal was unconditional and unequivocal and that no other appeal than the one filed by the Appellants had been filed in a timely matter against the Appealed Decision. Hence, contrary to what the Third Party has argued, there would be no basis to continue these proceedings.

61. On 18 June 2024, the CAS Court office, on behalf of the Panel, informed the Parties that the hearing scheduled on 25 June 2024 was maintained and would be held by videoconference.

62. On 25 June 2024, a hearing took place by videoconference. The Panel was assisted by Mr Antonio de Quesada, Head of Arbitration at the CAS, and joined by the following participants:

For the Respondent:

Mr Jean-Pierre Morand and Mr Riccardo Coppa, counsels;

For the Third Party:

Mr Sharam Dini, Mr Alexandre Zen-Rufinen and Mr Alexandre Karsegard, counsels.

63. The Appellants did not attend the hearing.

64. At the outset of the hearing, the Parties confirmed that they had no objection to the constitution of the Panel. At the end of the hearing, the Parties confirmed that their right to be heard and their right to

a fair trial had been fully respected during the hearing and that they had no objections as to the manner in which the proceedings had been conducted.

IV. THE PARTIES' SUBMISSIONS

65. The following summary of the Parties' positions and submissions is illustrative only and does not necessarily include each and every contention put forward by the Parties. However, in its deliberation, the Panel has thoroughly considered all of the evidence and arguments submitted by the Parties, even if no explicit or detailed reference to this evidence or these arguments is made in what immediately follows.

A. The Appellants' Submissions and Request for Relief

66. In their Appeal Brief, the Appellants requested the following reliefs:

"(i) Declare the present appeal is admissible.

(ii) Mainly, declare *the decision taken on 19 October by the members of the former Executive Board of the Olympic Council of Asia null and void.*

(iii) Alternatively*, to annul the decision taken on 19 October by the members of the former Executive Board of the Olympic Council of Asia.*

(iv) Order *the Respondent to bear the entire costs of these arbitration proceedings.*

(v) Order the Respondent to bear the entire costs of the Appellants legal costs and expenses incurred with the present arbitration proceedings".

67. However, on 5 June 2024, the Appellants send an email to the CAS Court Office stating the following: *"The Appellants have decided to withdraw the present appeal".*

68. The Appellants have not submitted any other communication after that date.

B. The Respondent's Submissions and Request for Relief

69. In its Answer to the Appeal Brief, the Respondent submitted the following requests for relief:

"(i) On *a preliminary basis, the request to act as Respondent or to intervene in these proceedings made by Sheikh Talal Fahad Al Ahmad Sabah in his alleged capacity of valid representative of OCA is rejected.*

(ii) The appeal filed by General Souhail Khoury and General Mowafak Jomaa on 9 November 2023 is dismissed in its entirety.

(iii) General Souhail Khoury and General Mowafak Jomaa are ordered to pay, jointly and severally to the Respondent the CAS arbitration costs, if any.

(iv) General s Souhail Khoury and General Mowafak Jomaa are ordered to make a significant contribution to the legal and other costs of the Olympic Council of Asia".

70. Regarding the withdrawal of the Appeal by the Appellants, the Respondent notes that this withdrawal is unconditional and unequivocal. Thus, in absence of any other timely filed appeal against the Appealed Decision, the CAS would have no basis to proceed or continue with the present proceedings.

71. Concerning the Third Party's wish to see the Panel continue the proceeding between the Third Party and the Respondent, the latter argues that the

initial proceedings do not exist anymore and that, in the present case, it does not matter whether the Third Party is to be considered as an "independent intervenor" or an "accessory intervenor". Indeed, given that the initial proceeding was an "appeal proceeding" an intervenor would have had to respect the deadline to appeal, which the Third Party did not.

72. As regards the Third Party's request, brought forward during the hearing, to suspend the present proceeding, pending the outcome in the proceedings CAS 2023/A/10232 & CAS 2023/A/10233, the Respondent considers that there is absolutely no need to proceed to such suspension as the present matter has no connection with the other two cases.

73. Finally, concerning the costs of the arbitration, the Respondent maintains that as the Appellants withdrew their appeal, they have to bear the arbitration costs. As regards the costs to be borne by the intervenor, the Panel would have full discretion as it would have discretion regarding the costs that arouse in connection with the Third Party intervention. The Respondent however asks the Panel to condemn the Appellants to pay the Respondent a fair contribution to its legal costs in relation to the present proceedings.

C. The Third Party's Submissions

74. The Third Party, in its written submissions entitled *"Answer to the Appeal Brief of 15 January"*, submitted the following requests for relief:

*"**On the admissibility of the Answer**:*

1. Declare the present Answer admissible.

***On the merits**:*

Mainly

2. Declare null and void the decision taken on 19 October 2023 by the former Executive Board of the Olympic Council of Asia.

Alternatively

3. Annul the decisions taken on 19 October 2023 by the former Executive Board of the Olympic Council of Asia.

***In any events**:*

4. Order the Olympic Council of Asia (OCA), allegedly represented by Mr. Raja Randhir Singh, to bear the entire costs of theses arbitration proceedings.

5. Order the Olympic Council of Asia (OCA), allegedly represented by Mr. Raja Randhir Singh, to bear the (sic) all expenses, including legal costs, incurred by the Olympic Council of Asia (OCA), duly represented by Sheikh Talal Fahad Al-Ahmad Al-Sabah, in the present arbitration proceedings".

75. After the withdrawal of the Appeal by the Appellants, the Third Party informed the CAS Court Office that it wished to continue the proceedings against the Respondent and asked the Panel the render an award. In support of its position, the Third Party argued that it had been formally granted the status of "third party" by the Panel's order on intervention dated 23 April 2024 and that the submissions it presented were entirely independent of those of the Appellants. According to the Third Party, its intervention gave birth to a second proceeding, fully independent of the first proceeding and the withdrawal of the Appeal by the Appellants could, thus, not terminate the proceeding

between the Respondent and itself. In this regard, the Third Party refers itself to the "Petit commentaire, Code de procédure civile", by Isabelle Chabloz, Patricia Dietschy-Martenet, Michel Heinzmann (Article 73, N 21).

76. At the hearing, the Third Party argued that the substantive question as to who was the valid representative of the OCA in the present appeal proceedings, i.e. Mr Raja Randhir Singh or Sheikh Talal Fahad Al-Ahmad Al-Sabah, had not yet been decided by the Panel. However, in order to take a decision on the costs and other legal fees in the present matter, it would be essential to know who this representative would be. Indeed, one part of the costs should be borne by the Appellants and the other should be borne by the person who has been recognized as not been the valid representative of the OCA.

77. The Third Party further stated that its intervention to have been a "principal intervention" and not an "accessory intervention". In support of this submission, the Third Party argues that it had asked to be considered as "respondent" and that although having been granted the statute on "third party" by the Panel, the latter had not formally limited the Third Party's rights in its order dated 23 April 2024.

78. Finally, the Third Party argued that the main issues at stake in the present matter and in the proceedings CAS 2023/A/10232 & CAS 2023/A/10233 are the same, i.e. whether the election, on 3 July 2023, of Sheikh Talal Fahad Al-Ahmad Al-Sabah as President of the OCA has been validly annulled. As this issue was, in any event, to be decided by the Panel in charge of the proceedings CAS 2023/A/10232 & CAS 2023/A/10233, it would be reasonable to suspend the present proceedings pending the outcome of the two others.

V. JURISDICTION OF THE CAS

79. In accordance with Article 186 of the Swiss Private International Law Act (the "PILA"), the CAS has the power to decide upon its own jurisdiction.

80. Article R47 para. 1 of the Code provides – in its relevant parts:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".

81. The Appellants rely on Article 34 para. 4 of the OCA Constitution, which reads as follows:

"All member of OCA and AF's, whose EB is recognized by OCA EB in accordance with Article 13 of this Constitution, shall submit to the following means of settlement of disputes to the exclusion of any other means: [...]

4. Decisions of OCA GA, or OCA Executive Board other than those issued in accordance with para. 1 or the sanctions imposed by the Ethics Committee may be appealed to the [CAS]".

82. In the present case, it is undisputed that there were no internal legal remedies available to the Appellants to challenge the Appealed Decision. Further, none of the Parties objected to the CAS jurisdiction.

83. The Panel thus considers that the CAS has jurisdiction to decide on the present appeal and its withdrawal.

VI. ADMISSIBILITY

84. Article R49 of the Code provides as follows:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties".*

85. Article 34 para. 6 of the OCA Constitution provides:

> *"The time limit for appeal is 21 days from the issuance of the appealed decision".*

86. In the present matter, the Appealed Decision was rendered and notified to the Appellants on 24 October 2023. The Appellants filed their Statement of Appeal on 9 November 2023.

87. By doing so, the Appellants manifestly respected the 21-day period set out in Article 34 para. 6 of the OCA Constitution.

88. The Appeal filed by the Appellants is thus admissible.

VII. APPLICABLE LAW

89. Pursuant to Article R58 of the Code:

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

90. In the present matter, the Parties are in agreement that the applicable regulations are the OCA Constitution and Regulations.

91. Article 12.5 of the OCA Constitution provides:

> *"Any dispute which has no relation to sports or the OCA Constitution and Rules with any other organisation (Government or non-governmental) will be settled as per Swiss law and Swiss courts".*

92. The Parties also submit that Swiss law is applicable on a subsidiary basis.

93. In light of the above, the Panel considers that the substance of the present proceedings is governed rules and regulations of the OCA, in particular the OCA Constitution, and that Swiss law applies on subsidiary basis.

VIII. LEGAL DISCUSSION

94. On 5 June 2024, the Appellants informed the CAS Court Office of the following *"[t]he Appellants have decided to withdraw the present appeal".*

95. In the Panel's view, it is clear from the Appellants communication, and none of the Parties have argued otherwise, that

the unilateral withdrawal of the Appeal was unconditional and amounts to a waiver of claim ("désistement d'action") (Zürcher Kommentar, Christian Oetiker, Schulthess, 3. Ed. Art. 189 IPRG, N. 85 and 86). According to Swiss law, which is the applicable law in absence of any specific rule in this respect in the Code (CAS 2015/A/3959, CAS 2020/A/7252), the waiver of a claim foreseen in Article 241 al. 2 of the Code de procédure civile (CPC), is an act by which the claimant abandons the requests for relief that he or she submitted all along the proceedings, it is directed to the claim and has res judicata effects (SFT 4A_374/2014, E.4.3.22: *"Le désistement d'action ... est l'acte par lequel le demandeur abondonne les conclusions prise au procès; il porte sur l'action et bénéficie de l'autorité de chose jugée"*).

96. In the present matter, the Respondent has not objected to the withdrawal of the Appeal and has solely requested that the Appellants bear the arbitration costs and pay the Respondent a fair contribution to its legal costs in relation to the present proceedings.

97. It follows that, regarding the Appeal filed by the Appellants, the CAS no longer has jurisdiction (ATF 140 III, cons. 3.2.2, CAS 2016/A/4408) and that, as a result, the Appealed Decision became final and binding upon the Appellants.

98. The Third Party argues that the above conclusion has no effect on what it considers, in substance, to be an independent proceeding pending between itself and the Respondent. In support of its position, the Third Party argues that its intervention was a principal intervention ("intervention principale") within the meaning of Article 73 of the CPC and not an accessory intervention ("intervention accessoire") within the meaning of Article 74 of the CPC. It further maintains, that the granting of its request for intervention has created a second proceeding, this one between the Third Party and the Respondent, totally independent of the proceedings between the Appellants and the Respondent, and the withdrawal of the Appeal by the Appellants would be without effect on this second proceeding.

99. In this regard, the Panel recalls that Article 73 of the CPC provides:

"[1] Any person who claims to have a better right in the object of a dispute, to the total or partial exclusion of both parties, may bring a claim directly against both parties in the court in which the dispute is pending in first instance.

[2] The court may either suspend the proceedings until the case of the principal intervenor is finally concluded, or join the two cases".

100. Article 74 of the CPC, for its part, reads as follows:

"Any person who shows a credible legal interest in having a pending dispute decided in favour of one of the parties may intervene at any time as an accessory party and for this purpose submit to the court an intervention application".

101. The Panel acknowledges that if the intervention of the Third Party were to be considered as principal intervention within the meaning of Article 73 of the CPC, the intervention would have given birth to a new proceeding, opposing the Third Party to, *inter alia*, the Respondent (ZPO Kommentar, Alexander Brunner, Dominik Gasser, Ivo Schwander, Dike, 2. Ed., Art. 73, N. 4; Kommentar zur

ZPO, Thomas Sutter-Somm, Franz Hasenböhler, Christoph Leuenberger, Schulthess, 2. Ed, Art. 73, N. 5; Code de procédure civile, Petit commentaire, Isabelle Chabloz, Patricia Dietschy-Martenet, Michel Heinzmann, Helbing Lichtenhahn, Art. 73, N. 21).

102. However, in the present case, the Panel considers that the intervention requested by the Third Party and granted by the Panel was not and could not have been a principal intervention within the meaning of Article 73 of the CPC.

103. Indeed as is clear from the wording of Article 73 of the CPC, in case of a principal intervention, the claims of the intervenor are directed against *"both parties"*. In the present matter, it was manifest from the beginning, that the Third Party did not claim to have a better right than the Appellants. The Third Party's interest was clearly expressed in its counsels' email of 15 December 2023, stating that the *"question of which organ is entitled to represent the OCA in these proceedings and which lawyers have been validly appointed to defend the OCA's interests is precisely the core of the dispute on the merits"*. However, on this specific aspect, the Third Party had the same position and the same claim than the Appellants, *i.e.*, in substance, that Mr Raja Randhir Singh was not the valid representative of the OCA.

104. This element, first, was considered as essential by the Panel when it decided to grant the request for intervention filed by the OCA as represented by Sheikh Talal Fahad Al-Ahmad Al-Sabah in the present matter. Indeed, as stated in paragraph 21 of the Order on request for intervention of 22 April 2024, the Panel held that *"in the present proceedings the 'OCA as represented by Sheikh Talal Fahad Al-Ahmad Al-Sabah', on the one side, has divergent interests from the Respondent, i.e. the OCA as represented by Mr Ranja Randhir Singh, and on the other side, has the same or similar interests as the Appellants"*. It was on basis of this consideration that, in paragraph 23 of its Order on request for intervention, the Panel allowed the intervention of the OCA as represented by Sheikh Talal Fahad Al-Ahmad Al-Sabah and granted it the status of a *"third party"* (tiers intéressé).

105. This element, second, is corroborated by the main and alternative requests for relief on the merits submitted by the Third Party, which are quasi-identical to the main and alternative request for reliefs filed by the Appellants. Indeed, where the Appellants requested *"(ii) Mainly declare the decision taken on 19 October by the members of the former Executive Board of the Olympic Council of Asia null and void. (iii) Alternatively, to annul the decision taken on 19 October by the members of the former Executive Board of the Olympic Council of Asia"*, the Third Party requested *"Mainly: 2. Declare null and void the decision taken on 19 October 2023 by the former Executive Board of the Olympic Council of Asia. Alternatively: 3. Annul the decisions taken on 19 October 2023 by the former Executive Board of the Olympic Council of Asia"*.

106. Hence, in view of the arguments and requests for relief submitted by the Third Party, its intervention could not have been a principal intervention within the meaning of Article 73 of the CPC.

107. Furthermore, the Third Party had not specifically qualified its request for intervention as *"principal intervention"* and had made no reference to Article 73 or Article 74 of the CPC but solely relied on

Article R41.3 of the Code. Thus, the Panel granted the request for intervention pursuant to Article R41.4 of the Code. However, in the Panel's view, the application of this provision does not allow to draw the conclusion that the intervention at stake was a "principal intervention". Indeed, although aware of the fact that some CAS panels held that the only statute that can be attributed to an Intervenor pursuant to Article R41.3 of the Code is that of a "party" (CAS 2015/A/4259 and CAS 2022/A/9198), the Panel considers that Article R41.4 al. 5, which provides that the *"the Panel shall determine the status of the third party and its rights in the procedure"* allows to draw the conclusion that the scope of application of this provision is not limited to "principal interventions" but also covers "accessory interventions" in which the Intervenor keeps a statute of "third party" (tiers intéressé). The Panel's position in this regard is corroborated by the fact that other CAS panels have previously come to the same conclusion (CAS 2011/O/2574 and CAS 2013/A/3057).

108. In the present matter, for the reasons already set out above, the Panel considered that the Third Party's request for intervention did not fulfil the criteria of a "principal intervention" but could be considered as an "accessory intervention". Given that the Third Party had the same or similar interests than the Appellants, it was manifest that this accessory intervention occurred on the side of the Appellants.

109. In those circumstances, it remains to be ascertained whether, in case of an "accessory intervention" on the side of an appellant, the Intervenor may validly oppose itself to the withdrawal of the claim or the appeal by the appellant.

110. The Panel notes that the Code does not contain any provision on that matter. Accordingly, in line with Article 182(2) PILA, the Panel shall apply Swiss law, which is the *lex arbitri* in the present proceedings.

111. Regarding the rights of the intervenor, Article 76 of the CPC provides:

"[1] The intervenor may carry out any procedural acts in support of the principal party, provided they are permitted at the relevant stage of the proceedings; he or she may in particular make use of any offensive or defensive measures and also seek appellate remedies.

[2] The procedural acts of the intervenor shall not be taken into consideration in the proceedings if they are contradictory to those of the principal party".

112. According to literature, except in case of an "independent accessory intervention" ("intervention accessoire indépendante", "unabhängige Nebenintervention" or "streitgenössische Nebenintervention"), which is manifestly not type of intervention at stake in the present matter, Article 76 of the CPC prevents an intervenor from submitting claims or requests which would extend the scope of the proceedings and even adopting a position or submitting a claim or request which are contrary to the position adopted by the party it's supporting by its intervention (ZPO Kommentar, Alexander Brunner, Dominik Gasser, Ivo Schwander, Dike, 2. Ed., Art. 76, N. 2 and N. 11.; Kommentar zur ZPO, Thomas Sutter-Somm, Franz Hasenböhler, Christoph Leuenberger, Schulthess, 2. Ed, Art. 76, N. 8; Code de procédure civile, Petit commentaire, Isabelle Chabloz, Patricia Dietschy-

Martenet, Michel Heinzmann, Helbing Lichtenhahn, Art. 76, N. 11; Le Code de procédure civile, David Hofmann, Christian Lüscher, Stämpfli Verlag, 3. Ed., p. 115).

113. Further, pursuant to this provision, the intervenor cannot oppose itself to the withdrawal or waiver of the claim pursuant to Article 241 of the CPC by the party on the side of which it intervenes (ZPO Kommentar, Alexander Brunner, Dominik Gasser, Ivo Schwander, Dike, 2. Ed., Art. 76, N15; Kommentar zur ZPO, Thomas Sutter-Somm, Franz Hasenböhler, Christoph Leuenberger, Schulthess, 2. Ed, Art. 76, N. 19-22; Code de procédure civile, Petit commentaire, Isabelle Chabloz, Patricia Dietschy-Martenet, Michel Heinzmann, Helbing Lichtenhahn, Art. 76, N. 9; Le Code de procédure civile, David Hofmann, Christian Lüscher, Stämpfli Verlag, 3. Ed., p. 116).

114. It follows from the above that in the case at hand, which concerns an "accessory intervention", the Third Party cannot validly oppose itself to the withdrawal of the Appeal by the Appellants. Thus, notwithstanding the objection raised by the Third Party, the withdrawal of the Appeal by the Appellants and its acceptance by the Respondent mark the end of the present appeal proceedings.

115. For the sake of completeness, the Panel notes, first, that in absence of a pending appeal proceeding against the OCA with respect to the Appealed Decision, the Third Party's legal interest, as formulated by the Third Party's counsels in their email of 15 December 2023 (para. 103 above), drawn from the question as to *"which organ is entitled to represent the OCA in these proceedings"*, manifestly disappears. Second, given that the Third Party's request to see the present matter suspended pending the awards in the proceedings *CAS 2023/A/10232* and *CAS 2023/A/10233* has be considered as a request which is contrary to the position adopted by the Appellants, *i.e.* the party it's supporting by its intervention, the Panel holds that this request has to be dismissed.

116. In view of all the above considerations, the Panel concludes that as a consequence of the unconditional withdrawal of the Appeal by the Appellants, the proceedings *CAS 2023/A/10129 General Souhail Khoury & General Mowafak Jomaa v. Olympic Council of Asia* are terminated. The Request for Provisional Measures filed by the Appellants is also deemed withdrawn.

IX. COSTS

117. Article R64.4 of the CAS Code provides the following:

"At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include:

- *the CAS Court Office fee,*
- *the administrative costs of the CAS calculated in accordance with the CAS scale,*
- *the costs and fees of the arbitrators,*
- *the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale,*
- *a contribution towards the expenses of the CAS, and*

- *the costs of witnesses, experts and interpreters.*

The final account of the arbitration costs may either be included in the award or communicated separately to the parties. The advance of costs already paid by the parties are not reimbursed by the CAS with the exception of the portion which exceeds the total amount of the arbitration costs".

118. Article R64.5 of the CAS Code reads as follows:

"In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties".

119. In view of the fact that the Appellants withdrew their appeal, the costs of the arbitration should, in principle, be borne by the Appellants.

120. However, pursuant to Article 106.3 of the CPC *"*[i]*f three or more persons are participating in the proceedings as principal parties or accessory parties, the court shall determine each party's share of the costs. It may hold the parties jointly and severally liable".* According to legal doctrine, in particular the authors relied upon by the Third Party, in case of an "accessory intervention", a part of the costs of the proceedings might be imposed on the intervenor (Code de procédure civile, Petit commentaire, Isabelle Chabloz, Patricia Dietschy-Martenet, Michel Heinzmann, Helbing Lichtenhahn, Art. 76, N. 20; Kommentar zur ZPO, Thomas Sutter-Somm, Franz Hasenböhler, Christoph Leuenberger, Schulthess, 2. Ed, Art. 76, N. 35 and Art. 106, N. 18).

121. Considering that in the present matter the Third Party has been admitted as "accessory intervenor" and that the Third Party's objection to the withdrawal of the Appeal has led the Panel to hold a hearing, inter alia, in order to safeguard the Third Party's right to be heard, which has entailed supplementary costs, the Panel deems it unfair to make the Appellants support the full costs of the present arbitration.

122. Hence, taken into account that the appeal has been withdrawn by the Appellants and that some costs have been caused by the position adopted by the Third Party in regard to this withdrawal, the Panel considers that it's fair and reasonable to order that the costs of the arbitration, in an amount that will be determined and served on the Parties by the CAS Court Office, shall be borne for 40% by the Third Party and for 60% by the Appellants.

123. (…)

124. (…)

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The procedure *CAS 2023/A/10129 General Souhail Khoury & General Mowafak*

Jomaa v. Olympic Council of Asia is terminated and removed from the CAS roll.

2. The costs of the procedure *CAS 2023/A/10129 General Souhail Khoury & General Mowafak Jomaa v. Olympic Council of Asia,* to be determined and served on the Parties by the CAS Court Office, shall be borne for 40% by the Olympic Council of Asia – as represented by Sheikh Talal Fahad Al-Ahmad Al-Sabah and for 60% jointly by the General Souhail Khoury and General Mowafak Jomaa.
3. (…)
4. All other and further motions or prayers for relief are dismissed.

CAS 2023/A/10207
SC Dnipro-1 LLC v. Igor Jovicevic
3 December 2024

Panel: Mr Marco Balmelli (Switzerland), Sole Arbitrator

Football
Activation of a unilateral extension clause
Filing of a separate claim before the FIFA PSC
Validity of a unilateral extension clause
Elements to take into consideration when assessing the validity of a unilateral extension clause
Deadline of the extension clause
Increase of remuneration
Behaviour of the waiving party

1. **Article 21 of the Procedural Rules Governing the Football Tribunal only specifies the deadline for the lodging of a counterclaim in the same proceedings for it to be considered. Subject to *res judicata* principle, the said provision does not state that the claim can no longer be lodged after the proceedings have been concluded. In the case of a claim that is related but not identical to the subject matter of the dispute, a party may therefore decide whether to assert it in the form of a counterclaim during ongoing proceedings or after the conclusion of the first proceedings. The latter does not lead to an exclusion of the assertion of the claim, as there is no *res judicata*.**

2. **Although unilateral options to extend contracts of employment in favour of football clubs limit the freedom of the party that cannot make use of the option in an excessive manner and are not based on reciprocity, since the right to extend a contract is left exclusively at the discretion of one party, they are not *per se* invalid and incompatible with the FIFA regulations (which do not contain any provision that generally prohibit them) and the principle of global labour law. The validity of the clause must always be assessed on a case-by-case basis.**

3. **The following elements need to be taken into consideration to determine whether a unilateral extension clause is valid: (i) the potential maximum duration of the labour relationship should not be excessive; (ii) the option should be exercised within an acceptable deadline before the expiry of the current contract; (iii) the salary reward deriving from the option right should be defined in the original contract; (iv) one party should not be at the mercy of the other party with regard to the contents of the employment contract; (v) the option should be clearly established and emphasized in the original contract so that the player (or coach) is conscious of it at the moment of signing the contract; (vi) the extension period should be proportional to the main contract; and (vii) it is recommended to limit the number of extension options to one. However, although these criteria are important and must be taken into account, they are not absolute rules whose non-fulfilment would lead directly to the invalidity of the disputed clause and *vice versa*.**

4. **A contractual deadline of ten days prior to the expiry of an employment contract to exercise the option to extend it is unreasonable. A player or**

a coach has the right to know well in advance whether or not the club will be extending the employment agreement so that he can look for another club and thus avoid having to find himself unemployed in case the club decides not to extend the employment agreement.

5. In principle, a unilateral extension option means that a contractual party has waived its contractual right of choice. This waiver of the own right respectively the granting of such a unilateral right to a contracting party should be accompanied by a corresponding compensation on the part of the waiving party. In the case of employment contracts, the compensation for granting such a right should usually be accompanied by an appropriate increase in remuneration.

6. The behaviour of the waiving party must also be considered. It is not *bona fide* and contradicts the principle of *pacta sunt servanda* if a player or a coach invokes the nullity of an extension option on the basis of a better offer from another club.

I. PARTIES

1. SC Dnipro-1 LLC (the "Appellant" or the "Club"), is a Ukrainian Football Club with seat in Dnipro City, Ukraine. It is affiliated with the Ukrainian Association of Football ("UAF") which in turn is affiliated with the Fédération Internationale de Football Association ("FIFA").

2. Mr Igor Jovicevic (the "Respondent" or the "Coach") is a Croatian football coach currently employed by Al-Raed in Buraidah, Kingdom of Saudi Arabia.

3. The Appellant and the Respondent are collectively referred to as the "Parties".

II. FACTUAL BACKGROUND

A. Facts of the case

4. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the Parties and the evidence examined in the course of the proceedings. This background is set out for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be referred to, where relevant, in connection with the later legal discussion. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence available to him in the present proceedings, only the submissions and evidence necessary to explain the reasoning of the award will be referred to in the following paragraphs.

5. On 23 September 2020, the Club and the Coach entered into an employment contract (the "Contract"), valid from 23 September 2020 until 30 June 2022.

6. In accordance with the Contract, the Parties agreed the following:

- Article 2.1

  "The Contract is valid from 23 September 2020 till 30 June 2022 (…). This Contract may be extended on the conditions agreed by the Parties, or may be concluded for a new period by the mutual agreement of the Parties".

- Article 2.5.3

"This Contract may be terminated by the Head Coach before the expiration of its term (…). In case of payment by the Head Coach or any third party on his behalf to the bank account of the Club of the sum in amount of 250 000 (two hundred and fifty thousand) Euro NET as compensation for unilateral early termination of the Contract by the Head coach".

- Article 5.2.1

  "The Club commits itself financially to the Head coach, such as: (…) payment of salary to the Head coach in the amount of 19 000,00 (nineteen thousand) Euro NET per month (beginning from October 2020) which will be paid by 20th day of the month following the month for which the payment is made (…)".

- Article 5.3

  "If according to the results of competitive season 2020/2021 among the teams of UPL clubs, the Club will be placed not lower then on the fifth position in the league table, the salary of the Head coach will be increased to 22 500,00 (twenty-two thousand five hundred) Euro NET (…)".

7. On the same date, the Parties signed an additional agreement (the "Additional Agreement"), which stipulated in its Article 5 (the "Extension Clause") the following:

   "Article 5

   The Parties have agreed that the term of the Contract may be extended by the Club till 30.06.2023 in case the latter directs to the Head coach a written notice regarding the extension of the term of the Contract not later then on or before 20.06.2022. In case of extension of the term of the Contract by the Club, the salary of the Head coach will be 25 000 (twenty five thousand) Euro NET per month starting from July 2022".

8. Moreover, the Additional Agreement stipulated the following conditional bonus payments:

   - EUR 2,000 net for every official match win;

   - EUR 4,000 net for a win in an official match against FC Shakthar Donetsk or FC Dynamo Kyiv;

   - EUR 100,000 net for either 1) placing third or higher in the league table; 2) qualifying for UEFA Europa League; or 3) winning the Ukrainian Cup.

9. On 24 February 2022, Russia invaded Ukraine. As a result, all sporting competitions in Ukraine including the Ukrainian Premier League ("UPL") Championship 2021/2022 ("Championship") competitive season, were prematurely stopped. The ranking in the UPL was confirmed based on the results of the last round of the Championship played before the invasion.

10. Until then, the Club won 15 matches in the first half of the season 2021/2022. The second half was cancelled due to the aforementioned.

11. On 7 March 2022, the Bureau of the FIFA Council (the "FIFA Council") decided to temporarily amend the Regulations on the Status and Transfer of Players ("RSTP"). Annexe 7 of the RSTP ("Annexe 7") provided that a contract of an international dimension between a player or a coach and a club affiliated to the UAF is automatically suspended until 30 June 2022.

12. On 27 April 2022, the Coach gave an interview to the "Tribuna" (a Ukrainian sports magazine), in which he said the following:

"My contract with Dnipro-1 is still valid, and I see myself as the coach of this club in the future as well. Since it all started, I've received many offers, I've been getting calls all the time, but I refused, and I'll continue refuse. I can't just leave like that, it would be unfair to those people, to the club, to everything that Ukrainians are going through, I'm not that kind of person. My thoughts and heart are with them, I believe that soon we will be together again, playing football and picking up where we left off. I am not thinking about leaving the club yet".

13. On 17 June 2022, the Appellant sent a letter to the Respondent in which the Appellant informed the Respondent about the extension of the Contract in accordance with the Additional Agreement. The Appellant requested the Respondent to sign an annex to the Contract attached to its letter ("Annex"), which provided for the extension of the Contract until 30 June 2023. The Annex did not define the salary and bonuses of the extended period.

14. On 20 June 2022, the FIFA Council extended the application of the Annexe 7 until 30 June 2023.

15. On 29 June 2022, the Respondent replied, stating that he was not bound by the unilateral Extension Clause since the unilateral extension was invalid and unenforceable. Consequently, the Respondent informed the Appellant that the Contract would expire on 30 June 2022. In addition, the Respondent requested the payment of outstanding salaries and various outstanding bonuses.

16. On 30 June 2022, the Appellant responded to the letter dated 29 June 2022, stating that:

- The employment relationship was suspended since March 2022 until 30 June 2022 in accordance with Annexe 7;

- The Extension Clause is valid;

- The question about the extension was not at stake at the moment *"[s]ince otherwise was not agreed between your client and SC 'Dnipro-1', and, with all responsibility, won't be agreed till the end of the day (30.06.2022) – in accordance with the 'Temporary rules governing the war in Ukraine' (Annexe 7 of the FIFA RSTP, June 2022 edition) – the employment relationship between your client and SC 'Dnipro-1' will be suspended as from 01.07.2022 till 30.06.2023 – till the date the Contract expires".*

17. The Club, however, did not refer to Article 2.5.3 of the Contract or to any compensation it would be entitled to claim.

18. On 14 July 2022, the Coach signed an employment contract with the Ukrainian club FC Shakhtar Donetsk.

19. On the same date, the Club informed the Respondent of the following:

- *"The employment relationship of [the Coach] with SC Dnipro-1 were suspended since March 2022 till 30 June 2022, so the Club has no obligations to pay to [the Coach] 'the salaries for March, April, May and June 2022 in the amount of EUR 76,000 net' due to the suspension of the Contract dated 23.09.2020";*

- The bonus for the UEFA Europa League *"will be paid by the Club during 15 (fifteen) banking days after the Club receives prize money from UEFA for UEFA Europa League group stage participation".*

  "As SC 'Dnipro-1' didn't receive the prize money from the UEFA for the UEFA Europa League group stage participation as to the present moment, the 'bonus for Club qualification to UEFA EL group stage in moment of EUR 100,000 net' is not due to be paid – nor date of your letter dates 29.06.2022, nor on the date of sending the present Answer";

- The bonus owed for every victory achieved in the season 2021/2022 would be paid in *"in due course".*

20. On 7 January 2023, the Respondent requested the payment of the outstanding bonuses in the amount of EUR 130,000 and UHR 626,034.23. The Respondent also stated that he waives the EUR 76,000 net in accordance with the Article 2 of the Annexe 7 (March 2022 edition).

21. On 22 March 2023, the Respondent filed a claim before the FIFA Players' Status Chamber ("FIFA PSC"), requesting that the Appellant shall be ordered to pay UHR 626,034.23 and EUR 130,000 plus interest (the "First FIFA Proceedings").

22. Despite having been invited to do so, the Club failed to provide its position to the claim during the First FIFA Proceedings.

23. On 12 June 2023, the FIFA PSC notified the grounds of the decision (the "FIFA PSC Decision") ordering the Club to pay:

- UHR 626,034.23 as outstanding remuneration plus 5% interest *p.a.* as from 1 July 2022 until the date of effective payment;

- EUR 130,000 net as outstanding remuneration plus interest *p.a.* as follows:

  - 5% interest *p.a.* over the amount of EUR 30,000 net as from 1 July 2022 until the date of effective payment;

  - 5% interest *p.a.* over the amount of EUR 100,000 net as from 1 October 2022 until the date of effective payment.

24. On 21 June 2023, the Club filed a Statement of Appeal against the FIFA PSC Decision with the Court for Arbitration for Sport (the "CAS"). The Club did not pay the advance of costs. Consequently, on 31 August 2023, the CAS issued a termination order, making the FIFA PSC Decision final and binding.

B. Proceedings before the FIFA Players' Status Chamber

25. On 15 September 2023, the Appellant lodged a claim before the FIFA PSC (the "Second FIFA Proceedings"), requesting payment of EUR 250,000 as compensation for breach of contract without just cause.

26. On 24 October 2023, the FIFA PSC rendered the following decision (the "Appealed Decision"):

- *The claim of the Claimant, SC Dnipro-1, is rejected.*

- *This decision is rendered without costs.*

27. In the grounds of the Appealed Decision, issued to the Parties on 17 November 2023, the FIFA PSC evaluated, in summary, the following:

- The matter at stake concerned an employment-related dispute with an international dimension between a Ukrainian club and a Croatian coach. In accordance with Article 23 par. 2 in combination with Article. 22 par. 1 lit. c) of the RSTP (May 2023 edition), the FIFA PSC is competent to deal with the matter.

- A contractual extension must include the key aspect of remuneration. In the Extension Clause, the exact monthly remuneration had been fixed but no conditional benefits had been included therein. Therefore, the *essentialia negotii* was insufficiently clear for the purposes of leading to a contractual extension.

- The Extension Clause did not include any reference to the financial terms of the Additional Agreement. Therefore, it was unclear to what extent the benefits contained therein apply to the Contract. This uncertainty questions the applicability of the unilateral extension by the Club.

- The Club failed to proof its assertions that the Coach allegedly committed to stay with the Club beyond the initial term of the Contract.

- Consequently, the Extension Clause is invalid, and the Contract was not extended on 17 June 2022.

- The Contract expired on 30 June 2022. The Coach therefore did not breach the Contract when signing a new contract.

- Therefore, no liability could arise for the Coach.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

28. On 8 December 2023, the Appellant filed its Statement of Appeal against the Respondent with respect to the Appealed Decision in accordance with Articles R47 and R48 of the CAS Code of Sports-related Arbitration (2023 edition; the "Code") with the CAS. The Appellant requested that the case is submitted to a sole arbitrator.

29. On 18 December 2023, the Appellant filed its Appeal Brief in accordance with Article R51 of the Code.

30. On 15 March 2024, the Respondent filed his Answer.

31. On 22 March 2024, pursuant to Article R54 of the Code and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to hear the dispute was constituted as follows:

Sole Arbitrator: Dr Marco Balmelli, Attorney-at-Law in Basel, Switzerland.

32. On 4 April 2024, the CAS Court Office noted that both Parties preferred for the Sole Arbitrator to issue an award based solely on the Parties' written submissions.

33. On the same date, both Parties informed the CAS Court Office, that a second round of written submissions was not needed.

34. On 18 April 2024, the CAS Court Office communicated the Order of Procedure, which was duly signed on the same day by the Appellant, hereby confirming that the Sole Arbitrator may decide this matter based on the Parties' written submissions and its right to be heard had been respected.

35. On 23 April 2024, the Order of Procedure was duly signed by the Respondent, hereby confirming that the Sole Arbitrator may decide this matter based on the Parties' written submissions and his right to be heard had been respected.

IV. SUBMISSIONS OF THE PARTIES

36. The following outline of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Sole Arbitrator, however, has carefully considered all the submissions made by the Parties, even if no explicit reference has been made in what immediately follows. The Parties' written submissions and the content of the Appealed Decision were all taken into consideration.

A. Appellant

37. The Appellant filed the following prayers for relief:

"1. To set aside the Decision of the FIFA Players' Status Chamber of the Football Tribunal.

2. To rule, that the Contract, concluded between the Club, SC 'Dnipro-1' and the Coach, Jovicevic Igor, was prematurely terminated by the Coach without just cause.

3. To obligate the Coach, Jovicevic Igor, to pay in favor of the Club, SC 'Dnipro-1', the compensation for premature termination of the Contract without just cause in the amount of 250 000 (two hundred and fifty thousand) EURO".

38. The Appellant's submissions, in essence, may be summarized as follows:

- The Coach verbally informed the Club several times in June 2022 that he wanted to stay with the Club and lead the Club's main team in the UPL Championship 2022/2023 competitive season.

- The Appellant does not agree with the consideration of the FIFA PSC, that the Extension Clause should be deemed invalid because it did not include any salary increase. According to the Appellant, the salary of the Coach would have been increased by 10%.

- For the reason aforementioned, the Additional Agreement was valid and the duration of the Contract was extended by the Club for one additional sporting season.

- The FIFA Council amended Annexe 7 to provide legal certainty and clarity on several important regulatory matters. FIFA enabled foreign players and coaches to leave the Ukraine despite their employment contracts with Ukrainian clubs. The respective contracts were suspended and players and coaches were able to leave the territory of the Ukraine and seek the employment in a safer place of their choice.

- By entering an employment relationship with another UAF club,

the Coach abused his right granted under the Annexe 7.

- Further, FIFA confirmed such approach and introduced certain limitations on the scope of application of Annexe 7 (May 2023 edition). Players and coaches who have, despite the war in Ukraine, decided to arrive in, return to, or not to leave the territory of Ukraine or Russia, cannot rely on Annexe 7 (May 2023 edition) to suspend an ongoing contract. Also, players whose contract have been suspended based on Annexe 7 are not allowed to sign a new contract with another club affiliated to the UAF or Russian Football Union ("FUR") during such suspension (FIFA Circular no. 1849, 22 May 2023).

- For that reason, the Coach had no justifiable grounds to sign the contract with FC Shakhtar Donetsk. He terminated the contractual relationship with Dnipro-1 without just cause.

- The Coach terminated the Contract unilaterally and prematurely. Consequently, he has to pay a compensation fee of EUR 250,000 net pursuant to Article 2.5.3. of the Contract.

B. Respondent

39. In his Answer, the Respondent filed the following prayers for relief:

"Prayer 1. The Appeal shall be dismissed.

Prayer 2. The Appellant shall be ordered to bear the costs of these proceedings and shall be ordered to contribute to the legal fees incurred by the Respondent".

40. The Respondent relies, in essence, on the following arguments:

- The Appellant was precluded from lodging its claim before FIFA in September 2023, considering that it failed to lodge a counterclaim in response to the Coach's initial claim before the FIFA PSC filed in March 2023 within the regulatory deadline and was therefore precluded from doing so at a later point.

- Article 5 of the Additional Agreement is invalid and, consequently, the Contract expired on 30 June 2022.

- Therefore, the Coach did not breach the Contract by signing an employment contract with a new club on 14 July 2022.

- Even if Article 5 of the Additional Agreement were to be valid – *quod non* – the Appellant has forfeited its right to invoke Article 2.5.3 of the Contract and to claim EUR 250,000.00 pursuant to the interconnected principles of good faith and *venire contra factum proprium*:

  - The Club never indicated that it would rely on the Extensions Clause and expected the Coach to pay an amount to the Club;

  - When invited to respond to the Coach's claim before FIFA, it failed to lodge a counterclaim;

  - The Club never intended to continue the contractual relationship with the Coach. If the Extension Clause was valid, the Club abused its right to unilaterally extend the Contract.

- In the alternative, the Respondent demonstrated that any compensation owed to the Club, *quod non*, shall be denied absent any substantiation of its damage brought forward by the Club.

V. JURISDICTION, ADMISSIBILITY, APPLICABLE LAW

A. Jurisdiction

41. Article R47 par. 1 of the Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".

42. The jurisdiction of CAS derives from Article 57 par. 1 of the FIFA statutes (2022 edition, "FIFA Statutes") as it determines that *"[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question".*

43. Further, the Contract contains the following provisions in its Article 6:

"6.3. In the event that no agreement is reached between the Head coach and the Club, the FIFA Dispute Resolution Chamber and/or CAS (Court of Arbitration for Sport, Lausanne, Switzerland) consider the dispute".

"6.4. The Parties undertake to refrain from settling disputes between themselves in the courts of general jurisdiction. For these purposes they are obliged to use the relevant bodies – the FIFA Dispute Resolution Chamber and/or CAS (Court of Arbitration for Sport, Lausanne, Switzerland)".

44. The jurisdiction of the CAS is undisputed by the Parties. It follows that CAS has jurisdiction to decide on the present dispute.

B. Admissibility

45. Article R49 of the Code provides, in its relevant parts, as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against".

46. In addition, Article 57 par. 1 of the FIFA Statutes states:

"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question".

47. The Appealed Decision was notified to the Parties on 17 November 2023 and the Statement of Appeal was filed by the Appellant on 8 December 2023, i.e. within the 21 days set by Article 57 par. 1 of the FIFA Statutes. The appeal complied with all other requirements of Article R48 of the Code, including the payment of the CAS Court Office fee.

48. It follows that the appeal is admissible.

C. Applicable Law

49. Pursuant to Article R58 of the Code,

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

50. The Sole Arbitrator notes that Article 56 par. 2 of the FIFA Statutes stipulates the following:

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

51. The Contract states the following:

"6.1. The Parties are responsible for the failure or improper performance of their obligations under this Contract in accordance with the current legislation of Ukraine".

52. The Sole Arbitrator assesses that by submitting the dispute to the CAS, the Parties have chosen to be subject to Article R58 of the Code (CAS 2008/A/1705 para. 9 and references).

53. With regard to Article 6.1 of the Contract, the Sole Arbitrator notes that it is a frequent issue in CAS proceedings that the parties make an implicit (and indirect) choice of law (by submitting their dispute to the CAS) but also an explicit choice of law in the contract. The issue has been discussed in legal literature:

"The latter situation arises if the parties agree not only on the jurisdiction of the CAS as the arbitral tribunal to decide on the case, and thus implicitly also agree on the application of the CAS Code, but also – for example in the contract – directly and explicitly specify the law that applies to the case. In such a case the question then arises as to the nature of the relationship between the implicit choice of law on the one hand and the explicit choice of law on the other. In particular the question is raised as to whether in such a case any room at all is left for the application of Art. R58 of the CAS Code" (HAAS U., Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law, CAS Bulletin, 2/2015, p. 10).

As to how this contradiction is to be resolved, the Sole Arbitrator follows the approach of HAAS:

"To summarise, it must therefore be concluded that Art. R58 of the CAS Code – because its intention is to mandatorily restrict the parties' freedom of choice of law – always takes precedence over any explicit (direct or indirect) choice of law by the parties. Hence any choice of law made by the parties does not prevail over Art. R58 of the CAS Code, but is to be considered only within the framework of Art. R58 of the CAS Code and consequently affects only the subsidiarily applicable law" (HAAS U., Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law, CAS Bulletin, 2/2015, p. 13).

54. A second contradiction arises as the applicable regulations in the matter at hand are the regulations of FIFA, which state that Swiss law shall be additionally applied, whereas the Parties have made a direct choice for Ukrainian law.

55. HAAS addressed this issue as well and concludes that the reference to Swiss law *"only serves the purpose of making the RSTP more specific"* and *"issues that are not governed by the RSTP should not be subject to Swiss law"* (HAAS U., Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law, CAS Bulletin, 2/2015, p. 15).

56. In conclusion, the Sole Arbitrator finds that the applicable law is to be determined against the background of Article R58 of the Code and Article 56 par. Of the FIFA Statutes. Therefore, the "applicable regulations" are the FIFA Statutes and regulations, in particular the RSTP. Furthermore, the Sole Arbitrator will apply Swiss law as an interpretative tool should the need arise to interpret FIFA's rules and regulations. Should the need arise to fill gaps in the various regulations of FIFA, the Sole Arbitrator will address the issue of the subsidiarily applicable law separately. Issues that are not governed by the various rules and regulations of FIFA should be subject to Ukrainian law.

VI. PRELIMINARY ISSUE

57. The Respondent argues that the Club was precluded from filing a separate claim before the FIFA PSC. The Club did not reply to the claim of the Coach in the First FIFA Proceedings and, instead of replying, lodged a new separate claim on 15 September 2023 which led to the Second FIFA Proceedings. The Respondent cites Article 21 of the Procedural Rules Governing the Football Tribunal ("FIFA Procedural Rules") which states the following in para. 2 and 3:

"2. The respondent(s) may submit a counterclaim with their response to the claim. A counterclaim shall have the same form as a claim and shall be submitted within the same time limit as that for the response to the claim.

3. If a party submits a new claim which is related to an existing case in which it is a respondent, the new claim shall be joined with the existing case and treated as a counterclaim in the existing case. Where the party has already been notified of the existing case, the new claim must have been submitted within the same time limit as that for the response to the claim in the existing case in order to be considered".

58. The Respondent notes that by not having filed the claim against the Coach in the First FIFA Proceedings, *"the Club was precluded from lodging any claim related to the first one that was decided in a final and binding manner on 12 June 2023"*. The Respondent refers to the commentary on the RSTP which contains a reference to a FIFA DRC decision of 22 October 2020, *Ruiz Torre*. In this case, the respondent missed the deadline for replying to the claim of the claimant and filed a new claim pertaining to the same matter, i.e. the termination of the contract of the player. Therefore, the FIFA DRC concluded that asserting the new claim in a new proceeding *"is to be considered as an attempt to circumvent the Procedural Rules"* as the new claim *"is nothing more than a counterclaim"*.

59. The Sole Arbitrator notes that Article 21 of the FIFA Procedural Rules stipulates by when a respondent must raise a counterclaim for it to be considered (para. 2) and that such a counterclaim, in case it is related to an existing case, shall be raised in such proceedings (para. 3). Taking into consideration that the subject matter of the Second FIFA

Proceedings concerns the same parties and is based on the same contractual relationship, the Sole Arbitrator concludes that the Club could in principle have submitted its claims as a counterclaim in the First FIFA Proceedings as the prerequisite of a "related" claim seems to be fulfilled.

60. This question is to be distinguished from the question of whether the assertion of a claim is barred by the principle of *res judicata*. *Res judicata* is the legal principle that precludes a subsequent legal action involving the same claim, demand, or cause of action to be redecided once it has been judged / decided on the merits. The *res judicata* principle avoids the occurrence of two contradicting decisions, which would be contrary to public policy (MAVROMATI D., *Res judicata* in sports disputes and decisions rendered by sports federations in Switzerland, CAS Bulletin 2015/1).

61. The principle of *res judicata* has been assessed by the CAS jurisprudence in several awards as summarized in CAS 2020/A/6912. The CAS panel therein stated that *"res judicata exists when there is (i) an identical claim from a substantive point of view; (ii) the same parties were involved in the proceedings; and (iii) the matter was solved based on the same facts and evidence at the time of the first judgment"*.

62. In the First FIFA Proceedings, the question was decided as to whether the Club must pay the Coach's salary and bonus for the period up to 30 June 2022. The Second FIFA Proceedings concerned the question of whether the Contract was extended beyond 30 June 2022 and whether the Coach therefore terminated the Contract without cause. The subject matter of the Second FIFA Proceedings is therefore not the same as in the First FIFA Proceedings. The principle of *res judicata* is not applicable.

63. Article 21 of the FIFA Procedural Rules only specifies the deadline for the lodging of a counterclaim in the same proceedings for it to be considered. Subject to *res judicata* principle, the said provision does not state that the claim can no longer be lodged after the proceedings have been concluded. In the case of a claim that is related but not identical to the subject matter of the dispute, a party may therefore decide whether to assert it in the form of a counterclaim during ongoing proceedings or after the conclusion of the first proceedings. The latter does not lead to an exclusion of the assertion of the claim, as there is no *res judicata*.

64. Therefore, the Sole Arbitrator concludes that the Appellant was not precluded from lodging the claim in the Second FIFA Proceedings.

VII. MERITS

65. In the present case, the Sole Arbitrator will assess the question of whether the Respondent owes the Appellant compensation for termination of the Contract without just cause. For this purpose, he must determine whether the Contract has been validly extended by the Appellant, meaning whether the contractual basis for the extension is valid.

A. Validity of the unilateral extension of the Contract

66. The Appellant argues that the Contract was extended on the basis of the Extension Clause in conjunction with the Club's letter dated 17 June 2022.

67. The Sole Arbitrator recalls that the Extension Clause reads as follows:

> *"Article 5*
>
> *The Parties have agreed that the term of the Contract may be extended by the Club till 30.06.2023 in case the latter directs to the Head coach a written notice regarding the extension of the term of the Contract not later than or before 20 June 2022. In case of extension of the term of the Contract by the Club, the salary of the Head Coach will be EUR 25,000 net per month starting from July 2022".*

68. The Respondent argues that the unilateral extension option provided in the Additional Agreement is null and void. In particular, the Respondent argues it is imbalanced because the Appellant may unilaterally decide to extend the Contract.

69. Therefore, the Sole Arbitrator will decide first, whether the Extension Clause is valid or not.

70. The FIFA regulations, in particular the RSTP, do not contain any provision that generally prohibit unilateral extension options in employment contracts. There is no jurisprudence known by the Sole Arbitrator which declares such unilateral options as absolutely void under all circumstances. On the other hand, the Sole Arbitrator also notes that CAS jurisprudence and FIFA tend to question the validity of unilateral options (cf. CAS 2004/A/678).

71. The commentary on the RSTP notes that the CAS and the FIFA Dispute Resolution Chamber ("FIFA DRC") *"have been quite critical and the corresponding decisions state quite explicitly that clauses which put the player at the mercy of the club, which can decide unilaterally to extend the contract without any corresponding gain for the player (such as an increased salary, for instance), are illegal in that they limit the player's freedom of movement and contravene the general principles of labour law".*

72. There is a well-established practice of the FIFA DRC that *"unilateral options are, in general, problematic, since they limit the freedom of the party that cannot make use of the option in an excessive manner. Furthermore such options are not based on reciprocity, since the right to extend a contract is left exclusively at the discretion of one party"* (cf. CAS 2004/A/678) and the CAS that *"a system that allows, for the benefit of the club alone, the contract of a player to be extended with limited salary adjustments, (…) is not, in principle, compatible with the time frame that the FIFA Regulations provide"* (cf. CAS 2005/A/983 & 984).

73. Notwithstanding this well-established jurisprudence according to which unilateral options are problematic, the CAS panel in CAS 2013/A/3375 & 3376 stated that *"unilateral options to extend contracts of employment in favour of football clubs are not per se invalid and incompatible with the RSTP and the principle of global labour law. The jurisprudence does not absolutely preclude the valid operation of such a clause and that each specific clause and the circumstances of its purported exercise must be examined on a case by case basis".*

74. The Sole Arbitrator therefore concludes that unilateral extension options are not prohibited per se by FIFA regulations, but the validity of the clause must always be assessed on a case-by-case basis. The Sole Arbitrator will evaluate the matter considering the spirit and legal framework that FIFA regulations seek to promote. This means that such a clause must not unduly and unjustifiably

restrict the players' respectively the coaches' freedom of movement and personality rights. CAS jurisprudence also emphasizes the principles of contractual stability, *pacta sunt servanda*, contractual freedom and good faith of the parties and, based on this, declared the unilateral extension option valid in CAS 2005/A/973. The Sole Arbitrator observes that in CAS 2005/A/973, in the opinion of this CAS panel, the player violated the principles of *pacta sunt servanda* and *bona fide* by first accepting the unilateral extension option *"but then to try to escape its obligations by claiming the nullity of the unilateral option clause with the purpose of ensuring for itself a substantial salary increase"*.

75. According to the recent jurisprudence, the following elements need to be taken into consideration in order to determine whether or not a unilateral extension clause is valid (cf. CAS 2013/A/3260):

- The potential maximum duration of the labour relationship should not be excessive;

- The option should be exercised within an acceptable deadline before the expiry of the current contract;$

- The salary reward deriving from the option right should be defined in the original contract;

- One party should not be at the mercy of the other party with regard to the contents of the employment contract;

- The option should be clearly established and emphasized in the original contract so that the player (or coach) is conscious of it at the moment of signing the contract;

- The extension period should be proportional to the main contract; and

- It is recommended to limit the number of extension options to one.

76. The Sole Arbitrator follows the view of the CAS panel in CAS 2014/A/3852 that the criteria mentioned are important and must be taken into account but are not absolute rules whose non-fulfilment would lead directly to the invalidity of the disputed clause and *vice versa*.

77. In the case at hand, the Extension Clause is unilateral in favour of the Club. The Club had the right to extend the Contract (ending on 30 June 2022) until 30 June 2023 if the Coach was informed of the extension in writing on or before 20 June 2022, i.e., ten days before expiry, at the latest. In case of extension, the Coach received EUR 25,000.00 net per month starting from July 2022. This meant a salary increase of 10%.

78. First of all, it is undisputed that the Parties have signed the Additional Agreement mutually and with free will. Also, the Additional Agreement is an integral part of the Contract (cf. Article 8 of the Contract).

79. With reference to the jurisprudence mentioned in para. 75, the Sole Arbitrator deems the following points decisive: i) the deadline for exercising the Extension Clause, ii) an appropriate increase of the remuneration under an extended contract and iii) if the Coach was at the mercy of the Club with regard to the contents of the Contract. The other criteria are of secondary importance in this case as they seem to be unproblematic. Finally, regarding previous CAS jurisprudence, in

particular CAS 2005/A/973, the behaviour of the Coach has to be taken into consideration.

i. Deadline

80. First, the deadline of the Extension Clause will be examined. The Contract was valid from 23 September 2020 until 30 June 2022. The Club had the right to exercise the Extension Clause until 20 June 2022 at the latest. The Club informed the Coach about the extension of the Contract on 17 June 2022.

81. The Sole Arbitrator observes that in CAS 2013/A/3260 it was held that *"it is generally unreasonable for a club to wait so late (for example until only five days before the start of the transfer-period) before exercising its right to extend an employment contract with a player"* and that *"the player has the right to know well in advance whether or not the club would be extending the employment agreement so that he can take advantage of the transfer period and look for another club and thus avoid having to find himself unemployed in case the club decides not to extend his employment agreement"*.

82. The Club had to notify the Coach of its intention to exercise the option no later than ten days prior to the expiry of the Contract. This would leave the Coach with little time to find an alternative employer and a highly uncertain professional future before the end of the Contract. The Club on the other hand was in the comfortable position to take its time until shortly before the end of the Contract to decide whether it wanted to continue working with the Coach for another year or part ways.

83. As previously mentioned, the Coach was unable to plan his professional future until ten days before the end of the Contract. The employee must be granted a certain period to explore other professional opportunities. Therefore, the Sole Arbitrator considers the contractual deadline of ten days as too short.

ii. Appropriate increase of remuneration

84. In principle, a unilateral extension option means that a contractual party has waived its contractual right of choice. This waiver of the own right respectively the granting of such a unilateral right to a contracting party should be accompanied by a corresponding compensation on the part of the waiving party. In the case of employment contracts, the compensation for granting such a right should usually be accompanied by a salary increase or an increased variable salary component. Therefore, the second question to be considered is whether the waiver of the Coach's rights is compensated by an appropriate increase in remuneration. In this context, it must be considered whether the conditions of employment resulting from the extension of the Contract are fair and adequately reflect the right (the unilateral extension) that the Coach has granted to the Club. The base salary and bonus payments are therefore considered.

85. The Extension Clause only refers to two aspects: the Club's right to extend the Contract and the increase of the base salary in the event of an extension. There is no reference to the various bonus payments set out in the Additional Agreement (e.g. EUR 100,000.00 for qualifying for the UEFA Europa League group stage, EUR 4,000.00 for each win against Shakhtar Donetsk or Dynamo Kyiv, etc.). Some of the bonus payments

are explicitly connected to the season 2020/2021.

86. On 17 June 2022, the Club informed the Coach of the extension of the Contract. Attached to this letter was the Annex. The Annex also fails to specify the Coach's future salary or any bonus payments.

87. The increase in the base salary amounts to 10% in the event of extension of the Contract. Previous CAS jurisprudence assumed that salary increases of 25% (CAS 2005/A/973) or over 160% (CAS 2014/A/3852) were significant enough to constitute monetary compensation for the ceded freedom of choice of the coach. In most cases, the unilateral extension clause was also accompanied by a substantial increase in the variable salary components.

88. As mentioned, in the present case, it is unclear whether the bonus payments are part of the extended Contract, as neither the Extension Clause nor the Annex refer to such payments. It does not seem very likely that the bonus payments should be applied again, because (i) the salary was explicitly mentioned and, conversely, the bonus payments should not be part of the extended Contract and (ii) certain bonus payments are linked to the 2020/2021 season, which prevents them from being applied again.

89. Moreover, even if they were, with a 10% salary increase and the variable salary components remaining the same, in light of past CAS jurisprudence, the Coach's adjusted salary does not adequately reflect the lost freedom of choice.

90. The Sole Arbitrator concludes that the terms of the Contract under the Additional Agreement are no better overall for the Coach. Therefore, the Sole Arbitrator follows the view of the Single Judge of the Appealed Decision that this lack of clarity questions the applicability of the unilateral extension option.

iii. Mercy

91. The ambiguous terms of the Contract after its hypothetical extension, combined with the circumstance that the Club was obligated to notify the Coach of the Contract's extension merely 10 days prior to the expiration of the contractual term, resulted in the Coach being at the mercy of the Club.

92. Also, in particular, regarding the principles of *pacta sunt servanda* and good faith, the Club's conduct does not comply with the principle of good faith. The Coach was informed in the letter from 30 June 2022 that in the event of a contract extension, the Contract would be suspended until the end of the extended term on the basis of Annexe 7.

iv. Behaviour of the Coach

93. Finally, the behaviour of the Coach must also be considered. According to CAS 2005/A/973, it is not *bona fide* and contradicts the principle of *pacta sunt servanda* if a player invokes the nullity of an extension option on the basis of a better offer from another club. Further, the Panel of said decision has not identified any imbalance in the contractual provisions.

94. The Appellant argues that the Coach repeatedly made similar statements in public stating that rejected many offers and is *"not thinking about leaving the Club yet"*. He stated as well that *"of course, if all this, God forbid, continues, then I will see what*

happens, but now I am definitely the coach of Dnipro-1 and I want to stay". This interview was given by the Coach in April 2022.

95. The Appellant further argues that the Club and the Coach started *"intensive consultations […] regarding the preparation for the new competitive season"* and the Coach assured that the rumors that he was in negotiations with another club were false. The Appellant provides no evidence in support of these statements.

96. The Club accuses the Coach of not having acted in good faith when he said in public that he would stay with the Club and then invoked the invalidity of the Extension Clause. In fact, there is evidence that the Coach made such statements in public. However, it is customary in the football business to publicly declare one's allegiance to one's current club. No great significance can therefore be attached to these statements. It is not apparent to the Sole Arbitrator why the Club waited until three days before the deadline to exercise the extension option if the Parties had apparently already planned the next season. The Club only exercised the extension option when the rumors about a change of Coach to another club emerged. Furthermore, the Club does not prove that the Coach invoked the invalidity of the Extension Clause because he received an offer from the new employer with a substantial salary increase.

97. The Sole Arbitrator therefore concludes that there is no significant evidence that the Coach did not act in good faith. The reliance on the invalidity of the Extension Clause does not appear to be abusive in this context.

v. Conclusion on the validity of the unilateral extension of the Contract

98. Taking into account the jurisprudence of the CAS and FIFA DRC and the aforementioned assessment of the specific circumstances in the case at hand, the Sole Arbitrator concludes that the Extension Clause is not valid.

B. Termination of the Contract without just cause

99. The Appellant argues that the Contract was prematurely terminated by the Respondent without just cause and, therefore, the Respondent is obliged to pay a compensation to the Appellant.

100. Since the application of the Extension Clause is denied in the present case, the Contract expired on 30 June 2022. In his letter dated 29 June 2022, the Coach made it clear that he was duly ending the Contract by 30 June 2022 and that he no longer saw his future with the Club. Consequently, the Contract expired after its regular term. Therefore, the Sole Arbitrator is not addressing the Appellant's arguments regarding early termination without just cause. Consequently, no compensation is owed to the Club for termination without just cause.

C. Conclusion

101. Based on the foregoing and after taking into due consideration all the evidence produced and all arguments raised, the Sole Arbitrator finds that:

- The Extension Clause is not valid and the application of the clause is denied.

- The Contract duly ended on 30 June 2022 without termination of the

Coach and therefore there is no basis for the Appellant's claim of EUR 250,000.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by SC Dnipro-1 LLC on 18 December 2023 against the decision rendered on 24 October 2023 by the Players' Status Chamber of the *Fédération Internationale de Football Association* is dismissed.

2. The decision rendered on 24 October 2024 by the Players' Status Chamber of the *Fédération Internationale de Football Association* is confirmed.

3. (…).

4. (…).

5. All other and further prayers or requests for relief are dismissed.

CAS 2024/A/10431
Yeni Mersin Idmanyurdu Futbol A.S. v. Milan Mitrovic & Fédération Internationale de Football Association (FIFA)
21 November 2024

Panel: Mr Rui Botica Santos (Portugal), Sole Arbitrator

Football
Bankruptcy of a club
Standards of burden of proof in CAS proceedings
Rational for concept of sporting succession
Article 21.4 FIFA Disciplinary Code (FIFA FDC) and requirements to establish sporting succession
Potential lis pendence due to ongoing other (CAS) proceedings also dealing with the question of succession
Article 21.1 FDC – consequences of failure to pay

1. **Under Article 8 of the Swiss Civil Code as well as Article 41 of the FIFA Disciplinary Code (FDC), the burden of proving the existence of an alleged fact rests on the person who derives rights from that fact. The three most common standards of proof applied in CAS proceedings are, by hierarchy of degree of requirement, *"beyond reasonable doubt"*, *"comfortable satisfaction"* and on the *"balance of probabilities"*. The standard of *"comfortable satisfaction"* is generally defined as a standard of proof that is higher than the civil law standard of *"balance of probability"* but lower than the criminal law standard of proof *"beyond a reasonable doubt"*.**

2. **Generally speaking, and as a rule, a legal entity is not responsible for obligations incurred by a third party. However, exceptions to this principle exist in legal systems that have introduced the figure of "disregarding the legal personality" in order to be able to hold accountable entities that use different identities to avoid the fulfilment of their obligations. FIFA, in order to protect sports creditors in good faith and avoid abuses, instituted Article 21.4 FDC, containing the concept of "sporting succession", which aims to provide legal protection to certain sports creditors who, from one moment to the next, due to the submission of the debtor club to insolvency/bankruptcy, extinction or simply dissipation of assets, are no longer able to rely on FIFA protection for the good collection of their credit(s).**

3. **While Article 21.4 FDC includes a list of factors that should be taken into account as the criteria when making the assessment of "sporting succession", given the wording "*among others*", these factors are non-exhaustive and therefore not the only ones that can be taken into consideration. Among others, the criteria to assess whether an entity is to be considered the sporting successor of another entity are its headquarters, name, legal form, team colours, players, shareholders or stakeholders or ownership and the category of competition concerned. Additional criteria can be taken into account, such as a club's crest/emblem/logo, its stadium, its reliance on a club's history, its founding year, its social media, its acquisition of sporting assets, its serial numbers, its technical staff and its reliance on the credits of a**

bankrupt club. A classification in three levels of each criteria (elements of minor importance, relevant elements and important elements) is useful before coming to an overall final conclusion. Shady practices in itself, or rather fraudulent practices by parties trying to avoid payments, do not constitute a *conditio sine qua non* in order to conclude that sporting succession occurred, *i.e.* sporting succession can exist even in the absence of such practices, and sporting succession can also exist in the absence of bankruptcy proceedings. Sporting succession is also not exclusively limited to entities which purchase clubs through public tender or auction. Finally, in order to assess the existence of "sporting succession", it is also important to understand the reasons and the subjective motivations that led to the alleged emergence of a "new club". This is perceived as one of the reasons why the provision contained in Article 21.4 FDC does not create a general and strict obligation for all cases of new clubs, but set indicatively some criteria that should be taken into consideration in order to decide whether a club shall be deemed as a sporting successor of another club or not, that is, whether succession exists or not shall be decided on a case by case basis.

4. **The principle of *lis pendens* is related to the contemporaneous pending of the same dispute before two different adjudication fora, which may also be various CAS proceedings. However, in case the claims in question are directed against different parties but also have a different substance, the conditions for application of the *lis pendens* principle are not met.**

5. **According to Article 21.1 FDC, the sanction applicable for failing to comply with a decision is, at the discretion of FIFA, a minimum fine of CHF 100 and a maximum fine of CHF 1,000,000. In order to contest a fine imposed as being unjust or disproportionate, it is not sufficient to argue accordingly in the written submissions; rather also a specific request for relief in this regard needs to be made. In the absence of such request, the Panel is barred from altering the appealed decision when it comes to the imposed fine, as it would be acting *ultra petita*. Furthermore, pursuant to longstanding CAS jurisprudence, sanctions imposed by the FIFA Disciplinary Committee can only be amended by a CAS panel if the sanction(s) concerned are *"evidently and grossly disproportionate to the offence"*.**

I. PARTIES

1. Yeni Mersin Idmanyurdu Futbol A.S. (the "Appellant", the "Yeni Mersin FC", the "New Mersin" or the "New Club") is a Turkish professional football club competing in the 2nd League (3rd Pro-Division) of Turkish Football Federation (the "TFF"). It is affiliated to the "TFF", which is a member association of Fédération Internationale de Football Association.

2. Mr Milan Mitrovic (the "First Respondent", the "Player" or the "Creditor") is a professional football player of Serbian nationality, currently playing for the Uzbek professional

Football Club Sogdiana Jizzakh that competes in the Uzbekistan Super League.

3. Fédération Internationale de Football Association (the "Second Respondent" or "FIFA") is an international governing body of football. FIFA exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials, and players belonging to its affiliates. FIFA is an association under Articles 60 et seq. of the Swiss Civil Code with headquarters in Zurich, Switzerland.

4. The New Mersin, the Player and FIFA are collectively referred to as the "Parties" and the Player and FIFA collectively referred to as the "Respondents".

II. FACTUAL BACKGROUND

5. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in this award ("Award") only to the submissions and evidence he considers necessary to explain his reasoning.

a. The object of the dispute

6. This appeal case (the "Appeal") is related to the challenging of the FIFA Disciplinary Committee ("FIFA DisCo") decision passed on 8 February 2024 (the "Appealed Decision" or the "FIFA DisCo Decision"), which considered the Yeni Mersin FC responsible for the debt(s) owed to the Player and incurred by the football club Mersin Idmanyurdy Spor Kulubu, now called Mersin Talim Yurdu SK (the "Original Mersin", the "Original Club" or the "Original Debtor"), on the basis of sporting succession. The grounds of the Appealed Decision were notified to the Club on 26 February 2024.

b. The origin of the dispute - the dispute between the Player and the Original Mersin

7. On 23 June 2017, the Player filed a claim against the Original Debtor, before FIFA Dispute Resolution Chamber (the "FIFA DRC"), demanding the payment of outstanding salaries and compensation for breach of his employment contract.

8. On 19 April 2018, the FIFA DRC passed a decision (the "FIFA DRC Decision") that ordered the Original Debtor to pay to the Player the following amounts (the "Debt"):

   i. EUR 175,000 as outstanding remuneration plus 5% interest *p.a* until the date of effective payment as follows:

      - On EUR 27,000 as from 1 January 2017;
      - On EUR 37,000 as from 1 February 2017;
      - On EUR 37,000 as from 1 March 2017;
      - On EUR 37,000 as from 1 April 2017; and
      - On EUR 37,000 as from 1 May 2017.

   ii. EUR 37,000 as compensation for breach of contract plus 5% interest

p.a. as from 27 June 2017 until the date of effective payment.

9. On 6 August 2018, due to the Original Debtor's failure to comply with the FIFA DRC Decision, the Player requested FIFA to initiate disciplinary proceedings (under reference number 190184), with a view to finding it liable for non-compliance with the FIFA DRC Decision.

10. On 1 April 2019, since the Debt was not paid to the Player, the FIFA DisCo passed a decision under with the Ref. no. 190184 (the "Disciplinary Decision"), which found the Original Club responsible for failing to comply with the FIFA DRC Decision and, consequently, a deduction of 6 points and a registration ban of one entire transfer window was implemented on the Original Club.

c. The origin of the present dispute - the dispute between the Player and the New Club

11. On 14 November 2023, due to the non-compliance with the FIFA DRC Decision by the Original Debtor, the Player requested the opening of a disciplinary procedure against the New Club, in front of the FIFA DisCo, claiming that the New Club should be considered the sporting successor of the Original Debtor (the Original Debtor and the New Club are collectively referred to as the "Clubs"). The Player stated in these disciplinary proceedings, *inter alia* that *"(…) in a recent FIFA decision, with Ref. FDD-15539, dated on 14.09.2023, the new club "Yeni Mersin Idmanyurdu Futbol AS" was confirmed that is the new sporting successor of the* [Original Debtor]*"*.

12. FIFA DisCo initiated its investigation, and through its Secretariat, investigations were completed (the "Investigatory Report") which concluded the following:
"(…)

- Disciplinary proceedings should be opened against the New Club for potential violation of art. 21 FDC.
- The New Club should be considered as the sporting successor of the Original Club.

(…)".

13. The Investigatory Report refers to other disciplinary cases involving the Appellant (the "Previous Disciplinary Decisions"):

*"On 16 March 2023 and 14 September 2023, in another disciplinary cases (Refs. FDD-14109 and FDD-15539) involving the club Yeni Mersin Idmanyurdu Futbol AS (**the New Club**), the FIFA Disciplinary Committee passed two decisions by means of which it considered the New Club responsible for the debt(s) incurred by the Original Club (the Disciplinary Decisions), and, as such, was found responsible for failing to comply in full with a FIFA decisions rendered on 21 January 2015 and 2 July 2015 (Refs. 12-03264 and 13-02698)".*

14. In the context of the Previous Disciplinary Decisions, the various elements regarding the concept of sporting succession (as defined in the FIFA Disciplinary Code – the "FDC" - and CAS jurisprudence), were analysed and the FIFA DisCo reached the following conclusions:

Disciplinary Decision FDD – 14109:

"On the basis of the information and documentation at its disposal and, in particular, in consideration of the various elements as outlined above, collectively evaluated, the Committee was comfortably satisfied in its conclusion that the New Club – Yenu Mersin Idmanyurdu Futbol AS – was to be considered as the sporting successor of the Original Club – Mersin Idam Yurdu".

Disciplinary Decision FDD – 15539:

"[…] In fact, the Committee found no element in relation to the matter at hand (including within the [New Club's submission] what would enable it to reach a different conclusion that of the Previous Disciplinary Decisions)".

15. The Previous Disciplinary Decisions were based on the initial investigatory report in relation to the investigations of the Appellant as the sporting successor of the Original Debtor (the "First Investigatory Report"), conducted in light of the disciplinary proceeding under the Ref. FDD-4323.

16. The relevant sections[1] of the First Investigatory Report may be summarized as follows:

a. The TFF observations:

- The Original Mersin is affiliated to the TFF as an amateur club with a code different than the New Mersin;
- No information regarding any insolvency or bankruptcy proceedings related to the Original Mersin is known;
- The Original Mersin is an association whilst the New Mersin is a joint stock company;
- The Original Mersin changed its name to "Mersin Talimyurdu SK" in July 2022, while the New Mersin changed its name from Icel Idmanyurdu Spor Kulubu to "Yeni Mersin Idman Yurdu Futbol AS" on August 2022;
- The Clubs share the same colours and stadium;
- The website and headquarters of the Original Mersin are different from that of the New Mersin;
- 23 players were transferred as amateurs in the season 2019/2020 and 1 amateur player in the season 2020/2021 to the New Mersin;
- The New Mersin's board of directors is or was comprised of people who have previously been members of the Original Mersin's Board of Directors (Mr. Mehmet Hanifi Isik, Mr. Sabri Tekli, Mr Besir Acar, Mr Akkun Lulu, Mr Sevket Varan);
- The New Mersin and Original Mersin participated in different divisions of football during the last seasons (from 2015/2016 until 2022/2023), with the exception of the 2018/2019 season, where both participated in the Regional Amateur League in light of a UEFA decision that affected the Original Mersin; and
- TFF declared that the *"abovementioned clubs have two different legal entities and sporting history of* [its] *own".*

[1] The First Investigatory Report also contains a section relating to the position of the New Club. The position of the New Club is summarized and referred to in section IV.A of the Award.

b. The FIFA DisCo Secretariat findings:

- The Clubs share the name "Mersin Idman Yurdu" and the term "yeni" means "new" in Turkish, therefore the New Mersin introduces itself as the "new" Original Mersin; and

- In addition, the Clubs appear to share the following elements:

i. The same team colours;
ii. A very similar logo;
iii. The same stadium ("Mersin Stadium");

(iv) The following former board members of the Original Mersin appear to be current board members of the New Mersin: Mr Sabri Tekli, Besir Acar, and Mehmet Hanifi Isic. Moreover, the current president of the Original Club (since 2019) was a board member of the New Club in 2020/2021;
(v) A total of 23 players, who were registered for the Original Mersin, were registered as amateurs in the season 2019/2020 for the New Mersin;
(vi) The public perceives the New Mersin as the Old Mersin since the New Mersin is presenting itself as the Original Mersin and its supporters identify the New Mersin as the Original Mersin; and
(vii) In sum, and according to the case file, it seems that the elements, that reveal sporting succession, would prevail over the non-existent elements, and consequently, it would appear that the New Club should be considered the sporting successor of the Original Club.

17. On 12 January 2024, based on the Investigatory Report, disciplinary proceedings were opened against the Appellant regarding the potential beach of Article 21 FDC Edition 2023.

d. The FIFA DisCo Decision

18. On 8 February 2024, FIFA DisCo passed the Appealed Decision that considered the New Mersin as the sporting successor of the Original Debtor and order it to pay the Debt.

19. The Appealed Decision ordered the following:

"(…)

1. Yeni Mersin Idmanyurdu Futbol AS is considered responsible for the debt(s) incurred by the club Mersin Idmanyurdu Spor Kulubu, and, as such is found responsible for failing to comply in full with the FIFA decision rendered on 19 April 2018 (Ref. 17-01049).

2. Yeni Mersin Idmanyurdu Futbol AS is ordered to pay to Mr. Milan Mitrovic as follows:

- *EUR 175,000 as outstanding remuneration plus 5% interest p.a. until the date of effective payment as follows:*
- *On EUR 27,000 as of 1 January 2017;*
- *On EUR 37,000 as of 1 February 2017;*

- *On EUR 37,000 as of 1 March 2017;*
- *On EUR 37000 as of 1 April 2017;*
- *On EUR 37,000 as of 1 May 2017.*
- *EUR 37,000 as compensation for breach of contract plus 5% interest p.a. as from 27 June 2017 until the date of effective payment.*

3. *Yeni Mersin Idmanyurdu Futbol AS is granted a final deadline of 30 days as from notification of the present decision in which to pay the amount due. Upon expiry of the aforementioned final deadline and in the event of persistent default or failure tocomply in full with the decision withinh the period stipulated, a ban on registering new players will be issued until the complete amount due is paid.*

4. *Yeni Mersin Idmanyurdu Futbol AS is ordered to pay a fine to the amount of CHF 15,000.*

5. *The fine is to be paid within 30 days of notification of the present decision.*

(…)".

e. The grounds of the Appealed Decision

20. The main grounds of the Appealed Decision are the following:

(1) <u>General Remarks on the Sporting Succession Criteria</u>

(i) A *"new club"* can be considered a *"sporting successor"* if (CAS 2007/A/1322):

- It creates the impression of being legally bound by the obligations of its predecessor;
- It takes over the licence or federative rights from the predecessor; and
- The competent federation treats the Clubs as successors of one another.

(ii) The key indicators of sporting successions are (CAS 2011/A/2646):

- New entity set up for continuing the same activities as the old entity;
- New club accepts certain liabilities of the old club;
- New club remains in the same city as the old club; and
- New club takes over the licence or federative rights from the old club.

(iii) Assessment of sporting succession (CAS 2020/A/6884):

- A club is identifiable by elements like its name, logo, colors, registration address, and managing board; and
- The existence of several elements collectively can lead to the conclusion of a sporting succession, even if not all elements are met).

(2) <u>The New Club as the Sporting Successor of the Original Club</u>

(i) Similarities:

- Name: Mersin Idmanyurdu Sport Kulubu vs. Yeni Mersin Idmanyurdu Futbol AS.
- Uniform and colors: the Clubs share red and navy.

- Logos: similar logos with minor differences.
- Stadium: the Clubs share the same stadium in Mersin city.

(ii) Connections:

- Shared players: a considerable number of players from the Original Club joined the New Club.
- Shared board members: five former board members of the Original Club were appointed to the New Club's board.
- Public perception: multiple sources referenced the New Club in connection with the Original Club (i.e. social media and posting pictures of what seemed to be supporters of the Original Club – Ultra group *"having inter alia posted on their official Facebook page, on 19 December 2022 and 04 August 2022 respectively (free English translation) "Long live our struggle for Mersn Idman Yurdu!" and "(…) we did not give up in the lowest leagues! Now we are witnessing the resurrection of our Mersin Idman Yurdu! (…) it is incumbent upon us to protect our team more than ever. (…)".*).
- Supporter sentiment: the Original Club's Ultras and supporters expressed support for the new club, viewing it as the same entity.

(3) Conclusions:

- Yeni Mersin Idmanyurdu Futbol AS was considered the sporting successor of Mersin Idmanyurdu Sport Kulubu and held liable for the latter's debts.
- The New Mersin had already been considered the sporting successor of the Original Club in previous proceedings before the FIFA DisCo. The FIFA DisCo found no elements in the case at hand that would enable it to reach a different conclusion.
- According to Article 21.4 of the FIFA DC, the sporting successor of a non-compliant party is also considered non-compliant and subject to the same obligation.
- In determining the applicable sanction, the FIFA DisCo considered it adequate to apply a fine of CHF 15,000, as per article 6.4 of the FIFA DC.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

21. On 17 March 2024 by email and on 19 March 2024 via e-Filing, the Appellant filed with the Court of Arbitration for Sport (the "CAS") a statement of appeal (the "Statement of Appeal"), in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code"), challenging the Appealed Decision. In the Statement of Appeal, the Appellant has applied for the stay of the Appealed Decision until the CAS rules on the merits of the present case. The Appellant also requested that the present case be submitted to a sole arbitrator.

22. On 28 March 2024, in accordance with Article R51 of the Code and within the time-limit previously extended, the Appellant filed the appeal brief (the "Appeal Brief") with the CAS.

23. On 28 March 2024, respectively, 4 April 2024, and within the relevant time-limits, the Respondents informed the CAS that they considered the Appellant's request for the stay of the Appealed Decision moot, taking into consideration that the transfer ban (i) had not been effectively imposed on the Appellant, (ii) was subject to the non-payment of the amounts provided therein, and (iii) the payment of those amounts was suspended while the present case is under appeal.

24. On 9 April 2024, considering the Respondents' position in relation to the Appellant's request for the stay of the Appealed Decision, the Appellant decided to withdraw its request *"(…) as the sanctions are not going to be implemented until a final CAS decision is taken (…)"*.

25. On 8 May 2024 and further to the Respondents' agreement previous with the appointment of a sole arbitrator in this case, the CAS Court Office informed the Parties regarding the appointment of the Sole Arbitrator by the President of the CAS Appeals Arbitration Division:

    Sole Arbitrator: Mr Rui Botica Santos, Attorney-at-Law in Lisbon, Portugal.

26. On 28 May 2024, within the extended time-limit, the Second Respondent filed its answer (the "FIFA's Answer").

27. On 7 June 2024, within the extended time-limit, the First Respondent filed his answer (the "Player's Answer", and together with the FIFA's Answer is collectively referred to as the "Answers").

28. On 21 June 2024, after consultation of the Parties, the Sole Arbitrator decided to hold a hearing on 3 July 2024 at 09:30 am (Swiss time), by videoconference.

29. On 24 June 2024, the CAS Court Office issued the Order of Procedure, which was duly signed by the Parties.

30. On 3 July 2024, a hearing was held by videoconference. In addition to the Sole Arbitrator and Ms Pauline Pellaux, as CAS Counsel, the following persons attended the hearing:

    1. <u>For the Appellant</u>
       - Mr Juan de Dios Crespo Pérez – Counsel

    2. <u>For the First Respondent</u>
       - Mr William Sternheimer - Counsel
       - Mr Zoran Rasic – Counsel

    3. <u>For the Second Respondent</u>
       - Mr Alexander Jacobs – Senior Legal Counsel FIFA Litigation Department.

31. As a preliminary remark, the Parties confirmed that they had no objections to the appointment of the Sole Arbitrator. The Parties were given the opportunity to present their case and make their submissions and arguments.

32. Before the hearing has been concluded, the Parties expressly stated that they had no objection to the way that these proceedings have been conducted and that the equal treatment of the Parties and their right to be heard had been respected.

IV. THE PARTIES' SUBMISSIONS

33. The following summary of the Parties' positions is illustrative and does not necessarily comprise each contention put forward by the Parties. The Sole Arbitrator, however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in what immediately follows:

A. The Appellant

34. The Appellant prayed the below reliefs in its Appeal Brief:
"(…)

1. to accept [the Appeal] *against the* [Appealed] *Decision;*
2. to annul the [Appealed] *Decision and issue an award determining that the Appellant is not the sporting successor of the Original Club and, therefore, not liable for the debts incurred by the Original Club towards the Player, not subject t Art. 15 FDC, and there should be no fine and transfer ban against the Appellant;*
3. to determine any other relief the [Sole Arbitrator] *may deem appropriate;*
4. to fix a sum to be paid by the Respondents, in order to contribute to the payment of the [Appellant] *legal fees and costs in the amount of CHF 20,000.00 (…); and*
5. to condemn the Respondents to the payment of the whole CAS administration costs and arbitrator fees.

(…)".

35. The Appellant advanced the following grounds in support of its appeal:

a. <u>*The New Club is not the sporting successor*</u>

(i) This case is not the typical case of sporting succession.

(ii) There are similarities between the Original Club and the New Club, but these similarities had to be created due to public pressure and due to the football culture of the Mersin city.

(iii) The similarities are substantially insufficient to conclude that the New Club is the sporting successor of the Original Club.

(iv) The continuity of the Original Club is a very important element in determining the existence, or not, of sporting succession.

(v) Sporting succession was mainly implemented to avoid abuse, consisting of setting up a new entity to avoid financial responsibility, and this "concept" should be applied restrictively since the sporting successor may be called upon to assume liabilities and commitments of the original debtors and may have to assume debts or obligations of significant magnitude.

(vi) There is no evidence to support the finding that the New Club breached any provision and rule and/or harmed any protected interests by its actions, or there is no indication that the formation of the New

Club was solely made for "clearing" the financial situation of the Original Club.

(vii) The Player should bear the burden of proof of the existence of such behaviour and the Respondents failed to demonstrate that. The sporting successor is only based on appearance elements.

b. *How the relevant elements in the Appealed Decision should be assessed*

(i) Name: there are 32 teams in Türkiye which includes the expression "IDMAN YURDU" in their names, and 6 of these teams are from the same city. The New Club changed its name in 2019 to "İÇEL İDMAN YURDU" only after the Original Debtor suspended its operations to honour the city's successful football history; and, in 2022, to "YENI MERSIN İDMANYURDU A.S." because of the (i) public pressure and (ii) inexistence of trademark regarding the name of the Original Club. "MERSIN" is the name of the city and the expression "IDMAN YURDU" means *"training center"*. The name should not be the only relevant element to determine the sporting succession. The New Club and the Original Debtor are two separate entities with a name that refers to the region in which they are located.

(ii) Founding Year: The Original Debtor was established in 1925. The New Club was established in 1964 and competed in amateur divisions until 2016. The Clubs have a different history without any connection. On the season 2019-20 (due to Covid-19) all leagues were suspended, and the New Club was announced as champions and promoted to TFF 3 League. This was the first relevant sporting success in 56 years of the New Club's history.

(iii) Title and Sporting Achievements: There is no sporting continuation between the New Club and the Original Debtor. These Clubs had different sporting journeys in different leagues. The New Club started to compete as from amateur level and due to sporting achievements, it is entitled to compete in the TFF3 league.

(iv) Public Perception: The Original Debtor's well-known ultras group Red Devils took over the management of the Original Debtor in their past active football season to prevent the closing of the Original Debtor and, as it was said in

an interview by its President *"(…) We aspire for the club to live and for this flag to fly so that people's memories are not destroyed. (…)"*. However, due to FIFA sanctions, the original Debtor ended football activities at the end of 2018-2019 season. The Original Debtor was the oldest and most known and successful club in the city of Mersin's history. Due to the relegation to the amateur leagues the city of Mersin was left without a club and, as a result of this, citizens had no team to support, no team to be a fan of, and no team to watch their matches. It is wrong to conclude that the New Club is the continuation of the Original Debtor. There is no general acceptance that the New Club is the successor of the Original Debtor. It cannot be expected that the fans of the Original Debtor to disappear and it is not possible to prevent them from giving any support to any other team if their teams are not in the leagues. In conclusion: (i) there is no general public acceptance that the new Club is the sporting successor of the Original Debtor; (ii) there is pressure from the public towards New Club as being the most successful club in the city to mimic the city's oldest club; and (iii) some football fans of the city are not happy that the New Club is the flag carrier of the city.

(v) Registered Address: The registered address of the Clubs have always been different, and the Clubs are currently registered under the TFF with different club codes.

(vi) Legal Form and Ownership Structure: The Original Debtor is an association that continues to legally exist under the name Mersin Talim Yurdu SK. The New Club is a joint stock company (AS). The New Club has only two board members and none of them had never been involved with the Original Debtor.

(vii) Team Colors: Many teams in Mersin used the same colors. There has been no trademark transfer. Mersin's city colors are blue and red because the city is near to Mediterranean Sea which brings the color of navy-blue and the color of red-orange representing the city's extremely hot climate.

(viii) Logo: Both logos are different. The comparison of the logos must take place while they ceased to exist. It is not possible to compare the logos as if the Original Mersin ceased to exist since both continue to coexist. Comparison, if any, should

be made during the same period of time.

(ix) Players and Technical Staff: Some players have played in both teams, but this is not sufficient to establish the existence of sporting succession. In the 2018-19 football season, the Original Debtor had 141 players registered as amateurs. Two of the players mentioned in the FIFA Investigatory Report who have been transferred to the New Club are only amateur players who played amateur football in their city. This element is not relevant, because most of those 23 players mostly reside in the city and play football amateur level in addition to their daily lives in the city. Moreover, none of the technical staff has been transferred to the New Club. The New Club did not inherit any assets of the Original Debtor and did not inherit any football related staff from the Original Debtor. Since the Original Debtor still exists and as the registration of the Original Debtor is different from the New Club, it is impossible for the New Club to collect any national contribution (such as solidarity and/or training compensation) for the Original Debtor's former or current players.

(x) Management: The Investigatory Report indicates as findings that (i) the board members (or former board members) of the Original Debtor appear to be current board members of the New Club: Mr Sabri Tekli, Besir Acar and Mehmet Hanifi Isic; and that (ii) the current President of the Original Club (since 2019) was a board member of the New Club in 2020/21. The following considerations need to be made: (i) since the end of 2019/20 football season, the board members of the Original Debtor who were named by FIFA are not board members of the New Club. The Appellant has only two shareholders Metin Saltik and Serdar Saltik, and they are the managers of the New Club. The referred members were members of the association named Içel Ídman Yurdu Kulubu Dernegi, which existed in the 2019-20 football season before the New Club become a joint stock company. These individuals had no participation in the management of the New Club. Mr Sabri Tekli, Mr Besir Acar and Mr Mehmet Hanifi Isik are important and leading people of the city of Mersin. All of them are businessman and their support is needed for their city teams. This is the reason why these 3 individuals were on board. Mr Sevket Varan,

the current president of the Original Debtor, was elected as a board member for the New Club on the congress held on 28 June 2019 when the New Club was an association and he resigned 3 months later. He was elected because he could be useful to the team with his knowledge about professional football life and club management as he was the board member of the Original Debtor.

(xi) Stadium: Mersin Stadium has been constructed for the 2013 Mediterranean Games and it is the biggest and only top-tier football stadium in the city. All the seats in the stadium are navy blue and red (official colors of the city of Mersin).

36. All the above elements have been wrongly assessed by the FIFA DisCo and in the Appellant's opinion, the correct checklist should be the following:

ELEMENT	**YES**	**NO**
NAME	✓	
LEGAL FORM		X
HISTORY		X
TITLE AND SPORTING ACHIEVEMENTS		X
TEAM COLOURS		X
TEAM LOGOS		X
REGISTERED ADDRESS		X
STADIUM		X
WEBSITE AND SOCIAL MEDIA		X
OWNERSHIP AND SHAREHOLDERS		X
MANAGEMENT		X
PLAYERS		X
OFFICIAL STAFF		X
SPONSORS		X
PUBLIC PERCEPTION		X
FOOTBALL DIVISION		X

c. *The pecuniary fine is unjust*

(i) Disciplinary sanctions should only be considered if the New Club is considered sporting successor of the Original Club.

(ii) The New Club is not the sporting successor of the Original Club and the pecuniary fine should be cancelled.

d. *The Relevant CAS jurisprudence*

(i) CAS 2020/A/7092
"(…) "i.e., elements present in a certain case may tip the balance in one direction, whereas elements present in a lesser or higher degree in another case, may tip the balance in the opposite direction". (Para. 69)

(ii) CAS 2020/A/7290

"(…) the identity of a club is constituted by elements such as its name, colors, fans, history, sporting achievements, shields, trophies, stadium, roster of players historic figures, etc. That allows it to distinguish itself from all the other clubs. Hence, the prevalence of the continuity and the performance in time of the sporting institution in front of the entity that manages it has been recognized, even when dealing with the change of management companies completely different from themselves". (Para. 81)

(iii) CAS 2011/A/2646

"(…) the new club undertook to fulfill with the national association of professional football all the pecuniary, administrative, sporting and any other kind of obligations which are currently held by the old club" and "the new club took position formerly held by the old club in the national sporting institutions and championships". (Paras. 8-9)

(iv) CAS 2016/A/4550 & 4576

"(…) a) Both clubs (…) and the new club (…) competed in the first decision of the Hungarian championship under the name (…); b) The logo and colours of (…) remain identical; c) Both the old club and the new club are registered at the same address; d) Both the old club and the new club have the same managing director". (Para. 138)

(v) CAS 2018/A/5618

"(…) a) the old club (consisting of several clubs) merged into the new club following an official decree issued by the competent national authority, b) the merger was confirmed in a press release by the competent national authority, c) the name of the merged entity incorporates parts of the names of each of the clubs the subject of the merger, d) federational license, PO Box and facsimile details recorded on the license issued for the new club are identical to those recorded for Original Debtor, e) Five of the six named coaching and management staff that were engaged by the Original Debtor continued in their roles with the newly merged entity and finally f) there is Sporting continuation between the original debtor and the new club". (Para. 70)

(vi) CAS 2019/A/6461

"(…) the mere fact that the [new club] and the [old club] appeared as two separate legal entities operating simultaneously over a certain period of time is not a decisive factor to rule out sporting succession. On the contrary, all other facts indicate that the [new club] had substituted the Debtor club, by participating in its place in the [Country's] top division, and, by using its identity, in such way as to be perceived as the same club". (Para. 52)

(vii) CAS 2020/A/7092

"(…). The Panel classified the relevance of the different elements in three levels: (i) elements of minor importance; (ii) relevant elements; and (iii) important elements" stating that "Although

such categoric distinction is admittedly somewhat artificial as elements overlap, the Panel considers it useful in coming to an overall conclusion". (Paras. 148-149)

(viii) CAS 2022/A/7183
"(…) with the exception of CAS 2020/A/6884, it results from these CAS precedents that the concept of "sporting successor" is not applied simply because the new club has the same appearance (same logo, same colors, etc.) as the old one. On the contrary, each situation was analyzed on a case-by-case basis, and several other criteria were taken into account (…)". (Para. 110)

e. Conclusion

(i) The name is the only element that undisputedly may lead to absolute similarity of the Clubs, but considering all the other elements that are against the similarities of both teams, the name is an insignificant element.

(ii) Team logo and the team colors should also be irrelevant since almost every team from the city uses the same color and there is no trademark on the logo of the Original Club's logo and is similar to all performing teams in Mersin.

(iii) If we do the test with the club IDMAN YURDU 1925 SPORT KULUBU, an amateur club that competes in the 3rd TFF Amateur League, we would conclude that this club has more elements in common with the Original Club than with the New Club. Could this mean that if, for any reason, the New Club becomes insolvent or disappears, that club could be considered the sporting successor of the New Club and of the Original Club?

(iv) The city's football culture has merged with the same name, the same colour and the same symbols, regardless of the individuals who carry out football activities in the city.

B. The First Respondent | The Player

37. The First Respondent filed his Answer to the Appeal Brief and made the following prayers for relief:
"(…)

[The First Respondent] *requests (…):*

a) To reject the Appeal by the Appellant;

b) Consequently, to uphold the [FIFA DisCo Decision] *entirely*, *passed on 8 February 2024;*

c) To condemn the Appellant to bear all costs relating to the arbitration proceeding, according to CAS Code R64.5 & art. 106 Swiss CO;

d) To grant to the First Respondent a contribution towards his legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of

witnesses and interpreters, if any, in accordance with the CAS Code, R64.5.

(…)".

38. The submissions of the Player, in essence, may be summarised as follows:

a. It is undisputed that the New Club failed to pay the amounts awarded to the Player in the FIFA DRC Decision and, subsequently, FIFA DisCo correctly held that the New Club failed to comply with such decision and that the criteria of Article 64(1) FDC for imposing sanctions were complied with.

b. The Player has not been informed that the Original Debtor had entered into an insolvency proceeding or that it has been disaffiliated as a member of the TFF.

c. The basis of the concept of sporting succession (a concept directly born from the *lex sportiva*), derived from the principle of good faith.

d. A *"new club"* has to be considered as the *"sporting successor"* of another one in a situation where (i) the *"new club"* created the impression that it wanted to be legally bound by the obligations of its predecessor (i.e. the *"old club"*), (ii) the *"new club"* took over the licence or federative rights from the *"old club"* and (iii) the competent federation treated the Clubs as successors of one another (CAS 2007/A/1322).

e. Accessible sources of public information made various references to the Original Club in connection to the New Club. The New Club even appeared to celebrate the Original Club's foundation on its social media and posting pictures of that seemed to be supporters of the Original Club. Furthermore, the Ultra group of the Original Club clearly considered the New Club *"as its own"* and this group has even posted on its Facebook page (on 19 December 2022) and 4 August 2022 respectively (free English translation provided by the First Respondent) *"Long live our struggle for Mersin Idman Yurdu!"* and *"(…) we did not give up in the lowest leagues! Now we are witnessing the resurrection of our Mersin Idman Yurdu! (…) it is incumbent upon us to protect our team more than ever"*. From the eyes of its supporters, the New Club established a strong connection with the Original Club and has not done anything to be distinguished from the latter.

f. In the case at stake, the concept of sporting succession should be assessed having in mind the following elements:

(i) <u>Elements of Minor Importance</u>

- Same headquarters: No/they have different addresses
- Same stadium/training center: Yes/they make use of the same stadium

(ii) <u>Relevant Elements</u>

- Same name:Yes/with minor changes
- Same legal form: No/before association, now joint stock company
- Same team colors: Yes/navy-blue and red
- Same team crest/emblem/logo: Yes/only the founding year 1925 is replaced with AS and minor changes in the "M" and the line going through the "M".
- Same social media: Yes/Facebook entries and all entries in Wikipedia can be found with a link to the Original Debtor

(iii)Important Elements

- Same players: Yes/considerable number of players transferred to the New Club
- Same technical staff: Yes, 5 members
- Same shareholders/Stakeholders/ Ownership/Management: Yes/5 members in 2020 as in 2014
- Registration in the same Category of competition: Yes/Appealed Decision, para. 77.
- Claimed solidarity contributions for players trained by the Original Club: Not known
- Reliance on the Original Club's history: Yes/Appealed Decision, para. 110 and Facebook

C. The Second Respondent | FIFA

39. FIFA filed its Answer to the Appeal Brief and made the following prayers for relief:

"(…)
(a) rejecting the requests for relief sought by the Appellant;
(b) confirming the Appealed Decision;
(c) ordering the Appellant to bear the full costs of these arbitration proceedings;
(d) ordering the Appellant to make a contribution to FIFA's legal costs.
(…)".

40. The submissions of FIFA, in essence, may be summarised as follows:

a. *General remarks on Sporting Succession*

(i) Article 21(4) FDC establish that a club shall be considered the "sporting successor" of another club if they both share, among others, elements of its identity as defined by a non-exhaustive list of criteria: its headquarters, name, legal form, team colors, players, shareholders or stakeholders or ownership and the category of competition concerned. CAS jurisprudence has confirmed that this list of criteria is not exhaustive (CAS 2020/A/7543).

(ii)The essential element is the new club's intention to be seen by the general public as the same original club.

(iii)The sporting succession has to be assessed on a case-by-case

basis, since there is no exhaustive list of elements/criteria to identify a sporting successor. As it is mentioned at CAS 2020/A/7543 (paras. 56 & 93) *"(…) the issue of sporting succession has to be evaluated case by case and sometimes facts and circumstances can tip the balance in favour of one or the other part (…)"* and *"[…]the existence of several elements considering this provision can lead, in its combination, and so even if not, all aspects are met in a specific case, to the conclusion that a club has to be considered as a "sporting successor". The overall package of features is decisive (…)".*

b. *The Appellant is the sporting successor of the Original Mersin*

(i) Fans base and commercial value of the New Club: by identifying itself as the same club that earned popularity in Mesin since 1925, the New Club seeks to benefit from a pre-existing fan base and commercial value that a younger club would not be able to obtain. The New Club *expressis verbis* admits that its similarities with the Original Mersin are deliberated and had to created due to public pressure and due to the football culture of the city. The end result is manifestly that *"in the eyes of the general public" the Successor Mersin is the same as the Original Mersin (…)".*

(ii) Name: the names of the Clubs are very similar. The addition of "Yeni" (which means "New") in front of the name denotes the deliberate impression of continuity between the Clubs. By adopting the Original Club's name, the New Club seeks to be seen as the Original Club and create an impression of continuity to benefit from its reputation among football fans and commercial value. There is only one historic club in the city of Mersin "Mersin Idman Yurdu". Continued as the "Yeni" or "New" Mersin Idman Yurdu, the New Mersin introduces itself as the new "old club".

(iii) Team Colors and Logo: a radical (r)evolution occurred from the New Club's initial traditional colors (black and white) to those of the Original Mersin (red and navy-blue). It should be noted that the New Club is the only professional club in Mersin region using the color combination red and navy-blue (the city's colors). The other two professional Mersin clubs use different color combination.

(iv) Stadium: the New Club is using the same stadium of the Original Mersin. The stadium is clearly and exclusively linked to the Original Mersin. All the seats in the stadium are navy and red color, which coincides with the team and logo colors of the Original Mersin.

(v) Management: 5 out of the 6 Original Mersin's board members are part of the New Mersin's board of directors: Mr Mehmet Hanifi Isik, Mr Sabri Tekli, Mr Besir Acar, Mr Akkun Lulu and Mr Sevket Varan.

(vi) Players: according to the TFF (as reported in the First Investigatory Report) 23 players who were registered for the Original Mersin were consequently registered with the New Mersin. Furthermore, the movement of such a significant number of players needs to be considered together with the other coinciding changes: name, team colors, logo, management and stadium.

(vii) Public Perception: this is a critical element. It is recalled that the guiding principle behind all cases of sporting succession is the New Club's intention to be seen by the general public as the same Original Mersin that ceased its activities (i.e. the markets perception). The New Mersin always maintained its public link to the Original Mersin and that the most prominent fan club of the Original Mersin considers that the New Mersin is its continuation. The social media posts leave little to the imagination.

a. Additional considerations

(i) The Appellant submitted additional arguments on elements that were not retained or relied during the disciplinary proceedings, such as (i) the founding year, (ii) the title and sporting achievements, (iii) the registered address and (iv) *the* legal form and the ownership structure. FIFA agrees that these criteria do not apply to the matter at stake or do not support the finding of sporting succession.

(ii) In an attempt to demonstrate that there is no sporting succession in the matter at stake, the Appellant relies on its *"hypothetical sporting succession test"* in relation to an *"amateur team from the city of Mersin who competes in the 3rd amateur League of TFF"*. The Appellant's test is fundamental flawed since the existence of amateur teams is entirely irrelevant for the purpose of sporting succession. The purpose of sporting succession is to capture the pre-existing fan base and commercial value, benefits that are generally not found at the lower amateur level.

(iii) The FIFA DisCo correctly applied Article 21 FDC in the case at stake, in particular, considering that the Appellant, as the sporting successor of the Original Mersin, had breached said article by not complying with the final and biding FIFA DRC Decision. Consequently, the FIFA DisCo correctly

imposed disciplinary measures on the Appellant.

(iv) Notwithstanding the CAS power to review the case de novo as per Article R57 CAS Code, a disciplinary decision of a FIFA judicial body can only be amended in cases in which it finds that the relevant body exceeded the margin of discretion accorded to it by the principle of association autonomy, i.e. only in cases in which the FIFA judicial body concerned must be held to have acted arbitrarily. This is not the case if the Sole Arbitrator merely disagrees with a specific sanction, but only if the sanction concerned is to be considered as evidently and grossly disproportionate to the offence. Considering that the Appellant solely and exclusively requests the annulment of the Appealed Decision, without questioning its proportionality, this issue is undisputed and shall not be addressed in detail. Nevertheless, FIFA states that the sanction is proportionate and in line with CAS jurisprudence (inter alia, CAS 2012/A/3032, CAS 2013/A/3358, CAS 2019/A/6461).

b. *Conclusion*

(i) The New Club has been using the Original Mersin's name, its team colors, its logo, its stadium, its fan while also taking over some players. Moreover, the Original Club's activity has continuously and purposely been exploited by the New Club maintaining the same sporting identity.

(ii) By identifying itself as the same club that earned popularity in Mersin for almost a century, the New Club seeks to benefit from a pre-existing fan base and commercial value that a new club could never obtain from one day to another. This is a key element for consideration.

(iii) To conclude, by failing to comply with the FIFA DRC Decision, the Appellant has committed a breach of the FDC, for which it has been duly sanctioned by the FIFA DisCo. The Appellant has wilfully hidden behind certain individualized details that are clearly overridden by an analysis of the important common characteristics it shares with the Original Mersin, to avoid complying with its financial obligations towards the Player. For this reason, the Appealed Decision should be confirmed.

V. JURISDICTION OF THE CAS

41. In accordance with Article 186 of the Swiss Private International Law Act (the "PILA"), the CAS has the power to decide upon its own jurisdiction.

42. Article R47 of the Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".

43. Article 56(1) of the FIFA Statutes ed. May 20222 reads as follows:

"FIFA recognizes the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, members associations, confederations, leagues, clubs, players, officials, football agents and match agents".

44. Furthermore, under Article 57(1) of the FIFA Statutes reads as follows:

"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question. (…)".

45. The Appeal is directed against a final decision of the FIFA DisCo and therefore, the CAS, considering the above provisions, has jurisdiction to rule on the appeal filed by the Appellant. Moreover, the Panel notes that the jurisdiction of the CAS, which is not disputed, is also confirmed by the Order of Procedure duly signed by the Parties.

46. It follows that the CAS has jurisdiction to hear this dispute.

VI. ADMISSIBILITY

47. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

48. The Sole Arbitrator notes that the admissibility of the Appeal is not contested by the Parties. The grounds of the Appealed Decision were notified to the Appellant on 26 February 2024 and that the Statement of Appeal was filed on 17 March 2024, *i.e.* within the 21-day deadline fixed under Article 57(1) of the FIFA Statutes. It was further submitted via e-Filing on 19 March 2024, *id est* within the time-limit provided for by Article R31 of the Code.

49. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

50. Pursuant to Article R58 of the Code, in an appeal arbitration procedure before the CAS:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to

[2] All subsequent references to FIFA Statues are always related to May 2022 edition.

the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

51. In addition, Article 56(2) of the FIFA Statutes stipulates the following:

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

52. As such, the Panel is satisfied to primarily apply the various regulations of FIFA, in particular the FDC (Edition 2023) and, subsidiarily, Swiss law shall be applied should the need arise to fill a possible gap or lacuna in the various regulations of FIFA.

VIII. MERITS OF THE APPEAL

53. This Appeal has been filed against the Appealed Decision by which the FIFA DisCo decided to consider the Appellant as the sporting successor of the Original Club and, as such, imposed on it the consequences which emerged from the FIFA DRC decision.

A. Scope of the Appeal

54. The key issues in the present appeal proceedings are (i) whether the New Club is the sporting successor of the Original Club and, if so, (ii) whether New Club is liable for paying the Player the sums owed according to the FIFA DRC Decision.

55. In this appeal proceedings are neither in dispute the revision of the Player's credit nor the determination of any sporting sanctions in case the Sole Arbitrator finds that there is "sporting succession" between the Clubs. The Sole Arbitrator underlines that only FIFA has the exclusive jurisdiction and powers to determine and impose sporting sanction(s) of a non-compliant party. CAS has only jurisdiction and powers to revise such determination and imposition.

B. The Burden of Proof and the Applicable Standard

56. As confirmed by Article 8 of the Swiss Civil Code ("SCC"), there is no doubt that the Respondents carry the burden of proof in establishing the New Club is the sporting successor of the Original Club and that New Club is liable to pay the sums established in the FIFA DRC Decision. This is also in line with Article 41 of the FDC which states that *"*[a]*ny party claiming a right on the basis of an alleged fact carry the burden of proof. During the proceedings, the parties shall submit all relevant facts and evidence of which they are aware at that time, or of which they should have been aware if they had exercised due care".*

57. The Sole Arbitrator highlights that the existence of succession cannot be presumed and must be proven by the party asserting it bearing in mind that the intensity of the evidentiary activity depends on the circumstances and the clarity of the succession. In the absence of contrary evidence, there is no basis to assume one entity should assume another's obligations. Furthermore, even when similarities exist between the successor and the predecessor entities, significant differences may lead to the

conclusion that succession is not warranted[3].

58. Having noted the above the Sole Arbitrator will now assess the applicable standard of proof.

59. The three most common standards of proof which are applied in CAS proceedings are, by hierarchy of degree of requirement, *"beyond reasonable doubt"*, *"comfortable satisfaction"* and on the *"balance of probabilities"*. In the context of this matter, the Sole Arbitrator defines as appropriate the standard of *"comfortable satisfaction"*, in line with previous CAS jurisprudence from which there is no reason to depart from (*see*, among others, CAS 2020/A/7314, para. 178).

60. The standard of *"comfortable satisfaction"* is generally defined as a standard of proof that is higher than the civil law standard of *"balance of probability"* but lower than the criminal law standard of proof *"beyond a reasonable doubt"*. In practical terms, the party bearing the burden of proof must establish the facts having in mind the seriousness of the invoked allegations. Depending on the elements that integrate the criteria to establish "sporting succession", the proof required to "comfortable satisfy" the Panel (or, in this case, the Sole Arbitrator) can vary along a sliding scale being closer to "balance of probability" (for less relevant "elements") or close to "beyond a reasonable doubt" (for more relevant and important "elements").

C. The Rationale of Article 21.4 of the FDC

61. Generally speaking, and as a rule, a legal entity is not responsible for obligations incurred by a third party. However, exceptions to this principle exist in legal systems that have introduced the figure of "disregarding the legal personality" in order to be able to hold accountable entities that, fraudulently or in abuse of rights, use different identities to avoid the fulfilment of their obligations.

62. FIFA, in a similar reasoning, and in order to protect sports creditors in good faith, instituted the rule of Article 21.4 FDC. This rule aims to provide legal protection to certain sports creditors who, from one moment to the next, due to the submission of the debtor club to insolvency / bankruptcy, extinction or simply dissipation of assets, are no longer able to rely on FIFA protection for the good collection of their credit(s).

63. Article 21.4 FDC (which corresponded to the former Article 15.4 of the 2019 edition of the FDC) reads as follows:

"The sporting successor of a non-compliant party shall also be considered a non-compliant party and thus subject to the obligations under this provision. Criteria to assess whether an entity is to be considered as the sporting successor of another entity are, among others, its headquarters, name, legal form, team colours, players, shareholders or stakeholders or ownership and the category of competition concerned".

64. The aforementioned rule provides a sporting creditor with efficient means to obtain the payment of monetary claims against the "sporting successor" of a non-compliant debtor, being usually

[3]. *See*, among others, Jordi López Batet, *"La sucesión deportiva de clubes de fútbol: consideraciones a la vista de la jurisprudencia del TAS en la materia"*, in CAS Bulletin 2020/2, page 36.

considered as a result of the codification of FIFA case law and long-standing CAS jurisprudence.

65. The concept of "sporting succession" was implemented to avoid abuses. This rationale is clear in FIFA Circular 1681 which states *"FIFA will act against the sporting succession of a debtor, a practice that has unfortunately become more common in recent years as clubs attempt to avoid mandatory financial responsibilities towards other cubs, players, managers, etc".*

66. The CAS has long been assessing cases of sporting succession and its jurisprudence provides some important guidelines:

- CAS 2016/A/4550 & 4567, para. 135: *"Indeed, as rightfully pointed out by FIFA, CAS jurisprudence considers that "a sporting entity identifiable by itself that, as a general rule, transcends the legal entities which operate it" (CAS 2013/A/3425 at para. 139)".*
- CAS 2018/A/5618, para. 35: *"The identity of a club is constituted by elements such as its name, colours, fans, history, sporting achievements, shield, trophies, stadium, roster of players, historic figures, etc. that allow it to be distinguished from all the other clubs. Hence, the prevalence of the continuity and permanence in time of the sporting institution in front of the entity that manages it has been recognised, even when dealing with a change of management companies completely different from themselves".*
- CAS 2020/A/7290, para. 79: *"(…) in the context of sporting succession it is of relevance to determine this concept in light of the eyes of the general public. In other words, so the Sole Arbitrator finds, the picture the alleged sporting successor presents to the general public is of relevance".*
- CAS 2020/A/7290, para. 86: *"(…) the Sole Arbitrator further recognises that the elements as referred to in Article 15(4) of the 2019 edition of the FDC and Article 24ter(1) of the FIFA RSTP are not exhaustive, as clearly follows from the words "among others". The Sole Arbitrator feels forced to lay emphasis on this. In other words, the existence of several elements in light of these provisions can lead, in its combination, and so even if not all elements are met in a specific case, to the conclusion that a club has to be considered as a "sporting successor". The overall package of elements is decisive (see also CAS 2020/A/6884). As was also clearly stated in CAS 2020/A/7092, on which the Appellant heavily relies, the Sole Arbitrator considers himself not bound by prior decisions of the FIFA DC, FIFA DRC or the CAS. In fact, because such analysis is to be made on a case-by-case basis, i.e. elements present in a certain case may tip the balance in one direction, whereas the elements present in a lesser or higher degree in another case, may tip the balance in the opposite direction".*
- CAS 2020/A/7290, para. 88: *"(…) Before analysing the relevant criteria, the Sole Arbitrator also wishes to point out that although the concept of "sporting succession" is mainly implemented in order to avoid abuse, as also rightfully considered by the panel in CAS 2020/A/7092, the Sole Arbitrator disagrees with the Appellant that "shady practices". as far as this must be understood by the Sole Arbitrator as fraudent practices trying to avoid payments, must be demonstrated in order to conclude that an entity is the sporting*

successor of another entity. In this regard, the Sole Arbitrator is also mindful of FIFA Circular no. 1681 and the main purpose of FIFA to implement the concept of sporting succession. However, and although it can certainly be an element to consider when analysing a concrete scenario, as was also argued by the Second Respondent, shady practices in itself, or rather fraudulent practices by parties trying to avoid payments, do not constitute a conditio sine qua non in order to conclude that sporting succession occurred. In other words, sporting succession can exist even if there is absence of such practices. The same applies to the absence of bankruptcy proceedings. Put differently, sporting succession can also exist even if there is the absence of bankruptcy proceedings (see, inter alia, CAS 2013/A/3425 and CAS 2020/A/6884). By the same token, the Sole Arbitrator wishes to add that sporting succession is also not exclusively limited to entities which purchase clubs through public tender or auction (see, inter alia, CAS 2018/A/5618)".

67. The Sole Arbitrator is of the view that to assess the existence of "sporting succession" it is also important to understand the reasons and the subjective motivations that led to the alleged emergence of a "new club". This is perceived as one of the reasons why the provision contained in Article 21.4 FDC does not create a general and strict obligation for all cases of new clubs, but set indicatively some criteria that should be taken into consideration by FIFA and CAS in order to decide whether a club shall be deemed as a sporting successor of another club or not, that is, whether succession exists or not shall be decided on a case by case basis.

D. Is New Mersin the "sporting successor" of the Original Mersin?

D.1 Preliminary remarks

68. As per the above referenced jurisprudence (namely CAS 2020/A/7902, para. 86), the Sole Arbitrator does not consider itself to be bound by prior decisions of FIFA and CAS regarding this matter, because the analysis of "sporting succession" should always be made on a case-by-case basis.

69. Regardless of this, the Sole Arbitrator considers that it is important to take previous CAS decisions, which are relevant to this decision, into due consideration, for reasons of legal predictability and stability. Consistency of interpretations is desirable whenever possible and justified, in order to establish and increase the level of confidence and legal certainty of the existing system.

D.2 Inexistence of "Lis Pendens" and "Res Judicata"

70. The Sole Arbitrator notes that there exist other cases in which the New Mersin was considered the sporting successor of the Original Mersin, namely the cases with the references FDD 14109, FDD 15539 and FDD 15961 which have been decided by the FIFA DisCo on the basis of the First Investigatory Report.

71. The aforementioned cases have all been appealed and gave rise to the procedures with the references CAS 2023/A/9807 and CAS 2023/A/10043 and CAS 2023/A/10255. At the date when the present Award is passed, no decision on

those appeal cases was made by the appointed panels.

72. In this instance, the Sole Arbitrator notes that there is, at least in theory, the possibility that the present proceedings could be stayed due to the existence of a *lis pendens* exception based on Article 186 of the PILA and R55 of the Code, which read as follows:
"Article 186 (PILA)

1 The arbitral tribunal shall decide on its own jurisdiction.

1bis It shall decide on its jurisdiction without regard to any action having the same subject matter that is already pending between the same parties before a state court or another arbitral tribunal, unless there are substantial grounds for a stay in proceedings.155

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

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

"Article R55 (CAS Code)

(…)

The Panel shall rule on its own jurisdiction. It shall rule on its jurisdiction irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless substantive grounds require a suspension of the proceedings. (…)".

73. CAS jurisprudence has already dwelled on the matter and reached the following conclusions:
"In the Panel's view, paragraph 1bis of Article 186 LDIP would require this Panel to uphold the Athlete's lis pendens exception and, thus, to stay these arbitral proceedings only if three conditions were cumulatively met:

(i) the first is an objective test: the arbitration and the civil lawsuit must be between the same parties and must concern the same matter.

(ii) the second test is also objective: the action before the State court must have been brought prior to the action before the CAS or, in other terms, the lawsuit before the State court must be "already pending" ("déjà pendante") when the arbitration claim is lodged with the CAS;

(iii) the third test allows consideration of subjective elements but it must rest on solid grounds: the party raising the exception of lis pendens must prove the existence of "serious reasons" ("motifs sérieux") requiring the stay of the arbitral proceedings".

74. Adapting these conclusions to the fact that the assessment must be made between different CAS arbitrations, the Sole Arbitrator notes that there is no reason to stay the present proceedings, since the *lis pendens* exception cannot apply considering that in the aforementioned proceedings:

a) The parties are different from the ones of the current proceedings;
b) The object of the dispute is different from that of the current proceedings.

75. In a close analysis, it is clear that while the New Mersin is the appellant in all of the mentioned cases, the respondent's position is occupied by FIFA and other football players – therefore, the cases do not share the same parties.

76. The object of the disputes is also different, since the current dispute

concerns a different FIFA DRC decision than that of the other pending cases.

77. The Parties also appear to be aware of this, since none of them requested the stay of the proceedings – even though this is an issue which the Sole Arbitrator must assess *ex officio*, due to the effects it could have on the decision to be issued.

78. Moreover, since all previous cases have yet to be decided at the time of this Award, there is no need to assess if the sporting succession has been definitively recognised in them, since the principle of res judicata would never apply.

79. Based on the foregoing, the Sole Arbitrator shall now proceed to assess the dispute at hand.

D.3 Brief analysis of the elements relevant to assess "sporting succession"

80. The Sole Arbitrator commences the analysis of the present case by identifying the objective factors referred to in Article 21.4 of the FDC, which should be taken into consideration in this decision.

81. Article 21.4 of the FDC includes the following non-exhaustive list of factors that should be taken into account in the criteria when making the assessment of "sporting succession":

- Headquarters;
- Name;
- Legal Form;
- Team Colours;
- Players;
- Shareholders, stakeholders, ownership, management; and
- Category of competition concerned;

82. However, and as CAS jurisprudence consistently recognizes, the abovementioned factors are not the only ones that can be taken into consideration. The relevant provisions states, "among others" and the Appellant, in addition to the elements mentioned on Article 21.4 FDC, invokes the following in support of his allegations:

- The date when the New Club was founded;
- New Club's titles and sporting achievements;
- The New Club's logo;
- Player's and technical staff of the New Club;
- New Club's Stadium;
- New Club's Management; and
- The public perception about the New Club.

83. While these elements comprise the main allegations of the Appellant, the Sole Arbitrator will nonetheless bear in mind in his analysis the fact that the Original Club has not ceased to the exist and the arguments of the Appellant related to the New Club's lack of intent to commit any abuse.

84. Moreover, the Sole Arbitrator shall also assess if the Player exhibited a diligent behaviour when trying to collect the debt, since this is a relevant factor in light of established CAS jurisprudence (*see*, among others, CAS 2011/A/2646 and CAS 2020/A/6846).

85. In order to conduct its assessment of the above elements, the Sole Arbitrator will

bear in mind the guidelines established by previous CAS Jurisprudence (*see* above para. 66).

D.4 The concrete assessment of the alleged sporting succession

86. In light of the background referred to, the Sole Arbitrator now turns to assessing the relevance of each of the said factors, before coming to its decision. As in case CAS 2020/A/7092, the Panel opts to rank the factors identified into three categories, *i.e.*: (i) minor importance; (ii) relevant; and (iii) important. However, the specific importance of each factor will be assessed in light of the circumstances and facts of the present case, due to the need to conduct a case-by-case assessment.

87. The Sole Arbitrator makes the following assessment, evaluation and ranking of the factors identified, in this case:

1. *Headquarters*

88. According to the information available at the official website of the TFF, the registered addresses of the New Club and the Original Club are located in the same city but are different from one another. While the Respondents deny the importance of this element, they do not contest it.

89. The Sole Arbitrator highlights that the fact that the registered addresses are different is not surprising, nor unusual, considering that the Original Club has not ceased to exist and kept its headquarters.

90. The registered address of a football club usually pertains to the location of its offices or central services and is largely ignored by the majority of the people who engage in any kind of relationship with it, especially the fans who are normally only aware of the sports infrastructure where a club trains and/or plays its matches, but not of the actual registered address. In fact, the Sole Arbitrator is convinced that most of the public perceives the stadiums in which a club plays as its "headquarters", as sometimes these elements coincide.

91. As a result, the Sole Arbitrator is of the view that this is a factor of minor importance against considering the New Mersin as the successor of the Original Mersin. This approach is consistent with the jurisprudence of CAS 2020/A/7092, CAS 2020/A/7314 and CAS 2021/A/8061.

2. *Name and Nickname*

92. The New Club is called "Yeni Mersin Idmanyurdu Futbol A.S." and the Original Club was called "Mersin Idman Yurdu" (it recently changed its name to Mersin Talim Yurdu). The term "Yeni" is the Turkish word for "New" – which means that, in essence, the New Club is literally calling itself "New Mersin".

93. While the terms "Idman" and "Yurdu" mean "training facilities" in Turkish and are apparently commonly used, as well as the fact that "Mersin" is a reference to the city, this does not deter the Sole Arbitrator from finding the similarities between the name of the New Mersin and Original Mersin as very striking and relevant, since that element obscures any differences of identities between the Clubs.

94. The fact that around 32 teams in Türkiye use the name "IDMAN YURDU" is also irrelevant, since most of these teams compete at the amateur level or have a very low visibility and reputation, the only exception being the club "Tarsus Idman Yurdu", which is also based in Mersin.

95. It follows that, even if the terms "IDMAN YURDU" are common in Türkiye, the New Mersin is not easily confused with any other club besides the Original Club, in other words, these elements do not "diminish" the relevance of the similarity between the names of the New Mersin and the Original Club.

96. The Sole Arbitrator also deems it very important to note the history of New Mersin's current name.

97. As the New Mersin stated, in its Appeal Brief, it *"(…) changed the Appellant's name to "İÇEL İDMAN YURDU" in 2019 after the Original Debtor halted their operations in order to honor the city's successful football history. In 2022, Appellant's name has changed to "Yeni Mersin İdmanyurdu A.Ş." because (i) of the public pressure (will be explained in detail under the Public Perception), (ii) there is no trademark regarding the name of the Original Debtor, Mersin Idman Yurdu"*.

98. The Sole Arbitrator is forced to recognize that the New Mersin's change of name was directly tied to the Original Mersin's cessation of activities, as it expressly confesses this in its Appeal Brief. Moreover, the New Mersin confesses that it decided to change to a name very similar to that of the Original Mersin due to *"public pressure"*. There is little doubt that this choice of name does not give the New Mersin an identity which is autonomous and different from that of the Original Mersin.

99. As for the "nickname" of the Original Mersin and the New Mersin, the Parties have refrained from commenting on potential similarities.

100. While the Sole Arbitrator will further assess below the issue of the public perception regarding the New Mersin, it should be noted that, just as decided in cases CAS 2020/A/7902 and CAS 2020/A/7314, this Sole Arbitrator also considers that the similarity of names and identity is a relevant factor that favours the recognition of New Mersin as the successor of Original Mersin.

3. Legal Form

101. The Sole Arbitrator notes that the legal form of the Original Club is an association under Turkish law that continues to exist legally under the name *"Mersin Talim Yurdu SK"*, whereas the New Mersin is a joint stock company under Turkish law (an *"Anonim Şirketi"* or *"A. Ş."*).

102. The legal structures of the New Mersin and the Original Club differ. The Sole Arbitrator has also observed that the VAT number and the registration number of the entities before the TFF are also different.

103. Following the line of the case CAS 2020/A/7314, since there's no meaningful difference in this matter, the Sole Arbitrator considers the legal form is a relevant factor against considering the New Mersin as the sporting successor of the Original Club.

4. Team Colours

104. The Sole Arbitrator notes that the colours of the New Mersin and the Original Club are the same: red and navy-blue. While the Appellant states that a lot of teams in Mersin use the same colours, since they are associated with the city itself, the Respondents note that the New Mersin's original colours were black and white.

105. While the fact that the New Mersin and Original Mersin share the same colours cannot automatically entail that one is a successor to the other, it is curious to note that the colours of New Mersin changed precisely when it decided to change name and logo – which happened right after the Original Club ceased its professional activities.

106. Moreover, it has been established that the New Mersin is currently the only professional team in the city using the red and navy-blue colours and the team jerseys of the Original Club and the New Club share some striking similarities, following the same colour scheme and even having identical patterns.

107. This much can be confirmed by comparing the team jerseys below:

Figure 1 – Old Mersin Kit

Figure 2 – New Mersin

108. As the jurisprudence of the CAS recognizes (*see*, among others, CAS 2020/A/7092, para. 96, CAS 2020/A/7314, para. 221 and CAS 2021/A/8061, para. 234), the colours of a club, along with its name, are a relevant factor of its identity and a main influencing element of the market perception about a club. Therefore, this factor is relevant and favours the recognition of New Mersin as the sporting successor of the Original Club.

5. *Team crest/emblem/logo*

109. The team crest of New Mersin is strikingly similar to that of the Original Mersin, as can be seen by the pictures below:

Figure 3 – New Mersin's logo

Figure 4 – Original Club's logo

110. More importantly, the Sole Arbitrator wishes to note the evolution of the New Mersin's logo, as the Appellant itself submitted in its Appeal Brief:

Figure 5 – New Mersin logo evolution

111. As is clear from the above, the New Mersin has historically revolutionized its logo, which has evolved in the direction of becoming very similar to that of the Original Club. The first change of the logo, which occurred in 2019, around the same time when the Original Club ceased its activities, cannot be ignored by the Sole Arbitrator, which considers it to be sound evidence of the New Mersin's intention to create an identity that is closely aligned to that of the Original Club, regardless of the motives behind this change.

112. The only notable difference between the current logo of the New Mersin and the logo of the Original Mersin relates to the replacement of mention of the year 1925 with the words "A.S.", which relate to the New Mersin's legal form. Aside from that, and small colour differences, it is clear that the logos could be easily confused by the general public.

113. As a result, the Sole Arbitrator, in line with CAS 2020/A/7314 (since there is no reason to depart from that jurisprudence in this matter), finds this to be a relevant factor in favour of considering the New Mersin as the sporting successor of the Original Mersin.

6. *Transfer of Players & Technical Staff*

114. As per the information provided by the TFF in the First Investigatory Report, the New Mersin registered 23 players who had been formerly registered with the Original Club. The Appellant disputes the relevance of this fact, since most of these players were amateur players who played football in the city's amateur teams and this element is not definitive in and of itself when considered in relation to the totality of the evidence (CAS 2020/A/7290).

115. The Sole Arbitrator notes, however, that the New Mersin also admits that it registered around 23 players which had previously been registered with the Original Club, even if the majority of these were amateurs.

116. While the fact that most of the players transferring from the Original Club to the New Mersin are simply amateurs contributes to the belief that it is not a relevant transfer of players, it cannot be ignored that 23 players transferring, even if amateurs, demonstrates that the New Mersin likely became the city's biggest and most influential club since the Original Club ceased its professional activities.

117. In fact, this massive transfer of the players to the New Mersin, occurring precisely after it started to associate itself closer with the Original Club due to the "public pressure", could be seen as relevant for the assessment of the public's perception of the club, since the movement of these players could give the impression that the New Mersin was, indeed, the continuation of the Original Mersin.

118. On the other hand, the Sole Arbitrator also found it relevant to note that apparently no professional staff moved from the Original Club to the New Mersin, which is indicative of the inexistence of any sporting succession between them.

119. It is also important to note that, as the Appellant points out, it is not able to collect any solidarity or training compensation for the Original Club's players, since it has a different registration number before the TFF. However, in cases of sporting succession, where a new entity is succeeding an old one, the registration numbers will always be different and, as such, the collection of those payments should not be possible in any case – therefore, this argument seems to lack any relevance to the present case.

120. Based on the above, and as per CAS 2020/A/7314, the Sole Arbitrator is of the opinion that the transfer of players between the Original Club and the New Mersin is a relevant factor that contributes to the conclusion that the latter is the sporting successor of the Original Club.

121. On the other hand, the lack of any technical staff being transferred from one club to another is a relevant factor that contributes to the conclusion that the New Mersin is not the sporting successor of the Original Club.

7. Shareholders, stakeholders, ownership and management

122. As per the First Investigatory Report and the Disciplinary Decision, five out of six of the Original Mersin's board members are a part of the New Mersin's board of directors. The Appellant claims that these findings were deficient, as it states that the referred board members ceased their functions when the 2019/2020 season ended. In addition, the New Mersin's only shareholders according to the Appellant are Mr. Metin Saltik and Mr. Serdar Saltik, which manage said club currently.

123. The Sole Arbitrator wishes to highlight, however, the justifications presented by the Appellant for the inclusion of the board members mentioned in the First Investigatory Report in the New Mersin:

a) "Mr. Sabri Tekli is the Chairman of the Board of Directors of Mersin Organized Industrial Zone. He is one of the most beloved and prominent figures of the city of Mersin".

b) *"Mr. Beşir Acar is the executive board member of one of the most known companies in Mersin "Acar Group". This Group Company owns Mercedes Benz, S Oil, Şehri Nur Hotel, Acarlar Rent a Car, Ramada by Wyndham Hotel. It can be understandable that, those companies have very important role for any Club due to need of accommodation, renting cars and oil company".*

c) *"Mr. Mehmet Hanifi Işık owns one of the biggest gas oil company in Mersin which is "Memoil".*

d) *"Mr. Şevket Varan, the current president of the Original Debtor, was elected as a board member for the Appellant in on the congress on held on 28.06.2019 when the Appellant was an association. He resigned within three months on 28.10.2019. The reason why Mr. Şevket Varan was elected to the management of the Appellant was the belief that he could be useful to the team with his knowledge about professional football life and club management as he was the board member of the Original Debtor even when they are in the highest professional league of Turkey".*

124. In addition to this, the Sole Arbitrator also notes that regarding the individuals mentioned above in paras. a), b) and c), the New Mersin stated that *"*[t]*hose 3 individuals are important and leading people of the city of Mersin. All of them are businessman and their support is needed for their city teams. That is the only reason that those 3 individuals were on board. Like the general public, all individuals were trying to achieve one goal. To create a team that can represent the city at a professional level".*

125. Considering the above, it is clear for the Sole Arbitrator that at least some managers and important individuals associated with the Original Club ended up associating with the New Mersin at the management level, even if for a brief period. Moreover, they did this because they wanted to *"create a team that can represent the city at a professional level"*, or, in other words, their intention was to allow the New Mersin to "fill in" the gap left by the Original Club.

126. The Sole Arbitrator is, as such, convinced that these transfers of managers between the Clubs served the purpose of continuing the legacy and work of the Original Club via the New Mersin, as is expressly admitted in the Appeal Brief. Moreover, the Appellant was not able to present any proof that these managers had already resigned by the time the First Investigatory Report was produced, since it presented no evidence that could contradict the documents which were sent by the TFF to FIFA.

127. As for the shareholders and stakeholders, seeing as the Clubs have very different legal forms, the Original Mersin was held by the members of that association, while the New Mersin is held by Mr. Metin Saltik and Mr Serdar Saltik, which are the sole and major shareholders (as far as the provided information goes).

128. It follows therefore that the management factor favours the existence of sporting succession between the Clubs, while the shareholders and stakeholders does not.

129. Considering that many of the board members of the Original Club were "transferred" to the New Mersin, and despite the difference in the ownership

of the Clubs, the Panel finds this to be an important factor in favour of considering New Mersin as the sporting successor of Original Mersin, in line with CAS 2020/A/7314, para. 234.

8. Category of competition concerned

130. The Sole Arbitrator notes that, according to the TFF information presented on the First Investigatory Report, the New Mersin and Original Mersin competed in the following competitions:

Season	**Original Mersin**	**New Mersin**
2022/2023	Local Amateur League	4th Professional Division
2021/2022	Local Amateur League	4th Professional Division
2020/2021	Local Amateur League	4th Professional Division
2019/2020	Local Amateur League	Regional Amateur League 5th Group
2018/2019	Regional Amateur League	Regional Amateur League 5th Group
2017/2018	3rd Professional Division	---
2016/2017	2nd Professional Division	---
2015/2016	1st Professional Division	---

131. As per the above, the New Mersin and Original Mersin competed in different categories and co-existed (and still co-exist). As such, the New Mersin did not start competing in the same division as the Original Mersin, meaning it did not rely on its sporting achievements to start at a higher division for Turkish football.

132. As stated in CAS 2020/A/7314, paras. 239 and 240, the Sole Arbitrator is also of the view that the "category of competition concerned" is one of the most relevant factors to establish or not a link for the sporting succession, as it would entail a truly "replacement" of the original club's place in a competition in favour of the new club.

133. In light of the above, the Panel finds this to be an important factor against considering New Mersin as the sporting successor of Original Mersin.

9. The establishment of the Clubs

134. The Appellant pleads that the New Mersin and Original Mersin were founded in different years:

a) New Mersin: founded as "*İÇELSPOR KULÜBÜ*" on the year of 1964; and
b) Original Mersin: founded as "*MERSIN İDMAN YURDU*" on the year of 1925.

135. Based on the above, as well as the different competition in which the Clubs were involved, the Appellant pleads that these have a different history, since they have always been separate entities with no connection. The Respondents do not attribute much weight to this factor and FIFA states it has not been relied on in the Appealed Decision.

136. While certainly an element that appears to indicate the Clubs have a different story, different achievements and legacy, the Sole Arbitrator must also note that this is not a decisive factor, since the case at hand pertains to the similarities between the New Mersin and the Original Mersin since 2019, the moment in which the Original Mersin stopped competing professionally and the New Mersin changed its current name to *"Yeni Mersin Ydmanyurdu Futbol A.S."*.

137. It is clear that the difference in the founding years is not a factor that can be decisive since, as was seen above, it is already been made clear that the New Mersin and Original Mersin are different entities – the real question, however, relates to the possibility that the New Mersin is portraying itself as the successor of the Original Mersin.

138. In light of the above, the Sole Arbitrator finds this to be an element of <u>minor importance</u> against considering New Mersin as the sporting successor of Original Mersin.

10. <u>Titles and sporting achievements of Original Mersin</u>

139. The Sole Arbitrator notes that the New Mersin does not rely on the Original Mersin's sporting achievements and titles. Neither the FIFA nor the Player contest this conclusion.

140. Sporting achievements and titles are a key part of any football club's legacy, since these moments constitute a fundamental part of that entities' history and are frequently cited by the fans and stakeholders. It is not possible to deny the importance of this element which constitutes a fundamental part of a club's identity.

141. Considering the above, the Sole Arbitrator finds this to be an <u>important</u> element against considering New Mersin as the sporting successor of Original Mersin.

11. <u>Stadium</u>

142. It is an undisputed fact that the New Mersin and Original Mersin use the same stadium, however, the Appellant pleads that this happens merely because the Mersin Stadium, which was built for the 2013 Mediterranean Games, is the only stadium capable of hosting professional level football. However, the Respondents point out that the other professional teams in Mersin (Tarsus Idman Yurdu and Silifke Belediye Spor) play their matches in their own stadiums.

143. The Sole Arbitrator points out that this element is usually seen as not very relevant. This conclusion is achieved because of the convenient location of the stadium, which is already well equipped and prepared for the practice of professional football.

144. The use of the stadium is not a result of any assignment by Original Mersin but rather seems to be a choice of the New Mersin. Considering that other teams in the city already use their "own" stadiums, it makes sense for a newly successful club to use the biggest stadium of the city, especially if it is now vacant.

145. Despite this, there is no denying that a football club's stadium is at the heart of its identity, serves as the physical and emotional epicentre for the club's

community, history, and culture. It is within the stadium's walls that unforgettable moments of triumph and heartbreak are etched into the collective memory of the public. The stadium stands as a symbol of local pride, reflecting the club's legacy and traditions, and providing a communal space where supporters from diverse backgrounds unite in their shared passion.

146. A club's stadium is, in many ways, similar to a "temple". It is where fans gather to express their devotion to their club, experience the highs and lows of their team's journey and take part in rituals that unite them. The "New Mersin" identity of the stadium creates a deep sense of belonging and continuity for those who enter its doors, be they fans, players or even followers. New Mersin's identity of belonging and unity with the stadium is not a coincidence, but a way of creating and consolidating a sense of identity and belonging. This identity is achieved through the identity of the stadium's colors (navy and red) with the colors of the New Mersin.

147. In the present case, there can be no doubt that the Mersin Stadium was deeply associated with the Original Club's legacy and known to all the football community as its "home" and has the colours of the Original Club - based on this, the use of this stadium by the New Mersin was ideal to cement the feeling of continuity.

148. As a result, considering the specific circumstances of this case, the Sole Arbitrator finds that the use of the stadium is a relevant factor in favour of considering that New Mersin is the sporting successor of Original Mersin.

12. Reliance on the same supporters

149. The New Mersin is accused in the Appealed Decision of relying on the support of the fans of the Original Mersin. From the perspective of the Appellant, since the Original Mersin was the best known and most successful club of the city, it was not possible to prevent the old supporters, which were left without a team to support, from associating with the New Mersin.

150. On the other hand, the Respondents contest this and highlighted that the New Mersin is deliberately associating itself with the Original Mersin and that it admitted this is happening due to public pressure. In fact, the fan club of the Original Mersin, the *"Mersin Idman Yurdu Saytanlar* [devils]*"*, even went as far as stating that they were *"witnessing the resurrection of our Mersin Idman Yurdu"*.

151. The Sole Arbitrator cannot ignore the fact that the New Mersin has changed its name, logo and colours to become more like the Original Mersin and that this played a deciding role in attracting the fan base of that club to the New Mersin. In fact, the New Mersin never contested that this was indeed happening, only tried to justify it with the idea that the fans would not accept the New Mersin to have any other name and identity than that of the Original Mersin.

152. The fact that the New Mersin was a small club that decided to "fill in" the gap left by the Original Mersin, changing its colour and logo to more closely align with that club, also helps to understand the reasons why the fans decided to support this club – and, as a consequence, there is no doubt that the

New Mersin relies on them as their main fan base.

153. Based on the above, it is clear for the Sole Arbitrator that this is a relevant factor that seems to support the allegation that the New Mersin is the sporting successor of the Original Mersin.

13. Co-existence of the Clubs during the same period

154. It is unquestionable that the New Mersin and the Original Mersin coexisted during the same period, and, in fact, the Original Mersin is still operating under a different name (*see* above para. 130-131)

155. While the Appellant does not directly rely on this argument to make a case for the lack of any sporting succession, the Sole Arbitrator deems it useful to recall the reasoning in case CAS 2019/A/6461: *"two separate legal entities operating simultaneously over a certain period of time is not a decisive factor to rule out sporting succession. (…)".* (para. 52).

156. The legal and *de facto* co-existence of the Clubs does not exclude the possibility that one is the sporting successor of the other. On the contrary, the fact that they co-exist and share the same premises and "values" could be evidence of what is commonly referred to as a "handover period" between one club and the other. In any event, it is the opinion of the Panel that the effect of this factor on the analysis and decision regarding the existence of sporting succession between the Clubs, is neutral (CAS 2020/A/7314, para. 262).

157. As such, based on the above, the temporal co-existence of the Clubs irrelevant.

14. The reason(s) behind the appearance of the new club

158. The Panel considers that it is also important to consider the motive and raison d'être of the appearance of the New Mersin. To this end, the Sole Arbitrator is comfortably satisfied that the reasoning for the New Mersin's appearance, linked to its logo, colours and name changes, was clarified by that club itself in its Appeal Brief:

a) *"(…) despite the fact that there are similarities between the Original Debtor and the Appellant, these similarities had to be created due to public pressure and due to the football culture of the city".*;
b) "*In 2022, Appellant's name has changed to "Yeni Mersin İdmanyurdu A.Ş." because of the public pressure…"*;
c) *"(…) the Appellant, which is founded in 1964, named İçelspor, has been fighting in the amateur league for 54 seasons, has increased its success in this period and started to make successful debuts and started to win championships in the amateur league. Following this development, İçelspor (Appellant) started to progress towards becoming the new city team of Mersin. As a result of this, citizens of Mersin who longed for the city Club embraced this club and devoted all their support to the new club as there is no other city club".*;
d) *"There is pressure from the public towards Appellant as being the most successful club in the city to mimic the city's oldest club"*;
e) *"The city, like the old times, wants a city team in the highest competition".*

159. The Sole Arbitrator is satisfied, following the presented evidence and allegations of the Parties, the New

Mersin's transformation was not caused by any intention to "evade" or "frustrate" performance by the Original Mersin of its pecuniary responsibilities.

160. On the contrary, it became clear to the Sole Arbitrator, based on the evidence and the pleadings at the hearing, is convinced that the New Mersin's transformation was prompted by the city's public pressure for this club to "continue" the legacy in professional football of the Original Mersin – however, the New Mersin was never "obliged" or "forced" to follow this path, nor is this a reason that could disqualify the finding of an eventual sporting succession, but merely an observation.

161. In essence, the emergence and transformation of the New Mersin does not appear to have its roots in any abusive conduct, which are almost always identified as the reason for Article 21.4 FDC, but it is instead based on the Appellant's willingness to create some similarities with the Original Mersin, in part caused by the public pressure it felt from the city's inhabitants and the Original Mersin fans to become the de facto main professional team of Mersin, therefore giving continuity to the sporting project of Original Mersin.

162. This situation is an additional complication that does not assist the New Mersin to prove the absence of sporting continuity between it and the Original Mersin. For the above reasons, this finding is an important factor that favours a finding that New Mersin is the sporting successor of Original Mersin.

15. The Public Perception regarding the New Mersin

163. Coming to the analysis of the final factor brought forth by the Appellant, the Sole Arbitrator highlights that CAS jurisprudence gives great weight to the element of public perception, i.e., how the new club is seen by the public (*see*, among other, CAS 2023/A/9386, para. 138; CAS 2021/A/8446, para. 154; CAS 2020/A/7543, para. 112).

164. The Appellant pleads that it is not seen by the general public as being the successor of the Original Club, since the fans and city inhabitants were very reluctant to accept the New Mersin. In the eyes of the Appellant, many of the fans of the Original Mersin and city inhabitants were unhappy about the efforts to revive the football culture of the city under any name different to that of the Original Mersin. In fact, the fan club of the Original Mersin (the abovementioned "devils") did not accept the New Mersin at first.

165. On the opposite side, the Respondents argue that the New Mersin clearly had the intention of being seen by the general public as a "continuation" of the Original Mersin, or even the same club, regardless of the cause for that, which is identified by the Appellant as being the public pressure of the city's inhabitants and football fans. Moreover, FIFA pointed out that the New Mersin often posted photos of supporters wearing jerseys of the Original Mersin on its social media pages and even celebrated the birthday of the establishment of the Original Mersin.

166. The Sole Arbitrator, having assessed all the elements and evidence brought forward by the Parties, is forced to conclude that there is no doubt that the

New Mersin is portraying itself as the successor of the Original Mersin's legacy in the football culture of the city. Indeed, as seen above in the preceding sections, the similarities between the clubs' appearance, the reliance on the same set of supporters and even the reasons that were advanced for the transformation of the Appellant after the Original Mersin ceased its professional activities confirm that it intends to be seen by the public as the only successor of the Original Mersin.

167. It is also striking to note that the New Mersin does not deny this, instead it only tries to justify it with the "public pressure" exercised on it by the city's inhabitants and important people – however, the Sole Arbitrator most point out that such influence, which appears to have been a reality, cannot be seen as means to allow the New Mersin to avoid the consequences of Article 21.4 FDC, should the sporting succession be confirmed.

168. While the Sole Arbitrator can understand the difficult position in which the New Mersin found itself in, it is clear from the presented facts that it never wished to become the city's main club based on its own unique identity, rather it ended up choosing to create similarities with the Original Mersin in an attempt to benefit from the city's acceptance of that club and its history.

169. It follows that the New Mersin has been on a path to be seen by the public as the successor of the Original Mersin, this being an <u>important</u> factor in the Sole Arbitrator's opinion that is in favour of considering that sporting succession occurred in the present case.

16. <u>Summary of the assessment of the factors identified</u>

170. The above assessments can be summarised as follows:

<u>Factor</u>	**<u>Minor Importance</u>**	**<u>Relevant</u>**	**<u>Important</u>**
Headquarters	(-)		
Name / Nickname		(+)	
Legal Form		(-)	
Team Colours		(+)	
Team Crest / Logo		(+)	
Transfer of Players		(+)	
Transfer of Technical Staff		(-)	
Management		(+)	
Ownership/Shareholdings		(-)	
Category of Competition Concerned			(-)
The founding year of the Clubs	(-)		
Reliance on titles and sporting achievements of the Original Club			(-)
Stadium		(+)	
Reliance on the same Supporters			(-)
Co-existence of the Clubs in the same period	(0)		
The reason(s) behind the appearance of the new club			(+)
The public perception			(+)
Total	**1 + / 2-**	**6 + | 1 -**	**3 + | 2 -**

(+) = in favour of sporting succession
(-) = not in favour of sporting succession
(0) = neutral / irrelevant

17. <u>The existence of sporting succession – conclusion</u>

171. As explained above in para. 54, the main issue to be decided by the Sole Arbitrator is the existence (or not) of sporting succession between the New Mersin and the Original Mersin on the basis of the factors assessed above, which were relied

upon by the Appellant and contested by the Respondents.

172. In favour of the sporting succession the following factors have been considered by the Sole Arbitrator:

- Important: (i) reliance on the same supporters, (ii) the reasons behind the appearance of New Mersin and the (iii) public perception.
- Relevant: (i) name/nickname; (ii) the use of the same stadium, (iii) the team colours, (iv) team crest/logo, (v) the transfer of players and (vi) management.

173. So far as the case to the contrary is concerned (*i.e.* the case against sporting succession), the factors are selected and ranked as follows:

- Important: (i) the different category of competition where both Clubs have play(ed) and (ii) the fact that the New Mersin does not appear to rely on the Original Club's titles and sporting achievements.
- Relevant: (i) the different legal form of the Clubs, (ii) the lack of any transfer of technical staff between the Clubs and (iii) the different ownership and shareholdings structures.
- Minor importance: (i) the different headquarters of the Clubs and the different founding years of the Clubs.

174. As per CAS 2020/A/7314, para. 275, the simple mathematical sum of the factor mentioned above is not enough to conclude that a club is the sporting successor of another. On the contrary, an overall assessment needs to be conducted in order to reach a conclusion in that regard.

175. In this sense, the Sole Arbitrator follows the reasoning of CAS 2020/A/7314, paras. 275-276):

"In our opinion, the reasoning and criterion to be followed should not be the counting and comparison of the factors identified for and against the existence of a sporting succession but should rather be based on a criterion based on the overall and qualitative assessment of the factors which are indicative of the existence of sporting succession. In that case, the important thing, in this case, is to establish whether the important and relevant factors that indicate the existence of sporting succession, do, or do not, suffice to comply with the requirements of Article 15.4 FDC and establish sporting continuity between the Clubs.

Stated in greater detail, this means mere confirmation whether the existence of some factors classed as "important" can, because of their intensity, be a sufficient basis for a determination that sporting succession exists, in this case. The most evident examples are the transfer of federation rights between clubs (cf. CAS 2007/A/1355) or the transfer of a significant number of players, which gives the new club a continuity with the identity of the old club".

176. In the present case, the factors considered to be important and relevant are, in the Sole Arbitrator's opinion, a sufficient basis for a determination that sporting succession (in the sense of "continuity") between the New Mersin and the Original Mersin exists.

177. Even if the Sole Arbitrator recognizes that that there is no evidence or indication that the new club arose in improper circumstances, or with the

intention to evade the "weight" of the Original Club's financial obligations, there is no doubt that the transformations endured by the New Mersin (the change of name, logo, colours, use of the same stadium), as well as its positioning in the football culture of the city, had the sole attention of portraying itself as the club that carried on the legacy of the Original Mersin – in other words, the New Mersin wanted to be seen as essentially the same club as the Original Mersin.

178. As an example, for a generic football fan it would be impossible to even distinguish between the Original Mersin and the New Mersin unless they had a deep understanding of the history that led to the current logo, colours and overall identity of the New Mersin. This suffices to state that, in the eyes of the public, they are perceived as one and the same club.

179. The Sole Arbitrator is comfortably satisfied that the New Mersin's transformation to become similar to the Original Mersin allowed it to reap some advantages which would otherwise be impossible, namely the extra visibility, support and sporting success in such a short period of time. There is little doubt that the success of the New Mersin as well as its public perception would be wholly different if it had opted to ignore the pressure and maintained its original identity – which, despite what the Appellant portrays, was always a possibility.

180. Essentially, the sporting succession in this case results from the fact that New Mersin has chosen to progressively associate itself with the image of the Original Mersin. There are no elements or even indications that this identity was made with the intention of evading responsibility. The Sole Arbitrator understands, based on the facts analysed, that New Club intended to "fill" the gap left by the Original Mersin, choosing to do so by associating its image with the Original Mersin, in order to capture the respective positive synergies.

181. This approach is in line with the decision in CAS 2011/A/2611 [free translation][1]:

"(…) If the "football clubs" require only sports recognition rather than legal recognition, it is legitimate to ask: what then is it that clearly distinguishes one from the other? In the opinion of the Single Arbitrator, the answer lies in a

[1]. The original text in Spanish: *"(…) si los "clubes de fútbol" sólo corresponden a un reconocimiento deportivo y no legal, resulta legítimo preguntarse entonces: ¿qué es aquello que los identifica claramente entre sí? La respuesta está dada, en opinión del Árbitro único, por un conjunto de elementos que se aúnan en su imagen, es decir, su nombre, colores, hinchada, su historia, logros deportivos, su escudo, trofeos, el estadio donde hace de local para disputar sus partidos, su plantel, sus ídolos históricos, etc. Son estos elementos, que, en su conjunto, permiten distinguir deportivamente a un equipo de fútbol de otro y por tanto se convierten en factores de importancia superlativa al momento de resolver una disputa de la naturaleza como la sometida al presente arbitraje (…)".* (Para. 56)

"Para este Arbitro Único, la historia del club es quizás el elemento de mayor importancia en este contexto, puesto que la misma encierra los hechos ocurridos en el pasado y que destacan los hitos relevantes en la existencia de algo. Así, la fecha de nacimiento del club manifiesta la permanencia y trascendencia del mismo en el ámbito deportivo local e internacional; los logros deportivos como, por ejemplo, títulos de campeonato constituyen probablemente el elemento de mayor distinción de un club por sobre otro y que frecuentemente es mencionado por sus dirigentes y seguidores como un factor de orgullo. (…) Se trata por tanto de elementos extralegales que identifican y distinguen a los clubes de fútbol entre sí, lo que, en todo caso, no significa que por ese sólo hecho se concluya que existe una simbiosis legal entre el equipo deportivo con la persona jurídica administradora, pero sí es un elemento que ilumina el raciocinio que hará el Árbitro Único". (Para. 58)

series of factors that are comprised in the club's image, i.e. its name, kit design, supporters, history, sporting achievements, emblem, trophies, the stadium where it plays its matches, its team, historical idols, etc. These are the factors, which together make it possible to distinguish one football team from another and which therefore become factors of superlative importance in the resolution of a dispute such as that in this arbitration (…)". (Para. 56)

"This Sole Arbitrator considers that the club's history is perhaps the most important factor in this context, since it includes the past events that highlight the relevant milestones in the existence of something. Accordingly, the date of the club's foundation demonstrated its permanence and transcendence in the local and international sports arena; its sports achievements, such as championship titles, are probably what most distinguishes one club from another, and are often referred to the club's leaders and supporters as a matter of pride. (…). These are therefore extra-legal factors that identify football clubs and distinguish them from each other, which, in any event, does not mean that it can be concluded, for this reason alone, that there is legal symbiosis between the sports team with the managing legal person, but this is nevertheless an aspect that will illuminate Sole Arbitrator's reasoning". (Para. 58)

182. In addition, the Club's perceived lack of any fraudulent or abusive intent, even if confirmed, does not negate the conclusions reached by the Sole Arbitrator, since sporting succession does not require any abusive or fraudulent conduct to be confirmed, this much being confirmed by CAS jurisprudence, as mentioned above in para. 66 and, among others, on the case CAS 2020/A/7543, para. 96.

183. As a final note, it should also be noted that, as per the evidence presented on file, there is no indication that the Player himself failed to exercise the necessary due diligence in collecting the debt (CAS 2011/A/2646). There have been no allegations in the written submissions about this matter and, as far as it was possible to ascertain, the Original Mersin is not involved in any insolvency proceedings in which the Player would be able to try and recover his credit – as a result, the Sole Arbitrator sees no reason to apply the doctrine of CAS 2011/A/2646 to the case at hand.

184. For all the reasons stated above, the Sole Arbitrator considers that the prerequisites for the existence of sporting succession between the Clubs have been met and the New Mersin shall be considered as the sporting successor of the Original Mersin.

E. What are the consequences for New Mersin based on the sporting succession?

185. The New Mersin breached Article 21.4 FDC and, as a consequence, said provision mandates it to pay the amounts due to the Player as indicated in the FIFA DRC Decision. In addition, since it never paid those amounts, the New Mersin was considered in the Appealed Decision as having failed to comply with the FIFA DRC Decision, pursuant to Article 21.1 FDC.

186. Article 21.1 FDC establishes that, in accordance with paragraph 1 of that provision, the applicable sanction is indeed a fine for failing to comply with a decision – in this sense, a fine of CHF 15,000 was deemed appropriate, since, according to Article 6 (4) FDC, when applying a fine, the FIFA has the discretion to apply a minimum CHF 100

fine and a maximum fine of CHF 1,000,000.

187. However, in its Appeal Brief, the Appellant also states that, in the event of the sporting succession being confirmed, that the monetary fine imposed on it is unjust, an allegation which the Respondents disagree with.

188. Despite this, in its prayers for relief it only requested the Sole Arbitrator *"to annul the Decision and issue an award determining that the Appellant is not the sporting successor of the Original Club and, therefore, not liable for the debts incurred by the Original Club towards the Player, not subject to Art. 15 FDC, and there should be no fine and transfer ban against the Appellant"*. It seems, as such, that the Appellant failed to plead a subsidiary relief for the event that it would be held as the sporting successor of the Original Mersin.

189. As a result, the Sole Arbitrator is barred from altering the Appealed Decision when it comes to the imposed fine, since it would be acting *ultra petita* in this case.

190. It follows that it is unnecessary to assess if the imposed fine is proportional or not to the case at hand and the Appealed Decision shall be confirmed. In any case, the Appellant has even failed to explain exactly why it deems the fine as "unjust" or "disproportionate" – this would always prevent the CAS from making a judgement on the matter, since pursuant to longstanding CAS jurisprudence: *"(…) there is an established line of CAS jurisprudence which states that sanctions imposed by the FIFA DC can only be amended by a CAS panel if the sanction(s) concerned are evidently and grossly disproportionate to the offence. Accordingly, the Panel considered that it could only grant the Club the requests for relief quoted above if it considered the sanctions imposed by the FIFA DC in the Appealed Decision to be 'evidently and grossly disproportionate to the offence"*. (*see*, among others, CAS 2018/A/5900, para. 94).

F. Conclusion

191. Based on all the foregoing, and after having given due consideration to the specific circumstances of this case, the evidence produced and the arguments submitted by the Parties, the Sole Arbitrator finds, based on comfortable satisfaction, that the Appellant is the sporting successor of the Original Debtor.

192. The case at hand presents some remarkable differences to "classic" cases of sporting succession in which the old club is effectively replaced by a new and fresh entity. In this case, the Sole Arbitrator has been called to assess if an already existing club, with an already existing history, may be deemed as the successor of another club which ceased its professional activities despite still existing and competing at an amateur and non-affiliated level.

193. The complexity of this case relates to the fact that the New Mersin willingly pursued a path of "transformation" by virtue of which it portrayed itself to the city and the football community as the "successor" of the Old Mersin, bearing in its shoulders the weight of continuing the legacy of that club and upholding its reputation in Turkish and international football.

194. It is also important to highlight that this "transformation" of the New Mersin meant that it basically "abandoned" its previous identity and adopted the

identity of the Old Mersin in all important aspects of it, as the analysis conducted clearly shows. By doing so, there can remain no doubt that it intended the public to see it and identify as the "new" Original Club.

195. While the Sole Arbitrator is sensible to the "public pressure" that the New Mersin felt to "fill in the gap" left by the Original Club, there can be no doubt that such a circumstance cannot serve as an excuse nor as a factor that could exclude the existence of sporting succession, which is to be evaluated from an objective point of view – and, in that sense, it is clear the New Club only grew as fast and successfully as it did because it "transformed" and created a sense of similarity with the Original Club, taking advantage of its established fans, culture and reputation.

196. After a careful assessment of the evidence and arguments presented, the Sole Arbitrator is therefore comfortably satisfied that the New Mersin is indeed the sporting successor to the Old Mersin.

197. Consequently, the Appeal Decision is confirmed, and the Appellant is ordered to pay the Debt, pursuant to Article 21.4 FDC.

198. All other motions and requests for relief are rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Yeni Mersin Idman Yurdu A.S. on 17 March 2024 against the decision issued by the FIFA Disciplinary Committee on 8 February 2024 is dismissed.

2. The decision issued by the FIFA Disciplinary Committee on 8 February 2024 is confirmed.

3. (…).

4. (…).

5. All other motions or prayers for relief are dismissed.

CAS 2024/A/10514
Sporting du Pays de Charleroi v. Fédération Internationale de Football Association (FIFA)
12 November 2024

Panel: Mr Fabio Iudica (Italy), Sole Arbitrator

Football
Transfer – Training compensation entitlement
Standing to sue/to be sued
Standing to be sued in the context of training compensation entitlement
Mandatory joinder of parties
Consequence of falling to call the right respondent to proceedings

1. ***Légitimation active/passive*** **derives from the mere fact of legally owning the right in dispute, i.e. a party has standing to sue or to be sued if a substantive right of its own is concerned by the claim.**

2. **The Electronic Player Passport (EPP) review process clearly involves the relationship between the player's training club and the new club with which the player was first registered as a professional after his transfer from the training club. This situation, would, in principle, trigger an entitlement to training compensation in accordance with the FIFA Regulations on the Status and Transfer of Players (FIFA RSTP). In a claim for training compensation entitlement by the training club against the new club, it is undeniable that the new club has an interest in relation to the subject matter of the present dispute, as it may be liable for the relevant payment. Consequently, the new club should be summoned in the proceedings in compliance with the right to be heard.**

3. **According to Article R48 of the CAS Code, the appellant has the responsibility to indicate in the statement of appeal *"the name and full address of the Respondent(s)"*. However, neither the FIFA Statutes nor any another FIFA regulations nor the CAS Code contain any specific provision regarding standing to be sued or mandatory joinder of parties. It is the appellant's responsibility to meet the necessary requirements of an appeal, in particular by identifying the appropriate respondent(s) already with the statement of appeal, and it is not possible to circumvent such obligation by requesting to join such party at a later stage. In fact, the CAS Code does not allow such a "correction/substitution" of a respondent, especially when the time limit to file the appeal has expired. In addition, any change in the identification of a respondent through joinder is not possible based on Article R56 of the CAS Code.**

4. **Under Swiss Law, issues relating to standing to be sued are generally considered a reason to reject an appeal on the merits. Therefore, if the prayers for relief, whatever the decision of the CAS panel may be, will affect the rights of a third party that has not been named as respondent in the proceedings before the CAS, there is no scope of review for the CAS panel and the appeal must be dismissed.**

I. INTRODUCTION

1. This appeal is brought by Sporting du Pays de Charleroi against the Determination of the FIFA General Secretariat on the Electronic Player Passport 29610 for the Player A. issued on 4 April 2024 (the "Appealed Decision") in connection with the generation of the Electronic Player Passport ("EPP") following the first registration of the Player as a professional with A.S. Monaco.

II. PARTIES

2. Sporting Pays du Charleroi ("Charleroi" or the "Appellant") is a professional football club based in Charleroi, Belgium, competing in the first division of the Belgian championship and affiliated with the Royal Belgian FA which, in turn, is affiliated with Fédération Internationale de Football Association (FIFA).

3. FIFA (the "Respondent") is an association under Swiss law, with its headquarters in Zurich, Switzerland. It is the governing body of football worldwide.

4. The Appellant and the Respondent are hereinafter jointly referred to as the "Parties".

III. FACTUAL BACKGROUND AND THE FIFA PROCEEDINGS

5. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions on the file and relevant documentation produced in this appeal. Additional facts and allegations may be set out, where relevant, in connection with the further legal discussion. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in this award only to the submissions and evidence he considers necessary to explain his reasoning.

6. On 25 August 2023, the Belgian player A., born [in] 2007 (the "Player"), transferred from Charleroi to the French club A.S. Monaco FC as a free agent, this being the first registration of the Player as a professional.

7. On the same day and as a consequence of the Player's transfer, a training rewards trigger was identified in relation to the Player's registration with the A.S. Monaco F.C. in accordance with Articles 20 and 21 of the FIFA Regulations on the Status and Transfer of Players (the "RSTP"), consisting in the first registration of the Player as a professional before the end of the calendar year of his 23rd birthday. Therefore, an EPP was duly generated in the FIFA Transfer Matching System (the "TMS") in accordance with Art. 8.1 of the FIFA Clearing House Regulations ("the FIFA CHR").

8. In accordance with Art. 9 of the FIFA CHR, the EPP review process took place with the participation of the member associations concerned, as well as the Appellant and A.S. Monaco F.C.

9. During the EPP review process, the participating member associations provided all relevant registration information of the Player according to which it was acknowledged that the Player had always been registered as an amateur with the Appellant since his 12th

birthday. Moreover, it was also undisputed that the Player transferred to A.S. Monaco F.C. as an out of contract player and registered with the latter for the first time as a professional before the end of the calendar year of his 23rd birthday.

10. In order to meet the requirement of Art. 6 of Annex 4 to the FIFA RSTP for the entitlement to training compensation in the case of players moving within the territory of the EU/EEA (which is applicable to the present case), the Appellant submitted a signed contract offer to the legal representative of the Player dated 17 May 2023 and an undated proof of delivery that appeared to be signed by the legal representative of the Player.

11. In turn, A.S. Monaco F.C. submitted its position with respect to the documentation filed by Charleroi, arguing that the Appellant was not entitled to training compensation, failing any proof that a contract offer had been duly notified in accordance with the provisions of the FIFA RSTP.

12. In the course of the review process, the matter was referred to the Single Judge of the FIFA Dispute Resolution Chamber (the "DRC"), in accordance with Art. 10.3 of the FIFA CHR, for consideration on the EPP with respect to the distribution of training rewards in relation to the Player's registration with A.S. Monaco F.C. as a professional.

13. Based on the information and documentation collected by the General Secretariat during the EPP review process, the Single Judge noted that Charleroi would, in principle, be entitled to training compensation in accordance with Annex 4 to the FIFA RSTP, in connection with the Player's first registration as a professional with A.S. Monaco F.C.

14. In addition, the Single Judge also considered that the Player moved between clubs that are based inside the territory of the EU and that Art. 6 of Annex 4 to the FIFA RSTP foresees special provisions for players moving from one association to another inside the territory of the UE/EEA. In this context, the Single Judge recalled that, according to the jurisprudence of the FIFA DRC and CAS on the applicability of Art. 6.3 of Annex 4 to the FIFA RSTP, there is no precise deadline within which the former club must offer such player a contract in order to be entitled to training compensation in case where the player was an amateur with the former club: *"when the former club is a professional club and the player was always registered under amateur status, then the former club has to justify its entitlement to training compensation by way of a contract offer to the player that should have been made at any time during their registration relationship"*.

15. To this effect, the Single Judge noted that the alleged delivery confirmation of the contract offer submitted by the Appellant is not dated and deemed that, consequently, it was impossible to establish that the alleged contract offer to the Player, dated 17 May 2023, had been duly notified to the Player or to his legal representative on or before 30 June 2023 (i.e., the day upon which the registration of the Player with Charleroi expired).

16. As a consequence, the Single Judge concluded that the provisions of Art. 6.3 of Annex 4 to the FIFA RSTP were not

met. Moreover, taking into account that Charleroi had not otherwise demonstrated a genuine interest in retaining the services of the Player, in his decision of 3 April 2024, the Single Judge concluded that Charleroi was not entitled to any training compensation in connection with the Player's first registration as a professional with A.S. Monaco F.C.

17. On 4 April 2024, in accordance with Art. 10.5 of the FIFA CHR, the parties to the review process were notified of the Determination of the FIFA General Secretariat on EPP 29610 based on the decision of the Single Judge of the FIFA DRC, whereby the General Secretariat decided that Charleroi is not entitled to training compensation in connection with the Player's registration with A.S. Monaco F.C. (the "Appealed Decision").

IV. THE APPEALED DECISION

18. The operative part of the Appealed Decision reads as follows:

"In consideration of the above and in accordance with the FCHR and annexes 4 and 5 to the RSTP, the FIFA general secretariat has determined the entitlement of clubs to training rewards for the above trigger as follows.
No club is entitled to training compensation.
All the above determinations and decisions are reflected in the EPP in question and/or will be considered in the generation of any Allocation Statement from this EPP for the calculation and distribution of training rewards in accordance with article 13 of the FCHR.
Pursuant to article 57 paragraph 1 of the FIFA Statutes and in accordance with article 10 of the FCHR, this decision may be appealed before the Court of Arbitration for Sport within 21 days of notification. The final EPP will remain available in TMS".

V. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

19. On 10 April 2024, the Appellant filed its Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against FIFA with respect to the Appealed Decision, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration, 2023 edition (the "CAS Code"). The Appellant requested that the present matter be submitted to a sole arbitrator and chose French as the language of the arbitration.

20. On 15 April 2024, the CAS Court Office granted the Appellant a deadline until 25 April 2024 to complete its Statement of Appeal in order to fulfil the requirements of Article R48 of the CAS Code by submitting the following information:

- The name and full address of the respondent or the respondents;
- The Appellant's requests for relief.

21. On 17 April 2024, the Appellant provided the requested information. In particular, the Appellant confirmed that *"l'intimé est: Fédération Internationale de Football Association"* and added that A.S. Monaco F.C. was the *"club concerné pour le payement de l'indemnité"*.

22. On 18 April 2024, the CAS Court Office notified A.S. Monaco F.C. of the Appellant's Statement of Appeal, and informed the latter that, although it had not been named as a respondent in the present procedure, it could participate as a party to the arbitration by submitting an application to this effect, in accordance with Art. R41.3 of the CAS Code.

23. A.S. Monaco F.C. did not file any application for the purpose of Article R41.3 of the CAS Code.

24. On 22 April 2024, FIFA informed the CAS Court Office that it did not agree that the present arbitration proceedings be conducted in French and that English should be the language of the arbitration, although FIFA would not object to the Parties being allowed to file correspondence and documentation in either English or French without translation. On the other hand, FIFA agreed with the appointment of a sole arbitrator in the present case.

25. On 24 April 2024, the Appellant filed its Appeal Brief in accordance with Article R51 of the CAS Code.

26. On the same day, the Appellant informed the CAS Court Office that it objected to English as the language of the present arbitration procedure.

27. On 25 April 2024, the Deputy President of the CAS Appeals Arbitration Division issued an Order on Language in which it was decided that the present proceedings would be conducted in English, while the Parties could still file correspondence, evidence and other written submissions in either English or French without translation, unless the sole arbitrator, once appointed, decided otherwise.

28. On the same day, the Respondent requested that the time limit to file its Answer be fixed once the advance of costs had been paid by the Appellant, in accordance with Article R55 para. 3 of the CAS Code.

29. On 21 May 2024, the CAS Court Office informed the Parties that the Appellant had paid the advance of costs in the present proceedings and accordingly fixed a new deadline for the Respondent to file its Answer.

30. On 5 June 2024, the Respondent requested a 10-day extension, until 20 June 2024, of the time limit to file its Answer, which was granted on the same day.

31. According to Article R55 of the CAS Code, the Respondent filed its Answer on 18 June 2024.

32. On 26 June 2024, the CAS Court Office informed the Parties that Mr Fabio Iudica, attorney-at-law in Milan, Italy, had been appointed as the Sole Arbitrator in the present matter.

33. On 4 July 2024, on behalf of the Sole Arbitrator, the CAS Court Office invited the Appellant to file its position, by 15 July 2024, with regard to the issue raised by the Respondent in its Answer, in relation to the fact that A.S. Monaco F.C. had not been summoned as a Respondent in the present procedure.

34. On 12 July 2024, the Appellant filed its position on the issue of standing to be sued of A.S. Monaco F.C.

35. On the same day, the CAS Court Office invited the Respondent to file its comments on the Appellant's submissions, by 25 July 2024.

36. On 20 July 2024, the Respondent file its comments on the Appellant's position with regard to the issue of standing to be sued of A.S. Monaco F.C.

37. On 5 August 2024, the CAS Court Office forwarded the Order of Procedure to the Parties, informing them that after consultation with them, the Sole Arbitrator had decided to issue an award in the present matter based solely on the Parties' written submissions.

38. The Order of Procedure was returned in duly signed copy on the same day by the Appellant and on 7 August 2024 by the Respondent.

VI. SUBMISSIONS OF THE PARTIES

39. The following outline is a summary of the Parties' arguments and submissions which the Sole Arbitrator considers relevant to decide the present dispute and does not comprise each and every contention advanced by the Parties. The Sole Arbitrator has nonetheless carefully considered all the submissions made by the Parties, even if no explicit reference has been made in this summary. The Parties' written and oral submissions, documentary evidence and the content of the Appealed Decision were all taken into consideration.

A. The Appellant's Submissions and Requests for Relief

40. The Appellant's submissions in its Statement of Appeal and in its Appeal Brief, may be summarized as follows.

41. The Appellant is entitled to training compensation in connection with the Player's first registration as a professional with A.S. Monaco F.C. In fact, it is undisputed that the Player, born on 15 August 2007, had been registered with Charleroi as from 1st January 2019 as an amateur, and achieved his training and education period at Charleroi from the age of 12 until his transfer to A.S. Monaco F.C. on 25 august 2023, i.e. before the end of the calendar year of his 23rd birthday.

42. Therefore, the Appellant is entitled to training compensation for the entire training period of the Player, in accordance with the FIFA RSTP. Although A.S. Monaco F.C. is aware of the Appellant's entitlement to training compensation, it has tried to escape its obligation.

43. With regard to the FIFA special provisions applicable within the EU/EEA territory, it is also demonstrated that the Appellant had sent a written proposal to the Player, dated 17 May 2023, to offer him a professional contract, and that the relevant correspondence was sent by registered mail and was duly received by the Player and his family, but, unfortunately, the Appellant realized later that the acknowledgement of receipt was not dated. In any event, the postal stamp confirms that such offer was addressed to the Player and his family before 30 June 2023, i.e. before the date on which the Player's registration with the Appellant was terminated, which is in accordance with the applicable regulations.

44. In addition, there are many circumstances proving that, beyond the contract offer, the Appellant had a clear interest in retaining the Player's services, such as the Player's history as an amateur within the Appellant, the high Player's potential, the fact that the Player's father was also part of Charleroi, as a coach.

45. In conclusion, in its requests for relief, the Appellant requested the CAS to be awarded the amount of EUR 77,200 as training compensation payable to the Appellant with respect to the Player's first registration as a professional with A.S. Monaco F.C., calculated on the basis of the criteria set forth by the applicable FIFA regulations:

"Suite à tous ces éléments incontestables, nous invitons par conséquent le TAS à réformer la 'decision of the single judge of the Dispute resolution Chamber of 3 april 2024 – annexe to EPP -29610' de ne pas nous accorder d'indemnité de formation dans ce dossier [A.] qui selon nos calculs basés sur le FIFA Calculator s'élève à minimum 77.200€ hors intérêts".

B. The Respondent's Submissions and Requests for Relief

46. The position of the Respondent is set forth in its Answer and can be summarized as follows.

47. On a preliminary basis, and before addressing the merits of the case, FIFA objected that the Appellant has committed a fatal procedural error by not calling A.S. Monaco F.C. as a respondent in the present arbitration proceedings, *"when, in fact, the latter has a direct, legitimate and financial interest in the outcome of the present arbitration (as the Appellant is requesting that Monaco be ordered to pay training compensation to it)".*

48. According to FIFA, such failure constitutes a violation of *"passive mandatory litisconsortium"* (passive mandatory joinder) which should lead the CAS to reject the present appeal without the need to assess the substantive merits of the case any further. In fact, any third party that is likely to be affected by the outcome of the arbitration proceedings should have been summoned by the Appellant as a respondent, otherwise the appeal lacks the condition of standing to be sued.

49. FIFA argues that the Appellant's requests for relief not only affect FIFA, which has an interest in the respect of the EPP process, in the strict application of the FIFA RSTP and the FIFA CHR, but they also directly affect A.S. Monaco F.C. to a financial extent, as the alleged debtor of the amounts requested by the Appellant.

50. The fact that A.S. Monaco F.C. was informed of the present appeal and given the possibility to become a party to this arbitration (which has not occurred) does not compensate for the Appellant's failure to identify A.S. Monaco F.C. as a proper respondent in the procedure when filing the present appeal. *"As confirmed by ample CAS jurisprudence on the matter, the responsibility of summoning the correct respondent always falls upon the appellant in a given procedure, who shall bear the consequences of not having properly configured the dispute".* In fact, there is no mechanism within the CAS Code to compel A.S. Monaco F.C. to participate in the arbitration proceedings.

51. FIFA relied on several CAS awards to support its procedural objection relating to the issue of passive mandatory joinder, and, in particular, with regard to the appellant's responsibility to name the correct respondent in a procedure (CAS 2008/O/1808; CAS 2013/A/3228; TAS 2022/A/9238; TAS 2017/A/5131).

52. As a consequence, the Sole Arbitrator cannot grant any of the Appellant's

requests without having heard A.S. Monaco F.C. which would be affected as the party allegedly responsible for the payment of the training compensation claimed by the Appellant.

53. With regard to the merits of the present case, and on a subsidiary basis, FIFA argued that, although it would have been extremely easy for the Appellant to demonstrate the date of delivery of the contract offer at the Player's address, even the new documentation submitted by the Appellant in the present appeal cannot prove that the Player had duly received the relevant contract offer in accordance with the requirements of the applicable regulations, despite the fact that the Appellant allegedly sent this document by certified mail.

54. Furthermore, there is no proof that Charleroi met the Player or that the alleged meetings with the Player were aimed at retaining the Player's services.

55. In addition, Charleroi did not demonstrate that B., to whom the contract offer was also apparently addressed, was the Player's legal representative as maintained by the Appellant.

56. In its Answer, the Respondent submitted the following requests for relief:

"(a) rejecting the requests for relief sought by the Appellant;
(b) confirming the Appealed Decision;
(c) ordering the Appellant to bear the full costs of these arbitration proceedings".

C. The position of the Parties on the issue of the mandatory joinder regarding A.S. Monaco F.C. and the consequences of the Appellant's failure to name A.S. Monaco as a respondent

57. Upon request of the Sole Arbitrator, after the filing of the Appeal Brief and the Answer, the Parties further submitted their position with regard to the issue raised by FIFA in its Answer in relation to the fact that A.S. Monaco FC had not been summoned as a respondent in the present procedure.

58. The following is a summary of their submissions which were respectively filed on 12 July 2024 by the Appellant and on 20 July 2024 by the Respondent.

59. The Appellant confirmed the indication of A.S. Monaco F.C. as the club responsible for the payment of the training compensation claimed (*"Club concerné pour le payement de l'indemnité"*) and not as a real co-respondent in the present proceedings. In fact, the Appellant maintains that *"Following various FIFA regulations and the CAS Regulations its shows that FIFA was the logical respondent against which the decision should be filed"*. According to the Appellant, there is no provision within the CAS Code imposing on the latter to sue *"any indirectly involved party"*; on the other hand, it does not oppose the possible intervention of A.S. Monaco F.C. based on Article R41.2 of the CAS Code, or on the basis of Swiss legal principles. Finally, in the event that the Sole Arbitrator decides that CAS cannot order any remedy affecting A.S. Monaco F.C. as a result of the latter not being a respondent in the present proceedings, the Appellant requested that the case be referred back to FIFA for a new decision.

60. In its response to the Appellant's submission, FIFA insisted that the Appellant is solely responsible for properly summoning the respondent/s in a CAS appeal proceedings and that the fact that A.S. Monaco F.C. was notified of the present appeal does not remedy its failure to include A.S. Monaco F.C. as a proper respondent when submitting the appeal, especially considered that the latter decided not to intervene. FIFA argued that according to CAS doctrine, it is the burden of the appellant in a proceeding to name the right respondent in the statement of appeal if it wishes the latter to participate and that it is not possible to circumvent such obligation by requesting to join such party at a later stage. Neither the CAS Code provide for a mechanism that would allow for a third party to be compelled to join. In addition, the Respondent recalled that according to CAS jurisprudence, the issue of lack of standing to be sued in a CAS appeal proceedings renders the appeal without merit, resulting in the dismissal of the appeal.

VII. JURISDICTION

61. Article R47 of the CAS Code provides as follows:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".*

62. The Appellant relied on Article 57 of the FIFA Statutes [Article 50(1) of the FIFA Statutes May 2024 edition] as conferring jurisdiction to the CAS.

63. The Sole Arbitrator notes that it is undisputed that the Appealed Decision is a final decision taken by FIFA within the meaning of Article 50(1) of the FIFA Statutes.

64. The Respondent did not dispute that CAS has jurisdiction in the present case.

65. The jurisdiction of the CAS was further confirmed by the signature of the Order of Procedure by both Parties.

66. Accordingly, the Sole Arbitrator is satisfied that CAS has jurisdiction to hear the present case.

VIII. ADMISSIBILITY OF THE APPEAL

67. Article R49 of the CAS Code provides the following:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against".*

68. According to Article 50(1) of the FIFA Statutes, the time limit to file an appeal to CAS shall be 21 days of receipt of the decision in question.

69. The Sole Arbitrator notes that the Appealed Decision was rendered on 4 April 2024 and notified to the Appellant on the same day. Considering that the Appellant filed its Statement of Appeal on 10 April 2024, *i.e.* within the deadline of 21 days set in the FIFA Statutes, the Sole Arbitrator is satisfied that the present appeal was filed in timely manner.

70. The admissibility of the appeal is not disputed by the Respondent.

71. Accordingly, the Sole Arbitrator is satisfied that the appeal is admissible.

IX. APPLICABLE LAW

72. Article R58 of the CAS Code provides the following:

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

73. As to the applicable law, the Parties refer to FIFA regulations, and particularly to the FIFA RSTP and FIFA CHR and additionally, Swiss law.

74. In consideration of the above and pursuant to Article R58 of the CAS Code, the Sole Arbitrator holds that the present dispute shall be decided principally according to the FIFA regulations, with Swiss law applying subsidiarily.

X. LEGAL ANALYSIS

75. The present appeal was filed by Charleroi against the decision issued by the FIFA General Secretariat within the review process of the Player's EPP which was generated in the context of the Player's first registration as a professional with A.S. Monaco F.C. following his (international) transfer from Charleroi, in accordance with the FIFA CHR.

76. The core of the dispute concerns the entitlement to training compensation claimed by the Appellant in connection with the Player's transfer and first registration as a professional with A.S. Monaco F.C., pursuant to Art. 20 and Annex 4 to the FIFA RSTP. In its prayers for relief, the Appellant requested CAS to amend the Appealed Decision as long as it has rejected the Appellant's request to be granted training compensation in relation to the Player's first registration as a professional with A.S. Monaco F.C.

XI. THE ABSENCE OF A.S. MONACO F.C. AS A RESPONDENT

77. First, the Sole Arbitrator notes that in the present case there is a preliminary issue to be resolved, concerning the identification of the proper respondent/s by the Appellant.

78. The appeal was directed against FIFA only and not against A.S. Monaco F.C. which, on the contrary, was a party to the EPP review process before the FIFA General Secretariat. In fact, the Sole Arbitrator recalls that, in the Statement of Appeal (the completed version filed by the Appellant on 17 April 2024 upon request of the CAS Court Office), the Appellant named FIFA as the only respondent (*"l'intimé"*) in the present proceedings, while A.S. Monaco F.C. was indicated as the club responsible for payment of the relevant training compensation (*"le club concerné pour le payement de l'indemnité"*).

79. Such position was also expressly confirmed and clarified by the Appellant

in its further authorized submissions filed on 12 July 2024 on the issue of standing to be sued of A.S. Monaco F.C. on request of the Sole Arbitrator. It is therefore undisputed that the Appellant did not deliberately summon A.S. Monaco F.C. because it considered FIFA to be the proper and only respondent in the present proceedings.

80. The Sole Arbitrator notes that FIFA, in its Answer, submitted that the Appellant has committed a fatal procedural mistake by failing to include A.S. Monaco F.C. as a respondent in the Statement of Appeal and that, in light of the fact that A.S. Monaco F.C. has not even decided to intervene in the proceedings pursuant to Article R41.3 of the CAS Code, the appeal would be without merit according to CAS case law.

81. Therefore, in order to decide the present case, the Sole Arbitrator will primarily address the question of whether the failure to summon A.S. Monaco F.C. in the present proceedings as a co-respondent violated a mandatory joinder of parties and should therefore lead the Sole Arbitrator to dismiss the appeal, as maintained by the Respondent.

82. With regard to the objection that A.S. Monaco F.C. should have been summoned with FIFA as a necessary party to this arbitration proceedings, the Sole Arbitrator considers the following.

83. First, it is recalled that according to Article R48 of the CAS Code, the Appellant has the responsibility to indicate in the statement of appeal *"the name and full address of the Respondent(s)"*. However, neither the FIFA Statutes nor any another FIFA regulations nor the CAS Code contain any specific provision regarding standing to be sued or mandatory joinder of parties.

84. Under Swiss law, the closest concept to standing to sue/be sued is so-called *"légitimation active/passive"* ("Aktiv- und Passivlegitimation"), which is characterized as a matter of substantive law (as opposed to procedural). Légitimation active/passive derives from the mere fact of legally owning the right in dispute, i.e. a party has standing to sue or to be sued if a substantive right of its own is concerned by the claim (CAS 2013/A/3278).

85. In CAS 2013/A/3372, the sole arbitrator referred to the jurisprudence of the Swiss Federal Tribunal, according to which the standing to sue or to be sued in civil proceedings pertains to the substantive basis of the claim as it relates to the (active or passive) entitlement of the right claimed.

86. The Sole Arbitrator considers that the matter in dispute in the EPP review process clearly involved the relationship between Charleroi, as the Player's training club and A.S. Monaco F.C. as the new club with which the Player was first registered as a professional after his transfer from Charleroi. This situation, would, in principle, trigger an entitlement to training compensation in favour of the Appellant in accordance with the FIFA RSTP.

87. In fact, the review process before the FIFA General Secretariat and the subsequent assessment by the Single Judge of the DRC dealt with the issue whether A.S. Monaco F.C. was responsible for payment of the training compensation to Charleroi with respect to the Player's first registration with A.S.

Monaco F.C. as a professional. This is undisputed by the Appellant, and it's confirmed by the participation in the EPP review process of both Charleroi and A.S. Monaco F.C., as well as the two national member associations of the two clubs.

88. Therefore, the Sole Arbitrator considers that it is undeniable that A.S. Monaco F.C. has an interest in relation to the subject matter of the present dispute, as the club that may be liable for the relevant payment, should the Sole Arbitrator find that the Appellant meets the requirements for entitlement to training compensation under the applicable FIFA regulations in relation with the Player's first registration as a professional with A.S. Monaco F.C.

89. In fact, although the requests for relief in the Appeal Brief are not specifically directed against A.S. Monaco F.C. as they generally aim at overturning the decision of the FIFA General Secretariat to deny the Appellant's entitlement to training compensation, it is clear that the consequences of the CAS decision to eventually grant the Appellant's requests for relief, would necessarily lead to adversely affect A.S. Monaco F.C. by establishing a payment obligation on the latter. As a consequence, the Sole Arbitrator considers that A.S. Monaco F.C. would have some stake in the present dispute and a legitimate interest in defending its case before the CAS (as it was before FIFA).

90. As a consequence, the Appellant's requests for relief, read together with the content of the Appeal Brief led the Sole Arbitrator to conclude that, whatever the decision on the merits could be, it would clearly affect the rights of A.S. Monaco F.C. which therefore should have been summoned in the proceedings in compliance with the right to be heard.

91. Besides, considering the specificity of the present case, the Sole Arbitrator deems that, in the present proceedings also FIFA has the capacity to be sued, according to Article 75 of the Swiss CC. In fact, in the opinion of the Sole Arbitrator, in the context of the EPP review process, FIFA did not merely act as a first-instance adjudicating body, as in an ordinary "horizontal dispute" between its indirect members but also exercised, (through the Clearing House), an administrative function in the process of assessment, allocation and distribution of training rewards within the context of players transfer, which is regulated by the FIFA CHR. Such administrative function, having an impact on the rights and obligations of its members in the sense of Article 75 of the Swiss CC finally results in FIFA also having capacity to be sued in the present proceedings (see CAS 2015/A/3999).

92. In conclusion, the Sole Arbitrator holds that, in the present matter there is an issue of passive mandatory *litisconsortium* as A.S. Monaco F.C. should have been named as a necessary co-respondent by the Appellant.

93. In this respect, the Sole Arbitrator also points out that, according to CAS doctrine, it is the appellant's responsibility to meet the necessary requirements of an appeal, in particular by identifying the appropriate respondent(s) already with the statement of appeal, based on Article R48 of the CAS Code and it is not possible to circumvent such obligation by requesting to join such party at a later

stage. In fact, the CAS Code does not allow such a "correction/substitution" of a respondent, especially when the time limit to file the appeal has expired. In addition, any change in the identification of a respondent through joinder is not possible based on Article R56 of the CAS Code (MAVROMATI/REEB, CAS Code Commentary page 292-293, para. 82).

94. Furthermore, Article R41.2 of the CAS Code on which the Appellant relied in its submissions of 12 July 2024 in order to allow A.S. Monaco F.C. to participate in the proceedings only applies to cases where a respondent intend to cause a third party to intervene, which is not the case here, since FIFA did not request such a joinder.

95. Finally, A.S. Monaco F.C. has decided not to acquire the status of a party to the proceedings although it had the possibility to intervene through a specific request in accordance with Article R41.3 after having been informed of the appeal by the CAS Court Office.

96. By failing to name A.S. Monaco F.C. as a respondent, the Appellant deprived the latter of its right to be heard, namely its right to state its defense, adduce evidence and make submissions in a matter that undoubtedly affects the latter's legal interests. The Sole Arbitrator is therefore not in the position to adjudicate the present matter in the absence of A.S. Monaco F.C. because the rights and interests of the latter would be otherwise impaired.

97. The Appellant has to face the consequences of its failure to name A.S. Monaco F.C. as a respondent in these proceedings.

98. In this respect, the Sole Arbitrator recalls that under Swiss Law, issues relating to standing to be sued are generally considered a reason to reject an appeal on the merits (see Swiss Federal Tribunal, ATF 126 III 59, para. 1a. p. 63; CAS 2022/A/9134; CAS 2017/A/5359; CAS 2017/A/5227; CAS 2012/A/3032; CAS 2013/A/3372).

99. According to the opinion of the panel in CAS 2013/A/3228, which was relied on by another panel in CAS 2022/A/8923, *"If the prayers for relief, whatever the decision of the CAS panel may be, will affect the rights of a third party that has not been named as respondent in the proceedings before the CAS, there is no scope of review for the CAS panel and the appeal must be dismissed"*.

100. Since the Appellant failed to direct the present appeal also against A.S. Monaco F.C. as the party having standing to be sued in addition to FIFA and without A.S. Monaco being a party to the present proceedings, the requests for relief sought by the Appellant cannot be granted and the appeal lodged by Charleroi must be dismissed from the outset.

101. All other and further motions or prayers for relief, including the subsidiary request for relief submitted by the Appellant with its authorized submission on 12 July 2024, are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Sporting du Pays de Charleroi on 10 April 2024 against the

Fédération Internationale de Football Association with respect to the Determination passed by the FIFA General Secretariat on 4 April 2024 on EPP 29610 is dismissed.

2. The Determination of the FIFA General Secretariat on EPP 29610 issued on 4 April 2024 is confirmed.

3. (…).

4. (…).

5. All other motions or prayers for relief are dismissed.

CAS 2024/A/10570
Association Russian Anti-Doping Agency (RUSADA) v. Albert Batyrgaziev
3 December 2024

Panel: Mr Heiner Kahlert (Germany), Sole Arbitrator

Boxing
Determination of the status of an athlete for the purpose of CAS jurisdiction in a context of doping (missed tests)
Bifurcation
CAS jurisdiction under the RUSADA ADR
Relevant point in time for determining the status of the athlete for the purpose of CAS jurisdiction
Interpretation of the regulations of an IF regarding the status of an athlete
Condition for an athlete to become an International-Level Athlete based on his participation in an International Event published by the IBA on its website
Relevance of an athlete's sporting level on his status

1. **CAS power to invite written submissions on jurisdiction and to render a preliminary decision on that issue is expressly foreseen in Article R55(5) of the CAS Code. Bifurcation should be ordered only if this is necessary in the interest of justice or likely to materially reduce time and costs, i.e. to improve procedural efficiency. To determine whether bifurcation would improve procedural efficiency, it is relevant to rely on three criteria developed in arbitral practice, namely whether the jurisdictional challenge (i) is frivolous, (ii) is distinct from or rather intertwined with issues pertaining to the merits and (iii) would, if upheld, dispose of all or a substantial portion of the dispute.**

2. **Pursuant to Article 15.2.1 of the RUSADA Anti-Doping Rules (ADR), appeals of decisions involving International-Level Athletes or International Events may be appealed exclusively to the CAS. In addition, letter (a) of the Scope Section Definition of the International Boxing Association's (IBA) ADR provides for an alternative ground for an athlete becoming an International-Level Athlete, namely inclusion in the IBA Registered Testing Pool. Moreover, if the Anti-Doping Rule Violation (ADRV) asserted against the athlete – missed tests – did not occur during an International Event and the athlete was removed from the IBA Registered Testing Pool, CAS has jurisdiction only if the athlete is to be qualified as an International-Level Athlete by way of participation in one of the International Events listed in letter (b) of the Scope Section Definition of the IBA ADR. Otherwise, Article 15.2.2 of the RUSADA ADR confers jurisdiction to the National Appeal Body.**

3. **Based on the wording of Article 15.2.1 of the RUSADA ADR, the relevant point in time for determining whether the athlete is an International-Level Athlete for the purpose of CAS jurisdiction is the time at which the alleged ADRV occurred in violation of Article 4.4 of the RUSADA ADR, i.e. in a case involving missed test, it is the athlete's third missed test within the 12 months period.**

4. **An International Federation is free to refer in its definition of International-Level Athletes to participation in**

International Events in the present tense. This cannot be interpreted as meaning that the athlete becomes an International-Level Athlete for future years. The choice of an International Federation in this regard cannot be corrected simply because it may bereave one of the two alternatives of Article 15.2.1 of the RUSADA ADR. In addition, even if one accepted that a present tense reference to participation in International Events included some time before and/or after the said event, this would beg the question of just how long that period should be. In any case, if at all, any such period before and/or after the International Event in question would need to be quite short, in order not to ignore the present tense used in the definition of International-Level Athlete i.e. it would certainly not stretch over 22 months.

5. For the athlete to become an International-Level Athlete based on his participation in an *"International Event published by the IBA on its website"* pursuant to the Scope Section Definition of the IBA ADR, those events would have had to be published on the IBA's website. If the IBA failed to publish the relevant event in the form required by the comment on the Scope Section Definition i.e. *"in clear and concise form, so that Athletes are able to ascertain quickly and easily when they will become classified as International-Level Athletes"*, the athlete's participation in those events cannot create CAS jurisdiction.

6. Under the IBA ADR, an athlete's sporting level is irrelevant to the determination of whether he or she is an International-Level Athlete.

I. THE PARTIES

6. The Association Russian Anti-Doping Agency (the "Appellant" or "RUSADA") is the National Anti-Doping Organisation ("NADO") for the Russian Federation (hereafter "Russia"). It operates pursuant to the provisions of the All-Russian Anti-Doping Rules, being the anti-doping rules approved by the order of the Ministry of Sport of the Russian Federation of 24 June 2021, No. 464 (the "RUSADA ADR").

7. Mr. Albert Batyrgaziev (the "Respondent" or "Athlete") is a Russian boxer.

8. The Appellant and Respondent are jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

A. Introduction

9. The present appeal proceeding concerns the decision no. 42/2024 (the "Decision") issued on 23 April 2024 by the RUSADA Disciplinary Anti-Doping Division (the "DADC"). In the Decision, the DADC found that contrary to RUSADA's allegation, the Athlete had not committed three Missed Tests[1] within 12 months and, therefore, had not committed an Anti-Doping Rule

[1] Capitalized terms not defined herein have the meaning ascribed to them in the RUSADA ADR.

Violation ("ADRV") under Article 4.4 of the RUSADA ADR.

10. Below is a summary of the relevant facts based on the Parties' submissions, including the evidence adduced. Additional facts found in the Parties' submissions may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts transpiring from the Parties' submissions, including the evidence adduced, in the present proceeding, he refers in his Award only to the facts he considers necessary to explain his reasoning on the bifurcated issue of jurisdiction.

B. Background Facts

1. The Tokyo Olympics

11. On 7 August 2021, the Athlete won a gold medal at the 2020 Summer Olympic Games in Tokyo, Japan (the "Tokyo Olympics"), representing the Russian Olympic Committee. At that time, the International Boxing Association (the "IBA") had included the Athlete on its Registered Testing Pool (the "IBA RTP").

2. Exclusion from the IBA's Registered Testing Pool and inclusion in RUSADA's Registered Testing Pool

12. On 7 June 2022, the Athlete was notified by the IBA that he had been removed from the IBA RTP.

13. On 14 June 2022, the Athlete was notified by RUSADA of his inclusion in RUSADA's Registered Testing Pool (the "RUSADA RTP"), in accordance with Article 7.4.1 of the RUSADA ADR.

3. The alleged Missed Tests and RUSADA's Results Management

14. On 4 August 2022, RUSADA recorded a Missed Test against the Athlete.

15. On 8 May 2023, RUSADA recorded a second Missed Test against the Athlete. In the ensuing Results Management process conducted by RUSADA, the Athlete submitted that he had not been at the address indicated in his whereabouts filing, but rather in Moscow. According to the Athlete, he had been invited to the military parade held in Moscow on 9 May 2023 to commemorate the 78th anniversary of the victory in the Great Patriotic War (the "Moscow Ceremony").

16. On 10 June 2023, RUSADA recorded a third Missed Test against the Athlete.

17. RUSADA subsequently proceeded with the Results Management for an alleged ADRV under Article 4.4 of the RUSADA ADR. Eventually, on 23 April 2024, the DADC rendered the Decision, finding that the second and third alleged Missed Tests could not be upheld, and that, consequently, no ADRV had been committed.

18. On 23 September 2024, RUSADA's counsel in this arbitration wrote an email to Mr Anton Sotir, Senior Legal Counsel of the ITA, which reads as follows, in its relevant part:

> *"I would be grateful if the International Testing Agency could confirm that, according to its records, Mr Batyrgaziev is an International Level Athlete as that term is used in the International Boxing Association anti-doping rules".*

19. On 23 September 2024, Mr Sotir responded relevantly as follows:

> *"In response to your query and based on the information currently available to the IBA and ITA, please note that athlete Albert Batyrgaziev is considered an International-Level Athlete as per the definition of the IBA Anti-Doping Rules. This follows his participation in the Tokyo 2020 Olympic Games (August 2021), the IBA Champions' Night in Dubai (December 2023), where he won the IBA Pro World Champion title, and the IBA Champions' Night in Serpukhov (July 2024), where he won the WBA Interim Super Featherweight title".*

4. Participation in IBA Competitions

20. On 9 December 2023, the Athlete competed in the IBA Champions' Night in Dubai, UAE (the "Dubai Event"), in which he won the *"IBA Pro World Champion"* title.

21. On 12 July 2024, the Athlete competed in the IBA Champions' Night in Serpukhov, Russia (the "Serpukhov Event" and, together with the Dubai Event, the "Champions' Night Events"), winning the *"WBA Interim Super Featherweight title"*.

III. THE PROCEEDING BEFORE THE COURT OF ARBITRATION FOR SPORT

22. On 13 May 2024, the Appellant filed its Statement of Appeal with the Court of Arbitration for Sport (the "CAS") within the meaning of Article R48 of the Code of Sports-related Arbitration (2023 edition) (the "CAS Code"). The application included a request for the extension of the timeline to file the Appeal Brief, pursuant to Article R51 of the CAS Code. This extension, and a further extension, were subsequently granted in the absence of any objection from the Respondent.

23. On 21 May 2024, the CAS Court Office acknowledged receipt of the Statement of Appeal and invited the Respondent to comment on the requested appointment of a sole arbitrator.

24. On 5 June 2024, the Respondent objected to the appointment of a sole arbitrator.

25. Still on the same day, the CAS Court Office invited the Respondent to comment on whether he intended to pay his share of the advance of costs, pursuant to his objection to submit the present procedure to a sole arbitrator.

26. On 7 June 2024, the Respondent stated that he did not intend to pay his share of the advance of costs but reiterated his position that the case was complicated and deserving of full attention of three arbitrators.

27. On 13 June 2024, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had decided to submit the present dispute to a sole arbitrator.

28. On 14 June 2024, the Appellant filed its Appeal Brief within the meaning of Article R51 of the CAS Code.

29. On 17 June 2024, the CAS Court Office acknowledged receipt of the Appeal Brief and informed the Respondent of the deadline to file his Answer within the meaning of Article R55 of the CAS Code.

30. On 15 July 2024, the CAS Court Office informed the Parties that, pursuant to Article R54 of the CAS Code and on

behalf of the President of the CAS Appeals Arbitration Division, the Panel to decide the present dispute was constituted as follows:

Sole Arbitrator: Dr Heiner Kahlert, Attorney-at-law in Munich, Germany.

31. On 18 July 2024, the Respondent filed a motion for bifurcation and termination (the "Motion").

32. On 22 July 2024, the CAS Court Office invited the Appellant to comment on the Motion.

33. On 29 July 2024, the Appellant requested for the Motion to be dismissed.

34. On 8 August 2024, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to bifurcate the arbitral proceedings and that the reasons for his decision would be included in the final Award. The Parties were requested to indicate whether they requested a hearing on the preliminary issue of jurisdiction.

35. On 12 August 2024, the Respondent submitted that he did not find a hearing on jurisdiction necessary.

36. On 2 September 2024, the Appellant requested a further round of submissions on jurisdiction, subsequent to which the Sole Arbitrator should decide whether he considered a hearing to be necessary. In case that no such further round of submissions was ordered, the Appellant requested that a hearing be held instead.

37. On 3 September 2024, the CAS Court Office informed the Parties that the Sole Arbitrator had decided not to hold a hearing on jurisdiction but allowed a further round of submissions on the said issue.

38. On 23 September 2024, the Appellant filed its submission on jurisdiction.

39. On 24 September 2024, the CAS Court Office invited the Respondent to file his comments.

40. On 4 October 2024, the Respondent filed his comments.

41. On 7 October 2024, the CAS Court Office acknowledged receipt of the Respondent's submission on jurisdiction and informed the Parties that the Sole Arbitrator would render his decision on jurisdiction in due course.

IV. THE PARTIES' SUBMISSIONS AND REQUESTS FOR RELIEF

42. The following summary of the Parties' positions is illustrative only and does not necessarily comprise every submission advanced by the Parties. The Sole Arbitrator confirms, however, that he has carefully considered all submissions made by the Parties, including the evidence adduced, regardless of whether there is any specific reference to them in this Award. As a result of the Sole Arbitrator's decision to bifurcate the present proceedings, the present section shall be limited to the bifurcated issue of jurisdiction.

A. RUSADA's submissions and requests for relief

43. The applicable rules are the RUSADA ADR. In particular, it has never been disputed at any stage of the disciplinary proceedings that the RUSADA ADR are applicable to the Athlete pursuant to

Article 1.3.3.a) of the ADR, which stipulates that the RUSADA ADR shall apply, inter alia, to *"[a]ll Athletes* […] *who are citizens or residents of the Russian Federation"*[2].

44. RUSADA has the right to appeal the Decision before CAS pursuant to Article 15.2.1 of the RUSADA ADR, which provides for CAS jurisdiction if the violation occurred during an International Event or if an International-Level Athlete is involved. While the ADRV at stake here did not occur during an International Event, it does involve an International-Level Athlete.

45. The definition of that latter term in the RUSADA ADR refers to the rules of the Athlete's International Federation. At the relevant time, this was the IBA. According to the IBA's Anti-Doping Rules (the "IBA ADR"), one case in which an athlete is an International-Level Athlete is if he participates in certain International Events as specified in the Scope section of the IBA ADR.

46. One of those International Events is the Olympic Games. As the Athlete won a gold medal at the Tokyo Olympics, he should be considered an International-Level Athlete within the meaning of the IBA ADR and, therefore, for the purposes of Article 15.2.1 of the RUSADA ADR. Contrary to the Athlete's argument, he did not shed himself of that status between the Tokyo Olympics and the Missed Tests. Instead, he remained an Olympic standard competitor through the time of his Missed Tests, for the following reasons.

47. Between the Tokyo Olympics and his Missed Tests, the Athlete competed on a number of occasions in professional bouts, including in the Champions' Night Events listed by the IBA on its website. While the IBA did not specify on its website that a Champions' Night Event is an International Event within the meaning of the IBA ADR, this does not detract from the fact that the IBA itself regarded the Champions' Night Events as such type of events. This is evident from the prominent entry in the "Events" section of the IBA's website, where the Champions' Night Events are detailed to be events bringing together the *"crème de la crème of the boxers around the world"* involving international participants. As such, the Champions' Night Events cannot be anything other than International Events within the meaning of the IBA ADR.

48. In addition, the ITA supports the IBA with its anti-doping programme, including Testing at the Champions' Night Events and being the Results Management Authority for such Testing. This likewise strongly supports the position that the Champions' Night Events are International Events.

49. Moreover, as evidenced by the ITA's email of 23 September 2023, the ITA itself considers the Athlete to be an International-Level Athlete, based on his participation at the Tokyo Olympics and the Champions' Night Events, at all of which events the Athlete was crowned champion.

50. Furthermore, based on the guidelines set out in the International Standard for

[2] Here and in the following, the Sole Arbitrator refers to the full English translation of the RUSADA ADR provided by the Appellant. The wording of the translations provided in the Appeal Brief are partially different, but seem to be identical in substance.

Testing and Investigations (the "ISTI") issued by the World Anti-Doping Agency ("WADA"), the Athlete was included in the RUSADA RTP precisely because, at least in part, he was a gold medallist competing at the highest level of his sport. This could be confirmed by the testimony of RUSADA's Head of Testing.

51. Similarly, the Athlete attended the Moscow Ceremony for the primary reason that he was a successful sports person who had excelled at the highest level of international sport, the Olympic Games. He would not have been invited to if he had not been an international level sports person. This is an important contextual factor.

52. RUSADA's position is supported by CAS jurisprudence:

- The award in CAS 2014/A/3670 was based on different rules because under the then application World Anti-Doping Code ("WADC"), in its 2009 edition, an athlete could only be regarded as an International-Level Athlete if he or she was a member of the International Federation's RTP, making the definition of International-Level Athlete very much a binary issue.

- By contrast, the award in CAS 2017/A/5021 concerned an International Federation's definition under which participation in an international competition made an athlete an International Level Athlete. The award in that case is of assistance as it suggests that an athlete's sporting history and experience are relevant when determining whether he or she is an International-Level Athlete. In particular, the fact that the athlete in that case had competed in various competitions over a number of years was seen to be satisfactory evidence of her status as an International-Level Athlete.

- In respect of CAS 2018/A/5853, RUSADA does not disagree with the view expressed by the CAS panel in that case that an athlete's participation at the international level of competition at some stage in his or her sporing career does not mean that the athlete becomes an International-Level Athlete for life. However, there must be some part of an athlete's career that is covered, as far their status as an International-Level Athlete is concerned, by the fact of their participation. In the present case, it would be wrong to say that the Athlete's status as an International-Level Athlete ended after the Closing Ceremony of the Tokyo Olympics. Rather, that status of the Athlete cannot have expired at the time the Missed Tests occurred from August 2022 to June 2023, because during that time the Athlete had all the appearance and actions of an *"International-Level Athlete"*:

  - He was a member of the RUSADA RTP because of his status as a successful Olympian.

  - He competed against athletes regularly from other nations, in particular at the IBA Champions' Night

Events, where Testing by the IBA/ITA could have taken place.

- He is regarded by the ITA as an International-Level Athlete.

- He was seemingly regarded as such by those Russian public authorities who asked him to attend the Moscow Parade.

- The award in CAS 2015/A/4215 confirms that an athlete can be an International-Level Athlete even if he competes at the national level, provided that he fulfils the definition of an International-Level Athlete.

- In any case, the award in CAS 2011/A/2495 has made clear that

> *"whilst CAS jurisprudence on the WADC, and its analogues* […]*, is of extreme importance in respect of the interpretation of the WADC and related antidoping regimes given the purpose of 'enforcing anti-doping rules in a global and harmonised way'* […]*, nevertheless the WADC and its analogues must be applied in the light of the facts of the specific case* […]*. Other CAS decisions based on fact-specific findings are of little relevance in deciding the present appeals unless the facts in such decisions are identical, or at least extremely similar, to the facts with which the present appeals are concerned".*

53. Accordingly, the facts of each case and appeal are the ultimate determining factors and in the present appeal the facts underscore the proposition that Mr Batyrgaziev is an International Level Athlete. As such, RUSADA maintains its position that the CAS has jurisdiction as the present case with the Athlete pertains to an International-Level Athlete.

54. RUSADA has submitted the following requests for relief:

> *"115.1. Mr Batyrgaziev has committed an anti-doping rule violation arising from the commission of three whereabouts violations between August 2022 and June 2023.*
>
> *115.2. Mr Batyrgaziev has provided no evidence that would justify the reduction of the standard sanction of a two year period of Ineligibility.*
>
> *115.3. The consequences to be imposed upon Mr Batyrgaziev should be those as provided for in ADR Article 12.3.2 and Article 12.10.*
>
> *116. RUSADA respectfully requests that the costs incurred by RUSADA in relation to this appeal be paid by Mr Batyrgaziev in their entirety in accordance with Rule 64.4 and Rule 64.5 of the Code of Sports-related Arbitration".*

B. The Athlete's submissions and requests for relief

55. According to the principle of *tempus regit actum*, the current version of the applicable anti-doping rules shall apply to both procedural matters and the merits of this case.

56. The CAS lacks jurisdiction under Article 15.2.1 of the RUSADA ADR because, at the time of RUSADA's appeal to CAS, the Athlete cannot be qualified as an International Level Athlete within the meaning of that provision. Instead, he is a national-level athlete, meaning that the appeal would have had to be filed before

the national appeal body pursuant to Article 15.2.2 of the RUSADA ADR.

57. In particular, no International-Level Athlete status can be derived from the Athlete's participation in the Tokyo Olympics. The IBA Anti-Doping Rules refer only to athletes who *"participate"* (present tense) in an International Event, while the Athlete participated (past tense) in the Tokyo Olympics in 2021, i.e., three years ago. Hence, based on a literal interpretation of the IBA ADR, which are crystal clear in this regard, the Athlete's participation in the Tokyo Olympics cannot render him an International-Level Athlete now. If one were to follow RUSADA's position, this would mean that any participant of the Olympic Games becomes an International-Level Athlete for life, which is devoid of logic. Even if RUSADA's position were that such status would only apply to the current Olympic cycle, it must be emphasized that the IBA ADR do not say for how many Olympic cycles such status would be retained, focussing instead on other circumstances only.

58. Since the Tokyo Olympics, the Athlete has never participated in any amateur competitions. Instead, all nine of his fights since then were professional bouts or tournaments. Seven of those fights were organized by professional boxing associations/organizations that are not operating under the auspices of the IBA. Based on the IBA ADR, professional bouts are not among the competitions in which participation would render an athlete an International-Level Athlete.

59. The other two fights were listed in the IBA calendar on its official website, namely the IBA Champions' Night Events. Indeed, these two competitions may be categorised as *"other International Events"* within the meaning of the definition of International-Level Athlete in the Scope section of the IBA ADR. However, as stated in the pertinent comment thereto, the IBA is required to *"specifically indicate, in a clear manner, that an Athlete's participation in any such Events will impact the Athlete's status"* as an International-Level Athlete. The IBA website did not say anything to that effect, instead highlighting the professional nature of the event. In addition, the Athlete competed at those two nights for the IBA Pro World Champion title and the WBA Interim World Champion title. He could not have known that participation in those fights could change his status for IBA ADR purposes. As per CAS 2005/A/946, neither RUSADA nor the ITA can substitute the clear rules enacted by the IBA. Accordingly, participation in the Champions' Night Events did not render the Athlete an International-Level Athlete.

60. Contrary to RUSADA's view, it is irrelevant that the Athlete competed outside of Russia against foreign boxers. This is also true for many other professional athletes (for example in the UFC, WBC, KHL etc.) but does not *per se* make all of them International-Level Athletes.

61. Likewise contrary to RUSADA's view, the Athlete's inclusion in the RUSADA RTP, and the reasons for why he was included, have no legal relevance. Under the IBA's definition of what an International-Level Athlete is, the only thing that counts is (i) inclusion in the IBA RTP and (ii) participation in International Events. In any case,

RUSADA omitted to mention that one criterion for inclusion in the RUSADA RTP, according to Article 4.5.2 of the ISTI, is receipt of public funding. The Athlete did receive public funding. Accordingly, one cannot be sure why the Athlete was included in the RUSADA RTP. In addition, it does not matter what employees of RUSADA thought when they included the Athlete, given that this is not a relevant criterion for determining whether he is an International-Level Athlete. Finally, RUSADA included the Athlete in the RUSADA ADR after he was excluded from the IBA RTP in June 2022, which per se confirms that, at least one year after the Olympic Games, he had lost his International-Level Athlete status.

62. Equally contrary to RUSADA's opinion, it is irrelevant what the ITA considers the Athlete's status to be. First, the question put to the ITA by RUSADA's counsel (in response to which the ITA confirmed that it regarded the Athlete's as an International-Level Athlete) was leading. Secondly, the ITA's decision is not decisive under the IBA ADR.

63. Similarly, it is irrelevant whether the ITA had a right to test the Athlete at the IBA Champions' Night Events. A right to test is a different concept than the level of an athlete. For instance, WADA has the right to test (and appeal a decision regarding) any athlete worldwide, but this does not make all athletes International-Level Athletes.

64. Finally, the Athlete's participation in the Moscow Ceremony does not make him an International-Level Athlete either. The said event is attended by active and retired Olympic champions and medallists. This is irrelevant to determining the level of the Athlete.

65. The Athlete's position is supported by CAS jurisprudence:

- Contrary to RUSADA's submission, the definition of the term International-Level Athlete in the anti-doping rules underlying CAS 2014/A/3670 was not limited to the question of whether the athlete was included in an International Federation's RTP. Instead, the relevant definition alternatively referred to athletes who are competing in an international competition. The CAS panel in that case found that having previously competed in international competitions in the years prior to his positive doping test, including at the Olympic Games in the year before the test, did not make the Athlete an international-Level Athlete.

- The award in CAS 2018/A/5853 highlights the present tense used in the definition of the relevant anti-doping rules, noting that this indicated that the player must have participated in an international competition at the time when the ADRV occurred.

- The award in CAS 2022/A/9246, para. 54, likewise found that in order to be considered an International-Level Athlete, the athlete must have been competing in an international competition at the time of the ADRV.

- The award in CAS 2015/A/4215 does not help RUSADA because in that case, the athlete was found

to be an International-Level Athlete because he was called by the national federation to participate in international competitions, which is not the case for the Athlete.

- In two other CAS cases, the "International-Level" status of the respective athletes was not contested (CAS 2017/A/5021; CAS 2017/A/5357). In addition, in CAS 2017/A/5021, the relevant samples were collected over a four-year period and the athlete had competed in international competition in each of those four years. By contrast, the Athlete is charged with three whereabouts failures that were recorded after his exclusion from the IBA RTP and a year after his last participation in an international competition (the Tokyo Olympics). Similarly, in CAS 2017/A/5357, the Athlete had participated for a long time, including on the date of sample collection, in an international club competition classified by the international federation as an International Event.

66. In summary, the Athlete discontinued his participation in International Events after the end of the Tokyo Olympics on 8 August 2021, and was excluded from the IBA RTP on 7 July 2022. Therefore, as of that date, he ceased to be an International-Level Athlete and did not regain that status thereafter as he never again participated in any competitions that would elevate his status back pursuant to the IBA ADR.

67. Moreover, it is noteworthy that it was RUSADA, not the IBA or WADA, that appealed the Decision. There was not only no legal basis for appealing before CAS (as the Athlete is not an International-Level Athlete), but RUSADA also had no reason to appeal before CAS. It would have been easier for the Athlete to review the case at the national level – this would have been cheaper and faster and the proceedings would have been conducted in Russia and in the Russian language. RUSADA often appeals decisions before the national appeals body and therefore considers the body an independent and impartial one.

68. In respect of jurisdiction, the Athlete requested

"this procedure to be terminated or an award dismissing the appeal be delivered due to lack of CAS jurisdiction".

V. DECISION TO BIFURCATE THE PROCEEDINGS

69. As mentioned in the procedural history above, the Athlete filed the Motion, which was opposed by RUSADA but granted by the Sole Arbitrator. The reasons for the order on bifurcation are set out briefly in the following paragraphs.

70. The Sole Arbitrator's power to invite written submissions on jurisdiction and to render a preliminary decision on that issue is expressly foreseen in Article R55(5) of the CAS Code, as follows:

"When an objection to CAS jurisdiction is raised, the CAS Court Office or the Panel, if already constituted, shall invite the parties to file written submissions on the matter of CAS jurisdiction. The Panel may rule on its

jurisdiction either in a preliminary decision or in an award on the merits".

71. As follows from the second sentence of Article R55(5), there is no presumption in favour of bifurcation in CAS arbitrations, contrary to the position under Article 186(3) of the Swiss Federal Act on Private International Law (the "PILA") (RIGOZZI/HASLER, in ARROYO M., *Arbitration in Switzerland – The Practitioner's Guide*, 2nd ed, Article R55 CAS Code, para. 20). Instead, bifurcation should be ordered only if this is necessary in the interest of justice or likely to materially reduce time and costs, i.e. to improve procedural efficiency (cf., albeit on bifurcation of preliminary issues other than jurisdiction, CAS 2022/A/8679, para. 104; CAS 2019/A/6275, para. 52-54; CAS 2019/A/6294, paras. 63 et seq.; CAS 2019/A/6298, para. 72; CAS 2019/A/6594, para. 206).

72. When he determined whether bifurcation would improve procedural efficiency, the Sole Arbitrator found it appropriate to rely on three well-established criteria developed in arbitral practice, namely whether the jurisdictional challenge (i) is frivolous, (ii) is distinct from or rather intertwined with issues pertaining to the merits and (iii) would, if upheld, dispose of all or a substantial portion of the dispute (see KAUFMANN-KOHLER/RIGOZZI, *International Arbitration – Law and Practice in Switzerland*, 2015, para. 7107).

73. In the present case, all three criteria militated in favour of bifurcation. First, based on a *prima facie* assessment of the Athlete's jurisdictional challenge carried out at the time bifurcation was ordered, the jurisdictional challenge was not frivolous. Instead, it was supported by plausible arguments calling into question whether the Athlete was an International-Level Athlete. Secondly, the jurisdictional challenge turns solely on the question of whether the Athlete is an International-Level Athlete. This a question that is completely distinct from the merits because this disputed status of the Athlete is irrelevant to determining whether he committed an ADRV under Article 4.4 of the RUSADA ADR, or what the consequences of any such ADRV should be. Thirdly, if upheld, the jurisdictional challenge will dispose of the dispute in its entirety. Therefore, procedural efficiency was better served by bifurcating the issue of jurisdiction, rather than inviting an Answer on the merits, let alone potentially inviting further submissions or holding a hearing on the merits.

VI. JURISDICTION

74. Article R47 of the CAS Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body […]" (emphasis added).

75. It is not in dispute between the Parties that the applicable regulations in this case are the RUSADA ADR, whose Article 15.2 provides as follows:

"15.2. Appeal from Decisions Regarding Violations of the Rules, Consequences, Provisional Suspension, Implementation of Decisions and Jurisdiction

The decisions specified below may be appealed exclusively pursuant to the procedure stipulated by Clause 15.2 hereof:

• A decision to impose or not to impose Consequences for the Rules violation.
• A decision that the Rules' [the RUSADA ADR's] *violation was committed.*

[…]

15.2.1. Appeals of decisions involving International-Level Athletes or International Events

If a violation occurred during an International Event or International-Level Athletes are involved, the decision made may be appealed exclusively to CAS.

15.2.2. Appeals of decisions made with respect to other Athletes or other Persons

Where Clause 15.2.1 hereof does not apply, the decision may be appealed to the National Appeal Body.

[…]*".*

76. The Appealed Decision, which found that the RUSADA ADR were not violated and that no Consequences shall be imposed, is an appealable decision under Article 15.2 of the RUSADA ADR. As the ADRV asserted against the Athlete did not occur during an International Event, the first alternative of Article 15.2.1 of the RUSADA ADR is not applicable. It follows that CAS has jurisdiction over the present appeal only if the Athlete is to be qualified as an International-Level Athlete, for otherwise Article 15.2.2 of the RUSADA ADR confers jurisdiction to the National Appeal Body instead. Therefore, the decisive question to be decided by the Sole Arbitrator is whether the Athlete qualifies as an International-Level Athlete. The Appellant submits that he does, while the Respondent dispute that this is the case.

77. The RUSADA ADR define that term as follows:

"Athletes who compete in sports at the international level, as defined by the respective International Federation, in accordance with the International Standard for Testing and Investigations" (emphasis added).

78. In other words, the RUSADA ADR refer to the Athlete's International Federation's definition of what an International-Level Athlete is. The Parties agree that the Athlete's International Federation was, at the time of the potential whereabouts failures, the IBA. The Definitions section of the IBA ADR provides as follows (the "Definitions Section Definition"), including the relevant footnote comment:

"International-Level Athlete: Athletes who compete in sport at the international level, as defined by each International Federation, consistent with the International Standard for Testing and Investigations. For the sport of boxing, International-Level Athletes are defined as set out in the Scope section of the Introduction to these Anti- Doping Rules.[83]

[83] *[Comment to International-Level Athlete: Consistent with the International Standard for Testing and Investigations, IBA is free to determine the criteria it will use to classify Athletes as International-Level Athletes, e.g., by ranking, by participation in particular International Events, by type of license, etc. However, it must publish those criteria in clear and concise form, so that Athletes are able to*

ascertain quickly and easily when they will become classified as International-Level Athletes. For example, if the criteria include participation in certain International Events, then the International Federation must publish a list of those International Events" (emphasis added).

79. The referenced *"Scope section"* of the IBA ADR, in turn, provides as follows (the "Scope Section Definition"), including the relevant footnote comment:

> *"*[…] *Within the overall pool of Athletes set out above who are bound by and required to comply with these Anti-Doping Rules, the following Athletes shall be considered to be International-Level Athletes for the purposes of these Anti-Doping Rules, and, therefore, the specific provisions in these Anti-Doping Rules applicable to International-Level Athletes (e.g., Testing, TUEs, whereabouts, and Results Management) shall apply to such Athletes:*
>
> *(a) Athletes who are part of the IBA's Registered Testing Pool or Testing Pool (if one is established); or*
>
> *(b) Athletes who participate in any of the following Events: IBA World Boxing Championships, IBA Women's World Boxing Championships, IBA Junior World Boxing Championships, IBA Youth World Boxing Championships, IBA President's Cup, all Olympic Qualifying Events, the Olympic Games, the Youth Olympic Games, any Continental Championships, the IBA Global Boxing Cup, World Series of Boxing, as well as other International Events published by IBA on its website (http://www.IBA.org).*[2]
>
> [2] *[Comment: Should IBA publish other International Events on its website that would render an Athlete an International-Level Athlete, it shall specifically indicate, in a clear manner, that an Athlete's participation in any such Events will impact the Athlete's status in this regard]"* (emphasis added).

80. As the Athlete was removed from the IBA RTP before any of the alleged Missed Tests occurred (and as he has not been re-included since), it follows that the Athlete could only have attained the status of an International-Level Athlete by way of participation in one of the International Events listed in letter (b) the Scope Section Definition.

81. It is undisputed that the Athlete participated in (and won) the Tokyo Olympics, with his final bout having taken place on 7 August 2021. It is further undisputed that the Athlete participated in two events announced by the IBA on its website, namely the Dubai Event on 9 December 2023 and the Serpukhov Event on 12 July 2024. Moreover, the Sole Arbitrator has no hesitation to find (and does not consider disputed) that both events qualified as International Events within the meaning of the IBA ADR.

82. Accordingly, it is undeniable that on 7 August 2021, on 9 December 2023, and on 12 July 2024, the Athlete participated in events listed in letter (b) of the Scope Section Definition. However, the Parties disagree on whether participation in those events bestowed upon the Athlete the status of an International-Level Athlete at the relevant time (as regards the Tokyo Olympics) or at all (as regards the IBA Champions' Nights).

83. The Sole Arbitrator finds it useful to first identify the relevant point in time at which the Athlete would have had to be an International-Level Athlete for CAS to have jurisdiction over the present appeal (see section A. *infra*). Subsequently, he will determine whether

any of the three above-mentioned events were capable of providing that status to the Athlete at the relevant time (see sections B. and C. *infra*). Finally, the Sole Arbitrator will address other circumstances relied upon by RUSADA to argue that the Athlete is an International-Level Athlete (see section D. *infra*).

A. Relevant point in time

84. RUSADA has not clearly expressed any view as to the relevant point in time for determining whether the Athlete is an International-Level Athlete, for the purposes of Article 15.2.1 of the RUSADA ADR. The Athlete, in turn, seems to suggest that the relevant point in time is the day on which the appeal to CAS was filed.

85. Indeed, the fact that this status of the relevant Athlete relates to jurisdiction may, at first blush, speak in favour of determining that status as at the date of the filing of the appeal, or even at the date on which the CAS proceedings are closed. After all, it is generally sufficient if an arbitration agreement comes into existence during the arbitration (see MAVROMATI/REEB, *The Code of the Court of Arbitration for Sports*, 2015, Article R27 CAS Code, para. 17).

86. That said, Article 15.2.1 of the RUSADA ADR requires that *"a violation occurred during an International Event or International-Level Athletes are involved"*. The first alternative (International Event) expressly refers to the time at which the ADRV occurred. While, linguistically, it is not entirely clear for the second alternative what the term *"involved"* refers to, the Sole Arbitrator finds that, in the absence of any indication to the contrary, there is much to suggest that the object of reference was meant to be the same as for the first alternative, i.e., the ADRV. This reading is supported by the fact that it would be rather surprising, and unpractical, if the avenue of appeal for a potential ADRV could change – even multiple times – during the results management procedure, depending on the athlete's subsequent inclusion in or exclusion from registered testing pools, or his/her participation in certain events. There is no indication that this is what the drafters of the RUSADA ADR or, ultimately, of the WADC, intended.

87. For the above reasons, the Sole Arbitrator finds that the relevant point in time for determining whether the Athlete was an International-Level Athlete is the time at which the alleged ADRV occurred (same view CAS 2018/A/5853, para. 94; CAS 2014/A/3670, para. 60; CAS 2022/A/9246, para. 54 with further references). In the present case, this was on 10 June 2023, when the Athlete allegedly missed a test for the third time within 12 months, in violation of Article 4.4 of the RUSADA ADR.

B. Participation in the 2020 Olympic Games

88. The Sole Arbitrator has no reason to doubt, and does not understand the Athlete to dispute, that his participation in the 2020 Olympic Games made him an International-Level Athlete within the meaning of the RUSADA ADR. The decisive question, which is disputed between the Parties, is whether the Athlete retained this status until 10 June 2023, more than 22 months later.

89. In this regard, the Sole Arbitrator notes the following observations by the panel in CAS 2018/A/5853, at para. 84:

> *"*[…] *What is in dispute between the Parties is the second limb of the above definition, i.e. whether or not the Player is someone who "participates in International Competitions…". The Panel has serious doubts whether the Player fulfills this condition. First of all, the Panel notes the present tense in the definition. This seems to indicate that a player – in order to qualify as an international-level player – must have participated at the relevant time (i.e. when the antidoping rule violation occurred) in an international competition. This interpretation based on the wording of the definition is further backed by a construction of the provisions based on its spirit and purpose. Qualifying an athlete as international-level player in case he participated sometimes during his career in a single international competition would cast the net far too wide. If one were to follow such approach, any player participating in an international event would never lose his or her status as an international-level player. He or she would remain an international-level player even if the international competition dates back several years. This, however, would render the first limb of the definition meaningless, since players included in FIFA's or a Confederation's Registered Testing Pool most certainly would have participated (at some point in time) in an international competition.* […]*"* (emphasis added).

90. The Sole Arbitrator notes that those observations represented an *obiter dictum* as the panel in CAS 2018/A/5853 did not eventually decide the issue. However, the Sole Arbitrator shares the view that, at least when the applicable rules refer to participation in certain events the present tense, as they do in the case at hand, this cannot be interpreted as meaning that the athlete becomes an International-Level Player for future years.

91. Of course, if one assumes that the status as an International-Level Athlete exists only during the International Event at issue, this creates the risk of equating the two alternative jurisdictional requirements mentioned in Article 15.2.1 of the RUSADA ADR, i.e. that the ADRV either occurs during an International Event or involves an International-Level Athlete. However, those two requirements are identical only if the relevant International Federation defines the term International-Level Athlete *exclusively* by a present tense reference to participation in International Events. This is not the case here, because latter (a) of the Scope Section Definition provides for an alternative ground for an athlete becoming an International-Level Athlete, namely inclusion in the IBA's Registered Testing Pool (analogous to many other anti-doping rules, see e.g. CAS 2014/A/3670, para. 42; CAS 2017/A/5021, para. 59; CAS 2018/A/5853, para. 93). Consequently, the reference in Article 15.2.1 of the RUSADA ADR to International-Level Athletes is not given the same meaning as the reference to International Events even if, under the Scope Section Definition, participation in an International Event makes an athlete an International-Level Athlete only for the duration of such event.

92. In addition, International Federations are free not to refer in their definition of International-Level Athletes to participation in International Events in the present tense. Rather, they may just as well provide for a certain time frame before and/or after participation in an

International Event, during which period the Athlete would be considered an International-Level Athlete (see, e.g., CAS 2018/A/5784, para. 35). As the IBA chose not to do so, but instead made a present tense reference to participation in an International Event, the Sole Arbitrator does not find it appropriate to "correct" that choice simply because it may bereave one of the two alternatives of Article 15.2.1 of the RUSADA ADR of some of its meaning.

93. In addition, even if one accepted that a present tense reference to participation in International Events included some time before and/or after the said event, this would beg the question of just how long that period should be. As there is no indication of any relevant period (or even criteria to determine such period) in the IBA ADR, the Sole Arbitrator is not prepared to concoct such period himself.

94. In any case, if at all, any such period before and/or after the International Event in question would need to be quite short, in order not to ignore the present tense used in the definition of International-Level Athlete. In particular, such period certainly would not stretch over 22 months, as would be required here to find that CAS has jurisdiction based on the Athlete's participation in the Tokyo Olympics. This view is supported not only by the *obiter dictum* of the panel in CAS 2018/A/8583 (with its dismissive reference to *"several years"*, see above para. 89), but also by the following ruling in CAS 2014/A/3670, at para. 60:

"Contrary to Appellant's contention, he is not an "international-level athlete" under IAAF Rule 35.7 [the IIAF Rules referred to an athlete who *"is competing in an International Competition under Rule 35.7"*] *simply because he previously competed in international competitions recognized by the IAAF (e.g., 2009 IAAF World Youth Championships, 2010 IAAF World Junior Championships, and 2012 Olympic Games) and was tested as part of the IAAF's drug testing program in 2009 and was drug tested from 2010-2013 in Jamaica and abroad. All of these international competitions and drug tests occurred in years prior to his 22 June 2013 positive test for HCTZ in his sample taken in a Jamaican national track and field competition"* (emphasis added).

95. Similarly, in CAS 2022/A/9246, the sole arbitrator found that participation in a relevant event more than three years before the doping test did not render the athlete an International-Level Athlete.

96. Conversely, in three cases in which other CAS panels did accept, based on similar definitions as in the present case, that participation in International Events rendered an athlete an International-Level Athlete, it was found that the athletes had participated in relevant events in the same years in which the alleged ADRVs occurred (CAS 2015/A/4215, paras. 8, 130; CAS 2017/A/5357, paras. 4, 6; CAS 2017/A/5021, paras. 14, 59; in addition, in two of those cases, the athletes did not dispute that they were International-Level Athletes, see CAS 2017/A/5357, para. 47; CAS 2017/A/5021, para. 61). This is undeniably not the case for the Athlete's participation in the Tokyo Olympics, which took place almost two years before the alleged ADRV.

97. For the above reasons, the Sole Arbitrator concludes that the Athlete's participation in the Tokyo Olympics on 7 August 2021 did not make him an

International-Level Athlete at the relevant point in time, i.e. on 13 June 2023.

C. Participation in the Champions' Night Events

98. The Dubai Event and the Serpukhov Event were held on 9 December 2023 and 12 July 2024, respectively. This is almost than six months, respectively more than twelve months, *after* the alleged ADRV on 13 June 2023. As the International-Level Athlete status must exist at the time of the alleged ADRV, it follows that the Athlete's participation in the Champions' Night Events cannot provide a basis for the Sole Arbitrator to assume jurisdiction over the present case (see also CAS 2022/A/9246, para. 54).

99. In addition, for the Athlete to become an International-Level Athlete based on his participation in the Champions' Night Events, those events would have had to be published on the IBA's website, pursuant to the Scope Section Definition. While it is undisputed that those events were announced on the IBA's website, the question is whether this is sufficient, in and of itself, to fulfil the publication requirement contained in the said definition.

100. In this regard, the Sole Arbitrator notes that, according to Article 23.2 of the IBA ADR, the comments contained in the IBA ADR shall be used to interpret the IBA ADR. The language of the comment on the Scope Section Definition is clear: the IBA *"shall specifically indicate, in a clear manner, that an Athlete's participation in any such Events will impact the Athlete's status in this regard"* (emphasis added). The rationale of that comment is likewise clear, because it is expressly set out in the comment on the Definitions Section Definition, whereby the IBA *"must publish those criteria* [for becoming an International-Level Athlete*] in clear and concise form, so that Athletes are able to ascertain quickly and easily when they will become classified as International-Level Athletes"* (emphasis added).

101. In the present case, it is undisputed that the IBA's website did not specifically indicate, in a clear manner, that the Athlete's participation in the IBA Champions' Night Events would make him an International-Level Athlete. While the Respondent refers to the fact that the IBA's website described the Champions' Night Events as bringing together the *"crème de la crème of the boxers around the world"* involving international participants, this is plainly not a specific and clear indication of the consequences that participation in such event would have on the Athlete's status under the IBA ADR. In addition, with respect to the Serpukhov Event, the fact that the Athlete fought for a WBA title, not an IBA title, made it even less obvious that his participation in that event could affect his status under the IBA ADR. As a result, the Athlete was clearly not able to ascertain *"quickly and easily"*, as required per the comment on the Definitions Section Definition, whether his participation in the IBA Champions' Night Events would make him an International-Level Athlete.

102. This is not changed by the undisputed fact that the ITA had Testing Authority and Results Management Authority for the Champions' Night Events. Apart from it being unclear whether the Athlete was even aware of the ITA's involvement in those Events, such involvement plainly is not, in any event,

the same (or of the same value) as the IBA specifically and clearly indicating, on its website, that participation in the Champions' Night Events would make participating athletes International-Level Athletes. Had the IBA sought to tie such status to all athletes participating in events at which the ITA had Testing Authority and/or Results Management Authority, its rules would have had to say so.

103. Therefore, based on both the wording of and the rationale behind the above-mentioned comments included in the IBA ADR, the Sole Arbitrator finds that the IBA failed to publish the IBA Champions' Night Events in the form required by its own regulations. Consequently, also for this reason, the Athlete's participation in those events cannot create CAS jurisdiction for the present case.

D. Other circumstances relied upon by the Appellant

104. RUSADA asserts that the Athlete retained his status as an International-Level Athlete even after the Tokyo Olympics because he allegedly remained an Olympic-level competitor, as confirmed especially by his inclusion in the RUSADA RTP, his invitation to the Moscow Ceremony, his participation in professional bouts against high-level international boxers, and the ITA's email of 23 September 2024.

105. The Sole Arbitrator is not persuaded by this argument. It may remain open whether the Athlete's sporting level remained unchanged, what the reasons behind his inclusion in the RUSADA RTP or his invitation to the Moscow Ceremony were, what the level of his opponents in professional bouts was, and whether the ITA made any statement on the Athlete's status as at the relevant point in time (i.e. 13 June 2023, as opposed to the date of the ITA's email of 23 September 2024). The Sole Arbitrator is not bound by the ITA's assessment of the legal question that is before the Sole Arbitrator, i.e. whether the Athlete is an International-Level Athlete under the IBA ADR. As explained above, the Scope Section Definition's present tense reference to participation in an International-Event cannot result in the Athlete still being an International-Level Athlete 22 months after the Tokyo Olympics. This finding is not affected by circumstances that may (or may not) show that his sporting level remained the same thereafter – for the simple reason that, under the IBA ADR, an athlete's sporting level is irrelevant to the determination of whether he or she is an International-Level Athlete.

106. In view of all of the above, the Sole Arbitrator finds that he has no jurisdiction to hear the appeal brought by RUSADA in this case, given that the Athlete was not, at the relevant moment in time, an International-Level Athlete.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Court of Arbitration for Sport has no jurisdiction to hear the appeal filed by Association Russian Anti-Doping Agency (RUSADA) against Albert Batyrgaziev on 13 May 2024 to challenge the decision adopted on 23 April 2024 by the RUSADA Disciplinary Anti-Doping Division.

2. (…).

3. (…).

4. All other and further motions or prayers for relief are dismissed.

CAS 2024/A/10831
Antani Ivanov v. Anti-Doping Centre of the Republic of Bulgaria (ADC)
4 June 2025

Panel: Mr James Drake KC (United Kingdom), Sole Arbitrator

Aquatics
Doping: Violation of the prohibition against participation in competitions during a period of ineligibility
Withdrawal of the appeal filed against one respondent
Burden and standard of proof regarding the violation of the prohibition
Establishment of the violation of the prohibition against participation in competitions during a period of ineligibility
Method of interpretation of a legal provision
Definition of "competition" for the purpose of the prohibition
Consequences of the violation

1. **The CAS Code does not address the withdrawal of an appeal before CAS making this a procedural question under Article 182 of the Swiss Private International Law Act (PILA). CAS panels must determine and apply appropriate arbitral procedures either directly or by reference to a law or rules of arbitration ensuring, of course, that the parties are treated equally and their rights to be heard are respected. In this respect, it is constant practice that a unilateral withdrawal of a claim in arbitration is only possible until the claimant has filed its full statement of claim / appeal brief with the arbitral tribunal. Thereafter, a withdrawal of the claim is only possible with the consent of the opposing party. An athlete that withdrew his appeal against one respondent with prejudice (not seeking to bring a second appeal on the same subject matter) validly withdrew his appeal against that respondent without the latter's consent.**

2. **It is for the Anti-Doping Centre of the Republic of Bulgaria (ADC) to prove the necessary elements of the alleged violation and to do so to the comfortable satisfaction of the CAS panel.**

3. **There is no intent or knowledge requirement for an athlete to be found in violation of the prohibition against participation in competitions during a period of ineligibility – all that is required is that the athlete participates in a competition (or activity) authorised or organised by a Signatory (to the WADC) or member organisation of a Signatory, or a club or other member organisation of a Signatory's member organisation during his period of ineligibility.**

4. **The starting point for interpreting a legal provision is its literal interpretation. Only if a text is not clear and if several interpretations are possible, one must determine the true scope of the provision by analysing its relation with other provisions (systematic interpretation), its legislative history (historic interpretation) and the spirit and intent of provision (teleological interpretation). It is not for the CAS more generally, to question the policy or intent of antidoping rule makers. CAS panels must exercise caution when engaging in interpretation of rules that, upon the face of the text, leave little doubt as to their meaning.**

5. The amateur nature of a triathlon event, its absence from the official calendar, the lack of ranking points, and its open registration system do not exclude it from the definition of "Competition". The prohibition under Article 51(1) of the Bulgarian Regulations on Anti-Doping Activities (RADA) should be interpreted broadly to keep banned athletes away from sport generally during their period of ineligibility. Indeed, to determine whether an event qualifies as a "Competition" under Article 51(1) of the RADA, the ordinary English language meaning of the terms used in the definition - race, game, match, and contest should be used. A race or contest where participants competed against each other involving competition for supremacy, with participants ranked according to their results with formal rules of participation, an official winner, and published rankings shall be considered as a competition.

6. By participating in a Competition during his period of ineligibility, the athlete violated Article 51(1) of the RADA. Since the athlete did not exercise his duty of care and his responsibility to ascertain what sporting events (or other activities) fell within the scope of the earlier ban, the athlete's degree of fault did not warrant a reduction in the standard two-year sanction for this violation. He must therefore serve an additional two-year ban starting on the date of the CAS Award rather than immediately following the expiration of the previous period of ineligibility.

I. THE PARTIES

1. The Appellant is Mr Antani Ivanov (the "Athlete" or the "Appellant"), a swimmer of Bulgarian nationality, born in 1999. He is an experienced competitor and has competed at the national and international levels since 2019. Amongst other successes, he won a bronze medal in the 200m butterfly at the 2021 European Championships and a gold medal in the 4x100m relay at the 2021 Bulgarian Open Championships.

2. The Respondent is the Anti-Doping Centre of the Republic of Bulgaria (ADC) ("ADC" or the "Respondent"), and, pursuant to Article 3(2) of the Bulgarian Regulations on Anti-Doping Activities (the "RADA"), is the National Anti-Doping Organization for Bulgaria and *"has an exclusive competence with respect to the anti-doping activities within the territory of the Republic of Bulgaria and is independent in its operative decisions and activities"*. The RADA are based on the model rules for national anti-doping organisations developed by the World Anti-Doping Agency ("WADA") in compliance with the World Anti-Doping Code 2021 (the "WADC").

3. In his Statement of Appeal, the Appellant also named the Bulgarian Olympic Committee ("BOC") as respondent. The BOC was founded in 1923 and has been recognised by the International Olympic Committee since 1924. Pursuant to Article 32(1) of the RADA, the BOC Disciplinary Committee (the "BOC DC") makes decisions on issues related to anti-doping rule violations ("ADRV") and determines and imposes the type and duration of sanctions for such ADRVs. The Appellant subsequently withdrew

his appeal against the BOC (see below paras 30 and 91 ff).

4. The parties shall be referred to collectively as the "Parties".

II. OUTLINE OF THE APPEAL

5. This is the Athlete's appeal to the Court of Arbitration for Sport ("CAS") pursuant to the Code of Sports-related Arbitration (2023 edition) (the "CAS Code") against a decision issued on 12 August 2024 by the BOC DC by which the BOC DC found that the Athlete had committed an ADRV under Article 51(1) of the RADA and imposed a period of ineligibility of two years commencing 8 June 2025 (the "Appealed Decision").

III. FACTUAL BACKGROUND

6. Set out below is a summary of the relevant facts based on the Parties' written submissions, pleadings and evidence adduced in these proceedings and from matters of public knowledge. While the Sole Arbitrator has considered all matters put forward by the Parties, reference is made in this Award only to those matters necessary to explain the Sole Arbitrator's decision and reasoning.

7. The Athlete was at all material times an International-Level Athlete as that term is defined in the RADA. On 2 December 2021, what was then known as the Fédération Internationale de Natation and is now known as World Aquatics, the international federation for aquatic sports, notified the Athlete that he was included in its Registered Testing Pool starting from 2022.

A. The Prior Proceedings

8. On 10 October 2022, the BOC DC issued a decision by which it determined that the Athlete had committed an ADRV in breach of Article 6.1.4 of the RADA (a combination of three missed tests and/or filing failures within a period of 12 months) and imposed a two-year period of ineligibility on the Athlete (the "BOC DC 2022 Decision"). The BOC DC set *"the start date of the sanction as 10.10.22, with a period of provisional suspension from 05.05.2022 to 19.05.2022 to be deducted from this period"*. The period of ineligibility imposed by the BOC DC, with credit allowed to the time on provisional suspension, thus expired on 26 September 2024.

9. On 13 October 2022, the Athlete appealed against the BOC DC 2022 Decision to CAS, and proceedings were opened under CAS 2022/A/9198.

10. On 17 October 2022, the Athlete filed an urgent request for a stay of the BOC DC 2022 Decision and on 18 October both the ADC and the BOC indicated that they had no objection to a stay.

11. On 20 October 2022, the Deputy President of the Appeals Arbitration Division (the "Deputy Division President") granted the request for a stay. The period of ineligibility imposed by the BOC DC 2022 Decision was therefore stayed and the Athlete was free to compete pending the determination of his appeal in CAS 2022/A/9198.

12. On 26 June 2023, the sole arbitrator in CAS 2022/A/9198 (the "Arbitrator") issued the operative part of his award by which he dismissed the Athlete's appeal and confirmed the BOC DC 2022 Decision. The reasoned award was issued on 15 August 2023 (the "9198 Award"). By the 9198 Award, the

Arbitrator: (a) saw no reason to reduce the two-year period of ineligibility imposed by the BOC DC; and (b) saw no reason to back-date the starting date of the period of ineligibility beyond the date of the BOC DC 2022 Decision, namely 10 October 2022. The Arbitrator also gave credit for the period of provisional suspension served by the Athlete from 5-19 May 2022 (i.e., 14 days). The period of ineligibility therefore expired on 26 September 2024.

13. On 11 September 2023, WADA submitted a Request for Interpretation of the 9198 Award, which was granted by the Deputy Division President on 5 October 2023. WADA sought clarification of two matters, the first of which is not important for present purposes and the second of which concerned the fact that the Arbitrator did not address, when considering the period of ineligibility to be served by the Athlete, the fact that a stay had been granted on 20 October 2022 by which the period of ineligibility imposed by the BOC DC 2022 Decision was stayed pending the determination of his appeal. WADA sought clarification in these terms:

"Second, the Award does not specifically recall that the period after the 20 October 2022, when the stay was ordered, until the Award was rendered should not count for the purposes of the calculation of the sanction against the Athlete. It goes without saying that, given the period of Ineligibility was suspended during that period, the period of Ineligibility, which was stayed in the interim, resumed with the issuance of the dispositive Award on 26 June 2023 (subject to further stays ordered subsequently by the Federal Tribunal). Any other outcome would mean in practice that the Athlete received a credit for a period where he was eligible to compete, which would be nonsensical".

14. On 5 November 2023, the Arbitrator provided clarification of the 9198 Award. As to the second matter raised by WADA, he said this:

"As regard the second element, it is my opinion that the period after 20 October 2022, when the stay of the Appealed Decision was ordered, until the operative part of the Award was rendered (26 June 2023) shall not count for the purposes of the calculation of the two-year period of ineligibility. Any other interpretation would be illogical in so far as it would give the Athlete a credit for a period where he was eligible to compete.

However, I respectfully note that this issue (i.e., whether the period during which the Appealed Decision was stayed should/ should not count for [sic] purpose of the calculation of the period of Ineligibility) has never been raised or discussed by the Parties during the proceedings. Accordingly, I imagine that the Parties could put forward different legal arguments in one sense and the other. In other words, it is my view that the requested interpretation involves a question of law not discussed by the Parties during the proceedings and on which I was not asked to make a decision".

15. On 28 June 2023, the Athlete appealed against the 9198 Award to the Swiss Federal Tribunal ("SFT"). There was no appeal or cross-appeal by WADA. In the context of that appeal, on the application of the Athlete the SFT ordered two stays of the sanction, from 29 June to 2 July 2023 and from 18 to 20 August 2023, adding up to a further seven days.

16. On 1 March 2024, the SFT dismissed the Athlete's appeal.

B. The Lion Heart Triathlon

17. On 2 September 2023, during the period of ineligibility imposed by dint of the prior proceedings, the Athlete participated in an ultra-cross triathlon in Primorsko, Bulgaria (the "Lion Heart Triathlon"), organised by the Bulgarian triathlon club, the Lion Heart Sports Club (the "Lion Heart Sports Club"), which club is a member of the Bulgarian Triathlon Association ("BTA") which, in turn, is a member of World Triathlon ("World Triathlon"), which is a signatory to the WADC. The Athlete posted information about his participation on social media on the same and following days.

18. On 4 September 2023, Ms Galeva, the ADC's Chief Expert of the Anti-Doping Programs, opened an investigation into the Athlete's participation in the Lion Heart Triathlon with a view to determining whether or not the Athlete had violated Article 51(1) of the RADA. Pursuant to that investigation, the ADC sought information from the Lion Heart Sports Club and the BTA.

19. On 6 September 2023, the Lion Heart Sports Club informed the ADC as follows: (a) it was a sports club and a member of the BTA; (b) the events of the Lion Heart Sports Club are financed by participation fees and the support of sponsors and partners and it receives no state funding; the prizes *"for the winners are entirely material and in the form of vouchers provided by our sponsors and partners"*; (c) its *"competitions are amateur events. Any athlete who is 18 years old has the right to participate after registering and paying the entry fee"*; and (d) its competitions are amateur, not listed in the official competition calendar of the BTA, and they do not award points for rankings either nationally or internationally.

20. On 8 September 2023, the BTA replied to the ADC with the following: (a) the competition organized by the Lion Heart Sports Club is an amateur cross-triathlon event and is not part of the BTA calendar; (b) the event *"is entirely focused on mass participation – an open sports event for every Bulgarian citizen over the age of 18";* and (c) the results of the competition are not recognized by any institution and are not part of the national or international ranking lists, and the competition does not have a points system.

21. Also on 8 September 2023, the ADC wrote to WADA asking its *"opinion"* with respect to a *"potential violation"* of the prohibition against participation by the Athlete in the Lion Heart Triathlon. The letter was in these terms:

> *"We would like kindly to ask for your opinion on a matter for a potential violation under Code Art. 10.14.1, especially because the matter involves* [the Athlete].
>
> *After a post in the social media networks, we started an investigation of a potential violation of the Prohibition against participation during a period of Ineligibility of the athlete by participation in the competition 'Lion Heart'. Please, find enclosed a report on the matter, as well as correspondences with* [the BTA] *and the [Lion Heart Sports Club].*
>
> *According to the information received by both organizations, the competition 'Lion Heart' in which* [the Athlete] *had taken part is an amateur one, not financed by the government and not included in a competition calendar, but organized by a sport club […] member of the* [BTA]. *Any Bulgarian citizen over 18 years-old is eligible to participate in it without any need to be registered in a sport club or organization, only by paying entry fee.*

According to you, in the abovementioned circumstances is there a violation of the Art. 10.14.1 or not. We would be grateful to receive your opinion on the matter".

22. On 15 September 2023, WADA responded as follows:

"[…] We have reviewed your request below and based on the information available to us (see attached), the Athlete seems to have violated the prohibition against participation during ineligibility described in Code article 10 14.3, by participating in an activity (a triathlon event called 'Lion Heart') organized by a member organization [the Lion Heart Sports Club] of a Signatory's member organization [the BTA] *which apparently fall under your jurisdiction.*

If this is the case, the [ADC] would be required, under Code article 10.14.3, to initiate disciplinary proceedings against the athlete, notifying him of the alleged violation of the prohibition described in Code article 10.14.1, reviewing any explanations he may submit and, ultimately taking a reasoned decision (see the combination of ISRM articles 11 and 5). […]*"*

23. On 14 November 2023, the ADC sent to the Athlete a notification of a potential ADRV by reason of his participation in the Lion Heart Triathlon.

24. On 24 November 2023, the Athlete (via counsel) responded. A number of points were made to the effect that the ADC was biased and incompetent and as to the merits said this:

"Lastly, I wish to state clearly and emphasize that Antani Ivanov is disqualified from competing by virtue of the decision of the CAS. Pursuant to Article 69 para. 5, 'The athlete shall compete only on behalf of the club wherewith he/she has been registered.' Antani Ivanov is not registered with the BAT, has not competed on behalf of the club you name, and, therefore, has not breached the prohibition on exercising competition rights. His participation was purely amateur, for pleasure and good health, without incurring any competition rights, and therefore not subject to the scrutiny of the ADC and the rules of WADA. The burden is on the ADC to prove that Antani Ivanov participated as a registered competitor with competition rights in the said event. It is the act of registration that creates competition rights for the athlete under the Physical Education and Sports Act. Such did not arise in this case! Everyone has the right to play sports for their health without being registered with a sports federation. Please contact BAT and check if Antani Ivanov has an official registration with them for the specific event. Once you have established that Antani does not have a registration with BAT and, therefore, no competitive rights have accrued to him in the event in question, i.e., he has not breached the ban on exercising competitive rights, I urge you to end this witch hunt immediately".

25. On 28 March 2024, the ADC issued to the Athlete a "Notice of Charge under the Regulations on Anti-Doping Activities and the Result Management Procedure of the Antidoping Center" (the "Notice of Charge") stating, *inter alia*, that the ADC was of the opinion that:

a. the Athlete had *"committed an ADRV by violating the prohibition under Art. 51, para. 1 of the RADA for participation in competition during a period of ineligibility"*; and

b. the Athlete was offering *"sports-pedagogical services, including for professional athletes, which violates the ineligibility period imposed on you according to Article 51 of the RADA and Article 10.14.1 of the Code".*

26. On 17 April 2024, the Athlete (via counsel) responded to the Notice of Charge with his "Objection". In relevant part, the stated grounds for objection were as follows:

    a. As to the Lion Heart Triathlon: The Athlete is not a registered athlete with the BTA, and therefore, he did not possess competitive rights during his participation in the Lion Heart Triathlon. The Lion Heart Triathlon *"is open to participation by all citizens who wish to take part by completing the registration form and the necessary documents. For this reason, professional athletes, ordinary sports enthusiasts, and those interested in a healthy lifestyle can participate in this event. This is exactly what my client did, participating in the event purely for enjoyment and maintaining his sports fitness"*.

    b. As to the provision of sports-pedagogical services: *"The reference to a website (which does not currently exist and cannot be verified for the exact services offered) is not valid evidence for holding my client responsible. The notification of charges sent to us does not specify how a violation of Article 51 of the ADR is established, nor is any evidence provided for the alleged violation. It is a well-known fact that various services, lessons, or advice can be offered on the mentioned website. My client has every right to offer any services on the site, which could include guidance on a healthy lifestyle, nutritional planning, graphic design, or even translation services. Simply pointing to a link from a non-existent profile does not prove a violation of the imposed ban, and the ADC has not sufficiently proven the alleged violation of Article 51 of the ADR"*.

27. On 15 May 2024, the ADC referred the matter to the BOC DC stating, amongst other things, that the ADC had determined that the Athlete's *"participation in the 'Lion Heart' competition on September 2, 2022, organized and conducted by 'Lion Heart' Ltd, constitutes a violation of the prohibition under Article 51 paragraph 1 of the RADA and Article 10.14.1 of the* [WADA] *Code"*.

28. On 12 August 2024, the BOC DC issued its decision No. 2/2024 in case No. 2/114/2024 by which it found that the Athlete had committed a violation pursuant to Article 51 (1) of the RADA *"having participated in a sports competition on 02.09.2023, organized by SC 'Lion Heart', a member of the Bulgarian Triathlon Association, an official member of the World Triathlon"* and imposed on the Athlete a *"deprivation of rights for a period of two (2) years"*. This is the Appealed Decision. In the Appealed Decision, the BOC DC took the view that the Athlete had violated Article 51(1) of the RADA by participating in the Lion Heart Triathlon, which was a competition and an activity pursuant to the language of that article. The BOC DC did not address the charge against the Athlete by reason of his offering sports-pedagogical services.

IV. PROCEEDINGS BEFORE THE CAS

29. On 29 August 2024, in accordance with Articles R47 and R48 of the CAS Code, the Athlete filed his Statement of Appeal against the Appealed Decision with the CAS Court Office against both the ADC and the BOC. In his Statement of Appeal, the Athlete requested the CAS Court Office to accelerate the procedure and to appoint a sole arbitrator capable

of rendering a final award by 8 June 2025.

30. On 9 September 2024, the Athlete informed the CAS Court Office that he *"wishes unilaterally to withdraw the appeal against BOC. Given the stage of the proceedings, BOC's consent is NOT required (art 65. CPC)"*.

31. On 12 September 2024 (in letters to the CAS Court Office):

    a. The ADC stated that it considered that there was no reason to exclude the BOC from the procedure and that *"the subject of the appeal is precisely the decision of the DC with BOC, and a procedure without the presence of the body that issued it would be extremely incomplete"* and would deprive the BOC *"of the opportunity to protect the document they created"*.

    b. The BOC formally objected to the withdrawal of the appeal against it. It said, amongst other things, that *"the BOC is a mandatory respondent. It is the decision of the BOC Disciplinary Committee that is being appealed so the BOC has a direct interest in upholding the decision of the Committee"*.

32. On 13 September 2024, the CAS Court Office informed the Parties that it would be for the Sole Arbitrator, once constituted, to rule on the withdrawal of the Athlete's appeal against the BOC.

33. On 4 October 2024, in accordance with Article R51 of the CAS Code, the Athlete filed his Appeal Brief against (only) the ADC with the CAS Court Office. The Athlete reiterated that he had withdrawn the appeal against the BOC.

34. On 7 October 2024:

    a. The CAS Court Office acknowledged receipt of the Appeal Brief and informed the ADC and the BOC that it was available on the CAS e-Filing platform.

    b. The Athlete requested the CAS Court Office to retract its message to the BOC on the basis that the appeal had been withdrawn against it and that it should not therefore have access to the Appeal Brief.

    c. The CAS Court Office advised the Athlete that the BOC was a party to the proceedings and was therefore entitled to receive all correspondence and submissions, and that it will be a matter for the Sole Arbitrator, once constituted, to rule on the withdrawal of the Athlete's appeal against the BOC.

35. On 6 November 2024, in accordance with Article R55 of the CAS Code, the ADC filed its Answer and the BOC filed its Answer.

36. On 16 January 2025, the CAS Court Office informed the Parties of the appointment of James Drake KC as the Sole Arbitrator in this appeal.

37. On 30 January 2025, the Sole Arbitrator held a case management conference ("CMC") in order to discuss the manner and timing of the hearing. At the CMC, the Athlete sought a direction that the question of the efficacy of the withdrawal of the appeal against the BOC should be bifurcated. The Sole Arbitrator expressed the concern that if that were to happen there was a risk that

the final Award would not be available prior to 5 June 2025, that being the date by which the Athlete required the Award. In those circumstances, it was agreed by the Parties, the Athlete included, that the question of the withdrawal would be dealt with at the final hearing on the merits and addressed in the Award.

38. On 18 February 2025, the Appellant signed and returned the Order of Procedure.

39. On 24 and 25 February 2025, the BOC and the ADC (respectively) signed and returned the Order of Procedure.

40. On 3 April 2025, an oral hearing took place (remotely) in which hearing the following people participated:

a. The Sole Arbitrator

b. For the Athlete:

i. Mr Georgi Gradev, Counsel

ii. Mr Márton Kiss, Counsel

iii. Mr Yavor Petkov, Trainee Counsel

iv. Mr Kaloyan Stefanov, Trainee Counsel

v. Ms Desislava Gegovska, Trainee Counsel

vi. Mr Antani Ivanov, the Athlete

c. For the ADC:

i. Ms Sylvia Mindova, Secretary General

ii. Ms Lyuba Bitrakova, Chief Expert

d. For the BOC:

i. Mr Ivan Yankov, Counsel

ii. Ms Radina Vakrilova, Counsel

e. For the CAS:

i. Ms Delphine Deschenaux-Rochat, CAS Counsel

41. At the outset of the hearing, the Parties confirmed that they had no objection to the jurisdiction of CAS in this appeal and no objection to the Sole Arbitrator.

42. At the close of the hearing, the Parties confirmed that they had a full and fair opportunity to present their respective cases before the Sole Arbitrator.

V. THE SUBMISSIONS OF THE PARTIES

43. The Sole Arbitrator has carefully considered the Parties' submissions and sets out below the essential nature of the principal submissions advanced by the Parties. By reason of the decision below as to the effective withdrawal of the appeal against the BOC, the submissions made by the BOC are left out of this account.

A. The Athlete's Submissions

a. Jurisdiction

44. The CAS has jurisdiction to hear this appeal pursuant to Article 40.4 of the RADA which provides that *"In cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS"*.

45. The Athlete is an International-Level Athlete and as such is entitled to bring this appeal to CAS.

b. Admissibility

46. The time limit to file the appeal is governed by Article 40.8.2 of the RADA which sets a time limit of 21 days from the date of the receipt of the decision to appeal to CAS. The Athlete received the Appealed Decision on 27 August 2024 and filed his Statement of Appeal on 29 August 2024, in time.

c. Applicable Law

47. Pursuant to Article R58 of the CAS Code, the Sole Arbitrator *"shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties"*.

48. The *"applicable regulations"* are the RADA because the appeal *"is directed against a decision issued by the BOC DC in their application thereof"*. Further, the World Anti-Doping Program is formed of three levels: (i) the WADC, (ii) the WADA International Standards (including in particular the International Standard for Testing and Investigations ("ISTI") and the International Standard for Results Management ("ISRM"), and (iii) the WADA Guidelines.

49. The Sole Arbitrator should therefore adjudicate this dispute applying the RADA primarily and the WADC, the ISRM, the ISTI, the WADA Guidelines subsidiarily, and to the extent that there are any gaps to Bulgarian law.

d. The ADC is Biased Against the Athlete

50. By way of context, the ADC is biased against the Athlete and the ADC representatives *"were not independent and qualified to conduct the proceedings"* by reason of the following matters:

a. The Athlete (and his counsel) are in *"deep and constant conflict"* with the ADC *"which we deem heavily biased and totally incompetent"*. The ADC representatives were asked to recuse themselves but declined; this *"speaks for itself"*.

b. The ADC representatives are *"abusing their right to test the Appellant by subjecting him to unnecessary doping tests"*; and on the occasion of the Athlete's whereabouts failures, they *"wrongly determined"* the charge as a missed test.

c. The ADC representatives wrote to WADA asking for its opinion on the alleged violation saying *"especially because the matter involves the athlete Antani Ivanov"*.

d. The Athlete is the victim of a witch hunt.

e. The Violation of Article 51(1) of the RADA

51. At the heart of this matter is what conduct is prohibited by Article 51(1) of the RADA and whether the Athlete has violated the terms of his ineligibility under the BOC DC 2022 Decision and confirmed in the 9198 Award.

52. Article 37(1) of the RADA imposes the burden of proving an ADRV on the ADC to the comfortable satisfaction standard. The ADC must therefore prove, to the Sole Arbitrator's comfortable satisfaction, that there has been a violation of Article 51(1) of the RADA.

53. Article 51(1) contains two separate prohibitions: one in relation to competitions, the other in relation to activities. The Lion Heart Triathlon is not a "competition" under Article 51(1) of the RADA, for the following reasons:

    a. The ADC did not seek to and the BOC DC did not disqualify the results of the Athlete's participation in the Lion Heart Triathlon because there were no results to be disqualified.

    b. The Athlete did not use the Lion Heart Sports Club's facilities for his participation in the Lion Heart Triathlon.

    c. There is a carve out from the broad and unspecified language of Article 51(1) of the RADA which allows the Athlete to swim in an amateur event, open for participation by every Bulgarian citizen over 18 years of age without a prior registration with a sports club or federation by paying an entry fee, not financed by the government and not included in an official competition calendar of a national or international sports federation, not awarding points for rankings either nationally or internationally, not registering any official results, where the sole goal of the participants was not trying to win a prize but mass participation and charity.

54. The ADC has never charged the Athlete for violating the prohibition in Article 51(1) of the RADA for participating in an activity and although the BOC DC in the Appealed Decision considered that the Athlete had violated the prohibition against participating in an activity, the issue of whether or not the Lion Heart Triathlon amounts to an activity is outside the scope of the present appeal and cannot be reviewed by the Sole Arbitrator.

55. Notwithstanding that, the Lion Heart Triathlon is not an activity under Article 51(1) of the RADA. The Lion Heart Triathlon was not a training camp, exhibition, or practice. The Athlete did not perform any administrative activities. The Athlete was not coaching, training, working with, treating, or assisting Persons, Athletes or Athlete Support Personnel to participate in or prepare for the Lion Heart Triathlon.

56. Given that the ADC has failed to establish that the Lion Heart Triathlon qualifies as a "competition", the charge is unproven and the ADC failed to discharge its burden to the required standard.

f. Consequences

57. In the event that the Sole Arbitrator finds *"that an ADRV has been proven"* then the consequences are set forth in Article 53(1) of the RADA.

58. According to CAS 2013/A/3327, 3335, in a case with a period of ineligibility of 0-24 months, the panel calibrated significant fault as follows: significant – 16-24 months; normal – 8-16 months; light – 0-8 months.

59. In this case, the Lion Heart Triathlon is focussed on mass participation and some of the money raised goes to charity. The Athlete's participation was therefore not related to training, practice, or competing in order to somehow circumvent the period of ineligibility previously imposed on him. The

sanction should be reduced from two years to 0-4 months on the basis that the Athlete's degree of fault *"is at the low end of the spectrum"*.

60. The other circumstances of the case also require a significant reduction of the sanction *"on the grounds of fairness"*.

a. The ADC withheld its report of 4 September 2023 and its correspondence with the Lion Heart Sports Club and BTA.

b. The ADC did not charge the Athlete for almost two months after receiving WADA's 15 September 2023 reply, waiting until 13 November 2023 to notify the Athlete.

c. The ADC did not respond to the Athlete's counsel's letter dated 23 November 2023 asking the ADC to contact BTA to see if the Athlete had *"an official registration with them for the specific event"*.

d. Only on 15 May 2024 did the ADC file its report with the BOC DC against the Athlete alleging that the Athlete's participation in the Lion Heart' Triathlon constituted a violation of the prohibition under Article 51(1) of the RADA, an inexplicable delay of six months.

61. As to the date on which the ineligibility period should start, Article 50(1) states that *"Where an Athlete is already serving a period of Ineligibility for an anti-doping rule violation, any new period of Ineligibility shall commence on the first day after the current period of Ineligibility has been served. […]"*. This is a mandatory rule.

62. The BOC DC 2022 Decision set the start date at 10 October 2022 with credit for the period of provisional suspension from 5 May 2022 to 19 May 2022, which was confirmed by the Arbitrator in the 9198 Award. The Appealed Decision erroneously says that the penalty imposed on the Athlete in the BOC DC 2022 Decision *"has an expiry date"* of 8 June 2025.

63. Hence, the Athlete served a two-year period of ineligibility from 10 October 2022 with a period of provisional suspension from 5 May 2022 to 19 May 2022 to be deducted from this period, which period expired on 26 September 2024. It makes no sense to impose a new period of ineligibility nearly nine months after the previous one has expired, and that would be contrary to Article 50(1) of the RADA in any event. Consequently, the new period of ineligibility should commence on 27 September 2024.

g. Relief

64. The Athlete, by his Appeal Brief, sought the following relief:

"118. On these grounds, the Appellant hereby requests that the Sole Arbitrator:

Primarily

a. Annul the Appealed Decision.

b. Determine that the Appellant did not violate Article 51.1 of the RADA.

Subsidiarily, only if the above is rejected

c. Revise the Appealed Decision so that the period of ineligibility is replaced with a reprimand.

More subsidiarily, only if the above is rejected

d. *Revise the Appealed Decision so that the period of ineligibility is reduced between zero and eight months (preferably up to four months), and the commencing date is amended to September 27, 2024.*

In any event

e. *Order the Respondent to bear all costs incurred with the present procedure.*

f. *Order the Respondent to bear all the costs of the proceeding before CAS.*

g. *Order the Respondent to pay the Appellant a contribution towards his legal and other costs in an amount to be determined at the Sole Arbitrator's discretion".*

B. The ADC's Submissions

a. Jurisdiction

65. The ADC does not challenge jurisdiction.

b. Admissibility

66. The ADC does not challenge admissibility.

c. Applicable Law

67. The ADC considers that the WADC *"should be applied therewithal RADA"* and that, should there be any incompleteness or translation errors in the RADA, the WADC should be consulted in accordance with Article 2 of the RADA.

d. The Violation of Article 51(1) of the RADA

68. The Athlete's separation of Article 51(1) of the RADA into two separate prohibitions, one for a competition and the other for an activity, is baseless. Article 51(1) is clear and explicit and it lists the necessary elements of the violation.

69. The ADC has established that there has been an ADRV. A thorough investigation was conducted, and the ADC had no hesitation in classifying the Lion Heart Triathlon as a competition or activity under Article 51(1) of the RADA. This is supported by the description of the Lion Heart Triathlon on the Lion Heart Sports Club's website as follows:

"LION HEART is a competition setting out to look for the unlimited human potential through the natural wealth of Strandzha and the cultural heritage of Primorsko. This exceptional challenge provokes us to believe in our super powers and to overcome our own limits. Inspired by the great tales of Strandzha's heroes and the epic past of this sacred region we invite everyone who is ready to join us against 3 km swimming in the sea, 96 km mountain biking and 21 km trail running. Embrace the competition to see if you shall find your lion heart too".

70. The text of Article 51(1) of the RADA is unconditional and states that athletes are not allowed to participate in any initiative under the described conditions and it is unclear why the Athlete decided that he was allowed to participate in an amateur competition. There is no lack of clarity or specificity. The provisions of Article 51(1) have existed for a long time and should be well known to the Athlete.

71. The ADC has proved beyond doubt that that the Athlete has violated the prohibition under Article 51(1) of the RADA.

e. Consequences

72. There are no grounds to reduce the sanction.

73. The provisions relating to No (Significant) Fault do not apply in this case. In circumstances where the Athlete has challenged the underlying decision at every stage, and would have had the consequences made clear to him, it is unrealistic for the Athlete to seek a reduction of the additional punishment due to be imposed for breaking the rules while serving the original sanction. Of what was he ignorant – that he was serving a sanction?; that there is an additional sanction in the RADA for violating the existing sanction?

74. The Athlete deliberately participated in the Lion Heart Triathlon with the knowledge that he had been sanctioned and was ineligible to compete. The fact that he considered the situation in advance and decided that he could compete because he was not listed to the club shows in itself that his participation was deliberate and calculated. The Athlete also participated in the relay race, thereby creating a prerequisite for punishing other athletes. That shows that the Athlete does not care whether his conduct will cause harm to others.

75. It is to be noted that a condition for participating in the Lion Heart Triathlon is the signing of a template contract which states that *"Upon signing this Agreement, the Participant expressly acknowledges that the Anti Doping provisions of the World Triathlon Corporation (WTC), in their respectively valid version are binding on him"*. These rules reproduce verbatim Articles 51(1) and 51(3) of the RADA (and Articles 10.14.1 and 10.14.3 of the WADC). In order to participate in the Lion Heart Triathlon, the Athlete was aware that the contract, under WTC rules, restrained him from participating.

76. In the information posted by the Athlete after the Lion Heart Triathlon, he said: *"How was it? I went to bed, slept, came and beat them; History will repeat itself for a long time; thanks to the organizers for the great competition, they organized. I will be back to participate again!"* This shows that he has made sure that he told everyone that he won and that he himself called the Lion Heart Triathlon a competition.

77. In all, there are no grounds to reduce the sanction; in this particular case even the longest period of ineligibility is not sufficient for what the Athlete did.

f. Relief

78. The ADC, by its Answer, sought the following relief:

"On these grounds, the ADC hereby respectfully requests that:

(a) The Appellant presents Lion Heart's Participation Contract and Waiver of Liability signed by the Appellant.

(b) ADC be awarded all costs incurred by the AC in this proceeding (if any).

(c) The CAS to rule explicitly on the issue of the end and start date of the new period of ineligibility.

ADC considers decision 2/2024 issued on 12.08.2024 by the DC with BOC to be correct, lawful and made after taking into account all the evidence presented to the Commission by the parties. There are no grounds for its complete or partial annulment".

VI. JURISDICTION

79. Article R47.1 of the CAS Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".

80. In this case, Article 40.4 of the RADA provides as follows: *"In cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS".* It is common ground that the Athlete is an International-Level Athlete.

81. The ADC does not dispute the jurisdiction of the CAS and confirmed it by signing the Order of Procedure.

82. It follows that the CAS has jurisdiction to decide the appeal, and the Sole Arbitrator so confirms.

VII. ADMISSIBILITY

83. Article R49 of the CAS Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document".

84. According to Article 40.8.2 of the RADA, *"the deadline for appeal before CAS shall be 21 days from the date of receipt of the decision by the appealing party".*

85. The Athlete received the Appealed Decision on 27 August 2024, such that the 21-day appeal period expired on 17 September 2024. The Athlete submitted his Statement of Appeal on 29 August 2024, within the 21-day period.

86. The ADC takes no issue with respect to the admissibility of the appeal.

87. In the circumstances, the Sole Arbitrator confirms that the appeal is admissible.

VIII. APPLICABLE LAW

88. Article R58 of the CAS Code provides as follows:

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

89. It is common ground that the applicable regulations in these appeals are the RADA. It is also to be noted that the RADA provides that in the event of any conflict between the RADA and the WADC then the latter is to prevail, and that the WADC is to be interpreted according to the following rules:

"§ 2. At incompleteness or discrepancy of the Regulations with the World Anti-doping Code, the provisions of the World Anti-doping Code prevail, observing the following rules for its interpretation:

1. In the event of any conflict between the English and French versions, in

which the Code is published, the English version shall prevail.

2. *The comments annotating various provisions of the Code shall be used to interpret the Code.*

3. *The Code shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of the Signatories or governments.*

4. *The headings of the Parts and the Articles of the Code shall not be deemed part of the substance of the Code provisions.*

[…]

7. *The Purpose, Scope and Organization of the World Anti-Doping Program, the Code and Appendix 1, the definitions, shall be considered integral parts of the Code".* (RADA Additional provisions, § 2)

90. The Sole Arbitrator will therefore adjudge the merits of the present dispute primarily according to the RADA as informed and supplemented by the WADC, and subsidiarily to the laws of Bulgaria, that being the country in which the ADC is domiciled.

IX. THE WITHDRAWAL OF THE APPEAL

91. As noted above, a preliminary question arises relating to the withdrawal by the Athlete of his appeal against the BOC. The question is a procedural question within the meaning of Article 182 of Swiss Private International Law Act ("PILA"), see CAS 2018/A/5560 & CAS 2018/A/5650 at para. 134.

92. By way of reminder, the Athlete commenced his appeal by filing his Statement of Appeal with the CAS Court Office on 29 August 2024 naming the ADC as the First Respondent and the BOC as the Second Respondent and then, on 9 September 2024, the Athlete informed the CAS Court Office that he wished unilaterally to withdraw the appeal against BOC and that, given the stage of the proceedings, the BOC's consent was not required, as to which the Athlete invoked Article 65 of the Swiss Civil Procedure Code (the "Swiss CPC").

93. Also by way of reminder, on 12 September 2024 both the ADC and the BOC objected to the unilateral withdrawal of the appeal against the BOC.

a. The ADC stated that it considered that there was no reason to exclude the BOC from the procedure and that *"the subject of the appeal is precisely the decision of the DC with BOC, and a procedure without the presence of the body that issued it would be extremely incomplete"* and would deprive the BOC *"of the opportunity to protect the document they created"*.

b. The BOC formally objected to the withdrawal of the appeal against it. It said, amongst other things, that *"the BOC is a mandatory respondent. It is the decision of the BOC Disciplinary Committee that is being appealed so the BOC has a direct interest in upholding the decision of the Committee"*.

94. The CAS Court Office directed that this issue was to be determined by the Sole Arbitrator and at CMC hearing it was agreed by the Parties and directed by the Sole Arbitrator that the issue would be

considered at the hearing on the merits and considered and determined in the final Award. The Parties therefore made submissions in this respect at the hearing, which may be summarised as set forth below.

95. The Athlete contends that he has effectively withdrawn his appeal against the BOC, and that he does not need the consent of the BOC to do so. The BOC (and the ADC for that matter) argue that the Athlete is not free to withdraw his appeal against the BOC in the absence of the BOC's consent, which it does not give. It is said further that the BOC has standing to be sued and is a proper respondent to these proceedings.

96. As to the latter issue, standing, the Sole Arbitrator disagrees. For all the reasons expressed in CAS 2022/A/9241, the BOC (in fact the BOC DC) is merely the decision maker at first instance according to the Bulgarian anti-doping structure and its decisions are attributable to the ADC – and ADC is the proper respondent with standing to be sued.

97. As to the former issue, the CAS Code does not address the particular situation of the withdrawal of an appeal before CAS but clearly indicates until when an appeal may be amended or withdrawn. It therefore falls, pursuant to Article 182 of the PILA, to the Sole Arbitrator to determine and apply appropriate arbitral procedures ensuring, of course, that the parties are treated equally and their rights to be heard are respected. This is what was said by the panel in CAS 2020/A/7252:

"84. In this regard, the Panel considers the question under which condition an appeal may be withdrawn before CAS is a procedural question within the meaning of Article 182 of Switzerland's Private International Law Act (the "PILA"), which provides as follows:

'1. The parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice.

2. If the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration.

3. Regardless of the procedure chosen, the arbitral tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in adversarial proceedings.'

85. The CAS Code does not contain any provision on the withdrawal of an appeal or a claim before CAS. Accordingly, in line with Article 182(2) PILA, the Panel shall apply the appropriate provisions and principles either directly or by reference to a law or rules of arbitration.

86. If and to what extent a respondent must consent to a withdrawal of a matter in dispute by the appellant is disputed. Daugavpils relies on Swiss legal literature which, in principle, draws an important distinction when it comes to the withdrawal of a claim before an arbitral tribunal. According thereto a unilateral withdrawal of a claim in arbitration is only possible until the claimant has filed its full statement of claim with the arbitral tribunal (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., 2015, no. 1559). Thereafter, a withdrawal of the claim is only possible with the consent of the opposing party (WIRTH/MAGLIANA in: GROLIMUND/LOACKER/SCHNYDER (Eds.), Basler Kommentar – Internationales Privatrecht, 4th ed. 2020, Art 189, no. 62)".

98. The Swiss CPC provides in relevant part as follows:

"Title 4, Pendency and Effects of Withdrawal of Action.

Art. 62 Start of pendency

1. A case becomes pending when an application for conciliation, an action, an application, or a joint request for divorce is filed.

2. Confirmation of receipt of such submissions shall be issued to the parties.

[…]

Art. 64 Effects of pendency

1. The pendency of an action has in particular the following effects:

a.the subject matter of the dispute may not be made pending elsewhere between the same parties; and

b.the territorial jurisdiction of the court is maintained.

[…]

Art. 65 Effects of withdrawal

Any person who withdraws an action before the competent court may not bring proceedings again against the same party on the same subject matter if the court has already served the statement of claim on the defendant and the defendant does not consent to its withdrawal".

99. It follows that, where party A has initiated (by filing) a claim against party B, and A withdraws the claim, then:

a. if the claim has <u>not</u> been served on B, A may bring a second action on the same subject matter against B; and

b. if the claim <u>has</u> been served on B, A may bring a second action on the same subject matter against B if B consents to the withdrawal of the first claim.

100. That is the purport and effect of Article 65 of the Swiss CPC: see CAS 2019/A/6144 & CAS 2019/A/6145 at para.130: *"The plain text of the aforementioned CPC provision indicates that, in order, for a claim […] to be withdrawn without prejudice, either (a) the withdrawal is exercised before the claim is served […] or (b) after the claim is served to the other party the latter should consent to the withdrawal* […]*"*..

101. There is a nice question as to whether, in this context, a claim for the purposes of an appeal to CAS is to be regarded as the Statement of Appeal or the Appeal Brief. The CAS jurisprudence appears to favour the latter: see the reference to *"full statement of claim"* in CAS 2018/A/5560 & CAS 2018/A/5650 at para. 134; and, more clearly, the reference to "appeal brief" in CAS 2015/A/3959 at para. 111:

"Whether there is a waiver or a simple withdrawal does not depend upon how the decision in question is named (award, termination order, etc.). Instead, the effects depend on the applicable arbitration rules. If the latter provide that no unilateral withdrawal is possible without renouncing to the matter in dispute altogether, the decision that puts an end to the proceeding also finally disposes of the claim and, thus, has res judicata effect. In the case at hand the CAS Code does not provide for any specific rules in that respect. However, it is constant practice with CAS (and most other arbitral institutions, see BSK-IPRG/WIRTH, 3rd ed. 2013, Article 189 No. 55; COURVOISIER, in ARROYO (Ed), Arbitration in Switzerland, Biggleswade 2013, Article 34 Swiss Rules No. 22) that a

claimant/appellant can unilaterally withdraw his appeal/request for arbitration before an appeal brief / statement of claim has been filed without renouncing his claim altogether. […]"

102. There is much to be said in favour of proceeding on the basis that the Appeal Brief is the relevant 'claim' for these purposes (in the context of CAS appeals) because it is then and only then that an appellant articulates their claim against the respondent(s) in full. This is supported by: (a) Article R56(1) of the CAS Code which provides that an appellant's prayers for relief set forth in the Statement of Appeal may be amended in the Appeal Brief (i.e. no later than the deadline for the filing of the Appeal Brief); and (b) Article R51 of the CAS Code which provides that an appeal is deemed withdrawn if an appellant fails to file an Appeal Brief, which means *a fortiori* that the possibility to voluntarily withdraw an appeal exists until the time limit for the filing of the Appeal Brief has elapsed. In any event, the Athlete, as confirmed to the Sole Arbitrator at the oral hearing, has withdrawn his appeal against the BOC with prejudice. That is, he is not seeking to reserve to himself the right to bring a second appeal on the same subject matter against the BOC. Accordingly, Article 65 of the CPC is not engaged and the Athlete was free to withdraw his appeal against the BOC when he did, with or without the consent of the BOC (still less the ADC). The Athlete withdrew his appeal on 7 September 2024 (in an email to the CAS Court Office), filed his Appeal Brief against the ADC on 4 October 2024, and did not file an Appeal Brief against the BOC. In the circumstances, the Sole Arbitrator concludes that the Athlete validly withdrew his appeal against the BOC and that the BOC is therefore no longer a respondent in the present procedure.

X. THE MERITS

103. The Panel turns to the merits. There are two issues to be determined on the merits: (a) did the Athlete breach Article 51(1) of the RADA; and (b) if yes, what consequences should follow? It is to be noted, at the outset, that while the Notice of Charge referred to two matters as constituting a violation of Article 51(1) of the RADA, namely the participation by the Athlete in the Lion Heart Triathlon and the provision of *"sports-pedagogical services"*, the BOC DC did not consider the latter and that alleged violation forms no part of the Appealed Decision or this appeal.

A. The Legal Framework

104. The Athlete has been charged with the violation of Article 51 of the RADA. It provides as follows:

"Article 51.

(1) […] No Athlete […] who has been declared Ineligible […] may, during a period of Ineligibility or Provisional Suspension, participate in any capacity in a Competition or activity (other than authorized anti-doping Education or rehabilitation programs) authorized or organized by any Signatory, Signatory's member organization, or a club or other member organization of a Signatory's member organization, or in Competitions authorized or organized by any professional league or any international- or national-level Event organization or any elite or national-level sporting activity, funded by a governmental agency.

(2) An Athlete or other Person subject to a period of Ineligibility longer than four (4) years

may, after completing four (4) years of the period of Ineligibility, participate as an Athlete in local sport events not sanctioned or otherwise under the authority of a Code Signatory or member of a Code Signatory, but only so long as the local sport event is not at a level that could otherwise qualify such Athlete or other Person directly or indirectly to compete in (or accumulate points toward) a national championship or International Event, and does not involve the Athlete or other Person working in any capacity with Protected Persons.

(3) An Athlete or other Person subject to a period of Ineligibility shall remain subject to Testing and any requirement by the Antidoping Centre to provide whereabouts information".

105. The relevant defined terms are as follows:

a. "Athlete" is *"any Person who competes in sport at the international level (as defined by each International Federation), or the national level (as defined by each National Anti-Doping Organization)".*

b. "Code" is the World Anti-Doping Code.

c. "Competition" is *"a single race, game, match or singular sport contest. For the stage races or other sport contests where the prizes are awarded on a daily or other interim basis, the distinction between a Competition and an Event is determined according to the rules of the applicable International Federation".*

d. "Signatory/ Signatories" *"are the entities accepting the Code and agreeing to implement the Code, as provided in Article 23 of the Code".*

106. Article 51(1) of the RADA is, of course, based on Article 10.14.1 of the WADC which in relevant part provides as follows:

"10.14 Status during Ineligibility or Provisional Suspension

Prohibition against Participation during Ineligibility or Provisional Suspension

No Athlete or other Person who has been declared Ineligible or is subject to a Provisional Suspension may, during a period of Ineligibility or Provisional Suspension, participate in any capacity in a Competition or activity (other than authorized anti-doping Education or rehabilitation programs) authorized or organized by any Signatory, Signatory's member organization, or a club or other member organization of a Signatory's member organization, or in Competitions authorized or organized by any professional league or any international- or national-level Event organization or any elite or national-level sporting activity funded by a governmental agency".

107. In the WADC, the definition is slightly different to that in the RADA. It provides as follows, with the added sentence emphasised:

"Competition: A single race, match, game or singular sport contest. ***For example, a basketball game or the finals of the Olympic 100-meter race in athletics.*** *For stage races and other sport contests where prizes are awarded on a daily or other interim basis the distinction between a Competition and an Event will be as provided in the rules of the applicable International Federation".*

108. Article 10.14.1 of the WADC is supplemented by Comment 77, which says as follows:

"Comment to Article 10.14.1: For example, subject to Article 10.14.2 below, Ineligible

Athletes cannot participate in a training camp, exhibition or practice organized by their National Federation or a club which is a member of that National Federation or which is funded by a governmental agency. Further, an Ineligible Athlete may not compete in a non-Signatory professional league (e.g., the National Hockey League, the National Basketball Association, etc.), Events organized by a non-Signatory International Event organization or a non-Signatory national-level Event organization without triggering the Consequences set forth in Article 10.14.3. The term "activity" also includes, for example, administrative activities, such as serving as an official, director, officer, employee, or volunteer of the organization described in this Article.

Ineligibility imposed in one sport shall also be recognized by other sports (see Article 15.1, Automatic Binding Effect of Decisions). An Athlete or other Person serving a period of Ineligibility is prohibited from coaching or serving as an Athlete Support Person in any other capacity at any time during the period of Ineligibility, and doing so could also result in a violation of 2.10 by another Athlete. Any performance standard accomplished during a period of Ineligibility shall not be recognized by a Signatory or its National Federations for any purpose".

109. The consequences of a violation of Article 51 of the RADA are set forth in Articles 50(1) and 53 of the RADA, which provide as follows:

"Article 50. (1) Where an Athlete is already serving a period of Ineligibility for an anti-doping rule violation, any new period of Ineligibility shall commence on the first day after the current period of Ineligibility has been served. Otherwise, and except the cases referred to in this Article, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed.

Article 53. (1) Where an Athlete or other Person who has been declared Ineligible violates the prohibition against participation during Ineligibility described in Article 51, the results of such participation shall be disqualified and a new period of Ineligibility, equal in length to the original period of Ineligibility, shall be added to the end of the original period of Ineligibility. The new period of Ineligibility, including a reprimand and no period of Ineligibility, may be adjusted based on the Athlete or the relevant other Person's degree of Fault and other circumstances of the case. The determination of whether an Athlete or other Person has violated the prohibition against participation, and whether an adjustment is appropriate, shall be made by the Anti-Doping Organization whose Results Management led to the imposition of the initial period of Ineligibility. This decision may be appealed under Article 40 and Article 41.

(2) An Athlete or other Person who violates the prohibition against participation during a Provisional Suspension described in Article 51, shall receive no credit for any period of Provisional Suspension served and the results of such participation shall be disqualified.

(3) Where an Athlete Support Person or other Person assists a Person in violating the prohibition against participation during Ineligibility or a Provisional Suspension, the Disciplinary Committee shall impose sanctions for a violation of Article 6.1.9 for such assistance".

110. It is accepted by the Parties that the ADC bears the burden of proof of showing that there has been a violation of Article 51 of the RADA, and that the relevant standard of proof is to the comfortable satisfaction of the hearing Sole Arbitrator. (This is so despite the fact that, strictly speaking, a violation of

Article 51 of the RADA does not fall within the definition of an ADRV in Chapter Two of the RADA and is not therefore directly caught by the provisions of Article 37 of the RADA as to the burden and standard of proof.) It is therefore for the ADC to prove the necessary elements of the alleged violation and to do so to the comfortable satisfaction of the Sole Arbitrator.

111. Did the Athlete breach Article 51(1) of the RADA?

112. There is no question that the Athlete took part in the Lion Heart Triathlon on 2 September 2023. This he freely admits. The question is: by doing so, did he violate the prohibition on participation set forth in Article 51(1) of the RADA?

113. The starting point, of course, is the language of Article 51 of the RADA (set out in full above). It follows from the language of Article 51(1) that each of the following elements must be established in order to sustain a violation thereunder (see CAS 2023/A/9926 at para.108ff):

    a. The Athlete is an Athlete as defined therein.

    b. The Athlete must have been declared ineligible (and is serving a period of ineligibility).

    c. The Athlete must have, during the period of ineligibility, participated in a Competition or activity (other than authorized anti-doping education or rehabilitation programs).

    d. The Competition or activity must have been authorised or organised by a Signatory (to the WADC) or member organisation of a Signatory, or a club or other member organisation of a Signatory's member organisation, or the Competition must have been authorised or organised by any professional league or any international- or national-level event organisation or any elite or national-level sporting activity, funded by a governmental agency.

114. It is to be noted as well that there is no intent or knowledge requirement for an athlete to be found in violation of the suspension – all that is required is that an athlete participates in a Competition (or activity) during his or period of ineligibility: see CAS 2023/A/9926 at para.116.

115. In this case, the elements at (a), (b) and (d) above are common ground. The Athlete is an Athlete as defined in the RADA, the Athlete had been declared ineligible by the BOC DC 2022 Decision as confirmed in the 9198 Award, and the Lion Heart Triathlon was authorised by a club or other member organisation of a Signatory's member organisation, namely the Lion Heart Sports Club, which club is a member of the BTA, which is a member of World Triathlon, which is a signatory to the WADC. It is also common ground that the Athlete has not been charged with participating in an activity, only with participating in a Competition.

116. Accordingly, the debate is solely concerned with whether or not the Lion Heart Triathlon is to be regarded as a Competition pursuant to Article 51(1) of the RADA. That resolves itself as a matter of construction of the RADA.

117. There is an array of jurisprudence in relation to the principles of construction

(or interpretation) which, of course, apply equally to the RADA (and the WADC). The Sole Arbitrator gratefully adopts the following passage from CAS 2020/A/6986:

"89. The Sole Arbitrator recalls that under Swiss law, "the starting point for interpreting a legal provision is its literal interpretation". As consistently held by the Swiss Federal Tribunal, there is no reason to depart from the plain text, unless there are objective reasons to think that it does not reflect the core meaning of the provision under review. If the provision under review is clear and unambiguous, an authority applying the provision is bound to follow its literal meaning, provided it expresses its true meaning. Only if a text is not clear and if several interpretations are possible, one must determine the true scope of the provision by analysing its relation with other provisions (systematic interpretation), its legislative history (historic interpretation) and the spirit and intent of provision (teleological interpretation).

90. According to the well-established CAS jurisprudence, the Sole Arbitrator notes that the interpretation of a rule should indeed begin first and foremost with the text. Moreover, it is not for the Sole Arbitrator, nor the CAS more generally, to question the policy or intent of antidoping rule makers, in particular given that the WADA Code emphasises that "when reviewing the facts and the law of a given case, all courts, arbitral hearing panels and other adjudicating bodies should be aware of and respect the distinct nature of the anti-doping rules in the Code and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport" (emphasis added). The Sole Arbitrator therefore must exercise caution when engaging in interpretation of rules that, upon the face of the text, leave little doubt as to their meaning".

118. The starting point is always the text and the question to be asked is: what is the ordinary meaning of the words within their context.

119. There has been little consideration of the language of Article 10.14.1 of the WADC and its equivalent in national ADRs. In SRCC DT 12-0177 (Russell), this was said (by an experienced CAS arbitrator) (emphasis added):

"58. Under [the relevant ADR] a person sanctioned by the policy is ineligible to participate in any role whatsoever in any (a) Competition or (b) Activity when either (a) or (b) has been organised, convened, held or sanctioned by a Canadian NSGB, PSGB or affiliate […]. ***Each of the words of the ban carries their ordinary English language meaning*** *[…]".*

120. In CAS 2017/A/4937, the panel was concerned to construe Article 10.12.1 of the NZ Sports Anti-Doping Rules (the "SADR", the equivalent of Article 10.14.1 of the WADC). The panel rejected the view that there needed to be a temporal connection between the participation and the competition or activity, saying as follows:

"59 […] The Panel rejects the view expressed in Russell that the provision requires the identification of a temporal connection to a competition (maybe days) between the ineligible person's coaching and the organised event in which the eligible the ineligible person is held… to be a participant. An interpretation of the purpose and ambit of SADR 10.12.1 must be consistent with the practical realities of sport. […] The panel is of the view that the provision does not require an arbitrary determination as to whether the provision of assistance to an athlete by a support person requires a finding that the assistance had a temporal or physical connection to a particular event or competition.

The provision has a broader reach. The ineligible person cannot participate "in any capacity" in an event or activity authorised or organised by a signatory during the full period of ineligibility. […] An athlete serving a period of ineligibility is therefore prevented from having any involvement with sport which involvement impacts on clean athletes who are members of a signatory organisation.

[…]

61 The Panel is satisfied given the ordinary meaning of the words of SADR 10.12.1, it is the intention of the SADR to ensure all athletes can compete in a drug-free environment and not be exposed to the taint of doping during either their preparation for or participation in an organised event or the sport's organised activities.. We are comforted in this analysis by the words of SADR 10.2 (see similar provisions 2016 WADCA Code Article 10.2) under which an athlete, once they are given notice, is prohibited from associating with any person who is serving a period of ineligibility. The commentary to this rule states 'athletes … must not work with ineligible persons (on account of an anti-doping rule violation)' […]".

121. This decision is instructive in that it demonstrates that the prohibition on participation set forth in Article 10.14.1 of the WADC is to have a broad reach and that an athlete who is under a ban is precluded from participating in any capacity in any event or activity authorised or organised by a signatory. The purpose of the broad reach is so that a banned athlete is precluded from having any involvement with sport, which involvement impacts on clean athletes who are members of a signatory organisation, and that all other athletes can compete in a drug-free environment and not be exposed to the taint of doping during either their preparation for or participation in an organised event or activity. This is of a piece with what was said in SR/345/2022 that *"the broad interpretation of these terms is consistent with the rationale of anti-doping provisions and the policy of preventing banned individuals from having any involvement in sport and with 'clean' athletes"*.

122. In this case, the task is to construe the word "Competition" and decide whether the Lion Heart Triathlon falls within the meaning of that term. The RADA provide essential assistance in this exercise because "Competition" is a defined term in the RADA (see above). It is defined as *"a single race, game, match or singular sport contest"*. The definition adds that *"[f]or the stage races or other sport contests where the prizes are awarded on a daily or other interim basis, the distinction between a Competition and an Event is determined according to the rules of the applicable International Federation"*. The Athlete pointed to other dictionary definitions of the word 'competition' but where, as here, the parties have agreed upon a definition, there is no need to resort to anything but the agreed definition.

123. The definition of Competition refers in turn to other terms which are not defined in the RADA. As was said in SRCC DT 12-0177, each of these words carries its ordinary English language meaning so that it *is* helpful to refer to the (relevant) dictionary definitions of these terms (references are to the Shorter Oxford English Dictionary):

    a. A race is defined as *"a contest of speed between runners, horses, vehicles etc"*; *"a contest or competition between individuals, groups, etc., to (be first to) achieve some objective, esp. superiority"*.

b. A game is defined in as *"a competitive sport or pastimes"*; *"a (form of) contest played according to rules and decided by skill, strength, luck (as opp, sport esp. one in which opponents actively engage to defeat each other) physical or mental competition conducted according to rules with the participants in direct opposition to each other"*.

c. A match is defined as *"a contest a matching of adversaries against each other"*; *"a contest or competitive trial of skill in some sport, exercise or operation, in which two or more people or teams compete against each other"*.

d. A contest is defined as *"a struggle for victory, for an objective etc. conflict, strife"* and *"a competition; amicable contention for a prize etc"*.

124. Is the Lion Heart Triathlon any one of these things? Whether or not the Lion Heart Triathlon is to be regarded as a race or a game or a match or a contest is to be assessed according to the characteristics of the event itself. (The use of the word 'event' is intended to be an entirely neutral epithet.)

125. The Lion Heart Triathlon is an annual event. It was (as always) held over three stages: a 3km swim, a 96km cycle, and a 21km run. Individuals may participate as individuals or as members of two- or three-person teams. The Athlete was a member of a three-man team and he took part in the 3km swim, the other members of his team completing the remaining stages.

126. The Lion Heart Sports Club describes the Lion Heart Triathlon as follows (where Strandzha is a mountain massif in southeastern Bulgaria and Primorsko is a town and seaside resort in southeastern Bulgaria**)**:

"LION HEART a competition setting out to look for the unlimited human potential through the natural wealth of Strandzha and the cultural heritage of Primorsko. This exceptional challenge provokes us to believe in our super powers and to overcome our own limits. Inspired by the great tales of Strandzha's heroes and the epic past of this historic region we invite everyone who is ready to join us against 3 km swimming in the sea, 96 km mountain biking and 21 km trail running. Embrace the competition to see if you shall find your lion heart too".

127. It is apparent from this excerpt that the Lion Heart Sports Club describes the Lion Heart Triathlon as a "competition" which, although it cannot be determinative of the question whether it amounts to a Competition as defined in the RADA, is nevertheless informative.

128. The Lion Heart Sports Club requires participants to sign a "Participation Contract and Waiver of Liability" (the "Participation Contract"). This was signed, according to the Athlete, not by him but by the leader of his team on behalf of the team. In relevant part it provides as follows:

"[…] READ THIS DOCUMENT CAREFULLY BEFORE SIGNING, THIS DOCUMENT HAS LEGAL CONSEQUENCES AND WILL AFFECT YOUR LEGAL RIGHTS, AND WILL LIMIT OR ELIMINATE YOUR ABILITY TO BRING FUTURE LEGAL ACTIONS.

In consideration of being permitted by the Lion Heart Sports Club NGO (hereinafter referred to as the "Organizer") to participate in the cross triathlon race "Lion Heart Ultra" or "Lion Heart Utopia" (hereinafter referred to as the

"Event"), I, the Participant, understand and acknowledge that by signing below I am legally agreeing to the terms and statements included in the following Event Registration, Release and Waiver of Liability, and Assumption of Risk and Indemnity Agreement (hereinafter referred to as the "Agreement") and that these statements are being freely and voluntarily accepted by the parties who acknowledge each other enough legal capacity to execute this document in accordance with the following:

I. Organizational Measures:

1) The Participant must follow the Rules for Participation in "Lion Heart Ultra" or "Lion Heart Utopia" and any other regulations of the Organizer as may be applicable, in addition to the race regulations, the official race program/race information.

2) In case of non-compliance, the Organizer has the right to exclude the Participant from the Event and/or announce the disqualification as he deems convenient, should the order of the Event or the safety of other Participants of the Event be endangered.

3) In case of according medical indications the medical staff is authorized to exclude a Participant from the race for his own safety and/or to deny him further participation in the Event.

4) If the condition of the Participant apparently does not allow his safe continuation in any way, at the discretion of the organizers and field medical personnel, the participant may be excluded from participation in the event or from the official ranking (disqualified);

5) If the bib is altered in any manner whatsoever, especially if the promotional logo has been made invisible or unrecognisable, then the Participant may be excluded from participation in the Event, in any case he will be excluded from the results (disqualification);

6) If the participant does not respect the control times for passing through the different stages and points of the competition, the organizer has the right to exclude him/her from participation for his and everyone's safety.

II. Waiver of liability:

1) The organizer may in its sole discretion, delay, modify, or cancel the Event if it believes the conditions on the race day are unsafe. […]

[…]

8) The Participant states that he is aware of the inherent dangers of the race, in particular, those that may appear on the course route such as vehicle or pedestrian traffic and therefore he takes all the risks related to the sports of running, biking and swimming which constitute the Event and the sport of triathlon.

[…]

12) Should medical treatment of the Participant be necessary during the Event, the Participant declares in advance his consent with these measures. Medical treatment outside the race track is not included in the entry fee and the Participant will directly be charged according to the applicable medical rates at the medical venue.

13) It is in the responsibility of the Participant to ensure adequate insurance coverage for medical treatments. The Organizer is not obliged to do so, but has

the right to refuse the participation in the competition in case of an absent of the last.

[…]

V. Doping

Upon signing this Agreement, the Participant expressly acknowledges that the Anti Doping provisions of the World Triathlon Corporation (WTC), in their respectively valid version are binding on him. Furthermore blood thresholds – if to the extent that Anti-doping code of the national Federation (in the country the Event takes place) defines so – are binding. If in a blood control these thresholds values are exceeded, the Organizer is entitled to pronounce a suspension from the race.

The Participant may be excluded from the event if there are pending doping proceedings, no matter before which court of law or arbitrator, and also in case of concrete reasons for a doping suspicion. In this case, claims in respect of appearance fee, prize money or other claims as well as possible subsequent claims (damages) are excluded".

129. Once again, it is apparent that the Lion Heart Sports Club describes its own event as, variously, a "race", a "competition", and an "event" which, again, is informative but not determinative. What it does demonstrate, however, is that the Lion Heart Triathlon certainly regarded itself as a competition or a race; it also shows that the event is a serious event, with formal rules of participation, with a formal contract for participation, which contract, amongst other things, applies (and warns the participants that it is so applying) the anti-doping provisions of the Word Triathlon Corporation.

130. It can be seen that the Participation Contract cross-refers and incorporates the "Rules for Participation". The Athlete gave evidence that he signed a document on the day of the event that set forth such details as his name and identification number, a certification that he was eligible to compete and that he had no problem with his heart, as well the *"basic"* rules of the Lion Heart Triathlon. It is a reasonable inference that he was referring to these Rules for Participation. These rules provide in relevant part as follows:

"RULES FOR PARTICIPATION IN LION HEART ULTRA CROSS TRIATHLON (hereinafter referred to as the "Competition")

The intention of these rules is to create conditions for equality and fair play, to guide participants in their preparation, to encourage sportsmanship and to punish those participants who gain or attempt to gain an unfair advantage.

1. Competition format

1.1 'Lion Heart' Ultra Cross Triathlon is an adventure, mountain race […] organized by the NGO Lion Heart […];

1.2 Lion Heart is an autonomous competition. Each participant must start and finish with the mandatory equipment […]. Assistance in any form other than that provided by the Organizers […] is prohibited within the competition;

1.3 The winner is the participant who goes through the three stages of the course in the shortest time, counted from the official start until the last passes on a timing bracelet through the final arch;

[…]

6.16 Before the start of the competition, participants must meet the following requirements:

6.16.1 To have completed the registration form and paid the participation fee;

6.16.2 To have filled out a participation contract y hand and submitted it for registration;

6.16.3 To be equipped with the mandatory equipment according to the regulations of the Competition – subject to inspection before the start and during the competition;

6.16.4 To wear the mandatory numbers and designations of the competition related to the specific stage;

6.16.5 To provide the following documents: medical note for fitness to participate, participation contract

[…]".

131. The Rules for Participation plainly characterise the Lion Heart Triathlon as a competition (that word appears some 26 times throughout, with "competitor" appearing 14 times) or a race (that word appears 16 times). Again, that is not determinative of the issue whether the Lion Heart Triathlon is a Competition as defined in the RADA, but it certainly provides an indication as to how the organisers viewed the event.

132. The Rules for Participation also demonstrate that the Lion Heart Triathlon bears many of the hallmarks of a competitive event, for example:

a. The stated intention of the rules includes the encouragement of sportsmanship and the punishment of those participants *"who gain or seek to gain an unfair advantage"*. If the event were not a competitive event it would be of no concern whether or not someone gained some sort of unfair advantage.

b. There is a *"winner"*, the person who completes the three stages in the shortest time. It the event was not competitive, there would be no recognition, or indeed suggestion, of a winner.

133. The Lion Heart Sports Club published (on its website) the results of the Lion Heart Triathlon in 2023. Those results, titled "LION HEART 2023 OFFICIAL RANKINGS", show the rankings for a number of different categories including the women, the men, the relay (both for the teams of two and the teams of three), the half marathon for women, and the half marathon for men. Under the 'relay – team of three', the team of which the Athlete was a member, called "Atilla", was recorded as comprising the Athlete, Bogdan Stoychev, and Ivaylo Georgiev. The team finishing second overall in the time of 6:58:29, with a *"diff"* of 0:23:40 behind the team who finished first. The times were recorded for the team and for the individual for each stage. The results recorded that the Athlete's time for the swimming stage was 0:43:10, that being (unsurprisingly) the fastest time recorded on the day for that stage. This explains

the Athlete's Instagram post saying that: *"How was it? I went to bed, slept, came and beat them; History will repeat itself for a long time; thanks to the organizers for the great competition, they organized. I will be back to participate again!"*

134. In the Sole Arbitrator's view, taking all of these matters into account, it is obvious that, whatever the parameters of the definition of Competition, the Lion Heart Triathlon is indeed a single race or singular sport contest. It is less clear whether the Lion Heart Triathlon may also be described as a game or a match in circumstances where there is no direct opposition between the participants, but there is little doubt that the ordinary meanings of 'race' and 'contest' accurately describe the Lion Heart Triathlon. The Lion Heart Triathlon is a competitive trial of speed in running, swimming, and cycling and/or an event in which people compete for supremacy in an athletic contest. According therefore to the plain meaning of those words – race and contest – the Lion Heart Triathlon is indeed a Competition. In light of the structure of the event, its official description, and the fact that is organised by a recognised sporting club, the Lion Heart Triathlon is, in the Sole Arbitrator's view, within the definition of Competition as it appears in the RADA (and in the WADC).

135. The Athlete argues otherwise but none of the matters relied upon is persuasive.

136. The principal submission was that because the language of Article 51(1) of the RADA was *"broad and unspecified"*, there was what was said to be a *"carve out"* which allowed the Athlete to swim in an amateur event by reason of these four things:

a. The event was not included in the BTA's official calendar.

b. The event was open to any adult over 18 years of age, requiring no club membership, just the payment of a participation fee.

c. The event was focussed on mass participation without offering any national or international ranking points.

d. The event produced internal results that were entirely unofficial, unrecognised by any sporting institution and irrelevant to any ranking.

137. Each of these matters is accurate and each was confirmed in correspondence from the BTA as follows:

"Regarding the cross triathlon competition 'Lion Heart' held on Primorsko on September 8, 2023 [sic] organized by the 'Lion Heart' Sports Club […]

1. The competition organized by the 'Lion Heart' Sports Club is an amateur cross-triathlon event and is not part of the calendar of the [BTA]. The event has been held for the 7th year and is entirely focused on mass participation – an open sports event for every Bulgarian citizen over the age of 18.

2. The results of the competition are not recognized by any institution and are not part of the national or international ranking lists. The competition does not have a points system. […]".

138. But while these four features may be present in a competition, they are not essential requirements of a Competition as defined in the RADA. Indeed, there is no mention of any of these argued-for

elements within the definition and no proper basis on which to imply them into the definition. By way of example, the fact that the Lion Heart Triathlon is not on the official BTA calendar is neither here nor there with respect to the consideration of whether or not the Lion Heart Triathlon is a Competition. The same is equally true of the absence of ranking points and of the fact that the event was open to any adult over 18 years of age, requiring no club membership, just the payment of a participation fee. That may be the position with any 'open' even such as The (British) Open in golf, which is open to professionals and amateurs alike, without the need for club affiliation, albeit via qualification rounds. No one would suggest that The Open was therefore not to be regarded as a competition or a contest.

139. This view is reinforced by the very broad language of the WADC Article 10.14.1 (and Article 51(1) of the RADA).

    a. First, the prohibition extends to participation *"in any capacity"*. That is plainly intended to keep the banned athlete away from sport generally for the duration of the period of ineligibility.

    b. Second, the word "activity", though not defined, is explained in the WADC comment so as to make it clear that a banned athlete (i) shall not participate in *"a training camp, exhibition or practice"* organised by their national federation or club, (ii) shall not compete in non-signatory professional leagues, and (iii) precludes, by way of example, *"serving as an official , director, officer, employee or volunteer"*.

    c. Third, the comment also provides that any ineligibility imposed in one sport is to be recognised by all sports, thus effectively taking the banned athlete out of <u>all</u> sport for the duration of the period of ineligibility.

140. This language illustrates that the prohibition on participation is very broad indeed, and tells against implying language that narrows the ban on participation in the manner argued for by the Athlete. In the Sole Arbitrator's view, as the definition of Competition stands, which is what must be construed, the matters advanced by the Athlete have no bearing on the question of whether or not the Lion Heart Triathlon falls within the definition, and there is no proper basis, and none articulated by the Athlete, for the implication of these limiting requirements into the terms of the RADA. It is safe to say that, had the drafters of the WADC (and in turn the RADA) taken the view that these four matters were essential ingredients to the definition of Competition, they would and could have said so.

141. The Athlete also submitted that Lion Heart Triathlon was not a Competition because the ADC did not seek to and the BOC DC did not disqualify the results of the Athlete's participation in the Lion Heart Triathlon because there were no results to be disqualified. It is true that the ADC and BOC did not seek to disqualify the results but that cannot inform the proper construction of the wording of Article 51(1) of the RADA. And it is not true that there were no results, for the evidence was in fact that the Lion Heart Sports Club did monitor and issue official results and that the

Athlete and his team finished second (see above).

142. It was said further that the Athlete did not use the Lion Heart Sports Club's facilities for his participation in the Lion Heart Triathlon. It is not understood how this could bear on the question of whether the Lion Heart Triathlon was a Competition or not for the purposes of Article 51(1) of the RADA, the proper construction of which cannot possibly turn on whether or not a particular athlete chooses to use the club's facilities.

143. It was next submitted that there were no prizes. As a matter of fact, prizes were awarded by the Lion Heart Sports Club for the event. According to the Athlete, there was an awards ceremony on the day after the event (at which either medals or vouchers or both were awarded). In any event, the presence or absence of prizes does not, in the Sole Arbitrator's view, determine whether a particular event is a competition – there is certainly no indication of such a thing in the definition of Competition adopted by the RADA. The reference to prizes in the definition of Competition is not to be understood as meaning that a prize is an essential element of a Competition; to the contrary, it speaks to the difference between a single Competition and an Event, a question that does not arise here.

144. It was said that the *"competitive aim"* was missing in this case. But that is plainly not right. The Lion Heart Triathlon records times and results and keeps account of official rankings as described above. There is clearly a competitive aim to the event; it may not be the sole aim but it is certainly one of them.

145. Finally, the Athlete argued that, even WADA did not consider that there had been participation in a competition and even then WADA was unsure whether the Athlete's participation amounted to a violation of the ban on participating in an activity because WADA used the word "seems". But that is to overstate things. Properly understood, what WADA were saying was that it appeared to them, on the facts provided to them, that there had been a violation of the prohibition on participation by the Athlete, and that the ADC should investigate it in the usual way in accordance with the ISRM. WADA did not address one way or the other whether the Lion Heart Triathlon amounted to a Competition, let-alone, as was submitted, take the view that the it was not a Competition.

146. In all, the Sole Arbitrator's view, the Lion Heart Triathlon is plainly a race or contest. The Lion Heart Triathlon is a competitive trial of speed in swimming, running, and cycling in which the participants compete against each other in a race to complete the course in the lowest time possible. It is also a contest in that the participants compete for supremacy and participants are ranked according to their results, the winner being the individual or team that finishes the course in the shortest time, with the other participants ranked in finishing order. It matters not at all that these rankings are what the Athlete described as "internal"; they are official rankings nonetheless.

147. In the result, the Sole Arbitrator is of the clear view that the Lion Heart Triathlon is a Competition for the purposes of the RADA and that, by participating therein, the Athlete violated the ban on

participation that is set forth in Article 51(1) of the RADA.

B. The Consequences

148. What consequences follow?

149. The consequences of a violation of Article 51(1) of the RADA are set forth in Articles 50(1) and 53 of the RADA, which are set forth above (see para. 109). It follows from what has been said above and from the plain language of Article 53 that:

a. The Athlete has violated the prohibition against participation during his period of ineligibility by participating in the Lion Heart Triathlon.

b. The results of his participation in the Lion Heart Triathlon are therefore to be disqualified.

c. A new period of ineligibility is to be imposed against the Athlete equal to in length to the original period of ineligibility, that being the two-year period imposed by the BOC DC and confirmed by the Panel in the 9198 Award.

d. This period of further ineligibility may be adjusted based on the Athlete's degree of fault *"and other circumstances of the case"*.

150. The Athlete submits that the Sole Arbitrator should indeed adjust the period of ineligibility to reflect what is said to be fault on the part of the Athlete *"at the low end of the spectrum"* and the circumstances surrounding the event in which he participated. The Athlete submits that the sanction should therefore be reduced from 2 years to 0-4 months.

151. The Sole Arbitrator is therefore required to form an assessment of the Athlete's degree of Fault. Fault and No Significant Fault are defined in the RADA as follows:

"7. "Fault" is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or the other Person's experience, whether the Athlete or other Person is a Protected Person, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or the other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his/her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 44.6.

"26. "No Significant Fault or Negligence" designates the case the Athlete or other Person establishes that any Fault or negligence (when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence) was not significant in relation to the anti-doping rule violation. […]"

152. At the outset, the Sole Arbitrator notes and respectfully adopts the following passage from the experienced panel in CAS 2016/A/4596 at para 126 (with

emphasis added) which was concerned with a breach of a provisional suspension:

"The Panel notes that there is no dispute that the Player participated in two matches during the period of his provisional suspension. A provisional suspension is a serious measure that must be respected by the individual concerned. The Panel does not consider that the Player's explanation, which relies on his professed ignorance of the effect of the suspension, is an acceptable excuse for breaching the terms of the suspension on two separate occasions. ***It was incumbent upon the Player, as the subject of a provisional suspension, to abide by the terms of the suspension and to exercise due care and responsibility in ascertaining what sporting activities and events fell within its scope.*** *…".*

153. This accords with what was said in CAS 2023/A/9926:

    a. at para 111: *"It would have been incumbent upon him to make inquiries with USADA or with his legal counsel to determine if the recently imposed suspension would prevent him from taking part in an activity that he considered to be somewhat benign, but which could potentially fall under the ambit of Article 10.14.1 of the WADC"*; and

    b. at para.114: *"due diligence required him to take reasonable steps to satisfy himself that such an assumption was justified and would not bring him into contravention of his […] suspension".*

154. It follows therefore that the Athlete was under a duty to exercise due care and responsibility to ascertain what sporting events (or other activities) fell within the scope of the earlier ban and to take reasonable steps to satisfy himself that any participation in such would not be in contravention of that earlier ban.

155. The Athlete asks the Sole Arbitrator to take into account the following maters as indicia of reduced fault:

    a. The Athlete's participation in the Lion Heart Triathlon was an isolated case; there is no suggestion that he put a scheme in place to breach the prior sanction.

    b. The event is geared toward *"mass participation"* (according to BTA) with some of the funds raised going to charity.

    c. The Athlete checked with the organisers of the Lion Heart Triathlon and they cleared him to participate.

    d. The Athlete's participation was not related to training, practice, or competing in order to somehow circumvent the period of ineligibility previously imposed on him by the BOC DC and the CAS.

156. Those matters do bear on fault – but, in the Sole Arbitrator's view, they are altogether outweighed by the following matters which tell against any reduction in the period of ineligibility on the basis of fault:

    a. Article 21.1.1 of the WADC (and its equivalent at Article X of the RADA) imposes an obligation on the Athlete *"to be knowledgeable of and comply with all applicable anti-doping policies and rules".*

    b. The Athlete is an experienced competitor and has competed at

the national and international levels since 2019. He was therefore no stranger to the strictures of the RADA (and the WADC) and would have or should have taken his two-year period of ineligibility seriously.

c. In the same vein, he would have or should have well understood that, as a banned athlete, he was not free to participate in a Competition or activity for the duration of that ban. If therefore he wanted to take part in an event of some sort, whatever it may be, he was under a duty to ensure (or, put another way, a duty to take care) that he was permitted to do so and that such participation would not violate the ban on participation set forth in Article 51(1) of the RADA. In this respect, the Athlete submitted that he had *"learned his lesson from his previous mistakes in youth"* (a reference to his whereabouts failures) and is now *"doing his utmost to strictly comply with the whereabouts requirements of the RADA and the WADC"*. This may well be true; but, given his situation, 'doing his utmost' required the Athlete to make sure that he did nothing at all that would violate the sanction for those whereabouts failures.

d. That means that, if there was any uncertainty about him participating in any event, he should have taken steps – well in advance of the event – to determine the correct position including but not limited to: (i) liaising with the event organisers; (ii) liaising with the ADC; and (iii) taking legal advice. It is simply not enough to say, as the Athlete has said, that he had no uncertainty: if that were really so it means that he was prepared to form his own view on this question and take the attendant risks that he was wrong. It also means that if the uncertainty persisted he should not have participated.

e. He should have done these things well in advance of the event. In this respect, the Athlete was asked questions at the hearing about the steps he took to ensure that he was free to compete without violating his period of ineligibility. He said that he, himself, did not make any inquiries in advance of the event. He said that, on the day of the event, he arrived at 6:00am for a 7:00am start and at 6:50am, after he had been assessed as fit to compete by the event doctor, he found the principal organiser of the event and said: *"Listen, I'm that person. Is this an official competition or is it just an event that anyone can participate"*. The Athlete said that he was told that it was not an official competition and that it was fine for him to participate. *"So I signed and I participated. I had only about 30 minutes of participation, just the swimming part, which was first"*.

f. This is something, to be sure, but in circumstances where the Athlete was under a duty to be careful to ensure that his participation would not violate his existing sanction, it was not enough. He should have made more and earlier enquiries, especially in circumstances where

he was first approached, so he said, to take part in June 2023, many months before the event.

157. On balance, therefore, the Sole Arbitrator takes the view that, taking into account all of the subjective and objective matters that bear on fault, there is no reason to reduce the two-year period of ineligibility.

158. The Athlete also relies on "other circumstances" which are prayed in aid of a reduction of the period. These other circumstances relate to what is said to be ADC's *"procedural conduct"* and the following things are complained of:

    a. The ADC withheld its report of 4 September 2023 and its correspondence with the Lion Heart Sports Club and BTA.

    b. The ADC did not charge the Athlete for almost two months after receiving WADA's 15 September 2023 reply, waiting until 13 November 2023 to notify the Athlete.

    c. The ADC did not respond to the Athlete's counsel's letter dated 23 November 2023 asking the ADC to contact BTA to see if the Athlete had *"an official registration with them for the specific event"*.

    d. Only on 15 May 2024 did the ADC file its report with the BOC DC against the Athlete alleging that the Athlete's participation in the Lion Heart' Triathlon constituted a violation of the prohibition under Article 51(1) of the RADA, an inexplicable delay of six months.

159. If these matters did amount to procedural irregularities on the part of ADC (as to which the Sole Arbitrator forms no view), they do not, individually or collectively, give rise to any reason to reduce the two-year ineligibility period because (a) it is difficult to see why they have any bearing at all on the matters to be taken into account with respect to penalty and (b) they have been readily cured by this *de novo* appeal. Further, these matters certainly do not fall within Article 45 of the RADA which provides for the elimination, reduction, or suspension of a period of ineligibility or for reasons other than fault (mirroring Article 10.7 of the WADC); and the delays complained of are not said by the Athlete to be *"substantial delays"* under Article 50(2) of the RADA.

160. The second issue with respect to the period of ineligibility is that of the start date.

161. The timetable relating to the imposition of the earlier period of ineligibility has been limned above. By way of repetition:

    a. On 10 October 2022, the BOC DC issued the BOC DC 2022 Decision imposing a period of ineligibility of two years from 10 October 2022 but deducting the 14 day period of provisional suspension, so that it expired on 26 September 2024.

    b. The Deputy Division President of CAS ordered a stay of the sanction on 20 October 2022 (on the Athlete's application in CAS 2022/A/9198, and with the consent of the ADC and the BOC). The stay was effective from 20 October 2022 through to the date on which the Arbitrator

issued the operative part of the 9198 Award on 26 June 2023.

c. By the 9198 Award (issued on 15 August 2023), the Arbitrator confirmed the BOC DC 2022 Decision. In particular, the Aritrator imposed a period of ineligibility of two years, giving credit for the period of provisional suspension served by the Athlete from 5-19 May 2022 (i.e., 14 days). Once again, the period of ineligibility imposed on the Athlete expired on 26 September 2024.

d. On 11 September 2023, WADA submitted a Request for Interpretation of the 9198 Award noting (relevantly) that the award did not note that the period of ineligibility had been stayed from 20 October 2022 to 26 June 2023, and contending that such period should be excluded from the calculation of period of ineligibility imposed.

e. On 5 November 2023, the Arbitrator responded to WADA's request. He said that, in his opinion, that period of stay should not count for the purposes of the calculation of period of ineligibility (*"any other interpretation would be illogical"*) but that it had not been argued before him and he was not asked to make a decision in that respect.

f. There was no further application to correct the 9198 Award and no appeal by WADA in this respect.

g. The Athlete appealed against the 9198 Award to the SFT, which appeal was dismissed. The SFT granted two stays, from 29 June to 2 July 2023 and from 18 to 20 August 2023, for a total of seven days.

h. In the Appealed Decision, the BOC DC imposed a period of ineligibility of a further two years commencing on 5 June 2025. It did not articulate why it did so but it is apparent that it extended the prior period of ineligibility by the length of the stay of that period from 20 October 2022 to 26 June 2023.

162. In this appeal, the Athlete argues that the BOC DC was wrong to do so and that the prior period of ineligibility expired according to its terms on 26 September 2024 – and that any new period of ineligibility should begin on the day following that expiry, namely 27 September 2024. For its part, the ADC sought confirmation of the Appealed Decision, i.e., that any new period of ineligibility should commence on 5 June 2025.

163. In the first place, it appears that the BOC DC fell into error in this respect by giving credit for the period of the CAS stay from 20 October 2022 to 26 June 2023. That was the very thing advanced by WADA in its Request for Interpretation and yet, despite taking the view that it would be "illogical" not to deduct that period of stay from the period of ineligibility, the Arbitrator felt unable to do so because the matter had not been addressed by the parties in argument. Accordingly, in the absence of any appeal on this front by WADA, the 9198 Award must stand according to its

terms, with the period of ineligibility coming to an end on 26 September 2024.

164. In the second place, the Sole Arbitrator notes that, since the 9198 Award, the SFT granted a stay (see above) for a total of seven days. It must follow therefore that the prior two-year period of ineligibility, as adjusted, expired on 3 October 2024.

165. In any event, the Athlete contends that any period of ineligibility imposed in respect of this appeal must follow from the last date of the prior period of ineligibility. The Athlete relies on Article 50(1) of the RADA and quotes the first sentence as follows: *"Where an Athlete is already serving a period of Ineligibility for an anti-doping rule violation, any new period of Ineligibility shall commence on the first day after the current period of Ineligibility has been served. […]"*. He then says that the earlier period expired on 26 September 2024 and it *"makes no sense to impose a new period of ineligibility nearly nine months after the previous one has expired"* and to do so would be contrary to Article 50(1) of the RADA in any event. As a consequence, the Athlete submits that any new period of ineligibility should commence on 27 September 2024.

166. However, the Athlete ignores the second sentence of Article 50(1), repeated here for ease of reference (with added emphasis): *"Article 50. (1) Where an Athlete is already serving a period of Ineligibility for an anti-doping rule violation, any new period of Ineligibility shall commence on the first day after the current period of Ineligibility has been served.* ***Otherwise, and except the cases referred to in this Article, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed***".

167. The first sentence plainly contemplates that, where an athlete is currently serving a period of ineligibility, then the new and additional period of ineligibility is to be appended to the end of that current period, so that the two periods are served in series. The second sentence recognises, however, that where the athlete's first period of ineligibility has come to an end it makes little sense to 'back-date' the second period of ineligibility to meet the first because the athlete will have been free to compete upon the expiry of the prior ban. In those circumstances, the new period of ineligibility is to start as at the date of the award.

168. That is the position here. Here, the earlier period of ineligibility expired on 3 October 2024 (see para. 164 above). It would make little sense to have the new period of ineligibility commence on 4 October 2024 because the Athlete has been free to compete between that date and now and the sanction would be of no effect for that period. It follows that the "otherwise" that is provided for in the second sentence of Article 50(1) therefore applies, namely that the period of ineligibility is to start on the date of the final hearing decision, that being the decision set forth in this Award.

169. This is consistent with the terms of Article 53(1) of the RADA:

"Article 53. (1) Where an Athlete or other Person who has been declared Ineligible violates the prohibition against participation during Ineligibility described in Article 51, the results of such participation shall be disqualified and a new period of Ineligibility, equal in length to the

original period of Ineligibility, shall be added to the end of the original period of Ineligibility. […]"

170. True it is that that this article provides that the new period of ineligibility is to be added to the end of the original period of ineligibility such that in the ordinary course the two periods will be served in series (as per the first sentence of Article 50(1)). But that does not mean where, as here, the original period of ineligibility expired some time ago that the new period of ineligibility must commence the day after that expiration, and nor did the Athlete contend for such a meaning.

171. Accordingly, in the circumstances of this case, the correct approach is to follow the second sentence of Article 50(1) of the RADA and commence the new period of ineligibility as at the date of this Award.

XI. CONCLUSION

172. In all, therefore, the Sole Arbitrator concludes as follows:

a. The Athlete properly withdrew his appeal against the BOC.

b. The Sole Arbitrator is comfortably satisfied that, having been declared ineligible for the prior ADRV (whereabouts failures) as set forth in the BOC DC 2022 Decision and confirmed in the 9198 Award, the Athlete violated the provisions of Article 51(1) of the RADA by participating in the Lion Heart Triathlon on 2 September 2023, that event being a Competition within the said article.

c. The Athlete shall therefore be sanctioned by a further period of ineligibility equal to two years, that being the length of his original period of ineligibility, which period is to commence on the date of this Award.

d. Considering that the BOC DC did not disqualify the results of the Athlete's participation in the Lion Heart Triathlon, and in accordance with the principle of *ne ultra petita,* the Sole Arbitrator finds that no such disqualification shall be imposed.

ON THESE GROUNDS

The Court of Arbitration for Sport hereby rules that:

1. The Appeal filed by Antani Ivanov on 29 August 2024 against Anti-Doping Centre of the Republic of Bulgaria (ADC) from the decision issued by the BOC Disciplinary Committee dated 12 August 2024 is dismissed.

2. The decision issued by the BOC Disciplinary Committee dated 12 August 2024 is confirmed.

3. (…)

4. (…)

5. All other and further motions or prayers for relief are dismissed.

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_372/2024, A. c. B.
12 décembre 2024

Recours en matière civile contre la sentence rendue le 27 mai 2024 par le Tribunal Arbitral du Sport (CAS 2023/A/10016)

Conséquence du défaut d'élection de domicile en Suisse par le requérant domicilié à l'étranger et du versement de l'avance de frais dans le délai de grâce imparti

Vu la sentence du 27 mai 2024 au terme de laquelle le Tribunal Arbitral du Sport (TAS) a rejeté l'appel interjeté par le club de football égyptien A._____ à l'encontre de la décision rendue le 17 août 2023 par la Chambre de Résolution des Litiges de la Fédération Internationale de Football Association (FIFA) dans le cadre du litige divisant ledit club d'avec le footballeur professionnel B._____;

Vu le recours en matière civile formé le 28 juin 2024 par A._____ (ci-après: le recourant) contre ladite sentence;

Attendu que, selon l'art. 39 al. 3 de la loi sur le Tribunal fédéral (LTF; RS 173.110) du 17 juin 2005, les parties domiciliées à l'étranger doivent élire en Suisse un domicile de notification, faute de quoi le Tribunal fédéral peut s'abstenir de leur adresser des notifications ou les publier dans une feuille officielle,

qu'il ressort clairement du texte de cette disposition légale que la partie domiciliée à l'étranger a l'obligation d'élire un domicile de notification en Suisse, faute de quoi le Tribunal fédéral a le choix de renoncer à toute notification ou de procéder à la publication dans une feuille officielle,

qu'une telle exigence légale doit être observée d'office, sans qu'il soit nécessaire de rendre attentive la partie à l'étranger à cette exigence ou de l'inviter à élire un domicile de notification en Suisse (CARRUZZO/KISS, Les particularités du contrôle des sentences exercé par le Tribunal fédéral suisse en matière d'arbitrage international, in SJ 2023 p. 649),

qu'on peut en effet attendre d'une partie qui dépose un recours au Tribunal fédéral qu'elle consulte la loi qui régit la procédure devant lui (CARRUZZO/KISS, op. cit., p. 650);

Attendu que le recourant, pourtant assisté d'un mandataire professionnel ayant représenté à diverses reprises des parties domiciliées ou sises à l'étranger en matière d'arbitrage international devant le Tribunal fédéral, a failli à son devoir d'élire un domicile de notification en Suisse lors du dépôt de son recours en matière civile,

que nonobstant le fait que l'intéressé aurait dû savoir, à la simple lecture de la LTF - à laquelle il s'est du reste référé à plusieurs reprises dans son mémoire de recours -, qu'il était tenu d'élire un domicile de notification en Suisse, le Tribunal fédéral, par avis du 3 juillet 2024, a rendu le recourant attentif à l'exigence découlant de l'art. 39 al. 3 LTF en l'invitant à lui communiquer le nom et l'adresse d'une personne domiciliée en Suisse à laquelle les actes de procédure pourraient être notifiés;

Attendu que le recourant n'a pas élu de domicile de notification en Suisse conformément à l'art. 39 al. 3 LTF,

que, nonobstant le non-respect de l'exigence prévue par l'art. 39 al. 3 LTF, le Tribunal fédéral a vainement tenté de communiquer au recourant, par voie électronique et/ou postale, ses ordonnances d'instruction ultérieures,

que, par ordonnance présidentielle du 3 juillet 2024, le recourant s'est vu impartir un délai au 19 août 2024 pour verser une avance de frais de 11'000 fr.,

que la Juge présidant la I re Cour de droit civil a rendu une nouvelle ordonnance, datée du 29 août 2024, expédiée par voie électronique, par laquelle, après avoir constaté le défaut de paiement de ladite avance dans le délai imparti, elle a fixé au recourant un délai au 13 septembre 2024 pour s'exécuter sous peine d'irrecevabilité de son recours,

que, par ordonnance du 20 novembre 2024, adressée par voie postale, le recourant s'est vu impartir, à titre tout à fait exceptionnel, un délai au 5 décembre 2024 pour verser l'avance de frais, sous peine d'irrecevabilité du recours;

Considérant qu'aux termes de l'art. 62 al. 3 LTF, le juge instructeur fixe un délai approprié pour fournir l'avance de frais ou les sûretés et, si le versement n'est pas fait dans ce délai, un délai supplémentaire, que si l'avance ou les sûretés ne sont pas versées dans ce second délai, le recours est irrecevable, que tel est le cas en l'espèce du moment que le recourant n'a pas versé l'avance de frais dans le délai de grâce qui lui avait été imparti par ordonnance présidentielle du 20 novembre 2024; qu'il y a lieu, partant, de constater l'irrecevabilité du présent recours (art. 62 al. 3 LTF) en faisant application de la procédure simplifiée prévue par l'art. 108 al. 1 LTF;

Considérant, étant donné les circonstances, qu'il ne sera pas perçu de frais judiciaires (art. 66 al. 1 *in fine* LTF), que la partie intimée, qui n'a pas été invitée à déposer une réponse, n'a pas droit à des dépens;

Considérant, par ailleurs, que, dans la mesure où le recourant n'a pas élu de domicile de notification en Suisse, le Tribunal fédéral s'abstiendra de lui adresser le présent arrêt, mais en conservera une copie à la disposition de l'intéressé (art. 39 al. 3, seconde phrase, première hypothèse, LTF).

Décision

Le recours est irrecevable.

4A_374/2024, A. c. B.
12 décembre 2024

Recours en matière civile contre la sentence rendue le 28 mai 2024 par le Tribunal Arbitral du Sport (CAS 2023/A/9761)

Conséquence du défaut d'élection de domicile en Suisse par le requérant domicilié à l'étranger et du versement de l'avance de frais dans le délai de grâce imparti

Vu le recours en matière civile formé le 28 juin 2024 par le club de football égyptien A._____ (ci-après: le recourant) contre la sentence rendue le 28 mai 2024 par le Tribunal Arbitral du Sport (TAS) dans le cadre du litige divisant ledit club d'avec le footballeur professionnel B._____ (ci-après: l'intimé);

Attendu que, selon l'art. 39 al. 3 de la loi sur le Tribunal fédéral (LTF; RS 173.110) du 17 juin 2005, les parties domiciliées à l'étranger doivent élire en Suisse un domicile de notification, faute de quoi le Tribunal fédéral peut s'abstenir de leur adresser des notifications ou les publier dans une feuille officielle,

qu'il ressort clairement du texte de cette disposition légale que la partie domiciliée à l'étranger a l'obligation d'élire un domicile de notification en Suisse, faute de quoi le Tribunal fédéral a le choix de renoncer à toute notification ou de procéder à la publication dans une feuille officielle,

qu'une telle exigence légale doit être observée d'office, sans qu'il soit nécessaire de rendre attentive la partie à l'étranger à cette exigence ou de l'inviter à élire un domicile de notification en Suisse (CARRUZZO/KISS, Les particularités du contrôle des sentences exercé par le Tribunal fédéral suisse en matière d'arbitrage international, in SJ 2023 p. 649),

qu'on peut en effet attendre d'une partie qui dépose un recours au Tribunal fédéral qu'elle consulte la loi qui régit la procédure devant lui (CARRUZZO/KISS, op. cit., p. 650);

Attendu que le recourant, pourtant assisté d'un mandataire professionnel ayant représenté à diverses reprises des parties domiciliées ou sises à l'étranger en matière d'arbitrage international devant le Tribunal fédéral, a failli à son devoir d'élire un domicile de notification en Suisse lors du dépôt de son recours en matière civile,

que nonobstant le fait que l'intéressé aurait dû savoir, à la simple lecture de la LTF - à laquelle il s'est du reste référé à plusieurs reprises dans son mémoire de recours -, qu'il était tenu d'élire un domicile de notification en Suisse, le Tribunal fédéral, par avis du 3 juillet 2024, a rendu le recourant attentif à l'exigence découlant de l'art. 39 al. 3 LTF en l'invitant à lui communiquer le nom et l'adresse d'une personne domiciliée en Suisse à laquelle les actes de procédure pourraient être notifiés;

Attendu que le recourant n'a pas élu de domicile de notification en Suisse conformément à l'art. 39 al. 3 LTF,

que, nonobstant le non-respect de l'exigence prévue par l'art. 39 al. 3 LTF, le Tribunal fédéral a vainement tenté de communiquer au recourant, par voie électronique et/ou postale, ses ordonnances d'instruction ultérieures,

que, par ordonnance présidentielle du 3 juillet 2024, le recourant s'est vu impartir un

délai au 19 août 2024 pour verser une avance de frais de 11'000 fr.,

que la Juge présidant la I re Cour de droit civil a rendu une nouvelle ordonnance, datée du 29 août 2024, expédiée par voie électronique, par laquelle, après avoir constaté le défaut de paiement de ladite avance dans le délai imparti, elle a fixé au recourant un délai au 13 septembre 2024 pour s'exécuter sous peine d'irrecevabilité de son recours,

que, par ordonnance du 27 septembre 2024 adressée par voie postale, la Juge présidant la I re Cour de droit civil, après avoir constaté le défaut de paiement de ladite avance dans le délai imparti, a fixé au recourant un délai non prolongeable au 18 octobre 2024 pour s'exécuter sous peine d'irrecevabilité de son recours;

Considérant qu'aux termes de l'art. 62 al. 3 LTF, le juge instructeur fixe un délai approprié pour fournir l'avance de frais ou les sûretés et, si le versement n'est pas fait dans ce délai, un délai supplémentaire,

que si l'avance ou les sûretés ne sont pas versées dans ce second délai, le recours est irrecevable,

que tel est le cas en l'espèce du moment que le recourant n'a pas versé l'avance de frais dans le délai de grâce qui lui avait été imparti par ordonnance présidentielle du 27 septembre 2024;

qu'il y a lieu, partant, de constater l'irrecevabilité du présent recours (art. 62 al. 3 LTF) en faisant application de la procédure simplifiée prévue par l'art. 108 al. 1 LTF;

Considérant, étant donné les circonstances, qu'il ne sera pas perçu de frais judiciaires (art. 66 al. 1 *in fine* LTF),

que la partie intimée, qui n'a pas été invitée à déposer une réponse, n'a pas droit à des dépens;

Considérant, par ailleurs, que, dans la mesure où le recourant n'a pas élu de domicile de notification en Suisse, le Tribunal fédéral s'abstiendra de lui adresser le présent arrêt, mais en conservera une copie à la disposition de l'intéressé (art. 39 al. 3, seconde phrase, première hypothèse, LTF).

Décision

Le recours est irrecevable.

4A_28/2025, A. c. Fédération Internationale de Football Association 3 mars 2025

Recours en matière civile contre la sentence rendue le 4 décembre 2024 par le Tribunal Arbitral du Sport (TAS 2021/A/8388)

Le droit d'être entendu n'est pas enfreint si la Formation arbitrale du TAS estime que l'audition de victimes potentielles en plus de la victime supposée et de témoins n'est pas nécessaire pour déterminer si le recourant a enfreint les règles contenues dans le Code d'Ethique de la FIFA ni pour apprécier la sanction qui lui a été infligée. Rappel de la possibilité, à certaines conditions, de tenir compte de témoignages anonymes.

Extrait des faits

La Fédération Internationale de Football Association (FIFA), association de droit suisse ayant son siège à Zurich, est l'instance dirigeante du football au niveau mondial. Elle dispose d'un pouvoir disciplinaire sur les fédérations nationales de football, les joueurs ou les officiels qui méconnaîtraient ses règles, en particulier son Code d'éthique (ci-après: le CEF).

Depuis 2020, A._____, ressortissant de l'État U._____ domicilié dans l'État U._____, occupe la fonction de vice-président de la Fédération B._____ de Football (ci-après: la Fédération B._____), laquelle est affiliée à la FIFA. Il préside également la Commission Nationale des Arbitres de la Fédération B._____ (ci-après: la CONA) depuis 2014.

Dans un document diffusé le 25 avril 2020 sur sa chaîne YouTube, le journaliste C._____ a fait état d'allégations d'abus sexuels systématiques qui auraient été commis au sein de la Fédération B._____.

Le 30 avril 2020, le journal britannique... a publié un article indiquant que plusieurs officiels de la Fédération B._____, en particulier l'ancien président de ladite fédération, D._____, auraient contraint plusieurs joueuses de football du Centre technique national de l'État U._____ (ci-après: le Centre) à entretenir des rapports sexuels en ayant recours à des méthodes de coercition et d'intimidation.

Le 11 mai 2020, la Chambre d'instruction de la Commission d'éthique de la FIFA (ci-après: la Chambre d'instruction) a nommé un comité ad hoc chargé de procéder aux mesures d'investigation nécessaires aux fins d'élucider les faits liés aux accusations formulées à l'encontre de D._____.

Au cours de cette enquête, la Chambre d'instruction a identifié A._____ comme l'un des auteurs potentiels d'abus sexuels, eu égard notamment à son rôle au sein de la CONA.

Le 13 août 2020, la Fédération Internationale des Associations de Footballeurs Professionnels (FIFPRO) a transmis à la Chambre d'instruction un rapport détaillé (ci-après: le rapport FIFPRO), dans lequel elle indiquait avoir pu identifier 34 victimes supposées d'abus sexuels commis par 10 auteurs potentiels, parmi lesquels figurait A._____. À teneur dudit document, le prénommé était notamment accusé d'avoir violé et/ou tenté d'abuser sexuellement au moins onze personnes.

Le 21 août 2020, la Chambre d'instruction a ouvert une enquête préliminaire à l'encontre de A._____ pour de possibles violations du CEF.

Le 10 février 2021, la présidente de la Chambre d'instruction a décidé de suspendre provisoirement A._____ pendant 90 jours. Cette mesure a été prolongée ultérieurement.

Le 24 juin 2021, la Chambre d'instruction a publié un rapport (ci-après: le rapport final), dans lequel elle a abouti à la conclusion que A._____ avait enfreint plusieurs dispositions du CEF, en se rendant coupable d'abus et de harcèlement sexuels sur des femmes arbitres, en menaçant des victimes et des témoins potentiels et en abusant de son pouvoir aux fins de convaincre des arbitres de se livrer à des actes sexuels. Le rapport final incluait la déclaration écrite, datée du 6 octobre 2020, d'une prétendue victime du prénommé (ci-après: la victime supposée). Il contenait également le procès-verbal d'un entretien entre la victime supposée et la Chambre d'instruction et celui d'un autre entretien entre ladite Chambre et un ancien officiel de la Fédération B._____ (ci-après: le témoin 1), lequel avait témoigné au sujet de potentiels abus sexuels prétendument commis au sein du Centre et d'autres infrastructures de la Fédération B._____.

Le lendemain, la Chambre de jugement de la Commission d'éthique de la FIFA (ci-après: la Chambre de jugement) a signifié à A._____ l'ouverture d'une procédure disciplinaire dirigée contre lui sur la base notamment des conclusions figurant dans le rapport final.

Après avoir invité l'intéressé à se déterminer, la Chambre de jugement a tenu une audience par vidéoconférence le 22 juillet 2021.

Par décision du 23 juillet 2021, dont les motifs ont été communiqués à l'intéressé le 17 septembre 2021, la Chambre de jugement, sur la base du rapport final, des déclarations de la personne mise en cause et celles de la présidente de la Chambre d'instruction, a considéré que A._____ avait enfreint les art. 23 ("protection de l'intégrité physique et mentale") et 25 ("abus de pouvoir") du CEF car il avait commis des actes de harcèlement, d'abus sexuels, de menaces et de coercition à l'égard de femmes arbitres entre 2011 et 2021. Elle a estimé que le prénommé avait profité de sa position au sein du monde du football de l'État U._____ pour obtenir des faveurs sexuelles. La Chambre de jugement lui a interdit à vie de participer à toute activité liée au football tant au niveau national qu'international et lui a infligé, de surcroît, une amende de 100'000 fr.

Le 6 octobre 2021, A._____ a contesté cette décision devant le Tribunal Arbitral du Sport (TAS).

Le 3 décembre 2021, l'appelant a requis la production de l'intégralité du dossier de la procédure ouverte à son encontre par la Commission d'éthique. Il a conclu à ce qu'ordre soit donné à la FIFA de lui remettre l'entier dudit dossier sous une forme non anonymisée.

Le 9 décembre 2021, la FIFA s'est opposée à la remise des documents originaux non caviardés et a refusé de révéler l'identité des victimes supposées et des témoins. Elle a souligné que le respect du droit d'être entendu de l'appelant pouvait être assuré par d'autres moyens aux fins de protéger les personnes concernées.

Le 17 janvier 2022, la FIFA a transmis au TAS une copie du dossier complet de la procédure menée devant la Chambre de jugement.

Le 31 janvier 2022, la Formation a rejeté la requête présentée par l'appelant tendant à la

production dudit dossier sous une forme non caviardée.

Le 8 mars 2022, A._____ a déposé son mémoire d'appel qui incluait diverses requêtes procédurales.

Le 7 octobre 2022, l'appelant a présenté une nouvelle requête tendant à lever l'anonymat "de la prétendue victime et de tous les témoins qui viendraient à l'accuser des faits lui étant reprochés".

Le 25 octobre 2022, le TAS a rejeté ladite requête aux fins de respecter les droits des personnes concernées. Il a précisé que les témoins protégés, cités par la FIFA, seraient entendus à distance, via un téléphone muni d'un dispositif permettant la distorsion de la voix, dans un lieu tenu secret, et selon les modalités suivantes:

- chaque personne témoignerait seule, en présence d'un collaborateur du TAS, lequel devrait vérifier, au préalable, son identité sur la base de son passeport et s'assurer que le témoin puisse s'exprimer librement, sans être influencé par une tierce personne;

- l'appelant devrait communiquer au TAS une liste des questions qu'il entendait soumettre aux personnes concernées aux fins que la Formation puisse veiller à la protection de l'identité des personnes interrogées et les leur poser directement.

Le 6 décembre 2022, la Formation a rejeté la requête de l'appelant visant à entendre les onze victimes potentielles mentionnées notamment dans le rapport FIFPRO, tout en précisant que les motifs étayant cette décision seraient indiqués dans sa sentence.

La Formation a tenu audience à Lausanne du 15 au 16 février 2023. Au cours de celle-ci, elle a indiqué que les questions de l'appelant destinées à la victime supposée et au témoin 1 lui avaient été soumises préalablement pour validation et que toute question additionnelle devrait recueillir son approbation. Les parties ont accepté cette approche. La Formation a procédé à l'audition de l'appelant, de plusieurs témoins cités par lui et de C._____. La victime supposée et le témoin 1 ont aussi été interrogés selon les modalités particulières décrites ci-dessus afin d'assurer leur protection.

Par sentence finale du 4 décembre 2024, la Formation a partiellement admis l'appel formé par A._____. Elle a reconnu que l'intéressé avait enfreint les art. 23 et 25 du CEF. Elle a estimé que la gravité des faits reprochés à A._____ justifiait de confirmer l'interdiction à vie faite à ce dernier de participer à toute activité en lien avec le football. Eu égard au principe de la proportionnalité, elle a toutefois réduit le montant de l'amende infligée à l'appelant à 35'000 fr.

En substance, la Formation a jugé que A._____ avait violé l'art. 23 du CEF ("protection de l'intégrité physique et mentale"), puisqu'il avait harcelé et traumatisé la victime supposée - laquelle avait été contrainte de mettre un terme à sa carrière d'arbitre -, en lui faisant des avances de nature sexuelle à réitérées reprises et en procédant à des attouchements sur sa personne, respectivement en tentant de se livrer à de tels actes. Elle a également estimé que l'intéressé avait enfreint l'art. 25 du CEF ("abus de pouvoir"), car il avait abusé de sa position au sein de la Fédération B._____ pour obtenir des faveurs sexuelles d'arbitres jusqu'en 2021 au moins. À cet égard, la Formation a considéré que le prénommé avait profité de son pouvoir de choisir les arbitres à inclure sur les listes de matchs de football nationaux et internationaux pour bénéficier de faveurs sexuelles d'arbitres, étant précisé que la rémunération octroyée aux arbitres était

intéressante eu égard à la situation de précarité régnant dans l'État U._____ et leur permettait de faire évoluer leur carrière de manière positive.

Pour aboutir à pareille solution, la Formation a analysé les divers moyens de preuve à sa disposition. Elle a estimé que les différentes déclarations faites par la victime supposée étaient cohérentes et n'avaient pas varié dans le temps. Celle-ci avait fait état d'avances de nature sexuelle répétées et persistantes formulées par A._____ durant plusieurs années, d'attouchements subis dans un hôtel et dans la voiture du prénommé ainsi que de l'irruption de ce dernier, entièrement nu, dans sa chambre d'hôtel au milieu de la nuit lors d'une formation, lequel s'était livré à de nouveaux attouchements. La Formation a observé, par ailleurs, que la victime supposée avait déclaré, à plusieurs reprises, qu'il y avait eu d'autres victimes, contraintes de répondre favorablement aux avances de A._____ au vu de leur situation de vulnérabilité sur le plan financier, étant donné que le prénommé conditionnait leur participation aux rencontres de football en qualité d'arbitre à l'acceptation de ses avances. Elle a aussi relevé que la victime supposée avait indiqué que A._____ n'avait jamais été violent, mais qu'il était très intelligent et manipulateur. La Formation a souligné que les risques pris par la victime supposée pour dénoncer les faits litigieux étaient importants, puisqu'elle aurait pu être identifiée lorsqu'elle avait dû quitter le territoire de l'État U._____ pour venir témoigner en Suisse et qu'elle avait potentiellement beaucoup à perdre, mais rien à gagner en participant à la présente procédure.

La Formation a également constaté que divers reproches formulés par la victime supposée à l'encontre de A._____ avaient été confirmés à plusieurs reprises par le témoin 1, lequel avait notamment déclaré que le prénommé profitait de son statut pour abuser des arbitres et qu'il s'était rendu dans la chambre d'une arbitre lors d'une formation, avant de s'allonger auprès d'elle, entièrement nu, et de tenter de la toucher.

La Formation n'a par ailleurs pas été convaincue par les propos tenus par A._____, ni par les nombreux témoignages écrits produits par ses soins ainsi que par les divers témoins cités par lui aux fins notamment de démontrer l'existence d'un prétendu complot visant l'intéressé. Elle a ainsi estimé, au degré de preuve requis de la "satisfaction adéquate", que la thèse de la victime supposée était plus crédible que celle de la personne incriminée.

Le 20 janvier 2025, A._____ (ci-après: le recourant) a formé un recours en matière civile à l'encontre de ladite sentence. Il a conclu, principalement, à la réforme de la décision entreprise aux fins de faire constater qu'il n'a commis aucune violation du CEF

Extrait des considérants

(…)

5.

Dans un premier moyen, le recourant, invoquant l'art. 190 al. 2 let. d LDIP, reproche à la Formation d'avoir enfreint son droit d'être entendu à plusieurs reprises.

5.1. Le droit d'être entendu, tel qu'il est garanti par les art. 182 al. 3 et 190 al. 2 let. d LDIP, permet à chaque partie de s'exprimer sur les faits essentiels pour la décision, de présenter son argumentation juridique, de proposer ses moyens de preuve sur des faits pertinents et de prendre part aux séances du tribunal arbitral. S'agissant du droit de faire administrer des preuves, il faut qu'il ait été exercé en temps utile et selon les règles de forme applicables (**ATF 142 III 360** consid. 4.1.1). Le tribunal arbitral

peut refuser d'administrer une preuve, sans violer le droit d'être entendu, si le moyen de preuve est inapte à fonder une conviction, si le fait à prouver est déjà établi, s'il est sans pertinence ou encore si le tribunal, en procédant à une appréciation anticipée des preuves, parvient à la conclusion que sa conviction est déjà faite et que le résultat de la mesure probatoire sollicitée ne peut plus la modifier (**ATF 142 III 360** consid. 4.1.1).

La jurisprudence a également déduit du droit d'être entendu 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; arrêt 4A_478/2017 du 2 mai 2018 consid. 3.2.1). 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_618/2020 du 2 juin 2021 consid. 4.2; 4A_478/2017, précité, consid. 3.2.1). Cependant, les arbitres n'ont pas l'obligation de discuter tous les arguments invoqués par les parties, de sorte qu'il ne peut leur être reproché, au titre de la violation du droit d'être entendu en procédure contradictoire, de n'avoir pas réfuté, même implicitement, un moyen objectivement dénué de toute pertinence (**ATF 133 III 235** consid. 5.2; arrêt 4A_692/2016 du 20 avril 2017 consid. 5.2).

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 fait valoir que la Formation a rejeté, le 6 décembre 2022, la requête qu'il avait présentée aux fins d'obtenir l'audition des onze victimes potentielles mentionnées notamment dans le rapport FIFPRO, tout en soulignant, à cette occasion, que les motifs qui justifiaient cette décision seraient indiqués dans la sentence. Or, contrairement à ce qu'elle avait annoncé initialement, la Formation n'aurait pas exposé les motifs en question. À en croire le recourant, les arbitres n'auraient ainsi pas fourni d'explications relatives à leur refus d'entendre les onze prétendues victimes. L'intéressé soutient que cette mesure d'instruction était pourtant cruciale pour lui permettre de se défendre efficacement. Il prétend que la Formation ne pouvait pas aboutir à la solution qu'elle a retenue en procédant à l'audition d'une seule victime potentielle. Il se plaint en outre de ce que des témoignages anonymes constitueraient les seules preuves à charge retenues contre lui. Il affirme en outre qu'il n'aurait jamais eu la possibilité de contester ces témoignages ni de réfuter leur véracité. Le refus de lever l'anonymat des témoins protégés constituerait une atteinte supplémentaire aux droits de la défense, dans la mesure où le recourant aurait été empêché de connaître l'identité de ses accusatrices et n'aurait ainsi pas été en mesure de contredire leurs allégations.

5.3. Tel qu'il est présenté, le grief ne saurait prospérer.

Il saute d'emblée aux yeux que le recourant, sous le couvert de prétendues atteintes à son droit d'être entendu, se contente, dans une très large mesure, de critiquer la motivation des arbitres et tente d'inciter le Tribunal fédéral à se prononcer sur le fond du litige, ce qui n'est pas admissible.

Quoi qu'il en soit, la Cour de céans estime que la lecture de la sentence attaquée permet de discerner les motifs ayant conduit la Formation à rejeter la mesure d'instruction présentée par l'intéressé tendant à l'audition des onze victimes potentielles identifiées notamment dans le rapport FIFPRO. Sous n. 169 de sa sentence, la Formation a en effet exposé ce qui suit:

"En raison de ce qui précède, la Formation arbitrale considère, à sa «satisfaction adéquate», que la dénonciation de la Victime [i.e. la victime supposée] est plus crédible et corroborée que la thèse du complot avancée par M. A._____ et ses témoins. La Formation arbitrale retient donc que les faits établis de manière objective et incontestable au cours des procédures devant la Commission d'Éthique et devant le TAS incluent les attouchements de M. A._____ sur la Victime dans un hôtel en 2011, les nombreuses et persistantes avances de nature sexuelle faites par M. A._____ à la Victime, les attouchements de M. A._____ dans sa voiture sur la Victime et les attouchements de M. A._____, entièrement nu, sur la Victime au milieu de la nuit lors d'une formation. Sur cette base, la Formation arbitrale ne juge pas nécessaire d'analyser les autres témoignages des victimes et témoins évoqués durant la procédure devant la FIFA, les actes prouvés étant suffisamment graves pour permettre de statuer dans cette procédure." (passage mis en gras par la Cour de céans).

Il apparaît ainsi que la Formation a considéré que les faits reprochés au recourant vis-à-vis de la victime supposée étaient établis et suffisamment graves pour permettre de statuer sur le sort de l'intéressé, sans qu'il soit nécessaire d'analyser les autres déclarations des victimes potentielles et témoins évoqués durant la procédure conduite devant la Commission d'éthique. Autrement dit, la Formation a visiblement estimé que l'audition d'autres victimes potentielles n'était pas nécessaire pour déterminer si le recourant avait enfreint les règles contenues dans le CEF ni pour apprécier la sanction qui lui avait été infligée. Le point de savoir si la motivation fournie par la Formation est cohérente et convaincante ne ressortit pas au droit d'être entendu et échappe, partant, à la cognition du Tribunal fédéral (arrêt 4A_300/2023 du 9 octobre 2023 consid. 6.3).

Lorsqu'il se plaint de ce que les arbitres ont refusé de faire droit à sa requête tendant à l'audition des onze victimes potentielles identifiées notamment dans le rapport FIFPRO, le recourant ne fait rien d'autre que s'en prendre à l'appréciation anticipée des preuves ayant conduit la Formation à refuser de donner suite à cette mesure probatoire. Ce faisant, il perd de vue que la question de l'appréciation des preuves échappe en principe à l'examen du Tribunal fédéral lorsqu'il statue sur un recours en matière civile visant une sentence arbitrale internationale.

Indépendamment de ce qui précède, le recourant ne saurait être suivi lorsqu'il prétend que la Formation aurait fondé sa décision exclusivement sur des témoignages anonymes, non vérifiés et non corroborés par d'autres éléments de preuve, sans qu'il ait pu bénéficier de la possibilité de contester les accusations portées contre lui.

Premièrement, il apparaît que la Formation, pour aboutir à la solution retenue par elle, n'a pas tenu compte uniquement des déclarations faites par la victime supposée et le témoin 1,

sous couvert d'anonymat, puisqu'elle a également pris en considération le témoignage de C._____, entendu lors de l'audience d'arbitrage (cf. sentence, n. 171: "... Cela étant, en l'espèce, le témoignage de la Victime - crédible et cohérent - est corroboré par le témoignage du Témoin 1, ainsi que le témoignage de M. C._____ qui confirme une tendance dans le comportement de M. A._____.").

Secondement, la Formation a fait état, dans la sentence attaquée, des raisons pour lesquelles elle avait décidé de procéder à l'audition, sous une forme particulière, de la victime supposée et du témoin 1 et a indiqué, références jurisprudentielles à l'appui, qu'il était possible, à certaines conditions, de tenir compte de témoignages anonymes (cf. sentence, n. 131-141). Le 25 octobre 2022, le TAS avait exposé aux parties de manière détaillée les modalités prévues pour l'audition des témoins protégés lesquelles visaient à concilier les intérêts liés à la sécurité des personnes interrogées, d'une part, et les exigences liées au droit à un procès équitable, d'autre part. Les personnes concernées, dont l'identité a été contrôlée préalablement par le TAS, ont ainsi été entendues, sans enregistrement vidéo, durant l'audience, au moyen d'un téléphone muni d'un appareil permettant la distorsion de la voix, dans un poste de police situé en Suisse, en présence d'un collaborateur du TAS. Les parties à la procédure ont pu soumettre des questions à la victime supposée et au témoin 1, questions qui ont été examinées préalablement par la Formation aux fins de s'assurer qu'elles ne puissent pas permettre d'identifier les personnes interrogées. Elles ont également été autorisées à leur soumettre des questions additionnelles en cours d'audience, moyennant l'accord préalable de la Formation. Il appert ainsi que le recourant a bel et bien pu participer à l'administration des preuves sur lesquelles s'est notamment fondé le TAS pour aboutir à la solution retenue par lui. La Formation a certes refusé de révéler au recourant l'identité de la victime supposée et celle du témoin 1. Elle a toutefois soigneusement motivé ce choix. À cet égard, elle a en particulier fait état de l'existence de potentielles menaces physiques pesant sur les personnes concernées ou visant leurs proches.

Au vu de ce qui précède, le moyen tiré de la violation du droit d'être entendu ne peut qu'être rejeté dans la mesure de sa recevabilité.

6.
Dans un second moyen, divisé en deux branches, le recourant soutient que la sentence attaquée est incompatible avec l'ordre public au sens de l'art. 190 al. 2 let. e LDIP.

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). On distingue un ordre public procédural et un ordre public matériel.

6.1.1. Une sentence est contraire à l'ordre public matériel lorsqu'elle viole des principes fondamentaux du droit de fond au point de ne plus être conciliable avec l'ordre juridique et le système de valeurs déterminants (**ATF 144 III 120** consid. 5.1; **132 III 389** consid. 2.2.1). 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). L'incompatibilité de la sentence avec l'ordre public, visée à l'art. 190 al. 2 let. e LDIP, est une notion plus restrictive que celle d'arbitraire (**ATF 144 III 120** consid. 5.1; arrêt 4A_318/2018 du 4 mars 2019 consid. 4.3.1). Pour qu'il y ait incompatibilité avec l'ordre public, il ne suffit pas que les preuves aient été mal appréciées, qu'une constatation de fait soit manifestement fausse ou encore

qu'une règle de droit ait été clairement violée (arrêts 4A_116/2016 du 13 décembre 2016 consid. 4.1; 4A_304/2013 du 3 mars 2014 consid. 5.1.1; 4A_458/2009 du 10 juin 2010 consid. 4.1).

6.1.2. Il y a violation de l'ordre public procédural lorsque des principes de procédure fondamentaux et généralement reconnus ont été violés, conduisant à une contradiction insupportable avec le sentiment de la justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un État de droit (**ATF 141 III 229** consid. 3.2.1; **140 III 278** consid. 3.1; **136 III 345** consid. 2.1). Selon une jurisprudence constante, l'ordre public procédural, au sens de l'art. 190 al. 2 let. e LDIP, n'est qu'une garantie subsidiaire ne pouvant être invoquée que si aucun des moyens prévus à l'art. 190 al. 2 let. a-d LDIP n'entre en ligne de compte (**ATF 138 III 270** consid. 2.3).

6.2.

6.2.1. Dans la première branche du moyen considéré, le recourant dénonce une violation de l'ordre public procédural. Il soutient qu'il n'a pas bénéficié du droit à un procès équitable au motif que la Formation se serait fondée exclusivement sur les témoignages anonymes de la victime supposée et du témoin 1, sans se référer à aucun autre moyen de preuve.

6.2.2. La recevabilité des critiques émises par le recourant pour étayer son grief apparaît des plus douteuses. L'intéressé méconnaît en effet la nature subsidiaire de la garantie de l'ordre public procédural, puisqu'il se borne essentiellement à formuler, sous un autre angle, des critiques similaires présentées antérieurement au soutien du moyen pris de la violation de l'art. 190 al. 2 let. d LDIP qui ont déjà été écartées.

Quoi qu'il en soit, le recourant assoit sa démonstration sur la prémisse erronée selon laquelle la Formation aurait fondé sa décision uniquement sur les déclarations de la victime supposée et du témoin 1, effectuées sous couvert d'anonymat, alors que tel n'est pas le cas comme on peut le constater à la lecture de la sentence attaquée (cf. en particulier, sentence, n. 171).

En tout état de cause, la Cour de céans considère que les explications fournies par le recourant ne permettent pas d'établir l'existence d'une quelconque violation de l'ordre public procédural.

6.3.

6.3.1. Dans la seconde branche du moyen examiné, l'intéressé soutient que la sentence querellée est contraire à l'ordre public matériel. Il fait valoir qu'il est "absolument arbitraire" de le condamner au motif qu'il aurait abusé de multiples femmes, alors qu'une seule victime potentielle a été entendue dans le cadre des procédures conduites par la Commission d'éthique et le TAS. À son avis, la sentence querellée est "arbitraire et ainsi contraire à l'ordre public".

6.3.2. Force est d'emblée de souligner que les quelques paragraphes que le recourant consacre à sa démonstration, à grand renfort d'affirmations péremptoires, ne constituent pas une motivation digne de ce nom visant à établir l'existence d'une prétendue incompatibilité avec l'ordre public matériel visé par l'art. 190 al. 2 let. e LDIP. De plus, en argumentant comme il le fait, l'intéressé perd manifestement de vue que la notion d'atteinte à l'ordre public est plus restrictive que celle d'arbitraire. Aussi ne suffit-il pas de taxer la sentence attaquée d'arbitraire, comme le fait le recourant, pour démontrer l'existence d'une contrariété à l'ordre public matériel. La

seconde branche du grief considéré est dès lors irrecevable.

7.
Au vu de ce qui précède, le recours doit être rejeté dans la mesure de sa recevabilité. Comme les conclusions du recours étaient vouées à l'échec, la requête d'assistance judiciaire présentée par le recourant ne peut qu'être rejetée (art. 64 al. 1 LTF). Celui-ci supportera dès lors les frais de la présente procédure (art. 66 al. 1 LTF). L'intimée n'a pas droit à des dépens puisqu'elle n'a pas été invitée à répondre au recours.

Décision

Le recours est rejeté dans la mesure où il est recevable.

Informations diverses
Miscellanous
Información miscelánea

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