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TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT

TRIBUNAL ARBITRAL DU SPORT/COURT OF ARBITRATION FOR SPORT/TRIBUNAL ARBITRAL DEL DEPORTE

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Editorial

Starting in 2025, the CAS Bulletin will transition to a quarterly publication schedule, ensuring more frequent coverage of important cases, i.e. cases containing interesting points of law. These may include new case law, reaffirmations of key legal principles, or high-profile awards.

Going forward, selected awards will be published in their original form, accompanied by a concise summary highlighting the key legal issues addressed. Additionally, extracts from Swiss Federal Tribunal (TF) judgments related to CAS will be featured regularly. Feature articles, however, will be published only once a year, exclusively in the June edition.

As most CAS cases are football-related, this new issue of the Bulletin includes a majority of selected football "leading cases", namely eight football cases out of 12 cases.

Thus, in the field of football, in the case 8233 RFEF v. FIFA, the CAS Panel addresses the supremacy of FIFA Regulations over national regulations in Spain concerning the international transfer of minors. The contractual dispute in 9851 Nikola Djurdjic v. Chengdu Rongcheng revolves around FIFA's jurisdiction, particularly in light of the principle of res judicata. In the training compensation dispute 9940 FK Shkupi v. FIFA & FC Aarau & FC Baden, the CAS Panel clarifies that the FIFA Determination Statement and the Allocation Statement are two distinct decisions. Importantly, the time limit to appeal these decisions only begins once both have been duly notified. A notable governance case, 9497 & 9523 Wiish Hagi Yabarow v. SFF & Ali Abdi Mohamed, is likely the first instance of CAS adjudicating a dispute involving parallel elections for the presidency of a national football association. In 9808 Futebol Clube do Porto v. Club Deportivo Popular Junior FC, the CAS Panel clarifies that a loan or transfer agreement may lawfully allow deductions from a sell-on fee, such as payments to intermediaries facilitating a player's transfer to a third club. The concept of forum shopping is addressed in 9477 Joan Carrillo Milan v. DVSC Futball Szervezo & FIFA. In 10102 Esteghlal FC v. Azizbek Amanov & Nasaf FC, the CAS Panel examines multiple legal issues related to contract termination by a player with just cause. Lastly, the case 9436 FK Apollonia v. KF Laçi revolves around the interpretation and enforcement of sell-on clauses in player transfers.

Outside football, significant arbitration cases have emerged in various sports: In 10209 Alex Schwazer v. World Athletics, the issue of substantial assistance in doping-related investigations within athletics is dealt with. The sailing case 10588 Anastasiya Valkevich v. World Sailing & IOC addresses the eligibility of an athlete to compete as a neutral participant at the Paris 2024 Olympics. In 10093 ROC v. IOC, the CAS Panel examines the suspension of a National Olympic Committee due to violations of the Olympic Charter. Finally, the case 9053 Abderahim Gharsallah v. ITIA focuses on the manipulation of betting markets by a chair umpire in tennis, highlighting integrity concerns in officiating.

A selection of extracts from recent judgments rendered by the Swiss Federal Tribunal (SFT) in connection with CAS decisions has been included in this Bulletin. Notably, the SFT dismissed all challenges against CAS awards brought before it in 2024. The SFT reaffirmed the broad autonomy of the CAS in establishing facts and applying legal principles. It confirmed the de novo review power under Article R57 of the CAS Code as well as the CAS's wide discretion in assessing evidence (4A_232/2024). Furthermore, the SFT held that the imposition of a doping sanction on a minor athlete does not constitute a violation of public policy, emphasizing that differentiating sanctions based on age could undermine the fight against doping (4A_564/2023 and 4A_136/2024). In

4A_16/2024, the SFT reaffirmed the importance of clear evidence in arbitration proceedings and reiterated the limited grounds on which an arbitral award may be challenged, particularly regarding alleged procedural violations or public policy concerns. Lastly, in 4A_406/2024, the SFT underscored that under Article 190a para. 1 let. a LDIP, a party cannot rely on facts or evidence that emerged after the contested award, reinforcing the principle of finality in arbitration.

The recent publication of the opinion of the Advocate General of the Court of Justice of the European Union in the Seraing/FIFA case, proposing that awards rendered by CAS must be open to full review by national courts to ensure compatibility with EU law, has not gone unnoticed. While it is too early to anticipate the direct consequences of a larger review process of CAS awards, it will be important to maintain an efficient sports-disputes resolution mechanism, not only at the CAS level but also during the subsequent appeal process, compatible with EU law, but also resistant to delaying tactics and obstructing strategies. It will be important to avoid any imbalance between European and non-European stakeholders, considering that the CAS jurisdiction is not limited to the European continent.

Most CAS users want to keep a speedy, cost-efficient, specialized and quality procedure. ICAS and CAS will undertake all appropriate measures they can to ensure that the review process of CAS awards remains not only effective but also uncomplicated.

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

Matthieu Reeb
CAS Director General

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.

TAS 2021/A/8233
Real Federación Española de Fútbol (RFEF) c. Fédération Internationale de Football Association (FIFA)
25 de marzo de 2024

Fútbol; Procedimiento disciplinario – Registro de jugadores menores de edad; Protección de menores de edad; Acuerdo entre FIFA y la UE; Artículo 19 RETJ y legislación catalana; Obligación de la RFEF de aplicar la normativa FIFA

Formación Arbitral
D. Ricardo de Buen Rodríguez (México), Árbitro Único

1. **La protección de los menores de edad es una preocupación expresada en la legislación catalana y la normativa FIFA, lo que implica que no hay contradicción entre ambas, y en cuanto al registro de los jugadores menores de edad, bien se puede dar a la luz de la legislación española y catalana cumpliendo al mismo tiempo con las reglas de la FIFA respecto de qué hacer previa y durante la transferencia internacional de un menor de edad.**

2. **Las regulaciones de la FIFA en relación con la transferencia de jugadores menores de edad tienen su origen en un acuerdo entre la FIFA y la Unión Europea, de la cual España es parte. Lo anterior implica que España y la RFEF están obligadas a aplicarlas y no hay prueba alguna de que exista, en la legislación española, alguna reserva respecto de dicha aplicación.**

3. **Una esencial parte de la protección de los jugadores menores de edad es la de la revisión del proceso de transferencia de los mismos de un país a otro. Ésta no sería posible si solo se aplicara la legislación española o la catalana, ya que la parte medular está contemplada en el art. 19 del Reglamento sobre el Estatuto y la Transferencia de Jugadores (RTEJ) de la FIFA. La protección de menores contemplada en la propia legislación catalana se complementa con la reglamentación de la FIFA para dar una más sólida protección a los menores, y debe la RFEF ser la responsable de que ello suceda.**

4. **La RFEF tiene la obligación de aplicar, en su territorio, toda la reglamentación FIFA, en especial, incluida la de la protección a los menores de edad. Igualmente, la RFEF debe incluir, en sus reglamentaciones, el contenido del artículo 19 RETJ. Asimismo, debe cerciorarse de que todos los jugadores que deseen ser parte del fútbol organizado en su territorio estén registrados en la propia RFEF y, consecuentemente, debe sancionar a clubes y/o jugadores porque alguno de estos juegue sin registro. La FIFA se reserva el derecho a sancionar a las asociaciones o clubes que no cumplan con las reglamentaciones relativas a la protección de menores.**

I. LAS PARTES

1. Real Federación Española de Fútbol (en lo sucesivo la "Apelante" o la "RFEF") es el órgano rector del fútbol en España.

2. Fédération Internationale de Football Association (en lo sucesivo la "Apelada"

o la "FIFA") es el órgano rector del fútbol a nivel mundial.

3. A la Apelante y a la Apelada en adelante se los denominará conjuntamente como las "Partes".

II. HECHOS

4. Los hechos que constituyen los antecedentes del presente procedimiento arbitral, tomando en cuenta todos los escritos, alegatos orales y pruebas ofrecidas por las Partes se resumen, sin dejar de analizar la totalidad de los mismos, como sigue.

5. El jugador O. (en lo sucesivo el "Jugador"), de nacionalidad azerbaiyana, nació […] de 2003.

6. La Federación Catalana de Fútbol (en lo sucesivo la "FCF"), la cual está afiliada a su vez a la RFEF, emitió diversas licencias territoriales en favor del Jugador el 6 de octubre de 2017, el 27 de septiembre de 2018 y el 4 de octubre de 2019, habiendo el Jugador concretado su inscripción, en esas fechas, con un club denominado Neurofútbol FC (en lo sucesivo el "Club"), mismo que es miembro de la FCF y, por lo tanto, de la RFEF.

7. El Jugador participó en diversas competiciones con el Club entre el 2017 y el 2020.

8. Entre enero y abril de 2020, la RFEF comunicó en varias ocasiones a la FIFA que el Jugador no había figurado en la base de datos de la RFEF.

9. El 27 de abril de 2020, la Federación Azerbaiyana de Fútbol (en lo sucesivo la "FAF"), comunicó a la FIFA que el Jugador había estado registrado en dicha asociación, como aficionado, del primero de agosto de 2012 al 30 de junio de 2016, comunicando también que, hasta esa fecha, no había recibido de la RFEF solicitud alguna para expedir a ésta el Certificado Internacional de Transferencias ("CTI") del Jugador.

10. El 8 de mayo de 2020, la Comisión Disciplinaria de la FIFA inició un procedimiento disciplinario en contra de la RFEF.

11. Después de cumplir con las etapas del citado procedimiento, la Comisión Disciplinaria emitió una decisión el 15 de junio de 2020 (en lo sucesivo la "Primera Decisión"), con los siguientes resolutivos:

"1. La Comisión Disciplinaria de la FIFA declara a la Real Federación Española de Fútbol responsable de la violación de los artículos del Reglamento relacionados con la transferencia internacional de un jugador menor y/o su registro sin la autorización previa de la subcomisión de la Comisión del Estatuto del Jugador (art. 19 apdo. 1 y 4 junto con el art. 1 apdo. 3 del Anexo 3) y sin el Certificado Internacional de Transferencia (art. 9 apdo. 1).
2. La Comisión Disciplinaria de la FIFA condena a la Real Federación Española de Fútbol a pagar una multa por la cantidad de 20,000 CHF.
3. En aplicación del art. 6 apdo. 1 lit. a) del Código Disciplinario de la FIFA, la Real Federación Española de Fútbol es advertida respecto a su conducta futura.
4. La multa previamente citada deberá abonarse en los treinta (30) días siguientes a la notificación de la presente decisión".

12. No conforme con la Primera Decisión, la RFEF presentó un recurso de apelación ante la Comisión de Apelación

de la FIFA, la cual adoptó, el 31 de agosto de 2020, una decisión (en lo sucesivo la "Decisión Apelada"), siendo que los fundamentos de la misma fueron notificados a la Apelante el 26 de julio de 2021. Los resolutivos de la Decisión Apelada son:

"1. La Comisión de Apelación de la FIFA encuentra a la Real Federación Española de Fútbol responsable de la violación de los artículos del Reglamento relacionados con la transferencia internacional de un jugador menor y/o su registro sin la autorización previa de la subcomisión de la Comisión del Estatuto del Jugador (art. 19 apdos 1 y 4 junto con el art. 1 apdo. 3 del Anexo 3) y sin el Certificado Internacional de Transferencia (art 9. apdo. 1).
2. Se desestima el recurso presentado por la Real Federación Española de Fútbol y se confirma la decisión adoptada por la Comisión Disciplinaria de la FIFA el 15 de junio de 2020, en su integridad.
3. Se imponen las costas del procedimiento en la cantidad de 1,000 CHF a la Real Federación Española de Fútbol. Esta cantidad está compensada con la tasa de 1,000 CHF abonada por la Real Federación Española de Fútbol.
4. La multa impuesta por la Comisión Disciplinaria deberá abonarse en los treinta (30) días siguientes a la notificación de la presente decisión".

III. PROCCEDIMIENTO ANTE EL TRIBUNAL ARBITRAL DEL DEPORTE

13. El 16 de agosto de 2021, la RFEF presentó, ante el Tribunal Arbitral del Deporte (en lo sucesivo el "TAS"), una apelación en contra de la Apelada con relación a la Decisión Apelada, con base en el Artículo R48 del Código de Arbitraje Deportivo (en lo sucesivo el "Código"). La Apelante solicitó que el presente procedimiento fuera sometido a un Árbitro Único.

14. El 20 de julio de 2021, la Secretaría del TAS tuvo por recibida la Declaración de Apelación y, entre otros puntos, requirió a la Apelada a que diera su posición respecto del número de árbitros que debían de resolver el caso.

15. El 24 de agosto de 2021, la Apelada envió una comunicación al TAS, en la cual, entre otros puntos, manifestó su conformidad con que el procedimiento fuese resuelto por un árbitro único.

16. El 9 de septiembre de 2021, la Apelante presentó su Memoria de Apelación, con los siguientes petitorios:

"La RFEF, por medio de la presente y sobre la base de los argumentos y pruebas documentales que se han puesto de manifiesto en este escrito, solicita respetuosamente al TAS que decida lo siguiente:
1. Que la apelación de la RFEF sea aceptada íntegramente
2. Que la decisión adoptada por la Comisión de Apelación de la FIFA el 31 de agosto de 2020 sea desestimada y anulada en su totalidad.
3. Que la RFEF no ha infringido los artículos del Reglamento sobre el Estatuto y la Transferencia de Jugadores de la FIFA (RETJ) relacionados con la transferencia internacional de un jugador menor y/o su registro sin la autorización previa de la subcomisión de la Comisión del Estatuto del Jugador (art. 19 apdo. 1 y 4 junto con el art. 1 apdo. 3 del Anexo 3) y sin el Certificado Internacional de Transferencia (art. 9 apdo. 1).
4. Que la sanción de 20.000 CHF impuesta a la RFEF sea cancelada.
5. Que el presente procedimiento sea gratuito y que, por tanto, los costes del procedimiento sean asumidos por el TAS, sin que las partes deban abonar cantidad alguna en concepto de costas o

de tasas".

17. El 11 de octubre de 2021, la Apelada presentó su Contestación a la Apelación, conteniendo las siguientes peticiones:

> *"Con base en lo anterior, la FIFA solicita respetuosamente al Árbitro Único que emita un laudo que en el fondo acuerde:*
> *(a) Rechazar las pretensiones de la RFEF;*
> *(b) confirmar la Decisión Apelada;*
> *(c) ordenar a la RFEF que corra con los costos de estos procedimientos de arbitraje; y, en su caso,*
> *(d) ordenar a la RFEF que contribuya a los gastos legales de la FIFA".*

18. El propio 11 de octubre de 2021, la Secretaría del TAS informó a las Partes que el Árbitro Único encargado de resolver el asunto, sería D. Ricardo de Buen Rodríguez.

19. El 18 de octubre de 2021, el TAS informó a las Partes que el Árbitro Único había decidido celebrar una audiencia.

20. El 18 de noviembre de 2021, la Secretaría del TAS notificó la Orden de Procedimiento, la cual fue posteriormente firmada por ambas Partes.

21. La audiencia del caso se llevó a cabo el 24 de enero del 2022, por videoconferencia. La misma fue presidida por D. Ricardo de Buen Rodríguez como Árbitro Único, acompañado de Dña. Lia Yokomizo, Consejera del TAS. A ella se presentaron por la Apelante, sus abogadas Dña. Cristina de Pablo, Dña. Leticia de Bergia y Dña. Verónica Guerra, además de su Secretario General D. Andreu Camps. Por la Apelada comparecieron D. Miguel Liétard Fernández-Palacios, Dña. Cristina Pérez González y D. Carlos Schneider Salvadores.

22. Al inicio de la audiencia se preguntó a las Partes si estaban conformes con la integración de la Formación Arbitral y con la forma en que se había conducido el procedimiento hasta ese momento, a lo que contestaron de manera positiva.

23. Todas las pruebas desahogadas en dicha audiencia, así como todas aquéllas ofrecidas por cada una de las Partes han sido analizadas detenidamente por el Árbitro Único, aun cuando no se haga referencia expresa a las mismas en el presente laudo.

24. Al final de la audiencia las Partes manifestaron su conformidad con la manera en que se había llevado a cabo el procedimiento y expresaron que su garantía de audiencia y derecho a ser oídos habían sido plenamente respetados.

IV. RESUMEN DE LOS ARGUMENTOS DE LAS PARTES

25. La descripción de los argumentos y posiciones de las Partes sobre las cuestiones objeto del presente laudo, que se realiza a continuación, tiene carácter resumido. No obstante lo anterior, el Árbitro Único ha estudiado, considerado y tenido en cuenta, en su integridad, todos los escritos presentados, aunque no se haga referencia específica a alguno de ellos en el presente laudo.

IV.1 La Apelante

26. La RFEF cumple y ha cumplido en todo momento con el régimen normativo al que está sometida y ha siempre velado

por el cumplimiento de la normativa FIFA en territorio español.

27. La situación jurídica de la RFEF es particular. El marco normativo que conforman la Constitución Española junto con las leyes nacionales y autonómicas, ha construido un sistema de distribución de competencias entre las federaciones deportivas españolas y autonómicas, cuya aplicación ha devenido en la presente sanción, contraria a derecho.

28. El derecho positivo que emana del Estado Español es de aplicación imperativa para la RFEF.

29. El TAS, previamente, en el caso CAS 2012/A/2750, ya ha determinado que en el supuesto de un conflicto de normas como el que nos ocupa, la RFEF no puede optar por la aplicación del derecho de la FIFA.

30. De acuerdo con el artículo 148 de la Constitución Española, las Comunidades Autónomas podrán asumir competencias exclusivas en la *"promoción del deporte y de la adecuada utilización del ocio"* entre otras materias, lo que significa que las 17 Comunidades Autónomas tiene competencia exclusiva en materia deportiva en su territorio.

31. La competencia de la RFEF se ciñe a las competencias de ámbito estatal, no estando facultada, ni siendo competente para dictar normas a todo el territorio nacional en cuanto a emisión de licencias, cuando estas licencias lo sean exclusivamente para competir en el nivel autonómico, por lo que la competencia para la regulación de la emisión de las licencias deportivas es exclusiva de la ley autonómica.

32. El Decreto 58/2010, de las entidades deportivas catalanas, establece que las federaciones deportivas catalanas ostentan la competencia exclusiva para *"expedir las licencias deportivas para poder participar en actividades o competiciones oficiales en el ámbito de Cataluña…"*.

33. La FCF tiene competencias exclusivas en materia de expedición de licencias para la participación en actividades o competiciones oficiales en el territorio de Cataluña, sobre las que la RFEF no puede ejercer funciones de control o supervisión. Su intervención en este ámbito sería inconstitucional.

34. La FCF no es un órgano de la RFEF, sino que es una asociación privada independiente de la RFEF.

35. La FCF está sometida igualmente, además de al ordenamiento jurídico estatal y autonómico ya mencionado, a la normativa de la RFEF por su integración en ésta, y a la de la FIFA por la integración de la RFEF en ella.

36. Remitiéndonos a la Decisión Apelada, el Jugador y el Club tramitaron la inscripción de la licencia del Jugador ante la FCF al tratarse de competiciones de ámbito territorial.

37. El Decreto 58/2010 contiene disposiciones que apelan a las federaciones deportivas para que velen por la integración social de los menores de edad extranjeros a través de las competiciones deportivas.

38. Es evidente que la normativa aplicable en Cataluña entra en conflicto directo con la regulación de la FIFA en materia de protección de menores de edad.

39. La FCF ha recibido por parte de varios organismos administrativos de la Comunidad Autónoma de Cataluña, resoluciones ordenando la inscripción de jugadores menores de edad extranjeros, con base en el Decreto 58/2010. Entre ellas están la Resolución del Secretario General del Deporte de la Generalitat de Cataluña de 27 de octubre de 2015 que establece, entre otras cosas, que *"en ningún caso, una entidad privada internacional, como es el caso de la FIFA, puede exigir unos requisitos que no respeten el ordenamiento jurídico vigente"* en insta a la FCF a que *"ajuste el procedimiento de expedición de licencias a la normativa vigente en Cataluña y, en consecuencia se respete el derecho a obtener licencia federativa de la Federación Catalana de Fútbol a todo el que acredite el cumplimiento de la normativa en materia de extranjería",* así como la Resolución O-02285/2014 del *Sindic de Greuges de Cataluña.*

40. De acuerdo con la legislación española, la emisión de licencias deportivas es una función pública delegada. La RFEF o las Federaciones Autonómicas, emiten sus licencias deportivas en ejercicio de funciones públicas delegadas del Gobierno y esto significa que cuando emiten una licencia deportiva para un futbolista, lo hacen por delegación del Gobierno.

41. El choque de ordenamientos jurídicos es manifiesto. La RFEF se encuentra en medio de esta colisión de ordenamientos y cualquier sanción que se le pueda imponer no cumple con la finalidad de que la infracción no pueda repetirse, ya que la RFEF no puede jurídicamente imponer algo en España que sea contrario al derecho positivo de dicho país.

42. El TAS debe pronunciarse sobre si la normativa de la FIFA prevalece sobre la normativa pública estatal o, por el contrario, si las normas de extranjería del gobierno español y gobiernos autonómicos prevalecen en todo caso sobre la normativa FIFA y, en ese caso, anular la decisión sancionadora de la FIFA.

43. A pesar de que la legislación española impone a las federaciones deportivas la prohibición de establecer cualquier tipo de requisito adicional a aquellos futbolistas extranjeros que se encuentren en situación legal en España, la RFEF impone a sus clubes afiliados y a las federaciones de ámbito autonómico el cumplimiento de los requisitos del artículo 19 Reglamento del Estatuto y Transferencia de Jugadores de la FIFA (en lo sucesivo el "RETJ"), siendo que en cuanto entró en vigor el régimen de protección de menores del artículo 19 del RETJ, la RFEF comenzó a instaurar su aplicación.

44. La RFEF ha emitido diversas circulares que tienen el fin de establecer la forma de inscribir y transferir a los jugadores extranjeros menores de edad, y ha impartido seminarios al respecto.

45. El contrasentido de la sanción impuesta por la FIFA a la RFEF es doble. No sólo se encuentra indefenso ante la normativa pública española que obliga a la emisión de dichas licencias, sino que encima es sancionado por una conducta que siquiera conoce, ni puede conocer, ya que la ley le da la competencia exclusiva a la federación de ámbito autonómico para emitir las licencias cuando la competición sea exclusivamente autonómica y no estatal.

46. La única conducta que se le achaca a la RFEF es la de no vigilar el cumplimiento por parte de sus afiliados de la normativa de la FIFA, y no la infracción a los artículos del RETJ. La RFEF no ha sido sancionada por violar el RETJ, sino por vulneración del artículo 14 de los Estatutos de la FIFA, sin embargo, el procedimiento iniciado contra la RFEF por parte de la FIFA no es por la presunta violación del artículo 14 de los Estatutos, sino por la presunta vulneración de diversos artículos del RETJ.

47. Una cosa es vulnerar el RETJ y otra muy distinta vulnerar el artículo 14 de los Estatutos de la FIFA. Esto le ha provocado un estado de indefensión a la RFEF, ya que durante todo el procedimiento se ha defendido de unos hechos que aparentemente se le imputaban, relacionados con la inscripción de un jugador menor de edad, mientras que finalmente la sanción se ha fundamentado en la vulneración de una disposición general de los Estatutos de la FIFA.

48. A través de la Decisión Apelada, se llevan a cabo unas atribuciones de responsabilidad objetiva de la RFEF, absolutamente proscrita en el derecho sancionador en el ámbito internacional.

49. La RFEF ha actuado en todo momento de forma tal que ningún reproche culpabilístico le puede ser atribuido. No solo por no haber tenido la voluntad de cometer ninguna infracción, sino que además no ha existido infracción alguna del deber de diligencia o cuidado.

50. Por su propia reglamentación, como por los principios que inspiran el derecho sancionador de Suiza, la FIFA está obligada a aplicar, en sus resoluciones sancionadoras, el principio de culpabilidad.

51. El principio de responsabilidad o culpabilidad no se cumple en el presente caso, toda vez que los presuntos responsables de la inscripción del Jugador han sido la FCF y el Club, únicos que podían cometer los hechos.

52. El artículo 14 de los Estatutos de la FIFA no puede ser utilizado como vehículo para la transmisión de la responsabilidad de sus miembros a las Asociaciones Nacionales.

53. La Decisión Apelada no fundamenta qué hechos realizados por a RFEF han vulnerado las obligaciones que establece el RETJ.

54. La RFEF siempre ha actuado de buena fe.

55. El espíritu de protección de menores contenido en el artículo 19 del RETJ no ha sido vulnerado. El Jugador no ha sufrido ningún tipo de abuso, maltrato, abandono o desarraigo social, cultural, económico y/o educativo.

IV.2 La Apelada

56. Desde que se detectó el problema de la vulnerabilidad de los menores de edad, la explotación, el abuso y el maltrato en un país extranjero, la FIFA ha tomado muy en serio la protección de los menores en el fútbol.

57. Según la disposición básica en relación a la protección de menores, que es actualmente el artículo 19 del RETJ, los traslados internacionales de menores de

edad están estrictamente prohibidos, como regla general.

58. La prohibición contenida en el artículo 19(1) del RETJ se basa en el hecho de que, si bien las transferencias internacionales pueden, en casos muy específicos, ser favorables para la carrera deportiva de un jugador joven, es muy probable que sean contrarias a sus mejores intereses, dada su minoría de edad y la deslocalización de su entorno personal y familiar.

59. El presente caso gira en torno a las continuas y flagrantes infracciones por parte de la RFEF de las distintas disposiciones que la FIFA ha promulgado a lo largo de los años para proteger a los futbolistas menores de edad de la inmorales prácticas de algunos clubes.

60. El Jugador ha estado varios años disputando partidos con el Club, sin que se hayan cumplido los principios y las medidas establecidas por la FIFA para proteger a los futbolistas menores de edad. La RFEF ha mantenido un enfoque pasivo y ha permitido con esa pasividad al Club y a la FCF poder eludir impunemente la normativa de la FIFA, cuando la RFEF es, o debería ser, precisamente, la entidad garante de la salvaguarda de la normativa FIFA aplicable al presente supuesto.

61. El presente caso no es novedoso. Ni en los hechos analizados, ni en los sujetos intervinientes, pues ya en varias veces la RFEF, bajo el paraguas del desconocimiento, viene permitiendo que sus afiliados vulneren de manera sistemática la normativa FIFA.

62. Como ejemplo de lo anterior, está el laudo recaído en el caso CAS 2014/A/3813 RFEF c. FIFA, que es un antecedente trascendental para la resolución del presente procedimiento, por haber analizado los mismos hechos cometidos por la propia RFEF, quien además aportó idénticas justificaciones al Panel.

63. La RFEF ha vulnerado el artículo 19 del RETJ. El Jugador fue inscrito por la FCF cuando tenía 14 años de edad, siendo que dicha solicitud y registro se llevaron a cabo sin mediar solicitud previa basada en las excepciones contenidas en el propio artículo 19(2) del RETJ.

64. La prohibición general de transferencias internacionales de jugadores menores de 18 años contenida en el artículo 19(1) del RETJ implica obligaciones específicas para clubes y asociaciones, siendo que respecto de éstas últimas, dichas asociaciones deben asegurarse, de manera preventiva y activa, de que sus propios miembros se abstengan de involucrar en la transferencia internacional de un jugador menor de 18 años.

65. El control respectivo se eludió, entre otras cuestiones, porque la RFEF no cuenta con un sistema capaz de detectar este tipo de situaciones.

66. La RFEF no niega la comisión de infracciones.

67. Sobre el desconocimiento alegado por la RFEF, llama la atención que la FIFA, con sede en Zúrich, y sin ningún vínculo administrativo ni jurídico con la FCF ha llegado a tener conocimiento de la participación del Jugador en la competiciones de la propia FCF,

mientras que la RFEF, entidad rectora del fútbol en España, y que cuenta entre sus afiliados con la FCF, y a través de ella con el Club, no llegara nunca, durante tres temporadas deportivas, a tener conocimiento de lo que estaba aconteciendo en su territorio.

68. Como cualquier otra asociación miembro de la FIFA, la Apelante se ha comprometido a respetar los estatutos y reglamentos de la FIFA, incluyendo el RETJ.

69. Las federaciones miembro, como la RFEF, tienen la responsabilidad legal de adoptar medidas afirmativas para hacer que sus miembros respeten y cumplan con las regulaciones de la FIFA.

70. Durante los procedimientos, no se ha acreditado que la RFEF haya llevado a cabo una actuación proactiva para evitar los incumplimientos. La RFEF no ha acreditado ni haber incorporado en su normativa algún tipo sancionador específicamente dirigido a las federaciones regionales o clubes para el caso de inobservancia de las obligaciones en materia de inscripción de menores ni ha acreditado haber iniciado procedimiento disciplinario en contra de la FCF o del Club por los multicitados incumplimientos. Tampoco la RFEF ha aportado comunicación alguna dirigida a sus miembros con el fin de compelerles su comportamiento irregular.

71. Como consecuencia de lo anterior, los miembros afiliados de la RFEF, con conocimiento de ésta o no, actuando en fraude de los artículos 9 y 19 del RETJ y anexos 2 y 3, en ningún momento han tenido que afrontar sanción disciplinaria alguna, lo cual denota una actitud tolerante y permisiva de la RFEF, que es a su vez cómplice de tales operaciones y por ello responsable frente a la FIFA, de los incumplimientos, al haber cooperado, por omisión, en que el Jugador haya podido participar de manera indebida en el fútbol organizado bajo su responsabilidad, durante 3 temporadas deportivas.

72. Las asociaciones miembros de la FIFA, incluida la RFEF, tienen sus propias responsabilidades y obligaciones respecto al sistema de protección de menores de la FIFA.

73. Seguir la posición de la Apelante, trasladando las obligaciones que son propias de las asociaciones nacionales a miembros a sus federaciones regionales, implicaría una quiebra de todo el sistema. La FIFA no reconoce asociaciones regionales, como la FCF. Es la RFEF, como ente rector del fútbol en España, quien resulta responsable frente a la FIFA. Es el único ente al que la FIFA le puede exigir, y exige, responsabilidades.

74. El propio desconocimiento por parte de la Apelante, de los hechos alegados, es ya en sí un motivo para tener por acreditada la infracción. La RFEF tiene la obligación de estar al corriente de las transferencias internacionales de futbolistas menores de edad que llegan al territorio español.

75. Con respecto a la incompatibilidad entre las normas de la FIFA y la normativa pública española, como explicación al hecho de no haber actuado al respecto de la transferencia y posterior registro del Jugador, es un mero pretexto, ya que la RFEF ni siquiera informó a la FIFA de que tales hechos se venían produciendo y no hizo nada para evitar

que este tipo de transferencias indebidas hayan tenido lugar.

76. Bastaría con implementar un sistema de alertas, con bases de datos compartidas entre la RFEF y sus afiliados, para que ésta tuviera acceso a la totalidad de las inscripciones operadas en el seno de sus afiliados, y en caso de que la RFEF encontrara algún tipo de impedimento, tendría que ponerlo en conocimiento de la FIFA.

77. Respecto de lo establecido en el artículo 19(4) del RETJ, la RFEF no solo no ha cumplido si no que ha demostrado una "apatía incumplidora". Está acreditado que la RFEF no solicitó la aprobación de la transferencia/inscripción/registro del Jugador, ni se aseguró de que las circunstancias de éste se ajustaran a alguna de las excepciones establecidas en el artículo 19(2) del RETJ.

78. El artículo 19(4) identifica de manera clara e indubitable que la entidad responsable de iniciar el procedimiento de aprobación es la asociación correspondiente, es decir, en este caso la RFEF y es evidente que esa disposición será vulnerada en caso de que la asociación miembro permita, por acción, o por omisión, la participación de jugadores en el "fútbol organizado", sin cumplir estrictamente con el artículo 19(4) del RETJ, como ha sucedido en el presente caso.

79. La FIFA niega la existencia de conflicto entre su reglamento y la ley española. Los mismos pueden ser compatibles siempre y cuando que la Apelante muestre su voluntad de que así sea.

80. El artículo 19 del RETJ es vinculante a nivel nacional y debe de ser incluido en el reglamento de la asociación sin ninguna modificación, independientemente de las disposiciones de las leyes nacionales de un país.

81. La FIFA no ha podido constatar, durante el procedimiento, ninguna evidencia de norma alguna que expresamente prohíba a la RFEF obtener información de los futbolistas menores que son inscritos en las federaciones autonómicas.

82. El procedimiento contenido en el Anexo 2 del RETJ transmite obligaciones directas a las asociaciones, en particular la obligación de actuar con el principio de buena fe, la obligación de decir la verdad y la obligación de colaborar en el esclarecimiento de los hechos.

83. La RFEF infringió el artículo 9 del RETJ, al no haber constatado que el Jugador contaba con el CTI, antes de que la FCF procediera a su registro, y con ello, su registro en la RFEF.

V. CONSIDERATIONES JURIDICAS

V.1 Competencia del TAS

84. competencia del TAS no ha sido discutida por ninguna de las Partes y resulta de la aplicación de los artículos 57 y 58 de los Estatutos de FIFA (en lo sucesivo los "Estatutos"). Adicionalmente, las Partes reconocieron expresamente la competencia del TAS al firmar la Orden de Procedimiento. Por lo tanto, el TAS es competente para conocer del presente asunto.

V.2. Admisibilidad

85. El Artículo R49 del Código dice *"En ausencia de plazo fijado en los estatutos o reglamentos de la federación, asociación o entidad deportiva en cuestión o en un acuerdo previo, el plazo para presentar la apelación será de veintiún días a partir de la recepción de la decisión que es objeto de apelación. El/La Presidente/a de la Cámara no iniciará ningún procedimiento si la declaración de apelación se presenta manifiestamente fuera de plazo, y así lo notificará a la persona que haya presentado la declaración. Al inicio de un procedimiento, una parte podrá solicitar al/a la Presidente/a de la Cámara o al/a la Presidente/a de la Formación, en el caso de que ya se haya constituido, que le ponga fin si la declaración de apelación se ha presentado fuera de plazo. El/La Presidente/a de la Cámara o el/la Presidente de la Formación adoptará su decisión después de haber invitado a las otras partes a presentar su posición al respecto".*

86. El Artículo 58 de los Estatutos establece el plazo general de 21 días para presentar una apelación ante el TAS.

87. La Decisión Apelada (sus fundamentos) fue notificada al Apelante el 26 de julio de 2021 y la apelación fue formulada ante el TAS el 16 de agosto de 2021, por lo cual fue presentada en tiempo.

88. Asimismo, la Apelante cumplió todos los requisitos de admisibilidad previstos en los Artículos R48 y siguientes del Código.

89. Con base en todo lo anterior y a que no hay objeción del Apelado respecto de la admisibilidad de la apelación, el Árbitro Único considera que la apelación es admisible.

V.3. Ley Aplicable

90. El Artículo R58 del Código dice *"La Formación resolverá la controversia de acuerdo con las regulaciones aplicables y, subsidiariamente, con las normas jurídicas elegidas por las partes o, en ausencia de dicha elección, de acuerdo con la ley del país en el que la federación, asociación o entidad deportiva que haya emitido la decisión recurrida esté domiciliada o de acuerdo con las normas jurídicas que la Formación considere apropiadas. En este último caso, la Formación deberá motivar su decisión".*

91. De acuerdo con el Artículo R58 del Código, el Árbitro Único considera que el presente litigio debe ser resuelto siguiendo la normativa y reglamentos de la FIFA, en especial los Estatutos, el RETJ, vigentes al momento de que ocurrieron los hechos materia del presente arbitraje, así como el Código Disciplinario de la FIFA (CDF) y, subsidiariamente, el Derecho Suizo.

92. Es claro que el RETJ aplica al caso que nos ocupa, al estar involucrados hechos relativos a la transferencia y registro de jugadores menores de edad en el ámbito del fútbol internacional, supuesto que está contemplado en varios preceptos contenidos en el citado Reglamento. Tomando en cuenta que los hechos materia del presente caso, sucedieron entre 2017 y 2019, el Árbitro Único hace notar, al igual que se hace en la Decisión Apelada, que en dicho periodo estuvieron vigentes diferentes versiones del RETJ, sin existir entre dichas versiones cambios sustanciales relativos a la transferencia internacional y al registro de menores, por lo cual no será necesario especificar la edición aplicable en cada uno de los hechos, haciendo referencia genérica, a la largo del presente laudo, a las versiones vigentes del RETJ en el periodo antes referido.

93. En cuanto a la aplicación del CDF, éste es aplicable, al tratarse, el fondo del asunto, de sanciones disciplinarias en el ámbito del fútbol internacional. Por lo que toca a la aplicación del Derecho Suizo, de manera subsidiaria, ello deriva de que la federación que ha emitido la Decisión Apelada, es decir la FIFA, tiene su sede justamente en Suiza. Sobre la aplicación concreta de los preceptos reglamentarios, se ahondará *infra* en el presente laudo.

V.4. Discusión legal

94. Una vez analizados por el Árbitro Único, a conciencia, los argumentos de las Partes, a continuación se avoca a su análisis jurídico, a fin de llegar a una determinación en el proceso que nos ocupa.

A) Fijación de la litis

95. Con base en los argumentos y las pruebas que han presentado las Partes, la controversia a resolver se resume en darle respuesta a las siguientes preguntas:

- ¿Hay conflicto normativo entre las Reglamentaciones de la FIFA y el Derecho Español en el tema de la transferencia y registro de menores de edad? ¿En caso afirmativo, dicho posible conflicto normativo le impide a la RFEF aplicar la reglamentación de la FIFA relativa a la transferencia y registro de jugadores menores de edad?

- ¿Ha violado la RFEF las reglamentaciones de la FIFA respecto de la protección de menores?

- ¿Es correcta la aplicación de la sanción de parte de FIFA a la RFEF?

96. Dichas preguntas se contestan a continuación.

B) ¿Hay conflicto normativo entre las Reglamentaciones de la FIFA y el Derecho Español en el tema de la transferencia y el registro de menores de edad? ¿En caso afirmativo, dicho posible conflicto normativo le impide a la RFEF aplicar la reglamentación de la FIFA relativa a la transferencia y registro de jugadores menores de edad?

97. En resumen, la RFEF alega que las leyes españolas, para el tema específico de la protección de los menores de edad, entran en conflicto con las reglamentaciones de la FIFA en ese rubro en particular, lo cual le impide a la Apelante cumplir con éstas últimas. Hace énfasis, en que debido al sistema de distribución de competencias establecido en las leyes españolas, y con relación al caso concreto, dichas leyes no le dan competencia a la RFEF para la expedición de licencias. Por el contrario, la legislación catalana, en este caso, establece la competencia exclusiva de la FCF para ello.

98. Una de las leyes en particular en que se escuda la RFEF es el Decreto 58/2010, de las entidades deportivas catalanas, el cual establece que las federaciones deportivas catalanas ostentan la competencia exclusiva para *"expedir las licencias deportivas para poder participar en actividades o competiciones oficiales en el ámbito de Cataluña…"* y además que *"…las federaciones deportivas tienen que velar por la especial protección de los extranjeros menores de*

edad mediante las normas y haciendo posible en todo momento su integración social a través de las competiciones deportivas".

99. Manifiesta también la RFEF que varios organismos administrativos de la Comunidad Autónoma de Cataluña han emitido resoluciones ordenando la inscripción de jugadores menores de edad extranjeros.

100. La Apelante también cita una jurisprudencia del TAS, en el caso CAS 2012/A/2750, con la que intenta soportar su argumento de que en caso de un supuesto conflicto de leyes como el que alega la RFEF, debe prevalecer la legislación nacional.

101. Por su parte, la FIFA ha manifestado que no hay conflicto entre sus reglamentos y las leyes españolas. Que lo único requerido para que ambas sean compatibles es la voluntad de que así sea por parte de la RFEF. Que, además, la RFEF está obligada a aplicar, en su territorio, el artículo 19 del RETJ.

102. Analizando la forma en la que se ha constituido esta punto de litigio, el Árbitro Único considera que la carga de la prueba respecto del supuesto conflicto entre las leyes españolas y las reglamentaciones de la FIFA mencionadas, y que ello impida a la RFEF aplicar éstas últimas, recae en la citada Apelante, al alegar un derecho con base en los mencionados hechos.

103. Respecto de las leyes, jurisprudencias y pruebas presentadas por la RFEF que buscan respaldar este punto en particular, destacan los ya mencionados Decreto 58/2010, la Resolución del Secretario General del Deporte de la Generalitat de Cataluña de 27 de octubre de 2015, así como la Resolución O-02285/2014 del *Sindic de Greuges de Cataluña*. También, el precedente CAS 2012/A/2750.

104. Del análisis del Decreto 59/2010, el Árbitro Único, no encuentra un conflicto del mismo con la reglamentación FIFA en temas de transferencias y registro de menores de edad, para efectos de las obligaciones de la RFEF. Parte de dicho Decreto, ya reproducido *supra*, sin duda busca la protección de los menores de edad y le da competencia a la FCF para expedir licencias deportivas, sin embargo, ello no impide a la RFEF cumplir con las obligaciones que al respecto tiene frente a la FIFA.

105. La protección de los menores de edad es una preocupación expresada en ambos cuerpos normativos, la legislación catalana y la normativa FIFA, lo que implica que no hay contradicción, y en cuanto al registro de los jugadores menores de edad, bien se puede dar a la luz de la legislación española y catalana cumpliendo al mismo tiempo con las reglas de la FIFA respecto de qué hacer previa y durante la transferencia internacional de un menor de edad.

106. En otras palabras, los requisitos establecidos en las reglas de la FIFA para las transferencias internacionales de menores de edad no impiden, después de cumplidos por la RFEF y sus afiliados, adicionalmente, en un caso como este, el registro por parte de la FCF de un menor de edad transferido internacionalmente. Tampoco se impide que, durante todo el camino para ello, exista una protección de dicho menor, que es lo más importante.

107. La propia RFEF ha reconocido, en su Memoria de Apelación, que desde su entrada en vigor, ha aplicado el artículo 19 y demás relacionados del RETJ. Eso implica, desde luego, su reconocimiento de que está facultada y obligada a aplicarlo en todo el territorio español. Además, ya lo ha hecho, lo que de alguna manera es un reconocimiento de que ello es posible frente al propio derecho español. Si en realidad el derecho español no le permitiera aplicar dicha reglamentación, entonces ni siquiera podría haberlo aplicado de inicio, como ella misma lo reconoce.

108. Las propias circulares 11 y 27 de la RFEF presentadas como prueba por dicha Apelante, expresan la obligación que la propia RFEF explica y reconoce, de que todos los afiliados deben de seguir el procedimiento contemplado en el artículo 19 del RETJ.

109. Además, por lo que respecta a la legislación española en general, frente a las regulaciones de la FIFA respecto de la transferencia internacional y registro de jugadores menores de edad, es importante resaltar que las mencionadas regulaciones de la FIFA tienen su origen en un acuerdo entre la FIFA y la Unión Europea, de la cual España es parte. Lo anterior implica que España y la RFEF están obligadas a aplicarlas, y que en el caso que nos ocupa, al igual que se menciona en el caso del laudo CAS 2014/A/3813, no hay prueba alguna de que exista, en la legislación española, alguna reserva respecto de dicha aplicación.

110. En adición a lo anterior, algo que le parece importante destacar el Árbitro Único, es que una esencial parte de la protección a los jugadores menores de edad es la de la revisión del proceso de transferencia de los mismos de un país a otro. Ésta no sería posible si solo se aplicara la legislación española o la catalana, ya que la parte medular está contemplada en el art. 19 del RETJ. En otras palabras, la protección a los menores de edad, contemplada en la propia legislación catalana, ya mencionada, se complementa con la reglamentación FIFA, para dar una más sólida protección a los menores, y debe la RFEF ser la responsable de que ello suceda.

111. Por lo que toca a las resoluciones mencionadas por la Apelante, desde el punto de vista del Árbitro Único, tanto la Resolución del Secretario General del Deporte de la Generalitat de Cataluña de 27 de octubre de 2015, como la Resolución O-02285/2014 del *Sindic de Greuges de Cataluña,* son más que resoluciones, la emisión de opiniones, que no vinculan a la RFEF.

112. No existe además, evidencia alguna de que, si la RFEF consideraba que la ley o algunas resoluciones en concreto, como las que se han citado, no le permitían cumplir con sus obligaciones frente a la FIFA, la Apelante lo haya notificado a ésta de manera oportuna, en el momento en que los respectivos hechos hayan acontecido, para con ello dejar constancia y acreditar que está pendiente del cumplimiento de sus obligaciones federativas.

113. En cuanto a la cita que hace la Apelante respecto del laudo del caso CAS 2012/A/2750, después de analizado el mismo, el Árbitro Único encuentra, al igual que lo manifestó la Formación Arbitral en el laudo del caso CAS

2014/A/3813, que el criterio expresado en el primer caso de los mencionados, no aplica al caso que nos ocupa, al responder a supuestos de hecho diferentes.

114. Por todo lo anterior, el Árbitro Único concluye que, en el caso concreto, no se ha probado que exista incompatibilidad o contradicción entre las leyes españolas y la legislación de la FIFA, exclusivamente respecto de la protección de los menores de edad, que impida a la RFEF aplicar ésta última en el territorio español.

C) ¿Ha violado la RFEF las reglamentaciones de la FIFA respecto de la protección de menores?

115. Este apartado del laudo, se dividirá en dos partes. En la primera (A), se hará un análisis de la reglamentación que se imputa como violada. En segundo término (B), se hará un análisis de si la conducta desplegada por la RFEF relativa al caso que nos ocupa, ha violado o no dichos preceptos.

A. Análisis de la reglamentación que se imputa como violada

116. Primeramente, y dado que lo que está en juego en el presente procedimiento arbitral es la posible omisión por parte de la RFEF respecto de sus obligaciones como asociación nacional en cuanto a la protección de menores, vale la pena, para un mejor entendimiento, repasar algunas disposiciones reglamentarias que estén, en el rubro mencionado, dirigidas a las asociaciones nacionales y a su rol en la protección de menores. Dichos antecedentes han sido también reproducidos en el laudo del caso CAS 2014/A/3813.

117. La circular 769 de la FIFA, del 24 de agosto de 2011, informa, de manera general, que la FIFA y la Comisión Europea llegaron a un acuerdo para la modificación de la reglamentación de la FIFA con relación a la transferencia de jugadores. En el punto 1 de dicha circular, que se refiere a la protección de menores, se establece, entre otras cosas, que las asociaciones nacionales o por default la FIFA, pueden imponer medidas disciplinarias a los clubes que deseen registrar menores que hayan sido impropiamente transferidos y también a los agentes involucrados en ese tipo de transferencias. También se establece que la FIFA, en colaboración con la UEFA, establecerán un Código de Conducta que deberá de ser seguido por las asociaciones nacionales, ligas y clubes.

118. En la misma circular 769, se establece que cuando un club no cumpla con el Código referido, su asociación nacional deberá no registrar al jugador y podrá imponer sanciones disciplinarias al citado club. En otra parte de la propia circular 769, la FIFA establece que las asociaciones nacionales pueden llevar a cabo investigaciones en los clubes para verificar el cumplimiento del Código de Conducta.

119. Más adelante, en la circular 1190 de la FIFA, del 13 de octubre de 2009, entre otros puntos, se expresó que el Anexo 2 del RETJ buscaba mejorar el procedimiento para monitorear y controlar el cumplimiento de las reglas relativas a la protección de menores.

120. También, el Árbitro Único ha analizado el contenido del artículo 14 de los

Estatutos, que establece las obligaciones de las federaciones miembro, como lo es la Apelante, y que en el apartado 1 d) textualmente establece:

"velar por que sus propios miembros respeten los Estatutos, reglamentos, disposiciones y decisiones de los órganos de la FIFA".

121. Ya repasadas, anteriormente, las disposiciones generales, ahora entrando al caso concreto que nos ocupa, es indispensable reproducir la reglamentación de la FIFA aplicable al tema de la protección de menores, que ha sido utilizada como base para determinar la sanción a la RFEF y que es materia de la presente apelación.

122. Comencemos con el artículo 9, apartado 1 del RETJ, el cual a la letra dice:

"Los jugadores inscritos en una asociación únicamente podrán inscribirse en una nueva asociación únicamente cuando esta última haya recibido el certificado de transferencia internacional (en adelante, 'el CTI') de la asociación anterior. El CTI se expedirá gratuitamente, sin condiciones ni plazos. Cualquier disposición en contra se considerará nula y sin efecto. La asociación que expide el CTI remitirá una copia a la FIFA. Los procedimientos administrativos para la expedición del CTI se encuentran definidos en el anexo 3, art. 8, y en el anexo 3a del presente reglamento".

123. Sigamos con el artículo 19 del RETJ, permitiéndonos reproducir solamente los apartados relevantes para el caso que nos ocupa. El apartado 1 del artículo 19 del RETJ establece que:

"Las transferencias internacionales de jugadores están permitidas solo cuando el jugador alcanza la edad de 18 años".

124. El apartado 2 del artículo 19 del RETJ, establece las excepciones a la regla mencionada en el párrafo inmediato anterior.

125. Por lo que toca al apartado 3 del citado artículo 19 del RETJ, el mismo establece que el propio artículo aplica también a los jugadores que no hayan sido registrados previamente por un club y no son nacionales del país en que serán registrados por primera vez.

126. El contenido del apartado 4 del artículo 19 del RETJ, es lo siguiente:

"4. Se aplicarán los siguientes principios generales procedimentales:
a) Toda transferencia internacional, conforme al apartado 2, toda primera inscripción conforme al apartado 3, así como las primeras inscripciones de jugadores extranjeros menores que hayan vivido de manera ininterrumpida los últimos cinco años como mínimo en el país donde desean inscribirse, están sujetas a la aprobación de la subcomisión designada por la Comisión del Estatuto del Jugador a tal efecto si el jugador menor en cuestión ha cumplido diez años.. La solicitud de aprobación deberá presentarla la asociación que desea inscribir al jugado a instancias del club afiliado. Se concederá a la asociación anterior la oportunidad de presentar su postura. Toda asociación que solicite la expedición del CTI y/o realizar la primera inscripción deberá solicitar primero esta aprobación.
b) Si el jugador menor en cuestión no ha cumplido diez años, la asociación que desee inscribir al jugador-a instancias de su club afiliado-será responsable de comprobar y asegurarse de que, sin lugar a dudas, las circunstancias del jugador se ciñan estrictamente al tenor de las excepciones estipuladas en el apartado 2 del presente artículo o a la regla de cinco años (v. apartados 3 y 4 a)). Tales

comprobaciones deberán hacerse antes de la inscripción.
c) En circunstancias especiales, las asociaciones miembro podrán presentar por escrito a la subcomisión una solicitud a través del sistema de correlación de transferencias (TMS) que conceda una exención limitada para menores ('ELM'). En caso de que se conceda, la ELM eximirá a la asociación miembro, conforme a términos y condiciones específicos y solo para jugadores menores aficionados que vayan a ser inscritos en clubes exclusivamente aficionados, de la obligación de presentar una solicitud formal de aprobación a través del TMS ante la subcomisión, conforme al apartado 4 a) precedente y al anexo 2 del presente reglamento. En ese caso, antes de solicitar el CTI y/o la primera inscripción, la asociación en cuestión deberá comprobar y asegurarse de que, sin lugar a dudas, que las circunstancias del jugador se correspondan con alguna de las excepciones de aplicación estipuladas en el apartado 2 del presente artículo o en la regla de cinco años. (v. apartados 3 y 4 a)).
d) De conformidad con el Código Disciplinario de la FIFA, la Comisión Disciplinaria de la FIFA impondrá sanciones en cualquier caso de violación de esta disposición. Igualmente, podrán imponerse sanciones, si procede, a la asociación que expidió el CTI sin la aprobación previa de la subcomisión y a los clubes involucrados en la transferencia de un menor de edad".

127. En cuanto al apartado 5 del artículo 19 del RETJ, en el mismo se hace referencia a que el procedimiento para llevar a cabo la solicitud a la subcomisión respectiva, de la transferencia internacional de los menores de edad, se describe en el Anexo 2 del RETJ.

128. En ese mismo orden de ideas, en el artículo 1 del Anexo 2 del RETJ, se refiere que las transferencias de jugadores menores de edad, llevada a cabo con base en el apartado 2 del artículo 19 del RETJ, se debe tramitar por vía del TMS.

129. Asimismo, en el apartado 1 del Anexo 3 del RETJ, se prescribe que:

"El TMS ayuda a salvaguardar la protección de los menores edad. Si un jugador menor de edad se inscribe por primera vez en un país del cual no es ciudadano o está implicado en una transferencia internacional, una subcomisión nombrada por la Comisión del Estatuto del Jugador a tal efecto deberá dar su aprobación (v. art. 19, apdo. 4). La solicitud de aprobación de la asociación que desea inscribir al menor sobre la base del art. 19, apdos. 2 y 3 y el consiguiente proceso de toma de decisiones se llevarán a cabo sobre la base del art. 19, apdos. 2 y 3 y el consiguiente proceso de toma de decisiones se llevarán a cabo a través del TMS (v. anexo 2)".

130. Por lo que toca a la obligación de la RFEF de aplicar toda la reglamentación antes referida, no existe mayor discusión, ya que la propia RFEF en su Memoria de Apelación, ha reconocido estar obligada a su aplicación en territorio español.

B. Análisis de los hechos y de la conducta que se le imputa a la RFEF como violatorios de la reglamentación de la FIFA

131. Habiendo hecho referencia a la reglamentación que la Apelada establece como violada por la Apelante, y que es la base de la sanción que hoy nos ocupa, el Árbitro Único procede a revisar si, con la conducta de la RFEF acreditada en el expediente, se incumplen, por ésta, todos o alguno de los supuestos de la citada reglamentación.

132. Previo a hacer el análisis artículo por artículo, para mayor claridad, el Árbitro Único considera indispensable enumerar las siguientes conclusiones previas,

llevadas a cabo con base en las disposiciones generales mencionadas *supra* en el presente laudo:

1. La RFEF tiene la obligación de aplicar, en su territorio, toda la reglamentación FIFA, en especial, por lo que toca a este caso, la de la protección a los menores de edad.

2. También, como se menciona en el laudo del caso CAS 2014/A/3813, con cuyo contenido general y particular coincide el Árbitro Único, la RFEF debe incluir, en sus reglamentaciones, el contenido del artículo 19 del RETJ. Asimismo, debe cerciorarse de que todos los jugadores que deseen ser parte del fútbol organizado en su territorio estén registrados en la propia Federación y, consecuentemente, debe sancionar a clubes y/o jugadores porque alguno de estos juegue sin registro.

3. Por otro lado, el Árbitro Único también coincide con lo concluido por la Formación Arbitral del caso CAS 2014/A/3813, en el sentido de que la FIFA se ha reservado el derecho de sancionar a las asociaciones o clubes que no cumplan con las reglamentaciones relativas a la protección de menores.

4. Está claro, por todo lo expuesto, que las asociaciones nacionales, en este caso la RFEF, son los responsables principales, en su respectivo territorio, de aplicar y vigilar el cumplimiento de las reglamentaciones de la FIFA en el tema de la protección de los menores de edad, teniendo además facultades de sancionar a quienes no las cumplan.

5. La FIFA tiene también la facultad de velar por el cumplimiento de los citados preceptos y, en su caso, entablar medidas disciplinarias por su incumplimiento.

6. En cuanto a los hechos relativos al caso que hoy nos ocupa, que se deben analizar a la luz de las normas, no hay controversia respecto de que el Jugador, teniendo 14 años de edad, fue inscrito por la FCF, el 6 de octubre de 2017, la cual además otorgó respecto del Jugador, licencias territoriales el 27 de septiembre de 2018 y el 4 de octubre de 2019, fechas en las cuales se llevó a cabo la inscripción del Jugador en el Club, jugando en diversos partidos.

7. También ha quedado reconocido por las Partes que el Jugador ya había estado registrado por la FAF, como aficionado, desde el 1 de agosto de 2016, habiendo quedado acreditado, por el informe de la FAF, que ésta nunca recibió, por parte de la RFEF, solicitud de transferencia del CTI del Jugador.

133. Pasemos ahora al análisis del posible incumplimiento de la RFEF de cada uno de los artículos cuya violación se le ha imputado por la FIFA.

i) Artículo 19 apartado 1 del RETJ

134. Como ya se ha mencionado antes, este apartado prohíbe la transferencia internacional de menores de 18 años.

135. Contrariando lo establecido en el mencionado apartado, el Jugador fue transferido de un club de un primer país a otro club en España y registrado por la FCF teniendo 14 años. Con ese hecho, el apartado 1 del Artículo 19 ha sido claramente violado. Máxime cuando no existió ninguna solicitud previa que tuviera fundamento en el apartado 2 del citado artículo.

136. Si bien el registro lo hizo la FCF respecto de un equipo de Cataluña, el Árbitro Único, de acuerdo con todos los preceptos generales antes aludidos, concluye, coincidiendo con el punto de vista de la Apelada, con que hay una falta de cumplimiento de la norma, por parte de la RFEF.

137. Tal y como se ha mencionado previamente, el artículo 14, apartado 1 d), establece como obligación de la RFEF en ese caso *"velar por que sus propios miembros respeten los Estatutos, reglamentos, disposiciones y decisiones de los órganos de la FIFA"*.

138. El anterior precepto, según lo que concluye el Árbitro Único, implica, a la luz del artículo 19 del RETJ no solo en el apartado 1, sino en todos sus apartados, que existe una obligación de la propia RFEF de aplicar directamente lo establecido en dicho artículo en su territorio y que el hecho de que se haya contravenido, con los hechos materia del presente arbitraje, al no prevenir, ni evitar, ni sancionar la transferencia irregular, fuera del marco reglamentario, de un jugador menor de edad, es una responsabilidad directa incumplida por parte de la RFEF.

139. Si bien es cierto que lo establecido en el artículo 19 está dirigido por un lado a los clubes, está claro, basados en una interpretación integral de ese artículo, que también está dirigido a las asociaciones nacionales, como lo es la RFEF, siendo que ésta lo ha incumplido a través de falta de acción. Como lo menciona la Apelada en su Contestación, entre otras cuestiones, la RFEF no ha llevado a cabo labores preventivas a través de algún sistema que le permita detectar en tiempo este tipo de prácticas, ni tampoco, en el caso concreto, ha abierto procedimientos disciplinarios en contra de la FCF o el Club.

140. Sobre los argumentos al respecto, hechos por la Apelante, el Árbitro Único los ha estudiado y considera lo siguiente:

    a) Lo que menciona la RFEF en el sentido de que en todo caso se le debería juzgar exclusivamente por violar el artículo 14 de los Estatutos, y no por la responsabilidad directa de incumplir el artículo 19 y demás del RETJ, el Árbitro Único no coincide con esa argumentación, ya que lo establecido en el citado artículo 14, implica en que las asociaciones nacionales sean responsables directas del cumplimiento de los preceptos respectivos.

    b) En cuanto al alegado desconocimiento de los hechos por parte de la RFEF, más que ser un argumento que le beneficie, le perjudica, ya que, al tenor de la interpretación que se ha dado

respecto de sus obligaciones anteriormente en el presente laudo, la falta de conocimiento es incumplimiento de su obligación preventiva de detectar este tipo de casos.

ii) Artículo 19 apartado 4 del RETJ

141. En el apartado 4 del artículo 19 del RETJ, que ya se reprodujo *supra* en el presente laudo, se establecen, expresamente, obligaciones a cargo de las asociaciones nacionales. Destacan la obligación de la asociación nacional, de presentar una solicitud de aprobación de la transferencia, inscripción o registro, y que toda asociación que solicite la expedición del CTI y/o realizar la primera inscripción, deberá solicitar dicha aprobación.

142. También, destaca la obligación de las asociaciones nacionales de cerciorarse, antes de solicitar un CTI o la primera inscripción, de que las circunstancias del jugador correspondan con alguna de las excepciones enumeradas en el apartado 2 del propio artículo 19.

143. En el caso que no ocupa, y siendo una responsabilidad expresa y directa de la RFEF, ésta incumplió con las citadas obligaciones. La RFEF, que es la única facultada para ello, no solicitó la aprobación de la transferencia, inscripción y registro del Jugador ni se cercioró que el mismo y sus circunstancias se ajustaran a las excepciones que estrictamente están contempladas en el apartado 2 del artículo 19 del RETJ. La Apelante ha sido omisa en sus obligaciones, al permitir la participación del Jugador en el fútbol organizado, sin cumplir los requisitos del mencionado apartado 4 del artículo 19 del RETJ.

144. Respecto a los argumentos de la Apelante al respecto, se reitera, con base en lo que el Árbitro Único ha desarrollado previamente en el presente laudo, que no hay impedimento o conflicto de leyes que le impidan a la RFEF aplicar el citado precepto.

iii) Anexo 2 y artículo 1 del Anexo 3 del RETJ

145. El contenido de los dos anexos en cuestión va de la mano con el contenido del apartado 4 del artículo 19 del RETJ, lo que lleva al Árbitro Único hacia las mismas conclusiones hechas en cuanto a la conducta de la Apelante a las que se llegó con respecto a ese artículo.

146. Como ya se dijo *supra* en el presente laudo, los Anexos 2 y 3 también contienen obligaciones directas de las asociaciones nacionales. Entre ellas la del uso y revisión del TMS por las asociaciones nacionales, con todos los deberes de cuidado y de conducirse con verdad que ello implica. Los anexos detallan la forma de uso del TMS, y las obligaciones detalladas de las asociaciones nacionales al solicitar la aprobación ante la Subcomisión respectiva.

147. Con los hechos materia del presente procedimiento, al no haber solicitado la aprobación por TMS para la transferencia internacional del Jugador, ni haber constancia de una revisión periódica respecto de los menores en el TMS, por parte de la RFEF, ha quedado claro que la RFEF tampoco cumplió con las obligaciones y procedimientos

enumerados a detalle en los citados anexos.

iv) Artículo 9 apartado 1 del RETJ

148. Este artículo, reproducido ya previamente en el laudo, establece que los jugadores inscritos en una asociación únicamente podrán inscribirse en una nueva asociación cuando esta última haya recibido el CTI de la asociación anterior.

149. Si bien el procedimiento de emisión del CTI respectivo únicamente puede iniciarse por el club que esté interesado en ello, quien debe llevar, en última instancia, el registro de dicho jugador es precisamente la asociación nacional.

150. La asociación nacional, como ya se dijo, con base en el artículo 14 de los estatutos, tiene la obligación de verificar y hacer cumplir que sus clubes afiliados sigan al pie de la letra el procedimiento del registro de un jugador.

151. En este caso, también con su inacción, la RFEF incumplió con dicho precepto. No cumplió con su deber de vigilancia, de revisar si el Jugador contaba ya con un CTI previo a su registro por la FCF y, consecuentemente, con la propia Apelante, incumpliendo con el artículo 9 apartado 1 del RETJ.

152. Nuevamente, en cuanto a la argumentación de la Apelante de que la misma no fue la que llevó a cabo la inscripción, sino lo fue la FCF sin haber solicitado el CTI, y que por ello la RFEF no es responsable, se reitera que es justamente esta omisión y vigilancia la que provoca el incumplimiento directo de la RFEF.

153. Finalmente, y respecto de la argumentación general que presenta la Apelante en cuanto al principio de culpabilidad a la luz del Derecho Suizo y de la Reglamentación FIFA, así como bajo el principio de *Nulla Poena Sine Culpa,* el Árbitro Único considera que las omisiones de la Apelante son solo atribuibles a ella misma, e implican un claro incumplimiento respecto de todos y cada uno de los preceptos que la FIFA ha considerado incumplidos como base de la sanción aplicada, y por ello merecen una sanción.

D) ¿Es correcta la aplicación de la sanción de parte de FIFA a la RFEF?

154. En estricto sentido, por todo lo ya expresado por el Árbitro Único, al considerar que la RFEF ha incumplido diversas obligaciones, ya enumeradas y analizadas a detalle previamente, está claro que es correcta, por la vía disciplinaria, la aplicación de una sanción a la Apelante.

155. En cuanto al tipo y monto de sanción aplicada, no existe argumentación específica de ninguna de las Partes, por lo que basta, en este caso, con establecer que hay razones para aplicarla y que se mantiene el tipo y monto de la sanción ratificada en la Decisión Apelada.

E) Conclusiones

156. Es correcta la Decisión Apelada al concluir que existen, por parte de la Apelante, diversos incumplimientos a los artículos 9 apartado 1, 19 apartados 1 y 4, así como del artículo 1 apartado 1 del Anexo 2, junto con el artículo 1 del apartado 3 del Anexo 3, todos del RETJ.

157. Por lo tanto, es correcta la aplicación de la sanción a la RFEF por parte de la

FIFA, contenida en la Primera Decisión y que fue ratificada en la Decisión Apelada.

158. Por lo anterior, la apelación de la RFEF es rechazada, dejando subsistente la Decisión Apelada.

EN VIRTUD DE ELLO

El Tribunal Arbitral del Deporte resuelve:

1. Rechazar la apelación presentada por la Real Federación Española de Fútbol en contra de la decisión adoptada por la Comisión de Apelación de la Federación Internacional de Fútbol Asociación de 31 de agosto de 2020.

2. Confirmar la decisión dictada el 31 de agosto de 2020 por la Comisión de Apelación de la Federación Internacional de Fútbol Asociación.

3. (…).

4. (…).

5. Desestimar cualquier otra pretensión de las Partes.

CAS 2022/A/9053
Abderahim Gharsallah v. International Tennis Integrity Agency (ITIA)
26 March 2024

Panel: Prof. Eligiusz Krześniak (Poland), President; Mr Pierre Muller (Switzerland); Prof. Martin Schimke (Germany)

Tennis
Disciplinary – Match-manipulation
Preponderance of the evidence
Legitimate actions
Principles of legality and in dubio contra proferentem
Interpretation of a rule subject to sanctions
Facilitation of betting as per section D.1.b TACP
Review of sanctions by CAS panels

1. **According to section G.3.a. of the 2020 Tennis Anti-Corruption Program (TACP), the International Tennis Integrity Agency (ITIA) bears the burden of proof in cases under section D.1. TACP. Accordingly, the relevant standard is whether the ITIA can establish a preponderance of the evidence, which is even less than "comfortable satisfaction". It is sufficient that the chances of the allegation being true are more than 50%, while a comfortable satisfaction has consistently been defined in match-fixing cases as higher than mere probability, but less than proof beyond a reasonable doubt. Additionally, the fact that no payments to the perpetrator of the manipulation are apparent is irrelevant according to section E.2. TACP.**

2. **While no sporting organization or sport federation can cause an otherwise legitimate behaviour to become illegal in the legal sense (e.g., criminalize such behaviours), a sports federation or a sports body can prohibit its direct and indirect members from participating in legitimate actions in order to maintain sports integrity.**

3. **Any decision rendered by a sports-related body must adhere to the principle of legality. Thereby, every action undertaken by a sporting authority necessitates a distinct and unequivocal regulatory foundation. Due to the principle of *in dubio contra proferentem*, ambiguities in regulations are at the expense of the rule maker. Whenever there is uncertainty or a lack of clarity in the application of regulations, this must be construed against the relevant federation and the principle of *contra preferentem* applies, such that the construction to be preferred is the one that favours athlete.**

4. **When analysing a provision of a sport federation subject to sanctions, a restrictive interpretation is required.**

5. **The purpose of section D.1.b TACP is to ensure that sport integrity is protected. The rule examples in section D.1.b TACP achieve this by protecting the integrity of covered persons (which includes referees) by not allowing them to have any links to betting operators through their public appearance. *In casu*, entering the score in an electronic handheld scoring device is directly related to the activity as a referee and concerns match management itself. If the rule is interpreted restrictively to the detriment of the user, as required by**

the principle of *contra proferentem*, it follows that incorrectly entering the score does not constitute facilitation of betting as provided for in section D.1.b TACP.

6. CAS panels should exert self restraint in reviewing the level of a sanction imposed by a first instance disciplinary body and should reassess such sanctions only if they are evidently and grossly disproportionate to the offence or if a different conclusion is reached on the substantive merits of the case than did the first instance body. Far from excluding or limiting the power of a CAS panel to review *de novo* the facts and the law of the dispute at hand (pursuant to Article R57 of the CAS Code), a CAS panel would tend to pay respect to a fully-reasoned decision and would not easily "tinker" with a well-reasoned sanction, not considering it proper to just slightly adjust the measure of the sanction. The general considerations to weigh in the assessment of the proportionality of a sanction thus include (i) severity (the gravity of the illegal act committed), (ii) deterrence (the potential of the sanction to dissuade repeated illicit conduct of the same nature), and (iii) the importance of the rule being protected.

I. Parties

1. Mr. Abderahim Gharsallah (the "Appellant" or "Mr. Gharsallah") is a Tunisian national and a Chair Umpire certified by the International Tennis Federation ("ITF").

2. The International Tennis Integrity Agency (the "Respondent" or "ITIA") is an independent body established by the international tennis governing bodies to promote, encourage, and safeguard the integrity of professional tennis worldwide.

3. The Appellant and the Respondent are hereinafter jointly referred to as the "Parties".

II. Factual Background

A. Introduction

4. The present dispute concerns the decision rendered by the Anti-Corruption Hearing Officer Jane Mulcahy KC ("AHO") on 4 July 2022 (the "Decision"). In the Decision, AHO found that the Appellant is liable in relation to four charges of corruption offences brought by ITIA under the terms of the 2020 Tennis Anti-Corruption Program ("TACP") and set him a 7-year ineligibility period as of the date of his provisional suspension (i.e., 16 October 2020).

5. The pertinent facts and allegations based on the Parties' written submissions and on the CAS files are summarized below. References to additional facts and allegations found in the Parties' written submissions, pleadings, and evidence will be made, where relevant, in connection with the legal analysis that follows. While the Panel has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, it refers in its award only to those submissions and evidence it deems necessary to explain its reasoning.

B. Background facts

6. The Appellant is an experienced international tennis umpire. By his own admission, he has umpired over 1,500 matches in the recent years, including in 2017 and the subsequent years.

7. In March 2020, the Appellant was an umpire at the ITF W15 tournament in Monastir, Tunisia, during which he umpired the match between Susanne Celik and Jenny Duerst on 7 March 2020.

8. In October 2020, the Appellant was an umpire at the ITF M15 and ITF W15 tournaments in Monastir, Tunisia, during which he umpired several matches.

9. In particular, during the above-mentioned ITF M15 tournament, he umpired matches between Mats Rosenkranz and Mirko Martinez on 13 October 2020 and Laurynas Grigelis and Daniil Glinka on 15 October 2020.

10. Also, at the ITF W15 tournament, he umpired the match between Ines Ibbou and Kathleen Kanev on 15 March 2020 (collectively with the matches referred to in Para. 9 above the "Matches").

11. When officiating a tennis match, an umpire carries a so-called Handheld Electronic Scoring Device (the "Device"). The umpire enters the match results into the Device in real time, i.e. after each individual player scores a successive point. The Device automatically transmits the score straight to the betting markets. This allows players to make real-time bets on scoring individual points.

12. When umpiring the Matches, the Appellant was using such a Device.

13. On 9 March 2017, a betting operator, William Hill, raised concerns with the Tennis Integrity Unit, the precursor of ITIA (the Tennis Integrity Unit was subsumed into ITIA in 2021), in relation to a match umpired by the Appellant. As a result of these concerns, the Appellant's matches were removed from the betting markets later that day.

14. On 12 March 2020, the International Betting Integrity Association ("IBIA") contacted the Respondent with concerns in respect of a match officiated by the Appellant. The IBIA did so following reports from betting operators in relation to bettors who achieved a suspicious level of success betting on players to win specific points.

15. Next, in October 2020, the Respondent received suspicious betting alerts from the IBIA, the Sportradar group ("Sportradar"), which specializes in delivering sports data and content to media companies, sports federations and the betting industry, as well as from two tournament supervisors in relation to a number of matches at the ITF M15 and ITF W15 tournaments (including the Matches), which were taking place at the same time in Monastir, Tunisia.

16. The Appellant officiated at the Matches and – according to the Respondent – when doing so, he committed certain corruption offences.

C. Proceedings before ITIA and AHO

17. Following the reports from William Hill, the IBIA, Sportradar and the tournament supervisors, the Respondent

investigated the Appellant's involvement.

18. In particular, the Respondent reviewed the audio recordings from certain matches, including the Matches, umpired by the Appellant and compared the scores announced by the Appellant verbally with the scores entered into his Device. The Respondent noted that there were several discrepancies between the recordings and the scores entered into the Device.

19. The Respondent thus concluded that the Appellant was intentionally delaying and/or manipulating the scores that he was entering into his Device. This, in turn, may render him liable for breaching TACP.

20. On 15 October 2021, the Respondent sent the Appellant a Notice of Major Offence (the "Notice"). The Respondent charged the Appellant with the following corruption offences set out in five distinct charges:

    (a) Five breaches of section D.1.b of the 2017 and 2020 TACP; and

    (b) Five breaches of section D.1.d of the 2017 and 2020 TACP.

21. AHO ordered that the proceedings against the Appellant be consolidated and heard together with the related proceedings regarding other umpires at the same tournaments at which the Matches took place - Mr. Affi and Mr. Snene. The two latter umpires allegedly acted jointly or similarly with the Appellant in the commission of certain corruption offences.

22. On 4 July 2022, by virtue of the Notice, AHO ruled that the Appellant had breached certain rules. AHO found that four of the five charges brought against the Appellant were proven.

23. According to the Decision:

    "[…] Mr Gharsallah's misconduct is limited to four charges being proven in relation to conduct in 2020 only. […]

    […] As for categorising impact, the offences were major ones and impinged on the integrity of tennis. But I am not at all sure that either Mr Snene or Mr Gharsallah benefitted in any monetary way. There is certainly no evidence to show that they did. […]

    […] But I accept the offences are serious. […]".

24. The operative part of the Decision reads as follows:

    "Mr Snene's and Mr Gharsallah's periods of ineligibility are each seven years beginning with the date of their provisional suspensions, which Mr Gharsallah told me was, in his case, 16 October 2020".

III. Proceedings before the Court of Arbitration for Sport

25. On 23 July 2022, the Appellant filed with CAS his Statement of Appeal pursuant to Article R47 of the Code of Sports-Related Arbitration (the "CAS Code"). The Appellant opted to submit the dispute to a sole arbitrator in accordance with Article R50 of the CAS Code.

26. The CAS Court Office acknowledged receipt of the Statement of Appeal on 27 July 2022, served its copy on the Respondent, which was, *inter alia*, invited

to accept whether the dispute be submitted to a sole arbitrator.

27. On 28 July 2022, the Respondent filed with CAS the answer to the CAS letter of 27 July 2022. The Respondent objected to French being the language of the proceedings and requested that the proceedings be conducted in English. Moreover, the Respondent objected to the procedure being submitted to a sole arbitrator and requested that a panel of three arbitrators be appointed in accordance with Articles R53 and R54 of the CAS Code.

28. The CAS Court Office acknowledged receipt of the Respondent's letter of 28 July 2022 on 2 August 2022, served its copy on the Appellant and invited the Appellant to answer certain issues raised in the Respondent's letter.

29. On 5 August 2022, the Appellant emailed CAS his response to the Respondent's letter of 28 July 2022. The Appellant maintained his request to proceed in French or, alternatively, proposed to implement a bilingual arbitration procedure.

30. The CAS Court Office acknowledged receipt of the Appellant's e-mail of 5 August 2022 on 8 August 2022, served its copy on the Respondent and invited the Respondent to answer it.

31. On 9 August 2022, the Respondent filed with CAS the answer to Appellant's e-mail of 5 August 2022. The Respondent maintained its previous requests in full. The CAS Court Office acknowledged receipt of the Respondent's letter of 9 August 2022 on 10 August 2022 and served its copy on the Appellant.

32. On 15 August 2022, the President of the CAS Appeals Arbitration Division, ruling *in camera*, pronounced that the language of the proceedings should be English.

33. The CAS Court Office served a copy of Order of the President of the CAS Appeals Arbitration Division on the Parties on 15 August 2022. The CAS Court Office also informed the Parties that the President of the CAS Appeals Arbitration Division had decided to submit the dispute to a three-member panel and invited the Appellant to nominate an arbitrator by 22 August 2022.

34. On 22 August 2022, the CAS Court Office noted that the Appellant had nominated Mr. Jean-Paul Costa as arbitrator pursuant to Article R53 of the CAS Code and invited the Respondent to nominate an arbitrator by 29 August 2022.

35. On 26 August 2022, the CAS Court Office noted that the Respondent had nominated Prof. Dr. Martin Schimke as arbitrator pursuant to Article R53 of the CAS Code.

36. Since Mr. Jean-Paul Costa declined to serve as an arbitrator, the Appellant was accordingly asked on 30 August 2022, to nominate another arbitrator by 5 September 2022.

37. On 5 September 2022, the CAS Court Office noted that the Appellant had nominated Mr. Pierre Muller as arbitrator pursuant to Article R53 of the CAS Code.

38. On 14 September 2022, the Appellant filed its Appeal Brief pursuant to Article R51 of the CAS Code.

39. On 15 September 2022, the CAS Court Officer served a copy of the Appeal Brief on the Respondent, which was invited to submit its answer.

40. On 5 December 2022, the Respondent filed the Answer to the Appeal Brief pursuant to Article R55 of the CAS Code.

41. By communication dated 6 December 2022, the CAS Court Office informed the Parties, on behalf of the Deputy President of the CAS Appeals Arbitration Division, that the Panel had been constituted as follows: Prof. Dr. Eligiusz Krześniak, President of the Panel; Mr. Pierre Muller and Prof. Dr. Martin Schimke, Arbitrators.

42. On 13 December 2022, both Parties requested a hearing.

43. On 22 December 2022, the Panel decided to hold an in-person hearing and provided the available dates.

44. On 3 January 2023, the Respondent confirmed its availability for the proposed hearing dates. The Appellant conveyed that they would be unable to attend the in-person hearing on the proposed dates and requested a postponement to late April 2023.

45. On 5 January 2023, the Panel provided its new availability for the in-person hearing at the Appellant's request and invited the Parties, by 12 January 2023, to inform the CAS Court Office of any impossibility to attend the hearing.

46. On 9 January 2023, the Respondent informed that it is available to attend a hearing on the proposed dates.

47. On 12 January 2023, the Appellant informed that it is available to attend a hearing on the proposed dates.

48. On 20 January 2023, the Panel informed the Parties that the in-person hearing would take place on 26 April 2023 at the CAS Court Office in Lausanne.

49. On 28 February 2023, the Deputy President of the CAS Appeals Arbitration Division informed that the deadline to communicate the Arbitral Award to the Parties, pursuant to Article R59 of the Code of Sports-Related Arbitration, has been extended until 30 June 2023.

50. On 1 March 2023, the Parties received a copy of the Order of Procedure and were requested to sign and return the document to the CAS Court Office by 31 March 2023.

51. On 21 March 2023, the Respondent sent a copy of the Order of Procedure, duly signed.

52. On 29 March 2023, the Appellant sent a copy of the Order of Procedure, duly signed.

53. Between 6 and 25 April, the CAS Court Office - with the Panel involved - communicated extensively with the Parties as to the technicalities of the hearing, including the necessary translation services.

54. On 26 April 2023, the scheduled hearing was held in Lausanne with some participants joining remotely via Webex.

Apart from the Panel and Mr. Fabien Cagneux, Counsel to the CAS, the following participants attended the hearing:

For the Appellant:

- Mr. Malek Ben Rjiba, Attorney-at-Law
- Mr. Mohamed Fahmi Belhadj, Attorney-at-Law

For the Respondent:

- Ms. Hannah Kent, Attorney-at-Law
- Mr. Ross Brown, Attorney-at-Law
- Ms. Julia Lowis, Legal Counsel, ITIA
- Mr Ben Rutherford, Senior Director, Legal, ITIA
- Ms Jodie Cox (Case Manager, ITIA)
- Mr Nathan Chambers, Trainee Solicitor

Witnesses:

- Mr. Marwen Boughanda
- Mr. Yassine Lakhdhar
- Ms. Helen Calton
- Mr. James Keothavong, ITIA

Translator:

- Mr. Ahmed Mustapha

55. The witnesses and the interpreter were invited by the President of the Panel to tell the truth, subject to sanctions of perjury. The Parties and the Panel had the opportunity to examine and cross-examine the witnesses. At the conclusion of the hearing the Parties expressly stated that they had no objections in respect of their right to be heard and to be treated equally in the arbitration proceedings.

IV. SUBMISSIONS OF THE PARTIES

56. This section of the Award does not exhaustively list the Parties' contentions, its aim being to summarize the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this Award, the Panel has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including the allegations and arguments not mentioned in this section of the Award or in the discussion of the claims below.

A. The Appellant's Position

57. The Appellant's submission, as drafted in the Appeal Brief dated 13 September 2022 and reiterated further during the hearing, may in essence be summarized as follows:

(a) The Appellant contested AHO Decision of 4 July 2022, as it was fundamentally flawed and in breach of the law. The Appellant raised several arguments.

(b) First, the Appellant stated that the Decision was based only on assumptions and that the fact of his corruption practices was never proven. The Appellant argued that the discrepancies themselves do not prove any betting manipulations or corruption. The reasons for these discrepancies are simply errors when entering the results into the Device.

(c) In this regard the Appellant stated that:

"These allegations are based purely and simply on assumptions and theories that have never been proven by the person who adopts them since errors can occur in the sport of tennis or otherwise".

(d) Second, the Appellant pointed that when issuing the Decision, AHO relied on the fact that the Appellant and Mr. Affi, Tunisian Chair Umpires, knew each other very well (they accepted they were friends). Particularly on that basis, AHO stated that there was a combined bet which included matches involving both Mr. Affi and the Appellant. However, according to the Appellant:

"The presumed relationship of friendship and the common nationality of the referees cannot alone be sufficient to establish proof of the alleged facts, especially since the only relationship between them being the function of referees (they reside in 3 different cities in Tunisia)".

(e) Third, the Appellant argued that this case lacks the intentional element on the part of the Appellant. The Decision does not clarify how the Appellant may have benefited from the alleged corruption offence.

(f) On that note, the Appellant pointed that:

"[…] the intentional element is lacking in this case, Regardless the fact that no financial gain has been made by Mr. Gharsallah to characterize the material aspect of the bribery offence".

(g) Fourth, the Appellant stated that he handed over his mobile phone and provided the password examination, which did not unearth any evidence of a corruption offence. It is the Appellant's position that this precluded any possibility of fraud.

(h) Finally, the Appellant argued that AHO did not discover any link between the Appellant and the sports betting companies, nor the bettors, which is crucial to establishing the commission of a corruption offense.

58. In the Appeal Brief, the Appellant submitted the following requests for relief [verbatim transcription]:

"We ask your honorable court to hear our witness Mr Marouane Boughanda, tennis referee in Tunisia since 2007 (telephone 0021624033842) for more clarification concerning the facts attributable to Mr Gharsallah and the reversal of the contested decision purely and simply and judge that the appellant Mr. Abderrahim Gharsallah is not guilty with regard to the charges".

B. The Respondent's Position

59. The Respondent's position, as presented in the Answer to the Appeal Brief dated 5 December 2022 and reiterated further during the hearing, may be summarized as follows:

(a) The Respondent stated that the Decision was not based on *"assumptions and theories"*. From the Respondent's point of view, the

evidence submitted by the Respondent demonstrates that the Appellant facilitated the third-party betting activities and/or contrived the aspects of the Matches.

(b) The Respondent emphasized that the Appellant's attempts to justify incorrectly entering the score into the Device as "mistakes" are flawed.

(c) First, the Respondent pointed that it is very easy to correct any data erroneously entered into the Device – either by using the "Back" button, if a wrong Chair Umpire name is selected, or by using the "Undo" button during the match.

(d) Second, such kinds of mistakes occur very rarely given the Appellant's experience. On that note the Respondent pointed that: *"This is all the more unlike given the Appellant's level of experience (he has officiated approximately 1,500 matches); the fact that the Appellant selected the wrong Chair Umpire's name in three matches over the period of three days, between 13 and 15 October 2020; and the pattern of the same "mistakes" being made on the same points or games from match to match".*

(e) Third, the Respondent emphasized that the Appellant's mistakes followed the same pattern those made by Mr. Affi and Mr. Snene. It is not credible that their common scheme and methodology could be attributed to a series of random mistakes.

(f) Fourth, the Respondent stated that:

"the alleged mistakes does not alter or explain the suspicious betting. The existence *of those betting alerts cast further doubt on the defence of "mistake"".*

(g) Fifth, the Respondent pointed that the alleged mistakes were not reflected in the audio recordings of the matches officiated by the Appellant.

(h) Finally, the Respondent contested the Appellant's previous allegations regarding the Devices' poor working order. According to the Respondent:

"the PDAs [the Devices] were in good working order in October 2020 (relevant to Charges 3, 4 and 5) and that in his experience, a PDA has never indicated an incorrect score due to a technical glitch".

(i) Next, the Respondent emphasized that the financial element or the *"intentional element"* was not part of the charges brought against the Appellant. Moreover, the Respondent stated that:

"it is not uncommon for the ITIA to be unable to locate evidence of payments made to individuals who have committed corruption offences. This is for a variety of reasons, e.g., individuals may be paid in cash, or may delete any records of electronic transfers".

(j) The Respondent stated that the examination of the Appellant's mobile phone does not preclude a

possibility of fraud. The Respondent explained that the Appellant was interviewed by an ITIA investigator remotely on 16 October 2020 in the presence of Mr. Lakhdhar. Initially, the Appellant refused to hand over his devices, yet shortly thereafter, the Appellant provided Mr. Lakhdhar with his login details for a rudimentary review of his social media and messaging applications. Such a review was not comparable to an ordinary forensic download usually carried out by the Respondent. Therefore, the review did not preclude the possibility of fraud, as claimed by the Appellant.

60. In the Answer to the Appeal Brief, the Respondent submitted the following requests for relief:

"In light of the foregoing, the ITIA respectfully requests that the CAS Panel rule as follows:

a. Dismiss the Appeal;
b. Uphold the Decision in its entirety;
c. Order the Appellant to pay the ITIA a contribution towards its legal fees and other expenses incurred in defending the Appeal pursuant to CAS Code Article R65.3; and
d. Dismiss any request from the Appellant for an order that the ITIA pay him a contribution towards his legal fees and other expenses incurred in these proceedings".

V. JURISDICTION OF THE CAS

61. Pursuant to Article 186 (1) of the Swiss Private International Law ("PILA"), the CAS has the power to decide upon its own jurisdiction.

62. Article R47 of the CAS Code states that:

"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".

63. In this case, the Appellant relies on Article I.1 of the 2021 TACP. Article I.1 of the 2021 TACP provides that:

"Any decision by an AHO (i) that a Major Offense has been committed, (ii) that no Major Offense has been committed, (iii) imposing sanctions for a Major Offense (all three of which amount to a Decision under section G.4.b), or (iv) that the AHO lacks jurisdiction to rule on an alleged Major Offense or its sanctions, may be appealed exclusively to CAS in accordance with CAS's Code of SportsRelated Arbitration and the special provisions applicable to the Appeal Arbitration Proceedings, by either the Covered Person who is the subject of the decision being appealed, or the ITIA. For the avoidance of doubt, a decision to impose, or not to impose, a provisional suspension cannot be appealed to CAS".

64. Neither Party has questioned the jurisdiction of the CAS in these proceedings and they both expressly recognize it. Both Parties further signed the Order of Procedure.

65. As a result, CAS has jurisdiction to hear and adjudicate the case.

VI. ADMISSIBILITY OF THE APPEAL

66. Pursuant 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. 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".

67. Section I.4 of the 2021 TACP specifies that the appeal to CAS against the AHO decision can be made within 20 business days of the appealing party' receipt of the decision. Therefore, the 20 business days deadline applies.

68. The Decision was issued on 4 July 2022 and the Appellant filed its Statement of Appeal on 23 July 2022.

69. Therefore, the Appeal is admissible.

VII. APPLICABLE LAW

70. A vast majority of cases resolved by CAS has an international aspect. Commonplace are cases in which each of the parties to a dispute resides or is established in another country, and the federation or sports body whose decision is the focal point of the dispute is established in yet another country. What complicates matters further is that the sports regulations themselves may point to a governing law other than Swiss.

71. To define the point of departure for analyzing the possible governing law choices, the Panel follows the conclusions from CAS 2020/A/7194. These are:

(a) There is a difference between the governing law (the law applicable to the contract) and the so called *lex arbitri* - the arbitration law of the seat. *Lex arbitri* is the relevant source of the legal norms for external (court) supervision. External supervision includes not only setting aside the award, but it can also include appointment, challenges, ordering provisional relief, and judicial assistance in taking evidence. All these issues would be resolved under the arbitration law of the seat of the arbitration institution selected.

(b) Undoubtedly, *lex arbitri* for all CAS cases is the Swiss law, since CAS has its seat in Lausanne, Switzerland (Article S1, R28 of the CAS Code). Therefore, the Swiss arbitration law has been applied.

(c) The Swiss arbitration law distinguishes between national and international arbitration proceedings. According to Article 176 (1) PILA, PILA shall always apply if the place of residence and/or domicile of at least one party was outside Switzerland at the time of concluding the arbitration agreement. This prerequisite has been fulfilled in the case at hand and, therefore, PILA applies.

(d) Pursuant to Article 187 (1) PILA, the Arbitral Tribunal shall decide

the case according to the rules of the law chosen by the parties or, in the absence thereof, according to the rules of the law with which the case has the closest connection.

(e) The above means that *lex arbitri* (for any cases heard by CAS, this will always be the Swiss law) and that the governing law, applicable to the merits and according to which a dispute shall be resolved, may differ.

72. Article R58 of the CAS Code provides as follows:

73. *"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. The "applicable regulations", referred to in Article R58 of the CAS Code, are in this case most notably TACP. This conclusion stems from section G.3.d of the 2021 version of TACP, according to which the facts relating to a corruption offence may be established by any reliable means, as determined in the sole discretion of AHO and from section C.1 of the TACP 2021, according to which TACP expressly applies to Tournament Support Personnel, such as umpires.

75. The corruption offences giving rise to the four charges that were upheld in the Decision occurred on 7 March 2020 (Charge 2), 13 October 2020 (Charge 3) and 15 October 2020 (Charges 4 and 5). The 2020 TACP came into effect on 1 January 2020; accordingly, the 2020 TACP applies to the substantive aspects of the appeal.

76. However, the procedural aspects of the case shall be governed by the 2021 TACP. This is due to the rules provided in the 2021 TACP Sections K.5. and K.6.:

"*K.5. This Program is applicable prospectively to Corruption Offenses occurring on or after the date that this Program becomes effective. Corruption Offenses occurring before the effective date of this Program are governed by any applicable earlier version of this Program or any former rules of the Governing Bodies which were applicable on the date that such Corruption Offense occurred.*

K.6. Notwithstanding the section above, the procedural aspects of the proceedings will be governed by the Program applicable at the time the Notice is sent to the Covered Person".

77. While the "applicable regulations" referred to in the CAS Code is TACP, TACP in turn, refers to the laws of the State of Florida. Under the section K-1 of the 2021 TACP, the 2020 Tennis Anti-Corruption Program *"shall be governed in all respects (including, but not limited to, matters concerning the arbitrability of disputes) by the laws of the State of Florida, without reference to conflict of laws principles".*

78. In the case at hand, the Parties did not choose any other law.

79. The Panel may only speculate that TACP refers to the State of Florida law, in section K-1 TACP, to make TACP more specific and to ensure uniform interpretation of the industry standards [see also 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, Bulletin TAS CAS 2015/2, p. 15]. To that end, one may avail oneself of the laws of the state of Florida if the applicable regulations, the TACP, are not clear or contain regulatory lacunae. In short - in the event a question is not answered by the TACP, the laws of the State of Florida merely apply subsidiarily.

80. The Panel thus accepts the TACP as applicable regulations, in the meaning of Article R58 of the CAS Code, and that they apply primarily. The Panel also acknowledges that the applicable regulations refer directly to the laws of the State of Florida which shall be subsidiarily used when interpreting the TACP.

81. In addition, neither the Appellant, nor the Respondent, nor AHO referred to the laws of the State of Florida in a substantial manner.

82. Taking the above into consideration, the Panel notes that this Award can, therefore, be based on the principles adopted in CAS jurisprudence regarding integrity and corruption, mostly driven by the *lex sportiva*.

VIII. MERITS

83. In order to resolve the present matter, the Panel was faced with the following questions:

1) Did the Appellant take any actions that were the basis for the four charges for which he was found liable?

2) Can the Appellant's actions be treated as violating section D.1.b TACP?

3) Can the Appellant's actions be treated as violating section D.1.d TACP?

4) If, having duly analyzed the case material, the Panel finds that the Appellant had breached the anti-corruption rules, is the extent of the sanction commensurate?

1. Did the Appellant take the actions which were the basis for the four charges for which he was found liable?

84. The Decision determined that the Appellant manipulated the output of the Devices in order to corrupt the sport of tennis for various individuals' financial gain. As stated in the Decision, *"[t]he manipulation centred around the data input into the Devices which, said the ITIA, did not always reflect the actual points won by the players on the court"*.

85. By way of an example, if the Appellant needed a particular game to go to deuce (to satisfy the bettors' interests), but that score did not arise from normal play, the Appellant would input false information to show the deuce while calling the correct – and different – score. The aim was for the information input into the Device to go according to a pre-arranged plan. While in some cases the reality – by pure luck – must have corresponded to this plan (i.e. the goal was to report a deuce in a given game and a deuce did in fact occur), in some other cases, the actual outcome of the game was different. In such cases, false information would be recorded in the

Device. This, in turn, must have enabled gamblers to win even though the chosen score in a particular game was not achieved, since the result from the device (and not the one announced at the tennis court) was transmitted to the betting markets.

86. Such manipulation must have led to the discrepancy between the actual result of the game as called out and communicated to the players and the audience orally, and the results as transmitted to the betting market. In order to "catch up" with the correct score, the Appellant allegedly made up for the "missing" points by artificially creating and inputting non-existent points into the Device.

87. The Appellant has been found liable of such manipulation in the Matches, i.e. four tennis matches which he umpired during the ITF M15 and ITF W15 tournaments in Monastir, Tunisia between March and October 2020.

88. In order to determine whether the alleged practices did take place, the Panel must first establish the applicable burden of proof.

89. The Panel notes that in the disciplinary proceedings brought before the CAS, there are at least three levels of burden of proof possible – "balance of probabilities", "comfortable satisfaction" and "beyond a reasonable doubt", with the last one applying in criminal procedures and the second one applying in most CAS disciplinary proceedings.

90. According to section G.3.a. TACP, the Respondent bears the burden of proof in cases under section D.1. TACP. Accordingly, the relevant standard is whether the Respondent can establish a preponderance of the evidence, which is even less than "comfortable satisfaction".

91. Therefore, the allegations by the Respondent have to be more likely to be true than not true. It is sufficient that the chances of the allegation being true are more than 50% (CAS 2011/A/2490, para. 25), while a comfortable satisfaction has consistently been defined in match-fixing cases as higher than mere probability, but less than proof beyond a reasonable doubt (CAS 2016/A/4650, para. 64; CAS 2017/A/5338, para. 64).

92. The betting data, together with the discrepancies in the results data, clearly suggest that the Appellant manipulated the results. It is also more likely than not that there was collusion with Mr. Affi, especially given the overlap with Mr. Affi's match according to the betting data. That all the discrepancies that occurred in the above matches were human errors seems to the Panel rather unlikely. This is for at least five reasons.

93. First, the Appellant is a very experienced umpire. It appears highly improbable that an umpire of such significant experience, having presided over approximately 1,500 matches, would recurrently commit inaccuracies in tasks as basic as registering Chair Umpire's name or entering points. Particularly noteworthy is the occurrence of such discrepancies within the same tournament, the same week, and with two such selections - on the very same day.

94. Second, as demonstrated by the expert witness, Mr. James Keothavong, errors can be corrected with a "back" or "undo" button. These buttons are simple to use.

95. Third, the alleged errors occurred at similar stages of different sets and matches. It seems highly unlikely that any genuine errors would consistently occur at the same stage of each game. If these were genuine errors, they would likely occur at different stages of each match.

96. Fourth, as evidenced by the audio recordings of the matches presided over by the Appellant, the number of the errors he committed was markedly limited. Any errors that did occur seemingly pointed towards the Appellant's attempts in implementing the pre-agreed scheme.

97. Fifth, the notion that the Appellant's erroneous recording of the match score was not a mere random mistake is substantiated by suspicious betting activity.

98. And finally, the Appellant, on three out of four Matches (games between Mats Rosenkranz and Mirko Martinez, Laurynas Grigelis and Daniil Glinka, and finally between Ines Ibbou and Kathleen Kanev), selected the wrong umpire name in the Device. By not putting his own name, but that of another umpire, the Appellant must have attempted to hide his participation in the scheme.

99. The fact that no payments to the Appellant are apparent is irrelevant according to section E.2. TACP.

100. The wrong name, the betting alerts, the discrepancies between the audio and point-to-point data, and the unrealistic timings are striking. Taking the above into consideration, the Panel believes that the evidence certainly meets the preponderance of evidence standard, and in fact goes even beyond that to the point of meeting the comfortable satisfaction standard.

2. Can the Appellant's actions be treated as violating section D.1.b TACP?

101. The first of the relevant norms that the Appellant had allegedly breached is section D.1.b TACP. According to this rule *"No Covered Person shall, directly or indirectly, facilitate any other person to wager on the outcome or any other aspect of any Event or any other tennis competition. For the avoidance of doubt, to facilitate a person to wager shall include, but not be limited to: display of live tennis betting odds on a Covered Person's website; writing articles for a tennis betting publication or website; conducting personal appearances for, or otherwise participating in any event run by, a tennis betting company or any other company or entity directly affiliated with a tennis betting company; promoting a tennis betting company to the general public through posts on social media; wearing clothing which includes a tennis betting company name or logo; and appearing in commercial advertisements that encourage others to bet on tennis".*

102. The Panel starts its analysis by noting that the wording of "for the avoidance of doubt" part of section D.1.b and the relatively low sanction for violating this provision (three years) both indicate that the goal of this provision was to make certain behaviours – otherwise not punishable (i.e., legitimate actions) –

punishable under TACP. In other words, the aim of this provision is not to eliminate corruption (for which there is zero tolerance under virtually any legal system), but to "capture" perfectly legitimate actions, such as participating in charity events organized by the betting companies and the like and to render such actions "illegal" in light of TACP. While no sporting organization or sport federation can cause an otherwise legitimate behaviour to become illegal in the legal sense (e.g., criminalize such behaviours), a sports federation or a sports body can, of course, prohibit its direct and indirect members from participating in such actions in order to maintain sports integrity.

103. For this reason alone, the Panel has serious doubts as to whether the Appellant's actions can be seen as being falling under section D.1.b TACP.

104. Further, the core of section D.1.b is "to facilitate any other person to wager". "Facilitate" is defined in the Collins English Dictionary as *"To facilitate an action or process, especially one that you would like to happen, means to make it easier or more likely to happen"*. This also includes the behaviours described in the second sentence of this norm, which are not to be understood as exhaustive examples of the rules in place. The behaviours relate to actions beyond the pitch referee activities. This suggests that only those behaviours are included that are not directly related to the activity as a referee - i.e. match management. However, since the list is not exhaustive, match management could also fall under the term "facilitate". Thus, in this respect, the regulation may lack clarity.

105. Pursuant to section B.1 TACP, an "event" is considered as "professional tennis competitions identified in Appendix 1". Explicitly, Appendix 1 TACP incorporates ATP World Tour Tournaments, excluding Junior Tournaments. The tournaments overseen by the Appellant are part of the ITF World Tour Tournaments and are not classified as Junior Tournaments. Thus, these tournaments align with the definition delineated in section B.1 TACP.

106. Moreover, the term "wager" in section B.28 TACP refers to *"a wager of money or consideration or any other form of financial speculations"*.

107. Tennis has therefore prohibited its practitioners from facilitating wagers through non-match-related undertakings, such as authoring articles, making publications, or participating in promotional activities.

108. As per the firmly established CAS jurisprudence, any decision rendered by a sports-related body must adhere to the principle of legality (CAS 2020/A/7504 at para. 60). Thereby, every action undertaken by a sporting authority necessitates a distinct and unequivocal regulatory foundation.

109. Due to the principle of *in dubio contra proferentem*, ambiguities in regulations are at the expense of the rule maker. As per the robustly established CAS precedents: *"whenever there is uncertainty or a lack of clarity in the application of Regulations, this must be construed against the federation"* (CAS 2020/A/7504, see also CAS 2007/A/1437) and *"the principle of contra preferentem applies, such that the construction to*

be preferred is the one that favours the Athlete" (CAS 2011/A/2384 & 2386, para. 228).

110. A restrictive interpretation is also required given the fact that a violation of the provision is subject to sanctions. The purpose of section D.1. TACP is to ensure that sport integrity is protected. The rule examples in section D.1.b TACP achieve this by protecting the integrity of the Covered Persons (which includes referees, see section B.6 TACP) by not allowing them to have any links to betting operators through their public appearance. Through the rule examples, it should be clear from an objective recipient/observer perspective that they may not show any connections to betting providers in public. A restrictive interpretation does not indicate that "facilitate" also includes conduct that is directly related to match management. This restrictive interpretation also does not create any protection gaps, since facilitating betting by manipulation is covered by section D.1.d TACP. Consequently, also as a result of the systematic view, no extension of section D.1.b TACP to conduct directly related to match-fixing is warranted.

111. The Appellant in the present case has not shown any conduct corresponding or close to any of the rule examples. Entering the score is directly related to the activity as a referee. It concerns match management itself. If the rule is interpreted restrictively to the detriment of the user, as required by the principle of *contra proferentem*, it follows that incorrectly entering the score does not constitute facilitation of betting as provided for in section D.1.b TACP.

112. The Panel thus concludes that the Appellant had not breached section D.1.b TACP.

3. Can the Appellant's actions be treated as violating section D.1.d TACP?

113. The second of the relevant norms that the Appellant had allegedly breached is section D.1.d TACP. According to section D.1.d TACP: *"No Covered Person shall, directly or indirectly, contrive the outcome, or any other aspect, of any Event"*.

114. "Contrive" is defined in the Collins English Dictionary as *"If you contrive an event or situation, you succeed in making it happen, often by tricking someone"*. This is probably closest to the term "manipulate", i.e. steering in a certain direction as a result of deliberate influence.

115. The Panel believes it to be of paramount importance in the context of the current case to comprehend the meaning of the phrase "any other aspect". Concerning the term "any other aspect", the Panel holds that this encompasses elements both within and beyond the court. Consequently, this not only envelops on-court elements, such as calling the score out loud on the court, but it may also extend to actions that have the potential to manipulate the online betting markets. Such an interpretation ensures comprehensive coverage of potential instances of conduct detrimental to tennis integrity.

116. The Panel is convinced that the Appellant had contrived an aspect of an Event, explicitly by altering the outcome of the game points in the Device. While such manipulation did not *per se* distort

the essence and the competition outcome (since the Appellant called out the correct score on the court), it did distort one aspect of the competition – the point-by-point summary of the individual points scored, as notified to the outside world via the Device and then on-line. This in turn undermined tennis integrity.

117. The stance held is validated by the assertion that, in the Panel's assessment, the Appellant's erroneous recording of scores into the Device was an intentional act. Numerous pieces of evidence lend credence to this conclusion.

118. First, the Appellant's errors in recording the scores into the Device were not random, but occurred during specific matches and at specific points, thus revealing a consistent and logical pattern in the Appellant's actions.

119. Second, an analysis of the audio recordings does not suggest any errors made by the Appellant during the live score announcement during the match, despite the discrepancies in the scores recorded in the Device. This discrepancy further supports the assertion of intentional manipulation.

120. Third, the Appellant had the opportunity, at any given point, to rectify the errors he had made, yet chose not to seize this opportunity, further indicating intentionality of his actions.

121. Fourth, an observed surge in betting activity at specific moments corresponding to the Appellant's recording errors suggests premeditation, implying these errors had been "planned" in advance.

122. Deliberately creating wrong score input into the Device, in the Panel's view, clearly qualifies as contriving an aspect of the game of tennis. Therefore, the Panel concludes that the Appellant had breached section D.1.d TACP.

4. If, having duly analyzed the case material, the Panel finds that the Appellant had breached the anti-corruption rules, is the extent of the sanction commensurate?

123. According to well-established CAS jurisprudence, CAS panels should exert self-restraint in reviewing the level of a sanction imposed by a first instance disciplinary body (cf. CAS 2017/A/5086 at para. 206, CAS 2015/A/3875 at para. 108, CAS 2012/A/2824 at para. 127, CAS 2012/A/2702 at para. 160, CAS 2012/A/2762 at para. 122, CAS 2009/A/1817 & 1844 at para. 174, CAS 2007/A/1217 at para. 12.4) and should reassess such sanctions only if they are evidently and grossly disproportionate to the offence or if a different conclusion is reached on the substantive merits of the case than did the first instance body (cf. CAS 2017/A/5086 at para. 206, CAS 2009/A/1817 & 1844 at para. 174 with references to further CAS case law, CAS 2012/A/2762 at para. 122, CAS 2013/A/3256 at paras. 572-572, CAS 2016/A/4643 at para. 100, CAS 2019/A/6344 at para. 501). The above does not mean that CAS's powers are somehow formally limited. It rather means that - far from excluding or limiting the power of a CAS panel to review *de novo* the facts and the law of the dispute at hand (pursuant to Article R57 of the CAS Code) - a CAS panel would tend to pay respect to a fully-reasoned decision and would not easily "tinker" with a well-reasoned sanction, not

considering it proper to just slightly adjust the measure of the sanction (cf. CAS 2015/A/3875 at para. 109, CAS 2011/A/2645 at para. 94, CAS 2011/A/2515 at paras. 66-68; CAS 2011/A/2518 at para. 10.7, CAS 2010/A/2283 at para. 14.36). In other words – the reference to a sanction being "grossly and evidently disproportionate to the offence" should be understood as a guideline rather than a binding norm, aimed at restraining CAS's powers.

124. Having said the above, the Panel is also aware of another CAS decision in which the threshold of review might be seen as somewhat lower: *"[t]here is well-recognized CAS jurisprudence to the effect that whenever an association uses its discretion to impose a sanction, CAS will have regard to that association's expertise but, if having done so, the CAS panel considers nonetheless that the sanction is disproportionate, it must, given its de novo powers of review, be free to say so and apply the appropriate sanction (see CAS 2015/A/4338, at para. 51)"* (see CAS 2017/A/5003; CAS 2020/A/7596, para 251). Similarly, in yet another CAS decision, the panel stated that the jurisprudence according to which CAS should reassess sanctions only if they are evidently and grossly disproportionate to the offence *"should be interpreted (and applied) with care"* since CAS *"powers to review the facts and the law of the case are neither excluded nor limited"* (see CAS 2018/A/5808).

125. Whether the threshold is that the sanction has to be "evidently and grossly disproportionate" or simply "disproportionate", the decision set out below as to the sanction to be applied to the Appellant would have been identical.

126. In the present matter, the Panel found a detailed explanation in the Decision as to why AHO deemed it appropriate to impose a *"period […] of ineligibility [of] […] seven years beginning with the date of [his] provisional suspensions […]"*.

127. The Panel may, thus, analyse the provided explanation while taking into account its own reasons in assessing the appropriate measure of the sanction in accordance with the principle of proportionality.

128. With respect to the factors to take into account in determining a sanction, the Panel finds the reasoning of the Panel in CAS 2019/A/6219 (and in CAS 2019/A/6344) helpful:

"In the Panel's opinion […] when imposing a sanction, account has to be taken […] of the following relevant factors:
• the nature of the violation;
• the impact of the violation on the public opinion;
• the importance of the competition affected by the violation;
• the damage caused to the image of FIFA and/or other football organizations;
• the substantial interest of FIFA, or of the sporting system in general, in deterring similar misconduct;
• the offender's assistance to and cooperation with the investigation;
• the circumstances of the violation;
• whether the violation consisted in an isolated or in repeated action(s);
• the existence of any precedents;
• the value of the gift or other advantage received as a part of the offence;
• whether the person mitigated his guilt by returning the advantage received, where applicable;

• *whether the offender acted alone or involved other individuals in, or for the purposes of, his misconduct;*
• *the position of the offender within the sports organization;*
• *the motives of the violation;*
• *the degree of the offender's guilt;*
• *the education of the offender;*
• *the personality of the offender and its evolution since the violation;*
• *the extent to which the offender accepts responsibility and/or expresses regret".*

129. Summarizing, the general considerations to weigh in the assessment of the proportionality of a sanction thus include (i) severity (the gravity of the illegal act committed), (ii) deterrence (the potential of the sanction to dissuade repeated illicit conduct of the same nature), and (iii) the importance of the rule being protected (CAS 2019/A/6432 at para. 250 *et seq.*).

130. Having said the above, the Panel would like to note that no list of criteria, however detailed, should obscure the fact that a sanction applies to a particular conduct on the basis of all the circumstances.

131. The same principle applies to any guidelines that may be derived from earlier CAS rulings. Although jurisprudence in other corruption cases could be a helpful guide, there is no principle of binding precedents at the CAS. While CAS rulings can be a useful guide, each case must be decided on its own facts and *"although consistency of sanctions is a virtue, correctness remains a higher one; otherwise unduly lenient (or, indeed, unduly severe) sanctions may set a wrong benchmark inimical to the interests of sport"* (see CAS 2011/A/2518, para. 10.23, see also CAS 2019/A/6344). While it may sound obvious the Panel believes it ought to remind that no two cases are identical.

132. Having set the stage for its analysis the Panel will now move on to the details of the case at hand.

133. The TACP, which has been in effect since 2020, contains rather thorough provisions on integrity and conflicts of interest (sections D and E TACP). The latter constitute roughly 20% of the length of TACP and spell out not only certain problematic situations constituting self-dealing, but also shed light on some violations of tennis integrity and offenses associated with corruption.

134. The extent of these considerations of corruption and integrity in TACP indicate their importance, which is clearly substantial. Its drafters recognized the risks inherent to sport, particularly at the international level, where such infringements profoundly impact the tennis integrity and shape its perception amongst the stakeholders and the general public. Indeed, as stated by another CAS panel, *"the standards of conduct required of officials of an international federation […] must be of the highest level because the public must perceive sports organizations as being upright and trustworthy, in order for those organizations to legitimately keep governing over their sports worldwide"* (CAS 2017/A/5086 at para. 154).

135. The breach of this provision is also far from innocuous in terms of severity, given the fact that not only had tennis integrity suffered, but also the bookmakers and innocent bettors might have been defrauded because the online betting markets had received the incorrect score. It was not necessary for

the Appellant to have a personal financial stake in the bets (as stated in CAS 2011/A/2364 para. 75: *"a player who is involved in a fix breaches […] notwithstanding that he does not benefit financially from doing so. Accordingly, the Panel does not consider the absence of financial gain to be determinative in sanctioning the infringement for which he has been found liable"*).

136. The Panel notes that the sanction meted out on the Appellant was not the most severe, considering that a seven-year suspension is not a lifetime ban, and that the person sanctioned is an umpire and not a player with a short-term career. At the same time the Panel notes that there is a major gap between the lowest sanction applied for an offence, i.e. a warning or a reprimand and a seven-year suspension, applied in this case.

137. The Panel further notes that the Decision found that the Appellant had breached sections D.1.b and D.1.d TACP.

138. The Panel notes that according to section H.1.b the 2021 TACP, the penalty for any Corruption Offense may include: *With respect to any Related Person or Tournament Support Person, (i) a fine of up to $250,000 plus an amount equal to the value of any winnings or other amounts received by such Covered Person in connection with any Corruption Offense, (ii) ineligibility from Participation in any Sanctioned Events for a period of up to three years, and (iii) with respect to any violation of Section D.1, clauses (c)-(p), Section D.2 and Section F., ineligibility from Participation in any Sanctioned Events for a maximum period of permanent ineligibility*.

139. This Panel concludes that the Appellant only breached section D.1.d.

140. The Panel notes, however, that violating section D.1.d TACP in itself can lead to permanent ineligibility, while violating section D.1.b TACP can only lead to ineligibility for up to three years. Since in the case of several violated provisions, only one sanction can be recognized and the overall sanction is determined according to the most severe sanction, it is irrelevant for the duration of the ineligibility whether or not section D.1.b TACP was additionally violated. The fact that this Panel rejects the Appellant's violation of section D.1.b TACP does not, in its own right, lead to disproportionality of the sanction.

141. The Panel notes several aggravating factors, which need to be taken into account. These are:

    (i) the nature of the violation (interference in the betting markets which – if made widely known – could easily bring the sport of tennis into major disrepute),

    (ii) the fact that the Appellant committed repeated actions,

    (iii) the fact that the Appellant acted with other individuals and the offenses must have taken planning and a thorough organization in the background,

    (iv) the position of the Appellant within the sport of tennis, since an umpire is the symbol for fair play and is tasked to uphold the rules.

    The Panel also notes several circumstances and factors, which weigh in the Appellant's favour. These are:

(i) no financial gain proven;

(ii) no negative impact on the game itself, since the Appellant was each time calling the correct score,

(iii) no major impact with regards to media coverage, especially because the umpire did not influence the outcome of the game *per se*,

(iv) relatively low importance of the tournaments in question,

(v) limited interest of the sport federation, since the damage mostly concerned betting operators – and even with respect to the latter it is not known whether they did in fact suffered any harm and to what extent,

(vi) the Appellant's cooperation in handing over his device and skype details.

142. The Panel notes, however, that some of the above mitigating circumstances have already been taken into account by AHO in the Decision. This most notably includes the absence of information about financial circumstances and monetary gain by the Appellant.

The Panel also notes that during the Proceedings before AHO, the Respondent considered a 12 to 15 years as a starting point for a ban for the Appellant.

143. On balance, the Panel considers that the Decision is well-reasoned, and it takes into account factors and circumstances that the Panel also considered when evaluating the sanction. In light of the fact that the seven-year suspension is not disproportionate to the offense when taking into account the totality of the circumstances, the Panel refrains from further reassessment of the sanction, a seven-year period of ineligibility.

144. In view of the above circumstances and factors, the Panel confirms the decision of AHO.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 23 July 2022 by Mr. Abderahim Gharsallah, against the decision of the Anti-Corruption Hearing Officer rendered on 4 July 2022 is dismissed.

2. The decision issued on 8 November 2022 by the Anti-Corruption Hearing Officer is confirmed.

3. (…).

5. (…).

6. All other and further motions or prayers for relief are dismissed.

CAS 2023/A/9436
FK Apollonia v. KF Laçi
16 February 2024

Panel: Mr Espen Auberg (Norway), Sole Arbitrator

Football
Transfer with sell-on clause
Request to exclude testimonies of witnesses and expert
Request for new witness after exchange of written submissions
Admissibility of evidence adduced after exchange of written submissions
Principles of interpretation of sell-on clauses
Rationale of sell-on clauses
Interpretation of notion "value of the card"
Interpretation of notion "20% of the value of the card"
Ne ultra petita and impossibility to file counterclaims in CAS Appeal arbitration proceedings

1. **According to Article R55 CAS Code, a respondent shall, when filing an answer, include the names of witnesses it intends to call, and include a brief summary of their expected testimony. This obligation to include a brief summary of expected testimony does not apply to experts a respondent intends to call. For experts it is sufficient to state their area of expertise. In order to fulfil the requirements set out in Article R55 CAS Code it is sufficient to include, in the Answer, brief summaries of expected testimonies of the witnesses and the expert specified in the Answer.**

2. **In accordance with Article R56 CAS Code, after the submission of the Appeal Brief and the Answer, the parties may only be authorized to specify further evidence on which they intend to rely if the parties agree or the Panel orders so on the basis of exceptional circumstances. Exceptional circumstances based on which a late request to call a witness could have to be granted are, *à priori*, not existent if there is no apparent reason for which the request for the witness had not been raised in the Appeal Brief.**

3. **New evidence in the meaning of Article R56 CAS Code that had already existed before the time limit to file the evidence, respectively submission, but was discovered thereafter, would constitute exceptional circumstances only if the said evidence could not have reasonably been discovered and produced in time for the filing. Furthermore, in case the new evidence is provided on the day of the hearing and not accompanied with a certified English translation in the meaning of Article R29 para. 3 CAS Code, and where the free English translation provided is disputed by the counterparty as containing several important errors, the new evidence may be excluded *e.g.* taking into consideration the counterparty's limited possibility to rebut the content of the new evidence and any risk of a resulting unfair advantage for the party having filed the evidence belatedly.**

4. **In case of dispute, the exact content of a sell-on clause primarily needs to be decided based upon an interpretation of such clause. According to Article 18 para. 1 Swiss Code of Obligations (SCO), when assessing the form and terms of a contract, the true and common**

intention of the parties when they concluded the contract must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement. If this common intention cannot be determined with certainty based on the wording, the formal agreement between the parties must be examined and interpreted in order to define their subjective common intention. This interpretation will first take into account the ordinary sense one can give to the expressions used by the parties and how they could reasonably understand them. The investigation is not to be limited to those words or the conduct even if they appear to give a clear answer to the question. Rather, due consideration is to be given to all relevant circumstances of the case. This includes the behaviour of the parties during the negotiations as well as subsequently, their respective interest in the contract and its goal which can also be taken into account as complementary means of interpretation.

5. In general, the parties to a transfer agreement are, as long as they comply with relevant football regulations, free to agree the terms of the transfer. They frequently include sell-on clauses, the economic rationale of which is, generally, that the transferring (or selling) club accepts to receive, in a first place, a lower "first" transfer fee of a fixed amount, payable upon the transfer of the player to the buying club, with the expectation of receiving an additional, variable, notional amount if the buying club will be subsequently able to transfer the player to a third club. Including a sell-on clause in a transfer agreement may be beneficial to both parties to the agreement: from the buying club's perspective, the sell-on clause may contribute to reducing the fixed transfer fee to be paid to the selling club, whilst the selling club will be entitled to a portion of the rise in the player's future transfer value. As such, the parties to a transfer agreement with a sell-on clause agree, in principle, to share the risk and potential benefit related to the development of the player's transfer value.

6. In case of a transfer agreement, under which the selling club is entitled to receive from the buying club a fixed transfer fee as well as 20% of the *"value of the card"* if the player later transfers to another club, it may be found, based on the parties' submissions and positions in the proceedings, that the expression "value of the card" may be interpreted to refer to the concept of a player's transfer fee.

7. In order to determine if the expression *"20% of the value of the card"* refers solely to a fixed transfer fee to be paid to the selling club in case of a subsequent transfer of the player, or if it also includes 20% of all other fees received in relation to the subsequent transfer of the player, *inter alia* sell-on clauses concluded in the transfer agreement regarding the subsequent transfer of the player, it may be taken into account that the calculation of the amount owed to the selling club based on a sell-on clause

shall be based on the amount subsequently actually received by the buying club in relation to a further transfer of the player in question. Furthermore, in case a sell-on clause contained in a subsequently concluded transfer agreement is included in a chapter entitled *"Transfer price and payment terms"*, this suggests that the parties to the subsequently concluded transfer agreement have considered that the sell-on clause in that agreement is a part of the total transfer price, which indicates that all the buying club's revenues from the sell-on clause in the subsequently concluded transfer agreement shall be taken into account when establishing the total fee to be paid by the buying club to the selling club as a part of the sell-on clause stipulated in the first concluded transfer agreement. Furthermore, it may be assumed that in principle, the parties to the subsequent transfer agreement agreed to exchange a higher fixed transfer fee with a transfer fee consisting of a lower fixed transfer fee and a sell-on fee. Accordingly, it is found that the transfer value of the player, when the subsequent transfer agreement was concluded, was not limited to the, assumedly reduced, fixed transfer fee paid by the third club, but the sum of the fixed transfer fee and the value of the sell-on clause, with the result that the selling club is entitled to 20% of all of the buying club's revenues from the sell-on clause agreed in the subsequent transfer agreement.

8. It is well established practice in international arbitration that a panel is bound by the limits of the parties' motions, since the arbitral nature of the proceedings obliges the panel to decide all claims submitted by the parties and, at the same time, prevents the panel from granting more than what the parties are asking by submitting their requests for relief, according to the principle of *ne ultra petita*. Furthermore, since the 2010 revision of the CAS Code, the filing of counterclaims in appeal proceedings before CAS is not permitted anymore, and therefore, if a respondent wants to challenge part of a decision, it must file an independent appeal.

I. PARTIES

1. FK Apollonia (also referred to as the "Appellant") is a professional football club from Fier, Albania. FK Apollonia is a member of the Albanian Football Association ("AFA") which in turn is affiliated with the Union des Associations Européennes de Football ("UEFA") and the Fédération Internationale de Football Association ("FIFA").

2. KF Laçi (also referred to as the "Respondent") is a professional football club from Laç, Albania, and a member of AFA.

3. The Appellant and the Respondent are hereinafter jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts, as established on the basis of the written 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 summary of the dispute. Additional facts may be set out, where relevant, in connection with the legal analysis.

A. Background Facts

5. The case concerns a dispute over payment in accordance with a transfer agreement, hereunder to what extent a sell-on clause applies to future transfers.

6. On 24 August 2017, the Parties concluded an agreement for the transfer of the player Myrto Uzuni (the "Player") from the Appellant to the Respondent (the "Transfer Agreement 2017"). The Transfer Agreement 2017 reads, *inter alia*, as follows:

"ARTICLE l OBJECT
The object of this Agreement is:
I. Payment of the card value from Laçi Club for the player, according to the terms of this Agreement.
2. Signing of the employment contract between Laçi Club and the player Murto Uzuni (sic).
ARTICLE 2 CARD VALUE, PAYMENT METHOD AND TERMS OF AGREEMENT

2.1 Laçi Club agrees to pay Apolonia Club the value of the player's card at the amount of 20,000 (twenty thousand) Euros + 20% of the value of the card to be paid to Laçi Club upon the transfer of the player to another club.

2.2 The payment of value of the player's card will be carried out as follows:
3. -15,000 (fifteen thousand) Euros will be paid to APOLONIA Club by bank transfer, on the date of signing this agreement;
4. - 2,500 (two thousand five hundred) Euros will be paid by bank transfer within November 2017;
5. - 2,500 (two thousand five hundred) Euros will be paid by bank transfer within December 2017;
6. - 20 (twenty) % of the card's gross value will be paid in the case of the player's transfer to another club, on the date of execution of the payment by the other club.

2.3 Apollonia Club will grant a Transfer Permit to the player Myrto Uzuni, after the signing of this agreement and the payment of 15,000 (fifty thousand) Euros of the card value, from Laçi Club".

7. Following the signing of the Transfer Agreement 2017, the Player concluded his transfer to the Respondent.

8. On 31 August 2018, the Respondent and the Croatian club Lokomotiva Zagreb Football Club ("Lokomotiva Zagreb") concluded a transfer agreement (the "Transfer Agreement 2018") for the Player, and the Player subsequently concluded a transfer to Lokomotiva Zagreb. The Transfer Agreement 2018 states, *inter alia*, as follows:

"2. Transfer price and payment terms
2.1 (…)
The total amount of the transfer fee is €350.000,00 (three hundred and fifty thousand euros) and is payable according to the following payment schedule:
a) €100.000,00 payable by 01.10.2018 the latest.
b) €150.000,00 payable by 10.01.2019 the latest.
c) €100.000,00 payable by 01.07.2019 the latest.
(…) 2.3 If Lokomotiva Zagreb executes a Transfer Agreement by which the player

will be permanently transferred to a third club, this club is then obliged to pay FC Laçi a compensation fee amounting to 20% (twenty percent) of the gross transfer fee. The gross transfer is calculated as the total transfer fee (including VAT and after deduction of solidarity contribution, both if applicable) received by Lokomotiva Zagreb from the third club".

9. After having received the agreed transfer fee of EUR 350,000 from Lokomotiva Zagreb, KF Laçi paid FK Apolonia an amount of at least EUR 64,000.

10. On 14 July 2020, Lokomotiva Zagreb and Ferencvárosi Torna Club ("Ferencváros") concluded a transfer agreement (the "Transfer Agreement 2020") for the Player, and the Player subsequently concluded a transfer to Ferencváros for an agreed transfer fee of EUR 1,045,000.

11. On 23 September 2020, the Appellant sent a letter to the Respondent requesting a payment corresponding to 20% of the transfer fees paid in connection with the transfers of the Player to Lokomotiva Zagreb in 2018 and to Ferencváros in 2020.

12. On 27 October 2020, FIFA issued a letter (the "FIFA letter") to, *inter alia*, the Appellant, regarding the solidarity contribution in connection with the Player's transfer from the Respondent to Lokomotiva Zagreb. The letter included a copy of the Transfer Agreement 2018 and its provisions 2.1 to 2.3.

13. On 13 January 2021, the Appellant sent a new letter to the Respondent. The letter stated, *inter alia*, as follows:

"Based on the agreement in question and according to the explanation made on the notification dated 23/09/2020, Laçi Club has the obligation to pay an amount of €47,500 (forty seven thousand and five hundred Euros) in favor to the club "FK Apollonia".

This obligation derives from the direct benefit (in the amount of 20%) arose to the Laçi Club on the price paid by Ferencavaros TC against Lokomotiva Zagreb for the player Myrto Uzuni. The value of this benefit is part of the cartoon value paid to Laçi Club by Lokomotiva Zagreb and as a result, "FK Apollonia" has the right to claim 20% of this value".

B. Proceedings before the AFA National Dispute Resolution Chamber

14. On 15 June 2022, the Appellant submitted a claim to the AFA National Dispute Resolution Chamber (the "AFA NDRC"), requesting, *inter alia*, that the Respondent should be condemned to make a payment of EUR 47,500 to the Appellant, in accordance with the Transfer Agreement 2017.

15. On 14 November 2022, the Appellant submitted an amended request to AFA NDRC, requesting that the Respondent should be condemned to make a further payment of EUR 6,000.

16. After hearing the Parties, and after holding a meeting on 16 November 2022, the AFA NDRC issued a decision that was sent to the Parties on 31

January 2023 (the "Appealed Decision"). The award reads, *inter alia*:

"First: In the content of the transfer agreement, it has been foreseen that FC Laçi jsc transfers the player to LOKOMOTIVA ZAGREB FOOTBALL CLUB for a value of 350,000 (three hundred and fifty thousand) euros. Also, if LOKOMOTIVA ZAGREB FOOTBALL CLUB executes a transfer agreement, whereby the player will be permanently transferred to a third club, LOKOMOTIVA ZAGREB FOOTBALL CLUB is then obliged to pay to FC Laçi jsc a compensation fee at the amount of 20% (twenty percent) on gross transfer fee.

The above agreement is different from that signed between FC Apolonia jsc and FC Laçi jsc since it is expected that FC Laçi jsc transfers the player to LOKOMOTIVA ZAGREB FOOTBALL CLUB for a transfer fee of 350,000 (three hundred and fifty thousand) euros. Thus we have specifically predicted the value of the transfer fee which will be 350,000 (three hundred and fifty thousand) Euros.

In the agreement, the will of the parties regarding the fee from the resale of the player is quite obvious and here we note that the agreement only includes the transfer fee paid to the defendant by LOKOMOTIVA ZAGREB FOOTBALL CLUB for the transfer of the player.
The compensation fee, provided for in point 2.3 of the transfer agreement, has nothing to do with the transfer value, but it is a result of the new relationship created between LOKOMOTIVA ZAGREB FOOTBALL CLUB and FTC LABDARUGO ZRT, which in no way can extend its effects to the first agreement. FC Apolonia jsc's right to receive 20% of the player's transfer value cannot continue indefinitely with each transfer, but it will stop only at the first transfer (subsequent sale).

Second: From the judicial examination it was found that the contractual parties in the agreement for the transfer of the player Myrto Uzuni have provided in Article 2 that :

2.1. FC Laçi jsc agrees to pay FC Apolonia jsc the value of the card of the player Myrto Uzuni at the amount of 20,000 (twenty thousand) Euros + 20% of the value of the card that will be paid to FC Laçi jsc upon the transfer of the player to another club.

According to the above provision, FC Laçi jsc has the obligation to pay FC Apolonia jsc the amount of 20,000 Euros + 20% of the value of the card that will be paid to FC Laçi jsc upon the transfer of the player to another club.

Consequently, the moment the player was transferred from FC Laci jsc to LOKOMOTIVA ZAGREB FOOTBALL CLUB, FC Apolonia jsc was entitled to receive 20% of the transfer value.

The plaintiff's claim for benefit from the player's transfer from LOKOMOTIVA ZAGREB FOOTBALL CLUB to the HUNGARIAN CLUB FERENCVAROS TC which has generated income for FC Laci jsc, does not stand, since the agreement signed by the parties provides for the benefit that the plaintiff would only receive for the transfer of the player from FC Laçi jsc to another club and not to any other club.

The clause used by the parties (sell on clause) aims to protect the club which originally had the player (the old club), which has then transferred the player to the other club (the new club), at an unexpected increase in his value, as in the case of his transfer to a third club.

So in the case under review we are dealing with three clubs that have made two transfers, more specifically the player was transferred from FC Apolonia jsc to FC Laçi jsc and the second transfer was concluded between FC Laçi jsc and LOKOMOTIVA ZAGREB FOOTBALL CLUB.

The old club has benefited from sell on clause displayed in the agreement, since the value of the player has undergone a significant increase from 20,000 (twenty thousand) Euros to 350,000 (three hundred and fifty thousand) Euros.

The plaintiff's claim to benefit from any future transfer of the player should have been clearly stipulated as a condition in the free will agreement between the parties.

As long as such a provision has not been agreed upon between the parties, then its implementation will be impossible.

From the above mentioned, the court considers the claim by the plaintiff to be unsupported.

Lastly: From the documents presented by the parties (bank statement, payment mandate), the judging panel finds that FC Laçi jsc has paid in favor of FC Apolonia jsc the amount of 84,000 Euros, an amount which consists of 20,000 Euro fixed value(of the player's transfer from FC Apolonia jsc to FC Laçi jsc) + 64,000 Euros (from the 20% of the value of 350,000 Euros that was paid to FC Laci jsc upon the player's transfer to LOKOMOTIVA ZAGREB FOOTBALL CLUB), while according to the agreement a total of 90,000 Euros should have been paid, so there is a difference of 6,000 Euros that FC Laçi jsc had to pay the plaintiff as a corresponding value of the 20% of the price the player's transfer to LOKOMOTIVA ZAGREB FOOTBALL CLUB.

As reviewed above, NDRC has come to the conclusion that, the plaintiff's claim must be partially accepted, thus forcing the defendant FC Laçi jsc to pay the sum of 6,000 (six thousand) Euros as an unpaid sum".

17. Against this background, the AFA NDRC decided as follows:

"1. The claim must be partially accepted.

2. FC Laçi is obliged to pay the defendant (sic) *FC Apolonia jsc the sum of 6000 (six thousand) Euros, as an obligation arising from the agreement concluded between the parties for the player's transfer.*

3. The court costs at the amount of 111,000 (one hundred and eleven thousand) lek are charged in relation to the accepted and dismissed part of the decision, 85% to the plaintiff FC Apolonia jsc and 15% to the defendant FC Laçi accordingly.

4. The remaining part from the present lawsuit should be dismissed

5. An appeal against this decision can be filed to the Court of Arbitration for Sport located in Lausanne Switzerland and recognized by the AFA, within 21 days from the day when this reasoned decision will be delivered".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

18. On 10 February 2023, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS"), pursuant to Article R47 of the CAS Code of Sports-related Arbitration (2023 edition) (the "Code"), against the Appealed Decision. In its Statement of Appeal,

the Appellant requested that the dispute be referred to a sole arbitrator.

19. On 15 February 2023, the CAS Court Office notified the Statement of Appeal to the Respondent and informed the Parties that the Respondent was granted a deadline of 5 days to inform the CAS Court Office whether it agreed to the appointment of a sole arbitrator. The Respondent did not respond to the letter within the given deadline.

20. On 20 February 2023, the Appellant filed its Appeal Brief in accordance with Article R51 of the Code.

21. On 23 February 2023, the CAS Court Office informed the Parties that the Respondent was given a deadline of 20 days to submit its Answer pursuant to Article R55 of the Code.

22. On 13 March 2023, the Respondent requested that the time limit to file its Answer be fixed once the advance of costs had been paid by the Appellant.

23. On the same day, on 13 March 2023, the CAS Court Office informed the Parties that the time limit for the Respondent to file its Answer as set out in the CAS Court Office letter dated 23 February 2023 was set aside and that a new time limit would be fixed upon the Appellant's payment of the advance of costs.

24. On 17 April 2023, the CAS Court Office informed the Parties that the Appellant had paid the advance of costs, and that, pursuant to Article R55 of the Code, a deadline of 20 days was set for the Respondent to submit its Answer.

25. Also on 17 April 2023, the CAS Court Office informed the Parties that pursuant to Article R54 of the Code and on behalf of the Director General of CAS, the Arbitral Tribunal appointed to decide the present case was constituted as follows:
Sole Arbitrator: Mr Espen Auberg, Attorney-at-Law in Oslo, Norway.

26. On 5 May 2023, the Respondent submitted a letter requesting a 15-day extension of the time limit to file its Answer.

27. On 8 May 2023, the CAS Court Office invited the Appellant to comment on the Respondent's request for extension of deadline to file the Answer, by 11 May 2023.

28. On 11 May 2023, the Appellant submitted a letter whereby it objected to the Respondent's request for a 15-day extension of the time limit to file its Answer.

29. On 15 May 2023, the CAS Court Office, on behalf of the Sole Arbitrator, informed the Parties that the Respondent's request for extension of the time limit to file its Answer was partially granted, and invited the Respondent to file its Answer by 25 May 2023.

30. On 25 May 2023, the Respondent informed the CAS Court Office that it was now represented by additional counsel, and that it had requested an expert report from Mr. Iris Klosi PhD, professor at the University of Tirana, with regards to the translation filed by the Appellant, and therefore requested a 10-day extension of the time limit to file its Answer.

31. On 29 May 2023, the Appellant objected to the Respondent's request a for a 10-day extension of the time limit to file its Answer.

32. On 31 May 2023, the CAS Court Office, on behalf of the Sole Arbitrator, informed the Parties that the Respondent's request for extension of the time limit to file its Answer was partially granted, and that the Respondent was invited to file its Answer by 2 June 2023.

33. On 2 June 2023, the Respondent filed an Answer in accordance with Article R55 of the Code.

34. By CAS Court Office letter of 5 June 2023, the Parties were requested to inform the CAS Court Office whether they preferred that a hearing should be held or if the matter should be decided based on the written submissions, and whether they requested a case management conference to be held.

35. On 12 June 2023, the Appellant informed the CAS Court Office that it preferred that the matter be decided on the written submissions and objected to the Respondent's request for examination of witnesses. On the same day, the Respondent requested a hearing to be held.

36. On 24 July 2023, following consultation with the Parties, on behalf of the Sole Arbitrator, the CAS Court Office confirmed that a hearing would be held on 26 September 2023, in Tirana, Albania.

37. On 3 August 2023, the CAS Court Office informed the Parties that the Appellant's objection to the examination of the witnesses offered by the Respondent was dismissed. In the same letter the Appellant was invited to clarify, by 8 August 2023, whether it agreed with the Respondent's position that CAS should apply the various regulations of FIFA, subsidiarily Swiss law, and that Albanian national regulations and Albanian law shall be applicable only to matters which are not addressed in FIFA Regulations.

38. On 7 August 2023, the Appellant submitted a letter by which it affirmed that the applicable law to the case must be the regulations of FIFA, subsidiary Swiss law, and the Albanian national regulations and that Albanian law should be applicable only to matters which are not addressed in FIFA Regulations.

39. On the same day, on 7 August 2023, the Appellant submitted its list of hearing participants, and a request to allow former official of the Appellant, Mr. Kamber Memallaj, to be examined as witness.

40. On 8 August 2023, the Respondent submitted its lists of hearing participants. In its submission, the Respondent objected to the witness listed by the Appellant arguing that the witness was not identified in the Appeal Brief, pursuant to Article R51 of the Code.

41. On 8 August 2023, the CAS Court Office informed the Parties of the Sole Arbitrator's decision that the Appellant's request to call Mr. Kamber Memallaj as witness was dismissed. In the same letter the CAS Court Office issued an Order of Procedure, which

was duly signed and returned by the Appellant on 14 August 2023, and by the Respondent on 15 August 2023.

42. On 23 August 2023, the CAS Court Office informed the Parties that with respect to the Respondent's objections to the witness listed by the Appellant, the Sole Arbitrator had decided to admit the testimonies of the witnesses.

43. On 20 September 2023, after consultation with the Parties, the CAS Court Office sent the Parties a hearing schedule, proposed by the Sole Arbitrator.

44. On 26 September 2023, the Respondent submitted a contract concluded on 7 January 2019 between the Appellant and Albanian club Skënderbeu, and requested that the contract should be admitted to the case file. In addition to the contract, drafted in Albanian, a free English translation of the contract was submitted.

45. On 26 September 2023, a hearing was held in Tirana, Albania. In addition to the Sole Arbitrator, the following persons attended the hearing:

    For the Appellant:
    Ms. Herjeta Deliaj, Counsel
    Ms. Erilda Papagjoni, Counsel
    Mr. Romarjo Kurti, Counsel
    Ms. Eralda Sanxhaku, Interpreter

    For the Respondent:
    Mr. Lorin Burba, Counsel
    Mr. Alfonso Leon Lleó, Counsel
    Mr. Gytis Rackauskas, Counsel
    Mr. Franci Bode, Witness
    Mr. Pashk Laska, Witness.

46. The Sole Arbitrator heard witness statements from Mr. Pashk Laska, president of the Respondent and Mr. Franci Bode, who acted as intermediary in connection with the transfer of the Player that led to the Transfer Agreement 2017. The witnesses were invited by the Sole Arbitrator to tell the truth subject to the sanction of perjury under Swiss law. The Parties and the Sole Arbitrator had full opportunity to examine and cross-examine the Player.

47. The Parties were given the full opportunity to present their cases, submit their arguments in closing statements and to answer the questions posed by the Sole Arbitrator.

48. Before the hearing was concluded, all Parties expressly stated that they had no objection to the procedure adopted by the Sole Arbitrator and that their right to be heard had been respected.

49. On 27 September 2023, the CAS Court Office invited the Appellant to indicate whether it accepted the evidence filed by the Respondent on 26 September 2023.

50. On 29 September 2023, the Appellant submitted a letter, and seven other documents. In the letter it objected to the evidence filed by the Respondent on 26 September 2023 and claimed, *inter alia*, that it had only been given the opportunity to review the new evidence during the hearing, and that the new evidence had several serious translation errors. Further, the Appellant requested that if the Sole Arbitrator to accept the new evidence filed by the Respondent, it should also accept to include new evidences filed by the Appellant.

51. On 23 October 2023, the Parties were informed by the CAS Court Office that the Sole Arbitrator had dismissed the Appellant's request submitted on 26 September 2023 to file new evidence as well as the Respondent's request submitted on 29 September 2023 to file new evidence.

IV. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

52. This section of the Award does not contain an exhaustive list of the Parties' contentions. Its aim is 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 of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the Award or in the discussion of the claims below.

A. The Appellant's Submissions

53. The Appellant's submissions, in essence, may be summarized as follows:

- The Transfer Agreement 2017 constitutes a consensual, bilateral legal action, with a binding payment, performed in a notarized form, with the purpose of passing/transferring the right, from the Appellant to the Respondent, for the latter to enter into an employment agreement with the Player.

- This transfer was made with a compensation in return, defined in Article 2.1 and 2.2 of the Transfer Agreement 2017 which provided that 20% of the "card's gross value" will be paid in the case of the Player's transfer to another club.

- The Parties to the Transfer Agreement 2017 were represented by their respective administrators, who expressed their free will to draft a contract for the transfer of the Player. These administrators have been involved in the football sector for several years. It is a known fact in Albania from the daily communication of football professionals, that the expression *"card value"* is used to refer to the concept of a player's transfer price. The use of this expression has acquired the power of a *"commercial custom"*, since it is used continuously, repeatedly and for a long period of time, from almost all entities and entrepreneurs of the football sector. The Parties have, when drafting the Transfer Agreement 2017, when referring to the concept "the player's transfer price", used the expression *"card value"* which they, massively used in football environments.

- As established, in order to determine the price for the Player's transfer to the Respondent, a fixed amount of EUR 20,000 and a sell-on clause were agreed, according to which a percentage is applied on the Player's future transfer price.

- The inclusion of a sell-on clause has become a very widespread practice in the case of transfers of players with promising potential. When the value of a talented young player is expected to increase in the future, the selling club will aim to *"keep a*

stake in the economic rights" of the player.

- In such transfers, the selling club is initially interested in accepting a fixed, relatively low transfer fee, such as the initial fee of EUR 20,000, maintaining its obvious expectations on the sell-on clause, as it gives the previous club the opportunity of benefiting from a subsequent increase in the player's market value. This also brings significant benefits to the new club, as was the case of the Respondent, because initially the Respondent paid a relatively low transfer fee, EUR 20,000 to the Appellant, on the condition that in the case of the Player's transfer to another club, it had to pay the Appellant 20% of the subsequent transfer price.

- Following the transfer, the fixed amount of EUR 20,000 was paid as agreed on in the signed agreement.

- When the Player was transferred from the Respondent to Lokomotiva Zagreb, the transfer fee was, as established in the Transfer Agreement 2018, as follows:

    a. EUR 350,000 plus
    b. 20% of the transfer value, in case of the Player's transfer from Lokomotiva Zagreb to a third club.

- The view that litra b was a part of the total transfer fee is supported by the fact that FIFA referred to this part of the contract when establishing the solidarity contribution. This proves without any doubt that the price obtainable from the Appellant in the case of the Player's transfer from Lokomotiva Zagreb to another club, consists of a fixed sum of EUR 350,000 and 20% of the price of the subsequent transfer of the Player.

- Next, on 7 August 2020, the transfer of the Player from Lokomotiva Zagreb to the Ferencváros was registered in FIFA TMS, with a transfer price of EUR 1,187,500, as shown in the Transfer Agreement 2020.

- The amount the Respondent is obliged to pay the Appellant, in accordance with the Transfer Agreement 2017, is EUR 137,500, calculated as follows:

    1) EUR 20,000 – corresponding to the fixed amount.

    2) EUR 70,000 – corresponding to 20% of the transfer fee of EUR 350,000 paid by Lokomotiva Zagreb to the Respondent in accordance with the Transfer Agreement 2018.

    3) EUR 47,500 – corresponding to 20% of the transfer fee received by the Respondent from Lokomotiva Zagreb, *i.e.* 20 % of 20% of the total transfer fee of EUR 1,187,500 paid by Ferencváros in accordance with the Transfer Agreement 2020.

- From the total amount of EUR 137,500 the Respondent owes the Appellant, the Respondent has paid as follows:

1. EUR 20,000 - corresponding to the fixed amount.

2. EUR 64,000 as part of the total amount of EUR 70,000 – corresponding to 20% of the transfer fee of EUR 350,000 paid by Lokomotiva Zagreb to the Respondent in accordance with the Transfer Agreement 2018. EUR 6,000 is unpaid.
3. EUR 47,500 remains unpaid - corresponding to 20% of the transfer fee received by the Respondent from Lokomotiva Zagreb, *i.e.* 20 % of 20% of the total transfer fee of EUR 1,187,500 paid by Ferencváros in accordance with the Transfer Agreement 2020.

- The total outstanding amount is EUR 53,500.

- The legal criteria used to interpret contracts are divided into:

  a. the subjective interpretation criteria, based on the seek for the true and common intention of the parties;

  b. the objective interpretation criteria, based on the understanding of contractual good faith or on other objective elements.

- As far as subjective interpretation is concerned, it can be said that the discovery of the true meaning, and of the common intention of the parties, starts from the principle that, in the interpretation of the contract, it is necessary to investigate what was the common intention of the parties and never be limited to the literal meaning of words used, which, if taken separately, could give the contract a different purpose from that agreed upon by the parties. Such a view is reflected in Article 681 of the Albanian Civil Code, which provides as follows:

  "While interpreting a contract, there needs to be explained which was the real and joint intention of the parties, while not focusing on the literal meaning of the words, and assessing their conduct in general, prior to and following the conclusion of the contract".

- Further, Article 682 of the Albanian Civil Code provides as follows:

  "The conditions of the contract shall be interpreted in their relationships, while assigning to each of them the meaning stemming from the entirety of the act. The contract shall be interpreted by the parties in good faith".

- Determining the true intention of the parties is an intellectual operation, but not independent of the criteria set by the legislator.

- For this reason, the law has provided the historical criterion, according to which it is necessary to evaluate the behaviour of the parties before and after the conclusion of the contract, and at the same time the logical criterion, which means that each of the conditions or clauses in the contract are interpreted by means of other special conditions or clauses, giving each of them the meaning that emerges from the entire contract.

- In the case of the contract under review, the intention of the Parties was in the sense of the full reward that would benefit the Appellant with the transfer of the Player to the Respondent, would be based on the full price that would benefit the Respondent from the subsequent transfer of the Player.

- The common and true goal of the Parties when concluding this contract was that, in exchange for the transfer of the Player to the Respondent, the Appellant would benefit, in addition to the fixed amount of EUR 20,000, an extra 20% of the amount that the Respondent would receive, from the subsequent transfer of the Player.

- The Appellant has claimed only the amount derived from the formula negotiated in the contract, which is conditional for the Player's transfer to another club, according to the amount that will be received by the other club.

- CAS jurisprudence regarding the content and meaning of sell-on clauses support the validity of the Appellant's claim.

- In transfer agreements, the clause for the further transfer fee (sell-on clause) is included in the provision of the transfer fee and in general, the parties share the amount that will be paid by the new club, in two components, *i.e.* in a fixed amount payable at the time of the player's transfer to the new club, and a variable amount payable to the old club in case of a subsequent transfer of the player from the new club to a third club, exactly as is provided for in the contract between the Parties, subject to review, for the transfer of the Player.

- On these grounds, the Appellant made the following requests for relief:

"1.Finding the decision no. 30 of 16 November 2022 of the ALBANIAN FOOTBALL ASSOCIATION partially unfounded, in the part that has not accepted the full amount of the obligation that the Respondent must pay to the Appellant;

2. The obligation of the Respondent to pay the Appellant the total sum of 53,500 Euros, based on the transfer Agreement, dated 24/08/2017, No. 5698 Rep., No. 2828 Col., concluded between the parties

3. The Respondent to bear all the costs incurred with the present procedure".

B. The Respondent's Submissions

54. The Respondent's submissions, in essence, may be summarized as follows:

- The present dispute in essence is very simple and straightforward, it concerns the interpretation and application of the provisions of the Transfer Agreement 2017, governing the rights and obligations of the Appellant and the Respondent in relation to the transfer of the Player from the Appellant to the Respondent.

- The Appellant is not entitled to receive any part of the payments

obtained by the Respondent as sell-on clause from Lokomotiva Zagreb after the Player's transfer from Lokomotiva Zagreb to Ferencváros, as this was simply never agreed by the Parties and would contradict the mutual intention of the Parties reflected in the Transfer Agreement 2017.

- On 14 November 2022, more than four years after the Player's transfer from the Respondent to Lokomotiva Zagreb, the Appellant suddenly filed a new Request for relief against the Respondent, claiming that the Respondent allegedly did not pay EUR 6,000 out of the EUR 70,000, which is simply not true.

- In accordance with the provisions of the Transfer Agreement 2017, the Respondent only had the obligation to pay *"20% of the value of the card to be paid to LAÇI Club upon the transfer of the player to another club"*, *i.e.* 20% of EUR 350,000, which shall be considered the value of the Player's card at the time of the conclusion of the Transfer Agreement 2018.

- The Appellant did not derive any rights towards the Respondent in relation to the subsequent payments, received by the Respondent from Lokomotiva Zagreb as a "sell-on" fee agreed in the Transfer Agreement 2018, as they originated out of the subsequent value of the Player's card at the time of the conclusion of the Transfer Agreement 2020.

- Before signing the Transfer Agreement 2018 the Appellant agreed that it shall not be entitled to any optional payments, receivable by the Respondent from Lokomotiva Zagreb, based on the "sell-on" fee agreed in the Transfer Agreement 2018, as it corresponded to the initial agreement by the Parties. The same understanding was further confirmed by later behaviour of the Appellant, as it never requested KF Laçi for a copy of the Second Transfer Agreement.

- The Appellant has failed to specify a single ground that could somehow entitle the Appellant to request part of the payments received by the Respondent from Lokomotiva Zagreb as a sell-on fee, based on the Transfer Agreement 2018.

- The Parties mutually agreed that after the conclusion of the Transfer Agreement 2017, the Appellant shall be entitled to receive from the Respondent:

  (i) the value of the Player's card at the time of the conclusion of the Transfer Agreement 2017, corresponding to the amount of EUR 20,000 and

  (ii) 20 % of the Player's card gross value at the time of the conclusion of the subsequent transfer agreement, which should have been paid on the date of the payment of the Player's card value from the other club.

- Whereas the Player's card gross value at the time of the conclusion of the Transfer Agreement 2018 corresponded to the amount of

EUR 350,000, as agreed by the Respondent and Lokomotiva Zagreb, the Appellant was only entitled to receive 20% of the said amount, *i.e.* EUR 70,000. As a result, the Appellant was not entitled to request any further payments from the Respondent.

- All the payments receivable by the Respondent as a "sell-on" fee from Lokomotiva Zagreb are derived out of the Player's card gross value at the time of the conclusion of the Transfer Agreement 2020.

- Contracts shall be interpreted in accordance with the proven intention of the parties which may deviate from the literal wording of a contract, as it is established at the Article 18 of the Swiss Code of Obligations ("SCO"). The goal of the interpretation of a term or a rule in a contract is to identify the actual and mutual intention of the contracting parties. If this actual and mutual intention cannot be established, the court must decide based on the assumed mutual intention of the parties by applying the so called "Vertrauensprinzip" (*"bona fide"* or "good faith principle").

- This interpretation will first take into account the ordinary sense one can give to the expressions used by the parties and how they could reasonably understand them. The behaviour of the parties, their respective interest in the contract and its goal can also be taken into account as complementary means of interpretation. By seeking the ordinary sense given to the expressions used by the parties, the real intention of the parties must be interpreted based on the principle of confidence. This principle implies that a party's declaration must be given the sense its counterparty can give to it in good faith.

- Therefore the agreement must be interpretated in accordance with the actual and mutual intention of the contracting parties. If such actual and mutual intention cannot be identified, the contract shall be interpreted against the person who drafted it.

- Even in case the terms used in a contract have a clear literal meaning, the adjudicatory body must assess whether or not the parties truly wished to attribute such meaning to the terms used.

- In the event that a sell-on clause is not clear, it is important to take note of the principle *"in dubio contra stipulatorem"*, which establishes that, in case of ambiguity or contradiction, unclear clauses shall be interpreted to the detriment of the party that drafted them, which also clearly follows from leading and consistent jurisprudence of the CAS. On the other hand, the CAS Panel does not need to look for the true intention of the parties at the moment of signing, when these are reflected in the clear wording of a contract.

- Whereas the Transfer Agreement 2017 was drafted by the Appellant, the Appellant could not now benefit from an allegedly vague wording of the contract. Even if certain

provisions of the Transfer Agreement 2017 were considered not expressly clear, the negative consequences should fall on the Appellant. As a result, all the inconsistencies, if any, shall be interpreted in favor of the Respondent.

- The Respondent considered the provisions of the Transfer Agreement 2017 clear. Following the mutual agreement of the Parties it was agreed that future sell-on payments to Apollonia in case of a subsequent transfer of the Player to the third club shall be calculated exclusively based on the Player's card gross value at the time of the conclusion of the Transfer Agreement 2018.

- Whereas in the matter at hand, the Player's card gross value at the time of the conclusion of the Transfer Agreement 2018 corresponded to the amount of EUR 350,000, as agreed by the Respondent and Lokomotiva Zagreb, the Appellant was only entitled to receive 20% of said amount, *i.e.* EUR 70,000, which was duly paid by the Respondent.

- Whereas the Parties mutually agreed on the sell-on fee calculation rules, it could not be extended to the Player's card value at the time of the conclusion of the Transfer Agreement 2020, as it would be contrary to the initial intention of the Parties and accordingly in violation with the principle of *pacta sunt servanda*.

- The Appellant's reference to the FIFA letter dated 27 October 2020 in relation to the solidarity contribution, shall not anyhow support the false interpretation of the Appellant. Firstly, Article 1 of Annex 5 of FIFA's Regulations on the Status and Transfer of Players ("FIFA RSTP") uses the clear definition of "any compensation" for the basis of calculation of the solidarity compensation fee, which explains why FIFA refers to the full article of the agreement. To the contrary, the Transfer Agreement 2017 uses the term *"the card's gross value paid in the case of the player's transfer to another club, on the date of execution of the payment by the other club"*, which should be considered as the value at the time of the subsequent transfer.

- Apart from that the Appellant did not provide any evidence that could prove the amount of the solidarity contribution received from Lokomotiva Zagreb, based on the Transfer Agreement 2018.

- The benefit of the subsequent transfer from KF Laçi to Lokomotiva Zagreb was shared with the Appellant after the Respondent paid 20% of the corresponding transfer fee of EUR 350,000. Accordingly, the benefit deriving out of the later transfer from Lokomotiva Zagreb to Ferencváros does not fall under the application of the sell-on clause agreed in the Transfer Agreement 2017, as it was not the intended purpose of the Parties, as correctly decided in the Appealed Decision.

- The claim for the allegedly missing part of 6,000 EUR was submitted in

violation of the statute of limitations, provided within Article 25(c) of the FIFA RSTP. Pursuant to Article 25(5) of the FIFA RSTP, FIFA's Players' Status Committee, the Dispute Resolution Chamber, the single judge or the DRC judge shall not hear any case subject to these regulations if more than two years have elapsed since the event giving rise to the dispute.

- The Appellant only filed the new request for relief against the Respondent claiming that the latter allegedly did not pay EUR 6,000 out of the EUR 70,000 on 14 November 2022, *i.e.* more than four years after the Player's transfer from the Respondent to Lokomotiva Zagreb.

- The Appellant never claimed having not received the full payment of EUR 70,000. Such request was not included in previous submissions or communication with the Appellant.

- In view of all the above, it shall be concluded that the Appellant's claim for the payment of allegedly missing compensation in the amount of EUR 6,000 must have been declared barred by the statute of limitations, in application of Article 25 para. 5 of the FIFA RSTP and therefore should have been declared inadmissible by the AFA NDRC.

- On this basis, the Respondent made the following requests for relief:

"1.To dismiss the Appeal filled (sic) by Apollonia against KF Laçi with respect to the Decision passed by the National Dispute Resolution Chamber of the Albanian Football Association on the 16th of November 2022 with the reference No. 4, communicated to the Parties with grounds on the 31st of January 2023;

2. To confirm the Decision passed by the National Dispute Resolution Chamber of the Albanian Football Association on the 16th of November 2022 with the reference No. 4, communicated to the Parties with grounds on the 31st of January 2023;

3. To condemn the Appellant to the payment of the whole CAS administration cost and the Arbitrator fees; and

4. To fix a sum of 10,000 CHF to be paid by the Appellant to the Respondent to help the payment of its legal fees covering the costs of its legal representation in front of the Court of Arbitration for Sport".

V. JURISDICTION

55. The jurisdiction of CAS derives from Article R47 of the Code, which reads:
"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".

56. Further, Article 71 of the AFA Statutes reads as follows:

"Article 71 - Arbitration
1. Disputes within AFA or disputes which affect AFA members, leagues, league members, clubs, club members, players and

officials may be appealed at the last instance (i. e. after exhaustion of all internal remedies of AFA) at CAS, which will definitely resolve the disputes without the involvement of the regular jurisdiction courts, until an independent sports arbitration tribunal becomes functional and recognized by FIFA and UEFA".

57. Furthermore, Article 29 of the Regulations of the National Dispute Resolution Chamber of AFA provides as follows:

"Article 29 - Appeal
29.1 As a last resort, the award issued by the NDRC can be appealed at the Court of Arbitration for Sport, CAS Lausanne, Switzerland, which is recognized by AFA".

58. The jurisdiction of CAS is confirmed by the Order of Procedure duly signed by the Appellant and the Respondent.

59. It follows that CAS has jurisdiction to adjudicate and decide on the present dispute.

VI. ADMISSIBILITY

60. Pursuant to Article R49 of the Code, the time limit for submitting a Statement of Appeal is 21 days from the receipt of the decision appealed against. The Statement of Appeal was filed by the Appellant on 10 February 2023, *i.e.* 11 days after the AFA NDRC communicated the Appealed Decision to the Parties on 31 January 2023, hence within the deadline of 21 days.

61. The appeal complied with all other requirements of Article R48 of the Code, including the payment of the CAS Court Office fee.

62. The Statement of Appeal was filed in due form and time and is considered admissible.

VII. APPLICABLE LAW

63. Article R58 of the Code provides as follows:

"Law Applicable to the merits.
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".

64. The Sole Arbitrator notes that the present dispute arises from the Parties' rights and obligations stipulated in the Transfer Agreement. The Transfer Agreement does not specify which regulations shall be applicable to disputes arising from it.

65. However, in their submissions before CAS, the Parties have stated that they agree that CAS should apply the various regulations of FIFA, subsidiarily Swiss law, and that Albanian national regulations and Albanian law shall be applicable only to matters which are not addressed in the FIFA Regulations or in Swiss law.

66. Applying these principles to the present matter, the dispute shall be decided according to the rules of law chosen by the Parties, *i.e.* the various regulations of FIFA, subsidiarily Swiss law. Albanian national regulations and Albanian law shall be applicable only to

matters which are not addressed in the FIFA Regulations or in Swiss law.

VIII. PRELIMINARY ISSUES

A. The Appellant's request to exclude the testimonies of witnesses and expert offered by the Respondent

67. On 12 June 2023, the Appellant informed the CAS Court Office that it objected to the Respondent's request for examination of witnesses and expert as the Respondent had failed to include a summary of the expected testimonies.

68. The Sole Arbitrator notes that Article R55 of the Code stipulates that a respondent shall, when filing an answer, include the names of witnesses it intends to call, and include a brief summary of their expected testimony. This obligation to include a brief summary of expected testimony does not apply to experts a respondent intends to call. For experts it is sufficient to state their area of expertise.

69. The Sole Arbitrator further notes that the Respondent, in its Answer, had included brief summaries of expected testimonies of the witnesses and the expert specified in the Answer. As such the requirements set out in Article R55 of the Code are fulfilled.

70. Against this background, the Sole Arbitrator concluded that the witnesses and the expert called by the Respondent should be allowed to testify during the hearing.

B. The Appellant's request to call a witness

71. In a letter submitted on 5 August 2023, the Appellant requested that it should be given the right to call Mr. Kamber Memallaj to be examined as witness.

72. In accordance with Article R56 of the Code, after the submission of the appeal brief and of the answer, the parties may only be authorized to specify further evidence on which they intend to rely, if the parties agree or the Sole Arbitrator orders so on the basis of exceptional circumstances.

73. On 8 August 2023, the Respondent submitted a letter by which it objected to the Appellant's request to present Mr. Kamber Memallaj as witness.

74. Consequently, the Appellant's request could only be granted on the basis of exceptional circumstances.

75. Having taken into consideration the Parties' positions on the matter, the Sole Arbitrator found that the Appellant had failed to establish exceptional circumstances based on which its late request to call Mr. Kamber Memallaj as witness would have to be granted. In particular, the Sole Arbitrator cannot see why the Appellant could not have raised such request in its Appeal Brief.

76. Against this background, the Appellant's request to call Mr. Kamber Memallaj as witness was dismissed.

C. The Respondent's request to file new evidence

77. On the same day as the hearing, *i.e.* on 26 September 2023, the Respondent submitted a contract, concluded on 7

January 2019 between the Appellant and the Albanian club Skënderbeu, and requested that the contract should be admitted to the case file. Together with such contract, drafted in Albanian, was enclosed a free English translation.

78. On 29 September 2023, the Appellant objected to the Respondent's request to admit the new evidence. Consequently, pursuant to Article R56 of the Code, the new evidence filed by the Respondent may only be admitted on the basis of exceptional circumstances.

79. The Respondent argued that the new evidence should be admitted as it only received the evidence the day before the hearing. In this regard, the Sole Arbitrator notes that in accordance with CAS case law, *e.g.* CAS 2015/A/4220 (paragraph 65), if the evidence in question existed already before the time limit to file the evidence but was discovered thereafter, this would constitute an exceptional circumstance only if the said evidence could not have reasonably been discovered and produced in time for the filing.

80. The Sole Arbitrator notes that the contract in question is dated 7 January 2019, *i.e.* indeed well before the Respondent's time limit to file the Answer. Although the new evidence was allegedly sent to the Respondent on the day before the hearing, on 25 September 2023, the Appellant's claim before the AFA NDRC was already filed on 15 June 2022, which indicates that the Respondent had sufficient time to discover and produce the evidence before the deadline to file its Answer on 2 June 2023.

81. Notwithstanding the above, the Sole Arbitrator notes that the new evidence was not accompanied with a certified English translation, and that the Appellant pointed out that the free English translation provided by the Respondent contained several important errors. The lack of a certified or undisputed translation, considered in connection with the Appellant's limited possibility to rebut the content of the new evidence due to the late filing, which might have given unfair advantages to the Respondent, indicates that the presented evidence cannot be taken into consideration.

82. Having taken into consideration the Parties' arguments, the Sole Arbitrator finds that the Respondent has failed to establish exceptional circumstances based on which the evidence filed on 26 September 2023 should have been admitted to the case file.

83. Against this background, the Respondent's request to file new evidence, filed on 26 September 2023, was dismissed and the Parties were informed accordingly on 23 October 2023.

IX. MERITS

A. Preamble

84. As a starting point, the Sole Arbitrator notes that, in accordance with Article R57 paragraph 1 of the Code, the Sole Arbitrator has *"full power to review the facts and the law"*, and that CAS appeals arbitration procedures allow for a *de novo* review of the merits of the case.

85. The Sole Arbitrator notes that the case concerns a dispute over payment in

accordance with a transfer agreement. The factual circumstances of this case are in essence undisputed by the Parties.

86. The Parties agree that the Appellant was entitled to a payment of EUR 20,000, in accordance with Transfer Agreement 2017, Article 2.2.3 to 2.2.5, and that it was, in accordance with Transfer Agreement 2018, Article 2.1 and 2.2.6, entitled to a payment of EUR 70,000, corresponding to 20% of the transfer fee of EUR 350,000 paid by Lokomotiva Zagreb to the Respondent in connection with the Player's transfer to Lokomotiva Zagreb.

87. However, the Parties disagree on two main issues. Firstly, the Parties disagree on whether the sell-on clause stipulated in Article 2.1 *in fine* and Article 2.6 of the Transfer Agreement 2017 applies to the Respondent's revenues from a sell-on clause agreed in the Transfer Agreement 2018. Secondly, the Parties disagree on whether the Appellant is entitled to a remaining amount of EUR 6,000 following the Player's transfer from the Respondent to Lokomotiva Zagreb in 2018.

88. With regards to the Respondent's claim that the Appellant has agreed that it shall not be entitled to any optional payments, receivable by the Respondent from Lokomotiva Zagreb, based on the "sell-on" fee agreed in the Transfer Agreement 2018, the Sole Arbitrator notes that no evidence has been adduced by the Respondent to establish that the Appellant agreed to such terms. Further, the Sole Arbitrator finds that the Appellant's behaviour during the transfer of the Player in 2018 cannot be considered as conveying an understanding that it had accepted that it was not entitled to further payments, should the Respondent in the future receive further payments originating from the Transfer Agreement 2018. Accordingly, the Respondent's argument in this regard is dismissed.

89. Consequently, based on the circumstances of the case and its established facts, the Sole Arbitrator observes that the main issues to be resolved are the following:
i. Does the Transfer Agreement 2017 entitle the Appellant to 20% only of a fixed transfer fee paid to the Appellant in connection with the Player's transfer to another club, or does it also entitle the Appellant to 20% all of the Respondent's revenues from the sell-on clause agreed in the Transfer Agreement 2018 between the Respondent and Lokomotiva Zagreb?
ii. Is the Appellant entitled to EUR 6,000 following the Player's transfer from the Respondent to Lokomotiva Zagreb in 2018?

B. The extent of the sell-on clause

90. The Sole Arbitrator notes that the concept of sell-on clauses in transfer agreements between football clubs seems to be rather common, which is illustrated by the fact that such sell-on clauses were included in two consecutive transfer agreements involving the Player, *i.e.* in the Transfer Agreement 2017 and in the Transfer Agreement 2018.

91. Whether the sell-on clause stipulated in Transfer Agreement 2017 entitles the Appellant to 20% of the Respondent's revenues from the sell-on clause agreed in the Transfer Agreement 2018 must

primarily be decided based upon an interpretation of the sell-on clause stipulated in Transfer Agreement 2017.

92. Article 18 paragraph 1 of the SCO provides as follows regarding interpretation of contracts:
"When 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 way of disguising the true nature of the agreement".

93. Furthermore, as held by the Panel in CAS 2005/A/871, the interpretation of a contract, in accordance with Article 18 paragraph 1 of SCO, shall take into account as follows (paragraph 4.30):

"the parties' common intention must prevail on the wording of their contract. If this common intention cannot be determined with certainty based on the wording, the judge must examine and interpret the formal agreement between the parties in order to define their subjective common intention (WINIGER B., Commentaire Romand – CO I, Basel 2003, n. 18-20 ad Art. 18 CO). This interpretation will first take into account the ordinary sense one can give to the expressions used by the parties and how they could reasonably understand them (WINIGER B., op. cit., n. 26 ad art. 18 CO; WIEGAND W., Obligationenrecht I, Basel 2003, n. 19 ad art. 18 CO). The behaviour of the parties, their respective interest in the contract and its goal can also be taken into account as complementary means of interpretation (WINIGER B., op. cit., n. 33, 37 and 134 ad art. 18 CO; WIEGAND W., op. cit., n. 29 and 30 ad art. 18 CO)" (CAS 2005/A/871, pg. 19, para. 4.29).

By seeking the ordinary sense given to the expressions used by the parties, the real intention of the parties must – according to the jurisprudence of the Swiss Federal Court – be interpreted based on the principle of confidence. This principle implies that a party's declaration must be given the sense its counterparty can give to it in good faith ('Treu und Glauben': WIEGAND B., op. cit., n. 35 ad art. 18 CO), based on its wording, the context and the concrete circumstances in which it was expressed (ATF 124 III 165, 168, consid. 3a; 119 II 449, 451, consid. 3a). Unclear declarations or wordings in a contract will be interpreted against the party that drafted the contract (ATF 124III 155, 158, consid. 1b): It is of the responsibility of the author of the contract to choose its formulation with adequate precision (In dubio contra stipulatorem – WINIGER B., op. cit., n. 50 ad 18 CO). Moreover, the interpretation must – as far as possible – stick to the legal solutions under Swiss law (ATF 126 III 388, 391, consid. 9d), under which the accrued protection of the weakest party (CAS 2005/A/871, pg. 19, para. 4.30)".

94. The principles of interpretation in accordance with Article 18 paragraph 1 of the SCO as held by the panel in the abovementioned case have been confirmed by numerous CAS panels since, hereunder CAS 2021/A/7909 where the sole arbitrator stated as follows:

"the interpretation of a contract in accordance with Article 18.1 Swiss CO aims at assessing the intention the parties had when they concluded the contract. In determining the intention of the parties it is necessary to look first to the words actually used or the conduct engaged in. However, the investigation is not to be limited to those words or the conduct even if they appear to give a clear answer to the question. In order to go beyond the apparent meaning of the words or the conduct by the parties, due consideration is to be given to all relevant circumstances of the

case. This includes the negotiation, any subsequent conduct of the parties and usages".

95. Taking these principles into account, the extent of the sell-on clause stipulated in the Transfer Agreement 2017 must primarily be determined considering the *"real common intention of the parties"* pursuant to Article 18 paragraph 1 of the SCO. When determining the real intention of the parties, all relevant circumstances of the case may be taken into account, hereunder the parties' subsequent conduct.

96. The Sole Arbitrator notes that the sell-on clause in Transfer Agreement 2017 states that the Respondent agrees to pay the Respondent a fixed transfer fee of EUR 20,000 and 20% of the *"value of the card"* if the Player transfers to another club.

97. Based on the Parties' submissions and positions expressed during the hearing, it is clear that the expression *"value of the card"*, used in the Transfer Agreement 2017, refers to the concept of a player's transfer fee. Consequently, the Transfer Agreement 2017 entitles the Appellant to 20% of the transfer fee that is paid to the Respondent when the Player transfers to another club. In this regard, the Sole Arbitrator notes that the Parties do not agree if the expression *"value of the card"* refers solely to a fixed transfer fee, or if it also includes fees received in relation to *inter alia* sell-on clauses.

98. Accordingly, the central issue in the case under scrutiny is if the real intention of the Parties, when agreeing on the transfer of the Player, was that the Appellant should be entitled to 20% only of a fixed transfer fee paid to the Appellant in connection with the Player's transfer to another club, or if the Appellant also should be entitled to 20% of all other fees received by the Respondent in relation to the Player's transfer to another club.

99. Having taken into account the Parties' positions, the Sole Arbitrator concludes that the Parties' *real common intention*, with regards to whether the Appellant should be entitled to 20% only of a fixed transfer fee paid to the Appellant in connection with the Player's transfer to another club, or if the Appellant also should be entitled to 20% of all fees received by the Respondent in relation to the Player's transfer to another club, cannot be established.

100. As held by the panel in CAS 2020/A/6861 (paragraph 106), when the real common intention of the parties cannot be established, the real intention of the parties has to be analysed according to the requirements of good faith, and in such interpretation the emphasis will be on how a reasonable person would have understood a declaration.

101. With respect to the Appellant's claim that the letter issued by FIFA on 27 October 2020 regarding solidarity contribution, which included a copy of the Transfer Agreement 2018 and its provisions 2.1, 2.2. and 2.3, proves that the Appellant was entitled to 20% of all fees received by the Respondent in relation to the Player's transfer to another club, the Sole Arbitrator notes that the FIFA letter concerns solidarity contribution, which, in accordance with FIFA RSTP Annex 5 Article 1 states that, in essence, clubs involved in a

player's training are entitled to 5 % of any compensation paid within a scope of a transfer. The relevant wording of FIFA RSTP is as such different from the wording in the Transfer Agreement 2017, and the Sole Arbitrator holds that the FIFA letter does not contribute to shed light on whether the Transfer Agreement 2017 entitles the Appellant to 20% of all fees received by the Respondent in relation to the Player's transfer to another club.

102. With regards to the Transfer Agreement 2018, concluded between the Respondent and Lokomotiva Zagreb on 31 August 2018, the Sole Arbitrator notes that the heading of chapter 2 in that agreement is entitled *"Transfer price and payment terms"*. Whilst paragraph 2.1 of the contract regulates the fixed transfer fee and payment schedule, paragraph 2.3 of the contract is a sell-on clause, regulating the Respondent's right to 20% of a transfer fee if the Player is sold from Lokomotiva Zagreb to a third club.

103. The fact that the sell-on clause is included in the chapter entitled *"Transfer price and payment terms"* suggests that the parties to the Transfer Agreement 2018, hereunder the Respondent, have considered that the sell-on clause in this agreement is a part of the total transfer price, which again indicates that the Respondent's revenues from the sell-on clause in the Transfer Agreement 2018 shall be taken into account when establishing the total fee to be paid by the Respondent to the Appellant as a part of the sell-on clause stipulated in the Transfer Agreement 2017.

104. The concept of sell-on clauses has been considered by CAS on numerous occasions. In CAS 2010/A/2098, the panel stated as follows (paragraph 20):

"The Sell-On Clause contains a well-known mechanism in the world of professional football: its purpose is to "protect" a club (the "old club") transferring a player to another club (the "new club") against an unexpected increase, after the transfer, in the market value of the player's services; therefore, the old club receives an additional payment in the event the player is "sold" from the new club to a third club for an amount higher than that one paid by the new club to the old club. In transfer contracts, for that reason, a sell-on clause is combined with the provision defining the transfer fee: overall, the parties divide the consideration to be paid by the new club in two components, i.e. a fixed amount, payable upon the transfer of the player to the new club, and a variable, notional amount, payable to the old club in the event of a subsequent "sale" of the player from the new club to a third club".

105. In CAS 2019/A/6525 (paragraph 69), the panel described that the purpose of a sell-on clause as follows:

"Its purpose is to "protect" a club (the "old club") transferring a player to another club (the "new club") against an unexpected increase, after the transfer, in the market value of the player's services; therefore, the old club receives an additional payment in the event the player is "sold" from the new club to a third club for an amount higher than that one paid by the new club to the old club. In other words, the new club agrees to share with the old club a portion of any profit made by the new club in connection with a player's movement".

106. A similar view was expressed by the Sole Arbitrator in CAS 2016/A/4379 (paragraph 102):

"Indeed, clauses providing for kind of risk-sharing and of participation of the transferring club in possible, uncertain gains obtained by the new club in the event of a further transfer to a third club, are not uncommon in international transfer agreements of professional football players. The economic rationale of such clauses is, generally, that by agreeing into such arrangement, the transferring club accepts to receive, in a first place, a lower "first" transfer fee, with the expectation of receiving an additional "fee" if the recipient club will be able to transfer, with profit, the player to a third club (see for instance CAS 2005/A/896). These clauses are most common in transfers involving young promising players".

107. The Sole Arbitrator concurs with the considerations of the panels in the abovementioned cases, and notes that, in general, the parties to a transfer agreement are, as long as they comply with relevant football regulations, free to agree the terms of the transfer. Including a sell-on clause in a transfer agreement may be beneficial to both parties to the agreement. From the buying club's perspective, the sell-on clause may contribute to reducing the fixed transfer fee to be paid to the selling club, whilst the selling club will be entitled to a portion of the rise in the player's future transfer value. As such, the parties to a transfer agreement with a sell-on clause agree, in principle, to share the risk and potential benefit related to the development of the player's transfer value.

108. With regards to the Respondent's argument that the Appellant did not derive any rights towards the Respondent in relation to the subsequent payments received by the Respondent following the sell-on clause agreed in the Transfer Agreement 2018, because they originated out of the transfer value of the Player at the time of the conclusion of the Transfer Agreement 2020, the Sole Arbitrator notes that the Respondent's choice to conclude a transfer agreement for the Player with Lokomotiva Zagreb where the total transfer fee to be paid to the Respondent was split in a fixed amount and a variable amount based on the sell-on clause, cannot prevent the Appellant from being entitled to a portion of the fees later received by the Respondent in relation to the sell-on clause agreed with Lokomotiva Zagreb.

109. In accordance with CAS case law, the calculation of the amount owed to the selling club based on a sell-on clause shall be based on the amount subsequently received by the buying club. In CAS 2012/A/2875 (paragraph. 73) the panel stated as follows:

"In the opinion of the Panel, it is common practice in the world of football that contracting parties deviate from initially agreed fictitious amounts. The Panel considers that a sell-on fee is to be based on the amount actually to be received by a club for selling a player to a subsequent club and not on an indicative amount".

110. A similar approach was taken by the panel in CAS 2014/A/3508 which stated as follows (paragraph 212):
"The Panel considers that a sell-on fee is to be based on the amount actually received by a club for selling a player to a subsequent club and not on an indicative amount".

111. Although the facts in the abovementioned cases differ from the case under scrutiny, the Sole Arbitrator agrees with the general views expressed

by the panels, *i.e.* that a selling club's entitlement from a sell-on fee must be based on the amount received by the buying club in relation to a future transfer of the player in question. Such a view is also in accordance with the view of the panel in CAS 2017/A/5213, which concerned the selling club's right from a sell-on clause, where part of the total revenue subsequently received by the buying club was related to a condition that the player in question played a predefined number of matches for a third club. In this regard, the panel stated as follows (paragraph 44):
"the Panel is confident that by "total transfer compensation" the parties, which are established football clubs that are commercially experienced and familiar with transfer agreements and the terms used therein, intended to regard both the fixed transfer fee and the variable amounts stipulated for the subsequent transfer of the Player".

112. The Sole Arbitrator concurs with the considerations of the panel in the abovementioned case. Furthermore, as noted above, a sell-on clause may contribute to reducing the fixed transfer fee to be paid to the selling club. In other words, it must be assumed that the parties to the Transfer Agreement 2018, in principle, agreed to exchange a higher fixed transfer fee with a transfer fee that consisted of a lower fixed transfer fee and a sell-on fee. Accordingly, the transfer value of the Player, when the Transfer Agreement 2018 was concluded, was not limited to the, assumedly reduced, fixed transfer fee paid by Lokomotiva Zagreb, but the sum of the fixed transfer fee and the value of the sell-on clause. Against this background, the Sole Arbitrator concludes that the Transfer Agreement 2017 entitles the Appellant to 20% of all of the Respondent's revenues from the sell-on clause agreed in the Transfer Agreement 2018.

113. As to the outstanding amount claimed by the Appellant, the Sole Arbitrator observes that it is uncontested that the Respondent has already paid EUR 64,000 (as part of the total amount of EUR 70,000 – corresponding to 20% of the transfer fee of EUR 350,000 paid by Lokomotiva Zagreb to the Respondent in accordance with the Transfer Agreement 2018) to the Appellant. It is further uncontested that the Player was transferred from Lokomotiva Zagreb to Ferencváros for an agreed transfer fee of EUR 1,187,500, including conditional payments, as stipulated in the Transfer Agreement 2020. It is also uncontested that the Respondent was entitled to 20% of this amount, *i.e.* EUR 237,500. As concluded above, the Transfer Agreement 2017 entitles the Appellant to 20% of this amount, *i.e.* EUR 47,500.

C. The amount owed following the second transfer

114. The Sole Arbitrator notes that the Respondent objects to the Appellant's claim that the Respondent has only paid EUR 64,000 of the EUR 70,000 the Respondent owed the Appellant following the Player's transfer from the Respondent to Lokomotiva Zagreb in 2018. In this regard, the Respondent claims that the full amount of EUR 70,000 was indeed paid, and further, that the Appellant's claim in any case is time-barred as it violates the statute of limitations, as regulated in Article 25 paragraph 5 of the FIFA RSTP.

115. The Sole Arbitrator notes that the Respondent's arguments regarding the Appellant's claim in relation to outstanding amounts related to the Player's transfer from the Respondent to Lokomotiva Zagreb in 2018 are not reflected in the Respondent's requests for relief. On the contrary, the Respondent has, in its relief, requested that the Appellant's appeal be dismissed, and that the Appealed Decision be confirmed. In this regard, the Sole Arbitrator notes that the Appealed Decision held that the Respondent is obliged to pay the Appellant EUR 6,000, corresponding to the Appellant's claim in relation to the Player's transfer from the Respondent to Lokomotiva Zagreb in 2018.

116. As a starting point, the Sole Arbitrator notes that, in accordance with Article R57 paragraph 1 of the Code, the Sole Arbitrator has *"full power to review the facts and the law"*, and that CAS appeals arbitration procedures require a de novo review of the merits of the case.

117. However, it is well established practice in international arbitration that a panel is bound by the limits of the parties' motions, since the arbitral nature of the proceedings obliges the Panel to decide all claims submitted by the Parties and, at the same time, prevents the Panel from granting more than what the parties are asking by submitting their requests for relief to the CAS, according to the principle of *ne ultra petita*. In CAS 2020/A/6916 the sole arbitrator stated as follows (paragraph 144):

"[t]he ability of a CAS panel to issue an award which is not consistent with a party's request for relief has been considered in detail in CAS jurisprudence and the basic principle is that a CAS panel must adhere to the specific parameters of the party's request for relief and is unable to substitute an alternative relief irrespective of whether it would be correct based on the evidence before the CAS panel".

118. A similar view was expressed by the panel in CAS 2016/A/4384 (paragraph 120 *et seq.*):

"In this context, the Panel observes that, without prejudice to the provision of article R57 of the CAS Code, which confers the CAS the full power to review the facts and the law of the case, the Panel is nonetheless bound to the limits of the parties' motions, since the arbitral nature of the proceedings obliges the Panel to decide all claims submitted by the Parties and, at the same time, 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.

As a consequence, and irrespective of the merits of the Appellant's argument on the relevant point, the Panel has no power to amend the amount of compensation granted by the Appealed Decision".

119. Notwithstanding the above, the Sole Arbitrator notes that, since its 2010 revision, the Code no longer permits the filing of counterclaims in appeal proceedings before CAS, and that if a respondent wants to challenge part of a decision, it must file an independent appeal, as stated in MAVROMATI/REEB, The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials, 2015, p. 488:

"It must be noted that, since 2010, counterclaims are no longer possible in appeal procedures. This means that, if a potential respondent wants to challenge part of all of a decision, it must file an independent appeal with the CAS within the applicable tie limit for appeal".

120. Such an approach has been confirmed by numerous CAS panels, hereunder CAS 2016/A/4379 (paragraph 70) where the sole arbitrator stated as follows:

"The Code does not provide for the possibility of the respondent to file in appeals arbitration proceedings a counterclaim against the decision challenged by the appellant - any party wishing to have the disputed decision set aside or modified has to file an independent appeal. Although the Respondent's request was not made as counterclaim in the strict sense of the word or as an appeal against the Decision, in effect it seeks modification or a supplement of the holding of the Decision".

121. Based on the abovementioned CAS jurisprudence and established practice, having taken into account that the Respondent did not file an independent appeal within the applicable time limit regarding the amount awarded to the Appellant in the Appealed Decision, the Sole Arbitrator concludes that it has no power to amend the amount of EUR 6,000 awarded to the Appellant in the Appealed Decision.

122. Finally, the Sole Arbitrator also notes that no evidence of payment of the EUR 6,000 in question has been provided by the Respondent. Given that the Appellant contested such payment, it would have been the Respondent's burden to prove its allegation.

D. Conclusion

123. Based on the foregoing, the Sole Arbitrator finds that:

- The Appellant is entitled, based on the sell-on clause agreed in the Transfer Agreement 2017, to EUR 47,500, corresponding to 20% of the Respondent's revenues from the transfer of the Player from Lokomotiva Zagreb to Ferencváros in 2020.

- The Sole Arbitrator has no power to amend the amount of EUR 6,000 awarded to the Appellant in the Appealed Decision.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by FK Apollonia on 10 February 2023 against the decision issued on 31 January 2023 by the Albanian Football Association's National Dispute Resolution Chamber is upheld.

2. The decision issued on 31 January 2023 by the Albanian Football Association's National Dispute Resolution Chamber is confirmed, except for paragraph 2 of the operative part, which shall be amended as follows:

   KF Laçi is obliged to pay FK Apollonia the sum of EUR 53,500 (fifty-three thousand five hundred euros) as an obligation arising from the agreement concluded between the Parties for the Player's transfer.

3. (…).

4. (…).

5. All other and further motions or requests for relief are dismissed

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CAS 2023/A/9477
Joan Carrillo Milan v. DVSC Futball Szervezo & Fédération Internationale de Football Association (FIFA)
14 February 2024

Panel: Mrs Yasna Stavreva (Bulgaria), Sole Arbitrator

Football
Contractual dispute
Representation of a party in CAS proceedings
Concept of "forum shopping"
Absence of sufficient proof of bad faith for a party's course of action to qualify as "forum shopping"

1. **The parties may be represented or assisted during the CAS proceedings by a person of their choice, not necessarily a lawyer.**

2. **Parties should not be allowed to engage in the so-called "*forum* shopping" practice, which could be understood as a situation where a party brings the same dispute before multiple *fora* in order to seek the most favourable judgement. Such practice is viewed as unlawful. The concept of "*forum* shopping" is closely connected to the principle *electa una via non datur recursus ad alteram.* In other words, once the choice of competent dispute resolution *forum* is made, it should become binding on both parties with respect to the dispute in question.**

3. **Although widely accepted in the sports-related dispute resolution system, the concept of "*forum* shopping" has not been regulated or defined. In view of the description made of it in the Commentary on the Regulations on the Status and Transfer of Players, and while this document does not constitute *per se* the applicable regulation, it appears that the practice is characterized by the intent of a claimant and his/her purposeful conduct aimed at "gaming the system" to the detriment of the opponent party. Its inherent element is therefore the bad faith of a party initiating a dispute. Conversely, one party should not be seen as having engaged in an unlawful "*forum* shopping" if it is not sufficiently proven that it acted in bad faith when filing its claims before the two deciding bodies.**

I. PARTIES

1. Mr Joan Carrillo Milan (the "Appellant" or the "Coach") is a coach of Spanish nationality.

2. DVSC Futball Szervezo Zrt. (the "First Respondent or the "Club") is a Hungarian professional football club with its seat in Debrecen, Hungary. It is affiliated to the Hungarian Football Federation (the "HFF"), which in turn is an affiliated member of the Fédération Internationale de Football Association (the "FIFA").

3. Fédération Internationale de Football Association (the "Second Respondent" or "FIFA") is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the world governing body of international football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials, coaches and players worldwide. The Club and FIFA are jointly referred to as the

"Respondents" and together with the Coach as the "Parties" where applicable.

II. INTRODUCTION

4. The appeal is brought by the Appellant against the decision of the FIFA Players' Status Chamber (the "FIFA PSC") dated 22 November 2022 with regard to the payment of compensation for breach of contract (the "Appealed Decision").

III. FACTUAL BACKGROUND

5. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced at the remote hearing held on 24 August 2023. 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.

6. On 7 November 2021, the Coach and the Club concluded an employment contract (the "Contract") whereby the Coach was appointed as head coach of the Club's first team. This contract was valid from 8 November 2021 until 30 June 2023.

7. Pursuant to the Contract the Club undertook to pay to the Coach a monthly salary of Hungarian Forint (HUF) […] net, payable until the 10th day of every following month, as well as benefits based on the ranking achieved in the 2021/2022 and 2022/2023 league seasons, as follows:

League season 2021/2022

NB I Championship Rank		Benefits (HUF)
1.	1. hely/ 1st place	[…]
2.	2. hely/ 2nd place	[…]
3.	3. hely/ 3rd place	[…]
4.	4. hely/ 4th place	[…]
5.	5. hely/ 5th place	[…]
6.	6. hely/ 6th place	[…]
7.	7. hely/ 7th place	[…]
8.	8. hely/ 8th place	[…]
9.	9. hely/ 9th place	[…]
10.	10. hely/ 10th place	[…]
11.	11. hely/ 11th place	-
12.	12. hely/ 12th place	-

League season 2022/2023

NB I Championship Rank		Benefits (HUF)
13.	1. hely/ 1st place	[…]
14.	2. hely/ 2nd place	[…]
15.	3. hely/ 3rd place	[…]
16.	4. hely/ 4th place	[…]

17.	5. hely/ 5th place	[…]
18.	6. hely/ 6th place	[…]
19.	7. hely/ 7th place	[…]
20.	8. hely/ 8th place	[…]
21.	9. hely/ 9th place	[…]
22.	10. hely/ 10th place	[…]
23.	11. hely/ 11th place	-
24.	12. hely/ 12th place	-

8. Regarding the termination, Article 17 of the Contract reads as follows:

"With regard to the status of the Employee as a senior employee, the Employer may terminate this contract with a unilateral legal declaration (termination), without any obligation to state reasons, in spite of the specified period of time, as follows:

- *Before the 30th of June 2022, by paying to the Employee the amount of the basic salary until 30th of June 2022 and the end-of-season bonus corresponding to the placement at the time of termination.*

- *If the Employer nevertheless justifies the termination, the Parties shall consider the following in particular as a ground based on the Employee's ability to justify the employer's lawful termination:*

  - *if the first team is eliminated from NB I, based on the announced final result of the 2021/2022 league season;*

  - *if the first team is relegated in three consecutive rounds at any time after the 5th round in the NB I championship season 2022/2023 and it is four or more points behind the 10th placed team".*

9. Regarding jurisdiction in case of disputes, Clause 22 of the Contract states as follows:

"The Parties agree to seek an amicable settlement of any dispute through negotiation. In the event of failure to do so, the Parties shall have the right to apply to the dispute settlement of the FIFA Dispute Resolution Chamber".

10. As to the governing law, Clause 23 of the Contract provides as follows:

"The Parties shall apply the rules and regulations of MLSZ, UEFA, FIFA and the rules of Hungarian law to their legal relationship. In matters not regulated in this contract, the Hungarian Civil Code, the Sports Act, the LC and other relevant laws and regulations shall prevail".

11. On 27 June 2022, the Club unilaterally terminated the Contract pursuant to its Article 17 Chapter IX and Article 210 (1) point *"b"* of the Hungarian Labour Code, providing *inter alia* as follows ("the Termination Letter"):

"In view if the fact that the Employee qualifies as a senior employee, pursuant to point b) of Article 210 (1) of the Hungarian Labour Code and the first sentence of point 17 of Chapter IX of the Employment Contract, the Employer is entitled to terminate the employment relationship of the Employee with a unilateral legal declaration (termination), without the obligation to state reasons, on the basis of which the Employer has decided as described above.

The Employee may submit a claim in 3 copies against the present termination notice to the Debrecen Regional Court (1.Perenyi utca,

Debrecen, H-4026) within 30 days of its receipt. There is no suspensory effect of bringing an action".

12. On 1 July 2022, the Coach indicated the Club that his dismissal was not in accordance with the Hungarian Labour Code and proposed to amicably settle the case, requesting the Club to pay 9 months' salary and the bonus.

13. As there was no answer from the Club, on 24 July 2022, the Coach lodged a claim before the FIFA PSC against the Club for termination of the contract without just cause.

14. On 26 July 2022, the Coach lodged a claim before the Tribunal of Szekesfehervar in Hungary against the Club, requesting the amount of HUF […] as compensation corresponding to 12 months' salary, the default interest being due since 27 June 2022 and the legal costs. The Coach argued that: (1) the dismissal shall be invalid, as it was not signed by a person exercising the employer's rights and it falsely indicated the possibilities for legal remedy; and (2) the dismissal shall be unlawful, as it did not have legal basis and the Club refused to comply with the precondition of dismissal. The Coach also noted the Tribunal of Szekesfehervar about the claim filed to FIFA PSC.

15. According to the Coach, on 1 February 2023 he signed a new employment contract with the Spanish 2nd division club CD Lugo, valid until 30 June 2023, earning remuneration for the 5 months period of EUR […] net.

16. On 24 February 2023, the Coach withdrew his claim lodged before the Tribunal of Szekesfehervar.

IV. PROCEEDINGS BEFORE THE FIFA PLAYERS' STATUS CHAMBER

17. On 22 November 2022, the FIFA PSC rendered the Appealed Decision, in the following terms:

> *"1. The claim of the Claimant, Juan Antonio Carrillo Milan, is inadmissible.*
>
> *2. This decision is rendered without costs".*

18. In substance, the FIFA PSC held as follows:

> *"29. The Single Judge recalled that the competence shall be examined also ex officio, as there seems to exist elements of Forum Shopping since the Claimant lodged two parallel claims before FIFA and in Hungary.*
>
> *30. In this respect, the Single Judge referred to the Commentary on the regulations on the Status and Transfer of Players (p.372), which sheds the following light on the concept of forum shopping:*
>
> *"The final considerations concern the practice known as "forum shopping" – a party taking the same matter to multiple fora in the hope of obtaining the result that suits its purposes. The relevant jurisprudence is designed to prevent such behaviour, which is viewed as illegitimate. A party should not be able to game the system by having multiple fora hear the same argument in the hope one of them will hand down the judgement it wants. For example, a party should not be allowed to ask a national body to confirm that a contract has been breached without just cause, and then, having obtained a favourable decision at national level, ask the DRC to settle compensation payable in the*

case. The principle that a party that has chosen to have a case heard under one competent jurisdiction cannot then have recourse to another (known colloquially as "forum shopping") is consistently applied".

31. While in the case at hand FIFA was seized first, it is also clear that the Claimant decided two days later to file a claim to the Hungarian Civil tribunal. It is to be noted that both claims had the same content, also similar amounts were requested.

32. The Claimant grounds his position on the admissibility on the fact that (1) due to the Hungarian strict deadline, the Claimant prudent and careful act was to file to file; (2) FIFA tribunals are not "arbitral tribunals" but only internal decision-making bodies and thus a formal collision of jurisdiction is excluded.

33. On this note as opposed to the Claimant's argumentation, the Single Judge was firmly of the opinion that the Claimant indeed engaged in a sophisticated form of forum shopping; the Claimant filed the FIFA Claim first, admittedly hoping that this would create lis pendens vis-avis the Hungarian claim and its particularities. The Hungarian Claim however is, as per the information on file, still ongoing".

34. The Single Judge finds this behaviour pivotal in the matter at hand, given that the Claimant deliberately acted in a manner to conduct two identical proceedings only to determine, later and at his convenience, which proceedings he preferred to carry on with.

35. The Single Judge was comforted to rule that this attempt to manipulate the system at the Claimant's will cannot subsist for, the Claimant's position is contradictory. If he wanted FIFA to adjudicate on the FIFA Claim (and he was certain on FIFA's jurisdiction per his statement of claim), the Claimant should have abstained from filing the Hungarian Claim.

36. Moreover, the Single Judge highlighted that allowing the Claimant's claim to be entered would be in sharp opposition with the jurisprudence of FIFA and CAS in the matter of forum shopping (for reference, the cases Stancu, Simkovic and 0181141-FR ruled upon by the Dispute Resolution Chamber, as well as the matter CAS 2007/A/1301 (…), award of 10 March 2008, for instance). The Single Judge particularly underlined the wording under Simkovic:

"The DRC observed that it therefore cannot condone the conduct of a player or a club who has specifically chosen to submit a labour dispute to the afore mentioned national body/court, and then subsequently submits the identical or essentially identical dispute between the same parties, based on the same legal framework i.e. the employment contract, to the FIFA Dispute Resolution Chamber; ***the same is to be noted if the party submits a claim first before the FIFA DRC and thereafter lodges the same claim in front of the national body****" (emphasis added)*

37. The Single Judge therefore concluded that once the player lodged the Hungarian Claim, the Claimant de facto renounced to have his FIFA Claim heard by the Football Tribunal".

19. On 17 February 2023, the grounds of the Appealed Decision were notified to the Parties.

V. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. On 7 March 2023, the Appellant lodged a Statement of Appeal with the Court of Arbitration for Sports ("CAS") against the Respondents with respect to the Appealed Decision, pursuant to Articles R47 and R48 of the CAS Code of Sports-related Arbitration, 2023 edition (the "CAS Code"). In the Statement of Appeal, the Appellant requested a Sole Arbitrator to be appointed.

21. On 16 March 2023, the Appellant filed its Appeal Brief in accordance with Article R51 of the CAS Code.

22. On 6 April 2023, the First Respondent filed his Answer in accordance with Article R51 of the CAS Code.

23. On 24 April 2023, the CAS Court Office informed the Parties that, pursuant to Article R54 of the CAS Code, the Panel had been constituted as follows:

    Sole Arbitrator: Mrs Yasna Stavreva, Attorney-at-law in Sofia, Bulgaria.

24. On 25 May 2022, the Second Respondent filed its Answer in accordance with Article R51 of the CAS Code.

25. On 19 June 2023, the Sole Arbitrator, after having consulted the Parties, decided to hold a hearing, by video-conference, pursuant to Article R57 of the Code.

26. On 17 July 2023, the CAS Court Office, on behalf of the Sole Arbitrator, issued the Order of Procedure, which was duly signed by the Parties.

27. On 24 August 2023, a hearing was held by video-conference. Besides the Sole Arbitrator and Mrs Delphine Deschenaux - Rochat, CAS Counsel, the following persons remotely attended the hearing:

    - For the Appellant: Dr Kristof Wenczel - by proxy;

    - For the First Respondent: Dr Andor Leka - attorney-at-law and Dr Peter Leka - attorney-at-law;

    - For the Second Respondent: Mr Alexander Jacobs - Senior legal counsel at FIFA.

28. At the hearing the Parties confirmed that they had no objections as to the constitution of the Panel. The First Respondent maintains its objection against the presence of Dr Kristof Wenczel as a representative of the Appellant and invited the Sole Arbitrator to take a decision on the issue. The Sole Arbitrator allowed Dr Kristof Wenczel to attend the hearing and requested from him to provide a new power-of-attorney. The reasons for the Sole Arbitrator's decision will be addressed further below in this Award. The Parties further made full oral submissions and at the end of the hearing they expressly confirmed that they were afforded the opportunity to present their case, submit their arguments and that their right to be heard had been fully respected.

29. On 24 August 2023, following a request made by the Sole Arbitrator at the hearing, the Appellant sent a new power-of-attorney in favour of Dr Kristof Wenczel, which was duly noted by the CAS Court Office on 25 August 2023.

VI. SUBMISSIONS OF THE PARTIES

A. The Appellant's position

30. In its Statement of Appeal and Appeal Brief, the Appellant requests CAS to render an award which:

> *"i. Sets aside the Decision adopted by the FIFA PSC on* ***22 November 2022****, (whose grounds were notifies on* ***17 February 2023****,* Ref.Nr.***FPSD-6806****);*
>
> *ii. Declares that the FIFA PSC is the competent body to deal with the matter at hand; and*
>
> *iii. Returns the matters to FIFA and orders the FIFA PSC shall pass the decisions on the merits based on the claim, lodged by the Coach on* ***24 July 2022*** *to the FIFA PSC against the Club.*
>
> *In the alternative:*
>
> *iv. should CAS accept the request "i" above, the Appellant requests that the matter be judged by the CAS itself, i.e. the ground of action of the question, having in mind the competence of the latter and the procedural economy, according* ***to article R57*** *of the Code of Sports – related Arbitration.*
>
> *In the further alternative:*
>
> *v. Should the CAS deems that the Club terminated the Employment Agreement without just cause,* ***to uphold the right of the Coach to receive outstanding salary and compensation corresponding to 12 months' salary and bonus in the amount of HUF*** […]***, - minus the residual value of the new contract of the Coach in accordance with article 6-2 b) of the RSTP =HUF*** […]***, - plus default interest and legal costs****.*
>
> *In all events:*
>
> *vi.* ***Order both Respondents to:***
>
> - ***reimburse the Appellant his legal costs and other expenses pertaining to this appeal; and***
> - ***bear any and all costs pertaining to the arbitration****".*

31. In support of its Appeal, the Appellant's position, in essence, may be summarised as follows:

- The Appellant submits that FIFA Regulations and Swiss law shall apply to the present proceedings and subsidiarily, Hungarian law to the merits of the case.

- The Appellant further submits, that his act to lodge a claim to two different tribunals does not constitute "*forum* shopping" and the FIFA PSC has improperly applied such term in the Appealed Decision. By analysing the definition of "*forum* shopping" in general and in the Commentary on the FIFA Regulations on the Status and Transfer of Players (the "Commentary") it can be presumed that "*forum* shopping" is no way unlawful if it does not meet the criteria of unjustified inequality between the parties. By taking the dispute to two different *fora* the Appellant did not act in bad faith and did not attempt to put the First Respondent in a weaker position which could have established inequality between the parties as the First Respondent could equally defend its interests at national and international level.

- The Appellant stresses that he submitted his claim first to the FIFA PSC and subsequently to the Labour Tribunal of Szekesfehervar, respecting Article 22 of the Contract and following the principle of "*pacta sunt servanda*". The main reason to initiate proceedings at national level was not to obtain a better outcome by one of the *forums* but to demonstrate the unlawfulness of the jurisdictional clause, contained in the Termination Letter that determined exclusivity of a certain court in Hungary where the Appellant could lodge his claim against illegal termination. Another reason was the impossibility an award rendered by the FIFA PSC to be enforced in Hungary as it contradicts the Hungarian law. The Hungarian Act on Arbitration prohibits labour-related disputes to be resolved by an arbitral tribunal which means that even the FIFA PSC has rendered an award in favour of the Appellant, its enforcement would have been hindered on a national level. Thus, the relevant provisions of the Commentary related to the main motive of "*forum* shopping" for obtaining a better outcome by taking a dispute to multiple *fora*, do not apply.

- Furthermore, the Appellant underlines as important fact that he duly informed the Tribunal of Szekesfehervar about the proceedings before the FIFA PSC and it was not taken into account as a decisive factor for the national court to terminate or suspend the proceedings at national level.

- The Appellant further notes, that he withdrew his claim before the Tribunal of Szekesfehervar and thus, the element of choosing multiple jurisdictions was ceased.

- Additionally, the Appellant contests the FIFA PSC's denial to deal with the matter at hand and considers that it had exclusive jurisdiction to resolve the dispute between the Appellant and the First Respondent on the basis of Article 23 para. 1 and Article 22 para. 1 lit. c) of the FIFA RSTP. According to him FIFA's "*ex officio*" examination of its competence had to be limited only to which chamber of the Football Tribunal should hear the case and not to the admissibility of the claim.

- Furthermore, the Appellant deems that the awards, mentioned in the Appealed Decision *(Stancu, Simkovic and 0181141-FR)* ruled upon the FIFA DRC are not applicable to the case at hand because they have different factual and legal background and on the other hand are not publicly accessible and legally binding. The interpretation of the CAS jurisprudence (award CAS 2007/A/1301) also does not support the FIFA PSC's stance to the matter of "*forum* shopping".

- Finally, the Appellant considers that the Appealed Decision contradicts Article 186 (1) bis of the Swiss Federal Act on Private International Law (PILA) and the CAS award CAS 2013/A/3364 which specifies that *"forum shopping occurs routinely in international litigation, and its mere existence is not in and of itself a reason for staying proceedings. In fact, the ratio legis of*

Article 186 1bis cited supra is precisely the Swiss legislator's will to signal that, unless serious reasons exist, the jurisdiction of international arbitral tribunals sitting in Switzerland should not be put into question".

B. The First Respondent's position

32. In its Answer to the Statement of Appeal and the Appeal Brief, the First Respondent submitted the following prayers for relief, requesting the CAS:

"1. (…) to establish the ineffectiveness and invalidity of the statement of appeal dated the 7th March 2023 and the appeal brief dated the 15th March 2023 – which documents were submitted by Dr. Kristof Wenczel, in the absence of his right of representation, and thus, their ineligibility for legal effect and, as in the absence of an appeal submitted within the time limit and with legal force, terminate the procedure, or reject the appeal that does not come from the person entitle to it without a substantive examination.

2. (…) as an alternative to reject the appeal as unfounded and to uphold FIFA's decision.

3. (…) oblige the claimant to pay the costs incurred during the procedure to the First Respondent based on R64.5 of the Code: Procedural Rules of CAS.

4. (…) pointing out that the claimant's appeal request that the Honorable CAS adjudicate his appeal on the merits is ruled out simply because, in view of the fact that FIFA did not make a substantive decision in the present case, thus, the Honorable CAS has no legal opportunity to make a decision, taking into account the CAS jurisprudence (CAS 2007/A/1301)".

33. In support of its defense, the First Respondent, in essence, submitted the following:

- The First Respondent first argues that the Statement of Appeal and the Appeal Brief submitted by Dr Kristof Wenczel as a legal representative of the Appellant are null and invalid, without providing legal effect because when they were filed to CAS Dr Kristof Wenczel was not a licenced attorney, practicing law. According to the public register of the Hungarian Bar Association his registration as an attorney was suspended on 7 February 2023 and then, cancelled on 16 February 2023 which makes him impossible to represent the Appellant and sign the submissions on behalf of *"Wenczel & Partners"* Law office. In this regard, the First Respondent insists CAS proceeding to be terminated or the Appeal Brief to be rejected on the basis of a lack of an authorised representation.

- The First Respondent further submits that "*forum* shopping" clearly exists at the case at hand because by claiming in parallel to two different tribunal (the FIFA PSC and the Tribunal of Szekesfehervar) the Appellant acted in bad faith, trying to manipulate both of the proceedings and providing contradictory statements with the only intention to achieve the most favourable result for him.

- The First Respondent underlines that if the Appellant wanted FIFA PSC to adjudicate on his claim and was sure on its competence, he should have abstained from lodging the same claim to the national court. By

subsequently filing a claim before the Tribunal of Szekesfehervar the Appellant waived his right to have the claim assessed by the FIFA PSC.

- According to the First Respondent the Appellant's withdrawal of his claim before the national tribunal was a result of the transfer of the litigation process from the Tribunal of Szekesfehervar to the Court of Debrecen which was competent to judge on the termination procedure. Being aware of the facts and the possible negative outcome for him at national level, the Appellant tried to assert his claim mostly to the FIFA PSC and thus, continued to maintain the form of "*forum* shopping".

- Furthermore, the First Respondent submits its allegations on the merits of the case concerning the termination of the Contract. It refers to its position already explained during the proceedings before the FIFA PSC, which can be summarized as follows:

- The First Respondent terminated the Contract with the Appellant with just cause on the basis of the Hungarian law (the Hungarian Act I of 2012 on the Labour Code) which governs the labour relationship between the Coach and the Club and is the law that shall apply to the merits of the matter at hand.

- The termination of the Contract was executed by an authorized person, exercising the Employer's rights – Mr Balazs Makray who was elected as a company manager by the General Assembly held on 26 June 2022.

- The Appellant performed a position of the so called "executive employee" under Clause 2.3 Chapter I of the Contract which gives the right to the First Respondent being an employer to prematurely and unilaterally terminate the Contract, without any obligations to provide reasons for that.

- The legal remedy, provided in the Termination Letter was appropriate and did not limit the Appellant to enforce his claim.

- The First Respondent fulfilled its final payment obligations with two days delay which did not reflect the contractual termination and did not make it invalid.

- The Appellant was not entitled to any additional bonus benefits after the contractual termination because the Coach and the Club agreed in Clause 9.3 Chapter IV of the Contract that *"if the Employee's employment is terminated during the NB I Championship Season, the amount of the benefits under clauses 9.1 and 9.2 is not even partially due"*.

C. The Second Respondent's position

34. In its Answer to the Statement of Appeal and the Appeal Brief, the Second Respondent submitted the following requests for relief:

"FIFA respectfully requests the Sole Arbitrator to:

reject the requests for relief sought by the Appellant;

confirm the Appealed Decision;

order the Appellant to bear the full costs of these arbitration proceedings".

35. The Second Respondent's arguments in support of its requests for relief may, in essence, be summarized as follows:

- The Second Respondent submits that FIFA Statutes and the FIFA Regulations, namely the FIFA RSTP (edition October 2022) constitute the applicable law to the present proceedings and subsidiarily Swiss law applies should the need arise to fill a possible gap in the regulations of FIFA.

- According to the Second Respondent the essence of the matter is that the Appellant elected to initiate legal proceedings before the FIFA PSC as well as before the Hungarian national court. Thus, he was clearly engaged in a form of "*forum* shopping" which is an unaccepted practice.

- Further, the Second Respondent points the specificities of the concept of *"forum shopping"* which are addressed in the Commentary and the jurisprudence of both the CAS and the Football Tribunal. It makes references to several CAS awards (CAS 2007/A/1301, CAS 2021/A/7775, CAS 2017/A/6626) and recent FIFA DRC jurisprudence *(Stancu, Simkovic and 0181141-FR)* where the concept of "*forum* shopping" is confirmed and concludes that the matter at stake can be described as a blatant or obvious form of *"forum shopping"*.

- The Second Respondent contests all arguments raised by the Appellant on *"forum shopping"* referring to different definitions (*e.g.* even relying on an opinion of the advocate general of the European Court of Justice) but staking on (i) *"unjustified inequality"* eradication as a *"legitimate legislative objective"*, (ii) the Commentary itself and (iii) on the general features of "*forum* shopping" by EWERT J.-P. and WESLOW D.. It deems these arguments based on a flawed premise, unworkable and non-credible for the following reasons:

- The Appellant ignored the specificities of the *"principle of coordination between the State and the sporting adjudicating systems"* trying to extrapolate findings originating outside of the scope of the FIFA regulations (and the subsidiarily applicable Swiss law) instead of staying within of the confines of the FIFA dispute resolution system and its relation to state courts.

- The Termination Letter did not contain a jurisdiction clause and did not establish that the parties should or had to adjudicate their dispute before the Hungarian national court. Therefore, the Appellant did not have to *"challenge"* the *"unlawfulness of the jurisdiction clause"* before the Hungarian national court. On the other hand if the Appellant had genuinely submitted a claim only to address the *"unlawfulness of the jurisdiction clause"* he would not have claimed an amount of HUF […] (an amount which mainly corresponds to twelve months of salary) which clearly concerns the breach of contract.

- The Appellant withdrew his claim before the Tribunal of Szekesfehervar

on 24 February 2023 despite the initial claim having been filed on 26 July 2022 (or 6 months later), the terms of the Appealed Decision having been notified on 22 November 2022 and the grounds of the Appealed Decision having been notified on 17 February 2023 which put in question the sincerity of all his arguments on "*forum* shopping".

- The nature of the proceedings before the FIFA PSC and the Hungarian national court was the same: concerned the same parties (the Appellant and the First Respondent), the same object (compensation for breach of contract) and the same cause of action (the First Respondent's dismissal of the Appellant). Recognizing that he filed his claim before the Hungarian national court because CAS awards and FIFA decisions were not enforceable in Hungary, the Appellant fulfilled the elements of "*forum* shopping" described by him, since he was *"gaining a perceived or actual advantage"*.

- In addition, beyond the Appellant's specific arguments involving "*forum* shopping", the Second Respondent objects the other arguments raised by the Appellant on (i) the chronological order of the proceedings, (ii) "*nemo auditor propriam turpitudinem allegans*", (iii) the FIFA's exclusive jurisdiction, (iv) the non – enforcement of the Appealed Decision in Hungary, (v) the absence of case law concerning Article 22 RSTP, (vi) the inaccessibility of a case cited in the Appealed Decision and the different and factual background of the jurisprudence, (vii) the absence of a specific reference to FIFA regulations and/or Swiss law, (viii) the alleged contradiction of the Appealed Decision and the Private International Law Act (the "PILA"). It considers these arguments lacking both in coherence and relevance, none of them substantiated by any jurisprudence (CAS or Football Tribunal) or legal doctrine.

- The Second Respondent concludes further in its submissions that the matter at stake is very straightforward because:

  - Article 22 RSTP establishes FIFA's competence in employment-related disputes and a right for the parties to seek redress either before the FIFA's adjudicatory bodies or before the local courts.

  - As explained in the CAS award CAS 2021/A/7775 and confirmed in the CAS award CAS 2019/A/6626 *"in case the parties opt for a local forum, the FIFA adjudicatory bodies are no longer competent"*.

  - The FIFA Commentary serves as a guidance or a *"reference text"* as explained in Circular letter no. 1075 and for the purpose of the matter at stake describes the concept of "*forum* shopping" and refers to the current state of the consolidated DRC/PSC jurisprudence in that regard.

- Lastly, the Second Respondent comments the Appellant's allegation that the Appealed Decision contradicts with the PILA and the CAS award 2013/A/3364. It points

that these conclusions are based on a flawed understanding of the cited CAS award and an isolated citation from the same award - which addressed a preliminary issue when the Panel was requested to stay the proceedings until the issuance of a decision by the respective Romanian Court where the question of jurisdiction to adjudicate the dispute had been submitted. The CAS award refers to the concept of "*lis pendens*" which differs from the concept of "*forum* shopping" ("*lis pendens*" typically occurs when the two opposing parties submit their dispute to different "*forums*" while "*forum* shopping" occurs when one and the same party submits its dispute to two different "*forums*").

VII. JURISDICTION

36. Article R47 para. 1 of the CAS Code provides as follows:

"An appeal against the decision of a federation, association or sports-related bodies maybe 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".

Article 58 (1) of the FIFA Statutes states 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".

37. Article 23(4) of the FIFA RSTP reads – in its pertinent part – as follows:

"Decisions reached by the single judge or the Players' Status Committee may be appealed against before the Court of Arbitration for Sport (CAS)".

38. The Sole Arbitrator also takes note of the fact that neither of the Parties objected to the jurisdiction of the CAS and that the Order of Procedure was duly signed by them without reservation.

39. It follows from all of the above that the CAS has jurisdiction to adjudicate and decide on the present dispute.

VIII. ADMISSIBILITY

40. Article R49 of the CAS Code reads as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, 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".

41. In accordance with Article 58 para. 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".

42. The grounds of the Appealed Decision were notified to the Parties on 17 February 2023 whilst the Statement of Appeal was filed on 7 March 2023, therefore within the deadline set forth in Article 58 (1) of the FIFA Statutes. The Statement of Appeal also complied with

the requirements of Article R48 of the CAS Code. Consequently, the appeal is admissible.

IX. APPLICABLE LAW

43. Article 187 para. 1 of the Swiss Private International Law Act ("PILA") provides:

> *"The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such choice, according to the rules of the law which in the case has the closest connection".*

44. 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, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

45. Article 56(2) of the FIFA Statutes (edition 2022) 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".*

46. In addition, Clause 23 of the Contract provides as follows:

> *"The Parties shall apply the rules and regulations of MLSZ, UEFA, FIFA and the rules of Hungarian law to their legal relationship. In matters not related to this contract, the Hungarian Civil Code, the Sports Act, the LC and other relevant laws and regulations shall prevail".*

47. The Appellant submits that the present dispute shall be governed first and foremost by the FIFA Regulations and Swiss law. Hungarian law shall apply subsidiarily when necessary to evaluate whether the Contract was terminated with or without just cause.

48. The First Respondent does not refer in its Answer to a specific choice-of-law but it can be presumed from its content that it agreed on the application of the Hungarian law to assess the Contract's termination.

49. According to the Second Respondent, as per Article 56(2) of the FIFA Statutes the provisions of the CAS Code shall apply to the proceedings. Pursuant to the same article FIFA Regulations, namely the FIFA RSTP constitute the applicable law to the matter at hand and subsidiarily Swiss law shall apply if the need arise to fill in a possible gap in the regulations of FIFA.

50. In evaluating the position of the Parties regarding the applicable law, the Sole Arbitrator notes that they have submitted their dispute to CAS and therefore decided that the CAS Code, including Article R58 of the CAS Code, shall govern the appeal arbitration proceedings. This finding is further corroborated by the Order of Procedure, signed by the Parties, which states in relation to the applicable law as follows:

> *"In accordance with Article R58 of the Code, the Sole Arbitrator shall decide the dispute according to the applicable regulations and, subsidiarily, the rules of the 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 the law, the application of which the Sole Arbitrator deems appropriate. In the latter case, the Sole Arbitrator shall give reasons for her decision".

51. The Sole Arbitrator further notes that, according to Article R58 of the CAS Code, she shall firstly *"decide the dispute according to the applicable regulations"* and secondly, based on the *"rules of the 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 the law, the application of which the Sole Arbitrator deems appropriate"*. By corollary, Article R58 of the CAS Code, in principle gives precedence to the applicable regulations (of the relevant federation) over the Parties' choice of law.

52. The above finding is not contradicted by Clause 23 of the Contract. The latter does not provide for any hierarchy of norms. It rather appears that the clause in question merely lists the various applicable legal regimes that may be applicable to the case at hand. This follows from the fact that the wording of Clause 23 of the Contract only refers to *"and"* instead of *"additionally"* or *"subsidiarily"* and therefore does not give precedence to Hungarian law over the rules and regulations of FIFA.

53. In view of the above, the Sole Arbitrator finds that the dispute in question must be resolved primarily according to the *"applicable regulations"*, *i.e.* the rules and regulations of FIFA, in particular the FIFA RSTP (edition July 2022). In addition, Swiss law shall be applied subsidiarily, should the need arise to interpret or fill a possible gap in the various regulations of FIFA. For all questions not covered by the FIFA regulations, the Sole Arbitrator will resort to the *"rules of law"* chosen by the parties, *i.e.* the Hungarian law.

X. PROCEDURAL ISSUE – REPRESENTATION IN CAS PROCEEDINGS

54. It is recalled that the First Respondent objected the participation of Dr Kristof Wenczel as a representative of the Appellant during the CAS proceedings and the hearing, which the Sole Arbitrator ultimately decided to reject for the following reasons.

55. Article R30 of the CAS Code states:

"The parties may be represented or assisted by persons of their choice. The names, addresses, electronic mail addresses, telephone and facsimile numbers of the persons representing the parties shall be communicated to the CAS Court Office, the other party and the Panel after its formation. Any party represented by an attorney or other person shall provide written confirmation of such representation to the CAS Court Office".

56. Accordingly, it means that during the CAS proceedings the parties may be represented or assisted by a person of their choice, not necessarily a lawyer.

57. In the case at hand the Appellant requested to be represented during the CAS proceedings by Dr Kristof Wenczel providing with his Statement of Appeal an explicit power-attorney and additional one after the hearing, as required by the

Sole Arbitrator. Both documents contain the necessary data for representation and comply with the provision of Article R30 of the CAS Code. Thus, the First Respondent's allegations that the Appellant is represented by an unauthorised person, lacking the capacity of a *"licenced attorney, practicing law"* are rejected.

58. In view of the above, the Sole Arbitrator finds that the requirements for representation are not violated by allowing the person of the Appellant's choice to attend the CAS proceedings, and accordingly permitted him to do so.

XI. MERITS

59. The relevant questions that the Sole Arbitrator needs to answer in this appeal and based on the Parties' written submissions can be grouped into two sets of issues:

    A. Did the FIFA PSC correctly renounced jurisdiction to adjudicate and decide on the Coach's claim against the Club?

    B. In case the previous question is not answered in the affirmative, should the Appealed Decision be annulled and the case referred back to the FIFA PSC or the Sole Arbitrator should directly adjudicate on the matter if the Club had just cause to terminate the Contract and, if so, what are the consequences thereof?

A. Did the FIFA PSC correctly renounced jurisdiction to adjudicate and decide on the Coach's claim against the Club?

60. In the Appealed Decision the FIFA PSC held that in principle it was competent to deal with the matter at stake since it concerned an employment-related dispute of an international dimension, arising from the nationality of the Appellant and the First Respondent (a coach with Spanish nationality and a Hungarian club) but found the claim inadmissible as the Appellant was engaged in a sophisticated form of "*forum* shopping". According to the FIFA PSC when the Appellant lodged two identical claims, first before the FIFA PSC and then, before the Hungarian national court he tried to manipulate the system at his convenience, thus his behaviour was considered pivotal. Once the Appellant lodged the claim before the national court in Hungary he *de facto* renounced the FIFA PSC's jurisdiction to adjudicate on the matter at hand.

61. It is reminded that, according to the Appellant, the FIFA PSC had exclusive jurisdiction to hear the dispute at stake on the grounds of Article 22 of the FIFA RSTP and Clause 23 of the Contract and it erred when declined its competence finding the case inadmissible on the grounds of "*forum* shopping". He argues that the concept of "*forum* shopping" was improperly applied in the Appealed Decision having in mind the FIFA Commentary, the opinion of the advocate general of the European Court of Justice and the general features of "*forum* shopping" by EWERT J.-P. and WESLOW D.. In his view there was no abuse in the matter at hand as it is not prohibited to bring different claims in different jurisdictions. The main reasons to file a claim before the Hungarian national court were to contest the *"unlawfulness of the jurisdictional clause in the Termination Letter"* and to avoid a possible

non-enforcement of the FIFA PSC decision on a domestic level because of the Hungarian law. The Appellant also rejects the notion that both claims were filed simultaneously, as FIFA PSC was seized first. Finally, he underlines that he withdrew his claim before the Hungarian national court which suspended *"the element of choosing multiple fora"*.

62. The Respondents, in turn, argue that the FIFA PSC was not competent to decide on the matter at hand because the Appellant was engaged in a form of *"forum* shopping*"* by filing two parallel claims: one before the FIFA PSC and one before the Hungarian national court. By lodging the claim before the Hungarian national court, the Appellant renounced his right to have his claim heard by the FIFA PSC, thereby rendering his claim inadmissible. The Appellant's arguments are generally based on a misconstrued understanding of Article 22 of the FIFA RSTP which does not state that FIFA competence in employment – related disputes is absolute. When the Appellant sought redress before the national *forum* the FIFA PSC became no longer competent. Lastly, the Respondents object the withdrawal of the claim before the Hungarian national court stressing that such action cannot refute the existed elements of *"forum* shopping*"* which made the Appellant's claim before the FIFA PSC inadmissible.

63. In light of the above, the starting point of the Sole Arbitrator's analysis is Article 22 lit. c) and Article 23 para. 2 of the FIFA RSTP.

64. Article 22 lit. c) of the FIFA RSTP provides as follows:

"Without prejudice to the right of any player, coach, association, or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear: (…)

c) employment – related disputes between a club or an association and a coach of an international dimension; the aforementioned parties may, however, explicitly opt in writing for such disputes to be decided by an independent arbitration tribunal that has been established at national level within the framework of the association and/or a collective bargaining agreement".

65. Article 23 para. 2 of the FIFA RSTP states as follows:

"The Players' Status Chamber of the Football Tribunal shall adjudicate on any of the cases described in article 22 paragraphs 1 c) and f), and 2".

66. The Sole Arbitrator further reiterates that Clause 22 of the Contract provides as follows:

"The Parties agree to seek an amicable settlement of any dispute through negotiation. In the event of failure to do so, the Parties shall have the right to apply to the dispute settlement of the FIFA Dispute Resolution Chamber".

67. According to the above-mentioned provisions, as a rule, FIFA is competent to deal with employment – related disputes between a club and a coach of an international dimension. There are only two exceptions from this rule – when the parties explicitly opt to refer their dispute to *"an independent arbitration tribunal"* or to *"a civil court for employment-related disputes".*

68. The international dimension of the matter at hand is clear as the Coach is of

a Spanish nationality and the Club is based in Hungary. The dispute further concerns an employment relationship.

69. Additionally and undisputedly, Clause 22 of the Contract is sufficiently clear that the Parties agreed on the jurisdiction of the FIFA adjudicatory bodies and not on the jurisdiction of an independent arbitration tribunal at national level or the state courts to resolve their disputes.

70. Consequently, the competence of the FIFA PSC is, in principle given and that was duly noted in the Appealed Decision.

71. Bearing in mind the above, the question is whether the FIFA PSC's competence can be denied on the grounds of "*forum* shopping" since a party (here it is the Coach) lodged a claim before the FIFA PSC and, two days after, a claim before the national court in Hungary.

72. As an initial matter, the Sole Arbitrator considers parties should not be allowed to engage in the so-called "*forum* shopping" practice which could be understood as a situation where a party brings the same dispute before multiple *fora* in order to seek the most favourable judgement. The concept of "*forum* shopping", although widely accepted in sports-related dispute resolution system, has not been regulated or defined. It is closely connected to the principle *electa una via non datur recursus ad alteram*. In other words, once the choice of competent dispute resolution *forum* is made, it should become binding on both parties with respect to the dispute in question (ref. CAS 2007/A/1301, CAS 2017/A/5111, CAS 2018/A/5664).

73. In this respect, the Sole Arbitrator refers to the concept of "*forum* shopping" which, in the absence of a specific definition is addressed in the FIFA Commentary on the Regulations on the Status and Transfer of Players (the "FIFA Commentary"). While this document does not constitute *per se* the applicable regulation, it provides useful guidelines as to which practice could be regarded as unlawful *forum shopping* within football-related dispute resolution system.

74. The FIFA Commentary specifically explains the concept of "*forum shopping*" as follows:

"The final considerations concern the practice known as "forum shopping" - a party taking the same matter to multiple fora in the hope of obtaining the result that suits its purposes. The relevant jurisprudence is designed to prevent such behaviour, which is viewed as illegitimate. A party should not be able to game the system by having multiple fora hear the same argument in the hope one of them will hand down the judgment it wants. For example, a party should not be allowed to ask a national body to confirm that a contract has been breached without just cause, and then, having obtained a favourable decision at national level, ask the DRC to set the compensation payable in the case. The principle that a party that has chosen to have a case heard under one competent jurisdiction cannot then have recourse to another' (known colloquially as "forum shopping") is consistently applied".

75. Taking the above into account, the Sole Arbitrator is of the view that the unlawful *forum shopping* practice is characterized by the intent of the claimant and his/her purposeful conduct aimed at "gaming the system" to the detriment of the opponent. Its inherent

element is therefore bad faith of the party initiating the dispute.

76. Analyzing the facts of the case the Sole Arbitrator is not convinced that the Appellant was engaged in inadmissible "*forum* shopping". In particular, the Sole Arbitrator does not find it sufficiently proven that the Appellant acted in bad faith when filing the claim before FIFA and subsequently the claim before the Hungarian State Courts. The Appellant's intention to file the claim before the Hungarian State Courts was explained by the Appellant himself as follows:

> The Hungarian Labor Code (HLC) strictly allows 30 days for the employee to file a claim against any employer's resolution, including unilateral termination (see R's A 2.4.3.2. refers to the same provision). As Respondent referred falsely to the exclusive jurisdiction to the Debrecen Regional Court in the Termination Notice, the Claimant prudent and careful act was to file his claim to the Székesfehérvár Labour Court.

77. Further to the First Respondent's objection to the jurisdiction of FIFA to hear the case, the Sole Arbitrator notes that the Appellant explained to FIFA the reason why he filed the claim before the Hungarian Courts. The Sole Arbitrator notes that while the statute of limitations under the applicable FIFA regulations is of two years (Article 23 para. 3 of the RSTP), the Appellant's claim before the national court would have become time-barred already 30 days after the termination of the Contract. As consequence, should the Appellant not have filed the claim before the Hungarian State Courts, he would have been permanently prevented to do so, even in case in which FIFA, for any reason, whatsoever (*i.e.* the First Respondent contested its jurisdiction), would decline its jurisdiction.

78. Considering the First Respondent's objection to the jurisdiction of FIFA, the Sole Arbitrator considers that the Appellant may have filed the claim before the Hungarian State Courts with the purpose of protecting his rights.

79. Taking into consideration the foregoing, the Sole Arbitrator finds that the Appellant did not engage in unlawful "*forum* shopping". It could not have been established that the Appellant's intent was to "game the system" to the detriment of the First Respondent in order to check which *forum* would bring a more favourable judgment. The Panel is not convinced that the Appellant's actions were characterized by bad faith. Rather, it is reasonable to assume that by filing the claim before the Hungarian State Courts, the Appellant wanted to preserve his rights deriving from his dismissal by the First Respondent (who also contested the jurisdiction of FIFA to hear the claim).

80. In view of the above, the Sole Arbitrator considers that the FIFA PSC erred in finding that the Appellant's claim filed before FIFA was inadmissible because the Appellant was engaged in "*forum* shopping".

81. In light of the above, the Sole Arbitrator considers that the appeal shall be upheld and, consequently, the Appealed Decision is set aside.

82. Furthermore, considering that the Appellant's principal prayer for relief was to send the case back to FIFA and his arguments were focused on the jurisdiction of FIFA to hear this case, the Sole Arbitrator decides to refer the case back to FIFA to allow the latter to decide on the merits of the case.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 7 March 2023 by Joan Carrillo Milan against the decision rendered on 22 November 2022 by the FIFA Players' Status Chamber is upheld.

2. The decision issued on 22 November 2022 by the FIFA Players' Status Chamber is annulled.

3. The case is referred back to the FIFA Players' Status Chamber to decide on the merits of the dispute.

4. (…).

5. (…).

6. All other and further motions or prayers for relief are dismissed.

CAS 2023/A/9497 & 9523
Wiish Hagi Yabarow v. Somali Football Federation (SFF) & Ali Abdi Mohamed
2 April 2024

Panel: Mr Mario Vigna (Italy), President; Mr Mark Hovell (United Kingdom); Mr Majid Khuthaila (Kingdom of Saudi Arabia)

Football
Governance
Power of review
Standing to appeal of a candidate elected in parallel elections
Procedural defects in an election
Belated arguments
Arbitration costs

1. **CAS panels' *de novo* power of review cannot be construed as being wider than that of the previous instance.**

2. **A candidate who considers himself to have been legitimately elected to the presidency of his national federation in parallel elections has standing to appeal the decision endorsing his rival. He does not necessarily have to seek confirmation of his own election separately.**

3. **An election cannot be confirmed in the presence of substantial procedural defects, ranging from the absence of probative value of the documentation provided to a breach of simple majority and delegates requirements. Conversely, the supervision of the Ministry of sport and unproven allegations of double representation are not problematic. Ultimately, the existence of a dissenting vote shall not automatically lead to the vacation of the entire procedure.**

4. **The alleged inappropriate composition of electoral committees and criteria used to designate candidates cannot be rediscussed in the context of the election itself. In any case, such arguments are groundless when they do not impact the outcome and reflect bad faith when they are invoked selectively.**

5. **In principle, the arbitration costs are borne by the unsuccessful party. They may, however, be apportioned in a more balanced manner when the federation concerned contributed to perpetuating a situation of uncertainty.**

I. PARTIES

1. Mr Wiish Hagi Yabarow ("Mr Yabarow" or the "Appellant") is an individual of Somalian nationality, who, in November 2022, filed his candidacy for election to the office of President of the Somali Football Federation.

2. The Somali Football Federation (the "SFF" or the "First Respondent") is the governing body of football in Somalia, with its headquarters in Mogadishu, Somalia. It is affiliated with the *Fédération Internationale de Football Association* ("FIFA") and the *Confédération Africaine de Football* ("CAF").

3. Mr Ali Abdi Mohamed ("Mr Mohamed" or the "Second Respondent") is an individual of Somalian nationality, who, in November 2022, filed his candidacy for election to the office of President of the SFF.

4. The SFF and Mr Mohamed are jointly referred to as the "Respondents".

5. The Appellant and the Respondents are collectively referred to as the "Parties".

II. FACTUAL BACKGROUND

6. These matters both relate to the 2023 SFF Executive Committee elections, which followed two parallel procedures, resulting in the simultaneous appointment of two different Presidents of the SFF. The main purpose of the appeals is two-fold: it aims at (i) the confirmation of the election of the Appellant and (ii) the annulment of the (purported) election of the Second Respondent, both of which took place on 22 February 2023 (the "Appealed Decisions").

7. Below is a summary of the relevant facts and allegations based on the Parties' written and oral submissions, pleadings and the evidence adduced in these proceedings. References to additional facts and allegations found in the Parties' written and oral submissions, pleadings and evidence will be made, where relevant, in connection with the legal analysis that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, the Panel refers in the Award only to the submissions and evidence it considers necessary to explain its reasoning.

A) Background Facts

a) Preliminary remarks

8. On 16 February 2022, FIFA was informed that the then SFF President, Mr Abdiqani Said Arab, had "resigned" from his duties and that the SFF Senior Vice-President, Mr Ali Abdi Mohamed, would be acting as a President for the remaining period of the Executive Committee's tenure (2018-2022).

9. On 18 February 2022, FIFA wrote a letter to the SFF in order to initiate discussions and define a roadmap to be implemented until the SFF Executive Committee elections scheduled for November 2022.

10. On 2 August 2022, FIFA renewed contact with the SFF to seek clarification regarding the reasons for the end of Mr Arab's mandate, given the existence of several inconsistent documents. It reiterated its commitment to closely monitor the situation.

11. On 30 August 2022, in a letter erroneously dated 30 August 2023, the SFF communicated the eligibility criteria for the SFF Executive Committee elections.

12. On 29 September 2022, FIFA asked the SFF to delay the Elective Congress of the SFF of October 2022 *"to ensure that the revision of the Statutes and the electoral code of SFF is properly approved under the supervision and in collaboration with FIFA"*.

13. On 20 October 2022, the SFF Statutes and Electoral Code were adopted by the SFF and came into force on the same day.

b) The SFF Electoral Committees

14. On the same date, 20 October 2022, the SFF Electoral Committees' members, that are responsible for the election process and the Elective Congress of the

SFF following the SFF Statutes, were elected during an extraordinary Congress. Based on the relevant meeting minutes, they included the following names:[2]

1. Mr Isak Abdullahi Hassan (Law background)
2. Mr Mohamed Ali Shirwac
3. Mr Mohamed Muse Sheikh Abdi
4. Mr Mukhtar Mohamed Abdi
5. Ms Ilham Ali Gassar
6. Dr Abdirahman Muse Habbad (Law background)
7. Ms Sagal Abdi Nasir Shiddo

15. On 24 October 2022, the exact composition of the SFF Electoral Committees (First Instance and Appeals) was refined during a meeting, as confirmed by an email sent internally by Mr Ahmed Harraz, FIFA Senior Member Associations Governances Services Manager, to four undisclosed recipients. This email reads as follows:

"Dear Yusuf,
Kindly find below the list of names of the members of the electoral committee and their distribution within the first instance and appeal bodies of the electoral committee:
First instance
- *Mr. Isak Abdullahi Hassan (Chairman / Lawyer)*
- *Ms. Sagal Abdi Nasir Shiddo*
- *Mr. Mohamed Ali Shirwac*
- *Mr. Mukhtar Mohamed Abdi*

Appeal
- *Dr. Abdirahman Muse Habbad (Law Background)*
- *Ms. Elham Ali Gasar (Vice-Chairwoman)*
- *Mr. Mohamed Muse Sheikh Abdi*

Please accept my best wishes".

c) The initial lists of candidates

16. On an unspecified date, the first instance body of the SFF Electoral Committee ("SFF Electoral Committee"), represented by its Chairman, Mr Hassan, stated that the SFF Executive Committee elections would take place on 28 December 2022. It declared that the election process for all candidates would open for a 15-day period, from 12 to 27 November 2022, with a further 3 days to complete the applications. The Appellant and the Second Respondent expressed interest in the position of SFF presidency, submitting their respective applications and initial lists of candidates.

17. On 12 November 2022, the SFF Electoral Committee, represented by its Chairman, Mr Hassan, thanked the candidates for their applications and reminded those wishing to participate in these elections that applications were due by 27 November 2022.

18. On 29 November 2022, the SFF Electoral Committee, represented by its four members, indicated that the Appellant and several candidates on his initial list of candidates had failed to submit various supporting documents. The SFF Electoral Committee, *inter alia*, identified that the Appellant had not

[2] Some names of the relevant stakeholders and cities are mentioned or transliterated in documents with different English spelling, depending on the different correspondences in which they are cited (Mr Hassan/Mr Xasan, Ms Elham Ali Gasar/Ms Ilham Ali Gassar, etc). In the present award, for the sake of clarity, all are mentioned in the same version, with the exception of quotes.

provided an SFF identification card and invited him to remedy this defect within three days.

19. On 30 November 2022, the Appellant sent an email to the SFF Electoral Committee stating that an SFF identification card was not required by the SFF Statutes or Electoral Code and *was "a preserve of the Employees of the SFF not candidates of the SFF President and the SFF Executive"*.

20. On 4 December 2022, in a letter erroneously dated 4 November 2022, the SFF Electoral Committee, represented by its four members, rejected the Appellant's initial list of candidates because five candidates on that list, including the only female candidate, were not eligible.

21. On the same date, SFF Electoral Committee declared the Second Respondent's list of candidates to be fully eligible.

22. On 5 December 2022, the Appellant filed an appeal against those said decisions of the SFF Electoral Committee. The position of the Parties differs as to whether this appeal was upheld or rejected by the appeal body of the SFF Electoral Committee ("SFF Appeals Committee"), due to conflicting letters whose content and validity are disputed:

    - The Appellant submits that the SFF Appeals Committee, represented by Ms Ilham Ali Gassar ("Ms Gassar") only, validly overturned the decisions of the SFF Electoral Committee by letter dated 10 December 2022.
    - The Respondents allege that the SFF Appeals Committee, represented by its three members, duly confirmed the decisions of the SFF Electoral Committee by letter dated 11 December 2022.

23. Following these decisions, at an unspecified date, the SFF issued the agenda for the elective congress and a related list of candidates. The Appellant was not included in that list.

24. On 7 December 2022, the SFF Electoral and Appeals Committees, consisting of six members, held an urgent meeting to discuss "the unilateral decision" made by Ms Gassar using an "unofficial" email and logo.

25. On 11 December 2022, the SFF Electoral and Appeals Committees, comprising six members, declared all acts processed by Ms Gassar as invalid, as follows:

    "The SFF Election Committee has met today with chaired by the Chairman of the Committee together with all members except one member absent from the meeting.

    Referred to the discussions [sic] communication email dated 7th December with following for falsification of letter and Stamp of the Appeal Committee which has made for inconvenient communication with the respect of the electoral Code article. 3 p7 article 4 p6.

    The election committee has set for the following points:

    1. *The communicated letter regarding on the appeal response for the candidate Mr. Wiish Hagi Yabarow which was false communicated letter claimed by the one of the members of electoral Appeal Committee*

names Ilham Ali Gasar, she has no power to exercise, while the rest of the member and the Chairman were at the office.

2. As communicated previously due to the respect and the unity of the electoral Committee this letter of joint communique will therefore notified that the letter sent by Mrs. Ilham Ali Gasar is false and not agreed with the in the electoral appeal committee.

Therefore, this is the second instance in which false documents were sent through a false email and stamp to a third party without the knowledge of the election committee. We would like to clearly state that such actions are unacceptable and undermines [sic] the legitimacy of the election committee as well as election process".

26. On the same date, according to the Appellant, the SFF Appeals Committee, represented by Ms Gassar only, validly confirmed the eligibility of the Appellant and his list of candidates.

27. On 12 December 2022, the Chairman of the SFF Electoral Committee, Mr Hassan, following a request for clarification from the Appellant, informed him that the SFF Appeals Committee consisted of a Chairman, Mr Habbad, and two members, Ms Gassar and Mr Abdi. He concluded that the documentation sent by Ms Gassar alone was *"not the correct letter"* and *"not authorized legally"*.

28. On 13 December 2022, the Somali Minister for Youth and Sports, Hon. Mohamed Bare Mohamud, sent a letter to FIFA which reads in its relevant parts as follows:

"Dear Sir, Madam,

On behalf of the Federal Ministry of Youth and Sports, I would like to highlight the efforts [FIFA] *has undertaken to develop the* [SFF] *and the Somali Football community at large.*
[…]

We would, however, like to raise some critical information that we have received via social media and directly from the parties concerned.
[…]

I have made two attempts to provide guidance and counsel the 7-member election of the committee after receiving complaints from both contestants and other members of SFF who were dissatisfied and gravely concerned about the direction and process of the election committee. I have taken the necessary steps and avoided to intervene with SFF and election committee however when it comes to ensuring safety and overall reputation of sports, I must take necessary action to avert conflict.

For the reason above I strongly advised against holding the scheduled election on 28th December 2022. […] *I urge FIFA to look in this matter and provide necessary training and guidance to the election committee, evaluate the concerns".*
[…]

29. On 17 December 2022, the SFF Electoral Committee, represented by its Chairman, Mr Hassan, announced the official list of candidates for the election due to be held on 28 December 2022. The Appellant, again, did not appear on that list.

30. On 20 December 2022, FIFA wrote to the SFF concerning the scheduled election of 28 December 2022 and highlighted the following points:

- FIFA received several complaints concerning the electoral process

conducted so far in preparation for the elections.

- A number of candidates for the elections were rejected due to not being active in football for the *"last 5 years"*. Yet, Article 37/5(ii) of the SFF Statutes only requires that all members of the Executive Committee *"have been active in football during at least five years"*, regardless of when and how this experience was gained.

- Contradictory letters seem to have been communicated by different members of the SFF Electoral Committees concerning the decisions on the appeals that were presented to the SFF Appeals Committee.

- FIFA Member Associations must ensure that their elections or appointments are carried out on the basis of a democratic process that guarantees the independence of the relevant elections or appointments.

- FIFA might not recognise the results of particular elections or appointments if these conditions are not met. It kindly recommends that the relevant SFF bodies either reassess their decisions in light of the provisions of the SFF Statutes and Electoral Code or postpone the SFF the Elective Congress so that the electoral process may be carried out anew.

31. On 24 December 2022, the Somali Minister for Youth and Sports, Mr Mohamud, sent a letter to the SFF Electoral Committee stating that the election date had to be postponed for the following reasons:

"The Ministry has progressively monitored this process under the incumbent of SFF administration. We received several complaints from multiple voices from some members of the football family within Somalia. The ministry has taken multiple steps to mitigate and address the raised concern through the appropriate channels while exercising its oversight role. However, the electoral committee of SFF bypassed the guidance and instructions stipulated in the SSF statutes, electoral code and overall FIFA's guidance. Ignoring the rules and regulations to hold free and fair elections resulted in multiple conflicting directives from the SFF electoral committee.

Thus, it is important to note that FIFA did respond with comprehensive interpretation and guidance to the SFF. Therefore, in view of the SFF Statutes article 30 and the SFF Electoral Code article, 8 and article 9 the recommendations of FIFA may not be appropriately implemented to have a free, fair, and transparent election.

Moreover, the ministry has the responsibility to oversight the elections of SFF to be free, fair, transparent, and non-political. The ministry directs SFF Elective General Assembly should not take place on 28th December 2022. The SFF should announce a new road map for elections no later than 30th January 2023. The relevant SFF bodies should reassess the persons that were excluded from the elections process in accordance with the SFF Statutes, Electoral Code and FIFA's guidance. This directive is effective immediately" (emphasis original).

32. On 26 December 2022, the SFF Electoral Committee sent a letter to FIFA summarising the overall situation. It emphasised that it was responsible for organising the election and committed to leading it independently.

33. On 27 December 2022, FIFA sent a letter to the SFF Electoral Committee, which was also copied to CAF and the Ministry of Youth and Sports. In this letter, FIFA encouraged *"the different football stakeholders in Somalia to resort to dialogue and to adopt and respect the legal processes as provided and approved by the statutes and regulations of FIFA and the SFF"*.

34. On the same date, the SFF Electoral Committee, represented by its Chairman, Mr Hassan, decided to postpone the date of the SFF the Elective Congress scheduled for 28 December 2022.

35. On 11 January 2023, a meeting took place between the SFF Electoral Committee and FIFA concerning the pending election.

36. On 12 January 2023, the SFF Electoral Committee held a meeting aimed at settling the situation.

d) The Revised Lists of Candidates

37. On 19 January 2023, the SFF Appeals Committee, represented by two members, issued a "reassessment" decision that five candidates, not including the Appellant, failed the eligibility check and were unable to stand in the elections.

38. On 20 January 2023, the Appellant replied to this letter, and objected to the SFF process in general.

39. On 21 January 2023, the SFF Electoral Committee, represented by its Chairman, Mr Hassan, announced that the new elections would be held on 1 February 2023. In so doing, it only validated the list of candidates presented by Mr Mohamed ("the First List"), which was constituted as follows:

No.	**Name**	**Candidate position**	**Status**
1	Ali Abdi Mohamed	President Candidate	Eligible
2	Ahmed Farah Takal	1st Vice-President Candidate	Eligible
3	Abdirashid Abdulle Mohamed	2nd Vice-President	Eligible
4	Yusuf Hussein Mumin	3rd Vice-President	Eligible
5	Yaxye Mohamud Abukar	Executive Committee member	Eligible
6	Fahmo Kulle Ali	Executive Committee (Female)	Eligible
7	Omar Mohamud Nor	Executive Committee member	Eligible
8	Abukar Islow Hassan	Executive Committee member	Eligible
9	Mohamed Ali Isse	Executive Committee member	Eligible
10	Bashir Salad Bare	Executive Committee member	Eligible
11	Abdikani Abdullalahi Abow	Executive Committee member	Eligible

40. On the same date, according to Mr Yabarow, the SFF Electoral Committee, represented by Ms Gassar, issued another decision declaring that he was also eligible to stand in the said elections, with the following list (the "Second List"):

No.	Name	Candidate positio	Status

1	Wiish Hagi Yabarov	President candidate	Eligible
2	Mohamed Ahmed Cantoobe	1st Vice-President Candidate	Eligible
3	Abdirizak Farah Omar	1st Vice-President Candidate	Eligible
4	Omar Ahmed Abdirahman	3rd Vice Presidemt	Eligible
5	Ali Omar Hassan	Executive Committee member	Eligible
6.	Shiama Salal Mohamed	Executice Committee female	Eligible
7.	Hassan Ibrahim Mohamed	Executive Committee member	Eligible
8.	Mohamed Farah Mohamed	Executive Committee member	Eligible
9.	Daadir Amin Ali	Executive Committee member	Eligible
10.	Bile Mohamud Jimcale	Executive Committee member	Eligible
11.	Mohamed Omar Hashi	Executive Committee member	Eligible

41. On 31 January 2023, the SFF Electoral Committee, represented by its Chairman, Mr Hassan, indicated that the elections should be postponed and would take place on 22 February 2023 at the Elite Hotel in Mogadishu, Somalia.

42. On the same date, the postponement was also confirmed by a letter signed by Ms Gassar only.

43. On 8 February 2023, based on the documentation provided by the Appellant, the SFF Appeals Committee, represented by Ms Gassar only, released a further decision declaring the Appellant and the Second Respondent eligible to stand in the elections to be held on 22 February 2023 at the Jaziira Hotel in Mogadishu, Somalia.

e) The SFF Executive Committee elections

44. On 22 February 2023, two parallel elections were held simultaneously at 9 am at the Elite and the Jaziira Hotels in Mogadishu, Somalia, and led to conflicting results (i.e. the Appealed Decisions):

- According to the detailed minutes drawn up by a notary public on 22 February 2023, 34 out of the 46 SFF members were present at the Elite Hotel and voted "yes" by a show of hands when presented with the First List. As a consequence, Mr Mohamed and his list were allegedly declared winners of the SFF election.

- According to the letter issued by Ms Gassar on 22 February 2023, 25 out of the 46 SFF members were present at the Jaziira Hotel and 24 voted "yes" by a show of hands and one abstained when presented with the Second List. As a consequence, Mr Yabarow and his list were allegedly declared winners of the SFF election.

45. On 23 February 2023, the SFF Electoral Committee, represented by its Chairman, Mr Hassan, issued a report statement summarising the election process. It concluded that Mr Mohamed had been elected as SFF President and that *"one of the members of the Electoral Committee"* (i.e. Ms Gassar) had *"seriously violated the SFF Statutes and Electoral Code"*.

46. On 3 March 2023, the FIFA President, Mr Gianni Infantino, congratulated Mr Mohamed on his election. Three days later, the CAF President, Dr Patrice Motsepe, did likewise.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

47. On 14 March 2023, the Appellant filed an appeal with the Court of Arbitration for Sports (the "CAS") against the Respondents with respect to the Appealed Decisions in accordance with Articles R47 and R48 of the CAS Code of Sports-related Arbitration ("CAS Code"). In his Statement of Appeal, the Appellant nominated Mr Mark A. Hovell, Solicitor in Manchester, United Kingdom, as arbitrator.

48. On 15 March 2023, the Appellant submitted a request for the production of documents in relation to the two separate presidential election results of 22 February 2022.

49. On 16 March 2023, the CAS Court Office decided to open two separate files, considering the subject matter of the Statement of Appeal and the configuration of the dispute. It noted that the Appellant had not attached a copy of the statutes and regulations providing for appeal to CAS and invited him to remedy this oversight. It made the same observation regarding the second appealed decision, while stressing that it had been listed in the request for the production of documents.

50. On the same date, the Appellant provided the CAS Court Office with a copy of the requested documents, namely the SFF Statutes.

51. On 27 March 2023, the CAS Court Office invited the Parties to indicate, *inter alia*, whether they agreed to submit their procedures to the same panel in accordance with Article R50 para. 3 of the CAS Code.

52. On the same date, the Appellant responded favourably to such a request. The Respondents did likewise three and four days later respectively.

53. On 31 March 2023, the Appellant filed his combined Appeal Brief with the CAS Court Office pursuant to Article R51 of the CAS Code.

54. On 3 April 2023, the First Respondent produced the minutes of the SFF the Elective Congress dated 22 February 2023.

55. On 4 April 2023, the Appellant submitted that his request for production had not been fully satisfied.

56. On 25 April 2023, the Appellant requested the consolidation of the proceedings.

57. On the same date, the CAS Court Office denied the Appellant's request for consolidation. It pointed out that Article R52 para. 5 of the CAS Code only allows such a mechanism when both appeals are directed against the same decision, which was not the case here.

58. On 15 May 2023, after the Respondents had failed to jointly appoint an arbitrator in these matters within the granted time limit, the President of the CAS Appeals Arbitration Division appointed Mr Majid Khuthaila, Attorney-at-law in Riyadh, Kingdom of Saudi Arabia, as

arbitrator *in lieu* of the Respondents in accordance with Article R53 of the CAS Code.

59. On 12 July 2023, within the extended and suspended time limit, the Respondents filed their combined Answer pursuant to Article R55 of the CAS Code. They also produced several documents regarding the presidential election.

60. On 13 July 2023, 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, the Panel appointed to hear the appeal was constituted as follows:

    President: Mr Mario Vigna, Attorney-at-law in Rome, Italy

    Arbitrators: Mr Mark A. Hovell, Solicitor in Manchester, United Kingdom
    Mr Majid Khuthaila, Attorney-at-law in Riyadh, Kingdom of Saudi Arabia

61. In the same letter, the CAS Court Office invited, *inter alia*, the Parties to indicate whether they preferred a hearing to be held in this matter or for the Panel to render an award based solely on the Parties' written submissions. It also enquired about the need to organise a case management conference.

62. On 17 July 2023, the Appellant requested a hearing and case management conference to be held.

63. On 18 July 2023, the Respondents expressed their preference for the Panel to issue an award based soled on the Parties' written submissions.

64. On 2 August 2023, the CAS Court Office informed the Parties that Ms Alexandra Veuthey had been appointed as a Clerk in this matter. In addition, it invited the Parties to comment on whether and how FIFA had managed the elections of the SFF President, and sought approval to the issuance of one single award encompassing both proceedings. In addition to that, it requested the Appellant to complete a *Model Redfern Schedule* and to provide an English translation of several exhibits.

65. On 3 August 2023, the Appellant indicated that he agreed that the Panel should render one single award, and referred to the evidence already attached to his written submissions regarding FIFA's involvement in the elections. He also withdrew his request for the production of documents.

66. On 7 August 2023, the Respondents stated that they agreed to the issuance of one single award.

67. On the same date, the CAS Court Office informed the Parties, *inter alia*, that the Panel had decided to hold a hearing in this matter without holding a prior case management conference.

68. On 22 August 2023, the CAS Court Office informed the Parties that a hearing would take place in Lausanne, Switzerland, on 29 November 2023. It also invited them to provide a list of their hearing attendees and to sign the Order of Procedure, issued on behalf of the Panel.

69. On 28 August 2023, the Respondents provided their comments on FIFA's involvement in the elections.

70. On 31 August 2023, the Respondents provided the CAS Court Office with the list of their hearing attendees and a signed copy of the Order of Procedure.

71. On 6 September 2023, the Appellant sent the CAS Court Office a signed copy of the Order of Procedure and the English translation of his exhibits.

72. On 11 October 2023, the Appellant released the list of his hearing attendees. On that occasion, he referred for the first time to an additional counsel, Mr Elvis Majani.

73. On 21 November 2023, the CAS Court Office, on behalf of the Panel, sent a draft hearing schedule to the Parties, which they endorsed.

74. On 29 November 2023, an in-person hearing was held at CAS headquarters, in Lausanne, Switzerland.

75. At the outset of the hearing, the Parties declared that they had no objections as to the constitution of the Panel. However, the Respondents objected to the presence of Mr Majani on the grounds of an alleged conflict of interest, and produced in support a letter of engagement dated 18 May 2022 stating that he had previously carried out a mandate for the SFF. As a result, Mr Majani withdrew from the case and left the hearing room.

76. In addition to the Panel, Mr Björn Hessert, CAS Counsel, and Ms Alexandra Veuthey, CAS Clerk, the following persons attended the hearing, in person or remotely:

For the Appellant:

- Mr Juan de Dios Crespo Pérez, Counsel;
- Mr Paolo Torchetti, Counsel;
- Mr Wiish Hagi Yabarow, Appellant;
- Mr Ahmed Ibrahim, Translator;

For the Respondents:

- Ms Joëlle Monlouis, Counsel;
- Mr Jean-Samuel Leuba, Counsel;
- Mr Yusuf Mohudin Ahmed, SFF General Secretary.

77. The Panel heard the Appellant and Mr Ahmed as a party representative. Both of them were invited by the President of the Panel to tell the truth subject to the sanctions of perjury under Swiss law and were cross-examined.

78. The Appellant began by outlining his career path. He emphasised his probity and the fact that he had always been committed to serving the world of sport since the death of his father, who worked in the same field. He declared that he could only account for his election, and expressed his surprise when he was told that the attendance sheet for his elective congress was not on the case file. However, he pointed out that some of the delegates appearing on the attendance sheet for the Second Respondent were not those customarily authorised to represent member clubs. He stated that he did not know Ms Gassar personally and that he had genuinely relied on her letters, all of which were sent by email. Asked about the odd peculiarities of the stamps and email address used by Ms Gassar – which appeared to be counterfeit as they were copied and pasted from other letters – he replied that he *"had not noticed"*. Lastly, he could not recall

receiving the email from the SFF dated 12 December 2022, instructing that Ms Gassar was not authorised to act alone, but acknowledged that he had been informed of the full composition of the SFF committees *"in the course of December"*.

79. Mr Ahmed explained that his role as SFF General Secretary is to assist the federation in a wide range of operational and financial matters and to liaise with FIFA. He acknowledged that he did not know the exact relationship between the Appellant and Ms Gassar, but reported that they had at least a friend in common. He affirmed that he had talked to Ms Gassar to remind her of the imperatives of "dignity" associated with her position, and urged her colleagues to do the same. As a reply to the question why the SFF did not take steps to formally remove Ms Gassar, he pointed out that she could only be removed from office by the SFF Congress. Furthermore, from a disciplinary perspective, he added that the SFF did not have any Ethics Committee in place at the time of the elections, and that its Disciplinary Code was only in draft form and would only come into force after FIFA's approval. He maintained that SFF Electoral Committees' members had been appointed in accordance with the applicable SFF regulations, and that all the delegates' identities and licences had been verified at the SFF Elective Congress held at the Elite Hotel on 22 February 2023. Finally, he specified that the SFF held its last Congress in June 2023, and that all 46 members supported the chosen directions, including the set-up of several committees (disciplinary, audit & compliance and appeals).

80. The Parties thereafter were given a full opportunity to present their case, submit their arguments and submissions and answer the questions posed by the Panel. At the end of the hearing, the Parties confirmed that they were satisfied with the hearing and that their right to be heard was respected. Then, the Parties were informed that the evidentiary proceedings were closed.

IV. SUBMISSIONS OF THE PARTIES

A. The Appellant's Position

81. In his Statement of Appeal and Appeal Brief, the Appellant submitted the following prayers for relief:

"1. To:
a. uphold the election results of 22 February 2023 electing the Appellant as President of the SFF; and
b. vacate the alleged election results of 22 February 2023 electing the Second Respondent as President of the SFF.
2. In the alternative, to vacate all elective procedures and order the SFF to re-commence the entire election process de novo.
3. Independently of the type of the decision to be issued, the Appellant requests that the Panel:
a. fix a sum of 10,000 CHF to be paid by the Respondent to the Appellant to contribute to the payment of his legal fees and costs; and
b. order the Respondent to pay the entirety of the administration costs and fees.
4. The Appellant reserves the right to request for additional written submissions and amend the request for relief".

82. At the hearing, the Appellant placed greater emphasis on his alternative prayers for relief, which he described as possibly *"more appropriate"* to the

situation, without formally amending his prayers.

83. The Appellant's submissions, in essence, may be summarised as follows:

i. The Appellant's standing to sue

- The Appellant has standing to sue, as he is technically "an official" within the meaning of Article 65 of the SFF Statutes and is directly affected by the Appealed Decisions.
- The Appellant legitimately relied on the three decisions of the SFF Appeals Committee that found him eligible for the elections. He cannot, therefore, be criticised for not appealing the other decisions ruling out his candidacy.

ii. The lists of candidates

- The Appellant was initially declared ineligible for the SFF the Elective Congress of 28 December 2022 because he did not have an SFF identification card, but this decision was correctly overturned. Some candidates on his list were also excluded, but only temporarily.
- The Appellant did not understand why he was not included in the list of candidates for the SFF the Elective Congress of 28 December 2022 and why he was deemed ineligible for the SFF Elective Congress of 1 February 2023, following a reassessment. In any event, the situation was clarified by three subsequent letters, which authorised him to take part in the elections.
- The Appellant cannot be accused of colluding with Ms Gassar, in her capacity of representative of the SFF Appeals Committee, in order to obtain decisions in his favour. In fact, he did not even know her, as the examination of the Parties at the hearing demonstrated.

iii. The SFF Elective Congress

- The Appellant was validly elected SFF President by decision of the SFF Electoral Committee of 22 February 2023. His election took place in the presence of 25 delegates, all of whom voted in his favour, with the exception of one abstention.
- The Appellant was never notified of the decision allegedly designating the Second Respondent for this position, nor any related letters, and cannot recognise his legitimacy.
- The Appellant rejects the validity of the documents provided by the Second Respondent with his submissions. In particular, the attendance sheets are signed by some individuals who had no power of representation for their respective clubs.

iv. FIFA's involvement

- FIFA was actively involved in the SFF elections, as can be seen by the correspondence on file.
- FIFA monitored the revision of the SFF Statutes and Electoral Code, received several complaints regarding the electoral process and issued several letters in an attempt to remedy the situation.

v. The alleged breaches of the SFF regulations

- Parts of the electoral process were undertaken contrary to the SFF Statutes and Electoral Code:

  - The SFF Electoral and Appeals Committees released inconsistent decisions with respect to the eligibility of the Appellant and other candidates, which led to the holding of two parallel Elective Congresses.
  - The SFF identification card was initially considered as a condition for eligibility, whereas only football experience of 5 years should have been required.
  - The SFF Electoral and Appeals Committees were improperly constituted (the election of 7 instead of 12 members; no clear division between the first instance and appeals body made by the extraordinary Congress; and the involvement of FIFA in the composition of the two bodies). A few of their decisions are not signed by some members listed as present.
  - The Somalian Ministry of Sport intervened in the electoral process, going so far as to dismiss the SFF Elective Congress and indirectly taking sides, in violation of the principles of political independence and neutrality enshrined in the FIFA Statutes.

- These breaches would, at the very least, justify the organisation of new elections.

B. The Respondents' Position

84. In their Answer, the Respondents submitted the following prayers for relief:

"Prayer 1: The Appeals shall be declared inadmissible and subsidiarily rejected, and the SFF election under appeal shall be confirmed. Prayer 2: In any event, the Appellant shall be ordered to bear the costs of the arbitration and he shall be ordered to contribute to the legal fees incurred by Respondents at an amount of CHF 15.000".

85. The Respondents' submissions, in essence, may be summarised as follows:

i. The Appellant's standing to sue

- The Appellant lacks standing to sue under Article 65 of the SFF Statutes, as he is acting solely under his capacity as an ousted presidential candidate. He is neither a delegate of a SFF member, a club member or an official under these regulations.
- The Appellant failed to contest the decisions of the Electoral Committee declaring him ineligible for the elections in due time. Hence, he has no legal interest anymore in challenging the SFF election results.

ii. The lists of candidates

- The Appellant relies on the decisions of Ms Gassar, a member of the SFF Appeals Committee, in support of his claim. Yet, the Appellant cannot ignore that Ms Gassar usurped the position of Chairwoman of the Appeals Committee, used an "unofficial stamp" and took decisions on her own, in breach of the SFF Statutes and Electoral Code. The Appellant was informed of Ms Gassar's practice on 12 December 2022.

- Only the SFF Congress could have deposed Ms Gassar. As it happens, the SFF does not yet have a disciplinary code.
- The only list validated by the SFF Electoral Committee was the one led by Mr Mohamed Conversely, the Appellant's list was rejected because 5 candidates were not eligible, which was confirmed upon appeal. This decision was never challenged by the Appellant.

iii. The elective congress

- The Appellant decided to hold an elective congress under no SFF election committee supervision and without any *quorum*. He was not able to provide any documentation in support of his election, with the exception of a letter dated 22 February 2023, which was signed only by Ms Gassar.
- The Second Respondent was duly elected as SFF President on 22 February 2023, during an SFF official elective congress that was jointly agreed by the SFF Electoral Committee and FIFA delegation, and attended by a notary public as provided for in Articles 5 lit. h) and 21 of the SFF Electoral Code.
- The Second Respondent was able to submit detailed documentation relating to his election, including the detailed minutes of the SFF Elective Congress stating that 34 out of the 46 SFF members were present and all voted "yes", together with an attendance sheet signed by all duly authorised participants.
- The Second Respondent's election was recognised by FIFA's and CAF's Presidents, who both congratulated him on his new position.

iv. FIFA's involvement

- FIFA was closely involved in the SFF elections, as demonstrated by the evidence on file.
- SFF and FIFA representatives built a roadmap as of May 2022 for the initially scheduled elections. They met and exchanged views several times following the successive postponement of the elective congress, in order to adjust to the situation.
- FIFA was informed at every step of the process, from the revision of the SFF Statutes and Electoral Code to the intervention of the Ministry of Youth and Sports and final elections.

v. The alleged breaches of the SFF regulations

- The electoral process was globally compliant with the SFF Statutes and Electoral Code:
  - The holding of parallel election procedures was only triggered by the Appellant, who held illegal, parallel elections that should be deemed null and void.
  - The SFF identification card can be an indication to determine that candidates have gained the required work experience in football. In any event, this requirement was not the only one that led to the exclusion of

the candidates supported by the Appellant and cannot be re-examined in the present proceedings.

- The SFF Electoral and Appeals Committees were properly constituted (the absence of substitutes did not affect the *quorum*, the division of the committees was subsequently clarified by an email to FIFA and matches the members listed in the decisions issued).
- The Somalian Ministry of Youth and Sports never intervened to influence the admission/rejection of a candidate list, despite the Appellant's unsuccessful attempts in that respect.

➢ Accordingly, there is no need to organise new elections.

V. JURISDICTION

86. Article R47 para. 1 of the CAS Code provides that:

"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".

87. Article 65 para. 1 of the SFF Statutes (2022 edition) states that:

"Disputes within SFF or disputes affecting Members of SFF, leagues, members of leagues, clubs, members of clubs, players and officials may only be referred in the last instance (i.e. after exhaustion of all internal channels within SFF) to CAS in Lausanne, Switzerland, which shall settle the dispute definitively to the exclusion of any ordinary court, unless expressly prohibited by the legislation in Somalia".

88. Article 9 para. 1 of the SFF Electoral Code (2022 edition) sets forth as follows: *"The decisions of the Election Appeal Committee may only be referred to CAS in accordance with the provisions in the Statutes of SFF".*

89. The Respondents did not contest the jurisdiction of CAS in respect of the appeals. Moreover, all Parties confirmed the CAS's jurisdiction by signing the Order of Procedure. In these circumstances, the Panel is satisfied that CAS has jurisdiction to hear and determine these appeals.

VI. ADMISSIBILITY

90. Article R49 of the CAS Code states, 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 in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against".

91. The SFF regulations do not provide for a time limit for lodging an appeal with the CAS, with the result that the general time limit of 21 days provided for in Article R49 of the CAS Code applies.

92. The Panel notes that the Appellant acknowledges that he was informed of the conflicting election results of 22 February 2023 on the very same day, and filed his Statement of Appeal on 14 March 2023. Thus, the appeals were filed within the deadline of 21 days and are, thus, admissible.

VII. APPLICABLE LAW

93. Article R58 of the CAS Code states:

> *"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".*

94. Article 30 of the SFF Statutes provide that *"the elections shall be conducted in accordance with the Electoral Code of SFF"*. It contains no express indication as to the subsidiary state law applicable to the dispute.

95. The Parties state that the laws applicable to this appeal are the SFF Statutes and Electoral Code (2022 edition). They do not comment on the application of subsidiary state laws.

96. The Panel will thus examine the dispute in light of the SFF regulations, primarily the SFF Statutes and Electoral Code. Somalian law may also apply in a subsidiary capacity, given the SFF's headquarters in Mogadishu, Somalia, if there were any gaps in SFF's regulations.

VIII. MERITS

A. The Main Issues

97. As a result of the above, the issues that arise for assessment by the Panel with these appeals may be summarised as follows:

> What is the scope of the Panel's review?
>
> Does the Appellant have standing to appeal?
>
> Was the election of Mr Yabarow as SFF President flawed?
>
> Was the election of Mr Mohamed as SFF President flawed?
>
> Should both elections be vacated?
>
> What consequences result from the answers to questions (a)-(e)?

(a) What is the scope of the Panel's review?

98. The starting point in determining the scope of the Panel's review is Article R57 para. 1 of the CAS Code, which states that:

> *"[t]he Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. …".*

99. As much as Article R57 para. 1 of the CAS Code provides the Panel with a *de novo* power of review in respect of the Appealed Decisions, this power is not without limits. According to legal writing and well-established CAS jurisprudence, a CAS panels' *de novo* power of review cannot be construed as being wider than that of the previous instance (CAS 2016/A/4727, para. 186; CAS 2014/A/3855, para. 93; MAVROMATI/REEB, *The Code of the Court of Arbitration for Sport. Commentary, cases and materials*, p. 522). The power of review of a CAS panel is also determined by the relevant statutory legal basis and

is limited with regard to the appeal against and the review of the appealed decision(s), both objectively and subjectively; if a motion was neither object of the proceedings before the previous authorities, nor in any way dealt with in the appealed decision(s), the Panel does not have power to decide on it and the motion must be rejected (CAS 2015/A/4095, with further references; CAS 2021/A/8312, para. 82).

100. In accordance with these principles, the Panel will only consider the Appellant's arguments insofar as they are directed against the Appealed Decisions, namely the conflicting election results of 22 February 2023, as set out in the minutes drawn up by a notary public and letter of Ms Gassar the very next day. It will not go into detail on the steps that preceded them, such as the criteria used by the SFF Electoral Committees to select the candidates and the composition of these committees, which should have been the subject of a separate appeal in due course (in the same vein, see CAS 2018/A/5947, paras. 86ff; CAS 2021/A/7717, paras. 100ff; CAS 2021/A/7875, paras. 154ff; CAS 2021/A/8435, paras. 135ff; CAS 2022/A/8915, paras. 94ff).

101. Bearing these limitations in mind, the Panel will carry out a two-fold analysis by examining:

- the validity of the Appellant's election in view of his motion to uphold his election results (as per CAS 2023/A/9747); and

- the alleged invalidity of the Second Respondent's election in conjunction with the flaws that – in the Appellant's view – marred the electoral process (as per CAS 2023/A/9523).

102. The Panel will then consider the Appellant's alternative request to vacate all elective procedures and order the SFF to restart the election process.

103. Before the Panel addresses the aforementioned issues, the Appellant's standing to appeal is first discussed below.

(b) Does the Appellant have standing to appeal?

104. The Appellant's standing to appeal is contested by the Respondents, who submit that the Appellant does not meet the requisite of the SFF Statutes and has no legal interest in challenging the results of the SFF's elections.

105. According to CAS well-established jurisprudence, the plea relating to the lack of standing to appeal relates to the merits of the case (CAS 2009/A/1869, paras. 29ff; CAS 2015/A/3959, paras. 141ff; CAS 2018/A/5658, para. 57).

106. A fundamental principle of law is that the appealing party must have a manifest interest in the dispute. In line with CAS jurisprudence, a party has standing to appeal if it has an interest worthy of protection, i.e. if it can show sufficient legal interest in the matter being appealed. In other words, an appellant has to demonstrate that he or she is sufficiently affected by the appealed decision and has a tangible interest, of financial or sporting nature, at stake. Accordingly, CAS dismisses appeals for lack of standing to appeal if the appellant is not directly affected by the decision at

issue (see e.g., CAS 2014/A/3744 & 3766, para. 175; 2018/A/5658, para. 58, and the references mentioned therein).

107. The Panel notes that Article 65 of the SFF Statutes provides for a right to appeal to CAS for two types of disputes, i.e. *"Disputes within SFF or disputes affecting SFF members, leagues, members of leagues, clubs, members of clubs, players and officials"*. The use of the disjunctive term "or" clearly identifies two categories that can be treated distinctly.

108. To interpret the scope of the article concerned, the Panel finds no reason why the words *"Disputes within SFF"* should be understood narrowly. Given that the Appellant seeks election as SFF President, criticises the holding of parallel elections and points to alleged procedural flaws, his appeal must be construed as a dispute *"within SFF"*, irrespective of his status as "official" or ousted candidate. In that respect, the Appellant has a legal interest in the proper organisation of the election in accordance with the SFF Statutes and the Electoral Code, and is entitled to contest the Second Respondent's election.

109. The Panel is less convinced of the Appellant's standing to request confirmation of his own election, even though the SFF Electoral Committee subsequently issued a report dated 23 February 2023 in which it refused to recognise his legitimacy. It considers, however, that this question does not need a definitive answer here, in view of the outcome of the case (see sections VIII. A. (c)-(e) below).

(c) Was the election of Mr Yabarow as SFF President flawed?

110. The Parties have diametrically opposed views on the question of the validity of Mr Yabarow's election.

111. The Appellant considers himself to be the only legitimate SFF President, on the basis of the letter of the SFF Electoral Committee dated 22 February 2022. He states that he was not kept informed of the parallel procedure that led to the appointment of his rival, Mr Mohamed.

112. The Respondents argue that the Appellant's election is invalid and flawed. They point out that such election only took place as a result of unauthorised decisions of Ms Gassar, who allegedly usurped the position of Chairwoman of the SFF Appeals Committee, and that the *quorum* necessary for a decision to be taken was not reached. They also contend that the Appellant was aware of Ms Gassar's lack of authority and could not trust her communications to be valid.

113. The Panel recalls that the letter on which the Appellant relies on is signed by Ms Gassar only and reads as follows:

"Dear Sir/Madam
On the 22nd of February 2023, a congress was convened, as scheduled, with the attendance of 25 members of congress. The proceedings of the congress were conducted in accordance with the standards of the Electoral Code.
The congress approved two agenda items. The first was the approval of the election agenda, which included the nomination and voting process for the executive position. The second was the convocation of the next congress, which is scheduled to be held on 30th of May 2023.
As noted above, 25 members of congress were present, and by a show of hands, in accordance with the Electoral Code, they cast their votes.

During the voting process, there was only one candidate for the executive position, namely Mr. Wiish Hagi Yabarow. Of the 25 members, 24 voted in favor of Mr. Wiish Hagi Yabarow, with one member abstaining.
Therefore, in accordance with the SFF Electoral Code and the statutes of the SFF, Mr. Wiish Hagi Yabarow has been duly elected as the President of the SFF, with the list of his Executive Committee. The SFF General Assembly delegates voted in his favor on this 22nd day of February 2023, and he is set to lead the Somali Football Federation for the next four years.
Yours Faithfully,
Ilham Gassar Vice Chair & Chair of SFF Appeals".

114. The Panel further notes that this document follows various other letters from Ms Gassar dated 5 December 2022, 11 December 2022, 21 January 2023 and 8 February 2023, declaring the Appellant eligible for the SFF elections.

115. The Panel has every reason to believe, as the Respondents maintain, that Ms Gassar acted from the outset without consulting her colleagues and without being duly authorised to do so, or was even herself the victim of identity theft, for the following reasons:

    (i) Ms Gassar is the sole signatory of the letters confirming the Appellant's eligibility. Yet, she was not entitled to make her own decisions on behalf of the SFF Appeals Committee, in light of Article 9 para. 5 of the SFF Electoral Code, which states that the *"Election Appeal Committee shall be composed of a chairperson and two ordinary members"*.

    (ii) The position claimed by Ms Gassar within the SFF ("Vice Chair & Chair of the SFF Appeals") does not correspond to the position of "Vice-Chairwoman" indicated in the letter from FIFA to the SFF dated 24 October 2022.

    (iii) Ms Gassar is clearly not authorised by the SFF and her committee members, as evidenced by various documents issued by the SFF Electoral Committee. These include the minutes of 11 December 2022, the letter to the Appellant of 12 December 2022 and the report of 23 February 2023, all of which indicate that she did not have the necessary powers of representation.

    (iv) The authenticity of the SFF stamps next to Ms Gassar's signature is highly doubtful, to say the least. They seem to have been copied and pasted from official letters from the SFF Electoral and Appeals Committees. They are all incomplete as if they had been cut off exactly where other members usually affix their signatures or where the information in the footer appears. In some instances, their signatures are still partially visible in the background.

    (v) The graphic sign next to Mr Muse's name in Ms Gassar's letter dated 10 December 2022 is extremely dubious. Assuming that it is supposed to be his signature, it is completely different from the one that appears in other letters.

    (vi) The email address indicated in the footers of Ms Gassar's letters (i.e. sffapealscommittee@gmail.co

m0619001958) is rather unorthodox. It contains a spelling error and does not correspond to the official address of the SFF Appeals Committee.

(vii) The Appellant did not provide a copy of the accompanying emails with which these letters would have been sent and received, and this does not make it possible to ascertain who was the author or the sender.

(viii) The Appellant did not even undertake to call Ms Gassar as a witness at the hearing, nor did he provide any specific documents to prove her position and powers.

116. The Panel is admittedly somewhat dubious about the passivity of the SFF, which did not take any concrete action against Ms Gassar, nor did it seek to clarify whether a third party was behind her letters. It particularly regrets that no extraordinary general congress was convened by the SFF, which, pending the entry into force of the Disciplinary Code, would at the very least have avoided the holding of parallel communications and elections. It is also carefully aware that no direct friendly relationship between Ms Gassar and the Appellant was established and ignores, at this stage, who may have carried out these wrongdoings. This being said, it can only observe that all the documentation provided by the Appellant in support of his claims has no adequate legal and probative value as to the validity of the SFF Elective Congress in which he was purportedly elected.

117. The Panel now turns to the conditions for decision-making at the SFF Elective Congress, which are governed by Articles 26 and 28 of the SFF Statutes:

*"**Article 26: Delegates, votes and representation***

1. The Congress is composed of 46 delegates. The number of delegates is allocated as follows:
a) One delegate from each of the 25 SFF League Clubs (i.e. 25 delegates in total), with each club having one vote.
b) Three delegates from each of the 5 Regional Associations, (i.e 15 delegates in total), with each Regional Association having three votes.
c) One delegate from each of the 6 interest groups [Referees, Coaches, Women, Players, Futsal and Schools] (i.e 6 delegates in total), with each interest group having one vote.

2. Delegates must belong to the Member that they represent and be appointed or elected by the appropriate body of that Member. Each delegate must be in possession of a written document issued by the relevant body of that Member attesting to his authority to represent the Member at the Congress.

3. Each delegate has one vote in the Congress. Only the delegates present are entitled to vote. Voting by proxy or by letter is not permitted. […]

Article 28: Quorum

1. *Decisions passed by the Congress shall only be valid if a majority (more than 50%) of the delegates representing the Members eligible to vote are present.*
2. *If a quorum is not achieved, a second congress shall take place within 7 days with the same agenda;* […]*"*

118. Article 5 of the Electoral Code further specifies that *"the Electoral Committee shall*

be responsible for verifying […] *the identity of the voters (delegates) under the supervision of the public notary appointed for this purpose".*

119. Against this background, the Panel notes that all delegates present at the SFF Elective Congress were expected to prove their identity and power of representation, and that a simple majority decision of 24 out of 46 delegates was required to appoint the SFF President. However, the Appellant was unable to provide a simple attendance sheet, or to convincingly explain how the *quorum* had been reached, when a parallel election, duly attested by notarised minutes, was taking place at the same time in another hotel of Mogadishu in the presence of 34 delegates (see section VIII. A. (d) below).[3]

120. In view of the above, the Panel finds that the election of Mr Yabarow was clearly flawed in many respects, from the convocation to the manner in which the meeting then took place in practice, and therefore cannot be recognised as valid.

(d) Was the election of Mr Mohamed as SFF President flawed?

121. The Parties again expressed disagreement on the question of the validity of Mr Mohamed's election.

122. The Appellant maintains that Mr Mohamed's election, as a whole, is vitiated by numerous procedural flaws. He states that he did not have to raise them earlier, since he relied in good faith on the SFF's decisions declaring him eligible.

123. The Respondents submit that Mr Mohamed is the only legitimate SFF President, on the basis of congressional minutes dated 22 February 2023. They underline that the procedural defects that allegedly occurred at the early stages of the election procedure can no longer be invoked at this point. In any case, they remain largely unfounded and, if they occurred, had no impact on the results.

124. Firstly, given that the Panel has assessed above that the Appellant's election was not valid, the Panel consequently rejects the argument that his appointment automatically annuls the Second Respondent's election. Consequently, the Panel shall independently assess the validity of the Second Respondent's election based on the Appellant's arguments related to this election. In doing so, the analysis will be conducted by the Panel in conjunction with the alternative request submitted by the Appellant and aimed at vacating both elective procedures and ordering the SFF to re-commence the entire election process. Whilst the Appellant does not indicate specific irregularities regarding the candidacy of the Second Respondent but rather alleges that some factors affected the regularity of the whole elective process, the Panel shall examine how such allegations relate to the Second Respondent's election.

125. In this last respect, the Panel sees an inherent contradiction between the Appellant's motion to declare his election as valid and then to argue instead that there have been issues in the electoral process, so serious that such a

[3] According to the Panel's findings, the two hotels where the elections were held, the Elite Hotel, located on Liido Street, and the Jaziira (Jazeera) Palace Hotel, located on Airport Road, are separated by 7.4 kilometers, or approximately 26 minutes' drive.

process needs to be recommenced. By all accounts, the electoral process can only be one, with the result that any serious defects in it could only impact on the validity of both SFF Elective Congresses held on 22 February 2023. In other words, if the Appellant considered his own election valid on the basis of that SFF electoral process, it is then inconsistent for him to claim the invalidity of another election held on the basis of the same electoral process. That noted, the Panel shall simply consider his claims concerning the invalidity of the Second Respondent's election.

126. The Panel notes that the minutes of the SFF Elective Congress on which the Respondents rely were drafted by a notary public and read as follows:

> *"According to article 21 of the SFF electoral code Hegan Law Firm was present at the SFF leadership election held on 22/Feb/2023 at Elite Hotel.*
> *The office was recording the minutes of the election, The meeting was opened by the general secretary of SFF and attended the SFF congress members, the office confirmed that 34 out of the 46 members of the SFF congress were present while 12 voters were absent from the election place, The office also recorded that the electoral committee were present at the polling place with 6 members including the chairman of the committee, the secretary of the committee, the chairman of the appeal body and 3 members while the deputy chairwoman of the appeal committee was absent from the election place.*
>
> *The candidates for the leadership of the SFF were only one list as the chairman of the electoral committee announced before.*
>
> *The 34 members voted (yes) no member has remained silent or rejected the list.*
>
> *Hegan law firm checked that the voting members were 34 members of SFF congress, and also made sure that six members of the electoral commission were present while only one member was absent.*
>
> *This evidence is in accordance with article 21 of the SFF electoral code and was registered at Hegan law firm.*
>
> *Advocate: Abdulqani Cabdullaahi Mohamed"*

127. The Panel further notes that these minutes are supported by an attendance sheet, which lists all the SFF members and is duly signed by all the delegates present.

128. The Panel understands that the Appellant's criticism regarding the Second Respondent's elections (and the electoral process as a whole) revolve around five main points:

(1) Holding of parallel election procedures;
(2) SFF identification card;
(3) Constitution of the SFF Electoral and Appeals Committees;
(4) Interference of the Somalian Ministry of Sport; and
(5) Elective congress' attendance sheet.

(1) Holding of parallel elections procedures

129. The Appellant reproaches the SFF for having conducted *"two parallel election procedures, which is not permitted in by the SFF Statutes and Electoral Code"*.

130. The Panel observes, however, that the holding of parallel election procedures is mainly attributable to the letters and behaviour of Ms Gassar (and of those acting with her) and the presumed trust

placed in them by the Appellant. Yet, said trust, if any, cannot constitute a form of procedural or substantive legitimate expectation, bearing in mind that:

- The Appellant was informed on 12 December 2022 (or *"in the* course *of December"*, as he acknowledged at the hearing) that the communications from Ms Gassar alone on behalf of the SFF Election Committee were devoid of legal value;
- The letters of Ms Gassar are blatantly dubious, even when examined with the naked eye. They result in all likelihood from counterfeited documents and their source could not be established;
- Article 6 of the SFF Electoral Code states that the Electoral Committee must abstain from deliberations unless a *quorum*, constituted by more than 50% of its members, is present. Moreover, decisions of the Electoral Committee shall be determined by a majority exceeding 50% of the valid votes cast.

131. It follows that, at least from 12 December 2022, the Appellant could not legitimately rely on Ms Gassar's decisions. Nor was Ms Gassar entitled to make a lawful representation to the Appellant.

132. Overall, given that the electoral meeting invoked by the Appellant did not meet regulatory standards (see section VIII A. (c) above), its occurrence is not sufficient to affect the validity of the other electoral meeting held on the same date. Otherwise, a "sham" election would make it possible to challenge the legitimacy of an official election conducted in accordance with the applicable rules of a sports institution.

133. In conclusion, the Panel considers that the fact that two parallel electoral meetings have been held does not, in itself, constitute sufficient grounds to invalidate the Second Respondent's election.

(2) SFF identification card

134. The Appellant submits that the SFF Electoral and Appeals Committees wrongly considered the identification card as a condition for eligibility in various letters and decisions. He specifically refers to the SFF Electoral Committee's decision of 4 December 2022, which declared non-eligible 5 members of the Appellant's list, and the SFF Appeals Committee's decision of 11 December 2022 that rejected his appeal.

135. The Panel finds that the Appellant did not file an appeal with CAS against the SFF Appeals Committee's decision of 11 December 2022 within 21 days, as prescribed by Article 65 of the SFF Statutes and Article R49 of the CAS Code (see section V above). As a result, his arguments are belated and inadmissible.

136. The Panel considers that such an appeal would in any case have been groundless. Certainly, as FIFA pointed out in its letter of 20 October 2022, the SFF identification card requirement goes beyond the conditions laid down in Article 37 para. 5 of the SFF Statutes, which only states that *"all members of the Executive Committee must have been active in football for at least five years"*.

137. However, the explanations provided by the SFF Appeals Committee in its decision show that the rejection of the Appellant's list was essentially based on other reasons, including the position held by one of the candidates, the duplication of some resumes and inconsistencies between the documents supplied.

138. This means that that the issue of the SFF identification card alone would not have been sufficient to overturn the decision of ineligibility and non-admission of the Appellant's list.

(3) Constitution of the SFF Electoral and Appeals Committees

139. The Appellant maintains that the SFF Electoral and Appeals Committees were improperly constituted. He underlines that only seven members were elected in total by the congress instead of 12, without clear division between the two committees until FIFA's intervention.

140. The Panel recalls that the seven members of the SFF Electoral and Appeals Committees were elected during the SFF Extraordinary Congress on 20 October 2022. They were then divided into four members for the first instance body and three members for the appellate body, according to an email sent by FIFA four days later. By contrast, the SFF regulations provide for the appointment of 10 members by the SFF Extraordinary Congress, namely five members for the SFF Electoral Committee, who shall be replaced if unavailable, as well as three members and two substitute members for the SFF Appeals Committee (see Articles 55 of the SFF Statutes; Articles 4 and 9 para. 5 of the Electoral Code).

141. The Panel is of the opinion, however, that these questions cannot be reopened and examined further at this stage, for the following reasons:

(i) The SFF Congress is the supreme and legislative authority of SFF under Article 25 para. 1 of the SFF Statutes;
(ii) The decisions passed by the Congress shall come into effect immediately after the close of the Congress, unless otherwise stipulated in the SFF Statutes or unless the Congress fixes another date for a decision to take effect, pursuant to Article 36 of the SFF Statutes.
(iii) The Appellant did not appeal against the Congress' decision of 20 October 2022, in accordance with Article 65 of the SFF Statutes.
(iv) The Appellant did not appeal against the SFF decision (or that of FIFA) to divide the members of the Electoral Committees between the first and second instance.
(v) The Appellant did not raise these arguments in his appeal against the decisions of the SFF Electoral Committee of 4 December 2022 rejecting his list and admitting that of the Second Respondent. Nor did he contest the decision of the SFF Appeals Committee of 11 December 2022 confirming this assessment.
(vi) As the timeframes for election procedures are short, so are the corresponding deadlines for legal remedies, making it impossible to wait until the election results to submit some grievances. Such behaviour contravenes the legal

principles of good faith and *nemo admittatur aut auditor propriam turpitudinem allegans* (no one can be heard to invoke his own turpitude).

142. Again, the Panel, as noted above, finds the Appellant's position somewhat inconsistent. On the one hand, he asks the CAS to declare that his election is valid despite these alleged flaws affecting the composition of the SFF electoral bodies and, on the other hand, he uses these same flaws to seek the annulment of the Second Respondent's election. In the Panel's view, such a stance is against the principle of *venire contra factum proprium*, since it is obvious that if there were errors significant enough to affect the validity of the electoral process, they would have affected both elections.

143. Ultimately, the Appellant failed to demonstrate that the incomplete composition of the two bodies affected his interests, the required *quorum* and the outcome of the SFF elections as a whole. He did not convincingly argue either that FIFA itself apportioned the members of the SFF electoral bodies and/or had exceeded its powers, given the supervisory role it exercised throughout the procedure. Even assuming that FIFA's email of 24 October 2022 mentioning the composition of the first and second-instance bodies within the SFF Electoral Committee could be interpreted as a decision, the SFF was required to comply with Article 2 lit. e) of its own Statutes. In any case, this was not questioned by the Appellant throughout the electoral process.

(4) Interference of the Somalian Ministry of Sport

144. The Appellant criticises the Somalian Ministry of Sport for unduly interfering in the electoral process.

145. Based on the Ministry of Youth and Sports' letters dated 13 and 24 December 2022, it is clear to the Panel that this criticism is unjustified.

146. The intervention of the said Ministry was not only legitimate in view of the circumstances but took place at the request of the two candidates themselves, including the Appellant, as evidenced by the first letter of Minister Mohamud (*"[I] would, however, like to raise some critical information that we have received via social media and directly from the parties concerned"*). This letter was also written two days after the decision of the SFF Electoral and Appeals Committees declaring all acts processed by Ms Gassar as invalid, which suggests that it was precisely intended to respond to an interpellation by the Appellant.

147. Moreover, there is no evidence that Minister Mohamud attempted, let alone succeeded, to influence the admission or rejection of a list. He merely provided recommendations to the relevant stakeholders regarding the date and smooth running of the elections, as stems from his second letter *("The ministry directs SFF Elective General Assembly should not take place on 28th December 2022. The SFF should announce a new road map for elections no later than 30th January 2023. The relevant SFF bodies should reassess the persons that were excluded from the elections process in accordance with the SFF Statutes, Electoral Code and FIFA's guidance").*

148. Any other approach on the part of the Minister would have been

incomprehensible and seen as passivity, in view of the serious disruptions taking shape and the specific complaints made by the different stakeholders.

(5) Elective congress' attendance sheet

149. The Appellant stated at the hearing that some individuals who signed the attendance sheet of the Second Respondent's election were not entitled to represent member clubs. As a result, some member clubs were allegedly represented in both SFF Election Congresses by different delegates, with only those present at his Elective Congress having powers of representation.

150. The Panel is not convinced by this argument. Indeed, the First Respondent confirmed without hesitation that the identity and credentials of all delegates had been checked, which is also supported, or at the very least, implied, by the notarised minutes that he produced *("Hegan Law Firm checked that the voting members were 34 members of SFF congress, and also made sure that six members of the electoral commission were present while only one member was absent").* It is difficult to fathom how the lawyers in charge of checking the legitimacy of SFF members could have carried out their tasks without asking to verify their identity cards and/or proxies.

151. More importantly, the Appellant did not provide any concrete evidence showing potential issues regarding the powers of delegates and/or double representation. This could have been easily feasible, for instance, through statements by the members themselves and the production of the attendance sheet of his own Elective Congress.

(6) Final remarks

152. In view of these considerations, the Panel finds that the Appellant's arguments are belated and/or groundless, and that the election of Mr Mohamed must be recognised as valid.

(e) Should both elections be vacated?

153. In the alternative, the Appellant requests the Panel *"to vacate all elective* procedures *and order the SFF to re-commence the entire election process de novo".*

154. Given the Panel's findings on the arguments raised by the Appellant on the alleged procedural errors affecting the SFF electoral process and the election of the Second Respondent, this subsidiary prayer for relief is accordingly dismissed.

(f) What consequences result from the answers to questions (a)-(e)?

155. The appeals filed by Mr Yabarow on 14 March 2023 should be dismissed.

B. Conclusion

156. Based on the foregoing, the Panel holds that:

i) The scope of these proceedings is restricted to the Appealed Decisions.
ii) The Appellant has, in whole or in part, standing to sue.
iii) Mr Yabarow's election cannot be recognised as valid.
iv) Mr Mohamed's election is confirmed.
v) The Appellant's alternative prayer for relief is dismissed.

vi) The appeals are dismissed in their entirety.

157. All other and further motions or prayers for relief are dismissed.

IX. COSTS

158. The Panel observes that Article R64.4 of the CAS Code, which governs the arbitration costs, provides as follows:

"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".

159. In addition to the payment of the arbitration costs, the Panel also has the discretion to award to the prevailing party or parties a contribution towards their legal fees and other expenses incurred in connection with the proceedings. In this respect, Article R64.5 of the CAS Code provides 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".

160. In principle, the unsuccessful party bears the costs of the arbitration and must make a contribution to the other parties' legal costs. That said, the CAS Panel has the competence to decide on a different apportionment depending on the circumstances (CAS 2010/O/2039, para 8.4; CAS 2020/A/7065-7066, paras 134ff; CAS 2021/A/8459, paras 141ff; CAS 2023/A/9423, paras 98ff).

161. In the present case, the Appellant was unsuccessful in all his prayers. Notwithstanding this, the Panel considers that it would not be appropriate to order the Appellant to pay all the costs of the proceedings alone and to contribute to the costs of the Respondents. It considers that some of the arguments raised by the Appellant were somewhat reasonable, given the SFF's longstanding inaction towards Ms Gassar and/or other unidentified individuals behind her dissenting letters, which seems to have contributed to the set-up of apparent conflicting elections. Consequently, it is fair for the costs of the proceedings to be borne […] by the Appellant and […] by the First Respondent.

162. (…)

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Wiish Hagi Yabarow on 14 March 2023 regarding the confirmation of the election results of 22 February 2023 electing him as President of the Somali Football Federation is dismissed.

2. The appeal filed by Wiish Hagi Yabarow on 14 March 2023 against the election results of 22 February 2023 electing Ali Abdi Mohamed as President of the Somali Football Federation is dismissed.

3. (…)

4. (…)

5. (…)

6. All other and further motions or prayers for relief are dismissed.

CAS 2023/A/9808
Futebol Clube do Porto v. Club Deportivo Popular Junior FC
7 June 2024

Panel: Mr Stephen Sampson (United Kingdom), Sole Arbitrator

Football
Transfers
Admissibility of new evidence
Deductions from the sell-on fee
Assessment of evidence
Reallocation of FIFA's procedural costs

1. Article R57(3) of the CAS Code gives the panel discretion, but not the obligation, to exclude evidence that was not produced before previous instance bodies. Consequently, the panel is not limited to consideration of the evidence that was adduced previously and can examine all new evidence produced before it. It should exclude evidence with restraint, only when there is a clear showing of abusive or inappropriate behaviour.

2. A loan and/or transfer agreement may allow deductions from the sell-on fee, such as the indemnity to be paid to the intermediary making viable the transfer of a player to a third club. Absent an "industry standard", it is necessary to ascertain the true common intention of the parties or, failing that, the meaning they should have given to their statements in good faith. In practical terms, decisive factors include the wording of the agreement(s), their interaction, the contractual negotiations, the conduct of the parties as well as the overall circumstances of the case.

3. Compelling evidence must show that the intermediary was involved in the transfer and remunerated for that purpose. Any delays in payment due to cash flow issues associated with the COVID outbreak do not preclude such a finding.

4. FIFA's procedural costs cannot be reviewed or reallocated on appeal.

I. PARTIES

1. Futebol Clube de Porto – Futebol, SAD ("FC Porto" or the "Appellant") is a professional football club based in Porto, Portugal. FC Porto is a member of the Federação Portuguesa de Futebol (the "FPF"), which is the governing body of football at domestic level in Portugal. The FPF is affiliated with the Union des Associations Européennes de Football ("UEFA") and the Fédération Internationale de Football Association ("FIFA").

2. Club Deportivo Popular Junior FC ("Junior FC" or the "Respondent") is a professional football club based in Barranquilla, Colombia. Junior FC is a member of the Federación Colombiana de Fútbol (the "FCF"), which is the governing body of football at domestic level in Colombia. The FCF is affiliated with the Confederación Sudamericana de Fútbol ("Conmebol") and FIFA.

3. The Appellant and the Respondent are collectively referred to as the "Parties".

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts and allegations, as submitted by the Parties in their written and oral submissions, pleadings and evidence 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, 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.

A. The Transfers of the Player

5. On 1 July 2019, the Appellant, the Respondent and the professional football player Mr L. (the "Player") concluded an agreement under which, *inter alia*, (i) the Player's registration was to be transferred temporarily from the Respondent to the Appellant for the period 1 July 2019 until 30 June 2020 for a fee of EUR 4,500,000, and (ii) the Respondent granted the Appellant an option to acquire the registration of the Player on a permanent basis on or before 1 October 2019 for a fee of EUR 2,500,000 (the "Loan Agreement").

6. The Loan Agreement stated, *inter alia*:

"3. Further JUNIOR FC grants to FC PORTO an option right to acquire the registration of the PLAYER on a permanent basis against the payment of an aggregate fixed Definitive Transfer Fee net amount of €2,500,000 (Two Million and Five Hundred Thousand Euros) on or before 01st October 2019, net of solidarity contribution, training contribution (without any deduction of solidarity contribution/training compensation due any third clubs), and also free of all expenses, fees, taxes related to or derivated of the above mentioned temporary loan. FC PORTO shall be responsible for all the payments regarding solidarity contribution/training compensation due to any third clubs – as established on the FIFA Regulations on the Status and Transfer of Players – and it is expressly agreed between the Parties that the Definitive Transfer Fee under clause 3 already comprises and includes any solidarity contribution which may be due to JUNIOR FC.

[…]

5. Finally, after the option right mentioned in clause 3 being exercised on time by FC PORTO and the accomplishment of permanent transfer of the player registration, in case FC PORTO transfers the PLAYER on permanent or on temporary basis (loan agreement or definitive transference) to a third club in the future, FC PORTO shall pay to JUNIOR BARRANQUILLA the amount corresponding to 20% (twenty percent) of the transfer fee (temporary or definitive) agreed between FC PORTO and the third club [herein defined and understood as all the revenues and credit rights resulting from the definitive transfer of the sporting rights of the PLAYER from FC PORTO to any third football club, after deducting (i) any amounts regarding training compensation and/or solidarity deductions, if applicable; and (ii) as well as possible mediation fee to be paid to the intermediaries making viable the transfer of

the Player to a third Club up to a maximum of 10%. No other deduction (fees, taxes etc.) of whatsoever shall be made].

[…]

15. This Agreement sets out the entire agreement between the PARTIES hereto and supersedes all prior discussions, statements, representations and undertakings between them or their advisers regarding the PLAYER".

7. On or around 30 July 2019, the International Transfer Certificate for the transfer of the Player's registration was received by the FPF. The FIFA TMS report relating to the Player's transfer stated that the Appellant was represented by an intermediary, Mr Carlos José Van-Strahalen Saade (the "Intermediary").

8. On 18 September 2019, the Appellant exercised the option in the Loan Agreement by paying the agreed option fee to the Respondent.

9. On 5 October 2019, the Appellant, the Respondent and the Player entered into a further agreement (the "Further Agreement"). The Further Agreement stated, *inter alia*:

*"1. **JUNIOR FC, FC PORTO** and **L.** signed on July 1 2019 a Temporary Transfer Agreement, with the option to acquire the registration of the PLAYER on permanent basis.*

*2. In consideration of such temporarily transfer of the PLAYER registration, **FC PORTO** paid to **JUNIOR FC** on July 16 2019, an aggregate fixed Temporary Transfer Fee net amount of € 4.500.000 (Four Million and Five Hundred Thousand Euros), net of solidarity contribution, training compensation (without any deduction of solidarity contribution/training compensation due any third clubs), and also free of all expenses, fees, taxes related to or derivated of the above mentioned temporary transference.*

*3. In consideration of the option right to acquire the registration of the PLAYER on a permanent basis, **FC PORTO** paid on September 19 2019 to JUNIOR FC an aggregate fixed Definitive Transfer Fee net amount of € 2.500.000 (Two Million and Five Hundred Thousand Euros), net of solidarity contribution, training compensation (without any deduction of solidarity contribution/training compensation due any third clubs), and also free of all expenses, fees, taxes related to or derivated of the above mentioned temporary loan.*

[…]

*7. As previously agreed, in case **FC PORTO** transfers the PLAYER on permanent or on temporary basis (loan agreement or definitive transference) to a third club in the future, **FC PORTO** shall pay to **JUNIOR FC** the amount corresponding to 20% (twenty percent) of the transfer fee (temporary or definitive) agreed between **FC PORTO** and the third club.*

[…]

10. This Agreement sets out the entire agreement between the PARTIES hereto and supersedes all prior discussions, statements, representations and undertakings between them or their advisors regarding the PLAYER, except for the above mentioned Temporary Transfer Agreement, with the option to acquire the registration of the PLAYER on permanent basis".

10. On 26 January 2022, the Appellant and the Intermediary entered into an agreement (the "Intermediary Agreement"). The Intermediary Agreement stated, *inter alia*:

"(1) The Intermediary has been irrevocably instructed by the Club to monitor the transfer market with the aim of securing the prospective future transfer on a definitive basis of the player L., born 13 January 1997, (hereinafter "the Player"), currently registered with the Club, to a third club. The Club considers the Player as one of its important players and it could be available to renounce to his sport performances only against an important transfer compensation; in this connection, the Club has shown the Intermediary the interest in availing itself of its activity on an exclusive basis to the end of exploring such possibilities and, in case, of negotiating a possible transfer agreement of the Player.

(2) The Parties now set out below the terms upon which the Club will pay the Intermediary for the service rendered in the event the Player is transferred on a definitive basis to Liverpool FC.

"1.1 In the event that the Intermediary secures the engagement of the Player on a definitive basis to a third club against payment of a transfer compensation, the Club shall pay the Intermediary 10% (ten percent) of the transfer compensation (fixed and/ or conditional amounts) received by the Club, after deducting any amounts regarding training compensation and/or solidarity deductions if applicable".

[…]

2. The Intermediary's Commission shall be paid within five days from the receipt of the transfer compensation by the Club, or in the case of payments in instalments, proportionally within five days from the receipt by the Club of the instalment concerned. The Club shall provide the Intermediary with a signed copy of the transfer agreement between the Club and Liverpool FC within five days of its signature….

3. Any transfer of the Player on a definitive basis from the Club to a third club during the validity of the employment contract between the Club and the Player shall be negotiated, promoted and achieved based on the services rendered by the Intermediary and will entitle to the payment of the remuneration as foreseen herein. In such case, the Club waives any right to challenge the validity of the payment obligations as stipulated under clauses 1, 2 and 3 above. The mandate is conferred by the Club to the Intermediary is on exclusivity and irrevocable basis".

11. On or around 31 January 2022, the Appellant and the Liverpool Football Club & Athletic Grounds Limited ("Liverpool") entered into an agreement for the transfer of the Player's registration from the Appellant to Liverpool (the "Liverpool Agreement"). The Liverpool Agreement stated, *inter alia*:

"2.1 In consideration of the Transfer, Liverpool agrees to pay Porto €45,000,000 (Forty-five million Euros) (the "Transfer Fee"). The Transfer Fee shall be payable by Liverpool to Porto as follows upon receipt of valid invoices as applicable:

a. €8,000,000 upon signature of this Agreement;
b. €7,000,000 upon the Player being registered as a Liverpool Player with the Premier League and The FA;

c. €6,000,000 on or before 30 September 2022;

d. €6,000,000 on or before 31 January 2023;

e. €6,000,000 on or before 30 September 2023;

f. €6,000,000 on or before 31 January 2024; and

g. €6,000,000 on or before 30 September 2024.

[…]

The parties agree that the Transfer Fee is inclusive of any and all compensation (including but not being limited to training compensation and/or solidarity) ("FIFA Compensation") due to Porto pursuant to the FIFA Regulations on the Status and Transfer of Players ("the FIFA Regulations"). Liverpool will be solely responsible for the payment of any applicable FIFA Compensation (i.e. solidarity contribution) to third party football clubs as a consequence of any payments made to Porto hereunder in respect of the Player's registration with Liverpool pursuant to the FIFA Regulations. The amounts pursuant to Clause 2.1 and 2.2 herein are gross amounts and Liverpool shall be entitled to deduct from any such amounts an amount equal to the sums due to third party clubs (if applicable) pursuant to the FIFA Regulations".

12. On 31 January 2022, the Player's registration was transferred from the Appellant to Liverpool. The FIFA TMS report relating to the Player's transfer stated that the Appellant was represented by the Intermediary and that the Intermediary Agreement was uploaded to FIFA TMS.

13. On 8 February 2022 and 11 February 2022 the Respondent wrote to the Appellant requesting the financial terms of the transfer to Liverpool and threatening a claim for payment of a sell-on fee.

B. First FIFA PSC Proceedings

14. On 22 February 2022, the Respondent filed a claim against the Appellant before the FIFA Players Status Chamber ("FIFA PSC") in case ref. FPSD-5221 seeking the payment of the sell-on fee then allegedly due to it ("First FIFA PSC Proceedings"). The Respondent requested payment of EUR 3,000,000, being 20% of EUR 15,000,000, corresponding to the sell-on fee allegedly due from the first and the second instalments of the transfer fee from Liverpool, without any deductions, plus 5% interest as from 1 February 2022 until the date of effective payment. The Respondent reserved its right to claim 20% of each future payment received by the Appellant from Liverpool in connection with the transfer of the Player.

15. On 14 March 2022, the Appellant responded to the claim. The Appellant argued that when calculating the 20% sell-on fee, the transfer fee instalment was subject to two deductions of (i) 5% for solidarity contributions and (ii) 10% for intermediary services, therefore the amount due to the Respondent was EUR 2,550,000.

16. On 5 April 2022, the FIFA PSC issued the operative decision in the First FIFA PSC Proceedings, partially accepting the Respondent's claim. The FIFA PSC ordered the Appellant to pay the Respondent the amount of EUR 2,550,000 plus 5% interest p.a. as

from 1 February 2022. Since the grounds of the decision were not requested by any of the Parties and therefore they were not issued by the FIFA PSC, the basis for the calculation of that amount was not set out in that decision. The Sole Arbitrator notes however that it equates to (EUR 15,000,000 – 15%) x 20%.

17. On 22 April 2022, the Respondent wrote to the Appellant stating *"I would like to underline that Junior FC refrained from asking the grounds of the decision, not because they would agree with the deductions made by the Player's Status Chamber's judge therein (which they clearly do not), but solely because of the long duration of CAS appeal proceedings"*.

C. Second FIFA PSC Proceedings

18. Following the payment by Liverpool to the Appellant of the third instalment of the transfer fee in the amount of EUR 6,000,000 on 30 September 2022, the Respondent received the amount of EUR 1,019,897 from the Appellant representing the sell-on fee the Appellant considered was due to the Respondent, less bank charges (EUR 1,020,000 less EUR 103).

19. On 10 October 2022, the Respondent confirmed receipt of the amount of EUR 1,019,897 and demanded the payment of EUR 180,103, being the difference between the sell-on fee it alleged was due and the amount it received, EUR 1,200,000 less EUR 1,019,897.

20. On 10 November 2022 the Respondent filed a claim against the Appellant with the FIFA PSC in case ref. FPSD-8169 ("Second FIFA PSC Proceedings"). The Respondent requested payment of EUR 180,103, plus interest at 5% p.a. as from 1 October 2022 until the date of effective payment, and for confirmation of the Respondent's right to receive from the Appellant 20% of any payment FC Porto received from Liverpool in connection with the Player in the future.

21. On 6 December 2022, the Appellant filed its response to the claim, in which it argued that the amount due as a sell-on fee was already calculated and established by the decision in the First FIFA PSC Proceedings, by not filing an appeal against that decision the Respondent had accepted the sell-on fee calculation, the principle of *res judicata* should apply, in the event that the FIFA PSC decided to consider the claim it should refer to the response filed in the First FIFA PSC Proceedings, and denied an additional payment was due to the Respondent.

22. On 25 April 2023, the FIFA PSC passed its decision (the "Challenged Decision"). The FIFA PSC partially accepted the Respondent's claim, determining as follows:

"1. The claim of the Claimant, CLUB DEPORTIVO POPULAR JUNIOR F.C. S.A., is partially accepted.

2. The Respondent, Futebol Clube do Porto - Futebol, SAD, must pay to the Claimant the following amount:

- EUR 120,103 as outstanding amount plus 5% interest p.a. as from 1 October 2022 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. This decision is rendered without costs.

8. The final costs of the proceedings in the amount of USD 25,000 are to be paid by the Respondent to FIFA. FIFA will reimburse to the Claimant the advance of costs paid at the start of the present proceedings".

23. On 23 June 2023, following a request for the grounds of the Challenged Decision, said grounds were communicated to the Parties. A summary of the reasoning in the Challenged Decision is as follows:

- The FIFA PSC held that it was competent to deal with the dispute.

- The wording of both the Loan Agreement and the Further Agreement should be considered as interrelated in terms of the option to acquire the Player's federative rights on a permanent basis, and must therefore be jointly interpreted.

- In spite of not being expressly mentioned in the Further Agreement, the calculation of the sell-on fee due from the Appellant should take into consideration the amount effectively received from Liverpool (i.e. 95% of the transfer fee stated in the transfer agreement).

- As per clause 5 of the Loan Agreement, the Appellant was entitled in principle to make further deductions from the payment due to the Respondent in respect of a sell-on fee, in particular: (i) any amounts regarding training compensation and/or solidarity deductions, if applicable; and (ii) as well as possible mediation fee to be paid to the intermediaries making

viable the transfer of the Player to a third club up to a maximum of 10%.

- The Appellant failed to provide any corroborating documentary evidence as proof of payment it had made to intermediaries, hence such deduction could not be considered in the calculation.

- The Respondent is entitled to receive 20% of the transfer fee with the reduction of 5% for solidarity mechanism (i.e., third instalment of EUR 6,000,000 less 20% = EUR 1,200,000 less 5% = EUR 1,140,000).

- This was not a question of *res judicata* as it relates to a subsequent instalment of the transfer fee which was not previously claimed or decided in the First FIFA PSC Proceedings.

III. SUMMARY OF THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

24. On 14 July 2023, the Appellant filed a statement of appeal challenging the Challenged Decision before the Court of Arbitration for Sport ("CAS") in accordance with Articles R47 and R48 of the Code of Sport-related Arbitration (2023 edition) (the "CAS Code"). In its Statement of Appeal, the Appellant requested a Sole Arbitrator. In the Statement of Appeal, the Appellant also named FIFA as a further Respondent.

25. On 17 July 2023, FIFA requested its exclusion from the proceedings because *inter alia "the appeal in question does not appear to contain any substantial request against FIFA".*

26. On 19 July 2023, the Respondent expressed their interest in submitting the dispute to CAS mediation, whilst reserving their right to subsequently re-submit to arbitration in which case they would accept the Appellant's proposal of a sole arbitrator.

27. On 21 July 2023, the Appellant noted the Respondent's interest in submitting the arbitration proceedings to CAS mediation and requested suspension of the deadline for the Appellant to submit its Appeal Brief until this issue was decided.

28. On 31 July 2023, after having been granted an extension, the Appellant confirmed that it did not object to the exclusion of FIFA as a party to the proceedings, provided that FIFA confirmed that: *"FIFA accepts that the CAS Panel could eventually decide on setting aside the whole Challenged Decision, including para. 8 of its operative part related to the procedural costs due to FIFA, without FIFA participating in the proceedings".*

29. On 7 August 2023, FIFA asserted that it should be excluded from proceedings, whilst noting that *"the Appellant incorrectly assumes that CAS could eventually set aside these procedural costs due to FIFA".* FIFA stated this was because: *"CAS has no power to annul, reduce or reallocate the costs of the first instance proceedings (even if FIFA is maintained as respondent). Additionally, in any case, CAS has already confirmed that the request to reallocate the procedural costs does not alter the horizontal nature of the dispute and FIFA does not need to be a party in the CAS proceedings to address this issue".*

30. On 9 August 2023, the CAS confirmed that the procedure was suspended until further notice pending discussions for an amicable settlement of the dispute.

31. On 30 August 2023, the Appellant informed the CAS that the Parties' *"attempts to find an amicable solution have failed"* and, as such, the Appellant withdrew its interest to submit the dispute to CAS mediation.

32. On 31 August 2023, in receipt of the letter from the Appellant, the CAS lifted the suspension of the procedure.

34. On 31 August 2023, the Appellant confirmed that it did not object to the request of FIFA to be excluded from the proceedings, and accordingly FIFA was no longer a party to the procedure.

35. On 15 September 2023, after having been granted extensions, the Appellant filed its Appeal Brief in accordance with Article R51 of the CAS Code.

36. On 6 November 2023, after having been granted an extension, the Respondent filed its Answer in accordance with Article R55 of the CAS Code.

37. On 11 November 2023, the CAS Court Office informed the Parties on behalf of the Deputy Division President of the CAS that the arbitral tribunal appointed to adjudicate the dispute was composed as follows:

Sole Arbitrator: Mr Stephen Sampson, Solicitor, London, United Kingdom

38. On 25 January 2024, the CAS Court Office issued an Order of Procedure, which was duly signed and returned by the Appellant and the Respondent on 1 February 202, without any reservation.

39. On 7 February 2024, a hearing was held by video conference (the "Hearing"). In addition to the Sole Arbitrator and CAS Counsel Mr Giovanni Maria Fares, the following persons attended the hearing:

<u>For the Appellant</u>

Mr Anton Sotir, Counsel

Mr Loic Theilkaes, Counsel
Mr Hugo Silva Nunes, Witness

Mr Carlos José Van-Strahalen Saade, Witness

<u>For the Respondent</u>

Ms Melanie Schärer, Counsel

Mr Alejandro Arteta Abello, President and representative of the Respondent

40. The Sole Arbitrator heard the witnesses for the Appellant, Mr Hugo Silva Nunes and Mr Carols Jose Van-Strahalen Saade (the "Intermediary"). Both witnesses were invited by the Sole Arbitrator to tell the truth subject to the sanction of perjury under Swiss law. The Parties and the Sole Arbitrator had full opportunity to examine and cross examine both witnesses. In particular Counsel for

the Respondent undertook significant cross examination of the Intermediary in order to put the Respondent's case to him and challenge his account of his role in the transfer of the Player to Liverpool.

41. Mr Hugo Silva Nunes stated that he was the Board Adviser for Football and Legal Affairs and that he was personally involved in the transfers of the Player to and from the Appellant. The transfer from the Respondent was "different" contractually to a usual permanent transfer. In order to ensure that the instalments of the agreed fee were paid on time, the transaction was structured as a loan with an option. The first instalment became a loan fee, the second instalment the fee to exercise the option. A fee of EUR 4,500,000 was not the sort of amount necessary for a loan fee. When asked about the Further Agreement, Mr Silva Nunes stated that the Respondent did not send to the Appellant an email confirming the option had been exercised. He was contacted by the Appellant's Football Secretary who informed him that the Appellant needed something to upload into FIFA TMS to convert the transfer to definitive; the club was under pressure from the FPF and the club had already entered into a full employment contract with the Player. The Appellant's TMS Manager liaised with his counterpart at the Respondent and produced a simple contract and Mr Silva Nunes inserted *"as previously agreed"* at the start of clause 7, so that there was a reference back to the terms of the prior sell-on clause, rather than reaching a new agreement as to the sell-on fee payable. The contract was not really discussed with the Respondent and was signed within a couple of days. The Further Agreement referred to the Loan Agreement and there was no discussion about any changes to the contracts at that time.

42. Regarding the transfer of the Player to Liverpool, Mr Silva Nunes stated that the Appellant was in a tough period due to FFP. Through another agent, the club had agreed a transfer of the Player to another club. The Player did not want to join that club. Then the Intermediary came to the Appellant with an offer from Liverpool. The transfer to Liverpool was better for the Appellant and the Player wanted to move to Liverpool. There were two agents working on that transfer. The Intermediary worked for the Appellant, another agent worked for the Player. Thus the Appellant signed the Intermediary Agreement with the Intermediary. Mr Silva Nunes stated that the Appellant does not simulate contracts; the club is a public company listed on the stock exchange and is fully audited. The Intermediary brought the deal to the Appellant and the club had to hire the Intermediary to close it. The Intermediary was stated as acting for the Appellant in FIFA TMS and was stated as the Intermediary in an addendum to the transfer agreement with Liverpool. He understood the Intermediary to hold a Portuguese licence to act as an Intermediary. He was not aware of whether the Intermediary was acting on a dual representation basis on the transfer to Liverpool but there was no reason for the Appellant to verify what the Intermediary was doing for others.

43. Regarding the payment of the commission to the Intermediary, the Appellant had paid some of the commission that was due. The club had a lot of financial issues due to the Covid-19 period and post Covid-19 and had to pay clubs and players first. The Intermediary had filed a claim at CAS and the Appellant and the Intermediary had then rescheduled the payments.

44. The Intermediary stated that he and his company and another partner agent, Mr Raul Pais Da Costa ("Mr Da Costa"), arranged the transfer of the Player to Liverpool. The Intermediary had worked with the Player from an early age, but he had not had a representation contract with him since years ago, although he did still work with the Player on commercial contracts. The Player had an agent, Mr Da Costa, who worked for the Player on the Liverpool deal and was registered with the English FA. The Intermediary was registered in both Colombia and Portugal.

45. Mr Da Costa and the Intermediary went to meetings in Liverpool. They were dealing with the Sporting Director and Mr Dave Fallows (the Head of Recruitment and Scouting). The Player had an offer from another English Premier League club but when Liverpool made its offer it all moved very fast. The Intermediary received the transfer offer from Liverpool and delivered it to the Appellant. Once it was agreed between the clubs, Liverpool sent people out to Argentina, as the Player was there for a FIFA World Cup qualifying match (which was played on 1 February 2022). The Intermediary did not negotiate the Player's salary, Mr Da Costa did. The Intermediary understood the issue of dual representation and denied that Mr Da Costa acted on his (the Intermediary's) behalf. He stated that he acted for the Appellant and received commission from it and Mr Da Costa acted for the Player and received commission from Liverpool; their roles were strictly separated.

46. Regarding the payment of the commission by the Appellant, the Intermediary stated that he had had problems with being paid by the Appellant and had made a claim against it, but now had an agreement under which 50% of the debt had been paid, including a payment made this month.

47. The Parties were given the full opportunity to present their cases, submit their arguments in closing statements and to answer the questions posed by the Sole Arbitrator.

48. Before the Hearing was concluded the Parties expressly stated that they had no objection to the procedure adopted by the Sole Arbitrator and that their rights to be heard had been respected.

IV. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELEIF

A. The Appellant

49. In its Statement of Appeal, the Appellant requested the following relief:

"(1) The decision rendered by the FIFA Players' Status Chamber on 25 April 2023 in the matter FPSD-8169 is set aside.

(2) Club Deportivo Popular Junior FC is ordered to reimburse FC Porto for the costs of the proceedings before FIFA in the amount of USD 25,000.

(3) Club Deportivo Popular Junior FC is ordered to bear the full CAS arbitration costs.

(4) Club Deportivo Popular Junior FC is ordered to pay to FC Porto a significant contribution towards its legal fees and other expenses".

50. In support of its requests for relief, the Appellant submitted, *inter alia*, the following:

- The main issue is whether the costs for the Intermediary services (i.e. 10%) should be deducted when calculating the sell-on fee.

- As the Respondent has not filed an appeal against the Challenged Decision, whether deductions should be made as a matter of principle and whether solidarity payments should be deducted are beyond the scope of the appeal.

- The Loan Agreement is an integral and inseparable component of the Further Agreement because:

  h. it had never been the intention of the Parties to deviate from the terms agreed in the Loan Agreement, including those related to the sell-on fee. When the Further Agreement was concluded, the Appellant had already paid the Respondent the transfer fee for the permanent transfer, thus the basis for the transfer was the Loan Agreement;

  i. when the Appellant exercised the option *"Junior FC requested FC Porto to sign a document in which would be synthetized all the relation between the parties – with the same conditions established on the Temporary Transfer – in order to have a document related to the definitive transfer"*;

  j. the Further Agreement itself refers to the Loan Agreement as its integral part, under clauses 1, 7, and 10; and

  k. the FIFA TMS report concerning the Player's permanent transfer, a document derived from the information that both clubs submit to the TMS independently, confirms that the *"Transfer contract date"* is 1 July 2019, i.e. the date of the Loan Agreement.

- Under Swiss law, when the interpretation of a contract is in dispute, the judge seeks the true and mutually agreed intention of the parties. When that cannot be established, the contract must be interpreted according to the requirements of good faith. The requirements of good faith tend to give preference to a more objective approach, with emphasis on how a reasonable person would have understood the party's declaration. In determining intent, the Sole

Arbitrator must first examine the words and conduct but 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. These principles of interpretation have been confirmed in particular in CAS 2017/A/5172.

- The Further Agreement was prepared at the request of the Respondent. It was drafted to include *"as previously agreed"* in clause 7 (the sell-on clause); was executed without negotiation of its terms or renegotiation of the commercial terms and the Respondent has not adduced evidence that there was negotiation of its terms or renegotiation of the commercial terms. Further clause 10 (the entire agreement clause) is very clear, and it incorporates the terms of the Loan Agreement.

- As for clause 5 of the Loan Agreement, the words in square brackets, beginning *"[herein defined and understood as…]"*, is the explanation of what the Parties agreed was meant by *"20% (twenty percent) of the transfer fee…"*. Clause 5 of the Loan Agreement defines how the sell-on fee is calculated and clause 7 of the Further Agreement incorporates that definition. The two agreements, and clauses, are interrelated; one is complete and one is a summary.

- The costs for intermediary services should be deducted from the transfer compensation paid by Liverpool to the Appellant for calculating the sell-on fee as per clause 5 of the Loan Agreement, as this deduction is justified and mandated by the contractual framework established by the Parties.

- On 26 January 2022, the Appellant entered into the Intermediary Agreement with the Intermediary, according to which the Appellant was obliged to pay the Intermediary 10% of the transfer compensation in the event of the Player's permanent transfer from the Appellant to Liverpool. The Player was transferred to Liverpool and the Intermediary acted for the Appellant on the transfer. His involvement was stated in the transfer agreement with Liverpool and on FIFA TMS.

- It is reasonable that the Parties agreed that the sell-on fee should be based on a "net" transfer compensation i.e. after deducting costs for intermediary services.

- Clause 5 of the Loan Agreement does not require that the cost of intermediary services must have been paid to be taken into account. The interpretation of Clause 5 in the Challenged Decision, which suggests the fee must have been paid, exceeds the agreement of the Parties. Instead it is sufficient that the Appellant is obligated to pay for intermediary services in order for this deduction to be made, as this obligation arises immediately upon the Appellant's receipt of the relevant instalment of the transfer fee from Liverpool, whereas the intermediary commission, as per Article 2 of the Intermediary

Agreement, is payable within five days. Clause 5 of the Loan Agreement does not require any evidence that payment has been made.

- The Appellant is making payments pursuant to the Intermediary Agreement. There had been a delay in making payments and a dispute, but the Intermediary had not waived his entitlement and the dispute was settled in January 2024.

- In the First FIFA PSC Proceedings the sell-on fee was calculated after the costs for intermediary services of 10% were deducted. A copy of the Intermediary Agreement was uploaded to the FIFA TMS, and therefore, the FIFA PSC could have considered and relied on it in accordance with Article 13(4) of the FIFA Procedural Rules Governing the Football Tribunal (October 2022 edition) (the "Procedural Rules"). The Challenged Decision is inconsistent with that of the First FIFA PSC Proceedings. It had taken a different approach on the same facts and evidence.

- As to the FIFA procedural costs paid by the Appellant, the Respondent should reimburse the Appellant in the sum of $25,000 as the Second FIFA PSC Proceedings should never have taken place.

- The Respondent should make a substantial contribution to the legal costs and other expenses of the Appellant and pay the arbitration costs.

B. The Respondent

51. In its Answer to the Appeal, the Respondent requested the following relief:

> *"(1) To reject the Appellant's appeal in its entirety and to confirm the decision of the Players' Status Chamber of the FIFA Football Tribunal of 25 April 2023.*
>
> *(2) To order the Appellant to bear all costs incurred through the present procedure, as well as to pay the Respondent an appropriate amount as contribution to its legal costs".*

52. In support of its request for relief, the Respondent submitted, *inter alia*, the following:

- The Respondent has not appealed the Challenged Decision and has therefore renounced a portion of the sell-on fee corresponding to 5% due to deductions for solidarity contributions. The Respondent did not appeal the Challenged Decision out of good faith, thinking that the dispute could be settled, to maintain good relations with the Appellant and to avoid lengthy and costly appeal proceedings.

- The Appellant and the Respondent disagree on how to calculate the sell-on fee. The Respondent insists it should be 20% of the transfer fee paid by Liverpool; the Appellant that it should be 20% minus solidary contributions and mediation fees.

- As the Appellant states, the conclusion of a contract requires the expression of mutual intent by the parties, be it express or implied.

Therefore the content is primarily determined by subjective interpretation, i.e. according to the concurring, real intention of the parties. If the common or real intention cannot be established the declarations are to be interpreted on the basis of the principle of trust, based on the wording, the context as well as the circumstances in which it was expressed. It will take into account the ordinary sense one can give to the expressions used by the parties and how they could reasonably understand them.

- The Loan Agreement was structured as it was to avoid the risk of non-payment of the transfer fees by the Appellant. Thus there was a high loan fee and a fee to exercise the option. Then the Respondent asked for a new contract to improve its contractual position. The Further Agreement was freely accepted by the Appellant. The Parties amended all the deductions from the sell-on fee when they signed the Further Agreement.

- The Appellant relies upon clause 5 of the Loan Agreement. The clause of relevance is in fact clause 7 of the Further Agreement. The word *"agreed"* in that clause makes it clear that the parties did <u>not</u> intend any deductions from the transfer fee when calculating the sell-on-fee. Common practice does not matter; what counts is the terms of the agreement between the Parties. With regards to the words *"as previously agreed"* at the start of clause 7, the Respondent's representative was not a native English speaker and intended to replace the sell-on clause in the Loan Agreement with that in the Further Agreement.

- Clause 10 of the Further Agreement is relied upon, as the Loan Agreement was replaced by this new agreement. The clause means that the Parties reached a new agreement for the permanent transfer of the Player's registration but the loan matters will continue to be governed by the loan agreement. The Parties did not want to change their agreement regarding the loan arrangements but did want to change the terms of the sell-on fee. The general reference in clause 10 – that the agreement supersedes all previous agreements save for the Loan Agreement – is far from sufficient to credibly establish any intention to calculate the sell-on based on a net amount.

- Given that the sharing of the economic risk and profit stemming from the Player's definitive transfer from the Respondent to the Appellant was contingent on the definitive transfer and not effective from the outset, this further substantiates the conclusion that the Parties modified the terms of the sell-on fee of clause 5 of the Loan Agreement in clause 7 of the Further Agreement.

- The exercise of the option would have been sufficient for the definitive transfer of the Player. One cannot understand why the Parties would have concluded a new agreement other than that they wished to amend the terms of the

Loan Agreement. Thus by entering into the Further Agreement the Appellant consciously agreed to the basis of the calculation of the sell-on as contained in clause 7 of that agreement, which is 20% without any deductions.

- If the Sole Arbitrator should still deem that the Further Agreement did provide for the application of deductions from the fee agreed between the Appellant and Liverpool for the purpose of calculating the sell-on fee, the Appellant is not entitled to deduct any solidarity contributions or mediation fees. It is not justified to deduct the solidarity contributions due to the Appellant from the transfer fee paid by Liverpool. As for solidarity contributions to be paid to third clubs, the Respondent is entitled to a percentage of the transfer fee "agreed" between the Appellant and Liverpool and not of the sum received; consequently such contributions cannot be deducted. Therefore the Single Judge of the FIFA PSC was wrong to allow deductions before the calculation of the sell-on fee.

- No deductions for intermediary fees are permissible. The Appellant bears the burden of proof for any deductions from the transfer sum for the calculation of the sell-on fee as per article 13, part 5 of the FIFA Procedural Rules, and the Appellant has not discharged this burden to prove that it had an obligation to pay any intermediary commission to the Intermediary or that it paid such fee.

- The existence of an obligation to pay intermediary commission in the Intermediary Agreement is not decisive. The decisive element is whether the conditions set out in the agreement for payment of commission in connection with the transfer of the Player to Liverpool are fulfilled or not. Only if the conditions are fulfilled is the Appellant obliged to pay the commission to the Intermediary or his agency "PASSION SPORTS MANAGEMENT SAS". According to the FIFA and CAS jurisprudence (including 03143842 of the FIFA PSC and 11171432 of the FIFA PSC), in order to establish an obligation to pay intermediary fees, there should be compelling evidence that the intermediary's work resulted in the conclusion of the transfer agreement with Liverpool. This rule is subject to an exception, if there is a clause that explicitly and unequivocally provides for payment to the intermediary even when he has not been involved in the transfer. There is no such clause in the Intermediary Agreement.

- It cannot be established that the Intermediary provided any services to the Appellant, let alone a causal link between such activity and the conclusion of the transfer. The testimony of the Intermediary was not convincing. He was clearly only the representative of the Player. He cannot show that he was involved in the transfer. The Appellant did not require the services of an intermediary. The Intermediary Agreement was signed only one day

before the Appellant signed the transfer agreement with Liverpool. It is telling that the Appellant has not provided a copy of the transfer agreement between it and Liverpool, so it is not possible to verify whether the Intermediary was a party to that agreement. Liverpool had already announced in November 2021 an interest in the Player and the Player's arrival. Either there was no obligation on the Appellant to pay the Intermediary or it has not been proven. It cannot be ruled out that the Appellant concluded the Intermediary Agreement only for the purpose of deducting the intermediary fee when calculating the sell-on fee. Thus the Appellant has not discharged the burden of establishing that the Intermediary was causative of the transfer.

- In any case the Appellant has not produced any conclusive evidence that the Intermediary was paid. The payment confirmations do not seem to be official bank documents confirming any financial transactions. The first does not contain any reference to the Player. The second was issued by the Appellant and not its bank. The dates of payment are inconsistent with the due dates under the Intermediary Agreement. The amounts are inconsistent with the amounts due under Intermediary Agreement. The Appellant has not submitted any evidence of payment of the intermediary fee relating to the third transfer fee instalment.

- It is more likely that the payments made to PASSION SPORTS MANAGEMENT SAS were made on behalf of the Player for representing him in connection with his transfer from the Respondent to the Appellant. The website at www.passionsport.co states that the Player is a client of PASSION SPORTS MANAGEMENT SAS. Given the possible conflict of interest it makes more sense to assume that PASSION SPORTS MANAGEMENT SAS had a contractual relationship with the Player and not with the Appellant. Equally the Intermediary's Instagram account reveals that he has always been the Player's agent and that he still is today. It is more than obvious that the Intermediary is the Player's agent.

- The bank documents that form part of the Challenged Evidence do not seem to be official bank documents, and cannot sufficiently prove the alleged payments. Instead, the Respondent hypothesises that it is more likely these payments were made not as remuneration for representing the Appellant in the negotiations with Liverpool, but rather made on behalf of the Player for representing the latter in connection with his transfer to the Appellant (from the Respondent), as the Intermediary appears to be the Player's agent.

- Thus the deduction of the 10% intermediary fee for the calculation of the sell-on fee is unfounded.

- The Appellant should make a contribution to the legal costs of

the Respondent, considering its procedural bad faith, and, in any event, pay a substantial share of the arbitration costs.

V. JURISDICTION

53. Pursuant to Article S20 of the CAS Code, the present arbitration has been assigned to the Appeals Arbitration Division of the CAS and shall therefore be dealt with according to Articles R47 *et seq.* of the CAS Code.

54. Article R47 of the CAS Code provides that *"[a]n 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"*.

55. Article 57, para. 1 of the FIFA Statutes (the "FIFA Statutes") provides 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"*.

56. Neither Party contests the jurisdiction of the CAS and each has confirmed it in the Order of Procedure.

57. It follows that Sole Arbitrator has jurisdiction to decide the present dispute.

VI. ADMISSIBILITY

58. 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".

59. Article 57 of the FIFA Statutes provides that appeals must be made within 21 days of receipt of the decision being appealed.

60. The Statement of Appeal was filed by the Club on 14 July 2023, i.e. 21 days after FIFA communicated the Appealed Decision to the Parties on 23 June 2023, hence within the deadline of 21 days.

61. The Club completed its appeal per the terms of Article R48 and R51 of the Code and within the deadline set by the CAS Court Office for it to do so. The appeal complied with all of the requirements of Article R47 et seq. of the Code, including the payment of the CAS Court Office fee.

62. It follows that the appeal is admissible.

VII. APPLICABLE LAW

63. The Sole Arbitrator takes note that the Parties do not dispute the applicable law.

64. Article R58 of the CAS Code states 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 that the [Sole Arbitrator] deems appropriate. In the latter case, the [Sole Arbitrator] shall give reasons for [his] decision".

65. Pursuant to Article 56, para. 2 of the FIFA Statutes, *"[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"*.

66. The Loan Agreement and the Further Agreement both contain a jurisdiction and choice of law clause that stated: *"Any dispute in connection with arising from this Agreement shall be exclusively decided by the competition FIFA judiciary bodies apply the FIFA statutes and regulations and, in addition, Swiss law"*.

67. By reason of those provisions, and as undisputed by the Parties, the Sole Arbitrator must decide the present dispute in accordance with the statutes and regulations of FIFA and, subsidiarily, Swiss law.

VIII. PRELIMINARY ISSUES

68. In its Answer, the Respondent requested that the Sole Arbitrator rule as inadmissible the following three documents:

    l. The Intermediary Agreement (being exhibit 10 to the Appeal Brief); and

    m. Two payment confirmations in the favour of PASSION SPORTS MANAGEMENT SAS, dated 14 April 2022 and 22 August 2022 (being exhibits 23 and 24 to the Appeal Brief) (the "Payment Confirmations").

    (the "Challenged Documents").

69. In support of that application, the Respondent submitted, *inter alia*, the following. New evidence regarding an alleged engagement of the Intermediary in the context of the transfer to Liverpool should not be admitted. The documents in question were, without any doubt, available to the Appellant at the time of the Second FIFA PSC Proceedings and could have easily been produced then.

70. As per Article R57 of the CAS Code the Sole Arbitrator may examine the facts and law with the full power of review and analyse all the factual and legal arguments of the Parties and all the documents that were produced before the FIFA Football Tribunal. There are, however, limits including (i) CAS must respect final and binding FIFA decisions, (ii) CAS must not disregard a FIFA decision without examining its well-founded grounds, (iii) CAS must respect FIFA's regulations, (iv) CAS must respect the principle of *ne ultra petita*; and (v) CAS must respect the principle of equal treatment of the Parties. Thus Article R57 (3) of the CAS Code stipulates that *"the Panel has 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"*. The CAS commentary specifies the rationale of that rule as to avoid evidence submitted in an abusive way and/or evidence retained by parties in bad faith in order to bring it for the first time before CAS. That makes sense

because the deciding body should always act within the limits set by the Swiss Federal Act on Private International Law (PILA). Article 182, par. 3 PILA guarantees the equal treatment of the parties and their right to be heard. CAS jurisprudence has confirmed that an appeal body has a wide discretion to exclude or admit evidence based on their own assessment of the case. This power may be exercised, inter alia, in circumstances where a party has displayed abusive procedural behaviour, or in any other circumstances where CAS deems the request to admit new evidence either as unacceptable procedural conduct or to be unfair or inappropriate in the light of the overall circumstances as well as the rights and interests of all the parties (CAS 2015/A/3923, para 66).

71. The Appellant failed to submit its primary evidence in the Second FIFA PSC Proceedings, being the Challenged Documents. The Respondent was thus unable to comment on these documents in those proceedings. By withholding that evidence the Appellant compelled the Respondent to initiate the Second FIFA PSC Proceedings. Producing this evidence in those proceedings would have allowed the Respondent to plan and adjust their procedural decisions.

72. The alleged Intermediary Agreement was available since 27 January 2022 and the alleged commission payment confirmations from 14 April and 22 August 2022. Withholding them demonstrates the Appellant's lack of good faith and caused procedural and financial harm to the Respondent. Admitting the Challenged Documents would constitute a clear violation of the principle of equal treatment of the Parties.

73. In contesting that application the Appellant submitted, *inter alia*, the following. The Appellant agreed that the Sole Arbitrator has a discretion as to whether or not the Challenged Documents should be admitted.

74. It would be impractical to exclude the documents, as the Sole Arbitrator has heard evidence from the witnesses about them. The FIFA PSC proceeded to resolve the prior instances without holding any hearings.

75. There are no grounds to exclude them. The Challenged Documents have not been hidden from the Respondent. The First FIFA PSC Proceedings decided the claim for the sell-on fee without reference to the Intermediary Agreement; it only became relevant due to the Challenged Decision. Given the two claims from the Respondent before the FIFA PSC were similar, there was no need to file the Intermediary Agreement previously. In any event it, and the Intermediary's name, were in FIFA TMS as having acted on the transaction.

76. The award CAS 2015/A/3923 establishes that evidence should be excluded only if the failure to produce the documents previously has been abusive, or there has been unacceptable conduct, or to introduce new evidence would be unfair or inappropriate. The Respondent here is

not able to establish that the Appellant's conduct has been abusive or that it has been ambushed.

77. The suggestion by the Respondent that it was forced to initiate proceedings because the Challenged Documents were withheld is denied. The Challenged Decision was not previously about these documents. Further the Respondent had a chance to reconsider its position once it had seen them, when the Appeal Brief was provided.

78. The Sole Arbitrator notes that the test to be applied by him under Art 57(3) is summarised in CAS 2015/A/3923, para 66: *"The Sole Arbitrator fully agrees with the opinion of the CAS Panel in CAS 2014/A/3486 which is focused on (a) the wide inherent discretion of the Panel to exclude or admit certain evidence under this provision of the CAS Code based on the Panel's own assessment of the case at hand and (b) the idea that this power can be executed by the Panel in a wide range of circumstances to include, inter alia, abusive procedural behaviour, or in any other circumstances where the Panel might, in its discretion, consider the request to admit new evidence either as unacceptable procedural conduct by a party or to be unfair or inappropriate having in mind the overall circumstances of the case and the rights and interests of all the parties to the proceedings".*

79. Applying these principles, the Sole Arbitrator holds that the Challenged Documents are admissible. Whilst they were in existence and available to the Appellant prior to the commencement of the Second FIFA PSC Proceedings, given the decision in the First FIFA PSC Proceedings it was reasonable for the Appellant to proceed on the basis that it would not need to file such evidence before the FIFA PSC in those second proceedings. The Sole Arbitrator does not consider that the Appellant has behaved abusively, unreasonably or inappropriately or caused unfairness to the Respondent by including the Challenged Documents as exhibits to the Appeal Brief, when they have only become relevant due to the content of the Challenged Decision. There is nothing to suggest that the documents have been "held back" in order to surprise the Respondent. The Respondent has been able to take account of the Challenged Documents in preparing its Answer and has been able to question two witnesses at the Hearing on the veracity of the documents. The Respondent has therefore been heard in relation to them.

80. At the hearing the Parties agreed that the Appellant would provide to the Sole Arbitrator a copy of the Liverpool Agreement (i.e. the agreement between the Appellant and Liverpool concerning the transfer of the Player) in order to establish if the Intermediary was named in that agreement. The Sole Arbitrator suggested that a redacted version could be provided so that the Respondent could review the document for itself. Notwithstanding that suggestion, the Parties agreed that the full, unredacted copy of the Liverpool Agreement would be provided to the Sole Arbitrator so that he could consider its content but the document would be kept confidential from the Respondent. The Sole Arbitrator can confirm that the necessary document has been

provided to him and reviewed by him, and is taken into account in reaching his findings.

IX. MERITS

81. The Appellant requests to set aside the Challenged Decision and rule that the deduction of the costs for intermediary services should be made when calculating the sell-on fee, under clause 5 of the Loan Agreement. The Respondent, on the other hand, seeks to have the Challenged Decision upheld. In the Respondent's view, the Appellant is not entitled to make deductions from the sell-on fee as per clause 7 of the Further Agreement as the Further Agreement constitutes a new agreement between the Parties that supersedes the Loan Agreement.

82. In view of the Parties' dispute, the Sole Arbitrator must determine whether the claimed amounts were in fact due and if so, whether the Appellant had a valid justification for not having complied with its financial obligations.

A. The Content and Application of the Sell-On Clause agreed by the Parties

83. This appeal concerns the payment of a sell-on fee due on one instalment, the third paid by Liverpool to the Appellant under the Liverpool Agreement, although it will have a bearing on the amounts that will be payable by the Appellant to the Respondent further to the sell-on fee agreed in respect of, at least, five instalments of the transfer fee due from Liverpool to the Appellant.

84. The main issues to be resolved by the Sole Arbitrator are:

i. What are the terms of the sell-on clause agreed by the Parties?

ii. Are any deductions permissible from the sell-on fee due in relation to the third instalment of the transfer fee from Liverpool?

iii. Is the Respondent liable to pay the Appellant the procedural costs charged by the FIFA PSC in the Second FIFA PSC Proceedings?

84. Before turning to these issues, the panel notes that the parties have different views concerning the facts of the case. In this regard Article 8 of the Swiss Civil Code provides with respect to burden of proof that: *"Unless the law provides otherwise, each party shall prove the facts upon which it relies to claim its right".*

85. This principle has been applied in CAS jurisprudence, as illustrated in CAS 2020/A/6796 (para 98) where the panel stated:

"[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 (…). 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".

86. In this respect, pursuant to Article 8 of the Swiss Civil Code, it is the party that wishes to establish a fact that has the burden of proving the alleged fact that it relies upon.

i. What are the terms of the sell-on clause agreed by the Parties?

87. There are two sell-on clauses in two agreements. The Appellant submits that the two agreements – the Loan Agreement and Further Agreement – are interrelated, so that the wording within clause 5 of the Loan Agreement is still applicable notwithstanding the execution of the Further Agreement. The Respondent submits that the Parties reached a new agreement so that clause 7 of the Further Agreement alone is applicable.

88. The Sole Arbitrator agrees with the Respondent that what is in issue is not what may or may not be "usual" or the "norm" with regard to sell-on clauses. The Sole Arbitrator observes that, in any event, whether or not there is an "industry standard" is, at the very least, doubtful, and agrees that what is in issue is the specific agreement reached between these Parties concerning this Player.

89. The Parties are in broad agreement as to the approach the Sole Arbitrator must take to deciding the issue of construction of the clauses in the agreements. CAS 2017/A/5172 summarises the principles as follows: *"…the meaning of a text, even a clear one, is not necessarily determining and that on the contrary, the purely literal interpretation is 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 – e.g. the drafting history of the agreement, its purpose or the overall content of the contract – that the text of such contractual clause does not convey exactly the content of the agreement concluded. Consequently, even in case the terms used in a contract have a clear literal (i.e. unambiguous) meaning, the adjudicatory body must assess whether or not the parties truly wished to attribute such meaning to the terms used. Under Swiss law, the principles on contract interpretation are to be found in Article 18 para. 1 CO, which is based on the assumption that the parties have concluded a contract and, in principle, do not dispute its effectiveness but rather the content of the agreement reached (so-called "reiner Auslegungsstreit"). In that case, Article 18 para. 1 CO rules that the content of the agreement must be construed according to the true intentions of the parties. Thus, 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 trust, i.e. by seeking, in accordance with the rules of good faith, the meaning the parties could and should have given to their respective declarations".*

90. The Sole Arbitrator notes that the Loan Agreement was executed on 1 July 2019 and that the Further Agreement was executed on 5 October 2019. The context is undisputed: the Further Agreement came into existence only after the Appellant had triggered the option for the permanent transfer of the Player and so the Appellant had already paid to the Respondent both guaranteed payments, being the loan fee and the option fee, and after the Appellant had submitted its instruction to FIFA TMS to *"engage against payment – from loan to*

permanent", i.e. to enable the permanent registration of the Player with the Appellant.

91. As for its purpose, the Appellant has pleaded in its Appeal Brief that the Further Agreement was prepared at the request of the Respondent *"to sign a document in which would be synthetized all the relations between the parties – with the same conditions established on the [loan] – in order to have a document related to the definitive transfer"*. Mr Silva Nunes gave evidence that the purpose of the Further Agreement was to have a document that could be uploaded on to FIFA TMS so that the Player's registration could be made permanent, i.e. a different purpose (although one that does not necessarily conflict with the pleaded case). The Respondent did not challenge that purpose at the Hearing directly but did submit that (i) the exercise of the option by the Appellant was sufficient to enable the permanent transfer of the registration, (ii) the execution of the Further Agreement was to amend certain terms following the transfer, and (iii) the fact that a new document was needed for FIFA TMS does not alter that the Parties amended the sell-on clause. The Sole Arbitrator understands those submissions to accept the purpose alleged by the Appellant, to enable the FIFA TMS process to be completed, but to suggest that there was another purpose too, to record new terms on the sell-on clause.

92. Both documents contain entire agreement clauses. The purpose of an entire agreement clause is to define the scope of the agreement between the Parties. That in the Loan Agreement is set out above and need not be repeated as its meaning is not in issue. The entire agreement clause in the Further Agreement stated *"10. This Agreement sets out the entire agreement between the PARTIES hereto and supersedes all prior discussions, statements, representations and undertakings between them or their advisors regarding the PLAYER, except for the above mentioned Temporary Transfer Agreement, with the option to acquire the registration of the PLAYER on permanent basis"*. There is therefore on the face of this clause an indication that the content of the Further Agreement is not the only document defining the scope of the agreement between the parties, as there is express reference to *"the above mentioned [Loan Agreement]…"*.

93. The Sole Arbitrator has not been provided with any prior draft(s) of the Further Agreement, or other contemporaneous communications concerning the creation of that document, and notes that the evidence of Mr Silva Nunes as to the circumstances of the creation of that document was not challenged. The Sole Arbitrator therefore accepts that this document was not the subject of any, or any significant, negotiation or discussion between the Parties prior to signature. There are therefore no pre-contractual exchanges between the Parties to assist the understanding of what they meant when they included reference to the Loan Agreement in the entire agreement clause.

94. The Respondent submitted that reference was to apply to any terms relating to the loan of the Player that survived the permanent transfer of the registration, for example concerning

solidarity contributions that would be applicable during the period of the loan. The Sole Arbitrator understands that this could have some application, given the age of the Player at the time of the loan. There is however also express reference to *"the option to acquire the registration of the PLAYER on permanent basis"* which suggests a more general incorporation of the terms of the Loan Agreement into the scope of the agreement between the Parties, or, at least, as the Appellant submits, create a situation where the two agreements are interrelated, in the sense that the terms set out in the Loan Agreement are not excluded simply because the Further Agreement has been executed. Taking account therefore of the principles of construction the Sole Arbitrator therefore holds that the intention of the reference back to the Loan Agreement was to retain its terms within the scope of the agreement between the Parties. That, however, is only a preliminary issue, as the Parties specifically agreed a new sell-on clause in the Further Agreement. The issue was there either (a) an incorporation of the sell-on clause from the Loan Agreement (which, in principle, allowed deductions) or (b) the agreement of a new sell-on clause (which did not allow deductions)?

95. Looking at the words used, clause 5 of the Loan Agreement stated *"5. Finally, after the option right mentioned in clause 3 being exercised on time by FC PORTO and the accomplishment of permanent transfer of the player registration, in case FC PORTO transfers the PLAYER on permanent or on temporary basis (loan agreement or definitive transference) to a third club in the future, FC PORTO shall pay to JUNIOR BARRANQUILLA the amount corresponding to 20% (twenty percent) of the transfer fee (temporary or definitive) agreed between FC PORTO and the third club [herein defined and understood as all the revenues and credit rights resulting from the definitive transfer of the sporting rights of the PLAYER from FC PORTO to any third football club, after deducting (i) any amounts regarding training compensation and/or solidarity deductions, if applicable; and (ii) as well as possible mediation fee to be paid to the intermediaries making viable the transfer of the Player to a third Club up to a maximum of 10%. No other deduction (fees, taxes etc.) of whatsoever shall be made]"*.

96. Clause 7 of the Further Agreement stated: *"As previously agreed, in case **FC PORTO** transfers the PLAYER on permanent or on temporary basis (loan agreement or definitive transference) to a third club in the future, **FC PORTO** shall pay to **JUNIOR FC** the amount corresponding to 20% (twenty percent) of the transfer fee (temporary or definitive) agreed between **FC PORTO** and the third club"*.

97. The relevant difference in the wording is the reference to the ability to make deductions from the transfer fee received from a third club before calculating the amount of the sell-on fee payable to the Respondent. The wording of the clauses gives us two indications of the intention of the parties.

98. First, the wording in parenthesis in the Loan Agreement, commencing *"[herein defined and understood…]"*. On its face, this wording records the specific agreement between the Parties as to those deductions which may be made from the transfer fee, specifically (*(i) any amounts regarding training compensation*

and/or solidarity deductions, if applicable; and (ii) as well as possible mediation fee to be paid to the intermediaries making viable the transfer of the Player to a third Club up to a maximum of 10%") but nothing else (*"No other deduction (fees, taxes etc.) of whatsoever shall be made]"*.) These deductions are contradictory to the immediately preceding words in the clause (*"the amount corresponding to 20% (twenty percent) of the transfer fee (temporary or definitive) agreed between FC PORTO and the third club"*) in that suggesting a payment of 20% is *"defined and understood"* to mean 20% less certain deductions does not necessarily make literal sense. It is however undisputed that the intention of the Parties was to specifically define what they intended the immediately preceding words to mean and that by using the wording in parenthesis the parties had agreed that the Appellant could make certain agreed deductions prior to calculating the sell on fee.

99. Second, the introductory wording of clause 7 of the Further Agreement, *"[a]s previously agreed…"*. The evidence of Mr Silva Nunes was that he included this wording in the draft of the document so that there was a reference back to the terms of the prior sell-on clause. Counsel for the Respondent stated that the representative of the Respondent who executed this document was not a native English speaker – suggesting an inference that they did not understand its significance – and submitted that this did not alter that there was a new agreement on the sell-on fee.

100. Again,*"[a]s previously agreed"* does not make literal sense in the context of the remainder of the clause, as the wording that follows is not the same as that in clause 5 of the Loan Agreement. However, the Sole Arbitrator notes that the parties had in that clause 5 agreed a specific (and undisputed) definition to what they considered the words *"the amount corresponding to 20% (twenty percent) of the transfer fee (temporary or definitive) agreed between FC PORTO and the third club"* to mean, i.e. it was to mean 20% less the specific deductions set out in the remainder of clause 5, but nothing more. On the face of the clause therefore the Parties had agreed to take account of their previous agreement on the terms of the sell-on fee and read into clause 5 the wording in parenthesis in order to *"define"* (and so they could *"understand"*) what they meant and agreed by a sell-on of 20%.

101. The Sole Arbitrator must though have regard to the principle that *"…the meaning of a text, even a clear one, is not necessarily determining and that on the contrary, the purely literal interpretation is prohibited"* and the (other) purpose of the Further Agreement alleged by the Respondent, that it was to amend certain terms including that of the sell-on, requires careful consideration.

102. It is undisputed that there was no negotiation over the clause. The Sole Arbitrator observes that if there was to be a renegotiation of the commercial terms at that time then it is reasonable to consider that perhaps there would have been some discussion or exchange of views, orally or in writing.

103. The Respondent submits *"one cannot reasonably understand why the parties would have concluded a new agreement following the exercise of the*

option other than the fact that they wished to amend certain terms…". However, the Respondent also admits that, so far as the Appellant is concerned, a purpose of the Further Agreement was to allow the FIFA TMS process to proceed.

104. The Respondent submits that *"[g]iven the sharing of the economic risk and profit stemming from the player's definitive transfer…was contingent on the definitive transfer and not effective from the outset"* is substantiation that there was an intention to vary the sell-on fee payable. The Sole Arbitrator does not accept this submission. The Loan Agreement was structured so as to require the payment of a substantial loan fee to the Respondent; further once the option fee was paid and the transfer was definitive there was no economic risk for the Respondent, only possible benefit.

105. The Further Agreement was executed after the Appellant had fulfilled its primary obligations to the Respondent. It is hard to discern any reason why it would have voluntarily worsened its future economic position. No satisfactory explanation has been given by the Respondent. The Respondent submits that it sought to improve its economic position. If the submission is that the Respondent therefore sought to introduce a new term that caused detriment to the Appellant then the principle of mutual trust (and good faith) could be engaged.

106. Lastly, the Sole Arbitrator notes that the Respondent did not appeal the decision from the First FIFA PSC Proceedings. The reasoning advanced by the Respondent – that it did not want to engage in lengthy appeal proceedings – is understandable (and it is common ground that the decision from the First FIFA PSC Proceedings does not establish a *res judicata*), the lack of reaction to that decision is, however, another factor to take into account.

107. Against this background and considering all the submissions and circumstances, the Sole Arbitrator finds that the sell-on clause agreed by the Parties allowed for the deductions to be made from the third transfer fee instalment received from Liverpool in the terms set out in clause 7 of the Loan Agreement. The Further Agreement incorporated the terms of clause 5 of the Further Agreement through either or both of the entire agreement clause in the Further Agreement or the specific inclusion of the wording *"as previously agreed"* in clause 7 of the Further Agreement.

ii. Are any deductions permissible from the sell-on fee due in relation to the third instalment of the transfer fee from Liverpool?

108. On its face, the sell-on clause permits deductions to be made for *"(i) any amounts regarding training compensation and/or solidarity deductions, if applicable; and (ii) as well as possible mediation fee to be paid to the intermediaries making viable the transfer of the Player to a third Club up to a maximum of 10%"*.

109. It is common ground that, as the Respondent did not file an appeal against the Challenged Decision, it is bound by the finding in that decision

that deductions of 5% in respect of solidary contributions were permissible. The Sole Arbitrator notes that the Respondent made lengthy submissions (in writing and at the Hearing) on the issue of whether in fact deductions for solidarity contributions should have been permitted by the FIFA PSC and understands that those submissions were made for context, or as the Respondent stated *"for completeness"*. Those submissions have been noted but do not form part of the reasoning for the Sole Arbitrator's findings. The issue to be determined by the Sole Arbitrator is therefore whether deductions may be made for *"possible mediation fee to be paid to the intermediaries making viable the transfer of the Player to a third Club up to a maximum of 10%"*. That requires a finding as to the meaning of the clause and then whether, on the facts established in this case, a deduction may be made against the third instalment.

110. The Appellant's submission is that that the Intermediary was engaged to act for it in relation to the transfer to Liverpool, that there is an obligation to pay the Intermediary the fees set out in the Intermediary Agreement and whether or not such fees have actually been paid is irrelevant to the fact that a deduction may be made.

111. The Respondent has challenged this submission on many bases, relying on circumstantial evidence such as social media and the Respondent's view as to what may or may not have been needed for the transfer to Liverpool to proceed and what may or may not have occurred in connection with that transfer. In so doing Counsel for the Respondent cross examined the Appellant's witnesses robustly, challenging the veracity of the documents produced by the Appellant (the Intermediary Agreement, the FIFA TMS entries and Payment Confirmations) and their evidence and thereby calling into question the integrity of both witnesses, and by implication the Appellant.

112. On the construction issue, on its face the meaning of the clause is clear: that if there are fees *"to be paid"* to an intermediary or intermediary engaged by the Appellant for *"making viable"* the transfer of the Player to a third club (such as Liverpool) then up to 10% of the transfer instalment may be deducted from the sell-on fee. Neither party made submissions, including on the purpose or circumstances, to suggest there was a credible contrary intention.

113. The Respondent recognises that the Intermediary Agreement contains an obligation upon the Appellant to pay commission to the Intermediary in connection with the transfer of the Player to Liverpool, in the amount of 10% of the transfer fee paid by Liverpool. The Respondent submits that, notwithstanding the declarations submitted by the Appellant on FIFA TMS, given the content of the Intermediary's Instagram account, in fact the Intermediary was the Player's intermediary and the fees were paid to him in connection with the transfer of the Player to the Appellant. Having considered the documents relating to the transfers to the Appellant and to Liverpool and heard the witnesses, the Sole Arbitrator firmly rejects that submission. The Intermediary stated

that he has had a long relationship with the Player, and continues to work with him on commercial (i.e. off field) matters, but has not acted for him in connection with his employment or transfers. While the Intermediary represented the Appellant, the Player has his own intermediary, Mr Da Costa, who acted for him in connection with the transfer to Liverpool. If in fact the Intermediary had been acting for the Player (or, as per questioning from the Respondent, Mr Da Costa, in his representation of the Player, was acting on behalf of the Intermediary) this would have required each of the Intermediary, the Appellant, the Player, Mr Da Costa and Liverpool to have misrepresented the position to, variously, the FPF, the FA and FIFA, when of course there is no evidence whatsoever that any of them would consider acting in that way.

114. Of greater credibility is the submission from the Respondent that the obligation to pay the Intermediary is insufficient, as the decisive element is whether the condition(s) set out in the Intermediary Agreement to trigger the payment of commission is (are) fulfilled. In that regard the relevant term of the Intermediary Agreement are as follows:

"1.1 In the event that the Intermediary secures the engagement of the Player on a definitive basis to a third club against payment of a transfer compensation, the Club shall pay the Intermediary 10% (ten percent) of the transfer compensation (fixed and/ or conditional amounts) received by the Club, after deducting any amounts regarding training compensation and/or solidarity deductions if applicable".

"3. Any transfer of the Player on a definitive basis from the Club to a third club during the validity of the employment contract between the Club and the Player shall be negotiated, promoted and achieved based on the services rendered by the Intermediary and will entitle to the payment of the remuneration as foreseen herein. In such case, the Club waives any right to challenge the validity of the payment obligations as stipulated under clauses 1, 2 and 3 above. The mandate is conferred by the Club to the Intermediary is on exclusivity and irrevocable basis".

115. Neither party made submissions as to the meaning of these clauses and the Sole Arbitrator finds that they provide (a) the Intermediary was appointed on an exclusive basis during the validity of the Player's 157mployyment contract with the Appellant, so that he was required to be involved in the negotiation of any transfer to Liverpool FC; and (b) if the Intermediary was involved in the negotiation of a transfer to Liverpool FC for a fee, he is entitled to receive 10% of the fee after any agreed deductions.

116. The Respondent relies upon a series of FIFA PSC cases, which held that for an intermediary (or agent) to be entitled to a receive a fee from his client club there should be compelling evidence that the intermediary's work resulted in the conclusion of the transaction in issue (the "Agent Cases"). The Sole Arbitrator notes that these Agent Cases concern disputes between an agent and a client over whether a fee is payable for services allegedly rendered to that client whereas here the issue is whether the condition within a sell-on

clause has been fulfilled. The Sole Arbitrator therefore does not decide that they are directly relevant to his findings but is, nevertheless, prepared to adopt their findings as the test to be satisfied given that the Intermediary Agreement provides that a deduction may only be made where the Intermediary is responsible for *"…making viable the transfer…"*.

117. Each of the terms of the sell-on clause, the terms of the Intermediary Agreement and the principle from the Agent Cases therefore require a similar question to be answered: is there compelling evidence that the Intermediary made the transfer viable? The answer on the evidence before the Sole Arbitrator (and including that which the Respondent agreed would not be provided to it but which the Sole Arbitrator may review) is "yes". The Intermediary gave a clear account of his involvement in the transfer on the part of the Appellant. Both he and Mr Silva Nunes testified that the Intermediary brought the offer from Liverpool FC to the Appellant, in circumstances where another agent had procured another offer for the Player from another club. The Appellant (a listed entity) declared on FIFA TMS that the Intermediary acted on the transfer. None of the facts that Liverpool (one of the world's most successful clubs and therefore with likely an extensive scouting network) had a prior interest in the Player, that matters proceeded swiftly, or that the Intermediary Agreement was signed only a few days before the transfer was concluded are unusual, especially towards the end of a registration period and where a (highly talented player) is in demand, and so do not establish a basis to doubt the oral evidence and documentary record.

118. The next issue is whether the sell-on clause requires that the commission to the Intermediary must have been paid to the Intermediary in order for the deduction from the sell-on to be made. The Sole Arbitrator finds that it need not have been paid; that there is an obligation to pay the Intermediary is sufficient. The clause states *"to be paid"* i.e. an action that may take place in the future, rather than wording such as *"has been paid"*. There is nothing in the purpose of the clause or circumstances of the transaction that suggest the words should not be given their literal meaning. It is notable that the sell-on clause does not specify a time period in which the Appellant must make payment of the amount due to the Respondent, while the Intermediary Agreement requires that the payment to the Intermediary is made within 5 days of receipt of the instalment. That the Appellant fell behind on its payment obligations to the Intermediary, so that he initiated a claim before CAS and the debt was restructured was explained by Mr Silva Nunes as being consequent upon the cashflow issues consequent upon the Covid-19 and post Covid-19 situation, but is in any event not a decisive factor.

iii. Is the Respondent liable to pay the Appellant the procedural costs charged by the FIFA PSC in the Challenged Decision?

119. The Appellant includes a claim for payment by the Respondent to it of the procedural costs charged by FIFA to secure the grounds of the

Challenged Decision, in the amount of USD 25,000.

120. The Sole Arbitrator dismisses this claim. The jurisprudence of CAS, which the Sole Arbitrator fully endorses, has consistently held that it does not have the power to reallocate the costs of the proceedings before FIFA (see CAS 2013/A/3054, paras 88 and 89; CAS 2016/A/4387, paras 180 and 181; CAS 2020/A/6992, paras 179-182).

B. Conclusion

121. Based on the foregoing, the Sole Arbitrator finds:

- The sell-on clause agreed by the Parties allowed for the deductions to be made from the third instalment of the transfer fee received from Liverpool in the terms set out in clause 5 of the Loan Agreement.

- In calculating the sell-on fee due to the Respondent arising from the receipt by the Appellant of the third instalment of the transfer fee from Liverpool of EUR 6,000,000, payable by Liverpool to the Appellant on or before 30 September 2022, in addition to the 5% deduction for solidarity contribution already decided by the Challenged Decision and not challenged by the Respondent, an additional 10% may be deducted from the amount to be paid to the Respondent due to the Appellant's obligation to pay such amount to the Intermediary. As a consequence, the total sell-on fee due to the Respondent on this instalment was EUR 1,020,000. Considering that the Appellant already paid to the Respondent EUR 1,019,897 (i.e. the owed amount less banking charges), it remains that the Appellant only owes the Respondent EUR 103.

- The Appellant is not entitled to a payment of USD 25,000 in respect of the procedural costs paid by it to FIFA.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Futebol Clube de Porto – Futebol, SAD against the decision rendered by the FIFA Players Status Chamber on 25 April 2023 is partially upheld.

2. Item 2 of the decision rendered by the FIFA Players Status Chamber on 25 April 2023 is partially amended as follows:

   "Futebol Clube do Porto – Futebol, SAD, must pay to Club Deportivo Popular Junior F.C. S.A. EUR 103 as outstanding amount, plus 5% interest p.a. as from 1 October 2022 until the date of effective payment".

3. Futebol Clube do Porto Futebol Clube do Porto's claim for reimbursement of the costs of the proceedings before the FIFA Players Status Chamber in the amount of USD 25,000 is rejected.

4. (…).

5. (…).

6. All other motions or prayers for relief are dismissed.

CAS 2023/A/9851
Nikola Djurdjic v. Chengdu Rongcheng
award of 23 September 2024

Panel: Mr Lars Hilliger (Denmark), Sole Arbitrator

Football
Contractual dispute - FIFA's jurisdiction based on the principles of res judicata
Objection of res judicata pertaining to jurisdiction or admissibility
Importance of a matter pertaining to jurisdiction or admissibility according to Article 190 PILA
Res judicata and its effects
Triple identity test of res judicata
FIFA DRC's jurisdiction pursuant to the RSTP

1. **It is not clear whether the objection of *res judicata* pertains to jurisdiction or to the admissibility of a claim. As a rule of thumb, the questions of whether the competence to decide a dispute in a binding way was transferred from the state-court system to arbitration and whether the matter before the arbitral tribunal is within the scope of the arbitration agreement are issues of jurisdiction, whereas all procedural issues that are non-jurisdictional issues and, that may for procedural reasons, cause the end of the arbitration are admissibility issues. The legal literature is split on the question of whether the plea of *res judicata* is a jurisdictional matter or an issue of admissibility.**

2. **The distinction whether a matter pertains to jurisdiction or admissibility is only important when an appeal is filed against an award according to Article 190 of the Swiss Private International Law Act (PILA). Here, the party appealing and the Swiss Federal Tribunal (SFT) must decide which of the limited grounds in Article 190(2) of PILA they wish to apply. Not all matters related to admissibility can be revisited under Article 190(2)(b) of PILA (lack of jurisdiction); lack of jurisdiction is only one of the elements defining the mandate of a panel. Other elements delimiting the mandate of a court or panel should therefore not be read into Article 190(2)(b) of PILA and can only be taken into account in the context of other subsections of Article 190 PILA.**

3. ***Res judicata* prohibits an identical claim that has been finally adjudicated from being challenged in a new proceeding between the same parties. The *res judicata* effect extends to all the facts existing at the time of the first judgment, whether or not they were known to the parties, stated by them or considered as proof by the first court. However, it does not stand in the way of a claim based on a change in circumstance since the first judgment. The *res judicata* effect does not extend to the facts after the time until which the object of the dispute could be modified, i.e. to those which took place beyond the last time when the parties could supplement their statements of facts and evidentiary submissions. Such circumstances are new facts (*real nova*) as opposed to the facts already in existence at the decisive time, which could not have been relied on in the previous proceedings (*false nova*), which under very restrictive conditions may justify the revision of**

the arbitral award.

4. **There is *res judicata* when the claim in dispute is identical to that which was already the subject of an enforceable judgment (identity of the subject-matter of the dispute). This is the case when in both litigations the same parties submitted the same claim to the court on the basis of the same facts. The identity must be understood from a substantive and not grammatical point of view, so that a new claim, no matter how it is formulated, will have the same object as the claim already adjudicated. In this regard, the so-called "triple identity" test has been previously noted and relied upon by some panels, confirming that if arbitral proceedings in Switzerland involve the same subject matter, the same legal grounds and the same parties as previous foreign arbitral proceedings terminated with an award, the so-called 'triple identity' test – used basically in all jurisdictions to verify whether one is truly confronted with a res judicata question – is thus indisputably met.**

5. **It does not follow from the FIFA Regulations on the Status and Transfer of Players (RSTP) that the absence of a valid arbitration clause in favour of the CAS in a contract between two parties to a dispute does also exclude the possibility that the CAS can in fact have jurisdiction as an appeal body. On the contrary, it is assumed that in the vast majority of disputes over which the FIFA Dispute Resolution Chamber (DRC) has jurisdiction pursuant to the FIFA RSTP, the parties to such disputes have not entered into any specific arbitration clause in their agreement.**

I. PARTIES

1. Mr Nikola Djurdjic (the "Player") is a former professional football player of Serbian nationality.

2. Chengdu Rongcheng (the "Club") is a professional football club based in Sichuan, China. The Club is affiliated with the Chinese Football Association (the "CFA"), which in turn is affiliated with the Fédération Internationale de Football Association ("FIFA").

II. FACTUAL BACKGROUND

A. Background facts

3. Below is a summary of the main relevant facts as established on the basis of the Parties' written and oral submissions and the evidence examined in the course of these proceedings. Additional facts and allegations found in the Parties' submissions may be set out, where relevant, in connection with the further 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, the Award only refers to the submissions and evidence he considers necessary to explain his reasoning.

4. In early January 2020, Mr Stojanovic, the then agent of the Player (the "Player's Agent") was informed by Mr Bao Fei and Mr Sunir Patel – on behalf of the Club – that the Club was interested in contracting the Player. Subsequently, discussions and negotiations concerning a possible transfer of the Player were initiated.

5. Later in the same month, the Club issued two offers, viz. an offer to the Player and an offer to the Player's then club, the Swedish football club Hammarby IF regarding a possible transfer of the Player to the Club.

6. On or around 18 January 2020, the Player and Mr Stojanovic arrived in China in order to finalise the negotiations of the Club's offer to the Player. During this trip, the Player met with the Club's team and passed the necessary medical tests. At the end of the contractual negotiations, the Club made an offer to remunerate the Player the following sums:

   - EUR 1 million in 2020;
   - EUR 1.2 million in 2021;
   - EUR 1.45 million in 2022; and
   - The possibility of doubling the above amounts if the Club gets promoted to the Chinese Super League (the "CSL").

7. Mr Patel also expressly informed the Player and Mr Stojanovic that two different contracts needed to be signed, viz. an employment contract and an image rights agreement. According to the Player, he was informed that such practice for remuneration was common in China due to *"strict and complicated banking legislation in China"* and doing so would be *"much easier for the clubs to make high payments"*.

8. On 22 January 2020, the Club and the Player had apparently reached a verbal agreement on the terms of the Player's employment contract and image rights agreement, but the Player alleges that he did not see any draft agreement for review before signature. However, in the late-night hours of the same day, Mr Patel allegedly came into the Player's hotel to explain that the image rights agreement would need to be executed with a third party, a Dutch company called Supervision Management ("Supervision") that is run by Mr Patel himself. According to the Player, Mr Patel had informed the Player that the entire deal depended on this technicality.

9. On 23 January 2020, the Club and the Player signed an employment contract valid as from 23 January 2020 until 22 January 2022, with a renewal option until 22 January 2023 (the "Contract"). The pertinent parts of the Contract read as follows:

"ARTICLE 1: Scope and Duration of the Contract

1. By means of the Contract, [the Club] employs [the Player], who hereby accepts employment as a professional football player of [the Club], subject to the terms and conditions set out in the Contract.

2. The term of the Contract (hereinafter referred to as the "Term") shall be from 23/01/2020 (day/month/year) to 22/01/2022 (day/month/year), unless prematurely terminated in accordance with Article 7 or as mutually agreed.

3. The Term has an option year from 23/01/2022 (day/month/year) to 22/01/2023 (day/ month/year). The option year will be activated when [the Player] reaches one or multiple of the following targets:

[...]

- In case [the Club] is promoted to the Chinese Super League (CSL) during the duration of [the Player]'s contract. […]

ARTICLE 2: Salary and Bonuses

1. *During the Term, the annual basic salary of [the Player] is 727,272 Euro (in words: seven hundred twenty seven thousand two hundred seventy two euros) (before tax, which shall be amounting to 400,000 euros after tax withheld in China) for the season of 2020, the annual basic salary of [the Player] is 909,090 Euro (in words: nine hundred and nine thousand ninety euros) (before tax, which shall be amounting to 500,000 euros after tax withheld in China) for the season 2021, the annual basic salary of [the Player] is 1,090,909 Euro (in words: one million ninety thousand nine hundred and nine euros) (before tax, which shall be amounting to 600,000 euros after tax withheld in China) for the season of 2022, unless the Contract is prematurely terminated in accordance with Article 6 [7 sic] or as mutually agreed.*

   If during the Term [the Club] is promoted to the Chinese Super League (CSL), the salaries that have been determined will be increased by 100% for each applicable season that [the Club] is active in the Chinese Super League (CSL).

[…]

4. *[The Club] shall pay [the Player] performance-related salaries as follows:*

[…]

   Euro 181,818 (in words: one hundred eighty-one thousand eight hundred eighteen euros, before tax, which shall be amounting to 100,000 euros after tax withheld in China) to be paid 20 days after the last working day before the end of the season in which [the Player] is officially named the topscorer of the Chinese League One (CJL).

[…]

6. *All the salary and bonus and other contractual benefits paid by Party A shall be amounts before taxes. All the salary and performance-related salary and any other contractual benefits have been agreed as net amounts. [The Club] has grossed up these amounts for any tax, social contributions and insurances that might be applicable. Parties hereby explicitly agree that [the Club] shall be responsible for withholding any and all amounts that might be due by [the Player] under this contract, whereby it is the responsibility of [the Club] that [the Player] will receive the agreed net amounts. On request of [the Player] [the Club] shall provide [the Player] or any designated person by [the Player] overviews, calculations and specifications of any amount paid on behalf of [the Player]. In case of changes in the amounts that need to be withheld or paid by [the Player] on the remuneration received under this contract, [the Club] shall make the appropriate changes to the gross amounts, so that [the Player] will receive the (remaining) agreed net amounts in December of every contractual year the latest.*

[…]

ARTICLE 6 IMAGE RIGHTS

[The Player] and [the Club], or an affiliated appointed by [the Player], will conclude a separate Agreement for the use of [the Player]'s image rights in China.

ARTICLE 7 TERMINATION OF THE CONRACT

The Contract may be terminated by mutual agreement between the Parties.

1. *[The Club] is entitled to terminate the Contract with just cause, free from any liability and entitled to request the pertinent compensation from [the Player] in the following cases:*
   (1) [The Player] commits a material breach of this Contract (including but not limited to severe and/or

repeated infringement of obligations stipulated in Article 4 hereof and/or internal regulations of Party A);

(2) convicted in the highest instance for a criminal offense which will lead to imprisonment;

(3) [The Player] fails to observe the reasonable regulations as stipulated by [the Club], CFA or AFC, which may be updated from time to time and have communicated to him beforehand in English, and failed make remedy upon receiving written notification with a copy to [the Player]'s lawyer (christophe.vanmechelen@vlvm.be) within a reasonable time frame of at least 20 (twenty) days;

(4) [The Player] leaves China, fails to return from holidays or leave, or does not participate the activities of [the Club] without just cause for a period of more than 15 (fifteen) days after [the Club]'s written notice without [the Club]'s written approval;

(5) [The Player] is suspended by CFA, AFC or FIFA for more than 12 (twelve) official CSL and Cup matches.

[…]

ARTICLE 8: Settlement of Disputes

1. Any disputes arising from the fulfilment of, or in connection with the Contract shall be settled, on a first attempt, through friendly negotiation between the Parties.

2. In case no settlement can be reached through negotiation, the dispute shall be submitted to the competent dispute resolution body of FIFA with express waiver to the national courts and with the consequent option of appealing to the Court of Arbitration for Sport (CAS) Lausanne, Switzerland. In case of an appeal to CAS, the Parties hereby choose the CAS Shanghai Alternative Hearing Centre as the hearing place.

3. This Contract is governed by the rules and regulations of FIFA, AFC and CFA. These rules shall be applicable as well to any other matter not regulated herein. Should any clause of the Contract result to be not compliant with any of said rules and regulations, exclusively the concerned clause shall be considered null and void, without interfering with the validity of the remaining clauses of the Contract".

10. On the same date, 23 January 2020, Supervision and the Club signed the image rights agreement (the "IRA") with the written consent of the Player. The pertinent parts of the IRA read as follows:

"Background

1. The Company [Supervision Management] is the owner of the exclusive rights in China to use, develop and otherwise exploit the image Rights of Nikola Durdic (the image Rights) which exist now or in the future, radio or media appearances, interviews and broadcasts (the "Appearances") by Nikola Durdic ('ND',) (other than when he is playing football) and the exclusive right to org-anise ND's attendance at events or engagements for reward (other than one that is directly related to his playing football) and all goodwill in connection with each of the foregoing.

3. The Company wishes to permit the Club to use, develop and otherwise exploit the image Rights in China on the terms and conditions of this Agreement' and the club wishes to take a license on such terms and conditions.

1. *PLAYER CONTRACT*

The Club and the Company acknowledge that ND has purported to grant to the Club certain rights in respect of the image Rights pursuant to the Player Contract between the Company and ND notwithstanding that those rights have in fact been assigned by ND to the Company.

2. PERMISSION TO USE IMAGE RIGHTS

In consideration of the payment of the fees set out in clause 3, the Company hereby grants to the Club for the duration of this Agreement an exclusive license to use, develop and otherwise exploit in China (by sub-license or otherwise) the ND's portrait, trademark, patents, sound, name, signature, spart nickname, personal image and related work, any sign and/or mark representing ND as well as other similar rights subject to any exclusive rights granted by the Company or ND to any third party elsewhere in the world.

3. PAYMENTS

In consideration of the rights granted to the Club hereunder, the Club hereby agrees to pay the following sums to the Company:

For the year 2020: EUR 588,235 net (five hundred eighty eight thousand two hundred thirty five Euros after tax) payable on or before 1 June 2020;

For the year 2021: EUR 705,882 net (seven hundred five thousand eight hundred eighty two Euros after tax) payable an or before 1 March 2021;

For the year 2022 (option year): EUR 823,529 net (eight hundred twenty three thousand five hundred twenty nine Euros after tax) payable on or before 1 March 2022;

The Agreement applies to the license of the Image Rights for the years 2020 and 2021. Additionally the Company hereby grants the Club an option to continue its use of the Image Rights under this Agreement for the year 2022 for the above mentioned fee for the year 2022. The Club must exercise this option by giving written notice thereof to the Company at the latest on 10 December 2021.

Only in the event the club promotes to CSL ("Chinese Super League") the yearly fee is increased with 100% to: EUR 1,411,764 (one million four hundred eleven thousand seven hundred sixty four Euros, for 2021) and EUR 1,647,058(one million six hundred forty seven thousand fifty eight Euros, for 2022):ln the event the club relegates from CSL to 2nd division, the fee shall be calculated as originally mentioned above (prior to the promotion to CSL) …

All sums mentioned in this Agreement are exclusive of any amounts of any Chinese tax or similar levy that might be due or which may be introduced from time to time arising in respect of such supply.

4. TERM AND TERMINATION

4.1 This Agreement shall have effect on and from the date of signature of this Agreement and shall subsist for as long as the Player Contract subsists unless terminated earlier in accordance with this clause. …

[…]

8. WARRANTIES AND UNDERTAKINGS

[…]

8.2.3 That ND has irrevocably: (i) assigned to the Company all the Image Rights which have prior to the date of this Agreement vested in ND at any time; and

(ii) undertaken to assign to the Company all the Image Rights which may vest in ND at any time during the Term, and that no other Image Rights exist at the date of this Agreement nor will arise during the Term;
…

10. CONSEQUENCES OF TERMINATION
[…]
10.2 The termination or expiry of this Agreement shall not affect in any way any provision under the Player Contract (provided that the Player Contract survives such termination or expiry). On termination or expiry of this Agreement (provided that the Player Contract survives such termination or expiry), the Club shall agree with ND a similar net fee to be paid to ND as the remaining amount that still was payable to the Company by the Club under this Agreement. …
[…]

12. GOVERNING LAW AND JURISDICTION
This Agreement is governed by, and shall be construed in accordance with, the laws of the Switzerland. All disputes with respect to this Agreement, including, without limitation its validity, construction and performance, shall belong to the exclusive jurisdiction of the courts of Lausanne, Switzerland".

11. Finally, and also on 23 January 2020, the Player signed the following consent declaration:

"I hereby retain Supervision Management BV from the Netherlands with company registration number 55606792, represented by Mr. Sunir Patel, to act as my sole and exclusive representative to represent, advice and counsel me in all negotiations and contracts with regards to commercial deals and image rights throughout the People's Republic of China".

12. For the 2020 season, apparently no issues arose around the contractual obligations of the Parties, and the Player apparently received all amounts due under the Contract. In 2020, the Player also received EUR 588,235 under the IRA. It is unclear whether the amount paid under the IRA was made directly by the Club to the Player or through Supervision.

13. After the 2020 season had ended, the Player alleges that the Club tried to force a premature termination of both Mr Quintana, another foreign player of the Club, and the Player. This was allegedly done by failing to notify both players of when they were expected to return to Chengdu, then making unreasonable requests on their return date – e.g., due to the Chinese travel restrictions arising out of the global pandemic, the Player and Mr Quintana were in mandatory quarantine for a total of 21 days. The Player also alleges that the Club failed to answer every letter from the Player in January and February 2021. When the Player returned to training on 4 February 2021, he was told (together with Mr Quintana) that they were to train with the second team, without an explanation.

14. On 1 March 2021, the Club made the payment to the Player under the IRA in the amount of EUR 705,882 for 2021.

15. On 12 April 2021, the Club and the Chinese club Zhejiang Professional FC ("Zhejiang FC") signed a loan agreement under which the Player was temporarily transferred from the former to the latter from 12 April 2021 until 31 July 2021.

16. On 8 June 2021, right after Zhejiang FC played its last match of the first stage of the 2021 season, the Player was informed that his services were no longer required, and he was free to go on vacation. The Player was aware that his contractual obligation under the loan agreement with Zhejiang FC only lasted until 31 July 2021, and he was only required to return to the Club within 7 days of the expiry of the said loan agreement.

17. On 26 June 2021, the Club allegedly wrote to the Player and informed him that his loan with Zhejiang FC would expire on 31 July 2021 and that the Club requested him to return to its premises until 1 July 2021. The letter, furthermore, read as follows: *"if you fail to return on time, the club may apply penalty to you based on the employment contract and rules on team management. Please pay attention to your return and back to our team on time"*.

18. On 8 July 2021, the Club failed to pay the June 2021 salary of the Player. When the Player enquired, he was allegedly told that *"this was the Club's decision"*.

19. On 26 July 2021, the Player sent the Club a letter requesting the Club to confirm whether it needed the services of the Player. The Player also stressed that if termination documents were not provided by 29 July 2021, he expected to *"show up at the [C]lub on 1 August 2021 in order to resume training and honour his contract"*.

20. On 30 July 2021, the Player wrote to the Club and stressed that he had not received any answer to his previous notice to the Club.

21. On 2 August 2021, the Player went to the Club's premises, but was informed by the Club then that the claim the Club had lodged before the FIFA DRC in July 2021 (discussed below in the next subsection of this Award) was sufficient to establish that the Contract had been terminated and the Player could seek new employment.

22. On 11 August 2021, the Player signed a new employment agreement with the Swedish club Degerfors IF ("Degerfors" and the "Degerfors Contract"), valid as from the date of signature until 31 December 2023. According to this contract, the Player was entitled to the following remuneration: SEK 60,000 per month during the season 2021; SEK 70,000 per month during the season 2022; and SEK 80,000 per month during the season 2023.

23. On 18 October 2021, and thus after the investigation phase of the FPSD-3035 proceedings before the FIFA DRC was closed (se para 31), the Club informed Mr Patel as follows:

"Dear Mr. Sunir Patel,

We have entered an Image Rights Agreement pertaining to the player Nicola Durdic on 23 January 2020 (hereinafter: Image Rights Agreement), and the attachment is for your reference.

In light of Nicola, Durdic has terminated the Employment Contract between he and Rongcheng FC without just cause, it is impossible for Rongcheng FC to execute the right from the image rights agreement normally. And according to the Image Rights Agreement, Rongcheng FC has the option to continue its use of the image right for the year 2022, and must exercise this option by written notice at the latest

on 10 December 2021. Now, Rongcheng FC hereof officially informs SUPERVISION MANAGEMENT B.V. that it would not exercise the option to continue use of the image right for the year 2022, the original Image Rights Agreement dated 23 January 2020 would expire on 31 December 2021.

Nevertheless, Rongcheng FC has paid all the image right fees for the year 2021 in full amount (EUR 705,882), therefore, SMBV should continue to execute the obligations in the Image Rights Agreement, guarantee Rongcheng FC can continue to exploit the image rights under the Image Rights Agreement. Hereof, Rongcheng FC solemnly declare that it not permit SMBV assign the right under the Agreement to any third party before 31 December 2021, or SMBV would bear all the legal liability on this. (…)".

24. On 25 October 2021, Supervision replied to the Club's letter as follows:

"(…) Such statement seems a bit premature as player Djurdjic and RONGCHENG FC are currently involved in a FIFA procedure in which parties are blaming each other the unilateral and wrongful termination of the Player's employment contract.

In the event FIFA would conclude that RONGCHENG FC unilaterally terminated the said employment contract, you will understand that such could also have an impact upon your current termination of the Image Right Agreement.

As one of the issues within the FIFA procedure concerns the wrongful termination of the Player's contract in order to avoid a possible extended contract year in the event RONGCHENG FC would promote to Chinese Super League (CSL), my client reserves all its rights with regard to the following.

If FIFA establishes that your club wrongfully terminated the Player's contract and RONGCHENG FC would at the end of season 2021 promote to the CSL, the Player would have a claim against your club for the missed (optional) contract year of 2022. As a matter of fact, the Player's contract states that in the event of promotion to the CSL, he would have received an additional contract year (option year) for the upcoming season. In such event, the Image Rights Agreement would also have been renewed for an additional season. Hence, your decision to terminate the Image Rights Agreement, based upon the alleged unilateral termination by the player, would be unlawful and my client would be entitled to a reimbursement of the Image Rights for the season 2022 (at double rate, given the promotion to CSL).

*Therefore, I have been instructed to inform you that (a) in the event FIFA decides to grant the Player's counter claim based upon a wrongful termination by RONGCHENG FC, (b) the promotion of RONGCHENG FC to CSL, my client shall be entitled to claim the amount of 823.529,00 EUR * 2 (1.647.058,00 EUR) against the club. Reference hereto is made to article 10.2 of the Agreement. In such event, the payment of the Image Rights' fee shall be payable to mr. Djurdjic in full. (…)".*

25. On 12 January 2022, the Club won the promotion playoffs against Dalian Professional Football Club and secured the promotion to the CSL.

26. On 24 February 2022, the Player notified the Club as follows:

"… As already ruled by FIFA, your club terminated the Contract without just cause. Clearly, this was done, inter alia, to avoid the scenario described in Article 10.2. (that the Player Contract survives such termination or expiry).

Moreover, after FIFA informed your club and the Player that the investigation-phase was closed and that new submissions would be admitted to the case file, your club informed Supervision Management that it would not extend the IRA to 2022, which triggered the application of clause 10.2.

In light of the foregoing, we herewith invite you to perform the payment of EUR 1,647,058 net to Mr. Djurdjic to his bank account at Komercijalna banka AD Beograd which is stated in Article 7 of the Contract and attached to the FIFA DRC Decision (with Intermediary bank being: Deutsche Bank AG, with swift code: DEUTDEFF).
In this regard, we expect your club to make the payment as soon as possible, otherwise we will request this amount (in net or gross) in a procedure before CAS.

Apart from this, we once again invite you to make the payment of EUR 496,525.47 plus 5% interest p.a. from 10 August 2021 (EUR 509,992.87 in total) as ordered by FIFA, otherwise, the transfer ban will be imposed tomorrow, bearing in mind that 44 days since the grounds of the decisions were notified and from receiving the findings until the grounds were asked for.

This is without prejudice to the Player's right to claim damages sustained from 23 January 2022 to 22 January 2023 in the amounts stated in the Contract (EUR 2,181,818 gross and EUR 181,818)".

B. Previous proceedings before the FIFA Dispute Resolution Chamber and the CAS

a) Proceedings before the FIFA Dispute Resolution Chamber – (FPSD-3035) (the "First DRC Proceedings")

27. On 20 July 2021, the Club lodged a claim against the Player in front of the FIFA Dispute Resolution Chamber (the "FIFA DRC"), claiming that it was forced by the Player to terminate the Employment Contract on 10 July 2021 and that it was consequently entitled to compensation for breach of contract in accordance with Article 17 of the FIFA RSTP.

28. On 16 August 2021, the Player filed his reply to the Club's claim and lodged a counterclaim against the Club, requesting the following payments from the Club (the "Previous Claim"):

- EUR 433,374.41 corresponding to the residual value of the Contract;
- EUR 1,200.000 net *"which would constitute the amount the player would be entitled to receive in the event [the Club] would promote to the China Super league and the option clause within the player's contract would become applicable"*;
- EUR 181,818 *"in the event the club would be promote at the end of the season 2021"*;
- EUR 50,000 as *"reputational damages and lawyer representation costs"*;
- Interest at 5% p.a. on the amounts payable to the Player.

29. The Player argued that the termination of the Employment Contract by the Club was without just cause and claimed to be the party entitled to receive compensation for breach of contract as well as outstanding remuneration. No reference was made to the IRA in the Player's submission in the context of the Previous Claim, and the Player alleged that the Club had a deadline until 10 December 2021 to inform the Player about the payment for 2022.

30. On 17 August 2021, the Club was invited to submit its reply to the Previous Claim of the Player, which it did on 4 September 2021.

31. On 7 September 2021, the FIFA DRC informed the Player that *"[i]n view of the above we would like to inform you that the investigation-phase of the present matter is now closed. This is, no further submissions from the parties will be admitted on file"*.

32. On 27 September 2021, FIFA acknowledged that the Player had entered into a new employment relationship with Degerfors, and as such, and in light of any potential consequences arising under Article 17 (2) and (4) of the FIFA RSTP, Degerfors was invited to submit its position on the case file, which it did on 1 November 2021.

33. On 22 January 2022, the decision of the FIFA DRC on the Previous Claim with its grounds (the "First FIFA DRC Decision) was notified to the Parties and to Degerfors, finding, *inter alia*, that

- the Employment Contract was prematurely terminated by the Club on 13 July 2021;
- the termination was without just cause; and
- considering the particularities of the case, the Club should be liable to pay to the Player EUR 496,525.47 as compensation for breach of contract plus 5% interest *p.a.* as from 10 August 2021 until the date of effective payment.

No reference was made in the First DRC Decision to the IRA.

b) Proceedings before the Court of Arbitration for Sport – CAS 2022/A/8621 ("CAS 8621")

34. On 30 January 2022, the Player filed an appeal against the Club to the CAS challenging the First DRC Decision, requesting, *inter alia*, *(i)* the amount of compensation to be increased considering the automatic renewal of the Employment Contract; and *(ii)* to be awarded additional monies under the IRA, insofar as it is an integral part of his employment relationship and it only became disputed after his counterclaim was lodged in front of the FIFA DRC.

35. The Player's requests for relief were as follows:

"1. The appeal filed on 30 January 2022 by [the Player] against [the First DRC Decision is upheld.
2. The First DRC Decision is confirmed, save for paragraph 4 of the operative part, which shall be amended as follows: [the Club] has to pay to [the Player]:
- an amount of EUR 496,525.47, plus interest of 5% per annum from 10 August 2021 until the payment is effectively made;
- an amount of EUR 181.818, plus interest of 5% per annum from 13 January 2022 until
the payment is effectively made;
- an amount of EUR 2,082,922.13, plus /ntere.st of 5% per annum from 13 July 2021 until the payment is effectively made;
- an amount of EUR 2,522,075 plus interest of 5% per annum from 13 July 2021 until the payment is effectively mad.
3. [the Club] shall bear its own costs and is ordered to pay [the Player]a contribution towards his legal fees and other expenses

incurred in connection with these arbitration proceedings, the amount of which will be specified at a later stage;

4. *The entire costs of the CAS administration costs and the arbitration fees shall be borne in their entirety by [the Club]".*

36. On 19 April 2022, the Club filed its Answer objecting to the position of the Player, *inter alia*, challenging CAS jurisdiction over the IRA.

37. On 30 December 2022, the CAS issued its award (the "First CAS Award") with the following operative part:

"The Court of Arbitration for· Sport rules that:

1. *The appeal filed on 30 January 2022 by [the Player] against the decision rendered on 11 January 2022 by the FIFA Dispute Resolution Chamber is partially upheld.*
2. *Point 4 of the operative part of the decision issued on 11 January 2022 by the FIFA Dispute Resolution Chamber is amended as follows:*
   [the Club] has to pay to [the Player]
   a. an amount of EUR 181,818, plus interest of 5% per annum from l3 January 2022 until the payment is effectively made;
   b. an amount of EUR 2,082,922.13, plus interest of 5% per annum from 13 July 2021 until the payment is effectively made.
3. *The costs of the arbitration, to be determined and served separately to the Parties by the CAS Court Office, shall be borne by [the Player] and [the Club].*
4. *[the Player] and [the Club] shall each bear their respective legal fees and expenses.*
5. *All other and further motions or prayers for relief are dismissed".*

38. In the grounds of the First CAS Award, it is stated, *inter alia*, as follows regarding the issue of CAS jurisdiction over the IRA:

*"**A. No competence of the CAS deriving from the IRA***

91. Article 12 of the IRA provides as follows:

'This Agreement is governed by, and shall be construed in accordance with, the laws of the Switzerland. All disputes with respect to this Agreement, including, without limitation its validity, construction and performance, shall belong to the exclusive jurisdiction of the courts of Lausanne, Switzerland'.

92. The Swiss Federal Tribunal ('SFT') has defined an arbitration agreement in the case SFT 4A_342/2019 as follows:

[…]

Free translation: An arbitration agreement is an agreement by which two or more specific or identifiable parties agree to submit one or more existing or future disputes to binding arbitration in accordance with a directly or indirectly determined legal order, to the exclusion of the original state jurisdiction ... . It is decisive that the will of the parties is expressed to have certain disputes decided by an arbitral tribunal, i.e. a non-state court.

93. It follows from a literal construction of Article 12 of the IRA that the competent forum to decide disputes arising from the IRA are 'the courts of Lausanne'. The Appellant is of the view that this term does not only cover state courts in Lausanne, but also includes arbitral tribunals having their seat in Lausanne. The Sole Arbitrator does not agree with such construction of the clause. The term 'courts' typically refers to state courts. In addition, the Sole Arbitrator

notes that – unlike the clause contained in Article 8(2) of the Contract – Article 12 of the IRA does not provide for an 'express waiver to the national courts'. Furthermore, the clause in Article 12 of the IRA does not foresee – e.g. – first-instance proceedings before the FIFA adjudicatory bodies. Absent any clear indication or evidence submitted by the Appellant that the parties to the IRA intended the term 'courts of Lausanne' to cover also arbitral tribunals, the Sole Arbitrator is not prepared to construe the provision as granting a mandate to CAS to adjudicate disputes arising from the IRA. While the word 'Court' appears in the English version of CAS' name, CAS is not a court in the proper sense under domestic law but rather an arbitral tribunal.

94. *Even, if one were to follow Appellant's argument that the plural 'courts' refer to both state courts and arbitral tribunals, this would not be of any help to the Appellant, since a key requirement of a valid arbitration clause in Swiss law is that it excludes all recourse to state courts (which is not the case here). Furthermore, there is simply no indication on file that the parties to the IRA wanted to give a potential claimant the option either to resort to state courts or to an arbitral tribunal. Finally, the Sole Arbitrator is minded by the jurisprudence of the SFT that a strict threshold must be applied in determining whether the parties wanted to resort to arbitration (contrary to the interpretation of the scope of an arbitration agreement). In SFT 4A_342/2019, consid 3.2, the SFT stated as follows:*

[…]

Free translation: When interpreting an arbitration agreement, its legal nature must be taken into account; in particular, it must be noted that the waiver of a state court severely restricts the avenues of appeal. According to the case law of the Federal Supreme Court, such a waiver cannot be assumed lightly, which is why a restrictive interpretation is required in case of doubt ... If, on the other hand, the result of the interpretation is that the parties wanted to exclude the dispute from state jurisdiction and submit it to a decision by an arbitral tribunal, but there are differences regarding the conduct of the arbitral proceedings, the utilitarian principle applies; according to this, a contractual understanding must be sought that leaves the arbitration agreement in place.

95. *To conclude, therefore, the Sole Arbitrator finds that the competence of the CAS to adjudicate on claims arising from the IRA cannot be based on Article 12 of the IRA.*

B. The IRA is not an integral part of the Contract

96. *The Appellant argues that the CAS is competent to decide on the claim arising from the IRA because the IRA is an integral part of the Contract. The Sole Arbitrator notes that nothing in the Contract points in such direction. Instead, Article 6 of the Contract provides as follows:*

'ARTICLE 6 IMAGE RIGHTS

[The Player] and [the Club], or an affiliated appointed by Party B, will conclude a separate Agreement for the use of Party B's image rights in China'.

97. *Contrary to what the Appellant states, it follows from Article 6 of the Contract that any regulation pertaining to the use of the Appellant's image rights will not be dealt with in the Contract, but remains reserved for a 'separate' contract. Furthermore, the Sole Arbitrator notes that the parties to the Contract and to the IRA are different. Thus, for all of*

these stated reasons, it cannot be assumed that the contents of the IRA is an integral part of the Contract.

C. Article 8(2) of the Contract does not extend to the disputes arising from the IRA

98. In SFT 142 III 239 (consid. 5.2.3), the SFT held as follows:

[…]

Free translation: According to the group of contracts theory, when several contracts are materially connected, such as the framework agreement and the various related contracts, but only one of them contains an arbitration clause, it is to be presumed, in the absence of an explicit rule to the contrary, that the parties intended to make the other contracts in the same group subject to that arbitration clause as well.

99. In the case at hand, there can be no doubt that the Contract and the IRA are materially connected. The IRA would have never been executed without the Contract. Furthermore, the Contract and the IRA were signed on the same day. Not only does the history of both contracts indicate that they are materially closely connected, but so does their content. Articles 1, 4 and 10.2 of the IRA specifically refer to the Contract, and Article 6 of the Contract refers to the (separate) IRA. Thus, the question arises whether in light of this interconnection between the contracts, the dispute resolution clause contained in the Contract extends to the (materially connected) IRA.

100. It follows from the above jurisprudence of the SFT, however, that such extension cannot be assumed automatically, but only absent any indications to the contrary. In the case at hand, the fact that the IRA contains a separate and different dispute resolution clause clearly speaks against extending the scope of Article 8(2) of the Contract to disputes arising from the IRA. In light of Article 12 of the IRA, there is no indication on file that the parties to the IRA and the Contract (that again are not identical) wanted to submit all disputes arising from these contracts to the CAS. The Appellant submits that the IRA was a sham and that for this reason Article 12 of the IRA shall not be attributed any relevance. However, the Sole Arbitrator, based on the evidence before him, is not prepared to follow this. Consequently, the Sole Arbitrator finds that CAS' competence for the Appellant's claim based on the IRA cannot be derived from Article 8(2) of the Contract.

D. Summary

101. To conclude, therefore, the Sole Arbitrator finds that – absent any arbitration agreement of the Parties in favor of the CAS – CAS is not competent to adjudicate any claims arising from the IRA. Thus, Appellant's claim for payment in the amount of EUR 2,522,075.00 including interest must be rejected".

c) Proceedings before the FIFA Dispute Resolution Chamber – (FPSD-10633) (the "Second DRC Proceedings")

39. On 20 June 2023, the Player filed the present claim before FIFA requesting the following:

"1 [the Club] has to pay to [the Player] EUR 55,555.50 as outstanding remuneration, plus 5% interest p.a. on this amount as from 21 July 2021 until the date of effective payment;
or, in the alternative

[the Club] has to pay to [the Player] EUR 30,555.52 net as outstanding remuneration,

plus 5% interest p.a. on this amount as from 21 July 2021 until the date of effective payment.

2. [the Club] has to pay to [the Player] EUR 2,994,649.56 as compensation for early termination, plus 5% interest p.a. on this amount as from 13 July 2021 until the date of effective payment;

or, in the alternative,

[the Club] has to pay to [the Player] EUR 1,647,058 net as compensation for early termination, plus 5% interest p.a. on this amount as from 13 July 2021 until the date of effective payment".

40. In support of his claim, the Player recalled the contents of the contracts signed between the Parties – especially the IRA – as well as the factual background to its conclusion. In doing so, he explained that such a contract was an integral part of his relationship with the Club despite being signed with the Company, entailing that it should also be taken into consideration while assessing his outstanding remuneration and compensation for the unlawful termination by the Club.

41. Moreover, the Player recalled the previous proceedings before the FIFA DRC and, in particular, explained that at the time he filed his counterclaim against the Club, the image rights for 2021 were still not due (*i.e.* deadline for payment until 10 December 2021). Therefore, he argued that the amounts now claimed could not have been requested at that time.

42. Furthermore, the Player referred to the First CAS Award, although he suggested that the Sole Arbitrator misinterpreted the facts and arrived at a wrong conclusion as to the lack of jurisdiction.

43. Against this background, and provided that the IRA was not discussed in the First DRC Decision, the Player claimed that FIFA still has jurisdiction over the IRA and should then adjudicate on the matter. He requested to be awarded the outstanding image rights plus the residual value of the IRA as part of compensation for breach of contract.

44. On 29 June 2023, the FIFA general secretariat *i)* acknowledged receipt of the claim of the Player; and *(ii)* informed the Player that his claim raised a preliminary procedural matter that should be analysed by the FIFA DRC *ex officio*.

45. With regard to whether he was competent to deal with the matter, the Chairperson of the FIFA DRC (the "Chairperson"), taking into account Article 19 of the March 2023 edition of the Procedural Rules Governing the Football Tribunal (the "Procedural Rules"), which were considered applicable, confirmed that he was competent to decide, in an expedited manner, whether the case at stake was affected by any preliminary procedural matters.

46. Subsequently, the Chairman observed that with reference to Article 2 par. 1 of the Procedural Rules and in accordance with Article 23 (1), read in conjunction with Article 22 (1) (b) of the FIFA RSTP (May 2023 edition), the FIFA DRC would – in principle – be competent to deal with the matter at stake, which concerns a dispute with an international dimension between a Serbian player and a Chinese club.

47. The Chairperson further observed that the claim *sub judice* was lodged by the Player against the Club pertaining to outstanding image rights and compensation for breach of contract in connection with the early termination of the employment relationship previously maintained between them.

48. Specifically, and provided that the FIFA DRC had already decided that the termination of the Employment Contract by the Club was without just cause, the Player now claimed that he should also be awarded the monies included in the IRA.

49. While considering the above, the Chairperson confirmed that the claim raised a preliminary procedural matter that should be analysed ex officio. In particular, the Chairperson was observant that before submitting this matter to FIFA, the Player had already claimed the same amounts in front of the CAS. Additionally, he took due consideration that the CAS Award went at great length to establish that the CAS had no jurisdiction over the IRA, which the Player now intended to rediscuss. *Mutatis mutandis*, the Chairperson stated that if the CAS lacks jurisdiction to rule the dispute between the Parties as to the IRA, the FIFA DRC equally cannot entertain it.

50. Accordingly, the Chairperson recalled that, on the basis of the principle of *res judicata*, a decision-making body is not in a position to deal with the substance of a case in the event that another – competent – decision-making body has already dealt with the same matter by passing a final and binding decision.

51. The cited principle of *res judicata* ensures that whenever a dispute has been defined and decided upon, it becomes irrevocable, confirmed, and deemed to be just – *res judicata pro veritate habetur*. This principle applies whenever three elements are concurrently present, namely:

- The same persons - *eadem personae*;
- The same object - *eadem res*; and
- The same cause - *eadem causa petendi*.

52. As such, the Chairperson went on to analyse the evidence on file regarding the previous dispute between the Parties. In this respect, he turned his attention to the First DRC Decision and, mostly, to the First CAS Award, which was then final and binding.

53. Subsequently, the Chairperson underlined that the principle of *res judicata* is applicable if cumulatively and necessarily the parties to the dispute and the object of the matter in dispute are identical. In this respect, he noted that both the Player and the Club were the parties to the proceedings leading to the First CAS Award as well as to the dispute at stake. Consequently, the Chairperson concluded that the condition of the identity of parties was fulfilled.

54. In addition, the identity of the object is fulfilled if the reason to claim and the relevant requests of the two claims are similar. When comparing the Player's first appeal at the CAS to the claim at hand, the Chairperson confirmed that both discuss *inter alia* the Player's entitlement to the amounts under the IRA. Consequently, both legal actions were based on the Club's alleged violation of the same contract and

materially contained the very same request for relief. Thus, the Chairperson underscored that the condition of identity of the object of the matter in dispute was also fulfilled.

55. In conclusion, the Chairperson determined that both legal actions not only concern identical parties to the dispute but also identical objects and (partial) requests for relief. Therefore, he decided that as the CAS has already dealt with the exact same matter, passing a final and binding decision, the present case is affected by *res judicata,* and the FIFA DRC is not in a position to deal again with the substance of the dispute.

56. For the sake of completeness, the Chairperson also outlined that the fact that the Player did not refer to the IRA in the Previous Claim is immaterial to the above-mentioned conclusion due to the CAS's *de novo* power of review. In the Chairperson's view, as the matter was already decided upon by the appeal body, the Player is prevented for reopening the same discussion.

57. Therefore, the Chairperson decided that the claim at hand is inadmissible, and on 7 July 2023, the Chairperson rendered the Appealed Decision and decided that:

"1. The claim of [the Player] is inadmissible.

2. This decision is rendered without costs".

58. On the same date, the grounds of the Appealed Decision were notified to the Parties.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

59. On 27 July 2023, the Player filed his Statement of Appeal with the Court of Arbitration for Sport (the "CAS") in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code") against the Appealed Decision.

60. On 28 August 2023, and within the granted extension of time, the Appellant filed his Appeal Brief in accordance with Article R51 of the CAS Code.

61. By letter of 11 September 2023 from the CAS Court Office, the Parties were informed that the Deputy President of the CAS Appeals Arbitration had decided to submit the present case to a Sole Arbitrator.

62. On 27 October 2023, and within the granted extension of time, the Respondent submitted its Answer in accordance with Article R55 of the CAS Code.

63. On 31 October 2023, the CAS Court Office informed the Parties that the Arbitral Tribunal appointed to hear the appeal was constituted as follows:

Sole Arbitrator: Mr Lars Hilliger, Attorney-at-Law, Copenhagen, Denmark

64. By email of 10 November 2023 to the CAS Court Office, the Respondent confirmed that it did not need a hearing or a case management conference, but by email of the same date, the Appellant stated, *inter alia*, as follows:

"Given that the Respondent brought many new arguments and factual allegations in its Answer for the first time since the Parties' engagement

and litigious procedures started, the Appellant would prefer a hearing to be held, so that he could challenge the Respondent's allegations. With regard to the case management conference, the Appellant also finds it necessary.

Please note that the Appellant would like to give his statement about how the Parties' negotiations went (and how the image rights agreement was concluded) and potentially be examined at the hearing. The same is valid for Mr. Manuel Stojanovic, a witness whose statement was attached to the Appeal Brief. The hearing (if any) would also be attended by prof. Marko Jovanovic.

The Appellant would also ask for the opportunity to ask questions to the Respondent's representative, Mr. Yao Xia, on circumstances surrounding the Parties' negotiations and conclusion of the image rights agreement.

At this stage, the Appellant asks the Sole Arbitrator to order the Respondent to produce:

- *all agreements that the Respondent concluded with third parties (except for Supervision Management) in relation to the exploitation of the Appellant's image (if any);*
- *all image right agreements that the Respondent concluded with its players who appear on photos from Exhibit 9 to the Respondent's Answer (if any);*
- *proof of payment (if any) that would show the amount of taxes paid to the Chinese authorities in relation to the 'image rights' fee that the Respondent paid to Supervision Management in 2020 and 2021;*
- *proof of all payments made to the Appellant (nota bene: the Respondent claims to have paid the salary for June 2021 on 8 June 2021 and the Appellant will argue that this was the payment of the May 2021 salary); […]".*

65. By letter of 19 December 2023, and following the Respondent´s comments on the Appellant's request for production of documents submitted to the CAS Court Office by letter of 17 November 2023, the Parties were informed, *inter alia*, as follows:

"[…] Request for document production:

Referring to the Appellant's email of 10 November 2023, the Sole Arbitrator has decided to reject the Appellant's following requests for production of documents, namely:

- *'all agreements that the Respondent concluded with third parties (except for Supervision Management) in relation to the exploitation of the Appellant's image (if an);*
- *all image right agreements that the Respondent concluded with its players who appear on photos from Exhibit 9 to the Respondent's Answer (if any);*
- *proof of payment (if any) that would show the amount of taxes paid to the Chinese authorities in relation to the 'image rights' fee that the Respondent paid to Supervision Management in 2020 and 2021'*

The Sole Arbitrator has decided to grant the Appellant's following request for production of documents, namely:

- *'proof of all payments made to the Appellant (nota bene: the Respondent claims to have paid the salary for June 2021 on 8 June 2021 and the Appellant will argue that this was the payment of the May 2021 salary)'".*

66. According to Article R44.3 of the CAS Code applicable in appeal arbitration proceedings on the basis of Article R57 par. 3 of the CAS Code, a party seeking the production of documents in the custody or under the control of the other party has the duty to demonstrate, with specificity in terms of requesting specific documents, whether these documents are likely to exist and to be relevant. A request that is too generic, explorative in nature and not directly relevant to the specific case is going too far within the meaning of being "fishing expeditions" for evidence and must be dismissed. The Sole Arbitrator's partial rejection of the Appellant's request as set out above was based on these considerations and the particularities of this dispute.

67. By letter of 22 December 2023, the Respondent forwarded to the CAS Court Office several documents in Chinese, which had been duly translated into English, while stating, *inter alia*, that *"Those documents are the proofs of the payments made to the Player in 2021, The amounts are after tax amounts of his salary from January to June 2021 and the currency is RMB. The amounts to the Player are Euros. […]"*.

68. On 3 January 2023, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to hold a case management conference (CMC) in order to discuss a) on which evidentiary measures, including witnesses, the Parties intend to rely during the hearing, and b) the date and expected duration of the virtual hearing.

69. By letter of 16 January 2024, and further to the documents submitted by the Respondent on 22 December 2023, the Appellant was given the opportunity to provide his calculation of the amount paid to him, which the Appellant forwarded to the CAS Court Office on 22 January 2024, following which the Respondent was given a short deadline *"to strictly comment on the Appellant's calculation, or provide its calculation"*. Finally, on 28 January 2024, the Respondent forwarded its "*comments on the calculation of salary*" to the CAS Court Office.

70. By the same letter of 16 January 2024, the Parties were informed that the hearing was to be held by video-conference on 5 March 2024.

71. By letter of 25 January 2024, the Respondent forwarded an Application for Submission of Skeleton Argument, and on 5 February 2024, the Appellant informed the CAS Court Office that he *"is of the opinion that the submitting these arguments, under the given circumstances, is unnecessary"*.

72. By letter of 9 February 2024, the Parties were *"granted the opportunity to file a short-written submission strictly limited to skeleton arguments (max. 2 pages)"*, which both Parties eventually did.

73. Both Parties signed and returned the Order of Procedure, even though the Respondent amended the wording, *inter alia*, objecting to the admissibility of the dispute and challenging the jurisdiction of the CAS to hear this dispute.

74. On 5 March 2024, a hearing was held by Cisco WEBEX.

75. In addition to the Sole Arbitrator and Mrs Andrea Sherpa-Zimmermann, Counsel to the CAS, the following persons attended the hearing:

<u>For the Appellant</u>:

Mr Nikola Djurdjic – Appellant
Mr Filip Blagojevic – Counsel
Mrs Tamara Salazarr – Translator
Mr Manuel Stojanovic – Witness
Mr Stefan Sebez – Witness
Mr Marko Jovanovic – Expert Witness

For the Respondent:

Mr Xia Yao – Party Representative
Mr Lijun Cao – Counsel
Ms Jiaying Yan – Counsel
Ms Jingjing Li – Counsel
Ms Xiaohan Ren – Counsel
Mr Jingnan Wang – Witness
Mr Shixi Huang – Expert Witness
Mr Rex Chen – Interpreter
Mr Rongfeng Sun – Employee of the Appellant/Observer
Mr Zhanhong Zhang – Employee of the Appellant/Observer
Mr Ji Bian – Employee of the Appellant/Observer
Mr Wei Lv – Employee of the Appellant/Observer

76. At the outset of the hearing, the Parties confirmed that they had no objections to the constitution of the Sole Arbitrator.

77. The Sole Arbitrator heard the evidence of Mr Nikola Djurdjic, Mr Manuel Stojanovic, Mr Stefan Sebez and Mr Marko Jovanovic called by the Appellant and the evidence of Mr Jingnan Wang and Mr Shixi Huang called by the Respondent. The witnesses were invited by the Sole Arbitrator to tell the truth subject to the sanctions of perjury under Swiss law. The Parties and the Sole Arbitrator had the opportunity to examine and cross-examine the witnesses and the Player.

78. The Parties were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the Sole Arbitrator.

79. After the Parties' final submissions, the Sole Arbitrator closed the hearing. The Sole Arbitrator took into account in his subsequent deliberations all the evidence and arguments presented by the Parties although they may not have been expressly summarised in the present Award.

80. Upon the closure of the hearing, the Parties stated that they had no objections in respect of their right to be heard and to have been treated equally and fairly in these arbitration proceedings.

81. By email of 23 April 2024, the Appellant forwarded a copy of the decision passed on 7 March 2024 by the FIFA DRC and notified to the parties to that case on 12 April 2024, submitting that even if the evidentiary proceedings were closed, the said decision should be brought to the attention of the Sole Arbitrator. However, the Appellant at the same time stated that he did not consider the said decision a new piece of evidence or a new argument, but only a new piece of jurisprudence of FIFA.

82. On 1 May 2024, the Respondent submitted its objection to the Player's belated submission and requested this to be disregarded.

83. As the Appellant did not request to have the said decision by the FIFA DRC included in the file and since the Sole Arbitrator considers it as jurisprudence, the Sole Arbitrator finds no need for deciding on the issue.

IV. SUBMISSIONS OF THE PARTIES

84. The following summary 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 is made thereto in what immediately follows.

A. The Appellant

85. In its Appeal Brief, the Player requested the CAS:

> *"1. to annul [the Appealed Decision] and refer the case back to FIFA*
>
> *or, in the alternative,*
>
> *to annul [the Appealed Decision] and*
>
> *2. to order [the Club] to pay to [the Player] EUR 55,555.50 as outstanding remuneration, plus 5% interest p.a. on this amount as from 21 July 2021 until the date of effective payment*
>
> *or, in the alternative,*
>
> *to order [the Club] to pay to [the Player] EUR 30,555.52 net as outstanding remuneration, plus 5% interest p.a. on this amount as from 21 July 2021 until the date of effective payment,*
>
> *3. to order [the Club] to pay to [the Player] EUR 2,994,649.56 as compensation for early termination, plus 5% interest p.a. on this amount as from 13 July 2021 until the date of effective payment;*
>
> *or, in the alternative,*
>
> *to order [the Club] to pay to [the Player)] EUR 1,647,058 net as compensation for early termination, plus 5% interest p.a. on this amount as from 13 July 2021 until the date of effective payment*
>
> *4. to grant [the Player] a contribution towards his legal fees and other expenses incurred in connection with these arbitration proceedings, the amount of which will be specified at a later stage;*
>
> *5. to condemn the Respondent to pay the entire CAS administration costs and the arbitration fees and to reimburse the Appellant of any and all expenses he incurred in connection with this procedure".*

86. The Player's submissions, in essence, may be summarised as follows:

Claim for outstanding salary

- The Club paid the Player his monthly contractual salaries for January – May 2021.
- The Player never received his full salary for June 2021. When requesting the payment of this salary, the Player was informed that it was the Club's decision.
- Pursuant to the Contract, the Player is entitled to the gross payment of EUR 75,757.50 for the month of June 2021.
- The Player assumes that remuneration for eight days of June 2021 was taken into consideration in the First DRC Decision, which is why the

outstanding amount for June 2021 (22 days) amounts to EUR 55,555,50 (gross) / EUR 30,555.22 (net).

- Such an amount fell due on 20 July 2021, and interest must therefore accrue from 21 July 2021.

- The Club never discharged its burden of proof regarding its alleged payment of this amount to the Player.

- The Player's claim for payment of his June 2021 salary is not affected by *res judicata*.

- The claim for the payment of the rest of the June 2021 salary was neither included in the Previous Claim before the FIFA DRCC, nor in the Player's claim before the CAS in CAS 8621.

- The Player's claim for the payment of his June 2021 salary was only, and for the first time, included in his claim in the Second DRC Proceedings.

- The FIFA DRC did not deal with this part of the Player's claim in the Appealed Decision.

<u>Claim for alleged outstanding payments pursuant to the IRA</u>

- The IRA is a simulated document, prepared and signed with the aim of splitting the Player's remuneration into two documents and had no other purpose.

- Although the IRA was signed with the written consent of the Player, the Player only accepted such an arrangement since it was apparently normal for Chinese clubs, since there were apparently no other options to close the deal, and since the agreed remuneration was very attractive to the Player compared to his remuneration with his former club.

- Moreover, the transfer window was soon to close, and the Player had to some extent ruined his relationship with his then current club in order to be able to facilitate the transfer to the Club.

- The Contract was signed by the Player without prior consultation with a lawyer.

- The Player is claiming the unpaid amounts stated in the IRA, as if they were not fictively transferred from the Contract to the IRA.

- It is not submitted that the IRA is an integral part of the Contract in a formal manner, only that it is an integral part of the Parties' employment relationship.

- The payable amount pursuant to the IRA for 2022 is a part of the Player's remuneration for his services provided to the Club.

- According to CAS jurisprudence, an agreement between a player and a company can be qualified as an integral part of the employment relationship with a club, even if the club is not formally a part of such an agreement.

- This is also in accordance with Swiss law.

- Thus, the amount of compensation payable to the Player as a consequence of the Club's termination of their employment relationship without just cause must encompass both payments pursuant to the Contract and the IRA.

- Based on the Club's promotion, the amount of compensation payable to the Player pursuant to the IRA amounts to EUR 2,994,649.56 (gross) / EUR 1,647,058 (net).

- The Player's salaries pursuant to the Degerfors Contract was already deducted in the amount of compensation awarded to the Player in the First CAS Award.

- The Parties only agreed in the Contract that FIFA and, subsequently, the CAS were to be considered competent forums.

- The dispute resolution clause in Article 12 of the IRA has no impact on the jurisdiction of the FIFA DRC with respect to any payment to the Player pursuant to the IRA, as such payments are part of the Player's remuneration from the employment relationship with the Club, thus making the IRA an element of the Contract.

- The Player never signed the IRA and, thus, is not bound by the dispute resolution clause of the said agreement. The same fact also prevents him from seeking justice before national courts as set out in the IRA.

- As a result, the only competent forums before which the Player can pursue his lost payment pursuant to the IRA are FIFA and, subsequently, the CAS, which, until now, have not decided on the claim.

- It was only in October 2021 that the Player was informed that the Club would not respect its obligations towards the Player pursuant to the IRA. At this moment, the Player could no longer amend his counterclaim in the First DRC Proceeding since the investigation phase of these proceedings had already closed.

- The Player's claim before FIFA for payment pursuant to the IRA is not affected by *res judicata*.

- The Player's claim pursuant to the IRA was never covered by or included in the First DRC Proceedings and was never a part of the Player's claim and, therefore, was never included in the First DRC Decision.

- At the time the Player filed his counterclaim in the First DRC Proceedings, there was no actual dispute over payment pursuant to the IRA.

- It is not disputed that the CAS is not competent to adjudicate on the IRA claim based on the lack of the arbitration agreement in the IRA in favour of the CAS.

- However, the First CAS Award never stated that FIFA is not competent to decide on the Player's claim pursuant to the IRA, nor did it state that the FIFA DRC would not have been competent, had the Player lodged this claim before it during the First DRC Proceedings.

- The grounds of jurisdiction of FIFA need to be assessed independently from the grounds of jurisdiction of other dispute-settlement bodies, including the CAS, since the current proceedings are not an appeal against the First CAS Award.

- If one body is not competent to adjudicate on a dispute due to lack of a valid dispute resolution clause, this does not mean *per se* that another body cannot rule on the same dispute.

- In fact, the CAS cannot prevent FIFA from adjudicating on a dispute only by ruling on its own competence.

- The Appealed Decision never stated that it does not have jurisdiction over the IRA-related claim. On the contrary, it only states that the claim is inadmissible because "*CAS has already dealt with the exact same matter, passing a final and binding decision*", thus being "*affected by res judicata*".

- FIFA is competent to adjudicate on the Player's IRA claim already based on the FIFA RSTP and FIFA Circular 1010.

- Neither the First CAS Award, nor the Appealed Decision states which body would instead be competent to adjudicate on the IRA-related dispute between the Parties.

- During the proceedings of CAS 8621, the Player never indicated that the CAS was competent as a first instance body, but, on the contrary, elaborated on why the CAS should decide the matter as an appeal body.

- If the Sole Arbitrator was to agree with the Appealed Decision that the claim for payment in affected by *res judicata,* the Player will be cut off from having his claim entertained, which would constitute a violation of his right to due process.

- Finally, and in accordance with CAS jurisprudence, it must be noted that the Player has standing to sue in relation to the IRA, even if he did not sign the said agreement.

B. The Respondent

87. In its Answer, the Club requested the CAS to:

i. "Dismiss all of the Appellant's arbitration requests.

ii. Render a decision requiring the Appellant to pay CHF 50,000 to the Respondent as compensation for the Respondent's losses in this case.

iii. Order the Appellant to bear all CAS administrative and arbitration costs associated with this case".

88. The Club's submissions, in essence, may be summarised as follows:

Claim for outstanding salary

- The Player's claim for a part of the June 2021 salary has already been conclusively dealt with in the previous proceedings and must consequently be dismissed based on *res judicata.*

- In the First DRC Proceedings, the Player claimed the *"residual value of the Employment Contract"*, which included all outstanding salary for 2021, and the FIFA DRC accepted the Player's claim in this regard.

- Moreover, the issue was never raised in the CAS 8621, and there was no further appeal to the SFT in relation to the *"residual value".*

- Since a final and binding arbitral award has already been rendered on this claim, the Player cannot raise the same claim in these proceedings.

- The Player has to exhaust the right of claim at once and cannot submit the same matter to arbitration repeatedly.

- In any case, the Club already paid the alleged outstanding amount for the period of 1 – 22 June 2021 to the Player on 8 June 2021.

Claim for alleged outstanding payments pursuant to the IRA

- The Player's claim pursuant to the IRA has already been conclusively dealt with in the previous proceedings and must consequently be dismissed based on *res judicata.*

- The Player claimed payments pursuant to the IRA in CAS 8621, in which proceedings the Sole Arbitrator ruled that the CAS lacked jurisdiction over IRA-related disputes. The fact that the Player did not bring this claim before FIFA in the First DRC Proceedings does not have any consequence in this regard.

- As there was no further appeal to the SFT in relation to such a claim, there is already a final and binding arbitral award on this claim, and the Player therefore cannot raise the same claim in these proceedings.

- The Player's request in the Second DRC Proceedings is the same as in CAS 8621, and so is the evidence submitted by the Player in both proceedings.

- As the question of CAS jurisdiction over IRA-related disputes has already been conclusively decided by one CAS panel, the Player is barred from submitting the same question to another CAS panel.

- The Sole Arbitrator in CAS 8621 already reviewed the IRA based on the *de novo* principle and included not only a procedural review (no arbitral clause in favour of the

CAS), but also a substantive review (the IRA not being an integral part of the Contract).

- The Player's standing to sue and jurisdiction are two aspects of the same matter, with the standing to sue determining the jurisdiction. The Sole Arbitrator in CAS 8621 found that the Player had no right to sue in IRA-related disputes.

- Any decision by the Sole Arbitrator in these proceedings which would confirm CAS jurisdiction over such disputes would be in direct conflict with the CAS 8621 Award, which is exactly what the principle of *res judicata* aims to prevent.

- The fact that CAS 8621 did not rule on FIFA competence regarding IRA-related disputes is irrelevant. Moreover, the Player never requested this from the CAS.

- In any case, there are no outstanding payments under the IRA.

- As already established in CAS 8621, the Player's submission alleging that the IRA was a "sham or simulated agreement" must be rejected.

- Moreover, the parties to the IRA did in fact perform their contractual obligations in accordance with their agreement, which would not have been the case, had it been a sham or simulated contract.

- Accordingly, the IRA is a normal commercial agreement signed by two equal companies and has nothing to do with the employment relationship of the Player, who is not a party to the IRA either.

- Moreover, the IRA is not covered by FIFA rules, and the jurisprudence submitted by the Player is irrelevant based on that fact alone.

- Moreover, the Sole Arbitrator in CAS 8621 found that the IRA was not *"an integral part of the Contract"*.

- Moreover, as the Player undisputedly is not a signatory to the IRA, the Player has no right pursuant to the said contract.

- The image rights fee for 2021 pursuant to the IRA has already been fully paid by the Club, which is undisputed.

- Whether the IRA should be extended to the year 2022 was entirely within the sole discretion of the Club pursuant to clause 3 of the IRA, and a possible renewal of the IRA was not linked to any promotion or relegation of the Club.

- Any possible promotion or relegation of the Club would only affect the size of the image rights fee pursuant to the IRA, not the length of the contractual period.

- Since the Club did notify Supervision that the IRA would not be renewed for 2022, naturally

no image rights fee for 2022 ever fell due.

- Thus, the Player is not entitled to receive any further payments pursuant to the IRA.

- Finally, and for the sake of completeness, should the Sole Arbitrator find the Club liable for any additional payments to the Player, such amounts must be set out as a net amount after taxes in order for the Club to be able to act in compliance with Chinese tax rules.

V. JURISDICTION

89. The present arbitration is governed by Chapter 12 of the Swiss Private International Law Act ("PILA"), which provides in Article 186 (1) that the Panel is entitled to rule on its jurisdiction (*"Kompetenz-Kompetenz"*).

90. Article R47 of the CAS Code reads 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".

91. Article 56 par. 1 of the FIFA Statutes reads as follows:

"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".

92. The Sole Arbitrator notes that while the Player submits that the CAS is competent to deal with his claims, which are also to be considered admissible, the Club objects to the admissibility of the claims and the jurisdiction of the CAS based on the principle of *res judicata*.

93. In this regard, the Sole Arbitrator initially notes that, based on the above provision, he is at least competent to decide on whether FIFA was correct in declaring the Player's claim inadmissible based on the principles of *res judicata*.

Qualification of the plea of *res judicata*

94. It is not clear whether the objection of *res judicata* pertains to jurisdiction or to the admissibility of a claim. The Swiss legal literature is of the view that the *"distinction between jurisdiction and admissibility is complex"* (GIRSBERGER/VOSER, International Arbitration, 4th ed. 2021, no. 1182a; cf. also Stacher, Jurisdiction and Admissibility under Swiss Arbitration Law – the Relevance of the Distinction and a New Hope, Bull-ASA 2020, 55 ff.). As a rule of thumb, the questions of whether the competence to decide a dispute in a binding way was transferred from the state-court system to arbitration and whether the matter before the arbitral tribunal is within the scope of the arbitration agreement are issues of jurisdiction, whereas all procedural issues that are non-jurisdictional issues and, that may for procedural reasons, cause the end of the

arbitration are admissibility issues (GIRSBERGER/VOSER, International Arbitration, 4th ed. 2021, no. 1182). The legal literature is split on the question of whether the plea of *res judicata* is a jurisdictional matter or an issue of admissibility.

95. The Sole Arbitrator also notes the jurisprudence of the Swiss Federal Tribunal ("SFT") on this matter. In its decision of 14 May 2001, the SFT emphasized that a conflict of jurisdictions could generate a situation of *res judicata* which would constitute a violation of public policy (SFT 127 III 279, 283). The decision states as follows in its relevant parts:

"Il est contraire à l'ordre public qu'il existe, dans un ordre juridique déterminé, deux décisions judiciaires contradictoires sur la même action et entre les mêmes parties, qui sont également et simultanément exécutoires (cf. ATF 116 II 625 consid. 4a). (…)
Quant à l'autorité de chose jugée, ce principe interdit au juge de connaître d'une cause qui a déjà été définitivement tranchée; ce mécanisme exclut définitivement la compétence du second juge".

Free translation: It is against public policy that, in the same particular legal order, two judiciary contradictory decisions exist, in the same lawsuit and with the same parties, which are also simultaneously enforceable.
With regard to *res judicata*, this principle precludes a judge from entertaining a case that has already been finally decided; such mechanism definitively excludes the jurisdiction of the second judge.

96. In SFT 136 III 345 (consid. 2.1), on the contrary, the Tribunal did not qualify the plea of *res judicata* as a jurisdictional issue, but as a procedural issue and – in the context of an appeal against an arbitral award – examined the matter in light of the public-policy exception in Article 190(2)(e) of the Private International Law Act ("PILA") only. The SFT stated insofar as follows:

"Das Schiedsgericht verletzt den verfahrensrechtlichen Ordre public, wenn es bei seinem Entscheid die materielle Rechtskraft eines früheren Entscheids unbeachtet lässt oder wenn es in seinem Endentscheid von der Auffassung abweicht, die es in einem Vorentscheid hinsichtlich einer materiellen Vorfrage geäussert hat".

Free translation: The arbitral tribunal violates procedural public policy if, in its decision, it disregards the substantive legal force of an earlier decision or if, in its final decision, it deviates from the opinion it expressed in a preliminary decision with respect to a substantive preliminary issue.

97. At the end of the day, the Sole Arbitrator agrees with the Panel in (e.g.) CAS 2023/A/9404, that he can leave the above question open. It is clear that the Sole Arbitrator must address the question of whether he/FIFA is/was barred from looking at the merits of this dispute because of alleged *res judicata* effects of the First CAS Award, be it under the heading "jurisdiction" or "admissibility". The distinction whether a matter pertains to jurisdiction or admissibility is only important when an appeal is filed against an award according to Article 190 of PILA. Here, the party appealing and the SFT must decide which of the limited grounds in Article 190(2) of PILA they wish to apply. The SFT has stated that not all matters

related to admissibility can be revisited under Article 190(2)(b) of PILA (lack of jurisdiction) and that lack of jurisdiction is only one of the elements defining the mandate of a panel. Other elements delimiting the mandate of a court or panel should therefore not be read into Article 190(2)(b) of PILA and can only be taken into account in the context of other subsections of Article 190 PILA:

"Sur un plan plus général, il ne faut pas perdre de vue que la compétence à raison de la matière et du lieu du tribunal saisi ne constitue qu'une condition de recevabilité parmi d'autres, comme l'existence d'un intérêt digne de protection, la capacité d'être partie et d'ester en justice ou encore l'absence de litispendance et de force de chose jugée (cf. l'art. 59 al. 2 CPC, qui énumère, à titre exemplatif, six conditions de recevabilité, dont la compétence du tribunal [let. b], que l'on désigne communément, sous l'angle négatif, par le terme de fins de non-recevoir). Si une ou des conditions de recevabilité ne sont pas remplies, le tribunal n'entrera pas en matière sur le fond mais prononcera un jugement d'irrecevabilité (HOHL, op. cit., n. 585).

On veillera donc à ne pas assimiler toutes les conditions de recevabilité à l'une d'entre elles - en l'occurrence, la compétence -, sauf à vouloir étendre indûment le pouvoir d'examen de l'autorité de recours dans l'hypothèse, qui se vérifie en droit suisse de l'arbitrage international, où la loi énonce limitativement les griefs susceptibles d'être invoqués dans un recours en matière civile visant une sentence et ne prévoit qu'un seul motif de recours tiré d'une fin de non-recevoir, à savoir le fait pour le tribunal arbitral de s'être déclaré à tort compétent ou incompétent (art. 190 al. 2 let. b LDIP)" (SFT 4A_394/2017, consid. 4.2.4).

Free translation: On a more general level, it should be borne in mind that jurisdiction by reason of the subject-matter and the place of the court seized is only one condition for admissibility among others, such as the existence of an interest worthy of protection, capacity to be a party and to institute proceedings, or the absence of *lis pendens* and *res judicata* (cf. art. 59 para. 2 CPC, which lists, by way of example, six conditions of admissibility, including the court's jurisdiction [subpara. b], which are commonly referred to, in negative terms, as 'grounds for dismissal'). If one or more of the conditions for admissibility are not met, the court will not enter into the merits of the case but will rule that the claim is inadmissible (HOHL, op. cit., n. 585).

Care must therefore be taken not to assimilate all the conditions of admissibility to one of them - in this case, jurisdiction - without wishing to unduly extend the review authority's power of review in the event, as is the case in Swiss international arbitration law, where the law sets out an exhaustive list of the complaints that may be raised in an appeal in civil matters against an award and provides for only one ground of appeal based on a plea of inadmissibility, namely the fact that the arbitral tribunal has wrongly declared itself competent or incompetent (Art. 190 al. 2 let. b PILA).

98. In view of the above, the Sole Arbitrator will address the issue of *res judicata* not under the heading jurisdiction, but in light of admissibility.

VI. ADMISSIBILITY

99. With regard to admissibility, Article R49 of the CAS Code provides, *inter alia*, 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 […]".

100. Moreover, Article 57 (1) of the FIFA Statutes reads:

"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".

101. The grounds of the Appealed Decision were notified to the Appellant on 7 July 2023, and the Appellant's Statement of Appeal was lodged 27 July 2023, i.e. within the statutory time limit of 21 days set forth in Article R49 of the CAS Code and in Article 57 of the FIFA Statutes, which is not disputed.

102. Furthermore, the Statement of Appeal and the Appeal Brief complied with all the requirements of Articles R48 and R51 of the CAS Code.

A. The First CAS Award is vested with *res judicata*.

103. With regard to the principle of res judicata, initially the Sole Arbitrator notes that the First CAS Decision is an arbitral award and thus has *res judicata* effects that must be observed by this Panel sitting in Switzerland subject to the conditions set out in PILA.

B. The effects of *res judicata*

104. According to the SFT, the effects of *res judicata* are as follows (SFT 4A_394/2017, consid. 4.2.3):

"L'autorité de la chose jugée interdit de remettre en cause, dans une nouvelle procédure, entre les mêmes parties, une prétention identique qui a été définitivement jugée".

Free translation: *Res judicata* prohibits an identical claim that has been finally adjudicated from being challenged in a new proceeding between the same parties.

105. The *res judicata* effect extends to all the facts existing at the time of the first judgment, whether or not they were known to the parties, stated by them or considered as proof by the first court (ATF 139 III 126 consid. 3.1, p. 129). However, it does not stand in the way of a claim based on a change in circumstance since the first judgment (ATF 139 III 126 consid. 3.2.1, p. 130). The *res judicata* effect does not extend to the facts after the time until which the object of the dispute could be modified, i.e. to those which took place beyond the last time when the parties could supplement their statements of facts and evidentiary submissions. Such circumstances are new facts (real nova) as opposed to the facts already in existence at the decisive time, which could not have been relied on in the previous proceedings (false nova), which under very restrictive conditions may justify the revision of the arbitral award (ATF 140 III 278 at 3.3; judgment 4A_603/2011 of November 22, 2011, at 3).

C. The conditions of *res judicata*

106. There is *res judicata* when the claim in dispute is identical to that which was already the subject of an enforceable judgment (identity of the subject-matter of the dispute). This is the case when in both litigations the same parties submitted the same claim to the court on the basis of the same facts. The identity must be understood from a substantive and not grammatical point of view, so that a new claim, no matter how it is formulated, will have the same object as the claim already adjudicated (ATF 140 III 278 at 3.3; ATF 139 III 126 at 3.2.3).

107. In this regard, the so-called "triple identity" test has been noted and relied upon in previous CAS cases, including CAS 2010/A/2091, in which the Panel confirmed that:

> *"If arbitral proceedings in Switzerland involve the same subject matter, the same legal grounds and the same parties as previous foreign arbitral proceedings terminated with an award, the so-called 'triple identity' test – used basically in all jurisdictions to verify whether one is truly confronted with a res judicata question – is thus indisputably met".*

108. The ratio behind the *res judicata* principle is to ensure the finality of judgments and to ensure that the same matter is not decided upon over and over again. However, the Sole Arbitrator appreciates that it must be applied with caution in order to not deprive any parties of access to justice, which by itself would also be a violation of Swiss public policy.

109. The Appellant´s claim before FIFA was declared inadmissible in the Appealed Decision because the Chairperson found, *inter alia*, that:

> *"on the basis of the principle of res judicata, a decision-making body is not in a position to deal with the substance of a case in the event that another – competent – deciding body has already dealt with the same matter by passing a final and binding decision".*

110. The Chairperson further found:

> *"that both the player and the club were the parties in the proceedings leading to the [First] CAS Award as well as in the dispute at stake" and that "the identity of the object is fulfilled if the reason to claim and the relevant requests of the two claims are similar. When comparing the player's appeal at CAS to the claim at hand," and then "confirmed that both discuss inter alia the player's entitlement to the amounts under the IRA. Consequently, both legal actions were based on the club's alleged violation of the same contract and materially contained the very same request for relief", underscoring thus "that the condition of identity of the object of the matter in dispute is also fulfilled".*

111. In conclusion, the Chairperson determined that both legal actions not only concerned identical parties to the dispute but also identical objects and (partial) requests for relief, and based on that decided that as the CAS has already dealt with the exact same matter, passing a final and binding decision, the case before him was affected by *res judicata,* and the DRC was not in a position to deal again with the substance of the dispute.

D. Applying the above principles to the case at hand

112. The Sole Arbitrator initially notes that the question regarding the possible application of the principle of *res judicata* to this case concerns two issues: i) whether the Player's claim for

outstanding salary was already decided on in a definitive matter in the First DRC Proceeding and subsequently in CAS 8621, and ii) whether the question of FIFA's possible jurisdiction over the Player's claim for compensation for termination of contract without just cause was dealt with in a definitive manner by the Sole Arbitrator in CAS 8621.

113. As already set out above, there is *res judicata* when the claim in dispute is identical to that which was already the subject of an enforceable judgment (identity of the subject-matter of the dispute from a substantive and not grammatical point of view) and this is the case when in both litigations the same parties submitted the same claim to the court on the basis of the same facts.

114. Thus, in order to assess whether the Player's two claims in these proceedings are covered by *res judicata* as submitted by the Club, the Sole Arbitrator needs to apply the *"triple identity"* test.

115. In this regard, the Sole Arbitrator notes that it is not disputed that the parties to the First and the Second DRC Proceedings, in CAS 8621 and in the present proceedings are identical, being the Player and the Club.

116. Thus, the first part of the test is met.

117. With regard to the subject-matter and the legal grounds, the Sole Arbitrator notes that these have to be assessed separately regarding the Player's two claims.

a) Claim for outstanding salary for June 2021

118. With regard to the Player's claim for outstanding salary for a part of June 2021, the Sole Arbitrator initially notes that the Player on the one hand claimed in CAS 8621 that he *"did not claim before FIFA his overdue salaries for 2021"* (in the First DRC Proceedings) and that the FIFA DRC did not elaborate on the exact period it took into account when encompassing the damage compensation.

119. The Club, on the other hand, submits that the Player in the First DRC Proceedings claimed *"the residual value"* of the Contract, which included all outstanding salary for 2021, and that the FIFA DRC granted him his claim in this regard.

120. In this regard, the Sole Arbitrator initially notes that the FIFA DRC in the First DRC Decision only granted the Player *"compensation for breach of contract"* but did not grant the Player any entitlement to outstanding salary.

121. The same appears to be the case in the First CAS Award, according to which the Player was only granted compensation for breach of contract.

122. In the view of the Sole Arbitrator, this approach appears to be in line with the nature of the claim of the Player in the First DRC Proceedings, since the term *"residual value"* of a contract in general refers to the cumulative value of "remaining" payments according to a contract which will fall due from the time of the termination of the said contract until the original expiry date of such a contract.

123. Any such outstanding payments which have already fallen due before the termination of the contract is not to be considered as a part of a compensation payable due to the termination of the contract without just cause, but simply as payments which, in line with the principle of *pacta sunt servanda,* must be respected by the debtor in any case.

124. As such and based on the wording of the First DRC Decision and of the First CAS Award, the Sole Arbitrator finds that the Player's claim was only, and for the first time, included in his claim before the FIFA DRC in the Second DRC Proceedings, which the Sole Arbitrator finds no reason for not to be allowed.

125. However, this claim was apparently never decided on by the FIFA DRC in the Second DRC Proceedings, which not appear to be disputed.

126. Based on that, the Sole Arbitrator rejects the Club's submission that there is already a final and binding arbitral award regarding this claim, which is why the Player is not barred from claiming this amount based on the principle of *res judicata* as this part of the Player's claim against the Club does not meet the "triple identity test".

b) Claim for outstanding payment pursuant to the IRA

127. With regard to the Player's claim for payment pursuant to the IRA, the Sole Arbitrator notes that the Player did not include this claim in the First DRC Proceeding based on the circumstances on the said agreement, but the Player did include it in his subsequent appeal before the CAS in CAS 8621.

128. Moreover, and since the claim was rejected by the Sole Arbitrator in the First CAS Award, the Player submitted the same matter to the FIFA DRC in the Second DRC Proceedings, just to have it rejected by the Chairperson, who found the claim inadmissible *"as CAS has already dealt with the exact same matter, passing a final and binding decision, the present case is affected by res judicata and the DRC is not in a position to deal again with the substance of the dispute"*.

129. However, in order to assess whether the Chairperson was correct in his decision, which is disputed by the Player and is the main object of this appeal, the Sole Arbitrator needs to analyse what was in fact decided on in the First CAS Award with regard to the IRA claim and what was in fact the subject-matter covered by the Appealed Decision as decided by the Chairperson.

130. In the Appealed Decision the Chairperson notes that the First CAS Award established that the CAS had no jurisdiction over the IRA, which is in fact not disputed by the Player to be a correct assessment by the Sole Arbitrator based on his considerations. However, based on that, the Chairperson apparently found, *mutatis mutandis*, that if the CAS lacks jurisdiction to rule on the dispute between the Parties as to the IRA, then the FIFA DRC equally cannot entertain it.

131. However, the Sole Arbitrator cannot confirm that this is a correct consequence of lack of jurisdiction of the CAS in every situation and with regard to any possible claim between two parties.

132. In the First CAS Award, the Sole Arbitrator found with regard to the claim based on the IRA that *"i) the competence of the CAS to adjudicate on claims arising from the IRA cannot be based on Article 12 of the IRA; ii) it cannot be assumed that the content of the IRA is an integral part of the Contract; and iii) Article 8(2) of the Contract does not extend to the disputes arising from the IRA"*.

133. Apparently, and as mentioned above, the Player does not dispute that the CAS does not have jurisdiction to adjudicate on any claim arising from the IRA based on the lack of an arbitration agreement in the IRA in favour of the CAS, nor was it a matter in dispute under the Second DRC Proceedings that Article 8(2) of the Contract, and thus in an arbitration clause, does not extend to any disputes arising from the IRA.

134. However, the Sole Arbitrator in the First CAS Award apparently did not, and was never requested to, decide on whether or not FIFA was or could have been competent to adjudicate on the IRA claim, e.g. based on the provisions of the FIFA RSTP.

135. In the same manner, the Chairperson apparently never specifically assessed whether the FIFA DRC did in fact have/could have had jurisdiction to decide on disputes between the Parties based on the IRA, but instead only rejected the Player's claim based on lack of admissibility, *"as CAS has already dealt with the exact same matter"*.

136. As a matter of fact, in the Appealed Decision, the Chairperson did observe that *"the DRC would – in principle – be competent to deal with the matter at stake, which concerns dispute with international dimension between a Serbian Player and a Chinese club"*.

137. Based on these considerations, the Sole Arbitrator finds that even if the Player's claim for compensation based on the IRA was raised before the CAS in CAS 8621, and even if such claim was rejected based on lack of jurisdiction of the CAS pursuant to the IRA, combined with the fact that the IRA was not considered to be an integral part of the Contract, the question of whether FIFA had/has jurisdiction to entertain a dispute between the Parties based on the IRA in accordance with, e.g., the FIFA RSTP was never dealt with and never decided on.

138. The Sole Arbitrator notes in this regard that it does not follow from the FIFA RSTP that the absence of a valid arbitration clause in favour of the CAS in a contract between two parties to a dispute does also exclude the possibility that the CAS can in fact have jurisdiction as an appeal body. On the contrary, the Sole Arbitrator assumes that in the vast majority of disputes over which the FIFA DRC has jurisdiction pursuant to the FIFA RSTP, the parties to such disputes have not entered into any specific arbitration clause in their agreement.

139. Based on the wording of the Appealed Decision, the Sole Arbitrator finds that the initial main subject-matter in the Second DRC Proceedings was in fact the matter of jurisdiction, and the claim was therefore declared inadmissible based on the alleged *res judicata* effect of this issue.

140. However, as the question of FIFA jurisdiction based on the FIFA RSTP was never decided on in previous proceedings, no final and binding decision on this issue was ever issued.

141. In view of the foregoing, the Sole Arbitrator concludes that the "triple identity" test is not met in the present dispute with regard to the issue of FIFA jurisdiction, based on which the Sole Arbitrator finds that the Chairperson erred in declaring the Player's claim inadmissible based on the principles of *res judicata*.

VII. APPLICABLE LAW

142. 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 the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

143. Article 56 par. 2 of the FIFA Statutes determines 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".*

144. Based on the above, and with reference to the filed submissions, the Sole Arbitrator is satisfied that the various regulations of FIFA are primarily applicable, and that Swiss law is subsidiarily applicable should the need arise to fill a possible gap in the various regulations of FIFA.

VIII. MERITS

145. As set out above, the Sole Arbitrator found that the Chairman was wrong in declaring the Player's claim for outstanding payment pursuant to the IRA inadmissible based on the principles of *res judicata*.

146. Furthermore, the Sole Arbitrator found that the FIFA DRC did not decide on the Player's claim for alleged outstanding remuneration and that no previous decision was ever issued covering this claim.

147. The Sole Arbitrator notes in this regard that he agrees with the Club that the *de novo* powers of the CAS extend to, *inter alia*, the jurisdiction of FIFA and the merits of the Player's claims, even though such issues were not examined or decided upon by the FIFA DRC in the Second DRC Proceedings.

148. However, based on the circumstances of this particular case, and based on the nature of the dispute, the Sole Arbitrator finds it appropriate that the FIFA DRC is given the opportunity to deal with the entire dispute in the first instance.

149. As such, the Sole Arbitrator finds that the Appellant's claims against the Club must be referred back to the FIFA DRC, which will then decide the case *de novo*, including the question of whether FIFA has in fact jurisdiction to adjudicate any claim based on the IRA, even if the Player is not a formal party to said contract.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 27 July 2023 by Mr Nikola Djurdjic against the decision rendered by the Dispute Resolution Chamber of the FIFA Football Tribunal on 7 July 2023 is upheld, and the matter between these two Parties is referred back to the Dispute Resolution Chamber of the FIFA Football Tribunal for a decision.

2. (…).

3. (…).

4. All other motions or prayers for relief are dismissed.

CAS 2023/A/9940 & 9941
1927 FK Shkupi v. FIFA & FC Aarau & FC Baden
6 May 2024

Panel: Prof. Ulrich Haas (Germany), Sole Arbitrator

Football
Training compensation
Admissibility of the appeal
Scope of the CAS power of review

1. **The FIFA determination that one or more clubs is/are entitled to training compensation (the Determination Statement) and the FIFA statement that determines the amounts of training compensation due to the training club(s) (the Allocation Statement) constitute two distinct decisions. This is corroborated by the fact that the reference number of both decisions is different, their contents is different, and both decisions contain a sperate notice of legal remedies. If both decisions contain separate notices of legal remedies, both decisions must be separately appealable. When reading Article 10.5 of the FIFA Clearing House Regulations (FCHR), however, it appears – contrary to what is expressed in the notice of legal remedies – that the time limit for appealing the decisions (i.e. the 21 days) does not start with the notification of the decision in question, but only starts running once *both* decisions have been notified to the addressee. This contradiction between the contents of the Determination Statement / Allocation Statement and the applicable rules cannot go to the detriment of a club that filed an appeal against both decisions within the relevant deadline only after receiving the second decision. The club that relied on the wording of Article 10.5 of the FCHR must be protected in this trust.**

2. **The concept of *de novo* hearing implies – in principle – that also new evidence may be taken into account that was not presented or available before the first instance. Thus, in principle, the correct reference to judge the correctness of the first instance decision is the date of the CAS hearing. However, there are exceptions to this rule. Access to justice may be restricted (by freezing the relevant reference date) for just cause, i.e. in the interest of good administration of justice. Whether to do so or not is, in principle, in the autonomy of the relevant federation. Also, Article R57(3) of the CAS Code provides that evidence may be excluded in the CAS procedure if such evidence was available before the first instance and the appellant did not act diligently or acted in bad faith. However, the use of this provision must be confined to cases of abuse. Therefore, if it does not follow from the purpose and the good administration of the Electronic Player Passport that the *de novo* principle before the CAS must be suspended and it does not appear that the club tried to circumvent the applicable regulations, the evidence before the CAS panel at the decisive reference date can be taken into consideration, including a valid waiver of the claim for training compensation.**

I. THE PARTIES

1. 1927 FK Shkupi ("FK Shkupi") is a professional football club based in Northern Macedonia playing in the Macedonian highest division. FK Shkupi is affiliated to the Football Federation of Macedonia (the "FFM").

2. Fédération Internationale de Football Association ("FIFA") is the world governing body of football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players, worldwide. FIFA is an association under Articles 60 et seq. of the Swiss Civil Code ("CC") with its headquarters in Zurich, Switzerland.

3. FC Aarau ("FC Aarau") is a professional football club based in Switzerland that is affiliated to the Swiss Football Association (the "SFV").

4. FC Baden ("FC Baden") is a professional club based in Switzerland that is affiliated to the SFV.

5. FIFA, FC Aarau and FC Baden are jointly referred to as "Respondents". FK Shkupi and the Respondents are hereinafter jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

5. [4]This case revolves around two decisions rendered by FIFA (the "Appealed Decisions") and notified to FK Shkupi, FC Aarau and FC Baden via the FIFA Transfer Matching System ("TMS") on 31 July 2023 and 2 August 2023.

6. [5]Below is a summary of the main relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced in the course of the present proceedings. Additional facts, allegations and evidence may be set out, where relevant, in other parts of this award. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in the award only to the submissions and evidence he considers necessary to explain his reasoning.

A. The transfer of the Player and the negotiations between FK Shkupi, FC Aarau and FC Baden

6. On 16 February 2023, the player Stefan Mitrev ("the Player") signed his first professional contract (the "Contract") with FK Shkupi at the age of 20.

7. The Player played as an amateur player with FC Aarau from 22 July 2019 until 30 July 2021 and as an amateur player with FC Baden from 4 August 2017 until 14 July 2019.

8. Prior to signing the Contract, FC Aarau and FC Baden, on 9 December 2022, wrote a letter to FK Shkupi that reads as follows ("Waiver"):

[4] Numbering similar to the original Award

[5] Numbering similar to the original Award

We hereby confirm to you as the advisor of our former player Stefan Mitrev, born 14.02.2003, known to us, that FC Aarau AG [FIFA TMS ID: 869] and FC Baden 1897 [FIFA TMS ID: 50941] agrees in principle under the following conditions to waive the claim of the training compensation due to us (and other compensation in connection with the training and promotion of the player) in the amount of EUR 10'000.00 per calendar year in which the player was qualified for our clubs (until 22.07.2019) in accordance with the present regulations of the respective competent football bodies:

- FC Aarau AG and FC Baden will participate in a possible transfer of the player from FC Shkupi to a third club with 5% of the net transfer amount (sell-on fee) [applies to both a definite transfer and transfers on loan]

9. On 15 December 2022, FK Shkupi responded to FC Aarau's and FC Baden's letter as follows:

I refer to your letter dated 09.12.2022 in which you gave your confirmation and accepted that FC Shkupi is entitled to transfer Stefan Mitrev, born on 14.02.2003, without being obliged to make any training compensation and/or solidarity contribution with a condition that in case the Player is sold or loaned to any other club, FC Aarau and FC Baden are entitled to get a total amount of 5% from the amount (shared by both clubs) that FC Shkupi receives due to this permanent or loan transfer.
FC Shkupi thanks hereby once again for your understanding and cooperation and looks forward to making new deals in this market with you.

B. The procedure according to the FCHR

10. Article 5 of the FIFA Clearing House Regulations ("FCHR") provides – in its pertinent parts – as follows:

"5.9 The first registration of a player as a professional at a different member association from that where the player was most recently registered as an amateur shall be entered in TMS as an international transfer as required by the RSTP and its Annexe 3.

5.10 TMS will identify, from the information provided in the international transfer instruction, the first registration of a player as a professional, which may trigger an entitlement to training rewards pursuant to the RSTP".

11. The trigger of an entitlement to training rewards automatically generates a provisional electronic player passport ("provisional EPP"). This follows from Article 8(1) of the FCHR, which reads as follows:

"When a training rewards trigger is identified as defined in these Regulations and in accordance with articles 20 and 21 of the RSTP, a provisional EPP for the relevant player will be generated by TMS".

12. As a consequence of the above, a provisional EPP was generated for the Player on 16 February 2023, which was notified – *inter alia* – to FK Shkupi through TMS.

13. Following the issuance of a provisional EPP, the FCHR provide for an inspection and a review period. The provisions related to the inspection period provide as follows:

"8.2 The provisional EPP will be available for inspection in TMS by all member associations and clubs for ten (10) days after generation (inspection period).

8.3 During the inspection period:

a) a member association that is not listed in the provisional EPP and believes that one or more of its affiliated clubs should be included in the final EPP may request to be included in the EPP review process;

b) a club that is not listed in the provisional EPP and believes that it should be included in the final EPP may request its member association to be included in the EPP review process and to provide pertinent registration information. Member associations must

act in good faith when responding to this request.

8.4 Upon completion of the inspection period, the FIFA general secretariat will assess the provisional EPP for accuracy and relevance. It may discard a provisional EPP in cases where, according to the registration information available in the provisional EPP, there is no indication that the player was registered with a different member association. Upon the substantiated request of an interested member association or club, and even after a provisional EPP has been discarded, the FIFA general secretariat may, at its discretion, reopen a provisional EPP at any time".

14. The relevant provisions related to the Electronic Player Passport ("EPP") review process read as follows:

"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 to the player through the FIFA Connect interface;

c) their relevant affiliated club(s);

d) the new club and its member association;

e) 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

f) any other member association(s) deemed relevant by the FIFA general secretariat, at its discretion.

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:

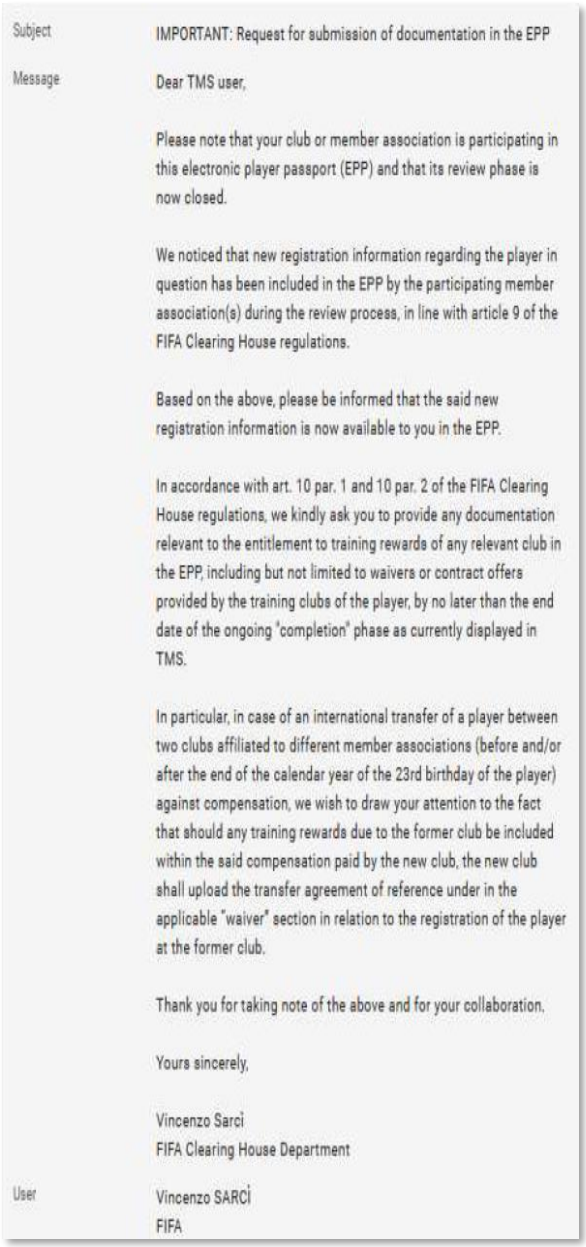
a) a document corroborating the registration of the player, issued by the member association;

b) a copy of any relevant International Transfer Certificate, if applicable; and

c) a copy of any relevant employment contract, if applicable".

15. In the case at hand the EPP for the Player was released for review on 28 February 2023. Therein, FK Shkupi was identified as a "party" within the meaning of Article 9.1 of the FCHR and informed via TMS that the EPP was open for review.

16. On 20 July 2023, FK Shkupi was informed through an automated message in TMS 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 noticed 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. Yours sincerely, Vincenzo Sarcì FIFA Clearing House Department
User	Vincenzo SARCÌ FIFA

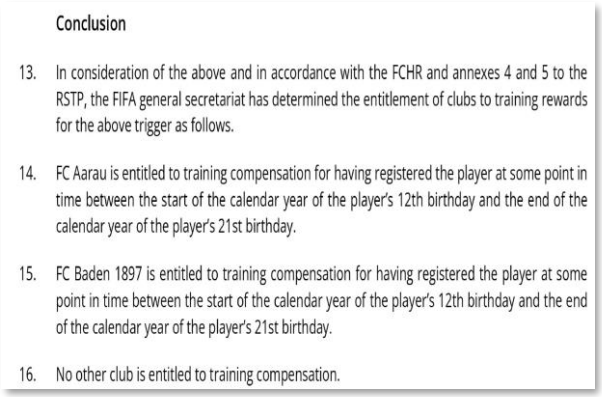
17. The *"end date of the of the ongoing completion phase as currently displayed in TMS"* referred to in the above message is 26 July 2023.

18. Two automated emails were generated to inform FK Shkupi of the message sent through TMS.

19. A further automated email was sent to FK Shkupi on 25 July 2023, advising the latter that the Completion period was about to expire in the next 24 hours.

20. Despite the above messages, FK Shkupi did not upload any amendments of the registration information in TMS.

21. On 31 July 2023, the FIFA General Secretariat approved the EPP for the Player and issued the FIFA determination on the Electronic Passport 18779 for the Player ("Determination Statement") which reads – in its pertinent parts – as follows:



Conclusion

13. 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.

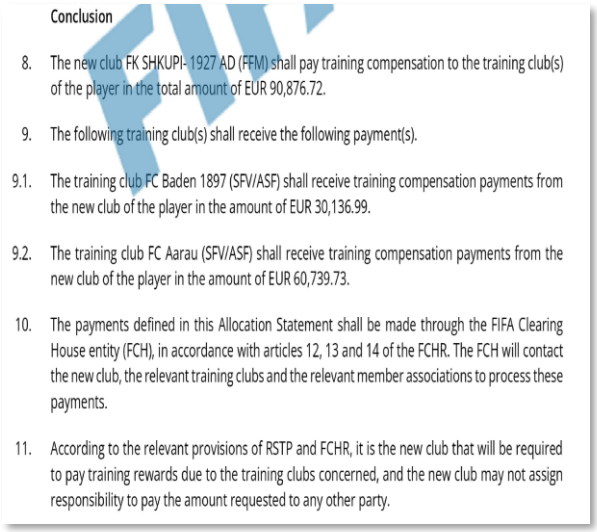
14. FC Aarau is entitled to training compensation for having registered the player at some point in time between the start of the calendar year of the player's 12th birthday and the end of the calendar year of the player's 21st birthday.

15. FC Baden 1897 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.

16. No other club is entitled to training compensation.

22. On the same date, the Determination Statement was notified to FK Shkupi.

23. Still on the same date, the FIFA General Secretariat "generated" the Allocation Statement TC-1454 corresponding to the Player's EPP ("Allocation Statement"). The pertinent parts of the Allocation Statement read as follows:



Conclusion

8. The new club FK SHKUPI- 1927 AD (FFM) shall pay training compensation to the training club(s) of the player in the total amount of EUR 90,876.72.

9. The following training club(s) shall receive the following payment(s).

9.1. The training club FC Baden 1897 (SFV/ASF) shall receive training compensation payments from the new club of the player in the amount of EUR 30,136.99.

9.2. The training club FC Aarau (SFV/ASF) shall receive training compensation payments from the new club of the player in the amount of EUR 60,739.73.

10. 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.

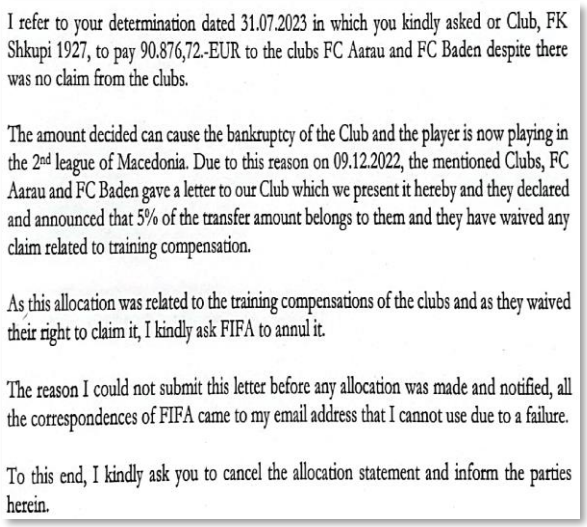
11. According to the relevant provisions of RSTP and FCHR, it is the new club that will be required to pay training rewards due to the training clubs concerned, and the new club may not assign responsibility to pay the amount requested to any other party.

24. On 2 August 2023, the Allocation Statement was notified to FK Shkupi.

25. The Determination Statement and the Allocation Statement are jointly referred to as the "Appealed Decisions".

C. Events following the FCHR-process

26. On 11 August 2023, a representative of FK Shkupi wrote to FIFA as follows:



I refer to your determination dated 31.07.2023 in which you kindly asked or Club, FK Shkupi 1927, to pay 90.876,72.-EUR to the clubs FC Aarau and FC Baden despite there was no claim from the clubs.

The amount decided can cause the bankruptcy of the Club and the player is now playing in the 2nd league of Macedonia. Due to this reason on 09.12.2022, the mentioned Clubs, FC Aarau and FC Baden gave a letter to our Club which we present it hereby and they declared and announced that 5% of the transfer amount belongs to them and they have waived any claim related to training compensation.

As this allocation was related to the training compensations of the clubs and as they waived their right to claim it, I kindly ask FIFA to annul it.

The reason I could not submit this letter before any allocation was made and notified, all the correspondences of FIFA came to my email address that I cannot use due to a failure.

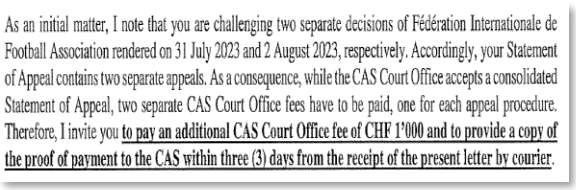
To this end, I kindly ask you to cancel the allocation statement and inform the parties herein.

27. Attached to the above letter to FIFA was the Waiver.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

27. [6]On 22 August 2023, FK Shkupi filed a Statements of Appeal against the Appealed Decisions with the Court of Arbitration for Sport ("CAS") in accordance with Articles R47 et seq. of the CAS Code of Sports-related Arbitration (the "Code"). In the Statements of Appeal FK Shkupi requested that the matters be submitted to a sole arbitrator in order to reduce the costs of the proceedings. The cases were docketed with the CAS under the procedure number CAS 2023/A/9940 and CAS 2023/A/9941.

28. On 24 August 2023, the CAS Court Office acknowledged receipt of FK Shupki's Statement of Appeal and advised FK Shupki as follows:



As an initial matter, I note that you are challenging two separate decisions of Fédération Internationale de Football Association rendered on 31 July 2023 and 2 August 2023, respectively. Accordingly, your Statement of Appeal contains two separate appeals. As a consequence, while the CAS Court Office accepts a consolidated Statement of Appeal, two separate CAS Court Office fees have to be paid, one for each appeal procedure. Therefore, I invite you to pay an additional CAS Court Office fee of CHF 1'000 and to provide a copy of the proof of payment to the CAS within three (3) days from the receipt of the present letter by courier.

29. The letter also noted that, according to the evidence on file, the Determination Statement was notified to FK Shkupi on 31 July 2023 and that the deadline for filing an appeal therefore expired on 21 August 2022. Accordingly, the letter invited FK Shkupi to provide the CAS Court Office with a proof of sending of the Statement of Appeal in 202elationn to the Determination Statement within three days from the receipt of this letter.

[6] Numbering similar to the original Award.

30. On 28 August 2023, FK Shupki informed the CAS Court Office that it had paid a further CAS Court Office fee. The email further advised the CAS Court Office that *"there is one decision of FIFA which was delivered us on 02.08.2023 and application to CAS can be made on 23.08.2023 instead of 21.08.2023. We made the necessary application on 22.08.2023. That date shall be within the appeal time"*.

31. On 30 August 2023, the CAS Court Office reiterated its initial request that FK Shkupi provide proof of notification of the Determination Decision.

32. On 31 August 2023, the CAS Court Office forwarded FK Shkupi's Statement of Appeal to the Respondents and, *inter alia*, informed the Parties that FK Shkupi had filed two appeals against the same Respondents that were docketed as CAS 2023/A/9440 and CAS 2023/A/9941. In addition, the CAS Court Office invited the Parties to inform the CAS Court Office, within 5 days as of receipt of the letter, whether they agreed to refer both proceedings to the same panel.

33. On 1 September 2023, FIFA informed the CAS Court Office that according to it the Allocation Statement and the Determination Statement constitute *"one single Appealed Decision in accordance with Article 10.5(b) and (d) of the* [FCHR]*"*. In addition, FIFA wished the matters CAS 2023/A/9940 and CAS 2023/A/9941 to be consolidated and did *"not object to the cases being dealt with by the same Panel"*. However, FIFA objected to the dispute being dealt with by a sole arbitrator.

34. On 2 September 2023, FK Shkupi filed its consolidated Appeal Brief with the CAS Court Office in the matters CAS 2023/A/9940 and CAS 2023/A/9941 in accordance with Article R51 of the Code.

35. On 4 September 2023, the CAS Court Office invited the Respondents to file their respective Answers within the deadline provided for in Article R55 of the Code. In addition, the CAS Court Office informed the Parties that it did not share FIFA's view according to which the Determination Statement and the Allocation Statement would constitute a single decision and that the CAS Court Office would therefore continue to consider both proceedings to be separate appeals.

36. On 5 September 2023, FIFA requested that its time limit for filing its Answer be set aside and fixed after the payment of FK Shkupi's share of the advance on costs in accordance with Article R55 para. 3 of the Code.

37. On the same date, the CAS Court Office accepted FIFA's request to set aside the time limit for the filing of the Answer.

38. On 26 September 2023, the CAS Court Office informed the Parties that the Deputy President of the CAS Appeals Arbitration Division had decided to submit both matters to the same sole arbitrator. In addition, the CAS Court Office informed the Parties that no Answer had been filed by FC Aarau and FC Baden in these proceedings and that the the Panel may nevertheless proceed with the arbitration and deliver an award also in case a respondent fails to submit an Answer in accordance with Article R55 of the Code.

39. On 27 October 2023, FC Baden

requested that *"the Second and the Third Respondents are to be excluded from the proceeding"* and that the *"costs of the proceedings an any party costs are to be awarded to the Appellant"*. The letter continued to state as follows:

> In this matter, we confirm that we have reached an agreement with the Appellant and have waived training compensation for this case. We have uploaded this document to FIFA's online platform during the transfer. After consultation with the Appellant, it appears that the problem is that they uploaded this waiver to FIFA's online platform too late. Which is not the fault of the Second and Third Respondents.
>
> However, we inform the court that we waive the training compensation claimed by FIFA in the sense of the agreement reached and ask you to exclude the Second and Third Respondents from the proceeding. The costs incurred are therefore to be paid exclusively by the Appellant.

40. On 30 October 2023, the CAS Court Office acknowledged receipt of the FC Baden's letter and invited FK Shkupi to provide the CAS Court Office with its position in relation to the above request.

41. On 3 November 2023, the CAS Court Office informed the Parties that FK Shkupi had paid its share of the advance of costs and that FIFA's deadline to file an Answer was therefore set in accordance with Article R55 of the Code.

42. On the same date, the CAS Court Office noted that it had not received any comments from FK Shkupi on FC Baden's request and that FC Baden and FC Aarau shall therefore remain a party to the present proceedings.

43. On 10 November 2023, FIFA requested a 20-day extension of the deadline to file its Answer.

44. On the same date, the CAS Court Office granted FIFA a 10-day extension to file its Answer. In addition, the CAS Court Office invited FK Shkupi to comment on FIFA's request for an additional 10-day extension within 3 days.

45. On 17 November 2023, the CAS Court Office informed the Parties that it had not received any response from FK Shkupi in relation to its letter dated 10 November 2023 and that FIFA's deadline to file its Answer was therefore extended by a further 10 days.

46. On 11 December 2023, FIFA requested a further extension of the deadline to file the Answer until 23 December 2023.

47. On 12 December 2023, the CAS Court Office invited FK Shkupi to comment on FIFA's request for an extension of the deadline.

48. On the same date, FK Shkupi informed the CAS Court Office that it did not agree to extent FIFA's deadline to file its Answer.

49. Still on the same date, the CAS Court Office informed the Parties that, absent an agreement between the Parties, FIFA's request for an extension of the deadline would be submitted to the President of the CAS Appeals Arbitration Division, or her Deputy, in accordance with Article R32 para. 2 of the Code.

50. On 13 December 2023, the CAS Court Office informed the Parties that FIFA is granted an additional 5-day extension of the deadline to file its Answer.

51. On 18 December 2023, FIFA filed its consolidated Answer in the matters CAS 2023/A/9440 and CAS 2023/A/9441.

52. On 19 December 2023, the CAS Court

Office informed the Parties that, in accordance with Article R54 of the Code, the Deputy President of the CAS Appeals Arbitration Division had decided that the Panel appointed to decide the present matter was constituted as follows:

Sole Arbitrator: Prof. Dr. Ulrich Haas, Professor in Zurich, Switzerland and Attorney-at-law in Hamburg, Germany

53. The letter also invited the Parties to inform the CAS Court Office by 27 December 2023 whether they preferred a hearing to be held in this matter and/or whether they requested a case management conference ("CMC") to be held.

54. On 20 December 2023, FK Shkupi informed the CAS Court Office about its preference for the Sole Arbitrator to issue the award based solely on the Parties' written submissions.

55. On 26 December 2023, FIFA informed the CAS Court Office that it considered a hearing to be unnecessary and that it did not request the holding of a CMC.

56. On 8 January 2024, the CAS Court Office informed the Parties that the Sole Arbitrator had decided, in light of the comments of the Parties, to issue an award based on the Parties' written submissions, without the need to hold a hearing or a CMC. In addition, the CAS Court Office invited the Parties to state whether they agreed that the Sole Arbitrator renders one award encompassing both proceedings and that a party's silence would be deemed acceptance of one award encompassing both proceedings.

57. On the same date, FIFA informed the CAS Court Office that it agreed to a single award encompassing both proceedings.

58. On 9 January 2024, FK Shkupi agreed that the Sole Arbitrator issues a single award coving both proceedings.

59. On 10 January 2024, the CAS Curt Office issued the Order of Procedures ("OoPs") in both proceedings and invited the Parties to return signed copies hereof on or before 17 January 2024.

60. On 11 January 2024, FIFA returned signed copies of the OoPs to the CAS Court Office.

61. On 12 January 1024, the CAS Court Office acknowledged receipt of FIFA's letter and noted that the Second and Third Respondent had failed to respond to the CAS Court Office letter dated 8 January 2024. Accordingly, the Second and Third Respondents' silence was construed as consenting to the issuance of a single award encompassing both proceedings.

62. Also on the same date, FK Shkupi returned a signed copy of the OoP in the procedure CAS 2023/A/9940.

63. Still on the same date, the CAS Court Office acknowledged receipt of the OoP in the matter CAS 2023/A/9940 and invited FK Shkupi to return a signed copy of the OoP in the other proceeding, i.e. CAS 2023/A/9941.

64. On 15 January 2024, the CAS Court Office acknowledged receipt of FK Shkupi signed copy of the OoP in CAS 2023/A/9941.

IV. PARTIES' POSITIONS AND RESPECTIVE PRAYERS FOR RELIEF

65. 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 of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the award or in the discussion of the claims below.

A. FK Shkupi

66. In its Statement of Appeal (that is identical for CAS 2023/A/9440 and CAS 2023/A/9441), FK Shkupi sought the following relief:

"1. To set aside the decision of the FIFA,

2. To condemn … [FIFA] and … [FC Aarau] to bear all the costs of the arbitration and to pay an attorneyship fee of CHF 4.000".

67. In support of the above prayers for relief, FK Shkupi submits as follows:

a) It has received on 9 December 2022 from FC Aarau and FC Baden a letter *"which clearly states that they have no claim regarding training compensation and in case the Player … is sold in return for an amount 5% of the mentioned amount will be shared by* … [FC Aarau and FC Baden]*".*

b) FC Baden and FC Aarau did not apply to FIFA for any payments for training rewards. Despite of this FIFA decided that FK Shkupi must pay EUR 60,739.73 to FC Aarau and EUR 30,136.99 to FC Baden.

c) FK Shkupi did not receive any correspondence from FIFA.

B. FIFA

68. In its Answer, FIFA sought the following prayers for relief:

"Based on the foregoing, FIFA respectfully requests the Sole Arbitrator to issue an award:

(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".

69. In support of the above prayers for relief FIFA submits as follows:

a) CAS has jurisdiction to hear the present appeal.

b) The CAS shall primarily apply the various regulations of FIFA (in particular the FIFA Statutes and the FCHR) and, additionally, Swiss law.

c) The Allocation Statement and the Determination Statement constitute a single decision as per Article 10.5 of the FCHR. This is further confirmed by the fact that once the Determination Statement is issued, the Allocation Statement is automatically generated. It therefore does not come as a surprise that both "decisions" in the case at hand were issued on the same date and

subsequently jointly notified via TMS. Qualifying the Allocation and the Determination Statement jointly as the matter in dispute is also in conformity with CAS jurisprudence.

d) FIFA introduced the Clearing House as a key element of the transfer system reform package adopted at the FIFA Council in 2018 in order to promote and protect the integrity of professional football (cf. Article 1.2 of the FCHR). In particular, the new system is designed to ensure that training rewards (training compensation and solidarity contribution) are effectively paid to the clubs that are entitled to them. The specificities of the new system are as follows:

- Even though the system is largely automatised, it provides for a review process that requires the participation of the relevant clubs and member associations, to enable FIFA to determine the final EPP.

- In order to achieve the objectives, i.e. to enforce claims for training rewards in favor of clubs entitled to such payments, an extremely large number of player passports have to be processed. Since November 2022, more than 14,500 EPPs have been generated.

- It is of outmost importance that the rules be applied strictly. This follows from an administrative point of view in light of the high numerical context. It is impossible for FIFA to allow exceptions to the rules in case a club does not respect the relevant administrative deadlines or the relevant conditions established therein. The efficiency of the system is linked to its automatisation. Thus, FIFA cannot allow for a "flexible approach".

- Once the Determination Statement and the Allocation Statement are issued, they are also shared with the FIFA Clearing House Entity ("FCH Entity"). The latter is an independent and regulated payment service institution based in France and licensed and supervised by the French Prudential Supervision and Resolution Authority. The FCH Entity performs a due diligence and compliance assessment on all parties involved before any payments are processed.

- FIFA does not prevent, nor does it object to the relevant parties from agreeing on the partial or total reimbursement of the amounts paid after such payment has been processed in accordance with the FCHR, since such agreements do not circumvent the objectives of the system.

e) Article 9 of the FCHR imposes on a player's new club the obligation to upload into TMS any waiver to training rewards during the EPP review process.

- Such obligation is mandatory.

- It is uncontested that FK Shkupi did not comply with its obligation.

- FK Shkupi had ample

opportunities to participate in the EPP process and to upload any waiver. This is evidenced by the following timeline:

- On 16 February 2023, the provisional EPP was generated and FK Shkupi was included by "default" as a participant in the EPP process. FK Shkupi received a notification of this event in its TMS dashboard and, additionally, an automated EPP email notification.

- On 28 February 2023, the EPP was released for review in which FK Shkupi was able to participate. FK Shkupi received a notification of this event in its TMS dashboard and, additionally an automated EPP email notification.

- The TMS user of FK Shkupi accessed the section related to the EPP 18779 on 3 March 2023 and was able to view the relevant information.

- On 8 March 2023, the SFV uploaded the "proof of registration" of the Player with the clubs FC Aarau and FC Baden.

- On 20 July 2023, FIFA informed FK Shkupi that the review phase *"is now closed"* and that, despite of the above, FK Shkupi had until 26 July 2026 to upload in TMS any documentation relevant to the entitlement to training rewards *"including but not limited to waivers"*.

- Still on 20 July 2023, FK Shkupi received two automated EPP notification emails informing it of the aforementioned message and the opening of the Completion Period within the meaning of Article 10 of the FCHR. Once again, FK Shkupi was invited to upload the relevant documentation such as *"waivers of training rewards"*.

- On 25 July 2023, FK Shkupi was advised that the Completion period was about to end within the next 24 hours.

f) Article 10.1 of the FCHR provides that *"failure to comply with FIFA's request within the time limit shall result in the request being disregarded"*. As FK Shkupi failed to upload any waiver within the deadline applicable, FIFA was correct in issuing the Appealed Decisions.

g) FK Shkupi is precluded from submitting new documents (or any document that could and should have been presented during the administrative EPP process). Any other approach would constitute a circumvention of the applicable rules and the FCH system as a whole.

h) FIFA holds that the CAS must consider and decide, despite its *de novo* power of review whether the Appealed Decisions are correct in accordance with the information given by the Parties during the relevant EPP administrative process. It is not permissible to introduce alleged evidence which could and should have been provided during the

administrative EPP process. FIFA requests the Sole Arbitrator to apply Article R57 para. 3 of the Code according to which the *"Panel has discretion to exclude evidence presented bs the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered"*. Such application of Article R57 para. 3 of the Code is justified in order to protect the objectives of the FCH and the well-functioning of the administrative process.

- The submission of documents during a CAS appeal procedure that could have been submitted during the EPP process raises concerns as to the authenticity and credibility of such documents.

- Admitting new documents at this late stage opens the door for abuse, i.e. to potential forgery of waivers, backdated agreements and other fraudulent activities. It also creates an opportunity for clubs to bypass the system and avoid using the FCH for payments, including undergoing the relevant compliance assessment.

- FIFA also refers to the process for an international player's transfer. International Transfer Certificates are processed through TMS where the relevant clubs need to upload several documents.

- It follows from all of the above that the Appealed Decisions cannot be modified at CAS level. Such approach is not excessively formalistic, since the relevant EPP process requires strict compliance and approach with the rules.

i) FK Shkupi was aware that all communications related to the EPP process are exchanged through TMS. This clearly follows from the FCHR.

   - All parties have the obligation to review the TMS on a daily basis in accordance with Article 2.1 of the FCHR and Article 10 of the Procedural Rules of the Football Tribunal ("Procedural Rules") to which Article 21.1 of the FCHR refers.

   - FK Shkupi has not alleged or proven that it did not have access to TMS or that it could not participate in the EPP process.

   - When looking at TMS activity of FK Shkupi in the period from February to August 2023 it becomes apparent that FK Shkupi was able to access the TMS and the notifications contained therein. FK Shkupi logged on to TMS on a regular basis, performed various activities on the platform and even accessed the EPP in question (on 1, 2 and 15 March 2023).

   - Furthermore, FK Shkupi received various reminders and notifications. In order for these reminders / notifications to be successfully notified it suffices, according to the Swiss legal doctrine, that the addressee of the statement *"had the opportunity to obtain knowledge of the content irrespective of whether such a person has in fact obtained knowledge … Thus, the relevant point in time is when a person*

receives the decision and not when it obtains actual knowledge of its content". This principle has been retained also by CAS jurisprudence, most recently in CAS 2022/A/8598.

C. FC Aarau and FC Baden

70. Apart from the letter sent by FC Baden on 27 October 2023 to the CAS Court Office, FC Aarau and FC Baden did not participate in these proceedings.

V. JURISDICTION

71. Article R47 para. 1 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 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".

72. The jurisdiction of CAS derives from Article 57 para. 1 of the FIFA Statutes and Article 10.5 lit. b) of the FCHR which state that:

Article 57 para. 1 of the FIFA Statutes

"1. 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".

Article 10.5 lit. b) of the FCHR

"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. The jurisdiction of CAS is not contested and is further confirmed by the OoPs in both proceedings duly signed by FK Shkupi and FIFA. Furthermore, FC Aarau and FC Baden have not contested the CAS jurisdiction in their letter dated 27 October 2023.

74. It follows that CAS has jurisdiction to adjudicate and decide on the present dispute.

VI. ADMISSIBILITY

75. 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".

76. As for the deadline to file an appeal, in accordance with Article R49 of the Code, Article 57 para. 1 of the FIFA Statutes and Article 10.5 lit. b) of the FCHR, the time limit for filing the appeal is 21 days. The present appeal was filed on 22 August 2023. The question, thus, is what the relationship is between the Determination Statement and the Allocation Statement, more particularly whether they constitute a single decision or two separate appealable "decisions" within the meaning of Article R47 of the Code. In the latter case the deadline for appealing the Determination Statement would

have expired by the time FK Shkupi filed its appeal, since the Determination Statement was notified to FK Shkupi on 31 July 2023.

77. In this regard, the Sole Arbitrator is of the view that the Determination Statement and the Allocation Statement constitute two distinct decisions. The reference number of both decisions is different ("EPP 18779" and "TC 1454"), their contents is different, and both decisions contain a sperate notice of legal remedies. In the Determination Statement at para. 19, it is stated that *"this decision may be appealed before the Court of Arbitration for Sport within 21 days of notification"* (emphasis added). Similarly, para. 12 of the Allocation Statement states that *"this decision may be appealed before the Court of Arbitration for Sport within 21 days of notification"* (emphasis added). If, however, both decisions contain separate notices of legal remedies, both decisions must be separately appealable.

78. The above stands somehow in contrast to the provisions in the FCHR. Article 10.5 of the FCHR reads as follows:

"The FIFA general secretariat will notify the final EPP and the Allocation Statement to all parties in 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 …

d) A valid and timely appeal to CAS shall suspend the legal effects of an EPP and of the corresponding Allocation Statement for the duration of the respective proceedings before the CAS" (emphasis added).

79. Thus, when reading the FCHR it appears – contrary to what is expressed in the notice of legal remedies – that the time limit for appealing the decisions (i.e. the 21 days) does not start with the notification of the decision in question, but only starts running once *both* decisions (i.e. the Determination Statement and the Allocation Statement) have been notified to the addressee. This contradiction between the contents of the Determination Statement / Allocation Statement and the applicable rules cannot go to the detriment of FK Shkupi. The latter relied on the wording of Article 10.5 of the FCHR and must therefore be protected in this trust. Consequently, the Sole Arbitrator finds that since FK Shkupi received the second decision only on 2 August 2023, the deadline for appealing both the Determination Statement and the Allocation Statement only expired on 23 August 2023. It follows form the above that the Statement of Appeal against both decisions was filed within the applicable deadline.

VII. OTHER PROCEDURAL ISSUES

80. FC Aarau and FC Baden (apart from the letter sent on 27 October 2023) did not participate in these proceedings. More particularly, they did not file an Answer neither in procedure CAS 2023/A/9940 nor in procedure CAS 2023/A/9941. However, in accordance with Article R55 para. 2 of the Code, this does not prevent the Sole Arbitrator to proceed with the arbitration and to issue an award.

VIII. Applicable Law

81. Article R58 of the 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".

82. Article 56 para. 2 of the FIFA Statutes states 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".

83. Accordingly, the applicable regulations in the present case are the various regulations of FIFA, including the FCHR, and subsidiarily, Swiss law.

IX. MANDATE OF THE SOLE ARBITRATOR

84. According to Article R57 para. 1 of the Code, the Sole Arbitrator has full power to review the facts and the law of the case. Furthermore, the Sole Arbitrator may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.

A. The Position of the Parties

85. The Sole Arbitrator recalls that the Parties are in dispute whether the Waiver can be submitted as evidence before the CAS in these proceedings. FIFA submits that the power of the CAS is limited to the issues before the previous instance. It is not admissible – according to FIFA – to reintroduce a waiver before the CAS that has not been uploaded in TMS in the EPP process. FIFA submits that the Sole Arbitrator is thus limited to reviewing whether the Appealed Decisions were correct. FK Shkupi, on the contrary, submits that the Sole Arbitrator shall set aside the Appealed Decisions based on the Waiver.

B. The Finding of the Sole Arbitrator

86. The Sole Arbitrator is mindful of the decision in the matter CAS 2018/A/5808 where the CAS panel at para. 130 et seq. found as follows:

"The present procedure is an appeal arbitration procedure. Thus, this Panel must examine whether or not the Decision is factually and legally correct. Whether the Decision is factually correct or not may depend also on the relevant reference date. The Parties disagree on the latter. The Respondent submitted that the legality of the Decision must be assessed on the basis of the facts and information available at the time when the decision in question was taken. The Respondent figuratively spoke of a 'photo finish' that cannot be called into question at the later stage. The Appellant, on the contrary, submitted that the decisive reference date for assessing the correctness of a decision is the date of the CAS hearing. The Appellant submitted that assessing the financial situation of a club is an 'ongoing process' and that it would be 'wrong to ignore today's reality'.

Article R57 of the Code provides for a de novo hearing. Such concept implies – in principle – that also new evidence may be taken into account that was not presented or available before the first instance. Thus, in principle, the correct reference to judge the correctness of the Decision is the date of the CAS hearing. However, there are exceptions to this rule. Article R57(3) of the CAS Code e.g. provides that evidence may be

excluded in the CAS procedure if such evidence was available before the first instance and the Appellant did not act diligently or acted in bad faith. The Respondent does not avail itself of this exception in the present case.

The Panel is aware that the above concept of a de novo hearing results somehow in a moving target and that the insecurity that comes with it may be troubling in a situation where under tight time restraints a federation must decide whether or not to admit a club to a certain competition and where such decision not only affects the direct addressee, but also other competitors. The Panel notes that access to justice may be restricted (by freezing the relevant reference date) for just cause, i.e. in the interest of good administration of justice. Whether to do so or not is, in principle, in the autonomy of the relevant federation. The Panel notes that the Procedural Rules do not provide for a specific reference date in order to assess the correctness of a decision. Instead, the Procedural Rules provide that – once a case is referred to the CFCB Adjudicatory Chamber – the latter may hold a hearing (Article 21 Procedural Rules) and hear evidence (Article 23 of the Procedural Rules) that was not before the CFCB Investigatory Chamber. Thus, the Procedural Rules provide that the decision to be taken by the Adjudicatory Chamber may be based on an evidentiary bases different from the one of the CFCB Investigatory Chamber. The same principle applies – absent any rules to the contrary – in relation between the CAS and the CFCB Adjudicatory Chamber".

87. The Sole Arbitrator adheres to the above. Consequently, evidence that was not presented or available before the first instance may be taken into account by the CAS unless the applicable rules and regulations dictate otherwise or unless Article R57 para. 3 of the Code applies.

i. The Applicable Regulations do not deviate from Article R57 of the Code

88. The applicable regulations in the case at hand neither explicitly nor implicitly deviate from the *de novo* principle in Article R57 para. 1 of the Code. More particularly, Article 10 para. 3 of the Procedural Rules cannot be construed in such a way. The provision reads as follow:

"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 are binding on the party that provided them".

89. First, the scope of the Procedural Rules is limited. According to Article 1 para. 1 of the Procedural Rules, the scope of the provisions only governs the *"213rganization, composition and functions of the Football Tribunal"*. Thus, the Procedural Rules do not deal with proceedings before the CAS. Furthermore, Article 10 para. 3 of the Procedural Rules only refers to "procedural disadvantages" that arise from failing to properly reviewing the TMS. The provision, however, does not state that the mandate of the appeal instance, i.e. the CAS, is limited when reviewing the decision under appeal.

90. Also, Article 10.5 of the FCHR does not appear to deviate from the *de novo* principle. The Sole Arbitrator recalls that this provision reads as follows:

"The FIFA general secretariat will notify the final EPP and the Allocation Statement to all parties in 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)".

91. The provision does neither restrict nor provide an exception to the *de novo* principle normally applicable before the CAS. The same is true when looking at Article 18 of the FCHR, which reads – in its pertinent parts – as follows:

"(1) 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. …

(3) Any party that fails to provide accurate and up-to-date information as required under these Regulations may be subject to disciplinary proceedings pursuant to the FIFA Disciplinary Code".

92. Nothing different follows from Article 10.7 of the FCHR. The provision requires that *"*[w]*here 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"*. The provision does not deal with the proceedings before the CAS and does not state that a waiver to a claim to training compensation can only be considered by the CAS if it was previously uploaded to TMS.

93. The Sole Arbitrator notes and endorses the purpose of FIFA's FCH and the rules applicable to it, i.e. to ensure the good functioning of the transfer system and to enhance transparency. The Sole Arbitrator is also aware of the administrative challenges for implementing a system that deals with many thousand EPP per year. However, it does not follow from the purpose and the good administration of the EPP that the *de novo* principle before the CAS must be suspended.

94. In the light of the above, the Sole Arbitrator finds that there is no provision or principle enshrined in the FIFA regulations that demands an exception from the *de novo* principle in the case at hand.

ii. The exception in Article R57 para. 3 of the Code

95. Article R57 para. 3 of the Code provides – in its relevant parts – as follows:

"The Panel has 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".

96. It follows from the above, that the question whether to admit evidence on file that was available already before the previous instance is within the discretion of the Sole Arbitrator. Furthermore, the Sole Arbitrator is mindful of the fact that CAS panels in the past have been reluctant to make use of this provision and have confined its application to cases of abuse. This is evidenced – e.g. – in the decision in the matter CAS 2020/A/6753 at para. 95, where the sole arbitrator found as follows:

"As such, R57(3) is discretionary and allows for the exclusion of certain evidence to prevent abuse. While the Panel may exclude certain evidence if its nature is such that it would be inappropriate to admit it, it may do so.

In the instant case, the Sole Arbitrator finds that while at least some of the evidence referred to by the Appellant could have, and perhaps

should have been produced before the FIFA DRC proceedings, fairness is nevertheless better served by admitting it and giving it appropriate weight.

The Respondents' request to exclude the specified exhibits to the Appeal Brief is therefore dismissed".

97. The Sole Arbitrator follows the above restrictive approach. It is beyond dispute that FK Shkupi acted negligently by not uploading the information pertaining to the Waiver even though being invited to do so on numerous occasions by FIFA. Despite of this, the Sole Arbitrator is of the view that – absent a case of abuse – justice is better served by admitting the evidence that was already available at the time when the Appealed Decisions were issued.

X. MERITS

98. The Sole Arbitrator accepts that FIFA acted factually and legally correct when issuing the Appealed Decisions. It was entitled according to the applicable rules to issue the Appealed Decisions and the latter were factually and legally correct based on the evidence before FIFA.

99. However, as previously explained, the decisive reference date for the Sole Arbitrator's assessment of the case at hand is the date when the Parties were advised that the Sole Arbitrator deems himself sufficiently informed and decided to issue an award based on the Parties' written submissions. The evidence before the Sole Arbitrator at such reference date is that there was a waiver of the claim for training compensation by FC Aarau and FC Baden. There is nothing on file that could indicate that such a waiver may be invalid. It is undisputed that such waiver is possible under the applicable rules. Furthermore, FIFA has not contested the authenticity of the documents submitted. Finally, there is no evidence on file that FK Shkupi tried to circumvent the FCHR.

XI. SUMMARY

100. In view of all of the above, the appeal must be upheld and, consequently, the Appealed Decisions must be set aside.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeals filed on 22 August 2023 by FK Shkupi against the FIFA Determination on the Electronic Player Passport 18779 for the Player Stefan Mitrev dated 31 July 2023 and the FIFA Allocation Statement TC-1454 corresponding to the Electronic Player Passport 18779 for the player Stefan Mitrev dated 2 August 2023 are upheld.

2. The FIFA Determination on the Electronic Player Passport 18779 for the Player Stefan Mitrev dated 31 July 2023 and the FIFA Allocation Statement TC-1454 corresponding to the Electronic Player Passport 18779 for the player Stefan Mitrev dated 2 August 2023 are set aside.

3. (…).

4. (…).

5. All other and further motions or prayers for relief are dismissed.

CAS 2023/A/10093
Russian Olympic Committee (ROC) v. International Olympic Committee (IOC)
23 February 2024

Panel: Lord John Dyson (United Kingdom), President; Mr David Wu (China); Prof. Luigi Fumagalli (Italy)

Olympic Movement
Suspension of a NOC for violation of the Olympic Charter
Autonomy of the IOC to adopt rules defining the territorial jurisdiction of a NOC
Private law vs public international law applicable to solve disputes between NOCs
Definition of a "country" and of its "limits"
Concept of "international community"
Previous practice as source of law
Principle of equality
Duty of political neutrality

1. **The IOC is an autonomous private association which under Swiss law can regulate and determine its own affairs. Based on the autonomy of association under Swiss civil law, the IOC is free to adopt rules defining the territorial jurisdiction of a NOC that it recognises.**

2. **What is a *"country"* and what constitutes its *"limits"* are to be determined as a matter of private law in accordance with the Olympic Charter (OC). It cannot have been intended by those who drafted the OC that any dispute between NOCs which concerns their *"area of jurisdiction"* can only be resolved at the level of public international law and is not amenable to determination by the IOC under Rule 59 OC or, in the event of a dispute, by the CAS.**

3. **Rule 30.1 OC defines "country" wherever the expression appears in the OC as meaning *"an independent state recognised by the international community"*. When read in conjunction with Rule 30.1 OC, the meaning of Rule 28.5 OC is clear and there is no need to have recourse to the *contra proferentem* principle. It means that an NOC can only exercise territorial jurisdiction within the limits of the boundary of an independent State recognised by the international community. Over the years, the IOC has consistently relied on the position of the international community to determine the jurisdiction of a NOC.**

4. **The concept of the international community is not vague or uncertain. In most cases, it will be clear whether an independent State is recognised by the international community. Where a dispute arises as to this, it can be resolved in accordance with the dispute resolution procedure provided by Rule 61 OC.**

5. **As a matter of Swiss law, for previous practice to constitute a source of law within an association, it must reach a level of *"Observanz"*.**

6. **According to the principle of equality, similar cases must be treated similarly, but dissimilar cases could be treated differently.**

7. **The 5th Fundamental Principle of Olympism mandates political neutrality among sports organisations within the Olympic Movement. This means that the IOC is obliged to ensure that each NOC**

applies political neutrality and complies with the OC. This includes preventing any NOC from interfering with the territorial jurisdiction of another NOC. That is achieved by ensuring compliance with Rule 28.5 OC read together with Rule 30.1 OC, if necessary, by imposing sanctions in accordance with Rule 59 OC in the event of a violation.

I. THE PARTIES

1. The Appellant is the Russian Olympic Committee ("ROC"), the National Olympic Committee ("NOC") representing Russia within the Olympic Movement. It is recognised by the International Olympic Committee ("IOC").

2. The Respondent is the IOC, a non-profit organisation under Swiss law. It governs the global Olympic Movement and organises all aspects of the Olympic Games.

3. The ROC and the IOC will hereinafter be referred collectively as "the Parties".

II. FACTUAL BACKGROUNDS

4. Set out below is a summary of the relevant facts based on the Parties' written submissions, pleadings and evidence in these proceedings and from matters of public knowledge. While the Panel has considered all matters put forward by the Parties, reference is made in this Award only to those matters necessary to explain the Panel's reasoning and its decision.

5. On 21 February 2022, the Russian State officially recognised the independence of the "Donetsk People Republic" and of the "Lugansk People Republic". On 30 September 2022, Russia proclaimed the incorporation of four regions from the southeast of Ukraine (Donetsk, Kherson, Lugansk and Zaporozhye). These four regions will be referred to as "the Regions".

6. With the exception of North Korea and Syria, the international community has not formally recognised Russia's annexation of the Regions. On the contrary, there has been international condemnation of Russia's annexation.

7. On 12 October 2022, the United Nations General Assembly issued Resolution ES-11/4 – *Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations*. 143 Member States approved the resolution, with only 5 (including Russia, Syria, North Korea, Belarus and Nicaragua) voting against and 35 abstaining. In particular, the UN General Assembly reaffirmed *"its commitment to the sovereignty, independence, unity and territorial integrity of Ukraine within its internationally recognized borders"* (point 1); condemned *"the attempted illegal annexation of the Donetsk, Kherson, Luhansk and Zaporizhzhia regions of Ukraine"* (point 2); declared that *"the subsequent attempted illegal annexation of these regions have no validity under international law and do not form the basis for any alteration of the status of these regions of Ukraine"* (point 3); and called *"upon all States, international organizations and United Nations specialized agencies not to recognize any alteration by the Russian Federation of the status of any or all of the Donetsk, Kherson, Luhansk or Zaporizhzhia regions or Ukraine"* (point 4).

8. On 30 September 2022, a resolution of the United Nations Security Council, declaring that referenda held in

September 2022 in parts of the Regions were neither valid nor formed the basis for any alteration of the status of the Regions, could not be adopted simply because it was vetoed by Russia itself.

9. On 21 October 2022, the European Council of the European Union adopted conclusions condemning and firmly rejecting the *"illegal annexation by Russian of Ukraine's Donetsk, Luhansk, Zaporizhzhia and Kherson regions"*, stating that *"the European Union will never recognise this illegal annexation"*.

10. On 30 September 2022, the members of the Council of Europe, of which Russia was still a member until March 2022, condemned the *"illegal annexation by Russia of Ukraine's Donetsk, Luhansk, Zaporizhzhia and Kherson regions"* stating that *"Crimea, Kherson, Zaporizhzhia, Donetsk and Luhansk are Ukraine"* and calling on *"all States and international organisations to unequivocally reject this illegal annexation"*.

11. On 11 October 2022, the members of the Group of Seven ("G7") condemned and rejected the *"illegal attempted annexation by Russia of Ukraine's Donetsk, Luhansk, Zaporizhzhya and Kherson regions"* and reiterated that they will never recognise this annexation.

12. On 30 September 2022, Switzerland – the country in which the IOC has its seat and the laws of which govern the IOC – has also officially condemned what it described as a *"serious violation of Ukraine's territorial integrity and sovereignty"* and confirmed that Switzerland *"does not recognise the incorporation of the Ukrainian territories into the Russian Federation"*.

13. On 4 September 2023, a new Russian legal entity entitled "Regional Public Organisation Olympic Council of the Kherson Region" was constituted and entered in the Russian register of legal entities.

14. On 22 September 2023, a new Russian legal entity entitled "Regional Public Organisation Olympic Council of the Lugansk People's Republic" was constituted and entered in the Russian register of legal entities.

15. On 26 September 2023, a new Russian legal entity entitled "Regional Public Organisation Olympic Council of the Zaporozhye Region" was constituted and entered in the Russian register of legal entities.

16. On 5 October 2023, a new Russian legal entity entitled "Regional Public Organisation Olympic Council of the Donetsk People's Republic" was constituted and entered in the Russian register of legal entities.

17. Each "Regional Public Organisation" sent a letter to the ROC in order to request their affiliation as a member of the ROC.

18. On 5 October 2023, the ROC Executive Board decided to accept these requests, and it recognised, as its members, the Regional Sports Organisations representing the Regions.

19. On 7 October 2023, the IOC sent a letter to the ROC saying that it had been informed of the recent admission by the ROC of Regional Sports Organisations from Ukraine territories. The letter continued [emphasis in the original]:

"This may constitute a violation of the jurisdiction of the National Olympic Committee of Ukraine, which is protected by the Olympic Charter. As you know, the territorial integrity of each NOC must be fully respected, in accordance with the Olympic Charter, in particular Rules 28.5 and 30.1. In view of the above, we offer your NOC the opportunity to be heard and to provide us with an official written explanation ***by Tuesday 10 October 2023 at 2 pm (Swiss time) at the latest****, so that this matter can be discussed at the IOC Executive Board meeting next week Mumbai".*

20. On 10 October 2023, the ROC replied to this letter saying:

"Please be assured of the willingness by the ROC to comply, to the fullest possible extent, with the Olympic Charter and all our obligations toward the Olympic movement, including a globally challenging situation like this. … the ROC does not intend to 'expand' its scope of jurisdiction outside the borders of the Russian Federation, but simply followed a Statutory provision and accepted applications from non-governmental and non-commercial organisation associated in territories listed – in compliance with article 76 of the Russian Constitution – as constituent elements (subjects) of the Russian Federation".

21. The ROC's reply then proceeded to make a number of points which it has repeated on this appeal and which are discussed later in this Award. In summary, it stated that it was not exercising jurisdiction outside the limits of the Russian Federation, as defined by the Russian Constitution.

22. On 12 October 2023, the Executive Board of the IOC issued the decision which lies at the heart of this appeal (the "Decision") as follows:

"The unilateral decision taken by the Russian Olympic Committee on 5 October 2023 to include, as its members, the regional sports organisations which are under the authority of the National Olympic Committee (NOC) of Ukraine (namely Donetsk, Kherson, Luhansk and Zaporizhzhia) constitutes a breach of the Olympic Charter because it violates the territorial integrity of the NOC of Ukraine, as recognised by the International Olympic Committee (IOC) in accordance with the Olympic Charter.

In view of the above, the IOC Executive Board (EB) today decided that:

1. *The Russian Olympic committee is suspended with immediate effect until further notice.*

2. *The suspension has the following consequences:*

   a. *The Russian Olympic Committee is no longer entitled to operate AS A National Olympic Committee, as defined in the Olympic Charter, and cannot receive any funding from the Olympic Movement.*

   b. *As stated in the IOC's position and recommendations of 28 March 2023, which remain fully in place, the IOC reserves the right to decide about the participation of individual neutral athletes with a Russian passport in the Olympic Games Paris 2024 and the Olympic Winter Games Milano Cortina 2026 at the appropriate time.*

The IOC EB also reserves the right to take any further decision or measure depending on the development of this situation".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

23. On 31 October 2023, the ROC filed a Statement of Appeal with the Court of Arbitration for Sport in accordance with Article R47 of the Code of Sports-related Arbitration (the "CAS Code") to challenge the Decision. In the Statement of Appeal the Appellant nominated Mr David W. Wu, Attorney-at-Law in Shanghai, P.R. of China, as an arbitrator.

24. On 2 November 2023, the CAS Court Office forwarded the Statement of Appeal to the Respondent, and requested it, *inter alia*, the nominate an arbitrator.

25. On 10 November 2023, the Respondent informed the CAS Court Office that it proposed that the arbitration be conducted on an expedited basis, pursuant to Article R52 of the CAS Code, and nominated Professor Fumagalli, Attorney-at-Law in Milan, Italy, as an arbitrator.

26. On 23 November 29023 the CAS Court Office was informed that the Parties had failed to agree on a procedural calendar and therefore that the procedure would not be expedited.

27. On 27 November 2023, the Appellant filed its Appeal Brief pursuant to Article R51 of the CAS Code.

28. On 5 December 2023, in accordance with Article R54 of the CAS 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 decide the present matter was constituted as follows:

President: The Rt. Hon Lord John A. Dyson, Arbitrator, 39 Essex Chambers, London, United Kingdom

Arbitrators: Mr David W. Wu, Attorney-at-Law in Shanghai, P.R. of China

Prof. Luigi Fumagalli, Attorney-at-Law in Milan, Italy.

29. On 28 December 2023, the CAS Court Office informed the Parties that the hearing would be held on 26 January 2024 by video-conference.

30. On 15 January 2024, the Respondent filed its Answer with the CAS Court Office.

31. On 16 January 2024, the CAS Court Office communicated to the Parties the Order of Procedure issued on behalf of the President of the Panel, which was signed by the Appellant on 19 January 2024 and by the Respondent on 22 January 2024.

32. On 16 January 2024, a hearing was held in the present matter by videoconference. In addition to the Panel and Mr Giovanni Maria Fares, CAS counsel, the following persons attended the hearing virtually:

For the Appellant: Mr X. […], counsel, Mr Victor Berezov, Deputy Secretary General and Professor Yves Nouvel, expert, assisted by Ms Gaëlle Le Gall, interpreter.

For the Respondent: Mr Antonio Rigozzi and Mr Patrick Pithon, counsel.

33. At the hearing, the Parties submitted by counsel their pleadings, answered questions asked by the Panel and

pursued their claims for the relief they respectively sought. Professor Yves Nouvel, an expert called by the Appellant, also gave evidence.

34. At the conclusion of the hearing, the Parties confirmed that they had no objections in respect of the composition of the Panel and their right to be heard and to be treated equally in the arbitration proceedings.

IV. SUBMISSIONS OF THE PARTIES

35. The following is a bare outline of the parties' submissions. The Panel sets out and discusses the Parties' submissions in more detail in Section VIII of this Award.

A. The Appellant's Submissions

36. ROC's case is that the Decision was unlawful and should be set aside for four reasons. These are that it violated (i) the Principle of Legality, (ii) the Principle of Equality, (iii) the Principle of Predictability, and (iv) the Principle of Proportionality. There is a degree of overlap between these reasons. The central submission of the ROC is that its decision to include the Regional Sports Organisations of the Regions as its members was not a violation of the OC and that the IOC acted unlawfully in holding that it was. The ROC also submits that the Decision was unlawful because the IOC's treatment of the ROC differed unjustifiably from its treatment of other NOCs in similar circumstances and that this difference of treatment amounted to a violation of the Principles of Equality and Predictability. In particular, it contrasts the way in which the IOC treated the ROC over the annexation of the Regions with its treatment of the ROC following Russia's annexation of Crimea and Sevastopol in 2016. Finally, the ROC submits that the sanction imposed for its alleged violation of the OC violated the Principle of Proportionality.

B. The Respondent's Submissions

37. The Respondent disputes the submission that the Decision was unlawful for any of the reasons advanced by the ROC. In particular, in relation to the first reason it submits that the ROC's decision to include the Regional Sports Organisations of the Regions as its members was a violation of Rule 28.5 when read with Rule 30.1 of the OC. As regards the second and third reasons, it submits that the differences in treatment of which the ROC complains cannot properly form the basis of a violation of the Principles of Equality and Predictability. As for the fourth reason, the IOC submits that the sanction imposed by the Decision was proportionate to the seriousness of the violation of the OC.

V. JURISDICTION OF CAS

38. 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 Player has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".

39. The IOC accepts CAS jurisdiction in the present arbitration.

VI. ADMISSIBILITY

40. 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. […]".*

41. 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. 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".*

42. The IOC does not dispute that the ROC's Statement of Appeal and Appeal Brief have been filed within the applicable time limits and that the ROC's appeal is thus admissible.

VII. APPLICABLE LAW

43. 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".*

44. It is agreed between the Parties that the present dispute is to be decided primarily according to the OC (in force from 8 August 2021) and, subsidiarily, by Swiss law.

VIII. MERITS OF THE APPEAL

45. By a Statement of Appeal dated 31 October 2023, the ROC appealed against the Decision and sought the following relief, confirmed in the Appeal Brief, namely that:

(i) The Appeal be upheld;

(ii) The Decision be set aside;

(iii) The ROC be reinstated as a National Olympic Committee recognised by the IOC benefitting from all rights and prerogatives granted by the Olympic Charter;

(iv) The IOC shall bear the arbitration costs, if any, and be ordered to reimburse the minimum court office fee of CHF 1,000 as well as any other advances of costs, if any paid by ROC;

(v) The IOC be ordered to pay ROC a contribution towards the legal

costs and other costs incurred in the framework in these proceedings in an amount to be decided by the Panel.

46. The Panel will examine in sequence the grounds relied on by the Appellant in support of its appeal, *i.e.*, the alleged violation of the principles of legality, equality, predictability and proportionality. Finally, the Panel will set out the consequences of its analysis.

A. Violation of the Principle of Legality

47. Before addressing the issues that have been raised in relation to this allegation, the Panel sets out the principal provisions of the OC that are relevant to it.

> *"27* ***Mission and role of the NOCs***
> *1. The mission of the NOCs is to develop, promote and protect the Olympic Movement in their respective countries, in accordance with the Olympic Charter.*
> *2. The NOC's role is*
> *2.1 to promote the fundamental principles and values of Olympism in their countries, in particular, in the fields of sport ….*
> *…*
> *3. The NOCs have the exclusive authority for the representation of their respective countries at the Olympic Games …*
> *4. The NOCs have the exclusive authority to select and designate the interested hosts which may apply to organise Olympic Games in their respective countries*
> *6. The NOCs must preserve their autonomy and resist all pressures of any kind, including but not limited to political, legal, religious or economic pressures which may prevent them from complying with the Olympic Charter.*
> *…*
> *9. Apart from the measures and sanctions provided in the case of infringement of the Olympic Charter, the IOC Executive Board may take any appropriate decisions for the protection of the Olympic Movement in the country of an NOC, including suspension of or withdrawal of recognition from such NOC if the constitution, law or other regulations in force in the country concerned, or any act by any governmental or other body causes the activity of the NOC or the making or expression of its will to be hampered. The IOC Executive Board shall offer such NOC an opportunity to be heard before any such decision is taken.*
>
> ***28 Composition of the NOCs …***
>
> ***5*** *The area of jurisdiction of an NOC must coincide with the limits of the country in which it is established and has its headquarters.*
>
> *30* ***Country and name of an NOC***
>
> *1. In the Olympic Charter, the expression "country" means an independent State recognised by the international community.*
>
> *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 competition.*
>
> 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".

48. There are several strands to the ROC's case that the Decision violates the principle of legality.

(i) The mischaracterisation of the ROC decision of 5 October 2023

49. The first strand is that the Decision mischaracterised the ROC decision of 5 October 2023 as being a decision *"to include, as its members, the regional sports organisations which are under the authority of the* [*NOC*] *of Ukraine"*. The ROC submits that by its decision it *"simply recognised new entities – constituted as per Russian law – representing the four territories … that Russia considers as being part of its territory since September 2022"*.

50. It is not in dispute that the ROC admitted the sports organisations of the Regions as members of the ROC on 5 October 2023. The Panel considers that the Decision did not mischaracterise the ROC's decision. The reference to regional sports organisations *"under the authority of the [NOC] of Ukraine"* when read together with the statement that the ROC decision violated *"the territorial integrity of the NOC of Ukraine"* was clearly a reference to organisations within the territorial scope of the NOC of Ukraine. The ROC could have been in no doubt as to the decision that the Decision was impugning. If, contrary to the Panel's opinion, the ROC decision was misdescribed, the misdescription was immaterial and of no effect.

(ii) Matters of public international law

51. The second strand is that questions of determining the *"limits"* of a country or deciding whether its "territorial integrity" has been breached are typical matters of public international law that fall outside the authority of the IOC and of the CAS. In support of its position, ROC relies on the opinion dated 22 November 2023 produced by Professor Nouvel, who is an expert in public international law.

52. These principles are not in doubt and have not been contested by the IOC. The ROC says that, in the absence of specific provisions in the OC granting the IOC the authority to define the *"limits"* of a country in a manner that would depart from public international law principles, *"the IOC [and the CAS] have no choice but to apply international public law"*. The Panel finds it surprising that the ROC has made this statement because it is inconsistent with the ROC's primary position that the IOC and the CAS cannot determine matters of public international law.

53. But for the reasons given by IOC, the Panel considers that these agreed principles are not relevant in the present context. The issues in the present case are not whether, as a matter of international law, Russia's annexation of part of the Ukraine was lawful or where the lawful boundary lies between the two countries. These issues raise questions of sovereignty and politics and cannot and should not be resolved by IOC or CAS or national courts.

54. The IOC, however, is an autonomous private association which under Swiss law can regulate and determine its own affairs[7]. The ROC rightly accepts that, based on the autonomy of association

[7] Swiss Supreme Court decision ATF 97 II 108, dated 17 June 1971.

under Swiss civil law, the IOC is free to adopt rules defining the territorial jurisdiction of an NOC that it recognises. The question is whether it has done so. The IOC submits that it has done so by enacting Rules 28.5 and 30.1 of the OC.

55. The IOC is not subject to international law, but its activities are governed by the OC which is described in its Introduction as *"a basic instrument of a constitutional nature"*. The Introduction also states that the OC *"sets forth and recalls the Fundamental Principles and* essential *values of Olympism"*. It is, therefore, unsurprising that it defines what constitutes a *"country"*. The definition imports an international element, namely *"an independent State recognised by the international community"*. This definition is not meant to solve territorial disputes under international law. It is required solely for the purposes of applying the OC. The definition is required for a number of OC purposes, such as those set out in Rule 27.

56. Let us suppose that two NOCs seek to exercise jurisdiction over the same *"country"*. Which NOC has the role to perform the important functions described in Rule 27.1; which has *"the exclusive authority for the representation of their countries at the Olympic Games"* (Rule 27.3); and which has *"the exclusive authority to select and designate the interested hosts which may apply to organise Olympic Games in their respective countries"* (Rule 27.4)? The ROC's case is that any dispute between NOCs which concerns their *"area of jurisdiction"* can only be resolved at the level of public international law and is not amenable to determination by the IOC under Rule 59 of the OC or, in the event of a dispute, by the CAS. The Panel considers that this cannot have been intended by those who drafted the OC. In its opinion, there is no reason for interpreting the OC in this way. The *"limits"* of a *"country"* are to be determined as a matter of private law in accordance with the OC. The IOC is therefore required to reach a conclusion on this issue for the purposes of deciding whether to impose a sanction under Rule 59.

57. So what the IOC could lawfully do was to consider whether the acts of the ROC amounted to a violation of the OC and, in the event of finding a violation, to take the measures or sanctions set out in Rule 59.1. The Panel accepts the submission of the IOC that by the Decision it did not purport to decide whether the annexation of part of the Ukraine was lawful *as a matter of public international law* or where *according to public international law* the boundary between the two countries was to be drawn. That would have been beyond its competence. Instead, it purported to apply Rules 28.5 and 30.1 of the OC to determine the territorial jurisdiction of the ROC *under the OC*. That was made clear by the terms of IOC's letter dated 7 October 2023, viz: *"the territorial integrity of each NOC must be fully respected, in accordance with the Olympic Charter, in particular Rules 28.5 and 30.1"*.

(iii) Rules 28.5 and 30.1 of the OC

58. The third strand is that, if in principle IOC could have the authority to decide on the *"limits"* of jurisdiction of NOCs, the OC does not *clearly* confer that authority on IOC. The ROC submits that Rules 28.5 and 30.1 (the Rules relied on by IOC) do not have that effect. IOC submits to the contrary.

59. In more detail, the ROC submits that the language of the text of these rules is clear and they should be given their plain and literal meaning. Rule 30.1 addresses the situation of an NOC representing a territory that is not recognised by the international community in an independent State capacity, such as Gibraltar or Faroe Island. Gibraltar is not an independent State recognised by the international community. But the Russian Federation is a State recognised by Switzerland and the international community. Full and final recognition of the ROC as the legal successor of the Soviet Olympic Committee by the IOC was received in September 1993.

60. The ROC submits that the recognition of it as the representant of the Russian Federation has never been contested. Accordingly, it submits that Rule 30.1 addresses an issue which is not applicable in the present case.

61. The ROC also submits that Rule 28.5 simply means that an NOC cannot exercise jurisdiction outside a sovereign State of its own. Rule 28.5 does not refer to the limits of the country as recognised by the international community: it refers to the *"limits of the country in which it is established and has its headquarters"*. Any other interpretation would be contrary to the text of the rule. Even if the wording were unclear, it would have to be interpreted against the IOC on the basis of the *contra proferentem* principle.

62. For the reasons given by the IOC, the Panel rejects the ROC's interpretation of Rule 28.5 when read with Rule 30.1. Rule 28.5 defines the territorial jurisdiction of an NOC and provides that the geographical area of over which an NOC exercises jurisdiction must coincide with the geographical limits of the *"country"* in which it established and has its headquarters. Rule 30.1 defines *"country"* wherever the expression appears in the OC (*i.e.* including in Rule 28.5) as meaning *"an independent state recognised by the international community"*.

63. The Panel considers that the meaning of Rule 28.5 when read in conjunction with Rule 30.1 is clear and there is no need to have recourse to the *contra proferentem* principle. An NOC can only exercise territorial jurisdiction within the limits of the boundary of an independent State recognised by the international community.

64. It follows that, if the international community recognises the Regions as part of Ukraine, then the ROC's decision to admit sports organisations from those regions as members violated the territorial integrity of the Ukrainian NOC, as protected by Rule 28.5 and Rule 30.1.

65. The ROC submits that the concept of *"the international community"* is vague and insufficiently clear and certain to be enforceable and form the basis of sanctions in the event of an alleged violation of Rule 28.5. The Panel does not accept that the concept of the international community is vague or uncertain. In most cases, it will be clear whether an independent State is recognised by the international community. Where a dispute arises as to this, it can be resolved in accordance with the dispute resolution procedure provided by Rule 61.

66. The IOC relies on Resolution ES-11/4 of the UN General Assembly adopted

on 12 October 2023 as evidence of where the boundary lay between Russia and Ukraine *i.e.* that it lay where it was before the Russian annexation of the Regions. By this resolution, the General Assembly declared that:

"the referendums held in the Donetsk, Kherson, Luhansk and Zaporizhzhia oblasts which were conducted under disputed circumstances and unrecognized by the international community, as well as their subsequent annexation by Russia, are invalid and illegal under international law. It calls upon all states to not recognize these territories as part of Russia. Furthermore, it demands that Russia 'immediately, completely and unconditionally withdraw' from Ukraine as it is violating its territorial integrity and sovereignty".

67. This resolution was passed with a vote of 143 in favour, 5 against and 35 abstentions. Professor Nouvel says that resolutions of the UN General Assembly are not binding, and are no more than recommendations. The ROC submits that the UN General Assembly has no authority to rule on territorial disputes. It follows that neither the IOC nor CAS can under public international law principles rely on the resolution of 12 October 2023 to determine the boundaries between Russia and Ukraine with respect to the Regions.

68. The Panel accepts that the resolution cannot be relied on as a decision which as a matter of law determines were the boundary lay at the time of the Decision. But a resolution by an overwhelming majority of members of the UN General Assembly as to the location of the boundaries of an independent State is sufficient evidence of the recognition by the international community of the *"limits"* of that State within the meaning of Rule 28.5.

69. The Panel considers that Resolution ES-11/4 is overwhelming evidence that the international community did not recognise the boundaries that Russia sought to achieve by its annexation of the Regions, and that accordingly the international community recognised as an independent State a Ukraine which included Regions.

70. But this resolution does not stand alone. Reference can also be made to the fact that:

(i) The European Council of the EU condemned and rejected the *"illegal annexation by Russia of Ukraine's Donetsk, Luhansk, Zaporizhzhia and Kherson regions"* stating that *"the European Union will never recognise this illegal annexation"*;

(ii) The members of the CoE, of which Russia was a member until March 2022, condemned an *"illegal annexation by Russian"* and expressly stated that *"Crimea, Kherson, Zaporizhzhia, Donetsk and Luhansk are Ukraine"*; and

(iii) The members of the G7 condemned and rejected the *"illegal attempted annexation by Russia of Ukraine's Donetsk, Luhansk, Zaporizhzhya and Kherson regions"* stating that the principles enshrined in the UN Charter *"do not give Russia a legitimate basis to change Ukraine's borders"*.

(iv) Legal basis for the suspension of the NOCs

71. The ROC relies on the jurisprudence of

the CAS[8] that *"every sanction requires an express and valid rule providing that someone could be sanctioned for a specific offence; and an athlete or official, when reading the rules, must be able to clearly make the distinction between what is prohibited and what is not"*[9]. It contends that Rules 28.5 and 30 together with the provisions for measures and sanctions in Rule 59 of the OC do not satisfy the requirement of certainty and predictability.

72. Although the ROC relies on a violation of the principle of predictability as a ground of appeal that is distinct from a violation of the principle of legality, there is a considerable degree of overlap between the two allegations. It is convenient to deal with them both here.

73. The ROC submits that there is nothing in the OC that indicates that an NOC can be suspended if it accepts the inclusion of sports organisations which are incorporated in accordance with the law of the country of that NOC, but which belong to disputed territories.

(v) Crimea and Sevastopol

74. The ROC submits that the violation of the principle of legality is further emphasised or confirmed by the fact that in December 2016 the sports councils of Crimea and Sevastopol were included as members of the ROC, but the ROC is not aware that either the IOC or the NOC of Ukraine complained or objected to this inclusion, although a majority of the international community had not recognised and still has not recognised Crimea or Sevastopol as part of the Russian Federation.

75. The ROC submits that there was no justification for the IOC not to have suspended Russia for the annexation of Crimea and Sevastopol in 2016, but to have decided to suspend Russia for its annexation of the Regions in 2023. This unexplained difference in response to materially similar circumstances shows that the Decision did not respect the principle of legality and must be set aside for that reason.

76. In support of its case, the ROC relies on the fact that *"some media mention that the suspension of the ROC by the IOC 'appears to highlight rising frustration from the IOC and its President, Thomas Bach, who can ultimately decide to impose a blanket ban on all Russian athletes from Paris'"*.

77. The Panel can dispose of this last point shortly. The IOC rightly dismisses it as speculation and irrelevant. It is speculation because the Panel has seen no evidence to support it. It is irrelevant because the IOC's motives are of no consequence. The question is whether the Decision was lawful. In any event, the statements attributed to the media were wrong, because, by a decision of 8 December 2023, the IOC allowed Russian athletes to compete in the Paris Games under a number of conditions.

78. But to return to the main argument, the Panel does not accept that what the IOC did in relation to Crimea and Sevastopol in 2016 can be prayed in aid by the ROC in support its case on violation of the principle of legality. First, even if there was no material distinction between the Crimea/Sevastopol circumstances and the circumstances relating to the Decision, that would not avail the ROC.

[8] CAS 2014/A/3832 para 84.

[9] CAS 2007/A/1437.

As a matter of Swiss law, for previous practice to constitute a source of law within an association, it must reach a level of *"Observanz"*[10]. The ROC does not dispute this and does not contend that the IOC's previous applications of Rule 28.5 when read in conjunction with Rule 30.1 have passed this threshold in relation to Crimea and Sevastopol.

79. The IOC says that there is no analogy between the two cases in any event. In 2016, it was not informed of the ROC's admission of Crimea and Sevastopol as members and the Ukrainian NOC did not express any concerns at the time. There has been no challenge by the ROC to this statement and the Panel sees no reason not to accept it.

80. In any event, the IOC has never recognised Crimea or Sevastopol as part of the ROC's area of jurisdiction within the meaning of Rule 28.5. This is because the international community considers these territories to be part of Ukraine[11]. The IOC relies on the fact that (as it puts it) between 2016 and 2019 it confirmed to the International Tennis Federation ("ITF"), World Rugby and World Sailing among others that it did not recognise Crimea as part of Russia, but rather as part of Ukraine. There are various emails to consider.

81. In an exchange of emails dated 23 March 2016, the ITF asked the IOC whether it had a *"position"* on Crimea. The IOC responded that *"at international level there is a self-explanatory UN Resolution about the territorial integrity of Ukraine"* and referred to the resolution of 27 March 2014. It added that concerning the hosting sports events in Crimea, this was a matter for each International Federation to consider.

82. In an exchange of emails dated 16 and 25 September 2016, in response to World Rugby's question of whether the IOC had a *"position"* on sport in Crimea, the IOC said that the question of organising specific international sports events/promoting international sports activities in Crimea *"in this very sensitive context is, of course, a matter for each IF to consider and decide"*. It added that it strongly believed that the International Federation concerned should *"take into consideration the position of the international community/United Nations in relation to this territory"*. It continued that the International Federation should:

"consult and coordinate with the two National Federations concerned (UKR and RUS) to find a potential agreement before considering any international sports activities in the region and/or discuss the most appropriate solutions for the athletes and the sport concerned in the region".

83. In an exchange of emails dated 1 and 8 June 2017, the IOC responded to World Sailing on this *"very delicate matter"* by referring to the UN General Assembly Resolution of 27 March 2014 about the territorial integrity of Ukraine and said *"concerning the question of hosting sports events in Crimea in this very sensitive context, this is primarily a matter for each UIF to consider and decide together with their national federations concerned (UKR and RUS)"*.

84. The ROC makes the point that the IOC did not say that the annexation of

[10] HEINI/PORTMANN/SEEMANN, Grundriss des Vereinsrecht, Basel 2009, para 56.

[11] Resolution of the UN General Assembly 68/262, dated 27 March 2014

Crimea and Sevastopol was a violation of the OC which justified the imposing of a sanction under Rule 59. It says that the IOC took a neutral position and said that it was for each International Federation to decide what to do: that response was very different from the response to the annexation of the Regions that appeared in the Decision.

85. The Panel acknowledges that the responses differed, but does not accept that the differences cast doubt on the legality of the Decision. The IOC was not informed that the sports organisations of Crimea and Sevastopol had been admitted as members of the ROC (if indeed they had been admitted). That makes a crucial difference because if they had not been admitted as members of the ROC, there would be no basis for alleging a violation of Ukraine's area of jurisdiction within the meaning of Rule 28.5 when read with Rule 30 and no basis for the IOC to impose sanctions for violation of the OC. Similarly, as regards the other cases relied on by the ROC (World Rugby, World Sailing and International Tennis), there is no evidence that the IOC was informed that the relevant sports organisations had been admitted as members of the ROC.

86. The Panel, therefore, does not accept that the IOC's treatment of the ROC in other cases can properly form the basis of an allegations of unequal treatment. Even if that were wrong, the cases relied on by the ROC do not meet the level of *Observanz* required under Swiss law and referred to at paragraph 78 above.

(vi) Rule 27.9

87. The IOC relies on Rule 27.9 as an alternative legal basis for the Decision. Since the Panel considers that Rules 28.5 and 30.1 provide a good and sufficient legal basis for the Decision, it is not necessary to deal with the Rule 27.9 issue in detail. The rule provides:

"Apart from the measures and sanctions provided in the case of infringement of the Olympic Charter, the IOC Executive Board may take any appropriate decisions for the protection of the Olympic Movement in the country of an NOC, including suspension of or withdrawal of recognition from such NOC if the constitution, law or other regulations in force in the country concerned, or any act by any governmental or other body causes the activity of the NOC or the making or expression of its will to be hampered. The IOC Executive Board shall offer such NOC an opportunity to be heard before any such decision is taken".

88. The IOC submits that Rule 27.9 was a lawful basis for the Decision because *"the constitution, law or other regulations in force"* in Russia caused the activity of the ROC to be *"hampered"*. In support of its submission, the IOC relies on the letter dated 10 October 2023 from the ROC to the IOC the relevant part of which is set out at paragraph 20 above.

89. The ROC responds by relying on what it said in its letter and additionally says that (i) Rule 27.9 has been *"mainly"* used in relation to Government interference *"through the national sports law or to address internal governance issues within the NOCs"*; and (ii) the present dispute is different: the Russian Government is not trying to interfere in the sports area through the law and the IOC has never mentioned any internal governance issues within the ROC.

90. The Panel notes that the ROC concedes that the scope of Rule 27.9 is not limited

to what it has been *"mainly"* used for. The language of Rule 27.9 would not justify such a limited interpretation. It is clear from its letter of 10 October 2023 that the ROC considered that it was obliged by Article 65 of the Russian Constitution to accept the sports organisations of the Regions as members of the ROC. In the opinion of the Panel, the effect of that obligation was to *hamper* the ROC's activity within the meaning of Rule 27.9 and permit the IOC Executive Board to suspend the ROC.

91. There remains that question of whether the IOC did in fact exercise the Rule 27.9 power. The text of the operative part of the Decision makes no reference to Rule 27.9. The substance of the text referring to a violation of the territorial integrity of the NOC of Ukraine was clearly a reference to a violation of Rule 28.5 when read in conjunction with Rule 30.1. Further support for this is to be found in the IOC's letter to the ROC dated 7 October 2023, which said of the ROC's admission of regional sports organisations from Ukrainian territories that this may constitute a violation of the jurisdiction of the NOC of Ukraine, which *"must be fully respected in accordance with the OC in particular Rules 28.5 and 30.1"*.

92. It is true that the IOC's Decision Proposal dated 12-13 October 2023 includes a reference to Rule 27.9 in the *"Statement of Reasons"*, but the Panel considers that this does not mean that the Decision itself was made under Rule 27.9. The principle of legality requires that, when imposing a sanction, the IOC should clearly identify the legal basis for the decision. The importance of this can be demonstrated by the language of Rule 27.9 itself, which requires the IOC Executive Board to offer the NOC an opportunity to be heard before any decision is taken. The Panel considers that this means that the NOC must be informed of the legal and factual basis for the proposed decision. A clear distinction is drawn in the text of Rule 27.9 between (i) an infringement of the OC and (ii) circumstances which cause the activity of the NOC or the making or expression of its will to be hampered. An NOC cannot avail itself of the opportunity to be heard unless it knows whether it is to respond to (i) or (ii).

93. If it had been necessary to decide the point, the Panel would have held that the IOC could have based the Decision on Rule 27.9, but instead chose to base it on Rules 28.5 and 30.1. In these circumstances, it cannot (but does not need to) rely on Rule 27.9.

(vii) Conclusion

94. In conclusion, the Panel finds that the IOC, by adopting the Decision, did not breach the principle of legality.

B. Violation of the Principle of Equality

95. The ROC's case is as follows. The CAS has regularly ruled that the principle of equality shall apply in sports law. According to CAS jurisprudence, *"similar cases must be treated similarly, but dissimilar cases could be treated differently"*[12]. The same is true, and widely recognised under Swiss law.

96. The ROC submits that an historical analysis shows that the IOC has never

[12] CAS 2020/A/6745 §90; CAS 2012/A/2750 §133.

reacted in these cases as it did with respect to the ROC in the instant case, which demonstrates that it did not have any legal basis to suspend an NOC for such reasons. Indeed, in the following cases, the IOC has never suspended an NOC because of a disputed territorial boundary. The Panel has already dealt with the ROC's submissions in relation to Crimea and Sevastopol.

97. The dispute over the territory of Kashmir between India, Pakistan and then China, began in 1947 and has not been settled since. In this context, Art. II of the Constitution of the Pakistan Olympic Committee explains that the jurisdiction of the Pakistan Olympic Committee extends to Pakistan, the acceding States and the Territories under the control of Pakistan. This Constitution had to be approved by the IOC Executive Board according to the OC. The Bye-law to Rules 27 and 28 requires the approval of an applicant's statutes by the IOC Executive Board, which is a condition for the recognition of the NOC.

98. The Turkish invasion of Cyprus began on 20 July 1974 and progressed in two phases over the following months. This invasion lasted 4 weeks and 1 day and the result was that Turkey occupies 36.2% of Cyprus. However, as far the ROC knows, the IOC did not suspend Turkey's NOC in response to this invasion.

99. Armenia and Azerbaijan have an unresolved 27-year-long conflict over the territory of Nagorno Karabakh. Fierce tension has indeed existed between those two countries ever since they received independence in 1991 following the break-up of the Soviet Union over ownership of Nagorno-Karabakh, a region in the South Caucasus which lies within Azerbaijan's internationally recognised borders. In this case to the best of the ROC's knowledge, the IOC has never reacted and has never suspended any of the NOCs of those countries.

100. In the long-lasting Israeli-Palestinian conflict, the IOC did not suspend any NOC. On the contrary, the IOC expressly underlined its dedication to the principle of individual responsibility, stressing that athletes should not be held accountable for the actions of their respective governments. Nevertheless, in September 2022, on the occasion of a visit by Thomas Bach in Palestine, the President of the Palestine Olympic Committee expressly *"called on the IOC to stop any Israeli sports activities on the internationally recognized Palestinian territories as per the Olympic Charter as the term of reference in both the regional and international sport context"*. The ROC says that it is not aware of any reaction by the IOC, or the imposition of any sanction or measures against the Israeli NOC.

101. According to the ROC, this is in contrast to the IOC's suspension of the ROC in the instant case, which amounts to sanctioning the ROC and Russian athletes as a result of a territorial dispute and/or the decision by the Russian Federation to consider as being part of its own territory several regions, which are not recognised as such by the majority of countries forming the General Assembly of the United Nations.

102. The ROC submits that these examples show that:

(i) In situations very similar to that in the present case, the IOC has never reacted by suspending an NOC;

(ii) The current suspension of the ROC is contrary to the principle of equality as between the NOCs;

(iii) The IOC has always refrained from deciding on a territorial dispute and/or referring to concepts of international public law such as *"territorial integrity"* when referring to the area of jurisdiction of NOCs.

(iv) The IOC acknowledged that the jurisdiction of an NOC can depend on the territories *de facto* occupied by a country, as for example the part of Kashmir occupied by Pakistan or the territories occupied by Israel. It therefore cannot now argue that this jurisdiction depends on the limits recognised by the international community.

103. In summary, the IOC may not lawfully apply double standards. Either it suspends all NOCs which recognise as their members entities by extending their jurisdiction *"over territories, that are considered by the countries of such NOCs as being an integral part of their* territories*, but which are considered by other countries as being illicit occupation, or the IOC considers (rightly) that such territorial disputes are outside the scope of its jurisdiction, and it applies the same standards to all concerned NOCs, by not issuing any sanction"*.

104. The IOC submits that the situations referred to by the ROC in its Appeal Brief differ significantly from the present case. Notwithstanding the foregoing, in each of these situations, the IOC has consistently relied on the borders recognised by the international community to determine the jurisdiction of the relevant NOC.

105. The ROC's references to the conflicts over the territory of Kashmir, the conflicts over the territory of Nagorno Karabakh and the conflicts in Palestine are misplaced as these situations differ significantly from the present case. In contrast to the present case, the relevant NOCs did not extend their area of jurisdiction over that of another NOC or outside their own area of jurisdiction. As a result, the IOC had no grounds to impose sanctions on these NOCs. If issues arose, the IOC would simply defer to the position of the international community, as provided for in Rules 28.5 and 30.1 OC.

106. Similarly, the IOC submits that the ROC's further reference to the Turkish Cypriot occupation of Northern Cyprus is misguided. In this particular case, the IOC also followed the position of the international community, as provided for in Rule 30.1 OC, to ascertain the territorial jurisdiction of the Cyprus NOC. The IOC explicitly confirmed in writing to the Cyprus NOC that its jurisdiction covers the entire island, in accordance with the position of the international community. Importantly, the IOC formally confirmed that it had never recognised any NOC for "Northern Cyprus" and that the Turkish NOC had never claimed to include this territory under its area of jurisdiction. This situation differs significantly from the present case and is therefore irrelevant, except to emphasise that the IOC consistently relies on the position

of the international community to define the area of jurisdiction of an NOC.

107. By the same token, on 28 September 2013, ahead of the Olympic Winter Games of Sochi 2014, the IOC formally clarified to the Georgian NOC that the IOC does not recognise an NOC for either Abkhazia or South Ossetia. The IOC confirmed that the Georgian NOC has jurisdiction over the entire territory of Georgia as recognised by the United Nations and the international community. Therefore, over the years, the IOC has consistently relied on the position of the international community to determine the jurisdiction of a NOC.

108. With particular reference to the Israel/Palestine conflict, there is no evidence that the NOC of Israel has been recognising Palestinian sporting organisations as its members or violating Rule 28.5 when read together with 30.1. Accordingly, there is no inconsistency between the IOC's stance as regards NOCs in relation to Israel/Palestine and NOCs in relation to Russia/Ukraine.

109. In the light of the above, the ROC's claims are clearly unsubstantiated. The Panel has seen no evidence that the IOC has applied "double standards" in relation to Rules 28.5 and 30.1. The IOC has always relied on Rule 30.1 and the position of the international community to determine the area of jurisdiction of an NOC. Furthermore, the IOC has never been in a position where it knew it had grounds for suspending an NOC for a violation of Rules 28.5 and 30.1 but decided not to do so.

110. Consequently, the IOC did not breach the principle of equality by suspending the ROC in the instant case.

C. Violation of the Principle of Predictability

111. As already noted at paragraph 72 above, the Appellant's submissions regarding the principle of predictability overlap with its submissions in relation to the principle of legality, and indeed with its submissions in relation to the principle of equality. The principles of equality and predictability are both aspects of the principle of legality.

112. As a result, the analysis developed at paragraphs 73 to 110 above is repeated here. It leads to the same conclusion, namely that there has been no breach. The IOC did not breach the principle of predictability by suspending the ROC in the instant case.

D. Violation of the Principle of Proportionality

113. Rule 59 of the OC provides, so far as is material:

> *"In the case of any violation of the Olympic Charter, the World Anti-Doping Code, the Olympic Movement Code on the Prevention of Manipulation of Competitions or any other decision or applicable regulation issued by the IOC, the measures or sanctions which may be taken by the Session, the IOC Executive Board or the disciplinary commission referred to under 2.4 below are: …*
>
> ***1.4*** *with regard to NOCs:*
>
> ***a*** *suspension (IOC Executive Board); in such event, the IOC Executive Board determines in each case the consequences for the NOC concerned and its athletes;*
>
> ***b*** *withdrawal of provisional recognition*

(IOC Executive Board);

c *withdrawal of full recognition (Session); in such a case, the NOC forfeits all rights conferred upon it in accordance with the Olympic Charter;*

d *withdrawal of the right to organise a Session or an Olympic Congress (Session)".*

114. The ROC submits that the Decision exceeds what is reasonably required for a number of reasons.

115. The first reason is that there was no justifiable goal or objective for the Decision. The territorial integrity of Ukraine – as a State – could not be the justification. On the contrary, *"sports organisations within the Olympic Movement shall apply political neutrality"*[13]. The interest of a country or of a State cannot therefore be a legitimate basis for a decision within the Olympic Movement. This is also emphasized by the fact that in similar situations, the IOC did not react and did not suspend the NOC of the country concerned.

116. Secondly, it is not possible to understand why the measure taken by the IOC was necessary to reach the declared goal, *i.e.* protection of the territorial integrity of the NOC of Ukraine. The ROC has no power in relation to the armed conflict in Ukraine, and even less in relation to the Russian Constitution that treats the Regions as part of the Russian territory.

117. Thirdly, the suspension was disproportionate because the constraints which the ROC and the athletes will suffer as a consequence of the Decision are not justified by the interest in achieving the declared goal of protecting the territorial integrity of the NOC of Ukraine.

118. Fourthly, the 4th Fundamental Principle of Olympism states that *"[t]he practice of sport is a human right. Every individual must have the possibility of practising sport,* without *discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play"*. The Decision affects Russian athletes, as their participation in the 2024 Paris Olympic Games will have to rely entirely on the good will of the IOC.

119. Fifthly, the sanction of suspension is disproportionate because the IOC did not even set a deadline for the end of the suspension. A suspension that is unlimited in time violates the principle of proportionality. The decision to suspend the ROC *"until further notice"* makes the ROC totally dependent on the goodwill and judgement of the IOC, in the absence of any criteria laid down by the IOC.

120. In this context, the ROC submits that a time limit expiring at the end of the war in Ukraine would not be proportionate. Such a territorial dispute could last for decades. Moreover, the suspension of the ROC until the resolution of the conflict between Ukraine and Russia would make this suspension dependent on events external to the parties to this dispute, *i.e.* the IOC and the ROC. The end of the territorial dispute and the recognition by the international community of any treaty or *de facto* situation defining the borders between Ukraine and the Russian Federation is a

[13] 5th Fundamental Principle of Olympism.

matter of public international law, on which neither the IOC nor the ROC can have influence.

121. The IOC submits that the Panel can only amend a disciplinary decision if it considers that the IOC has acted *"arbitrarily and exceeded the margin of discretion afforded to it by the principle of association autonomy"*; and even if the Panel disagrees with the sanction imposed by the IOC, it should only amend it *"if the sanction concerned is to be considered as evidently and grossly disproportionate to the offence"*[14].

122. The Panel does not understand the ROC to challenge this last submission, which is supported by CAS authority. It means that the ROC has a high hurdle to surmount in order to succeed with its disproportionality argument.

123. The Panel addresses each of the reasons advanced by the ROC in turn.

124. As regards the first reason, it is true that the 5th Fundamental Principle of Olympism mandates political neutrality among sports organisations within the Olympic Movement. This means that the IOC is obliged to ensure that each NOC applies political neutrality and complies with the OC. This includes preventing any NOC from interfering with the territorial jurisdiction of another NOC. That is achieved by ensuring compliance with Rule 28.5 read together with Rule 30.1, if necessary, by imposing sanctions in accordance with Rule 59 in the event of a violation. Therefore, the Panel cannot accept the submission that protecting the territorial integrity of the NOC of Ukraine cannot be a justification for the Decision.

125. As for the second reason, it is not to the point that the ROC has no influence over the armed conflict. The Decision did not sanction the ROC for the armed conflict. Rather, as the IOC submits, the Decision sanctioned the ROC because it had accepted regional Ukrainian organisations as members in violation of Rules 28.5 and 30.1.

126. The third reason is without a factual foundation. On 8 December 2023, the Executive Board of the IOC decided that athletes with a Russian passport who qualified through the existing qualification systems of international federations would remain eligible to compete at the 2024 Paris Olympic Games as Individual Neutral Athletes subject to a number of conditions. In the opinion of the Panel, these conditions are fair and carefully calibrated to ensure that individual athletes are in fact politically neutral.

127. As for the fourth reason, the rights of individual athletes are sufficiently protected if they are and remain neutral. Their right to participate in the Paris Olympic Games does not depend on the goodwill of the IOC, but on the application of the OC.

128. As regards the fifth reason, suspension was the least intrusive measure that the IOC Executive Board could have imposed under Rule 59.1.4. It could have imposed the more serious sanctions mentioned in Rule 59.1.4 b to d. The IOC was entitled to take the view that the ROC's violation of Rule 28.5 in conjunction with rule 30.1 was serious and merited the imposition of a

[14] CAS 2014/A/3562; CAS 2009/A/1817; CAS 2009/A/1844; CAS 2015/A/4271.

substantial sanction. It could have said that the suspension would remain in place until the dispute between Russia and Ukraine was resolved, although that would not have met the ROC's argument based on the alleged need for certainty. Instead, the IOC decided to suspend the ROC's membership *"until further notice"* so that, for example, the suspension could be lifted if this was justified by future circumstances. Indeed, the possibility of this occurring was foreshadowed in the Decision itself (*"the IOC EB also reserves the right to take any further decision or measure depending on the development of this situation"*). The Panel considers that this was an entirely reasonable response by the IOC to a serious violation of the OC. It was far from being an evidently and grossly disproportionate response to the ROC's violation of the OC. In these circumstances, there are no grounds for the Panel to interfere with the Decision for lack of proportionality.

E. Conclusion

129. In light of the foregoing, the Panel holds that the Decision did not breach the principles of legality, equality, predictability or proportionality. As a result, the appeal must be dismissed. The Decision stands. The Panel wishes to repeat with emphasis that the issues in the present case are not whether, as a matter of international law, Russia's annexation of part of the Ukraine was lawful or where the lawful boundary lies between the two countries. These issues raise questions of sovereignty and politics and cannot and should not be resolved by IOC or CAS or national courts.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 31 October 2023 by the Russian Olympic Committee against the decision rendered by the Executive Board of the International Olympic Committee on 12 October 2023 is dismissed.

2. The decision rendered by the Executive Board of the International Olympic Committee on 12 October 2023 is confirmed.

3. The present arbitral award is pronounced without costs, except for the Court Office fee of CHF 1,000, which is retained by the Court of Arbitration for Sport.

4. (…).

5. All the other motions or prayers for relief are dismissed.

CAS 2023/A/10102
Esteghlal FC v. Azizbek Amanov & Nasaf FC
18 June 2024

Panel: Mr Patrick Grandjean (Switzerland), Sole Arbitrator

Football
Termination of an employment contract with just cause by a player
Admissibility of correspondence sent to the CAS Court Office through postal services
Calculation of the monthly pro-rata value of a player's salary for the purpose of calculating a breach of article 14bis RSTP
Inapplication of Art. 18 RSTP to an intermediary acting on a player's behalf to terminate the contract
Validity under Swiss law of legal actions undertaken by an individual acting as an agent for another person
Principle of the "positive interest"
Adjustment of the amount of compensation for damages

1. **An official postal service can be validly used in the CAS' arbitration proceedings.**

2. **According to art. 14bis (2) of the FIFA Regulations on the Status and Transfer of Players (RSTP), *"[f]or any salaries of a player which are not due on a monthly basis, the pro-rata value corresponding to two months shall be considered. Delayed payment of an amount which is equal to at least two months shall also be deemed a just cause for the player to terminate his contract, subject to him complying with the notice of termination* [of art. 14bis (1) of the FIFA RSTP]*".***

3. **Art. 18 (3) of the FIFA RSTP only concerns intermediaries involved in the negotiations of a transfer agreement or the conclusion of an employment contract. An individual's intervention on a player's behalf in order to terminate said player's employment relationship with his club is a situation that is not governed by Art. 18 of the FIFA RSTP.**

4. **Legal actions undertaken by an individual acting as an agent for another person become legally binding on the principal if the agent possesses the appropriate authority, or upon subsequent endorsement of these actions by the principal, or if the behavior of the principal suggests to the third party that authority has been granted to the agent, leading to a reasonable inference of a power of attorney.**

5. **According to Art. 17 of the FIFA RSTP and in case of termination of an employment contract with just cause, the party which has given rise to premature termination is liable to pay compensation for damages suffered by the injured party. The latter is entitled to a whole reparation of the damages suffered, pursuant to the principle of the *"positive interest"*, under which compensation for breach must be aimed at reinstating the injured party to the position it would have been, had the contract been fulfilled to its end. Therefore, the damages to be taken into account are not only those that may have caused the act or the omission that justify the termination, but also the *"positive interest"* which, in case of termination of an employment contract, corresponds to the salaries and other material**

income or benefits that a player would have earned if the contract would have been performed until its natural expiration.

6. **On the basis of Article 17 (1) lit. ii) of the FIFA RSTP, the amounts that the player has earned with (an)other employment agreement(s) during the residual period of the employment contract must be taken into account to adjust the amount of compensation for damages. A contract signed by the player with a new club after the decision of the FIFA DRC (and therefore not taken into account by the latter) can also be taken into consideration by the CAS panel.**

I. PARTIES

1. Esteghlal FC is a football club with its registered office in Tehran, Iran ("Esteghlal" or the "Appellant"). It is a member of the Islamic Republic of Iran Football Federation ("FFIRI"), itself affiliated with the *Fédération Internationale de Football Association* ("FIFA").

2. Mr Azizbek Amanov is a professional football player, born on 30 October 1997 and of Uzbekistan nationality (the "Player").

3. Nasaf FC is a football club with its registered office in Karshi, Uzbekistan. It is a member of the Uzbekistan Football Association ("UFA"), itself affiliated with FIFA.

4. The Player and Nasaf FC are jointly referred to as the "Respondents".

5. Esteghlal and the Respondents are jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

A. Introduction

6. These arbitration proceedings concern an employment-related dispute between Esteghlal and the Player. A notable aspect of this case is that neither Party has made any factual assertions regarding the events that took place between the signing of the employment contract on 3 February 2022 and its unilateral termination by the Player on 2 February 2023. This period of time is exclusively documented by the decision delivered on 24 August 2023 by the FIFA Dispute Resolution Chamber, which is the subject of the appeal filed by Esteghlal.

7. Bearing the foregoing in mind, below is a summary of the relevant facts and allegations based on the available written submissions and evidence adduced in these proceedings. References to additional facts, allegations and evidence found in the file at hand will be made, where relevant, in connection with the legal analysis that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments, and evidence submitted in these arbitration proceedings, he refers in his award only to the submissions and evidence he deems necessary to explain his reasoning.

B. The contractual relationship between Esteghlal and the Player

8. On 3 February 2022, Esteghlal and the Player signed an employment contract (the "Employment Contract"), the main characteristics of which can be summarised as follows:

- It is a fix-term agreement valid as from 3 February 2022 *"until the end of the sporting season 2023/ 2024 or 31st of June 2024 whichever happens later"*.

- Among other obligations, Esteghlal agreed to pay to the Player:

  2021/2022 Season

  - USD 50,000 *"paid within 1 week after Player ITC receipt"*;
  - USD 50,000 on 24 February 2022;
  - USD 50,000 on 16 March 2022;
  - USD 50,000 on 20 April 2022;
  - USD 50,000 on 21 May 2022;
  - USD 50,000 on 21 June 2022.

  2022/2023 Season

  - USD 100,000 *"within one week before the first official match of the Iranian Premier league for the 2022/2023 season"*;
  - USD 50,000 on 10 October 2022;
  - USD 50,000 on 10 December 2022;
  - USD 50,000 on 10 February 2023;
  - USD 50,000 on 10 May 2023;
  - USD 50,000 on 10 June 2023.

  2023/2024 Season

  - USD 100,000 *"within one week before the first official match of the Iranian Premier league for the season 2023/2024"*.
  - USD 60,000 on 10 October 2023;
  - USD 60,000 on 10 December 2023;
  - USD 60,000 on 10 February 2024;
  - USD 60,000 on 10 May 2024;
  - USD 60,000 on 10 June 2024.

- Pursuant to Article 5 of the Employment Contract, entitled *"Rewards, Bonuses and Fines for the seasons 2021/21-2022/23-2023/24"*, the Player was entitled to the following bonuses:

  "Iranian Premier League Championship: $ 20,000";

  "Match-winning bonus for Iranian Premier League" home and away games: USD 200.

- Article 10 of the Employment Contract, entitled *"Applicable Law and Jurisdiction"*, reads as follows:

  *"**10.1.** The Contract is governed by FIFA Regulations and subsidiary by Swiss law.*

  ***10.2.** Any dispute arising out of or in connection with the present Contract shall be settled exclusively by the legal bodies/committees/chambers of FIFA and, in particular, Football Tribunal, and FIFA DRC. The appeal to a ruling of the FIFA Players' Status Committee shall be addressed to the Court of Arbitration for Sports ('CAS') based in Lausanne, Switzerland, and resolved definitely in accordance with the Code of sports-related*

arbitration. Three (3) arbitrators shall form the panel; the language to be used in any arbitral proceedings shall be English".

- According to Article 12 of the Employment Contract *"[a]ny notices and other communications under the Contract shall be in writing and shall be given by facsimile or by electronic mail addressed as follows:*

  The Club *(…) fcesteghlaliran20@gmail.com (…)*

  The Player *(…) Freekick.dubai@gmail.com".*

9. The following facts have been established by the FIFA Dispute Resolution Chamber in its decision of 24 August 2023 and are not disputed or have not been altered in any way by either Party to these arbitration proceedings:

   5. "On 29 August 2022, the player put [Esteghlal] *in default and requested payment of USD 121,800, corresponding to salary payments and bonuses, within 10 days.*

   6. On 8 September 2022, [Esteghlal] *replied with an email from esteghlal.cls@gmail.com acknowledging its debt and maintaining to settle the debt within a week.*

   7. On 27 September 2022, the [Player] *acknowledged receipt of a payment in the amount of USD 86,700 from* [Esteghlal].

   8. On 21 October 2022, the player put [Esteghlal] *in default and requested payment of USD 85,696.20, corresponding to the residual debt, salary payments and bonuses, within 10 days.*

   9. On 10 December 2022, the [Player] *acknowledged receipt of a payment in the amount of USD 10,640 from* [Esteghlal].

   10. On 14 December 2022, [Esteghlal] *informed the player that all correspondence to the club shall be sent to the email address fcesteghlaliran20@gmail.com.*

   11. On 19 December 2022, the [Player] *put* [Esteghlal] *in default* [*via* an] *email to fcesteghlaliran20@gmail.com and requested payment of USD 125,346.20, corresponding to the residual debt, two salary payments and bonuses, within 15 days.*

   12. On 20 January 2023, the parties held a meeting and discussed a mutual termination without agreeing terms.

   13. On 2 February 2023, the [Player] *terminated the contract with* [Esteghlal] *due to outstanding remuneration of more than two monthly salaries and based on art. 14bis RSTP.*

   14. On 3 February 2023, [Esteghlal] *replied and insisted that a mutual termination was agreed upon.*

   15. On 3 February 2023, the [Player] *reiterated his termination and denied having reached an agreement".*

10. On 5 February 2023, Esteghlal sent a notice to the Player complaining about his absence, which it claimed was in breach of several clauses of the Employment Contract. It gave 24 hours to the Player to resume training and

warned him that *"[i]f the unjustified absence of the player continues, the club will have no choice but to file a complaint against the player in FIFA Judicial Bodies"*.

11. On 7 February 2023, Esteghlal sent the following email to freekick.dubai@gmail.com:

"Dear Sir/Madam,

I am writing to you again as our previous letter remained unanswered.

In this regard, I would like to officially inform you that due to the continued unjustified absence of the player Mr. Azizbek Amonov in the team training sessions, the club Disciplinary Committee will have a meeting regarding the said matter on Monday February 13th, 2023 in the club office accordingly.

I hereby invite Mr. Azizbek Amonov to attend the said disciplinary meeting in person or send his defensive bill to the club office directly. it [sic] *is clear that in the case of absence or lack of sending the defensive bill to the club disciplinary committee, it will not prevent the said committee from issuing a justified verdict"*.

12. On 13 February 2023, the Disciplinary Committee of Esteghlal imposed upon the Player a fine of USD 10,500 for his unjustified and unauthorized absences since 3 February 2023.

13. The Player did not reply to any of the messages sent by Esteghlal as from 5 February 2023.

14. On 15 February 2023, and as determined by the FIFA Dispute Resolution Chamber in its decision of 24 August 2023, without this being contested by the Parties to these arbitration proceedings, *"the* [Player] *signed an employment contract with the Uzbek club, Nasaf FC, valid as from 15 February 2023 until 30 December 2023, including a monthly salary of Uzbekistan Som (UZS) 77,161,000 (approx. USD 6,630)"*.

15. On 3 January 2024, the Player signed an employment contract with the Emirati football club Khorfakkan FC, valid as from 3 January until 31 December 2024. The club agreed to pay to the Player a monthly salary of USD 34,375. According to its clause 1.A and 1B, this contract states the following:

"A- first advance payment of (USD NET 68,750) (…) paid to the player at 30/01/2024.

B- Second advance payment of (USD NET 68,750) (…) paid to the player at 28/02/2024".

C. The Proceedings before the FIFA Dispute Resolution Chamber

16. On 17 February 2023, the Player filed a claim against Esteghlal before FIFA, requesting unquantified moral damages as well as the payment of USD 580,346 plus interest, broken down as follows:

- Outstanding salaries (instalments due on 10 October and 10 December 2022):
  USD 100,000
- Remaining amount of the first USD 100,000 due for the 2022/2023 season:
  USD 3,146
- Unpaid bonuses:
  USD 22,200
- Compensation for breach of the Employment Contract:
  USD 450,000
- Legal fees:
  USD 5,000

Total USD 580,346

17. In its reply, Esteghlal rejected the Player's claim and lodged a counterclaim against the latter and Nasaf FC, requesting the payment of USD 750,000 as compensation for breach of the Employment Contract. In support of its claim, Esteghlal put forward that the Player had terminated the Employment Contract without just cause. It also submitted that any correspondence sent on behalf of the Player to esteghlal.cls@gmail.com had to be disregarded as the Employment Contract clearly stipulated that written communications between the Player and Esteghlal were to take place *via* the email address fcesteghlaliran20@gmail.com. Finally, Esteghlal argued that the formal notices sent on the Player's behalf were invalid because his representative was not duly authorised to act in his name.

18. In his Reply, the Player reiterated his position and rejected Esteghlal's counterclaim. Nasaf FC did not reply to Esteghlal's counterclaim.

19. In a decision dated 24 August 2023, the FIFA Dispute Resolution Chamber ("DRC") partially accepted the Player's claim based upon the following considerations:

    - The DRC held that *"notwithstanding previous notifications, as of 14 December 2022, the* [Player] *did correspond with the email address indicated for the* [Esteghlal] *in the contract. Therefore, the Chamber concluded that the club's argument shall be rejected"*.

    - Esteghlal failed to prove that the Player's claim for outstanding salaries and unpaid bonuses (amounting to USD 125,346.20) was without merit. In particular, it did not establish that it had met its financial obligations and paid the amount of money claimed by the Player.

    - The outstanding remunerations and bonuses claimed by the Player correspond to more than four monthly salaries.

    - The Player had provided written evidence of having put Esteghlal in default on 19 December 2022, *i.e.* at least 15 days before unilaterally terminating the Employment Contract on 2 February 2023.

    - The requirements of Article 14bis of the applicable FIFA Regulations on the Status and Transfer of Players ("RSTP") have been met by the Player, who had therefore a just cause to unilaterally and prematurely terminate the Employment Contract.

    - In accordance with the general legal principle of *pacta sunt servanda*, Esteghlal was liable to pay to the Player the amounts which were outstanding under the Employment Contract at the moment of its termination, *i.e.* USD 125,346.

    - With regard to the calculation of the compensation, the DRC made the following findings:

        - The DRC held that the Employment Contract did not contain a provision by means of which Esteghlal and the Player had beforehand

agreed on an amount of compensation payable in the event of premature termination of the Employment Contract for just cause.

- In compliance with Article 17 of the RSTP, the DRC took into account the remuneration of the Player and the residual duration of the Employment Contract. In this regard, the DRC found that *"the amount of USD 450,000 serves as the basis for the determination of the amount of compensation for breach of contract"*.

- The compensation awarded to the Player had to be reduced by the wages received from Nasaf FC for the period corresponding to the time remaining on the prematurely terminated Employment Contract. *"Indeed, the* [Player] *found employment with the Uzbek club, Nasaf FC between 15 February 2023 and 30 December 2023. In accordance with the pertinent employment contract, the* [Player] *was entitled to approximately USD 6,630 per month. Therefore, the Chamber concluded that the* [Player] *mitigated his damages in the total amount of USD 72,930, that is, 11 times USD 6,630"*.

- The DRC determined that the criteria set forth in Article 17 (1) lit. ii) of the RSTP had been met and that the Player was entitled to an amount equal to three monthly salaries as additional compensation as the early termination of the Employment Contract was the result of overdue payables. It decided to award the Player additional compensation in the amount of USD 72,930. However, in compliance with the last sentence of Article 17 (1) lit. ii) of the RSTP, according to which *"the overall compensation may never exceed the rest value of the prematurely terminated contract"*, the DRC *"decided that the club must pay the amount of USD 450,000 to the player (i.e. USD 450,000 minus USD 72,930 plus USD 72,930), which was to be considered a reasonable and justified amount of compensation for breach of contract in the present matter"*.

20. As a result, on 24 August 2023, the DRC issued the following decision:

    1. *"The claim of* [the Player] *is partially accepted.*

    2. [Esteghlal] *must pay to* [the Player] *the following amount(s):*

    - *USD 3,146 as outstanding remuneration plus 5% interest p.a. as from 8 August 2022 until the date of effective payment;*

    - *USD 50,000 as outstanding remuneration plus 5% interest p.a. as from 11 October 2022 until the date of effective payment;*

- *USD 50,000 as outstanding remuneration plus 5% interest p.a. as from 11 December 2022 until the date of effective payment;*

- *USD 22,200 as outstanding remuneration plus 5% interest p.a. as from 17 February 2023 until the date of effective payment;*

- *USD 450,000 as compensation for breach of contract without just cause plus 5% interest p.a. as from 4 February 2023 until the date of effective payment.*

3. Any further claims of [the Player] *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. The counterclaim of [Esteghlal] *is rejected.*

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. [Esteghlal] *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.

7. The consequences shall only be enforced at the request of [the Player] *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".

21. On 5 October 2023, the Parties were notified of the grounds of the decision issued by the DRC (the "Appealed Decision").

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. On 24 October 2023, Esteghlal lodged its Statement of Appeal with the Court of Arbitration for Sport ("CAS") against the Respondents with respect to the Appealed Decision in accordance with Article R47 *et seq.* of the CAS Code of Sports-related Arbitration (2023 edition) (the "Code").

23. In several subsequent emails, Esteghlal explained to the CAS Court Office that the hard copies of its Statement of Appeal had been sent by the National Post Company of the Islamic Republic of Iran, given that *"DHL Courier company continues to refrain from providing its services to our club as an Iranian national due to the unilateral sanctions of the US against Iran"*. According to Esteghlal *"the package is expected to be delivered to* [the CAS] *no later than 16 December 2023"*.

24. On 4 November 2023, Esteghlal filed its Appeal Brief in accordance with Article R51 of the Code.

25. On 16 November 2023, the CAS Court Office acknowledged receipt of Esteghlal's Statement of Appeal and of its payment of the CAS Court Office fee, which was made on 19 October 2023. It informed the Parties that it *"acknowledge*[d] *receipt of* [Esteghlal's] *Appeal Brief filed by email on 4 November 2023. A copy of* [Esteghlal's] *Appeal Brief will be provided to the Respondents upon its receipt at the CAS, whereupon the Respondents will be invited to file an Answer within a deadline of twenty (20) days of its receipt, pursuant to Article R55 of the Code"*. The CAS Court Office invited the Respondents to comment within five days on Esteghlal's request to refer the present matter to a sole arbitrator. With this respect, the Respondents' attention was drawn to the fact that in the absence of an answer or in case of disagreement, it would be for the President of the CAS Appeals Arbitration Division, or her Deputy, to decide the issue, taking into account the circumstances of the case, in accordance with Article R50 of the Code.

26. On 24 November 2023, the Player informed the CAS Court Office that a) he refused to refer the present matter to a sole arbitrator, b) confirmed that he had no intention to pay his share of the costs, c) asked that the time limit for the filling of his Answer be fixed after the payment by Esteghlal of its share of the advance of costs, d) submitted that the Appeal was inadmissible as the Statement of Appeal should have been sent by *"courier"* as opposed to *"postal delivery"*.

27. Nasaf FC did not comment on the letter of 16 November 2023 sent by the CAS Court Office.

28. On 27 November 2023, the CAS Court Office acknowledged receipt of the Appeal Brief filed on 4 November 2023 and invited Nasaf FC to submit its Answer within 20 days. With respect to the Player, it confirmed that his time limit to file his Answer would be fixed upon the payment by Esteghlal of its share of the advance of costs.

29. On 29 November 2023, Nasaf FC asked the CAS Court Office that the time limit for the filing of its Answer be fixed after the payment by Esteghlal of its share of the advance of costs. Its request was granted.

30. On 12 December 2023, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had appointed Mr Patrick Grandjean, Attorney-at-law, Belmont-sur-Lausanne, Switzerland as Sole Arbitrator.

31. On 5 January 2024, the CAS Court Office invited the Respondents to submit their Answer within 20 days.

32. On 31 January 2024, the CAS Court Office confirmed that it did not receive the Respondents' Answer or any communication from them in this regard. It invited the Parties to state whether they preferred a hearing to be held in this matter or for the Sole Arbitrator to issue an award based solely on the Parties' written submissions.

33. On the same date, the Player referred to his letter of 24 November 2023, in which he had requested that the Sole Arbitrator issue a preliminary award on the admissibility of the appeal, based on the fact that Esteghlal had used regular mail

services, in breach of Article R31 of the Code. He also requested for a case management hearing as well as a hearing to be held and maintained that *"in the instance that the CAS, post preliminary decision by the esteemed Sole Arbitrator, seeks to proceed with this matter,* [the Player] *fully endorses the FIFA decision and seeks to add nothing further to this"*.

34. On 3 February 2024, Esteghlal opposed to any hearing and requested that the Sole Arbitrator issue an award based solely on the Parties' written submissions. Nasaf FC did not make its views known on the matter of the hearing.

35. On 13 February 2024, Esteghlal maintained that it had no choice but to resort to the National Post Company of the Islamic Republic of Iran to file its appeal as per Article R31 of the Code and requested that the Player be asked to submit a copy of its employment contract with Khorfakkan FC.

36. On 15 January 2024, the CAS Court Office informed the Parties that the Sole Arbitrator deemed himself sufficiently well informed to issue his decision solely on the basis of the written submissions and sent them the Order of Procedure.

37. On 18 January 2024, Esteghlal returned a duly signed copy of the Order of Procedure.

38. On 17 February 2024, the Player filed the three first pages of the employment contract signed with Khorfakkan FC and requested the replacement of the Sole Arbitrator by a three-member panel, in accordance with Article 10.2 of the Employment Contract signed with Esteghlal. In view of these circumstances, he did not return a signed copy of the Order of Procedure.

39. On 19 February 2024, the CAS Court Office informed the Parties that the arbitration proceedings were suspended in view of the Player's objection for the Sole Arbitrator to deal with the present matter and invited Esteghlal and Nasaf FC to comment on the Player's letter of 17 February 2024 within three days.

40. On 20 February 2024, Nasaf FC confirmed that it shared the Player's viewpoint as articulated in his letter of 17 February 2024, requesting the referral of the matter to a three-member panel. Consequently, Nasaf FC declined to sign and to return the Order of Procedure. Additionally, Nasaf FC announced that it was enclosing a copy of the employment contract signed with the Player but failed to do so.

41. On 24 February 2024, Esteghlal maintained its request for the Sole Arbitrator to decide on this matter.

42. On 6 March 2024, the CAS Court Office informed the Parties of the following:

"In consideration of the Parties' submissions on the number of arbitrators in this matter, the CAS Court Office comes to the conclusion that the decision of the Deputy President of the CAS Appeals Arbitration Division to appoint a sole arbitrator in this matter shall not be reconsidered and, consequently, the present procedure shall be decided by the appointed Sole Arbitrator.

For the sake of good order, this procedure is no longer suspended and resumes with immediate effect.

Finally, the Respondents are requested to sign and return a copy of the Order of Procedure by 12 March 2024".

43. On 11 and 12 March 2024 respectively, Nasaf FC and the Player returned a duly signed copy of the Order of Procedure.

IV. SUBMISSIONS OF THE PARTIES

A. The Appellant

44. In its Statement of Appeal, Esteghlal submitted the following requests for relief:

- *"Set aside the Decision of DRC of FIFA;*
- *Reconsider the matter and render a new decision in compliance with the applicable rules and regulations with special attention to the counter-claim of Esteghlal Club;*
- *Declare that the termination of the player is without just cause;*
- *Order 1st and 2ed respondents jointly to pay 750,000 USD to Esteghlal as liquidated damages;*
- *to impose sporting sanctions against the respondent(s), namely, a fine and ban from registering any new players, either nationally or internationally for two entire and consecutive registration periods, all in the light of FIFA RSTP;*
- *Reduction of the compensation determined in the appealed decision based on duty to mitigate damages (the player deliberately fails to search for a new club or unreasonably refuses to sign a satisfying employment contract, or when, having different options, he deliberately accepts to sign a contract with worse financial conditions, in the absence of any valid reason to do so)".*

45. In its Appeal Brief, Esteghlal also asked the CAS to *"[o]rder the Respondents to pay the costs of the present arbitration proceedings together with a contribution towards* [its] *legal fees".*

46. The submissions of Esteghlal, in essence, may be summarized as follows:

- The Player has failed to comply with the conditions set out in Article 14bis of the RSTP. Consequently, the Player's premature termination of the Employment Contract is not valid. *"Basically, the termination of the contract in the world of football is a formal legal act, and all related formalities must be observed".*

- *"All e-mails and notices of the player were sent both from anonymous e-mails and to e-mails not included in the contract".* As stipulated in the Employment Contract and in order to be valid, written communications to Esteghlal could only be made *via* the email *"fcesteghlaliran20@gmail.com".* Hence, the notices sent to the club using the email address *"esteghlal.cls@gmail.com"* were not received by Esteghlal and, therefore, must not be taken into account.

- *"According to clause 12 of the employment contract, the Player has introduced the email 'freekick.dubai@gmail.com'; therefore, the* [Player] *was obliged to send all his*

notices to the club by email 'freekick.dubai@gmail.com'. This is [why] *Esteghlal FC did not receive any email from the claimant from this email address (freekick.dubai@gmail.com). (…) Also, according to the last part of Article 12 of the employment contract, 'In the case of change of the above information for one party, he shall inform the other party in writing in two (2) weeks' (…) It is noteworthy that any possible change in email address other than the ones stipulated in the employment contract must be communicated promptly to the other party. Otherwise, the other party has no responsibility regarding the notification to the former addresses. (…) Therefore, it was the Player's duty to notify the Esteghlal FC in writing if the email address has been changed. That such a thing was never done by the player. Obviously, Esteghlal FC has no responsibility in this regard".*

- In breach of Article 18 of the RSTP, the Player failed to disclose in the Employment Contract that he was being represented by an intermediary. Hence, the various notices sent to Esteghlal on the behalf of the Player by Mr Shuaib Ahmed are contractually null and void, as the latter had no authority to represent the Player. *"For the sake of good order, when Mr. Shuaib Ahmed sent a notice to 'fcesteghlaliran20@gmail.com', Esteghlal FC requested him to present a valid power of attorney. The only thing sent by Mr. Shuaib Ahmed to Esteghlal FC as a power of attorney was a screenshot (…), which did not have the validity of a power of attorney in any way. The submitted power of attorney lacked subject matter, duration (term), powers, and also did not have any of the characteristics required for a power of attorney".*

- The Player breached numerous provisions of the Employment Contract by failing to participate in several training sessions, by not attending official matches and leaving Iran without the prior permission of Esteghlal, which was therefore entitled to terminate the employment relationship. However, "[in] *order to maintain the contractual relationship and show its good faith, Esteghlal FC did not terminate the employment contract and asked the player to return to club training".* Despite Esteghlal's benevolent attitude towards him, the Player joined Nasaf FC, thereby terminating the Employment Contract without just cause.

- In accordance with Article 17 of the RSTP and given that the Player had terminated the Employment Contract without just cause, Esteghlal is entitled to compensation of USD 750,000. This amount corresponds to the contractually agreed minimum fee payable to Esteghlal in the event of the Player's transfer to another club during the term of the Employment Contract.

- On the assumption that the termination of the Employment Contract by the Player was justified, "[he] *did not make any effort to conclude a suitable employment contract with a reasonable salary, thinking of receiving possible compensation from Esteghlal FC. The*

duty to mitigate damages shall be regarded in accordance with the general principle of fairness, which implies that, after a breach by the Club, the Player must act in good faith and seek for other employment, showing diligence and seriousness, with the overall aim of limiting the damages deriving from the breach and avoiding that a possible breach committed by the club could turn into an unjust enrichment for him. The duty to mitigate should not be considered satisfied when, for example, the player deliberately fails to search for a new club or unreasonably refuses to sign a satisfying employment contract, or when, having different options, he deliberately accepts to sign a contract with worse financial conditions, in the absence of any valid reason to do so. However, the circumstance that a player received a higher remuneration under his former contract than he will receive under his new contract is not in itself sufficient to mean automatically that the compensation payable from his former club has to be reduced in the event that the new contract does not pay the player just as well as the original contract did".

In the present case and according to information available on the internet, the Player's market value is of EUR 400,000. The fact that he signed an employment contract with Nasaf FC worth USD 72,930 per year shows that he made no effort to mitigate his damages. The Player's bad faith is all the more significant given that he signed with Nasaf FC only 13 days after the termination of the Employment Contract. The Player could have very well taken more time to find a better paid job.

B. The Respondents

47. Although duly invited by the CAS Court Office, the Respondents did not file an Answer to the Appeal Brief within the granted time limit.

V. JURISDICTION

48. Article R47 (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".

49. The jurisdiction of the CAS, which is not disputed, derives from Articles 57 (1) of the applicable FIFA Statutes, Article R47 of the Code and Article 10.2 of the Employment Contract. It is further confirmed by the Order of Procedure duly signed by the Parties.

50. It follows that the CAS has jurisdiction to decide on the present dispute.

VI. ADMISSIBILITY

51. Article R49, first sentence, of the 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 in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against".

52. Article 57 (1) of the applicable 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".

53. Pursuant to Article R31 (3), first sentence, of the Code, *"[t]he request for arbitration, the statement of appeal and any other written submissions, printed or saved on digital medium, must be filed by courier delivery to the CAS Court Office by the parties in as many copies as there are other parties and arbitrators, together with one additional copy for the CAS itself, failing which the CAS shall not proceed"*.

54. Article R32 of the Code states that *"[t]he time limits fixed under this Code are respected if the communications by the parties are sent before midnight, time of the location of their own domicile or, if represented, of the domicile of their main legal representative, on the last day on which such time limits expire"*.

55. Esteghlal submitted its Statement of Appeal on 24 October 2023 and its Appeal Brief on 4 November 2023. These documents were sent by *"express mail"* through the National Post Company of the Islamic Republic of Iran, as evidenced by the postal receipt, which indicates:

- for the Statement of Appeal, the *"postal zone"* (Tehran), the date (24 October 2023), the hour (11:54.28 am), the sender (*"Esteghlal clube"*), the recipient (CAS), the country of destination (Switzerland) and the *"postal fare"*;
- for the Appeal Brief, the *"postal zone"* (Tehran), the date (4 November 2023), the sender (*"Esteghlal Sport & Cultural Club"*), the country of destination (Switzerland) and the *"Overall Postal Costs"*.

56. The authenticity of these postal receipts is not disputed and the Sole Arbitrator sees no reason to doubt the reliability of their contents. It is also not contested the fact that the National Post Company of the Islamic Republic of Iran is the official corporation responsible for providing postal services in Iran.

57. In his letters of 24 November 2023 and 31 January 2024, the Player claims that a Statement of Appeal filed by postal service does not meet the requirement of Article R31 of the Code, *"which specifically refers to the word 'courier' no less than 4 (four times), and does not mention the word 'post', even once"*. He is of the opinion that Esteghlal should have made use of DHL courier services, which was in operation in Iran and specifically in Tehran at the relevant time. He argues that Esteghlal significantly delayed the matter by using regular postal services and thus benefited from additional time. According to the Player, the appeal is therefore inadmissible.

58. The CAS Code does not define *"courier"*. The French text of the Code (which prevails in the event of discrepancy – see Article R69 of the Code), also refers to *"courrier"*, the definition of which is *"Correspondance (lettres imprimés paquets) reçue ou envoyée par la poste"* (Correspondence (letters, printed material, parcels) received or sent by post - Larousse Dictionnaire Français en ligne). According to scholars, the statement of appeal and any other written submissions must be filed by *"courier delivery"*, which includes postal as well as delivery services (The CAS

Procedural Rules, in: Arbitration in Switzerland, The Practitioner's Guide, Second edition, Volume II, 2018, ad art. R31, N. 7 p. 1458).

59. The Sole Arbitrator notes that the Code does not distinguish between ordinary postal services and other delivery services. If such a distinction had been intended, the Code would certainly have explicitly excluded the use of ordinary postal services. Furthermore, the position of the Player is untenable for several reasons. If official postal services are to be excluded, the parties to CAS proceedings would be forced to resort to using the services of other delivery providers, even if none of them operates in their part of the world. Maintaining such a position would not only be unreasonable but would also be a source of great inequality of treatment and uncertainty. Furthermore, if the use of the official postal service is not valid, a delivery service offering minimum guarantees would be required. Such minimum guarantees are not provided for in the Code. It seems quite difficult to accept that any delivery service would meet the requirements of Article R31 of the Code, regardless of its reliability, when official postal services, no matter how efficient and stable, fail to do so.

60. Based on the foregoing and on the wording of Article R31 of the Code, the Sole Arbitrator comes to the conclusion that an official postal service can be validly used in the arbitration proceedings before the CAS. Articles R31 and R32 of the Code simply place the burden of proof of having sent the communication within the set time limit on the party filing the submission.

61. In the present case, Esteghlal has established that it had submitted its appeal within the deadline provided by Article R49 of the Code as well as by Article 57 (1) of the applicable FIFA Statutes. Therefore, given that the appeal complies with all the other requirements set forth by Article R48 of the Code, it is admissible.

VII. APPLICABLE LAW

62. Article R58 of the 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

63. Pursuant to Article 56 (2) of the applicable 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".*

64. Article 10.1 of the Employment Contract provides that "[it] *is governed by FIFA Regulations and subsidiary by Swiss law".*

65. As a result, and in light of the foregoing, subject to the primacy of applicable FIFA's regulations, Swiss law shall apply complementarily, whenever warranted.

66. On 17 February 2023, the Player lodged his claim before FIFA against Esteghlal. This happened after 31 March 2022 and

16 November 2022, which are the dates when the FIFA Statutes, edition May 2022, and the RSTP, edition October 2022, came into force. These are the editions of the rules and regulations, which the Sole Arbitrator will rely on to adjudicate this case.

VIII. MERITS

67. Esteghlal contends that the Player did not validly terminate the Employment Contract with just cause as he did not comply with the requirements set in Article 14bis of the RSTP. In particular and according to Esteghlal, the Player failed to send notices to and from the email addresses specified in the Employment Contract, and because the author of the notifications was allegedly an individual lacking proper authorization. Furthermore, should the unilateral and premature termination of the Employment Contract be valid, the compensation should be reduced as the Player failed to mitigate his damage by securing a better paid job.

68. In this context, the issues to be decided by the Sole Arbitrator are:

    A. Were the requirements of Article 14bis of the RSTP met by the Player?

    B. If the Employment Contract was terminated by the Player with just cause, what are the financial consequences?

69. The Sole Arbitrator will address these issues in turn below.

A. Were the requirements of Article 14bis of the RSTP met by the Player?

70. Fixed-term employment contracts expire without the necessity of notice at the end of the specified duration. Termination before the agreed-upon period is permissible solely through mutual consent or in the presence of a just cause (Judgments of the Swiss Federal Tribunal 4C.61/2006 of 24 May 2006 consid. 3.1).

71. Pursuant to Article 14bis of the RSTP and provided that certain formal conditions are met, a player has a just cause to terminate his employment contract if the club unlawfully fails to pay him two monthly salaries on their due dates.

72. Article 14bis (1) and (2) of the RSTP, entitled *"Terminating a contract with just cause for outstanding salaries"*, reads as follows:

    "In the case of a club unlawfully failing to pay a player at least two monthly salaries on their due dates, the player will be deemed to have a just cause to terminate his contract, provided that he has put the debtor club in default in writing and has granted a deadline of at least 15 days for the debtor club to fully comply with its financial obligation(s). Alternative provisions in contracts existing at the time of this provision coming into force may be considered.

    For any salaries of a player which are not due on a monthly basis, the pro-rata value corresponding to two months shall be considered. Delayed payment of an amount which is equal to at least two months shall also be deemed a just cause for the player to terminate his contract, subject to him complying with the notice of termination as per paragraph 1 above".

73. The Sole Arbitrator observes that, for the 2022/2023 season, the Player's salary was not paid monthly. Based on Article 14bis (2) of the RSTP, the *pro-rata* value

corresponding to two monthly salaries is USD 58,333.32 (= USD 350,000 : 12 x 2).

74. Esteghlal does not dispute that on 19 December 2022, the Player put it in default by sending an email to fcesteghlaliran20@gmail.com, requesting payment of USD 125,346.20 within the next fifteen days. Esteghlal also does not contest that this amount was outstanding and represented more than the equivalent of two monthly salaries. However, Esteghlal considers that the notice was not validly served on behalf of the Player as it was not sent from Freekick.dubai@gmail.com, which was the email address that the Player contractually agreed to use to communicate with Esteghlal. Furthermore, the notice was sent by a person who was not duly authorised to act on behalf of the Player.

75. According to Article 12 of the Employment Contract, *"Any notices and other communications under the Contract shall be in writing and shall be given by facsimile or by electronic mail addressed as follows:*

***The Club** (…) fcesteghlaliran20@gmail.com (…)*

***The Player** (…) Freekick.dubai@gmail.com".*

76. The Sole Arbitrator observes that this clause does not explicitly address the consequences of failing to meet its requirements or of utilizing an email address other than the one specified. Particularly, it does not mention that any communication transmitted from or through an alternate email address must be disregarded. Such a clause is quite common in contractual relationship and aims to establish a clear protocol for communication, ensuring that important notices, requests, or other formal correspondence reach the intended recipient in a timely manner. Should one of the parties opt for another email address, it must bear the consequences of any communication failure. A provision such as Article 12 of the Employment Contract does not preclude a party from conveying information to the other party by other means; however, it is incumbent upon that party to demonstrate that the communication has reached its intended recipient.

77. In this particular case, the notice sent to Esteghlal on 19 December 2022 was transmitted *via fcesteghlaliran20@gmail.com*; *i.e. via* the email address designated for communicating with the club as outlined in Article 12 of the Employment Contract. Esteghlal does not object that it has received this notice. On the contrary, in its Appeal Brief it claims that *"when Mr. Shuaib Ahmed sent a notice to 'fcesteghlaliran20@gmail.com', Esteghlal FC requested him to present a valid power of attorney"* admitting thereby that it had been served with the notice and was aware of its content.

78. The same applies to the notice sent on 2 February 2023, in which the Player informed Esteghlal that he was terminating the Employment Contract with immediate effect. Again, Esteghlal does not claim that it did not receive the notification, which would have been in conflict with the fact that it replied the following day insisting that a mutual termination had been agreed upon.

79. The Sole Arbitrator notes that Esteghlal did not prove, nor did it attempt to prove, the existence of a mutual agreement to terminate the Employment Contract. Moreover, it did not rely on the existence of such an agreement in these arbitration proceedings. Therefore, there is no reason to address this issue any further.

80. Based on the foregoing considerations, it appears that a) on 19 December 2022, b) Esteghlal *"unlawfully fail*[ed] *to pay* [the Player] *at least two monthly salaries on their due dates"*, c) the Player *"put the debtor club in default"*, d) *"in writing"* and e) *"has granted a deadline of at least 15 days for* [Esteghlal] *to fully comply with its financial obligation(s)"*. As a consequence, the requirements of Article 14bis of the RSTP were met and the Player had a just cause to terminate the Employment Contract on 2 February 2023, *i.e.* more than 15 days after the expiry of the deadline set in the notice of 19 December 2022.

81. Esteghlal argues that Mr Shuaib Ahmed, the person who sent the notices of 19 December 2022 and 2 February 2023 on behalf of the Player, did not have proper authority to do so. In these circumstances, Esteghlal submits that his intervention should be treated as if it had never taken place. In addition, Esteghlal contends that Mr Shuaib Ahmed's capacity to act on behalf of the Player could only be recognized if his authority to do so was expressly stated in the Employment Contract, as stipulated by Article 18 of the RSTP. Esteghlal claims that this condition was not met in the present case.

82. According to Article 18 (1) of the RSTP *"*[if] *an intermediary is involved in the negotiation of a contract, he shall be named in that contract"*. According to the FIFA Commentary on the RSTP (Edition 2021, page 192) *"*[this] *complements the Regulations on Working with Intermediaries which requires that clubs or players must ensure that any transfer agreement or employment contract concluded with the services of an intermediary bears the name and signature of such intermediary"*. The FIFA Commentary on the RSTP, Edition 2023, has a similar content (see its page 228). It is clear that this provision only concerns intermediaries involved in the negotiations of a transfer agreement or the conclusion of an employment contract. In the matter at hand, there is nothing to suggest that Mr Shuaib Ahmed acted as an intermediary within the meaning of Article 18 of the RSTP; *i.e.* for the signing of the Employment Contract. Esteghlal has not established nor claimed the contrary.

83. Mr Shuaib Ahmed intervened in the termination of the employment relationship with Esteghlal, which is a situation that is not governed by Article 18 of the RSTP. It is not unusual for a player to retain the services of a representative, specifically for labour disputes. In such circumstances and for obvious reasons, nothing requires for the latter's name to be indicated in the employment contract. As a matter of fact, it is difficult to see how this could be done when the agent is specifically mandated to terminate the employment contract and was not necessarily at the services of the Player at the moment of the signature of the employment contract.

84. Hence the only remaining question to resolve is whether Mr Shuaib Ahmed validly acted on behalf of the Player

when he sent the notices of 19 December 2022 and 2 February 2023 to Esteghlal.

85. The FIFA regulations do not specify the form that a mandate linked to the termination of an employment contract must take. According to Swiss law, which applies subsidiarily, the termination of an employment contract is a unilateral declaration of intent, subject to receipt, by which the party terminating the contract notifies the other party of his/her intention to terminate the employment relationship (Judgments of the Swiss Federal Tribunal 4A_257/2019 of 6 November 2019 consid. 2.2). Notice of termination must be given by the party himself/herself or by his/her representative (Judgments of the Swiss Federal Tribunal 4C.151/2003 of 26 August 2003 consid. 4.1 and 4.2). In the latter case, Article 32 of the Swiss Code of Obligations ("CO") applies (ORDOLLI/WITZIG, in: Commentaire Romand, Code des obligations, Art. 253-529 CO, 3rd edition, 2021, ad art. 335 N. 2 p. 2546 and references; WYLER/HEINZER, Droit du travail, 4th edition, 2019, p. 624).

86. According to Article 32 (1) of the CO, *"The 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"*. This provision does not only apply to "contracts" as its wording may suggest but extends to unilateral or multilateral legal acts in general (CHAPPUIS C., in: Commentaire Romand, Code des obligations, Art. 1-252 CO, 3rd edition, 2021, ad art. 32 N. 6 p. 315 and references).

87. Legal actions undertaken by an individual acting as an agent for another person become legally binding on the principal if the agent possesses the appropriate authority (Article 32 CO), or upon subsequent endorsement of these actions by the principal (Article 38 CO), or if the behavior of the principal suggests to the third party that authority has been granted to the agent, leading to a reasonable inference of a power of attorney (Judgments of the Swiss Federal Tribunal 4A_478/2015 of 20 May 2016, consid. 3.1).

88. In the present case, the Parties do not dispute that between December 2022 and January 2023 a formal notice was served regarding the payment of outstanding wages and negotiations took place between the Player and Esteghlal regarding the mutual termination of the Employment Contract. In this context, given that the amounts owed remained unpaid and that the Player did not return to training in January 2023, Mr Shuaib Ahmed's notification of the unilateral termination of the Employment Contract can be seen as the logical and consistent consequence of the whole situation and in particular of the fruitless discussions between the Player and Esteghlal. Mr Shuaib Ahmed's involvement implies that he had the authority to act on behalf of the Player, as evidenced by the fact that the Player initiated proceedings before FIFA two weeks after the notification of the termination letter, thereby affirming (or ratifying) Mr Shuaib Ahmed's valid power of attorney.

89. Based on the foregoing, the Sole Arbitrator concludes that the requirements of Article 14bis of the RSTP were met and that the Player had

a just cause to bring the Employment Contract to an end, which was validly terminated on his behalf on 2 February 2023.

B. If the Employment Contract was terminated by the Player with just cause, what are the financial consequences?

90. The Sole Arbitrator has to assess the financial consequences deriving from the fact that the Player terminated the Employment Contract with just cause.

91. Neither Esteghlal nor the Respondents called into question the detailed calculation of outstanding salaries, bonuses and compensation made by the DRC in its Appealed Decision. Save for the legal fees, the DRC fully adhered to the requests made by the Player when he referred the matter to it on 17 February 2023:

- Remaining amount of the first USD 100,000 due for the 2022/2023 season:
  USD 3,146
- Outstanding instalment due on 10 October 2022:
  USD 50,000
- Outstanding instalment due on 10 December 2022:
  USD 50,000
- Unpaid bonuses:
  USD 22,200
- Compensation for breach of the Employment Contract:
  USD 450,000

Total USD 575,346

92. The outstanding salaries must be dissociated form the compensation for damages suffered by the Player following the termination of the Employment Contract with just cause.

1. The outstanding salaries

93. It must be inferred from the Player's claim before FIFA as well as from the Appealed Decision of the DRC, that on 2 February 2023, date of the termination of the Employment Contract by the Player for just cause, the outstanding salaries and bonuses due to the Player amounted to USD 125,346. This sum corresponds to the amount mentioned in the notice sent on behalf of the Player to Esteghlal on 19 December 2022 as well as in the claim filed by the Player before FIFA on 17 February 2023. Furthermore, Esteghlal does not dispute that this amount was not paid to the Player. In any event, it has not proven the contrary.

94. Based on the foregoing, the Sole Arbitrator holds that the outstanding salaries of USD 125,345 are due and that there is no reason to depart from this amount. On the basis of the principle of *pacta sunt servanda,* Esteghlal is liable to pay this sum to the Player.

2. The compensation for damages suffered by the Player

95. The situation is governed by Article 17 of the RSTP, entitled *"Consequences of terminating a contract without just cause"*, which states the following:

"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:

i. in case the player did not sign any new contract following the termination of his previous contract, as a general rule, the compensation shall be equal to the residual value of the contract that was prematurely terminated;

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 a maximum of six monthly salaries. The overall compensation may never exceed the rest value of the prematurely terminated contract".

96. The party responsible for and at the origin of the termination of the contract, is liable to pay compensation for damages suffered as a consequence of the early termination of the contract. As the Employment Contract does not contain a specific compensation clause in the event of its premature termination for just cause, the Player's claim for compensation must be calculated on the basis of Article 17 of the RSTP.

97. According to this provision and in case of termination of an employment contract with just cause, the other party which has given rise to premature termination, is liable to pay compensation for damages suffered by the injured party. The latter is entitled to a whole reparation of the damages suffered, pursuant to the principle of the *"positive interest"*, under which compensation for breach must be aimed at reinstating the injured party to the position it would have been, had the contract been fulfilled to its end. Therefore, the damages to be taken into account are not only those that may have caused the act or the omission that justify the termination, but also the *"positive interest"* which, in case of termination of an employment contract, corresponds to the salaries and other material income or benefits that the Player would have earned if the contract would have been performed until its natural expiration (see the FIFA Commentary on the RSTP, Edition 2021, page 151 and numerous references; FIFA Commentary on the RSTP, Edition 2023, page 183 and numerous references).

98. Considering that the Employment Contract was terminated on 2 February 2023, the remaining salaries for the 2022/2023 season amounted to USD 150,000 (outstanding instalment of USD 50,000 due on 10 February 2023, outstanding instalment of USD 50,000

due on 10 May 2023 and outstanding instalment of USD 50,000 due on 10 June 2023). In addition, for the 2023/2024 season, the agreed salary was USD 400,000, bringing the residual value of the Employment Contract that was prematurely terminated to USD 550,000 (USD 150,000 of the 2022/2023 season + USD 400,000 of the 2023/2024 season).

99. Under these circumstances, it is not clear how the Player (in his claim filed on 17 February 2023 before FIFA) and FIFA established that the compensation for breach of contract amounted to USD 450,000. Even recently, on 31 January 2024, the Player confirmed that he *"fully endorses the FIFA decision and seeks to add nothing further to this"*. In light of the foregoing, the Sole Arbitrator does not see any reason to depart from the amount of compensation (*i.e.* USD 450,000) a) claimed by the Player before FIFA, b) awarded in the Appealed Decision, c) confirmed by the Player on 31 January 2024, and d) ultimately not contested by Esteghlal, which only complains about the Player's lack of effort to mitigate it any further.

3. Is there a reason to adjust the amount of compensation for damages suffered by the Player

100. The question then arises whether there is any reason to adjust the compensation to be awarded to the Player. On the basis of Article 17 (1) lit. ii) of the RSTP, must be taken into account the amounts that the Player has earned with another employment agreement during the residual period of the Employment Contract.

101. Esteghlal contends that the Player has not seriously attempted to mitigate his losses as he deliberately accepted to sign a contract with poor financial conditions, in the absence of any valid reason to do so. According to Esteghlal and bearing in mind that his market value was of EUR 400,000, the Player acted in bad faith when he accepted to sign an employment contract with Nasaf FC, worth USD 72,930 per year. The Player's bad faith is all the more significant given that he signed with Nasaf FC only 13 days after the termination of the Employment Contract. According to Esteghlal, the Player could have very well taken more time to find a better paid job.

102. With respect to the burden of proof, Article 8 of the Swiss Civil Code ("CC") states that *"Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact"*. As a result, the Sole Arbitrator reaffirms the principle established by CAS jurisprudence that *"in 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. The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some facts and persuade the deciding body, it must actively substantiate its allegations with convincing evidence"* (CAS 2021/A/7673 & 7699 and references).

103. Esteghlal has not substantiated its submission that the Player deliberately chose to sign with Nasaf FC rather than with another employer that could have

offered him a higher salary. Moreover, such an assertion is not compatible with the fact that the hypothetically higher salary paid by another club, added to the mitigated compensation, would likely result in the same sum as that to which the Player is entitled as a result of the premature termination of the Employment Contract for just cause. In these circumstances, the Sole Arbitrator fails to see what interest the Player would have in foregoing a better paid job if not exclusively to harm the interests of Esteghlal, which has not been demonstrated at all. On the contrary, once he had terminated the Employment Contract with just cause, the Player was diligent in finding a new employer, which enabled him to reduce the amount of compensation owed by Esteghlal. Furthermore, while he was contractually bound with Nasaf FC, the Player secured a better professional opportunity with Khorfakkan FC, which enabled him to significantly mitigate the amount of compensation for damages he suffered because of Esteghlal's breach of the Employment Contract.

104. On 17 February 2024 and with respect to the contract signed with Khorfakkan FC, the Player confirmed that *"*[the] *salary in the New Contract is $412,500.00 (four hundred and twelve thousand, five hundred United States dollars only) for the term, in addition payments in advance of the salary equating to $137,500.00 (one hundred and thirty-seven thousand, five hundred United States dollars only)"*. Hence, it is admitted that the Player is entitled to USD 550,000 for the services he will be providing to Khorfakkan FC for the year 2024.

105. In calculating the compensation due to the Player, the following elements must be taken into account:

- The Employment Contract was terminated on 2 February 2023.

- At the time of its signature, the agreed expiry date of the Employment Contract is at the earliest on 31 June 2024.

- From February until December 2023, the Player received USD 72,930 from Nasaf FC.

- The employment contract signed by the Player and Khorfakkan FC is effective from 3 January until 31 December 2024.

- From 3 January 2024 to 31 June 2024, the Player is entitled to USD 275,000 (= USD 550,000 : 12 x 6).

- Pursuant to Article 17 (1) lit. ii) of the RSTP, 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. Where egregious circumstances exist in cases where the early termination of the contract was due to overdue payables, the *"additional compensation"* can be increased up to a maximum of the equivalent of six monthly salary payments. In the present case, the Employment Contract was prematurely terminated because of overdue payables but, in its Appealed Decision, the DRC did not find that there were *"egregious*

circumstances" as it decided to award to the Player only three monthly salaries as "additional compensation". This was not questioned by any of the Parties. Hence the Player is entitled to USD 87,500 as additional compensation, corresponding to three monthly salaries, calculated on the pro rata basis of the entire salary due for the whole duration of the Employment Contract (USD 1,050,000: 36 x 3).

106. In view of the above findings, the compensation due by Esteghlal is the following:

- Compensation awarded by the DRC: USD 450,000
- Additional compensation USD 87,500
- Salaries paid by Nasaf FC: USD 72,930
- Salaries paid by Khorfakkan FC USD 275,000

Total: USD 189,570

107. Hence, the compensation due by Esteghlal for the damages caused to the Player as a result of the termination of the Employment Contract with just cause, is of USD 189,570. This amount is within the limits set by Article 17 (1) lit. ii) of the RSTP according to which *"*[the] *overall compensation may never exceed the rest value of the prematurely terminated contract"*; *i.e.* USD 450,000.

4. What are the default interests?

108. With respect to the payment of default interest, the question is not governed by FIFA Regulations and must therefore be assessed according to Swiss law. The pertinent provisions are:

"Article 73 CO

1. Where an obligation involves the payment of interest but the rate is not set by contract, law or custom, interest is payable at the rate of 5% per annum.

2. Public law provisions governing abusive interest charges are not affected".

"Article 104 CO

1. A debtor in default on payment of a pecuniary debt must pay default interest of 5% per annum even where a lower rate of interest was stipulated by contract.

2. Where the contract envisages a rate of interest higher than 5%, whether directly or by agreement of a periodic bank commission, such higher rate of interest may also be applied while the debtor remains in default".

109. Regarding the *dies a quo*, where an obligation is due, the obligor is in default as soon as he receives a formal notice from the creditor. Where a deadline for performance of the obligation has been set by agreement, a notice is not necessary (see Article 102 CO; THÉVENOZ L., in: Commentaire romand, Code des obligations I, Art. 1-252 CO, 3rd edition, 2021, ad art. 102 CO, N. 26, p. 918).

110. Based on the foregoing, it appears that the DRC correctly applied the above provisions in its Appealed Decision.

B. Conclusion

111. For all the reasons set above, the Sole Arbitrator comes to the conclusion that

the Player is entitled to the following amounts:

- USD 3,146 as outstanding remuneration plus 5% interest *p.a.* as from 8 August 2022 until the date of effective payment;

- USD 50,000 as outstanding remuneration plus 5% interest *p.a.* as from 11 October 2022 until the date of effective payment;

- USD 50,000 as outstanding remuneration plus 5% interest *p.a.* as from 11 December 2022 until the date of effective payment;

- USD 22,200 as outstanding remuneration plus 5% interest *p.a.* as from 17 February 2023 until the date of effective payment;

- USD 189,570 as compensation for breach of contract without just cause plus 5% interest *p.a.* as from 4 February 2023 until the date of effective payment.

112. The above conclusion, finally, makes it unnecessary for the Sole Arbitrator to consider the other requests submitted by the Parties. Accordingly, all other prayers for relief are rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Esteghlal FC against the decision issued on 24 August 2023 by the FIFA Players' Status Chamber is partially upheld.

2. The decision issued on 24 August 2023 by the FIFA Players' Status Chamber is confirmed, save for Item 2 of its operative part which is amended as follows:

"[Esteghlal FC] *must pay to* [Azizbek Amanov] *the following amount(s):*

- *USD 3,146 as outstanding remuneration plus 5% interest p.a. as from 8 August 2022 until the date of effective payment;*

- *USD 50,000 as outstanding remuneration plus 5% interest p.a. as from 11 October 2022 until the date of effective payment;*

- *USD 50,000 as outstanding remuneration plus 5% interest p.a. as from 11 December 2022 until the date of effective payment;*

- *USD 22,200 as outstanding remuneration plus 5% interest p.a. as from 17 February 2023 until the date of effective payment;*

- *USD 189,570 as compensation for breach of contract without just cause plus 5% interest p.a. as from 4 February 2023 until the date of effective payment".*

3. (…).

4. (…).

5. All other or further motions or prayers for relief are dismissed.

CAS 2023/A/10209
Alex Schwazer v. World Athletics
15 May 2024 (operative part of 15 March 2024)

Panel: Mr André Brantjes (The Netherlands), President; Prof. Ulrich Haas (Germany); Mr Ken Lalo (Israel)

Athletics (race walking)
Doping (substantial assistance)
Expedited procedure
Request for bifurcation
Standing to be sued
Nature of an association's decision in a matter of substantial assistance
Assessment by CAS of the discretionary power of the association regarding substantial assistance applications
Issuing authority of the substantial application decision under Rule 10.7.1 (a) of the WA ADR
Importance of an athlete anti-doping history in the assessment of a substantial assistance application
Athlete's cooperation throughout the substantial assistance
Costs and nature of the appealed decision

1. **Under Article R52 (4) of the Code of Sports-related Arbitration (CAS Code), a request for an expedited procedure can only be implemented with the agreement of the parties. Similarly, CAS panels have no power to force a party to accept an expedited procedure.**

2. **The question whether to bifurcate proceedings in order to decide on a preliminary question is a procedural issue that is, in principle, governed in international arbitrations by Article 182 of the Swiss Private International Law Act (PILA). The CAS Code only deals with the question whether a CAS panel can bifurcate the proceedings in order to decide the preliminary question of its competence (Article R39, par. 5 of the CAS Code). It does not contain any provision on whether a CAS panel may bifurcate the proceedings in order to decide on other preliminary issues (be it on procedure or on the merits). In the absence of any specific provisions in the CAS Code, the CAS panel is entitled to apply the provisions and principles either directly or by reference to a law or rules of arbitration it deems fit. In accordance with Article 125 lit. a of the Swiss Code of Civil Procedure (CCP), a court may *"[i]n order to simplify the proceedings […] limit the proceedings to individual issues or prayers for relief"*. This power of the court is directly connected to Article 237 CCP according to which a court *"may issue an interim decision"*. When exercising its discretion according to Article 125 lit. a CCP, a court will take into account whether limiting the procedure to certain preliminary questions allows for a (substantial) saving of time or costs. Such power is a particular aspect of the mandate of an arbitral tribunal to organize the arbitral proceedings.**

3. **The question of who has standing to be sued is a matter regarding the merits of the case. It refers to the party against whom an appellant must direct its claim in order to be successful; in addition, a party has standing to be sued if it is personally obliged by the "disputed right" at stake, *i.e.* if said party has some stake in the dispute because something is sought against it. When deciding who is the proper party to defend an appealed decision, CAS panels**

proceed by an analysis of the interests involved and by taking into account the role assumed by the association in the specific case. In vertical disputes, the proper party to defend the decision, and thus, having standing to be sued is the association that has issued the decision.

4. Article 10.7.1 (a) of the World Athletics Anti-Doping Rules (WA ADR) which provides for the substantial assistance application indicates that there is no automatic right for an athlete who has provided assistance - even if substantial - to obtain a reduction, as it is a discretionary power for the decision-making body to assess whether the assistance is substantial and, if so, whether this assistance can justify, and in what proportion, obtaining a reduction. This discretion must be exercised on a case-by-case basis. Under Rule 10.7.1 of the WA ADR, CAS panels must assess (i) first, whether the assistance provided by the athlete is substantial or not; (ii) second, whether the provided substantial assistance can justify obtaining a suspension of the period of ineligibility; and (iii) third, the proportion of the suspension that should be granted. Furthermore, for an athlete to be able to assess whether the association exercised its discretionary power in a proper manner, the association shall state the grounds for its determination in its decision.

5. The freedom of an association to "govern" the relations with its members and their athletes, within the limits of the applicable rules, is widely recognized. This principle is far from excluding or limiting the power of a CAS panel to review the facts and the law involved in the dispute heard: it only means that a CAS panel would not easily "tinker" with a well-reasoned decision.

6. In accordance with Rule 10.7.1 (a) of the WA ADR, once a final decision on the sanctioning of an athlete's ADRV is taken, World Athletics may only suspend part of an athlete's ineligibility period with the approval of World Anti-Doping Agency (WADA). In a case in which WADA would decide not to approve a substantial assistance application, World Athletics would have to issue a refusal decision in which it would refer to both Rule 10.7.1 (a) of the WA ADR and to WADA's decision not to approve said athlete's request. It remains however that such decision issued to the athlete would be the sole responsibility of WA.

7. It appears reasonable for an association to consider that if an athlete's anti-doping rule violation (ADRV) history is so serious, it would be contrary to the overriding interest of the fight against doping to grant to that athlete any suspension. In casu, an athlete currently serving an eight-year period of ineligibility, which was immediately preceded by a three-years and nine-months period of ineligibility justifies the conclusion that said athlete's ADRV history is very serious.

8. It appears legitimate for the association to take into consideration an athlete's cooperation throughout the substantial assistance process in its determination of whether the

assistance provided by the athlete can justify suspension of part of the athlete's ineligibility period. In fact, the athlete's full cooperation in the substantial assistance process is required in order for the assistance provided to qualify as substantial, under the definition of the term "substantial assistance" in the WA ADRV. Additionally, the WADA Guidelines for the 2021 International Standard for Result Management provide that *"no RMA [Results Managements Authority] should agree to suspend Consequences unless it is satisfied that the Athlete or other Person has provided a full and frank disclosure of all of the facts surrounding the ADRV committed by the Athlete or other Person"* and that *"the RMA should also be satisfied that the Athlete or other Person has provided a full and frank disclosure of all previous ADRVs"*.

9. It follows from the wording of Article R65 of the CAS Code that the conditions for an appeal to be free of costs is that it is directed against i) a decision which is ii) exclusively of a disciplinary nature iii) issued by an international federation or sports-body. Article R65 (second sentence) of the CAS Code also specifies that this provision does not apply to appeals "related to sanctions imposed as a consequence of a dispute of an economic nature". A decision is disciplinary in nature if it imposes adverse effects to an individual in reaction to the latter's breach of rules and/or obligations. In the case of an appeal against a decision not to suspend part of an athlete's ineligibility period for substantial assistance, such decision is not of an exclusive disciplinary character, nor does it constitute a new disciplinary sanction. The nature of the substantial assistance decision does not have any sanctioning character as it is not intended to punish the athlete.

I. PARTIES

1. Mr Alex Schwazer is an Italian racewalker (the "Athlete"). He has won inter alia the gold medal in the 50 km race walking event at the 2008 Beijing Olympic Games. He is sanctioned with an eight-year period of ineligibility expiring on 7 July 2024.

2. World Athletics ("WA") is the international governing body of the sport of athletics, recognised as such by the International Olympic Committee. WA has its seat and headquarters in Monaco. It is a signatory to the World Anti-Doping Code, in compliance with which it has adopted a set of rules, namely the World Athletics Anti-Doping Rules (the "WA ADR"), to eradicate doping in athletics. It has also established the Athletics Integrity Unit (the "AIU"), which is charged with responsibility for the day-to-day administration of the WA ADR.

3. The Athlete and WA are jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

4. The present appeal was initiated against WA's decision dated 10 November 2023 to dismiss the Athlete's application to suspend part of his period of ineligibility in accordance with Rule 10.7.1 (a) of the WA ADR. This provision enables athletes serving a period of ineligibility to

apply for the suspension of part of such period upon provision of substantial assistance in discovering or establishing other anti-doping rule violations.

5. Below is a summary of certain key facts and allegations drawn from the Parties' written submissions as well as the oral pleadings and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in later sections of this award (the "Award"), in particular in connection with the Panel's discussion of the merits of the case. The Panel has considered all of the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings. It nonetheless refers in this Award only to those submissions and evidence that it considers necessary to explain its reasoning and conclusions.

A. The underlying Anti-Doping Rule Violation

6. On the eve of the 2012 London Olympic Games on 30 July 2012, the Appellant deliberately evaded a doping control. When he was ultimately located and tested, his sample was positive for recombinant EPO. The Athlete was sanctioned with a period of ineligibility from 30 July 2012 to 29 January 2016, and a further period until 29 April 2016 for evading the doping control on 30 July 2012.

7. On 1 January 2016, namely towards the end of his period of ineligibility, the Athlete underwent an unannounced out-of-competition doping test. The initial screening did not reveal the presence of any prohibited substance. However, as a result of the analysis of other samples provided by the Athlete, the Athlete's urinary steroid profile was flagged as abnormal on 5 March 2016. Consequently, the Athlete's sample was re-analysed. The re-analysis revealed that it was consistent with the administration of exogenous androgenic anabolic steroids, which is a prohibited substance under the Prohibited List of the World Anti-Doping Agency ("WADA").

8. On 21 June 2016, the Athlete was notified of the Adverse Analytical Finding ("AAF") and requested the opening of the B Sample. The results of the analysis of the B sample confirmed the results of the A sample. On 8 July 2016, the IAAF (i.e. former WA) imposed a provisional suspension on the Athlete.

9. In view of the proximity of the Olympic Games in Rio de Janeiro, the Athlete brought the case directly to the CAS. On 11 August 2016, the CAS rendered an Award in the matter *CAS 2016/A/4707 Alex Schwazer v. IAAF, NADO Italia, FIDAL & WADA* (the "2016 CAS Award"), by which the CAS Panel dismissed the Athlete's appeal against the provisional suspension imposed on him following notification of the AAF. The Athlete was found to have committed a second Anti-Doping Rule Violation ("ADRV") and was sanctioned with an 8-year period of ineligibility. The CAS Award was not challenged by the Athlete.

10. Following publication of the CAS Award, the *Procura di Bolzano* opened criminal proceedings against Mr Schwazer, doping being a criminal offence under Italian law (*frode sportiva*).

11. On 20 November 2022, the public prosecutor decided that there was insufficient evidence to prove a charge

of intentional doping to the requisite criminal standard, and therefore requested that the criminal proceedings be discontinued.

12. On 18 February 2021, the criminal proceedings against the Athlete were dismissed by the *Giudice per le indagini preliminari* (the "Bolzano Decision"). The Bolzano Decision was that, in essence, *"with a high degree of rational credibility"* the urine sample provided by the Athlete had been manipulated, suggesting that procedural fraud and other criminal offences under Italian law had been committed. All charges against the Athlete were dropped as it was found that he did not commit any crime.

13. On 6 April 2021 and following notification of the Bolzano Decision, the Athlete requested WADA and WA to allow him to return to competition.

14. On 15 April 2021, the Athlete, on the basis of the Bolzano Decision, sought the revision of the 2016 CAS Award in front of the Swiss Federal Tribunal ("SFT") on the basis of Article 190a, para. 1 (b) of the Swiss Private International Law Act ("PILA").

15. On 16 April 2021, WADA and WA rejected the Athlete's request to allow him to return to competition considering that the case had been decided definitively in the 2016 CAS Award (the "Reinstatement Refusal").

16. On 22 April 2021, WADA and WA issued a joint public statement explaining why the Bolzano Decision lacked any merit whatsoever.

17. On 29 April 2021, the Athlete appealed the Reinstatement Refusal before the CAS and sought provisional measures to allow him to return to competition in advance of the 2020 Tokyo Olympic Games. The CAS Court Office initiated an appeals procedure under reference *CAS 2021/A/7921 Alex Schwazer v. WA & WADA*.

18. On 6 May 2021, the Athlete's request for provisional measures was rejected.

19. On 26 July 2021, the Athlete withdrew his appeal before the CAS in the matter *CAS 2021/A/7921 Alex Schwazer v. WA & WADA*.

20. On 28 September 2021, the SFT dismissed the Athlete's recourse.

B. The Substantial Assistance Process

21. On 17 July 2021, the Athlete reported information regarding an anti-doping rule violation committed by V. via the online portal of WADA (the "Substantial Assistance Application") as well as to the AIU by email. V. is a former […] athlete who had been sanctioned with a lifetime period of ineligibility. The Athlete alleged that V. was employed […] by the […] Athletics Federation despite his lifetime period of ineligibility.

22. On 16 November 2021, the Athlete provided the AIU with a witness statement to substantiate his Substantial Assistance Application.

23. On 16 November 2021, the Athlete provided the AIU with a witness statement to substantiate his Substantial Assistance Application.

24. On 16 November 2021, the Athlete provided the AIU with a witness statement to substantiate his Substantial

Assistance Application.

25. On 22 November 2021, the AIU acknowledged receipt of the witness statement and requested further clarification from the Athlete.

26. On 1 December 2021, the Athlete provided the requested clarifications to the AIU.

27. On 19 January 2022, upon the Athlete's request, the AIU informed the Athlete that it was reviewing the information provided by the Athlete.

28. On 16 March 2022, the Athlete enquired again the AIU about the progress of his Substantial Assistance Application.

29. On 17 March 2022, the AIU informed the Athlete that, whilst it is under no obligation to provide updates of its investigation into the information provided by the Athlete, it was content to report that having interviewed V. concerning matters raised by the Athlete and having sought corroborating information from third parties, it was now seeking to interview V. a further time.

30. On 7 June 2022, the Athlete provided further information to the AIU.

31. On 23 June 2022, the AIU acknowledged receipt of the additional information filed by the Athlete and informed the Athlete that it anticipated undertaking in person interviews of third parties at the World Athletics Championships in Oregon in the course of July 2022.

32. On 27 September 2022, the AIU issued V. a notice of charge for several breaches of the prohibition on participation during his lifetime ban.

33. On 4 October 2022, V. returned a signed admission and acceptance of consequences form confirming that he admitted to violating the prohibition on participation during ineligibility as set out in the notice of charge.

34. On 11 November 2022, the Athlete again enquired about the progress on his Substantial Assistance Application.

35. On 17 November 2022, the AIU informed the Athlete that he would be invited for a meeting within the following month.

36. On 19 December 2022, a meeting was held between the AIU and the Athlete. During that meeting, the AIU requested the Athlete to formulate a proposal as to the suspension of his period of ineligibility.

37. On 17 January 2023, the Athlete requested the suspension of 50% of his period of ineligibility.

38. On 2 March 2023, the AIU informed the Athlete that it would require the authorization of WADA as per Rule 10.7.1 (a) of the WA ADR.

39. On 30 March 2023, WADA received the Substantial Assistance Application.

40. On 28 April 2023, WADA requested additional information from the Athlete.

41. On 10 May 2023, the Athlete replied to WADA objecting to some of the requested additional information and requesting further clarifications from WADA.

42. On 19 May 2023, WADA replied to the Athlete providing the requested clarifications.

43. On 26 May 2023, the AIU confirmed to the Athlete that although it had formed the view that the Athlete had provided substantial assistance (within the meaning of the term in the WA ADR), WADA, from which it had requested approval, is free to determine the necessary steps to reach a determination in that respect in the exercise of its sole discretion.

44. On 5 June 2023, the Athlete provided further comments on WADA's request for additional information and its clarifications.

45. On 14 July 2023, the Athlete provided his final reply to WADA's request for additional information.

46. On 27 July 2023, WADA requested the Athlete to provide clarification regarding the breach of confidentiality resulting from the publication of an article in the Italian newspaper *Gazzetta dello Sport* on 16 July 2023 regarding the Athlete's ongoing substantial assistance process.

47. On 4 August 2023, the Athlete provided his comments regarding the alleged breach of his duty of confidentiality resulting from the publication of the said article in the press.

48. On 8 August 2023, WADA replied to the Athlete regarding his comments on the alleged breach of confidentiality.

49. On 10 August 2023, WADA provided its comments to the Athlete's reply dated 14 July 2023.

50. On 12 August 2023, the Athlete personally provided his comments to WADA's letter dated 10 August 2023.

51. On 5 October 2023, the Athlete provided further comments and documents to WADA in answer to WADA's letter dated 10 August 2023.

52. On 6 November 2023, WADA informed WA that it did not approve the Athlete's Substantial Assistance Application.

53. On 10 November 2023, WA denied the Athlete's Substantial Assistance Application (the "Decision"). The Decision provided as follows:

"Dear Mr Seamer,

We refer to your letter dated 17 January 2023 requesting that the AIU suspend Mr Schwazer's period of Ineligibility in accordance with Rule 10.7.1 (a) of the [WA ADR].

As set out in the e-mail from Mr. Jackson on 2 March 2023, Rule 10.7.1 (a) of the [WA ADR] *provides that the AIU may only suspend a part of the otherwise applicable Consequences Imposed upon Mr Schwazer with the approval of WADA, and the AIU has sought WADA's approval accordingly.*

Please find enclosed correspondence from WADA confirming that, having reviewed the matter, WADA does not approve any suspension of the eight-year period of Ineligibility that Mr Schwazer is currently serving.

Considering WADA's position, Mr Schwazer's application cannot proceed and is therefore denied.

As stated in the WADA correspondence, Mr Schwazer had a right of appeal to CAS in

accordance with Rule 13.2 of the [WA ADR] *(together with those organisations that are copied on this correspondence)".*

54. WA attached to the Decision the correspondence received from WADA dated 6 November 2023 expressing WADA's decision not to approve any suspension of the Athlete's period of ineligibility. The reasoning of WADA's decision is, in essence, as follows:

"[…] In this case, the Athlete has provided open-source materials establishing that a former Belarusian athlete who had been sanctioned with a lifetime period of ineligibility, [V.], was employed […] by the […] Federation. [V.] subsequently admitted to having violated the prohibition against participation during his ineligibility and accepted that he was banned for life.

Even assuming that this information qualifies for Substantial Assistance, WADA considers, for the reasons set out below, that the Athlete should not receive any suspension of his period of ineligibility.

WADA recalls in particular that Substantial Assistance is a discretionary remedy. Indeed, this is clear from the wording of Code Article 10.6.1.1:

"An Anti-Doping Organization with results management responsibility for an antidoping rule violation **may** (…), prior to a final appellate decision under Article 13 or the expiration of the time to appeal, suspend a part of the period of Ineligibility imposed in an individual case where the Athlete or other Person has provided Substantial Assistance (…)" *(emphasis added)*

The CAS has confirmed that there is no "automatic right" to a suspension of the otherwise applicable consequences on the basis of Substantial Assistance, even if the conditions set forth by the Code are met:

When assistance is provided, "the hearing body or the CAS may reduce the period of ineligibility (…)". Therefore, there is no automatic right for the athlete who has provided assistance — even substantial — to receive this reduction, but a discretionary power for the decision-making body to assess whether the assistance is substantial and, if so, whether this assistance may justify, and to what extent, the granting of a reduction. Therefore, this discretion must be exercised on a case-specific basis.

WADA does not consider that a discretion to suspend any portion of the Athlete's period of Ineligibility should be exercised in this case. Without limitation, WADA notes that:

i. *The Athlete's own ADRVs are in themselves so serious as to not warrant any suspension of his period of ineligibility under Substantial Assistance. As evidenced by the below, the Athlete has repeatedly violated the anti-doping rules throughout his career:*
   - *On 30 July 2012, the Athlete attempted to subvert the doping control process and committed an ADRV under Article 2.3 of the 2009 World Anti-Doping Code;*
   - *On the same date, the Athlete returned an adverse analytical finding for recombinant erythropoietin, a potent prohibited substance, which he admitted having repeatedly injected himself with in the spring and summer of 2012;*

- *The Athlete admitted to having repeatedly used testosterone, a non-specified anabolic agent, in 2011;*
- *On 1 January 2016, the Athlete returned an adverse analytical finding for testosterone. This violation was found by the CAS to constitute an intentional violation and sanctioned with a period of ineligibility. The Athlete has, to this day, not provided any credible explanation for the presence of this non-specified anabolic agent in his body.*

ii. *The Athlete, as well as certain of his entourage and representatives, have made public comments that World Athletics and/or the Cologne Laboratory and/or WADA (respectively their staff members) were involved in a conspiracy to manipulate the urine sample collected on 1 January 2016 so that it would test positive. These public statements, which are devoid of any truth, have the potential to undermine the credibility and reputation of these three organizations and to cause significant damage to the fight against doping.*

iii. *WADA also notes that the Athlete has not been fully transparent and cooperative throughout his Substantial Assistance application. By way of example:*
- *The Athlete did not specifically address a number of the requests made by WADA relating to how he discovered [V.]'s breach of ineligibility.*
- *Despite numerous requests, the Athlete has failed to provide WADA with the originals of all pictures that he provided to the AIU.*
- *The Athlete also failed to provide WADA with documents related to his previous anti-doping rule violations in Italy; he apparently chose to do this because a lawyer affiliated to NADO-Italia, who happens to sit on WADA's Legal Expert Advisory Group, had access to those documents.*
- *The Athlete has admitted to intentionally breach the confidentiality of the results management process in connection with his Substantial Assistance application, with the specific objective of putting pressure on World Athletics and WADA during the course of their respective assessment of his applications. This is not only a breach of the confidentiality requirements under the applicable rules, but could potentially even amount to a tampering violation.*

[…] It bears recalling that the suspension of a period of ineligibility for Substantial Assistance is a discretionary remedy that is intended to reward athletes and other persons who have made a positive contribution to the fight against doping. Whereas the Athlete did bring to the attention of the AIU a breach of ineligibility (which ultimately led to no new sanction), any possible benefit to the fight against doping has been significantly outweighed by the damage caused by his repeated ADRVs and the above-mentioned allegations of a conspiracy against him implicating the AIU, the Cologne Laboratory and WADA.

[…] Therefore, for the above-mentioned reasons, and based on the elements established in the file, WADA does not approve any suspension of the eight-year period of

ineligibility that the Athlete is currently serving.

[…] Pursuant to Code Article 10.6.1.1, because the time to appeal the decision sanctioning the Athlete has expired, the AIU may only suspend a part of the consequences imposed on the Athlete with the approval of WADA. Since WADA does not approve any suspension of the Athlete's period of ineligibility, we trust that the AIU will now draft and issue its decision denying the Athlete's Substantial Assistance request.

[…] This decision of the AIU will be appealable in accordance with Code article 13.2 and shall be notified to all parties with a right of appeal.[…]"

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

55. On 11 December 2023, the Athlete filed with the Court of Arbitration for Sport (the "CAS") an appeal against WA with respect to the Decision and submitted a Statement of Appeal pursuant to Article R48 of the Code of Sports-related Arbitration (2023 edition) (the "CAS Code"). In his Statement of Appeal, the Athlete designated WA as respondent, and WADA, the National Anti-Doping Organisation Italia ("NADO Italia") and the *Federazione Italiana di Atletica Leggera* ("FIDAL") as "Interested Parties". Finally, the Athlete nominated Prof. Dr Ulrich Haas, Attorney-at-Law in Hamburg, Germany and Professor in Zurich, Switzerland, as arbitrator, and requested his appeal to be decided following an expedited procedure with an operative part issued *"within the end of February"* 2024.

56. On 12 December 2023, the CAS Court Office informed the Parties that the present arbitration proceedings had been assigned to the Appeals Arbitration Division of the CAS. The CAS Court Office noted that the Athlete's appeal was directed against WA only since the Statement of Appeal was not formally directed against WADA, NADO Italia and FIDAL who had not been designated as respondents in the Athlete's Statement of Appeal but only as *"interested parties"*, a role which is not recognized under the CAS Code The CAS Court Office further took note of the Athlete's request for an expedited procedure and invited WA to indicate whether it agreed with the Appellant's request. Finally, the CAS Court Office invited the Athlete to file his Appeal Brief within the prescribed time limit and informed the Parties that the costs of the present arbitration proceedings were to be paid by the Parties, in accordance with Article R64.2 of the CAS Code.

57. On the same day, the CAS Court Office informed WADA, NADO Italia and FIDAL that the Athlete had filed a Statement of Appeal against WA and that they had been designated as *"interested parties"*.

58. On 13 December 2023, the Athlete submitted that these proceedings were of exclusively disciplinary nature and, as such, subject to Article R65 of the CAS Code and free of costs.

59. On 18 December 2023, WA noted that WADA was not included by the Athlete as a respondent, despite the fact that the Decision was effectively rendered by WADA. WA argued that WADA's legal interests would be affected by the Athlete's requests and that WADA should therefore have been included as a respondent. WA requested the CAS

Court Office that the issue of WA's standing to be sued alone in the present matter be decided upon on a preliminary basis by way of bifurcation (the "Request for Bifurcation"). WA further informed the CAS Court Office that it did not agree with the Athlete's request that the present proceedings be expedited.

60. On 19 December 2023, the CAS Court Office informed the Parties that the present proceedings were subject to costs in accordance with Article R64 of the CAS Code and that, if the Athlete so requested, the Panel would make a determination in this respect. In particular, the CAS Court Office informed the Parties as follows:

"As a matter of fact, Mr Schwazer has not been subjected to any sanction as a result of the decision currently under appeal. The disciplinary sanction affecting the Appellant stems from CAS 2016/A/4707, which was, indeed, an appeal "against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body" *in accordance with Article R65 of the Code.*

In the present case, as a matter of fact, the Athlete's "disciplinary status" has remained unaltered with respect to the sanction already imposed on him: it is undisputable that the denial of his request for suspension does not constitute a new disciplinary sanction against him.

It is noted that in the context of CAS 2020/A/7921*, where the Athlete was seeking to overturn the decision of World Athletics and WADA denying his reinstatement following the findings of* [the Bolzano Decision]*, the Athlete paid the totality of the procedural costs without raising any objection regarding the application of Article R64 of the Code. In that instance as well, as a matter of fact, Mr Schwazer's "disciplinary status" remained unchanged by the appealed decision.*

Similar to a reinstatement decision, a decision concerning "substantial assistance" and the potential reduction in ineligibility it may entail does not, per se, constitute a disciplinary matter. Therefore, this case should be considered as predominantly concerning eligibility, and not as a disciplinary matter, for which reason it does not fall under Article R65 of the Code.

As a consequence, it is confirmed that the present procedure shall be subject to costs".

61. On the same day, WADA informed the CAS Court Office that it requested its deadline to intervene pursuant to Article R41.3 of the CAS Code be suspended pending determination of the matters set out in WA's letter dated 18 December 2023.

62. On 21 December 2023, within the prescribed time limit, the Athlete filed his Appeal Brief with the CAS Court Office.

63. On the same day, the CAS Court Office invited the Parties to comment on WADA's request to suspend its time limit to intervene pursuant to Article R41.3 of the CAS Code and invited WA to file its Answer.

64. On the same day, WA requested the CAS Court Office that its deadline for filing its Answer be suspended pending a decision on the Request for Bifurcation and dismissal of the appeal for WA's lack of standing to be sued alone. Moreover, WA nominated Mr Ken E. Lalo, Attorney-at-Law in Gan-Yoshiyya, Israel, as arbitrator.

65. On 22 December 2023, the CAS Court Office invited the Athlete to comment on WA's request for suspension of the time limit to file the Answer and suspended such time limit until further notice.

66. On the same day, the Athlete stated that the CAS Court Office's invitation made to WADA to indicate whether or not it wished to intervene in the present proceedings constituted an *"abnormal measure"* since WADA was already a party to the present proceedings; in addition, the Athlete requested the CAS Court Office to reject WA's Request for Bifurcation and to dismiss the appeal for lack of standing to be sued alone as well as WADA's request for suspension of its time limit to intervene.

67. On the same day, the CAS Court Office reiterated to the Athlete that, unless the Panel once constituted decides otherwise, WADA was not considered a formal party to the present proceedings and, as a result, the CAS Court Office's request made to WADA to indicate whether it wished to intervene in the present proceedings or not, was not an *"abnormal measure"*.

68. On 11 January 2024, the CAS Court Office informed the Parties and WADA that the Division President had decided that the time limit for the possible intervention of WADA as well as the time limit to file the Answer were suspended until further notice.

69. On 24 January 2024, the CAS Court Office informed the Parties that the Panel appointed to decide the present procedure was constituted as follows:

President: Mr André Brantjes, Attorney-at-Law in Amsterdam, the Netherlands.

Arbitrators: Prof. Dr Ulrich Haas, Professor in Zurich, Switzerland and Attorney-at-Law in Hamburg, Germany.M. Ken E. Lalo, Attorney-at-Law in Gan-Yoshiyya, Israel.

The CAS Court Office further informed the Parties that Ms Stéphanie De Dycker, CAS Clerk, would assist the Panel in the present matter.

70. On 29 January 2024, the CAS Court Office informed the Parties and WADA that the Panel had decided to reject WA's Request for Bifurcation and that its decision as well as the issue of WA's standing to be sued alone would be determined in the Award. The CAS Court Office also informed the Parties and WADA that WA's time limit to file its Answer and WADA's time limit to inform whether it intended to intervene in the present proceedings resumed with immediate effect. The CAS Court Office further requested the Athlete, on behalf of the Panel, to provide detailed clarification in support of his request for an operative part to be notified by 1 March 2024.

71. On 30 January 2024, WADA informed the CAS Court Office that it *"w[ould] not intervene in these proceedings as a party but reserve[d] all its rights"*.

72. On 31 January 2024, the Athlete provided further clarifications in support of his request for an operative part to be notified by 1 March 2024.

73. On 1 February 2024, the CAS Court Office invited WA to comment on the Athlete's submission in support of his

request for a decision to be issued by 1 March 2024, and consulted the Parties on a possible hearing date. In addition, the Panel informed the Parties that, without prejudice to the question of whether WA has standing to be sued alone, it would not consider WADA as a respondent in the present proceedings.

74. On 6 February 2024, the CAS Court Office informed the Parties that they were called to appear at the hearing in the present proceedings, which would be held by videoconference on 27 February 2024 and invited the Parties to communicate the list of the persons attending the hearing as well as their contact details.

75. On 19 February 2024, WA filed its Answer with the CAS Court Office. In its Answer, WA requested Athlete's Exhibits 8, 9 and 12 to be removed from the record since these exhibits contain *"without prejudice"* correspondence between WA and the Athlete's legal representative. In the event the Panel would decide not to remove the concerned exhibits from the record, WA requested leave to *"produce all of the "without prejudice" correspondence it engaged in with the Athlete"*.

76. On 21 February 2024, the Parties separately communicated to the CAS Court Office the list of persons attending the hearing as well as their contact details.

77. On 22 February 2024, the CAS Court Office informed the Parties that the Panel rejected the Respondent's request to exclude from the file Exhibits 8, 9 and 12, and that, since the Athlete had not objected to WA's alternative request, WA was granted a short deadline to *"produce all of the "without prejudice" correspondence it engaged in with the Athlete"*. In addition, the CAS Court Office issued a tentative hearing schedule for the Parties to comment.

78. On 22 February 2024, the CAS Court Office issued an order of procedure (the "Order of Procedure") in the present matter and requested the Parties to return a completed and signed copy, which the Parties did on 23 February 2024.

79. On 23 February 2024, within the provided time limit, WA also filed additional *"without prejudice"* correspondence between the Athlete and WA.

80. On 26 February 2024, upon comments from the Parties, the CAS Court Office issued a finalised hearing schedule.

81. On 27 February 2024, a hearing was held in the present matter by videoconference. In addition to the members of the Panel, Ms Stéphanie De Dycker, CAS Clerk, and Mr Giovanni Maria Fares, CAS Counsel, the following persons attended the hearing:

<u>For the Athlete</u>:

Mr Alex Schwazer, Athlete
Ms Maria Laura Guardamagna, counsel
Mr Massimiliano Valcada, counsel
Mr Gerhard Brandstätter, counsel
Mr Thomas Tiefenbrunner, counsel
Mr Alessandro Cerruti, interpreter

<u>For WA</u>:

Ms Louise Reilly, counsel
Mr Tony Jackson, AIU Deputy Head of Case Management

Ms Annalisa Cherubino, AIU Case Management Coordinator

82. At the outset of the hearing, the Parties declared that they had no objections as to the constitution of the Panel.

83. At the hearing, the Parties were given full opportunity to present their case, submit their arguments and answer the questions from the Panel. The Athlete also had the opportunity to make a statement.

84. At the end of the hearing, the Parties confirmed that they were satisfied with the procedure throughout the hearing, and that their right to be heard had been fully respected.

IV. THE PARTIES' SUBMISSIONS AND REQUESTS FOR RELIEF

85. The aim of this section of the Award is to provide a summary of the Parties' main arguments rather than a comprehensive list thereof. Additional elements of the Parties' claims may be discussed in subsequent sections of the Award. As stated above, the Panel reiterates that in deciding upon the Parties' claims it has carefully considered all the submissions made and all the evidence adduced by the Parties, whether or not expressly referred to in this section of the Award or in the discussion that follows.

A. The Athlete

86. In its Appeal Brief, the Athlete requested the following relief:

"i. To declare that the present appeal proceeding falls under R.65 CAS Code

ii. To expedite the proceedings as per the following calendar:
• a hearing to be held within 30 January 2024 and
• the operative part of the Award to be issued within eight (8) days of the hearing.
In any case to issue a decision which grants effective and efficient access to justice within a reasonable time.
iii. The Appeal of Alex Schwazer is admissible.
iv. The AIU's Decision issued on 10 November 2023 is set aside.
v. Alex Schwazer is found to have provided substantial assistance and thus he is worthy of an ineligibility period suspension.
vi. The remaining ineligibility period Alex Schwazer is currently serving (scheduled to expire on 7 July 2024) is suspended in its totality (meaning to say less than 10% of Mr Schwazer period of ineligibility), or, in alternative, is reduced or suspended in the measure that the Honourable Panel would deem fair and equal in view of the Olympic Games Paris 2024 qualification and, accordingly, Alex Schwazer is declared eligible to compete.
vi. World Athletics is condemned to pay Alex Schwazer legal and other costs related to the proceeding".

87. The Athlete's submissions, in essence, may be summarized as follows:

- The Athlete correctly directed his appeal against WA only. For his appeal to proceed, the Athlete does not need to direct his appeal against WADA (in addition to WA). The Decision concerning the status of the Athlete is the Decision rendered by WA (not WADA) and WADA's decision was never directly notified to the Athlete. The Athlete indicated WADA as "interested party" because it is a third party with an

interest in the proceedings. Moreover, the Athlete does not make any request against WADA. In addition, upon receiving a copy of the Statement of Appeal, WADA was put in the same position to defend itself as WA, and it chose not to intervene.

- The Athlete provided substantial assistance within the meaning of the WA ADR:
  - the Athlete disclosed in a signed written statement all information he possessed regarding V.'s violation of disqualified status and prohibited association under the WA ADR. WADA considered, in August 2021, that the documentation provided by the Athlete was suitable to open an investigation, and AIU carried out such investigation in the following months.
  - The Athlete fully cooperated in the investigation involving V. and assiduously tried to answer and revert to all WADA's requests (even those asked with a clearly dilatory intent).
  - Based on the information provided by the Athlete, a doping investigation related to the violation of Rule 2.10 of the WA ADR was carried out and V. confessed, which sufficiently demonstrates that the information provided by the Athlete was indeed credible and comprised an important part of an initiated case.
- With respect to the criteria for the determination of the extent of the suspension of the ineligibility period:
  - V.'s ADRV qualifies as serious since by persisting to perform his sport duties despite his lifelong ineligibility he caused an immediate, visible and profound discredit to the world sports community; in addition, his behaviour exposed a number of athletes and other licensees to the violation of Rule 2.10 of the WA ADR, which prohibits association with persons serving a period of ineligibility.
  - The Athlete's ADRV is the result of a positive test for testosterone following the re-examination of a previously negative urine sample; the Athlete also recalls that the criminal charges for doping in Italy had been dropped against him. In such context, the fact that the Athlete always defended himself against this charge and always refused to confess having doped is not an impeding factor in granting the suspension of the ineligibility period.
  - The significance of the substantial assistance provided by the Athlete is blatant: the information he provided concerned multiple violations

committed by V. and also involved, indirectly, a considerable number of individuals with whom V. was in extremely close sport-relationship. In addition, V. is a high-level […] who collaborates with highest-level athletes.

- The requested suspension is of less than 10% of the period of ineligibility.

- WADA's letter attached to the Decision invokes unfounded justifications for denying the Athlete's Substantial Assistance Application:
  - The reference to the ADRVs committed in 2011-2012 by the Athlete is not relevant for the present proceedings; with respect to the disputed ADRV of 2016, WADA should have taken into account in the evaluation of the Athlete' Substantial Assistance Application the fact that according to the Bolzano Decision, the urine sample had been intentionally manipulated, which resulted in the criminal proceedings instituted against the Athlete being dismissed.
  - The fact that the Athlete publicly defended his position is not a criterion for denying his Substantial Assistance Application as per Rule 10.7.1 (a) of the WA ADR. Moreover, the fact that the Athlete exercised his right of defence in a trial where he was accused of a doping crime cannot negatively impact the assessment of his Substantial Assistance Application.
  - Some of the justifications contained in WADA's letter attached to the Decision are not specific enough and are also unfounded since the Athlete repeatedly responded to WADA on the origin of the pictures provided, on the source of the information he revealed and provided all the requested documents to WADA.
  - Finally, the Athlete did not breach any duty of confidentiality since he did not provide any sensitive information to the press, nor did he commit any tampering violation since he did not put any pressure on the sports organisations deputed to evaluate his Substantial Assistance Application.

B. World Athletics

88. In its Answer, WA requested the following relief:

> *"(i) The appeal of Alex Schwazer is found to be inadmissible, or in the alternative is dismissed.*
> *(ii) The arbitration costs shall be borne by Alex Schwazer.*
> *(iii) World Athletics is granted a contribution to its legal and other costs".*

89. WA's submissions, in essence, may be summarized as follows:

- The Athlete failed to identify the proper respondents in this matter. It is the Athlete's responsibility to identify the respondents for his appeal to proceed. In the present case, the Athlete should have included WADA as respondent, since it was WADA's *animus decidendi* that disposed of the matter, not that of WA: the Decision makes clear that a suspension for Substantial Assistance is only possible with the approval of WADA and that since WADA did not approve any suspension in this case, the application could not proceed. Without WADA as a respondent, WADA's non-approval is equally binding on this CAS panel as it was on WA.

- The Athlete never challenged the fact that WADA was only informed of the proceedings with a right to intervene but was never included as a party in the proceedings.

- Suspension for Substantial Assistance is subject to the double discretion of both WADA and WA (provided that WADA approves the application). In the present matter, the Athlete is challenging WADA's exercise of discretion. However, as confirmed by CAS case law, there is no right to a suspension of sanction for Substantial Assistance, which is characterized as a *"mesure de clémence"*.

- WADA exercised its discretion in a reasonable and proper manner. WADA's clear grounds for its refusal of the Athlete's Substantial Assistance Application are set out in its letter dated 6 November 2023: it relied on (a) the Athlete's history of ADRVs, (b) his public statements which were devoid of any truth and had the potential to cause damage to the fight against doping, and (c) the Athlete's lack of cooperation and transparency in the substantial assistance process.

V. JURISDICTION

90. 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. […]"

91. Rule 13.2 of the WA ADR provides as follows:

"The following decisions may be appealed exclusively as provided in Rules 13.2 to 13.7: [….] a decision to suspend (or not suspend) Consequences or to reinstate (or not reinstate) Consequences under Rule 10.7.1; […]
13.2.1 In cases involving International-Level Athletes or arising from Persons participating in an International Competition, the decision may be appealed exclusively to CAS. […]
13.2.2 In cases under Rule 13.2.1, the following parties will have the right to appeal to CAS: (i) the Athlete or other Person who is the subject of the decision being appealed;[…]"

92. There is no doubt that the Athlete qualifies as an *"international-level athlete"* within the meaning of the WA ADR, and that, the Decision qualifies as *"a decision to […] not suspend Consequences under Rule 10.7.1"*. As a result, the CAS holds jurisdiction to decide on the present matter brought by the Athlete. By signing the Order of Procedure, the Parties have confirmed that the CAS has jurisdiction to decide the appeal at issue in the present proceedings.

VI. ADMISSIBILITY

93. 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. 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. […]"*

94. Rule 13.6.1 of the WA ADR provides as follows:

> *"(a) The time to file an appeal to the CAS will be thirty (30) days from the date of receipt of the reasoned decision by the appealing party. Where the appellant is a party other than World Athletics or WADA, to be a valid filing under this Rule 13.6.1, a copy of the appeal must be filed on the same day with World Athletics".*

95. The Statement of Appeal was filed by the Athlete on 11 December 2023, i.e. within the time limit of 30 days of receipt of the Decision. The Panel notes that the further conditions set out under Article R48 of the CAS Code and Rule 13.6.1 of the WA ADR are also met.

96. The Panel therefore finds that the present appeal is admissible.

VII. APPLICABLE LAW

97. 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".*

98. The Panel notes that the Decision was rendered following a procedure that was initiated under the WA ADR. It follows, and the Parties agree, that WA ADR apply to the merits of the present appeals proceedings. Since the Substantial Assistance process was initiated in 2021, the Panel considers that the WA ADR (2021 edition) (also referred to as "WA ADR") applies to the present matter. To the extent that the WA ADR do not rule on a specific issue, the Panel finds that Monegasque law applies subsidiarily.

VIII. PROCEDURAL ISSUES

99. The Panel shall examine in this section some preliminary issues of a procedural nature.

A. Expedited Procedure

100. First, the Panel recalls that, in his Statement of Appeal, the Athlete requested the present proceedings to be expedited under Article R52 (4) of the CAS Code. On 18 December 2023, WA informed the CAS Court Office that it did not accept the Athlete's request that the proceedings be expedited. Following WA's refusal, the CAS Court Office informed the Parties that in accordance with Article R52(4) of the CAS Code, the present proceedings were not expedited.

101. In his Appeal Brief, filed on 21 December 2023, the Athlete nevertheless requested the Panel to find that the present matter be decided upon in an expedited manner even if WA did not consent to an expedited procedure as per Article R52 (4) of the CAS Code. The Athlete contended that he has a right to obtain a useful decision within a reasonable time. However, if the Panel were to decide to accept his appeal and suspend his period of ineligibility only after 1 March 2024, it would be difficult for the Athlete to try to qualify for the Paris 2024 Olympics. The Athlete further noted that he is not to blame for such situation as the AIU took more than two years to issue a negative decision on his Substantial Assistance Application. WA did not answer on this specific point.

102. The Panel confirms that, under Article R52 (4) of the CAS Code, a request for an expedited procedure can only be implemented with the agreement of the Parties. Similarly, the Panel has no power to force a party to accept an expedited procedure. Hence, the Panel has no other choice than to reiterate that the present proceedings are not expedited under Article R52 (4) of the CAS Code.

103. The Panel nonetheless duly took into account the Athlete's desire for a quick decision, because a late decision would effectively deprive him of the opportunity to qualify for and participate in the 2024 Paris Olympics. With this in mind, the Panel facilitated the holding of a hearing on an expedited basis. Furthermore, as set forth below, the Panel also took into account the Athlete's urgency for a quick resolution of the matter at hand in dismissing WA's application for a bifurcation of the proceedings.

B. WA's request for bifurcation

104. Second, the Panel shall explain here its decision to reject WA's Request for Bifurcation. On 18 December 2023, WA filed a Request for Bifurcation of the procedure and requested that the Panel render a Preliminary Award on the issue of standing of the Appellant to bring a claim against WA before the CAS without WADA being a formal party to the proceedings. WA explained that, in accordance with CAS case law, the organisation that renders the appealed decision, i.e. disposed of the matter, has standing to be sued and is the proper respondent on appeal, and that the Panel should refuse to render an award if such award would have effects on the legal interests of a non-party – *in casu* WADA's right of approval as provided under Rule 10.7.1 of the WA ADR.

105. On 22 December 2023, the Athlete objected to WA's Request for Bifurcation arguing that the Decision was rendered by WA (not WADA) and that WA referred to WADA's letter

dated 6 November 2023 as forming the grounds of its own Decision. In addition, since the Statement of Appeal and Appeal Brief – in which the Athlete had qualified WADA as an "interested party" – had been notified to WADA also, WADA's legal interests are secured. The Athlete therefore considers that any different conclusion would constitute excessive formalism that would run counter to the requirement of securing a practical and effective right.

106. As a starting point, the Panel notes that the question whether to bifurcate proceedings in order to decide on a preliminary question is a procedural issue that is, in principle, governed in international arbitrations by Article 182 of the PILA. The CAS Code, to which both Parties submitted, only deals with the question whether a Panel can bifurcate the proceedings in order to decide the preliminary question of its competence (Article R39, par. 5 of the CAS Code). It does not contain any provision on whether a Panel may bifurcate the proceedings in order to decide on other preliminary issues (be it on procedure or on the merits).

107. In the absence of any specific provisions in the CAS Code, the Panel is entitled – according to Article 182 (2) PILA – to apply the provisions and principles either directly or by reference to a law or rules of arbitration it deems fit. The Panel is inspired by Article 125 lit. a of the Swiss Code of Civil Procedure (CCP). According thereto a court may *"[i]n order to simplify the proceedings…limit the proceedings to individual issues or prayers for relief"*. This power of the court is directly connected to Article 237 CCP according to which a court *"may issue an interim decision"* (KUKO-ZPO/WEBER, 3rd ed. 2021, Article 125 no. 3; see CAS 2019/A/6294, paras 63 et seq. and the references mentioned). When exercising its discretion according to Article 125 lit. a CCP, a court will take into account whether limiting the procedure to certain preliminary questions allows for a (substantial) saving of time or costs (CPC-HALDY, 2nd ed. 2019, Article 125 no. 5). The view held here that an arbitral tribunal is entitled to issue decisions on preliminary questions is also backed by the legal literature according to which in the absence of an agreement by the parties, the panel is vested with the power to issue interim or final awards. Such power is a particular aspect of the mandate of an arbitral tribunal to organize the arbitral proceedings (POUDRET/BESSON, Comparative Law of International Arbitration, 2nd ed. 2007, no. 725).

108. In the present matter, as already explained, the Athlete's request for an expedited procedure was denied in accordance with Article R52 of the CAS Code following WA's refusal to submit to such expedited procedure. As already explained, the Panel informed the Parties that it was nevertheless ready to accommodate – as much as possible and without any guarantee – the Athlete's request for a decision to be issued before 1 March 2024 in order to secure as much as possible his chances to qualify for the Paris 2024 Olympics in case the Panel were to accept his appeal. In this context, if the Panel were to accept the Request for Bifurcation, regardless of its decision on the bifurcated issue, the Athlete's appeal would be largely moot, as a decision on the merits (in case WA's objection to its standing to be sued alone were dismissed) would effectively

deprive the Athlete of the opportunity to qualify for and participate in the 2024 Paris Olympics. In the Panel's view, it follows from the principle of procedural efficiency, and to avoid a situation of "justice delayed is justice denied", that the issue of WA's standing to be sued alone, i.e. in the absence of WADA as a party, shall in the present case be decided upon together with the merits of the matter in the Award.

C. WA's request for the removal of documents from the file

109. Third, in its Answer, WA requested Athlete's Exhibits 8, 9 and 12 to be removed from the record since these exhibits contain *"without prejudice"* correspondence between WA and the Athlete's legal representative. In the event the Panel would decide not to remove the concerned exhibits from the record, WA requested leave to produce all of the *"without prejudice"* correspondence it engaged in with the Athlete.

110. The Athlete submitted that the correspondence that WA asked to be removed from the record was used to issue the Decision and that its removal would cause a severe prejudice to the Athlete's right of defense. Moreover, the use of '*without prejudice*' does not automatically qualify all communications made alongside as privileged and the correspondence at stake was not exchanged between lawyers but between a lawyer and WA. Finally, the Athlete noted that WA itself also submitted *"strictly private and confidential"* correspondence under Exhibits R 8, 9 and 10. In addition, the Athlete did not oppose WA's filing of *"without prejudice"* correspondence.

111. On 22 February 2024, the CAS Court Office informed the Parties that the Panel had decided to dismiss WA's request to remove the Athlete's Exhibits 8, 9 and 12 from the record and, since the Athlete did not oppose WA's alternative request, allowed WA a short deadline to file the *"without prejudice"* correspondence it engaged in with the Athlete it sees fit. The Panel considered that since these exhibits are relevant documents for the case and WA also submitted *"strictly private and confidential"* correspondence under exhibits R 8, 9 and 10 to its Answer, there was no reason to remove exhibits 8, 9 and 12 of the record. Similarly, since the Athlete did not oppose, there was no reason for the Panel not to accept the filing of additional *"without prejudice"* correspondence related to the same matter.

IX. MERITS

112. In light of the submissions of the Parties, the Panel shall answer the following questions:

(a) Does WA have standing to be sued in the absence of WADA as a party?

(b) Is the Decision legally valid based on the applicable level of CAS' scrutiny?

A. WA's Standing to be Sued Alone

113. The Appellant contends that WA is the sole respondent in the present appeal, since only WA's decision was directly notified to him. The fact that WA is required to request WADA's approval before being able to accept the Athlete's

Substantial Assistance Application and the fact that WA relied on WADA's disapproval to dismiss the Athlete's Substantial Assistance Application does not affect WA's standing to be sued alone in the present appeal.

114. WA in turn submits that, without WADA being a respondent, this CAS Panel is bound by WADA's decision not to approve the Substantial Assistance Application. The Decision makes it clear that a suspension for substantial assistance is only possible with the approval of WADA and that the Athlete's application could not proceed as a result of WADA's disapproval of the Substantial Assistance Application. WA therefore submits that the Appellant should have named WADA as an additional respondent in the present appeal, and that his failure to do so should necessarily lead the Panel to the conclusion that the present appeal be dismissed.

115. The Panel starts its examination by recalling that, according to settled CAS jurisprudence, the question of who has standing to be sued is a matter regarding the merits of the case implying that if WA's standing to be sued is denied, then the appeal must be dismissed (see MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, under R48, no. 65; see also ATF 126 III 59; CAS 2020/A/7356, para. 63; CAS 2020/A/6694; CAS 2020/A/6922, para. 95; CAS 2016/A/4602; CAS 2015/A/4131, para 95; CAS 2009/A/1869; CAS 2008/A/1639, no. 26; CAS 2007/A/1329 & 1330).

116. The issue of standing to be sued refers to the party against whom an appellant must direct its claim in order to be successful; in addition, a party has standing to be sued if it is personally obliged by the "disputed right" at stake, i.e. if said party has some stake in the dispute because something is sought against it (CAS 2020/A/6922, para. 96; CAS 2022/A/8225, para. 75; CAS 2007/A/1329&1330, para. 27; CAS 2008/A/1620, para. 4.1; CAS 2007/1367, para. 37; and CAS 2012/A/3032 para. 42; see also see MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, under R48, no. 65; HAAS U., Standing to Appeal and Standing to be sued, in International Sport Arbitration, Bern 2018, p. 53-88, para. 1 with reference to other CAS jurisprudence).

117. CAS panels have also repeatedly decided that *"the question of standing to be sued […] must be resolved on the basis of a weighting of the interests of the persons affected by said decision. The question, thus, is who […] is best suited to represent and defend the will expressed by the organ of the association"* (CAS 2016/A/4787 para. 109; CAS 2015/A/3910, para. 138, endorsed by CAS 2016/A/4602, paras. 81 ff.; see also CAS 2021/A/8225, para.76-77). It follows that when deciding who is the proper party to defend an appealed decision, CAS panels proceed by an analysis of the interests involved and by taking into account the role assumed by the association in the specific case (CAS 2020/A/7356, para. 64).

118. In order to assess who is/are the proper respondent(s) in the present matter, the Panel shall verify who is to take the responsibility for the decision under appeal.

119. The Panel first notes that the present appeal is directed against the Decision, and that the Decision was issued by WA. Moreover, the Decision, that was rendered in a disciplinary or eligibility context, was issued in a "vertical dispute". As a result, *"it is an undisputed principle that the proper party to defend the decision, and thus, having standing to be sued is the association that has issued the decision"* (HAAS U., Standing to Appeal and Standing to be sued, in International Sport Arbitration, Bern 2018, p. 76-77, para.43). Therefore, the Panel *prima facie* concludes the natural respondent in the present case is WA only.

120. The delicate issue in the present matter, however, is that the Decision was taken *per relationem*, i.e. on the exclusive and sole basis of the letter dated 6 November 2023 that WADA sent to WA and in which WADA exposes its decision – as well as its reasoning – not to approve the Athlete's Substantial Assistance Application, as provided under Rule 10.7.1 (a) of the WA ADR. The relevant part of this provision states as follows:

"After an appellate decision under Rule 13 or the expiration of time to appeal, the Integrity Unit may only suspend a part of the otherwise applicable Consequences with the approval of WADA".

121. Hence, following this provision, if WADA does not approve an athlete's request for suspension based on substantial assistance, WA is required to dismiss it. This is exactly what occurred in the present case: WADA disapproved the Athlete's Substantial Assistance Application on 6 November 2023, which led WA to dismiss the Substantial Assistance Application on 10 November 2023, with no other explanation than WADA's disapproval of such application.

122. For the Panel to assess the impact of this specific characteristic of the present matter on the issue of standing, it is necessary to investigate the various elements before it, starting with the applicable WA ADR. Under Rule 13.2 of the WA ADR, the Decision is *"a decision to suspend (or not suspend) Consequences or to reinstate (or not reinstate) Consequences under Rule 10.7.1"* and therefore is appealable before the CAS. The Panel however notes that the WA ADR do not detail against whom an athlete needs to direct its appeal in the specific context where WADA has taken a preliminary decision in the lead up of the WA's final decision.

123. The WA ADR – in line with the World Anti-Doping Code ("WADC") – do not provide for other scenarios where an athlete may seek to challenge a preliminary question decided by WADA in the lead up to a final decision of a federation. In the rare situation where the WA ADR (or the WADC) do so, WADA's participation within the dispute between an athlete and his/her federation is expressly provided for and organised. This is the case under Article 3.2.1 of the WA ADR, which states as follows:

"Analytical methods or Decision Limits that have been approved by WADA after consultation within the relevant scientific community or that have been the subject of peer review are presumed to be scientifically valid. Any Athlete or other Person seeking to challenge whether the conditions for such presumption have been met or to rebut this presumption of scientific validity will, as a condition precedent to any such challenge, first notify WADA of the challenge and the basis of

the challenge. The initial hearing body, appellate body or CAS may also (on its own initiative) inform WADA of any such challenge. Within ten days of WADA's receipt of such notice and the case file related to such challenge, WADA will also have the right to intervene as a party, appear as amicus curiae or otherwise provide evidence".

124. The fact that the WA ADR do not provide or organise WADA's participation in the context of an appeal against a decision under Rule 10.7.1 (a) of the WA ADR is, in the Panel's view, a further indicator that WADA did not consider itself as a proper respondent in such context.

125. The Panel further notes that, based on Rule 1.1.2 of the WA ADR, *"[t]hese Anti-Doping Rules must be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of any Signatory or government".* As a result, the Panel is prevented from falling back on Swiss law, Monegasque law or apply general legal principles.

126. Absent any national legal framework to consult in order to determine the proper defendant in this appeal procedure, the Panel turns to other sources of information in order to assess who is – according to the WA ADR – the proper defendant of the decision in dispute. This is also in line with CAS jurisprudence. In CAS 2015/A/3910 (no. 138) the Panel applied the following criteria to determine the appropriate defendant:

> *"[…] the Panel holds that […] the question of standing to be sued […] must be resolved on the basis of a weighting of interest of the persons affected by said decision. The question thus is who is best suited to represent and to defend the will expressed by the organ of the association".*

127. In the context of the balancing exercise, the Panel holds it appropriate to take also into account the understanding of the stakeholders at the time the decision in question was issued. Neither the Decision nor WADA's letter attached thereto indicate that an appeal must be lodged against WA and WADA. In its Decision, WA equivocally stated that *"Mr Schwazer has a right of appeal to CAS in accordance with Rule 13.2 of the Rules (together with the organisations that are copied on this correspondence"* [i.e. NADO Italia and WADA]. In its letter dated 6 November 2023, WADA in turn stated that *"This decision of the AIU will be appealable in accordance with Code article 13.2 and shall be notified to all parties with a right of appeal".* Quite the contrary. WADA's letter rather provides an indication that WADA considered that it should only be notified of WA's decision based on its right to appeal. In the Panel's view, contrary to WA's contention, there is thus no indication that the Athlete should have included WADA as respondent.

128. Finally, the Panel also notes that CAS panels have repeatedly confirmed that *"no order for relief can be granted which affects the rights and legitimate interests of absent third parties"* (CAS 2020/A/7061, para. 125; CAS 2019/A/6334, par. 57; CAS 2020/A/6713). The Panel indeed notes that nothing is sought against WADA and the Award will have no direct implication whatsoever on WADA.

129. That said, despite the above indicators, the Panel, for the reasons exposed hereafter, considers that the question whether WA has standing to be sued in the present proceedings in the absence

of WADA as respondent will not change the outcome of the present procedure and, therefore, does not necessarily need to be answered.

B. The applicable Level of Scrutiny by the CAS and Application to the Case at hand

(a) The Position of the Parties

130. The Appellant submits that, based on CAS case law, this Panel is allowed to set aside the Decision because it is the result of an abusive exercise of discretionary power by WA and WADA. In the Athlete's view, the justifications contained in WADA's letter are not legally valid reasons for dismissing his application and/or are factually wrong. With respect to (a) in WADA's letter dated 6 November 2023, the Athlete submits that only the seriousness of his 2016 ADRV shall be taken into consideration for the assessment of his Substantial Assistance Application, not earlier ADRVs, and that the Bolzano Decision should have been taken into account. With respect to (b) in WADA's letter dated 6 November 2023, the Athlete contends that he merely exercised his right to defend himself as well as his freedom of speech and that the exercise of his rights in good faith cannot legitimately support a dismissal of his Substantial Assistance Application. Finally, with respect to (c) of WADA's letter of 6 November 2023, the Athlete notes that he provided the requested additional information and that he did not disclose any sensitive information to the press. In addition, the Athlete contends that this Panel has the power to issue a new decision replacing the Decision in case of abuse of discretionary power or otherwise unreasonable exercise of discretion. The Athlete submits that the Panel should find that he provided substantial assistance and that the balance between the seriousness of his ADRV and the significance of the substantial assistance he provided to WA should lead the Panel to decide that the remaining period of his ineligibility period be entirely suspended.

131. WA in turn submits that, as confirmed by CAS case law, there is no right to a suspension of sanction for substantial assistance, which is characterized as a *"mesure de clémence"*, and that, in any event, WADA exercised its discretion in a reasonable and proper manner, the grounds for its decision being stated in a clear manner in its letter dated 6 November 2023 attached to the Decision.

(b) The Position of the Panel

(i) The Level of Scrutiny Exercised by the CAS

132. The provision at the centre of the dispute is Rule 10.7.1 (a) of the WA ADR, which provides as follows:

> *"10.7.1 Substantial Assistance in discovering or establishing violations*
>
> *(a) Prior to an appellate decision under Rule 13 or the expiration of the time to appeal, the Integrity Unit may suspend a part of the Consequences (other than Disqualification and mandatory Public Disclosure) imposed in an individual case where the Athlete or other Person has provided Substantial Assistance to an Anti-Doping Organisation, criminal authority or professional disciplinary body that results in: (i) the Anti-Doping Organisation discovering or bringing forward an anti-doping rule violation by another Person; or (ii) a criminal or*

disciplinary body discovering or bringing forward a criminal offence or the breach of professional rules committed by another Person and the information provided by the Person providing Substantial Assistance is made available to the Integrity Unit or other Anti-Doping Organisation with Results Management responsibility; or (iii) WADA initiating a proceeding against a Signatory, WADA-accredited laboratory, or Athlete passport management unit (as defined in the International Standard for Laboratories) for non-compliance with the Code, International Standards or Technical Documents; or (iv) a criminal or disciplinary body bringing forward a criminal offence or the breach of professional or sport rules arising out of a sport integrity violation other than doping (provided that, for this point (iv) to apply, the Integrity Unit must have first obtained WADA's approval). After an appellate decision under Rule 13 or the expiration of time to appeal, the Integrity Unit may only suspend a part of the otherwise applicable Consequences with the approval of WADA.

The extent to which the otherwise applicable period of Ineligibility may be suspended will be based on the seriousness of the anti-doping rule violation committed by the Athlete or other Person and the significance of the Substantial Assistance provided by the Athlete or other Person to the effort to eliminate doping in sport, non-compliance with the World Anti-Doping Code, and/or sport integrity violations. No more than three quarters of the otherwise applicable period of Ineligibility may be suspended. If the otherwise applicable period of Ineligibility is a lifetime, the non-suspended period under this Rule must be no less than eight years. For purposes of this paragraph, the otherwise applicable period of Ineligibility will not include any period of Ineligibility that could be added under Rule 10.9.3(b)". [emphasis from the author]

133. The Panel notes that in the context of the present matter, the Substantial Assistance Application was filed after the 2016 CAS Award was rendered; as a result, in accordance with the second sentence of Rule 10.7.1 (a), WA may only suspend a part of the Athlete's ineligibility period with the approval of WADA.

134. The Panel also examined whether the comment to Rule 10.7.1 of the WA ADR – which, in accordance with Rule 1.1.2 of the WA ADR, is *"used as an aid to the interpretation of these Anti-Doping Rules"* – is of any avail in the present matter. The Comment provides as follows:

"Comment to Rule 10.7.1: The cooperation of Athletes, Athlete Support Personnel and other Persons who acknowledge their mistakes and are willing to bring other anti-doping rule violations to light is important to clean sport. Where the Integrity Unit declines to exercise the discretion conferred on it by Rule 10.7.1, and the matter comes before a hearing panel under Rule 8 or an appeal panel under Rule 13, the hearing panel/appeal panel (as applicable) may exercise such discretion if the conditions of Rule 10.7.1(a) are satisfied and the panel sees fit. Alternatively, the hearing panel/appeal panel may consider a submission that the Integrity Unit, in exercising its discretion under Rule 10.7.1, should have suspended a greater part of the Consequences". [emphasis from the author]

135. In the Panel's view, the second sentence

of this Comment, which allows a CAS panel to exercise discretion on a request based on Rule 10.7.1 of the WA ADR, does not apply in the present matter. This sentence indeed allows a CAS panel to substitute for AIU's discretion in cases where WADA did exercise its discretion, which appears not to be the case in the present matter since in the present matter WADA decided not to approve the Athlete's Substantial Assistance Application. As a result, the Comment to Rule 10.7.1 does not appear to be of any assistance in the determination of the level of scrutiny exercised by this Panel.

136. The Panel then considered the CAS case law regarding substantial assistance cases. The nature of an association's decision in a matter of substantial assistance was defined as follows by a CAS panel:

" [i]*l n'y a donc pas un droit automatique pour l'athlète qui a fourni une aide – même substantielle – à obtenir cette réduction, mais un pouvoir discrétionnaire pour l'instance de décision, d'apprécier si l'aide est substantielle et, si elle l'est, si cette aide peut justifier et dans quelle proportion, l'obtention d'une réduction. C'est donc en fonction de chaque cas d'espèce que ce pouvoir d'appréciation doit s'exercer.* […] *Il n'y a pas un droit à obtenir une réduction, mais un pouvoir discrétionnaire de l'accorder ou de ne pas l'accorder, même en présence d'une aide substantielle. Mais il importe alors de justifier que ce refus n'est pas entaché d'une erreur manifeste d'appréciation, soit en raison des circonstances particulières du cas d'espèce (attitude particulièrement équivoque de l'athlète par exemple), soit en raison d'un intérêt supérieur de la lutte contre le dopage (l'infraction commise par l'athlète apparaît tellement grave qu'il ne serait pas concevable de le faire bénéficier de mesures de clémence).* (TAS 2007/A/1368 para. 28-29).

[Free Translation : *"[t]here is therefore no automatic right for an athlete who has provided assistance - even if substantial - to obtain a reduction, but a discretionary power for the decision-making body to assess whether the assistance is substantial and, if so, whether this assistance can justify, and in what proportion, obtaining a reduction. This discretion must be exercised on a case-by-case basis. […] There is no right to obtain a reduction, but rather a discretionary power to grant or withhold it, even in the presence of substantial assistance. However, it is important to justify that this refusal is not vitiated by a manifest error of assessment, either because of the particular circumstances of the case (a particularly equivocal attitude on the part of the athlete, for example), or because of an overriding interest in the fight against doping (the offence committed by the athlete appears so serious that it would be inconceivable to grant him leniency)".*

137. More recent CAS panels also repeatedly confirmed that *"[i]n the determination of such reduction, the disciplinary body enjoys a discretionary power (TAS 2007/A/1368, at § 98). […]"* (CAS 2009/A/1817&1844, para. 67-68; see also CAS 2017/A/5000 para. 53; CAS 2021/A/8296, para. 88).

138. Similarly, in the matter CAS 2016/A/4772, which was rendered in a different context but still concerned a CAS panel's exercise of power of review over an association's decision made in the exercise of its discretion, the CAS panel similarly found that *"courts should not lightly exercise their power of review over the association's decisions made in the exercise of such discretion, especially in cases in which sports governing bodies have special expertise and experience in relation to their respective sport"* and that *"appeals may still be permitted on the ground that the decision was arbitrary, grossly*

disproportionate, irrational or perverse or otherwise outside of the margin of discretion, or taken in bad faith or without the due process rights provided to the athlete" (CAS 2016/A/4772, para. 101-102). In the Panel's view, a decision fulfilling any of the above criterion would be the expression of the authority's abuse of discretionary power.

139. The Panel agrees with the view expressed in the above-mentioned cases and sees no reason to deviate from it in the context of the present matter. The Panel highlights that an association's discretionary power under Rule 10.7.1 of the WA ADR (or any equivalent provision) is threefold. It relates to the issue of (i) first, whether the assistance provided by the athlete is substantial or not; (ii) second, whether the provided substantial assistance can justify obtaining a suspension of the period of ineligibility; and (iii) third, the proportion of the suspension that should be granted. Furthermore, for an athlete to be able to assess whether the association exercised its discretionary power in a proper manner, the association shall state the grounds for its determination in its decision.

140. This Panel's deference to WA's decision on the matter, as expressed in the Decision, is furthermore in line with a recognition of the freedom of an association to "govern" the relations with its members and their athletes, obviously within the limits of the applicable rules. This principle is, however, far from excluding or limiting the power of a CAS Panel to review the facts and the law involved in the dispute heard (pursuant to Article R57 of the CAS Code): it only means that a CAS Panel would not easily "tinker" with a well-reasoned decision (CAS 2021/A/8296 para. 89 and the references included therein).

141. The Panel therefore finds that it should refrain from reviewing too lightly an association's decision made in the exercise of its discretion like the decisions rendered under Rule 10.7.1. of the WA ADR. The Panel shall limit its review to the question of whether the Decision at stake is reasoned and whether the reasons stated therein are not vitiated by a manifest error of assessment or are otherwise the expression of the authority's abuse of power.

(ii) Application to the Decision

142. Before delving into the review of the Decision based on the above-mentioned principles, the Panel shall make some preliminary remarks.

143. First, the Panel shall address the issue of the burden of proof. Following the principle *"actori incumbit probatio"* which is applicable in CAS arbitration, any party wishing to prevail with respect to 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.

144. In light of the foregoing, the Panel notes that the Athlete has the burden to give evidence of the facts on which his claim has been based. The Athlete is seeking to establish that the Decision was wrong; it is therefore for the Athlete to convince the Panel in that respect.

145. Second, the Panel also notes that the Decision rendered under Rule 10.7.1 of

the WA ADR is the expression of the discretionary power of WA. The Panel of course notes that, in accordance with Rule 10.7.1 (a) of the WA ADR, once a final decision on the sanctioning of an athlete's ADRV is taken, WA may only suspend part of an athlete's ineligibility period with the approval of WADA. Hence, since WADA decided not to approve the Substantial Assistance Application, WA issued the Decision in which it referred to Rule 10.7.1 (a) of the WA ADR and to WADA's decision not to approve the Athlete's request. It remains however that the Decision that was issued to the Athlete is the sole responsibility of WA.

146. Third, the Panel shall base its scrutiny on the grounds that are contained in the Decision. Unexpressed grounds cannot be considered. However, this does not mean that the Panel cannot consider the grounds that were included in WADA's letter dated 6 November 2023. Since the Decision expressly refers to WADA's letter of 6 November 2023, a copy of which is attached to the Decision, when examining the Decision, the Panel is led to indirectly examine the grounds which WADA referred to in its letter dated 6 November 2023.

147. The Panel starts its examination by recalling that, in the context of Rule 10.7.1 of the WA ADR, WADA – and, in case of WADA's approval, WA – indeed has the authority to assess on a case-by-case basis (i) whether the assistance provided by the Athlete is substantial and, if so, (ii) whether this assistance can justify obtaining a suspension of the Athlete's ineligibility period and finally, if so, (iii) in what proportion. There is thus no automatic right for the Athlete to obtain the requested suspension even if the conditions provided in the WA ADR are fulfilled. Considering the above-mentioned CAS case law on the review of discretionary decisions, the Panel's review in the context of the present appeal proceedings is limited to verifying whether the Decision is vitiated by a manifest error of assessment or is otherwise the expression of WA's (or WADA's) abuse of power.

148. The Panel will now go through the arguments put forward by the Athlete and assess the Decision based on the above.

➢ **The Athlete's ADRVs**

149. WADA's letter dated 6 November 2023, under subsection (a), states as follows:

> *"a. The Athlete's own ADRVs are in themselves so serious as to not warrant any suspension of his period of ineligibility under Substantial Assistance. As evidenced by the below, the Athlete has repeatedly violated the anti-doping rules throughout his career:*
> – *On 30 July 2012, the Athlete attempted to subvert the doping control process and committed an ADRV under Article 2.3 of the 2009 World Anti-Doping Code;*
> – *On the same date, the Athlete returned an adverse analytical finding for recombinant erythropoietin, a potent prohibited substance, which he admitted having repeatedly injected himself with in the spring and summer of 2012;*
> – *The Athlete admitted to having repeatedly used testosterone, a non-specified anabolic agent, in 2011;*
> – *On 1 January 2016, the Athlete returned an adverse analytical finding for testosterone. This violation was*

found by the CAS to constitute an intentional violation and sanctioned with a period of ineligibility. The Athlete has, to this day, not provided any credible explanation for the presence of this non-specified anabolic agent in his body".

150. The Athlete argued with respect to the reasoning under subsection (a) of WADA's letter dated 6 November 2023 that WA (i) wrongly considered the information regarding the Athlete's anti-doping rule violations occurred in 2011/2012, and (ii) failed to take into consideration the fact that, in the Bolzano Decision, it was decided that the Athlete did not commit the offence of doping in 2016.

151. As to the first point, the Panel notes that a CAS panel already decided with respect to another athlete that *"the WADA Substantial Assistance Decision concerns the Appellant's Second ADRV and it is therefore the seriousness of the Second ADRV that is relevant in this case. It therefore follows that the Appellant's First ADRV is of no pertinence to the case at hand"* (CAS 2017/A/5000, para. 55).

152. The Athlete argued that based on the above case law, only the seriousness of the ADRV that relates to the sanction for which the suspension is requested is relevant for the purpose of a request for suspension for substantial assistance.

153. The Panel first notes that the cited case law does not directly concern the association's discretionary decision of whether the athlete's assistance *can justify* obtaining a suspension or not, but rather the assessment - under the second paragraph of (the equivalent provision to) Rule 10.7.1 (a) of the WA ADR - of the *extent* of the suspension that is already considered as justified. The WADA letter dated 6 November 2023 makes it indeed clear that in the present case *"[e]ven assuming that this information qualifies for Substantial Assistance, WADA considers, for the reasons set out below, that the Athlete should not receive any suspension of his period of ineligibility".*

154. In the Panel's view, it appears only reasonable for an association to consider – as was stated in the above-mentioned CAS matter TAS 2007/A/1368 – that if an athlete's ADRV history is so serious, it would be contrary to the overriding interest of the fight against doping to grant to that athlete any suspension. Similarly, the WADA Guidelines for the 2021 International Standard for Result Management also provide that *"the RMA* [i.e. the Results Management Authority] *should also be satisfied that the Athlete or other Person has provided a full and frank disclosure of all previous ADRVs"* (WADA Guidelines for the 2021 International Standard for Result Management, p. 108).

155. The Panel therefore finds that, in the context of the present matter, the consideration that *"an athlete's own ADRVs are in themselves so serious as to not warrant any suspension of his period of ineligibility under Substantial Assistance"* is not the expression of an abuse of power or a manifest error of assessment.

156. Indeed, noting that the Athlete is currently serving an eight-year period of ineligibility, which was immediately preceded by a three-years and nine-months period of ineligibility, the Panel considers the conclusion justified that the Athlete's ADRV history is very serious.

157. As to the second point, the Panel cannot follow the Athlete when he argues that the Bolzano Decision must be taken into consideration in the evaluation of his past conduct. The Panel is obviously not bound by the Bolzano Decision which concerns criminal proceedings that were conducted by criminal courts in Italy under the Italian Penal Code. Moreover, the Athlete's request for revision of the 2016 CAS Award, under Article 190a, para. 1 (b) of the PILA, was dismissed by the SFT in 2021. As a result, there is clearly no ground for concluding that not taking into consideration the Bolzano Decision is a manifest error of assessment or otherwise demonstrates an abuse of discretionary power on WA's (or WADA's) side.

➢ **The Athlete's Alleged Lack of Cooperation**

158. WADA's letter dated 6 November 2023 provides under subsection (c), as follows:

> *"c. WADA also notes that the Athlete has not been fully transparent and cooperative throughout his Substantial Assistance application. By way of example:*
> – *The Athlete did not specifically address a number of the requests made by WADA relating to how he discovered [V.]'s breach of ineligibility.*
> – *Despite numerous requests, the Athlete has failed to provide WADA with the originals of all pictures that he provided to the AIU.*
> – *The Athlete also failed to provide WADA with documents related to his previous anti-doping rule violations in Italy; he apparently chose to do this because a lawyer affiliated to NADO-Italia, who happens to sit on WADA's Legal Expert Advisory Group, had access to those documents.*
> – *The Athlete has admitted to intentionally breach the confidentiality of the results management process in connection with his Substantial Assistance application, with the specific objective of putting pressure on World Athletics and WADA during the course of their respective assessment of his applications. This is not only a breach of the confidentiality requirements under the applicable rules, but could potentially even amount to a tampering violation".*

159. The Athlete argues that WADA's statement is too generic and that, in any event, he replied to all the requests made by WADA in the course of the substantial assistance process. The Athlete also contended that he did not breach any duty of confidentiality since no sensitive information was provided to the media nor did he commit any tampering violation since he did not put any pressure on WA and WADA.

160. In the Panel's view, it appears only legitimate for WA (and WADA) to take into consideration the Athlete's cooperation throughout the substantial assistance process in its determination of whether the assistance provided by the Athlete can justify suspension of part of the Athlete's ineligibility period. In fact, the Athlete's full cooperation in the substantial assistance process is required in order for the assistance provided to qualify as substantial, under the definition of the term "substantial assistance" in the WA ADR. The Panel has carefully reviewed the exchange of correspondence between the Athlete, WA and WADA and came to the conclusion that there is no proof of a

manifest error of assessment nor otherwise abuse of discretionary power on WA's (or WADA's) side. The record rather shows, for instance, that the Athlete provided only basic information on his previous ADRVs and that he refused to provide further information relating to the source of the information provided.

161. In particular, with respect to the information relating to the Athlete's previous ADRVs, the Panel notes that the WADA Guidelines for the 2021 International Standard for Result Management provide that *"no RMA should agree to suspend Consequences unless it is satisfied that the Athlete or other Person has provided a full and frank disclosure of all of the facts surrounding the ADRV committed by the Athlete or other Person"* and that *"the RMA should also be satisfied that the Athlete or other Person has provided a full and frank disclosure of all previous ADRVs"* (WADA Guidelines for the 2021 International Standard for Result Management, p. 108).

162. With respect to the Athlete's breach of confidentiality, the Panel notes that according to Article 4.1 of the 2021 International Standard for Result Management, *"[s]ave for disclosures, including Public Disclosure, that are required or permitted under Code Article 14 or this International Standard, all processes and procedures related to Results Management are confidential"*. Moreover, the Athlete accepted that he revealed elements regarding his ongoing substantial assistance process (for instance, the fact that WADA requested additional information on 28 April 2023) to the media, in particular to the *Gazzetta dello Sport* in July 2023, which is indeed contrary to the above provision.

163. In light of the above considerations, the Panel finds that the Athlete did not demonstrate that by concluding that *"the Athlete has not been fully transparent and cooperative throughout his substantial assistance application"*, WA (or WADA) committed a manifest error of assessment nor otherwise abused of its discretionary power.

- **The Athlete's Public Statements**

164. WADA's letter dated 6 November 2023 provides under subsection (b), as follows:

> *"b. The Athlete, as well as certain of his entourage and representatives, have made public comments that World Athletics and/or the Cologne Laboratory and/or WADA (respectively their staff members) were involved in a conspiracy to manipulate the urine sample collected on 1 January 2016 so that it would test positive. These public statements, which are devoid of any truth, have the potential to undermine the credibility and reputation of these three organizations and to cause significant damage to the fight against doping".*

165. The Athlete argued with respect to the reasoning under subsection (b) of WADA's letter dated 6 November 2023 that the fact of an athlete making public statements is not a criterion provided under Rule 10.7.1 (a) of the WA ADR and that the above statement in WADA's letter – besides not being sufficiently precise so as to allow the Athlete to defend himself – also refers to statements made by persons other than the Athlete which should not be taken into account for his Substantial Assistance Application. Finally, the

Athlete contends that by reporting publicly on the Bolzano Decision, he merely exercised his freedom of speech.

166. The Panel first notes that WADA indicated in its letter dated 6 November 2023, that the Athlete's public statements on his case were essentially contained in a Netflix series, Italian media articles and even in a book of the Athlete's trainer. In addition, WADA specified that the comments concerned the allegation that *"World Athletics and/or the Cologne Laboratory and/or WADA (respectively their staff members) were involved in a conspiracy to manipulate the urine sample collected on 1 January 2016 so that it would test positive"*. In the Panel's view, there is no doubt that WADA sufficiently identified the Athlete's alleged offensive conduct, which allowed the Athlete to defend himself in the framework of the present proceedings.

167. Second, the Panel recalls that when deciding whether the assistance provided by an athlete *can justify* suspension of part of his/her ineligibility period, the concerned association exercises a discretionary power, which is not dictated by specific criteria expressly provided for in the applicable rules.

168. The Panel, however, finds that the mere fact of an athlete exercising his/her right of defense should not as such prevent an athlete from obtaining a suspension for substantial assistance. Similarly, public comments made by persons other than the athlete who are not acting as representatives of the latter, should not as such prevent an athlete from obtaining a suspension for substantial assistance.

169. Despite the above, in the context of the present matter especially considering the Panel's assessment of the other grounds for the Decision, the Panel is of the view that there are not enough elements on the record to conclude that the Decision is the result of an abuse of discretionary power or a manifest error of assessment on the side of WA or WADA.

- **The Value of the Assistance Provided**

170. In paragraph 11 of its letter dated 6 November 2023, WADA also stated as follows:

"[…] It bears recalling that the suspension of a period of ineligibility for Substantial Assistance is a discretionary remedy that is intended to reward athletes and other persons who have made a positive contribution to the fight against doping. Whereas the Athlete did bring to the attention of the AIU a breach of ineligibility (which ultimately led to no new sanction), any possible benefit to the fight against doping has been significantly outweighed by the damage caused by his repeated ADRVs and the above-mentioned allegations of a conspiracy against him implicating the AIU, the Cologne Laboratory and WADA".

171. In this respect, the Athlete generally argued that the assistance he provided to AIU and WADA was substantial as it led to the opening of an investigation by the AIU and the confession by V. The Athlete also indicated that the information he provided not only concerned multiple violations committed by V. but also involved indirectly a considerable number of individuals with whom V. was in extremely close sport-relationship; and that V. is a high-level […] who collaborates with highest-level athletes.

172. The Panel notes that, in paragraph 11 of

its letter, WADA still addresses the issue of whether the assistance provided by the Athlete *can justify* the granting of any suspension to the Athlete, which the Panel recalls is a discretionary decision. The Panel shall therefore not enter the examination of the significance of the substantial assistance provided by the Athlete, which rather serves the assessment of the *extent* of the suspension an athlete would deserve.

173. The Panel notes that nothing prevents WA (or WADA) from taking into account - among the other factors provided in the letter dated 6 November 2023 - the fact that the information gathered constituted "open-source materials" and that the breach of ineligibility "ultimately led to no new sanction". In the Panel's view, it even appears reasonable to take those factors into account in order to balance the possible benefit for the fight against doping with the damage caused by the Athlete's repeated ADRVs. The Panel therefore finds that the Athlete did not demonstrate that WA (or WADA) committed a manifest error of assessment or otherwise abused its discretionary power.

- **Abnormal Delays in the Substantial Assistance Process**

174. The Athlete also argued that it took more than two years for the Athlete to receive a decision on his Substantial Assistance Application and that, by delaying the substantial assistance process, in particular by making dilatory requests for additional information, WA and WADA abused their discretionary power.

175. The Panel indeed notes that the Athlete initially reported to WADA information regarding V. on 17 July 2021, as well as to the AIU by email. After a long investigation by the AIU (for which the Athlete also provided additional information on 7 June 2022), on 4 October 2022, V. admitted to violating the prohibition on participation during ineligibility. On 17 January 2023, upon WA's invitation to do so, the Athlete formally requested 50% suspension of his ineligibility period based on the assistance provided in the matter regarding V. It is only on 30 March 2023 that WADA received a request to approve the Athlete's Substantial Assistance Application. On 28 April 2023, WADA requested additional information from the Athlete, which triggered various exchanges of correspondence between the Athlete and WADA. It is thus more than two years after the initial report, i.e. on 6 November 2023, that WADA issued its decision not to approve the Athlete's Substantial Assistance Application, and that WA issued to the Athlete its decision denying the Substantial Assistance Application on 10 November 2023.

176. The Panel notes – and both Parties accept – that the substantial assistance process was abnormally long in the case of the Athlete. The Panel however also notes that the Athlete never brought a claim in view of forcing WA and WADA to render a decision on his Substantial Assistance Application while the process was still ongoing. Moreover, the record shows that during the substantial assistance process, the Athlete and WADA had numerous exchanges of views, in particular on additional requested information.

177. The Athlete argued that WADA's request for additional information was purely dilatory. In the Panel's view, nothing prevents WADA from reviewing the matter in the process of making its own determination on whether or not it should approve a suspension request for substantial assistance. WA and WADA thus have the discretionary power to reasonably determine the steps they wish to take to reach determination under Rule 10.7.1 (a) of the WA ADR.

178. In addition, in the Panel's view, the Athlete did not demonstrate that WADA's request for additional information on 28 April 2023 was the expression of an abuse of discretionary power. It is evident from the review of the correspondence between the Athlete and WADA as well as the grounds stated in WADA's letter dated 6 November 2023 that the additional requested information enabled WADA to reach determination on the Athlete's Substantial Assistance Application. Considering the Panel's assessment of WADA's grounds for denying the Athlete's Substantial Assistance Application, the Panel is of the view that there is no proof on record that WADA's request for additional information was the expression of an abuse of discretionary power or the result of a manifest error of assessment.

C. Conclusion

179. In light of the above considerations, the Panel finds that the Decision, which relies on the grounds exposed in WADA's letter dated 6 November 2023, is not the result of a manifest error of assessment or abuse of discretionary power. As a result, the Panel finds that the Decision shall be confirmed and the Athlete's appeal dismissed.

180. In light of the above conclusion, the Panel does not need to further address the Athlete's arguments relating to the extent of the suspension he requests, and that all other submissions are dismissed.

X. Costs

181. The Athlete contends that the present procedure falls under Article R65 of the CAS Code since it is directed against a decision of the AIU that is competent in disciplinary matters, and under Rule 10 of the WA ADR which is entitled *"Further sanctions on Individuals"*. WA, in turn, argued that Article R65 of the CAS Code does not apply since the Decision did not impose a sanction on the Athlete, but rather only decided on suspension of part of that existing sanction. In light of the objection by the Athlete, the Panel shall, in accordance with Article R65 of the CAS Code, make a determination on this issue.

182. Article R65.1 of the CAS Code provides as follows:

> *"This Article R65 applies to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body. It is not applicable to appeals against decisions related to sanctions imposed as a consequence of a dispute of an economic nature. In case of objection by any party concerning the application of Article R64 instead of R65, the CAS Court Office may request that the arbitration costs be paid in advance pursuant to Article R64.2 pending a decision by the Panel on the issue".*

183. It follows from the wording of Article

R65 of the CAS Code that the conditions for an appeal to be free of costs is that it is directed against i) a decision which is ii) of exclusively of a disciplinary nature iii) issued by an international federation or sports-body.

184. The second sentence of Article R65 of the CAS Code also specifies that this provision does not apply to appeals *"related to **sanctions** imposed as a consequence of a dispute of an economic nature"* (emphasis added).

185. The use of the word "sanction(s)" makes it clear that the object of the appeal must be a disciplinary sanction.

186. While it is undisputed that the Decision was issued by an international federation or sports-body, the Panel does not consider that the present dispute is of an exclusive disciplinary character. In the Panel's view, the object of the present appeal is not to define the disciplinary sanction which is to be imposed on the Athlete. This was the object of the Athlete's case in the matter *CAS 2016/A/4707 Alex Schwazer v. IAAF, NADO Italia, FIDAL & WADA*, which was definitively decided upon in the 2016 CAS Award. The present appeals proceedings are directed against the decision not to suspend part of the Athlete's ineligibility period for substantial assistance; as such, the Decision did not modify the disciplinary sanction imposed upon the Athlete under the 2016 CAS Award; nor does it constitute a new disciplinary sanction against him.

187. It is true that the provision in question here (Article 10.7.1 of the WA ADR) deals with "sanctions". However, whether a decision qualifies as a sanction is not a matter of wording, but of contents. A decision is disciplinary in nature if it imposes adverse effects to an individual in reaction to the latter's breach of rules and/or obligations. No breach of rules/obligations is in dispute here. The decision not to suspend part of the existing period of ineligibility of the Appellant is not aimed at sanctioning an illicit behaviour of the Athlete. The nature of the substantial assistance decision rendered in the present case, does not have any sanctioning character as it is not intended to punish the Appellant.

188. The appealed decision at stake is rather dealing with an issue of eligibility: the Athlete who is ineligible to compete by virtue of the 2016 CAS Award, is seeking to become eligible to compete again by filing a substantial assistance request.

189. In view of the above, the Panel finds that the present matter does not qualify as *"exclusively of a disciplinary nature"* within the meaning of Article R65 of the CAS Code. The present proceedings are therefore governed by Article R64 of the CAS Code.

190. Article R64.1 of the CAS Code provides 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".

191. (…)

192. (…)

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

6. The appeal filed by Alex Schwazer on 11 December 2023 against World Athletics with respect to the decision rendered by the Athletics Integrity Unit on 10 November 2023 is dismissed.

7. The decision rendered by the Athletics Integrity Unit on 10 November 2023 is confirmed.

8. (…)

9. (…).

10. All other motions or prayers for relief are dismissed.

CAS 2024/A/10588
Anastasiya Valkevich v. World Sailing & International Olympic Committee (IOC),
19 September 2024 (operative part of 18 July 2024)

Panel: Prof. Ulrich Haas (Germany), Sole Arbitrator

Sailing (windsurf)
Eligibility to compete as an individual neutral athlete for the Paris 2024 Olympic Games
Delimitation of issues of jurisdiction and admissibility
Characteristic features of a decision within the meaning of Article R47 of the CAS Code
Timeliness of the appeal
Right of a National Olympic Committee to select its competitors for the Olympic Games

1. **The distinction between jurisdiction and admissibility is complex and differs from jurisdiction to jurisdiction. As a rule of thumb, the question whether CAS has competence to decide the dispute in a binding manner in lieu of a state court, and whether the matter before CAS is within the scope of the arbitration agreement, are issues of jurisdiction, whereas all procedural issues that are non-jurisdictional issues and that may cause the end of the arbitration for procedural reasons are admissibility issues. Accordingly, the question whether an IOC email qualifies as an appealable decision within the meaning of Article R47 of the CAS Code is an admissibility issue.**

2. **In defining the concept of a decision within the meaning of Article R47 of the CAS Code, the CAS has relied upon the relevant principles of Swiss administrative law. According thereto, the form and/or denomination of the challenged act are not determinative. Instead, what matters is whether the latter contains a ruling affecting the parties' legal positions. An email sent by the IOC to an International Federation that merely describes the applicable process to be followed according to the relevant rules for the allocation of quota places for the Olympic Games is of a purely informative character as it does not dispose of any matter or request and does not contain a ruling. Therefore, it is not an appealable decision within the meaning of Article R47 of the CAS Code.**

3. **As provided for in Article R49 of the CAS Code, absent any provisions to the contrary, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. Discussions, negotiations, correspondence or complaints following the issuance of a decision cannot extend or alter the deadline for appeal. This view is also backed when looking at Article 75 of the Swiss Civil Code, which functioned as a template and source of inspiration for Article R49 of the CAS Code.**

4. **According to the Olympic Charter (OC) and its By Laws, it is for a National Olympic Committee (NOC) to select its competitors for the Olympics Games. No other body or person within a member country has that right. This**

principle is also enshrined in the IOC Qualification System Principles and the Olympic Notice of Race. On the other hand, the decision what eligibility criteria are applicable and what entity is responsible for the entry of athletes is a decision which falls within the autonomy of the sports organization. In this respect, the IOC has decided on these issues in a certain manner and World Sailing has adopted these IOC principles. Absent any breach of the otherwise applicable law or the substantive *ordre public*, CAS panels are not called upon to rewrite the eligibility and entry rules for the Olympic Games. Thus, an athlete that has been awarded a quota place under the qualification system by World Sailing in its capacity of Individual Neutral Athlete may be refused her quota place by her NOC since the NOC is the only body that can approve quota places for athletes of the same nationality. Yet the discretion granted to NOCs under the applicable rules when deciding upon the entry of athletes is not limitless and athletes do have a certain level of legal protection. Indeed, under the OC, one of the basic principles of Olympism is political neutrality. In addition, Rule 44(4) OC provides – *inter alia* – that *"NOCs must investigate the validity of the entries proposed by the national federations and ensure that no one has been excluded for racial, religious or political reasons or by reason of other forms of discrimination".* Thus, the athlete would not be deprived of legal protection, when appealing against the decision of her NOC to decline the quota place because of her political views. However, absent any remedy filed by the athlete against her NOC, the International Federation is entitled to reallocate such quota place to another NOC.

I. PARTIES

1. Ms Anastasiya Valkevich (the "Appellant" or the "Athlete"), born 10 November 1994, is a Belarusian windsurfer, who competes in national and international competitions. From 2007 to 2018, she competed internationally for Belarus, including youth and senior World and European championships. She currently resides in Kuznica, Poland.

2. World Sailing ("World Sailing" or the "First Respondent"), is the world governing body for the sport of sailing recognized by the International Olympic Committee ("IOC"). Its registered seat is in London, United Kingdom.

3. The International Olympic Committee (the "IOC" or the "Second Respondent") is the governing body of the Olympic Games and the organization responsible for the Olympic Movement, having its headquarters in Lausanne, Switzerland. One of its primary responsibilities is to organize, plan, oversee and sanction the summer and winter Olympic Games, fulfilling the mission, role and responsibilities assigned by the Olympic Charter.

4. World Sailing and the IOC are jointly referred to as the "Respondents".

5. The Athlete, World Sailing and the IOC are jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

A. Introduction

6. The dispute in these proceedings revolves around the decision of the National Olympic Committee ("NOC") of Belarusia ("BOC") to decline the quota place earned by the Appellant to compete as an Individual Neutral Athlete ("AIN") for the Paris 2024 Olympic Sailing Competition.

7. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, the CAS file and the content of the remote hearing that took place on 17 July 2024. References to additional facts and allegations found in the Parties' written and oral submissions, pleadings, and evidence will be made, where relevant, in connection with the legal analysis 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 this Award only to the submissions and evidence the Sole Arbitrator deems necessary to explain his reasoning.

B. Background facts

8. In 2018, the Appellant left Belarus for sporting and political reasons and moved to Odessa in Ukraine.

9. In 2020, there were numerous protests in Belarus in connection with the presidential elections. The Appellant supported these protests, which caused her relationship with the Belarus Sailing Federation to deteriorate. The Appellant credibly submits that this made it unsafe for her to return to Belarus.

10. On 7 December 2020, the IOC Executive Board issued the following decision proposal:

"The IOC Executive Board to adopt the following provisional measures until further notice or until such time as a new NOC Executive Board is elected in February 2021 by the NOC General Assembly:

1. *Exclude the currently elected members of the Executive Board of the NOC of Belarus from all IOC events and activities, including the Olympic Games. This includes in particular Mr Alexander Lukashenko, in his capacity as NOC President and legal representative of the NOC; Mr Viktor Lukashenko, in his capacity as NOC First Vice-President and the person responsible for the NOC's operations and activities on a daily basis; and Mr Dmitry Baskov, in his capacity as an NOC Executive Board member and in view of the specific allegations raised against him. This provision is not applicable to Mrs Tatiana Drozdovskaya, as she is an ex-officio athletes' representative on the Executive Board.*
2. *Suspend all financial payments to the NOC of Belarus, with the exception of payments related to the preparations of the Belarusian athletes for, and their participation in, the Olympic Games Tokyo 2020 and Olympic Winter Games Beijing 2022. All Olympic scholarships for Belarusian athletes will now be paid directly to the athletes, and no longer through the NOC.*

3. *Request the relevant International Federations to make sure that all eligible Belarusian athletes can take part in qualification events for the upcoming Olympic Games without any political discrimination.*
4. *Suspend any discussions with the NOC of Belarus regarding the hosting of future IOC events.*
5. *Request all constituents of the Olympic Movement to respect these measures in the interest of protecting Belarusian athletes' rights and the reputation of the Olympic Movement".*

11. On 8 March 2021, the IOC Executive Board issued the following decision:

"In view of the outcomes of the NOC Elective General Assembly and the conclusion the IOC Executive Board came to in its decision of 7 December 2020 that the previous leadership of the NOC of Belarus had not appropriately protected the Belarussian athletes from political discrimination within the NOC, their member federations or the sports movement, it is proposed that the IOC Executive Board adopt the following provisional measures until further notice (or until such time as the NOC fully addresses the first item of the IOC Executive Board decision of 7 December 2020):

1. *To not recognise the election of Mr Viktor Lukashenko as the new President of the NOC of Belarus and the election of Mr Dmitry Baskov as a member of the NOC Executive Board and maintain their exclusion from all IOC events and activities, including the Olympic Games. The IOC will liaise with the NOC and the other members of the newly elected Executive Board, through the NOC Secretary General.*
2. *To maintain the other provisional measures taken by the IOC Executive Board on 7 December 2020, as follows:*
   a. *Suspend all financial payments to the NOC of Belarus, with the exception of payments related to the athletes' scholarships and the preparations of the Belarusian team for, and their participation in, the Olympic Games.*
   b. *Request the relevant International Federations to make sure that all eligible Belarusian athletes can take part in qualification events for the upcoming Olympic Games without any political discrimination.*
   c. *Suspend any discussions with the NOC of Belarus regarding the hosting of future IOC events.*
   d. *Request all constituents of the Olympic Movement to respect these measures in the interest of protecting Belarusian athletes' rights and the reputation of the Olympic Movement.*
3. *To request the NOC of Belarus and its member federations to ensure that there is no political discrimination in the participation of the Belarusian athletes in qualification events, and in the final selection of the team of the NOC of Belarus, for all Olympic Games.*
4. *To not invite, or grant any accreditation to, any senior Government official from the Republic of Belarus for Olympic Games".*

12. On 8 October 2021, the IOC issued a document entitled *"Games of the XXXIII Olympiad, Paris 2024 - Qualification System Principles"* ("IOC

QSP"). The document instructs the international sporting federation how to structure and compile their respective qualification systems.

13. When Russia invaded Ukraine in February 2022, the Appellant was forced to evacuate to Poland. Since then, the Appellant has been living in Poland and has obtained a ten-year Polish residence permit. She is in the process of obtaining Polish citizenship and intends to remain in Poland in the long term.

14. On 1 March 2022, World Sailing suspended participation of Russian and Belarusian athletes and officials in World Sailing owned and sanctioned competitions and events until further notice.

15. Following her escape to Poland, the Appellant joined a windsurfing club in Poland and has trained there ever since. However, she was unable to participate in international competitions because of her Belarusian nationality.

16. On 7 December 2022, World Sailing implemented the IOC QSP and issued the *"Qualification System – Games of the XXXIII Olympiad – Paris 2024 World Sailing (WS)"* ("WS QS"). The WS QS were approved by the IOC.

17. On 28 March 2023, the IOC issued a document entitled "Recommended Conditions of Participation for Individual Neutral Athletes and Support Personnel with a Russian or Belarussian Passport in International Sports Competitions Organised by the International Federations and International sports events Organisers" ("Recommendation Conditions"). The IOC summarised its recommendations as follows:

> *"1. Athletes with a […] Belarusian passport must compete only as Individual Neutral Athletes.*
> *2. Teams of athletes with a […] Belarusian passport cannot be considered.*
> *3. Athletes who actively support the war cannot compete. […]*
> *4. Athletes who are contracted to the Russian or Belarusian military or national security agencies cannot compete. […]".*

18. On 8 December 2023, the IOC issued the Principles Relating to the Implementation of the Participation for Individual Neutral Athletes and their Support Personnel with a Russian or Belarusian Passport at the Olympic Games Paris 2024 ("AIN Principles"). Therein, the IOC declared that the Recommendation Conditions will be strictly applied for the Olympic Games Paris 2024.

19. On 19 January 2024, the World Sailing Board adopted the AIN Principles and decided as follows:

> *"Those who meet the necessary eligibility criteria will be permitted to participate as AINs in competition for the Paris 2024 Olympic Games, starting with the Last Chance Regatta qualifying event, to be held as part of the Semaine Olympique Française, 20-27 April, and finishing with the Olympic regatta in Marseille.*
> *This permission will also include – for those athletes who have secured qualification – Olympic class competition between the Last Chance Regatta and the Paris 2024 Olympic Games.*

World Sailing continues to recommend that athletes with a Russian or Belarusian passport should not be permitted to compete in events or classes other than those specified above".

20. In early February 2024, the Appellant learned about the opportunity for Belarusian athletes to qualify for and compete in the Paris 2024 Olympic Sailing Competition as an AIN. On 6 February 2024, she sent an email to World Sailing asking for permission to participate in World Sailing competitions. Her request was supported by the Polish Yachting Association and the iQFoil Class Association.

21. At the end of February 2023, World Sailing – following the adoption of the AIN Principles on 19 January 2024 – implemented a document entitled *"World Sailing Policy Individual Neutral Athlete Participation"* ("World Sailing Policy"). The World Sailing Policy provides – *inter alia* – as follows:

"The Neutrality Policy incorporates the strict neutrality conditions outlines by the International Olympic Committee and in particular the individual must have:

1. *No link with the Russian or Belarusian military or with any other national security agency since the 24 February 2022 when the war in Ukraine commenced*
2. *No communications promoting Russia or Belarus from 24 February 2022 onwards*
3. *No active support for the war in Ukraine since 24 February 2022.*

Those sailors and their Support Persons who satisfy the criteria will be entered as, and compete as, Individual Neutral Athletes ("AINs") and this means that they will represent themselves as individuals and will display no flag, anthem, colours or any other identifications whatsoever of Russia or Belarus.

Participation as an Individual Neutral Athlete is limited to:

- *The Last Chance Regatta qualifying event, to be held as part of the Semaine Olympique Française, 20-27 April;*
- *For those athletes who have secured qualification, Olympic class competition between the Last Chance Regatta and the Paris 2024 Olympic Games;*
- *The Paris 2024 Olympic Games Regatta itself.*

World Sailing continues to recommend that athletes with a Russian or Belarusian passport should not be permitted to compete in events or classes other than those specified above, and after the Paris 2024 Olympics the temporary sanctions will resume for all".

22. On 28 February 2024, World Sailing sent to the Appellant an application form together with the World Sailing Policy and the AIN Principles following which the Appellant submitted her duly filled out application to World Sailing.

23. On 25 March 2024, World Sailing – in response to the Appellant's application – sent the following letter to her:

"After initial vetting from World Sailing your application to sail as a Neutral in the Last Chance Regatta has been approved by the World Sailing Board.

[…]

This information is also being sent to the International Olympic Committee and if you qualify for the Paris 2024 Olympics then they will carry out further vetting and process your Olympic entry accordingly".

24. On 2 April 2024, the IOC informed World Sailing as follows:

"[…] Given that the Belarusian NOC (BOC) is not suspended, the BOC will be responsible for directly registering the AIN athletes and support personnel with Belarusian passports […]".

25. In early April 2024, World Sailing Board decided, that in regard to the Olympic qualification events, the Semaine Olympique Française ("SOF") (also known as the Last Chance Regatta, hereinafter "LCR") in April 2024 represented the targeted opportunity for any potential readmission to Olympic qualification events.

26. From 20 to 27 April 2024, the Appellant took part in LCR in Hyeres, France, as an AIN. She finished 4th overall and qualified as a quota woman for the Paris 2024 Olympic Games. World Sailing's public documents confirmed that the quota was awarded to AIN.

27. On 29 April 2024, World Sailing sent an email to the Appellant stating: *"You did it! Well done on qualifying for Olympic Games. Just wanted to confirm you can compete in any events between now and Olympics as well with AIN flag and colours".*

28. On 30 April 2024, Mr Michael Downing World Sailing sent an email to the IOC confirming that the Appellant had been awarded a quota place under the qualification system and that the initial review has shown that she was a genuine neutral. The letter further inquired with Mr Bram Schellekens from the IOC as follows: *"Can you advise me on the formal process I should undertake to offer the W Windsurfing quota place to the AIN NOC?".*

29. On 6 May 2024, Mr Bram Schellekens from the IOC informed Mr Michael Downing from World Sailing by email as follows ("IOC-Decision"):

"[…] The process for the allocation of quota places for BLR athletes is the same for any other NOC and you may write to them directly to confirm the quota. The NOC is not suspended and is collaborating with us on entering the athletes. The athlete would then go through the IOC AIN eligibility review panel before an individual invitation would be issued if declared eligible. […] Regarding the specific athlete in windsurfing, we have been contacted by the NOC following their pre-delegation registration meeting and wanted to verify the sporting nationality of the athlete as they mentioned the following to us:
'After the Pre-DRM I contacted our Sailing Federation, and they told me that Ms Anastasiya Valkevich is not a member of the Belarus Sailing Federation because she had changed her nationality and has been representing another country since 2018'.
It would be great if you could confirm her sporting nationality please ahead of allocating any quota places".

30. On 7 May 2024, Mr. Michael Downing from World Sailing responded to Mr Bram Schellekens of the IOC as follows:

"[…] I had forgotten BLR NOC is not suspended. I have confirmed that World Sailing has Ms Anastasiya Valkevich's sporting nationality as BLR. She has started the process of changing sporting nationality with World Sailing but that won't be complete before Paris 2024 so she is listed as AIN in all our competitions. I will go ahead and offer the BLR NOC the quota place she has

earned and lets see what happens. Hopefully administration doesn't get in her way".

31. On the same date, World Sailing sent a letter to the BOC, informed the latter about the quota place and requested it to accept or decline the Appellant's quota place. The letter had the following content:

> *"Following the conclusion of the Last Chance Regatta, the final qualifier for the Paris 2024 Olympic Sailing Competition, Ms Anastasiya Valkevich under the identity of AIN has qualified in the 1 Event listed below.*
> *If you do not agree with this decision, or any other decision made under the qualification system, you must inform the World Sailing Technical Delegates (Ricardo Navarro and Alexandra Rickham) within 7 days of receipt of this letter. Only the Technical Delegates are authorised on behalf of World Sailing to make decisions under the qualification system.*
> *[…]*
> *Please mark the relevant box:*
> *Acceptance: The NOC confirms the acceptance of the athlete quota place, please indicate athlete names if known, these will be kept confidential and not announced by World Sailing.*
> *Will Not Send: The NOC formally declines the athlete quota place and will not use it. World Sailing will reallocate the athlete quota place if you mark the 'Will Not Send' box.*
> *[…]"* (emphasis omitted).

32. Also on the same date, Mr Downing from World Sailing sent an email to the Polish Yachting Association (Mr Dominik Zycki) (d.zycki@pya.ord.pl) with the Appellant in copy (avpol422@gmail.com) stating that it had confirmed that the BOC was the only body that could approve quota places for athletes of Belarusian nationality and advised the Appellant to contact the BOC.

33. On 8 May 2024, the BOC informed World Sailing that, according to the Belarus Sailing Federation, the Appellant was no longer a member of the national sailing federation because she had changed her nationality in 2018 and, therefore, could not be granted the quota place.

34. Between 8 May 2024 and 20 May 2024, World Sailing had several verbal conversations with the IOC to try to resolve the matter and confirm the AIN status of the Appellant. However, the IOC insisted on the fact whether or not to accept a quota place earned by a Belarusian athlete was purely a matter for the BOC.

35. On 29 May 2024, World Sailing sent a letter (the "WS-Decision") to the Appellant with the following content:

> *"World Sailing received your application to compete as an AIN and you were approved to compete as a neutral athlete at the 2024 Last Chance Regatta.*
> *The qualification system for Paris 2024 Olympic Sailing Competition allocates the 330 sailing athlete quota places to the NOC. The IOC mandates the NOCs are exclusively responsible for choosing the athletes that represent them at the Olympic Games. For the avoidance of doubt, this also applies to the National Olympic Committee of the Republic of Belarus, whilst the protective measures are in place.*
> *Following the conclusion of the final qualifier for the Paris 2024 Olympic Sailing Competition, World Sailing wrote to the National Olympic Committee of the Republic of Belarus offering them the quota place*

obtained in the Women's Windsurfing event based on your result at the 2024 Last Chance Regatta. In response, the National Olympic Committee of the Republic of Belarus wrote to us declining the quota place.
I confirm World Sailing has thoroughly assessed this situation and confirm that our process and our understanding of the situation is correct.
I understand this news is devastating for you Anastasiya. However, I confirm we have followed our process exactly and there is no way to bypass the National Olympic Committee of the Republic of Belarus accepting the quota place. […]".

36. On 31 May 2024, the Appellant responded to World Sailing as follows:

"I hereby submit an appeal against the decision to deny me a place in the Paris 2024 Olympic Games as an Authorised Neutral Athlete (AIN). This decision was based on the rejection of the quota place by the National Olympic Committee (NOC) of the Republic of Belarus. I would like to draw your attention to several key regulations and circumstances that justify the reconsideration of my case.
IOC Olympic Charter:
Rule 44 (Entries): According to this rule, NOCs are responsible for entering athletes for participation in the Games. However, exceptions exist in extraordinary circumstances where athletes may be approved to compete as neutral athletes if their NOC is unable to represent them due to sanctions or other protective measures.
Rule 40 (Nationality of Competitors): Athletes may compete as neutral athletes under exceptional circumstances if they are unable to represent their country.
World Sailing Qualification System for the Paris 2024 Olympic Games:
Quota Allocation Rules: Quota places are allocated to NOCs, but in the case of neutral athletes, the IOC and World Sailing have the authority to implement special regulations to allow the participation of such athletes (Paris 2024 Sailing).
IOC Protective Measures:
Protective Measures: In cases of countries subject to sanctions or other protective measures, the IOC may introduce special regulations regarding the participation of neutral athletes. In my situation, as I have not resided in Belarus for a long time and no longer have any affiliation with the NOC of Belarus, seeking the opinion of a local sports club in Belarus is inappropriate.
I kindly request that my case be reconsidered in light of the aforementioned regulations and the fact that my current place of residence and circumstances should be taken into account when making a decision. I ask for the opportunity to consult with my current sports club, which can provide credible information about my sporting status and place of residence.
The decision of the Belarusian NOC to reject the quota place is unjust and unwarranted towards an athlete who has worked hard for her achievements. I seek your understanding and assistance in resolving this issue so that I may fully benefit from my sporting accomplishments".

37. On 5 June 2024, World Sailing replied to the Athlete as follows:

"[…] I would like to point out that World Sailing has not issued a decision to deny you a place in the Paris 2024 Olympics. As per long established processes (and the letter sent to you from World Sailing on 29 May 2024), we offered the Paris 2024 quota place to the National Olympic Committee of the Republic of Belarus (Belarus NOC), and the Belarus NOC have decided not to accept the offered quota place. We have carefully reviewed this situation and can only imagine how disappointing it is, however there is no right of appeal to World Sailing in relation to the

decision of the Belarus NOC to reject the place. […]".

38. On 11 May 2024, Appellant's counsel contacted Mr Bram Schellekens from the IOC and stated – *inter alia* – as follows:

"[…] In March 2024, Anastazja was given approval by the Board of World Sailing to participate as an AIN. In April 2024 she earned a quota in women's windsurfing at the Last Chance qualifier in France. After the competition she was told by World Sailing that she had earned the quota. Later, World Sailing sent the letter confirming her quota to the Belarus Olympic Committee, who declined the quota. I understand World Sailing has since given the quota to another NOC. It appears that the process followed by World Sailing is inconsistent with IOC's Principles Relating to the Implementation of the Participation for Individual Neutral Athletes issued 8 December 2023. Anastazja should have been awarded her quota as an individual and interacted directly with World Sailing and IOC in relation to her quota. […]".

39. On 11 June 2024, the IOC replied that the proper recipient of the correspondence is World Sailing as the competent international federation and the BOC, which is responsible for the selection and registration of athletes based on the qualification system established by the respective international federation. Should an athlete disagree with the decision of the BOC or World Sailing, the appeal procedures of the BOC or World Sailing must be followed.

40. It is undisputed between the Parties that the quota place in female windsurfing for the Paris 2024 Olympic Sailing Competition, originally offered to the BOC, has been reallocated and accepted by the NOC of Peru.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

41. On 6 June 2024, the Appellant filed her Statement of Appeal with the Court of Arbitration for Sport ("CAS") against World Sailing and the IOC in accordance with Articles R47 and R48 of the CAS Code of Sports-related Arbitration ("CAS Code"). In her Statement of Appeal, the Appellant requested the appointment of Mr Alan Sullivan KC as a sole arbitrator and the holding of a hearing (preferably by videoconference). Furthermore, the Appellant applied for legal aid.

42. On 18 June 2024, the Appellant submitted her Statement of Appeal against World Sailing and the IOC via the CAS e-Filing platform.

43. On 19 June 2024, the CAS Court Office invited the Respondents to inform it within two days whether they agree with the Appellant's request for an expedited procedure. Furthermore, the CAS Court Office invited the Appellant to file her Appeal Brief within 10 days following the expiry of the time limit of the appeal. Finally, the CAS Court Office invited the Respondents to comment on the Appellant's request to submit the case to Mr Alan Sullivan KC as a sole arbitrator.

44. On 20 June 2024, the First Respondent informed that it agreed to the Appellant's requests for an expedited procedure and accepted the

appointment of Mr Alan Sullivan KC as a sole arbitrator.

45. On the same date, the CAS Court Office – *inter alia* – requested the Appellant to submit a power of attorney in favour of Ms Sarah Wroe and Mr Tom Ashley or other written confirmation of the power of attorney to represent the Appellant in these proceedings.

46. On 21 June 2024, the Appellant submitted a confirmation of legal representation for Ms Sarah Wroe and Mr Tom Ashley.

47. On 24 June 2024, the Second Respondent informed the CAS Court Office that it will be represented by Mr Antonio Rigozzi, Mr Eolos Rigopoulos and Ms Marie-Christin Bareuther all from Lévy Kaufmann-Kohler.

48. In a separate letter of the same day, the Second Respondent submitted that

> *"…[a]s a preliminary matter, considering that (i) the relief requested by the Appellant is only directed against World Sailing and (ii) the "decision appealed against" produced according to Article R48(1) of the Cas Code is a letter of World Sailing in which the IOC is neither mentioned nor copied, the IOC respectfully requests an order that these proceedings continue without the IOC as a Respondent. In any event, the IOC does not agree with the Appellant's requests for expedited proceedings and for the appointment of a sole arbitrator, let alone an arbitrator unilaterally suggested by the Appellant without any consultation with the IOC. Nothing in the present correspondence should be interpreted as an acknowledgment of the admissibility of the Appellant's claims against the IOC. Should this arbitration continue with the IOC as a Respondent, the IOC reserves the right to request the Panel to bifurcate the proceedings and to issue a partial award within the meaning of Article 188 of the Swiss Private International Law Act (PILA) and Article 91(b) of the Swiss federal Tribunal Act (LTF) (i.e., "terminating the proceedings with respect to a correspondent")".*

49. Still on the same day, the Appellant submitted a Statement of Evidence.

50. Always on 24 June 2024, the Appellant sent an email to the First and the Second Respondent as well as to the CAS Court Office, indicating – *inter alia* – that the Appeal Brief had not yet been finalized and that it will be filed shortly.

51. On 25 June 2024, in light of the Second Respondent's request *"that these proceedings continue without the IOC as a Respondent"*, the CAS Court Office invited the Appellant to indicate by 27 June 2024 whether she maintains her appeal against the IOC. In addition, the CAS Court Office informed the Parties that the IOC objected to an expedited procedure and to the appointment of Mr Alan Sullivan KC.

52. On 26 June 2024, the Appellant filed her Appeal Brief in accordance with Article R51 of the CAS Code.

53. On the same date, the CAS Court Office acknowledged receipt of the Appellant's Appeal Brief and its statement of evidence and invited the First and the Second Respondent to submit their respective Answers within 20 days.

54. Still on 26 June 2024, the Second Respondent submitted that the appeal filed against the IOC was manifestly belated and therefore inadmissible. The IOC's decision had been taken on 7 May 2024 at the latest (when the Appellant became aware of it) and her appeal, which was only filed on 6 June 2024, was therefore late. In addition, the Second Respondent reserved its right to request a termination order and/or a bifurcation of the proceedings on the admissibility of the appeal in the event it remains as a respondent.

55. On 27 June 2024, the Appellant submitted a Memorandum of Counsel for the Appellant stating the following:

> *"[…]*
> *2. The appellant does not consent to IOC being removed as a respondent in the arbitration. If the IOC files an application, the appellant will respond in full. In brief the [the Appellant] notes that:*
> *a. The decision under appeal was a decision of WS [World Sailing] authorised and/or directed by IOC, notified to the appellant on 29 May 2024.*
> *b. Communication between IOC and WS, and IOC's role in the decision communicated in 29 May 2024, will be a matter of evidence.*
> *c. While the appellant was advised on or around the 7 May 2024 that WS/IOC considered hat consultation with Belarus NOC was required, that was not communicated as a part of the process. By mail dated 7 May 2024, Mr Downing, of WS advised, "We are doing what we can to support Anastasiya in her endeavours and will keep her informed of the progress as dialogue with the various parties continues". It was not communicated at that point in time that IOC's decision was that if Belarus did not accept the quota that would be the end of the matter for Ms Valkevich. That was only made clear to her in the letter of 29 May 2024. The appeal was in time.*
> *d. In any event, IOC retained (and retains) a residual discretion under the AIN Principles to accept Ms Valkevich's entry for Paris 2'24. World Sailing's communication to her on 29 May was confirmation to Ms Valkevich that the IOC had decided not to exercise its discretion to allow her to be entered.*
> *3. The appellant notes IOC's opposition to an expedited process, a sole arbitrator and the arbitrator suggested by the appellant. Given the Olympic Games will commence on 26 July 2024, time is of the essence for resolution of the dispute. The appellant requests an urgent procedural conference (by telephone or videoconference) to address how the arbitration can be progressed".*

56. Always on 27 June 2024, the CAS Court Office determined that the IOC remains a party to these proceedings. The letter also indicated that in light of the IOC's objection, the Appellant's request for an expedited proceeding is denied. In addition, the CAS Court

Office informed the Parties that in case of disagreement on the number of arbitrators, the President of the CAS Court of Arbitration or her deputy will decide on this issue.

57. On 8 July 2024, the CAS Court Office informed the Parties that pursuant to Article R50 of the CAS Code the President of the CAS Appeals Arbitration Division has decided to submit the case to a sole arbitrator.

58. On the same date, the CAS Court Office advised the Parties that Prof. Dr Ulrich Haas, Professor of Law in Zurich, Switzerland, and Attorney-at-Law in Hamburg, Germany was appointed as Sole Arbitrator.

59. On 9 July 2024, the CAS Court Office invited the Parties to indicate what the final date for the issuance of the decision in this proceeding would be in view of the 2024 Olympic Games in Paris.

60. On 10 July 2024, both the Appellant and the First Respondent informed the CAS Court Office that 19 July 2024 would be the latest date on which a decision shall be issued, as the event, in which the Appellant sought to participate, was scheduled for 28 July 2024. In its letter the First Respondent also informed the CAS Court Office that it would provide its Answer on or before the 12 July 2024 and that it would be available for a hearing on any date except 17 July 2024.

61. Still on the same date, Second Respondent agreed with World Sailing that the last day for the issuance of the operative part of the Award was 19 July 2024. It also stated that the IOC had instructed the AIN Eligibility Review Commission to review the Appellant and that the commission considered her to be – in principle – eligible. Furthermore, the Second Respondent submitted the following:

"The IOC respectfully requests that the present arbitration be summarily discontinued, on the ground that the Appellant's appeal is manifestly late (Article R49 third sentence on the CAS Code).
The IOC's request is based on the following grounds:

1. *Pursuant to Article R49 of the CAS Code, in the absence of a time limit set in the statues or regulations of the federation, association or sports-related body concerned, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against.*
2. *In the present case, the Appellant claims that her appeal is directed against: [the] IOC's decision to require World Sailing to offer the AIN quota earned by Ms Valkevich to the Belarus Olympic Committee for acceptance.*
3. *The Appellant contends that "IOC's conduct engendered a legitimate expectation that Ms Valkevich would not be requires to engage with the Belarus NOC and that the NOC would not have any part in accepting or declining any Olympic quota that she earned".*
4. *However, the Appellant was informed on 7May 2024 (at the latest) that the IOC had confirmed that any quota earned by a Belarusian national would have to be approved by the Belarusian Olympic Committee ("BOC").*
5. *Accordingly, if the Appellant wished to challenge the IOC's (purported) decision to require the BOC to approve*

any quota earned by a Belarusian national, she should have done so, at the very latest, no later than 28 May 2024 (i.e. 21 days after the 7 May 2024).

6. *The Appellant's appeal, lodged on 6 June 2024, is therefore manifestly late.*
7. *In light of the foregoing, the IOC respectfully requests the Sole Arbitrator to terminate the present proceedings pursuant to Article R49 third sentence of the CAS Code by rendering a partial award pursuant to Article 188 of the Swiss Federal private International Law Act (PILA) by analogy with Article 91(b) of the Swiss Federal Tribunal ACT (LTF).*
8. *In the meantime, and in order to avoid unnecessary costs, the IOC respectfully requests that the time limit for filing its Answer be suspended pending a decision on its request for the issuance of a partial award".*

62. On 11 July 2024, the Appellant opposed the IOC's request to discontinue the proceedings and the IOC's request for suspension of the time limit to file the Answer. The Appellant argued – *inter alia* – as follows:

"[…]
To start time running, it should be clear that the decision is provisional, under review or subject to further revision by the decision-maker, and that the person has no further avenues to challenge the decision internally or have it reconsidered by another decision-maker within the body; this finality is what will prompt a person whose rights have been affected to take legal advice. Further, a requirement for finality reduces the likelihood of unnecessary appeals. The approach taken by IOC here would mean that potential appellants would have to consider filing appeals based on provisional notification that a decision may have been made without being informed of reasons, whether it is final or the consequences of the decision. This would be contrary to the purpose of the Code which is to facilitate the resolution of sports-related disputes while safeguarding the rights of the parties. […] In summary, it is submitted that to start time running […], what is required is communication, normally in writing, addressed (generally) to a person or his/her representatives and actually received in to the person's sphere of control, […]. […] any uncertainty should be resolved in an appellant's favour. […]".

63. On the same date, CAS Court Office acknowledged receipt of Respondent's *"objection to the admissibility of the appeal, and its request for a partial award to be issued in this respect"* as well as Appellant's objections to such requests. The letter continued to state that the correspondence has been forwarded to the Sole Arbitrator for consideration and that in the meantime, the time limit for the Second Respondent to file its Answer had been suspended.

64. On 12 July 2024, the CAS Court Office communicated the following to the Parties on behalf of the Sole Arbitrator:

"- at this stage, the IOC's request for a partial award and that the present arbitration be summarily discontinued is rejected;
- the IOC's request for suspension of the time for the filing of the Answer is rejected;
- the IOC is invited to submit as soon as possible and in any event, no later than 15 July 2024, its decision whereby it advised World Sailing that it must liaise with BLR NOC to approve the

quota place for the Appellant" (emphasis omitted).

65. On the same date, the First Respondent filed its Answer in accordance with Article R55 of the CAS Code.

66. Also on the same date, the CAS Court Office acknowledged receipt of the First Respondent's Answer and informed the Parties that it would be submitted to the Parties together with the Second Respondent's Answer. Furthermore, the CAS Court Office confirmed that the suspension of the Second Respondent's deadline to file its Answer was lifted with immediate effect.

67. On 13 July 2024, the Second Respondent informed the CAS Court Office that the document it was requested to file following the CAS Court Office letter dated 12 July 2024 has been filed by World Sailing (together with the Answer) on 12 July 2024 and that since this document is now part of the case file, the *"Sole Arbitrator's request has become moot"*. The letter continued to state that its motion to terminate the arbitration, which was rejected for the time being by the Sole Arbitrator, *"must now be granted"* for the following reasons:

> *"1. In her Appeal Brief, the Appellant indicated that she is appealing the following purported decision by the IOC:*
> *'[the] IOC's decision to require World Sailing to offer the AIN quota earned by Ms Valkevich to the Belarus Olympic Committee for acceptance.'*
> *2. To start with, and contrary to the Appellant's assertion, the IOC never made such decision in the first place.*
> *3. In fact, World Sailing had to liaise with the Belarusian Olympic Committee ("BOC") to approve the quota place for the Appellant as this is what the Olympic Charter requires for every athlete.*
> *4. According to Rule 40 of the Olympic Charter, "[t]o participate in the Olympic Games, a competitor [...] must respect and comply with the Olympic Charter and World Anti-Doping Code, including the conditions of participation established by the IOC, as well as with the rules of the relevant IF as approved by the IOC, and the competitor, [...] must be entered by his NOC". Pursuant to Bye-law 2.1 to Rules 27 and 28 of the Olympic Charter, the NOCs "decide upon the entry of athletes proposed by their respective national federations". In other words, the NOCs are ultimately responsible for the selection of their team/athletes for the Olympic Games.*
> *5. The only communication by the IOC that could possibly qualify as a "decision to require World Sailing to offer the AIN quota earned by Ms Valkevich to the Belarius Olympic Committee for acceptance", is Mr. Schellekens' email of 6 May 2024 to World Sailing's Mr. Downing. On that date, the IOC confirmed to World Sailing that "the process for the allocation of quota places for BLR athletes is the same for any other NOC and [World Sailing] may write to the [BOC] directly to confirm the quota. The NOC is not suspended and is collaborating with [the IOC] on entering the athletes".*

6. *Whether this email qualifies as a decision or an information is a question that the IOC will develop in its Answer on the merits, if any. At this juncture it suffices to mention that the informative nature of this communication is obvious from Mr. Downing's answer that he "had forgotten BLR NOC is not suspended".*
7. *What matters the most for the purposes of this submission is that the Appellant was "notified" of this (purported) "decision" by World Sailing on 7 May 2024 (at the latest) when Mr. Downing informed her that the IOC had confirmed that "BLR NOC is the only entity that confirm the acceptance of quota places earned by BLR nationals. The BLR suspended by the IOC so their rights and obligations regarding entries remain unchanged".*
8. *This confirms that the Appellant's appeal, lodged on June 6, 2024, is, in any case, manifestly late. If the Appellant wished to challenge the IOC's (purported) decision "to require World Sailing to offer the AIN quota earned by Ms Valkevich to the Belarus Olympic Committee for acceptance", as she claims in her Appeal Brief,5 she should have done so by May 28, 2024, at the very latest (i.e., 21 days after May 7, 2024).*
9. *Consequently, the IOC respectfully reiterates that the present arbitration should be summarily discontinued on the grounds that the Appellant's appeal is manifestly late (Article R49, third sentence of the CAS Code). This should be done with a partial award pursuant to Article 188 of the Swiss Federal Private International Law Act (PILA) by analogy with Article 91(b) of the Swiss Federal Tribunal Act (LTF).*
10. *To avoid unnecessary costs, the IOC respectfully requests that, in the meantime, the time limit for filing the Answer be suspended pending a decision on its request for the issuance of a partial award"* (emphasis omitted).

68. On 16 July 2024, the CAS Court Office informed the Parties – *inter alia* – as follows:

"Insofar as the appeal is directed against the IOC's decision 'to require World Sailing to offer the AIN quota earned by Ms Valkevich to the Belarus Olympic Committee for acceptance', the CAS does not have jurisdiction/mandate to rule on the appeal. The reasons for the Sole Arbitrator's decision will be included in the final Award.
In view of the above, the IOC's time limit to file its Answer is moot.
Insofar as it is directed against World Sailing's decisions 'to withdraw the Olympic quota place earned by Ms Valkevich for the Paris 2024 Olympic Sailing Competition to compete as an Individual Neutral Athlete (AIN)' and 'not to enter her in the Paris 2024 Olympic Games', the Sole Arbitrator has decided to hold a hearing by video-conference.
The Sole Arbitrator would be available for the hearing on Wednesday 17 July 2024 at 14:00 CEST (Swiss time). The Parties are invited to advise the CAS Court Office, by today at 14.00 CEST (Swiss time), whether they would be available on this date. […]" (emphasis omitted).

69. Still on 16 July 2024, the First Respondent informed the CAS Court Office that it is available for the hearing and that Ms Urvasi Naidoo will be attending the hearing on its behalf.

70. On the same day, the Second Respondent requested clarification as to whether it is invited to attend the hearing.

71. Always on the same day, the CAS Court Office informed the Parties that *"[…] while the Sole Arbitrator has determined that the CAS does not have jurisdiction/mandate to rule on the appeal against the IOC's decision 'to require World Sailing to offer the AIN quota earned by Ms. Valkevich to the Belarus Olympic Committee for acceptance', the IOC remains a party to the present procedure and is therefore welcome to attend the hearing, if it so wishes"*. Finally, the letter invited the Parties to return a signed copy of the Order of Procedure ("OoP") to the CAS Court Office before the hearing.

72. Later that day, the Second Respondent informed the CAS Court Office that it will attend the hearing and would be represented by Mr Antonio Rigozzi and Mr Eolos Rigoulos.

73. Also on that date, the First Respondent submitted a signed copy of the OoP.

74. On 17 July 2024, the Appellant returned a signed copy of the OoP to the CAS Court Office and informed the latter that the Appellant as well as Ms Sarah Wroe and Mr Tom Ashley will attend the hearing.

75. On the same date, Second Respondent submitted its signed copy of the OoP.

76. On 17 July 2024, a hearing via videoconference was held. The Sole Arbitrator was assisted by Ms Delphine Deschenaux-Rochat, Counsel to the CAS. Furthermore, the following persons attended the hearing

For the Appellant
- Ms Anastasiya Valkevich
- Ms Sarah Wroe, Counsel
- Mr Tom Ashley, Counsel

For the First Respondent
- Ms Urvasi Naidoo, Director of Legal and Governance

For the Second Respondent
- Mr Antonio Rigozzi, Counsel
- Mr Eolos Rigopoulos, Counsel

77. At the closing of the hearing, the Parties expressly stated that they did not have any objections with regard to the procedure. The Parties further confirmed that they were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the Sole Arbitrator and that their right to be heard had been respected.

78. On 18 July 2024, CAS Court Office notified to the Parties of the operative part of the Award.

IV. SUBMISSIONS OF THE PARTIES

79. 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 of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the Award

or in the discussion of the claims below.

A. The Appellant's Position

80. In her Statement of Appel dated 6 June 2024, the Appellant requested as follows:

> *"a. An order that World Sailing and/or IOC (re)allocate a quota to Ms Valkevich and enter her as an AIN to compete in the Paris 2024 Olympic Sailing Competition in Women's Windsurfing;*
> *b. Any consequential order(s) required to give effect to order (a); and*
> *c. Costs".*

81. In her Appeal Brief dated 26 June 2024, the Appellant appealed:

> *"a. World Sailing's decision:*
> *i. to withdraw the Olympic quota place earned by Ms Valkevich for the Paris 2024 Olympic Sailing Competition to compete as an Individual Neutral Athlete (AIN);*
> *ii. not to enter her in the Paris 2024 Olympic Games;*
> *b. IOC's decision to require World Sailing to offer the AIN quota earned by Ms Valkevich to the Belarus Olympic Committee for acceptance".*

82. Furthermore, the Appellant requested:

> *"a. an order that World Sailing and/or IOC (re)allocate a quota to Ms Valkevich/AIN and submit an application to the IOC AIN Eligibility Review Panel to evaluate her eligibility to compete at Paris 2024;*
> *b. any consequential order(s) required to give effect to order (a) including, if required, an order that IOC make an additional quota available to WS for allocation to Ms Valkevich".*

83. The Appellant's submissions in support of her appeal may, in essence, be summarised as follows:

- On the proper application of the AIN Principles, World Sailing was required to offer the AIN quota directly to the Appellant.
- World Sailing and IOC breached the AIN Principles by offering the AIN quota acquired by the Appellant to the Belarus NOC for acceptance and then reallocating the quota place when the BOC declined it.
- World Sailing should not have approached the BOC and/or the Belarus Sailing Federation. This is contrary to the spirit of the AIN program, which is about athletes being able to compete as individuals and not as representatives of their country. In the Appellant's situation, the Belarus Sailing Federation would never have allowed her to compete. Tatiana Drozdovskaya, a sailor and former president (2017-2018) of the Belarus Sailing Federation, told the Appellant that the Belarus Sailing Federation or the BOC would not approve her application for Belarus because she did not support the regime and the war.
- If the quota place has been awarded to another nation, another quota place must be added for women's windsurfing.

- The AIN Principles and the World Sailing Policy must be interpreted in light of the Olympic Charter. In the context of a proper construction of the rules one must take account of the political problems in Belarus, the Russian invasion of Ukraine that is supported by Belarus and the various IOC and World Sailing press releases and decisions relating to Belarus and Russia in which the decision makers have sought to balance the rights of neutral individual athletes against the need to sanction non-compliance with international norms and breaches of the Olympic truce.
- Construed against this relevant background, the proper interpretation of the AIN Principles and the World Sailing Policy is that:
    a. AINs may take part in the Olympic Games Paris 2024 *"only in an individual and neutral capacity, and not in any way as representatives of […] Republic of Belarus, or any other organization in their country, including their NOC or NF"*.
    b. The BOC, unlike other NOCs, does not have exclusive/any authority in relation to the representation of its country at the Olympic Games Paris 2024. The BOC cannot be represented at the Games and is not entitled to send competitors to Paris 2024.
    c. Preliminary vetting and approval of athletes is undertaken by World Sailing; final approval is a matter for the IOC. The decision as to whether an athlete merits AIN status is discretionary, but the discretion must be exercised in good faith and not arbitrarily/capriciously and consistently with the AIN Principles and the World Sailing Policy.
    d. AINs will be registered for the Olympic Games Paris 2024 on an individual basis. The registration (accreditation and sport entries) of AINs will be coordinated jointly between the Paris 2024 Organizing Committee, the relevant international federation and the IOC, without the intervention of NOCs. Once an international federation has confirmed that an athlete has met the specific eligibility criteria and has been awarded a quota place, the IOC must refer such athlete to the IOC AIN Eligibility Review Panel. Neither the AIN Principles nor the World Sailing Policy provide a basis for taking the additional step of referring the AIN quota back to Belarus for acceptance.
- In accordance with the AIN Principles and the World Sailing Policy, Russia and Belarus (and consequently Russian and Belarusian athletes) are to be treated materially equally. The exception is that the AIN Principles allow the IOC to *"consult and coordinate with the NOC (at a technical level) on the implementation"* of the AIN measures. The World Sailing Policy does not give World

Sailing the same right of consultation. That means that technical consultation cannot extend to whether an AIN quota is accepted or not, as the management and distribution of quota places is a matter for World Sailing.

- While the AIN Principles and the World Sailing Policy depart from the general position under the Olympic Charter and the WS QS, they must take effect according to their terms as the documents deal with the specific circumstance of measures taken against Belarus and Russia, and were enacted later in time than the Olympic Charter and the WS QS.
- Likewise, while the World Sailing Policy provides that entries will be managed subject to the Olympic Notice of Race ("NOR"), the World Sailing Policy was enacted after the NOR, addresses a special circumstance, and therefore takes precedence where it is inconsistent with the NOR.
- It is submitted that neither the AIN Principles nor the World Sailing Policy are ambiguous. Properly construed, their effect is to remove the role of the BOC in the process of accepting/declining quota places. To the extent any ambiguity remains, it should be resolved in the Appellant's favour under the *contra proferentem* principle.
- The position taken by World Sailing and the IOC to entitle the BOC to decide whether to accept AIN quota places on behalf of athletes is illogical and at odds with the AIN regime. Athletes "representing" their NOC, and NOCs having the right to accept or decline quota places on behalf of athletes, are two sides of a coin. Thus, if AIN athletes are not allowed to compete as representatives of their NOC under any circumstances, it would be bizarre to put the onus on the NOC to manage their entries and *de facto* decide which athletes are "not" allowed to represent Belarus.
- To refer the acceptance of quota places to the BOC is fundamentally inconsistent with a system where the athlete has earned a quota place to compete at the Games on a neutral basis. It creates an opportunity for the BOC to defeat the purpose of the AIN Principles by electing not to take quota places earned by athletes who may not be in good standing with the national federations.
- Further, where it appears to be accepted that Russian athletes cannot be entered by the Russian NOC and where the AIN Principles and World Sailing Policy make no material distinction between Russian and Belarusian athletes, it does not make sense to apply different procedures to athletes from these two countries.
- A bilateral contractual relationship was created between the Appellant and World Sailing through the Declaration Form provided by World Sailing and signed by the Appellant. The terms of such contract reaffirm the position that the individual neutral athletes are not representatives of the NOC, a national federation or any other

organization of their country and that they interact directly with World Sailing.

- The Appellant and World Sailing agreed when executing the contract that Belarus would not be involved if the Appellant successfully qualified for a quota place at the LCR.
- World Sailing's conduct further gave rise to a legitimate expectation on the Appellant that under the AIN scheme she would interact directly with World Sailing and IOC and would not have anything to do with Belarus.
- IOC's conduct engendered a legitimate expectation that the Appellant would not be required to engage with the BOC and that the BOC would not have any part in accepting or declining any Olympic quota that she earned.

B. The First Respondent's Position

84. In its Answer dated 12 July 2024, the First Respondent did not specifically file a prayer for relief. However, it follows from the contents of its Answer and also from its submissions at the hearing that World Sailing requests the appeal to be dismissed.

85. The First Respondent's Answer may, in essence, be summarised as follows:

- World Sailing is under the authority of the owner of the Olympic Games, the IOC, which establishes the rules, regulations and procedures that govern the qualification and eligibility system for the Olympic Games.
- World Sailing was advised by the IOC that applications for Belarusian athletes were to be processed via the BOC, since the process for the allocation of quota places for BOC athletes is the same as for any other NOC.
- The BOC declined the quota place on the basis that the athlete was not a member of their national sailing federation and had changed her nationality. It was within the BOC's authority to decline the quota place offered to it.
- World Sailing has acted in accordance with the instructions of the IOC and in accordance with the WS QS.
- The quota place originally offered to the Appellant has been reallocated and accepted by another NOC. World Sailing does not have the power to revoke this allocation.
- World Sailing is not authorized to allocate an additional quota place to the Appellant in order to enter her as a neutral athlete for the Paris 2024 Olympic Sailing Competition.

C. The Second Respondent's Position

86. The Second Respondent has not submitted an Answer. However, it has raised in its various letters to the CAS Court Office a series of requests/objections:

- To reject the appeal filed by the Appellant, because the IOC-Decision does not constitute a decision within the meaning of Article R47 of the CAS Code. More particularly, the IOC did not require World Sailing to offer he AIN quota place earned by the Appellant to the BOC. Instead, it

follows from the IOC Charter that World Sailing has to liaise with the BOC to approve the quota place for the Appellant. This is backed by Rule 40 of the Olympic Charter. Furthermore, pursuant to Bye-law 2.1 to Rules 27 and 28 of the Olympic Charter, it is the NOCs that decide upon the entry of athletes proposed by their respective national federations.

- The IOC-Decision is of an informative nature only, it does neither impact on the rights of World Sailing nor on the rights of the Appellant. This finding is consistent with Mr Downing's answer (World Sailing) to Mr Bram Schellekens of the IOC in which he stated that he *"had forgotten BLR NOC is not suspended"*.
- The Appellant's request is inadmissible, because the appeal directed against the alleged decision of the IOC (IOC-Decision) is manifestly belated. The IOC-Decision was issued at the latest on 7 May 2024 (when the Appellant became aware of it) and the Appellant has only filed her appeal on 6 June 2024. Thus, the deadline referred to in Article R49 of the CAS Code has expired.

V. JURISDICTION

87. The question whether the CAS has jurisdiction to hear the present dispute must be assessed on the basis of the *lex arbitri*. As Switzerland is the seat of the arbitration and not all Parties were domiciled in Switzerland at the time the Parties entered into an (alleged) arbitration agreement, the provisions of the Swiss Private International Law Act ("PILA") apply, pursuant to its Article 176(1). In accordance with Article 186 of the PILA, the CAS has the power to decide upon its own jurisdiction (*"Kompetenz-Kompetenz"*).

88. Pursuant to Article R27 of the CAS Code:

"These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings). …".

89. Article R47(1) 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".

90. Whether there is jurisdiction must be determined with respect to all matters in dispute separately. In the case at hand the Appellant has appealed two alleged decisions (WS-Decision and IOC-Decision). These decisions constitute different matters in dispute, since they involve different parties and, therefore, jurisdiction will be addressed thereafter separately.

A. Jurisdiction vis-à-vis World Sailing

91. Concerning the matter in dispute involving World Sailing, the Appellant relies on Rule 35.9.1. of the Appendix 6 to the 2024 World Sailing Regulations. The provision states as follows:

"Part H – Appeals to the Court of Arbitration for Sport
35.9.1 No appeal from a decision of World Sailing lies to the Court of Arbitration for Sport except:
(a) in accordance with this Regulation 35.9; or
(b) under Rule 61(2) of the Olympic Charter for disputes arising on the occasion of, or in connection with, the Olympic Games; or
(c) any decision made by an Elections Ad Hoc Independent Panel which disqualifies a candidate or nominee from standing as a candidate or nominee in a World Sailing Election […]".

92. Neither World Sailing nor the Appellant have expressed any reservations to be bound to this arbitration clause. Furthermore, the Sole Arbitrator notes that the Appellant and the First Respondent have duly signed the OoP.

B. Juridiction vis-à-vis IOC

93. With respect to the Appellant's appeal against the IOC-Decision, the Appellant relies on Rule 61(2) of the Olympic Charter, which states as follows:

"61 Dispute Resolution
[…]
2. Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration".

94. Neither the Appellant nor the IOC have expressed any reservation that the present dispute falls within the scope of the above provision and that the IOC and the Appellant are bound to the latter.

C. The delimitation of issues of jurisdiction and admissibility

95. The IOC submits that the IOC-Decision does not qualify as a decision within the meaning of Article R47 of the CAS Code. It is unclear whether this objection pertains to jurisdiction or admissibility.

96. The distinction between jurisdiction and admissibility is complex and differs from jurisdiction to jurisdiction (GIRSBERGER/VOSER, International Arbitration, 5th ed. 2024, no. 1358; cf. also STACHER, Jurisdiction and Admissibility under Swiss Arbitration Law – the Relevance of the Distinction and a New Hope, Bull-ASA 2020, 55 ff.). In particular, the CAS jurisprudence in relation to the above issue is not unanimous. In CAS 2008/A/1633 and CAS 2022/A/8865-8868 the panels treated the question whether the appeal was directed against a "decision" as an admissibility issue. In CAS 2007/A/1633 or CAS 2015/A/4174, on the contrary, the respective panels analyzed the identical issue as a jurisdictional matter. It is for this reason that the Sole Arbitrator in the CAS Court Office letter dated 16 July 2024 left the issue undecided ("jurisdiction/mandate") and announced that he will give the reasons for his decision in the final Award.

97. As a rule of thumb, the question whether CAS has competence to decide the dispute in a binding manner in lieu of a state court, and whether the matter before CAS is within the scope of the arbitration agreement, are issues of jurisdiction, whereas all procedural issues that are non-jurisdictional issues and that may cause the end of the arbitration for procedural reasons are admissibility issues (GIRSBERGER/VOSER, International Arbitration, 5th ed. 2024, no. 1358). If one applies this rule of thumb in the case at hand, the question whether the IOC-Decision qualifies as a decision within the meaning of Article R47 of the CAS Code is an admissibility issue. It is not disputed that the competence to decide a dispute in a binding way was transferred from state courts to arbitration in the case at hand. Neither the Appellant nor the IOC object to being bound to Rule 61(2) of the Olympic Charter, which provides for such a transfer of competence to the CAS.

98. Furthermore, the Sole Arbitrator after carefully reviewing the CAS precedents finds that there are further arguments speaking in favour of qualifying the above issue as an admissibility matter (cf. also CAS 2021/A/8034, no. 74). The CAS Code provides different types of proceedings depending on the matter in dispute, i.e. whether the requests filed by an appellant relate to the setting aside of a "decision" of a sports organisation. If the latter is the case, then the dispute will be adjudicated according to the provisions applicable to the Appeals Arbitration Procedure. In case the matter in dispute does not concern an appeal against a decision, the respective provisions of the Ordinary Appeals Procedure apply. The question of what procedural rules apply is, however, completely independent from the question whether CAS – based on an arbitration agreement – has jurisdiction. As such, the Sole Arbitrator will proceed to address the legal status of the IOC-Decision in the section on admissibility.

VI. ADMISSIBILITY

A. The IOC-Decision does not qualify as a decision within the meaning of Article R49 of the CAS Code

99. The Appellant in her Appeal Brief states that her challenge is directed against the "IOC's decision to require World Sailing to offer the AIN quota earned by Ms Valkevich to the Belarus Olympic Committee for acceptance", i.e. the IOC-Decision.

a) The applicable criteria

100. In defining the concept of a decision within the meaning of Article R47 of the CAS Code, the CAS has relied upon the *relevant principles of Swiss administrative law*. According thereto, the form and/or denomination of the challenged act are not determinative. Instead, what matters is whether the latter contains a ruling affecting the parties' legal positions (RIGOZZI/HASLER, in ARROYO (ed.) Arbitration in Switzerland, The Practitioner's Guide, 2nd ed, 2018, Volume II, Article R47 no. 29 et seq.).

101. The CAS case law has interpreted the term "decision" and the characteristic

features of decision within the meaning of Article R47 of the Code as follows:

"the form of the communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitute a decision subject to appeal" (CAS 2005/A/899 para. 63; CAS 2007/A/1251 para. 30; CAS 2004/A/748 para. 90; CAS 2008/A/1633 para. 31).
- In principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties" (CAS 2005/A/899 para. 61; CAS 2007/A/1251 para. 30; CAS 2004/A/748 para. 89; CAS 2008/A/1633 par. 31; CAS 2013/A/3409 para 123).
- A decision is thus a unilateral act, sent to one or more determined recipients and is intended to produce legal effects" (2004/A/659 para. 36; CAS 2004/A/748 para. 89; CAS 2008/A/1633 para. 31).
- an appealable decision of a sport association or federation is normally a communication of the association directed to a party and based on an 'animus decidendi', i.e. an intention of a body of the association to decide on a matter […]. A simple information, which does not contain any 'ruling', cannot be considered a decision" (BERNASCONI M., "When is a 'decision' an appealable decision?" in: RIGOZZI/BERNASCONI (eds), The Proceedings before the CAS, Bern 2007, para 273; CAS 2008/A/1633 para. 32)".

102. In their commentary of the Code of the Court of Arbitration for Sport, MAVROMATI/REEB, state at Article R47 no. 13/14:

"[…] Generally, the term 'decision' must be interpreted in a broad manner so as not to restrain the relief available to the persons affected (see CAS 2005/A/899; CAS 2004/A/748; CAS 2004/A/659 and CAS 2008/A/1583&1584). In principle, simple letters addressed from a federation to a club/athlete cannot qualify as 'appealable decisions' unless they affect the legal situation of their addressee(s). The relevant criterion is not the form of the communication but it's content: […] However, the form of a communication may offer an indication of the intent of the body issuing the communication (see CAS 2007/A/1293). In general, a communication is qualified as a decision if it contains a ruling intending to affect the legal state of the addressee of the decision or other parties (see CAS 2012 /A/2750, CAS 2005/A/899 etc.)".

b) Application of the above principles to the case at hand

103. The contents of the IOC-Decision reads as follows:

"[…] The process for the allocation of quota places for BLR athletes is the same for any other NOC and you may write to them directly to confirm the quota. The NOC is not suspended and is collaborating with us on entering the athletes. The athlete would then go through the IOC AIN eligibility review panel before an individual invitation would be issued if declared eligible. […] Regarding the specific athlete in windsurfing, we have been contacted by the NOC following their pre-delegation registration meeting and wanted to verify the sporting nationality of the athlete as they mentioned the following to us:
'After the Pre-DRM I contacted our Sailing Federation, and they told me that Ms Anastasiya Valkevich is not a member of the Belarus Sailing Federation because she

had changed her nationality and has been representing another country since 2018'".

104. The Sole Arbitrator finds that the email sent by the IOC to World Sailing on 6 May 2024 is not an appealable decision within the meaning of Article R47 of the CAS Code. This email did not dispose of any matter or request and does not contain a ruling. The IOC's email was sent in response to the letter by Mr Downing from World Sailing dated 30 April 2024. Therein, Mr Downing did not file a request with the IOC, but merely asked – *inter alia* – whether Mr Schellekens from the IOC could *"advise* [him] *on the formal process* [he] *should undertake to offer the W Windsurfing quota place to the AIN NOC"*. The answer provided by Mr Schellekens in the form of the IOC-Decision is of a purely informative character. It merely describes the applicable process to be followed by World Sailing according to the relevant rules according to which the *"process for the allocation of quota places for BLR athletes is the same for any other NOC and you may write to them directly to confirm the quota"*. The informative character of the IOC email was also plainly understood by World Sailing. This clearly follows from Mr Downing's response to Mr Schellekens, in which Mr Downing states that *"I had forgotten BLR NOC is not suspended. […] I will go ahead and offer the BLR NOC the quota place she has earned and lets see what happens. Hopefully administration doesn't get in her way"*.

105. Thus, the IOC-Decision does not contain any ruling, it is not a refusal of a request made by World Sailing and/or the Appellant. The email, in addition, does not affect the legal positions of either the Appellant or World Sailing. The Sole Arbitrator further notes that the email is not even addressed to the Appellant. Instead the email is solely directed to World Sailing. Consequently, the email in question is not intended to regulate a legal situation in a binding and mandatory manner and does not fulfil the criteria for a decision within the meaning of Article 47 of the CAS Code. As a result of all of the above, the appeal filed by the Appellant against the IOC-Decision is inadmissible.

B. Timeliness of the Appeal

106. Article R49 of the CAS Code provides as follows:

"In the absence of a time limit in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for the 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 parties".

107. Rule 35.9.3 of the Appendix 6 to the 2024 World Sailing Regulations states as follows:

"35.9.3 The time limit for lodging an appeal shall be fourteen days from receipt of the written decision of the Independent Panel appealed against. The arbitration shall be

conducted in accordance with the Code of Sport-Related Arbitration. The Court of Arbitration for Sport panel will consist of one arbitrator and the language of the arbitration will be English".

108. The provision is only applicable in the context of appeals against decisions of the Independent Panel. In all other instances – absent any provisions to the contrary – it is the 21-day deadline provided for in Article R49 of the CAS Code that applies.

109. The Sole Arbitrator notes that the WS-Decision was rendered on 29 May 2024. Considering that the Appellant filed her Statement of Appeal on 6 June 2024 (via e-Filing on 18 June 2024) and therefore within the 21-day time limit, the Sole Arbitrator is satisfied that the Appeal against World Sailing was filed in a timely manner.

110. On a subsidiary basis, the Sole Arbitrator notes that even if – contrary to the view followed in this Award – one assumes that the IOC-Decision qualifies as a decision pursuant to Article R49 of the CAS Code, such appeal would be belated and would have to be rejected. According to Article R49 of CAS Code, and in the absence of a time limit set forth in the statutes or regulations of the IOC, the time limit for an appeal against the IOC-Decision would be twenty-one days from the receipt of the decision appealed. The Appellant has submitted that the IOC-Decision was communicated to her on 7 May 2024 (email from World Sailing to Polish Yachting Association with the Appellant in copy). The Appellant, however, lodged her appeal against the IOC only on 6 June 2024, which is manifestly late. The Appellant submits that one must differentiate between "receiving a decision" and having "notice" and that the "notice" received from World Sailing on 7 May 2024 did not *"indicate with sufficient finality that Ms Valkevich will definitely not be given the opportunity to engage directly with World Sailing and IOC concerning her Olympic entry"*. The Sole Arbitrator disagrees with this conclusion. If one qualifies the IOC-Decision as a decision within the meaning of Article R47 of the CAS Code, one must also accept that such decision has sufficient finality to form the object of an appeal. The mere fact that a party files requests for reconsiderations or starts negotiations/discussions following the issuance of the ruling does not alter the deadline for appeal. This view is also backed when looking at Article 75 of the Swiss Civil Code, which functioned as a template and source of inspiration for Article R49 of the CAS Code. According thereto, discussions, negotiations, correspondence or complaints following the issuance of a decision cannot extend or alter the deadline for appeal (BK-RIEMER, Civil Code, 2nd ed. 2023, Article 75 no. 85).

VII. APPLICABLE LAW TO THE MERITS

111. 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 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".

112. Rule 17 of the 2024 World Sailing Regulations reads as follows:

"17. APPLICATION OF ENGLISH LAW

17.1 Any disputes relating to the validity or construction of the World Sailing Constitution or Regulations or any other rules or regulations made thereunder (together, the 'World Sailing Regulations'), and any disputes relating to the application of the World Sailing Regulations or the exercise of powers thereunder, shall […] be governed by English law, excluding English choice of law principles. […]".

113. The Sole Arbitrator notes that – according to Article R58 of the CAS Code – it *"shall decide the dispute according to the applicable regulations"*, i.e. the rules and regulations of World Sailing. Subsidiarily, he will apply English law (excluding choice of law principles).

VIII. MERITS

114. At the hearth of this dispute is the question whether World Sailing acted correctly by offering the quota place earned by the Appellant to the BOC.

A. The Legal Framework

115. Rule 40(1) of the Olympic Charter states the following:

"1 To participate in the Olympic Games, a competitor, team official or other team personnel must respect and comply with the Olympic Charter, the World Anti-Doping Code and the Olympic Movement Code on the Prevention of the Manipulation of Competitions, including the conditions of participation established by the IOC, as well as with the rules of the relevant IF as approved by the IOC, and the competitor, team official or other team personnel must be entered by his NOC".

116. Bye-law to Rule 40 of the Olympic Charter reads as follows:

"1. Each IF establishes its sport's rules for participation in the Olympic Games, including qualification criteria, in accordance with the Olympic Charter. Such criteria must be submitted to the IOC Executive Board for approval.

2. The application of the qualification criteria lies with the IFs, their affiliated national federations and the NOCs in the fields of their respective responsibilities".

117. Rules 27 and 28 as well as the Bye-laws to Rules 27 and 28 of the Olympic Charter provide in their pertinent parts the following:

"27 Mission and role of the NOCs

[…]

3 The NOCs have the exclusive authority for the representation of their respective countries at the Olympic Games and at the regional, continental or world multisports competitions patronised by the IOC. In addition, each NOC is obliged to participate in the Games of the Olympiad by sending athletes.

7 NOCs have the right to:

[…]

7.2 send competitors, team officials and other team personnel to the Olympic Games in compliance with the Olympic Charter; […]

Bye-law to Rules 27 and 28

[…]

2.1 They constitute, organise and lead their respective delegations at the Olympic Games and at the regional, continental or world multisports competitions patronised by the IOC. They decide upon the entry of athletes

proposed by their respective national federations. Such selection shall be based not only on the sports performance of an athlete, but also on his ability to serve as an example to the sporting youth of his country. The NOCs must ensure that the entries proposed by the national federations comply in all respects with the provisions of the Olympic Charter".

118. Rule 41 of the 2024 World Sailing Regulations stipulates as follows:

"TEMPORARY CHANGES TO REGULATIONS

41.1 In accordance with the International Olympic Committee (the "IOC") recommendations on the participation of athletes with a Russian or Belarusian passport in the Olympic Sailing Competition in the Olympic Games Paris 2024, the following provisions shall apply notwithstanding any other Regulation, Policy Document or the provisions of The Racing Rules of Sailing.

41.2 In accordance with the World Sailing policy for participation of Individual Neutral Athletes and Support Persons with a Russian or Belarusian Passport in the Olympic Sailing Competition in the Olympic Games Paris 2024 (the "Neutrality Policy") the Board shall approve as "Individual Neutral Athlete" in English and "Athlètes Individuels Neutres" in French, ("AIN"), any sailor/Support Person who has:

• signed the self-declaration attached to the Neutrality Policy; and

• has been verified as being in compliance with the Neutrality Policy.

41.3 Under the provisions of the IOC recommendations, an AIN sailor shall not in any way act as a representative of the Russian Federation or the Republic of Belarus, or any other organisation in their country, including their National Olympic Committee ("NOC") or Member National Association ('MNA'). Therefore, all AIN sailors will represent themselves and will not have an MNA. For the purposes of permitting Participation as defined in the Neutrality Policy all World Sailing Rules, Policy Documents and Regulations and The Racing Rules of Sailing shall be construed accordingly.

41.4 AIN sailors will be allocated a temporary AIN Sailor ID by World Sailing.

41.5 This Regulation will only apply for the Participation defined In the Neutrality Policy and will expire at the conclusion of the Paris 2024 Olympic Sailing Competition in Marseille on the 11 August 2024".

B. The Application of the above provisions to the case at hand

119. According to Rule 40 of the Olympic Charter, *"*[t]*o participate in the Olympic Games, the competitor, [...] must be entered by his NOC"*. Thus, the authority to select athletes for the Olympic Games rests – subject to the rights of the IOC – with the NOCs. This principle is reiterated in Rule 27.7.2 of the Olympic Charter and Bye-law 2.1 to Rules 27 and 28 of the Olympic Charter (the NOCs *"decide upon the entry of athletes proposed by their respective national federations"*).

120. This principle is also enshrined in the IOC QSP, which provide that the allocation of quota places rests with the respective NOCs:

"The application of the qualification criteria lies with the IFs, their affiliated NFs and the NOCs in the field of their respective responsibility. The NOCs have the exclusive authority for the representation of their respective countries at the Olympic Games.
All qualification systems for the Olympic Games Paris 2024 should be developed based on the following:
[…]
Each qualification system must indicate if the quota place is allocated to the athlete by name or the NOC. The NOCs have the exclusive authority for the representation of their respective countries at the Olympic Games even if the quota is allocated to the athlete by name".

121. The Sole Arbitrator notes that the NOR also adhere to this principle. The latter contain the rules applicable to the Olympic Sailing competitions. Article 5 of the NOR states in no. 5.1. that *"[e]ntries will be offered to National Olympic Committees (NOC) under the provisions of the* [WS QS]*"* and in no. 5.2 that *"*[a]*thletes […] shall be entered by an NOC".* The Appellant states that the NOR are superseded by the World Sailing Policy. However, this is not correct. The World Sailing Policy is referred to in the NOR as an "eligibility" requirement (for the individual athletes). The World Sailing Policy, however, does not specify, that the entry of Belarusian athletes shall be managed without the involvement of the BOC. Furthermore, the Sole Arbitrator notes that the NOR have been changed a couple of times since their entry into force on 8 November 2023. The latest amendments occurred on 1, 19 and 25 July 2024. Thus, the argument of the Appellant that the World Sailing Policy trumps the NOR, because the World Sailing Policy was enacted after the NOR, is incorrect.

122. Furthermore, this principle (that the entry of athletes rests with the NOC) is also acknowledged and accepted in CAS jurisprudence. According thereto *"[i]t is not in issue that it is for a NOC to select its competitors for the Olympics. No other body or person within a member country has that right"* (CAS OG 08/003).

123. Unlike the Russian NOC, the BOC is not suspended. Consequently, the rights of the BOC under the Olympic Charter remain in force. Thus, the procedure for the allocation of quota places for Belarusian athletes is the same as for any other NOC. In other words, the Belarus NOC is and remains responsible for the selection of "their" team/athletes for the Olympic Games, including the selection of the Appellant.

124. The AIN Principles do not deviate from the above principle. They explicitly refer to the fact that the Russian Olympic Committee (and not the BOC) has been suspended, because of the Russian Olympic Committee's *"unilateral decision to include as its members the regional sports organisations under the authority of the NOC of Ukraine, which is a breach of the Olympic Charter because it violates the territorial integrity of the NOC of Ukraine".* The AIN Principles were recognized by World Sailing on 19 January 2024 and later on implemented in the form of the World Sailing Policy. Thus, there is no conflict between the rules and regulations of World Sailing and the rules and regulations of the IOC.

125. The Appellant has submitted that the above procedure is non-sensical. According to the Appellant athletes "representing" their NOC, and NOCs having the right to accept or decline quota places on behalf of athletes, are two sides of a coin. Thus, if AIN athletes are not allowed to compete as representatives of their NOC under any circumstances, it would be bizarre to put the onus on the NOC to manage their entries and *de facto* decide which athletes are "not" allowed to represent Belarus. The Appellant challenges the above procedure because athletes qualifying as AIN most likely will not be in good terms with the national sporting federations of Belarus and the BOC. The Appellant argues that by granting discretion to the BOC to select the Belarusian athletes to compete at the Olympic Games Paris 2024 the very purpose of the AIN Principles and the World Sailing Policy is undermined.

126. The Sole Arbitrator acknowledges that there is a certain conflict arising from the fact that the BOC remains entitled to select the Belarusian athletes participating in the Olympic Games. However, the decision what eligibility criteria are applicable and what entity is responsible for the entry of athletes is a decision which falls within the autonomy of the sports organization. The IOC has decided on these issues in a certain manner and World Sailing has adopted these IOC principles. Absent any breach of the otherwise applicable law or the substantive *ordre public*, the Sole Arbitrator is not called upon to rewrite the (eligibility and entry) rules for the Olympic Games Paris 2024.

127. The Sole Arbitrator understands the frustration of the Athlete, but observes, on a side note, that the discretion granted to the NOCs under the applicable rules when deciding upon the entry of athletes is not limitless and that athletes do have a certain level of legal protection. In its decision dated 8 March 2021, the IOC Executive Board specified that *"the NOC of Belarus and its member federations"* shall *"ensure that there is no political discrimination in the participation of the Belarusian athletes in qualification events, and in the final selection of the team of the NOC of Belarus, for all Olympic Games"*. Furthermore, one of the basic principles of Olympism is political neutrality (cf. Olympic Charter). In addition, Rule 44(4) of the Olympic Charter provides – *inter alia* – that *"NOCs must investigate the validity of the entries proposed by the national federations and ensure that no one has been excluded for racial, religious or political reasons or by reason of other forms of discrimination"*. Thus, the Appellant would not have been deprived of legal protection, when appealing against the decision of the BOC to decline the quota place because of her political views or her attitude towards the Russian invasion of Ukraine.

128. To conclude and in view of all of the above, the Sole Arbitrator is not prepared to depart from the clear principles enshrined in the rules and regulations of the IOC and World Sailing and – therefore – rejects the Appellant's proposal that Russian and Belarusian athletes must be treated equally. Consequently, the Sole Arbitrator finds that World Sailing acted correctly when offering the quota place to the BOC and reallocating such

quota place – absent any remedy filed by the Appellant against the BOC – to another NOC once the BOC had declined the quota place.

129. It follows from the above that also all further prayers of relief, such as the Appellant's request to compel World Sailing to (re)allocate a quota to her, to submit an application to the IOC AIN Eligibility Review Panel to evaluate her eligibility to compete at the Paris 2024 Olympic Sailing Competition and to issue any subsequent orders necessary to give effect to these requests (including, if necessary, an order that the IOC provide World Sailing with an additional quota to allocate to the Appellant) must be dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 6 June 2024 by Anastasiya Valkevich against the International Olympic Committee to require World Sailing to offer the AIN quota earned by her to the Belarus Olympic Committee for acceptance is inadmissible.

2. The appeal filed on 6 June 2024 by Anastasiya Valkevich against World Sailing to withdraw the Olympic quota place earned by her for the Paris 2024 Sailing Competition to compete as an Individual Neutral Athlete is dismissed.

3. The request filed on 6 June 2024 by Anastasiya Valkevich whereby she seeks an order that World Sailing and/or the International Olympic Committee (re)allocate a quota to her/AIN and submit an application to the IOC AIN Eligibility Review Panel to evaluate her eligibility to compete at the Paris 2024 Olympic Sailing Competition is dismissed.

4. (…).

5. (…).

6. All other 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_16/2024, 26 juin 2024
A. c. Fédération Internationale de Football Association

Recours en matière civile contre la sentence rendue le 20 décembre 2023 par le Tribunal Arbitral du Sport (CAS 2023/A/9876)

Importance de la clarté des preuves dans les procédures d'arbitrage et portée limitée de l'examen des violations de procédure alléguées par le SFT.

Extrait des faits

Par contrat de travail du 17 juin 2022 conclu pour une durée déterminée échéant le 31 mai 2024, le club de football turc A._____ (ci-après: le club), membre de la Fédération Turque de Football (FTF), a engagé le footballeur professionnel lituanien C._____ (ci-après: le joueur ou le footballeur).

Après avoir entretenu durant plusieurs mois des relations conflictuelles avec le club, le joueur a résilié unilatéralement son contrat de travail le 2 janvier 2023 en raison des mesures disciplinaires adoptées à son encontre par le club.

Le 22 février 2023, le joueur a assigné le club devant la Chambre de Résolution des Litiges (CRL) de la FIFA en vue d'obtenir le paiement de diverses sommes représentant un montant total de 808'000 euros (EUR), intérêts en sus.

Par décision du 7 juillet 2023, notifiée aux parties le 17 juillet 2023, la CRL a condamné le défendeur à payer au demandeur un montant de 70'601 EUR à titre de rémunération impayée ainsi que la somme de 512'419.84 EUR à titre d'indemnité pour rupture injustifiée du contrat de travail, le tout avec intérêts. Elle a également interdit au club d'enregistrer de nouveaux joueurs, tant au niveau national qu'international, durant les deux périodes de transfert consécutives à la notification de sa décision.

Le 25 juillet 2023, le club a indiqué à la FIFA avoir conclu un accord transactionnel avec le joueur en date du 4 juillet 2023, soit avant la décision rendue par la CRL. Il a joint à son envoi un exemplaire dudit accord, lequel prévoyait notamment que la transaction devait être transmise à la CRL par le joueur et son conseil immédiatement après sa signature. Le club a précisé que le conseil du footballeur n'avait pas pu adresser cet accord transactionnel à la CRL avant que celle-ci ne rende sa décision car il avait été hospitalisé le 5 juillet 2023. Il a dès lors requis l'annulation de la décision prise par la CRL.

Le lendemain, le club a indiqué à la FIFA avoir versé au joueur un montant de 620'000 euros, conformément aux termes de l'accord transactionnel.

Après avoir demandé des preuves supplémentaires au joueur et à son conseil et reçu deux lettres datées du 28 juillet 2023 de la part de ce dernier, la FIFA a refusé d'annuler la décision rendue par la CRL.

Le 7 août 2023, le club a formé un appel auprès du Tribunal Arbitral du Sport (TAS) à l'encontre de la décision prononcée par la CRL.

Par sentence du 20 décembre 2023, dont la motivation a été communiquée aux parties le 8 février 2024, la Formation a rejeté l'appel formé par le club et confirmé la décision attaquée.

Le 9 janvier 2024, le club (ci-après: le recourant) a formé un recours en matière civile à l'encontre de la sentence non motivée. Il a également présenté une requête de mesures provisionnelles et d'effet suspensif.

La requête d'effet suspensif et de mesures provisionnelles a été rejetée par ordonnance du 15 mars 2024.

Extrait des considérants

(…)

5.

Dans un premier moyen, le recourant, invoquant l'art. 190 al. 2 let. d LDIP, dénonce une violation de son droit d'être entendu. Il reproche à la Formation d'avoir ignoré certains arguments qu'il avait avancés au cours de la procédure arbitrale.

5.1. La jurisprudence a déduit du droit d'être entendu, tel qu'il est garanti par les art. 182 al. 3 et 190 al. 2 let. d LDIP, un devoir minimum pour le tribunal arbitral d'examiner et de traiter les problèmes pertinents. Ce devoir est violé lorsque, par inadvertance ou malentendu, le tribunal arbitral ne prend pas en considération des allégués, arguments, preuves et offres de preuve présentés par l'une des parties et importants pour la sentence à rendre (**ATF 142 III 360** consid. 4.1.1 et les références citées). Il incombe à la partie soi-disant lésée de démontrer, dans son recours dirigé contre la sentence, en quoi une inadvertance des arbitres l'a empêchée de se faire entendre sur un point important. C'est à elle d'établir, d'une part, que le tribunal arbitral n'a pas examiné certains des éléments de fait, de preuve ou de droit qu'elle avait régulièrement avancés à l'appui de ses conclusions et, d'autre part, que ces éléments étaient de nature à influer sur le sort du litige (**ATF 142 III 360** consid. 4.1.1 et 4.1.3). Si la sentence passe totalement sous silence des éléments apparemment importants pour la solution du litige, c'est aux arbitres ou à la partie intimée qu'il appartiendra de justifier cette omission dans leurs observations sur le recours. Ceux-ci pourront le faire en démontrant que, contrairement aux affirmations du recourant, les éléments omis n'étaient pas pertinents pour résoudre le cas concret ou, s'ils l'étaient, qu'ils ont été réfutés implicitement par le tribunal arbitral (**ATF 133 III 235** consid. 5.2).

Au demeurant, le grief tiré de la violation du droit d'être entendu ne doit pas servir, pour la partie qui se plaint de vices affectant la motivation de la sentence, à provoquer par ce biais un examen de l'application du droit de fond (**ATF 142 III 360** consid. 4.1.2 et les références citées).

5.2. Le recourant indique avoir soutenu, lors de la procédure arbitrale, que l'intimée n'avait pas formellement contesté, en se conformant aux exigences procédurales applicables, l'allégation de fait selon laquelle l'accord transactionnel litigieux avait effectivement été signé le 4 juillet 2023. Or, la Formation n'aurait, à son avis, pas examiné cet argument.

Semblable argumentation tombe à faux. En l'occurrence, le TAS a correctement exposé les positions respectives des parties s'agissant de la problématique relative à la date à laquelle l'accord transactionnel avait effectivement été conclu. Sous n. 62 let. l. et m. de sa sentence, il a en particulier mentionné ce qui suit:

"l. The First Respondent [l'intimée] raises several questions as to the correctness of the sequence of events that took place in and around the time that the Settlement Agreement was allegedly signed by the Player and the Club on 4 July 2023. It is the strong conviction of the First Respondent that the Club and the Player had in fact signed the Settlement Agreement after the Appealed Decision and pursued only the avoidance of the sporting sanctions imposed against the Appellant by claiming that the signature took place on 4 July 2023.
m. These question marks lead the First Respondent to conclude that "none of the elements presented by the Appellant are persuasive enough to hold the idea that indeed on 4 July 2023 the Player and the Club reached a Settlement Agreement. It seems more reasonable to think that the Settlement Agreement was the result of a negative

outcome for the Appellant who had to compensate the Player and, principally, the fact that it had to serve sporting sanctions".

Lors de l'examen des mérites de l'appel, la Formation a examiné par le menu s'il était suffisamment établi que l'accord transactionnel avait été conclu le 4 juillet 2023 et déterminé qui supportait le fardeau de la preuve d'une telle allégation (sentence, n. 77-97). A cet égard, elle a notamment constaté que l'intimée avait en substance soutenu, lors de la procédure d'arbitrage, que le recourant et le joueur avaient signé la transaction litigieuse après le prononcé de la décision rendue par la CRL ("... FIFA [...] alleged that the Player and the Club had not entered into a *bona fide* agreement, as it has been "FIFA's strong conviction that the Club and the Player signed the Settlement Agreement after the DRC [CRL] decision and pursues only the avoidance of the sporting sanctions against the Appellant"; sentence, n. 88). Après avoir jugé que le recourant supportait le fardeau de la preuve de l'allégation selon laquelle l'accord transactionnel avait été conclu le 4 juillet 2023, la Formation a considéré, sur la base des preuves administrées, que l'intéressé avait échoué à prouver cet élément. Elle a en particulier souligné qu'aucun document écrit ne venait étayer la thèse prônée par le recourant et pointé du doigt le fait que celui-ci avait attendu le 25 juillet 2023, soit huit jours après avoir reçu la décision rendue par la CRL, pour informer l'intimée qu'un accord transactionnel avait prétendument été conclu le 4 juillet 2023 (sentence, n. 92-97).

A la lecture de la sentence querellée, il appert ainsi que la Formation a bel et bien rejeté, ne serait-ce que de manière implicite, l'argument auquel se réfère l'intéressé. La motivation retenue par les arbitres démontre en effet que ceux-ci ont considéré que l'intimée avait suffisamment contesté l'allégation de son adversaire selon laquelle la signature de l'accord transactionnel était intervenue le 4 juillet 2023, puisqu'ils ont jugé qu'il appartenait au recourant de prouver semblable allégation. Dans ses observations sur le recours, le TAS expose également de manière convaincante, sans être contredit par le recourant, que l'intimée n'a pas admis l'allégation de fait formulée par le club. Le moyen pris de la violation du droit d'être entendu du recourant n'est donc pas fondé, puisqu'il n'apparaît pas que la Formation aurait omis d'examiner des problèmes pertinents pour l'issue du litige. Quant à savoir si la motivation fournie est cohérente et convaincante, cette question ne ressortit pas au droit d'être entendu et échappe à la cognition du Tribunal fédéral.

6.
Dans un second moyen, le recourant soutient que la sentence attaquée est contraire à l'ordre public visé par 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).

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).

6.2. Le recourant prétend que la sentence querellée serait contraire à l'ordre public car elle reconnaîtrait implicitement qu'il aurait produit un titre falsifié. En n'admettant pas que l'accord transactionnel avait été signé le 4 juillet 2023 alors même que cette date figure sur ledit document, la Formation aurait porté atteinte à son honneur et l'aurait accusé d'avoir commis une grave infraction pénale.

Pareille argumentation ne résiste pas à l'examen. Contrairement à ce qu'affirme le recourant, la sentence attaquée ne laisse nullement entendre que l'intéressé aurait produit un titre falsifié. Les arbitres ont simplement considéré que le recourant avait échoué à établir, au degré de preuve requis, que l'accord transactionnel avait effectivement été conclu le 4 juillet 2023, raison pour laquelle il devait supporter l'échec de la preuve sur ce point. Dans ses observations sur le recours, la Formation a également insisté sur le fait que les considérations émises par elle dans la sentence entreprise ne devaient en aucun cas être vues comme une accusation de crime. Pour le reste, les explications appellatoires fournies par le recourant ne permettent pas de démontrer l'existence d'une contrariété à l'ordre public.

Décision

Le recours est rejeté dans la mesure où il est recevable.

4A_136/2024, 5 septembre 2024
A. c. Russian Anti-Doping Agency, International Skating Union, Agence Mondiale Antidopage

Recours contre la sentence rendue le 29 janvier 2024 par le Tribunal Arbitral du Sport (CAS 2023/A/9451, CAS 2023/A/9455 et CAS 2023/A/9456)

Proportionnalité d'une sanction pour dopage imposée à une athlète mineure. Le jeune âge de l'athlète ne justifie une sanction moins sévère en vertu de l'ordre public car l'abaissement des sanctions uniquement en raison de l'âge saperait les efforts de la lutte contre le dopage.

Extrait des faits

Née en avril 2006, A._____ (ci-après: l'athlète) est une patineuse artistique russe de niveau international, domiciliée à Moscou, qui a remporté plusieurs compétitions dans sa discipline.

International Skating Union (ci-après: l'ISU) est la fédération internationale de patinage artistique. Elle a son siège à Lausanne.

L'Agence Mondiale Antidopage (ci-après: l'AMA) est une fondation de droit suisse ayant son siège à Lausanne. Elle a notamment pour but de promouvoir, au niveau international, la lutte contre le dopage dans le sport. L'AMA a édicté le Code Mondial Antidopage (ci-après: le CMA).

La Russian Anti-Doping Center Agency (ci-après: RUSADA) est l'agence russe de lutte contre le dopage. Elle est chargée de la mise en oeuvre du Règlement antidopage russe ("All Russian Anti-Doping Rules"; ci-après: le RAR).

Le soir du 25 décembre 2021, l'athlète, alors âgée de 15 ans et 8 mois, a remporté le programme libre lors des championnats russes de patinage artistique à Saint-Pétersbourg. A l'issue de sa prestation, elle a fait l'objet d'un contrôle antidopage. Les échantillons prélevés ont été transmis pour analyse au laboratoire de Stockholm accrédité par l'AMA.

Les Jeux Olympiques d'hiver organisés à Pékin ont débuté le 4 février 2022.

En date des 6 et 7 février 2022, l'athlète et ses coéquipières russes ont obtenu la médaille d'or lors de l'épreuve par équipe de patinage artistique.

En raison du retard pris par le laboratoire de Stockholm lors de l'analyse des échantillons prélevés, RUSADA a informé l'athlète, le 8 février 2022, que le test antidopage subi par elle en décembre 2021 avait révélé la présence de trimétazidine, une substance non spécifiée proscrite selon la Liste des interdictions publiée par l'AMA. Elle a suspendu provisoirement l'athlète sur la base de l'art. 9.4.1 RAR et lui a signalé qu'elle pouvait contester ladite décision auprès de la Commission disciplinaire de RUSADA ("Russian Disciplinary Anti-Doping Committee"; ci-après: la DADC).
Par décision du 9 février 2022, la DADC a décidé de lever la suspension provisoire de l'athlète.

L'AMA, l'ISU et le Comité International Olympique (ci-après: le CIO) ont attaqué cette décision devant la Chambre ad hoc du Tribunal Arbitral du Sport (TAS) mise sur pied lors des Jeux Olympiques de Pékin 2022.

Statuant le 14 février 2022, la Chambre ad hoc du TAS, après avoir admis sa compétence pour connaître du litige, a refusé de suspendre provisoirement l'athlète. Celle-ci a ainsi pu participer à l'épreuve individuelle

de patinage artistique lors des Jeux Olympiques de Pékin 2022, au terme de laquelle elle a terminé à la quatrième place.

Le 17 mars 2022, sur requête de l'athlète, le laboratoire de Stockholm a analysé l'échantillon B prélevé en décembre 2021, lequel a confirmé la présence de trimétazidine.

Le 22 septembre 2022, après avoir mené des investigations et recueilli les explications de l'athlète, RUSADA a officiellement reproché à l'intéressée d'avoir enfreint le RAR.

Après avoir tenu une audience le 14 décembre 2022, la DADC a rendu sa décision le 24 janvier 2023. Elle a renoncé à suspendre l'athlète et à annuler les résultats obtenus par elle lors des Jeux Olympiques de Pékin 2022.

En date des 14, 20 et 21 février 2023, RUSADA, l'ISU et l'AMA ont chacune appelé de cette décision auprès de la Chambre arbitrale d'appel du TAS.

La jonction des trois procédures a été ordonnée par le TAS le 1er mars 2023.

Par sentence finale du 29 janvier 2024, la Formation a annulé la décision entreprise. Cela fait, elle a reconnu l'athlète coupable d'avoir enfreint la réglementation antidopage, a prononcé sa suspension pour une durée de quatre ans à compter du 25 décembre 2021 et a ordonné la disqualification de tous les résultats obtenus par l'intéressée depuis cette date-là.

Constatant qu'une substance non spécifiée a été retrouvée dans l'organisme de l'athlète, la Formation précise que celle-ci risque une suspension d'une durée de quatre ans, à moins qu'elle n'établisse, au degré de preuve requis ("balance of probabilities"), que la violation des règles antidopage n'était pas intentionnelle. La Formation estime que celle-ci a échoué à démontrer, au degré de preuve requis, que la violation des règles antidopage n'était pas intentionnelle, raison pour laquelle elle doit être suspendue pour une durée de quatre ans, d'éventuelles réductions de la durée de la sanction n'entrant pas en ligne de compte (sentence, n. 374-403). Tenant compte des retards dans la conduite de la procédure antidopage non imputables à l'athlète, elle juge qu'il y a lieu, exceptionnellement, de faire débuter la période de suspension à la date du prélèvement de l'échantillon, soit le 25 décembre 2021 (sentence, n. 404-410). Au surplus, tous les résultats obtenus par l'athlète à compter de cette date doivent être disqualifiés (sentence, n. 411-420).

En guise de conclusion, la Formation souligne que la sanction infligée à une athlète âgée de quinze ans au moment des faits litigieux peut paraître sévère. La durée de la suspension correspond toutefois à celle prévue par le RAR et le CMA. Elle observe en outre que la jurisprudence du TAS est clairement hostile à ce que le principe de proportionnalité puisse conduire à réduire davantage la durée minimale de la suspension d'un sportif prévue par le CMA. Dans ces circonstances, elle estime, à la majorité de ses membres, que, si une protection accrue des jeunes athlètes s'avère nécessaire, il incombe aux organes chargés d'édicter les règles antidopage de modifier celles-ci (sentence, n. 421-425).

Le 28 février 2024, l'athlète (ci-après: la recourante) a formé un recours en matière civile aux fins de faire constater la nullité de la sentence querellée, respectivement d'obtenir son annulation.

Extrait des considérants

(…)

5.
Dans un premier moyen, la recourante, invoquant l'art. 190 al. 2 let. b LDIP, prétend que le TAS a admis, à tort, sa compétence pour connaître de la présente affaire.

5.1. Saisi du grief d'incompétence, le Tribunal fédéral examine librement les questions de droit, y compris les questions

préalables, qui déterminent la compétence ou l'incompétence du tribunal arbitral (**ATF 146 III 142** consid. 3.4.1; **133 III 139** consid. 5; arrêt 4A_618/2019 du 17 septembre 2020 consid. 4.1). Il ne revoit cependant l'état de fait à la base de la sentence attaquée - même s'il s'agit de la question de la compétence - que si l'un des griefs mentionnés à l'art. 190 al. 2 LDIP est soulevé à l'encontre dudit état de fait ou que des faits ou des moyens de preuve nouveaux (cf. art. 99 al. 1 LTF) sont exceptionnellement pris en considération dans le cadre de la procédure du recours en matière civile (**ATF 144 III 559** consid. 4.1; **142 III 220** consid. 3.1; **140 III 477** consid. 3.1).

Selon l'art. R47 du Code de l'arbitrage en matière de sport (édition 2023; ci-après: le Code), un appel contre une décision d'une fédération, association ou autre organisme sportif peut être déposé au TAS si les statuts ou règlements dudit organisme sportif le prévoient ou si les parties ont conclu une convention d'arbitrage particulière et dans la mesure aussi où la partie appelante a épuisé les voies de droit préalables à l'appel dont elle dispose en vertu des statuts ou règlements dudit organisme sportif.

5.2. Dans la sentence attaquée, la Formation, se référant à l'art. 15.2 RAR, constate que la décision prise par la DADC concernant une éventuelle infraction aux règles antidopage commise par une athlète de niveau international peut être contestée exclusivement auprès du TAS. Elle souligne qu'il n'est pas contesté que la DADC est un "organisme sportif" au sens de l'art. R47 du Code et que la recourante est une sportive de niveau international. Selon les arbitres, l'art. 15.2 RAR, qui prévoit une forme d'arbitrage forcé, est valide au regard de l'art. 178 al. 2 LDIP. Ladite réglementation a été valablement édictée par le pouvoir exécutif russe sur la base d'une clause de délégation ancrée dans une loi au sens formel adoptée par le législateur russe. La Formation estime que l'art.15.2 RAR constitue une *lex specialis* par rapport à l'art. 22.1 du Code de procédure civile russe, lequel dispose que les litiges découlant de relations civiles ainsi que les conflits de travail impliquant des athlètes professionnels et des autres sportifs de haut niveau peuvent être soumis à l'arbitrage s'il existe une convention d'arbitrage valide entre les parties. Elle observe également que l'État russe a ratifié, en 2006, la Convention internationale de l'UNESCO contre le dopage dans le sport, dans laquelle il s'est expressément engagé à respecter les principes énoncés dans le CMA, parmi lesquels figure notamment la reconnaissance d'une voie d'appel exclusive auprès du TAS dans les litiges impliquant des athlètes de niveau international. Poursuivant son analyse, la Formation, se référant à l'arrêt rendu le 2 octobre 2018 par la Cour européenne des droits de l'homme (ci-après: la CourEDH) dans l'affaire Mutu et Pechstein contre la Suisse et à la jurisprudence du Tribunal fédéral (arrêt 4A_600/2020 du 27 janvier 2021), estime que l'arbitrage forcé prévu à l'art. 15.2 RAR est admissible, dans la mesure où le tribunal arbitral offre les garanties prévues par l'art. 6 par. 1 de la Convention européenne des droits de l'homme (CEDH; RS 0.101), en particulier celles d'indépendance et d'impartialité, ce qui est le cas du TAS. Elle constate, en outre, que la recourante a précédemment reconnu, devant la Chambre ad hoc du TAS, que l'art. 15.2 RAR constitue une clause attributive de compétence en faveur de la Chambre arbitrale d'appel du TAS. Indépendamment de ce qui précède, les arbitres estiment, par surabondance, que la recourante a, dans les faits, consenti à l'arbitrage auprès du TAS, étant donné qu'une athlète qui prend part au sport de compétition accepte les règles conditionnant sa participation aux épreuves en question et consent ainsi, de manière implicite, aux diverses normes prévues par la réglementation antidopage y relative, laquelle inclut la clause d'arbitrage au profit du TAS. Par conséquent, l'athlète concernée, compte tenu de sa participation à une compétition d'élite, est liée par les dispositions relatives à l'arbitrage forcé énoncées à l'art. 15.2 RAR (sentence, n. 274-300).

5.3. Dans ses écritures, la recourante soutient, en substance, qu'elle n'a pas consenti à la clause d'arbitrage en faveur du TAS prévue à l'art. 15.2 RAR, raison pour laquelle la Formation aurait dû se déclarer incompétente. A son avis, il convient d'opérer une distinction entre la situation dans laquelle un sportif exprime son consentement à l'arbitrage mais ne le fait pas librement et celle où il y a une absence pure et simple de toute forme de consentement. Selon la recourante, les considérations émises par la CourEDH dans l'arrêt Mutu et Pechstein contre la Suisse ne seraient pas pertinentes ici, dans la mesure où lesdits athlètes avaient tous deux signé des documents dans lesquels ils consentaient à l'arbitrage, ce qui n'est pas le cas en l'espèce. L'intéressée relève également que le site internet du TAS indique qu'il est important que les athlètes acceptent par écrit les clauses attributives de compétence en faveur du TAS. Elle estime, par ailleurs, que l'art. 15.2 RAR ne saurait l'emporter sur l'art. 22 du Code de procédure civile russe, ce dernier occupant un rang supérieur du point de vue de la hiérarchie des normes. Elle réfute aussi la thèse selon laquelle elle aurait exprimé son consentement à l'arbitrage à l'occasion de la procédure conduite devant la Chambre ad hoc du TAS durant les Jeux Olympiques de Pékin 2022. La recourante fait encore valoir que son consentement à l'arbitrage ne saurait être déduit uniquement de sa seule participation aux compétitions sportives. N'ayant jamais exprimé son consentement par écrit à la clause d'arbitrage prévue à l'art. 15.2 RAR ni signé de document faisant référence à cette disposition, elle est d'avis que le TAS aurait dû décliner sa compétence.

5.4. Semblable argumentation n'emporte pas la conviction de la Cour de céans.

5.4.1. On peut s'interroger sur le point de savoir si, comme le soutient la recourante, il convient d'opérer une distinction entre la situation dans laquelle un athlète n'a jamais formellement consenti à une clause d'arbitrage prévue par une loi au sens matériel et celle où un sportif a signé un document prévoyant directement ou indirectement la compétence du TAS, sans avoir d'autre choix. Selon la jurisprudence de la CourEDH, un arbitrage forcé, c'est-à-dire un arbitrage imposé par la loi, est en principe valable pour autant que le tribunal arbitral offre les garanties prévues par l'art. 6 par. 1 CEDH (arrêt Mutu et Pechstein contre Suisse, § 95 et 114 s.). La CourEDH a aussi considéré que le TAS a les apparences d'un tribunal établi par la loi et qu'il est véritablement indépendant et impartial (arrêt Mutu et Pechstein contre Suisse, § 149 et 159), ce qu'elle a du reste confirmé ultérieurement (arrêt Michel Platini contre Suisse du 11 février 2020, § 65). On relèvera, par ailleurs, que le nouvel art. 178 al. 4 LDIP, entré en vigueur le 1er janvier 2021, prévoit que les dispositions du chapitre 12 LDIP s'appliquent par analogie à une clause d'arbitrage prévue dans un acte juridique unilatéral ou des statuts, ce qui a conduit certains auteurs à soutenir que des athlètes pourraient être liés par une clause d'arbitrage figurant dans les statuts d'une fédération sportive dont ils sont, directement ou indirectement membres, quand bien même ils n'auraient pas signé de formulaire d'adhésion à de tels statuts (TSCHANZ/SPOORENBERG, Chronique de jurisprudence arbitrale, in Revue de l'arbitrage 2021 p. 1237 s.). Point n'est toutefois besoin de pousser plus avant l'examen de cette problématique pour les motifs qui vont suivre.

5.4.2. Selon la jurisprudence, un comportement donné peut, suivant les circonstances, suppléer, en vertu des règles de la bonne foi, à l'observation d'une prescription de forme (**ATF 129 III 727** consid. 5.3.1; **121 III 38** consid. 3). Ainsi, le problème se déplacera bien souvent de la forme de la convention d'arbitrage au consentement, question de fond au sens de l'art. 178 al. 2 LDIP (arrêts 4A_174/2021 du 19 juillet 2021 consid. 5.2.2; 4A_548/2009 du 20 janvier 2010 consid. 4.1 et la référence citée). Même lorsqu'il n'a pas signé de document renvoyant directement ou

indirectement à une clause d'arbitrage en faveur du TAS, un athlète peut dès lors, suivant les circonstances, par son comportement, manifester son acceptation de la compétence du TAS.

Tel est le cas en l'espèce. En l'occurrence, l'art. 15.2 RAR, édicté par le Ministère des sports russe sur la base d'une loi adoptée par le pouvoir législatif russe, dispose que les décisions prises par la DADC concernant d'éventuelles infractions à la réglementation antidopage commises par des athlètes de niveau international peuvent être contestées uniquement auprès du TAS. La recourante connaissait la norme précitée puisqu'elle y a fait expressément référence lors de la procédure conduite devant la Chambre ad hoc du TAS au sujet de sa suspension provisoire en relation avec le même contrôle antidopage. En effet, l'athlète a notamment indiqué ce qui suit:

"[a]lthough Article 15.2 Russian ADR [RAR] provides that 'a decision to apply or lift a provisional suspension based on a preliminary hearing' can be appealed before CAS, there is no provision in the Russian ADR granting jurisdiction to the CAS Ad Hoc Division; therefore the CAS Appeals Division should be the competent body...
-. the expedited procedure before the CAS Ad Hoc Division does not allow sufficient time to safeguard the Athlete's due process rights; while the Athlete would have more possibilities to defend her case before the CAS Appeals Division (...) : "Had the Applicants filed their applications before the CAS Appeals Arbitration Division, as they should have, A._____ would at least then have had the right to appoint an arbitrator and would have had sufficient time to prepare her defense, including by presenting medical science based detailed expert evidence" (sentence, n. 296 s.; passages en caractère gras mis en évidence par la Cour de céans).

Bien qu'elle soutienne le contraire, en agissant comme elle l'a fait, la recourante a reconnu, par ses déclarations explicites mises en exergue ci-dessus, la compétence de la Chambre arbitrale d'appel du TAS pour connaître des décisions prises par la DADC la concernant en lien avec les faits qui lui étaient reprochés. La recourante a ainsi clairement manifesté le fait qu'elle s'estimait liée par la clause d'arbitrage insérée à l'art. 15.2 RAR. Sa tentative de minimiser, après coup, la portée des déclarations reproduites ci-dessus est ainsi vouée à l'échec.

En tout état de cause, force est de relever que la recourante adopte une attitude manifestement incompatible avec les règles de la bonne foi, dans la mesure où elle a affirmé, dans un premier temps, que son affaire aurait dû être soumise à la Chambre arbitrale d'appel du TAS, avant de dénier, dans un second temps, toute portée à l'art. 15.2 RAR aux fins de nier la compétence de ladite Chambre appelée à statuer sur la décision rendue sur le fond par la DADC dans la même affaire. Une telle attitude contradictoire ne mérite aucune protection.

6.
Dans un autre grief fondé lui aussi sur l'art. 190 al. 2 let. b LDIP, la recourante soutient que la Formation aurait rendu une sentence dans le cadre d'un litige qui ne serait pas arbitrable, ce qui entraînerait la nullité de la décision attaquée ou devrait, à tout le moins, conduire à son annulation. A en croire l'intéressée, les sanctions qui lui ont été infligées sur la base du droit public russe, et non d'une réglementation édictée par une fédération sportive de droit privé, revêtent un caractère "pénal", respectivement s'apparentent à des "sanctions administratives".

6.1. Tel qu'il est présenté, le grief ne saurait prospérer.

Selon la jurisprudence, l'exception d'inarbitrabilité du litige obéit à la même règle que l'exception d'incompétence. Partant, à l'instar de celle-ci, elle doit être soulevée préalablement à toute défense sur le fond sous peine de forclusion (**ATF 143 III 578** consid. 3.2.2.1 et les références citées).

Au considérant 3.2.2.1 de l'arrêt publié in ATF 143 III 578, le Tribunal fédéral a certes laissé indécise la question de savoir si le défaut d'arbitrabilité pouvait être constaté d'office par le tribunal arbitral. En l'occurrence, il n'est toutefois pas admissible, au regard des règles de la bonne foi procédurale et de l'ensemble des circonstances, que la recourante puisse soulever semblable moyen pour la première fois devant le Tribunal fédéral. Il faut en effet bien voir que l'intéressée n'a, à aucun moment durant la procédure d'arbitrage, prétendu que le litige ne serait pas arbitrable, mais s'est bornée à contester la compétence du TAS pour d'autres motifs. La recourante est ainsi malvenue de venir soutenir, pour la première fois devant le Tribunal fédéral, que la Formation aurait méconnu l'art. 177 al. 1 LDIP, étant donné qu'elle aurait pu et dû faire valoir pareille argumentation devant le TAS.

En tout état de cause, le simple fait que l'État russe a choisi, à l'instar d'autres pays tels que la France, de codifier dans son ordre juridique les principes du CMA sous la forme d'une loi au sens matériel ne saurait avoir pour effet de rendre un tel litige inarbitrable. Admettre le contraire reviendrait à mettre en péril le bon fonctionnement de l'arbitrage sportif mis en place pour lutter contre le fléau que constitue le dopage. La recourante ne peut pas davantage être suivie lorsqu'elle soutient que les sanctions présenteraient un caractère pénal ou s'apparenteraient à des sanctions administratives au motif qu'elles sont prévues dans une loi au sens matériel. Les mesures prononcées à l'encontre de l'athlète relèvent en effet du droit disciplinaire sportif, étant donné qu'elles se limitent à ce domaine-là et qu'elles ont uniquement pour effet d'interdire à l'intéressée de participer à des activités sportives durant une période déterminée et de la priver, pendant un certain laps de temps, de divers avantages financiers dont elle aurait pu bénéficier si elle n'avait pas enfreint la réglementation antidopage. Au vu de ce qui précède, la recourante, si tant est qu'elle ne soit pas forclose à soulever le moyen considéré devant le Tribunal fédéral, échoue à démontrer que le présent litige ne serait pas arbitrable.

7.
Dans un dernier moyen, la recourante soutient que la Formation aurait rendu une sentence incompatible avec l'ordre public matériel (art. 190 al. 2 let. e LDIP).

(…)

7.1. Une sentence est incompatible avec l'ordre public matériel si elle méconnaît les valeurs essentielles et largement reconnues qui, selon les conceptions prévalant en Suisse, devraient constituer le fondement de tout ordre juridique (ATF 144 III 120 consid. 5.1; 132 III 389 consid. 2.2.3). Tel est le cas lorsqu'elle viole des principes fondamentaux du droit de fond au point de ne plus être conciliable avec l'ordre juridique et le système de valeurs déterminants (ATF 144 III 120 consid. 5.1). Qu'un motif retenu par un tribunal arbitral heurte l'ordre public n'est pas suffisant; c'est le résultat auquel la sentence aboutit qui doit être incompatible avec l'ordre public (ATF 144 III 120 consid. 5.1). 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; arrêts 4A_318/2018 du 4 mars 2019 consid. 4.3.1; 4A_600/2016 du 29 juin 2017 consid. 1.1.4).

Pour juger si la sentence est compatible avec l'ordre public matériel, le Tribunal fédéral ne revoit pas à sa guise l'appréciation juridique à laquelle le tribunal arbitral s'est livré sur la base des faits constatés dans sa sentence. Seul importe, en effet, pour la décision à rendre sous l'angle de l'art. 190 al. 2 let. e LDIP, le point de savoir si le résultat de cette appréciation juridique faite souverainement par les arbitres est compatible ou non avec la définition jurisprudentielle de l'ordre public matériel (arrêt 4A_157/2017 du 14 décembre 2017 consid. 3.3.3).

7.2. En matière de sanctions infligées dans le domaine du sport, le Tribunal fédéral n'intervient à l'égard des décisions rendues en vertu d'un pouvoir d'appréciation que si elles aboutissent à un résultat manifestement injuste ou à une iniquité choquante (arrêts 4A_318/2018, précité, consid. 4.5.2; 4A_600/2016, précité, consid. 3.7.2). Dans l'affaire Platini où elle a été amenée à examiner la sanction infligée à ce dernier sous l'angle déjà restreint du grief d'arbitraire au sens de l'art. 393 let. e CPC, la Cour de céans a relevé que seule la mise en évidence d'une ou de plusieurs violations crasses de leur pouvoir d'appréciation par les arbitres, qui plus est à l'origine d'une sanction excessivement sévère, pourrait justifier l'intervention du Tribunal fédéral (arrêt 4A_600/2016, précité, consid. 3.7.2). Le pouvoir d'examen de la Cour de céans est encore plus limité *in casu*, puisqu'il s'exerce dans le cadre du grief de contrariété à l'ordre public matériel, notion plus restrictive que celle d'arbitraire.

7.3. Selon la recourante, la Formation aurait indûment refusé de tenir compte de son jeune âge et de son statut de personne protégée au regard du RAR et du CMA lors de la fixation de la sanction prononcée à son encontre. L'intéressée fait aussi valoir que, dans l'avis de droit qu'il avait rédigé en 2019 sur le projet de révision du CMA, Jean-Paul Costa, ancien président de la CourEDH, avait indiqué qu'une infraction à la réglementation antidopage commise par une personne protégée, tel un enfant, constituait un facteur atténuant. Elle estime ainsi qu'il est nécessaire de ne pas traiter les enfants de la même manière que les adultes en matière de lutte antidopage. Elle relève en outre que de nombreux États ont adopté un système répressif opérant une distinction entre les prévenus majeurs et mineurs en matière pénale. La recourante critique ensuite l'interprétation donnée par les arbitres à certaines dispositions du RAR et soutient que le raisonnement tenu par la Formation est empreint de contradictions. En tout état de cause, elle estime que le fait de sanctionner une violation des règles antidopage commise par un enfant de la même manière que s'il s'agissait d'un adulte méconnaît la conception universelle selon laquelle les mineurs nécessitent une protection accrue exigeant un traitement différencié afin de tenir compte de leur responsabilité atténuée. La recourante insiste aussi sur le fait que la Formation n'a jamais conclu qu'elle était une tricheuse ni considéré qu'il était établi qu'elle avait enfreint intentionnellement le RAR. Elle rappelle également que la Formation a reconnu elle-même que la sanction infligée à une athlète âgée de 15 ans au moment de la violation des règles antidopage pouvait paraître sévère et disproportionnée.

7.4. Force est de relever d'emblée le caractère appellatoire marqué de l'argumentation présentée par la recourante. Celle-ci consacre, en effet, de nombreux développements visant à critiquer la manière dont les arbitres ont interprété les dispositions du RAR applicables en l'espèce. Ce faisant, l'intéressée confond derechef le Tribunal fédéral avec une cour d'appel dans la mesure où elle cherche à entraîner la Cour de céans sur le terrain de l'application du droit matériel et à l'inciter à contrôler librement l'application faite par les arbitres des normes topiques du RAR. Une telle démarche est inadmissible. La recourante le reconnaît du reste elle-même, à demi-mots, puisqu'elle indique, dans son mémoire de recours, que la "question de savoir si les arbitres ont mal appliqué le règlement antidopage russe ou si celui-ci comporte une lacune qu'ils auraient dû combler peut rester ouverte". En réalité, la seule question à résoudre ici est celle de savoir si la Formation, au regard de l'ensemble des circonstances de la cause en litige, a méconnu ou non l'ordre public matériel en infligeant à la recourante une suspension d'une durée de quatre ans et en disqualifiant tous les résultats obtenus par elle depuis l'infraction commise. Une réponse positive à cette question exige que le résultat auquel la sentence attaquée a abouti, et non pas déjà les motifs qui sous-tendent celle-ci, soit incompatible avec l'ordre public, ce qui signifie que la sanction infligée doit être

manifestement injuste dans son résultat ou conduire à une iniquité choquante.

Tel n'est clairement pas le cas ici. Les critiques formulées par la recourante, considérées à la lumière du pouvoir d'examen restreint dont jouit la Cour de céans, ne révèlent aucune contrariété à l'ordre public matériel. A la lecture de la sentence entreprise, il appert en effet que la Formation n'a négligé aucune circonstance pertinente et qu'elle a bel et bien tenu compte du jeune âge de l'athlète concernée (15 ans et 8 mois) au moment d'apprécier les faits qui lui étaient reprochés. A cet égard, la Formation a certes relevé que la recourante revêtait le statut de personne protégée, lequel commande, dans certaines circonstances particulières, mais pas toutes, de traiter différemment de telles personnes des autres sportifs. Elle a toutefois nié ici l'existence de telles circonstances particulières, raison pour laquelle elle a estimé qu'il ne se justifiait pas de prononcer une sanction moins sévère à l'encontre de la recourante. Sur ce point, la Formation a souligné que la réglementation antidopage applicable prévoit une suspension d'une durée de quatre ans - sans opérer de distinction aucune entre les personnes protégées et les autres athlètes - lorsque, comme en l'espèce, la violation des règles antidopage n'implique pas une substance spécifiée et que l'athlète ne parvient pas à établir que ladite violation n'était pas intentionnelle. Elle a également relevé, à juste titre, que l'intéressée ne contestait pas avoir commis une infraction à la réglementation antidopage. Il ressort en outre des constatations faites par les arbitres que la recourante, nonobstant son jeune âge, avait déjà pris part à plusieurs compétitions internationales de patinage artistique avant le contrôle antidopage qui s'est révélé positif (sentence, n. 4) et qu'elle était éduquée et consciente de ses obligations en matière de sécurité alimentaire (sentence, n. 370 let. l). Il apparaît ainsi que l'athlète concernée était déjà expérimentée malgré son jeune âge. La recourante ne remet pas véritablement en cause les éléments retenus par les arbitres pour justifier la sanction prononcée par eux, mais se borne, en réalité, à affirmer que son statut de personne protégée commanderait de la punir moins sévèrement que d'autres sportifs placés dans les mêmes circonstances. Ce faisant, elle échoue manifestement à démontrer que la sanction qui lui a été infligée serait, vu sa durée, incompatible avec l'ordre public matériel, étant donné que la violation des règles antidopage est avérée et que l'intéressée n'a pas réussi à démontrer, au degré de preuve requis, que l'infraction à la réglementation antidopage n'était pas intentionnelle.

Sur le plan des principes et de manière plus générale, on ne discerne pas pour quelle raison le jeune âge d'un sportif reconnu coupable d'une infraction à la réglementation antidopage, réputée intentionnelle, commanderait nécessairement de le punir moins sévèrement qu'un athlète âgé de quelques années de plus que lui. Le fait d'infliger systématiquement des sanctions moins sévères à de jeunes d'athlètes, en raison uniquement de leur âge, pourrait se révéler contraire aux objectifs poursuivis en matière de lutte antidopage car les sanctions prononcées pourraient avoir un effet moins dissuasif et risqueraient d'inciter davantage de jeunes sportifs à avoir recours à des substances illicites pour améliorer leurs performances, avec les conséquences néfastes que peut entraîner l'usage de produits dopants sur leur santé. Il ne faut en outre pas perdre de vue que les règles antidopage et les sanctions y relatives visent à assurer une compétition loyale entre les divers athlètes. Or, l'objectif principal poursuivi en matière de lutte antidopage risquerait d'être mis à mal si, en présence d'une violation des règles antidopage réputée intentionnelle, on venait à sanctionner moins sévèrement les personnes protégées que les autres athlètes uniquement en raison de leur jeune âge.

En l'espèce, la recourante qui, malgré son âge (15 ans et 8 mois) au moment des faits reprochés, était déjà expérimentée, étant donné qu'elle avait participé à diverses compétitions internationales de patinage

artistique, n'avance aucune raison objective qui justifierait de lui réserver un traitement distinct de celui applicable aux autres sportives ni, *a fortiori*, n'établit que le résultat auquel a abouti la Formation serait incompatible avec l'ordre public matériel. Il s'ensuit le rejet du moyen considéré.

7.5. L'intéressée fait enfin grief au TAS d'avoir procédé à une médiatisation excessive de cette affaire en publiant plusieurs communiqués de presse et de n'avoir ainsi pas préservé la confidentialité de la procédure impliquant une personne revêtant le statut de personne protégée.

Semblable reproche tombe à faux. Selon l'art. 17.3.7 RAR, qui reprend les principes énoncés à l'art. 14.3.7 CMA, la divulgation d'une affaire impliquant une personne protégée est possible mais doit être proportionnée aux faits et aux circonstances du cas. En l'occurrence, force est d'admettre que le TAS était en droit de publier divers communiqués de presse, dans la mesure où la présente affaire avait défrayé la chronique lors des Jeux Olympiques de Pékin 2022 et où elle concernait une athlète qui jouissait déjà d'une grande notoriété à ce moment-là. La fédération intimée expose du reste dans sa réponse, sans être véritablement contredite par la recourante, que la presse n'avait pas attendu les communiqués de presse du TAS pour relayer des informations à propos de la présente cause. Les critiques émises par la recourante sont ainsi impropres à démontrer une incompatibilité de la sentence attaquée avec l'ordre public matériel.

Décision

Le recours est rejeté dans la mesure où il est recevable.

4A_232/2024, 3 octobre 2024
A. c. B & C.

Recours en matière civile contre la sentence rendue le 18 mars 2024 par le Tribunal Arbitral du Sport (CAS 2022/A/9157)

Violation du droit d'être entendu (art. 190 al 2 let d LDIP). Sur la base de l'article R 57 du Code TAS, l'arbitre unique ayant rendu la sentence arbitrale contestée, a estimé ne pas être lié par la decision de première instance. A cet égard, le TF a considéré qu'il n'y avait pas de violation du droit d'être entendu ni d'incompatibilité avec l'ordre public.

Extrait des faits

A._____ (ci-après: A._____) est un club professionnel de football, membre de la Fédération Ivoirienne de Football (FIF), elle-même affiliée à la Fédération Internationale de Football Association (FIFA).

B._____ est un joueur de football professionnel ivoirien (ci-après: le joueur ou le footballeur), né en décembre 2002.

C._____ (ci-après: C._____) est une équipe de football professionnelle affiliée à la Fédération Norvégienne de Football (FNF), laquelle est membre de la FIFA.

A._____ prétend avoir conclu le 14 novembre 2017 un contrat d'entraînement avec le joueur, en vertu duquel ce dernier n'avait droit à aucune rémunération.

A._____ soutient qu'un contrat de travail de durée déterminée échéant le 31 juillet 2022 aurait été conclu avec le footballeur en date du 31 juillet 2019. À teneur dudit contrat, ce dernier devait toucher un salaire mensuel de 63'000 francs CFA. Les signatures prétendument apposées par le joueur - encore mineur à ce moment-là -, sa mère ainsi que le président du club figuraient au pied du contrat.

Le 9 janvier 2020, C._____ a fait savoir à A._____ qu'il souhaitait que le joueur vienne visiter ses installations sportives pour une durée de deux mois.

Le 8 mars 2020, le footballeur s'est rendu à C._____ mais a dû retourner prématurément en Côte d'Ivoire en raison de la crise liée au coronavirus.

Le 31 mai 2020, A._____ a supprimé l'enregistrement du footballeur dans le système de régulation des transferts de la FIFA ("Transfer Matching System").

Le 29 juin 2020, la mère du joueur a écrit à la FIF pour dénoncer le contrat de travail prétendument conclu le 31 juillet 2019, dont ni son fils ni elle n'avaient connaissance.

Le 10 août 2020, A._____ a signé un contrat de mandat en faveur de D._____ pour lui permettre de le représenter, à titre exclusif, en vue d'un éventuel transfert du joueur au club français E._____.

Le 30 octobre 2020, la mère du joueur a saisi la Commission du Statut du Joueur de la FIF (ci-après: la CSJ FIF) aux fins de contester la validité du contrat de travail prétendument conclu le 31 juillet 2019.

Par décision du 23 décembre 2020, la CSJ FIF a considéré qu'il y avait un doute quant à l'authenticité de la supposée signature du joueur apposée sur ledit contrat et a annulé celui-ci.

A._____ a contesté cette décision auprès de la Commission d'appel de la FIF.

Le 4 janvier 2021, A._____ a signé un contrat en vue du transfert du joueur au E._____. Le club français n'a toutefois pas signé ledit contrat.

Le 29 janvier 2021, le footballeur a conclu un contrat de travail avec C._____ déployant ses effets à partir du 22 décembre 2020 jusqu'au 31 décembre 2024.

Le 2 février 2021, la FIFA a délivré un certificat de transfert international ("International Transfer Certificate") autorisant le joueur à s'enregistrer auprès de la FNF.

Le 16 mars 2021, A._____ a saisi la Chambre de Résolution des Litiges (CRL) de la FIFA d'une demande dirigée notamment contre le joueur et C._____ en vue d'obtenir le paiement de divers montants au titre d'indemnité de formation et de perte de revenus.

Le 12 juillet 2021, la FIFA a formulé une "proposition contraignante" ("binding proposal") dans laquelle elle a considéré que C._____ devait payer à A._____ un montant supérieur à 70'000 euros (EUR), intérêts en sus, au titre d'indemnité de formation du joueur. C._____ a réglé ledit montant le 14 juillet 2021.

Le 29 avril 2022, A._____ a assigné le footballeur et C._____ devant la CRL FIFA en vue d'obtenir le paiement d'un montant de 5'165'000 EUR pour rupture injustifiée du contrat de travail ainsi que de la somme de 286'100 EUR au titre de solde de l'indemnité de formation.

Par décision du 6 septembre 2022, la CRL FIFA a rejeté cette demande dans la mesure où elle était recevable.

Le 21 septembre 2022, A._____ a appelé de cette décision auprès du Tribunal Arbitral du Sport (TAS).

Le 2 décembre 2022, l'appelant a transmis au TAS un exemplaire de la décision rendue le 9 novembre 2022 par la Commission d'appel de la FIF. Dans ladite décision, l'autorité d'appel, se fondant sur une expertise graphologique (ci-après: l'expertise graphologique ivoirienne), a considéré que les signatures apposées sur le contrat de travail du 31 juillet 2019 étaient authentiques, raison pour laquelle il convenait de réformer la décision attaquée devant elle.

Par sentence finale du 18 mars 2024, l'arbitre a rejeté l'appel et confirmé la décision attaquée.

Le 19 avril 2024, A._____ (ci-après: le recourant) a formé un recours en matière civile aux fins d'obtenir l'annulation de cette sentence.

Extrait des considérants

(…)

5.
Dans un premier moyen, le recourant, invoquant l'art. 190 al. 2 let. d LDIP, dénonce une violation de son droit d'être entendu. Il reproche à l'arbitre d'avoir omis de prendre en considération plusieurs éléments de fait, de preuve et de droit qu'il avait invoqués au cours de la procédure d'arbitrage qui étaient de nature à influer sur le sort du litige.

La jurisprudence a déduit du droit d'être entendu, tel qu'il est garanti par les art. 182 al. 3 et 190 al. 2 let. d LDIP, un devoir minimum pour le tribunal arbitral d'examiner et de traiter les problèmes pertinents. Ce devoir est violé lorsque, par inadvertance ou malentendu, le tribunal arbitral ne prend pas en considération des allégués, arguments, preuves et offres de preuve présentés par l'une des parties et importants pour la sentence à rendre (**ATF 142 III 360** consid. 4.1.1 et les références citées). Il incombe à la partie soi-disant lésée de démontrer, dans son recours dirigé contre la sentence, en quoi une inadvertance des arbitres l'a empêchée de se faire entendre sur un point important. C'est à elle d'établir, d'une part, que le tribunal arbitral n'a pas examiné certains des éléments

de fait, de preuve ou de droit qu'elle avait régulièrement avancés à l'appui de ses conclusions et, d'autre part, que ces éléments étaient de nature à influer sur le sort du litige (**ATF 142 III 360** consid. 4.1.1 et 4.1.3). Si la sentence passe totalement sous silence des éléments apparemment importants pour la solution du litige, c'est aux arbitres ou à la partie intimée qu'il appartiendra de justifier cette omission dans leurs observations sur le recours. Ceux-ci pourront le faire en démontrant que, contrairement aux affirmations du recourant, les éléments omis n'étaient pas pertinents pour résoudre le cas concret ou, s'ils l'étaient, qu'ils ont été réfutés implicitement par le tribunal arbitral (**ATF 133 III 235** consid. 5.2).

Au demeurant, le grief tiré de la violation du droit d'être entendu ne doit pas servir, pour la partie qui se plaint de vices affectant la motivation de la sentence, à provoquer par ce biais un examen de l'application du droit de fond (**ATF 142 III 360** consid. 4.1.2 et les références citées).

5.2. En premier lieu, le recourant reproche à l'arbitre d'avoir ignoré son argument selon lequel les intimés avaient adopté un comportement contradictoire, puisqu'ils avaient fait valoir devant la CRL FIFA que la décision prise le 23 décembre 2020 par la CSJ FIF ne pouvait pas être revue par l'organe juridictionnel de la FIFA, avant de soutenir devant le TAS que la décision rendue le 9 novembre 2022 par la Commission d'appel de la FIF ne liait en aucune manière ce dernier.

En deuxième lieu, l'intéressé fait grief à l'arbitre d'avoir omis de traiter l'argument selon lequel le TAS ne pouvait pas revoir la décision prise par la Commission d'appel de la FIF - laquelle était devenue définitive et exécutoire vu l'absence d'appel interjeté à l'encontre de celle-ci - ni réexaminer les moyens de preuve recueillis dans le cadre de cette procédure et, singulièrement, l'expertise graphologique ivoirienne.

En troisième et dernier lieu, le recourant se plaint de ce que l'arbitre n'a pas tenu compte de l'argument selon lequel les intimés avaient fait preuve de mauvaise foi en s'opposant, par tous les moyens, à la mise en oeuvre de l'expertise graphologique ivoirienne.

5.3. L'argumentation présentée par le recourant n'emporte pas la conviction de la Cour de céans.

Dans la sentence attaquée, l'arbitre a correctement exposé l'argument central de l'intéressé selon lequel la décision de la Commission d'appel de la FIF était devenue définitive et exécutoire, raison pour laquelle le TAS ne pouvait pas revoir cette dernière ni l'expertise graphologique ivoirienne (sentence, n. 102, 9ème tiret: "... The AC FIF Decision [la décision de la Commission d'appel de la FIF] - which defeats all of Respondents' arguments - is now final and binding and the CAS cannot rule again on the matter, as the Player and the Mother should have appealed to local courts [which they did not]..."). Il a également fait état de la thèse prônée par les intimés, lesquels estimaient que l'arbitre pouvait apprécier librement la portée de la décision prise par la Commission d'appel de la FIF et de l'analyse graphologique ivoirienne, dans la mesure où l'art. R57 du Code de l'arbitrage en matière de sport (ci-après: le Code) confère au TAS un pouvoir d'examen illimité tant en fait qu'en droit (sentence, n. 106, 7ème tiret: "Notwithstanding the AC FIF Decision, and in accordance with Article 8 of the Swiss Civil Code, it is A._____'s burden to prove the existence of any alleged contract concluded with the Player. On the basis of Article R57 of the CAS Code and the *de novo* powers granted by such provision, the Sole Arbitrator has full and unrestricted discretion to make his own assessment of the AC FIF Decision and the Handwriting Analysis on which it relies. In any case, such decision cannot be relied upon to adjudicate the present dispute..."). Lors de l'examen des mérites de l'appel, l'arbitre a visiblement épousé la thèse défendue par les intimés. Il s'est en effet référé expressément à la

disposition réglementaire invoquée par eux (art. R57 du Code) et a souligné qu'il jouissait d'un pouvoir d'examen illimité (sentence, n. 143), ce qui l'a conduit à réexaminer librement la valeur probante de l'analyse graphologique ivoirienne. Il appert ainsi de la motivation retenue par l'arbitre que celui-ci a considéré que l'art. R57 du Code l'autorisait à revoir librement les tenants et aboutissant de cette affaire, raison pour laquelle il a visiblement estimé ne pas être lié par la décision prise la Commission d'appel de la FIF. L'arbitre a donc écarté, à tout le moins de manière implicite, l'argument invoqué à cet égard par le recourant, étant précisé ici que ce dernier ne saurait obtenir des explications détaillées sur chaque aspect du raisonnement tenu par l'arbitre. Que la décision à laquelle a abouti l'arbitre sur le problème considéré soit juridiquement fondée ou non importe peu sous l'angle du moyen pris de la violation du droit d'être entendu. Aussi est-ce en vain que l'intéressé, sous le couvert d'une prétendue atteinte à son droit d'être entendu, discute de la portée exacte à donner à l'art. R57 du Code.

Au vu de la solution retenue par l'arbitre, le point de savoir si les intimés ont effectivement adopté une attitude contradictoire en soutenant devant la CRL FIFA que celle-ci ne pouvait pas revoir la décision prise par la CSJ FIF n'a manifestement eu aucune influence sur le sort du litige, étant donné que l'arbitre a estimé, à tout le moins implicitement, ne pas être lié par les décisions des organes juridictionnels de la FIF. En tout état de cause, sur le vu des explications fournies par le recourant, on ne saurait reprocher aux intimés d'avoir adopté une attitude incompatible avec les règles de la bonne foi. D'une part, la situation a évolué sur le plan factuel entre le moment où la CSJ FIF a statué et celui où les intimés ont déposé leur réponse à l'appel introduit devant le TAS, puisque la Commission d'appel de la FIF a entre-temps annulé la décision attaquée devant elle. Aussi n'est-il guère surprenant que les intimés aient changé leur fusil d'épaule. D'autre part, affirmer qu'un organe juridictionnel d'une fédération internationale ne puisse pas revoir la décision prise par celui d'une autre association sportive ne signifie pas encore qu'il en irait forcément de même pour un véritable tribunal arbitral, tel le TAS. L'attitude procédurale des intimés n'apparaît ainsi pas incompatible avec les règles de la bonne foi.

Pour le reste, le recourant fait grief à l'arbitre d'avoir fait fi de son argument selon lequel les intimés s'étaient opposés par tous les moyens à la mise en oeuvre de l'expertise graphologique ivoirienne, en refusant notamment de produire des documents originaux et contemporains contenant leur signature. Or, semblable reproche repose sur des prémisses de fait qui ne ressortent nullement des faits constatés dans la sentence attaquée. Quoi qu'il en soit, on relèvera que la violation du droit d'être entendu dénoncée par le recourant n'a manifestement pas eu les conséquences que celui-ci lui prête. Dans sa sentence, l'arbitre n'a pas nié l'existence d'un contrat de travail valablement conclu le 31 juillet 2019, en motivant exclusivement sa décision par l'absence de force probante de l'analyse graphologique ivoirienne. Il s'est au contraire fondé sur un faisceau d'éléments pour aboutir à la solution retenue par lui. Il a ainsi notamment relevé qu'aucun témoin cité par les parties n'avait pu confirmer avoir vu les intimés signer le contrat litigieux, constaté que le prêt conclu le même jour ainsi que la licence du joueur ne contenaient pas la signature de celui-ci ni celle de sa mère, et souligné que le passeport FIFA du footballeur daté du 9 juin 2020 n'indiquait pas que ce dernier était contractuellement lié au recourant. L'arbitre a également observé que le contrat prétendument conclu le 31 juillet 2019 prévoyait une rémunération mensuelle de 63'000 francs CFA, mais que le recourant n'avait fourni aucune preuve établissant le paiement effectif des salaires au footballeur. Il a également pointé du doigt divers éléments qui semblaient démontrer le caractère arbitraire de l'analyse graphologique ivoirienne. Enfin et surtout, l'arbitre a estimé qu'une simple observation des différentes signatures présentées par les parties

permettait de conclure que la signature prétendument apposée par la mère du joueur sur le contrat litigieux n'était pas authentique. À cet égard, il a constaté que les trois signatures reconnues comme authentiques par la mère du footballeur se terminaient par un trait dirigé vers le bas, alors que le trait pointait vers le haut sur celle figurant au pied du contrat litigieux. En outre, l'arbitre unique a remarqué que les signatures apposées sur le contrat litigieux semblaient hésitantes et n'étaient pas fluides, contrairement aux signatures reconnues comme authentiques par la mère du footballeur. Au terme de son analyse reposant sur un ensemble d'éléments concordants, l'arbitre a ainsi conclu que le contrat litigieux n'était pas valide, faute d'avoir été signé par la représentante légale du footballeur, qui était encore mineur le 31 juillet 2019 (sentence, n. 143-150).

Au vu de ce qui précède, le grief examiné ne peut qu'être rejeté dans la mesure où il est recevable.

6.
Dans un second moyen, le recourant, dénonçant une violation du principe de la bonne foi et de celui de la prohibition de l'abus de droit, soutient que la sentence querellée est incompatible avec l'ordre public (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; arrêts 4A_318/2018 du 4 mars 2019 consid. 4.3.1; 4A_600/2016 du 29 juin 2017 consid. 1.1.4). Selon la jurisprudence, une décision est arbitraire lorsqu'elle est manifestement insoutenable, méconnaît gravement une norme ou un principe juridique clair et indiscuté, ou heurte de manière choquante le sentiment de la justice et de l'équité; il ne suffit pas qu'une autre solution paraisse concevable, voire préférable (**ATF 137 I 1** consid. 2.4; **136 I 316** consid. 2.2.2 et les références citées). 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). L'annulation d'une sentence arbitrale internationale pour ce motif de recours est chose rarissime (**ATF 132 III 389** consid. 2.1).

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).

6.2. Premièrement, le recourant reproche aux intimés d'avoir adopté un comportement contradictoire, en faisant valoir, lors de la procédure arbitrale, des allégations incompatibles avec celles formulées devant la CRL FIFA quant à la possibilité de revoir la décision rendue par les organes juridictionnels de la FIF.

Deuxièmement, l'intéressé fait grief aux intimés d'avoir fait preuve d'une attitude incompatible avec les règles de la bonne foi en s'opposant par tous les moyens à la mise en oeuvre de l'expertise graphologique ivoirienne.

Troisièmement, le recourant soutient que l'arbitre aurait enfreint le principe de la bonne foi, en considérant que cette expertise graphologique était arbitraire, sous prétexte que celle-ci ne se fondait pas sur des documents contemporains contenant la signature de la mère du footballeur, alors que celle-ci avait refusé de prêter son concours à la réalisation de ladite expertise. Il reproche également à l'arbitre d'avoir lui-même jugé que la signature litigieuse n'était pas authentique sur la base d'une simple observation de celle-ci.

6.3. Il sied d'emblée de souligner que la motivation du grief laisse fortement à désirer, de sorte que l'on peut sérieusement douter de sa recevabilité, vu l'art. 77 al. 3 LTF. Les quelques paragraphes que le recourant consacre à sa démonstration ne constituent en effet pas une motivation digne de ce nom visant à établir l'existence d'une prétendue contrariété à l'ordre public. Au demeurant, le recourant assoit en partie ses critiques sur des faits s'écartant de ceux constatés dans la sentence attaquée.

Quoi qu'il en soit, le recourant, sous le couvert d'une prétendue contrariété à l'ordre public, se borne à faire valoir une nouvelle fois les critiques qu'il a déjà formulées sous l'angle du moyen pris de la violation de l'art. 190 al. 2 let. d LDIP. Son argumentation ne résiste toutefois pas à l'examen et on peut reprendre ici, *mutatis mutandis*, les considérations déjà émises précédemment. Pour le reste, l'intéressé s'en prend, en pure perte, à l'appréciation des preuves disponibles opérée par l'arbitre, ce qui n'est pas admissible.

En tout état de cause, l'argumentation développée par le recourant ne permet nullement de démontrer que le résultat auquel a abouti l'arbitre, sur la base des faits constatés souverainement par lui, serait contraire à l'ordre public matériel, ce qui scelle le sort du moyen considéré. Celui-ci n'apparaît dès lors pas fondé, si tant est qu'il soit recevable.

Décision

Au vu de ce qui précède, le recours doit être rejeté dans la mesure de sa recevabilité.

4A_406/2024, 30 septembre 2024
A. c. B.

Demande de révision de la sentence rendue le 22 février 2024 par le Tribunal Arbitral du Sport (CAS 2022/O/9354)

Demande de révision d'une sentence TAS sur la base de l'art. 190 a al. 1 let. a LDIP pour le motif tiré de la découverte de faits nouveaux. Rappel des conditions requises pour l'existence de faits nouveaux.

Extrait des faits

Le 30 septembre 2021, l'équipe de cyclisme (...) A._____ (ci-après: A._____) a engagé le cycliste professionnel (...) B._____ (ci-après: le cycliste) en qualité de coureur cycliste indépendant pour les saisons 2022 et 2023. La rémunération mensuelle convenue était de 125'000 euros (EUR) pour la saison 2022 et de 150'000 EUR pour la saison 2023. Le cycliste a également signé un document, intitulé "Acknowledgment and Recognition of Ethical Principles", conformément à la réglementation adoptée par l'Union Cycliste Internationale (UCI).

En mai 2022, le cycliste a pris part au Tour d'Italie mais il a dû abandonner quelques jours après le début de la compétition en raison d'une blessure à la cuisse gauche.

Le 20 juillet 2022, le cycliste s'est vu notifier, à l'aéroport de Madrid, une citation à comparaître dans le cadre d'une procédure pénale conduite par les autorités espagnoles liée à la distribution de médicaments illégaux et de produits dopants à des athlètes par le Dr C._____. Un colis contenant des produits à base de ménotropine, prétendument envoyé par le Dr C._____ au cycliste, a été intercepté par la Garde civile espagnole.

Le 22 juillet 2022, A._____, ayant appris que le cycliste était potentiellement impliqué dans "l'affaire du Dr C._____", a décidé de suspendre immédiatement le sportif à titre préventif et de cesser de lui verser sa rémunération.

Le 31 juillet 2022, après avoir recueilli les explications du cycliste, A._____ a accepté de le réintégrer dans l'équipe, à certaines conditions. Tout d'abord, l'échéance du contrat liant les parties a été fixée au 31 décembre 2022 au lieu du 31 décembre 2023. Ensuite, celles-ci sont convenues qu'aucune rémunération ne serait versée au cycliste jusqu'à la confirmation, par les autorités chargées de la lutte antidopage, qu'aucune infraction n'avait été commise par ce dernier. Enfin, le cycliste s'est engagé à informer A._____ de tout nouveau développement concernant sa situation devant les autorités judiciaires ou celles responsables de la lutte antidopage. Le contrat conclu le 30 septembre 2021 a été amendé par les parties afin de tenir compte desdits éléments.

Entre le 19 août et le 11 septembre 2022, le cycliste a participé à la "Vuelta de España". Il a subi divers contrôles antidopage qui se sont tous révélés négatifs et aucun incident n'a été rapporté s'agissant de son passeport biologique.

Le 5 octobre 2022, le cycliste a informé A._____ que sa citation à comparaître en qualité de personne sous investigation avait été annulée par les autorités espagnoles.

Le 24 octobre 2022, l'UCI a indiqué à A._____ qu'aucune procédure antidopage n'était ouverte à l'encontre du cycliste.

Le 22 novembre 2022, A._____ et le cycliste ont conclu un nouveau contrat, en vertu duquel ce dernier s'est engagé à fournir ses services pour la saison 2023 moyennant le versement d'un salaire annuel de 1'000'000 EUR, payable en douze mensualités.

Le 28 novembre 2022, un physiothérapeute de A._____ a révélé à cette dernière le contenu d'un rapport figurant au dossier de la procédure pénale conduite par les autorités espagnoles, document qui contenait des messages échangés entre le Dr C._____ et le cycliste à l'époque du Tour d'Italie 2022.

Le 9 décembre 2022, A._____ a décidé de résilier les contrats conclus avec le cycliste en 2021 et 2022. Pour justifier cette décision, elle a indiqué avoir reçu, quelques jours auparavant, de nouvelles informations établissant l'existence d'une collaboration entre le Dr C._____ et le cycliste et l'implication de ce dernier dans les faits ayant donné lieu à l'ouverture d'une enquête pénale en Espagne.

Le 28 décembre 2022, le cycliste a introduit une requête d'arbitrage devant le Tribunal Arbitral du Sport (TAS) à l'encontre de A._____ en vue d'obtenir le paiement des montants de 750'000 EUR et de 1'000'000 EUR au titre de la rémunération qu'il estimait encore due pour les saisons 2022 et 2023.

Le 15 mai 2023, l'International Testing Agency a informé le cycliste de l'ouverture d'une procédure disciplinaire à son encontre pour cause d'éventuelles infractions à la réglementation antidopage de l'UCI en raison de la prétendue utilisation de ménotropine par lui dans les semaines précédant le Tour d'Italie 2022.

Le 25 mai 2023, A._____ a sollicité la suspension de la procédure d'arbitrage jusqu'à droit connu sur ladite procédure disciplinaire.

Le 6 juin 2023, la Formation a rejeté cette requête.

Le 25 juillet 2023, l'UCI a décidé de suspendre immédiatement le cycliste à titre provisionnel. Elle a communiqué cette décision à A._____ le même jour.

Par sentence finale du 22 février 2024, la Formation, admettant partiellement la demande, a condamné A._____ à payer au demandeur la somme de 662'500 EUR, intérêts en sus, montant correspondant à la rémunération due pour la période du 22 juillet au 9 décembre 2022. En bref, elle a estimé que le cycliste avait enfreint ses obligations contractuelles en faisant appel aux services du Dr C._____ sans avoir recueilli l'autorisation préalable de A._____. Celle-ci était dès lors fondée à mettre un terme aux rapports contractuels, raison pour laquelle il n'était pas nécessaire de déterminer si le cycliste avait également utilisé des substances interdites, telle la ménotropine. La Formation a également considéré qu'un éventuel lien de causalité entre le prétendu usage de ménotropine et la blessure subie par le cycliste lors du Tour d'Italie 2022 n'était pas établi, raison pour laquelle l'incapacité de travail résultant de cette blessure ne pouvait pas être qualifiée de fautive. Poursuivant son analyse, elle a jugé que le cycliste avait contractuellement droit à la rémunération convenue jusqu'au moment de la résiliation. A cet égard, elle a notamment relevé qu'aucune procédure disciplinaire n'avait été ouverte à l'encontre du cycliste au moment de la résiliation du contrat, de sorte que A._____ ne pouvait pas se fonder sur la deuxième condition, objet de l'amendement du 31 juillet 2022, pour ne pas verser à l'intéressé la rémunération convenue. La Formation a, en revanche, estimé que le cycliste n'avait pas droit aux montants réclamés pour la période postérieure à la résiliation.

Les parties n'ont pas formé de recours au Tribunal fédéral contre cette sentence dans le délai prévu à cet effet.

Le 26 juillet 2024, A._____ (ci-après: la requérante) a présenté une demande de

révision de ladite sentence, en concluant à son annulation.

Extrait des considérants

5.

5.1. A l'appui de sa demande de révision, fondée sur l'art. 190a al. 1 let. a LDIP, la requérante fait valoir que le Tribunal antidopage de l'UCI, en mai 2024, a reconnu l'intimé coupable d'une violation des règles antidopage pour usage et possession d'une substance interdite (ménotropine) à l'époque du Tour d'Italie 2022 et, partant, lui a infligé une suspension de quatre ans, cette sanction déployant ses effets à partir du 25 juillet 2023. Elle précise avoir découvert ces informations le 29 mai 2024, date à laquelle l'UCI a publié un communiqué de presse relatant la condamnation de l'intimé. Selon la requérante, la Formation, si elle avait eu connaissance de l'infraction antidopage commise par l'intimé dans le contexte du Tour d'Italie 2022, aurait reconnu qu'elle avait refusé à juste titre de ne pas verser à l'intimé la rémunération convenue pour la période comprise entre le 22 juillet et le 9 décembre 2022, étant donné que ce dernier n'avait pas respecté ses obligations contractuelles. A en croire la requérante, ces "faits nouvellement découverts, respectivement confirmés" auraient été de nature à conduire à une solution différente. La requérante prétend en outre que les éléments fondant la présente demande de révision existaient déjà avant le prononcé de la sentence attaquée.

5.2. Semblable argumentation n'emporte pas la conviction de la Cour de céans.

Force est d'emblée de relever que la requérante fonde en l'occurrence sa demande de révision sur la décision rendue par le Tribunal disciplinaire de l'UCI en mai 2024, soit un moyen de preuve postérieur au prononcé de la sentence entreprise. Or, il ressort clairement du texte de l'art. 190a al. 1 let. a LDIP qu'une partie ne peut pas se prévaloir de faits ou de moyens de preuve postérieurs à la sentence querellée. La requérante, qui cherche à contourner ce problème en affirmant que l'organe disciplinaire de l'UCI a nécessairement dû se baser sur des moyens de preuve qui existaient déjà au moment de la reddition de la sentence arbitrale pour retenir que l'intimé avait enfreint la réglementation antidopage lors du Tour d'Italie 2022, ne saurait être suivie, car pareille démarche est incompatible avec la lettre de l'art. 190a al. 1 let. a LDIP (**ATF 149 III 277** consid. 4.3 et les références citées; arrêt 4A_69/2022 du 23 septembre 2022 consid. 4.4 non publié in **ATF 148 III 436**).

Mais il y a plus. Au cours de la procédure d'arbitrage, la Formation et la requérante savaient pertinemment qu'une procédure disciplinaire avait été ouverte en mai 2023 à l'encontre de l'intimé car ce dernier était suspecté d'avoir utilisé de la ménotropine à l'époque du Tour d'Italie 2022. Ainsi, le prétendu nouvel élément allégué par la requérante - à savoir l'usage par l'intimé d'une substance interdite lors du Tour d'Italie 2022 - n'a en réalité pas été découvert après coup. Seule la sanction prononcée par le Tribunal disciplinaire de l'UCI à raison de ces faits, postérieurement au prononcé de la sentence attaquée, est nouvelle. Cette seule circonstance n'est toutefois pas déterminante. La lecture de la sentence attaquée permet en effet de constater que la Formation a considéré qu'elle était saisie d'un litige d'ordre contractuel et qu'il ne lui appartenait pas de déterminer si l'intimé avait commis ou non une infraction à la réglementation antidopage (sentence, n. 117). La Formation avait du reste refusé de suspendre la cause pendante devant elle jusqu'à droit connu sur la procédure disciplinaire initiée contre l'intimé. Autrement dit, les arbitres ont visiblement considéré, à tort ou à raison, que le point de savoir si l'intimé avait enfreint la réglementation antidopage n'avait aucune incidence sur le sort du présent litige. Il s'ensuit que les éléments prétendument nouveaux invoqués par la requérante ne présentent pas un caractère pertinent respectivement concluant, puisqu'ils ne sont

pas de nature à entraîner une modification de la sentence entreprise, eu égard aux considérations émises par les arbitres pour justifier la solution retenue par eux.

Décision

La demande de révision est rejetée.

Informations diverses
Miscellanous
Información miscelánea

Sélection de publications récentes relatives au TAS /Selected recent CAS publications/ Selección de publicaciones recientes del CAS

- Berger L., L'arrêt Diarra: une nouvelle Victoire pour les sportifs professionnels, Les Cahiers de droit du sport, no. 66, 2024, p. 63

- Blondin J., CAS 2023/A/9611 Al Merrikh Sports, Football Legal, no. 21, 2024/2, p. 227

- Blondin J., Spera S., CAS 2023/A/9622 Angers SCO c. ES Tunis, FIFA & Ilyes Cheti c. ES Tunis, FIFA & Angers SCO, Football Legal, no. 21, 2024/2, p. 231

- Camporesi S., Teetzel S., Ospina-Betancurt J., Conflicting values, implicit norms, and flawed evidence: a critical review of World Athletic's eligibility criteria to compete in the women's category from 2009 to 2024, The International Sports Law Journal, Volume 24, Number 2, June 2024 p. 82

- Cavaliero, Berney F., SFT 4A_552/2023, 18 March 2024, Football Legal, no. 21, 2024/2, p. 209

- Chanda S., Gupta A.,Bajpai A, Need for Indian Court of Arbitration for Sports in India, The International Sports Law Journal, Volume 24, Number 3 – 4, p.283

- Crespo Perez J., Castelli G., Moreno Caballero C., CJEU, 4 October 2024, Case C-650/22, FIFA v. Lassana Diarra, Football Legal, no. 21, 2024/2, p. 72

- Diakité A., La mise en oeuvre du Code Mondial Antidopage par les Etats, Bruylant, 2023

- Duval A., Van Rompuy B., The ESL, ISU, and Royal Antwerp judgements: towards a new framework of justification for sports governance under EU Competition law?, Spurt 5/2024, p. 359

- Fischinger P., Rybak F., The Diarra Case: Consequences for the Sanctioning of Professional Football Players for Breaches of Contract under FIFA Association Law, Football Legal, no. 21, 2024/2, p.78

- Garcia Caba M., Again, on racism and sports discipline in football: commentary on the award of the Court of Arbitration for Sports 2022/A/9250 Club Atlético Boca junior v. Conmebol, Revista aranzi de derecho de deporte y entretenimiento, Num. 83, Abril – Junio 2024, p. 149

- Gradev G., Kiss M., Forum Shopping or Protection of Rights?, Football Legal, no. 21, 2024/2, p. 224

- Gradev G., Kiss M., Admission of a waiver After the Closure of an EPP Procedure, Football Legal, no. 21, 2024/2, p. 235

- Heermann P., Will the football agent's service fee cap survive the current legal attacks?, The International Sports Law Journal, Volume 24, Number 2, June 2024 p. 188

- Heurtaux G., La normativité de l'article 165 TFUE en matière sportive sous le prisme des arrêts Superleague et Royal Antwerp, Les Cahiers de droit du sport, no. 66, 2024, p. 13

- Ibarrola J., SFT 4A_154/2024, 4A_156/2024, 4A_180/2024 and 4A_182/2024, 10 June 2024, Football Legal, no. 21, 2024/2, p. 212

- James M., The Diarra case, The International Sports Law Journal, Volume 24, Number 3 – 4, p. 205

- Krechetov E., 'International Dimension' in Employment-Related Disputes, Football Legal, no. 21, 2024/2, p. 243

- Lombardi P., CAS 2022/A/9248 Joris Gnagnon v. Sevilla Football Club and FIFA, Football Legal, no. 21, 2024/2, p. 218

- Lopez Moreno F., To be or Not to Be: Analysis of the CAS Award in the Byron Castillo case, Revista aranzi de derecho de deporte y entretenimiento, Num. 82, Enero – Marzo 2024, p. 195

- Maisonneuve M., chronique de jurisprudence arbitrale en matière sportive, Revue de l'Arbitrage 2024 – N°3, p. 967

- Maisonneuve M, Rabu G., Les Grandes decisions du droit du sport, Grands Arrêts, Lefebvre Dalloz, 1ère edition, 2024

- Marmayou J.-M., Le système d'arbitrage TAS est-il anticoncurentiel? Les Cahiers de droit du sport, no. 66, 2024, p. 143

- Mercer A., Soay Ling T, AFC's Approach to Prosecuting and Sanctioning the Offences of 'Brawl' and *'Bringing the Game into Disrepute'* under the AFC Disciplinary and Ethics Code, Football Legal, no. 21, 2024/2, p. 255

- Morand J.-P., Coppa R., SFT 4A_430/2023, 23 February 2024, Football Legal, no. 21, 2024/2, p. 206

- Ongaro O., Sternheimer W., Cisneros B., Kasoulis S., Lavs M., CAS 2023/A/9949 Marcos Raphael Alvarez Giraldez v. MKS Cracovia S.S.A. & FIFA, Football Legal, no. 21, 2024/2, p. 238

- Perez Lavado M., Commentary on the CAS award of Sara Castillo Martinez v. World Skate, Revista aranzi de derecho de deporte y entretenimiento, Num. 82, Enero – Marzo 2024, p. 207

- Rietiker D., Human Rights of Football Players: The Current and Potential Role of the European Court of Human Rights, Football Legal, no. 21, 2024/2, p. 10

- Rizzo F., La CJCE adopte une position sans concession dans l'affaire Diarra, Les Cahiers de droit du sport, no. 66, 2024, p. 88

- Rizzo F., L'analyse des transferts internationaux de footballeurs par la Cour de justice de l'Union européenne Les Cahiers de droit du sport, no. 66, 2024, p. 97

- Shinohara T., Book Review: 'Defending Athletes, Players, Clubs and Fans by Daniel Rieteker, Football Legal, no. 21, 2024/2, p.17

- Souloukou A., CAS Reduces Sanctions Imposed on Olympiacos FC for Match Incidents, Football Legal, no. 21, 2024/2, p. 248

- Spera S., A (New) Reminder of the Procedural Implications of Joint Liability: CAS 2022/A/8967 Red Bull New York, Inc. v. Alejandro Sebastian Romero Gamarra, Al-Taawoun Football Club & FIFA, Football Legal, no. 21, 2024/2, p. 214

- Tschanz P.-Y., Spoorenberg F., Chronique de jurisprudence étrangère, Revue de l'Arbitrage 2024 – N°4, p. 1221

- CAS, Anforderungen en EPO-Nachweisverfahren (Fall Vuskovic), Spurt, 6/2024, p. 503

- Focus The Diarra Case, Rizzo F., The CJEU Adopts an Uncompromising Stance in the Diarra Case, Football Legal, no. 21, 2024/2, p. 59

- Quel avenir pour le système des transferts internationaux des joueurs de football?, Jurisport, no. 257, novembre 2024, p. 8