Bulletin TAS
CAS Bulletin

2020/01

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

Bulletin TAS
CAS Bulletin
2020/1

Lausanne 2020

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Editorial

2020 is a special year for the world at large due to the covid-19 pandemic. With respect to sport in general, the impact of the coronavirus is multiple. The postponement or the suspension of major competitions, such as the Tokyo Olympic Games and the UEFA Euro 2020, has caused an extraordinary disruption in organized sport. Covid-19 also affected CAS procedures to some extent. In this regard, in the wake of the Covid-19 outburst, the CAS immediately released the "Emergency Guidelines" in force from 16 March to 30 June 2020 to supplement its arbitration rules in order to facilitate the access to CAS by using the CAS e-filing platform and by holding hearings by video-conference. With these special measures, the CAS procedures were not delayed, except when the parties have chosen to postpone their hearing in order to hold it in person.

The pandemic has unfortunately also affected the renovation work of the future CAS headquarters at the Palais de Beaulieu/Lausanne. Due to the mandatory sanitary measures, the construction work was delayed by about 6 weeks and it is likely that the future seat of CAS will not be available before November 2021.

Since the beginning of July 2020, Spanish is recognized as the third official language for CAS arbitrations, along English and French. The decision to adopt Spanish as an official language acknowledges the growing importance of the Spanish language in the sports arbitration world (approximately 10% of the CAS arbitrations are conducted in Spanish). The formal adoption of Spanish as official language of CAS is implemented in an updated version of the Code of Sports-related Arbitration (the Code), in force as of 1 July 2020. Other amendments to the Code pertain to the use of electronic filing and video-conferencing, the use of which has increased in importance in recent times.

The ICAS also decided to better reflect the managerial role of the chief executive of CAS through the years and acknowledged the person's supervision of the activities of the CAS Court Office by changing the title of Secretary General to Director General.

It should also be noted that in a recent resolution dated 4 June 2020, the Committee of Ministers of the Council of Europe decided to end the supervision of the execution of the judgment of the European Court of Human Rights in the Mutu & Pechstein v. Switzerland case after having ascertained that the rules authorising public hearings have been implemented by the CAS in accordance with said judgment. Thus, since 2019, the CAS procedural rules have been updated to widen the scope for hearings to be held in public, which can be held at the sole request of the athlete when the dispute is of a disciplinary nature. In that respect, under this new regime, a first hearing has been held in public on 15 November 2019 in Montreux/Switzerland at the request of the Chinese swimmer Sun Yang. The appeal was filed by the World Anti-doping Agency (WADA) at the CAS in relation to a decision issued by the Fédération Internationale de Natation (FINA) Doping Panel dated 3 January 2019 exonerating Sun Yang from any sanction following an out-of-competition doping control. The CAS award, issued on 28 February 2020, has been challenged before the Swiss Federal Tribunal.

Regarding the "leading cases" selected for this issue, they mostly remain football-related (8 cases out of 11).

In the field of football, the case 6007 Jibril Rajoub v. FIFA is the first decision dealing with Article 53 FIFA Disciplinary Code related to the incitation to hatred or violenve. In 5264 Miami FC & Kingston v. FIFA, CONCACAF & United States Soccer Federation, the panel analyses and interprets the system of promotion / relagation in US soccer. The transfer case 6027 Sociedeade Esportiva Palmeiras v. FIFA addresses Article 18 bis RSTP related to third party

influence on clubs. In 6233 Al Shorta Sports Club v. FIFA & Dalian Yilang FC, the panel examines the issue of joint liability to pay compensation (article 17 FIFA RSTP) whereas the notion of "sporting just cause" to terminate a contract is analysed in 6017 FC Lugano v. FC Internazionale Milano. In 6288 Waterford Football Club v. UEFA, a discussion is addressed by the panel on the aim and conditions to grant an exception to the three-year rule defined in Article 12(2) UEFA CL/FFF. The case 5959 Club Al Kharaitiyat v. FIFA offers a review of the legality of sanctions imposed under Article 64 FIFA Disciplinary Code and, finally, in the case 5945 Maxim Astafiev v. FC Mordovia & FUR, the panel deals with various arbitration related concepts and questions related to the parties' failure to participate in CAS proceedings.

Turning to doping, the case 6482 Gabriel da Silva Santos v. FINA is one of the rare cases of "No Fault" where an athlete is cleared and the sanction annulled.

Outside football and doping, the case 6330 Sara Castillo Martinez v. World Skate deals with the eligibility of an athlete with a double nationality to compete in a major competition and the interpretation of the terms of the federation's Statute and the Olympic Charter. Lastly, in 6181 Fédération Belge de Gymnastique (FRBG) v. FIG and JCA, the issue of the bidding process to organize a world championship is examined.

In addition to the interesting article written by Philippe Vladimir Boss entitled "Duty to cooperate in disciplinary proceedings and its limitations deriving from standard rights in criminal proceedings – A review under Swiss law", we are pleased to publish an article related to "Health data transfer and processing in CAS proceedings" prepared by Vladimir Novak, CAS arbitrator.

As usual, summaries of the most recent judgements rendered by the Swiss Federal Tribunal in connection with CAS decisions have been enclosed in this Bulletin. Furthermore, the decision rendered in French on 5 March 2020 by the European Court of Human Right in the case Michel Platini c. Suisse has been included in this issue together with an English press release.

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

Matthieu REEB
Director General

Articles et commentaires
Articles and Commentaries

Duty to cooperate in disciplinary proceedings and its limitations deriving from standard rights in criminal proceedings – A review under Swiss law

Philippe Vladimir Boss*

I. Introduction

Disciplinary bodies of sport organisations do not bear the same powers as those of a law enforcement authority[1]. The latter holds the public power and is exclusively entitled to exercise coercive measures. The disciplinary bodies may not search houses, monitor telephone conversations or freeze bank accounts. However, as an entity based on private law, they do enjoy a tremendous efficient fact-finding tool that is the duty to cooperate that they impose on their members or officials under their jurisdiction. To the contrary, criminal justice authorities do not benefit from such power, and the right not to cooperate may beat a fatal strike at a criminal investigation.

From an investigation point of view, the best situation would be to benefit from both the coercive measures of a prosecutor and the cooperation due to a disciplinary body. The fundamental rights of the person under (criminal) investigation, namely his or her right to remain silent, will draw the limit: where he or she faces coercive measures, he or she may not collaborate (right to remain silent).

The individual under a disciplinary proceeding may usually not remain silent. If he or she does, a sanction may be imposed, depending upon the relevant sport organisation's regulation[2]. If he or she speaks out (or otherwise cooperates by handing over

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[1] The present contribution is limited to analyzing the situation where a criminal investigation is carried by Swiss law enforcement authorities. The terms "law enforcement authorities", "criminal justice authorities" and "prosecution authorities" are used indifferently in this contribution and have equal meaning.

[2] See Björn Hessert, Cooperation and reporting obligations in sports investigations, The International Sports Law Journal, Springer, Published online 3 June 2020, § 2.

documents), that statement will appear on a protocol and this document will be outside his sphere of influence.

As a private entity, a sport organisation remains subject to the coercive powers of a criminal justice authority. Consequently, the statements (or documents) received from that person under investigation in the course of a disciplinary proceeding may be the target of such coercive powers. The sport organisation is also free, within the limitations of the procedural rules applying to criminal prosecution, to file a criminal complaint against anyone that has been under its disciplinary jurisdiction and attach all documents gathered through the duty to collaborate. In both situations, the right to remain silent may be put at jeopardy even before that person is heard by a law enforcement authority.

This contribution analyses to what extent, under Swiss law applicable when the Swiss Federal Tribunal ("SFT") reviews awards rendered by the Court of Arbitration for Sport ("CAS"), the right to remain silent (or the right against self-incrimination, said as *nemo tenetur se ipsum accusare*) shall mediate the ambivalent powers of the disciplinary bodies and those of criminal justice authorities. Both the individual's fundamental right protected by international covenants and the fact-finding mission of the sport organisation deserve specific promotion.

II. The right not to incriminate oneself does not apply in disciplinary proceedings

A. The CAS Panel findings in the *J.V. vs. FIFA* case

A publicly well-known case, the *J. V. vs. FIFA* case ("the *V. case*") related to various corruption and conflicts of interest violations in the position of a senior FIFA official.

In March 2015, the Office of the Attorney General of Switzerland ("OAG") opened criminal proceedings on suspicion of criminal mismanagement and of money laundering in connection with the awarding of the 2018 and 2022 FIFA World Cups. The U.S. Department of Justice ("DOJ") and the U.S. Attorney's Office for the Eastern District of New York carried out a similar investigation. In September 2015, the FIFA Investigatory Chamber started a disciplinary proceeding against Mr. V. based on the violation of the FIFA Code of Ethics ("FCE") related to facts of conflicts of interest and corruption in the selling of World Cup tickets and use of a FIFA airplane. The FIFA Investigatory Chamber summoned him for an interview and requested him to provide documentation, based on his duty to cooperate under then Article 41 FCE. Mr. V. refused to attend the interview and grant the documents. He considered that the confidentiality of the FIFA internal proceedings could not prevent the record of the interview and other documents produced in the internal proceedings from ending up in the hands of the DOJ and of the OAG. To his appreciation, this would jeopardize the right to remain silent that he bears before these authorities. Based on its internal investigations, FIFA filed a criminal complaint against Mr. V. with the OAG. As per the disciplinary proceeding, Mr. V. was eventually found guilty of various breaches of the FCE in light of the facts of corruption and conflict of interest and sanctioned him with a six-year ban as well as breaches of his duties to disclose and cooperate with an additional four-year ban[3].

The appeal filed before CAS by Mr. V. was dismissed. More specifically, the CAS Panel found that the right not to self-incriminate proved inapplicable in the context of a disciplinary proceeding governed by Swiss private law. The CAS Panel held that sport organisations do not otherwise have the investigatory means of state authorities and that the individual subject to such disciplinary

[3] CAS 2017/A/5003 J.V. vs. FIFA, 27 July 2018, § 76-94.

proceeding has deliberately chosen to accept those ethics rules while entering into the context of the association[4].

The appeal filed with the SFT was rejected on 7 May 2019[5]. On the specific ground of the right to remain silent allegedly put at jeopardy by the duty to cooperate, the SFT dismissed it swiftly as explained here-below.

B. A door left open in case of a concurrent criminal proceeding

Both the CAS and SFT decisions left an open question, which is the topic of this contribution.

Mr. V. alleged that he could not comply with his duty to cooperate according Article 41 FCE in the context of the DOJ and OAG criminal investigations. According Mr. V., such compliance would have (and eventually has) resulted in this documentation being made available to criminal justice authorities, putting at jeopardy the exercise of his right against self-incrimination[6]. Before the SFT, Mr. V. claimed that, in the present case, his right against self-incrimination in a criminal proceeding would be moot in violation of Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"[7]) and 14 of the International Covenant on Political and Civil Rights. Such would amount to a violation of Swiss procedural public policy ("*ordre public*") according Article 190 (2) (e) of the Swiss Private International Law Act (PILA)[8]. It shall here be recalled that, according SFT case law, procedural public policy is violated when fundamental and generally recognized principles are disregarded, thus leading to an intolerable contradiction to justice, so that the decision appears inconsistent with the values acknowledged in a state governed by laws[9].

Neither CAS nor the SFT analyzed this argument, considering that it was unclear what were the object and the target of the investigations carried by the criminal justice authorities. The CAS Panel noted that there was no clear and imminent danger that the privilege against self-incrimination (applicable before public authorities) would be circumvented in that case. However, should the information passed by the sport organisation to the criminal justice authorities which have opened proceedings against the same individual be on the same matter, there was, according the CAS Panel, "a real danger that the sport organisation will be (mis-)used by public authorities to collect information that they could be otherwise unable to obtain". In such case, there may be a valid claim to invoke the right against self-incrimination in a disciplinary proceeding[10]. In the view of the SFT, this allegation, which could not be reviewed on the merit, "raises particularly interesting issues linked to the application and scope of the *nemo tenetur se ipsum accusare* principle in a disciplinary proceeding within an association governed by private law while a criminal investigation on the same facts is pending or considered"[11].

Hence, there is a door left open for consideration of the argument, which we offer to analyze in the present contribution.

III. *Nemo Tenetur* principle in the criminal proceeding concurrent to a disciplinary proceeding

Whether the rights of an individual during the disciplinary proceeding are under an "intolerable contradiction to justice" shall be reviewed through the broad spectrum of the

[4] CAS 2017/A/5003 J.V. vs. FIFA, 27 July 2018, § 265-266.
[5] SFT 4A_540/2019 J.V. vs. FIFA, 7 May 2019.
[6] CAS 2017/A/5003 J.V. vs. FIFA, 27 July 2018, § 112.
[7] "ECHR" also refers to "European Court of Human Rights".
[8] SFT 4A_540/2019 J.V. vs. FIFA, 7 May 2019, § 3.1.
[9] See SFT 136 III 345, 31 August 2009, § 2.1
[10] CAS 2017/A/5003 J.V. vs. FIFA, 27 July 2018, § 266.
[11] SFT 4A_540/2019, 7 May 2019, § 3.2.

subsequent stages of a criminal proceeding that would eventually be concurrently carried out.

The *nemo tenetur* principle only applies in relations between an individual and the State[12]. Hence, it is of no direct application in a disciplinary proceeding. However, should documents delivered to the disciplinary body or the protocol of a hearing before that body be brought to the attention of a prosecution authority, their admissibility deserves to be considered in light of the *nemo tenetur* principle (A). In this process, the remedies that individuals may seek in order to challenge their admissibility show interesting evolution in recent Swiss case law (B).

A. Inadmissibility of evidence gathered in violation of the right no to incriminate oneself

The principle of non-self-incrimination encompasses the right to remain silent. This guarantee is enshrined in Article 14 (3) (g) of the International Covenant on Civil and Political Rights and Article 6 (1) ECHR[13]. These provisions forbid any kind of "improper coercion" from the prosecuting authority on the individuals subject to its investigation[14]. It is contemplated under Article 113 (1) of the Swiss Criminal Procedure Code ("SCPC") according which "the indicted person may not be compelled to incriminate him or herself".

1. Inadmissibility of evidence gathered under threat by a criminal justice authority

According Article 140 (1) SCPC, *the use of coercion, violence, threats, promises, deception and methods that may compromise the ability of the person concerned to think or decide freely are prohibited when taking evidence*. This prohibits taking advantage of physical or psychological circumstances that may harm the freedom of will or the ability to think[15]. The prohibition relates not only to coercion methods that the criminal justice authorities would use on purpose, but also coercive situations that already exist, such as the situation of an individual under alcohol, drugs or who lacks sleep at the beginning of his or her deposition[16]. This follows the lines of ECHR case law, according which an *improper coercion* may also arise where an indicted individual is compelled to testify under threat of sanctions and testifies in consequence or where the authorities use subterfuge to elicit information that they were unable to obtain during questioning[17].

Hence, the *coercion* to speak imposed by a criminal justice authority on an individual that bears the right to remain silent would amount to an inadmissible evidence in a criminal proceeding[18]. To the contrary, there are admissible evidence that may be taken against the will of the indicted person, since they are independent therefrom, such as DNA analysis or documents seized during a house search[19] or, generally speaking, that exist before the coercion of the prosecuting authority is exercised[20].

In order to fully exercise his or her right, the indicted person must be given the information on his or her right against self-incrimination prior his or her first hearing by the police or the criminal justice authority. In case this information is not given, the protocol of the hearing is not admissible[21]. It

[12] SFT 131 IV 36, 22 December 2004, § 3.3.1.
[13] See ECHR case 31827/96, 3 May 2001, *JB vs. Switzerland*, § 64.
[14] ECHR, 19187/91, 17 December 1996, *Saunders vs. UK*, § 68.
[15] Niklaus Schmid, Daniel Jositsch: Schweizerische Strafprozessordnung, Praxiskommentar, Zurich/St-Gallen, 2018, ad Article 140, n° 2.
[16] Wolfgang Wohlers in Donatsch/Hansjakob/Lieber: Kommentar zur Schweizerischen Strafprozessordnung (StPO), Zurich/Basel/Geneva, 2014, ad Article 140, n° 4.
[17] ECHR, 50541/08, 50571/08, 50573/08 and 40351/09, *Ibrahim and others vs UK*, 13 September 2016, § 267.
[18] Article 141 (1) SCPC.
[19] SFT 140 II 384, 27 May 2014, § 3.3.2.
[20] SFT 142 II 207, 30 May 2016, § 8.3.2.
[21] Article 158 (1) (b) and (2) SCPC. ECHR case law is in line with this and adds that this is all the more true when the indicted individual did not benefit from

shall here be noted that, under Swiss Criminal Procedure law, there are various scales of inadmissible evidence. However, in the case where the information on the right to remain silent (if applicable) lacks, the prohibition is absolute. Hence, the protocol is inadmissible, regardless of the importance of the evidence gathered in securing a conviction for a serious offence[22].

2. Gathering of evidence in administrative proceeding and its admissibility in criminal proceedings

An individual may not only be put under threat to speak by the criminal justice authority that carries out the investigation. The ECHR contemplates the possibility to also invoke the *nemo tenetur* principle when the threat did not originate directly from the prosecuting authority but from a prior administrative proceeding.

In *Saunders vs. UK*, the ECHR was confronted with a case of fraud where an individual first made statements, under threat of sanction, to an administrative authority, the Department of Trade and Industry. Those statements were later passed on to criminal investigators and used against him during his criminal trial. The ECHR found that the public interest could not, even in highly complex crimes, be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation, *e.g.* administrative investigation, to incriminate the accused during the trial proceedings[23]. For such reason, the ECHR ruled that the evidence was inadmissible. Similar situation arose in *H. and J. against Netherlands*: two asylum seekers in the Netherland made statements before the Dutch Immigration and Naturalisation Service, which were later used against them in a criminal proceeding for alleged acts of torture. Those statements were eventually found admissible in the criminal proceeding as neither indicted individual had admitted a confession. However, the ECHR confirmed that the use of evidence gathered prior to the criminal proceeding without due consideration to the guarantees of the *nemo tenetur* principle may be inadmissible[24].

The SFT, based on ECHR case law, has set a series of parameters to be taken into consideration in the assessment of the admissibility, in the criminal proceeding, of the evidence gathered during a prior administrative proceeding[25], such as whether:

- the right against self-incrimination competes to a legal or a natural person[26];
- the statements are made on facts or imply a recognition of guilt and whether such guilt derives from other evidence[27];
- the nature and degree of the sanction for non-cooperation;
- the defense possibilities; as well as
- the use made of the evidence[28].

Recent Swiss case law predominantly relies on the criterion of the nature of the sanction: in a very short fashion, where the sanction for non-cooperation is not of a criminal nature, the threat does not amount to "improper coercion" and the evidence gathered in this context is not inadmissible.

This echoes specifically in Switzerland's financial legal landscape[29]. Private entities (*e.g.*

legal aid, ECHR, 25303/08, *Stojkovic vs. France*, 27 October 2011, § 54.

[22] Article 141 (1) and (2) SCPC; Jean-Marc Verniory, in Kuhn/Jeanneret: Commentaire Romand, CPP, Basel 2011, ad art. 158, n° 26.

[23] ECHR, 19187/91, Saunders vs. UK, 17 December 1996, § 74; ECHR, 34720/97, Heaney and McGuiness vs. Ireland, 21 December 2000, § 57.

[24] ECHR, 978/09 and 992/09, *H. and J. against the Netherlands*, 13 November 2014, § 80.

[25] SFT 140 II 384, 27 May 2014, § 3.3.3 and 3.3.5, which was criticized by scholars as referenced in SFT 142 II 207, 30 May 2016, § 8.4.

[26] See SFT 142 II 207, 30 May 2016, § 8.4.

[27] See ECHR, 978/09 and 992/09, *H. and J. against the Netherlands*, 13 November 2014, § 80.

[28] See ECHR, 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, *Ibrahim and others vs UK*, § 269.

[29] A similar situation occurs in the field of supervision of casinos (SFT 140 II 384, 27 May 2014,

banks) benefit from a license to perform financial activities. In view of anti-money laundering objectives, such entities are bound by a public law-rooted duty to cooperate with their supervisory administrative body. Such duty may contradict a right not to incriminate oneself in case a criminal proceeding is eventually started on the charges of money laundering. In a recent landmark case ruling on this issue, the SFT found that the duty to collaborate was not threatened through a sanction of criminal nature given the fact that those entities were bound by a duty to produce, keep and make documentation available to state supervisory authority. In this context, such entities could not invoke the right against self-incrimination. Statements made or documents forced to be produced to their supervisory (administrative) authority could be lawfully seized and used by criminal law enforcement authorities. Consequently, the *nemo tenetur* principle could not prevent criminal prosecution authorities from accessing such documentation[30].

This case shows that, among the various listed criteria to appreciate whether an "improper coercion" was imposed while collecting evidence, the SFT seems to consider the absence of threat of a sanction of criminal nature as a compelling factor to rule out the inadmissibility of the evidence[31].

It shall be recorded that, according ECHR 6 (1) jurisprudence, a sanction is considered of criminal nature on the basis of three criteria. It shall first be reviewed how that sanction classifies under domestic law (whether criminal or otherwise), then the nature of the offence and finally the severity of the penalty faced by the person concerned[32]. Under ECHR case law, a temporary prohibition to exercise a profession does not amount to a criminal sanction[33]. In case of a fine imposed as a disciplinary sanction, the ECHR does not consider it of a criminal nature so long as the non-payment of the fine cannot result in an imprisonment[34]. Same occurs if the "fine" actually equaled the amount of the profit made by the individual that committed the disciplinary violation, giving to the fine the nature of a compensation[35].

Even if the nature of the threatened sanction seems to be the most relevant parameter to take into consideration in the assessment of the admissibility of the evidence taken, the various criteria to be considered express the idea that the right against self-incrimination is not absolute and deserves review in each specific case[36].

The limitations of the use of evidence exposed in this jurisprudence apply in cases where the evidence was gathered in a public (administrative) proceeding. The author is not aware of a similar jurisprudence rendered in cases where the evidence would have been collected by a private entity, and later remitted to a criminal prosecution authority.

3. Gathering of evidence by private entities and its admissibility in criminal proceedings

The issue now lies whether specific limitations apply when the evidence is

§ 3.3); of medical doctors (SFT 2C_1011/2014, 18 June 2015, § 3.2); or of civil aviation (Swiss Federal Criminal Tribunal (SFCT) TPF 2018 50, 15 March 2018, § 5-6).

30 SFT 142 II 207, 30 May 2016, § 8.3.2, 8.18.1, 8.18.3. See also SFCT SK.2017.22, 14 June 2018, § 5.8.2.8

31 On whether a similar appreciation derives from ECHR case law, see: ECHR, 15809/02 and 25624/02, *O'Halloran and Francis vs UK*, 29 June 2007, § 56-58; ECHR, 34720/97, *Heaney and McGuiness vs Ireland*, 21 December 2000, § 54-55.

32 ECHR, *Engel vs the Netherlands*, 5100/71; 5101/71; 5102/71; 5354/21; 5370/72, 8 June 1976, § 82.

33 ECHR, *Müller-Hartburg vs. Austria*, 47195/06, 19 February 2013, § 48. See also *a contrario* the civil nature of such sanction : ECHR, *Pechstein and Mutu vs. Switzerland*, 40575/10 and 67474/10, 2 October 2018, § 58. See : SFT 142 II 243, 25 April 2016, § 3.4.

34 ECHR, *Müller-Hartburg vs. Austria*, 47195/06, 19 February 2013, § 47.

35 ECHR, *Brown vs UK*, 38644/97, 24 November 1998, § 1.

36 ECHR 18731/91, *John Murray vs UK*, 8 February 1996, § 46-47.

gathered by private entities such as a Swiss-based association.

The Swiss Criminal Procedure Code does not have a specific regulation on evidence gathered by the parties themselves. A party is free to bring (or hand over if ordered to) all kind of lawful evidence that it holds. In recent years, courts dealt with the issues of reports prepared by private investigation agencies on behalf of private entities, specifically insurance companies seeking confirmation of the severity of the incapacity to work of their clients. The SFT found that "coercive measures may in principle only be ordered by a prosecutor, a court and, in the cases provided for by law, by the police. The few cases in which private individuals may exceptionally use actual coercive measures and interfere with the fundamental rights of individuals are expressly regulated in the SCPC"[37].

The SFT has constantly affirmed its jurisprudence on this matter. Specific cases related, again, to the admissibility of a private investigation agency's report or to unauthorized recorded phone calls were reviewed under the admissibility criteria of Article 141 SCPC. Constant case law finds that evidence unlawfully obtained by private individuals can only be used provided that it could have been lawfully obtained by the law enforcement authorities and if, cumulatively, a balance of interests speaks in favor of its use[38].

It is also worth taking a view at the situation in internal investigations in the field of labour law. In fact, the gathering of evidence during disciplinary proceedings shows similarities with that process followed in the course of internal investigations conducted by employers according labour law regulation. Similarities amount (1) to the legal *nexus* rooted in private law, (2) to the fact-finding goal of the proceeding as well as (3) the duty to cooperate of the person under investigation. One dissemblance is that the duty to cooperate under labour law derives not only from the labour contract but also from Swiss statutory law of Articles 321a and 321b of the Swiss Obligation Code[39]. To the contrary, the duty to cooperate under association law derives solely from the association's regulation which an individual subject to that jurisdiction has accepted, but has no explicit statutory basis. This being said, some scholars accept that statements made by employees gathered by private entities under coercion shall be inadmissible in a criminal investigation[40]. As examples, these opinions rely on a decision rendered by the Swiss Federal Criminal Tribunal (SFCT) which considered as inadmissible statements made during (among other inquiries) an internal inquiry where the indicted person had not been made aware of his or her right against self-incrimination[41]. It is also advocated that the lack of protection of that person's right against self-incrimination in a criminal investigation may terminate the duty to cooperate of the employee in the internal labour law investigation[42]. The SFT stressed that internal inquiries should include "guarantees equivalent to those of a criminal investigation", such as the opportunity to prepare a defense, to be assisted by legal

[37] See: SFT 143 IV 387, 16 August 2017, §. 4.2.
[38] See: SFT 6B_1241/2016, 17 July 2017, § 1.2.2 ; SFT 6B_786/2015, 8 February 2016, § 1.2.
[39] See : David Raedler: Les enquêtes internes dans un contexte suisse et américain. Instruction de l'entreprise ou Cheval de Troie de l'autorité?, Lausanne 2018, p. 178.
[40] See : David Raedler, *op. cit.*, p. 185 ; Damian Graf, Strafprozessuale Verwertbarkeit von Befragungsprotokolllen interner Untersuchungen, forumpoenale 1/2016, Bern 2016, p. 42-44 ; Viktor Lieber , *op. cit.*, ad Article 113, § 3; Andreas Länzlinger, Rechtliche Rahmenbedingungen und praktische Erfahrungen im Zusammenhang mit Mitarbeiterbefragungen, Zurich 2015, p. 125; Niklaus Ruckstuhl, in Niggli/Heer/Wiprächtiger, Basler-Kommentar, Schweizerische Strafprozessordnung, Basel 2011, ad Article 158, n° 36. Similar debate may occur in a civil procedure: Ernst Schmid in Spühler, Tenchio, Infanger (ed.), Basler-Kommentar-ZPO, Basel 2010, ad Article 163, § 6.
[41] SFCT SK.2010.7, 16 June 2010 § 3.1; Damian Graf, *op. cit.*, p. 41.
[42] Andreas Länzlinger, *op. cit.*, p. 136; David Raedler, *op. cit.*, p. 194.

counsel and to have evidence taken[43]. This finding is not self-applicable in a disciplinary proceeding, but these specific rights are usually recognized by disciplinary regulations. This being said, save in cases advocated in the literature and mentioned here-above, the right to remain silent would not enter into consideration in an internal investigation regarding an employee, as this would collide with his or her statutory duty to cooperate.

In a very recent decision dated 26 May 2020, the SFT had to appreciate the admissibility, in a criminal proceeding, of the minutes of the interview of an employee during an internal enquiry. In that decision, the SFT confirmed that the employee in such a situation is not under coercion by the mere fact that his position in the labor contract might be affected if he or she refused to collaborate. Hence, the interview was a piece of evidence deemed admissible in a parallel criminal proceeding. We shall note that the decision does not mention the gravity of the sanction that the employee could face in case he or she had refused to collaborate in the specific case[44].

Hence, further criteria might prove of relevant guidance when assessing the admissibility of evidence gathered by private individuals for the benefit of a criminal proceeding, namely that:

- Coercive measures may only be imposed by private individuals where contemplated by the Swiss Code of Criminal Procedure;
- The use of coercive measures by private individuals shall be exceptional;
- The criminal justice authorities would have been in a position to lawfully gather that evidence;
- The use of this evidence shall follow a balance of interest taking into consideration the seriousness of the offence.

In order to fully appreciate the admissibility of such evidence, it must be recalled the possible ways for the criminal justice authorities to get into possession of such evidence and the possible remedies for the person under investigation to protect his or her right against self-incrimination.

B. Enforcement of the right against self-incrimination

1. Ways of transmission of information to the prosecuting authority

The information transmitted from a sport organisation to a criminal justice authority follows different routes depending on whether it is voluntarily transmitted or upon a judicial order. We will not review in the present contribution the situation where the information provided for by an individual during a disciplinary proceeding is voluntarily reported by that sport organisation to criminal justice authorities. This transmission of information is mainly limited by the provisions on false accusation[45] as well as by general civil provisions on protection of personality[46].

Should a criminal justice authority be legitimately interested in reviewing facts under investigation in a disciplinary proceeding, it may issue an order to the sport organisation to hand over documents in view of seizing them[47]. The sport organisation has to comply with such an order and remit the documentation to the criminal justice authority. Such an order may not be appealed[48] and may be enforced either under threat of criminal sanctions[49] or through search of premises[50].

An order to hand over documents is addressed to the entity which holds those

[43] SFT 4A_694/2015, 4 May 2016, § 2.4.
[44] SFT 6B_47/2020, 26 May 2020, § 5.3.
[45] Article 303 of the Swiss Criminal Code.
[46] Article 28 of the Swiss Civil Code.
[47] Article 263 and 265 SCPC.
[48] SFT 1B_477/2012, 13 February 2013, § 2.2.
[49] Article 265 (3) SCPC.
[50] Article 265 (4) and 244 SCPC.

documents. The indicted individual cannot be summoned similarly[51], as this would amount to a violation of his or her right against self-incrimination.

The trial judge will eventually appreciate the admissibility of the evidence. However, a special process is put in place to protect special interests at an earlier stage of the proceeding.

2. Sealing of documents

The holder of documents that opposes the order to hand documents may immediately seek the sealing of evidence based on Articles 248 and 264 (3) SCPC. Specifically, the sealings have to be put on the evidence gathered if the right to remain silent or to refuse to testify is invoked[52].

Hence, the holder of documents (*i.e.* the sport organisation) may invoke the *nemo tenetur* principle to seal the documents[53]. The prosecuting authority then has to file a request, within 20 days, to the Compulsory Measures Court in view of lifting the sealing. During this proceeding, the prosecuting authority will have to establish, among other conditions, that the evidence is not covered by a specifically protected legal interest[54].

As a general rule, only the (natural or legal) person that was subject to the order would participate to the proceeding regarding the lifting of the sealing. However, recent jurisprudence has extended the standing to participate to such proceeding and to seek specific reliefs. It was first confirmed that not only those persons that hold the documents to be seized may seek their sealing, but also those that have a legally protected interest, including the indicted individual[55]. This means that, should the indicted individual have a specifically legally protected interest, he or she may seek the documents to be sealed even if those documents were not in his or her possession when the criminal justice authority ordered its seizure[56]. In a very recent decision, the SFT explicitly confirmed that the indicted person could challenge the admissibility of the evidence on the basis of the violation of his or her right against self-incrimination even when that evidence was gathered from other entities. Consequently, he or she was legitimate to seek sealings be imposed on evidence that was seized or obtained from a third party[57].

In that very case, the evidence had been gathered from another state authority (on the basis of legal assistance, and not on the basis of an order). The SFT however held that it was not relevant that the evidence was gathered by the prosecutor's office through an order within the criminal proceeding or following a request for assistance between authorities[58]. The gathering of evidence must respect fundamental rights no matter how the prosecutor's office came into possession of the evidence[59].

Despite his or her participation to the criminal procedure[60], the indicted individual might not be aware that documents have been seized on which he or she may raise reliefs for protection of specific rights such as the *nemo tenetur* principle. The prosecution office has therefore the duty to inform him or her thereof *ex officio* and offer the possibility to seek that sealings be imposed on the documents[61]. However, should the

[51] Article 265 (2) (a) SCPC.
[52] Article 248 (1) and 264 (3) SCPC.
[53] See: SFT 1B_459/2019, 16 December 2019, § 2.3-2.5.
[54] SFT 1B_477/2012, 13 February 2013, § 2.1.
[55] SFT 140 IV 28, 25 November 2013, § 4.3.4 - § 4.3.6, § 4.3.8
[56] SFT 1B_487/2018, 6 February 2019, § 2.3; SFT 1B_91/2019, 11 June 2019, § 2.2 and 2.4.
[57] SFT 1B_268/2019, 25 November 2019, § 2.1 and 2.3.
[58] SFT 1B_268/2019, 25 November 2019, § 2.1; see also: SFT 1B_26/2016, 29 November 2016, § 4.2.
[59] SFT 140 IV 28, 25 November 2013, § 3.4; SFT 1B _26/2016, 29 November 2016, § 4.2. A similar consideration was observed in SFCT, TPF 2018 50, 15 March 2018, § 5.1.
[60] Article 107 (1) (b) SCPC.
[61] SFT 140 IV 28, 25 November 2013, § 4.3.4; SFT 1B_268/2019, 25 November 2019, § 2.1 and 2.3; SFT 1B_91/2019, 11 June 2019, § 2.2; SFT 1B_487/2018, 6 February 2019, § 2.3.

indicted individual be aware that such documents were seized, he or she must spontaneously and immediately extend his request for sealings to the prosecutor's office[62].

Finally, it must be mentioned that, as the indicted person must give reasons to his or her relief for sealings, he or she may not always have to make a formal claim to the prosecuting authority. Under certain circumstances, it may be sufficient to understand that that person intends to oppose the seizure of documents based on his or her legally protected right[63]. In an already mentioned case, the SFT found that a request for sealings was valid, even if it had been made before the administrative authority before which the statement was made, for the case that the protocol containing such statements would eventually be shared with a prosecuting authority[64].

3. Judicial review of the admissibility of the evidence

Regardless of the immediate ruling of the Compulsory Measures Court, the admissibility of the evidence gathered may be referred to the trial judge of the criminal case, which will make the distinction between lawful and unlawful evidence and base his or her assessment on the merit of the case accordingly. The grounds upheld by the judge of first instance may then be challenged on appeal and, as a last resort, the indicted person may challenge the judgement before the SFT[65]. In such a situation the SFT will have a full power of review as whether the evidence is admissible or not[66].

IV. Procedural public policy limitation on the admissibility of evidence

Swiss law on the admissibility of evidence in case of parallel proceedings is evolving. It gives a (yet not entirely defined but) valuable set of rules as regards the CAS Panel in the V. case assessment of the "real danger that the sport organisation will be (mis-)used by public authorities to collect information that they could be otherwise unable to obtain"[67].

As stated in introduction, it shall be reviewed whether this danger could lead to an "intolerable contradiction to justice" in the meaning of Article 190 (2) (e) PILA.

A set of arguments speaks against a contradiction amounting to a breach of public policy.

First, both ECHR and Swiss jurisprudence have drawn limitations and set criteria to the use, in a criminal proceeding, of evidence gathered in an administrative proceeding based on the duty to collaborate in order not to circumvent the right to remain silent. The situation is more blurred as regards evidence collected by private entities. However, the *rationale* of this jurisprudence lies in the finding that the *nemo tenetur* principle cannot be circumvented because the entity that took the evidence was administrative and not criminal. A similar approach should fully apply to a situation where the evidence is gathered by an entity based on private law. In both situations, the criminal justice authority shall not benefit from the possible *improper coercion* exercised by the (either administrative or private) fact-finding body that collects the evidence and that is entitled to enforce a duty to collaborate. The careful consideration of all parameters may then lead the criminal justice authority to consider that the evidence may or may not be admitted.

We will not extensively review each criterion and their global assessment, but this may include whether the statements are made on facts or imply a recognition of guilt, whether this recognition of guilt is or is not the only incriminating evidence and whether the admissibility of the evidence may be

[62] SFT 1B_487/2018, 6 February 2019, § 2.4.
[63] SFT, 1B_522/2019, 4 February 2020, § 2.1.
[64] SFT, 1B_268/2019, 25 November 2019, § 2.3.
[65] SFT 141 IV 284, 12 May 2015, § 2.2.
[66] Article 95 (a) of the Swiss Federal Tribunal Act.
[67] CAS 2017/A/5003 J.V. vs. FIFA, 27 July 2018, § 266.

challenged in court. Recent case law has put a heavy weight on the criterion of the nature of the sanction: absent a sanction of a criminal nature (such as those imposed by disciplinary bodies and despite their harshness), there may be no room left to consider an "improper coercion" that renders the evidence inadmissible. In the very recent decision rendered under 6B_49/2020, the SFT rejected that an *improper coercion* be imposed by a private entity. However, the gravity of the sanction faced by the individual under internal investigation in that specific case is unknown[68]. The admissibility of the evidence gathered in a case where that individual would face, e.g., a life-ban remains untested. The consideration that any sanction imposed by a private entity is, *per se*, not an *improper coercion* may not be satisfactory and may have to be scrutinized under ECHR case law[69]. A lighter threshold as that of a "sanction of a criminal nature" might be preferable, such as *e.g.* a "serious personal or economic disadvantage"[70].

In this review, it shall be taken consideration that evidence gathered through coercive measures by private individuals shall only be admissible where criminal justice authorities would have been lawfully authorized to collect them, should they have been in the place of that private entity. Obviously, the protocol of a hearing or documents gathered on the basis of the duty to cooperate in a disciplinary proceeding could not have been collected by a criminal justice authority. That criminal justice authority should, under the risk of absolute inadmissibility, inform the individual under investigation that he or she had a right to remain silent[71].

Furthermore, according ECHR case law reviewed in this contribution, the "improper coercion" may not only result from threats but may also occur where the authorities use subterfuge to elicit information that they were unable to obtain during questioning[72]. Criminal justice authorities are bound by the Swiss Constitution to act in good faith[73]. A "subterfuge" such as the "[misuse of a sport organisation] by public authorities to collect information that they would be otherwise unable to obtain"[74] may contradict this requirement and, hence, render the evidence inadmissible.

As it appears from this set of criteria, there is no one and only answer to the question whether a piece of evidence gathered during a disciplinary proceeding is admissible in a criminal proceeding. This is however not the purpose of this contribution. The main point of interest lies in the fact that a trial judge in a criminal court will best be in a position to appreciate these various conditions in each specific case, and rule on the admissibility of the evidence. This decision will be appealable to the competent upper court and then to the SFT (acting as an authority in criminal justice) with a full power of review. The ECHR may then be called to review whether or not this admissibility is justified.

Consequently, in the second place, the mere fact that an individual under criminal investigation has the possibility to challenge the admissibility of the evidence is a strong mitigating factor to any eventual "intolerable contradiction to justice" in the sense of the jurisprudence on *ordre public* derived from Article 190 (2)(e) PILA. According this provision, the SFT (acting as a judicial authority in international arbitration) will analyze the admissibility of the evidence gathered and review whether it may amount to a possible breach of procedural public policy. It will do so by appreciating the balance of interests between the discovery of

[68] SFT 6B_49/2020, 26 May 2020, § 5.3.
[69] In favor: Björn Hessert, Cooperation and reporting obligations in sports investigations, The International Sports Law Journal, Springer, Published online 3 June 2020, § 3.2.
[70] See: Viktor Lieber , *op. cit.*, ad Article 113, § 3. See also: Damian Graf, *op. cit.*, p. 42; David Raedler, *op. cit.*, p. 197.
[71] Article 158 (1) (b) SCPC.
[72] ECHR, 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016*, Ibrahim and others vs UK*, § 267 and case law referred to.
[73] Article 5 (3) of the Swiss Constitution.
[74] CAS 2017/A/5003 J.V. vs. FIFA, 27 July 2018, § 266.

the search and the protection of the legal interest harmed by the collection of the evidence. This was *e.g.* the situation where incriminating videos had been illegally recorded and used in a disciplinary proceeding related to a match-fixing case. Upon appeal against the CAS award, the SFT found that there was no violation of public policy at least because the concerned individual had the possibility to dispute the authenticity of the video and challenge its admissibility in the arbitral proceeding, which he did not do eventually[75]. Hence, the SFT seems to be of the view that there is no room for a violation of public policy wherever the individual has a possibility to challenge, before the trial (arbitral) judge, the admissibility of the evidence gathered.

As described in the present contribution, the individual under investigation has a first possibility of defense by seeking the sealing of the documents gathered by the disciplinary body based on a duty to collaborate. If rejected, he or she has a second opportunity to seek final exclusion of such evidence before the trial judge, with a final review by the SFT.

One may not review here the assessment that would be made by criminal court on the admissibility of the evidence gathered by a sport organisation's disciplinary body. It shall be a case-by-case assessment. However, it appears that the mere possibility to have a judge review such admissibility seems, *per se,* sufficient not to contradict the limited concept of procedural *ordre public* of Article 190 (2) (e) PILA, without reviewing in detail whether the evidence is admissible or not. We should here keep in consideration that the judge in the criminal proceeding, and in last resort the SFT in this same proceeding, will enjoy a full power of review on the admissibility of the evidence, where the SFT in the international arbitration proceeding can only review it under the narrow scope of *ordre public.*

Finally, the above-described set of criteria as well as the case law cited in this contribution do not refer to whether or not there is a "clear and imminent danger" of the evidence gathered in the disciplinary proceeding being used in a criminal proceeding, as it was described by the CAS Panel in J.V. vs FIFA[76]. We doubt that this criterion is necessary. A criminal proceeding is triggered upon the existence of a suspicion of a criminal offence, which may well arise from the situation known to the disciplinary body, but may also appear years later. In this context, it may result very difficult to determine what is an imminent danger of facing a criminal proceeding in a multi-jurisdictional environment.

V. Conclusion

At first, the J.V. vs FIFA case appears as a confrontation between the right not to self-incriminate vs the duty to cooperate, and a fierce opposition between those that benefit therefrom, *i.e.* the individual under investigation respectively the disciplinary body conducting it.

The analyzis of the later stages of the process, namely those of the criminal proceeding, offer a distinctive picture. The right to remain silent is not aimed against the sport organisation's legitimate willingness to find the truth, but contradicts the coercive means of a criminal justice authority. On the same token, the duty to cooperate is not meant to jeopardize the *nemo tenetur* principle, which may be invoked before the judge that must duly consider it, namely the criminal court judge.

The individual under both disciplinary and criminal investigations (actual or potential) faces a complex situation as he or she must prepare him- or herself to content both his or her duty to cooperate and preserve his or her right to be heard. This can be done mainly by seeking, before the criminal justice authority, the sealing of the protocol of the hearing

[75] SFT, 4A_448/2013 and 4A_362/2013, 27 March 2014, § 3.2.2.

[76] CAS 2017/A/5003 J.V. vs. FIFA, 27 July 2018, § 266.

before the disciplinary body in case it is forwarded, voluntarily or otherwise, to a criminal justice authority. In any case, this individual shall seek that evidence be deemed inadmissible.

As per the sport organisation, its aim to find the truth will not be jeopardized by informing that individual of the possibility to seek such sealings before the criminal justice authority. Should the individual under disciplinary proceeding express the willingness to request those sealings be put on documents or on the protocol of his or her testimony, the sport organisation may then forward this information to the criminal justice authority if and when the documents are handed over. This would appear as an adequate way to preserve the right to remain silent before the criminal justice authority, amounting to guarantees "equivalent to those of a criminal proceeding" in internal investigation[77] and as far as this concept should apply in case of a disciplinary proceeding carried out in parallel to a criminal investigation. Such process would enable the debate over the exercise of the right not to incriminate oneself to be conducted in the correct *forum*, namely that of a criminal proceeding and not during a disciplinary proceeding.

It therefore appears that, even though closely linked when disciplinary and criminal proceedings arise or are susceptible to arise, the right to remain silent and the duty to collaborate serve different purposes, impact different bodies and deserve distinctive legal regimes. The duty to collaborate and the *nemo tenetur* principle can actually coexist and properly serve the purposes which they are each designed for without harming either the sport organisation's right to establish the facts nor the right of the person under its jurisdiction to have his right to remain silent respected.

[77] SFT 4A_694/2015, 4 May 2016, § 2.4.

Health Data Transfer and Processing in CAS Proceedings

Vladimir Novak, Jan Philip Kühne*

I. Introduction

The General Data Protection Regulation (the "GDPR")[1] has placed the concept of data protection in the global spotlight. As anticipated, however, the combination of 'principles-based regulation'[2] and ambiguous concepts has left practitioners, decision-makers, and the data protection community with questions about the GDPR's scope and boundaries. Many of these pressing issues are before the EU Courts,[3] while others have already been clarified in practice, including through guidelines issued by the European Data Protection Board and local data protection agencies.[4]

The GDPR is designed to provide comprehensive and uniform standards for all forms of data collection, processing, and storage, regardless of the sector. This includes the sports industry. This article focuses on a discreet and complex question of the legality under the GDPR of the processing (including the transfer) of athletes health data in appeal proceedings in doping matters before the Court of Arbitration for Sport (the "CAS").[5] To the authors' best knowledge, this issue is gradually arising in the CAS proceedings, though there is little publicly available guidance or precedent to date.[6]

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[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

[2] *See* Chris Jay Hoofnagle *et al*, *The European Union general data protection regulation: what it is and what it means* (Information & Communications Technology Law, 2019), 28:1, p. 67.

[3] *See e.g., Orange Romania* (Case C-61/19), regarding the concept of 'consent' of a data subject.

[4] *See*, among others, the European Data Protection Board (the "EDBP") Guidelines 3/2018 on the territorial scope of the GDPR (Article 3) of 14 November 2018; and the European Data Protection Supervisor (the "EDPS") Guidelines on the concepts of controller, processor and joint controllership under Regulation (EU) 2018/1725 of 7 November 2019.

[5] For a general overview of questions and issues stemming from the application of the GDPR to anti-doping policy, *see* Marjolaine Viret, 'How Data Protection Crystallises Key Legal Challenges in Anti-Doping,' available at: https://www.asser.nl/SportsLaw/Blog/post/how-data-protection-crystallises-key-legal-challenges-in-anti-doping-by-marjolaine-viret.

[6] *See* 'Anti-Doping & Data Protection,' a study carried out by the Tilburg Institute for Law, Technology and Society (the "TILT") of Tilburg University and Spark Legal, October 2017, p. 4: *"With regards to the legal basis for the processing of athletes' personal data (processing ground),*

II. Application of the GDPR to the CAS Proceedings

A. Overview

The anti-doping control process entails the collection of bodily substances and biological samples (*e.g.*, urine and blood samples) and subsequent collection, processing, and storage of athletes' data derived from such samples,[7] using a variety of tools including the ADAMS database.[8] Prior to tackling the key issue as to whether the athletes' health-related data could legally be transferred to, and processed by the CAS, it is essential to set out a number of key concepts under the GDPR.

Health data under the GDPR. Pursuant to Article 4(1) GDPR, personal data is generally defined as *"any information relating to an identified or identifiable natural person ('data subject')"*. The GDPR places a particular emphasis on the category of 'sensitive data' that includes, among others, data concerning health.[9] Health data are generally defined as *"personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status,"*[10] while recital 35 clarifies that it includes *"information derived from the testing or examination of a body part or bodily substance, including from genetic data and biological samples"*. There is, in the authors' view, little doubt that data processed in connection with the collection and testing of urine or blood samples fall within the definition of sensitive health data under the GDPR.[11]

Data processing under the GDPR. The GDPR defines "processing" broadly to include the *"collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction of personal data"*.[12] The GDPR further clarifies that its application is *"technologically neutral"* and does not depend on the techniques used to process the data, including processing by automated means or manually.[13]

This article does not address the distinction between the role of a "data controller" and "data processor," which is undoubtedly relevant for the complex web of relations between the various undertakings involved in

a blurry picture emerged. Most NADAs interviewed mentioned consent as a/ the processing ground that legitimizes the processing of athletes' personal data in their view. In most cases, other grounds are also mentioned, including contract, legal obligation, public interest, and legitimate interests of the controller". See also Kathleen Paisley, *It's All About the Data: The Impact of the EU General Data Protection Regulation on International Arbitration* (Fordham Int'l L.J. 41, 2018), p. 898.

[7] *"Personal data is gathered from athletes through a variety of means. Athletes may be subjected to tests in-competition and out-of-competition. To facilitate the latter type of testing, a small number of athletes is obliged to provide daily whereabouts information. However, any athlete over which the anti-doping organisations have testing authority may be tested day and night, without advance notice. Testing is done primarily by taking urine or blood from the athletes. Personal details, such as name, home address and other identifying information of athletes are also recorded"* (*see* TILT, 'Anti-Doping & Data Protection,' p. 2).

[8] The Anti-Doping Administration and Management System (the "ADAMS") is a web-based database management tool for data entry, storage, sharing, and reporting designed to assist stakeholders and the World Anti-Doping Agency ("WADA") in their anti-doping operations in conjunction with data protection legislation.

[9] The processing of sensitive data entails the risk of discriminatory use based on prejudice (*see* Eugen Ehmann, Martin Selmayr, *DS-GVO* (C.H. Beck, 2018), Article 9, para. 1).

[10] *See* Article 4(15) GDPR. *See also* recitals 35, 45, 52–54, 63, 65, 71, 75, 91 of the GDPR.

[11] *See also* Marjolaine Viret, 'How Data Protection Crystallises Key Legal Challenges in Anti-Doping,' available at: https://www.asser.nl/SportsLaw/Blog/post/how-data-protection-crystallises-key-legal-challenges-in-anti-doping-by-marjolaine-viret; cf. TILT, 'Anti-Doping & Data Protection,' at p. 5: *"Obviously, a major part of data processed as part of doping control qualifies as sensitive data as it relates to health, including the data gathered through analysis of doping control samples"*.

[12] Article 4(2) GDPR.

[13] Recital 15 GDPR.

the anti-doping control process[14] and has already been examined in academic commentary[15] and to some extent in recent CJEU jurisprudence.[16]

Suffice it to say that processing is defined broadly and includes the various uses of health data in the course of arbitral proceedings.[17] Indeed, various commentators take the position that virtually any activity undertaken during an arbitration proceeding in connection with documentation containing personal data is likely to be considered processing, covered by the GDPR, even if it only entails tasks such as taking notes on the individuals involved.[18]

Accordingly, the adjudication of anti-doping matters requiring the review, analysis, dissemination, and storage of information related to proceedings concerning a doping allegation arguably entails the processing of sensitive health data.

Territorial application of the GDPR. Pursuant to Article 3(1) GDPR, the regulation applies to all organizations based in the European Union. The CAS, headquartered in Lausanne, Switzerland, clearly falls outside the ambit of Article 3(1).

Article 3(2) GDPR then states that the regulation also applies to the processing of personal data of subjects who are in the Union by a controller or processor *"not established in the Union,"* if the processing is, among others, related to the offering of goods and services to customers in the European Union.[19] This raises a debatable question of whether an arbitral body established outside of the EU, such as the CAS, may be deemed to offer "services" to EU-based athletes. The CAS is described as an independent institution *"which provides for services in order to facilitate the settlement of sports-related disputes through arbitration or mediation by means of procedural rules"*.[20] This supports the view that the CAS dispute resolution mechanism might, in principle, be considered a service for the parties involved.[21]

However, it is less clear whether that service is "directed" at the EU-based athletes meaning *"whether it is apparent that the* [CAS] *envisages offering services to data subjects in one or*

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[14] For further information, *see* Marjolaine Viret, 'How Data Protection Crystallises Key Legal Challenges in Anti-Doping,' available at: https://www.asser.nl/SportsLaw/Blog/post/how-data-protection-crystallises-key-legal-challenges-in-anti-doping-by-marjolaine-viret.

[15] Sibylle Gierschmann, *Gemeinsame Verantwortlichkeit in der Praxis* (ZD, 2020), pp. 69 *et seq*.; Eugen Ehmann, Martin Selmayr, *DS-GVO* (C.H. Beck, 2018), Article 4, paras. 36 *et seq*.; *see also* the EDPS Guidelines on the concepts of controller, processor and joint controllership under Regulation (EU) 2018/1725 of 7 November 2019.

[16] Cf. *Fashion ID GmbH & Co.KG v. Verbraucherzentrale NRW eV* (Case C-40/17); *Wirtschaftsakademie Schleswig-Holstein* (Case C-210/16); *Jehovan todistajat* (Case C-25/17); and *Google Spain SL e Google Inc. v. Agencia Española de Protección de Datos (AEPD) e Mario Costeja González* (Case C-131/12).

[17] *See also* Kathleen Paisley, *It's All About the Data: The Impact of the EU General Data Protection Regulation on International Arbitration* (Fordham Int'l L.J. 41, 2018), pp. 897–898.

[18] This includes (i) document retention, (ii) document review, (iii) document transfer to a third party engaged to assist during the process, including external providers of electronic data review services, external counsel, or an independent expert engaged by a party, (iv) tribunal-ordered disclosure of materials, (v) preparation, exchange and issuance of an award, (vi) document destruction. Cf. Kathleen Paisley, *It's All About the Data: The Impact of the EU General Data Protection Regulation on International Arbitration* (Fordham Int'l L.J. 41, 2018), pp. 864 *et seq*.

[19] This stems from the belief that the access to the European market is only possible at the cost of compliance with data protection regulations under EU law (*see* Stefan Hanloser, *DS-GVO* (C.H. Beck, 2018), Article 3, para. 30).

[20] *See* section 'What is the Court of Arbitration for Sport?' of the CAS website, available at: https://www.tas-cas.org/en/general-information/frequently-asked-questions.html.

[21] *See also* Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

more Member States in the Union".[22] An argument could be made that the CAS appeal procedure, incorporated into the national sporting regulations of the EU Member States, is specifically directed at (international) athletes including those based in the EU who could (and often do) appeal unfavourable national doping decisions to the CAS. But this position is not free from doubt because a foreign court or quasi-judicial body would not necessarily be deemed to "offer services" merely because an EU person may have standing before such body.

But even if the data processing by the CAS falls outside the territorial scope of the GDPR, the transfer of the athlete's health data to the CAS may nonetheless be regulated by the GDPR where the transferor's (*e.g.*, a NADO) processing of the data (including the transfer) falls within the GDPR's scope.

Against this background, this article therefore addresses two legal questions: (1) can health data be transferred from the EU to the CAS, and (2) assuming conservatively that the CAS falls within the scope of the GDPR, can athletes' health data then be processed by the CAS to render award?

B. Athletes' Health Data Transfer to the CAS

To prevent undertakings from escaping the GDPR by moving information out of the EU to "data havens," the GDPR imposes a set of requirements on permissible data transfers outside the EU.[23] Pursuant to Article 44 GDPR, a transfer of personal data intended for subsequent processing can only take place if the data subject is ensured protection at the destination. There are essentially two main grounds to consider here (in addition to the athlete's consent):[24]

Adequacy decision. Article 45 GDPR enables data transfer to a third country based on an "adequacy decision" finding that a particular jurisdiction offers adequate data protection. The European Commission has adopted an adequacy decision related to Switzerland under the previous Data Protection Directive,[25] concluding that:

"[…] *for all the activities falling within the scope of that Directive, Switzerland is considered as providing an adequate level of protection for personal data transferred from the Community"*.[26]

The Swiss adequacy decision adopted under the previous Data Protection Directive, and standing today, provides sufficient comfort that Switzerland is deemed to guarantee adequate data protection within the meaning

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[22] *See* Recital 35 GDPR. *See also* EDPB Guidelines 3/2018 on the territorial scope of the GDPR (Article 3) of 14 November 2018.

[23] Chris Jay Hoofnagle *et al*, *The European Union general data protection regulation: what it is and what it means* (Information & Communications Technology Law, 2019), 28:1, p. 73.

[24] Moreover, Article 49(1)(e) GDPR allows data transfers to third countries where the transfer is *"necessary for the establishment, exercise or defence of legal claims"*. Recital 111 explicitly states that references to legal claims apply *"regardless of whether in a judicial procedure or whether in an administrative or any out-of-court procedure, including procedures before regulatory bodies"*. *See also* Kathleen Paisley, *It's All About the Data: The Impact of the EU General Data Protection Regulation on International Arbitration* (Fordham Int'l L.J. 41, 2018), p. 880.

[25] 2000/518/EC: Commission Decision of 26 July 7 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data provided in Switzerland (notified under document number C(2000) 2304). For an overview of the evolution from the Directive 95/46/EC to the GDPR *see* Chris Jay Hoofnagle *et al*, *The European Union general data protection regulation: what it is and what it means* (Information & Communications Technology Law, 2019), 28:1, pp. 69 *et seq*.

[26] Article 45(2) GDPR sets out elements that are taken into account in adopting a decision on adequacy, including (i) the existence of data protection rules (*see* the Swiss Federal Act on Data Protection (the "FADP"); (ii) enforceable data subject rights (*see* Article 8 FADP); and (iii) an effective and independent supervisory authority (*see* Article 26 FADP).

of the GDPR.[27]

Important reasons of public interest. For completeness, absent an adequacy decision, Article 49 GDPR permits transfer of data to a third country based on a number of derogations, including if *"the transfer is necessary for important reasons of public interest"*.[28] Article 49(4) GDPR clarifies that the public interest *"shall be recognised in Union law"*. EU law arguably recognizes the importance of anti-doping in sport.[29] For instance, Article 165 of TFEU provides that *"Union action shall be aimed at* […] *developing the European dimension in sport, by promoting fairness and openness in sporting competitions"*. Moreover, the GDPR explicitly clarifies in recital 112 that public interest derogations apply:

"for example […] in order to reduce and/or eliminate doping in sport".

Accordingly, the GDPR arguably permits the transfer of athletes' health data to the CAS, either under the Swiss adequacy decision or, more generally, in furtherance of an important public interest of fighting doping in sport as per Article 49 GDPR.

C. Athletes' Health Data Processing by the CAS

The following analysis proceeds under a conservative view that the GDPR does apply territorially to data processing undertaken by the CAS. But even if the GDPR did not apply in this regard, the analysis is anyway relevant to determine whether an EU body (such as a NADO) can process the data in connection with the CAS proceedings.

Due to the sensitivity of health data, the starting point in the GDPR is that the processing of health data *"shall be prohibited,"*[30] unless one of the conditions listed in Article 9(2) GDPR can be fulfilled. This list is restrictive as neither the Union nor the Member States may establish additional exceptions.[31] The most relevant exemptions are described below.

Athlete's explicit consent (Article 9(2)(a) GDPR).[32] The CAS may process the athlete's health data based on the athlete's explicit consent. The general topic of the athlete's consent and arbitration before the CAS has been subject to a long debate that led to seminal judgments in the *Mutu* and *Pechstein* cases.[33] This article does not address the merits of this debate, which is already covered in public commentary.[34] If one takes

[27] The processing of personal data in Switzerland is primarily governed by the FADP of 19 June 1992, which is under revision to align the act with the requirements of the GDPR.

[28] Article 45(1)(d) GDPR. The transfer is subject to a "necessity" requirement as further explained below.

[29] *See* the speech delivered on 28 November 2003 by the European Commissioner for Sports Viviane Reding, announcing that the elimination of doping in sport is to become one of the priorities in the Community's policy, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_01_983; *see also* European Commission White Paper on Sport, COM(2007) 391 final, pp. 4 *et seq*. With regard to the growing importance of fighting illegal doping within European Union Law, *see* Magdalena Kedzior, *Effects of the EU Anti-Doping Laws and Politics for the International and Domestic Sports Law in Member States* (The Int'l Sports L.J., 2007), 1–2, p. 114.

[30] Article 9(1) GDPR.

[31] Cf. Council position at first reading of 8 April 2016, Interinstitutional Dossier 2012/0011 (COD), p. 12. *See also* Eugen Ehmann, Martin Selmayr, *DS-GVO* (C.H. Beck, 2018), Article 9, para. 32.

[32] *"The data subject has given explicit consent to the processing of those personal data for one or more specified purposes, except where Union or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject"*.

[33] *Mutu & Pechstein v. Switzerland*, no. 40575/10 and no. 67474/10 (ECHR 324 2018)

[34] Antonio Rigozzi and Fabrice Robert-Tissot, *"Consent" in Sports Arbitration: Its Multiple Aspects in Sports Arbitration: A Coach for Other Players?* (ASA Special Series No. 41, 2015), pp. 59 *et seq*.; Girish Deepak *et al*, 'Compulsory consent in Sports Arbitration: Essential or Auxiliary,' available at: http://arbitrationblog.kluwerarbitration.com/2016/04/12/compulsory-consent-in-sports-arbitration-essential-or-auxiliary/; Antoine Duval, 'The "Victory" of the Court of Arbitration for Sport at the European Court of Human Rights: The End of the Beginning

the position that the athlete's consent to arbitration before the CAS, as stipulated in sporting regulations and executed in the relevant doping forms attached to blood/urine samples, are valid legal declarations of consent, then a similar conclusion could be drawn in relation to the athlete's consent to the subsequent health data processing before the CAS. However, a more in-depth assessment of the relevant doping forms might be warranted given the GDPR's strict requirements related to the notion of "consent". In any event, since the GDPR empowers the athlete to withdraw consent at any time,[35] relying on Article 9(2)(a) GDPR as a legal basis for health data processing before the CAS may not always be practicable.

Dispute resolution proceedings (Article 9(2)(f) GDPR). The GDPR also enables the processing of athletes' health data if it *"is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity"*.

Recital 52 clarifies that the *"establishment, exercise, or defence of legal claims"* relates to court proceedings or administrative out-of-court procedure.[36] The GDPR does not define the term *"out-of-court procedure,"* though it is reasonable to conclude that the architects of the GDPR had different types of Alternative Dispute Resolution (including arbitration) in mind.[37] The reference to *"establishment, exercise, or defence of legal claims"* suggests that this ground is primarily available for a party to the arbitration (such as WADA) or international sports federation), rather than the CAS itself. However, an argument could be made that this provision would effectively be deprived of substance if WADA were allowed to process athletes data with a view of bringing an appeal to the CAS (*i.e.*, "establish a legal claim"), but the CAS would then not be permitted to process that data to issue an award. This suggests that the first limb of Article 9(2)(f) GDPR may well be relied on by the CAS as a legal basis for processing.[38]

In addition, the second limb of Article 9(2)(f) GDPR enables health data processing when courts are acting in their judicial capacity. This essentially allows courts to process sensitive data to the extent that it is necessary to issue a decision.[39] The obvious legal question is whether the CAS could qualify as a "court" within the meaning of the GDPR. Based on ECJ jurisprudence *ex* Article 267

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for the CAS,' available at: https://www.asser.nl/SportsLaw/Blog/post/the-victory-of-the-court-of-arbitration-for-sport-at-the-european-court-of-human-rights-the-end-of-the-beginning-for-the-cas; Antoine Duval, 'Not in My Name! Claudia Pechstein and the Post-Consensual Foundations of the Court of Arbitration for Sport,' available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2920555; and Oliver Michaelis, *Der Schiedszwang im Profisport – Unter Besprechung der aktuellen Rechtsprechung am Fall Claudia Pechstein* (SchiedsVZ, 2019), pp. 331 *et seq.*

[35] Article 7(3) GDPR: *"The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. It shall be as easy to withdraw as to give consent"*.

[36] In addition, the processing must be "necessary" for the legal claims. The "necessity" requirement cannot be interpreted restrictively because of the importance of enforcement of claims under the rule of law. Thus, each factual submission which contains sensitive data is not in violation of Article 9 solely because the submission is considered irrelevant by the court. Only with an arbitrary, deliberate disclosure of sensitive data, which is no longer connected with the matter in dispute, is the exception clause no longer applicable (cf. Eugen Ehmann, Martin Selmayr, *DS-GVO* (C.H. Beck, 2018), Article 9, para. 49).

[37] Cf. Kathleen Paisley, *It's All About the Data: The Impact of the EU General Data Protection Regulation on International Arbitration* (Fordham Int'l L.J. 41, 2018), p. 859.

[38] *See also* EDPB guidance on the derogations under Article 49 GDPR, at page 11: *"The combination of the terms "legal claim" and "procedure" implies that the relevant procedure must have a basis in law, including a formal, legally defined process"*.

[39] Eugen Ehmann, Martin Selmayr, *DS-GVO* (C.H. Beck, 2018), Article 9, para. 50.

TFEU related to arbitral tribunals,[40] the CAS would unlikely be deemed a court.[41] However, various commentators question whether a different legal analysis should apply for disciplinary bodies of sporting federations,[42] including those such as the CAS.[43] Moreover, unlike Article 267 TFEU, the GDPR does not require the "court" to belong to a Member State. In any event, absent clear guidance/precedent whether the CAS could be deemed a court for the GDPR purposes, relying on the second limb of Article 9(2)(f) GDPR as a basis for health data processing before the CAS may not be practicable.

Substantial public interest (Article 9(2)(g) GDPR). Finally, the GDPR also includes a derogation on account of "reasons of substantial public interest"[44] based on Union or Member State law:

"processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject".

As explained, recital 112 of the GDPR explicitly recognizes that anti-doping is "an important reason of public interest". It is not clear from the GDPR whether there is any meaningful difference between the concept of an "important reason of public interest" referred to in Article 49 GDPR and that of "substantial public interest" referred to in Article 9 GDPR, and in particular whether the latter is generally meant to be narrower in scope.

Concerning anti-doping specifically, it is difficult for the authors to accept that the GDPR would explicitly enable the transfer of health data outside of EU to promote fairness in sport, but not the subsequent processing, which is essential in the adjudication of anti-doping matters and, therefore, in effective enforcement of anti-doping rules.[45] In addition, Article 165 of TFEU, the primary Union law, explicitly recognizes the importance of *"developing the European dimension in sport, by promoting fairness and openness in sporting competitions".* There is, however, ambiguity regarding the extent to which EU law actually provides an explicit basis to process health data for anti-doping (adjudication) purposes.

An additional basis for the processing could also be found in national laws of EU Member States (as referenced in Article 9(2)(g) GDPR), which implement international agreements related to anti-doping (*e.g.*, the International Convention Against Doping in

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[40] When examining the concept of a court, decisive conditions include statutory origin, permanence, compulsory jurisdiction, *inter partes* procedure and the application of rules of law (cf. *Gabalfrisa SL and Others* (Case C-110/98 and Case C-147/98)). In the context of Article 267 TFEU, the ECJ additionally focused on whether the "court" in question gives binding decisions of a judicial nature or only fulfils an advisory function (*see* European Court of Justice Order of 5 March 1986 in *Greis Unterweger* (Case C-318/85)).

[41] The ECJ found in *Nordsee* (Case C-102/81), that an arbitral tribunal constituted pursuant to an arbitration agreement is purely private in nature because its authority is derived only from party autonomy, and therefore, it is not a "court or tribunal of a Member State" within the meaning of Article 234 EC Treaty. *See further* Epameinondas Stylopoulos, 'Arbitrators: judges or not? An EC approach…,' available at: http://arbitrationblog.kluwerarbitration.com/2009/03/09/arbitrators-judges-or-not-an-ec-approach/.

[42] Cf. Matthias Pechstein, *EU-Prozessrecht* (Mohr Siebeck, 2011), p. 670; Manfred A. Dauses, *Handbuch des EU-Wirtschaftsrechts* (C.H. Beck, 2013), P. II. p. 89.

[43] *See* Richard Lungstras, *Das Berufungsverfahren vor dem Court of Arbitration for Sport (CAS) im Lichte der Verfahrensgarantien gemäß Art. 6 EMRK* (Nomos, 2019), p. 66.

[44] *See* Marion Albers, Raoul-Darius Veit, *DS-GVO* (C.H. Beck, 2019), Article. 9, para. 72.

[45] *See also* TILT, 'Anti-Doping & Data Protection,' p. 5: *"Much of the data processed in the anti-doping context can be classified as sensitive personal data. Of the 10 grounds listed under Article 9 GDPR that permit the processing of such data, this study identifies the grounds set out in Article 9(2)(g) and (i) as the most appropriate grounds for the processing of sensitive personal data by NADAs in the context of anti-doping activities".*

Sport[46] or the Council of Europe Anti-Doping Convention[47]).[48] Reliance on laws of EU Member States would, however, require a case-by-case assessment.

III. Conclusion

The GDPR permits the transfer of athletes' health data to the CAS, either under the Swiss adequacy decision or in furtherance of an important public interest of fighting doping in sport *ex* Article 49 GDPR.

Moreover, assuming conservatively that the GDPR does apply to the processing conducted by the CAS, the legality of such processing raises a few questions, but is arguably permitted under a number of alternative bases *ex* Article 9. This is most notably the athlete's explicit consent (unless withdrawn) and the establishment of legal claims before the CAS. Moreover, one could also rely on the reasons of substantial public interest, albeit with a potential need to undertake a case-by-case assessment as per laws of a particular EU Member State at issue.

[46] UNESCO International Convention against Doping in Sport (2005) Doc.: ED.2005/CONVENTION ANTI-DOPING Rev.

[47] Council Of Europe Anti-Doping Convention of 16 November 1989, ETS No.135.

[48] The possibility of relying on the national implementations was pointed out by the Article 29 Working Party in the context of Directive 95/46/EC for clauses without equivalent provisions in the GDPR, cf. Opinion 3/2008 on the World Anti-Doping Code Draft International Standard for the Protection of Privacy, WP 156, p. 5.

Jurisprudence majeure*
Leading Cases

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

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

CAS 2017/O/5264, 5265 & 5266
Miami FC & Kingston Stockade FC v. Fédération Internationale de Football Association (FIFA), Confederation of North, Central American and Caribbean Association Football (CONCACAF) & United States Soccer Federation (USSF)
3 February 2020

Football; Governance (system of promotion/relegation in US soccer); Admissibility of amendments to prayers for relief; Standing to sue; Principles of interpretation with regard to FIFA statutes; Historical or purposive interpretation; Application of the principle of estoppel; Compliant interpretation; Constant practice

Panel
Mr Efraim Barak (Israel), President
Mr Félix de Luis y Lorenzo (Spain)
Mr Jeffrey Mishkin (USA)

Facts

Miami FC is a soccer club which last competed in the North American Soccer League (the "NASL"), which was granted Division 2 status by the USSF until September 2017. The NASL utilizes a split-season format similar to the *apertura* / *clausura* system in certain Latin American countries. In the last season, which ended in 2017, Miami FC was both spring and fall champion, winning the combined standings by a total of 15 points. Miami FC was registered, through its affiliation with the NASL, with the United States Soccer Federation when it lodged its claim in the present proceedings. However, in September 2018 (i.e. during these proceedings), Miami FC formally withdrew from the NASL.

Kingston Stockade FC is a soccer club which last played in the National Premier Soccer League (the "NPSL"). The NPSL is a member organisation of the United States Adult Soccer Association (the "USASA"), which in turn is a member organisation of the USSF. Although the divisional status of the NPSL is uncertain, it is undisputed that it is not one of the top three professional leagues in the USA sanctioned directly by the USSF, but only indirectly. In the last season, which ended in 2017, Kingston Stockade FC won the Atlantic White Conference Division of the NPSL.

On 29 and 30 May 2008, the FIFA Congress adopted Article 9 of the FIFA Regulations Governing the Application of the FIFA Statutes (the "RGAS"). This provision (headed *"Principle of promotion and relegation"*) provides as follows:

"1. A club's entitlement to take part in a domestic league championship shall depend principally on sporting merit. A club shall qualify for a domestic league championship by remaining in a certain division or by being promoted or relegated to another at the end of a season.

2. In addition to qualification on sporting merit, a club's participation in a domestic league championship may be subject to other criteria within the scope of the licensing procedure, whereby the emphasis is on sporting, infrastructural, administrative, legal and financial considerations. (…).

3. (…).

4. (…)".

When the Claimants filed their claim before CAS, the only Division 1 professional soccer league in the United States was Major League Soccer (the "MLS"). The NASL and the United Soccer League ("USL") were both USSF-sanctioned Division 2 professional soccer leagues. The sanctioning of professional soccer leagues is subject to periodic review by

USSF. At present, the MLS remains the Division 1 professional soccer league, while the United Soccer League Championship (the "USLC") is the Division 2 league, and USL League One – a second league created by the USL – and the National Independent Soccer Association (the "NISA") are Division 3 leagues. The NASL, to which Miami FC was affiliated, is no longer sanctioned by USSF as a professional league and is currently inactive.

All these leagues, as well as the NPSL, are so-called "closed leagues", i.e. no system of promotion and relegation is in force among these leagues. In order for a soccer club to be able to compete in the highest division, i.e. the MLS, a franchise must be obtained from the MLS. Acquiring a franchise requires, *inter alia*, an investment in the range of USD 150,000,000 – USD 200,000,000.

The Claimants argued that the Respondents, by operating the MLS (or allowing the MLS to operate) as a "closed league", deprived the Claimants of any (realistic) chance to "climb the ladder", as teams from lower divisions had no chance to gain access to the MLS through sporting merit. Consequently, teams from lower divisions had *de facto* no realistic chance to qualify for any international club competition. The Claimants argued that the disregard of the principle of promotion and relegation based on sporting merit had the effect of depriving the Claimants of any right to access the USA, CONCACAF and FIFA premium club markets and caused severe financial damage to the Claimants.

The Claimants requested CAS to declare i) that by not enforcing the principle of promotion and relegation in US professional soccer, the Respondents violated Swiss law on associations and Swiss competition law; ii) that the implementation of such principle was mandatory pursuant to Article 9 RGAS; iii) that the Respondents be ordered to adopt such principle immediately; and iv) that the Respondents be ordered to take all measures necessary to implement such principle in US professional soccer.

Reasons

1. Admissibility of amendments to prayers for relief

   Before the hearing, the Claimants had requested that the modification in their Statement of Claim of their prayers for relief from "US soccer" to "US professional soccer" be disregarded and that it be reverted to the original wording of the prayers for relief as submitted in the Request for Arbitration.

   For the Panel, the Claimants' narrowing of the scope of their prayers for relief in the Statement of Claim in comparison with the Request for Arbitration was undoubtedly permissible and reflected a deliberate choice made by the Claimants. However, this amendment was binding on the Claimants and constituted a waiver of the claims not reiterated in the Statement of Claim. As the Panel explained, having submitted different prayers for relief before the filing of the Statement of Claim does not grant parties the right to subsequently and suddenly rely again on the initial prayers for relief as submitted in the Request for Arbitration (but deliberately altered in the more comprehensive Statement of Claim) and request that the Panel decide the case on such basis. Accepting such conduct would put Respondents at a loss against which claims they would have to defend themselves.

   The Panel found that the Claimants' desire to revert to their original prayers for relief appeared to have been motivated solely to avoid any potential problems with their

standing to sue, given that they were no longer affiliated with any professional league. This could not be accepted as a valid argument to modify prayers for relief after the filing of the Statement of Claim. Consequently, the Panel decided to deny the Claimants' request.

2. Standing to sue

   The Respondents had objected to the Claimants' standing to sue as neither of the Claimants was affiliated with any professional league sanctioned by USSF. Accordingly, neither of the Claimants could have been said to have an interest in having the principle of promotion / relegation implemented in US professional soccer because they could not have benefitted from a favourable judgment and hence lacked standing.

   While pointing out that, in view of all the facts and documents submitted by the parties, the issue of the Claimants' standing to sue was complex and not easy to solve, the Panel finally considered that it was not required to adjudicate and decide on such issue, because the Claimants' claim had, in any event, to be dismissed on the rest of the merits. As the plea relating to the lack of standing to sue was a question related to the merits of the case, this issue did not necessarily have to be addressed first. Indeed, an arbitral tribunal was free to determine how to address the sequence of the different substantive questions at stake in legal proceedings.

3. Principles of interpretation with regard to FIFA statutes; Historical or purposive interpretation

   According to the Claimants, Article 9 RGAS required that each of FIFA's member associations was obliged to implement a system of promotion and relegation in its territory and that such system was to be principally based on sporting merit. For the Panel, therefore, the core of the dispute between the Parties was coming down to an interpretation of what Article 9 RGAS brought about or was supposed to bring about.

   The Panel found that since the relationship among the Parties was not contractual in nature, Article 9 RGAS was not to be interpreted according to the general rules of interpretation of contracts, but rather to those applicable to statutes and articles of by-laws of legal entities. According to the Panel, the starting point for interpreting had to be the wording of the provision (literal interpretation). There was no reason to depart from the plain text, unless there were objective reasons to think that it did not reflect the core meaning of the provision under review. Where the text was not entirely clear and there were several possible interpretations, the true scope of the provision had to be narrowed by taking into account all the pertinent factors, such as its relationship with other legal provisions and its context (systematic interpretation), the goal pursued, especially the protected interest (teleological interpretation), as well as the intent of the legislator as it was reflected, among others, from the drafting history of the piece of legislation in question (historical interpretation).

4. Application of the principle of estoppel

   While acknowledging that the wording of Article 9 RGAS could arguably lead one to believe that Article 9 RGAS was universally applicable and that the system implemented in the United States was not compliant with Article 9 RGAS, the Panel recalled that, according to the principles of interpretation, this was not necessarily

decisive. The relations between Article 9(1) and Article 9(2) RGAS, the fact that this provision did not state that utilizing a system of promotion and relegation was mandatory upon all FIFA members, and that the provision had been enacted when there were FIFA members that did not utilize a system of promotion and relegation, warranted that the Panel proceeded in the attempt to find the true meaning and intention of the provision by using other interpretative tools.

The Respondents had argued that Article 9 RGAS had not been implemented to require member associations to implement a system of promotion and relegation. According to the Panel, in order to ascertain the purpose of the draftsman in adopting a certain provision, guidance was particularly to be sought in the period prior to the adoption of the provision, rather than the purpose given to it after its adoption and implementation. A historical or purposive interpretation was therefore to be favored, in particular by looking at the numerous working documents (*travaux préparatoires*) available regarding the implementation of the provision. Looking at the minutes of the meetings of the FIFA Strategic Committee, the FIFA Legal Committee and the FIFA Executive Committee as well as the minutes of the FIFA Congress, the Panel found that it was clear that although FIFA considered the principle of promotion and relegation important, it was also sympathetic to the specific situations in some countries where promotion and relegation had not been implemented. In this respect, reference had specifically been made to the United States and Australia. This showed that FIFA had agreed that existing closed leagues would be exempted from the obligation to implement the principle of promotion and relegation.

According to the Panel, the assurances given to USSF and CONCACAF in the meetings of the FIFA Legal Committee, the FIFA Executive Committee and the FIFA Congress prevented FIFA from suddenly changing its course of action and to act contrary to such assurances. In this respect, such conduct would have been contrary to the principle of "estoppel" or *venire contra factum proprium*.

5. Compliant interpretation; Constant practice

The Claimants had however argued that the interpretation of a provision could change over time and that, if the practical application of the provision was different from the initial interpretation, the more contemporaneous interpretation might prevail. Reference was made to letters sent to the Football Federation Australia at one point after the implementation of Article 9 RGAS in particular by the former Secretary General of FIFA where he had indicated that the principle of promotion and relegation was of fundamental importance to FIFA and a mandatory principle binding on all FIFA Member Associations, expressly referring to said provision.

In answering this argument, the Panel noted that the above statement of the former Secretary General of FIFA was the only evidence on file supporting the Claimants' interpretation of Article 9 RGAS. The Panel however found that one statement of a FIFA executive could not take precedence over the entire legislative process that had preceded the implementation of Article 9 RGAS. Besides, even after the implementation of this provision, statements of other FIFA executives had demonstrated that FIFA still accepted that USSF was exempt from the principle of promotion and relegation, and that it did not intend to change this position.

Given that the principle of promotion and relegation had neither been implemented in the United States when Article 9 RGAS was enacted, nor afterwards, and consistent with the finding that FIFA's conduct subsequent to the implementation of Article 9 RGAS could not lead to the conclusion that its purpose had significantly changed over time such that a certain constant practice of FIFA would now warrant a different interpretation of Article 9 RGAS, the Panel held that it was never the intention of FIFA that Article 9 RGAS would be applicable to USSF. Accordingly, USSF was not required to implement a system of promotion and relegation on the basis of sporting merit in the United States.

Decision

As a result, the Panel decided that the claims filed by Miami FC and Kingston Stockade FC against FIFA, CONCACAF and USSF were dismissed.

CAS 2018/A/5945
Maxim Astafiev v. FC Mordovia & Football Union of Russia (FUR)
28 June 2019

Football; Employment-related dispute; Choice of place of arbitration and PILA; Choice of law; Article R58 CAS Code; Failure of a party to participate in the proceedings; Failure to comply with order to produce documents and adverse inference; Principle of burden of proof; Burden of proof by club for alleged salary payment

Panel
Mr Marco Balmelli (Switzerland), Sole Arbitrator

Facts

Mr Maxim Astafiev (the "Player" or the "Appellant") is a Russian professional football player formerly employed by the Non-Commercial Partnership Football club "Mordovia".

Non-Commercial Partnership Football club "Mordovia" (the "First Respondent" or the "Club") is a Russian professional football club. It is affiliated to the Football Union of Russia which is, in turn, affiliated to the Fédération Internationale de Football Association ("FIFA").

The Football Union of Russia (the "Second Respondent" or the "FUR") is a Russian public sports organization and is affiliated to FIFA.

On 6 June 2016, the Player and the Club entered into an employment contract valid until 31 May 2018 (the "Contract"). The Contract contained, *inter alia*, the following terms:

"Article 7. Payment for Labor

[…]

7.4. The Employer when entering into the Contract is obliged to pay the Employee by May 31, 2018 money in the amount of 3 450 000 (three million four hundred and fifty thousand) rubles in the following order:

- 862 500 (eight hundred sixty thousand and five hundred) rubles by November 1, 2016;

- 862 500 (eight hundred sixty thousand and five hundred) rubles by March 1, 2017;

- 862 500 (eight hundred sixty thousand and five hundred) rubles by September 5, 2017;

- 862 500 (eight hundred sixty thousand and five hundred) rubles by March 1, 2018;"

The Contract was terminated on 31 May 2018.

On 19 July 2018, the Player lodged a claim against the Club before the FUR Dispute Resolution Chamber (the "FUR DRC"), requesting, *inter alia*, the payment of three installments of the remuneration according to Article 7.4. of the Contract.

On 9 August 2018, the FUR DRC issued its decision (the "Appealed Decision"). The FUR DRC partially upheld the claim regarding the remuneration according to Article 7.4. of the Contract. Specifically, it condemned the Club to pay the fourth installment in the total amount of RUB 862'500 (para. 5 of the Appealed Decision) to the Player. The FUR DRC dismissed the Player's claim regarding the second and third installment in the amount of RUB 1'725'000 holding that the Club had submitted satisfactory evidence showing that it had paid the second and third installment according to Article 7.4. of the Contract. The FUR DRC specified that the evidence filed showed that the payments regarding monthly salary exceeded the amounts owed and that these overpayments of salary covered the second and third installment. That further the

Player had failed to explain which other debts should have been covered by this overpayment except for the second and third installment.

On 24 September 2018, in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "Code"), the Club filed its statement of appeal at the Court of Arbitration for Sport (the "CAS") against the Appealed Decision.

Neither the First nor the Second Respondent – despite having been duly invited, on numerous occasions and throughout the proceedings, by the CAS Court Office and by the Sole Arbitrator – participated in the proceedings.

On 8 April 2019, and in accordance with Article R44.3 and Article R57.3 of the Code, the Sole Arbitrator ordered the Club to produce additional documents, within a deadline of ten days as of receipt of the order. The First Respondent was advised that if it refused to comply with the production order, the Sole Arbitrator may infer that the documents would be adverse to its interests. The order was delivered via email and courier to the Club on 11 April 2019. The Club failed to produce the requested documents within the set deadline, and at any time later.

Reasons

1. Choice of place of arbitration and PILA

   Having initially affirmed its jurisdiction to adjudicate the present dispute and the admissibility of the appeal, the Sole Arbitrator analysed the law applicable to the proceedings. The Sole Arbitrator developed that the choice of the place of arbitration also determines the law to be applied to arbitration proceedings. For arbitrations held in Switzerland the Swiss Private International Law Act ("PILA") is the relevant arbitration rule of law. Furthermore, Article 176 para. 1 PILA provides that the provisions of Chapter 12 PILA regarding international arbitration shall apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its usual residence in Switzerland. Given that CAS has its seat in Lausanne, Switzerland, the PILA is applicable.

2. Choice of law

   The Sole Arbitrator further outlined that Article 187 para. 1 of the PILA foresees, *inter alia*, that *"the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such a choice, according to the law with which the action is most closely connected"* and that the respective choice of law by the parties can be made tacit and/or indirect, by reference to the rules of an arbitral institution. Furthermore, in agreeing to arbitrate a dispute according to the Code, the parties submit themselves to the conflict-of-law rules contained in the Code, in particular to Article R58 of the Code.

3. Article R58 CAS Code

   As regards Article R58 of the Code, the Code's provision that indicates how to determine the substantive rules/laws to be applied to the merits of the dispute, the Sole Arbitrator detailed that the provision recognizes the pre-eminence of the *"applicable regulations"* to the *"rules of law chosen by the parties"*, the latter only being applicable *"subsidiarily"*. Article R58 of the Code does not admit any derogation and imposes a hierarchy of norms, which implies the obligation to resolve the matter pursuant to the regulations of the relevant *"federation, association or sports-related body"*. Should this

body of norms leave a *lacuna*, it is to be filled by the *"rules of law chosen by the parties"*.

The Sole Arbitrator, taking into account that in the Contract, the Player and the Club had agreed that both the Player and the Club have *"… the rights and responsibilities in accordance with the labor legislation and other normative legal acts of the Russian Federation containing employment and labor laws, collective agreements, agreements, as well as local normative acts, adopted by the Employer taking into consideration the norms of the FUR, regulatory documents of FIFA, UEFA and the FUR"* deemed appropriate to apply the FUR Regulations on disputes resolution (the "FUR Regulations") and, on a subsidiary basis, Russian law, to the dispute.

4. Failure of a party to participate in the proceedings

Thereupon, in light of the fact that both the First Respondent and the Second Respondent did not participate in the present proceedings, the Sole Arbitrator underlined that in commercial arbitration, it is well established that the failure of one party to participate in the proceedings cannot be taken as acquiescence in the other party's claims or allegations. Therefore, even if a party fails to take part in the arbitral procedure, the tribunal must proceed to determine the facts of the case. Similarly, in arbitration under the rules of the Code, Article R55 para. 2 of the Code provides that (even) if *"the Respondent fails to submit its answer by the stated time limit, the Panel may nevertheless proceed with the arbitration and deliver an award"*. Accordingly, and based on Article R55 para. 2 of the Code, the Sole Arbitrator concluded that the failure of the Club and FUR to participate in the arbitration has no direct effect on the jurisdiction for the present case and he therefore proceeded with the arbitration notwithstanding the two parties' refusal to take part in the proceedings.

5. Failure to comply with order to produce documents and adverse inference

As regards the fact that the First Respondent, despite the order under Article R44.3 in connection with Article R57.3 of the Code to produce specific documents, had failed to comply with the production of any documents, the Sole Arbitrator held that, as the First Respondent had also been informed, it is generally accepted in international arbitration that if a party refuses to comply with a production order without a reasonable excuse, the Panel may infer that such documents would be adverse to the interests of said party. The Sole Arbitrator held that this principle must also apply to the present arbitration.

6. Principle of burden of proof

In analysing the burden of proof applicable to the present case, the Sole Arbitrator noted that the distribution of the burden of proof as outlined in Article 24 of the FUR Regulations is congruent with general rules and principles and consistent with the well-established CAS jurisprudence, *i.e.* facts pleaded have to be proven by the party who derives rights from these facts, while the other party is required to prove such facts as exclude, or prevent, the efficacy of the facts proved, upon which the right in question is based. Hence, it is well established that any party wishing to prevail on a disputed issue must discharge its burden of proof, *i.e.* must provide evidence of the facts on which its claim has been based. In order to fulfil its burden of proof, a party must provide all relevant evidence that it holds, and, with reference thereto, convince the Panel that the facts it pleads are true, accurate and produce the

consequences envisaged by the party. If these requirements are complied with, the party has fulfilled its burden and the burden of proof is transferred to the other party.

The Sole Arbitrator found that accordingly, the Player bears the burden of proving the agreement between the Player and the Club regarding the amount owed of RUB 1'725'000 and that such payment is due; the Club had to provide evidence for the alleged payments made. As the Player had submitted the Contract according to which he is entitled to the payments claimed, the Sole Arbitrator found that, based on the documents on file, it was established that the Player and the Club validly concluded the Contract, with Article 7.4. of the Contract clearly lining out the Club's obligation to pay four separate installments, each in the amount of RUB 862'500, and that those installments had become due. In conlusion, the Player has proven that he is entitled to the second and third installments.

7. Burden of proof by club for alleged salary payment

Finally, the Sole Arbitrator examined whether the Club, as found by the FUR DRC in the Appealed Decision, had satisfied its burden of proof regarding the alleged payments. In this context, the Player argued that while the FUR DRC had ordered the Club to provide all the documents related to the payment of salary to the Player for the entire period of his work, the Club had refused to provide these documents, a refusal which, according tot he Player, has not been taken into account by the FUR DRC. According to the Player, the FUR DRC rather considered that the Player himslef had failed to verify the accuracy of the calculation of his claim and the purpose of certain payments made by the Club and had thereby imposed upon the Player the burden of proving the payments made by the Club in violation of Article 24 para. 4 of the FUR Regulations.

The Sole Arbitrator noted that the FUR DRC, based on three bank payment orders provided by the Club, had concluded that the Club had proven payment of the second and the third installments and that it had paid more than the agreed salaries for certain time periods. The FUR DRC further found it established that the alleged overpayments were considered set off with the second and third installments. Unlike the FUR DRC, and based on the documents submitted by the Player in the proceedings before CAS, the Sole Arbitrator found that the Club had organized its salary payment procedures in an incomprehensive and non-transparent manner and that the respective documents raise substantial doubts whether indeed the Club had paid the second and third installments. Amongst others it appeared to the Sole Arbitrator from the payment orders presented by the Club that the Club had paid several monthly salaries in default of the Contract, with delay. In addition, the Club had not clearly and in a non-transparent way indicated the purpose of the payments in the payment orders, creating difficulties in tracking these payments. In summary, despite the Club having been ordered by the Sole Arbitrator to provide full documentation regarding the payments made to the Player during his employment from June 2016 to June 2018, including all payment orders and all pay slips, the Club failed to produce this evidence without any excuse; hence it remained unclear which payments were made in which period for which obligation under the Contract. The Sole Arbitrator underlined that the Club, as an employer, had all the pertinent evidence in its hand to

prove all payments made to its employee and therefore provide an explanation for all payments that can be retraced and recalculated based on the Contract. However, the Club failed to prove the payment of the second and third installments. Furthermore, the Sole Arbitrator found that according to the concept of burden of proof, the Club bears the risk if the payment of the amounts owed remains unproven. Specifically, as the Club, without any excuse, failed to produce the evidence it had been ordered to produce, in accordance with generally accepted principles of international arbitration, the Sole Arbitrator infered that the full documentation regarding all payments made to the Player during his employment would be adverse to the interests of the Club, *i.e.* would show that the Club in fact did not pay the second, third and fourth installments according to Article 7.4. of the Contract.

Decision

The Sole Arbitrator upheld the appeal filed by Maxim Astafiev on 24 September 2018 against the decision issued on 9 August 2018 by the FUR Dispute Resolution Chamber. He further set aside para. 5 of the FUR Dispute Resolution Chamber decision and instead ordered the Club to pay RUB 2'587'500 to Maxim Astafiev.

CAS 2018/A/5959
Club Al Kharaitiyat v. Fédération Internationale de Football Association (FIFA)
11 June 2019

Football; Disciplinary sanction under Article 64 FIFA Disciplinary Code (FDC); "Outstanding amounts due" decisive element for imposition of sanctions; Predictability of sanctions provided for by the FDC; Applicability of the Treaty on the Functioning of the European Union ("TFEU") in CAS proceedings; Proportionality of fine imposed on club; Aggravating factors in determination of adequate sanction; Grace period as prerequisite for further sanctions; *Ne bis in idem* and multiple sanctions under Article 64 FDC; Prerequisites to amend common practice; FIFA Circular no. 1628 of 9 May 2018

Panel
Mr Hendrik Kesler (the Netherlands), Sole Arbitrator

Facts

Club Al Kharaitiyat (the "Appellant" or the "Club") is a football club with registered office in Al Khor, Qatar. The Club is registered with the Qatar Football Association (the "QFA"), which in turn is affiliated to the Fédération Internationale de Football Association.

The Fédération Internationale de Football Association (the "Respondent" or "FIFA"), an association under Swiss law with registered office in Zurich, Switzerland, is the world governing body of international football.

On 12 June 2016, following a contractual dispute between the Club and football player Mr Issiar Dia (the "Player"), the latter lodged a claim against the Club before the FIFA Dispute Resolution Chamber (the "FIFA DRC"), requesting that the Club be ordered to pay him remuneration in the amount of USD 1,500,000, plus default interest.

On 13 October 2016, the FIFA DRC rendered its decision (the "FIFA DRC Decision"), partially accepting the Player's claim and ordering the Club to pay USD 1,330,000 plus 5% interest p.a. as from 12 June 2016 until the date of effective payment.

On 10 March 2017, following an appeal filed by the Club on 12 January 2017 against the FIFA DRC Decision with the Court of Arbitration for Sport ("CAS"), CAS issued a termination order, by means of which the CAS procedure related to the Club's appeal against the FIFA DRC Decision was terminated and removed from the CAS roll.

On 5 May 2017, the Player provided the FIFA Players' Status Department (the "FIFA PSD") and the QFA with a settlement agreement (the "Settlement Agreement") concluded between him and the Club. Under the Settlement Agreement, the Club agreed to pay the amount of USD 1,130,000.00 to the Player as compensation for breach of contract of employment and interests for the final settlement of the dispute in front of the FIFA DRC. Payment had to be made in two instalments: USD 530,000 latest on the day of the Settlement Agreement's signature and USD 600,000 latest on 31 July 2017.

On 22 August 2017, absent payment by the Club and following various requests by the Player to forward the case to the FIFA Disciplinary Committee (the "FIFA DC"), the FIFA PSD informed the parties that the case would be forwarded to the FIFA DC for consideration and a formal decision.

On 30 October 2017, the Player informed the Secretariat to the FIFA DC (the "Secretariat") that the Club had not paid the amount due and requested the case to be submitted to the FIFA DC.

On 8 March 2018, the Player again requested the FIFA PSD to submit the case to the FIFA DC. Also on 8 March 2018, the Secretariat opened disciplinary proceedings against the Club due to its failure to respect the final and binding FIFA DRC Decision.

On 1 April 2018, the Club and the Player reached an agreement regarding a payment plan (the "Payment Plan") under which the Club essentially agreed to pay the amount of USD 778,630 at the latest on 5 April 2018 as well as to pay the amount of USD 675,877 no later than 29 May 2018.

On or before 5 April 2018, the Club paid the first instalment of the Payment Plan of USD 778,630.

On 9 May 2018, FIFA published FIFA Circular no. 1628 regarding its policy in respect of violations of Article 64 FDC, explaining that while under the "Current procedure", solely a points deduction would be imposed on the perpetrator of Article 64 FDC, under the "New Procedure", applicable as of 23 May 2018, it is possible to impose a points deduction and/or a transfer ban.

On 13 July 2018, absent payment by the Club of the second instalment under the Payment Plan, the FIFA DC rendered its decision (the "Appealed Decision"), finding that the Club had infringed Article 64 of the FIFA Disciplinary Code (the "FDC") as it is guilty of failing to comply in full with the FIFA DRC Decision. The Appealed Decision, in its relevant part, further determined as follows:

2. The [Club] is ordered to pay a fine to the amount of CHF 25,000. The fine is to be paid within 60 days of notification of the present decision. […].

3. The [Club] is granted a final deadline of 60 days as from notification of the present decision in which to settle its debt to the [Player].

4. If payment is not made to the [Player] and proof of such a payment is not provided to the secretariat to the FIFA Disciplinary Committee and to the [QFA] by this deadline, six (6) points will be deducted automatically by the [QFA] without a further formal decision having to be taken nor any order to be issued by the FIFA Disciplinary Committee or its secretariat.

5. In addition, if payment is not made to the [Player] and proof of such a payment is not provided to the secretariat to the FIFA Disciplinary Committee and the [QFA] by the aforementioned deadline, a ban from registering new players, either nationally or internationally, for two (2) entire and consecutive registration periods will be imposed on the [Club] as from the first day of the next registration period following the expiry of the granted deadline. Once the deadline has expired, the transfer ban will be implemented automatically at national and international level by the [QFA] and FIFA respectively, without a further formal decision having to be taken nor any order to be issued by the FIFA Disciplinary Committee or its secretariat. […]

6. If the [Club] still fails to pay the amount due to the [Player] even after the deduction of points and the complete serving of the transfer ban in accordance with points III./4 and III./5 above, the FIFA Disciplinary Committee, upon request of the [Player], will decide on a possible relegation of the [Club's] first team to the next lower division.

On 19 July 2018, the operative part of the Appealed Decision was communicated to the parties.

On 20 September 2018, the grounds of the Appealed Decision were communicated to the

Club, determining, to the extent relevant here, *inter alia*, as follows:

In accordance with art. 64 par. 1 c) of the FDC and with the Circular no. 1628, the [Club] *is hereby warned and notified that, in the case of default within the period stipulated, points will be deducted, a transfer ban may also be pronounced or demotion to a lower division may be ordered.*

On 11 October 2018, in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "Code"), the Club filed its statement of appeal at the CAS against FIFA.

On 7 February 2019, a hearing was held in Lausanne, Switzerland.

Reasons

1. "Outstanding amounts due" decisive element for imposition of sanctions

   Having to start with affirmed its jurisdiction to adjudicate the present dispute and the admissibility of the appeal, the Sole Arbitrator underlined that the Club had not disputed the violation in question, *i.e.* the Club's failure to fully comply with the Appealed Decision and that it still owed the Player an amount of USD 675,877, plus interest. The Sole Arbitrator then turned to analyse the sanctions imposed on the Club and, at the outset, emphasized that under Article 64 FDC, the "outstanding amounts due" constitutes the most logical nexus between the severity of the violation committed and the sanctions to be imposed and therefore "outstanding amounts due" is also the most important element in deciding the sanctions to be imposed on a club for violating Article 64 FDC. The reference to "outstanding amounts due" is sufficient to corroborate the sanctions imposed.

2. Predictability of sanctions provided for by the FDC

   With the aim of invalidating the sanctions imposed on it in the Appealed Decision (*i.e.* a fine of CHF 25,000, a potential 6-point deduction and a potential transfer ban of two registration periods), the Club argued that the elements and criteria used by the FIFA DC to impose disciplinary measures were not duly determined insofar as Article 64 FDC does not establish a clear parameter regarding the dosimetry of the sanctions to be imposed. Consequently, such procedure does not comply with the "predictability test" and therefore the Appealed Decision violates FIFA regulations and general principles of law. FIFA on the other hand contended that the "predictability test" only requested that the stakeholders subject to such provision and proceedings must know or must be able to know that a certain conduct is wrong in order for a disciplinary sanction to be validly imposed. In order for the principles of predictability and legality to be respected, it is not necessary that the sanctioned stakeholder should know in advance the exact sanction that will be imposed. The Sole Arbitrator found that the potential sanctions for failure to respect FIFA decisions are clearly set out in Article 64 FDC (*i.e.* a combination of a fine, points deduction and a transfer ban) and that furthermore, by publishing, on 9 May 2018, FIFA Circular no. 1628, FIFA had provided more transparency about the procedure to be followed in case of a violation of Article 64 FDC. Accordingly the Sole Arbitrator dismissed the Club's argument that the Appealed Decision must be annulled on the ground that it was not clear to the Club what sanction could be imposed for violating Article 64 FDC.

3. Applicability of the Treaty on the Functioning of the European Union ("TFEU") in CAS proceedings

Thereupon, the Sole Arbitrator assessed whether – as contended by the Club in the context of its critism that FIFA DC decisions are not published – in addition to the law applicable in the case at hand *i.e.* the various regulations of FIFA, in particular the FDC, and, in case of gaps in the various FIFA regulations, additionally Swiss law - the Treaty on the Functioning of the European Union ("TFEU") is directly applicable to the proceedings before the FIFA DC and the present CAS proceedings. Whereas in the Club's view, such transparency is required based on Article 15 of the TFEU, FIFA submitted that the EU Transparency Register is irrelevant as it had been created for purposes unrelated to any of the matters surrounding the present procedure.

The Sole Arbitrator determined that in order for a party to CAS proceedings to successfully rely on the (direct) applicability of the TFEU to its case, the party had to prove that the provisions of the TFEU relied upon are directly applicable. Specifically, it had to establish *e.g.* if and how a decision appealed against or the conduct of the first instance judicial body had any impact on the European internal market or would otherwise violate EU Competition Law. The Club failed to establish that the FIFA DC, by failing to publish its decisions, did not act in accordance with Article 15 TFEU and the EU Transparency Register. Rather, based on the publicly available (through arbitral awards issued by CAS in appeal or otherwise) FIFA DC decisions, the Club could reasonably have anticipated that sanctions, such as the ones imposed by means of the Appealed Decision, would be imposed on it.

4. Proportionality of fine imposed on club

Turning thereupon to the specific sanctions imposed on the Club and the Club's subsidary request to reduce the sanctions, the Sole Arbitrator assessed the proportionality of the sanctions. Starting with an analysis of the fine, the Sole Arbitrator noted that according to the Club, the fine of CHF 25,000 was disproportionate, in particular because in five previous FIFA DC decisions, identical fines were imposed on other clubs that had much higher outstanding amounts. The Sole Arbitrator, having analysed the jurisprudence of the FIFA DC provided by the Club as well as the respective interpretation thereof as submitted by both parties, found that, when taking into account the outstanding amount due, the fine of CHF 25,000 was not disproportionally high in comparison with other cases. Given the outstanding amount due of approximately USD 675,877, the fine amounts to approximately 3.69%, *i.e.* remained at a lower percentage than the fines imposed in the referred to decisions. Furthermore, it had already been determined in CAS jurisprudence that a fine of 4.37% for a violation of Article 64 FDC was not disproportionate. In this context the Sole Arbitrator further noted that the FIFA DC was careful in not imposing a fine that was too high, because, as acknowledged also by FIFA itself, high fines may indeed be counterproductive. In conclusion the Sole Arbitrator held that the fine of CHF 25,000 does not seriously limit the Club's abilities to pay the Player the outstanding amount due and therefore the fine is not disproportionate.

5. Aggravating factors in determination of adequate sanction

A question also discussed in the context of the proportionality of the fine resulted from

the fact that the Club and the Player, following the FIFA DRC Decision and their Settlement Agreement - had concluded a Payment Plan and that the Club – prior to the Appealed Decision – had paid a part of the debt (USD 778,630 of in total USD 1,330,000 plus interest) under the Payment Plan. Whereas in the opinion of the Club, these facts should have been taken into account as a mitigating factor, FIFA underlined that the Club, since it failed to pay the remaining amount under the Payment Plan, failed to comply with its obligations towards the Player. The Sole Arbitrator found that a partial payment of the total outstanding amount *per se* does not warrant a reduction of the fine that would normally be imposed, in particular not in circumstances where the amount owed to the Player is still significant. To the contrary, the Sole Arbitrator considered it to be an aggravating factor that the Club, following issuance of the FIFA DRC Decision, concluded a Settlement Agreement and a Payment Plan with the Player, while it did not comply with any of the obligations set out in the Settlement Agreement and only partially complied with its obligations under the Payment Plan. Accordingly, the Club breached three subsequent agreements with the Player.

6. Grace period as prerequisite for further sanctions

   The Sole Arbitrator thereupon addressed the period of grace of 60 days as foreseen in the Appealed Decision prior to the imposition of any further sanctions on the Club. This as the Club argued that the FIFA DC failed to provide any commentary or grounds to limit the period to 60 days, while, in line with its usual jurisprudence, it should have taken into account that the Club had paid more than half of its debt and had made an undertaking to pay the outstanding amount through payment of instalments within a reasonable concrete time period; therefore the Club deserved a period of grace of at least 90 days. Conversely, FIFA argued that the Club's attempts to reach an amicable agreement could not be taken into account and that the Club had not proven what difference an additional period of 30 days would make on its duty to pay its debts.

   The Sole Arbitrator underlined that according to Article 64(1)(b) and (c) FDC, the only mandatory aspect for the FIFA DC to impose further sanctions is to grant a grace period. That furthermore, no specific reasoning in this regard by the FIFA DC was required. A club could not contest a grace period as unreasonable without providing any argument as to why an additional period of grace would make any difference. Taking into account the FIFA DC jurisprudence in this regard and the fact that already since 13 October 2016 (*i.e.* the date the FIFA DRC Decision was pronounced), the Club had failed to comply with its obligations, the Sole Arbitrator determined that the specific period of grace foreseen in the Appealed Decision is not disproportionate.

7. *Ne bis in idem* and multiple sanctions under Article 64 FDC

   As regards the Club's argument that it derives from the wording of Article 64 FDC that the imposition of a transfer ban is an alternative to the other sanctions mentioned, *i.e.* that a transfer ban cannot be imposed together with such other measures and that therefore, the simultaneous sanction of deducting points and imposing a transfer ban for the same violation amounts to a violation of the principle of *ne bis in idem*, the Sole Arbitrator, in line with FIFA's position in this regard, dismissed

such argument. The *ne bis in idem* principle prevents a person from being sanctioned twice for the same violation but does not mean that multiple sanctions cannot be imposed for the same violation; rather, a court is precluded from imposing additional sanctions on the perpetrator for the same violation once he has already been sanctioned for such violation by the same court. The joint imposition of a transfer ban as well as a point deduction does not constitute a violation of the *ne bis in idem* principle.

8. Prerequisites to amend common practice

   Turning to the Club's argument that the FIFA DC, by imposing a point deduction as well as a transfer ban on the Club, had deviated from its established practice in this regard, the Sole Arbitrator acknowledged that indeed, no such triple sanction had been pronounced before. The Sole Arbitrator however also acknowledged that a common practice may be terminated or amended and that, in order to terminate a common practice, similar principles apply as for the amendment of rules and regulations. While the relevant legal stipulations, *i.e.* Articles 60 *et seq.* of the Swiss Civil Code, do not explicitly regulate the question at what point in time a change of rules becomes binding upon the members of an association, in order for a change of rules to become binding upon the association's members it does not suffice that the competent (legislative) body within the association adopts the amendments. Instead, the new rules only take effect once the members of the association had a chance to obtain knowledge of the contents of the new rules. Accordingly, to be valid a change in practice has to be adopted by the competent body of the association and – in addition – the termination of the past practice has to be properly communicated to the relevant stakeholders.

9. FIFA Circular no. 1628 of 9 May 2018

   Finally, as regards the change of its common practise by the FIFA DC in the present case, the Sole Arbitrator found that the issuance of FIFA Circular no. 1628 on 9 May 2018 was sufficient to justify a deviation from FIFA's previous policy in respect of violations of Article 64 FDC. The FIFA DC explained in detail the "Current procedure" and the "New procedure" highlighting that under the new policy, to be implemented as of 23 May 2018, it is possible to impose a points deduction and/or a transfer ban.

Decision

The Sole Arbitrator concluded that the appeal filed on 11 October 2018 by Club Al Kharaitiyat against the decision issued on 13 July 2018 by the Disciplinary Committee of the Fédération Internationale de Football Association is dismissed and furthermore confirmed the decision of the Disciplinary Committee of the Fédération Internationale de Football Association of 13 July 2018.

CAS 2018/A/6007
Jibril Rajoub v. Fédération Internationale de Football Association (FIFA)
18 July 2019

Football; Disciplinary sanction for inciting to hatred or violence; Duty of a party to bring the evidence on which it intends to rely; Inciting to hatred; Power of an association to impose duties to its members; Limits of the freedom of speech

Panel
Mr Hendrik Willem Kesler (the Netherlands), President
Mr Gonzalo Bossart (Chile)
Prof. Ulrich Haas (Germany)

Facts

On 29 May 2018, FIFA approved an application filed by the Israel Football Association (the "IFA") to play an international friendly match between the "A" representative teams of Israel and Argentina (the "Match"). The Match was scheduled to take place on 9 June 2018 in Jerusalem.

On 3 June 2018, as broadcasted on that day by Al-Jazeera Network, Mr Jibril Rajoub (the "Appellant" or "Mr Rajoub"), a Palestinian citizen who is, *inter alia*, the President of the Palestine Football Association (the "PFA") stated, *inter alia*, the following to the press in Arabic, in a translation that was not disputed by Mr Rajoub: *"You have all heard about the upcoming soccer match between the national teams of Argentina and Israel. It has clearly turned from a sports match into a political tool. The Israeli government is trying to portray this sports event in a political light, by insisting on holding the match in Jerusalem.* […] *For our part, given what we have heard, and since we cannot, under any circumstances, agree to this match, we will launch, as of today, a campaign targeting the Argentinian (Football) Federation, and in particular targeting (Lionel) Messi, who has tens of millions of fans in Arab and Islamic countries, in Asia, Africa, and in countries that are friends of the Palestinian people. (For these fans) he used to be a symbol and a big deal. We are going to target Messi, and we are going to ask everybody to burn their Messi T-shirts and pictures, and to wash their hands of him. But we are still hoping that Messi will not show upon on Thursday, and will not serve to whitewash the crimes of the occupation.* […] *This is not a match for peace. Rather, it is a political match, which is meant to whitewash Israeli racism and fascism. I don't think that there is any difference between what is happening today and what happened in Europe in the 1930s".*

On 6 June 2018, the IFA filed a complaint with FIFA. On 7 June 2018, the Argentinean Football Association (the "AFA") informed FIFA that it had decided not to play the Match due to causes of *force majeure* that were publicly known.

On 8 June 2018, FIFA opened disciplinary proceedings against Mr Rajoub for a possible violation of Article 53 of the FIFA Disciplinary Code (the "FDC"). On 13 July 2018, the FIFA Disciplinary Committee rendered its decision (the "FIFA Disciplinary Committee Decision"), with the following operative part:

"1. The official Jibril Rajoub is regarded as having breached art. 53 of the FIFA Disciplinary Code (FDC) for inciting hatred and violence during his statements of 3 June 2018 […].

2. In application of art. 53 par. 1 and art. 19 of the FDC, the official Jibril Rajoub is suspended for twelve (12) months, until 23 August 2019, from all matches at any level.

3. The official Jibril Rajoub is ordered to pay a fine to the amount of CHF 20,000 in application of art. 53 par. 2 and art. 15 of the FDC. […].

4. *In application of art. 10 c) and art. 14 of the FDC, a reprimand is issued against the official Jibril Rajoub.*

5. *[…]".*

By decision of 24 September 2018 (the "Appealed Decision"), the FIFA Appeal Committee rejected the appeal of Mr Rajoub against the FIFA Disciplinary Committee Decision.

On 8 November 2018, Mr Rajoub lodged a Statement of Appeal with the CAS. In this submission, Mr Rajoub requested the following evidentiary measures:

"The statement of D. Lionel Messi.

The statement of Mr. Sampaoli, coach of the Argentinian football team.

The statement of Mr. Jibril Rajoub.

To request the security Council of United Nations to deliver a copy of the Resolutions 242 (1967), 338 (1973), 446 (1979), 452 (1979), 465 (1980), 476 (1980), 478 (1980), 1397 (2002), 1515 (2003), 1850 (2008) and 2334 (December 2016).

The statement of Mr. Wilfried Lemke, Special Adviser to the United Nations Secretary General on Sport for Development and Peace to inform about the situation regarding the practice of football on Palestinian Occupied Territories and about the systematic politization of football made by IFA.

Together with this appeal brief are attached press releases showing the importance of the evidence requested. Besides, attached is a copy of the Security Council of United Nations Resolutions specified above even if this party insists on the request to the Security Council in order to guaranty [sic] *the authenticity of the documents".*

On 23 January 2019, the CAS Court Office informed the parties that the Panel had decided to reject Mr Rajoub's request for production of evidence since it is for the parties (and not for the Panel) to produce the evidence upon which they intend to rely. As to the resolutions requested by Mr Rajoub, the Panel considered that their authenticity was not disputed by FIFA and that therefore no action was required from the Panel.

On 16 May 2019, a hearing was held in Lausanne, Switzerland. Although Mr Rajoub had initially called as witnesses Mr Lionel Messi, Mr Wilfried Lemke and Mr Jorge Sampaoli, these persons were ultimately not made available for examination at the hearing. Mr Rajoub himself was initially supposed to attend the hearing, but even though informed that he could attend by video-conference, he did not.

Reasons

1. Duty of a party to bring the evidence on which it intends to rely

   Mr Rajoub was submitting that both the FIFA Disciplinary Committee as well as the FIFA Appeal Committee lacked independence, and that the alleged procedural deficiencies in the proceedings before the FIFA Disciplinary Committee were not cured by the FIFA Appeal Committee. The lack of impartiality of the FIFA Disciplinary Committee was apparent notably because no evidence presented by him had been admitted to the case file and because his request that the FIFA Disciplinary Committee should request the United Nations Security Council to provide copies of certain resolutions had been dismissed.

   The Panel however noted that Mr Rajoub had not called any witnesses himself or submitted witness statements in the proceedings before the FIFA Disciplinary Committee or the FIFA Appeal Committee, but had merely requested from these bodies that they would request additional evidence from such persons,

which was fundamentally different. The Panel found that the committees had rightly decided to dismiss such request. Indeed, according to the FDC, although witness declarations were, in principle, admissible types of evidence, it was for a party to call witnesses or submit witness statements in the proceedings before FIFA bodies. As opposed to state courts, the FIFA Disciplinary Committee and the FIFA Appeal Committee did not have judicial power to require persons to testify.

With regard to the production of certain resolutions of United Nations Security Council, the Panel found that the FIFA Disciplinary Committee had not acted unreasonably in this regard. Mr Rajoub's request could have been reasonable in case the veracity of the resolutions would have been disputed, but this was not the case. In any case, it did not exempt him from bringing this publicly available information to the attention of the FIFA Disciplinary Committee himself if he wished to rely thereon. Also in this respect, it was in principle for a party to bring the evidence on which it intended to rely. No compelling arguments had been submitted by Mr Rajoub as to why this should have been different in the matter at hand.

2. Inciting to hatred

The main question to be addressed by the Panel was whether the statement of Mr Rajoub, as broadcasted on 3 June 2018 by Al-Jazeera Network, violated the prohibition of inciting hatred. Article 53 FDC provides as follows: *"1. A player or official who publicly incites others to hatred or violence will be sanctioned with match suspension for no less than twelve months and with a minimum fine of CHF 5,000. 2. In serious cases, in particular when the infringement is committed using the mass media (such as the press, radio or television) or if it takes place on a match day in or around a stadium, the minimum fine will be CHF 20,000".*

In this respect, the Panel had no difficulty to find that the statement could indeed be qualified as inciting hatred, as Mr Rajoub had called upon *"everyone"*, and the Arabic and Islamic world in particular, to undertake a violent act (burning t-shirts and pictures), specifically targeting one well-known individual (Mr Messi).

3. Power of an association to impose duties to its members; Limits of the freedom of speech

However, FIFA's interest in sanctioning such conduct had be balanced against Mr Rajoub's interest to exercise his freedom of speech. The remaining question was therefore whether the statement in issue was covered by Mr Rajoub's freedom of expression and in favor of which side the balance was swaying.

For the Panel, the balancing of interests in the matter at hand was however different from the balancing made by the European Court of Human Rights ("ECtHR") in the jurisprudence cited by Mr Rajoub. The ECtHR balanced criminal law (state/public) interests against an individual's freedom of speech. However, in the matter at hand, no criminal law interests were at stake, but rather the private interests of FIFA, as the international governing body of football. By assuming the role of President of the PFA, Mr Rajoub had voluntarily committed himself to abide by the Statutes and regulations of FIFA. In the Panel's view, the consequences of this were important, because an association – based on the special contractual legal relationship – could impose stricter duties on its members than the duties imposed on citizens by criminal

law. Associations in general had a large freedom to manage their own affairs and Mr Rajoub could freely opt-out of his obligations as a FIFA official by resigning from any role that subjected him to FIFA's rules and regulations.

Engaging in the balancing of interest mentioned above, the Panel found that the balance swayed in favour of FIFA. The purpose of Article 53 FDC was legitimate, while the same is not true for Mr Rajoub. The latter had exceeded the legitimate boundaries of the freedom of speech by targeting persons that had no direct involvement whatsoever in the political issues between Israel and Palestine.

The Panel also found that Mr Rajoub's statement was not proportionate. He could not rely on the jurisprudence of the ECtHR according to which the burning of t-shirts fell under the freedom of speech. Independently of whether or not the ECHR was directly applicable to international sports federations, such jurisprudence, even if interpreted correctly, did not apply to Mr Rajoub, because he had not burned any t-shirt himself. What Mr Rajoub had done was more severe, since he had requested *"everybody"* to burn their Messi shirts, thereby specifically calling upon Messi's fans in Arabic and Islamic countries, using mass media to convey his message. Considering also the high political positions of Mr Rajoub, Mr Rajoub's statements had had a much higher impact than an "anonymous" individual forming part of a larger demonstration actually burning a t-shirt.

The Panel therefore concluded that Mr Rajoub had indeed incited hatred against Mr Messi with his statement and that this statement could not be protected by the freedom of speech. Mr Rajoub's conduct further amounted to a "serious case" of inciting hatred for the purposes of Article 53(2) FDC, in particular because this provision specifically refers to the situation when the infringement is committed by using mass media, an element that was undisputedly complied with in the matter at hand.

Decision

Consequently, the Panel found that Mr Rajoub was guilty of violating Article 53(1) and (2) FDC and dismissed the appeal of Mr Rajoub against the decision rendered by the FIFA Appeal Committee.

CAS 2018/A/6017
FC Lugano SA v. FC Internazionale Milano S.p.A.
9 September 2019

Football; Termination of employment contract by a player; Dismissal of the player's request of intervention; Dismissal of a request for production of document whose relevance is not sufficiently established; Condition for "sporting just cause" to terminate a contract; Determination of an "established player"; Necessity to give Prior Notice or a Warning to successfully invoke termination for sporting just cause; No just cause to terminate the contract; Financial consequences: application of Article 17(1) FIFA RSTP; Quantification of the positive interest; No need for adjustment of the compensation

Panel
Prof. Ulrich Haas, Sole Arbitrator

Facts

FC Lugano SA (the "Appellant" or "Lugano") is a professional football club with its registered office in Lugano, Switzerland. Lugano is registered with the Swiss Football Association (the *Schweizerischer Fussbalverband* – the "SFV"), which in turn is affiliated to the *Fédération Internationale de Football Association* ("FIFA").

FC Internazionale Milano S.p.A. (the "Respondent" or "Inter") is a professional football club with its registered office in Milano, Italy. Inter is registered with the Italian Football Federation (the *Federazione Italiana Giuoco Calcio* – the "FIGC"), which in turn is also affiliated to FIFA.

On 23 January 2012, the Italian clubs, Parma FC ("Parma") and Inter concluded an agreement for the transfer of Mr Yao Guy Eloe Koffi, a football player of Ivorian nationality born on 20 January 1996 (the "Player"), from Parma to Inter for the amount of EUR 1,000,000, while the Player remained registered on loan with Parma for the rest of the season. Parma retained 50% of the Player's economic rights valued at an extra EUR 1,000,000.

Also on 23 January 2012, at the age of 16, the Player and Inter entered into an employment relationship for the official federal minimum salary of EUR 29,000 per year.

On 19 June 2014, Inter acquired the remaining 50% of the Player's economic rights from Parma for the amount of EUR 1,000,000.

In the 2013/2014 and 2014/2015 seasons, the Player regularly appeared in matches for Inter's *primavera* team (Inter's youth team).

In January 2015, the Player turned 19 and therefore became ineligible to play for Inter's *primavera* team.

On 14 July 2015, Inter and the Player entered into their fifth employment contract (the "Employment Contract") for a period of three seasons, valid as from the date of signing until 30 June 2018. In accordance with the Employment Contract, the Player was entitled to a salary of EUR 115,750 for the 2015/2016 season and EUR 143,000 for the 2016/2017 and 2017/2018 seasons.

During the 2015/2016 season, the season of the Player's 20th birthday, the Player was loaned to the Italian club FC Crotone ("Crotone") for free, which club participated in the *Serie B* at the relevant moment in time (the Italian second division). At the end of the

season, Crotone was directly promoted to the *Serie A* for the first time in its history.

At the start of the 2016/2017 season, after his loan spell with Crotone, the Player returned to Inter.

According to Inter, towards the end of August 2016, Inter and the Player received an enquiry about the availability of the Player for a transfer on loan basis to Nice. According to Inter, the Player and Inter gave their verbal consent to such transfer.

By 31 August 2016, Inter and Nice had negotiated the terms of a loan agreement that was finally never executed because, on the last date of the relevant transfer window, the Player refused leaving for Nice and indicated his preference to stay with Inter.

Although the Player was part of Inter's A team during the 2016/2017 season and was regularly called upon as a substitute, the Player was not fielded in any of the 46 official matches played by Inter during this season. Never throughout the 2016/2017 season did the Player revert to Inter in connection with an alleged shortage of playing time.

On 7 June 2017, at the end of the 2016/2017 season, the Player informed Inter that based on Article 15 of the FIFA Regulations for the Status and Transfer and Players, he gave notice of the termination of his contract for sporting just cause since he participated in less than 10% of official matches played by the Club during the season and given that he is an established professional.

On 22 June 2017, the Player lodged a claim against Inter before the Dispute Resolution Chamber of FIFA (the "FIFA DRC"), requesting as follows:

- To acknowledge that the Player had "sporting just cause" to terminate his Employment Contract with Inter;
- To award the Player the amount of EUR 143,000 as moral damage;
- To acknowledge that Inter does not have any right to receive compensation from the Player.

On 20 July 2017, the Player and Lugano concluded an employment contract for one season, valid as from the date of signing until 30 June 2019 for a basic annual salary of CHF 100,000 net.

On 10 August 2017, Inter rejected the Player's claim in its entirety and lodged a counterclaim against the Player for the unjustified termination of the Employment Contract, requesting EUR 4,700,000 as compensation. Inter also requested Lugano, in its status as the Player's new club, to be held jointly and severally liable with the Player.

Lugano rejected Inter's claim in its entirety.

On 7 June 2018, the FIFA DRC rendered its decision (the "Appealed Decision") with the following operative part:

"1. The claim of the [Player] is rejected.

2. *The counterclaim of [Inter] is partially accepted.*
3. *The [Player] is ordered to pay to [Inter],* ***within 30 days*** *as from the date of notification of this decision, compensation for breach of contract in the amount of EUR 133,532.*
4. *[Lugano] is jointly and severally liable for the payment of the aforementioned compensation.*
5. *If the aforementioned amount in accordance with point 3. is not paid within the above-mentioned time limit, interest at the rate of 5% p.a. will fall due as of expiry of the aforementioned time limit and the present matter shall be submitted, upon request, to*

the FIFA Disciplinary Committee for consideration and a formal decision.

(…)

On 19 November 2018, Lugano filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against Inter with respect to the Appealed Decision, in accordance with Articles R47 and R48 of the 2017 edition of the CAS Code of Sports-related Arbitration (the "CAS Code").

On 20 December 2018, upon being invited to express its view in this respect, FIFA renounced its right to request its possible intervention in the present arbitration.

On 28 December 2018, the Player filed a request for intervention in French, premised on Article R41.3 CAS Code.

On 30 January 2019, in accordance with Article R54 CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the arbitral tribunal appointed to decide the present matter was constituted as follows:

- Mr Ulrich Haas, Professor of Law, Zurich, Switzerland, as Sole Arbitrator

On 7 February 2019, the CAS Court Office informed the parties that the Sole Arbitrator had decided to reject the Player's request for intervention and that the reasons for this decision would be provided in the final award.

On 13 March 2019, Inter filed its Answer in accordance with Article R55 CAS Code, including a request for production of documents.

On 27 May 2019, the CAS Court Office informed the parties that the Sole Arbitrator had decided to reject Inter's request for production of documents and that the reasons for this decision would be set out in the final award.

On 4 June 2019, a hearing was held in Milan, Italy.

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

Reasons

1. Dismissal of the player's request of intervention

   Intervention according to Article R41.3 of the CAS Code only provides participation as a formal party and not participation as a non-party (with restricted rights) in analogy to the provisions of the Swiss Code of Civil Procedure. Article R41.3 of the CAS Code is not designed to cure a failed deadline of a party that was entitled to appeal against the FIFA decision. Intervention according to Article R41.3 of the CAS Code requires a legal interest of the intervenor. Therefore, the Sold Arbitrator held that by failing to meet the deadline of appeal the player has accepted the binding effects of the FIFA decision and, thus, has lost any legal interest in participating in this proceeding as a party challenging said decision.

   In addition to the reasons set out above, the Sole Arbitrator in particular disagreed with Lugano's submission that in case the Sole Arbitrator would issue an award more favourable to Lugano than the Appealed Decision, there would be two contradictory decisions, for Lugano would remain jointly and severally liable with the

Player in respect of the Appealed Decision.

Such fear of contradictory decisions that would both remain binding on Lugano is unwarranted. Indeed, the Swiss Federal Tribunal held the following in a similar football-related situation:
"[…] The joint defendants remain independent from each other. The behavior of one of them, and in particular his withdrawal, failure to appear or appeal, is without influence upon the legal position of the others (judgment 4P.226/2002 of January 21, 2003 at 2.1; Hohl, op. cit., n. 525; Schaad, op. cit., p. 76 f.; Gross and Zuber, op. cit., n. 19 ad Art. 71 CPC). As to the judgment to be issued, it may be different as to one of the joint defendants or the other (Jeandin, op. cit., n. 11 ad Art. 71 CPC). The independence of joint defendants will continue before the appeal body: a joint defendant may independently appeal the decision affecting him regardless of another's renouncing his right to appeal the same decision; similarly, he will not have to worry about the appeals of the other joint defendants being maintained if he intends to withdraw his own (Schaad, op. cit., p. 281 ff.). Among other consequences, this means that the res judicata effect of the judgment concerning joint defendants must be examined separately for each joint defendant in connection with the opponent of the joint defendants because there are as many res judicata effects as couples of claimant/defendant (Schaad, op. cit., p. 317 ff.)
(…)

Accordingly, in case the award in the present matter would turn out to be more favourable towards Lugano than the Appealed Decision, Lugano would not be jointly and severally liable for the difference between the two decisions, if any, but only for the part of the Appealed Decision that is confirmed.

Consequently, the Sole Arbitrator decided to reject the Player's request for intervention.

2. Dismissal of Inter's request for production of document whose relevance is not sufficiently established

   Contrary to Inter's submission, the amount of an unexercised buy-out clause can generally not be considered to reflect the market value of a football player. Indeed, since it has not been submitted that the pertinent buy-out clause was exercised by the player, the added value of having a legal instrument providing for additional financial terms in the contractual relation between the Player and the appellant club on file cannot be seen. Therefore, the request for production of such document shall be rejected.

3. Conditions for "Sporting Just Cause"

   The concept of "sporting just cause" is set out in Article 15 FIFA RSTP.

   Article 15 FIFA RSTP provides as follows: "An established professional who has, in the course of the season, appeared in fewer than ten per cent of the official matches in which his club has been involved may terminate his contract prematurely on the ground of sporting just cause. Due consideration shall be given to the player's circumstances in the appraisal of such cases. The existence of sporting just cause shall be established on a case-by-case basis. In such a case, sporting sanctions shall not be imposed, though compensation may be payable. A professional may only terminate his contract on this basis in the 15 days following the last official match of the season of the club with which he is registered".

According to Article 15 FIFA RSTP, the conditions that need to be cumulatively met in order to legitimately invoke the application of "sporting just cause" are the following: 1) the player must be an "established player"; 2) he must have appeared in fewer than 10% of the official matches of his club; 3) the Employment Contract must be terminated on this basis within 15 days of the club's last official match of the season.

It is not in dispute that the Player featured in less than 10% of Inter's matches in the 2016/2017 season. In fact, the Player was not fielded in any of Inter's official matches during this season. It is also not in dispute that the Player terminated his Employment Contract within 15 days of Inter's last official match of the 2016/2017 season, invoking Article 15 FIFA RSTP.

Accordingly, the Sole Arbitrator is put to the task of assessing whether the Player was an "established player" within the meaning of Article 15 FIFA RSTP.

4. "Established player" within the meaning of Article 15 FIFA RSTP

Only players that have a legitimate expectation to be (regularly) fielded may avail themselves of Article 15 RSTP. This, however, is not the case for players that have not yet finished their training. According to Article 1(1) Annex 4 FIFA RSTP, *"A player's training and education takes place between the ages of 12 and 23. Training compensation shall be payable, as a general rule, up to the age of 23 for training incurred up to the age of 21"*. Thus, a player's training period in principle terminates when he reaches the age of 21. Accordingly, unless exceptional circumstances require determining otherwise, players under the age of 21 cannot be considered "established professionals". At the moment the Player terminated his Employment Contract with Inter he was roughly 21 and a half years old, i.e. he had thus already concluded his training period. The question, thus, is whether a player by reaching the age of 21 automatically becomes an "established player" or whether additional circumstances need to be taken into account. The Sole Arbitrator finds that no such automatism is warranted. Article 1(1) Annex 4 FIFA RSTP establishes that the education of a player goes on until the age of 23. Also, other CAS panels have pointed to the difference between "training" and the "development" of a player (cf. CAS 2006/A/1029, CAS 2011/A/2682). The Sole Arbitrator accepts this distinction between "training" and "development" of a player in the sense that a football player does not stop learning and might still improve as a football player after the end of his training period (cf. CAS 2017/A/5090 para. 96 *et seq.*). Thus, pursuant to CAS jurisprudence, within the age bracket of 21 until 23 not only the age of the player, but in particular his development as a player must be taken into account, in order to determine whether or not a player is an "established player". According thereto, the mere fact that a player reaches the age of 21, and therefore finished his training period in the sense of the training compensation system set out in the FIFA RSTP, does not automatically make him an "established player" within the meaning of Article 15 FIFA RSTP. Consequently, the Sole Arbitrator must examine whether or not – based on the overall circumstances before him – the Player had a legitimate expectation of being fielded (which is required in order to be an "established player"). Only as of the age of

23 (i.e. with completion of his education) the Sole Arbitrator finds that there is room for a presumption that the player has turned into an "established professional". However, a young football player opting to join a major football club should (and will) be aware that he may face more competition and less playing time than if he would join a less prominent club. Moreover, the interest of a major club like Inter in loaning a player to another club i.e. Nice is an indication that the player should probably not have expected to be fielded regularly in the major club's A team.

5. Necessity to give Prior Notice or a Warning to successfully invoke termination for sporting just cause

   At the end of the day whether or not the Player had a legitimate expectation to be fielded can be left open in this matter. The Sole Arbitrator does not need to finally and conclusively determine whether the Player is an "established player", because even if this was the case, in order to legitimately invoke the application of Article 15 FIFA RSTP, it is incumbent on a player to give a prior warning to his club before terminating the employment contract. Such notice is vital because the termination of an employment contract is an *ultima ratio*. In principle, only when the employer is in good faith provided with an opportunity to cure the conduct that is considered unsatisfactory by the employee can an employment contract be terminated prematurely. This is also determined in case law of the SFT and consistently applied by CAS in respect of the concept of "just cause" (cf. CAS 2006/A/1180, para. 25; CAS 2016/A/4846, para. 175 of the abstract published on the CAS website). There is no reason why this should not apply to an early termination based "sporting just cause". This view is also supported in the jurisprudence of CAS (CAS 2007/A/1369, para. 172-174 of the award that was referred to by the parties). A termination for "sporting just cause" is not one of the categories of contractual breaches that are of such severity that no prior warning is required. By failing to notify the club of his alleged dissatisfaction, the player prevented the club from possibly changing its course of action in an attempt to restore the player's confidence in his employer. Under such circumstances, a unilateral and premature termination of an employment relationship is not warranted. Consequently, the player did not have "sporting just cause" to terminate his Employment Contract with the club.

6. No just cause to terminate the contract

   As a subsidiary argument in case his termination on the basis of "sporting just cause" would be dismissed, the Player submits that he terminated his Employment Contract with "just cause" on the basis of Article 14 FIFA RSTP.

   Article 14 FIFA RSTP provides as follows: *"A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause".*

   Be it as it may, the Sole Arbitrator does not consider it necessary to enter into a detailed analysis of the different arguments exchanged by the parties in respect of whether or not there was "just cause" to terminate the contract. The Player's argument based on Article 14 FIFA RSTP must fail for the same reason as set out above, i.e. because the Player did not give a prior warning to Inter about his alleged dissatisfaction with Inter's conduct, thereby preventing Inter from

the opportunity to possibly change its course of action and prevent a termination on this basis.

Consequently, the Sole Arbitrator finds that the Player did not have "just cause" to terminate his Employment Contract with Inter.

7 Financial consequences: application of Article 17(1) FIFA RSTP

The consequences of terminating an employment contract without "just cause" i.e. determination of the compensation for breach of contract to be paid to the club by the player in breach of the Employment Contract are set out in Article 17(1) FIFA RSTP since the parties did not deviate from the application of this Article by means of a liquidated damages clause. Accordingly, Inter is entitled to be compensated for the damages inflicted upon it by the Player's breach of the Employment Contract. According to CAS jurisprudence the purpose of Article 17(1) FIFA RSTP is basically nothing else than to reinforce contractual stability, i.e. to strengthen the principle of pacta sunt servanda in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player (CAS 2008/A/1519-1520, para. 80, with further references to: CAS 2005/A/876, p. 17: "[…] it is plain from the text of the FIFA Regulations that they are designed to further 'contractual stability' […]"; CAS 2007/A/1358, para. 90; CAS 2007/A/1359, para. 92: "[…] the ultimate rationale of this provision of the FIFA Regulations is to support and foster contractual stability […]"; confirmed in CAS 2008/A/1568, para. 6.37). In respect of the calculation of compensation in accordance with Article 17 FIFA RSTP and the application of the principle of "positive interest", the framework set out by a previous CAS panel should be followed i.e. assessment of the club's objective damages by the panel, before applying its discretion in adjusting this total amount of objective damages to an appropriate amount if deemed necessary (CAS 2008/A/1519-1520, at para. 85 et seq.).

8. Quantification of the positive interest

In order to calculate the positive interest, the value of the player's services must be assessed based on the average between the remaining value of the breached contract and the player's new contract. The predetermined value attached to lifting an option to buy the player's federative rights is only of direct relevance in assessing the value of a player's services when such option is indeed exercised. Further, the *pro rata* part of the salary already paid by the player's former club (the respondent) should be added to the latter's damage. Moreover, the approach according to which only the non-amortised transfer fee paid by the player's former club to the previous club of the player can be taken into account as a basis to determine the damages caused is not considered appropriate, because the transfer fee paid by the player's former club has already been fully amortised, while the player still represents a certain value on that club balance sheets. Finally, the investments made by the player's former club in training the player cannot be considered a damage because such investments are already covered by training compensation under the FIFA RSTP (cf. CAS 2019/A/6096).

9. No need for adjustment of the compensation

Lugano submits that the value of the services must be adjusted or reduced to zero

in view of the fact that Inter had no use for or lacked any genuine interest in the services of the Player and – consequently – did not suffer any damage due to the Player's departure. The Sole Arbitrator does not concur with this view.

The Sole Arbitrator does not consider it otherwise proven that Inter lacked any genuine interest in the Player's services. There is no need to adjust the amount of the compensation in favour of the appellant club where it is not established that the respondent club did lack any genuine interest in the services of the player. Such interest stems from the fact that (i) the respondent club had the possibility to field the player and to make use of his services by loaning him to another club, (ii) the player was regularly called upon to sit on the substitutes bench during official matches of the respondent's A team and was always training together with the A-team, (iii) the club needed to have a team with a diverse mix of players. Therefore, this is not a situation of a *de facto* deregistration of the player or proof that the respondent club did not attach any value to the services of the player. However, the decrease of the market value of the player due to the next expiry of his employment contract should be taken into account as a factor leading to a decrease of the damages.

Decision

The appeal filed on 19 November 2018 by FC Lugano SA against the decision issued on 7 June 2018 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is partially upheld.

The decision issued on 7 June 2018 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is confirmed, save for para. 4 of the operative part, which shall read as follows:

FC Lugano SA is jointly and severally liable with the Player for the payment of compensation for breach of contract in the amount of EUR 120,000.

CAS 2018/A/6027
Sociedade Esportiva Palmeiras v. Fédération Internationale de Football Association (FIFA)
30 December 2019

Football; Transfer; Purpose of Art. 18bis RSTP; Inclusion of clubs in the scope of Art. 18bis RSTP; Validity and/or binding nature of the contractual provisions enabling a party to exercise undue influence; Adressees of the prohibition of Art. 18 bis RSTP

Panel
Mr Sofoklis Pilavios (Greece), President
Mr Daniel Lorenz (Portugal)
Mr Efraim Barak (Israel)

Facts

On 24 January 2012, Liga Deportiva Universitária, a professional football club with seat in Quito, Ecuador ("Liga" or "LDU") and Sociedade Esportiva Palmeiras (the "Appellant" or "Palmeiras") a football club, with seat in São Paulo, Brazil entered into an "Assignment of Rights" agreement (the "Transfer Agreement") for the transfer of the federative rights of the Argentine professional football player H. (the "Player"), then under contract with LDU.

The relevant provisions of the Transfer Contract provide as follows:

"1.1 LIGA assigns and transfers to PALMEIRAS seventy percent (70%) of the Economic Rights, credits, benefits and financial revenues arising from the temporary or definitive transfer of the Federative Rights of the PLAYER which it owns, retaining ownership of the remaining thirty percent (30%), and assigns to PALMEIRAS 100% of the Federative Rights of the PLAYER (…).

1.2 LIGA definitively assigns and transfers to PALMEIRAS 100% of the Federative Rights of the PLAYER (…).

2.1 The price of this assignment is agreed to be USD 4,000,000 net, to be paid by PALMEIRAS to LIGA as follows: (…).

3.1 The PARTIES, either jointly or individually, may negotiate in their own name or in the name of any other party, with any third party, the transfer of the Federative Rights and the totality or part of the Economic Rights, keeping the other party informed of the negotiations in writing and by reliable means. (…)

3.4 The parties shall immediately share with each other all the information available in the event of a possible transfer.

3.5 The minimum transfer price must be equal to or greater than USD 8,000,000 net, and both PALMEIRAS and LIGA may mutually bind one another, by written notification in accordance with this agreement, to the sale and transfer of the Federative Rights or their part of the Economic Rights. The parties also agree that, at the request of either party, the transfer may be made for a price lower than that indicated in this clause but always respecting the percentages and amounts of the other parties as if the transfer had taken place for the sum of USD 6,000,000. (…)

3.7 For the loan or temporary transfer of THE PLAYER to a third club (without constituting a sale or transfer of the federative rights on a permanent basis) Palmeiras shall request the written consent of LIGA with prior communication of all details of the loan or temporary transfer (including copies of all relevant documentation held by whoever gets the offer).

3.8 The parties by mutual agreement provide that, in the event of a future sale a "mixed operation" is excluded and expressly prohibited, this being understood to be a transaction including as consideration the transfer of another player in exchange for a percentage of the Rights assigned, or one which includes the simultaneous sale of Economic or Federative Rights of another player, or for which an aggregate amount is paid without detailing the real

value of the transfer of the Rights of THE PLAYER. (…)

3.10 Neither party may assign or sell to third parties, in whole or in part, the percentage of Economic Rights or Federative Rights which they have and corresponds to them regarding THE PLAYER, without the express written consent of the other parties. Failure to comply with this obligation will entitle the compliant parties to ignore the assignment that has been effected and to demand compensation from the party in breach in the amount of USD 2,000,000. (…)

3.12 To monitor, participate in, manage or negotiate a future definitive or temporary transfer of the rights of THE PLAYER (whether Federative Rights or Economic Rights or both), LIGA gives exclusive authorization to the AFA players' agent Mr. Gustavo Lesovich, as its only agent for the purpose.

4.1 THE PLAYER, who is a witness to the signing of this agreement, accepts the conditions thereof and signs a sports employment contract with PALMEIRAS to be effective from January 24, 2012, to December 31, 2014. Furthermore, and in relation to the said contract, a termination clause pursuant to Article 17 of the FIFA Regulations on the Status and Transfer of Players, is agreed in favor of THE PLAYER for an amount of EUR 15,000,000, with the PLAYER and the new club engaging the PLAYER being jointly responsible for payment. (…)

4.4 In the event that PALMEIRAS fails to comply with all the above obligations and THE PLAYER becomes free to contract as a result of not receiving payment, or if such freedom of contract is acquired by mutual agreement between THE PLAYER and PALMEIRAS, or on termination of the contract through the fault of PALMEIRAS, the latter shall pay an indemnity to LIGA in the amount of USD 2,000,000 within 10 days of the date on which the freedom of contract is acquired. (…).

4.5 In the event that THE PLAYER early terminates his Employment Contract with PALMEIRAS, or if such termination is determined by THE PLAYER as a result of injury by PALMEIRAS, or is decided by PALMEIRAS through the fault of the PLAYER, LIGA shall be entitled to receive from PALMEIRAS its 30% share of the amount fixed as compensation or indemnity for such termination. (…)".

On 8 February 2013, the Player was transferred to the Brazilian club Grêmio Football Portoalegrense.

On 8 May 2013, LDU filed a claim for breach of the Transfer Agreement against Palmeiras in front of the FIFA Players' Status Committee ("PSC"), which was partially accepted by the FIFA PSC on 26 March 2015.

On 12 May 2015, FIFA Transfer Matching System ("TMS") sent a letter to Palmeiras requesting its position on the matter of an apparent violation of Article 18bis of the FIFA Regulations on the Status and Transfer of Players ("Regulations" or "RSTP") concerning the Transfer Agreement. The wording of the applicable 2010 version of Article 18bis provides that *"No club shall enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams".*

On 1 September 2015, FIFA TMS informed Palmeiras that the case was transferred to the FIFA Disciplinary Committee.

On 22 July 2016, the secretariat to the FIFA Disciplinary Committee opened disciplinary proceedings against Palmeiras and requested its position with respect to the apparent violation of Article 18bis of the FIFA Regulations by certain provisions of the Transfer Agreement.

On 22 August 2016, Palmeiras submitted its answer and contested the alleged violation of Article 18bis of the FIFA Regulations by arguing, *inter alia*, that the clauses of the

Transfer Agreement at issue had already been declared valid by the FIFA PSC that ruled in favour of LDU's claim on the basis of the same provisions.

On 9 December 2016, the FIFA Disciplinary Committee rendered its decision ruling that: *"1. The club SE Palmeiras is liable for the violation of art. 18bis par. 1 of the Regulations on the Status and Transfer of Players (…). 2. The club SE Palmeiras is ordered to pay a fine to the amount of CHF 50,000. (…)".*

Upon appeal of Palmeiras, the FIFA Appeal Committee rendered its decision (the "Appealed Decision") on 20 April 2018, ruling that: *"1. The appeal lodged by the club SE Palmeiras (…) is partially upheld. 2. Paragraph 2 of the decision (…) is amended as follows: The club SE Palmeiras is ordered to pay a fine to the amount of CHF 25,000. (…)".*

On 23 November 2018, the Appellant filed a statement of appeal before the CAS. On 8 July 2019, a hearing took place in Lausanne, Switzerland.

Reasons

1. Purpose of Art. 18bis RSTP

   The Appellant was disputing the application of Article 18bis to the matter at hand arguing that Article 18bis is not directed to football clubs but only meant to protect them from external influence and, therefore, the provisions of an agreement between clubs could not violate Article 18bis.

   The Panel recalled that the purpose of Article 18bis of the FIFA Regulations was to increase the independence of clubs and transparency by preventing all types of external influence on clubs. The wording of the provision was intentionally broad in determining who the subject of exercise of the forbidden undue influence might be, namely any other party to that contract or any third party. The Panel found that it was clear from the literal interpretation of the provision that Article 18bis was meant to prevent anyone (either being a party to the contract concerned or not) from acquiring the ability to exercise undue influence on football clubs. The quality of the person or legal entity enabled by the football club to exercise undue influence as external (meaning outside football) was irrelevant and had no legal basis.

2. Inclusion of clubs in the scope of Art. 18bis RSTP

   The Appellant was also submitting that the 2015 version of the FIFA Regulations expressly mentioning the *"counter club/counter clubs"* as addressees of Article 18bis was proof that football clubs were not included as such until that time.

   The Panel observed that whereas Article 18bis of the FIFA Regulations had indeed been amended in 2015, the wording *"which enables the counter club/counter clubs"* that had been adopted (compared to *"which enables any other party to that contract"* of the 2010 edition) in no way meant that clubs were not included in the scope of the provision until 2015. In the Panel's view, the 2010 edition of the FIFA Regulations adopted a wide scope including any and all counter-parties to the contract concerned. That scope had been limited by the 2015 amendment to the rule, to define as counter parties football clubs only, but this certainly did not mean that a contract with a football club as counter party would have escaped the scope of the 2010 rule; the contrary was rather the case. The intentionally broad formulation *"any other party"* in the 2010 edition was decisive here; had the FIFA legislator

wanted to exclude football clubs as counter parties, he would most certainly have done so in an explicit way.

3 Validity and/or binding nature of the contractual provisions enabling a party to exercise undue influence

In addressing the question of whether there had been a breach of Article 18bis of the FIFA Regulations, the Panel first took note that the Appellant had not submitted any arguments or claims disputing that the Transfer Agreement, and in particular clauses 3.1, 3.4, 3.5, 3.7, 3.8, 3.10, 3.12, 4.1, 4.4 and 4.5, did enable LDU to exercise an influence on the Appellant, which had been the finding of the Appealed Decision. As a result, the Panel could not but find that the aforementioned clauses of the Transfer Agreement had in fact enabled LDU to influence in employment and transfer-related matters the independence and policies of the Appellant, which constituted a violation of Article 18bis of the FIFA Regulations.

For the sake of completeness, the Panel also examined the arguments of the Appellant on the alleged contradiction of the Appealed Decision with the decision of the FIFA PSC that had held that the Appellant was in breach of its contractual obligations towards LDU under the provisions at stake of the Transfer Agreement and with the decision passed by FIFA in the disciplinary proceeding against LDU, which had found LDU not guilty of a violation.

As to the decision of the FIFA PSC, the Panel held that Article 18bis of the FIFA Regulations was not concerned with the issue of the validity and/or the binding nature of the contractual provisions enabling a party to an agreement to exercise undue influence to its counter party-football club. This was a matter to be settled under the applicable law, which was the task of the FIFA PSC when called to examine the validity and the binding nature of the same contractual provisions in the context of a contractual dispute brought before the FIFA PSC. It was therefore perfectly possible that said contractually agreed provisions were enforceable under a set of applicable (civil law) rules and at the same time fell foul of Article 18bis of the FIFA Regulations (which in any case did not and could not determine whether they were illegal, invalid or unenforceable). Indeed, FIFA could have decided to clearly state in the FIFA Regulations that agreements that contain provisions that violates the FIFA Regulations would not be enforced or "recognized". But with respect to agreements such as the one at hand FIFA had chosen not to do so.

4. Adressees of the prohibition of Art. 18 bis RSTP

As to the decision passed by FIFA in the disciplinary proceeding against LDU, the Panel found that in view of the wording of the 2010 edition of Article 18bis, only the influenced football clubs were subject to the prohibition established therein and, consequently, to sanctions. This was not the case, however, for the clubs that had been enabled to influence them. As a result, even though one may have expressed legitimate doubts as to the fairness of said provision, which was probably why FIFA had amended it in 2015, it was beyond doubt that the 2010 edition of the FIFA Regulations had left no discretion to the FIFA judicial bodies to sanction LDU for acquiring the ability to influence the Appellant.

Decision

Consequently, the Panel dismissed the appeal filed by Sociedade Esportiva Palmeiras against the decision of the FIFA Appeal Committee.

CAS 2019/A/6181
Fédération Royale Belge de Gymnastique (FRBG) v. Fédération Internationale de Gymnastique (FIG) & Japan Gymnastics Association (JGA)
24 September 2019 (operative part of 25 April 2019)

Gymnastics; Validity of a FIG decision regarding the bidding process for the organization of an event; CAS jurisdiction; Standing to sue regarding a bidding process; Determination of the deadline to submit an application; Interpretation of the term "mid-December" in the bid contract

Panel
Prof. Luigi Fumagalli (Italy), President
Mr Pierre Muller (Switzerland)
Mr Philippe Sands QC (United Kingdom)

Facts

The Fédération Royale Belge de Gymnastique (the "FRBG" or the "Appellant") is the national federation for gymnastics in Belgium and is recognized as such by the Fédération Internationale de Gymnastique.

The Fédération Internationale de Gymnastique (the "FIG" or the "First Respondent") is the international governing body of competitive gymnastics. The FIG is an association established and organized in accordance with the Swiss Civil Code and is based in Lausanne, Switzerland. One of the objects of the FIG is to organize its official events, which include the World Championships in the different disciplines.

The Japan Gymnastics Association (the "JGA" or the "Second Respondent") is the national federation for gymnastics in Japan and is recognized as such by the FIG. It is based in Tokyo, Japan.

On 28 March 2018, the JGA requested the FIG to provide information about the bid applications for the 2023 Men's and Women's Artistic Gymnastics World Championships (the "2023 ART World Championships"). Later the same day, the JGA received from the FIG a blank copy of the Event Candidate Official Bid Contract (the "Bid Contract") for the organization of the 2023 ART World Championships stipulateing in the section *"Instructions – Applicant File"* the following:

1. *Questionnaire*
   (…)
   d) The Application File must be submitted as soon as possible but by no later than mid December 2018.

On 29 March 2018, the JGA asked the FIG to confirm whether its understanding that *"the application files have to be submitted to the FIG Office by the middle to December 2018"* was correct. The FIG replied *"This is correct"* later that day.

On 22 June 2018, the FIG announced in an official communication to the FIG authorities, the affiliated and associated federations, and the continental unions that the 2023 ART World Championships would be allocated during the next Council meeting, to be held in St-Petersburg, Russia, in May 2019. In this official communication, the FIG stated the following: *"we kindly ask you to please send your possible candidature files as soon as possible, but not later than 30th November 2018 (date of receipt in Lausanne). Please note that no late candidatures will be accepted".*

In response to the FIG's communication of 22 June 2018, the FRBG expressed on 3 September 2018 its interest in bidding for the organization of the 2023 ART World Championships.

On 4 September 2018, the FIG sent the Bid Contract to the FRBG, which, in the same way as the copy sent to the JGA on 29 March 2018, also stated that *"the Application File must be submitted as soon as possible but by no later than mid-December 2018"*.

On 5 October 2018, the FRBG sent an email to Ms Céline Cachemaille, Sports Event Manager of the FIG, seeking information about the deadline to submit its application. On that same date, Ms Cachemaille replied as follows: *"for 2023, the Application File must be submitted by no later than mid-December 2018 and a decision will be taken by FIG Council in May 2019"*.

On 15 November 2018, the FRBG requested an extension of the deadline to submit its bid until the end of January 2019 due to political issues related to local elections in Belgium.

On 27 November 2018, Mr André F. Gueisbuhler, Secretary General of the FIG, sent the following correspondence to the FRBG with respect to its extension request:

I very much regret, but I cannot help you in this matter.

(…)

Therefore, only bids duly filled in received on or before 15th December 2018, including the necessary payment of the requested deposit of CHF 50'000.- will be considered.

(…)

On 14 December 2018, the FRBG submitted its application.

On 17 December 2018, the FIG acknowledged receipt of the FRBG's application to host the 2023 ART World Championships.

On 21 December 2018, the JGA submitted its application to host the 2023 ART World Championships.

On 22 December 2018, the FIG acknowledged receipt of the JGA's application.
On 17 January 2019, the FIG sent the following letter to the FRBG and the JGA:

Dear BEL and JPN Federations,

There are some points to bring to your attention regarding the bid process for the 2023 ART World Championships. The points are as follows:

- *The bid contract stated the deadline for submission was mid-December 2018. This term of "mid-December" is open to interpretation because its true definition is neither at the beginning nor at the end of the month.*
- *The FIG issued an Official Communication to all federations on 22 June 2018 entitled "2019 Council-Technical Regulations and FIG Events". This document contained contradictory information regarding the deadline date for submission of the bids for the 2023 ART World Championships by stating a deadline of 30 November 2018.*

We must acknowledge that we did receive two bids for the competition as follows:

- *BEL on 14 December 2018*
- *JPN on 21 December 2018*

By our observations, BEL determined mid-December as being by 15 December 2018, while JPN determined mid-December to be in the middle two weeks of the month. An argument could be made that both federations are late based on the Official Communication dated 22 June 2018, but we consider the contract terms to take precedence.

We want to acknowledge an email was sent by our Sports Event Manager, Céline CACHEMAILLE, on 18 December 2018 responding to Ilse ARYS of the BEL Federation's question on how many bids has the FIG received. Our response to Ilse, "You are the only candidate who has presented a bid". Celine delivered this information at the request of our former Secretary General, Mr Andre GUEISBUHLER. On 18

December 2018, there was indeed only one candidature received for 2023 at the FIG office.

After careful deliberation within the FIG office and consideration of past incidents with differences in interpretation, FIG will accept both bids and provide the opportunity for the two federations to present their bids (max. 15 min) at the Council 2019 in St. Petersburg (RUS) on the second day, 4th May.

(…)

On 21 January 2019, the FRBG requested the FIG to correct its decision and confirm that: (i) the FRBG's bid was the only procedurally correct bid; and, as such, (ii) the FRBG was the only candidate eligible to host the 2023 ART World Championships.

On 4 February 2019, the FIG informed the FRBG that the Presidential Commission considered the FRBG's letter, but determined that *"the final decision regarding which federation(s) can make a presentation for their bid"* would be taken by the FIG's Executive Committee ("EC") during a meeting in Lausanne to be held on 19 and 20 February 2019.

On 5 February 2019, the FIG informed the JGA that the *"FRBG has challenged the decision to allow two federations to bid for the 2023 ART World Championships".*

On 10 February 2019, the JGA sent a letter to the FIG, explaining that it had followed the FIG's instructions in submitting its application and, therefore, that the JGA's candidacy for the 2023 ART World Championships should be permitted.

On 12 February 2019, the FIG invited the FRBG and the JGA to submit a written report to the EC on the issue of the applicable deadline by no later than 17 February 2019.

On 15 February 2019, the JGA submitted its written report to the FIG and reiterated its position that it should be allowed to present its bid to the 2019 FIG Council, alleging it had followed the FIG's instructions in relation to the submission of its application. Notably, the JGA asserted the following:

(…)

We have the perception that "beginning of the month" means "the first week of the month", "end of the month" means "the last week of the month", and "middle of the month" means the weeks except for the first and the last weeks of the month. Therefore, our interpretation of the term "mid-December" is December 10th to 23rd. We successfully submitted our files within the deadline on December 21, 2018 based on this interpretation. (…)

The fact that FIG used a word "mid-December" which is not clear led to confusion among Japan and Belgium. In this sense, it is not reasonable to differentiate treatments of two federations on the grounds of discrepancy in the interpretation of "mid-December". The host country has to be determined in a way to serve the best interests of gymnasts and participants. (…)

(…)

On 16 February 2019, the FRBG filed its written report to the EC, setting out its position on the matter, namely:

(…)

As stated in the e-mail of 27 November 2018 sent by the acting FIG Secretary General, bids were only taken into consideration if they were received on or before 15 December 2018. 15 December 2018 is the only legally and semantically correct interpretation of "mid-December" 2018. No further interpretation of this concept is required or should be considered in this case.

(…)

If the bid of the Japanese federation were to be taken into account, the principles of equal competition and equal treatment would be harmed in two ways.

On the one hand it should be noted that the Japanese federation did not respect the deadline of 15 December 2018 which was imposed and followed by the Royal

Belgian Gymnastics Federation. This deadline was set out and communicated in the e-mail of 27 November 2018 to the Royal Belgian Gymnastics Federation as being a hard deadline. This approach should be applied to all interested federations, not only the Royal Belgian Gymnastics Federation.

On the other hand the possibility should be taken into account that the Japanese federation had knowledge of the official Belgian bid and was in a position to structure and alter its bid taking into consideration that there were other official bids for the 2023 ART World Championships. If the Japanese federation indeed had knowledge of the Belgian bid, they had a clear and undeniable advantage over the Belgian bid. Even without knowledge of the Belgian bid, the Japanese federation has received an advantage over the Belgian bid, the latter not getting any extension beyond the deadline of 15 December 2018. (…).

On 19 and 20 February 2019, the EC held a meeting. The relevant points from the minutes of the meeting read as follows (emphasis in the original):

(…)

The lawyer confirmed that some information like "mid-December" could be subject to interpretation. We are not going to repeat this kind of mistakes in the future. Nevertheless, both federations already informed us that they might decide to go to court.

On 20 February 2019, the FRBG and the JGA were informed that the EC had adopted a final decision allowing both of them to present their bids for the 2023 ART World Championships to the 2019 FIG Council (the "Appealed Decision")

On 1 March 2019, the FRBG filed a complaint with the Compliance Section of the Gymnastics Ethics Foundation ("GEF") in which it *"formally denounce[d] the FIG Executive Committee decision due to (i) the unequal treatment the RBGF has received in the bidding process, (ii) the fact that rules are being interpreted which are unequivocal and therefore do in no way need to be interpreted, and (iii) the fact that FIG violates its own rules and statutes in allowing late bid applications to be admitted"*.

On 1 March 2019, the FRBG filed its statement of appeal with the Court of Arbitration for Sport (the "CAS") against the FIG with respect to the Appealed Decision in accordance with Article R47 *et seq*. of the Code.

On 15 March 2019, the JGA filed a request for intervention. On agreement of the Parties, the JGA was thereafter permitted to intervene as a co-Respondent in this case.

In essence, the Appellant's position is that the JGA's application of 21 December 2018 did not comply with the FIG's formal requirements for the submission of a bid to host the 2023 ART World Championships. According to the Appellant, on the basis of: (i) the express terms of the Bid Contract; (ii) the FIG's conduct; (iii) the JGA's own bid documents; and (vi) Swiss law principles and common sense, the only possible meaning of *"mid-December 2018"*, as the deadline for the filing of bids, is *"15 December 2018"*. In addition, by taking the Decision under Appeal, the FIG committed a breach of the principle of equal treatment. Therefore, the Appellant submits that its bid to organize the 2023 ART World Championships is the only procedurally correct bid and that it should thus be the only eligible candidate to host this FIG event.

The FIG requests the CAS to dismiss the appeal. According to the First Respondent, in fact, the EC exercised its power and discretion in a legally correct, responsible and fair manner when it concluded to admit both the Appellant and the Second Respondent to the presentation of their bids to the Council. In addition, according to the FIG: (a) there is no "right" to be awarded a FIG event, even if the Appellant would be the only bidder; (b) the FIG is competent to organize the bidding

process for hosting the 2023 ART World Championships and to specify the time limits for the submission of the applications; (c) the relevant time limit of *"mid-December 2018"* has been met by both applicants; (d) the FIG has the responsibility and the competence to decide on the admission of candidates for the organization of the 2023 ART World Championships, and (e) the FIG has not disadvantaged the Appellant, since its bid was accepted and would be presented to the Council on 4 May 2019 for decision.

In support of its requests JGA Respondent submits, in essence, that: (i) the meaning of *"mid-December"* is open to interpretation and, as a result, *"15 December"* is not the only possible meaning of *"mid-December"*, and (ii) even if the Panel finds that *"mid-December 2018"* does mean *"15 December 2018"*, the JGA's bid should not be discarded, because this would constitute a breach of the principle of equal treatment.

Reasons

1. CAS jurisdiction

Article R47 of the Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with the CAS 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.

Pursuant to Article 43.2 of the FIG Statutes, *"in so far as they come under the civil law"* and are not *"of sports nature"*, decisions adopted by the FIG bodies can be exclusively disputed to the CAS. Article 43.2 provides as follows:
(…)

In so far as they come under the civil law, decisions of the FIG bodies (of proprietary nature) can be exclusively disputed to the Court of Arbitration for Sport "CAS" in Lausanne (Switzerland). The legal ordinary procedures are excluded. The decisions which are of sports nature cannot be disputed. Complaints to the Court of Arbitration for Sport can be addressed only when the internal FIG appeal procedures were exhausted. An appeal to the Court of Arbitration for Sport does not have a suspension effect, except if this Authority orders it. The provisions of the sports' code of arbitration of the CAS apply to this authority. Special provisions apply for doping cases.

In this case, the dispute concerns a decision adopted by a FIG body (the EC) and is not of *"sports nature"* but refers to the bidding process for the organization of an event. In this regard, Article 43.2 of the FIG Statutes expressly provides for an appeal to CAS. Moreover, CAS jurisdiction stems from the Bid Contract entered into between the parties.

Accordingly, the Panel confirms that CAS has jurisdiction to hear this matter.

2. Standing to sue

Standing to sue (or to appeal) is attributed to a party which can validly invoke the rights which it puts forward, on the basis that it has a legally protectable and tangible interest at stake in litigation. This corresponds to the Swiss legal notions of *"légitimation active"* or *"qualité pour agir"*, as confirmed by the case-law of the Swiss Federal Tribunal. According to the CAS jurisprudence, parties which have a direct, personal and actual interest are considered to have legal standing to appeal to the CAS. Such an interest can exist not only when a party is the addressee of a measure, but also when it is a directly affected third party i.e. a party who have a tangible interest of a

financial or sporting nature at stake. There is a category of third party applicants who, in principle, do not have standing, namely those deemed *"indirectly affected"* by a measure. As regards the differentiation of directly affected parties from indirectly affected parties, the CAS jurisprudence displays a *"common thread"*. The correct approach when dealing with standing is to deem mere competitors of the addressee of the measure/decision taken by the association indirectly affected –and thus exclude them from standing – when the measure does not have tangible and immediate direct consequences for them beyond its generic influence on the competitive relationship as such (cf. CAS 2016/A/4924 & 4923). In that respect, a bidding process, however competitive in nature, might be different from the conduct of a plain sporting competition, where the exclusion of a competitor might be irrelevant to the other participants in the event. In a bidding process, procedural fairness and equality of treatment are of the essence, since, *inter alia*, the adjudication might depend also on a comparison between the different bids. Therefore, a decision as to the admission of other bidders appears to have tangible and immediate direct consequences for all of them. In this case, the parties have a legal interest in ensuring that the bid application standards, the FIG Statutes and the Bid Contract are all applied uniformly so as to create a level playing field for all FIG members in the sport. There is an interest in the law that everyone competes under the same rules. Sport federations must comply with certain basic principles of procedural fairness towards its members while an international federation is required to exercise its normative discretion by adopting regulations in appropriate compliance with the formal procedures displayed in its own statutes. An international federation cannot simply disregard rules which bind it contractually to its member federations. This said, the Panel notes that the existence of competing bids is normal in a sports environment, and underlines that the admission of a bid is only half the battle; the bidder must also secure a majority vote from the Council. Nevertheless, the requirement of a level playing field is a *lex sportiva* principle to be respected by all sports governing bodies and protected by the CAS.

In view of the above, the Panel concludes that the Appellant has standing to bring this appeal as filed, insofar as it aims at protecting its right to ensure that the bidding process is conducted by applying the same rules to all bidders.

3. Determination of the deadline to submit an application

   Pursuant to the clear wording of the FIG Statutes, late candidatures for the organization for a FIG event shall not be admitted, and proposals for such event shall be filed 5 months before the Council meeting. However, under the circumstances the application of the FIG Statutes is unclear since the FIG provided its member federations with three different deadlines to submit their applications. Yet, according to the blank Bid Contract sent to the candidate federations by the FIG and on the basis of the FIG's explicit communication, it is fair to presume that the candidates were generally aware that the Bid Contract needed to be filed *"no later than mid-December"*. Therefore, on an objective assessment of the facts, the applicable deadline for any such bid was *"mid-December"*.

4. nterpretation of the term "mid-December" in the bid contract

The Bid Contract did not contain any specific definition of the term *"mid-December"*.

In this respect, the FRBG contends that Articles 76 and 77 of the SCO provide the answer to the meaning of *"mid-December"*. The FIG, however, rebuts that Article 76 cannot be applied to the present case, since it only concerns the time of performance of a contractual obligation. This issue was not addressed by the JGA.

Article 18 of the Bid Contract stipulated that *"this Contract shall be governed by and interpreted exclusively in accordance with the Laws of Switzerland"*. Consequently, it should be turned first to Swiss law for the determination of the meaning of the expression *"mid-December"*. The meaning of Article 7 Swiss Civil Code (SCC) is that all the general provisions of the Swiss Code of Obligations (SCO) (*e.g.*, Articles 68 to 113 of the SCO) are applicable to all the legal matters, regardless of whether they concern contracts, decisions or expressions of intent. Consequently, pursuant to Article 7 of the SCC, Articles 76 and 77 of the SCO apply to the associations governed by Articles 60 *et seq*. of the SCC. Having regard to these articles, the expression *"mid-December"*, properly to be interpreted as corresponding to the wording *"middle of the month"*, should mean the 15th day of the month of December. The above conclusion is confirmed by a reference to a *"natural and ordinary meaning"* of the expression, understood in good faith in the context in which it occurs, and if the intention of the draftsman (*i.e.*, the ruling body) is considered. In ordinary English parlance, the term *"mid-December"* might normally be interpreted as referring to a period of time comprised between 11-20 December (*i.e.*, a period of time centred around 15 December), rather than a single date. Early December might refer to 1-10 December, while late December concerns 21-31 December. Therefore, even if application of Swiss law was to be disregarded, the application of ordinary English parlance would not appear to allow the interpretation of *"mid-December"* to support the conclusion that by filing a bid on 21 December 2018, the candidate federation filed it by *"mid-December"*.

Decision

In light of the foregoing, the Panel finds that the appeal filed by the FRBG should be upheld, that the Appealed Decision should be set aside and that the bid presented by the JGA for the 2023 ART World Championships has to be disregarded.

CAS 2019/A/6233
Al Shorta Sports Club v. Fédération Internationale de Football Association (FIFA) & Dalian Yifang FC
25 September 2019

Football; Joint liability to pay compensation for breach of contract (article 17 FIFA RSTP); Standing to be sued; CAS panels' power of review; Payment of compensation in case of jointly liable defendants

Panel
Mr Rui Botica Santos (Portugal), President
Prof. Massimo Coccia (Italy)
Mr Alexis Schoeb (Switzerland)

Facts

Al Shorta Sports Club (the "Appellant" or "Al Shorta") is an Iraqi football club and a member of the Iraqi Football Association (IFA).

The Fédération Internationale de Football Association ("FIFA") is the governing body of football worldwide. FIFA exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players belonging to its affiliates. Its seat is in Zurich, Switzerland.

Dalian Yifang FC (formerly known as Dalian Aerbin FC and hereinafter referred to as "Dalian") is a Chinese football club and a member of the Football Association of the People's Republic of China.

On 10 February 2014, Dalian concluded two contracts with the football player N (the "Player"). The first contract was titled "Employment Contract for Players" (the "Employment Contract") and was entered into between the Player and Dalian. The second contract was titled *"Personal Portrait Right Agreement"* (the "Image Rights Agreement") and was entered into between the Player, Dalian, and Aerbin (Hong Kong) Investment Limited ("Aerbin HK"). The Employment Contract and the Image Rights Agreement (collectively, the "Contracts") had a duration of two seasons, starting on 2 February 2014 and expiring on 31 December 2015. Dalian allegedly breached its contractual obligations towards the Player, forcing him to terminate his contractual relationship with Dalian on 25 May 2014, after which he joined Al Shorta.

On 28 May 2014, the Player lodged a claim before FIFA against Dalian requesting FIFA to hold that he had a *"right to cancel his contract as the Respondent hasn't paid his salary for last 3 months"*. Dalian refuted the Player's assertions and lodged a counterclaim against the Player for breach of contract on grounds that the Player had among other things failed to attend the club's training sessions for almost 7 weeks.

On 27 November 2014, the FIFA Dispute Resolution Chamber (FIFA DRC) rendered its decision ("FIFA DRC Decision") and dismissed the Player's claim and partially granted Dalian's counterclaim. It ordered the Player to pay Dalian USD 690,000 in compensation for breach of contract with Al Shorta being held jointly and severally liable in accordance with Article 17.2 of the FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP").

On 14 April 2015, the Player appealed the FIFA DRC decision before the Court of Arbitration for Sport (the "CAS"). Al Shorta did not appeal but was invited by the CAS Court Office to take part in the proceedings in view of its joint and several liability. Al Shorta however declined and/or ignored the CAS Court Office's invitation, leaving the Player to pursue the appeal on his own. On 3 February 2016, the CAS rendered its award CAS

2015/A/4039 in which it held that the Player lacked just cause to terminate his contractual relationship with Dalian. The panel went on to find that both the Employment Contract and the Image Rights Agreement were linked and that at the time of termination, Dalian owed the Player USD 560,000 in monies due under both contracts. The Panel consequently took into account these overdue payables by reviewing and offsetting the compensation due from the Player to Dalian from USD 690,000 to USD 130,000 (*i.e.* USD 690,000 – USD 560,000).

Inter alia on 13 May 2016, Dalian wrote to Al Shorta asking it to pay USD 136,803.42 (inclusive of interest) on account of its joint and several liability as ordered in CAS 2015/A/4039. On 10 and 15 August 2016, Dalian petitioned the FIFA DRC to refer the matter to the FIFA Disciplinary Committee (FIFA DC) for disciplinary proceedings against the Player for having failed to pay the amounts ordered in the case CAS 2015/A/4039.

On 16 March 2018, the secretariat to the FIFA DC informed the Parties that the committee was not in a position to conduct further disciplinary proceedings against the Player in respect of Article 64 of the FIFA Disciplinary Code following the information provided by the IFA that the Player was no longer active as a professional or amateur player. Additionally, the letter of the secretariat to the FIFA DC went on in its relevant parts as follow:

"I. Liability of the club Al Shorta

(…) according to the Swiss Federal Tribunal (4A_6/2014), "the presence of joint defendants does not affect the plurality of the cases and the parties" and that "joint defendants remain independent from each other" (free translation from French to English). Therefore, "the behaviour of one of them, and in particular his withdrawal, failure to appear or appeal, is without influence upon the legal position of the others" and "this independence of joint defendants will continue before the appeal body: a joint defendant may independently appeal the decision affecting him regardless of another's renouncing his right to appeal the same decision".

In addition, the Swiss Federal Tribunal clarified that "the res judicata effect of the judgement concerning joint defendants must be examined separately for each joint defendant in connection with the opponent of the joint defendant because there are as many res judicata effects as couples of claimant/defendant".

In this respect and in line with the CAS jurisprudence, we would like to emphasise that, since the club Al Shorta has not explicitly challenged its joint and several liability imposed by the [DRC] *in its decision passed on 27 November 2014 and did not participate to the proceedings before the CAS, the decision of the* [DRC] *dated 27 November 2014 has become final and binding upon the club Al Shorta. Based on these considerations, we would like to inform* [Dalian] *that the* [FIFA DC] *is not in a position to enforce the CAS award dated 3 February 2016 against the club Al Shorta (…).*

As a consequence, [Dalian] *is kindly invited to clarify by return the outstanding amounts due by the club Al Shorta in this matter and to specify the legal basis on which it is basing its request on".*

On 20 March 2018, Dalian informed the FIFA DC that *"the amount sought from Club Al Shorta (as distinct from Mr.* [N]*), is the amount as set out in the decision of the FIFA* [DRC] *dated 27 November 2014"* pursuant to which *"Al Shorta became liable to* [Dalian] *in the sum of $690,000 plus interest at 5% per annum"*. On 8 August 2018, the secretariat to the FIFA DC opened disciplinary proceedings against Al Shorta for having failed to pay the USD 690,000 plus interest at 5% *per annum* as ordered in the FIFA DRC Decision. On 9 August 2018, Al Shorta *inter alia* argued that the amount actually due from it as a joint and several debtor is USD 130,000 by submitting that it ought to benefit from the award in CAS 2015/A/4039. By letter dated 16 August 2018, the legal representative of Al

Shorta and the Player informed FIFA that they had paid Dalian USD 151,345 in satisfaction of the compensation due to Dalian. On 12 October 2018, Dalian acknowledged receipt of the above amount but requested Al Shorta to pay the full amount as ordered by the FIFA DRC.

On 16 November 2018, the FIFA DC rendered the Appealed Decision and *inter alia* held as follows:

> *"1.* [Al Shorta] *is found to have infringed art. 64 of the FIFA Disciplinary Code as it is guilty of failing to comply in full with the decision passed by the to* [DRC] *on 27 November 2014, according to which it was ordered to pay to* [Dalian] *(…) the amount of USD 690,000 as compensation for breach of contract plus 5% interest p.a. (…). (…)* [Al Shorta] *has only paid a partial amount to* [Dalian] *(USD 151,345)".*

The Parties have raised a few procedural and substantive issues for the Panel's determination. As a matter of procedure, Dalian states that it lacks standing to be sued. The Appellant also raises a procedural issue by submitting that the FIFA DC violated its right to be heard. In substance, the Appellant primarily contends that the FIFA DC was wrong in imposing disciplinary sanctions. It claims that the Player and Al Shorta had fully paid the amounts due to Dalian as ordered in the FIFA DRC decision and the FIFA DC should therefore not have rendered the Appealed Decision. The issues for determination therefore are:

1. Does Dalian lack standing to be sued?
2. Did the FIFA DC violate Al Shorta's right to be heard?
3. Is there any legal basis for disciplinary sanctions against Al Shorta? Does Al Shorta – as a joint and several liable party – has to pay any additional amount in excess of Dalian's credit over the Player?

Reasons

1. Standing to be sued

   Dalian submits that pursuant to CAS jurisprudence (in particular CAS 2007/A/1329), a party only has standing to be sued if it has some stake in the dispute because something is sought against it. Given that Al Shorta is seeking relief only against FIFA, only FIFA has standing to be sued. Al Shorta submits that Dalian has standing to be sued because the cornerstone of this appeal relates to the amount of debt for which Al Shorta is jointly and severally liable. Al Shorta states that according to CAS jurisprudence (CAS 2011/A/2654 & CAS 2011/A/2551), an appellant's failure to summon a third party as a co-respondent to the appeal may have serious ramifications on the panel's scope of review to the extent that the panel lacks power to award the reliefs sought by the appellant.

   Pursuant to CAS jurisprudence, a party has standing to sue (and be sued) if it can be demonstrated that it is sufficiently affected by the appealed decision and has a tangible interest, of financial or sporting nature, at stake (CAS 2013/A/3140). In CAS 2017/A/5359, the panel stated as follows:

   > *"Pursuant to CAS jurisprudence, a party has standing to be sued if it is personally obliged by the "disputed right" at stake or has a de facto interest in the outcome of an appeal. For instance, the panel in CAS 2006/A/1206 stated as follows: "4. Under Swiss law, applicable pursuant to Article R58 of the Code, the defending party has standing to be sued (légitimation passive) if it is personally obliged by the "disputed right" at stake"* (para. 62).

   The question is whether Dalian has a stake or *de facto* interest in the outcome of these appeal proceedings. The Panel's finding on

this question is in the affirmative. Dalian showed its legal interest by moving the FIFA DC to render the Appealed Decision and successfully caused disciplinary sanctions to be imposed on Al Shorta for failing to pay USD 690,000. It follows that Dalian should also have the same legal interest in supporting FIFA's position, and ultimately ensuring that the CAS upholds the Appealed Decision which would see Dalian being paid USD 690,000. Inevitably, any decision rendered by CAS will have a legal impact on Dalian. To that extent, the Panel agrees with CAS jurisprudence as invoked by Dalian that a party only has standing to be sued if something is sought against it (CAS 2007/A/1329). In these proceedings, Al Shorta seeks something from Dalian, in the form of a relief from the duty to pay the latter the full USD 690,000 plus accrued interest it sought to enforce before the FIFA DC. It therefore follows that Dalian has standing to be sued.

2. CAS panels' power of review

Al Shorta claims that the FIFA DC violated its right to be heard by ignoring numerous correspondence, evidence and legal considerations it filed with a view to demonstrating its full compliance with point III.4 of the FIFA DRC decision. FIFA submits that Al Shorta's right to be heard was fully respected in the proceedings before the FIFA DC.

To begin with, Al Shorta does not deny having received notice of the FIFA DC proceedings and all correspondence leading to the Appealed Decision. Al Shorta duly replied to this correspondence, meaning that the FIFA DC granted and considered all the submissions filed by Al Shorta. The mere fact that FIFA deemed these letters to be irrelevant in reaching at the Appealed Decision does not necessarily mean that Al Shorta's right to be heard was violated. Indeed, FIFA's decision was based on its understanding that Al Shorta was to pay USD 690,000 irrespective of the effect of the Player's appeal in CAS 2015/A/4039 and the USD 151,388 paid by Al Shorta and the Player. It follows that Al Shorta's right to be heard was not violated.

In any case, the Panel wishes to stress that pursuant to Article R57 of the CAS Code, CAS panels have full power to review the facts and the law of the matter, which enables them to go beyond the establishment of the legality of the previous decision and to issue an independent and free standing decision (MAVROMATI/REEB, The Code of the Court of Arbitration for Sport: Commentary, cases and materials, 2015, p. 508, para. 14; see also: CAS 2010/2235, para. 73; CAS 2006/A/1153, para. 53ff.; CAS 2004/A/607, para. 4.3).

In addition, CAS panels have consistently held that *"the virtue of an appeal system which allows for a full rehearing before an appellate body is that issues relating to the fairness of the proceedings before the authority of first instance fade to the periphery"* (MAVROMATI/REEB, *ibid.*, p. 513, paras. 29-30; see *inter alia*: CAS 2006/A/1153, para. 54; CAS 2005/A/1001, para. 16.4.2; TAS 2004/A/549, para. 31; CAS 2008/A/1574; CAS 2009/A/1840 & CAS 2009/A/1851; CAS 2008/A/1545 para. 15). As a result, any procedural prejudice suffered by Al Shorta may and has been cured through this appeal.

3. Payment of compensation in case of jointly liable defendants

This appeal relates to the Player's appeal against the FIFA DRC Decision dated 27 November 2014. The FIFA DRC Decision had ordered the Player to pay Dalian USD

690,000 plus interest with Al Shorta being jointly and severally liable. The Player – as the main obligor – appealed the FIFA DRC decision and succeeded in reducing the outstanding debt from USD 690,000 to USD 130,000 plus interest. The CAS panel off set USD 560,000 from the USD 690,000 and for this reason the total remaining amount due to Dalian was about USD 151,388 (USD 130,000 + interest). This amount was finally paid by the *"legal representative of the player"*. In light of the above-mentioned facts, it seems that the Player – *via* off set and through his legal representative – paid Dalian its credit.

In respect of Article 17 (2) FIFA RSTP and from a procedural perspective, it is clear that a player and his new club are *"necessary joint defendants on the merits"* and that the joint defendants remain independent from each other, meaning that the *res judicata* effect of the decision concerned must be examined separately for each of them (see SFT 4A_6/2014, 28 August 2014, ATF 140 III 520, 33 ASA Bull. 85 (2015) (the "Boca" case); see also for instance: CAS 2016/A/4408).

It is also clear under Article 17 (2) FIFA RSTP that the new club's pecuniary liability has a subsidiary character and its extent necessarily depends on the amount to be owed (or not owed) by the player to his former club. This is especially the case for the settlement of the compensation – if one of the joint debtors pays the creditor, the other joint debtor does not have to pay anymore.

In the case at hand, point III.4 of the FIFA DRC decision did not directly order Al Shorta to pay USD 690,000 but only declared Al Shorta as being *"jointly and severally liable for the payment"* of the compensation owed by the Player. Due to Al Shorta's failure to appeal, such decision did become final and binding *vis-à-vis* Al Shorta and it could not challenge anymore the fact that it was jointly and severally liable with the Player. It follows that Al Shorta is not the principal obligor but rather a subsidiary obligor, with Al Shorta merely being jointly and severally liable. Al Shorta's duty to perform its payment obligation partially or wholly depends on the Player's execution of his payment obligation towards Dalian. Therefore, if the Player entirely satisfies the debt jointly owed with Al Shorta to Dalian, Al Shorta would thus be discharged from any payment obligation towards Dalian.

The Panel also notes that the award CAS 2015/A/4039 did not modify the FIFA DRC decision regarding the breach nor the *quantum* of the compensation. Rather, the CAS panel confirmed the amount of compensation awarded by the FIFA DRC but also took into account an amount due by Dalian to the Player and proceeded to a set-off. The entire compensation due to Dalian by the Player and Al Shorta was still USD 690,000 but the CAS panel acknowledged that the Player already settled - *via* a set-off - an amount of USD 560,000 and therefore that only the remaining amount of USD 130,000 was due to be paid to Dalian. In other words, Dalian was entitled to receive USD 690,000 and it actually did. Demanding any additional payment from Al Shorta as claimed by Dalian and upheld by the FIFA DC in the Appealed Decision – when Dalian has already received full payment – would amount to excessive payment or unjustified enrichment.

In the Panel's opinion, the decision rendered by the Swiss Federal Tribunal on 28 August 2014 in the Boca case is not relevant to the present matter. Besides what

is mentioned above, the Panel notes that the Federal Tribunal did not analyse the merits of the case, namely expressing an opinion on the legal nature and extent of the parties' liabilities under Article 17 RSTP, but only on jurisdictional aspects of the case. Second, the SFT judgement was rendered in critically different circumstances than the present matter since, in the Boca case, the Player, *i.e.* the principal obligor, had initiated then withdrawn his CAS appeal against the decision rendered by the DRC, whereas in the present matter it is the subsidiary obligor, the Appellant, who did not appeal the DRC decision before CAS. The SFT decision 4A_6/2014 is therefore irrelevant in the present dispute.

In light of the foregoing, the Panel concludes that there was no legal basis for disciplinary sanctions against the Appellant, essentially because Dalian has been fully compensated in compliance with both the FIFA DRC decision of 27 November 2014 and the subsequent award CAS 2015/A/4039.

Decision

The appeal filed on 1 April 2019 by Al Shorta Sports Club against the decision rendered by the FIFA DC on 16 November 2018 is upheld and said decision is set aside.

CAS 2019/A/6288
Waterford Football Club (FC) v. Union des Associations Européennes de Football (UEFA)
5 August 2019 (operative part of 28 June 2019)

Football; UEFA refusal to grant an exception to the three-year rule as defined in article 12 (2) UEFA CL/FFP; Competence to grant a licence and competence to grant an exception to the three-year rule; Fairness of the procedure before UEFA; Aim of the three-year rule; Strict interpretation of the application of the exception to the three-year rule; No unequal treatment

Panel
The Hon. Michael Beloff QC (United Kingdom), Sole Arbitrator

Facts

The Appellant in these proceedings is Waterford Football Club ("WFC"), a professional football club competing in the League of Ireland Premier Division and affiliated to the Football Association of Ireland (hereinafter "FAI"). WFC appeals a decision of the UEFA CFCB Investigatory Chamber ("The Chamber"), *"to refuse to grant an exception to the three-year rule to Power Grade Ltd (trading as Waterford FC)"* ("the Appealed Decision").

The Respondent in these proceedings is the Union des Associations Européennes de Football ("UEFA"), the governing body of European football. UEFA is an association under Articles 60 *et seq.* of the Swiss Civil Code with its headquarters in Nyon, Switzerland.
A club entitled "Waterford Football Club" was founded in 1930 and competed in the League of Ireland.

In May 1982, Waterford Football Club changed its name to Waterford United and continued to participate in the League of Ireland.

On 21 October 2005, WUFC Operations Limited ("WUFC") was incorporated with the Companies Registration Office of Ireland and became a member of the FAI and a yearly participant in the League of Ireland until the end of the 2016 season.

WUFC did not apply for a 2017 domestic licence.

On 14 December 2016, Power Grade Ltd was incorporated with the Companies Registration Office of Ireland.

On 6 January 2017, the business name "Waterford FC" was registered to Power Grade Ltd.

On 13 February 2017, WFC became a full member of the FAI when it obtained a domestic licence to participate in the First Division. At the same time WFC signed a participation agreement to play in the League of Ireland in 2017 and subsequent years.

In October 2017, WFC was crowned champion of the First Division and was promoted to the Premier Division.

On 24 October 2018, WUFC was dissolved.

On 26 October 2018, the Premier Division season concluded. WFC finished in fourth position which could have entitled it to participate in the first qualifying round of the UEFA Europa League 2019-2020 on sporting merit. St. Patrick's Athletic ("St Patricks") finished one place behind WFC i.e. in fifth position.

On 25 March 2019, five months later, the FAI applied by letter, ("The FAI letter") *"on behalf of Power Grade Ltd trading as Waterford FC" for the granting of an exception request for the "three-year rule"* as defined in Article 12(2) of the UEFA Club Licensing and Financial Fair Play Regulations ("CL&FFP") and filed an exception request form for non-application of the three-year rule designated for the *"transfer of football club[s] from one legal entity to another"*.

In the FAI letter the FAI, mainly stated that there is no legal connection between the old and new entities which are separate legally under law and the FAI Board would not have accepted any legal connection with WUFC and those applying to operate the new entity WFC.

The FAI in the FAI letter also submitted that WFC embraced *"the spirit of the [CL&FFP] regulations"* in so far as *"[Notwithstanding there being no legal obligation to do so, the new entity* [WFC] *paid off football creditors of [WUFC]"* (emphasis added) and that *"[t]hese significant gestures have ensured goodwill towards the new club within the football family in Waterford City"*. (Additionally, WFC has furnished an Excel table alleging that it paid off all *"known creditors"* of WUFC (for an amount of around EUR 100000) from 19 December 2016 until 13 February 2017).

On 12 April 2019, the Chamber met and took the decision not to grant the exception request for the non-applicability of the three-year rule to WFC ("the initial decision").

On 24 April 2019, the FAI issued a statement that the *"Independent Club Licensing Committee of the Football Association of Ireland met on April 24, 2019 and awarded UEFA licences to four SSE Airtricity League clubs for the 2019-20 UEFA Club competition season [...] Dundalk FC, Cork City FC, Shamrock Rovers FC, St Patrick's Athletic FC"*. Accordingly, WFC was not awarded a UEFA licence for 2019/20 (the "Licence Decision").

On 26 April 2019, the UEFA administration received an email from WFC's external counsel informing that it wished to appeal against the decision to refuse WFC' a licence. WFC asked for a reconsideration of the matter, stating inter alia, that they *"assume(d) that their licence has been refused due to the disputed sums owed to their former manager Roddy Collins"* an issue with which they could "easily deal" and enclosing a draft of their appeal which, inter alia, sought to do so.

On 30 April 2019, following the observations submitted by WFC's lawyer, the UEFA Administration, acting on behalf of the Chamber, requested WFC, inter alia, to (re)confirm the accuracy of the information provided by FAI in the FAI letter in support of the three-year rule exception request and annexes, and to provide some additional information, including (i) an assurance that all WUFC creditors had been paid off, (ii) any agreement between WUFC and WFC, (iii) any agreement between WFC/PowerGrade and the FAI/League of Ireland concerning any particular condition required for their affiliation to the FAI/participation to the League of Ireland.

On 2 May 2019, in response WFC provided information with respect to its efforts to make payments to Roddy Collins, and confirmed that:

i. The information in the FAI letter was factually correct;

ii. There was no asset purchase or share purchase agreement between WUFC and WFC;

iii. The companies (i.e. WFC and WUFC) were not connected in any way and there were no persons involved in the ownership of WFC; who were involved in the ownership of WUFC;

iv. There was no conditional/ agreement with WFC and the FAI/ League of Ireland

relating to their affiliation or any conditions (particularly relating to any financial liabilities) for WFC participating in the League of Ireland.

On 8 May 2019, the FAI submitted a UEFA Club Competitions 2019-20 entry form which registered St. Patrick's Athletic for the UEL 2019/20.

On 10 May 2019, the Chamber handed down the Decision under Appeal.

On 18 June 2019, the draw took place for the first qualifying round of the UEL 2019/20. St. Patrick's were drawn against FK Norrköping (SVVE). Their matches were scheduled to take place on 11 and 18 July 2019.

On 16 May 2019, in accordance with Articles R47, R48 and R51 of the CAS Code, WFC filed its Statement of Appeal to be considered as its Appeal Brief.

Reasons

1. Competence to grant a licence and competence to grant an exception to the three-year rule

   The Sole Arbitrator considers that WFC in pursuit of its aim to participate in the Europa League for the 2019/2020 football season ("the WFC aim") has misdirected its fire.

   Under the applicable regulations a national federation, in this case the FAI, was alone competent to grant a licence to an affiliated club, in this case WFC (see the UEFA Club Licensing & Financial Fair Play Regulations, Edition 2018 (the "CL&FFP Regulations") articles 5 (1), 14, 17, 12, 4)). On the other hand, the UEFA CFCB Investigatory Chamber was alone competent to grant a club's request for an exception to the three-year rule as defined in article 12 (2) of the CL&FFP Regulations. If granted, the exception to the three-year rule club enables the licence applicant (the club) to secure a UEFA licence from its federation absent satisfaction of the three-year criterion i.e. despite the fact that its membership in its federation i.e. a UEFA member association and its contractual relationship (if any) of a UEFA member association did not last – at the start of the licence season – for at least three consecutive years. The club in appealing an alleged refusal by UEFA to grant it a licence has conflated and confused the distinctive roles of the national federation and UEFA.

2. Fairness of the procedure before UEFA

   WFC's complaint that the procedure adopted by UEFA was "procedurally defective" appears to rely, not only any alleged breach of express provisions of the applicable regulations but rather on a denial of a fair opportunity to put its case for an exception from the three-year rule to be made in its favour.

   WFC was or ought to have been aware since 26 October 2018 (the end of the previous Premier League Season) that it would need to qualify for an exception under Article 12 of the CL&FFP Regulations in order for it to be able to successfully secure a UEFA Licence from the FAI for Europa League 2019/20. However, for reasons which are unexplained, UEFA did not receive the application for the exception request until 25 March 2019 i.e. five months after that October date and only 6 days before the final deadline for making the same. In so far as the timetable became unduly constricted WFC was author of its own misfortune.

   In any event, no unfairness was detected in

the procedure adopted by UEFA. The club had access to the applicable regulations and knew (or should have known) the test to meet in order to put its case for an exception from the three-year rule to be made in its favour. Moreover, in a letter sent to the club, the UEFA CFCB Investigatory Chamber sufficiently identified to the applicant club the kind of materials relevant to that test in which the Chamber might be interested.

3. Aim of the three-year rule

   The objectives of the three-year rule are to (i) act as a deterrent against financial misconduct, protect clubs' creditors, (ii) encourage new investments into existing clubs, (iii) preserve club's identity, and (iv) help safeguard the integrity of the competition. The three-year rule has been established to avoid circumvention of the CL&FFP Regulations. The UEFA licensing system has been acknowledged by CAS. In particular, pursuant to CAS case law, clubs are not to be permitted to create a new company or change their legal structure so as to "clean up" their balance sheet while leaving their debts in another legal entity (which is likely to go bankrupt). If allowed, this kind of device would obviously harm the integrity of competition and would contradict the interest of the sport as well as putting at risk the interests of creditors. Furthermore, the application of the three-year rule and its exceptions must be combined with the fundamental principle of legality which aims at avoiding unequal treatment and arbitrary decisions.

4. Strict interpretation of the application of the exception to the three-year rule

   The possibility to grant exceptions to the three-year rule must be strictly interpreted. It is well established law that such is the correct approach to any exception to a general rule. The three-year rule, being consistently applied, aims precisely at ensuring the integrity of the competitions. The exception process was created to prevent unfair situations, which may occur when applying a rule without any derogation. For instance, an exception to the three-year rule could be granted-after a careful scrutiny of the situation to a club which changed its legal form only to be compliant with national regulations and then had its membership interrupted pursuant to Article 12(3) of the CL&FPP Regulations. The grant of an exception to the three-year rule is under the Regulations a matter for the discretion of UEFA (Annex 1 (B) (5) of the CL&FPFP Regulations). It is for the club to show why the discretion should be exercised in its favour, not for UEFA to show why it should not. The club that has not put forward any compelling reasons to trigger grant of an exception to the Rule; that has not shown why it would be unfair to apply to them the three-year rule; that was not treated is any stricter manner than any other clubs, but rather in the same way and that deliberately chose to initiate and launch a new legal structure, thereby accepting the inherent benefits and drawbacks of such a new structure; whose acceptance of the exception request would trigger an unequal treatment amongst the clubs and would create an unacceptable degree of legal uncertainty shall not be granted (see CAS 2011/A/2476, Fotbal Club Timisoara SA v. UEFA, 24 August 2011, § 3.15)." (Para 20). In short, subject only to the Equal Treatment Complaint discussed below, WFC was not treated in any stricter manner than any other clubs, but rather in the same way.

There is, therefore in the Sole Arbitrator's view, no hint of any misdirection in the

reasons given by the Chamber for the Appealed Direction.

5. No unequal treatment

WFC submit that a decision issued in February 2010 with respect to another Irish club, namely Sporting Fingal ("the Fingal decision"), was an analogous case where an exception was granted in "similar circumstances".

In the Sole Arbitrator's view UEFA have compellingly rebutted this contention for the following reasons: There is no unequal treatment where the circumstances in which an exception was previously granted to a club were different. In the precedent case, creditors were indisputably protected; to accede to the club's application created no risky precedent. By contrast while in the case at hand, the applicant club paid off "known" (sic) creditors on a "goodwill" basis, it did so on its own averment voluntarily rather than on the basis of legal obligation. To accede the club's application would create a risky precedent enabling clubs to adopt this informal course of action in the future.

Decision

The appeal filed by Waterford Football Club against the decision rendered on 10 May 2019 by the Investigatory Chamber of the UEFA Club Financial Control Body is rejected. The decision rendered on 10 May 2019 by the Investigatory Chamber of the UEFA Club Financial Control Body is confirmed.

CAS 2019/A/6330
Sara Castillo Martínez v. World Skate
18 February 2020 (operative part of 9 July 2019)

Artistic Skating; Eligibility; Application of the principles of legality and predictability to sports organisations' rules on eligibility to participate to their events

Panel
Mr Efraim Barak (Israel), Sole Arbitrator

Facts

Mrs Sara Castillo Martínez (hereinafter: the "Appellant") is an artistic skater of both Spanish and Brazilian nationalities.

World Skate (hereinafter: "World Skate" or the "Respondent") is the international governing body for Roller sports, including artistic skating.

In June 2018, the Appellant competed in the 2018 RFEP Spanish Championship of Artistic Skating and was ranked in 3rd place. This 3rd place gave the Appellant the right to be selected to compete in the World Roller Games 2019 (hereinafter: the "World Roller Games 2019") as a member of the Spanish national team. Later, the *Real Federación Española de Patinaje* (hereinafter: the "Spanish Federation") did not select the Appellant to compete for Spain in the World Roller Games 2019.

On 12 November 2018, the Appellant sent an email to the Spanish Federation requesting the transfer of her federation card to Brazil in order to be registered with the Brazilian Federation. On the same day, Mr Francisco Jansà Solé, Vice President of the Spanish Federation, replied that the *Federación Catalana de Patinaje* was the sport organization competent in the matter of her registration. Nevertheless, and for information, and referring to the possibility for the Appellant to represent Brazil while she previously had represented Spain, he enclosed to his email a copy of the Olympic Charter and made a reference to its Rule 41.

Early 2019, the Appellant, as a Brazilian national, competed in the Brazilian Artistic Skating Championship 2019. The Appellant was later selected by the *Confederação Brasileira de Hóquei e Patinação* (hereinafter: the "Brazilian Federation") to compete, representing Brazil, in the World Roller Games 2019 to be held in Barcelona in July 2019. On 29 March 2019, the Brazilian Federation requested World Skate to clarify whether or not the Appellant was eligible to compete in the World Roller Games 2019 representing Brazil considering her participation in the European Championships representing Spain in the past year. On 8 April 2019, Mrs Paula A. Contarino, on behalf of World Skate, informed the Brazilian Federation that the Appellant should wait three (3) years from the date of her participation in the European Championships before she will be eligible to represent Brazil in view of the application of Rule 41 of the Olympic Charter (hereinafter: the "OC"). In particular, Mrs Paula A. Contarino indicated that *"this decision does not depend on the artistic regulation nor our old By-Laws (at least by now). For this scenarios, World Skate applies Rule 41 of the* [OC]*"*.

On 3 May 2019, Mr Roberto Marotta, Secretary General of World Skate, convened all Member Federations to the 2019 World Skate Ordinary Congress to be held on 3 July 2019 in Barcelona, Spain. The agenda included, *inter alia*, the topic *"Amendments to the World Skate Statutes (Att. 2)"*.

On 28 May 2019, the Counsel for the Appellant sent a letter to World Skate requesting it to allow the participation of the Appellant in the World Roller Games 2019 as a member of the Brazilian national team. On 5 June 2019, Mr Roberto Marotta replied by email to the Appellant and its Counsel (hereinafter: the "Appealed decision" or the "Email of 5 June 2019") answering to the letter sent on 28 May, and *inter alia* wrote the following:

"Our Statutes clearly state at Art. 2.5 that "The general and fundamental principles of the [OC] *shall be enforced, and no provisions of these Statutes and of the Regulations of World Skate shall be either in conflict with or depart from these principles".*

The principles you quoted include also point 7 "Belonging to the Olympic Movement requires compliance with the [OC] *and recognition by the IOC", consequently, our Nationality criteria as well as terms and conditions of Country representation on an International level, have been transposed from Rule 41 of the* [OC] *(…).*

As per Rule 41 which we enforced in our system and which we are fully compliant to: "A competitor who has represented one country in the Olympic Games, in continental or regional games or in world or regional championships recognised by the relevant IF, and who has changed his nationality or acquired a new nationality, may participate in the Olympic Games to represent his new country provided that at least three years have passed since the competitor last represented his former country".

Therefore, World Skate cannot authorize Sara Castillo Martínez participation in the forthcoming World Championship representing Brazil".

On 21 June 2019, Mr Francesco Jacopo D'Urbano, legal counsel of World Skate, informed the Counsel for the Appellant by email that, *inter alia*, it would be willing to evaluate the possibility to make an exception to Rule 41 of the OC and allow the Appellant to represent Brazil in the World Roller Games 2019 should both the Brazilian and Spanish Federations agree to it. On 25 June 2019, Mr Carmelo Paniagua, President of the Spanish Federation, replied by email [to the President of the Brazilian Federation's request] that Rule 41 of the OC should apply in this case and that therefore the Spanish Federation could not accept the Brazilian Federation's request.

On 3 July 2019, the World Skate Ordinary Congress took place and, *inter alia*, approved new Statutes and By-Laws (hereinafter: the "New Statutes" and the "New By-Laws"), which included expressly the application of Rule 41 of the OC at Paragraph 10C (vi) of the New By-Laws.

On 19 June 2019, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (hereinafter: the "CAS"), challenging the content of the Email of 5 June 2019.

There is no choice of law in the World Skate Statutes (2017). In all its communications in the present proceedings, World Skate indicated *"Maison du Sport International, Avenue de Rhodanie 54, CH – 1007 Lausanne (Switzerland)"* as its seat. Additionally, the Sole Arbitrator notes that Art. 1(5) of the New Statutes and Paragraph 1.1 of the New By-Laws indicate that the headquarters of World Skate shall be in Lausanne, Switzerland. Accordingly, the Sole Arbitrator finds that the World Skate regulations and, subsidiarily, Swiss law are applicable.

The Sole Arbitrator has however to decide whether the World Skate Statutes (2017) or the New Statutes and the New By-Laws are applicable to the present matter. The Appellant submits in particular that the New Statutes and the New By-Laws cannot apply to the matter considering the general principle of non-retroactivity. The Respondent requested that, (only) in the

event the Sole Arbitrator finds that Rule 41 of the OC is not applicable, Paragraph 10.C of the New By-Laws shall apply to the matter considering that the New By-Laws entered into force on 4 July 2019 and that the competition in which the Appellant wishes to participate starts on 11 July 2019. The Sole Arbitrator notes that Paragraph 13.C of the New By-Laws provides as follows:

"These By-Laws and their further amendments shall come into force on the day after their approval by World Skate Executive Board. These By-Laws shall be ratified by the World Skate Congress".

The Sole Arbitrator further observes that the World Skate Congress approved the New By-Laws on 3 July 2019 and that therefore the New By-Laws entered into force as from 4 July 2019. The Sole Arbitrator notes that the registration period to participate to the World Roller Games 2019 was opened from 15 April to 6 June 2019, namely before 4 July 2019. The Appealed Decision was rendered on 5 June 2019 and the Appellant appealed such decision on 19 June 2019, namely also before 4 July 2019. In view of the above findings, the Sole Arbitrator concludes that the regulations of World Skate as were in force until 6 June 2019 are applicable to the substance of the case, in particular the World Skate Statutes (2017) (hereinafter: the "Applicable Statutes"), and, subsidiarily, Swiss law, should the need arise to fill a possible gap in the regulations of World Skate.

Reasons

The main issues to be resolved by the Sole Arbitrator in assessing and deciding the validity of the Appealed Decision are:

- Did the wording of the Applicable Statutes contain any rule that may have validly prevented the participation of the Appellant to the World Roller Games 2019 representing Brazil, including by means of application of Rule 41 of the OC?

- If the answer to (a) is negative, did any other applicable legal source exists that could support and validate the decision of World Skate to refuse the Appellant's request to participate to such games representing Brazil?

- If the answer to (b) is negative, could Rule 41 of the OC have been considered part of the Applicable Statutes based on customary law?

1. Application of the principles of legality and predictability to sports organisations' rules on eligibility to participate to their events

   The Sole Arbitrator notes that the only clear reference to the OC is at Art. 2(5) of the Applicable Statutes, a rule that indicates that the general and fundamental principles of the OC shall be enforced and that no provision of the World Skate regulations shall be in contradiction with such principles. The Sole Arbitrator also notes that the fundamental principles of the OC include mainly values to which the IOC adheres. In its point 7, it reads that *"Belonging to the Olympic Movement requires compliance with the* [OC] *and recognition by the IOC"*. The Sole Arbitrator must therefore determine whether the reference to the fundamental principles of the OC at Art. 2(5) of the Applicable Statutes is sufficient to justify the application of Rule 41 of the OC to the Applicable Statutes.

   In this respect, the Sole Arbitrator finds that such article must be interpreted according to Swiss law and related CAS jurisprudence. As a starting point, the Sole Arbitrator considers and fully adheres to

the following consideration retained by a previous important CAS panel (CAS 94/129, para. 34): *"Regulations that may affect the careers of dedicated athletes must be predictable (…). They should not be the product of an obscure process of accretion"*. The Sole Arbitrator finds that this longstanding jurisprudence is also applicable to regulations that govern procedures that may have very important consequences on a party (as it was retained in CAS 2014/A/3621, para. 115), such as the refusal to accept the participation of an athlete to a world competition based on a double nationality issue.

Consequently, the Sole Arbitrator finds it important to refer to the "principle of legality" ("*principe de légalité*") which must be respected when interpreting Art. 2(5) of the Applicable Statutes, being reminded that such principle requires that offences and sanctions must be clearly and previously defined by law and precluding the "adjustment" of existing rules to apply them to situations or behaviours that the legislator did not clearly intend to penalize (CAS 2011/A/2670, para. 8.13).

In this respect, the Sole Arbitrator observes that CAS awards have consistently held that sports organizations cannot impose sanctions without a proper legal or regulatory basis for them and that such sanctions must also be predictable ("predictability test"). CAS case law (for example CAS 2011/A/2670, para. 8.13; CAS 2007/A/1437 para. 8.1.8) has also held that inconsistencies in the rules of a federation will be construed against the federation. The Sole Arbitrator is of course aware of the fact that the eligibility rules of a sport organization, including the ones at stake in these proceedings, are usually administrative rules, are usually not disciplinary in nature nor have any sanctioning purpose (although in some cases it may also be related to disciplinary issues).

Yet, considering the overall framework and organization of the sport activity in national and international levels, and the affiliation of the athletes to a sport organization, being subject to its statutes / rules, and especially considering the importance of the participation of an athlete in the sport events organized by the sport organizations, the rules that define the eligibility to participate in the sport events, and for sure the major sport events such as the national, continental or world competitions, should be drafted in a very clear and predictable way. This important goal should also be imposed and achieved by applying the "principle of legality" either directly or by analogy.

When interpreting Art. 2(5) of the Applicable Statutes according to these above principles, the Sole Arbitrator finds that its reference to the fundamental principles of the OC is not sufficient to predict an automatic direct application of the OC as a whole, including its Rule 41, to the Applicable Statutes. One can indeed hardly deduct from such reference that all rules of the OC – which govern mainly the IOC, the National Olympic Committees and the Olympic Games – will be applicable to an international competition organized outside the scope of the IOC's powers. It is clear that any sanction or rule in the OC that may affect the rights of athletes is not predictable when reading Art. 2(5) of the Applicable Statutes.

The Sole Arbitrator further takes note of Rule 25 of the OC. In the Sole Arbitrator's opinion, the fact that the OC itself allows the International Federations to maintain their independence and autonomy to

govern their sport is evidence that Rule 41 of the OC, which pertains to a very specific rule regarding the eligibility of athletes to represent specific countries in the Olympic Games in cases of double nationality, is not part of the fundamental principles of the OC in the meaning of this term within the Applicable Statutes. In this respect, and in support of his finding, the Sole Arbitrator notes that other International Federations which are part of the Olympic Movement have provided for different rules regarding the double nationality issue which evidences that they have autonomy to provide for different rules even if they are part of the Olympic Movement.

Finally, the Sole Arbitrator notes that, in any event, the terms of Rule 41 of the OC suggests that such rule applies only to the participation in the Olympic Games and that there is no rule in the OC which provides for a general application of Rule 41 in competitions organized by International Federations. This is even more so in a sport that at present is not part of the Olympic Program.

In view of the above, the Sole Arbitrator concludes that the Applicable Statutes did not include in any direct way the application of Rule 41 of the OC and therefore the Applicable Statutes could not prevent the participation of the Appellant to the World Roller Games 2019 representing Brazil.

Since it has been determined that the wording of the Applicable Statutes does not allow the application of Rule 41 of the OC by any legitimate mean of interpretation, the Sole Arbitrator has however to examine whether there is any other applicable legal source that could support and validate the Appealed Decision.

In this context, the Sole Arbitrator observes that neither the regulations of World Skate nor Swiss law (in particular the Swiss Civil Code which applies to all associations domiciled in Switzerland) contain any rule that could support the Appealed Decision. In particular, the Sole Arbitrator notes again that the New Statutes and the New By-Laws cannot apply to the present matter considering the general principle of non-retroactivity. In the Sole Arbitrator's opinion, an international federation should indeed not impose new rules regarding the eligibility to participate in a competition when the registration period to participate to that competition is already closed. The eligibility rules in force until the closing of the registration period should indeed be the only relevant rules with respect to the eligibility to participate in a competition, otherwise the organising body of the competition may create discrimination situations between the athletes. In this context, the Sole Arbitrator concludes that no other applicable legal source exists to support and validate the Appealed Decision.

Since it has been determined that the wording of the Applicable Statutes does not allow the application of Rule 41 of the OC by any legitimate mean of interpretation and that no other applicable legal source exists to validate the Appealed Decision, the Sole Arbitrator has finally to examine whether such rule could apply because it was applied in the past by World Skate.

Swiss doctrine and jurisprudence recognizes indeed the potential importance of customary law within an

association (in German the "*Vereinsübung*" or "*Observanz*", in French the "*droit coutumier*"). In addition, CAS has recognized the institution of customary law in an association in its jurisprudence, for instance in CAS 2004/A/589. The majority of Swiss scholars agree that a custom consists of two elements: objective and subjective. The ordinary meaning of the term "custom" presupposes the existence of widespread practice for a very long time (*longa consuetudo*). The practice should emerge out of the spontaneous and unforced behaviour of various members of a group. The parties involved must subjectively believe in the obligatory or necessary nature of the emerging practice (*opinio juris sive necessitatis*) (WERRO F., in Pichonnaz/Foëx (eds.), *Commentaire romand, Code civil I*, Basel, 2010, ad art. 1 CC, N. 7, p. 6 and N. 27, p. 12). In this context, the concerned party must objectively demonstrate the existence of its allegations with regard to a longstanding and undisputed practice that acquired force of customary law (Article 8 of the Swiss Civil Code; ATF 123 III 60 consid. 3a); ATF 130 III 417 consid. 3.1.). In order to convince that such customary law indeed was established it is not sufficient to simply assert a statement of such a practice.

In the case at hand, the Sole Arbitrator had no intention to dismiss the argument without giving the Respondent the opportunity to produce sufficient evidence to support the possibility that Rule 41 of the OC was actually applied by World Skate as a matter of customary law. For this purpose, the Sole Arbitrator, on his own initiative, requested the production of more information. The Sole Arbitrator observes that the Respondent has produced no evidence as to the existence of any longstanding practice. In particular, the Sole Arbitrator notes that the Respondent stated only that it has no jurisprudence on the matter because the rule has always been respected and that it received only requests of information. In this respect, the Sole Arbitrator observes that the Respondent also did not submit any evidence of such requests of information. In view of the above findings, the Sole Arbitrator denies the allegation of the Respondent in respect of the past practice in respect of the application of Rule 41 of the OC, and concludes that the Appealed Decision could not have been legitimately issued based on a "longstanding practice", and therefore Rule 41 of the OC did not become part of the Applicable Statutes as a customary law.

Decision

The appeal filed on 19 June 2019 by Mrs Sara Castillo Martínez against the decision issued on 5 June 2019 by the Secretary General of World Skate is upheld. The decision issued on 5 June 2019 by the Secretary General of World Skate is set aside. Mrs Sara Castillo Martínez is eligible and allowed to compete, representing Brazil, in the World Roller Games 2019 to be held in Barcelona in July 2019.

CAS 2019/A/6482
Gabriel da Silva Santos v. Fédération Internationale de Natation (FINA)
14 February 2020

Aquatics (Swimming); Doping (Clostebol); CAS panels' adjudicatory role; Basis for the analysis of an athlete's claim of No Fault or Negligence; Limits to athletes' required endeavors to defeat doping; Athletes' anti-doping-related responsibility for their entourage

Panel
Mr Jeffrey Benz (USA), President
Mr Efraim Barak (Israel)
Ms Raphaëlle Favre Schnyder (Switzerland)

Facts

Mr Gabriel da Silva Santos ("Athlete" or "Mr Santos") is an elite international swimmer, swimming in the 50m and 100m freestyle disciplines, and is a member of the Brazilian national swimming team.

The Federation Internationale de Natation ("FINA") is the international governing body and international sports federation for the sport of all international competition in water-based sports, including swimming, worldwide and is recognized as such by the International Olympic Committee. FINA's headquarters are in Lausanne, Switzerland.

On 20 May 2019, Mr Santos provided a urine sample in a out-of-competition test conducted by FINA. On 25 June 2019, Mr Santos received a letter from FINA notifying him that his sample had tested positive for the presence of the substance Clostebol, which appears on the Prohibited Substances List as a Class S1.1.A "Exogenous Anabolic Agent" (*i.e.* a Non-Specified Substance).

Mr Santos put forward that the Clostebol entered his system as a consequence of cross-contamination through the sharing of cloths, towels, pillows, soaps etc. with his brother during a brief overnight visit at his mother's home to celebrate the birthday of his grandfather. Mr Santos's brother, used a cream with the brand name Novaderm that contains Clostebol. Mr Santos's brother was using the Clostebol cream for treatment of a skin condition, apparently under direction of a physician, a fact about which Mr Santos was unaware. The Parties did not have any dispute on how the Clostebol entered the system of Mr Santos and agreed upon it in this appeal. The Parties disagreed, however, on the legal effect these facts should have on the sanction to be applied to Mr Santos.

On 19 July 2019, a hearing was conducted before the FINA Doping Panel in Gwangju, South Korea. The FINA Doping Panel was satisfied and concluded that *"the cause of the* [adverse analytical finding ("AAF")] *is cross-contamination, as explained by the Athlete"*. Yet, the FINA Doping Panel has found that Mr Santos had committed an anti-doping rule violation under FINA DC Rule 2.1 and sanctioned him with a period of ineligibility of eight (8) months in accordance with FINA DC Rule 10.5.2. On 22 July 2019, the FINA Doping Panel, *sua sponte*, rectified the prior decision by applying a one (1) year period of ineligibility in accordance with FINA DC Rule 10.5.2, with the sanction starting on 20 July 2019 and ending on 19 July 2020. On 24 September 2019, FINA notified Mr Santos of the grounds for the decision (the "Appealed Decision").
Mr Santos' arguments may [*inter alia*] be summarized briefly as follows:

"31. (…) He acted with No Fault or Negligence and not with No Significant Fault or Negligence as the FINA Doping Panel wrongfully qualified it (although to a minimum degree); as such pursuant to FINA DC Rule 10.4 he should suffer no sanction; (…)

Subsidiarily that he ingested Clostebol through a Contaminated Product [the towel that had on it the cream that his brother was using that had in it Clostebol] *and should thus be imposed* [sic] *a reduced period of suspension in accordance with FINA DC Rule 10.5.1.2".*

FINA's responsive arguments may [*inter alia*] be summarized succinctly as follows:

- The FINA Anti-Doping Panel sanctioned the athlete with a one-year Ineligibility period starting 20 July 2019, which is the lowest possible sanction when applying the principle of No Significant Fault or Negligence. In any event, the bar for No Fault or Negligence is extremely high and was not successfully overcome here because Mr Santos did not exercise utmost caution to investigate the medications present in his mother's home.

In this case, which does not involve a Specified Substance, and where the anti-doping rule violation is admitted, the primary, actually the only, issue to determine is the question of the Athlete's fault or negligence and, the sanction to be imposed if the panel would find either fault or negligence. Here, it was accepted by the Parties that the presence of the Clostebol in Mr Santos' body resulted of an unintentional conduct. As a result, to further reduce the sanction below two years, the Panel must consider Mr Santos' fault under FINA Doping Control Rules ("FINA DCR"). If the Panel determines that there is No Fault or Negligence, the Panel must eliminate any period of Ineligibility. If the Panel determines that the presence of Clostebol in Mr Santos' sample was the result of a contaminated product, the Panel may issue a penalty of at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility based on a consideration of Mr Santos' degree of fault. If the Panel determines that there is Fault but the Fault is not significant then the minimum penalty is a period of Ineligibility of twelve months, but after considering Mr Santos' level of Fault, the Panel may consider a penalty of a period of between twelve months and twenty-four months Ineligibility.

Reasons

1. CAS' panels adjudicatory role

   Mr Santos argues that there is some unfairness in the inequality of treatment in determining fault, and sanction, as between those who test positive for specified substances and those who test positive for non-specified substances when they engage in similar levels of fault. The Comment to Article 4.2.2 of the WADA Code provides the explanation for this different treatment:

   "The Specified Substances identified in Article 4.2.2 should not in any way be considered less important or less dangerous than other doping substances. Rather, they are simply substances which are more likely to have been consumed by an Athlete for a purpose other than the enhancement of sport performance".

   A version of WADA Code Section 4.2.2 and the comment thereto has existed in the regulations of international sport among World Anti-Doping Code signatories since at least the 2009 edition of the World Anti-Doping Code. No challenge has succeeded since on the basis that there is some procedural or legal infirmity in providing athletes who test positive for certain substances with the opportunity for more favorable treatment than those athletes who test positive for other substances.

   The legislator has spoken and it is not up to this Panel to engage in a review, or revision, of the WADA Code, supplementing the Panel's views for that of the WADA Code

drafters (CAS 2010/A/2307). It is black letter law that the Panel must apply the provisions of the WADA Code to the facts before us, and here the requirements of the WADA Code to consider the sanctions to be imposed for non-Specified Substances. There is no legal principle that has been presented to this Panel to compel a different conclusion. Accordingly, the Panel rejects the argument advanced by Mr Santos for causing Specified Substances and non-Specified Substances positive tests to be treated identically on fairness grounds. The Panel accepts the provisions of the FINA DCR on their face and limits its analysis to those provisions and the application of those provisions to the facts established in this case.

2. Basis for the analysis of an athlete's claim of No Fault or Negligence

When assessing fault, the Panel must start with its definition as contained in the FINA DCR Appendix 1, and the comment relating thereto, which provides in relevant part: *"Fault: Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as disability, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour".*

No Fault or Negligence is defined in the FINA DCR Definitions as *"the Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or had been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule".*

The Comment to Article 10.4 of the FINA DCR [*inter alia*] provides *"DC 10.4 (…) will apply only in exceptional circumstances, for example where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (…) (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink)".*

As the FINA panel stated, a panel confronted with a claim by an Athlete of No Fault or Negligence must evaluate *"(i) what the Athlete knew or suspected and (ii) what he could reasonably have known or suspected, even with the exercise of utmost caution"*. In addition, and this did not appear to have been considered by the FINA panel, the Panel must consider the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk as required by the definition of Fault.

3. Limits to athletes' required endeavors to defeat doping

The Panel is acutely aware of the fact that No Fault or Negligence cases are relatively few and far between, and that the applicable comments emphasize that the finding of No Fault or Negligence is to be reserved for the truly exceptional case. The leading CAS case on this subject is CAS 2009/A/1926

and CAS 2009/A/1930 (the "Gasquet case"). In the Gasquet case, the athlete was kissed by a stranger at a restaurant and the panel found that she was the source of the cocaine that had entered his system. In reaching its determination that the athlete had no fault or negligence, the Gasquet case panel stated in pertinent part as follows (cf. paras. 5.31. to 5.33.):

"Considering these facts, the Panel concludes that it cannot find that the Player did not exercise utmost caution when he met Pamela in an unsuspicious environment like an Italian restaurant (…). He could not have known that she might be inadvertently responsible for administering cocaine to him if he were to kiss her that night. Also, the Panel concludes that it was impossible for the Player to know, still exercising the utmost caution, that when indeed kissing Pamela, she might inadvertently administer cocaine to him. As the Player did not know Pamela's cocaine history and did not see her, during the entire evening, taking cocaine or appearing to be under its influence, how could he imagine that she had been consuming cocaine? And even more, how should he have been in a position to know that, even assuming that he knew that she had been consuming cocaine, that it was medically possible to be contaminated with cocaine by kissing someone who had ingested cocaine beforehand? The parties' experts in the present matter concluded only after some study that this is possible. The members of the Panel are not reluctant to admit that they would not have believed, without having seen the statements of these experts that such a means of contamination is possible. The Panel's position is thus clear: even when exercising the utmost caution, the Player could not have been aware of the consequences that kissing Pamela could have on him. It was simply impossible for the Player, even when exercising the utmost caution, to know that in kissing Pamela, he could be contaminated with cocaine.

The question following this conclusion is thus the following: is it the intention of the Programme or of the WADA Code to make a reproach to a player if he kisses an attractive stranger whom he met the same evening, under the circumstances such as in the present case? This can obviously not be the intention of any Anti-Doping Programme. As a matter of course, no Anti-Doping Programme can impose an obligation on an athlete not to go out to a restaurant where he might meet an attractive stranger whom he might later be tempted to kiss. As the Player correctly emphasised, this would be precisely the sort of "unrealistic and impractical expectations" that the CAS identified in the CAS advisory opinion CAS 2005/C/976 & 986 FIFA & WADA, par. 73, and that should not be imposed by sanctioning bodies in their endeavours to defeat doping.

In view of the above, the Panel comes to the conclusion that by kissing Pamela, and thereby accidentally and absolutely unpredictably, even when exercising the utmost caution, getting contaminated with cocaine, the Player acted without fault or negligence, in accordance with the respective definition in Appendix One of the Programme".

Considering the principles in the relevant FINA DCR provisions and enunciated in the Gasquet case, the Panel is of the view that Mr Santos was not at fault or negligent under the circumstances. Mr Santos was attending a celebration for his grandfather that included an overnight stay at his mother's house where his brother was also staying. Mr Santos had no knowledge of his brother's use of the Novaderm cream containing Clostebol or that his brother had a condition that required its use. While it is expected that a professional Athlete will apply a high degree of care with respect to food and beverage or to sharing plates or glasses in public places or even a reduced degree of care with respect to such elements in a known and safe environment, the Panel is satisfied that Mr Santos had no reason to make an inquiry about his family members' medical conditions or treatment, or the

presence of any prohibited substances other than food and drinks in his mother's house as he was visiting for a very short time. It was entirely likely, given that his brother was using the Clostebol for treatment of a skin condition in his genital region, the subject never would have been brought up given its very private nature. Mr Santos did not entrust any of his anti-doping obligations to his mother or his brother, but took full responsibility for them. There was nothing suspicious or even remotely dangerous about the environs in which Mr Santos was staying or how he contracted contact with the Clostebol. Quite the opposite, Mr Santos was in a safe environment. It would not have been obvious to anyone that Mr Santos could have contacted Clostebol from a towel in his bathroom or pillow shared with his brother.

Here, even exercising the utmost caution, it is unlikely Mr Santos would have discovered that his brother was taking an over the counter treatment for a skin condition that contained a prohibited substance or that such prohibited substance could or would transfer from his brother's topical use of it to a face towel in a bathroom or a pillow or even a piece of dress that they were sharing. It is simply not something that any family member, in their reasonable, or likely, discussions about a celebratory weekend for a grandparent involving a shared overnight in the mother's home, would ever bring up. In fact, given that there was some testimony that the skin condition involved his brother's genital area, it is likely that the condition is of the kind that family members would specifically not share with each other or that would come up in any conversation.

There are, and must be limits to which the anti-doping rules can extend in terms of imposing obligations on athletes. It is not reasonable here, nor would there have been any way for Mr Santos to have appreciated any degree of risk of testing positive on the facts presented, and accepted by all sides here. It is an unreasonable and impractical expectation to obligate an athlete to endeavor to survey the ailments of family members and the use by family members of various substances when visiting them in their home for a short stay. In this respect, the Panel agrees with the comment made by the panel in CAS 2005/C/976 and 986 that *"the Panel reminds the sanctioning bodies that the endeavours to defeat doping should not lead to unrealistic and impractical expectations the athletes have to come up with"*.

4. Athletes' anti-doping-related responsibility for their entourage

FINA suggests that the case of CAS 2017/A/5301 and CAS 2017/A/5302 (the "Errani case") is dispositive here on the question of fault. In that case, the athlete, an elite level professional tennis player, tested positive for a cancer medication (letrozole, a prohibited substance) that she claimed that her mother, who was taking the medication, had inadvertently spilled into her food. The panel in the Errani case, when evaluating and disposing of the athlete's claim of No Fault or Negligence, relied on three facts that are not here:

- Athletes are responsible for the actions of the members of their entourage and her mother, who was living in the same house as her, was a member of her entourage and her mother knew that her daughter was a high level professional tennis player subject to anti-doping obligations and testing (para. 198).
- *"The degree of fault exercised by the Athlete's mother is to be imputed to the Athlete herself because she entrusted her mother to prepare the*

meal she ate. The Femara box was stored in the kitchen close to the space where meals were prepared; that situation was changed by her after she concluded that the Femara medication most likely was the source of the AAF. The Athlete's mother was a pharmacist and knew or must have known that Femara contained letrozole. She was aware or must have been aware of the doping warning on the back of the Femara box. She knew that her daughter was a high profile tennis player and, therefore, was under a strict obligation to avoid ingesting any prohibited substance. Previously, at least once, when she took her daily medication, a Femara pill had fallen out of the blister package. Femara pills do not quickly, if at all, dissolve in the broth or the tortellini filling and could have been removed" (para. 199).

- The athlete *"did not know that her mother was suffering from cancer and took Femara. Nevertheless, although she had a separate apartment in the house, she could and should have known that the Femara box was stored in the kitchen close to the spot where her mother was cooking because the kitchen and dining room, in a family house, are places common to the family. The pictures presented as evidence show that the Femara box was in plain sight. The Athlete, after having lived for years abroad had moved to her parents' house without establishing or suggesting even basic controls to ensure a safe and clean environment for a professional athlete. Similarly to suggesting what the Athlete needed or wanted to eat to ensure her condition, weight etc. she had to suggest basic actions to avoid contamination even if she did not know about the existence of the Femara box"* (para. 200).

None of these factors are present in this case. Here, the Athlete did not live in the house where the face towel or the pillow had become contaminated. He was visiting his mother's home for a celebratory dinner with a single overnight stay and then returning to his home. The Athlete did not know his brother was taking an over the counter medication for a skin condition. There is no case saying that a brother an Athlete does not live with, and to whom the Athlete does not assign any responsibility or participation in the Athlete fulfilling the Athlete's anti-doping obligations, is a member of an Athlete's entourage for whose actions the Athlete bears anti-doping-related responsibility. In addition, the product here containing Clostebol was not stored in plain sight. But even if the Novaderm cream had been discovered, it is unlikely that the Athlete could have been aware of the possibility of contamination by transfer. As a result of these significant distinctions, the Panel determines that the Errani case is of no assistance in this case.

The Panel is of the view that the circumstances of this case are truly unique, however they are a good example of circumstances were an Athlete may satisfy the Panel that there was no fault or negligence. Accordingly, the Panel determines unanimously that this is a case of No Fault or Negligence by Mr Santos. Where a finding of No Fault or Negligence is made, the FINA DCR provides that any otherwise applicable period of Ineligibility shall be eliminated entirely. Thus, the Athlete's suspension is lifted with immediate effect, and he will not serve any period of Ineligibility for his violation.

Decision

The appeal filed by Mr Gabriel da Silva Santos against the Fédération Internationale de Natation with respect to the decision rendered by the FINA Doping Panel on 19 July 2019 (rectified on 22 July 2019) is upheld. The

decision rendered by the FINA Doping Panel on 19 July 2019 (rectified on 22 July 2019) is set aside. Mr Gabriel da Silva Santos is found to have committed an Anti-Doping Rule Violation but bears no fault or negligence and no period of ineligibility shall be imposed on him.

Jugement de la Cour Européenne des Droits de l'Homme
Judgement of the European Court of Human Rights

Michel Platini c. la Suisse

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME
TROISIÈME SECTION
DÉCISION
Requête ne 526/18 Michel PLATINI contre la Suisse
La Cour européenne des droits de l'homme (troisième section), siégeant
le 11 février 2020 en une Chambre composée de:
Paul Lemmens, *président,*
Georgios A. Serghides,
Helen Keller,
Alena PolEkovà,
Maria Elösegui,
Gilberto Felici,
Lorraine Schembri Orland, *juges,*
et de Stephen Phillips, *greffier de section,*
Vu la requête susmentionnée introduite le 22 décembre 2017,
Après en avoir délibéré, rend la décision suivante :

En Fait

1. Le requérant, M. Michel Platini, est un ressortissant français né en 1955 et résidant à Genolier (canton de Vaud). Il a saisi la Cour le 22 décembre 2017. Il a été représenté devant la Cour par Me W. Bourdon, avocat exerçant à Paris.

A. Les circonstances de l'espèce

1. L'origine de la requête

2. Les faits de la cause, tels qu'ils ont été exposés par le requérant, peuvent se résumer comme suit.

3.Michel Platini (ci-après : le requérant) est un ancien joueur de football professionnel, capitaine et sélectionneur de l'équipe de France de football.

4. Au cours du premier semestre de l'année 1998, le requérant collabora à la campagne électorale de X.Y. pour la présidence de la Fédération Internationale de Football Association (FIFA). Dés la seconde moitié de la même année, il commença à travailler pour la FIFA en qualité de conseiller de X.Y., nouvellement élu. Par la suite, X.Y. fut réélu en 2002, 2007, 2011 et 2015, et exerça la fonction de Président de la FIFA jusqu'à sa démission, le 2 juin 2015.

5. Le 25 avril 2002, le requérant mit un terme à cette activité de conseil après avoir été élu au Comité exécutif de l'Union Européenne de Football Association (UEFA). Il représenta cette association au sein du Comité exécutif de la FIFA dès cette date. En 2007, il fut élu à la présidence de l'UEFA, puis réélu à cette fonction en 2011, ainsi que le 24 mars 2015. Il était également Vice-Président de la FIFA.

6. En 2007, le requérant demanda que les quatre années durant lesquelles il avait été conseiller du Président de la FIFA fussent prises en compte dans le calcul de ses droits au titre de la prévoyance, conformément au plan de prévoyance mis en place pour les membres du Comité exécutif de la FIFA en 2005. Cette extension de 36 000 dollars américains (USD) fut accordée par X.Y.,

celui-ci attirant l'attention du requérant sur le fait que l'indemnité de prévoyance ne lui serait versée qu'au moment où il quitterait ses fonctions au sein du Comité exécutif de la FIFA.

7. Le 17 janvier 2011, le requérant adressa au directeur financier et secrétaire général adjoint de la FIFA, M.K., une facture de 2 000 000 francs suisses (CHF) se rapportant soi-disant à un complément de salaire convenu dans le cadre d'un contrat oral, pour les années 1998 à 2002, s'ajoutant à la rémunération initialement fixée dans une convention écrite signée le 25 août 1999.

8. Après que X.Y. ait approuvé et signé la facture, la FIFA versa la somme de 2 000 000 CHF sur le compte du requérant le l[er] février 2011. Ce versement fut inclus dans la déclaration fiscale relative à l'année 2011 du requérant, dans les comptes de l'exercice 2010 de la FIFA, puis fut approuvé par la Commission des finances de la FIFA.

9. Le 25 septembre 2015, le Ministère public de la Confédération ouvrit une procédure pénale contre X.Y. pour soupçon de gestion déloyale et, subsidiairement, abus de confiance en rapport avec le versement de 2 000 000 CHF au requérant, effectué en 2011. Ce dernier fut entendu le même jour en qualité de personne appelée à donner des renseignements. La procédure à l'encontre X.Y. est actuellement pendante.

10. En répercussion de la procédure pénale et après enquête préliminaire, la Chambre d'instruction de la Commission d'éthique de la FIFA initia une procédure disciplinaire contre le requérant pour infraction du Code d'éthique de la FIFA (CEF) en raison des actes susmentionnés. La même démarche fut effectuée à l'encontre de X.Y.

11. Par décision non motivée du 7 octobre 2015, la Chambre de jugement de la Commission d'éthique de la FIFA suspendit provisoirement le requérant de toute activité liée au football pendant une durée de 90 jours. En date du 11 décembre 2015, le Tribunal arbitral du sport (TAS) confirma la suspension provisoire, mais ordonna à la FIFA de ne pas la prolonger au-delà de la durée initiale de 90 jours.

12. Par décision du 18 décembre 2015, une fois l'instruction close, la Chambre de jugement de la Commission d'éthique de la FIFA retint que le requérant avait violé les articles 13 (règles de conduites générales) ; 15 (loyauté) ; 19 (conflits d'intérêts) et 20 (acceptation et distribution de cadeaux et autres avantages) du CEF (paragraphe 32 ci-dessous). Elle lui interdit d'exercer toute activité en lien avec le football au niveau national et international pour une période de huit ans à compter du 8 octobre 2015 et lui infligea une amende de 80 000 CHF.

13. Par décision du 15 février 2016, la Commission de Recours de la FIFA confirma cette décision, tout en réduisant, de huit à six ans, la durée de l'interdiction d'activité.

2. La procédure devant le TAS

14. Le 26 février 2016, le requérant interjeta appel auprès du TAS aux fins d'obtenir l'annulation de la décision. Le requérant fit valoir, en particulier, que les articles 11 (version 2006) et 10 (version 2009) CEF n'évoquaient pas les "tiers au sein de la FIFA ou à l'extérieur de celle-ci", contrairement à l'article 20 du CEF de 2012, mais indiquaient uniquement de "tierces parties" ou "tierces personnes" (paragraphes 30-32 ci-dessous). Il remit également en cause la légalité et la proportionnalité de la sanction disciplinaire.

15. La procédure d'arbitrage fut conduite en français par une formation de trois arbitres qui tint une audience. Le TAS notifia le dispositif de sa sentence le 9 mai et communiqua les motifs le 16 septembre 2016. Il réforma la décision de la Commission de Recours de la FIFA et réduisit de six à quatre ans la durée d'interdiction d'activité et de 80 000 à 60 000 CHF le montant de l'amende. Concernant les violations alléguées de l'article 6 de la Convention, la formation indiqua que la procédure devant le TAS guérissait toutes les violations procédurales commises par les instances précédentes. La formation rejeta également le grief concernant l'application rétroactive du CEF de 2012. Pour elle, l'expression "tierces parties" visait simplement "toute personne autre que celle recevant le bénéfice", conformément à l'utilisation ordinaire de ces mots et suivant l'approche de la jurisprudence des organes de la FIFA et du TAS. Du reste, la formation retint que la version 2012 du CEF n'avait pas étendu les dispositions comparables des versions antérieures, mais les avait simplement précisées en indiquant que la notion de "tierces parties" pouvait viser des personnes se trouvant aussi bien à l'intérieur qu'à l'extérieur de la FIFA.

16. Quant à la sanction infligée au requérant, le TAS considéra que l'interdiction d'exercer toute activité (administrative, sportive ou autre) liée au football devait être réduite à un total de quatre ans, entre autre pour les motifs suivants:

"358. Comme l'a retenu la Décision entreprise, en l'espèce, les circonstances atténuantes sont le fait que M. Platini n'avait aucun antécédent, qu'il avait rendu des services considérables à la FIFA, à l'UEFA et au football durant de nombreuses années et, qu'il a coopéré jusqu'à un certain degré durant la procédure, en fournissant spontanément des pièces et en citant des témoins, ainsi qu'en donnant des explications détaillées. À cela s'ajoute, de l'avis de la Formation, que M. Platini est âgé de 61 ans, qu'il se dirige vers la fin de sa carrière et qu'il a dévolu toute sa vie professionnelle au football. (...)

359. En revanche, la Formation considère comme facteurs aggravants le fait que M. Platini a exercé des fonctions très élevées tant à la FIFA qu'à l'UEFA et qu'il avait donc un devoir accru de respecter les règles internes de ces organisations. De surcroît, il n'a manifesté aucun repentir.

(...)363. Ainsi, la Formation retient qu'une interdiction de toute activité footballistique durant 3 ans pour violation de l'article 20 CEF et durant 1 an pour violation de l'article 19 CEF est proportionnée, car les infractions sont certes graves, mais une telle durée est suffisante pour atteindre le but recherché, qui est d'empêcher M. Platini de commettre d'autres actes contraires au CEF et de le punir des violations commises. Une telle durée est raisonnable en relation avec le but recherché, parce qu'elle est suffisamment sérieuse pour sanctionner la violation des intérêts protégés par les articles 19 et 20 CEF et envoie un signal fort pour rétablir la réputation du football et de la FIFA et pour punir les infractions commises. Enfin, le désavantage que subira M. Platini en raison de cette sanction est en rapport adéquat avec les actes graves dont il a été reconnu coupable.

364. L'interdiction de toute activité footballistique ne peut en revanche pas être réduite davantage dans la durée, contrairement à ce que demande l'Appelant. En effet, elle doit être suffisamment importante, pour être pertinente au regard des graves infractions commises. À ce titre, la Formation n'accepte pas l'argumentation de l'Appelant, selon laquelle la sanction serait contraire aux articles 8 CEDH et 27 CC (...). En l'espèce, la sanction ne prive pas définitivement l'Appelant d'exercer son activité professionnelle, mais uniquement durant 4 ans. De plus, les droits de la personnalité peuvent être restreints si un intérêt public ou privé prépondérant existe [référence omise] ce qui est manifestement le cas en l'espèce."

3. Le recours au Tribunal fédéral

17. Le 17 octobre 2016, le requérant forma un recours en matière civile devant le Tribunal fédéral suisse en vue d'obtenir l'annulation de la sentence rendue par le TAS en date du 16 septembre 2016. Il fit grief à la formation d'avoir rendu une sentence arbitraire dans son résultat au double motif qu'elle reposerait, selon lui, sur des constatations manifestement contraires aux faits résultant du dossier et constituerait une violation manifeste du droit. Le requérant maintenait notamment que la version 2012 du CEF, soit l'article 20 CEF, aurait étendu le champ d'application matériel de la règle de conduite, alors que les versions précédentes ne visaient que les personnes extérieures à l'organisation.

18. Le requérant soutenait également, se fondant sur l'article 27 du code civil (CC) ainsi que l'article 163 alinéa 3 du code des obligations (CO) en lien avec l'article 4 CC (paragraphes 27 et 28 ci-dessous) et sur la jurisprudence en la matière, que la sanction prononcée à son égard était excessivement sévère, en ce sens qu'elle aurait porté une atteinte injustifiable à sa personnalité et à la liberté économique. Il estimait également que la durée de quatre ans d'interdiction générale d'activité dans le domaine du football était excessive, en particulier au regard de son étendue à "toute" activité liée au football. Par ailleurs, le libellé de la sanction serait contraire au principe de la précision de la sanction qui ne doit pas être laissée à l'arbitraire de l'association qui la prononce. En effet, la référence à "toute" activité serait d'une telle généralité qu'elle permettrait à la FIFA d'en définir les limites à sa guise en raison de sa position dominante dans le football en retenant même des liens très indirects (par ex. une activité de consultant pour une marque de vêtements sportifs). Le requérant fit également valoir que la sanction incluait même toute activité bénévole ou de loisir en lien avec le football, ce qui serait particulièrement choquant.

19. Le requérant alléguait également que les arbitres n'auraient pas suffisamment tenu compte de l'impact réel de la sanction sur les droits de sa personnalité, en particulier sur sa vie sociale, qui était entièrement consacrée au football. La sanction serait aussi disproportionnée au regard de l'âge du requérant, alors âgé de 61 ans, et qui aurait donc atteint l'âge de la retraite à son échéance. Il serait illusoire qu'il puisse escompter retrouver des fonctions à cet âge étant donné qu'il n'avait aucune autre qualification.

20. Enfin, le requérant soutenait que le principe de la proportionnalité imposait de procéder à une pesée des intérêts prenant en compte sa situation concrète, ce qui n'aurait pas été fait en l'espèce.

21. Pour les raisons exposées ci-dessus, le requérant demanda au Tribunal fédéral d'annuler la sentence arbitrale.

4. L'arrêt du Tribunal fédéral du 29 juin 2017

22. Par un arrêt daté du 29 juin 2017, le Tribunal fédéral constata être compétent pour connaître des recours contre les sentences arbitrales rendues en procédure d'arbitrage interne en vertu de l'article 393 du code de la procédure fédérale (paragraphe 26 ci-dessous). Cependant, il rejeta le recours du requérant au motif que sa compétence en la matière ne lui permettait que d'examiner si la sentence attaquée était arbitraire dans son résultat, parce qu'elle reposait sur des constatations manifestement contraires aux faits résultant du dossier ou parce qu'elle constituait une violation manifeste du droit ou de l'équité. En l'espèce, le Tribunal fédéral considéra que le TAS n'avait pas versé dans l'arbitraire en qualifiant l'extension du plan de prévoyance et l'acceptation de 2 000 000

CHF de violations du CEF. En ce qui concernait la suspension prononcée et le conflit d'intérêts dans lequel s'était trouvé le requérant, il n'était pas non plus possible de mettre en évidence une violation manifeste du droit.

23. Par ailleurs, le Tribunal fédéral, suite à une analyse développée des principes jurisprudentiels relatifs aux méthodes d'interprétation de textes normatifs, conclut qu'il n'existait pas de différence d'interprétation significative entre les deux versions des dispositions pertinentes du CEF. La formation n'aurait dès lors pas rendu une sentence juridiquement insoutenable en retenant que les cadeaux ou autres avantages remis à un officiel par un autre officiel de la FIFA tombaient déjà sous le coup des articles 10, 11 et 20 des anciennes versions du CEF, la version de 2012 n'ayant fait que préciser la notion de "tierces parties" (paragraphes 20-32 ci-dessous).

24.Quant à la sanction disciplinaire infligée au requérant, le TF indiqua qu'en matière de sanctions disciplinaires infligées à des sportifs, il n'intervenait à l'égard des décisions rendues en vertu d'un pouvoir d'appréciation que si elles aboutissaient à un résultat manifestement injuste ou à une iniquité choquante. Or, les moyens soulevés par le requérant ne révélaient aucune violation manifeste du droit qui rendrait la sentence arbitraire dans son résultat en ce qui concerne la peine disciplinaire que le requérant s'était vu infliger par la formation.

Le Tribunal fédéral se prononça comme suit quant à la nature alléguée trop générale de la sanction:

"3.7.3 (...) Le recourant en convient du reste expressément (réplique, p. 4, 4e §). L'adjectif "toute", placé avant le terme "activité" à l'art. 22 du Code disciplinaire de la FIFA, suffit à justifier l'extension territoriale de la sanction au plan mondial, ce qui est logique dans le cas d'une fédération internationale régissant le sport concerné. Quant aux qualificatifs figurant dans la parenthèse qui clôture cette disposition ("administrative, sportive ou autre"), ils restreignent un tant soit peu le champ d'application matériel de l'art. 6 al. 1 let. h CEF, qui interdit l'exercice de "toute activité relative au football". Le recourant n'en dénonce pas moins le manque de précision de cette adjonction, du fait de la présence du terme "autre" à la fin de la parenthèse. En cela, il n'a pas tout à fait tort. Force est, en effet, d'admettre que cette formulation pourrait théoriquement favoriser d'éventuels abus de la part de l'intimée. Il faut, dès lors, bien marquer qu'elle ne saurait être assimilée à un blanc-seing donné à cette dernière, qui justifierait l'application sans limites de cette interdiction à n'importe quelle activité, fat-elle sans rapport avec les domaines régis par la FIFA ou ses associations affiliées, c'est-à-dire essentiellement l'organisation des compétitions de football. Il n'est pas nécessaire d'annuler pour autant la sentence attaquée, car la sanction prononcée est susceptible d'être interprétée d'une manière soutenable. Au demeurant, si d'aventure l'idée venait à la FIFA d'interdire concrètement au recourant l'exercice d'une activité qui ne serait manifestement pas proscrite par l'art. 6 al. 1 let. h CEF, sa décision serait annulable sur recours (cf., mutatis mutandis, l'arrêt 4A_458/2009 du 10 juin 2010 consid. 4.4.8). Quoi qu'en dise l'intéressé, on peine à imaginer que la FIFA, faisant usage du monopole dont elle jouirait selon lui dans tout ce qui concerne le football de près ou de loin, s'ingénierait à inciter tel ou tel sponsor ou média à ne pas l'employer, voire à faire pression sur un tiers afin qu'il lui interdise d'entrer dans un stade comme simple spectateur. Cet argument relève de la pure spéculation. Quant à imposer à des tiers, par voie d'exécution forcée, la prise de telles mesures, cela n'est guère concevable de la part d'une association de droit privé. À cela s'ajoute que, dans sa réponse au recours, la FIFA précise elle-même que l'interdiction litigieuse ne saurait s'étendre à des activités privées ne relevant pas du football organisé, partant que, si le recourant ne pourra pas exercer des fonctions

officielles au sein de la FIFA, de l'UEFA ou de la Fédération Française de Football jusqu'au terme de sa suspension, rien ne l'empêcherait, en revanche, d'assister à un match, du moins comme spectateur non invité par une fédération, ni de travailler comme consultant pour une marque de vêtements de football. Ce sont là des concessions que l'intimée pourrait se voir opposer si l'envie lui prenait de faire machine arrière. On ose espérer, il est vrai, que la FIFA, qui cherche aujourd'hui à redorer un blason passablement terni ces derniers temps par une série d'affaires, aura mieux à faire que d'appliquer de manière chicanière une sanction dont l'objet est défini un peu trop largement."

En ce qui concerne l'âge du requérant, le Tribunal fédéral poursuivit dans les termes qui suivent:

"Pour le surplus, l'interdiction prononcée devrait poser moins de problèmes, du point de vue de son étendue matérielle, dans la mesure où elle vise l'activité administrative et l'activité sportive. S'agissant de cette dernière, la portée de la sanction disciplinaire sera sans doute limitée. En effet, à l'âge qui est le sien, le recourant ne saurait raisonnablement caresser l'espoir de redevenir le brillant footballeur qu'il fut jadis, le milieu de terrain offensif qui fit la gloire des plus grands clubs européens de l'époque et l'extraordinaire tireur de coups francs qui désola nombre de gardiens de but chevronnés, puisqu'aussi bien en ce domaine comme dans beaucoup d'autres, le dicton populaire est de mise, qui veut que l'on ne puisse être et avoir été."

Quant à la durée de la sanction, la haute Cour se prononça comme il suit :

"Pour ce qui est de sa durée, soit 4 ans, l'interdiction prononcée n'apparaît pas manifestement excessive sur le vu des critères énoncés par la Formation et qui ont été résumés plus haut (...). Les arbitres ont tenu compte de tous les éléments à charge et à décharge ressortant de leur dossier. Ils n'ont négligé aucune circonstance importante pour fixer cette durée. Les éminents services rendus par le recourant à la cause du football ne leur ont pas échappé, non plus que la situation actuelle de l'intéressé, tout comme, en sens inverse, la position élevée qu'occupait le recourant au sein des plus hautes instances du football au moment de la commission des infractions retenues contre lui et l'absence de repentir du condamné. À cet égard, il n'y a aucune commune mesure entre la peine statutaire qu'un footballeur professionnel brésilien en activité - Matuzalem - s'est vu infliger, à savoir la menace d'une interdiction illimitée d'exercer sa profession pour le cas où il ne paierait pas une indemnité supérieure à 11 millions d'euros à bref délai (AIF 128 III 322), et celle qui a été prononcée à l'encontre du recourant. Toute proportion gardée, cette dernière est d'ailleurs inférieure aux 6 ans de suspension dont a écopé [X.Y.] dans des circonstances comparables."

B. Le droit interne et international pertinents

25. L'article 387 du code de procédure civile (CPC) du 19 décembre 2008 prévoit les effets d'une sentence arbitrale. Il est libellé comme il suit:

Article 387 — Effets de la sentence

"Dès qu'elle a été communiquée, la sentence déploie les mêmes effets qu'une décision judiciaire entrée en force et exécutoire."

26. L'article 393 CPC prévoit les motifs de recours au Tribunal fédéral contre une sentence arbitrale. Il est libellé comme il suit:

Article 393 — Motifs de recours

"Les motifs suivant sont recevables :

a. l'arbitre unique a été irrégulièrement désigné ou le tribunal arbitral irrégulièrement composé ;

b. le tribunal arbitral s'est déclaré à tort compétent ou incompétent ;

c. le tribunal arbitral a statué au-delà des demandes dont il était saisi ou a omis de se prononcer sur un des chefs de la demande ;

d. l'égalité des parties ou leur droit d'être entendues en procédure contradictoire n'a pas été respecté ;

e. la sentence est arbitraire dans son résultat parce qu'elle repose sur des constatations manifestement contraires aux faits résultant du dossier ou parce qu'elle constitue une violation manifeste du droit ou de l'équité ;

f. *les dépenses et les honoraires des arbitres fixés par le tribunal arbitral sont manifestement excessifs."*

27. Les articles pertinents du code civil (CC) du 10 décembre 1907 sont libellés comme il suit :

Article 4 - B. Etendue des droits civils / III. Pouvoir d'appréciation du juge

Le juge applique les règles du droit et de l'équité, lorsque la loi réserve son pouvoir d'appréciation ou qu'elle le charge de prononcer en tenant compte soit des circonstances, soit de justes motifs.

Article 27 - B. Protection de la personnalité II. Contre des engagements excessifs

Nul ne peut, même partiellement, renoncer à la jouissance ou à l'exercice des droits civils.

Nul ne peut aliéner sa liberté, ni s'en interdire l'usage dans une mesure contraire aux lois ou aux moeurs."

28. L'article 163 du code des obligations (CO) du 10 décembre 1907 est libellé comme il suit:

Article 163 - C. Clause pénale / II. Montant, nullité et réduction de la peine
"Les parties fixent librement le montant de la peine.

La peine stipulée ne peut être exigée lorsqu'elle a pour but de sanctionner une obligation illicite ou immorale, ni, sauf convention contraire, lorsque l'exécution de l'obligation est devenue impossible par l'effet d'une circonstance dont le débiteur n'est pas responsable.

Le juge doit réduire les peines qu'il estime excessives."

29. L'article 22 du code disciplinaire de la FIFA (édition 2011) était libellé comme il suit:

"Une personne peut se voir interdire d'exercer toute activité relative au football (administrative, sportive ouautre)."

30. L'article 11 du code d'éthique de la FIFA (CEF) de 2006 était libellé comme il suit:
"1. Les officiels ne sont pas autorisés à accepter de la part de tierces parties des cadeaux ni autre avantage dont la valeur excéderait celle communément acceptée par les coutumes locales et culturelles ; en cas de doute, le cadeau doit être refusé. L'acceptation de cadeaux pécuniaires est interdite sous quelque forme que ce soit.

2. Dans le cadre de leur fonction, les officiels sont autorisés à offrir à des tierces personnes des cadeaux et autres avantages dont la valeur n'excède pas les critères locaux et culturels et dans la mesure où ces cadeaux n'entraînent pas d'avantage malhonnête ni de conflit d'intérêts. [...]."

31. L'article 10 du CEF de 2009 était libellé comme il suit:

"1. Les officiels ne sont pas autorisés à accepter de tierces personnes des cadeaux ni autres avantages dont la valeur serait supérieure à celle des présents traditionnellement remis selon la coutume locale. En cas de doute, ils devront refuser le cadeau. Il leur est strictement interdit d'accepter des sommes d'argent quels qu'en soient le montant ou la forme.

2. Dans l'exercice de leurs fonctions, les officiels sont autorisés à offrir à des tierces personnes des cadeaux et autres avantages d'une valeur équivalente à celle des présents traditionnellement remis selon la coutume locale, sous réserve qu'il ne soit pas possible d'en retirer un avantage malhonnête et qu'ils ne donnent pas lieu à un conflit d'intérêts.

3. [...]."

32. Les dispositions pertinentes du CEF de 2012 sont libellées comme il suit:

Article 13 - Règles de conduite générales

"1. Les personnes auxquelles s'applique le présent code doivent avoir conscience de l'importance de leur fonction et des obligations et responsabilités qui en découlent.

2. Les personnes auxquelles s'applique le présent code se doivent d'observer le droit applicable et tous les textes en vigueur ainsi que la réglementation de la FIFA les concernant.
3. Les personnes auxquelles s'applique le présent code doivent faire preuve d'un grand souci d'éthique. Elles doivent se comporter de manière digne et faire preuve d'une totale crédibilité et d'intégrité.

Article 15 - Loyauté

Les personnes auxquelles s'applique le présent code doivent faire preuve d'une absolue loyauté vis-à-vis de la FIFA, des confédérations, des associations, des ligues et des clubs.

Article 19 - Conflits d'intérêts

1. ***Dans*** *le cadre de leurs activités pour le compte de la HIA ou avant d'être élues ou désignées comme officiel, les personnes auxquelles s'applique le présent code doivent révéler tout intérêt personnel qui pourrait être lié à leurs nouvelles fonctions.*

2. Les personnes auxquelles s'applique le présent code doivent éviter toute situation pouvant donner lieu à un conflit d'intérêts. Il y a conflit d'intérêts lorsque les personnes auxquelles s'applique le présent code ont ou semblent avoir des intérêts privés ou personnels susceptibles de les empêcher d'accomplir leurs obligations avec intégrité, indépendance et détermination. Par intérêt privé ou personnel, on entend notamment le fait que les personnes auxquelles s'applique le présent code retire un avantage pour elles-mêmes, leur famille, leurs parents, leurs amis ou leurs relations.

3. Les personnes auxquelles s'applique le présent code ne peuvent pas accomplir leurs tâches si elles sont en situation potentielle ou avérée de conflit d'intérêts. Dans un tel cas, le conflit d'intérêts doit être immédiatement révélé et notifié à l'organisation à laquelle la personne à laquelle s'applique le présent code appartient.

4. En cas d'objection basée sur l'existence ou l'éventualité d'un conflit d'intérêts d'une personne à laquelle le présent code s'applique, celle-ci doit être immédiatement signalée à l'organisation pour laquelle la personne à laquelle s'applique le présent code accomplit sa mission, et ce, afin que les mesures appropriées soient prises.

Article 20 - Acceptation et distribution de cadeaux et autres avantages

1. Les personnes auxquelles s'applique le présent code ne peuvent ni accepter ni offrir de cadeaux et autres bénéfices de/à des tiers au sein de la FIFA ou à l'extérieur de celle-ci — ou en rapport avec des intermédiaires ou des parties qui leur sont liées au sens du présent code — que:

a) s'ils ont une valeur symbolique ou insignifiante ;

b) si est exclue toute influence sur l'exécution ou l'omission d'un acte se rapportant à leurs activités officielles ou relevant de sa discrétion;

c) s'ils ne sont pas contraires à leurs devoirs ;

d) s'ils ne constituent aucun avantage indu, de nature pécuniaire ou autre ; et

e) s'ils ne créent aucun conflit d'intérêts.

Tout cadeau ou avantage ne répondant pas à la totalité des critères susmentionnés est interdit.

2. En cas de doute, les cadeaux ne doivent pas être acceptés ni distribués. Les personnes auxquelles s'applique le présent code ne doivent en aucun cas accepter, ni offrir d'argent à quelqu'un au sein de la FIFA ou à l'extérieur de celle-ci de n'importe quel montant et sous quelque forme que ce soit.

3. Les personnes auxquelles s'applique le présent code ne peuvent pas être remboursées par la FIFA pour les frais inhérents aux membres de leur famille ou aux associés les accompagnant aux événements officiels, sauf autorisation expresse de l'organisation compétente. Ladite autorisation devra être documentée.

4. Les personnes auxquelles s'applique le présent code doivent s'abstenir de toute activité ou comportement pouvant donner l'impression ou laisser supposer l'existence d'un comportement fautif ou l'existence

d'une tentative de comportement fautif tel que décrit plus haut."

Griefs

33. Invoquant l'article 6 de la Convention, le requérant se plaint de multiples violations commises dans la procédure disciplinaire et par le TAS.

34. Le requérant allègue, en outre, que le principe de non-rétroactivité de la loi, concrétisé à l'article 7 de la Convention, aurait été violé, puisque les faits qui lui sont reprochés ont été commis en 2007 et 2011, or les instances juridictionnelles de la FIFA auraient refusé d'appliquer les textes en vigueur au moment des faits.

35. Il fait encore valoir que la sanction qui lui a été infligée violerait la liberté d'exercer une activité professionnelle, protégée par l'article 8 de la Convention, car elle l'empêcherait d'exercer toute activité relative au football durant quatre ans.

En droit

A. Responsabilité internationale de la Suisse en vertu de la Convention et compétence *ratione personae* de la Cour

36. En l'espèce, la sanction litigieuse prononcée à l'encontre du requérant a été infligée par la FIFA, à savoir une association de droit privé suisse. Par ailleurs, la procédure s'est déroulée devant les instances de la FIFA, puis devant le TAS. Or, ce dernier n'est ni un tribunal étatique ni une autre institution de droit public suisse, mais une entité émanant du CIAS, c'est-à-dire d'une fondation de droit privé *(Mau et Pechstein c. Suisse, nOS* 40575/10 et 67474/10, § 29, 2 octobre 2018). Il se pose dès lors la question de la responsabilité internationale et, en même temps, de la compétence *ratione personae* de la Cour.

37. Cela étant, la Cour note que, s'agissant d'un arbitrage interne, la loi suisse prévoit les effets des sentences arbitrales du TAS ainsi que la compétence du Tribunal fédéral pour connaître de leur validité (articles 387 et 393 CPC, respectivement ; paragraphes 25 et 26 ci-dessus). En outre, dans la présente cause, cette haute juridiction a rejeté le recours du requérant donnant, de ce fait, force de chose jugée à la sentence arbitrale en question dans l'ordre juridique suisse.

38. Les actes ou omissions litigieux sont donc susceptibles d'engager la responsabilité de l'État défendeur en vertu de la Convention (voir, *Mutu et Pechstein,* précité, §§ 66 et 67, et *mutatis mutandis, Nada c. Suisse* [GC], no 10593/08, §§ 120-122, CEDH 2012). Il s'ensuit également que la Cour est compétente *ratione personae* pour connaître des griefs du requérant quant aux actes et omissions du TAS, entérinés par le Tribunal fédéral.

B. Griefs tirés de l'article 6 de la Convention

39. Selon le requérant, les violations des règles du procès équitable auraient été nombreuses dans les statuts régissant le fonctionnement des instances de la FIFA, comme dans le déroulement de la procédure disciplinaire. Il allègue que le TAS se serait prononcé sur la base de pièces du dossier qui seraient affectées de vices tenant aux conditions dans lesquelles ces preuves ont été recueillies et qu'il n'aurait pas le droit de statuer sur un dossier constitué de manière illégale.
Le requérant allègue que les carences dans les statuts de la FIFA laissent planer un soupçon de dépendance des organes juridictionnels (commission d'éthique et de recours) à l'égard de l'exécutif de la FIFA. En outre, il soutient que le financement important que la FIFA

accorde chaque année au TAS laisse douter de la dépendance de ses organes juridictionnels vis-à-vis de l'exécutif de la FIFA.
Le requérant fait également valoir que l'instruction n'a pas respecté les droits de la défense et a fait preuve de partialité. Elle aurait systématiquement refusé de communiquer au requérant le dossier d'instruction, alors qu'il aurait formulé plusieurs demandes dans ce sens. En plus, l'instruction aurait été menée en un temps incompatible avec l'exercice effectif des droits de la défense (ouverture de la procédure le 28 septembre 2015, prononcé de la sanction le 18 décembre 2015).
Enfin, le requérant reproche au TAS de ne pas avoir assumé son rôle de gardien des garanties du procès équitable étant donné que ce tribunal a estimé qu'il "guériss[ai]t toutes les violations procédurales qui auraient pu être commises par les instances précédentes" et qu'il n'était donc "pas nécessaire que la Formation statue sur l'existence ou non des violations procédurales alléguées par l'Appelant, ni qu'elle tranche si les exigences de l'article 6 de la Convention doivent être suivies ou non devant les instances internes". Le Tribunal fédéral, en dernier ressort, n'aurait pas été en mesure ni d'examiner ni de réparer ou de sanctionner lesdites violations en raison du caractère extrêmement limité du contrôle qu'il exerce sur les décisions du TAS.

40. L'article 35 de la Convention impose de soulever devant l'organe interne adéquat, au moins en substance et dans les formes et délais prescrits par le droit interne, les griefs que l'on entend formuler par la suite devant la Cour. Une requête ne satisfaisant pas à ces exigences doit en principe être déclarée irrecevable pour non-épuisement des voies de recours internes *(Gàfgen c. Allemagne* [GC], n°22978/05, § 144 et 146, CEDH 2010).

41. En l'espèce, les griefs tirés de l'article 6 n'ont pas été soulevés devant le Tribunal fédéral, même pas en substance. Cela découle par ailleurs de la structure du mémoire de recours au Tribunal fédéral qui comporte, sur le fond, les parties suivantes : "En général", "Les dispositions réglementaires appliquées", "L'extension du plan de prévoyance", "Le paiement litigieux", "La participation à la réunion de la commission des finances du 2 mars 2011", et la "Sanction infligée". La Cour observe que, mis à part le dernier titre (sanction infligée), qui sera examiné par elle sous l'angle de l'article 8, aucune autre partie du mémoire ne porte sur les violations alléguées de l'article 6 § 1 de la Convention. Par ailleurs, le seul grief invoqué devant le Tribunal fédéral était celui de l'arbitraire et du défaut d'équité de la sentence arbitrale en tant que telle. L'équité de la procédure n'était, quant à elle, pas remise en cause.

42. Il s'ensuit que ces griefs doivent être rejetés pour non-épuisement des voies de recours internes, en application de l'article 35 §§ **1** et 4 de la Convention.

C. Grief tiré de l'article 7 de la Convention

43. Le requérant estime que le principe de non-rétroactivité de la loi, concrétisé à l'article 7 de la Convention, aurait été violé, puisque les faits qui lui sont reprochés ont été commis en 2007, respectivement 2011, et que les instances juridictionnelles de la FIFA auraient refusé d'appliquer les textes en vigueur au moment des faits (CEF de 2009) pour s'appuyer sur le CEF en sa version de 2012. Selon le requérant, le texte de la version ancienne avait un champ d'application plus étroit et interdisait de recevoir des cadeaux que de la part de tiers. Les avantages que la FIFA accorde elle-même n'auraient pas été compris dans le champ d'application de l'article 10 du CEF

de 2009. Cette violation aurait été alléguée devant le TAS et le Tribunal fédéral, sans être corrigée ni réparée.

44. La Cour estime nécessaire d'aborder d'emblée la question de savoir si le requérant peut se prévaloir de l'article 7 de la Convention. La notion de "peine" à l'article 7 possède, comme celles de "droits et obligations de caractère civil" et d'"accusation en matière pénale" à l'article 6 § 1 de la Convention, une portée autonome. Pour rendre effective la protection offerte par l'article 7, la Cour doit demeurer libre d'aller au-delà des apparences et d'apprécier elle-même si une mesure particulière s'analyse au fond en une "peine" au sens de cette clause *(Kafkaris c. Chypre,* no 21906/04, § 142, 12 février 2008; *Welch c. Royaume-Uni,* 9 février 1995, § 27, série A no 307-A, et *Jamil c. France,* 8 juin 1995, § 30, série A no 317-B). Le libellé de l'article 7 § 1, seconde phrase, indique que le point de départ d'où elle peut déterminer si une "peine" a été prononcée, consiste à savoir si la mesure en question a été imposée à la suite d'une condamnation pour une "infraction pénale". D'autres éléments peuvent être jugés pertinents à cet égard : la nature et le but de la mesure en cause, sa qualification en droit interne, les procédures associées à son adoption et à son exécution, ainsi que sa gravité *(Kafkaris,* précité, § 142, *Welch,* précité, § 28, et *Jamil,* précité, § 31).

45. La Cour a également expressément dit que les procédures relatives au renvoi d'un huissier motivé par la commission de nombreux délits "n'impliquaient pas une décision sur une accusation en matière pénale" *(Bayer c. Allemagne,* n° 8453/04, § 37, 16 juillet 2009).

46. En outre, dans l'affaire *Olekyandr Volkov,* précitée, § 93, le requérant était un juge qui s'est vu sanctionné pour un manquement aux règles de sa profession, c'est-à-dire pour une faute relevant clairement du domaine disciplinaire. La sanction qui lui a été imposée était une mesure disciplinaire classique pour faute professionnelle et, au regard du droit interne, elle se distinguait des sanctions de droit pénal encourues par les juges adoptant sciemment une mauvaise décision. Pour ces motifs, la Cour a conclu que l'affaire ne tombait pas dans le volet "pénal" de l'article 6 de la Convention *(ibidem., §* 95).

47. Par ailleurs, la Cour a généralement refusé de faire entrer en jeu l'aspect pénal de l'article 6 concernant le licenciement et les restrictions à l'emploi visant des anciens agents du KGB *(Sidabras et Düautas c. Lituanie* (déc.) **n**^{os} 55480/00 et 59330/00, 1er juillet 2003). Les affaires concernant la "lustration" polonaise était différente dans la mesure où la Cour a observé que, dans un cas de ce type, les dispositions pertinentes de la législation polonaise ne touchaient pas un petit groupe d'individus dotés d'un statut particulier, à l'instar, par exemple, des mesures disciplinaires, mais visaient au contraire un grand nombre de citoyens, la procédure résultant en une interdiction d'emploi dans un grand nombre de postes publics sans que la liste exhaustive de ces postes ne soit énoncée dans le droit interne *(Matyjek c. Pologne* (déc.), n° 38184/03, §§ 53 et 54, CEDH 2006-VII).

48. En l'occurrence, les sanctions prononcées contre le requérant, un haut fonctionnaire de la FIFA, notamment l'interdiction d'exercer toute activité liée au football pendant quatre ans, étaient fondées sur les dispositions pertinentes du CEF et l'article 22 du code disciplinaire (paragraphe 29 ci-dessus) de ladite organisation et ont été prononcées par ses organes judiciaires, à savoir la commission d'éthique et la commission de recours. Il s'agit donc de mesures particulières prises à l'encontre d'un

membre d'un groupe d'individus relativement petit, dotés d'un statut particulier et soumis à des règles spécifiques. La Cour conclut, en l'absence d'"infraction pénale" retenue contre le requérant, que celui-ci ne peut pas se prévaloir de l'article 7 de la Convention.

49. Il s'ensuit que ce grief est incompatible *ratione materiae* avec les dispositions de la Convention au sens de l'article 35 § 3 a) et doit être rejeté en application de l'article 35 § 4.

D. Grief tiré de l'article 8 de la Convention

50. En vertu de l'article 8 de la Convention, le requérant fait encore valoir que la sanction qui lui a été infligée violerait la liberté d'exercer une activité professionnelle, protégée par cette disposition, car elle l'a empêché d'exercer toute activité relative au football durant quatre ans.
51. La Cour relève d'emblée que le requérant ne s'est pas explicitement référé à l'article 8 devant le Tribunal fédéral, mais qu'il a invoqué une atteinte aux droits de la personnalité (article 27 CC; paragraphe 27 ci-dessus) et à sa liberté économique ("l'avenir économique"). La Cour estime, dès lors, qu'il a épuisé, en substance, les voies de recours internes.

1. Sur l'applicabilité de l'article 8 au cas d'espèce

52. Quant à l'applicabilité de l'article 8 au cas d'espèce, la Cour est amenée à examiner si le grief du requérant tombe sous la notion de "vie privée". La Cour a déjà eu l'occasion d'observer que cette notion est une notion large, non susceptible d'une définition exhaustive. Elle recouvre également le droit au développement personnel et le droit d'établir et entretenir des rapports avec d'autres êtres humains et le monde extérieur (voir, par exemple, *Evans c. Royaume-Uni* [GC], n° 6339/05, § 71, CEDH 2007-I). À ce titre, l'article 8 peut s'étendre aux activités professionnelles *(Fernández Martinez c. Espagne* [GC], no 56030/07, § 110, CEDH 2014 (extraits), *Bàrbulescu c. Roumanie* [GC], n° 61496/08, § 71, 5 septembre 2017 (extraits), *Antovie et Mirkovié c. Monténégro,* no 70838/13, § 42, 28 novembre 2017, et *Lopez Ribalda et autres c. Espagne* [GC], nOS 1874/13 et 8567/13, § 88, 17 octobre 2019).

53, La Cour a récemment eu l'occasion de synthétiser les principes guidant la portée de l'article 8 dans les litiges professionnels dans l'affaire *Denisov c. Ukraine* [GC], no 76639/11, 25 septembre 2018:

"115. La Cour conclut de la jurisprudence ci-dessus que les litiges professionnels ne sont pas par nature exclus du champ d'application de la notion de "vie privée" au sens de l'article 8 de la Convention. Dans de tels litiges, un licenciement, une rétrogradation, un refus d'accès à une profession ou d'autres mesures tout aussi défavorables peuvent avoir des répercussions sur certains aspects typiques de la vie privée. Parmi ces aspects figurent i) le "cercle intime" du requérant, ii) la possibilité pour lui de nouer et de développer des relations avec autrui, et iii) sa réputation sociale et professionnelle. Un problème se pose généralement au regard de la vie privée de deux manières dans le cadre de litiges de ce type: soit du fait des motifs à l'origine de la mesure en cause (auquel cas la Cour retient l'approche fondée sur les motifs), soit — dans certains cas — du fait des conséquences sur la vie privée (auquel cas la Cour retient l'approche fondée sur les conséquences).

116. Si l'approche fondée sur les conséquences est suivie, le seuil de gravité à atteindre pour chacun des aspects susmentionnés revêt une importance cruciale. C'est au requérant qu'il incombe d'établir de manière convaincante que ce seuil a été atteint dans son cas. Il doit produire des éléments prouvant les conséquences

de la mesure en cause. La Cour ne reconnaîtra l'applicabilité de l'article 8 que si ces conséquences sont très graves et touchent sa vie privée de manière particulièrement notable.

117. La Cour a énoncé des critères permettant d'apprécier le sérieux ou la gravité des violations alléguées dans le cadre de différents régimes. Le préjudice subi par le requérant s'apprécie par rapport à sa vie avant et après la mesure en question. La Cour estime en outre que, pour déterminer la gravité des conséquences dans un litige professionnel, il convient d'analyser au regard des circonstances objectives de l'espèce la perception subjective que le requérant dit être la sienne. Pareille analyse englobe les conséquences tant matérielles que non matérielles de la mesure en cause. Il reste toutefois que c'est au requérant de définir et préciser la nature et l'étendue de son préjudice, lequel doit avoir un lien de causalité avec la mesure en cause. La règle de l'épuisement des voies de recours internes veut que les éléments essentiels des allégations de ce type doivent avoir été suffisamment exposés devant les autorités internes saisies du litige".

54. S'agissant du cas d'espèce, le requérant rappelle qu'il était joueur de football professionnel, capitaine et sélectionneur de l'équipe nationale de football, qu'il a poursuivi une carrière dans le monde du football, qu'il a été membre du Comité d'organisation de la Coupe du Monde de football en France en 1998, qu'il a collaboré à la campagne électorale de X.Y., qu'il a travaillé pour la FIFA en qualité de conseiller du Président nouvellement élu jusqu'à juin 2002, qu'il a été élu, le 25 avril 2002, au Comité exécutif de l'UEFA qu'il a représentée au sein du Comité exécutif de la FIFA à partir de cette date, qu'il a été élu à la présidence de l'UEFA en 2007, puis réélu en 2011 et 2015, et qu'il était Vice-Président de la FIFA. Il ajoute qu'il a arrêté toutes activités commerciales dès la fin de l'année 2006 pour prendre la tête de l'UEFA en qualité de Président exécutif, évitant ainsi tout conflit d'intérêts.

55. Le requérant conclut qu'il aurait ainsi consacré toute sa vie et sa carrière professionnelle au football, à l'exclusion de tout autre secteur. Il s'ensuit que les instances juridictionnelles de la FIFA, le TAS et le Tribunal fédéral ne pouvaient pas lui infliger une sanction aussi large et paralysante que celle qui lui a été infligée, soit l'interdiction générale d'exercer toute activité professionnelle (administrative, sportive ou autre) liée au football au niveau national et international durant quatre ans à compter du 8 octobre 2015, alors qu'il avait 61 ans, sans violer la Convention. Il s'agirait dès lors d'une mesure disproportionnée et injustifiée qui avait eu pour effet, en pratique, de le priver de toute possibilité d'exercer une activité professionnelle, soit une mesure contraire à l'article 8 de la Convention.

56. La Cour estime que les motifs à la base de la mesure litigieuse touchant la vie professionnelle du requérant n'ont aucun rapport avec sa vie privée. Par contre, les répercussions sur sa vie privée sont la conséquence des actes qui lui ont été reprochés (voir à contrario, par ex. *Smith et Grady c. Royaume-Uni,* nos 33985/96 et 33986/96, § 71, CEDH 1999-VI). Dès lors, elle estime qu'il faut appliquer, dans le cas d'espèce, l'approche fondée sur les conséquences *(Denisov,* précité, 107). Dans de tels cas, la Cour ne reconnaîtra l'applicabilité de l'article 8 que si le requérant arrive à établir de manière convaincante, par la production d'éléments concrets, que ces conséquences sont très graves et touchent sa vie privée de manière particulièrement notable *(ibidem, §* 116).

57. A la lumière des arguments présentés par le requérant, la Cour est prête à admettre que l'intéressé, qui a passé et travaillé toute sa vie

dans le milieu du football, peut effectivement se sentir considérablement affecté par l'interdiction d'exercer toute activité en lien avec le football durant quatre ans. La Cour accepte, premièrement, que les conséquences négatives de la mesure étaient susceptibles de se produire dans le cadre du "cercle intime" du requérant, qui s'est provisoirement vu interdit de gagner sa vie *(a contrario, Denisov,* précité, § 118) dans le milieu du football, la seule source de revenus pendant toute sa vie, situation aggravée par la position dominante, voire de monopole de la FIFA dans l'organisation globale du football (dans ce sens *Schiith c. Allemagne,* no 1620/03, § 73, CEDH 2010) et par son âge. Deuxièmement, elle estime que la sanction pouvait avoir un impact négatif sur la possibilité de nouer et développer des relations sociales avec autrui eu égard à la nature très large de la sanction prononcée, qui s'étend à "toute" activité liée au football. À cet égard, la Cour estime qu'il ne faut pas perdre de vue que le requérant était communément, dans le public et les médias, identifié par rapport au football. Enfin, la Cour considère comme probable que la sanction prononcée à l'encontre du requérant, comme par ailleurs chaque sanction d'un comportement socialement reprochable, a eu des effets négatifs sur sa réputation dans le sens d'une certaine stigmatisation.

58. Il s'ensuit que, eu égard à la particularité de la situation du requérant, le seuil de gravité exigé pour faire entrer en jeu l'article 8 de la Convention a été atteint. Compte tenu de ce qui précède, la Cour estime que l'article 8 s'applique au cas d'espèce.

2. Sur la nature de l'obligation imposée et la marge d'appréciation dans le cas d'espèce

59. Comme constaté plus haut, la sanction litigieuse a en l'espèce été infligée par la FIFA, à savoir une association de droit privé suisse. En l'absence d'une mesure étatique, la Cour estime qu'elle ne peut pas aborder le grief tiré de l'article 8 sous l'angle de la théorie de l'ingérence. Il lui appartient, dès lors, d'examiner si l'État défendeur s'est acquitté de ses obligations positives par rapport à l'article 8 de la Convention.

60. Si l'article 8 tend pour l'essentiel à prémunir l'individu contre des ingérences arbitraires des pouvoirs publics, il ne se contente pas de commander à l'État de s'abstenir de pareilles ingérences : à cet engagement négatif peuvent s'ajouter des obligations positives inhérentes au respect effectif de la vie privée. Celles-ci peuvent nécessiter l'adoption de mesures visant au respect de la vie privée jusque dans les relations des individus entre eux. Si la frontière entre les obligations positives et négatives de l'État au regard de l'article 8 ne se prête pas à une définition précise, les principes applicables sont néanmoins comparables. En particulier, dans les deux cas, il faut prendre en compte le juste équilibre à ménager entre l'intérêt général et les intérêts de l'individu, l'État jouissant en toute hypothèse d'une marge d'appréciation *(Obst c. Allemagne,* n° 425/03, § 41, 23 septembre 2010, *Evans c. Royaume-Uni* [GC], n° 6339/05, §§ 75-76, CEDH 2007-IV, et *Lopez Ribalda et autres,* précité, §§ 111 et 112).

61. Dans certaines circonstances, l'État ne s'acquitte de manière adéquate de ces obligations positives que s'il assure le respect de la vie privée dans les relations entre individus en établissant un cadre normatif qui prenne en considération les divers intérêts à protéger dans un contexte donné *(Lopez Ribalda et autres,* précité, § 113, *MC. c. Bulgarie,* n°39272/98, § 150, CEDH 2003-XII; *KU. c. Finlande,* no 2872/02, §§ 43 et 49, CEDH 2008). À cet égard, la Cour rappelle également que les juridictions internes

doivent motiver leurs décisions de manière suffisamment circonstanciée, afin notamment de permettre à la Cour d'assurer le contrôle européen qui lui est confié (voir, *mutatis mutandis, IM c. Suisse,* n° 23887/16, § 72, 9 avril 2019, et *X c. Lettonie* [GC], no 27853/09, § 107, CEDH 2013). Un raisonnement insuffisant des juridictions internes, sans véritable mise en balance des intérêts en présence, est contraire aux exigences de l'article 8 de la Convention.

62. La Cour estime que la question principale qui se pose en l'espèce est donc de savoir si l'État était tenu et, dans l'affirmative, dans quelle mesure, au regard de ses obligations positives découlant de l'article 8, de protéger le droit du requérant au respect de sa vie privée contre la mesure infligée par la FIFA, confirmée, même si réduite, par le TAS. Il convient, en particulier, de vérifier si le requérant disposait en l'espèce des garanties institutionnelles et procédurales suffisantes, soit un système de juridictions devant lesquelles il a pu faire valoir ses griefs, et si celles-ci ont rendu des décisions dûment motivées et tenant compte de la jurisprudence de la Cour *(Obst,* précité, §§ 45-46).

63. Dans le cadre de cet examen, la Cour tiendra compte de la spécificité de la situation du requérant, qui a librement choisi une carrière particulière dans le domaine du football, d'abord en tant que joueur et sélectionneur, puis dans des fonctions officielles des associations du football, qui sont des acteurs privés et, en tant que tel, pas directement soumis à la Convention. Si une telle carrière offre sans doute de nombreux privilèges et avantages, elle implique en même temps la renonciation de certains droits (voir, dans ce sens, *Fernández Martinez,* précité, §§ 134-135). De telles limitations contractuelles sont acceptables au regard de la Convention lorsqu'elles sont librement consenties *(ibidem,* § 135). Or, en l'espèce, et contrairement à l'affaire *Mutu et Pechstein* (précitée, §§ 114 et 122), le requérant ne fait pas valoir devant la Cour qu'il aurait été contraint à signer des clauses d'arbitrage obligatoires excluant toutes les voies de droit devant les tribunaux domestiques ordinaires. Par ailleurs, il a expressément accepté la compétence du TAS en signant l'ordonnance de procédure (§ 137 de la sentence du TAS).

64. La Cour estime nécessaire de garder ces particularités de la situation concrète du requérant à l'esprit dans l'examen du bien-fondé du grief tiré de l'article 8 de la Convention.

3. Conclusions dans le cas d'espèce

65. En l'espèce, le requérant a pu porter le litige qui l'opposait à la FIFA devant le TAS, dont l'indépendance et l'impartialité, en tant que tribunal, n'ont pas été mises en doute par la Cour dans l'affaire *Mutu et Pechstein,* (précitée, § 159).

66. Le TAS, par une formation de trois arbitres et après avoir tenu une audience, a revu la décision de la Chambre de jugement de la Commission d'éthique de la FIFA et réduit de six à quatre ans la durée d'interdiction d'activité et de 80 000 CHI à 60 000 CHF le montant de l'amende. La Cour note que le TAS a, de manière exhaustive et détaillée, dans le cadre d'une sentence de 63 pages (374 paragraphes), répondu aux griefs du requérant. Elle partage entièrement le point de vue du Tribunal fédéral selon lequel le TAS a procédé à un examen complet des griefs soulevés en vertu de la Convention, qu'il a rendu une sentence suffisamment circonstanciée et qu'il a procédé à une balance convaincante des intérêts en jeu en tenant compte de la spécificité de la procédure d'arbitrage sportif.

67. Le TAS a notamment estimé que la durée de quatre ans était raisonnable en relation avec le but recherché car elle était suffisamment sérieuse pour sanctionner la violation, considérée grave, des articles 19 et 20 CEF, et envoyant ce faisant un signal fort pour rétablir la réputation du football et de la FIFA. Le TAS a dès lors jugé qu'il existait un intérêt prépondérant pour restreindre les droits de la personnalité du requérant et le droit d'exercer son activité professionnelle (paragraphe 19 ci-dessus). Par ailleurs, ni les éminents services rendus par le requérant à la cause du football n'avaient échappé aux arbitres, ni la situation actuelle de l'intéressé. Au contraire, le TAS a tenu compte de la position élevée qu'occupait le requérant au sein des plus hautes instances du football au moment de la commission des infractions retenues contre lui, tout comme l'absence de repentir de l'intéressé.

68. Par la suite, le requérant a pu saisir le Tribunal fédéral d'un recours en matière civile contre la décision du TAS. Dans le cadre de ce recours, il a fait valoir, entre autres, que la durée de la sanction de quatre ans était excessivement longue, que la sanction n'était pas suffisamment précise, que le TAS n'avait pas suffisamment pris en compte l'impact réel de la sanction, ni tenu compte de son âge et donc pas fait une vraie pesée des intérêts en jeu (paragraphes 17-21 ci-dessus).

69. Saisi de ce recours, le Tribunal fédéral, quant à lui, a entériné avec un raisonnement plausible et convaincant la sentence du TAS. Il a estimé, s'agissant de la durée de la sanction, que l'interdiction prononcée n'apparaissait pas manifestement excessive eu égard aux critères énoncés par la formation et que les arbitres avaient tenu compte de tous les éléments à charge et à décharge ressortant de leur dossier. Le Tribunal fédéral a estimé également que les arbitres n'avaient négligé aucune circonstance importante pour fixer cette durée.

70. Compte tenu de ce qui précède, il s'avère que le requérant disposait en l'espèce des garanties institutionnelles et pro cédurales suffisantes, soit un système de juridictions privée (TAS) et étatique (Tribunal fédéral) devant lesquelles il a pu faire valoir ses griefs, et que celles-ci ont procédé à une véritable pesée des intérêts pertinents en jeu et ont répondu à tous les griefs du requérant dans le cadre de décisions dûment motivées. Par ailleurs, dans la mesure où la Cour est compétente pour se déterminer, elle estime que les conclusions des instances inférieures ne paraissent ni arbitraires ni manifestement déraisonnables, et poursuivaient non seulement l'objectif légitime de punir les infractions commises aux règlements pertinents par un haut fonctionnaire de la FIFA, mais également le but d'intérêt général consistant à rétablir la réputation du football et de la FIFA. Dès lors, et notamment compte tenu de la marge d'appréciation considérable dont jouissait l'État défendeur en l'espèce, la Suisse n'a pas manqué à ses obligations en vertu de l'article 8 de la Convention.

71. Il s'ensuit que ce grief est manifestement mal fondé et doit être rejeté en application de l'article 35 §§ 3 a) et 4 de la Convention.

Par ces motifs, la Cour, à l'unanimité,

Déclare la requête irrecevable.

Fait en français puis communiqué par écrit le 5 mars 2020.

Stephen Phillips, Greffier
Paul Lemmens, Président

Michel Platini v. Switzerland
Press release issued by the Registrar of the court, ECHR 085 (2020), 05.03.2020
European Court of Human Rights / Cour Européenne des Droits de l'Homme

Michel Platini: suspension from football-related professional activity was justified

In its decision in the case of Platini v, Switzerland (application n°526/18) the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final.

The case concerned Michel Platini, a former professional football player, president of UEFA and vice-president of FIFA. Disciplinary proceedings had been brought against him in respect of a salary "supplement" of 2 million Swiss francs (CHF), received in 2011 in the context od a verbal contract between him and FIFA's former President. He was suspended from any football a-related professional activity for four years and fined CHF 60,000.

The Court found in particular that, having regard to the seriousness of the misconduct, the senior position held by Mr Platini in football's governing bodies and the need to restore the reputation of the sport and of FIFA, the sanction did not appear excessive or arbitrary. The domestic bodies had taken account of all the interests at stake in confirming the measure taken by FIFA, subsequently reduced by the Court of Arbitration for Sport (CAS).

Lastly, the Court noted that the applicant had been afforded the domestic institutional and procedural safeguards allowing him to challenge FIFA's decision and submit his arguments in his defence.

Principal facts

In 2015, after a preliminary investigation, the FIFA authorities initiated disciplinary proceedings in respect of an alleged salary supplement of 2 million Swiss francs (CHF) that Mr Platini had received in 2011, in the context of a verbal contract between him and FIFA's President, for activities as adviser between 1998 and 2002.

The applicant was initially given an eight-year suspension from all football-related activities at national and international levels and was fined CHF 80,000 by the adjudicatory chamber of the FIFA Ethics Committee. The sanction was upheld by the FIFA Appeal Committee, which reduced the length of the suspension to six years.

The applicant appealed against this decision to the Court of Arbitration for Sport (CAS). He alleged, in particular, that the Articles of the FIFA Code of Ethics relied upon had not been applicable at the time of the relevant acts and that the sanction appeared excessive. The CAS rejected this complaint but reduced the suspension period from six years to four and the fine from CHF 80,000 to CHF 60,000.

The applicant lodged a civil-law appeal against the CAS decision before the Swiss Federal Court, which upheld that decision, holding that, in view of the applicant's age (61 in 2015), the length of the suspension did not appear excessive.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 22 December 2017.

Relying on Article 6 (right to a fait hearing), the applicant complained that the disciplinary proceedings and the CAS proceedings had been incompatible with that Article. Under Article 7 (no punishment without law), he complained that the prohibition on retrospective application of law had been breached, as the rules in force at the relevant time — between 2007 and 2011 — had not been applied. Lastly, relying on Article 8 (right to respect for private and family life), he argued that the four-year suspension was incompatible with his freedom to exercise a professional activity.

The decision was given by a Chamber of seven judges, composed as follows:
Paul **Lemmens** (Belgium), *President,*
Georgios A. **Serghides** (Cyprus),
Helen **Keller** (Switzerland),
Alena **Pola'ekova** (Slovakia),
Maria **El6segui** (Spain),
Gilberto **Felici** (San Marino),
Lorraine **Schembri Orland** (Malta),
and also Stephen **Phillips,** *Section Registrar.*

Decision of the Court

Article 6 § 1

The Court reiterated that under Article 35 of the Convention any complaints brought before it should first have been raised before the relevant domestic courts, failing which the application would be inadmissible.

In the present case, the Court noted that the applicant had only raised before the Federal Court his complaints alleging the arbitrariness and unfairness of the arbitral award. He had not referred, before the Swiss court, to the other complaints he had submitted in his application: illegality of the evidence used by the CAS, suspicion of subordination of FIFA's adjudicatory bodies to its executive, failure to respect defence rights, unfairness of the proceedings.

Consequently, the Court rejected the complaints under Article 6 § 1 for non-exhaustion of domestic remedies.

Article 7

The Court examined whether the sanction imposed on the applicant fell within the criminal sphere of Article 7 of the Convention. It pointed out in particular that, according to its case-law, disciplinary sanctions ordered following professional misconduct could be distinguished from criminal sanctions. It further noted that sanctions imposed on a "small group of individuals possessing a special status" did not fall within that criminal scope.

In the present case, the applicant, a high-ranking FIFA official, had been disciplined based on the Federation's Code of Ethics and disciplinary rules. The sanction had been imposed by FIFA's adjudicatory bodies. It was therefore a sanction based on a special status concerning a member of a small group.

The Court thus declared the Article 7 complaint inadmissible on account of its incompatibility with the provisions of the Convention.

Article 8

The Court reiterated that the concept of "private life" was a broad and non-exhaustive one. In the instant case, the

sanction imposed on the applicant had been based on acts committed in his professional life which had no connection with his private life. However, the Court acknowledged that the negative repercussions had affected his private life.

The Court thus accepted that the applicant had established that those consequences reached a certain threshold of seriousness. He had spent his entire career in the world of football, which therefore constituted his sole source of income, and he had been deprived of that source. The scope of the sanction was such that it was capable of preventing him from developing social relations with others. Lastly, his reputation had suffered as a result of the sanction, "in the sense of a certain stigmatisation".

Furthermore, the Court examined whether the respondent State had complied with its positive obligation to protect the applicant's right to respect for his private life *vis-à-vis* the sanction imposed by FIFA, which was reduced but confirmed by the CAS, and in particular whether the applicant had been afforded sufficient judicial safeguards.

The Court noted that the applicant had freely consented to the waiver of certain rights by signing compulsory arbitration clauses excluding the possibility of submitting disputes to an ordinary domestic court. He had nevertheless been able to appeal against the measure imposed by FIFA before the CAS. The CAS had duly reasoned its decision to reduce but confirm the sanction in a 63-page decision responding to the applicant's complaints. It had held, among other things, that the particular seriousness of the facts, the senior position held by the applicant, and the need to restore the reputation of football and FIFA, justified the four-year suspension from professional activity.

Lastly, the applicant had lodged a civil-law appeal in the Federal Court against the CAS decision. The Federal Court had likewise upheld the previous decisions, finding the sanction to be well-founded and duly reasoned.

Consequently, the applicant had been afforded sufficient institutional and procedural safeguards. The Court dismissed the Article 8 complaint, declaring it manifestly ill-founded.

The decision is available only in French.

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Jugements du Tribunal fédéral*
Judgements of the Federal Tribunal

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

4A_268/2019
17 October 2019
A. v. B. & The Fédération Algérienne de Football

Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of 9 April 2019 (CAS 2018/A/5881)[1]

Extract of the facts

A. (hereinafter, the player, the Appellant) is a professional football player of Algerian nationality.

B. (hereinafter, the club or Respondent 1) is a football club based in [name of city omitted] and affiliated to the Algerian Football Federation (hereinafter, the Federation, Respondent 2), an association under private law, whose purpose is the management and organization of football in Algeria, and which is affiliated to the Fédération Internationale de Football Association (hereinafter, FIFA).

By contract from 1 July 2015, the player was hired by the club for a period of two sports seasons, that is, from July 1, 2015, to June 30, 2017. By an amendment dated August 2, 2016, the parties agreed to extend the duration of this contract until June 30, 2018, and to increase the player's gross monthly remuneration to 2'300'833.33 Algerian dinars.

According to Art. 7 of this contract,
[…] any disputes or contestations that may arise in connection with the execution of this contract shall be resolved amicably between the two parties. Failing this, the dispute shall be submitted by either party to the dispute resolution chamber at the FAF.

Complaining about the cessation of payment of his salary as of April 2017, his assignment to the reserve team as of August 2017, as well as his withdrawal from the list of participants in official competitions and the cancellation of his license for the 2017/2018 season, the player referred the matter to the National Dispute Resolution Chamber of the Federation.

By decision of January 3, 2018, the National Dispute Resolution Chamber ordered the club to pay the player a net amount of 5'153'980 Algerian dinars representing 4 months' salary as well as 400'000 Algerian dinars in compensation.

Following an appeal submitted by the player against the decision of the National Dispute Resolution Chamber, the Algerian Court of Sports Dispute Resolution, by decision of April 30, 2018, annulled the decision and ordered the club to pay the player the amount of 9'618'564.64 Algerian dinars.

On August 6, 2018, the player submitted a statement for appeal to the Court of Arbitration for Sport (hereinafter, CAS) against the club and the Federation concerning the aforementioned arbitral decision.

[1] The original decision was issued in French. The full text is available on the website of the Federal Tribunal, vvww.bger.ch

After the CAS Court office questioned him in particular on the question of the jurisdiction of the tribunal, requesting him to submit a copy of the statutory or regulatory provisions or of the special agreement providing for the appeal to the CAS, the player submitted an additional brief. His arguments were that the club should be ordered to pay him the salary corresponding to several months' salary as well as damages.

By an Award of April 9, 2019, the CAS declared that it did not have jurisdiction to decide on the appeal submitted on August 6, 2018, by the player against the arbitral decision issued on April 30, 2018, by the Algerian Court for the Settlement of Sports Disputes.

On May 31, 2019, the player submitted a civil law appeal arguing that the Federal Tribunal should annul the CAS award, declare that the CAS indeed had jurisdiction and refer the case back to the CAS for a decision on the merits.

Extract of the legal considerations

Invoking Art. 190(2)(b) PILA, the Appellant argues that the CAS panel wrongly declared that it did not have jurisdiction to decide on the appeal submitted by him on August 6, 2018.

First, the Appellant challenges the points made by the lower court concerning whether the Federation was the proper party to be sued. He considers that the latter is a party to the arbitration agreement, this agreement having its basis *("Grundlage")* in the statutes of the Federation. Moreover, he maintains that the National Chamber for Dispute Resolution is an organ of the Federation and that its decision to declare the breach of the contract must therefore be attributed to the Federation. He deduces from this that the Federation itself was a party to the proceedings before the Algerian Court of Sports Dispute Resolution and the CAS. He further states that Art. 70(2) of the Federation's statutes authorized the latter to appeal to the CAS in the present case.

The Appellant then argued that the Arbitral Tribunal had wrongly interpreted the arbitration clause, submitting that it should be interpreted in light of Art. 2(u), 10.3(d), and 13.1(a) of the Federation's statutes. He was of the opinion that the numerous references to the FIFA Statutes contained in the Federation's statutes, in particular Art. 13.1(a), according to which the members of the Federation must abide by the FIFA Statutes, allowed him to rely on Art. 58(1) of the latter in order to appeal to the CAS. Referring to a CAS decision cited in the award, he considered that Art. 70(2) of the Federation's statutes allows each party, and not only the Federation, to appeal to the CAS against a decision of the Algerian Court for the Settlement of Sports Disputes. In this connection, he pointed out that both the Federation's and FIFA's Statutes prohibit players from appealing to state courts, from which he deduced that appealing to an independent arbitral tribunal must be possible. However, the Algerian Court for the Settlement of Sports Disputes does not constitute an independent arbitral tribunal in his view because of the lack of representation and participation of player associations in the election process of arbitrators.

Seized of a jurisdictional defense, the Federal Tribunal freely reviews the legal issues determining the jurisdiction of the arbitral tribunal (or the lack thereof), including preliminary issues. Yet the Federal Tribunal is not a court of appeal. Thus, in the award under appeal, it is not incumbent upon the Court to research which legal arguments could justify upholding the grievance based on Art. 190(2)(b) PILA. Instead, the Appellant should draw the Court's attention to them in order to comply with the requirements of

Art. 77(3) LTF[2] (ATF 142 III 239 at 3.1). This provision, which introduces the same requirements of reasoning as Art. 106(2) LTF, presupposes that the Appellant, after having indicated which hypothesis of Art. 190(2) PILA is, in his view, met, must still endeavor to demonstrate in detail, starting from the award under appeal, what the violation of the principle invoked consists of (Judgments 4A_7/2019 of March 21, 2019, 2; 4A_378/2015 of September 22, 2015, at (3.1); see (ATF 128 III 50 at (1)(c)).

With regard to whether the Federation was the proper party to be sued, the arbitral tribunal considered that its jurisdiction *ratione personae* could not extend to the Federation, as the latter was not bound by the arbitration agreement contained in Art. 7 of the contract. It stated that the fact that the Appellant had assigned the Federation as Respondent in the appeal proceedings did not change this. The argument developed by the Appellant against this reasoning falls wide of the mark. First of all, nothing can be inferred as to the standing of the sports association itself as a party to the appeal proceedings subsequent to the decision of the body in question (ATF 119 II 217 at 3; Judgment 4A_490/2017 of February 2, 2018, at 3.3.4 and the references cited) from the fact that the adjudicative bodies of sports associations do not constitute genuine courts and that their decisions are merely expressions of contractual intention by the associations concerned. In the present case, the standing to be sued of the Federation cannot be inferred from the mere fact that the National Chamber for Dispute Resolution was called upon to rule on the dispute and, in that context, declared that the contractual links between the parties had been severed. Furthermore, the fact that the arbitration agreement has its origin in the Federation's statutes does not in any way mean that the Federation has the standing of a party to proceedings between a player and his (former) club.

With regard to the possibility for the player to appeal to the CAS against the decision of the Algerian Court of Sports Dispute Resolution, the CAS' arguments are twofold. The Tribunal first considered the possibility of submitting an appeal to the CAS on the basis of the FIFA Statutes, and then looked at the issue from the perspective of the Federation's statutes. Referring to its own case law, the Arbitral Tribunal considered that the Appellant could not rely directly on the provisions of the FIFA Statutes, as these only constitute instructions to the member associations on how to appeal against their decisions and do not confer any immediate right to submit an appeal against a decision with the CAS. Turning next to the Federation's statutes, it endorsed the opinion expressed in a 2008 CAS decision that Art. 70 of these statutes cannot be interpreted as meaning that the decision issued by the Algerian Court of Sports Dispute Resolution can only be appealed against by the Federation and not by the club concerned. However, it refused to infer from this interpretation a general jurisdiction of the CAS to hear appeals against all the decisions of the Algerian Court of Sports Dispute Resolution. In its opinion, Art. 70 of the Federation's statutes must be interpreted as meaning that, according to the principle set out in paragraph (1) of that provision, the decisions of the Algerian Court for the Settlement of Sporting Disputes concerning a dispute between a club and a player are, in principle, final, and that, by virtue of the exception provided for in Art. 70(2), an appeal to CAS is only open when a dispute arises between a club or a player and the Federation.

[2] LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

The Arbitral Tribunal reiterated that, according to Art. R47 of the CAS Code of Sports Arbitration

...[an] appeal against a decision of a sports federation, association or other sports body may be submitted with the CAS if the statutes or regulations of the said sports body so provide or if the parties have concluded a specific arbitration agreement and also to the extent that the appellant has exhausted the legal remedies prior to the appeal available to him under the statutes or regulations of the said sports body.

The Appellant does not refer to this provision, but nevertheless wishes to depart from it insofar as he bases the jurisdiction of CAS directly on the FIFA Statutes. However, his argument, contrary to the letter of the aforementioned article and based solely on the references contained in the Federation's statutes to the FIFA Statutes, is unconvincing. In particular, it should be noted that the Federation's statutes do not specifically refer to the provisions of the FIFA Statutes relating to the possibility of appeal to the CAS but, on the contrary, contain a provision of their own relating to this issue. It should be recalled in this respect that, under Swiss law, the statutes of an association are only binding on the association itself and its members and only exceptionally produce effects with regard to third parties *("Drittwirkung')* (Riemer, in: *Berner Kommentar,* pp. 136-138, nn. 320-328). Thus, there is nothing to add to the assessment of the Arbitral Tribunal that the relevant provisions of the FIFA Statutes do not constitute a basis for arbitration on which the Appellant, as a third party, could directly rely in order to appeal to the CAS (see on this point Mavromati/Reeb, *The Code of the Court of Arbitration for Sport,* p. 390 No. 30).

The Federation statutes expressly deal with the question of appeal to the CAS in Art. 70. This article reads as follows:

The decisions of the Arbitral Tribunal of Algiers concerning clubs and players shall be final and not subject to appeal before any foreign arbitration body. Nevertheless, the FAF reserves the right to appeal against the decisions of the Arbitral Tribunal of Algiers to the CAS in Lausanne.

The Appellant relies on a decision of the CAS to argue that any party to proceedings before the Algerian Court for the Settlement of Sports Disputes may appeal to the CAS on the basis of Art. 70(2) of the statutes. In this case between the Federation and a club, on which the Court of Appeal did not have to decide, the CAS declared that it had the jurisdiction to decide on the appeal submitted by the club, considering that a literal interpretation of this Article would lead to an asymmetry contrary to the equality of treatment between the parties to a dispute. In attempting to infer from that decision his right to appeal to the CAS, the Appellant disregards the fact that the situation which gave rise to that decision cannot be compared with the situation which is the subject of the award sought. Indeed, as the Arbitral Tribunal rightly affirmed, the said decision was taken in the context of a procedure between a club and the Federation and the CAS recital relating to the asymmetry between the parties which would result from a literal interpretation of Art. 70(2) only makes sense in the context of the Federation's participation in the proceedings. However, as previously established, the Federation did not have standing as a party in the present case. There can thus be no question of a right of the Appellant to appeal to the CAS in order to guarantee equal treatment between the parties, Art. 70 2 of the statutes does not confer on the club as an opposing party the right to appeal to the CAS. Moreover, the Appellant ignores the rule laid down in Art. 70(1), according to which the decisions of the Arbitral Tribunal of Algiers concerning clubs and players shall be final and not subject to appeal before any foreign arbitration body.

The Appellant further alleges a lack of independence of the Algerian Court for the Settlement of Sports Disputes, citing Art. 6(1) of the European Convention on Human Rights (ECHR). It should be noted

first of all that this issue is not the subject of the award sought, which is why it cannot be raised before this Court. For the rest, it should be noted that a party to an arbitration agreement cannot argue directly, before the Federal Tribunal in a Civil appeal against an award, that the arbitrators have breached the ECHR, even though the principles of the ECHR can be used, if necessary, to give concrete form to the guarantees invoked under Art. 190(2) PILA (ATF 142 III 360[7] at 4.1.2). Moreover, the Appellant fails to recognize that by agreeing to an arbitration clause the parties voluntarily waive certain rights guaranteed by the ECHR and that such a waiver is not contrary to the Convention in so far as it is free, lawful and unequivocal (Judgment of the European Court of Human Rights in *Mutu et Pechstein v. Switzerland* of October 2, 2018, note 96). As the Appellant does not claim that this would be a forced arbitration, there is no need to rule on the independence of the Algerian Court for the Settlement of Sports Disputes.

In a final grievance, the Appellant claims that there was a violation of his right to be heard (Art.190(2)(d) PILA). Noting that the dispute could not be submitted to any independent tribunal, he considered that the CAS could not declare itself lacking jurisdiction without breaching his right to be heard under the Constitution and the ECHR.

It is not clear what the Appellant wishes to achieve in the present case from his grievance based on Art. 190(2)(d) PILA, formulated at the end of the appeal after having presented in detail his arguments in favor of the CAS' jurisdiction under Art. 190(2)(b) PILA. Regarding the grievance of deprivation of access to a court in Switzerland, the European Court of Human Rights also considers that the grievance under Art. 13 ECHR is absorbed by Art. 6(1) of the European Convention on Human Rights (ECHR), *Tabbane v. Switzerland* of March 1, 2016, note 28). In the present case, the Arbitral Tribunal declared that it did have jurisdiction after having examined the arguments developed by the Appellant and dealt with the relevant issues in accordance with the minimum duty imposed on it by case law (see ATF 142 III 360 at 4.1.2). The grievance is not well-founded.

Decision

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

4A_287 / 2019
6 January 2020
A. v. World Anti-Doping Agency (WADA) & International Swimming Federation (FINA)

Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of May 19, 2019 (CAS 2019/A/6148)[1]

Extract of the facts

A. (hereinafter: the Swimmer or the Athlete) is a professional swimmer from xxx.

The World Anti-Doping Agency (hereinafter: WADA) is a foundation under Swiss law; its headquarters are in Lausanne. It aims in particular to promote, on the international level, the fight against doping in sport.

The International Swimming Federation (hereinafter: FINA), an association under Swiss law with its headquarters in Lausanne, is the world governing body for swimming.

Charged for an anti-doping rule violation due to the unsuccessful attempt to take blood and urine samples during an unannounced test carried out at his home in the night of September 4, 2018, the swimmer was cleaned on January 3, 2019, by the FINA Anti-Doping Commission.

On February 14, 2019, WADA filed a statement of appeal to the Arbitral Tribunal for Sport (CAS), by which it requested the suspension of the athlete for a period of eight years. It also requested an extension of 45 days to file its appeal brief. WADA stated that it needed more time to gather the last elements of the file ("additional time to gather the rest of the file").

The Appellant amended its statement of appeal dated February 18, 2019, adding FINA as the second respondent.

On March 21, 2019, the CAS Court Office clarified that it did not provide information relating to the calculation of the time limits and that it was up to the parties to ensure themselves that the deadlines were respected. lt also refused to suspend the time limit for the filing of the Appeal Brief.

On March 22, 2019, the Athlete invited the CAS to terminate the arbitration proceedings, arguing that the time for filing the Appeal Brief had expired on March 20, 2019. FINA followed, requesting the issuance of a termination order.

[1] The original decision was issued in French. The full text is available on the website of the Federal Tribunal, vvww.bger.ch

On April 3, 2019, WADA filed its Appeal Brief.

On May 9, 2019, the Athlete asked the CAS to bifurcate the procedure (Request for bifurcation) and to examine, on a preliminary basis, the question of the admissibility of the appeal and / or its jurisdiction.

On May 19, 2019, the CAS informed the parties that the Hearing Panel had dismissed the plea of inadmissibility due to the late filing of the Appeal Brief, stating the following:

"(...) The Panel considers that WADA's Statement of Appeal and Appeal Brief were timely filed in accordance with Articles R49 and R51 of the Code of Sports-related Arbitration. The reasons for such decision will be set out in the final award. (...) "

During the proceedings, the Swimmer and FINA also argued that the Appellant's counsel was in a conflict of interest. On May 29, 2019, the Athlete filed a brief at the end of which he concluded that counsel for the Appellant should be barred from representing WADA in the proceedings pending before the CAS, he requested the inadmissibility of the Statement of appeal and the Appeal Brief due to the incapacity to act on behalf of WADA's counsel and, consequently, the lack of jurisdiction ratione temporis of the CAS to decide on the matter. By an interlocutory decision of July 26, 2019, the CAS dismissed the request made by the Athlete. The Federal Tribunal declared the action brought by the Swimmer against said decision inadmissible (judgment 4A_413 / 2019 of October 28, 2019).

On June 11, 2019, the Athlete (hereinafter: the Appellant) filed a civil law appeal to the Federal Tribunal in order to obtain the annulment of the "decision / award rendered by the Court of Arbitration for Sport on May 19, 2019 relating to the admissibility of the Appeal Brief'. He asked the Federal Tribunal to declare that the CAS has no jurisdiction. He also requested the challenge of Arbitrator B.

Extract of the legal considerations

In the field of international arbitration, a civil law appeal is admissible against the decisions of arbitral tribunals under the conditions provided for in Articles 190 to 192 of the federal law on private international law of December 18, 1987 (PILA; RS 291), in accordance with Article 77 para. 1 lit. a LTF.[2] The seat of the CAS is in Lausanne. The Appellant was not domiciled in Switzerland at the relevant time. The provisions of Chapter 12 of the PILA are therefore applicable (Article 176 para. 1 PILA).

The civil remedy referred to in Article 77 para. 1 lit. a LTF in conjunction with Articles 190 to 192 PILA is admissible only against an award. The challengeable act may be a final award, which puts an end to the arbitral proceedings on substantive or procedural grounds, a partial award, which relates to a quantitatively limited part of a contested claim or to one of the various claims in question or that terminates the procedure with regard to a party of consorts (ATF 143 III 462 at 2.1; judgment 4A_222/2015 of January 29, 2016 at 3.1.1), even a preliminary or interlocutory award,

[2] LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

which settles one or more preliminary substantive or procedural questions (on these concepts, see ATF 130 III 755 at 1.2.1 p. 757). On the other hand, a simple procedural order which can be modified or withdrawn during the proceedings is not subject to appeal (ATF 143 Ill 462, cited above, at 2.1; ATF 136 III 200 at 2.3.1 p. 203; ATF 136 III 597 at 4.2; judgment 4A_596/2012 of April 15, 2013 at 3.3). The same applies to a decision on provisional measures referred to in Article 183 PILA (ATF 136 Ill 200, cited above, at 2.3 and references). In determining the admissibility of the appeal, what is decisive is not the name of the act undertaken but its content (ATF 143 III 462, cited above, at 2.1; ATF 142 Ill 284 at 1.1.1; judgment 4A_222 / 2015, cited above, at 3.1.1).

According to Article 186 para. 2 PILA, the jurisdictional objection must be raised before any defense on the merits. This is in accordance with the principle of good faith, anchored in Article 2 para. 1 Civil Code, which governs all areas of law, including civil procedure. Put differently, the rule in Article 186 para. 2 PILA, like the more general one of Article 6 thereof, implies that the arbitral tribunal before which the defendant proceeds on the merits without making any reservation has jurisdiction for this reason. Therefore, the person who files submissions on the merits without reservation (vorbehaltlose Einlassung) in adversarial arbitration proceedings relating to an arbitrable cause accepts, by this conclusive act, the jurisdiction of the arbitral tribunal and definitively loses the right to object to the jurisdiction of said tribunal. However, the defendant may file submissions on the merits, in the event that the objection of jurisdiction is not admitted, without such behavior amounting to tacit acceptance of the jurisdiction of the arbitral tribunal (ATF 143 III 462, cited above, at 2.3; ATF 128 III 50 at 2c / aa).

Article 186 para. 3 PILA provides that, in general, the arbitral tribunal rules on its jurisdiction by an interlocutory decision. This provision certainly expresses a rule, but it does not have any imperative and absolute character, and even its violation is without sanction (judgment 4A_222/2015, cited above, at 3.1.2 and references). The arbitral tribunal will derogate from this principle if it considers that the jurisdictional objection is too closely linked to the facts of the case to be judged separately from the merits (ATF 143 III 462, cited above, at 2.2; ATF 121 III 495 at 6d p. 503).

If the arbitral tribunal, examining the question of jurisdiction beforehand, declares itself incompetent, thereby terminating the procedure, it renders a final award (ATF 143 III 462, cited above, at 3.1).

When it dismisses a jurisdictional objection, by a separate award, it renders an interlocutory decision (Article 186 para. 3 PILA), irrespective of the name given (ATF 143 III 462, cited above, at 2.2; judgment 4A_414/2012 of December 11, 2012 at 1.1). This must be assimilated to the interlocutory or preliminary ruling by which the arbitral tribunal, without ruling directly on its jurisdiction, nevertheless admits it in an implicit and recognizable way by the very fact of settling one or more preliminary questions of procedure or substance (ATF 143 Ill 462, cited above, at 3.1; ATF 130 III 76 at 3.2.1 p. 80; Judgment 4A_370/2007 of February 21, 2008 at 2.3.1 and references). Pursuant to Article 190 para. 3 PILA, this decision, which the defendant must immediately challenge (ATF 130 III 66 at 4.3), can only be challenged before the Federal Tribunal for reasons based on

irregular composition (Article 190 para. 2 lit. A PILA) or lack of jurisdiction (Article 190 para. 2 lit. b PILA) of the arbitral tribunal. The grievances referred to in Article 190 para. 2 lit. c to e PILA can also be raised against the interlocutory decisions within the meaning of Article 190 para. 3 PILA, but only insofar as they are strictly limited to points directly concerning the composition or jurisdiction of the arbitral tribunal (ATF 143 Ill 462, cited above, at 2.2; ATF 140 III 477 at 3.1; ATF 140 III 520 at 2.2.3).

As for the simple procedural order which can be modified or revoked during the proceedings, it is not open to appeal, except in exceptional circumstances (judgment 4A_596/2012, cited above, at 3.3-3.7).

The common denominator of all these decisions, apart from those falling into the last category cited, is that they settle once and for all the question of the jurisdiction of the arbitral tribunal, in one way or another. In other words, in each of them, whether it is a final award or an interlocutory or preliminary ruling, the arbitral tribunal shall definitively decide this question, by admitting or excluding its jurisdiction by an explicit decision or procedural behavior whose finality will be binding on the tribunal as well as on the parties. Such character thus appears to be the substantive common element in all these decisions, whatever their object and form. Therefore, as the Federal Tribunal has already pointed out in relation to Article 92 LTF in the context of criminal proceedings, by requiring that a separate decision on international jurisdiction decide the question definitively in order to be the subject of the appeal provided for by this provision (ATF 133 IV 288 at 2.2), it is also not possible to appeal against a decision that only provisionally deals with the jurisdictional issue of an international arbitral tribunal (judgment 4A_222/2015, cited above, at 3.4).

Relying on Article 190 para. 2 lit. b PILA, the Appellant argues that the CAS declared itself wrongly competent, insofar as the First Respondent did not file its Appeal Brief in due time. He submits that the question of respecting the time limit for submitting the Appeal Brief constitutes a problem of ratione temporis jurisdiction referred to in Article 190 para. 2 lit. b PILA.

Similar argument is unfounded. In the present case, the CAS, in its letter of May 19, 2019, dismissed the objection of inadmissibility due to the late filing of the appeal brief raised by the Appellant and the Second Respondent. In so doing, the Panel has not made a final decision on its jurisdiction. In reality, it made a preliminary ruling or an interlocutory decision by which it finally settled a procedural question not relating to a jurisdictional problem. That preliminary question was whether the filing of the Appeal Brief had taken place in a timely fashion. The Panel certainly could not render this preliminary or interlocutory award without admitting, at least implicitly, on the basis of a prima facie examination, that it had jurisdiction to do so. However, it must be admitted that it did not decide the question of its jurisdiction in a definitive manner.

This conclusion is all the more necessary since, in its response to the appeal, the CAS, through its Secretary General, indicated, after consulting the Arbitration Panel, that the latter had not (yet) decided on its jurisdiction and that the letter of May 19, 2019 did not contain a decision on this issue. The characterization of the decision adopted by the CAS, although it certainly

does not bind the Federal Tribunal, constitutes an element which must be taken into account. Indeed, faced with an unmotivated decision, the Federal Tribunal cannot completely disregard the opinion expressed by the author of this decision as to its legal nature, also because, until proof of to the contrary, the Panel is still in the best position to provide details concerning the scope of the decision it has rendered, regardless of the name of such decision (judgment 4A_222/2015, cited above, at 3.2.2). Contrary to what the Appellant maintains, the CAS, in its response to the appeal signed by its Secretary General, did not encroach on the inalienable powers of the Arbitration Panel nor did it seek to motivate the decision of May 19, 2019. The CAS Secretary General has indeed contented itself in making certain observations "after consultation with the Arbitration Panel" concerning the admissibility of the appeal to the Federal Tribunal.

For the rest, it will also be noted that the letter of May 19, 2019 is similar to that in question in a previous case tried by the Federal Tribunal in which it considered that a letter rejecting in principle an objection of jurisdiction and stating that the reasons would be communicated in the final award to come could not be assimilated to a formal and final decision on jurisdiction (judgment 4A_460/2008 of January 9, 2009 at 4).

Hence it follows that the appeal brought against the interlocutory or preliminary ruling of the Hearing which the CAS legal counsel notified to the parties by letter of May 19, 2019 is inadmissible, since said decision does not rule on the jurisdictional question of the CAS in a final way.

For the sake of completeness, it should also be noted that the grievance articulated by the Appellant does not fall within the framework outlined by Article 190 para. 2 lit. b PILA. In the judgment of October 28, 2019 in the related case 4A_413/2019, the Federal Tribunal considered that the question of compliance with the time limit for appealing to the CAS does not constitute a problem of jurisdiction but another condition of admissibility (at 3.3.2). Consequently, the complaint alleging incompetence ratione temporis of the CAS is inadmissible.

In a second plea, based on Article 190 para. 2 lit. a PILA, the Appellant complained of the irregular composition of the Panel which rendered the contested award rejecting the objection of inadmissibility on account of the late filing of the appeal brief. In this regard, he argues that Arbitrator B., who resigned on June 28, 2019, did not offer sufficient guarantees of independence and impartiality. In addition to the breach of the duty of disclosure alleged by the arbitrator, the Appellant submits that the fact that he had been appointed ten times as arbitrator by the First Respondent in the past five years, respectively eight times in the last three years constitutes in itself a circumstance demonstrating that said arbitrator did not offer sufficient guarantees of independence and impartiality. Furthermore, in the opinion of the Appellant, the appointment of the same arbitrator by the same party in two parallel arbitral proceedings relating to the same legal question would constitute an additional reason likely to raise legitimate doubts as to his impartiality.

On March 11, 2019, the Appellant filed a challenge request for Arbitrator B. The ICAS Challenge Commission rejected this request by decision of April 16, 2019. On May 31, 2019, the Appellant challenged this decision before the Federal Tribunal. The accused

arbitrator chose to resign on June 28, 2019. By judgment of September 25, 2019, the Federal Tribunal noted that the proceedings had become without object since the appeal was filed after the arbitrator's resignation.

Stemming from a private body, the decision rendered by the ICAS Challenge Commission, which could not be the subject of a direct appeal to the Federal Tribunal, cannot bind the latter (ATF 138 III 270 at 2.2.1 p. 271; judgment 4A_644/2009 of April 13, 2010 at 1). Furthermore, the decision in question does not prevent the Appellant from raising the problem which would cover the interlocutory decision rendered on May 19, 2019 due to the participation of an arbitrator who allegedly should have recused himself. Pursuant to Article 190 para. 3 PILA, the interlocutory decision by which the Hearing Panel dismissed an objection of inadmissibility may be challenged before the Federal Tribunal on the ground of the irregular composition of the arbitral tribunal (Article 190 para. 2 lit. a PILA). The Court may therefore in principle freely review whether the circumstances invoked by the Appellant justify the plea of irregular composition of the Arbitral Tribunal.

However, it should not be forgotten that the challenged arbitrator resigned on June 28, 2019. The requests for relief by the Appellant for the challenge of the said arbitrator have therefore no longer any purpose in the context of these proceedings. It remains to be examined whether, in view of the resignation of the arbitrator, the person concerned still has an interest in appealing against the interlocutory award on the ground that it was made in an irregular composition.

According to Article 76 para. 1 lit. b LTF, the Appellant must have an interest worthy of protection in the annulment of the contested decision. The interest worthy of protection consists in the practical utility which the admission of the recourse would bring to its author, by avoiding a prejudice of an economic, ideal, material or other nature that the attacked decision would cause him (ATF 137 II 40 at 2.3 p. 43). The interest must be current, that is to say that it must exist not only at the time of filing of the appeal, but also at the time when the judgment is rendered (ATF 137 I 296 at 4.2 p. 299; 137 II 40 at 2.1 p. 41). The Federal Tribunal declares the appeal inadmissible when there is a lack of an interest worthy of protection at the time of filing the appeal. On the other hand, if this interest disappears during the procedure, the appeal becomes devoid of purpose (ATF 137 I 23 at 1.3.1 p. 24 f. And the judgments cited). Exceptionally, the present interest requirement is waived when the contestation on which the contested decision is based is likely to occur at any time in identical or analogous circumstances, its nature does not allow it to be decided before it loses its significance and that, because of its scope, there is a sufficiently significant public interest in the solution of the question at issue (ATF 139 I 206 at 1.1; ATF 1371 23 at 1.3.1 at p. 25; ATF 136 II 101 at 1.1 p.103; ATF 1351 79 at 1.1 p.81).

The PILA does not regulate the consequences of the resignation of an arbitrator on the pleadings preceding such resignation. However, the Code of Sports-related Arbitration (hereinafter: the Code), which governs the procedure applicable before the CAS, states in particular the following, in its version which came into force on January 1, 2019: *"Article R36 Replacement In the event of resignation, death, removal or successful challenge of an arbitrator, such arbitrator shall be replaced in accordance with the*

provisions applicable to her/his appointment. If, within the time limit fixed by the CAS Court Office, the Claimant/Appellant does not appoint an arbitrator to replace the arbitrator it had initially appointed, the arbitration shall not be initiated or, in the event it has been already initiated, shall be terminated. Unless otherwise agreed by the parties or otherwise decided by the Panel, the proceedings shall continue without repetition of any aspect thereof prior to the replacement." Acts performed before the resignation of an arbitrator therefore remain in principle valid (MAVROMATI / REEB, The Code of the Court of Arbitration for Sport, 2015, para. 15 ad Article R36 of the Code).

In their submissions, the parties do not dispute that Article R36 of the Code is applicable in this case. In his reply, the Appellant submits that *"even if Article R36 of the CAS Code provides, as a general rule, for the continuation of the procedure without repeating acts already performed, there is nothing to exclude, at this stage, that the Parties or, if they do not reach an agreement, that the Hearing Panel decides to repeat procedural acts prior to the replacement of the arbitrator concerned, more particularly to repeat the decision undertaken in this appeal."* (N. 92). However, he acknowledges, in this same writing, that the CAS, in its response to the appeal, *"confirmed (and even motivated) the award under appeal"* (n. 30). In his response dated August 8, 2019, later than more than a month after the resignation of Arbitrator B. on June 28, 2019, the CAS clearly stated, *"after consultation with the Arbitration Panel",* that the appeal brief had been filed within the time limits. After the resignation of the accused arbitrator, the Arbitration Panel, in its new composition, never manifested the slightest intention of reversing the decision which was rendered on May 19, 2019. It results on the contrary from the content of the response of the CAS that the Arbitration Panel, after the resignation of the disputed arbitrator, confirmed the contested decision. In these circumstances, we cannot discern the current and practical interest that the Appellant might still have in the annulment of the contested decision on the ground of the irregular composition of the arbitral tribunal, since the CAS, more than one month after the resignation of the arbitrator, confirmed, after consulting the Arbitration Panel, that the deadline for submitting the appeal brief had been respected. In addition, the Appellant does not allege - and there is nothing to support - that the conditions permitting to derogate from the requirement of current interest are fulfilled in the present case. Consequently, the action is devoid of purpose on this point, for lack of a current and practical interest on the part of the Appellant.

Decision

The appeal is inadmissible insofar as it is not without object.

4A_413 /2019
28 October 2019 First Civil Law Court
A. v. World Anti-Doping Agency (WADA) & International Swimming Federation (FINA)

Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of July 26, 2019 (CAS 2019/A/6148)[1]

Extract of the facts

A. (hereinafter: the Swimmer or the Athlete) is a professional Swimmer xxx.

The World Anti-Doping Agency (hereinafter: WADA) is a foundation under Swiss law; its headquarters are in Lausanne. One of its aims is to promote the fight against doping in sport at international level.

The International Swimming Federation (FINA), a Swiss-based association with headquarters in Lausanne, is the governing body for swimming at a global level.

Accused of an anti-doping rule violation due to an unsuccessful attempt to take blood and urine samples during an unannounced doping control at his home in the night of September 4, 2018, the Swimmer was cleared by the FINA Anti-Doping Commission on January 3, 2019.

On February 14, 2019, WADA sent a statement of appeal to the Court of Arbitration for Sport (CAS), signed by Counsel B. and C., in which it requested the suspension of the Athlete for eight years.

On March 9, 2019, the Athlete's Counsel invited Counsel B. to immediately resign due to a conflict of interest, since said Counsel sat on the FINA Legal Commission.

On March 11,2019, FINA did the same, ordering the Counsel to terminate his appointment. FINA noted that the solicitor resigned from the FINA Legal Commission on February 1, 2019, in order to represent WADA in the FINA dispute before the CAS.

On March 12, 2019, WADA's Counsel denied the existence of a conflict of interest and refused to withdraw from the case.

On March 16, 2019, the Athlete once again invited WADA's Counsel to give up his mandate.

On April 3,2019, Counsel B. and C. sent the CAS the appeal brief on behalf of their client.

In the course of the proceedings, the Swimmer and FINA raised a plea of inadmissibility because of the allegedly late

[1] The original decision was issued in French. The full text is available on the website of the Federal Tribunal, vvww.bger.ch

filing of the appeal brief. The CAS rejected this request on May 19, 2019. The Athlete lodged an appeal in civil matters against this decision with the Federal Tribunal (matter 4A_287/2019).

After referring to the conflict of interest of Counsel B. in the petition entitled "Request for bifurcation" addressed to the CAS on May 9, 2019, the Swimmer filed, on May 29, 2019, a request at the end of which it concluded that it was prohibited for Counsel B. and C. to represent WADA in the proceedings pending before the CAS, that the statement of appeal was inadmissible because of the inability to retain the above-mentioned Counsel and, consequently, the lack of jurisdiction *ratione temporis* of the CAS to settle the dispute.

By decision of July 26, 2019, transmitted to the parties by email on August 2, 2019, CAS dismissed the Athlete's application in its entirety. In short, it considered that the Appellant's Counsel were not in a situation of conflict of interest, that participation in the proceedings of those Counsel did not affect the admissibility of the submissions filed on behalf of the Appellant or the jurisdiction of the CAS to decide on the case.

On September 2, 2019, the Athlete (hereinafter called the Appellant) lodged an appeal in civil matters with the Federal Tribunal against the decision of 26 July 2019.

Extract of the legal considerations

In the field of international arbitration, an appeal in civil matters is admissible against the decisions of arbitral tribunals under the conditions provided by Art. 190 to 192 of the Federal Law on Private International Law of 18 December 1987 (PILA, RS 291), pursuant to Art. 77 para. 1 let. at LTF[2].

The seat of the CAS is in Lausanne. The Appellant was not domiciled in Switzerland at the pertinent moment. The provisions of Chapter 12 of the PILA are therefore applicable (Article 176 (1) PILA).

Invoking Art. 190 para. 2 let. (b) PILA, the Appellant complains that the CAS wrongly accepted its jurisdiction to hear the first Respondent's appeal. In support of this grievance, he alleges that the first Respondent's incapacity to represent WADA would render the appeal inadmissible. Since the notice of appeal and the appeal brief were not validly filed in due time, the CAS should not have jurisdiction *ratione temporis* to rule on the appeal.

An appeal on the ground provided for in Art. 190 para. 2 let. b PILA is open when the arbitral tribunal has ruled on claims that it did not have jurisdiction to review, whether there was no arbitration agreement, or it was restricted to certain matters not including the claims in question *(extra potestatem)*. An arbitral tribunal has jurisdiction, among other conditions, only if the dispute enters into the scope of the arbitration agreement and it itself does not exceed the limits assigned to it by the request for arbitration and, where applicable, the mission statement (judgment 4A_210/2008 of October 29, 2008 at 3.1 and references).

As presented, the Appellant's complaint seems to be inadmissible.

[2] LTF is the abbreviation of the Law of the Federal Tribunal (Loi sur le Tribunal Federal).

Indeed, although Art. 92 and 93 LTF are not applicable - since the text of Art. 77 para. 2 LTF excludes the application of Art. 90 to 98 LTF in arbitration - it must be noted from the outset that the Federal Tribunal considers that the refusal to decide on the incapacity to act as a lawyer and prohibit such person from representing a client because of an alleged conflict of interest is *"an interlocutory decision that does not concern jurisdiction or a question of challenge within the meaning of art. 92 LTF, so this is an "other interlocutory decision"* within the meaning of Art. 93 para. 1 LTF (judgment 4A_366/2019 of September 2, 2019, 4A_349/2015 of January 5, 2016 at 1.11, 5A_47/2014 of May 27, 2014 at 3 and 4.1, 1B_420/2011 of November 21, 2011 at 1.2.1). There is no difference when such decision is rendered in the context of arbitral proceedings. It must therefore be admitted that the contested decision does not concern the composition of the arbitral tribunal in any way and is not a decision on jurisdiction which can be challenged immediately. In reality, the capacity to act as a lawyer does not fall within the jurisdiction of the tribunal but is only a condition of admissibility. In the present case, and irrespective of what the Appellant says, the decision that the CAS notified to the parties on July 26, 2019 is not an interlocutory decision on jurisdiction. Therefore the Appellant cannot attack such decision concerning the capacity to act as a lawyer immediately, making use of an alleged violation of art. 190 para. 2 let. b PILA and in application of art. 190 para. 3 PILA, against an interlocutory decision.

It is questionable whether the failure to act as the First Respondent's Counsel, if proven, could entail the inadmissibility of the statement of appeal and the appeal brief as argued by the Appellant. In a judgment rendered in application of the rules of the Code of Civil Procedure (CPC), the Federal Tribunal has considered that, in the absence of capacity to act as a representative, the court must in principle set a time limit for the party to allow him to designate a representative satisfying the legal requirements (judgment 4A_87/2012 of April 10, 2012 at 3.2.3). That being the case, even following the Appellant's argument, the complaint does not fall within the framework of Art. 190 para. 2 let. b PILA. In two judgments, the Federal Tribunal examined the question whether the late filing of the appeal entails the lack of jurisdiction of the CAS or simply its inadmissibility, or even rejection of the appeal (judgments 4A_170/2017 of May 22, 2018 at 5.2, 4A_488/2011 of June 18, 2012 at 4.3.1). Even though it finally left the question open, the Federal Tribunal set out the reasons that argue in its opinion in favor of the second hypothesis. It thus noted that the criticism made to an arbitral tribunal for not having respected the temporal validity limit of the arbitration agreement or the precondition of conciliation or mediation certainly relates to the conditions of exercise of jurisdiction, more precisely to the competence *ratione temporis,* and as such, falls under art. 190 para. 2 let. b PILA (judgments 4P.284/1994 of August 17, 1995 at 2 and 4A_18/2007 of June 6, 2007 at 4.2). However, this jurisprudential principle essentially concerns the typical or traditional arbitration; it is doubtful that it is also appropriate for atypical arbitration, such as sports arbitration, and it considers in particular the hypothesis in which the jurisdiction of the arbitral tribunal results from the reference to the statutes of a sports federation providing for an arbitration procedure to settle disputes of a disciplinary nature. Whether a party is entitled to challenge the decision taken by the body of a sports federation on the basis

of the statutory rules and the applicable legal provisions does not concern the jurisdiction of the arbitral tribunal seized of the case, but is a question of standing, that is to say a procedural issue to be resolved according to the relevant rules which the Federal Tribunal does not review when seized of an appeal against an international arbitral award (judgments 4A_428/2011 of February 13, 2012 at 4.1.1 and 4A_424/2008 of January 22, 2009 at 3.3).

One author, cited by the Federal Tribunal in 4A_488/2011, pointed to the unsatisfactory result of applying to the appeal period provided by Art. R49 of the Code of Arbitration for Sport (hereinafter: the Code) the general principle that the exceeding of the period agreed upon by the parties entails the lack of jurisdiction of the arbitral tribunal and, in turn, the jurisdiction of the state courts: in short, the application of this principle would have the consequence that after the expiry of the 21-day appeal period laid down in that provision, the decisions of sports federations whose seat is in Switzerland could be brought before the state courts until the expiry of the period of one month provided for in art. 75 CC; such a consequence would undoubtedly be contrary to the spirit of international arbitration in the field of sport, in that it would not make it possible to ensure that Athletes are judged in the same manner and according to the same procedures; it would, moreover, cause important complications. According to this author, the appeal period before the CAS must therefore be considered as an expiry period, the non-compliance of which does not entail the lack of jurisdiction of the arbitral tribunal, but the forfeit of the right to submit the decision to judicial review and, therefore, the dismissal of the appeal (ANTONIO RIGOZZI, *Le délai d'appel devant le Tribunal arbitral du sport: quelques considérations ä la lumière de la pratique récente, in Le temps et le droit,* 2008, p. 255 ff.).

According to another author, the question of compliance with the time limit for bringing an arbitral tribunal to court is in principle not a problem of jurisdiction *ratione temporis*. In this respect, the expiry of the fixed period does not entail the lack of jurisdiction of the arbitral tribunal in favor of state courts. In fact, the respect of the time limit to file an appeal is simply a condition of admissibility of the action which in no way affects the jurisdiction of the arbitral tribunal. Consequently, the complaint of the late submission of the arbitral jurisdiction does not fall within the ambit of Art. 190 para. 2 let. b PILA (STEFANIE PFISTERER, *Die Befristung der Schiedsvereinbarung und die Zuständigkeit eines Schiedsgerichts ratione temporis - eine Illusion ?, in Mélanges ä l'honneur de Anton K. Schnyder,* 2018, pp. 292).

The opinion of these two authors seems convincing. Moreover, if it were sufficient for a party to wait for the expiry of the time limit for appeal of Art, R49 of the Code in order to seize the Swiss state courts, this party would be able to bypass the jurisdiction of the arbitral tribunal by its inaction alone. In the light of the foregoing, it must be considered that compliance with the time limit for appeal to the CAS is a condition of admissibility and not a problem of jurisdiction. Accordingly, the complaint based on Art. 190 para. 2 let. b PILA is inadmissible.

For the sake of completeness, it should be noted that the Appellant's complaint also appears inadmissible for another reason. As regards the challenge of an arbitrator, the case-law considers that the party must invoke the ground of challenge as soon as it becomes aware of it (ATF 136 III 605 at

3.2.2). This jurisprudential rule applies both to the grounds for challenge that the interested party knew but also those that it could have known by showing the attention required, since the choice to remain in the ignorance can be seen, depending on the case, as an abusive maneuver comparable to the delayed request for challenge (ATF 136 III 605, cited above, at 3.2.2, judgment 4A_506/2007 of March 20, 2008 at 3.1.2). This rule constitutes an application, in the field of arbitral proceedings, of the principle of good faith. By virtue of this principle, the right to invoke the plea of improper composition of the arbitral tribunal expires if the party does not raise it immediately. The same applies to a situation where a party intends to contest the capacity to act as a representative, since the requirement to immediately raise such an issue in the arbitral proceedings is an expression of the principle of good faith.

In the present case, after the filing of the Statement of Appeal on February 14, 2019, the Appellant, by letter of March 9, 2019, invited Counsel B. to cease his mandate because of the existence of an alleged conflict of interest. Following Counsel's refusal to withdraw from the case, the Appellant again invited him by letter of March 13, 2019, to stop representing the interests of the Respondent. First Respondent sent its appeal brief to the CAS on April 3, 2019, which did not give rise to any immediate reaction on the part of the Appellant. Thus, the Appellant's attempt to have the Respondent's inability to apply for the Respondent's first Counsel, more than a month after the filing of the appeal brief, appears manifestly late. In conclusion, the Appellant is estopped from raising the violation of art. 190 al. 2 let. b PILA.

On a separate ground, the Appellant, relying on Art. 190 para. 2 let. d PILA, raises the violation of his right to be heard. According to the case-law referred to above, no exception can be made to the inadmissibility of the grounds provided for in Art. 190 let. c-e PILA, deduced *a contrario* from Art. 190 para. 3 PILA, where the civil law appeal relates to an interlocutory decision only to the extent that the grievances based on these grounds are strictly limited to matters relating to the composition or the jurisdiction of the arbitral tribunal (ATF 143 Ill 462, cited above). 2.2 pp. 465, ATF 140 III 477, cited above, at 3.1, 520 at 2.2.3). In reserving this exception, the First Court of Civil Law had mainly in mind cases in which the arbitral tribunal rendered its interlocutory decision concerning its composition or jurisdiction on the basis of findings of fact that it would have determined without respecting the equality of the parties or their right to be heard (ATF 140 III 477, cited above, at 3.1, pp. 479 ff.).

In the present case, the Appellant's complaint of lack of jurisdiction against the interlocutory decision of the CAS dated July 26, 2019 is inadmissible, since that decision does not resolve the question of the jurisdiction of the arbitral tribunal. Therefore, the grievance based on art. 190 para. 2 let. d PILA is also inadmissible.

Decision

The appeal is inadmissible.

Informations diverses
Miscellanous

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- Bellver Alonso R., Commentary to the Arbitral Award TAS 2018/A/5653, Nelson Ezequiel González v. Club Sport Loreto, Revista Aranzadi de Derecho de Deporte y Entretenimiento, Núm. 66, Enero-Marzo 2020 p. 335

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