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## Editorial

This new issue of the CAS Bulletin includes a majority of selected “leading cases” related to football. This illustrates the fact that football has generally been predominant in CAS jurisprudence lately. Therefore, this number comprises eight football cases and three doping cases.

In the field of football, the French case *Raphaël Hamidi c. Wydad Athletics Club* and the case *Ittihad FC v. James Troisi & FIFA* both deal with the termination of employment contracts and the notion of just cause whereas the case *Jackson Ferreira Tiago v. FA of Penang & FA of Malaysia* addresses the lack of jurisdiction of CAS regarding the termination of an employment contract and the criteria applicable to a pathological clause. In the case *5006 Harold Mayne-Nicholls v. FIFA*, the violation of the FIFA Code of Ethics by a FIFA official is analysed by the CAS Panel. The case *Jersey FA v. UEFA* addresses a governance issue related to an unusual topic, namely the Jersey application for membership with UEFA. Interestingly, the case *4843 Hamzeh Salameh & Nafit Mesan FC v. SAFA Sporting Club & FIFA* contemplates a breach of contract without just cause by a player with inducement by his new club and the applicable consequences in terms of compensation and sporting sanctions. The match fixing case *Ion Viorel v. Romanian Football Federation* deals with a variety of procedural issues as well as merits consideration. Finally in *Gordon Derrick v. FIFA*, the denial of eligibility to a candidate for a top position with FIFA due to a lack of integrity is examined by the CAS.

Turning to doping, the athletics case *Anna Chicherova v. IOC* illustrates various aspects of doping including the contractual relationship between an athlete and the IOC and the right to initiate disciplinary proceedings regarding positive re-testing following initial negative results. The *FIS v. Therese Johaug & the Norwegian Olympic & Paralympic Committee & Confederation of*

*Sports case* contemplates the criteria for a finding of no fault or negligence. Lastly, for the first time in CAS jurisprudence, the cross-country skiing case involving the well-known Russian athlete *Alexander Legkov v. FIS* deals with the burden and standard of proof applicable to a provisional suspension.

In addition to an article entitled “A Brief Historical Review of the Procedural and Substantive Issues in CAS jurisprudence related to some Russian Anti-Doping Cases”, we are pleased to publish in this issue an interesting article on match fixing entitled “The match-fixing admission criteria process in European competitions: An overview through the CAS Case law” written by Mr Emilio Garcia, UEFA head of disciplinary and integrity matters.

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. Of particular interest is the decision *4A\_260/2017 ASBL Royal FC Seraing c. FIFA* rendered in French by the Federal Tribunal which confirms the independence of the CAS both structurally and financially, in particular with regard to FIFA.

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

Estelle de La Rochefoucauld  
Counsel to the CAS, Editor-in-chief

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**Articles et commentaires**  
**Articles and Commentaries**



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# The match-fixing eligibility criteria in UEFA competitions: an overview of CAS case law

Emilio García Silvero<sup>1</sup>

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## I. Sport and match-fixing – a quick overview

Match-fixing is legally defined as “an intentional arrangement, act or omission aimed at an improper alteration of the result or the course of a sports competition in order to remove all or part of the unpredictable nature of the aforementioned sports competition with a view to obtaining an undue advantage for oneself or for others”.<sup>2</sup> It has been said that there has always been match-fixing in sport.<sup>3</sup> From the ancient Olympic Games to the most important global sports competitions of today, manipulation

of results has always been an all-too-frequent occurrence.

We have seen a number of very prominent cases of match-fixing in recent years.<sup>4</sup> One of the most remarkable examples, which was even the subject of a film,<sup>5</sup> took place during the 1919 World Series, when a number of Chicago White Sox players were found guilty of accepting bribes and deliberately losing matches against the Cincinnati Reds.<sup>6</sup>

The situation has changed considerably since then. In particular, the globalisation of the sports betting industry has had a massive impact, with studies estimating that between

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The author thanks Alasdair Bell (CAS Arbitrator), Michele Bernasconi (CAS Arbitrator) and Carlos Schneider (UEFA Legal Counsel) for their respective contributions to this paper.

<sup>2</sup> Article 3(4) of the Council of Europe Convention on the Manipulation of Sports Competitions.

<sup>3</sup> See HILL, D. (2016). Why sport is losing the war to match-fixers. *Global Corruption Report: Sport*, Transparency International, p. 231.

<sup>4</sup> See TAK, M. (2018). The politics of countermeasures against match-fixing in sport: A political sociology approach to policy instrument. *International Review for the Sociology of Sport*, Vol. 53 (1), pp. 30–48.

<sup>5</sup> *Eight Men Out*, directed by John Sayles, released in 1988.

<sup>6</sup> See CARPENTER, K. (2013). Global Match-Fixing and the United States’ Role in Upholding Sporting Integrity. *Berkeley Journal of Entertainment and Sports Law*, Vol. 2, Issue 1.

€200bn and €500bn is bet on sport every year.<sup>7</sup> Neither does match-fixing only affect football;<sup>8</sup> it also affects other sports, notably tennis.<sup>9</sup>

In addition to these staggeringly high betting figures, it is widely recognised that match-fixing has become a global issue because it enables organised criminal gangs to expand their illegal and violent activities – which include murder, extortion and assault – worldwide. It also results in the loss of billions in tax revenue and public income every year. Indeed, match-fixing is now one of the most profitable forms of money laundering.<sup>10</sup>

In light of the growth of this phenomenon, which could be even expanded with more emphasis following the US Supreme Court's recent decision in *Murphy v. National Collegiate Athletic Association*,<sup>11</sup> both international sports federations and public authorities are now engaged in a continuous battle against this

scourge.<sup>12</sup> More and more sports federations are establishing specific programmes in this area.<sup>13</sup> As regards public authorities, various resolutions have been adopted by the European Union,<sup>14</sup> several initiatives have been launched by INTERPOL and EUROPOL,<sup>15</sup> and, in particular, excellent work has been completed by the Council of Europe, including the adoption of the first ever international treaty aimed at combating the manipulation of sports competitions.<sup>16</sup> These are all good examples of cooperation between public authorities and the world of sport, but we are still a long way from winning this battle.

## II. UEFA's first cases and the evolution of the legal framework

### A. The case of RSC Anderlecht

Back in 1996, after alarming media reports about old match-fixing cases in UEFA competitions appeared all over Europe,

<sup>7</sup> See Sorbonne-ICSS (2014). Protecting the Integrity of Sport Competition: The Last Bet for Modern Sport.

<sup>8</sup> See FIFPro (2016). 2016 FIFPro Global Employment Report.

<sup>9</sup> See ESSA (2018). ESSA 2017 Annual Integrity Report (available at: <http://www.eu-ssa.org/wp-content/uploads/ESSA-2017-annual-integrity-report.pdf>). See also Lewis, A. (2018). *Independent Review of Integrity in Tennis* (available at: <http://tennisirp.com>).

<sup>10</sup> See Anderson, J. (2014). Match Fixing and Money Laundering. *The International Sports Law Journal*.

<sup>11</sup> Available at: [https://www.supremecourt.gov/opinions/17pdf/16-476\\_dbfi.pdf](https://www.supremecourt.gov/opinions/17pdf/16-476_dbfi.pdf). See, Wolohan, J. (2018). The demand for sports betting integrity fee in the US. *World Sports Advocate*, Volume 16, Issue 5, pp. 14-15.

<sup>12</sup> In the context of sports arbitration, it has been reported that 28 cases have been dealt with by the Court of Arbitration for Sport to date (see STERNHEIMER, W. (2018), CAS and Match Manipulation. An Introduction to CAS Jurisprudence on Match Manipulation – A general overview from the “Pobeda case” (2008) until today. *International Conference on Tackling Match-fixing*, London). Also see, BLACKSHAW, I (2018): The Role of the Court of Arbitration for Sport (CAS) in Countering the Manipulation of Sport, *The Palgrave Handbook on the Economic of Manipulation in Sport*, pp. 233 *et seq.*

<sup>13</sup> Examples include the Tennis Integrity Unit (see <http://www.tennisintegrityunit.com/>) and the Cricket Anti-Corruption Unit (see <http://www.icc-cricket.com/about/46/anti-corruption/overview>).

<sup>14</sup> Examples include the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Developing the European Dimension in Sport, COM(2011)12, section 4.5.

<sup>15</sup> See <https://www.interpol.int/Crime-areas/Crimes-in-sport/Match-fixing-and-illegal-gambling> and <https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/corruption/sports-corruption>

<sup>16</sup> The purpose of this Convention is “to prevent, detect, punish and discipline the manipulation of sports competitions, as well as enhance the exchange of information and national and international cooperation between the public authorities concerned, and with sports organisations and sports betting operators. The Convention calls on governments to adopt measures, including legislation, notably: i) Prevent conflicts of interest in sports betting operators and sports organisations; ii) Encourage the sports betting regulatory authorities to fight against fraud, if necessary by limiting the supply of sports bets or suspending the taking of bets; iii) Fight against illegal sports betting, allowing to close or restrict access to the operators concerned and block financial flows between them and consumers. Sports organisations and competition organisers are also required to adopt and implement stricter rules to combat corruption, sanctions and proportionate disciplinary and dissuasive measures in the event of offences, as well as good governance principles. The Convention also provides safeguards for informants and witnesses”.

UEFA decided to set up an internal commission to investigate the claims. Eighteen months later, in September 1997, the UEFA Executive Committee, having heard the conclusions of the internal commission chaired by Wilfried Hennes, adopted the decision to declare the Belgian club RSC Anderlecht ineligible to take part in UEFA competitions for the 1998/99 season. In its decision, the UEFA Executive Committee concluded that RSC Anderlecht had been involved in two match-fixing cases affecting the independence of the referee. The first related to the UEFA Cup match between RSC Anderlecht and FC Baník Ostrava played on 19 October 1983 and the second to the UEFA Cup semi-final between RSC Anderlecht and Nottingham Forest FC played on 25 April 1984. It is worth noting that, even though, when these matches took place, UEFA had in place a proper institutional structure for dealing with disciplinary issues,<sup>17</sup> the Executive Committee's decision was based on Article 28 of the UEFA Statutes (unforeseen circumstances).<sup>18</sup>

Interestingly, this decision was taken only a few months before the CAS had been granted jurisdiction over UEFA's decisions.<sup>19</sup> Nevertheless, after the Belgian club threatened to file civil actions against the European confederation with the ordinary courts in Switzerland, UEFA and RSC Anderlecht 'voluntarily' decided to submit the dispute to the CAS.

In this case, the CAS considered that, under the system of separation of powers enshrined in the UEFA Statutes, it was not acceptable

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<sup>17</sup> See Articles 15 and 16 of the UEFA Statutes (Edition 1993).

<sup>18</sup> "For all matters not provided for in these Statutes, the Statutes, Regulations and Congress Regulations of FIFA shall be applicable if they cover such an occurrence. Otherwise the Executive Committee of UEFA shall take a decision". (Edition 1993).

<sup>19</sup> CAS jurisdiction was accepted by UEFA by means of the statutory amendments approved by the UEFA Congress held in Helsinki on 24 September 1997 (see Articles 56, 57 and 58). These provisions came into force on 24 December 1997.

that the executive organ (i.e. the UEFA Executive Committee) should issue a decision which fell in the domain of the judicial bodies.<sup>20</sup> Consequently, the appeal was upheld by the CAS. Hence, the first match-fixing case affecting eligibility to participate in UEFA competitions was decided in favour of a club that had apparently been involved in match-fixing activities in UEFA competitions.

### **B. AC Milan: UEFA's first modern-day integrity case**

The outcome was not much more successful ten years later, after a match-fixing scandal that became known as *calciopoli* was unearthed in Italian football in May 2006. Investigations led by the Italian police revealed that a network of club managers, officials responsible for referees and other individuals had sought to influence the outcome of various Serie A matches. Several clubs were punished by the Italian Football Association (FIGC). One of those clubs was AC Milan, who were issued with a heavy points deduction. However, despite this disciplinary measure, the club still managed to qualify for the 2006/07 UEFA Champions League.

Thus, during the 2006/07 UEFA Champions League admission process, UEFA was confronted with a real legal conundrum: could it allow a club that had been punished for its involvement in *calciopoli* to take part in a UEFA competition the following season?

On 2 August 2006, the UEFA Emergency Panel decided to allow AC Milan to

<sup>20</sup> TAS 98/185 Royal Sporting Club Anderlecht c/ UEFA (p. 10): "La Formation parvient donc à la conclusion que la présente affaire avait bel et bien un caractère disciplinaire et qu'en vertu des règlements édictés par l'UEFA, une telle affaire aurait dû être soumise aux instances juridiques de l'UEFA. Or, le Comité Exécutif s'est saisi d'une affaire qui était clairement du ressort des instances juridiques en se fondant sur une règle de compétence subsidiaire très générale (celle de l'art. 28 des statuts) qui ne saurait être invoquée dans des cas où le partage des compétences entre les différents organes de l'UEFA est tout à fait clair".

participate in UEFA's flagship competition on the basis of the following considerations:

*"The UEFA Emergency Panel, being competent to decide on the matter, came to the conclusion that it had no choice but to admit AC Milan for the UEFA club competitions 2006-07 for formal reasons because of an insufficient legal basis in the regulations which would allow not admitting AC Milan under specific circumstances".*

This situation was highly frustrating for UEFA, who felt unable to prevent AC Milan from participating in its competition even though the club had been involved in match-fixing activities at domestic level only a few months previously. It should also be noted that AC Milan went on to win that competition, beating English side Liverpool FC in the final on 23 May 2007. The situation was therefore exacerbated even further, since the 2006/07 UEFA Champions League was won by a club that had been found guilty of match-fixing activities only months before the start of the UEFA competition.

### C. Evolution of the legal framework

UEFA's response to the AC Milan case was a swift one. At the very next UEFA Congress, which took place in Dusseldorf on 25 and 26 January 2007, representatives of the various member associations approved a new paragraph 3 for Article 50 of the UEFA Statutes.

That amendment, which remains in force today, established a two-stage process aimed at guaranteeing the integrity of UEFA's competitions. The first stage involves an administrative measure, whereby the offending club is excluded from European competitions for one season. The second stage involves disciplinary measures, which may be imposed subsequent to the

administrative measure and do not have a maximum duration.<sup>21</sup>

Since 2007, Article 50(3) of the UEFA Statutes has therefore read as follows:

*"The admission to a UEFA competition of a Member Association or club directly or indirectly involved in any activity aimed at arranging or influencing the outcome of a match at national or international level can be refused with immediate effect, without prejudice to any possible disciplinary measures".*

Logically, this provision has also been incorporated in the regulations governing the UEFA Champions League and the UEFA Europa League. The first derivation of this general clause of the Statutes was integrated into the regulations of the respective competitions by means of the new paragraph 1.04(d) which, as from the 2007/08 season, read as follows:

*"To be eligible to participate in the competition, a club must fulfil the following criteria:*

*it must not be or have been involved in any activity aimed at arranging or influencing the outcome of a match at national or international level"*

It was not long before the CAS had the opportunity to test the above-quoted provision in CAS 2008/A/1583 & 1584. Following this case, even though the appeals filed by the appellants were dismissed, UEFA decided to amend and clarify this particular framework in light of the considerations of the award which, by way of *obiter dicta*, raised serious doubts about the reasonableness of the rule.<sup>22</sup>

In this context, the regulations of the UEFA Champions League and UEFA Europa League were adapted in line with the CAS's

<sup>21</sup> For more detail, see CAS 2013/A/3256, Fenerbahçe SK v. UEFA, para. 160 *et seq.*

<sup>22</sup> "Particularly in the light of the principle of proportionality the Panel has serious doubts about the reasonableness of the rule in Art. 1.04 of the UCL-Regulations. According to the wording, the provision has the consequence that a club, which at some point

in time was involved in some way or other with the actions described therein can never again participate in the CL. Ultimately, the rule gives rise to a "lifelong" boycott of the club. The UEFA CDB has even recognized that this can hardly be proportional and so it wants to interpret the provision narrowly". (para. 10.3.3.1).

considerations, determining a clear “two-stage approach”. Ever since the 2009/10 season, the provisions as regards match-fixing eligibility criteria in both UEFA competitions have remained unchanged.<sup>23</sup>

*“4.02 If, on the basis of all the factual circumstances and information available to UEFA, UEFA concludes to its comfortable satisfaction that a club has been directly and/or indirectly involved, since the entry into force of Article 50(3) of the UEFA Statutes, i.e. 27 April 2007, in any activity aimed at arranging or influencing the outcome of a match at national or international level, UEFA will declare such club ineligible to participate in the competition. Such ineligibility is effective only for one football season. When taking its decision, UEFA can rely on, but is not bound by, a decision of a national or international sporting body, arbitral tribunal or state court. UEFA can refrain from declaring a club ineligible to participate in the competition if UEFA is comfortably satisfied that the impact of a decision taken in connection with the same factual circumstances by a national or international sporting body, arbitral tribunal or state court has already had the effect to prevent that club from participating in a UEFA club competition.”*

*4.03 In addition to the administrative measure of declaring a club ineligible as provided for in Paragraph 4.02, the UEFA Organs for the Administration of Justice can, if the circumstances so justify, also take disciplinary measures in accordance with the UEFA Disciplinary Regulations”.*

In few years, a firm statutory basis and a clear set of rules in the Competition Regulations had been put in place: the legal framework to prevent clubs involved in match-fixing activities to participate in UEFA club competitions was ready to be applied.

#### **D. A model exported to other football confederations: the case of the Asian Football Confederation**

It should be noted that, unsurprisingly, UEFA is not the only football confederation

to have been confronted with match-fixing cases. Unfortunately, there are other examples in the world of football in which clubs facing match-fixing charges at domestic level have, at the same time, hoped to participate in continental competitions. In order to prevent match-fixers spreading their influence over more high-profile football competitions, other football confederations have replicated the UEFA model.

The case of the Asian Football Confederation (AFC) is the most visible one. For several reasons, Asia is particularly vulnerable to match-fixing, a situation recognised by its football confederation which, back in 2010, decided to implement a match-fixing admission process very similar to that of UEFA.

In this regard, the AFC Statutes were amended in 2010, when Article 73.6 was added as follows:

*“The admission to an AFC competition of a Member Association or Club directly or indirectly involved in any activity aimed at arranging or influencing the outcome of a match at national or international level can be refused with immediate effect, without prejudice to any possible disciplinary measures”.*

By the same token, the Entry Manual for AFC Club Competitions lays down the following requirement for admission to AFC competitions:<sup>24</sup>

*“Clubs directly or indirectly involved in match manipulation*

*12.8. If, on the basis of all the factual circumstances and information available to the AFC, the AFC concludes to its comfortable satisfaction that a club has been directly and/or indirectly involved, since the entry into force of Article 73.6 of the AFC Statutes on 8 June 2010 (or its future equivalents), in any activity aimed at arranging or influencing the outcome of a match at national or international level, such club shall be declared ineligible to participate in*

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<sup>23</sup> Paragraphs 4.02 and 4.03 of both the Regulations of the UEFA Champions League 2018/19 and the Regulations of the UEFA Europa League 2018/19.

<sup>24</sup> See Articles 12.8 and 12.9 (2017–2020 edition).

*AFC Competitions. Such ineligibility is effective for only one (1) football season.*

*12.8.1. When making this administrative decision, the AFC can rely on, but is not bound by, a decision of a national or international sporting body, arbitral tribunal or state court.*

*12.8.2. The AFC can refrain from declaring a club ineligible to participate in the competition if the AFC is comfortably satisfied that the impact of a decision made in connection with the same factual circumstances by a national or international sporting body, arbitral tribunal or state court has already had the effect to prevent that club from participating in an AFC Competition.*

*12.8.3. Where a club is declared ineligible, it is considered to have not met the sporting criteria. Accordingly, the club that finished in the next highest position in the national top division league and is licensed shall replace it, subject to the operation of Articles 5.4 to 5.6 (for ACL) or Articles 7.1 to 7.3 (for ACC), read together with Article 12.6.*

*12.9. The AFC Entry Control Body shall make all final decisions in this regard. Such decisions shall be made in accordance with the Procedural Rules Governing the AFC Entry Control Body.*

*12.9.1. In addition to the administrative measure of declaring a club ineligible, the AFC may, if the circumstances so justify, initiate disciplinary proceedings in accordance with the AFC Disciplinary and Ethics Code”<sup>25</sup>*

It is worth noting that the above provisions of the AFC Entry Manual (Articles 12.8 and 12.9) were only implemented as from the 2017/18 season following the CAS panel’s considerations in CAS 2016/A/4642.<sup>26</sup>

### **III.CAS case law on UEFA match-fixing admission cases**

#### **A. Introductory remarks**

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<sup>25</sup> It is relevant to mention that, contrary to the UEFA system in which admission decisions are issued by the respective UEFA disciplinary bodies (Control, Ethics and Disciplinary Body and Appeals Body), the AFC has set up a dedicated Organ for Administration of Justice for this purpose, known as the AFC Entry

UEFA has been actively applying the above-described two-stage process to its club competitions, i.e. an administrative measure comprising a standard one-year ban imposed against the club concerned, followed by a disciplinary measure with no maximum duration.

The aim of this paper is limited to the legal analysis of the first step (the administrative measure) in the light of the applicable legal framework (the current paragraph 4.02 of the UEFA Champions League and UEFA Europa League regulations), taking into consideration the various CAS awards issued since this provision was adopted.

By way of introduction, we can note that different CAS panels have identified the *ratio legis* of the first stage (the administrative measure) as the need to act quickly in order to guarantee UEFA’s image and reputation.

This was the approach adopted in TAS 2011/A/2528:<sup>27</sup>

*“The panel recognises that it is firmly in the interests of UEFA, as the organiser of sports competitions, that the integrity of its competitions is upheld and perceived by the public. The panel considers it undeniably in UEFA’s interest to show the public that it takes all measures necessary to safeguard the integrity of its competitions. The panel recognises that the UEFA Control and Disciplinary Body’s decision helps to protect that interest, given the serious damage that Olympiacos Volou FC’s participation in the 2011/12 UEFA Europa League could cause to UEFA’s image and that of its competitions”.*

This view was subsequently confirmed by the panels in CAS 2014/A/3625 and CAS 2014/A/3628:<sup>28</sup>

*“This is the first and preventive level of UEFA’s fight against match-fixing, aimed to protect the integrity, image and reputation of its competitions”.*

Control Body (see the Procedural Rules Governing the AFC Entry Control Body, Edition 2017).

<sup>26</sup> CAS 2016/A/4642 Phnom Penh Crown Football Club v. AFC, para. 77-84.

<sup>27</sup> Para. 141.

<sup>28</sup> Paragraphs 119 and 100 respectively.

Since the introduction of this possibly innovative, but successful two-stage process, which has been declared fully in line with Swiss law,<sup>29</sup> more than ten clubs from all over Europe have been declared ineligible to participate in UEFA competitions. In some cases, disciplinary measures have been imposed in addition to these one-season bans.<sup>30</sup>

Inevitably, many of these cases have resulted in proceedings before the CAS in Lausanne. To date, the CAS has reviewed a total of eight cases in which a club's admission to UEFA competitions has been examined on grounds relating to its involvement, directly or indirectly, in activities aimed at arranging or influencing the outcome of a match at national or international level:<sup>31</sup>

- CAS 2008/A/1583 & 1584 Sport Lisboa e Benfica Futebol SAD and Vitória Sport Clube de Guimarães v. UEFA & FC Porto Futebol SAD
- TAS 2011/A/2528 Olympiacos Volou c. UEFA
- CAS 2013/A/3258 Besiktas Jimnastik Kulübü v. UEFA
- CAS 2013/A/3297 Public Joint-Stock Company "Football Club Metalist" v. UEFA & PAOK FC
- CAS 2014/A/3625 Sivasspor Kulübü v. UEFA
- CAS 2014/A/3628 Eskişehirspor Kulübü v. UEFA
- CAS 2015/A/4151 Panathinaikos FC v. UEFA & Olympiakos FC
- CAS 2016/A/4650 Klubi Sportiv Skënderbeu v. UEFA<sup>32</sup>

Additionally, as mentioned above, other football confederations have decided, *mutatis*

<sup>29</sup> CAS 2014/A/3625 Sivasspor Kulübü v. UEFA, para. 148.

<sup>30</sup> See BARAK, E (2012). Match-fixing. Illegal betting and CAS jurisprudence. *CAS Seminar – Montreux*, pp. 182–205.

<sup>31</sup> For clarification purposes, we will refer to this provision as the 'UEFA match-fixing admission process' or 'UEFA match-fixing eligibility criteria'.

*mutandis*, to replicate the UEFA model in their respective jurisdictions. In particular, the AFC has been involved in a CAS procedure under the above-mentioned legal framework:

- CAS 2016/A/4642 Phnom Penh Crown Football Club v. AFC

With all these cases in mind, the following pages will try to address the key legal aspects relating to the admission of clubs to UEFA competitions in accordance with the match-fixing eligibility criteria (the current paragraph 4.02 of the regulations of the UEFA Champions League and UEFA Europa League). This will be done in the light of CAS case law issued since the first such case, i.e. the 2008 case involving Portuguese club FC Porto, with reference to the AFC admission cases where appropriate.

## B. CAS awards: main legal issues

### 1. The scope of the provision

Two main questions relating to the scope of the provision have been discussed during UEFA match-fixing admission proceedings. The first relates to the types of illicit conduct covered by the match-fixing admission clause of the UEFA Champions League and UEFA Europa League regulations, while the second concerns the territorial application of the UEFA admission rule. In other words, to what extent are UEFA's disciplinary bodies competent to deal with domestic/national illicit conduct and its impact on the UEFA admission process.

Concerning the types of illicit conduct that may fall under the admission rule, the different CAS panels have repeatedly emphasised the broad interpretation that must be given to the UEFA provision,

<sup>32</sup> An individual analysis of this CAS award can be found in: GARCÍA SILVERO, E. (2017). UEFA's betting fraud detection system: How does the CAS regard this monitoring tool? *Asser International Sports Law Blog*. See also CAVALIERO, M (2017). The Skënderbeu case: Demonstrating a club's involvement in match-fixing. *World Sports Advocate*, Volume. 15 Issue 8, pp. 7–11.

particularly on account of the fact that it is impossible to determine *ex ante* all the activities that might be relevant under the admission rule.<sup>33</sup> All this is guided by the principle of zero tolerance to match-fixing which, according to CAS case law, is one of the most important values and principles in football.<sup>34</sup>

In this sense, the first CAS panel to be confronted with this matter clearly accentuated this approach:

*“The scope of application of Art. 2.08 UELR is broad. In this sense, the Panel does not agree with the Appellant when it states that this provision only encompasses illicit activities aimed at manipulating the outcome of a match. An activity which might look at first sight as licit, might breach Article 2.08 UELR, considering all the circumstances of a case, if this activity might have an influence on the outcome of a particular match”.*<sup>35</sup>

This view has been endorsed by other CAS panels, particularly on the basis of the different natures of the two stages:<sup>36</sup>

*“In the Panel’s view, the ineligibility measure under art. 2.08 of the UEL Regulations is clearly of a different nature compared to the measure under art. 2.09 and the UEFA DR”.*

(...)

*“The conduct that entails the application of the administrative measure is broader and more generic than the one established for the disciplinary offence which, in line with its sanctioning character, is more restrictive and accurate”.*

In other words, the types of conduct that the match-fixing admission rule claims to prevent are not only those covered by Article 12 of the UEFA Disciplinary Regulations, i.e.

typical match-fixing offences, but also other activities that might have an impact on the image or reputation of the competition.

In line with these CAS decisions, the panel in CAS 2014/A/3628 stated that:<sup>37</sup>

*“(…) not only those activities intended to fraudulently determine the result of a match (...) but also those activities that could somehow have an unlawful influence in the match (...) fall under the scope of art. 2.08 of the UEL Regulations”.*

Consequently:<sup>38</sup>

*“The Panel notes that the conduct described in article 2.08 of the UEL Regulations is very broad and thus needs to be determined on a case by case basis”.*

A good practical example of this very broad interpretation is the so-called ‘third-party incentive bonus’ in football.<sup>39</sup> Here, the question is whether acceptance of a bonus from an external third party for winning a match could be covered by the UEFA match-fixing admission rule.

The only CAS panel to have dealt with this issue to date considered that:<sup>40</sup>

*“(…) a third party bonus for playing well is an activity clearly aimed at influencing the outcome of a match, and hence falls under art. 2.08 of the UEL Regulations”.*

In reaching this conclusion, the panel in CAS 2014/A/3628, after a very detailed analysis of the matter, determined that third-party incentive bonuses: i) constitute a breach of UEFA’s statutory objectives and principles, ii) exert an influence on the competition, and iii) could imply an undue advantage for the offeror.<sup>41</sup>

<sup>33</sup> CAS 2014/A/3628 Eskişehirspor Kulübü v. UEFA, para. 113.

<sup>34</sup> CAS 2010/A/2172 Oleg Oriekhov v. UEFA, para. 80.

<sup>35</sup> CAS 2013/A/3258 Besiktas Jimnastik Kulübü v. UEFA, para. 139.

<sup>36</sup> CAS 2014/A/3625 Sivasspor Kulübü v. UEFA, para. 124-125 and CAS 2014/A/3628 Eskişehirspor Kulübü v. UEFA, para. 105-106.

<sup>37</sup> CAS 2014/A/3628 Eskişehirspor Kulübü v. UEFA, para. 114.

<sup>38</sup> Para. 111.

<sup>39</sup> In this connection, see TRIVIÑO, J.L. (2018). Ethico-Legal Implications of Third-Party Incentives to Win Matches in European Professional Football, *Journal of Global Sport Management* (awaiting publication).

<sup>40</sup> CAS 2014/A/3628 Eskişehirspor Kulübü v. UEFA, para. 115.

<sup>41</sup> Para 116.

Concerning the second question, i.e. the extent to which the UEFA disciplinary bodies are competent to deal with illicit conduct at domestic/national level, the conclusions of CAS case law are fully in line with the provisions of Articles 2(3) and 2(4) of the UEFA Disciplinary Regulations.<sup>42</sup> UEFA is only competent to examine domestic cases if the clubs are under the scope of the UEFA Champions League or UEFA Europa League regulations, i.e. after they have been admitted to a UEFA competition.

## 2. The legal nature of the so-called ‘administrative measure’

Since this innovative two-stage admission process for UEFA competitions was introduced, the relevant decision-making panels (either internally at UEFA or the CAS) have had to determine whether the admission measure taken by the confederation is an administrative act or a purely disciplinary measure.<sup>43</sup> Depending on the answer, the legal consequences could possibly be completely different.

In general, CAS panels have been extremely reluctant to categorise UEFA first-stage decisions declaring a club ineligible to participate in its competitions as a purely disciplinary measure. For instance, in CAS 2013/A/3258, the panel stated that:<sup>44</sup>

*“Art. 2.08 UELR above is a regulatory provision whose main purpose is to establish the eligibility criteria and the conditions of participation in UEFA competitions and not to punish a club. In the Panel’s view even if the application of Art. 2.08 UELR may have the effect to exclude a club from a UEFA competition, the relevant provision is not of a sanctionatory nature”.*

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<sup>42</sup> Art. 2(3): “These regulations apply to every match and competition organised by UEFA”. Art. 2(4): “They also apply to any serious violation of UEFA’s statutory objectives, unless that violation is otherwise prosecuted in an appropriate manner by one of UEFA’s member associations”.

<sup>43</sup> TAS 2007/O/1381 Real Federación Española de Ciclismo & Alejandro Valverde c. UCI, para. 55 *et seq.*

<sup>44</sup> Para. 127.

The above approach has been confirmed by several subsequent CAS decisions, which clearly emphasise the *ratio legis* when evaluating the legal character of the measure:<sup>45</sup>

*“In the Panel’s view, art. 2.08 of the UEL Regulations is aimed not to sanction the club but to protect the values and objectives of UEFA’s competition, its reputation and integrity, not only to prevent a club which has violated such values from taking part in the competitions organized by UEFA (i.e. to protect the integrity of the competition), but also to dispel any shadow of doubt in the public about the integrity, the values and the fair play of its competitions (i.e. to protect the reputation of the competition)”.*

However, the aforementioned case law is not set in stone. Indeed, some CAS panels have refrained from considering a decision to declare a club ineligible as a purely administrative measure, preferring to view it from a wider angle. For example, the panel in CAS 2008/A/1583 & 1584 stated the following:<sup>46</sup>

*“For the question of whether the provision in Art. 1.04 of the UCL-Regulations has a disciplinary character, one must consider, inter alia, the effects, which the application of the rule has on the addressee (CAS 2007/A/1381, nos. 109 et seq.). From the addressee’s point of view it undeniably has a penal character for the person affected must feel that the exclusion from the CL because of particular past conduct is a penalty for said conduct”.*

In particular, in the above analysis, the panel opted for a hybrid solution: the potential non-admission of a club based on the match-fixing eligibility criteria has at least an inherent disciplinary aspect.<sup>47</sup> The same approach is

<sup>45</sup> CAS 2014/A/3625, Sivasspor Kulübü v. UEFA, para. 123, CAS 2014/A/3628, Eskişehirspor Kulübü v. UEFA, para. 104 or CAS 2016/A/4650 Klubi Sportiv Skënderbeu v. UEFA, para. 46 *et seq.*

<sup>46</sup> Para. 37.

<sup>47</sup> CAS 2008/A/1583 & 1584 Sport Lisboa e Benfica Futebol SAD and Vitória Sport Clube de Guimarães v. UEFA & FC Porto Futebol SAD, para. 38. An administrative decision with “certain punitive elements” was mentioned by the panel in CAS

taken in CAS 2016/A/4642, which classifies the association's decision as administrative but in the sense that it *"would inevitably be felt by a club as distinctly punitive"*.<sup>48</sup>

In CAS 2013/A/3256, even though analysis of the nature of the administrative measure was not central to the case, the panel made some relevant points concerning the characterisation of a decision declaring a club ineligible to participate in a UEFA competition. Taking inspiration from the hybrid solution presented in CAS 2008/A/1583 & 1584, the panel concluded that:<sup>49</sup>

*"The Panel finds that this "two stage process" can be understood from article 50(3) of the UEFA Statutes in conjunction with article 2.06 of the UCLR, particularly because in the latter provision reference is made to "administrative measure" and "disciplinary measure", which, in the opinion of the Panel, one can only understand as to reveal UEFA's intention to differentiate between these two types of measures. Also the words "in addition to" seem to create a distinction between the two types of measures. Nevertheless, and for the avoidance of doubt, the Panel wishes to clarify that irrespective of the wording used, proceedings initiated by UEFA on the basis of article 2.05 of the UCLR are disciplinary in nature, because the subject matter in such proceedings is the imposition of a sanction"*.

Furthermore, and also in this context, the question that follows is a logical one: do the fundamental principles of criminal law apply to a decision declaring a club ineligible, i.e. the so-called 'administrative measure'? Once again, different panels have approached this question from different perspectives, although their conclusions are almost identical.

While those who understood a decision declaring a club ineligible as a purely administrative measure considered that there was no room for debate, those who identified

an inherent disciplinary aspect opted for a more cautious solution.

For instance, in CAS 2014/A/3628, the panel confirmed the non-applicability of the *nulla poena sine culpa* principle due to the administrative nature of the association decision<sup>50</sup>:

*"In the Panel's view, taking into account the purpose and the wording of art.2.08 of the UEL Regulations, to declare a club ineligible under this article, it is irrelevant whether the latter had any degree of culpability in connection with the prohibited activities. Even recognizing that the principle of criminal law "nulla poena sine culpa" could be applicable in some cases to the relationships between a sport association and a club, this principle nevertheless does not apply to every measure taken by an association, especially when this measure is not of a disciplinary nature but of an administrative one"*.

This approach was confirmed, for example, in CAS 2014/A/3625:<sup>51</sup>

*"Since the ineligibility measure is not of a disciplinary nature, the fundamental legal principles that could potentially be applicable to disciplinary matters are not relevant to the present case"*.

As mentioned above, other panels have shown a little more readiness to at least consider the application of fundamental criminal principles to decisions declaring clubs ineligible for UEFA competitions, particularly after emphasising that the association decision contains an inherent disciplinary aspect. However, these panels seem to have reached virtually the same conclusion. For example, the panel in CAS 2008/A/1583 & 1584 clearly stated that<sup>52</sup>:

*"The analogous application of criminal principles to limit the powers of sports organizations is therefore only a possibility if the principle in question is an expression of a fundamental value system that penetrates all areas of the law"*.

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2016/A/4650 Klubi Sportiv Skënderbeu v. UEFA, para. 48.

<sup>48</sup> Para. 77.

<sup>49</sup> Para. 162.

<sup>50</sup> CAS 2014/A/3628 Eskişehirspor Kulübü v UEFA, para. 136.

<sup>51</sup> Para. 128(ii).

<sup>52</sup> Para. 10.3.2.1.

(...)

*“To summarize therefore, the Panel is of the opinion that the criminal law prohibition of retroactivity does not apply to Art. 1.04 of the UCL-Regulations, which governs the requirements for being admitted to the CL”.*

Therefore, even if they have followed different methodologies, the different CAS panels seem to agree that principles of criminal law do not apply to UEFA admission decisions.

This is finally fully in line with the well-established CAS case law according to which disciplinary sanctions of an association are of civil law, and not criminal nature. Accordingly, criminal law principles *“do not apply in sports disciplinary cases”*: *“only civil law standards are relevant”*.<sup>53</sup>

### 3. The interaction between ongoing criminal cases and UEFA admission proceedings

One of the main criticisms of UEFA’s match-fixing eligibility criteria is that, in most cases, the domestic ordinary courts have not issued a final criminal decision against the club and/or its individuals at the time when UEFA seeks to apply the so-called ‘administrative measure’. In other words, is UEFA entitled to declare a club ineligible even if a domestic investigation is still pending before the ordinary courts in the respective jurisdiction?

The first CAS procedure to address this point was TAS 2011/A/2528, which clearly supported the idea that UEFA does not need to wait for a final decision at domestic level, particularly when it comes to criminal proceedings:

*“(…) since neither UEFA nor the CAS can be forced to defer their decisions when an effective fight to ensure the integrity of sport depends on prompt action. UEFA and the CAS are not subject to the same*

*rules as the ordinary courts in terms of procedure, proof (types of evidence and standard of proof) and substance”*<sup>54</sup>

In a slightly different way, the panel in CAS 2013/A/3258 acknowledged that, even if UEFA has broad discretion when evaluating the facts and evidence included in a preliminary decision of a criminal domestic court in the relevant jurisdiction:

*“CAS, or UEFA, must be particularly careful when decisions it relies on are not final, as it is the case of the decision of the High Court”*.<sup>55</sup>

In conclusion, CAS panels tend to support the possibility of declaring a club ineligible even if domestic investigations or proceedings against the club and/or its individuals are still ongoing, in line with the clear wording of the UEFA Statutes and the respective Competition regulations. Of course, when doing so UEFA, as every sport federation, shall carefully assess all the evidence and its disposal.

### 4. Can the ineligibility declaration be reduced by a CAS panel?

As a preliminary remark, it is noted that, according to the current version of Article 4.02 of the UEFA Champions League and UEFA Europa League regulations, if UEFA concludes that a club has been directly and/or indirectly involved in any activity aimed at arranging or influencing the outcome of a match at national or international level, *“UEFA will declare such club ineligible to participate in the competition. Such ineligibility is effective only for one football season”*.

This suggests that, once the violation is established, the subsequent step is to declare the club ineligible to participate in UEFA competitions.

<sup>53</sup> CAS 2016/A/4871 Vladimir Sakotic v. FIDE World Chess Federation.

<sup>54</sup> TAS 2011/A/2528, Olympiacos Volou FC v UEFA, para. 136.

<sup>55</sup> CAS 2013/A/3258 Besiktas Jimnastik Kulübü v. UEFA, para 148.

Two different CAS panels have addressed this point: the first left the situation open to debate, while the second clearly decided that, on account of the legal (administrative) nature of the UEFA decision, the standard administrative consequence could not be amended.

In CAS 2013/A/3297, the panel left the debate open for a subsequent procedure by stating the following:

*“The Panel emphasises, as a matter of form, that the Panel in this finding has not addressed itself to whether the Panel finds that the necessary regulatory authority is available, if occasion should arise, to hand out a sanction according to Article 2.05 of the RCL with a probationary period”.*<sup>56</sup>

The opportunity for a new CAS panel to evaluate this particular issue arose a year later, in CAS 2014/A/3628, when a firmer approach was taken:

*“In the Panel’s view, taking into account that the measure under art. 2.08 of the UEL Regulations is not a sanction and does not have a disciplinary nature, art. 11 of the UEFA DR cannot be applied and the ineligibility measure is to be applied automatically. As a consequence, the Panel considers that (i) it is not possible to annul the administrative measure on the basis that the Appellant bears no fault or negligence and (ii) the one-year ineligibility period cannot be subject to a probationary period”.*<sup>57</sup>

### **C. Standing to appeal and standing to be sued vs admission cases**

Finally, it is obvious that UEFA’s decisions to declare, or not to declare, a club ineligible for its competitions has an impact on other potential participants. For instance, a decision issued by the relevant UEFA disciplinary body declaring a club not in breach of the match-fixing eligibility criteria might deny other clubs the opportunity to participate in a UEFA competition. Such clubs may consider

that their own rights have therefore been violated.

Different CAS panels have addressed this issue, which has generated a number of interesting legal discussions, mostly around the concept of parties directly affected by a decision and its practical implications for the admission process.<sup>58</sup>

In order to better understand the situation, paragraph 4.08 of the UEFA Champions League and UEFA Europa League regulations should be noted:

*“A club which is not admitted to the competition is replaced by the next best-placed club in the top domestic championship of the same association, provided the new club fulfils the admission criteria. In this case, the access list is adjusted accordingly”.*

In other words, if a club is declared ineligible by a UEFA disciplinary body, the next-best placed club of the same national association will fill the gap in the respective UEFA competition.

Moreover, in this particular context, Article 62(2) of the UEFA Statutes should also be considered:

*“Only parties directly affected by a decision may appeal to the CAS”.*

As a preliminary observation, it is worth noting that the various CAS panels that have dealt with the question of assigning places in a competition (in this case, the UEFA Champions League or UEFA Europa League) have been reluctant to expand the number of potential appellants. The clearest approach in this sense is contained in CAS 2015/A/4151:

*“It cannot be that every club that to date has been knocked out of the 2015/16 UEFA Champions League competition has a sufficient interest to appeal the Appealed Decision to CAS (...) It is not that*

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<sup>56</sup> Para. 8.35.

<sup>57</sup> Para. 141.

<sup>58</sup> See LA ROCHEFOUCAULD. E (2011). Standing to sue, a procedural issue before the CAS. *CAS Bulletin*,

1/2011, pp. 13 *et seq.* See also KEIDEL, K and FISHER, P (2018): Standing to Appeal of Third Parties in front of CAS, *Yearbook of International Sports Arbitration 2016*, pp. 41–59.

*every competitor is “affected” as they are in the competition, they need to be affected directly or legally*”.<sup>59</sup>

With this in mind, the panel in CAS 2008/A/1583 & 1584 considered that directly and indirectly affected parties should be distinguished in accordance with the particular circumstances of the case:<sup>60</sup>

*“When a third party, who is himself not the addressee of the measure taken by an association, is directly affected and therefore has a right of appeal, is a question of the facts of the individual case”.*

In the context of the UEFA match-fixing admission process, the first time a panel was confronted with the issue of assigning places in a UEFA competition was in the aforementioned CAS 2008/A/1583 & 1584. In a nutshell, this case concerned a positive decision taken by a UEFA disciplinary body under which the Portuguese club FC Porto had been allowed to enter the 2008/09 UEFA Champions League despite doubts about its fulfilment of the match-fixing eligibility criteria. The Portuguese clubs that stood to benefit by being ‘promoted’ from the UEFA Europa League to the Champions League (Sporting CP) or qualifying for the Europa League (Vitória SC and Benfica Futebol SAD) filed an appeal before the CAS against UEFA’s decision.

The panel reached a logical solution in view of the circumstances of the case:<sup>61</sup>

*“(…) if UEFA grants a club a starting place in a championship which has a closed field of starters, it has at the same time made a negative decision about including other candidates for said starting place. However, UEFA’s allocation or denial of a starting place in the CL is not the realisation of any vague hope or fateful bad luck for the club concerned. Rather, it is a decision about a legal right of the clubs (more particularly specified in the UCL-Regulations). For the clubs have a right that when it awards the*

*starting places the First Respondent firstly complies with its own rules and secondly treats all of the candidates for said starting places equally. If therefore, the UCL-Regulations provide in Art. 1.07 that the starting place goes to the next-best-placed club in the top domestic league, said club has a right against the First Respondent that if the appropriate requirements are met this provision is applied just as the Second Respondent has a right to be admitted to the CL pursuant to Art. 1.05 of the UCL-Regulations if it fulfils the admission criteria”.*

The second occasion on which a panel was faced with this issue was in CAS 2015/A/4151. This case was a little more particular than the above-mentioned FC Porto case. At the time when, based on the lack of evidence, the relevant UEFA disciplinary body decided not to declare Olympiacos FC ineligible for the 2015/16 Champions League, the competition had already started and the CAS therefore deemed that the aforementioned paragraph 4.08 of the UEFA Champions League regulations could be applied. Briefly, once a UEFA competition has started, the situation is no longer covered by this provision, but by paragraph 82.01 of the regulations:<sup>62</sup>

*“(…) after the competition starts any issues are “disruptive”. The Panel concurs with UEFA that such disruptions are the domain of the Emergency Panel to deal with and to deal with in a way to protect the smooth running and integrity of the competition”.*

The panel was therefore more interested in the probability of the appellant (Panathinaikos FC) being designated Olympiacos FC’s replacement by the Emergency Panel of the UEFA Executive Committee than in declaring the latter ineligible to participate in UEFA competitions. To this end, in line with previous CAS panels, the arbitrators in charge of these proceedings examined the particular circumstances of the case and concluded as follows:<sup>63</sup>

UEFA Emergency Panel or, if not possible due to time constraints, by the UEFA President or, in his absence, by the UEFA General Secretary. Such decisions are final”.

<sup>63</sup> Para. 141.

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<sup>59</sup> Para. 134.

<sup>60</sup> Para. 31.

<sup>61</sup> Para. 32.

<sup>62</sup> “Any matters not provided for in these regulations, such as cases of force majeure, will be decided by the

*“The Panel cannot second guess exactly what the Emergency Panel would do, and it does not have to, but there is some logic in UEFA’s position that the most likely outcome would be to order a draw from the various clubs eliminated from the play-off round (so this would not include Panathinaikos in any event) as these were the last to be eliminated, so the closest on sporting merit; and that it would not advance Panathinaikos ahead of the club (Club Brugge KV) that had already eliminated it on the pitch.*

*Accordingly, the Panel concludes that Panathinaikos has no standing to sue”.*

From a different angle but following the same legal principles, two CAS panels were also invited to analyse the procedural consequences of the failure to nominate as co-respondent the club that was granted the place of the club declared ineligible. This was carried out in isolation of the evaluation of the eligibility of the club suspected of being involved in match-fixing. Here, the issue concerns the situation in which a club is declared ineligible and replaced in the competition by another club, which may be deprived of its rights if a potential appeal by the ineligible club is upheld by the CAS. The question is whether the replacing club should also take part in the proceedings. In other words, is the club that was declared ineligible obliged to name as co-respondent in any CAS proceedings the club that replaced it in the competition?

In this respect, the two above-mentioned CAS panels reached different conclusions with different legal consequences.

In the first order on provisional and conservatory measure rendered in CAS case 2011/A/2551, the panel deemed that it could not make a decision that would directly affect the situation of a third party without that party being able to present its position (i.e. without that party being a co-respondent). In this case, after the Turkish club Fenerbahçe

SK was withdrawn from the 2011/12 UEFA Champions League by its national federation, UEFA awarded its place to Trabzonspor AŞ.<sup>64</sup> In its appeal to the CAS, seeking reinstatement into the UEFA competition, Fenerbahçe SK failed to name AŞ Trabzonspor as co-respondent, despite the fact that its request for relief clearly affected the rights of the latter.

The CAS panel clearly stated that:<sup>65</sup>

*“The provisional and conservatory measure sought by Fenerbahçe is to reinstate it into the group phase of the UEFA 2011/2012 Champions League. However, for the Panel to do so, given the unalterable competition format and calendar, this would result in a third party, Trabzonspor, losing the place it currently holds in the group stage. The Panel feels that this would only be possible (quite apart from whether the first two preliminary considerations are satisfied or not) if Trabzonspor had been brought into these proceedings as a co-respondent.*

(...)

*The Panel has to respect Trabzonspor’s right to be heard on a matter as important to its position in the UEFA Champions League. Since the Panel on the basis of the Code has no possibilities to make Trabzonspor a party to these proceedings ex officio, it has determined that it is precluded from taking a decision which would directly affect the situation of a third party in such a way without that party being able to present its position”.*

Taking a different view, the panel in CAS 2016/A/4642 disregarded this approach, despite accepting the similarities between the circumstances of both cases:

*“The position of Trabzonspor in the Fenerbahçe case was essentially the same as the position of Nagaworld in the present case. However, this Panel does not see the same insuperable difficulty as apparently seen by the panel in the Fenerbahçe case”.*<sup>66</sup>

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<sup>64</sup> The withdrawal of Fenerbahçe SK from the 2011/12 UEFA Champions League by the Turkish Football Federation shall be regarded as the imposition of a period of ineligibility equal to a period of ineligibility pronounced by UEFA on the basis of the match-fixing

admission process (CAS 2013/A/3256 Fenerbahçe Spor Kulübü v. UEFA, para. 187).

<sup>65</sup> Para. 6.8.

<sup>66</sup> Para. 119.

The CAS panel in this AFC admission case did not feel bound by the considerations of the panel in the Fenerbahçe SK case and followed a different logic when reaching its conclusion.<sup>67</sup> As a starting point, the panel concluded that it:

*“(...) does not unequivocally accept the principle that no order for relief can be granted which affects the rights of absent third parties”.*

In its legal considerations, the panel made “a crucial distinction” (in the words of the decision) between the interests and the rights of the third party club affected by the AFC decision, something which ultimately enabled it to disregard the fact that the appellant (Phnom Penh Crown Football Club) had failed to name Nagaworld (the replacing club) as co-respondent.<sup>68</sup> Even more critical is the fact that the decision was partially based on facts that occurred after the operative part of the award had been issued.<sup>69</sup>

#### **IV. Conclusion**

As the CAS has noted on several occasions, *“corruption is, by nature, concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoing”*.<sup>70</sup>

By the same token, CAS panels have also emphasised that *“the nature of the conduct in*

*question (...) and (...) the nature and restricted powers of the investigation authorities of the governing bodies of sport as compared to national formal interrogation authorities”* hinder the efforts of sports governing bodies to gather evidence. UEFA has neither the coercive powers of the public authorities nor the resources and experience to undertake this sort of investigation.<sup>71</sup>

In this context of evidentiary limitations, sports governing bodies have been almost forced to introduce clear and firm regulatory and disciplinary rules in order to protect their respective competitions from match-fixers.

The two-stage system introduced in UEFA competitions as from the 2007/08 season and replicated by the AFC since 2010 has achieved positive results when it comes to the protection, integrity and stability of the most important club competitions in the world. After certain clarifications have been introduced, the system now in place has been declared fully in line with Swiss law and compatible with the general principles of law, while significant legal challenges that have been faced along the way have been addressed and adequately dealt with by the CAS.

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<sup>67</sup> It is common knowledge that CAS panels are entitled to do this. For more detail, see Bersagel A. (2012). *Is There a Stare Decisis Doctrine in the Court of Arbitration for Sport? An Analysis of Published Awards for Anti-Doping Disputes in Track and Field, Pepperdine Dispute Resolution Law Journal*, Volume 12, Issue 2, pp. 189 *et seq.*

<sup>68</sup> Para. 122.

<sup>69</sup> Para. 123.

<sup>70</sup> CAS 2010/A/2172 Oleg Oriekhov v. UEFA. para. 54.

<sup>71</sup> CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA. para 85.

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# A Brief Review of the Procedural and Substantive Issues in CAS jurisprudence related to some Russian Anti-Doping Cases

Estelle de La Rochefoucauld\*

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## I. Introduction

Since 2016, the number of procedures related to doping at CAS has increased considerably following the revelation of a doping system in Russia. The origin of these revelations goes back to December 2014 with the broadcast on a German channel of a documentary “*Top Secret Doping: How Russia makes its Winners*” highlighting the existence of extensive doping practices in Russia and implicating Russian athletes, coaches, national and international sport federations, the Russian Anti-Doping Agency and the Moscow WADA-accredited laboratory. Following this broadcast, in December 2014, an independent commission was established by the World Anti-Doping Agency (WADA) to investigate the allegations of doping in Russia. The investigations resulted on the publication of a report by WADA on November 2015 supporting the allegations of extensive doping in Russian athletics. As a consequence of this report, on November 2015, the IAAF decided to temporarily suspend the Russian Athletics Federation (ARAF). To date, ARAF has not been reinstated.

On 12 May 2016, *The NY Times* published an article entitled “*Russian Insider Says State-Run Doping Fueled Olympic Gold*,” based on interviews with the former Director of the Moscow Laboratory, Dr. Grigory Rodchenkov who made allegations regarding doping at the 2014 Winter Games in Sochi. Following this publication, WADA set of an independent commission whose mandate was the investigation into said allegations of doping practices implicating Russia. Professor Richard McLaren was appointed by WADA as the Independent Person (IP) on 19 May 2016. The investigations led to the publication of the McLaren Report. Part One of the report published in July 2016 revealed the existence of doping at the State level (institutionalized system allowing doped athletes to appear “clean” that occurred before the 2014 Winter Olympics in Sochi up to the 2016 Olympics in Rio de Janeiro). Part Two released in December 2016 allowed the identification of over 1000 athletes who may have been involved in doping practices. The IP, however, did not act as an authority to prosecute athletes and did not appreciate the evidence gathered.

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\* Counsel to the CAS

Therefore, in July 2016, the IOC established two disciplinary Commissions. The Schmid Commission was responsible for establishing the facts on the basis of documented, independent and impartial evidence. It established the involvement of Russian Ministry of Sports officials and others mentioned in the report for violations of the Olympic Charter (OC) and the World Anti-Doping Code (WADC). The Oswald Commission was responsible for investigating the alleged doping violations by individual Russian athletes at the [2014 Olympic Winter Games](#) in [Sochi](#). The Oswald Commission re-analyzed all of the available samples collected from Russian athletes at the 2014 Sochi Games and conducted hearings for all athletes who could qualify for the Olympic Winter Games 2018 in PyeongChang.

Moreover, some samples from London and Vancouver were retested. The IOC also supported the measure announced at the Olympic Summit on 21 June 2016 to reverse the presumption of innocence of Russian athletes. This means that the admission of each Russian athlete to the international competitions has to be decided by his or her International Federation (IF) on the basis of the individual analysis of the doping controls he or she<sup>1</sup> has undergone at international level.

In addition, in deciding on the participation of Russian athletes in the 2016 Rio Games, the IOC stated that it wanted to *“take into consideration the CAS decision expected on 21 July 2016 concerning the IAAF rules”*. The relevant rules are Rule 22.1(a) IAAF Competition Rules adopted in 2000 imposing ineligibility on athletes affiliated to a suspended federation member of the IAAF and Rule 22.1A adopted on 17 June 2016 providing an amendment to Rule 22.1(a). The application of Rule 22.1(a) resulted in the ineligibility of Russian athletes for international competitions (including the Rio Games)

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<sup>1</sup> For the purpose of this paper and to facilitate reading, the word “he” will be consistently used to designate any male or female athlete.

since ARAF was suspended. Yet, according to Rule 22.1A, an athlete who can clearly and convincingly demonstrate that is not affected by the Russian doping system because he has been outside the country for a period of time long enough to provide objective guarantees of integrity and has been subjected during that period to effective anti-doping control systems, both in-competition and out-of-competition, in full qualitative conformity with those to which his opponents in competition are subjected, may apply for authorization to participate in international competitions, not as a Russian athlete, but as a “neutral” athlete. In this context, in anticipation of the Rio Games, the Russian Olympic Committee (ROC) & 68 Russian mandated CAS to decide in an expedited procedure whether IAAF Competitions Rules 22.1(a) and 22.1A were valid<sup>2</sup>.

In the procedure CAS 2016/O/4684, the CAS Panel first considered that Rule 22.1(a) IAAF Competition Rules was an old rule imposing ineligibility on athletes affiliated to a suspended federation member of the IAAF. Said rule affects the eligibility of athletes to enter into international competitions. It is therefore an eligibility rule of general application, not specific to doping cases since it is for example also applicable to a national federation which does not pay its membership. It is not a sanction. The rule was therefore found valid and applicable to athletes affiliated to a federation suspended for failing to ensure an effective doping system. The Panel then stated that Rule 22.1A IAAF Competition Rules was also valid and enforceable since it is a permissive rule in the sense that it does not impose ineligibility but on the contrary, it allows eligibility to be regained for athletes affiliated to a suspended National Federation (NF), if specific conditions are satisfied. As a result, it could neither be construed as a sanction nor considered inconsistent with the WADC or disproportionate.

<sup>2</sup> See CAS 2016/O/4684 ROC, Lyukman Adams et al. v. IAAF.

Consequently, on 24 July 2016, the IOC Executive Commission took the following decision:

1. *The IOC will not accept any entry of any Russian athlete in the Olympic Games Rio 2016 unless such athlete can meet the conditions set out below.*

2. *Entry will be accepted by the IOC only if an athlete is able to provide evidence to the full satisfaction of his or her International Federation (IF) in relation to the following criteria:*

- *The IFs, when establishing their pool of eligible Russian athletes, to apply the World Anti-Doping Code and other principles agreed by the Olympic Summit (21 June 2016).*
- *The absence of a positive national anti-doping test cannot be considered sufficient by the IFs.*
- *The IFs should carry out an individual analysis of each athlete's anti-doping record, taking into account only reliable adequate international tests, and the specificities of the athlete's sport and its rules, in order to ensure a level playing field.*
- *The IFs to examine the information contained in the IP Report, and for such purpose seek from WADA the names of athletes and National Federations (NFs) implicated. Nobody implicated, be it an athlete, an official, or an NF, may be accepted for entry or accreditation for the Olympic Games.*
- *The IFs will also have to apply their respective rules in relation to the sanctioning of entire NFs.*

3. *The ROC is not allowed to enter any athlete for the Olympic Games Rio 2016 who has ever been sanctioned for doping, even if he or she has served the sanction.*

4. *The IOC will accept an entry by the ROC only if the athlete's IF is satisfied that the evidence provided meets conditions 2 and 3 above and if it is upheld by an expert from the CAS list of arbitrators appointed by an ICAS Member, independent from any sports organisation involved in the Olympic Games Rio 2016.*

5. *The entry of any Russian athlete ultimately accepted by the IOC will be subject to a rigorous additional out-of-competition testing programme in*

*coordination with the relevant IF and WADA. Any non-availability for this programme will lead to the immediate withdrawal of the accreditation by the IOC.*

For the purposes of this paper and given the important number of doping Russian cases handled by the CAS in the last years, it appeared necessary to curb this analysis to a limited number of cases particularly worthy of interest though this choice is necessarily subjective. Thus four cases are hereafter examined with a chronological approach.

1. CAS OG 16/004 Yulia Efimova v. ROC, IOC & FINA is an eligibility case linked to the Rio Olympic Games. The decision questions the validity of some aspects of the IOC decision dated 24 July 2016.

2 CAS 2016/O/4481 IAAF v. ARAF & Maria Savinova concerns the violation by a Russian athlete of Rule 32.2(b) of the IAAF Rules (use of a prohibited substance or a prohibited method). The decision has been rendered on 10 February 2017 by a Sole Arbitrator appointed by CAS according to the special procedure provided by Rule 38.3 of the IAAF Anti-Doping Rules (ADR) following the suspension of ARAF by the IAAF (first instance decision). The case raises interesting procedural and evidentiary issues.

3. CAS 2017/A/4968 Alexander Legkov v. FIS relates to the burden and standard of proof applicable to a provisional suspension imposed on a cross-country skier suspected of a doping violation. The CAS decision has been rendered following an appeal made by the athlete against a disciplinary decision rendered by the FIS.

4. Finally, CAS OG 18/002 Victor Ahn et al. v. IOC is an eligibility case related to the PyeongChang Winter Olympic Games which illustrates the discretionary power of the IOC granted by article 44 OC to invite to the Olympics athletes whose name are submitted by an NOC.

## **II. Eligibility of an athlete who served a past doping sanction to participate in the Rio Games: CAS OG 16/004 Yulia Efimova v. ROC, IOC & FINA**

Yulia Efimova is a Russian swimmer residing in the USA.

On 12 May 2014 she was suspended by FINA for 16 months following a violation of anti-doping rules. She served her sentence.

On 20 July 2016, the Russian National Olympic Committee (NOC) approved the composition of the Russian Olympic delegation for the Rio Olympic Games. Yulia Efimova was on the list. However, as a consequence of the IOC decision of 24 July 2016 referred above, notably point 3, she was removed from the list on 25 July 2016. On 30 July 2016, the athlete seized the CAS ad Hoc Division to have point 3 declared invalid and inapplicable. The following Panel of arbitrators was designated by the President of the ad Hoc Division: Ms Annabelle Bennet (President), Justice Catherine Davani and Ms Rabab Yasseen.

Article 44 OC provides the various steps for the selection and registration of athletes for the Olympic Games. The last stage before an athlete can compete is for the IOC to accept the entry of athletes selected by the NF, according to the criteria of the IF, and approved by the NOC. Here, the IOC had decided not to accept any Russian athlete entries for Rio unless they met the criteria established by the decision of 24 July 2016, notably points 2 and 3.

Yulia Efimova argued that by introducing point 3 in the qualification criteria for Russian athletes, the IOC has revived the “Osaka rule”<sup>3</sup>, although declared invalid by the CAS, since it is in reality a double sanction for the same facts. To require the

ROC to prohibit athletes who have already been sanctioned for doping from entering the Olympic Games violates article 44 OC providing for the stages of athletes’ qualification for the Olympic Games and also providing that an NOC must ensure that no one is excluded because of a form of discrimination.

According to the CAS Panel, the IOC’s decision of 24 July 2016 has the effect of depriving Russian athletes of the presumption of innocence and establishing a presumption of collective but individually rebuttable misconduct. The decision also clearly refers to the rules of natural justice<sup>4</sup>. Yet, it must be recognized that point 3 of the decision contains an absolute test that does not provide an athlete with an opportunity to rebut the presumption and does not in any way recognize his right to natural and individual justice. Therefore, the arbitrators considered that point 3 is characterized as an additional sanction in addition to the sanction for doping<sup>5</sup>. The Panel added that contrary to the IOC’s opinion, it is not a question of contesting the IOC’s discretionary right granted by article 44 OC to refuse the entry of an athlete whose name is submitted by an NOC but the instruction given by the IOC to the NOC not to propose the name of an athlete who has been sanctioned for doping. The IOC exercised its autonomy by granting in its decision of 24 July 2016 the right to natural and individual justice. Points 2 and 3 represent the implementation of this decision. However, point 3 of the decision constitutes a denial of natural justice and a denial of personality rights because it excludes the possibility for an athlete to rebut the presumption of guilt which weighs collectively on Russian athletes, whereas this right is precisely provided for individually by the decision to counterbalance the presumption of collective guilt. Point 3 of the IOC decision of 24 July

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<sup>3</sup> In 2007, the International Olympic Committee (IOC) decided to ban athletes with doping suspensions of more than six months from the following Olympics. The rule was declared invalid by CAS as amounting to a double sanction.

<sup>4</sup> See CAS OG 16/04 para. 7.18 & ff.

<sup>5</sup> See CAS OG 16/04 para. 7.17, see also a similar reasoning in case OG 16/013.

2016 must therefore be considered inapplicable.

The Panel concluded that Yulia Efimova was allowed to participate in the Rio Olympic Games.

### **III. Disciplinary sanction against an athlete whose violation has been established: CAS 2016/O/4481 IAAF v. ARAF & Maria Savinova**

#### **A. AAF Anti-Doping Rules (ADR)**

As a result of the suspension of ARAF from IAAF's membership, no entity had jurisdiction in Russia to conduct a hearing related to infringements that occurred as of November 2015. Therefore, the IAAF took over the responsibility for coordinating the relevant disciplinary proceedings and filed a request for arbitration with the CAS as a first instance hearing body against the Russian Federation and the athlete pursuant to the Code of Sports-related Arbitration (the CAS Code) and the IAAF Rules.

The jurisdiction of CAS to hear as a first instance hearing body the disputes concerning the commission of anti-doping rule violations is indeed contemplated by Rule 38.3 of the IAAF ADR, as in force at the time the requests for arbitration were filed, which provides materially as follows:

*"... If the Member fails to complete a hearing within 2 months, or, if having completed a hearing, fails to render a decision within a reasonable time period thereafter, the IAAF may impose a deadline for such event. If in either case the deadline is not met, the IAAF may elect, if the Athlete is an International-Level Athlete, to have the case referred directly to a single arbitrator appointed by CAS. The case shall be handled in accordance with CAS rules (those applicable to the appeal arbitration procedure without reference to any time limit for appeal). The hearing shall proceed at the responsibility and expense of the Member and the decision of the single arbitrator shall be subject to appeal to CAS in accordance with Rule 42. ..."*

In other words, where a national federation is suspended by IAAF, no entity has jurisdiction in the relevant country to conduct a hearing in a doping case. Against this background, IAAF can take over the responsibility for coordinating the relevant disciplinary proceedings and to inform the athlete and his national federation that the case will be referred to the CAS for a hearing. In this regard, where the proceedings are based on a request for arbitration for the conduct of a first instance hearing and do not involve an appeal against a decision rendered by a sports-related body, they are considered as ordinary arbitration proceedings within the meaning and for the purposes of the CAS Code. However, in accordance with Rule 38.3 of the IAAF ADR, these proceedings are handled in accordance with CAS rules applicable to the appeal arbitration procedure without reference to any time limit for appeal.

The conditions for the CAS jurisdiction under Rule 38.3 of the IAAF ADR were met in the Savinova case as due to the ARAF suspension no entity had jurisdiction to conduct the cases. Furthermore, as Ms Savinova has been competing at international level, she ought to be considered as *"International-Level Athlete"* for the purpose of IAAF ADR.

Mr Hans Nater was nominated as Sole Arbitrator in the matter in accordance with Article R54 of the CAS Code.

#### **B. Applicable law**

In 4481, the athlete, Maria Savinova-Farnosova, contented that since the IAAF was *"standing in the shoes"* of the Russian anti-doping authority (RUSADA) and ARAF, the anti-doping regulations of RUSADA (the "RUSADA ADR") should apply to the dispute. Ms Savinova maintained that the IAAF Rules were only applicable to appeal procedures, not first instance procedures. She added that the application of the RUSADA ADR was important to her because, contrary to the IAAF ADR, it

provided for a fairness exception in respect of the disqualification of results whereas the IAAF ADR failed to incorporate the rules relating to backdating of sanctions for delays not attributable to athletes. Ms Savinova argued that those differences should be resolved in her favour pursuant to the principle of *contra proferentem*. However, the Sole Arbitrator found that the athlete's case was not prejudiced by the application of the IAAF Rules instead of the RUSADA ADR since the general principles of fairness and proportionality were applicable and adequately protected the interests of the athlete, who would hence in any event not have been better off under the RUSADA ADR. Furthermore, the Sole Arbitrator underlined that in the IAAF Charge Letter, reference was already made to an anti-doping rule violation under the IAAF ADR. Yet, the athlete, at that time, did not object to the application of the IAAF ADR<sup>6</sup>.

Thus, in all athletics cases the “*applicable regulations*” referred to in article R58 of the CAS Code were the IAAF Competitions Rules and more specifically, the IAAF ADR in force at the time of the alleged violations. Therefore, the case of Maria Savinova shall be governed by the IAAF ADR in force between 2009 and 2012 (i.e. editions 2009/2010 and 2012/2013) since it is related to infringements which occurred between July 2010 and August 2013, i.e. before the 2015 edition of the WADC which includes major amendments and upon which the IAAF ADR are based<sup>7</sup>.

Procedural matters are governed by the regulations in force at the time of the procedural facts in question under the “*tempus regit actum principle*”. With regard procedural questions the IAAF Rules (2016), i.e. the rules at the time when the appeal was filed,

are applicable.

### **C. Admissibility of the evidence submitted by IAAF to prove the doping offences**

The admissibility of evidence is subject to procedural laws, i.e. the *lex arbitri*. Since the seat of the arbitration is Switzerland, Switzerland's Private International Law Act (PILA) is applicable. Article 184(1) PILA determines that “*The arbitral tribunal shall take evidence*”. In this respect, the admissibility of a piece of evidence should “*be determined according to the procedural rules applied by the Panel [...] which has a margin of appreciation in order to decide on the admissibility or inadmissibility of evidence*”<sup>8</sup>.

Accordingly, all matters relating to evidence are governed pursuant to the procedural rules included in the CAS Code i.e. Article R44.2 and 44.3 - ordinary proceedings which both apply by analogy to the appeal procedure - and Article R57 - appeal proceedings - of the CAS Code<sup>9</sup> with the exception of possible evidentiary rules provided by the applicable sport regulations. In this respect, Rule 33 of the IAAF ADR provides that the IAAF has the burden to establish to the comfortable satisfaction of the relevant hearing panel that an anti-doping rule violation has occurred. Rule 33 para. 2 of the IAAF ADR provides that the violations may be established “*by any reliable means, including but not limited to admissions, evidence of third persons, witness statements, experts reports, documentary evidence, conclusions drawn from longitudinal profiling such as the Athlete Biological Passport (ABP) and other analytical information*”.

It should be noted at this stage that arbitral tribunals are neither bound by the rules applicable to the taking of evidence before

<sup>6</sup> See CAS 2016/O/4481 IAAF v. ARAF & Mariya Savinova paras. 63-69.

<sup>7</sup> In any event, the editions of the IAAF ADR in force between March 2009 and October 2012 contained identical anti-doping rules.

<sup>8</sup> See MAVROMATI/REEB, *The Code of the Court of Arbitration for Sport, Commentary & Materials*, para. 22 p. 331, 332.

<sup>9</sup> TAS 2009/A/1879 Alejandro Valverde Belmonte c. Comitato Olimpico Nazionale Italiano (CONI), award of 16 March 2010, para. 99. See also CAS 2016/O/4481 para. 83.

the Swiss civil or criminal courts in Switzerland nor by the decisions of another body as an independent forum.<sup>10</sup>

In the case 4481 involving the multiple Russian gold medal winner in the 800 metres discipline Maria Savinova, the IAAF based its accusation on the following elements:

- Written statement by Ms Stepanova (an elite Russian athlete who was sanctioned in February 2013 with a two year period of ineligibility in connection with abnormalities in her ABP and who recorded a number of conversations that she had with Russian athletes and athlete support personnel).
- Audio/video recording of conversations between the athlete and Yuliya Stepanova and between Ms Stepanova and Valdimir Kazarin (former coach).
- Athlete's Biological Passport (ABP).

The athlete was provisionally suspended on 24 August 2015.

The athlete claimed that no violation of the ADR has been established, only mere allegations of unspecified violations. Maria Savinova asserted that the recordings were illegal and inadmissible because they were procured illegally. She maintained that Ms Stepanova's action, and the IAAF's use of the recordings were a criminal offence under the Swiss Criminal Code and the Criminal Code of the Russian Federation. Ms Savinova also referred to article 6(1) of the European Convention of Human Rights and case law of the European Court of Human Rights. Furthermore, she contended that the only abnormalities in her ABP were due to her pregnancy. Without the recordings and without the ABP, all that remained was Ms. Stepanova's testimony, which couldn't convince anyone of the commission of an

offence. Thus she argued that a maximum 2-year suspension was justified and no disqualification of results at the 2012 Olympic Games.

The IAAF contended that the recordings made by Ms Stepanova were admissible and reliable registrations establishing the use of prohibited substances. Moreover, the ABP constituted also clear evidence of a violation of the ADR. Finally, the IAAF claimed that the standard 2-year penalty should be increased to 4 years due to aggravating circumstances.

The Sole Arbitrator reminded that it is the responsibility of the IAAF to establish the anti-doping rule violation (s) to the comfortable satisfaction of the hearing body "by any means".

First, the Sole Arbitrator found that the witness statement was "*undoubtedly admissible, particularly because witness statements are listed as a means of evidence in Rule 33(3) of the IAAF Rules*"<sup>11</sup>.

Regarding the recordings and their transcripts, the Sole Arbitrator found that although they objectively fall under the category "*any reliable means*" provided for in Rule 33(3) of the IAAF ADR, their admissibility require a more detailed analysis since they were made covertly on Ms Stepanova personal initiative to accuse widespread doping in Russian sport. Ms Stepanova acted therefore as a whistleblower.<sup>12</sup> In principle, in civil and criminal law procedure, the principle of good faith prevents the judges from admitting evidence obtained illicitly by a party. However, as seen above, since an international tribunal sitting in Switzerland is not bound to follow the rules of evidence applicable before the Swiss State courts, therefore it is not necessarily

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<sup>10</sup> "[t]he power of the Panel to rule on the admissibility of evidence is also noted in the CAS Code (cf. Article 44.2). It follows from Article 184, paragraph 1 PILS (as well as the CAS Code) that the Panel disposes of a certain discretion to determine the admissibility or inadmissibility of evidence" (free translation Kaufmann-Kohler/Rigozzi, Arbitrage

international, Droit et pratique à la lumière de la LDIP, no 478 et TAS 2009/A/1879, para. 36.

<sup>11</sup> See CAS 2016/O/4481 IAAF v. ARAF & Mariya Savinova para. 91.

<sup>12</sup> See CAS 2016/O/4481 IAAF v. ARAF & Mariya Savinova para. 101.

precluded from admitting illegally procured evidence into the proceedings. The Swiss Federal Tribunal has indeed recognized in one of its judgements of 2014 that the use of unlawfully obtained evidence is not *per se* forbidden, but may be permitted according to the circumstances and to the balance of interest test<sup>13</sup>. Thus if a means of evidence is illegally obtained, it is only admissible if the interest to find the truth outweighs the interest in protecting the right infringed by obtaining unlawfully the evidence (Article 152, 168 Swiss Code of Civil Procedure (CCP))<sup>14</sup>. The Sole Arbitrator found that the interest in discerning the truth concerning systematic use of doping by coaches, clubs and government-affiliated organisations and widespread doping abuse in Russia was of utmost importance to keep the sport clean and to maintain a level playing field among athletes competing against each other. The Sole Arbitrator also deemed it unlikely that Ms Stepanova could have acquired the (same) evidence in a legitimate manner. Considering all the circumstances, the Sole Arbitrator concluded that the interest in discerning the truth should prevail over the interest of the athlete that the covert recordings were not used against her in the proceedings. Furthermore, the Sole Arbitrator was not prepared to accept that the principle of good faith had been violated. Consequently, the latter considered that the recordings of Ms Stepanova's conversations with the athlete and the coach were *admissible* as evidence<sup>15</sup>. Importantly, the Sole Arbitrator found that the recording constituted *sufficient* and *reliable*

(good enough quality) evidence to prove the violation since the IAAF ADR do not set forth that a conviction must be based on multiple pieces of evidence<sup>16</sup>. Indeed, the recording established that the athlete clearly admitted in her conversations with Ms Stepanova the use of Parabolan (Trenbolone), a prohibited substance belonging to the category of anabolic steroids and of growth hormones. Contrary to the athlete's submissions, the charges had been adequately particularised.

The evidence provided by the IAAF with respect to the violation of article 32.2 (b) IAAF Rules was also based on the ABP. The Sole Arbitrator confirmed that in principle an ABP is a reliable and accepted means of evidence to assist in establishing anti-doping rule violations<sup>17</sup>. However, referring to CAS jurisprudence, the Sole Arbitrator underlined that one cannot automatically deduced from the mere fact that an athlete cannot provide a credible explanation for the deviations in his or her ABP that an anti-doping rule violation has been committed. A judge needs to be convinced that the abnormal values "*are caused by a "doping scenario", which does not necessarily derive from the quantitative information provided by the ABP, but rather from a qualitative interpretation of the experts and possible further evidence*"<sup>18</sup>. In the particular case, although the Sole Arbitrator deemed that, none of the evidence on its own was sufficient to prove that the athlete used blood doping, the evidence altogether convinced him to his comfortable satisfaction that the athlete

<sup>13</sup> See ATF 4A\_362/2013 of 27 March 2014 X. v. FFU at 3.2.2; See Article 14 f. of the Swiss Criminal Code (SR 312.O), Article 152 para.2 Swiss CCP. See CAS 2010/A/2267, Metalist et al. v. FFU, award of 2 August 2013.

<sup>14</sup> Article 152 para. 2 Swiss Code of Civil Procedure (CCP): "*the discretion of the arbitrator to decide on the admissibility of evidence is exclusively limited by procedural public policy. In this respect, the use of illegal evidence does not automatically concern Swiss public policy, which is violated only in the presence of an intolerable contradiction with the sentiment of justice, to the effect that the decision appears incompatible with the values recognized in a State governed by the rule of law*".

See MAVROMATI/REEB fn. 2 para. 23 p. 332.

See also BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3<sup>rd</sup> ed., p. 461.

See also HAFTER, Commentary to the Swiss Code of Civil Procedure, 2<sup>nd</sup> ed., para. 8

<sup>15</sup> See op. cit. CAS 2016/O/4481 fn 10 para. 105-107.

<sup>16</sup> What is more, CAS Panels have admitted that the uncontroverted testimony of a wholly credible witness could be sufficient to establish a doping offence absent any adverse analytical finding. See LA ROCHEFOUCAULD E., The Taking of Evidence Before the CAS, CAS Bulletin 2015/1, with further reference to CAS 2004/O/645 USADA v. M. & IAAF, para. 45 ff. and CAS 2004/O/649 USADA v. G, para. 46 ff.

<sup>17</sup> See CAS 2010/A/2174, para. 9.8; VIRET, Evidence in Anti-Doping at the Intersection of Science and Law, 2016, p. 735; LEWIS / TAYLOR (Eds.), Sport: Law and Practice, 2014, para. C.126.

<sup>18</sup> Op. cit. CAS 2016/O/4481, para. 138.

engaged in blood doping. In particular, the Sole Arbitrator found that the athlete's conversation with Ms Stepanova, in conjunction with the fact that the variations in her ABP especially regarding the samples taken shortly before three major competitions (showing a very high OFF-score i.e. above the threshold of normality followed by a very low OFF-score in the samples taken in the off-season i.e. below the threshold of normality), constituted convincing evidence that the athlete used blood doping. The fact that the athlete was never tested positive despite several retests did not jeopardize this conclusion as the ABP aims to reveal doping cases that are not otherwise detectable. In view of the evidence deriving from the athlete's ABP, the Sole Arbitrator "*was satisfied to accept that the IAAF established a "doping scenario" in its qualitative assessment of the evidence*"<sup>19</sup> and that the athlete used blood doping during a certain time at least in view of important championships.

#### **D. Applicable sanction based on aggravating circumstances**

As mentioned, the athlete admitted in her conversations with Ms Stepanova the use of Parabolan (anabolic steroids) and growth hormones. The Sole Arbitrator therefore accepted that the athlete used prohibited substances on *multiple occasions*. This fact is an aggravating circumstance to be taken into account in determining the period of ineligibility to be imposed on the athlete.

Regarding the alleged engagement of the athlete in a doping plan or scheme, the Sole Arbitrator observed that CAS jurisprudence has determined the following in the context of avoiding detection and/or adjudication of a doping violation:

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<sup>19</sup> See CAS 2016/O/4481 op. cit. fn 10 para. 155.

<sup>20</sup> CAS 2012/A/2772, para. 129.

<sup>21</sup> CAS 2010/A/2235, para. 119.

<sup>22</sup> See CAS 2010/A/2235, TAS 2010/A/2178 and TAS 2010/A/2308 no aggravating circumstances were established and a two year period of ineligibility was imposed. In CAS 2012/A/2772 and CAS 2013/A/3080 two separate categories of aggravating

*"The Sole Arbitrator notes that most, if not all, doping practices are timed to avoid detection. As a result, an aggravating circumstance is likely to require a further element of deception"*<sup>20</sup>.

What is more, no provision in the IAAF ADR indicates that an anti-doping rule violation proven by means of the ABP, *per se*, justifies a higher sanction than the presence of a prohibited substance.

*"It is the circumstances of the offence, not the commission of the offence itself which may aggravate"*<sup>21</sup>.

This being said, the Sole Arbitrator inferred from the recorded conversations that there was a high level of sophistication in the doping use by the athlete. The athlete showed a detailed knowledge of wash-out periods of certain specific substances and her husband had extensive knowledge about the ABP. Furthermore, the use of blood doping, in general, is a more advanced method of doping in comparison with the mere ingestion of prohibited substances. Blood doping requires indeed a certain degree of advice and support. In addition, the athlete used doping over a prolonged period of time which establishes that the athlete did not act on her own initiative, but that she had certain people monitoring her, proving the sophistication of the doping regime the athlete was subjected to and thereby the existence of a doping plan. This is therefore also to be taken into account as an aggravating circumstance in determining the period of ineligibility to be imposed on the athlete.

CAS jurisprudence is diverse on the nature and effect of aggravating factors<sup>22</sup>. Maria Savinova used blood doping over a prolonged period of time in combination

circumstances were considered to be present and periods of ineligibility of four years and two years and nine months respectively were imposed. In the case at hand the facts most closely resemble the facts of CAS 2012/A/2772. Similar to CAS 2012/A/2772, the athlete used blood doping over a prolonged period of time in combination with other prohibited substances.

with other prohibited substances. The Sole Arbitrator deemed that

*“[T]he establishment of a sophisticated doping plan or scheme over a protracted period of time and the fact that the Athlete used a prohibited substance on multiple occasions, justify the imposition of the maximum period of ineligibility of four years, even without considering that the Athlete also used multiple prohibited substances (which is an additional aggravating circumstance that was not explicitly raised by the IAAF)”<sup>23</sup>.*

Turning to the date of commencement of the period of ineligibility, Rule 40.10 of the pre-2015 IAAF ADR provides as follows:

*“Except as provided below, the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date the Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility served”.*

Accordingly, the period of ineligibility should start on the date of commencement of the provisional suspension and not on the date of the award.

### **E. Disqualification of results**

Rule 40.8 of the IAAF ADR also provides for the disqualification of results and states as follows:

*“In addition to the automatic disqualification of the results in the Competition which produced the positive sample under Rules 39 and 40, all other competitive results obtained from the date the positive Sample was collected (whether In-Competition or Out-of-Competition) or other anti-doping rule violation occurred through the commencement of any Provisional Suspension or Ineligibility period shall be Disqualified with all of the resulting Consequences for the Athlete including the forfeiture of any titles, awards, medals, points and prize and appearance money”.*

Pursuant to the literal wording of Rule 40.8 of the IAAF ADR all the competitive results of the athlete as from the moment the positive sample was collected until her provisional suspension was pronounced would have to be disqualified. A complicating factor in this respect is that contrary to a violation established by a “positive sample”, an anti-doping rule violation established on the basis of a testimony, a recording and an ABP can normally not be determined on a specific date but merely for a certain period. This difficulty has been identified in CAS jurisprudence.<sup>24</sup>

In the case at hand, the Sole Arbitrator accepted that the period during which the athlete used doping started on the eve of a major championship i.e. 26 July 2010.

Therefore, based on a literal reading of Rule 40.8 of the IAAF ADR, in principle, all results of the athlete as from this date (26 July 2010) until 24 August 2015 (the date the athlete was provisionally suspended) would have to be disqualified which amounted to a period of five years and one month, despite the fact that there is no evidence of doping use by the athlete after 19 August 2013.

The Sole Arbitrator considered that the disqualification of results is, in itself, a severe sanction and, in a way, can be equated to a period of ineligibility. However, whereas the period of ineligibility to be imposed (even for the worst cases) is limited to four years, the period during which results can be disqualified is theoretically unlimited.

In this respect, the Sole Arbitrator found that the general principle of fairness should prevail in order to avoid disproportional sanctions. As suggested by the athlete in her answer, such interpretation of the IAAF ADR would further not only be in accordance with the general principle of law but also with the WADA Code, which the IAAF signed and thus committed to comply with.

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<sup>23</sup> CAS 2016/O/4481, para. 78.

<sup>24</sup> See CAS 2010/A/2235, para. 116.

**imposed on a cross-country skier  
suspected of a doping violation: CAS  
2017/A/4968 Alexander Legkov v. FIS**

Furthermore, according to established CAS jurisprudence, the principle of proportionality requires to assess whether a sanction is appropriate to the violation committed in the case at stake. Excessive sanctions are prohibited.<sup>25</sup>

Consequently, the Sole Arbitrator did not consider it fair to disqualify any results of the athlete between 19 August 2013 (deemed the last day the athlete used doping) and 24 August 2015 (starting date of the provisional suspension) considering that there was no evidence that the athlete used doping substances or methods during this period and that she was not accountable for the fact that the result management process got started a long time after the relevant ABP samples became known to the IAAF.

As a result, a period of ineligibility of four years was to be imposed on the athlete from the starting date of the use of doping by the athlete and the results of the athlete should be disqualified for 3 years i.e. from the starting date of the use of doping until the date where the athlete allegedly stopped using doping, including the forfeiture of any titles, awards, medals, points and prize and appearance money<sup>26</sup>.

It is to be noted that the decision rendered on 10 February 2017 by the Single arbitrator has been appealed by the athlete before the CAS appeal division.

#### **IV. Burden and Standard of Proof applicable to a provisional suspension**

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<sup>25</sup> see *e.g.* CAS 2005/A/830 paras. 10.21 – 10.31; 2005/C/976 & 986 paras. 139, 140, 143, 145 – 158; 2006/A/1025 paras 75 – 103; TAS 2007/A/1252 paras. 33 - 40, CAS 2010/A/2268 paras. 141 f, all of them referring to and analysing previous awards and doctrine).

<sup>26</sup> Similarly, in other CAS cases related to Russian doping, the Sole Arbitrator also found that the principles of fairness and proportionality demanded that Rule 40.8 of the IAAF ADR related to the disqualification of results was not applied strictly in the matter. See CAS 2016/O/4463 IAAF v. ARAF & Kristina Ugarova, paras. 129 ff., CAS 2016/O/4464

A number of similar Russian cross-country skiing cases have recently been examined on appeal by the CAS. Those cross-country cases raise an interesting evidentiary issue. Yet, the issue is specifically related to the determination of the applicable burden and standard of proof to an optional provisional suspension. The peculiarity of a provisional suspension in the context of an ADRV is that it has a necessarily preliminary character since the ADRV is asserted but not yet proven. This specificity impacts the burden and standard of proof applicable.

Due to the similarity of the questions addressed in the six cross-country skiing decisions rendered on appeal by the CAS, only the case 4968 Alexander Legkov v. FIS is analysed since it is probably the most emblematic due to the fame of the athlete<sup>27</sup>. Alexander Legkov became the first cross-country skier from Russia to win the FIS Tour de Ski and has five individual World Cup victories. The Panel appointed in the procedure was composed of Professor Jan Paulsson (President), Mr Nicholas Stewart and Hon. Michael Beloff.

The athlete challenges an Optional Provisional Suspension, imposed on him by the FIS on 22 December 2016 based on a potential finding of an ADRV at the 2014 Sochi Winter Olympic Games.

IAAF v. ARAF & Ekaterina Sharmina paras. 185 ff., CAS 2016/O/4469 IAAF v. ARAF & Tatyana Chernova paras. 170 ff.

<sup>27</sup> CAS 2017/A/4968 Alexander Legkov v. International Ski Federation (FIS), CAS 2017/A/4969 Evgeniy Belov v. International Ski Federation (FIS), CAS 2017/A/4985 Alexey Petukhov v. International Ski Federation (FIS), CAS 2017/A/4986 Evgenia Shapovalova v. International Ski Federation (FIS); CAS 2017/A/4987 Maxim Vylegzhanin v. International Ski Federation (FIS); CAS 2017/A/4998 Julia Ivanova v. International Ski Federation (FIS).

### A. Burden and Standard of proof applicable to a provisional suspension under the FIS ADR

The provisional suspension was based on evidence made available to FIS by the IOC in the “McLaren Report”. The names of individual athletes in Part II of the McLaren Report focusing on the identification of the athletes were encrypted. However, by letter dated 9 December 2016, Professor McLaren indicated to the FIS that one sample indicative of potential tampering matched the athlete<sup>28</sup>.

To begin with, the Panel stressed that provisional suspensions have a “*necessarily preliminary character*”<sup>29</sup>. Therefore, the burden of proof and legal thresholds applicable must reflect the appealed suspension’s provisional nature and track the rules specific to its imposition. A provisional decision is overturned if it has “*no reasonable prospect of being upheld*”<sup>30</sup>. Therefore the imposition of a provisional suspension requires a “*reasonable possibility*”<sup>31</sup> that the suspended athlete has engaged in an ADRV. The Panel found that “*a reasonable possibility is more than a fanciful one; it requires evidence giving rise to individualized suspicion. This standard, however, is necessarily weaker than the test of “comfortable satisfaction” set forth in Article 3.1 [FIS Anti-Doping Rules (FIS ADR), relating solely to the adjudication of an ADRV]. Accordingly, a reasonable possibility may exist even if the federation is unable to show that the balance of probabilities clearly indicates an ADRV on the evidence available*”<sup>32</sup>. Articles 7.9.2

and 7.9.3.2 FIS ADR<sup>33</sup>, read in conjunction, establish a two-step framework that endows the federation with broad authority to provisionally suspend athletes who it has reasonable cause to believe committed an ADRV. Pursuant to Article 7.9.2 FIS ADR, “*any*” ADRV suspected of an athlete can serve as cause for a provisional suspension against him, should the federation so decide. From that moment onward, a provisional suspension is subject to challenge only by reference to the enumerated criteria in Article 7.9.3.2, whose satisfaction it is the athlete’s burden to establish. Article 7.9.3.2 imposes three, independently sufficient criteria for lifting the suspension:

- a demonstrable lack of “*fault*” or “*negligence*” on the athlete’s part,
- “*no reasonable prospect*” of the assertion of an ADRV succeeding on the merits, or
- the presence of “*other facts*” making it “*clearly unfair*” to leave the suspension in place.

### B. Lack of infringement of the athlete’s rights

Legkov argued, *inter alia*, that he (i) was never charged with an ADRV; (ii) did not know that an ADRV could potentially be charged; and (iii) was compelled to defend himself against assumptions, not evidence. The Panel therefore examined the principles alleged by Legkov to be in tension with the suspension, namely the presumption of innocence and his

<sup>28</sup> CAS 2017/A/4968 para. 16.

<sup>29</sup> Op. cit. CAS 2017/A/4968 para.158.

<sup>30</sup> Op. cit. CAS 2017/A/4968 para.168.

<sup>31</sup> Op. cit. CAS 2017/A/4968 para.175.

<sup>32</sup> Op. cit. CAS 2017/A/4968 para.176.

<sup>33</sup> **7.9.2** *In case of an Adverse Analytical Finding for a Specified Substance, or in the case of any other anti-doping rule violations not covered by Article 7.9.1, FIS may impose a Provisional Suspension on the Athlete or other Person against whom the anti-doping rule violation is asserted at any time after the review and notification described in Articles 7.2–7.7 and prior to the final hearing as described in Article 8.*

[...]

**7.9.3.2** *The Provisional Suspension shall be imposed (or shall not be lifted) unless the Athlete or other Person establishes*

*that: (a) the assertion of an anti-doping rule violation has no reasonable prospect of being upheld, e.g., because of a patent flaw in the case against the Athlete or other Person; or (b) the Athlete or other Person has a strong arguable case that he/she bears No Fault or Negligence for the anti-doping rule violation(s) asserted, so that any period of Ineligibility that might otherwise be imposed for such a violation is likely to be completely eliminated by application of Article 10.4; or (c) some other facts exist that make it clearly unfair, in all of the circumstances, to impose a Provisional Suspension prior to a final hearing in accordance with Article 8. This ground is to be construed narrowly, and applied only in truly exceptional circumstances. For example, the fact that the Provisional Suspension would prevent the Athlete or other Person participating in a particular Competition or Event shall not qualify as exceptional circumstances for these purposes.*

right to know the nature and cause of the charge against him. Alexander Legkov's submissions raised the Swiss Federal Constitution, its Code of Criminal Procedure, public order and European and international human rights law.

The Panel stressed that though the principles guaranteeing a fair hearing are in any event applicable under Swiss law, they cannot be infringed by a provisional suspension since there is neither "*conviction*" nor yet a formal "*charge*" of an ADRV. Furthermore, contrary to the athlete's contention, the charge against him was clear i.e. suspicion of an ADRV by tampering or attempted tampering with doping controls under the athlete's purported benefit from and participation in the sample-swapping scheme detailed by Professor McLaren. In addition, no breach of due process could be established since the parties had an equal opportunity to present their case at the first instance and on appeal. Finally, the athlete's reference to a presumption of innocence could not be invoked in the context of a provisional suspension since it is a non-punitive and interim measure and not a final sanction. Indeed, since there is no finding of culpability at the stage of a provisional suspension, the latter cannot implicate, still less violate, a presumption of innocence<sup>34</sup>.

In this context, none of the athlete's applicable rights has been infringed so as to constitute a violation either of the *ordre public* or of Swiss substantive law guaranteed by article 190.2 PILA.

### **C. Assessment of the evidence upon which the provisional suspension is based**

Regarding the assessment of the evidence upon which the provisional suspension is based, it is to be noted that the probability of an ADRV and the legitimacy of provisional measures are obviously tangled. The demonstration of any ADRV charge will

depend on further inquiries, the result of which is unknown at the time of the decision of the Panel. It is therefore imperious that Article 7.9 FIS ADR be applied strictly so that a "*reasonable possibility*" of an ADRV shall at least be established. The evidence submitted by the federation derives from the McLaren Report and associated documents upon which the Report relied. In assessing whether the provisional suspension meets legal thresholds required under the FIS ADR, the context described leads to the conclusion that "*individual connecting factors and inferences which might emerge meet the test of "reasonable possibility", and therefore justify the provisional suspension*"<sup>35</sup>. In this respect, though evidence of the athlete's testing history may strengthen his claim to innocence, it is not inconsistent with a "*reasonable possibility*" that the federation will prevail. In this regard, the implication of the athlete in a clean urine bank whose existence is adduced by the McLaren Report, the existence of lists of athletes purportedly authorized to take a "boosting cocktail" and scheduled to start in medal races and who likewise enjoyed "protected" status under Russia's doping Scheme on which the athlete's code appears, particularly when assessed collectively with evidence of tampering with the athlete's sample bottle, indicate a reasonable possibility of an ADRV. The evidence suffices for the limited purpose of Article 7.9.2 of the FIS ADR.

### **D. Determination of the length of the provisional suspension**

With respect to the determination of the length of the provisional suspension, an athlete cannot endorse an indefinite and indeterminable suspension as proportionate. Noting the athlete's reasonable entitlement to legal certainty, the Panel deemed appropriate and just that the provisional suspension expire after 10 months, at which time it will be for the federation to consider whether or not to seek a further suspension

<sup>34</sup> Op. cit. CAS 2017/A/4968 para. 189.

<sup>35</sup> Op. cit. CAS 2017/A/4968 para.236.

justified by new developments and within the framework of the FIS ADR.

## **V. IOC discretionary power not to invite an athlete to participate in the Pyeongchang Olympic Games: GAS OG 18/002 Victor Ahn et al. v. IOC**

In order to introduce the case, it seems useful to revisit certain elements that led to the athlete's appeal against the IOC decision.

On 5 December 2017, based on the Schmid Commission's recommendations, the IOC Executive Board decided to suspend the Russian Olympic Committee (ROC) with immediate effect.

At the same time, the IOC Executive Board established a two-stage process to allow "clean" Russian athletes to compete at the Olympic Winter Games 2018. The first step was to delegate to an independent panel (the Invitation Review Panel (the IRP)) the responsibility of developing a list from which the IOC would ultimately issue invitations.

The ROC submitted a list of 500 athletes for potential inclusion on the invitation list. After conducting an individual assessment of each athlete, the IRP considered that 389 of the 500 proposed athletes could be included in that list. Asked to propose which athletes, from those on the invitation list, would fill the quota places earned in each sport, discipline and event, the ROC eventually provided a list of 169 athletes who were invited to compete as Olympic Athletes from Russia (OAR).

The IRP then submitted the list to the IOC's Olympic Athlete from Russia Implementation Group (the "OAR IG"), to determine which athletes would be issued an invitation from the initial invitation list. On 25 January 2018, the IRP published seventeen criteria it considered for each athlete in developing the pool of athletes who could be invited by the IOC to take part in

the Olympic Winter Games 2018 as an OAR. The criteria, which were noted to be non-exhaustive, included the athlete's anti-doping rule violation history, evidence of suspicious Steroid Profile values, e-mails, DNA inconsistencies and irregularities of the ABP, steroid profile manipulation as well as evidence provided by the McLaren and Schmid reports and the Oswald Commission; information provided by various departments of WADA and intelligence provided by Olympic Winter Sports Federations regarding athletes and/or support personnel and the Pre-Games Testing Taskforce.

On 2 February 2018, Victor Ahn together with 31 athletes requested that the IOC provide reasons for not having been included in the list of invited athletes.

On 4 February 2018, the IOC replied that

*"the decision of the Invitation Panel and the OAR Implementation Group to put athletes on the list of potential invitations and the subsequent decision to invite them were both discretionary decisions" and that "there are no decisions to be made in respect" of the Applicants. The IOC reminded the Applicants that the "elements, which were considered with regard to the invitations have been published on 25 January 2018"*<sup>36</sup>.

On 6 February 2018, the Ad hoc Division of the Court of Arbitration for Sport (CAS) opened an arbitration procedure following an urgent application filed by 32 Russian athletes (the Applicants) against the International Olympic Committee (IOC) (the Respondent). The Applicants challenged the IOC decision refusing to invite them to participate in the 2018 Olympic Winter Games. They requested that CAS overturn the IOC decision and allow them to participate in these Games as Olympic Athletes from Russia.

### **A. CAS jurisdiction**

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<sup>36</sup> CAS OG 18/02, para. 2.19.

As regards the CAS' jurisdiction, it is to be noted that in the specific case, the IOC did not oppose the CAS' ad hoc Division jurisdiction even though the decision not to select the Applicants dated from 19 January 2018 and the dispute had therefore arisen on that date.

The competence of the ad hoc Division only exists, according to Article 1 of the Rules on Arbitration for the OG, if the dispute arises during the OG or during a period of ten days preceding the Opening Ceremony of the Olympic Games (i.e. on 30 January, 10 days before the opening ceremony).

Yet, as the IOC did not oppose the CAS' jurisdiction, the latter was recognised.

### **B. Merits**

The Applicants contended that the process put in place by the IOC was a sanction whereas the athletes never committed an anti-doping rule violation and complied with all pre-game testing requirements. The IOC process was arbitrary, discriminatory and unfair.

On the other hand, the IOC maintained that by establishing a process that gave individual athletes the opportunity to be invited to the Olympic Games, it has not deprived them of any "*right*" to participate. It was therefore rather a decision concerning their eligibility and not a sanction. The starting point is article 44.3 OC which specifies that there is no "*right*" to participate in the Games and which reserves to the IOC the right to accept or refuse at its sole discretion, without stating any reason, any registration for the Games. As soon as the IOC had suspended the ROC, without this suspension having been challenged in court, no Russian athlete could no longer be entered in the Games.

The Panel reminded that in CAS 2016/O/4684 already<sup>37</sup>, the arbitral tribunal had concluded that a rule allowing an athlete

to regain its eligibility when a number of specific conditions were met could not be interpreted as a sanction but rather as an eligibility decision. The IOC chose to offer individual athletes the opportunity to participate in the Winter Games under prescribed conditions despite the ROC's suspension- a process that was designed to balance the IOC's interest in the global fight against doping and the interests of individual athletes from Russia. Moreover, at the hearing, the Applicants acknowledged that the IOC had the ability to institute such process. The Applicants did not demonstrate that the manner in which the two special commissions i.e. the IRP and the OAR IG independently evaluated the Applicants was carried out in a discriminatory, arbitrary or unfair manner. The two entities established and applied rational criteria. The Panel also concluded that there was no evidence the IRP or the OAR IG improperly exercised their discretion. Furthermore, the evaluation of candidates for an invitation took place anonymously to avoid discrimination. Although the process was not perfect because of time constraints, it was as fair as possible in light of those constraints.

### **VI. Concluding remarks**

The jurisprudence analysed here offers practical examples of eligibility issues and disciplinary sanctions justified by doping. It establishes a clear distinction between eligibility decisions and disciplinary decisions regarding the Olympic Games. In this respect, a rule allowing an athlete to regain its eligibility after his federation or his NOC has been suspended when a number of specific conditions are met shall be interpreted as an eligibility rule. Further, the CAS shall respect the discretion of the IOC to invite an athlete who fulfilled the requested conditions. Thus, the IOC has a discretionary power in this respect granted by the OC provided the IOC decision is not arbitrary or discriminatory (OG 16/004 Yulia Efimova). This is true whether the athletes concerned have not

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<sup>37</sup> Op. cit. footnote 2 CAS 2016/O/4684 ROC, Lyukman Adams et al. v. IAAF para. 141.

been sanctioned for doping or whether the sanctions taken against the athletes by their federations have been annulled by the CAS for lack of evidence (OG 18/002 Victor Ahn et al. v. IOC).

The jurisprudence analysed also presents interesting evidentiary issues related to doping. The admissibility of evidence in general and the admissibility of illegally obtained evidence in particular have been examined (4481 Marya Savinova). The

decisions confirm in this regard the established CAS jurisprudence. The cases examined also specify the notion of fairness and proportionality linked to the disqualification of results and of aggravating circumstances allowing the increase of the suspension imposed on the athletes (4481 Marya Savinova). Finally, for the first time, the burden and standard of proof required for an optional provisional suspension in the context of an ADRV has been determined by the CAS (4968 Alexander Legkov v. FIS).

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## Jurisprudence majeure\* Leading Cases



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\* 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.

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CAS 2016/A/4579

**Gordon Derrick v. Fédération  
Internationale de Football Association  
(FIFA)**

3 February 2017

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**Football; Denial of eligibility to a candidate for a top position within FIFA; Standing to appeal; Duty of a football official to report the existence of bribes; FIFA discretionary power to determine whether a candidate has an impeccable integrity report; Legal nature of a decision providing for a denial of eligibility**

#### **Panel**

Mr José María Alonso Puig (Spain), President  
Mr Romano Subiotto QC (United Kingdom)  
Mr Nicolas Ulmer (Switzerland)

#### **Facts**

Mr. Gordon Derrick (hereinafter, the “Appellant” or simply “Mr. Derrick”), is a national of Antigua & Barbuda and of the United States of America and a former professional football player of the Antigua & Barbuda national football team. He is currently the General Secretary of the Antigua and Barbuda Football Association and the President of the Caribbean Football Union.

The Fédération Internationale de Football Association (hereinafter, the “Respondent” or simply “FIFA”), is the international governing body of professional association football.

In April 2004, Mr. Derrick was appointed to the position of General Secretary of the Antigua and Barbuda Football Association (“ABFA”). It is a member of FIFA, the Caribbean Football Union (“CFU”), and the Confederation of North, Central America and

Caribbean Association Football (“CONCACAF”).

In May 2012, Mr. Derrick was elected President of the CFU. This is the regional governing body of Caribbean football associations and federations.

In February 2016, the Appellant announced that he would run as candidate for the presidency of CONCACAF. This is the continental governing body for association football in the region. However, this actually entailed a candidacy for two positions:

- Firstly, the position of President of CONCACAF.
- Secondly, the position of FIFA-Vice-President on the FIFA Council, because the President of CONCACAF also serves *ex-officio* as a FIFA Vice-President on the FIFA Council.

The election for the CONCACAF President was one of the items on the agenda for the 66th FIFA Congress, which was scheduled to take place on 12 and 13 May 2016 in Mexico City.

Both of the above positions require the candidates to pass prior eligibility checks in order to be placed on the ballot for the respective elections to each position.

Thus, the Appellant went through two eligibility checks:

- 1) The eligibility check by the CONCACAF (March 2016) included the completion of an eligibility check questionnaire (the “Questionnaire”) filled out by the Appellant and the conduct of an integrity check by a law firm.

The Questionnaire revealed the existence of two specific proceedings (the “Two Proceedings”):

- a) The Decision of the FIFA Ethics Committee of 17 November 2011 (*a previous proceeding and sanction*) whereby the Appellant indicated that he had been found guilty by the FIFA Ethics Committee of an infringement of the FIFA Statutes and the FIFA Code of Ethics in connection with the Mohamed Bin Hammam scandal. He was sanctioned with a reprimand and fine of CHF 300.
- b) The Letter of FIFA Ethics Committee of 6 March 2015 (*a current investigatory proceeding*) regarding possible violations of the FIFA Code of Ethics notably the alleged mismanagement of FIFA funds.

The CONCACAF concluded, based on the Questionnaire and the Integrity Check, that the Appellant had passed the eligibility check, notwithstanding the negative issues raised.

- 2) The eligibility check by the FIFA Audit and Compliance Committee (April 2016):

According to the FIFA Statutes and the FIFA Governance Regulations (“FGR”), the Vice-Presidents and members of the FIFA Council are required to undergo eligibility checks. The general rule is that the checks are to be conducted by the Review Committee. However, as provided in the FIFA Statutes, the FIFA Audit and Compliance Committee can be (and in this case was) granted the power to conduct the eligibility checks foreseen in the FIFA Statutes until the establishment of the Governance Committee. This eligibility check was carried out in accordance with the FIFA Governance Regulations. The conclusion reached by the FIFA Audit and Compliance Committee was that the Appellant had not passed the eligibility check.

Ultimately, in light of the Two Proceedings, the Audit and Compliance Committee came to the

final decision that the Appellant could neither be admitted as a candidate for the election to the office of FIFA Vice-President nor member of the FIFA Council.

On 2 May 2016, Mr. Derrick lodged a Statement of Appeal before CAS against FIFA concerning the Decision of the Audit and Compliance Committee of 12 April 2016.

On 28 November 2016, a hearing was held in Lausanne.

### Reasons

1. In Swiss law it is well established that a party must have a current “interest worthy of protection” that can be addressed or rectified by the claims or appeal being made. This principle, under Swiss law, is known as “*Rechtsschutzinteresse*” or an “*intérêt digne de protection*”; it is generally translated into English by the term “*standing*”, and the Panel adopts that term for convenience.

The Parties have been at odds as to whether the Appellant here retains standing to sue in light of the fact that the appeal concerns the Appellant’s eligibility for elections that have already taken place. The Appellant claimed the existence of a current interest worthy of protection sufficient to justify standing. The Respondent, for its part, asserted that none of these reasons were convincing.

The legal standard applied in CAS standing determinations largely echoes that to be found in the case law of the Swiss Federal Tribunal: “[I]’*intérêt digne de protection* consiste dans l’*utilité pratique* que l’*admission du recours* apporterait à son auteur, en lui évitant de subir un *préjudice de nature économique, idéale, matérielle ou autre* que la *décision attaquée* lui occasionnerait” [4A\_134/2012 at §2.1, citing ATF 137 II 40 at §2.3; see also, ATF 137I 23 at § 1.3.1 (exception to present interest when dispute

under appeal may arise in analogous circumstances or has a sufficient public interest)].

Reviewing the argument and evidence submitted by the Appellant, the Panel comes to the conclusion that Mr. Derrick has demonstrated a sufficient actual and present interest to provide standing for his appeal. In particular, the Appellant has demonstrated that the reversal of the Challenged Decision of the FIFA Audit and Compliance committee would have significant practical and tangible benefits to him going forward. The Appellant continues to be deeply involved in football at a national and regional level. The Appellant's failure to pass his FIFA eligibility check was publicized and widely known and has been shown to have actual and potential negative effects on the Appellant's reputation and prospects. While it is certainly true that the elections to which the integrity check applied are long over, it should be noted that a decision which causes harm to reputation continues to deploy direct or indirect effects, and is not entirely analogous to a decision excluding an athlete or a football club from a specific tournament.

The Appellant has, however, sustained his essential position that the Challenged Decision causes him both actual and potential problems going forward due to harm to his reputation, and that these problems would be diminished significantly if the appealed decision were reversed. Therefore the appeal is admissible.

2. On 17 November 2011, the FIFA Ethics Committee issued a decision in which it found that the Appellant violated provisions of the FIFA Code of Ethics including those related to loyalty and confidentiality and the duty of disclosure

and reporting. In fact, the Appellant was effectively sanctioned for failure to comply with its obligation to provide information regarding irregular contributions, such as deliveries of envelopes with money regarding Mr. Bin Hammam, candidate to FIFA presidency. The Appellant was found to have violated a number of provisions of the FIFA Statutes and the FIFA Code of Ethics, and in particular art. 7 par. 1 of the FIFA Statutes, art. 3 par. 1, art. 3 par. 2, art. 9 par., and art. 14 par. 1 of the FIFA Code of Ethics.

Mr. Derrick states that he was found guilty "*only*" of not reporting alleged violations of FIFA regulations to the FIFA Secretary General. Moreover, the Appellant describes the sanction as "*insignificant*", consisting of a reprimand and a fine of CFH 300.

In his defense, the Appellant mentions the award rendered in CAS 2011/A/2625, in which the panel annulled the decision issued by the FIFA Appeal Committee and lifted the life ban that was imposed on Mr. Bin Hammam. According to his own interpretation, if Mr. Bin Hammam was "*acquitted*", Mr. Derrick cannot be sanctioned for not reporting a violation of FIFA regulations.

Under the Panel's view, a football official has an autonomous duty to report the existence of bribes from a candidate to FIFA presidency to the Secretary General of FIFA, independent from the conduct of said candidate. The failure to do so is clearly irregular regardless of the purpose of the bribes. Such breach cannot be excluded by the fact that there was insufficient evidence to confirm the life ban imposed by FIFA on the candidate to FIFA presidency. Every person with significant duties in organizations related to sports should have an impeccable record. This position is not

new within CAS, and it has been recently reaffirmed that *“an integrity test as to whether a person, based on the information available, is perceived to be a person of integrity for the function at stake”* (CAS 2015/A/4311, par. 57). In CAS 2011/A/2426, the Panel stated that *“officials as highly ranked as the Appellant must under any circumstance appear as completely honest and beyond any suspicion. In the absence of such clean and transparent appearance by top football officials, there would be serious doubts in the mind of the football stakeholders and of the public at large as to rectitude and integrity of football organizations as a whole”*. The Panel fully concurs with these statements.

3. Due to the recent events that happened in the past years with respect to football organizations, and in particular with FIFA, it has become necessary to increase and enhance the checks and controls of the potential high officials that operate in these organizations. In order to develop these checks and controls, FIFA in February 2016 approved the FGR.

In the light of the discretionary power provided for in the FGR, it is not the function of the FIFA Audit and Compliance Committee to decide whether a candidate has violated the FIFA Code of Ethics but to determine whether the person at stake has an impeccable integrity record and to render its opinion on the suitability of the candidate. In this respect, the FIFA Audit and Compliance Committee concluded that due to his disciplinary record and the ongoing investigation against the Appellant before the FIFA Ethics Committee, the Appellant did not meet the requirements necessary to become Vice-President of the FIFA, and the Panel agrees with its decision.

4. Another point that the Panel must address is the legal nature of the Challenged

Decision on which these proceedings have been grounded. As stated before, it is not the function of the FIFA Audit and Compliance Committee to decide whether a candidate has violated the FIFA Code of Ethics, but to determine whether the candidate has an impeccable integrity record. This fact has the natural consequence that the Challenged Decision is not of a disciplinary nature but rather is administrative.

As a consequence of the administrative nature of the Challenged Decision, the principles of proportionality and presumption of innocence should not be applied as argued by the Appellant. This does not mean that FIFA could proceed in an arbitrary or irrational manner. On the contrary, it is the Panel's view that FIFA did carry out a proper procedure consistent with the requirements of the FIFA Statutes and the FGR, in order to perform due diligence with respect to the candidate's record and following the mandatory eligibility check for all the candidates in compliance with art. 48 par. 1 d) of the FGR.

### **Decision**

The Appeal filed by Mr. Derrick shall be dismissed and the Challenged Decision shall be confirmed. This conclusion makes it unnecessary for the Panel to consider the other requests submitted by the Parties to the Panel. Accordingly, all other prayers for relief are rejected.

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CAS 2016/A/4787

**Jersey Football Association v. Union of European Football Associations (UEFA)**

28 September 2017

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**Football; Application to become member of UEFA; Admissibility of the appeal; Standing to sue or to be sued; Standing to be sued; Priority of associations' statutes and rules over deviating custom; Interpretation of statutes and regulations of a (sport) association; Competent body within UEFA to deal with applications for UEFA membership; Discretion by UEFA Congress when examining applications for UEFA membership**

**Panel**

Mr José María Alonso Puig (Spain), President

Mr Dirk-Reiner Martens (Germany)

Mr Jan Räker (Germany)

**Facts**

The Jersey Football Association (“JFA” or the “Appellant”) is the body that co-governs and coordinates football in Jersey.

The Union of European Football Associations (“UEFA” or the “Respondent”) is an association incorporated under the laws of Switzerland with its headquarters in Nyon, Switzerland. It is the governing body of European football dealing with all questions relating to European football and exercising regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players of the European continent.

On 7 December 2015, JFA submitted its application for membership in UEFA.

On 1 September 2016, UEFA issued a decision (the “Appealed Decision”), which was received by JFA on 6 September 2016, informing that, in accordance with the standard practice of UEFA, JFA’s membership application was examined by the UEFA administration and was discussed at a meeting of the UEFA Executive Committee on 25 August 2016. The appealed decision rejected the application:

*“Please be informed (...) the UEFA Executive Committee decided that the application should not be forwarded to the UEFA Congress, since the admission criteria set out in Article 5 of the UEFA Statutes are clearly not satisfied, in particular, since Jersey cannot be considered as an independent state within the meaning of this provision”.*

**Reasons**

1. According to Article R49 of the CAS Code, a federation may derogate from the 21-day time-limit in its statutes or regulations. Article 62 (3) UEFA Statutes stipulates that the time-limit to challenge a decision shall be 10 days from the receipt of the decision. In cases in which time-limits to appeal set by the federation differ from Article R49 CAS Code, the rule of the federation prevails (being the *lex specialis*) (see CAS Code Commentary, MAVROMATI/REEB, Article R49 n. 91).

The Appealed Decision was communicated to the JFA on 6 September 2016 by the UEFA Executive Committee. On 15 September 2016, the Appellant filed its Statement of Appeal against the Appealed Decision with the CAS Court Office. Consequently, the Appellant complied with the time limits prescribed by Article 62(3) UEFA Statutes.

2. The question of standing to sue or to be sued is a matter of substantive law. Several awards have established this doctrine, in

particular CAS 2016/A/4602, CAS 2013/A/3047, CAS 2008/A/1639, CAS 2008/A/1583 & 1584.

In Swiss law it is well established that a party must have a current interest worthy of protection that can be addressed or rectified by the claims or appeal being made. This principle is provided in Article 59(2) of the Swiss Code of Civil Procedure (the “CCP”) and is known as “Rechtsschutzinteresse” or an “intérêt digne de protection”. It is generally translated into English by the term “standing”, and the Panel adopts that term for convenience (although standing can have a somewhat different role when applying English or other Common laws).

The Panel comes to the conclusion that the JFA has demonstrated a sufficient actual and present interest to provide standing for its Appeal. In particular, the Appellant has demonstrated that the reversal of the Appealed Decision of the UEFA Executive Committee would have significant importance to the JFA in going forward in its candidacy to become a member of UEFA.

3. With respect to the standing to be sued, the CAS on several occasions in appeal proceedings held that:

*“the question of standing to be sued (...) must be resolved on the basis of a weighting of the interests of the persons affected by said decision. The question, thus, is who (...) is best suited to represent and defend the will expressed by the organ of the association” (CAS 2015/A/3910, para. 138, endorsed by CAS 2016/A/4602, paras. 81 ff.).*

UEFA as the organization (through an organ of the association) that issued the Appealed Decision should *prima facie* have standing to be sued in the present proceedings. In light of the challenges brought forward by UEFA, the question

arises though, if UEFA also has standing to be sued as the sole Respondent of this proceeding or if the JFA had to direct its Appeal against both UEFA and the English FA and, if so, what legal consequence follows from JFA’s failure to do so. For the evaluation of this question, the petition of the Appellant must first be looked at. The petition by the Appellant included in its Statement of Appeal reads as follows:

*“The JFA’s request for relief is for an Order:*

*Directing the UEFA Executive Committee to transmit the JFA’s application for UEFA membership to the UEFA Congress which shall take all necessary measures to admit the JFA as a full member of UEFA without delay”.*

Despite being phrased together in one sentence, the Panel understands that it has to decide on two different issues:

- i. first, whether to “transmit the JFA’s application for UEFA membership to the UEFA Congress”, and
- ii. second, whether to order the UEFA Congress to “take all necessary measures to admit the JFA as a full member of UEFA without delay”.

The first request of JFA concerns a challenge of the internal decision-making process at UEFA. The Panel holds that whether a decision on JFA’s membership application is taken by the UEFA Executive Committee or by the UEFA Congress does not affect the legal interests of the English FA in any way. The Panel therefore holds that UEFA does have standing to be sued as the sole Respondent for the first request of JFA.

With its second request, the JFA seeks to predetermine the result of the UEFA Congress’ decision on JFA’s membership application. The JFA therefore seeks the

UEFA Congress, and thereby the national FAs, who are the members of UEFA and whose delegates constitute the UEFA Congress, to have no discretion in their decision on the application of JFA, once it has been transmitted to the UEFA Congress as requested. The Panel notes that such request would have a bearing on all UEFA members represented in the UEFA Congress as all of them would be deprived of their discretion in their decision on JFA's membership application. The Panel therefore takes the view, that in such situation, UEFA as the mother association of its members and as the association whose body's decision is sought to be predetermined is best suited to represent and defend the interests of its members. The Panel further considers that the most pertinent issues behind the legal questions which need to be addressed in order to evaluate the merits of JFA's membership application are much more of general nature than resembling an antagonistic situation in which one party seeks to get something at the other's expense. This proceeding is about what kind of members are entitled to UEFA membership under its regulations and not about a claim of one FA against another which defends its rights and possession against a potential loss. It is noted that this approach is also in line with prior CAS jurisprudence in the case CAS 2016/A/4602, in which the Panel held that a newly admitted member of UEFA did not have to be a Co-Respondent aside UEFA in a proceeding challenging its admission, *i.e.* in a proceeding which could lead to a much more severe consequence for such FA than the English FA might suffer from if the request of JFA was granted by the Panel. The Panel finally observes that UEFA neither treated the English FA as a party to the membership application procedure of JFA, nor did they attempt to cause the English FA to participate in the current

proceeding, despite being able to do so in line with Article 41.2 of the CAS Code. Equally, despite being aware of the current proceeding being initiated, the English FA never sought to intervene with it in line with Article 41.3 of the CAS Code.

On the basis of the aforementioned the Panel therefore holds that UEFA does have standing to be sued as a sole Respondent for both requests of the Appellant.

4. In support of its request to transmit its membership application to the UEFA Congress the Appellant argues that the decision rejecting a candidate for membership in UEFA is vested in the UEFA Congress and not in the UEFA Executive Committee. The Appellant therefore submits that the Appealed Decision does not comply with substantive provisions in the UEFA Statutes and regulations. On the other hand, the Respondent argues that the Executive Committee is the head of the administrative governance of UEFA and that it is one of its duties to provide a legal analysis of compliance with the requirements for candidates to become members of UEFA. The Respondent stated that it would be completely inefficient to make the Congress decide on every application for membership to UEFA. The Respondent also argues that under Swiss law a crucial factor for interpretation is how an association itself applies a rule in question (so-called "Vereinsübung"), stating that it is not even required that such application amounts to standard, long-standing practice but a one-time application may suffice to be an "important indication" ("gewichtiges Indiz") as to how a statutory provision shall be applied.

In principle the Panel agrees with what has been pointed out in the previous paragraph.

However, the Panel holds that associations enact regulations and statutes that articulate its functioning. These regulations constitute legal bodies which are mandatory for the association itself (including its organs) and for its members and such regulations have priority over any deviating custom.

5. Whether and to what extent the Appealed Decision complies with substantive provisions in the UEFA Statutes and regulations depends – *inter alia* – on the principles applicable to their interpretation. In this respect, statutes and regulations of an association shall be interpreted and construed according to the principles applicable to the interpretation of the law rather than those applicable to contracts; see BSK-ZGB/Heini/Scherrer, Article 60 SCC no. 22; BK-ZGB/Riemer, Systematischer Teil no. 331; BGE 114 II 193, E. 5a). The Panel concurs with this view, which is also in line with CAS jurisprudence, which has held in the matter CAS 2010/A/2071 as follows:

*“The interpretation of the statutes and rules of a sport association has to be rather objective and always to start with the wording of the rule, which falls to be interpreted. The adjudicating body - in this instance the Panel - will have to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax. In its search, the adjudicating body will have further to identify the intentions (objectively construed) of the association which drafted the rule, and such body may also take account of any relevant historical background which illuminates its derivation, as well as the entirely regulatory context in which the particular rule is located (...)”* (para. 46).

6. In the case at hand, it is evident that UEFA is an association incorporated in Switzerland and, consequently, shall respect Swiss law. In addition, the rules and regulations for the governance and the

procedures of the association are included, in the first instance, in the UEFA Statutes, the Rules of procedure of the UEFA Congress, and the Regulations governing the Implementation of the UEFA Statutes. In order to decide whether the procedure that was internally followed by UEFA when deciding about JFA’s application for membership was correct, the Panel has taken into account the following relevant provisions of the UEFA Statutes:

- a. Article 6(2): *“The Congress shall have the power in its discretion to accept or refuse an application for membership”*.
- b. Article 6(3): *“The Executive Committee may admit a national football association into membership on a provisional basis. A decision on full admission must be taken at the next Congress”*.
- c. Article 13(2) l): *“Matters within the power of Congress shall be the: (...) l) consideration of membership applications and the exclusion of a Member Association”*.
- d. Article 23(1): *“The Executive Committee shall have the power to adopt regulations and make decisions on all matters which do not fall within the legal or statutory jurisdiction of the Congress or another Organ”*.

In the case at hand, the Appealed Decision was taken by the Executive Committee. Then, in order to determine if the Executive Committee is entitled to reject a candidate for membership of UEFA the Panel has to follow a logical sequence, which results from answering to the following questions:

- 1) Which organ has the power to analyse the application at first?
- 2) Which organ has the power to admit or reject definitely an application for membership in UEFA?

The Panel considers uncontested between both Parties that the UEFA Executive Committee is competent to deal with an application for UEFA membership first. The Panel considers that it would not properly reflect the role of the Executive Committee as the head of the administrative governance of UEFA, if the Executive Committee was obliged to serve as a mere postman and to forward any application to the Congress irrespective of merit. The Panel therefore holds that the Executive Committee did have the power to analyse the application of JFA at first.

7. The question is then, how much discretionary power the Executive Committee has in these respects. For the evaluation of this issue, the Panel refers to Article 6(3), under which the Executive Committee has the power to “provisionally” admit a candidate. However, as stated in Article 6(2), the final power to accept or refuse an application to membership resides with the UEFA Congress. Moreover, Article 13 (2) lit. 1) establishes that one of the attributions to the UEFA Congress is the “*consideration of membership applications*”. It is therefore clear that the UEFA Statutes provide the Congress with the primary power and discretion to make final decisions on the merits of membership applications. Article 23(1) does not leave room for interpretation when stating “*The Executive Committee shall have the power to adopt regulations and make decisions on all matters which do not fall within the legal or statutory jurisdiction of the Congress or another organ*” (emphasis added). Therefore, the competent organ for denying an applicant to become a member of UEFA is not the Executive Committee but the Congress, regardless of the competence of the former to submit to the Congress its view on the application, its background facts and its merits, thereby properly

preparing and recommending the decision of Congress on the eventual fulfilment of the requirements and the convenience for an association to become a member. Such application of the Statutes also serves to free the Congress from impractical burdens of extensive determinations of facts. But the final decision to admit or reject the application has to be taken by the Congress.

In conclusion, in order to respond to the first part of the *petitum* (i.e. whether the Panel decides to “*transmit the JFA’s application for UEFA membership to the UEFA Congress*”), it is the Panel’s view that, in accordance with the UEFA Statutes, the UEFA Executive Committee was not entitled to render a final and binding decision on whether a candidacy may or may not be rejected. The application should have been transmitted to the UEFA Congress for decision-making. The Appealed Decision must therefore be set aside and UEFA is ordered to transmit the JFA’s application for UEFA membership to the UEFA Congress.

The Appellant further requests the Panel to order the UEFA Congress to “*take all necessary measures to admit the JFA as a full member of UEFA without delay*”.

Article 6(2) of the UEFA Statutes provides that the Congress has discretion to accept or refuse an application for membership. But discretion cannot mean that the Congress can take arbitrary decisions without complying with the requirements for membership stated in Article 5(1) of the UEFA Statutes (with the only exception of the territories mentioned in Article 69(1)).

The discretion of the Congress cannot be confused with arbitrariness, and the compliance with Article 5(1) is mandatory for all new potential members. Once this

threshold is satisfied, then the Congress may or may not admit a candidate, and on this lies its discretionary power in accordance with Article 6(2) of the UEFA Statutes.

The Panel is therefore bound to respect such power of discretion. It is not the role of the CAS to replace the due discretion of a body of a sports association by the discretionary views of the respective Panel. In order to reach the conclusion that the UEFA Congress should be ordered to admit the JFA as a UEFA member, the Panel holds that it would have to reach the conclusion that, even after the consideration of all due discretion, such order would be the only legitimate outcome of the evaluation of the Appellant's application.

The Panel points out that, after the change introduced by the Extraordinary Congress held in October 2001, the decisive provisions of Article 5(1) of the UEFA Statutes now read as follows:

*“Membership of UEFA is open to national football associations situated in the continent of Europe, based in a country which is recognised by the United Nations as an independent state, and which are responsible for the organisation and implementation of football-related matters in the territory of their country”.*

As already explained, this provision contains different requirements that must be cumulatively met by any potential candidate.

The question whether or not the JFA is a “national” FA within the meaning of the Statutes is closely connected to the question whether or not Jersey is a nation. Such question touches on very fundamental and disputed issues of nationhood. For the purpose of this award, the answer to such

questions can however be left open, as the Panel holds that the requirement that the applicant “*must be based in a country which is recognised by the United Nations as an independent state*” is not met.

As acknowledged by both Parties, the wording of the provision is suboptimal, as it is undisputed that the United Nations do not recognise countries. Only states, such as the member states of the United Nations can recognise other states. A literal understanding of the requirement must therefore be rejected, as otherwise no applicant could ever meet the requirement. The meaning of the requirement must therefore be determined by other means of legal interpretation.

Such interpretation of the meaning of the very provision at hand was carried out extensively by the Panel in the award in CAS 2016/A/4602. The Panel in that award concluded its extensive deliberations that the second requirement in Article 5 must be interpreted as requiring the applicant to be based in a country which is recognised as an independent State “*by the majority of UN members*” (see para. 133 of the award). The Panel, fully conscious of its legal power to reach a different conclusion, concurs with the view of the Panel in the case CAS 2016/A/4602 for the reasons elaborated therein.

In any event, the Appellant has not established that Jersey has been recognized as an independent State by any other State and even less so by the majority of the United Nations members. Jersey therefore does not meet this second requirement of Article 5(1). Whether or not the JFA has full responsibility for organizing football on its territory therefore does not need to be considered further.

For the above reasons, it is the Panel's view that the JFA does not meet the requirements stated in Article 5(1) of the UEFA Statutes. Therefore, the Panel cannot come to the conclusion that the only legitimate outcome of the consideration of the Appellant's membership application by the UEFA Congress would be the acceptance of the application. To the contrary, irrespective of the UEFA Congress' persisting discretion to decide otherwise, the Panel is convinced that the Respondent made the right decision, albeit taken by the wrong body.

### **Decision**

The Appeal filed by the Jersey Football Association on 15 September 2016 against the Decision of the UEFA of 1 December 2016 is partially upheld.

The decision rendered by the UEFA Executive Committee on 1 September 2016 informing the Jersey Football Association that its application should not be forwarded to the UEFA Congress is set aside.

UEFA is ordered to transmit the Jersey Football Association's application for UEFA membership to the UEFA Congress.

The petition to order the UEFA Congress to *"take all necessary measures to admit JFA as a full member of UEFA without delay"* is dismissed.

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CAS 2016/A/4839

Anna Chicherova v. International Olympic Committee (IOC)

6 October 2017

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**Athletics (high jump); Doping (turinabol); Contractual relationship between the athlete and the IOC; Waiting time before splitting and re-analysis of samples; Independence of witnesses; Right to be heard; Right to initiate disciplinary proceedings regarding positive re-testing following initial negative results; Retrospective automatic disqualification**

#### Panel

Judge Mark Williams SC (Australia), President

Mr Dominik Kocholl (Austria)

Mr Mark Hovell (United Kingdom)

#### Facts

Anna Chicherova (the “Athlete” or the “Appellant”), a Russian citizen and professional high jumper, participated in the Beijing 2008 Summer Olympics (“Beijing 2008”). As a condition of her participation, the Athlete was required to sign an ‘Eligibility Conditions Form’ (“the Beijing Entry Form”) according to which she would – like the other participants – have specifically agreed to comply with the provisions of the World Anti-Doping Code (the “WADC”) in force at the time of the Olympic Games as well as the IOC Anti-Doping Rules applicable to the Beijing 2008 Summer Olympics (the “Beijing ADR”). However, at the hearing for this matter, the Athlete testified that she did not sign the Beijing Entry Form, and the signature on the signed Beijing Entry Form submitted by the IOC was not hers. Moreover, she stated that nobody drew her attention to the regulations contained in the Beijing Entry Form.

Accordingly, she submitted that she was not bound by any applicable regulations, including *inter alia*, the Beijing ADR.

From 21 to 23 August 2008, the Athlete competed in the Women’s high jump event (qualification and final), in which she finished third and was awarded a bronze medal. On 24 August 2008, the Athlete was requested to provide a urine sample for a doping control. The A-Sample 1846073 was analysed during Beijing 2008 by the World Anti-Doping Agency (“WADA”) accredited laboratory in Beijing. This analysis did not result in an adverse analytical finding (“AAF”) at that time.

The Athlete participated in the London 2012 Summer Olympics (“London 2012”). The Athlete competed in the Women’s high jump event (qualification and final), in which she finished first and was awarded a gold medal. On 11 August 2012, after the competition, the Athlete was requested to provide a urine sample for a doping control. The A-Sample 2717361 was analysed during London 2012 by the WADA accredited laboratory in London. This analysis did not result in an AAF either.

After the conclusion of Beijing 2008 and London 2012, all the samples collected during the Olympic Games (including the Athlete’s samples 1846073 and 2717361) were transferred to the WADA accredited laboratory in Lausanne, Switzerland (the “LAD”) for long term storage. The possibility to collect samples during Beijing 2008 and the London 2012 for long term storage was provided for in Article 6.5 of the Beijing ADR and Article 5.1 of the IOC Anti-Doping Rules 2012 respectively. These provisions clarified that re-analysis could be performed for up to 8 years after collection, i.e. the applicable statute of limitation specified under Article 17 of the WADC applicable to anti-doping proceedings.

A global re-testing program was scheduled to be completed prior to the Rio 2016 Summer Olympics (“Rio 2016”). The re-testing of the Athlete’s London 2012 sample (number 2717361) reported as negative. However, the re-testing of the Athlete’s Beijing 2008 sample (number 1846073) returned a positive result for DHCMT (oral turinabol).

On 18 May 2016, a letter formally informing the Athlete of the existence of the A- Sample re-analysis results and of the planned conduct of the B-Sample analysis was issued. The letter stated that the IOC had decided to offer the Athlete the opportunity to attend the opening and splitting of the B-Sample despite the fact that this was not formally required by ISL 2015 (and further ISL 2016) which was allowing for the B-Sample opening and splitting without the requirement that the Athlete would be notified or present, but with the presence of an Independent Witness. The dates indicated were 31 May and 1 June 2016.

On 25 May 2016, the representative of the Athlete, Dr. Thilo Pachmann, requested the IOC to reschedule the opening and splitting of the B-Sample and asked for a copy of the Laboratory Document Package (“LDP”) for the A-Sample. Dr. Pachmann also stated that the proposed dates of 31 May and 1 June 2016 were inappropriate due to his own personal schedule and the Athlete’s training and competition schedule. He requested dates at the end of June or beginning of July 2016. On 27 May 2016, the IOC stated, *inter alia*, that the 1 month delay suggested was not appropriate given that the matter had to be resolved within a timely manner, prior to Rio 2016, and proposed alternative dates of 6 or 7 June 2016. On 30 May 2016, Dr. Pachmann wrote to the IOC rejecting the proposed new dates indicating that it would not be appropriate for the Athlete, for him or for the scientist contacted by the Athlete, Dr. Douwe De Boer (although he could make 8 June 2016). Dr.

Pachmann indicated that the only available dates for the 3 of them would be 27, 28 or 29 June 2016. On 31 May 2016, the IOC stated that since the Athlete’s chosen scientist was available on 8 June 2016, the re-testing process was rescheduled for 8 June 2016.

On 6 June 2016, Dr. Pachmann wrote to the IOC stating that the Athlete needed to go to the hospital “*due to her intense training before the Olympic Games in Rio de Janeiro*” and would “*under no circumstances be able to make it to Lausanne for the sample re-testing and splitting*”. No further details were provided about the Athlete’s hospitalisation. On 7 June 2016, the IOC offered to postpone the re-testing process to 9 or 10 June 2016. Dr. Pachmann did not respond to this correspondence.

On the morning of 8 June 2016, the Athlete’s B-Sample was scheduled to be split and re-tested at the LAD in Switzerland. Dr. De Boer arrived unannounced at the LAD and stated that he was acting as a scientific observer and not as a representative (legal or scientific) for the Athlete, and accordingly, he did not have any authorisation to sign any of the LAD forms on behalf of the Athlete. Due to this confusion, the opening process was rescheduled to 4pm that afternoon. At 4pm on 8 June 2016, the LAD received confirmation and instructions from the IOC to proceed with opening the sample 1846073. The sample was opened and split. At that time, it was too late to consider progressing to B1-Sample preparation and analysis, so the process was postponed until the next morning.

On the evening of 8 June 2016, the IOC sent an email to Dr. Pachmann which, *inter alia*, stated that Dr. De Boer had until 8am on the following morning in which to inform the LAD whether he would be ‘observing’ the analysis process. In the morning of 9 June 2016, Dr. De Boer sent an email to the LAD Director (Dr. Kuuranne) in which he indicated

that he had not received any further instructions from the Athlete or her counsel, so he would not be present during the analysis. Later that same day, Dr. Pachmann sent a fax to the IOC in which he, *inter alia*, stated that the IOC knew all along that Dr. De Boer would only be available on 8 June 2016. Accordingly, Dr. Pachmann argued that the LAD's inability to complete the analysis on that day was purposely done to prevent the Athlete from not only being able to witness the sample splitting herself but also to prevent Dr. De Boer from witnessing the re-testing of the B1-Sample. Dr. Pachmann also alleged that the IOC had a "secret agenda" and that such "justice behind closed doors must be forbidden". Later that same day, the IOC sent an email to Dr. Pachmann stating: "Please note that the IOC does not agree with the content of your fax that you sent to [us] earlier today".

On 15 June 2016, the AAF notification letter reporting the analytical results of the B1-Sample analysis (which tested positive for turinabol) was sent to Dr. Pachmann. Further, the opening of the B2-Sample was scheduled to occur on 29 June 2016 (a date which the Athlete, Dr. Pachmann and Dr. De Boer had previously stated they were all available for) at the LAD, with analysis being performed over the days following. This letter also indicated that the matter would be heard by an IOC Disciplinary Commission, and stated that the hearing would likely be scheduled between 11 and 15 July 2016. On 21 June 2016, the IOC received the Athlete's completed AAF Notification Appendix in which the Athlete indicated that she did not accept the AAF and requested an opening and analysis of the B2-Sample. Dr. Pachmann also wrote to the IOC stating, *inter alia*, that there was no reason for the Athlete to witness the opening of the B2-Sample since the integrity of the sample "had been violated behind closed doors". Nevertheless, Dr. De Boer would still attend the procedure in Lausanne as a 'scientific reviewer'. On 22 June

2016, the IOC wrote to Dr. Pachmann stating that "There is no specific qualification attached to the Athlete's representative, and your attempts to allege that Dr. Douwe De Boer is anything other than an athlete's representative is artificial. Dr. Douwe De Boer will be allowed to attend the sample based upon the above". On 29 June 2016, the opening and analysis of the B2-Sample was conducted. During the procedure, Dr. De Boer stated that he was not there as a witness and would not verify anything. He was simply there as an observer. He did not answer any questions in relation to the sample or sign any paperwork. A copy of the B1-Sample LDP was provided to Dr. De Boer. Later that day, an electronic copy was also sent to Dr. Pachmann via a secure mechanism. On 30 June 2016, the results of the B2-Sample analysis confirmed the B1-Sample analysis results and the presence of the metabolites (substances produced by a biotransformation process within the body) of a Prohibited Substance, i.e. turinabol.

On 11 July 2016, the IOC informed Dr. Pachmann that a hearing of the IOC Disciplinary Commission was scheduled to take place on 21 July 2016. The correspondence stated that this schedule had been set further to direct contact between Dr. Pachmann and the IOC's counsel. On 12 July 2016, Dr. Pachmann wrote to the IOC stating that he would not be available on 21 July 2016. On 13 July 2016, the Chairman of the IOC Disciplinary Commission, Mr Denis Oswald, advised Dr. Pachmann that the hearing had been fixed in the later part of the afternoon on 21 July 2016 based on the understanding between him and the IOC's counsel. Nevertheless, additional dates were suggested to Dr. Pachmann – 18, 19, 20 and (once again) 21 July 2016. It was also indicated that a hearing could be held via videoconference. Dr. Pachmann was invited to indicate which date he chose for the hearing. Dr. Pachmann ultimately rejected all of these proposed dates.

On 14 and 15 July 2016, after further correspondence, Mr Oswald confirmed that a hearing would take place on 21 July 2016. On 21 July 2016, the IOC Disciplinary Commission conducted a hearing. Neither the Athlete nor Dr. Pachmann were in attendance.

On 4 October 2016, the IOC Disciplinary Commission issued a decision (the “Appealed Decision”) in which the Appellant was found to have committed an ADRV (retesting of samples) pursuant to the IOC ADR Beijing 2008 and was disqualified from the women’s high jump event in which she placed 3rd.

On 25 October 2016, the Athlete filed a Statement of Appeal with the CAS challenging the Appealed Decision. In her Statement of Appeal, the Athlete nominated Dr. Dominik Kocholl, Attorney-at-Law, Innsbruck, Austria, as an arbitrator, however she also stated the following: *“17 According to R48 CAS Code Appellant herewith nominates Mr. Dominik Kocholl, Austria, as its Arbitrator. This nomination is, however only been made in order to comply with the appeal requirements, and can under no circumstances be construed as acceptance of the closed list of arbitrators which are exclusively allowed to arbitrate on CAS Panels. For this reason and pursuant to her procedural request Appellant herewith nominates Dr. Lucien Valloni, Switzerland, as arbitrator for Appellant’s side”*.

On 2 November 2016, the IOC nominated Mr Mark A. Hovell, Solicitor, Manchester, England, as an arbitrator. On 17 November 2016, the Athlete wrote to the CAS Court Office challenging Mr Hovell’s appointment as an arbitrator in this case. On 20 December 2016, the Athlete wrote to the CAS Court Office, *inter alia*, maintaining her challenge of Mr Hovell’s appointment as an arbitrator and requested that the ICAS render a decision in that regard. Moreover, the Athlete requested information regarding the persons at ICAS who would be rendering such a decision and

stated that *“such formal decision of the ICAS is even more important as the Appeal Division’s President did not step down from her position given the first appointment of Prof. Matthew Mitten who was through his nationality directly involved in the matter”*. The Athlete also stated that she upheld her challenges *“against the other members of the Panel as well, and she expects an additional decision of the ICAS pursuant to her challenge filed on 7 December 2016”*. In particular, the Athlete expressed concerns regarding the appointment of Judge Williams SC as President of the Panel, and requested Judge Williams SC to provide further information regarding his background. On 6 January 2017, the ICAS Board dismissed the petition for challenge regarding the appointment of Mr Hovell.

A hearing was held on 30 and 31 May 2017 at the CAS premises in Lausanne, Switzerland.

### Reasons

1. At the hearing, the Athlete had submitted that she was not contractually bound by the Beijing Entry Form, and therefore the Beijing ADR, because she had not signed the document.

The Panel came to the conclusion that, as under Swiss law contracts do not have to be in writing, even if an athlete did not sign the Entry Form of the Olympic Games (as it might be someone at the NOC who signed on his/her behalf), his or her conduct, i.e. participating in Beijing 2008 and submitting him/herself to Doping Control, could amount to an acceptance to be bound by the rules and regulations of the sporting competition, in particular its ADR. Therefore, there was an implied contractual relationship between the athlete and the IOC, as the IOC was known to be the last authority of last resort on any question concerning the Olympic Games. For the Panel, the Athlete could not ‘have it both

ways'. If the Athlete argued that she was not bound by the Beijing Entry Form and the Beijing ADR, the logical conclusion was that she would also not have been allowed to participate in Beijing 2008 or to have finished in third place in the women's high jump event and to have obtained a bronze medal.

2. The Athlete was submitting that the turinabol testing advancements had been made some time ago, around 2012 and onwards, and that there was no need for the IOC to wait until 2016 to carry out the re-analysis.

The Panel recalled that analysis was not without costs and that it was clearly in the IOC's best interests to wait as long as possible before re-analysing, in order to see if the new testing methods enabled it to uncover positives that would have previously been undetectable. Additionally, the amount of urine in the sample was limited and therefore the number of re-analyses to be carried out restricted. One caveat to that was where samples could be affected by time (so substances are naturally broken down or are created over time). However, as turinabol was an exogenous anabolic steroid, it could not be created naturally in the sample of an athlete. Therefore, any delay in re-analysis or potential changes regarding the samples' temperatures during that timeframe could not result in the AAF.

3. The Athlete was also submitting that the two independent witnesses used by the IOC in the opening and splitting of the Athlete's samples were not truly independent.

The Panel noted that while questions could be asked about the LAD's selection process for independent witnesses, there had been absolutely no evidence submitted in this

case to suggest that any such witness had 'tampered' with the samples or doctored the minutes/reports. For example, if Dr. De Boer had reported anything to indicate that there was a mistake in the sample opening/re-sealing procedure but the witness had failed to record it in their minutes/report, then the Panel might have been more convinced by the Athlete's arguments regarding the witnesses' lack of independence contributing to the Athlete's AAF. However, no such claims had been made and no evidence submitted to cast doubt on the actions of the two witnesses. Further, the Panel noted that tampering with sample bottles was a practice to clean dirty samples, not to contaminate clean ones. Accordingly, in summary, the Athlete had failed to submit any evidence to convince the Panel that the actions (or indeed any purported lack of true independence) of the witnesses "*could reasonably have caused*" the Athlete's AAF.

4. The Athlete further argued that her right to be heard had been violated by, *inter alia*, (a) the IOC not permitting her, or her representatives, to attend the opening, splitting and re-testing of her samples; and (b) its own extreme hurry (i.e. its own fault).

With regard to the first argument, the Panel recalled that pursuant to ISL 2015/16, the presence of the Athlete or her representative was not a pre-requisite for the IOC to conduct the B-Sample opening and splitting procedure. In any event, the Panel noted that the Athlete, instead of (i) attending the procedure herself or sending a representative, and request her representative to closely inspect the procedure to ensure that it complied with any applicable regulations, or (ii) not attending or sending a representative, and argue that her right to be heard had been violated, had chosen a hybrid third option

and had sent Dr. De Boer (but not as a representative), asking him to inspect the procedure (but only from a distance), and instructing him not to sign any documents on her behalf to ensure the documents stated that she was not represented. For the Panel, in doing so, the Athlete had perhaps missed an opportunity to validate, or alleviate, any concerns she had with the procedure. As regards the Athlete herself, the Panel accepted both the fact that she was ill and that she would have otherwise attended. Finally, with regard to the fact that her counsel was unable to attend himself when the B-Sample was split, the Panel noted that the Athlete had provided a power of attorney naming six attorneys, one of which was Dr. Pachmann, but that it had never heard why one of the other ones could not attend on her behalf. The Panel was therefore satisfied that the IOC had made reasonable attempts to accommodate the Athlete, but when unsuccessful, it was within its rights to appoint an independent witness and proceed with the procedure. The Panel was comforted by the fact that to the extent that the Athlete did have a right to attend, she exercised this right by sending Dr. De Boer (irrespective of whether he was designated as an official representative or not). Accordingly, there was no violation of the Athlete's right to be heard.

With regard to the second argument that the IOC had acted hastily, the Panel could see some merit in it (for example regarding the date for the IOC Disciplinary Commission hearing). However, the Panel did not believe this amounted to a violation of the Athlete's right to be heard or her procedural rights. The rationale behind the IOC re-testing samples as closely as possible to the 8 year statute of limitation period was to maximise the chances of detecting previously undetectable substances. Accordingly, the re-testing

could, and should, not have been done as early as 2011. In relation to the procedure itself, the Panel accepted that deadlines in the analytical process were short, but as noted above, the non-attendance of the Athlete during the sample splitting procedure did not prohibit the IOC from proceeding. The IOC were clearly concerned that it had no power to provisionally suspend the Athlete, so its processes needed to be followed so the IAAF could follow its processes and potentially ensure the Athlete did not compete at Rio 2016. That noted, the process regarding the AAF itself still ran through to an IOC Disciplinary Commission hearing. The process may have been swift, but any procedural issues were cured at the CAS level. The Athlete was provided every opportunity to be heard during the present CAS proceedings.

5. The Athlete was claiming that the IOC was barred from acting against her as it had not appealed the negative result of her sample test from Beijing 2008.

The Panel determined that the negative outcome of the Athlete's sample analysis (i. e. test) in Beijing 2008 was not a 'decision' which needed to be appealed in order for the IOC to reserve their right to re-test her sample 8 years later. The outcome of the test in 2008 was negative, and it was a report of the analysis/testing process and its result for that sample. The Athlete's samples, which were retained pursuant to Article 6.5 of the Beijing ADR, were re-tested in 2016. Those "re-tests" returned a positive result which initiated a disciplinary procedure ultimately leading to the Appealed Decision, the appeal of which was the basis of these CAS proceedings.

6. The Athlete was also submitting that the re-testing program and subsequent automatic

disqualification after 8 years was a violation of numerous provisions of Swiss law.

The Panel conceded that 8 years was a long period of limitation and could be considered to be harsh, but was however satisfied that it was not excessive in the context of anti-doping (WADC 2015 even increased this period to 10 years). It represented a consensus which had been incorporated into the WADC. Its scope was predominately to look at a single event. If an athlete had competed in that event with the benefit of a prohibited substance, then the regulations were in place to effectively remove that athlete's performance, to ensure a level playing field for the remaining athletes. The records needed to show which one of those competing without the benefit of a prohibited substance had come first and the rewards (medals, prize money, pins, the accolade, etc.) needed to go to the unassisted winner. The Panel recalled that it was not a matter of the athlete's intent, fault or negligence. It might be that when that was examined elsewhere a perfectly plausible explanation was advanced that resulted in the athlete receiving no ban at all and his/her reputation remained intact. When that matter was heard, s/he was able to defend him/herself. Therefore, his/her right to defend him/herself against further sanctions was not affected.

### **Decision**

As a result, and after taking into due consideration all the evidence produced and all submissions made, the Panel rejected the Appeal by the Athlete in its entirety and upheld the Appealed Decision.

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CAS 2016/A/4843

**Hamzeh Salameh & Nafit Mesan FC v.  
SAFA Sporting Club & Fédération  
Internationale de Football Association  
(FIFA)**

24 November 2017

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**Football; Termination of the employment contract without just cause by the player; Determination of the law applicable to the dispute; Definition of contract of employment under Swiss law; Existence of a valid and binding employment contract based on the presence of the *essentialia negotii* in an agreement; Annulment of contract based on material error; Definition of professional football player; Termination of a contract of employment with just cause; Burden of proof; Joint and several liability of a player's new club to pay compensation; Principle of positive interest**

#### **Panel**

Mr Olivier Carrard (Switzerland), President  
Prof. Massimo Coccia (Italy)  
Mr Jirayr Habibian (Lebanon)

#### **Facts**

Mr Hamzeh Salameh (the "Player") is a Lebanese football player, born on 3 May 1986.

Nafit Mesan FC ("Nafit Mesan") is a football club with its registered office in Amarah, Iraq. It is an affiliated member of the Iraqi Football Federation ("IFA"), which is itself affiliated with the Fédération Internationale de Football Association ("FIFA").

SAFA Sporting Club ("Safa") is a football club with its registered office in Beirut, Lebanon. It is an affiliated member of the Lebanese

Football Federation ("FLFA"), which is itself affiliated with FIFA.

FIFA is the international governing body of football, with its registered office in Zurich, Switzerland.

On 17 October 2013, the Player and Safa signed a document titled "Sports Agreement" (the "Sports Agreement") valid as from 17 October 2013 until 17 October 2018 and in accordance with which Safa obliged itself, *inter alia*, "to provide medical insurance to [the Player] during the term of [the Sports Agreement]", "to pay an amount of USD 10,000 (ten Thousand Dollars) to [the Player] for each season during the term of [the Sports Agreement]"; "to pay a monthly salary of USD 1,000 (One Thousand US Dollars) to [the Player] during the term of [the Sports Agreement]". As to the applicable law, Article 7 of the Sports Agreement provides that "the applicable rules are the regulations of the Lebanese Football Association".

On 23 July 2014, the Player signed an employment contract with the Nafit Mesan valid until 15 June 2015, according to which he was entitled to receive a salary of USD 125,000 payable as follows: "40% from the total amount of the contract will be paid upon of completing the contract procedures (...); 30% from the total amount will be paid as a monthly salary (...); 30% from the total amount of the contract will be paid at the end of the above mentioned period".

On 25 July 2014, Nafit Mesan inserted information in the FIFA Transfer Matching System ("TMS") in the aim of obtaining the Player's International Transfer Certificate ("ITC"). On 5 August 2014, the FLFA rejected the relevant ITC request of the IFA through the TMS stating that the contract between Safa and the Player had not expired. On 2 September 2014, the IFA requested the assistance of FIFA with regard to the provisional registration of the Player for Nafit

Mesan. On 10 September 2014, the FLFA informed FIFA that it insisted on the rejection of the ITC's request for the Player since the latter was under contract with Safa until 17 October 2018. On 16 September 2014, the Single Judge of the Players' Status Committee rendered a decision authorizing the IFA to provisionally register the Player for Nafit Mesan with immediate effect. In said decision, the Single Judge concluded that Safa did not seem to be "*genuinely and truly interested in maintaining the services of the player*", but was "*rather looking for financial compensation*".

On 27 September 2014, Safa lodged a claim in front of FIFA against the Player and Nafit Mesan arguing that the former was to be held liable for breach of contract without just cause, and requested to be awarded compensation. Safa further claimed that Nafit Mesan was to be held jointly and severally liable for the payment of such compensation, as it induced the Player to terminate the Sports Agreement unilaterally. Moreover, Safa requested sporting sanctions to be imposed on the Player and Nafit Mesan.

On 12 January 2015, the Player and Nafit Mesan terminated their employment agreement by mutual consent. The Player then signed an employment agreement with the Omani club Al Nasr Sports Club, valid until 31 May 2015. In June 2015, the Player returned playing for Safa.

On 17 June 2016, the FIFA Dispute Resolution Chamber (the "FIFA DRC") rendered the appealed decision in which it held that the Player acted in breach of his employment contract concluded with Safa. As a consequence, the FIFA DRC imposed on Nafit Mesan a ban from registering any new players, either nationally or internationally, for the two next entire and consecutive registration periods, as well as a four-month restriction on the Player's eligibility to play in

official matches. Additionally the Player and Nafit Mesan were held jointly and severally liable to pay to Safa compensation for breach of contract in the amount of USD 312,375

### Reasons

1. Article 187(1) PILA stipulates how the applicable law is to be determined in each case. The provision reads as follows: "*The arbitral tribunal shall rule according to the rules of law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected*".

According to the legal doctrine, the choice of law made by the parties can be tacit and/or indirect, by reference to the rules of an arbitral tribunal (see CAS 2014/A/3850 para. 45 *et seq.* quoted by HAAS U., *Applicable law in football-related disputes – The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law*, in: CAS Bulletin 2015/2, pp. 9-10). In the present case, in agreeing to arbitrate the present dispute according to the CAS Code, the Parties have submitted to the conflict-of-law rules contained therein, in particular to Article R58 of the CAS Code.

In light of the foregoing, the Panel finds that the dispute at hand shall be decided based on the various regulations of FIFA, in particular the RSTP. Swiss law shall be applied to matters not covered by relevant FIFA regulations.

2. According to Swiss law, the individual employment contract is a contract whereby the employee has the obligation to perform work in the employer's service for either a fixed or indefinite period of time, during which the employer owes him a wage (Article 319(1) of the Swiss Code of Obligations - "CO"). The main elements of

the employment relationship are the employee's subordination to the instructions of the employer and the duty to personally perform work (Decision of the Swiss Federal Tribunal 4C.419/1999 of 19 April 2000; ATF 112 II 41).

3. The Appellants then argue that the Sports Agreement lacks the required elements to be considered as a binding employment contract. In the Appealed Decision, the FIFA DRC found that the Sports Agreement contains the *essentialia negotii* of an employment contract.

The Panel shares the same opinion. The Sports Agreement signed by the Parties is, to all effects and purposes, a binding and valid agreement since it had all elements necessary for a *bona fide* employment contract: it establishes that the Player is a football player for Safa during a fixed period of time, and that, in exchange, Safa has to pay to the Player a staggered remuneration.

The Panel, therefore, has no doubt that the Sports Agreement constitutes a valid and binding employment contract.

4. Moreover, referring to Lebanese and Swiss contract law, the Appellants submit that the conclusion of the Sports Agreement was vitiated by an error since the real intent of the Player was to conclude a "*unilateral agreement to i) allow [Safa] to register him with FLFA in light of the FLF new law, ii) to amalgamate his footballing expenses in one lump-sum payable to him if he chooses to render his services for [Safa] and not payable to him if she [sic] chooses not to do so*".

In this respect, the Panel observes that the provisions of the Swiss Code of Obligations ("CO") on error are art. 23, 24 and 25 CO. Accordingly, a contract is not binding because of an error only if (i) the error is

material and (ii) the invocation of the error is not contrary good faith.

In the Panel's opinion, the foregoing provisions do not allow the relief sought by the Appellants, *i.e.* the conclusion that the Sports Agreement was vitiated by an error. The Panel considers that the legal argument raised by the Appellants is not supported by its findings relating to the content of the Sports Agreement. It is indeed clear from its text that the Sports Agreement constitutes an employment contract. There is therefore no doubt that the Player would have refrained from signing the Sports Agreement if his real intent was not to bind himself. The Panel further notes that the Player validly bound himself since this contract does not present any kind of unbalance that would trigger its nullity either under Swiss law or under FIFA rules.

In conclusion, the Panel finds that the Player was bound by the Sports Agreement.

5. As to the Player's challenge of the DRC's conclusion that he be considered a professional football player, Article 2(2) RSTP reads "*A professional is a player who has a written contract with a club and is paid more for his footballing activity than the expenses he effectively incurs (...)*". The definition of "professional" in the RSTP is clear. To be a professional, the Player must meet two cumulative requirements: a) he must have a written employment contract with a club and b) must be paid more than the expenses he effectively incurs in return for his footballing activity (CAS 2015/A/4148 & 4149 & 4150 para. 64; TAS 2009/A/1895 para. 29). Furthermore, according to CAS jurisprudence, the status of the player as a "professional" is exclusively defined in the RSTP without any reference to national regulations (see TAS 2009/A/1895 quoted in: DUBEY J.-P., *The jurisprudence of the CAS*

*in football matters (except Art. 17 RSTP)*, CAS Bulletin, 1/2011, p. 4.).

It is not disputed by the Parties that the Player and Safa have signed a written agreement on 17 October 2013. It follows that the formal requirement (existence of written contract) set out in Article 2(2) RSTP is met.

According to CAS jurisprudence, the decisive substantive criterion for qualifying a player as a “professional” is whether the amount is “more” than the expenses effectively incurred by the player. In this respect, it is irrelevant whether it is much more or just a little more (CAS 2009/A/1781 para. 46; CAS 2006/A/1177 para. 7.4.5). The FIFA regulations do not stipulate a minimum wage. The player can still be considered as a non-amateur, even if he agrees to perform services for a meagre salary (CAS 2006/A/1027 para. 18). The annual remuneration of the Player was USD 22,000, *i.e.* a gross monthly salary of USD 1,833.

The Player submits that his monthly football-related expenses amounted to USD 2,015. However, the Panel observes that the list of expenses provided by the Player contain expenses that are not related to his football activity, namely: housing, utilities, food & nutrition, personal care items, personal clothing, internet, cell phone and gym. The only expenses that could fall into the category of football-related expenses are transportation and sport clothing, *i.e.* a total of USD 242. It results that the Player was paid more for his footballing activity than the expenses he effectively incurred to practice football. The second condition set out in Article 2(2) RSTP is therefore met.

Based on the FIFA regulations and in view of the circumstances of the case, the Panel

concludes that the Player had signed a professional contract.

6. The Player being considered as a professional player, the provisions regarding the maintenance of contractual stability between professionals and clubs in Article 13 to 18bis RSTP – including the consequences of terminating a contract without just cause – do apply.

In this regard, Article 13 RSTP, provides “*A contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement*”. Article 18(5) RSTP reads that “[*i*]f a professional enters into more than one contract covering the same period, the provisions set forth in Chapter IV [Maintenance of contractual stability between professionals and clubs] *shall apply*”.

The Player breached the Sports Agreement by entering into an employment contract with Nafit Mesan before the expiry of that concluded with Safa. Then, the question arises whether the Player had just cause to terminate the contract. In this regard, Article 14 RSTP reads “[*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”.

The Appellants maintain that, in any case, the Player had just cause to terminate the Sports Agreement because he had valid reason to believe that Safa did not intend to register him for season 2014/2015. They further claim that Safa did not provide a health insurance and failed to pay the remuneration stipulated in the Sports Agreement.

7. In this respect, the Panel reminds the well-established CAS jurisprudence concerning burden of proof (CAS 2016/A/4580; CAS

2015/A/309; CAS 2007/A/1380, with further references to CAS 2005/A/968 and CAS 2004/A/730). In the case at hand, the Panel observes that the Appellants' arguments that the termination of the Sports Agreement was justified are unsupported. In particular, the Panel notes that the evidence submitted by the Appellants did not contain any written records evidencing that the Player requested payment of his salaries. In this regard, the Panel recalls that according to CAS jurisprudence, a player that is not being paid his salaries has the onus of giving a proper notice to the club before unilaterally terminating a contract for just cause. If, after the player's warning, his club is still not paying the missing salaries, the player can terminate the contract (only in some exceptional circumstances – which are not given in the present case – no warning is necessary) (see CAS 2006/A/1180, CAS 2012/A/2698 and CAS 2013/A/3331).

In consideration of the above, the Panel believes the Appellants have not fulfilled their burden of proof, and that it could thus not determine with the required degree of certainty the Player had just cause to terminate the Sports Agreement.

8. Having established that the Player was not entitled to terminate the Sports Agreement and having therefore agreed with the FIFA DRC that there was a breach of contract committed by the Player, the further issue to be decided by the Panel is what amount of compensation for breach of contract Safa is entitled to receive from the Player. In addition, pursuant to Article 17(2) RSTP (second sentence) *“If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment”*.

This provision plays an important role in the context of the compensation mechanism set by Article 17 RSTP. As established by CAS jurisprudence, it is aimed at avoiding any debate and difficulties of proof regarding the possible involvement of the new club in the player's decision to terminate his former contract, and at better guaranteeing the payment of whatever amount of compensation the player is required to pay to his former club on the basis of Article 17 RSTP (see among others CAS 2013/A/3149 para. 99).

9. The Appellants claim that Safa has failed to prove that it sustained actual damage due to the breach and should therefore be denied the right to any compensation.

In this respect, the Panel observes that Safa proved that the Player breached his employment without just cause. It results that pursuant to Article 17(1) RSTP, the Player *“shall pay compensation”* to Safa, to be determined under the provisions of Article 17(1) RSTP and in light of the principle of the *“positive interest”* under which compensation for breach must be aimed at reinstating the injured party to the position it would have been in, had the contract been fulfilled to its end (CAS 2015/A/4206 & CAS 2015/A/4209; CAS 2012/A/2698).

Turning to the calculation of the compensation, the Panel preliminarily notes that in the Sports Agreement the Parties have not agreed any contractual remedy in case of breach. As a result, the actual measure of the damages sustained by Safa should be assessed with due consideration for the factors provided in Article 17(1) RSTP. With respect to the *“objective criteria”*, the Panel observes that the Appellants claim that the Player returned playing for Safa from 1<sup>st</sup> June 2015 to 10 January 2016 and from 24 April 2016 until

11 August 2016. The Panel considers that this circumstance – which was unknown to FIFA at the time of the Appealed Decision – must be taken into consideration for the assessment of the compensation. The relevant period for the calculation of the compensation is therefore from 23 July 2014 (*i.e.* the date of the breach of the Sports Agreement) until 1<sup>st</sup> June 2015 (*i.e.* the date of the Player's return to Safa). This period of time corresponds to season 2014/2015.

Furthermore, the Panel observes that, towards the end of August 2014, Nafit Mesan made an offer to Safa consisting in the loan of the Player to Nafit Mesan for the 2014/2015 season. The offer stipulated that Nafit Mesan was ready to pay an amount of USD 125,000 as a compensation for the services of the Player. The Panel considers that such amount is particularly relevant to assess the Player's market value at the relevant period of time.

Having said that, the Panel believes it is adequate to also take into consideration the fact that Safa has saved the player's remuneration during the 2014/2015 season, *i.e.* USD 22,000. Therefore, the amount of USD 22,000 must be deducted from the Player's market value at the relevant period of time (*i.e.* 125,000). This would result in an amount of USD 103,000.

In light of the foregoing, the Panel finds that the amount of USD 103,000 represents the actual damage incurred by Safa as a result of the termination by the Player of the Sports Agreement without just cause. Said amount takes into account the Player's market value, the savings made by Safa, the fact that the Player breached the Sports Agreement in the protected period and the fact that the Player returned to Safa on 1<sup>st</sup> June 2015. This conclusion takes also into

account the specificity of sport, which is in itself not an additional head of damage, but a factor to take into account in the evaluation of the other elements.

### **Decision**

The appeal filed by Hamzeh Salameh and Nafit Mesan FC on 17 December 2016 against the Decision of the FIFA Dispute Resolution Chamber rendered on 17 June 2016 is partially upheld.

The principal amount relating to the compensation for breach of contract is fixed at USD 103,000.

All other points of the Decision of the FIFA Dispute Resolution Chamber rendered on 17 June 2016 are confirmed.

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CAS 2017/A/4947

**Ion Viorel v. Romanian Football Federation (RFF)**

6 October 2017

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**Football; Match-fixing; Necessity of brief summary of witnesses' expected testimony under Article R55 CAS Code; Impartiality of witness; Necessity of translation of documents under Article R29 CAS Code; Discretion regarding admissibility of evidence in arbitration; 2-year ban and right to exercise profession and enjoy economic freedom; Independence and impartiality of first instance judicial body; Applicable law and *lex mitior***

#### **Panel**

Mr Jacopo Tognon (Italy), Sole Arbitrator

#### **Facts**

Mr. Ion Viorel (the "Appellant") is a football coach of Romanian nationality. At the time of the facts he was the coach and part of the management staff of the Romanian team Gloria Buzau, which was playing in League 2 of the Romanian National Championship.

The Romanian Football Federation (the "Respondent" or "RFF") is the governing body of football in Romania and is a member of the Union des Associations Européennes de Football ("UEFA") and of the Fédération Internationale de Football Association ("FIFA").

Between 20 September 2014 and 30 May 2015, in total nine games played by FC Gloria Buzau in League 2 of the Romanian National Championship against various other teams were investigated. Following each match, within the UEFA Betting Fraud Detection System ("BFDS"), the company

SPORTRADAR AG ("Sportradar") issued a report with regard to the respective match; in each report it concluded that the respective betting patterns (combined with other elements described in the report) suggested that betters may have had/had prior knowledge of the final result and that the match should therefore be considered (highly) suspicious and (possibly/most likely) manipulated for betting purposes. That further the betting could not be explained by any logical factors and therefore the BFDS believed that (it was possible that) the respective match was (very) likely manipulated with the primary aim of securing fraudulent betting profits.

As a result of the foregoing, the Department of Integrity and Antifraud of the RFF informed its Secretary General that the result of the aforementioned games played by FC Gloria Buzau, had been manipulated and influenced by, *inter alia*, the technical management, including the Appellant.

On 26 October 2015, the case was referred to the RFF Discipline and Ethics Committee ("DEC").

On 25 May 2016, the DEC passed its Decision (the "DEC Decision"), by means of which, *inter alia*, "by virtue of Article 60 bis with the application of Article 60 paragraph 1, Article 61 and Article 45 of RD of RFF" it imposed on the Appellant "the sanction of prohibiting any football-related activity for a period of 2 years" as well as a sports penalty of 200,000 Romanian Lei (RON).

On 6 June 2016, the Appellant filed an appeal before the Recourse Committee of the RFF (the "RC") against the DEC Decision, requesting the RC to squash the DEC Decision and refer the case back to the Disciplinary and Ethics Committee of the Romanian Football Federation. Alternatively for the RC to deliver

a new judgment, rejecting the initial referral of the case to the DEC.

On 9 November 2016, the RC rendered its decision (the “Appealed Decision”) dismissing the Appellant’s appeal as unfounded. On 19 December 2016, the RC notified its decision to the Appellant.

On 12 January 2017, the Appellant filed a statement of appeal with the CAS against the Appealed Decision.

On 13 June 2017, following request by the CAS of 28 April 2017, the Respondent filed English translations of all “*applicable legal and regulatory norms*” referred to in its Answer to the Appeal.

A hearing took place on 14 June 2017 in Lausanne, Switzerland. In the course of the hearing the Appellant objected to the admissibility of the witnesses called by the Respondent, as well as to the admissibility of the translations filed by the Respondent on 13 June 2017.

### Reasons

1. At the outset the Sole Arbitrator analysed the objection raised by the Appellant regarding the admissibility of the Respondent’s two witnesses, in particular the argument that whereas the Respondent, in its Answer to the Appeal, had stated the name of the witnesses proposed as well as their job and position, but had not produced “*a brief summary of their expected testimony*”.

The Sole Arbitrator, acknowledging to start with that under Article R55 of the CAS Code, the Respondent is expected to provide, together with his answer to the appeal, the names of any witnesses that he intends to call, “*including a brief summary of their expected testimony*”, held that this

provision had to be interpreted in accordance with its procedural spirit. That the requirement was firstly aimed at giving the Panel the necessary information to determine if the examination of a witness would be relevant and pertinent to the facts in dispute and thus to decide on his/her admissibility. That moreover, at the same time, the requirement intended to guarantee the counterparty’s right of defence, so that he/she may have the necessary information to prepare the examination of the witness proposed, in order to preserve his/her right of defence.

Applied to the case the Sole Arbitrator found that the Respondent’s omission was not of sufficient significance to entail the inadmissibility of the two witnesses. In coming to its decision the Sole Arbitrator took into account that the Appellant had had an ample period of time to raise an objection with regard to the admissibility of the witnesses, but chose to only do so during the hearing. Further the witnesses’ “*expected testimony*” was easily deducible for the Appellant from the content of the Respondent’s answer, insofar as the participation of the witnesses with regards to the facts in dispute was clear. In conclusion the Sole Arbitrator found that the admission of these witnesses did not violate the Appellant’s right of defence or infringe any of his procedural rights and guarantees.

2. Still in the context of the alleged inadmissibility of the Respondent’s witnesses the Sole Arbitrator thereupon addressed the argument sustained by the Appellant that one of the witnesses lacked of impartiality, as at the time of the facts he was working for the Respondent.

The Sole Arbitrator determined that the mere fact that in the past, a witness had

been employed by the party by which it has been called, could not lead to the inadmissibility of such witness for lack of impartiality. This was because first, any witness is obliged to tell the truth, subject to the sanctions of perjury envisaged by the Swiss Criminal Code. In addition, when examining any witness, it is the CAS panel's duty to properly assess the credibility and authenticity of the witness' testimony, considering all his personal circumstances and contrasting his testimony with the rest of the evidence. Specifically, the CAS panel had to take into account the potential relationship the witness may have with the parties and the interests he or she may have in connection with the outcome of the proceedings.

3. In the following the Sole Arbitrator Panel turned to the request made by the Appellant during the hearing, *i.e.* to declare as inadmissible the English translation of the relevant provisions invoked by the Respondent in its Answer to the Appeal, on the grounds that it had only been submitted on 13 June 2017, instead of – as requested by the Sole Arbitrator – on 18 May 2017. The Appellant requested the Sole Arbitrator to declare the document inadmissible since, in his opinion, its admission would infringe Article R56 of the CAS Code and his right of defence.

The Sole Arbitrator, acknowledging that Article R29, *in fine*, of the CAS Code provides that a CAS panel has the prerogative to decide whether or not it is necessary to order the parties to produce certified translations of the documents produced in another language, held that the production of a document in a language different than the one of the proceedings does not entail the automatic exclusion of this document. Rather, two conditions should be met for the CAS panel not to

order the production of certified translations: the CAS panel should be in a position to understand the content of these documents, and the non-translation of these documents should not bring the other party at a disadvantage in the proceedings, nor deprive it of its right to be heard. Applied to the case at hand the Sole Arbitrator considered that the Appellant and his counsel – both of a decent command of the Romanian language – perfectly understood the document at stake and that therefore its admission without translation did not cause the Appellant any disadvantage in the proceedings, or violate his right of defence or the adversarial principle. Further, and for the same reason, the admission of the translation into English after filing the Answer to the Appeal did not put the Appellant at a procedural disadvantage, or violated or restricted his rights of defence or to be heard.

4. Further with regard to the translation produced by the Respondent on 13 June 2017 the Sole Arbitrator dismissed the Appellant's argument that it had to be considered as a "new" or "further evidence", in the meaning of Article R56 of the CAS Code. The Sole Arbitrator held that insofar as Article 184 para. 1 of the Swiss Federal Code on Private International Law ("PILA") and Article R44.2 of the CAS Code provide arbitrators with a certain power of discretion to rule on the admissibility or inadmissibility of the evidence submitted by the parties, a CAS panel may decide that the belated production by a party of translations of documents it had produced earlier in a different language cannot be considered as "new exhibits" or "further evidence" on which the party intended to rely, but rather as a supplement of the documentation and evidence it had already brought to the

procedure.

5. In the next step the Sole Arbitrator examined whether, as contended by the Appellant but denied by the Respondent, the sanctions imposed on him were completely unlawful, contravened public order and were contrary to human rights. In particular, the Appellant considered the sanctions imposed on him to violate his right to economic freedom (Article 41 Constitution of Romania) and his right to private property (Article 44 Constitution of Romania).

The Sole Arbitrator concluded that a 2-year ban from any football-related activity did not violate the concerned individual's right to exercise a profession or enjoy its economic freedom. On the contrary, the respective sanction simply limited the individual's capability of performing any football activity, during a temporary and limited period of 2 years. The concerned individual would however continue to enjoy its economic freedom and would be allowed to exercise any profession or economic activity, provided it was not related to football.

6. Thereupon the Sole Arbitrator considered the Appellant's claim that the RC was not an impartial and independent tribunal, in particular not in cases where one of the parties was the RFF itself. In support of his claim the Appellant argued that the regulations on the composition of the RC breached his right to an impartial and independent tribunal insofar as the 5 members of the RC are appointed by the RFF Executive Committee and that they could be renewed under what the Appellant considers to be "a non-transparent procedure". To start with the Sole Arbitrator noted that, despite his general accusation of partiality and lack of

independence, the Appellant had not raised any specific concern or reason that could lead him to suspect or be afraid of the potential lack of independence and impartiality of any or all of the members of the RC. The Sole Arbitrator further noted that despite the fact that according to the Statutes of the RFF, resolutions of the Executive Committee of the RFF appointing the members of its jurisdictional bodies can be challenged in case they are unlawful or contravene the RFF regulations, the Appellant had not challenged the resolution appointing the RC's members for the present case, and that therefore the appointments should in principle be assumed lawful. The Sole Arbitrator further found that it was not sufficient to raise general accusations of partiality and lack of independence regarding a first instance judicial body. Instead, the party intending to challenge that body on grounds of partiality and/or lack of independence had to bring forward specific concerns or reasons that could lead it to suspect or be afraid of the potential lack of independence and impartiality of any or all of the members of the first instance judicial body. Furthermore, the fact that – as in the case at hand - the different federative bodies of the association holding the first instance judicial body play different procedural roles within the federative proceedings – may provide grounds to conclude that these federative bodies are independent and impartial.

7. Lastly, addressing the Appellant's claim that the (retroactive) application of the 2016 edition of the RFF-DR by both the DEC and the RC violated his right to a fair trial (Article 6 of the ECHR) and the prohibition of a retroactive application of the law (Article 7 of the ECHR), the Sole Arbitrator recalled that according to constant CAS jurisprudence, the applicable substantive

rules had to be identified by reference to the principle “*tempus regit actum*”. Therefore, in order to determine whether an act constituted a disciplinary infringement, the law in force at the time the act was committed had to be applied; new regulations, unless more favourable for the accused (*lex mitior*), did not apply retroactively to facts that occurred prior to their entry into force, but only for the future. Furthermore, the assessment of the retroactive application of the law should not be made *in abstracto* but, on the contrary had to be made on a case-by-case basis, taking into consideration the specific circumstances of each case. Applying the above principles to the case at hand the Sole Arbitrator noted that in the 2016 version of Article 61 of the RD of the RFF, the additional sanction established in the last paragraph of the former, 2013 version of this provision, pursuant to which “*The judicial body can apply, in serious cases, the sanction of declaring the person non grata*”, had disappeared. Furthermore, the rest of the disciplinary provision had remained unchanged, with the original wording maintained point by point. Therefore the Sole Arbitrator considered that the 2016 edition of the RD of the RFF was more favourable for the Appellant and that the RC was correct in considering it as the *lex mitior* at stake.

### **Decision**

The Panel therefore dismissed the appeal by Mr. Ion Viorel and confirmed the decision rendered by the Recourse Committee of the Respondent on 9 November 2016.

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TAS 2017/A/4960

Raphaël Hamidi c. Wydad Athletic Club

22 décembre 2017

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**Football; Résiliation du contrat de travail d'un directeur technique sans juste cause par le club; Exception d'incompétence; Prohibition du formalisme excessif; Absence de juste cause de résiliation; Contenu de l'indemnité pour résiliation injustifiée; Indemnité pour tort moral**

#### Formation

M. le Juge Pierre Muller (Suisse), Arbitre unique

#### Faits

Le 13 juillet 2010, Raphaël Hamidi (ci-après: "l'Appelant"), entraîneur professionnel de nationalité espagnole, et le Wydad Athletic Club (ci-après: "le Club", "l'Intimé" ou "le WAC"), club de football affilié à la Fédération Royale Marocaine de Football (ci-après: "la FRMF"), ont signé un contrat, intitulé "contrat d'engagement", en qualité de Directeur technique du Club.

Par courrier du 24 avril 2012, la Fédération Française de Football a adressé à l'Appelant sa licence "UEFA A", indiquant qu'il s'agissait de "l'équivalence européenne de [son] D.E.F (Diplôme d'Entraîneur de Football) obtenu le 06/01/2004".

Par lettre recommandée du 23 août 2012 adressée au Président du Club, l'Appelant a rappelé que ses salaires des mois de juin, juillet et août ne lui avaient toujours pas été versés. L'Appelant exposait en outre, notamment, avoir été surpris de constater que les entraînements de l'équipe "espoir" avaient repris au début du mois, sans qu'il en ait été averti et que deux personnes avaient été mises à l'essai, lesquelles donnaient des directives et

exerçaient sa fonction. Le 4 septembre 2012, l'Appelant, constatant que le courrier recommandé du 23 août 2012 avait été refusé, a adressé au Club une lettre de mise en demeure du paiement des salaires.

Il résulte d'un constat d'huissier de justice établi le 5 septembre 2012 qu'à cette date, l'Appelant a été enjoint de remettre les clés du véhicule qui lui avait été fourni par le Club. Un constat d'huissier établi le 6 septembre 2012 atteste que l'Appelant s'est vu interdire l'accès à son lieu de travail.

Par courrier du 6 septembre 2012, l'Appelant a informé le Club qu'il ne pouvait que constater que le contrat les liant avait été unilatéralement rompu par le WAC et ce, sans motif et sans respect d'une quelconque procédure ou préavis.

Par acte d'huissier du 11 septembre 2012, l'Appelant a mis le Club en demeure de lui verser dans les 15 jours: l'intégralité de ses rémunérations de juin 2012 jusqu'au 30 juin 2014, soit un montant de 1.164.000 MAD, conformément à l'art. 5 du contrat; un montant de 500.000 MAD au titre des frais de rapatriement et déménagement dans son pays d'origine; un montant de 200.000 MAD en réparation de son préjudice moral et un montant de 500.000 MAD au titre des dommages-intérêts pour rupture abusive du contrat.

Par courrier 12 septembre 2012, le Club s'est adressé en ces termes à l'Appelant: "Nous accusons réception à votre notification par huissier datée du 06/09/2012 relative à notre décision de mettre fin à votre exercice comme Directeur Technique au sein du WAC. Cette décision a été prise à la suite de l'invalidation par les membres de l'Organe de Première Instance (OPI) [...], de votre Diplôme pour assurer la fonction de Directeur Technique du Club. [...] nous vous avons adressé une correspondance le 04 Juin 2012 [...]".

Le courrier du 4 juin 2012 auquel fait référence la lettre susmentionnée expose ce qui suit:

*“[...] Nous portons à votre connaissance que [...] les membres de [l’OPI] nous ont notifié, en votre présence, que le diplôme de qualification que vous avez présenté ne répond pas aux critères exigés pour assurer la fonction de Directeur Technique pour laquelle vous avez été engagé, cette notification nous a été confirmée par lettre du 26 juin 2012 n° 19 OPI 12-13. [...]”*

L’Appelant expose que ce courrier ne lui a jamais été adressé. La référence au courrier de l’OPI du 26 juin 2012) est un élément qui conduit à retenir que le courrier du 4 juin 2012 a très vraisemblablement été rédigé postérieurement au 26 juin 2012 et que l’Appelant n’a pas été informé de l’intention du WAC de mettre fin au contrat de travail avant de recevoir le courrier du 12 septembre 2012.

Le 15 janvier 2013 la FIFA, a informé l’Appelant que les litiges entre un directeur technique sportif et un club ou une association ne relevaient pas de sa compétence.

Le 19 février 2013, l’Appelant a saisi la Commission Spéciale de Résolution des Litiges de la FRMF (ci-après: “la CSRL”). Le 22 avril 2014, la CSRL a statué que l’Appelant ne pouvait pas réclamer ses dus financiers auprès du club WAC dès lors que l’OPI avait confirmé que le diplôme de qualification ne répondait pas aux critères exigés pour exercer la fonction de Directeur Technique.

Le 28 avril 2014, l’Appelant a adressé à la Commission Centrale d’Appel de la FRMF (ci-après: “la CCA”) un appel contre cette décision. Le courrier d’accompagnement mentionnait notamment *“concernant l’avance des frais de procédure d’un montant de 2.000 MAD, je vous remercie de m’indiquer les coordonnées bancaires de la FRMF [...]”*. L’Appelant allègue que la FRMF lui a adressé les coordonnées bancaires

par courriel du 5 mai 2014, reçu le 9 mai 2014 et qu’il procéda au paiement requis le même jour. Par courriel du 7 octobre 2014, l’Appelant a relancé la CCA au sujet de cette procédure d’appel en communiquant pour rappel les références de son virement de 2.000 MAD indiquant qu’il avait eu lieu le 9 mai 2014. Par courriel du 1<sup>er</sup> juillet 2014, l’Appelant a à nouveau interpellé la FRMF pour connaître l’état d’avancement de la procédure, indiquant avoir effectué un virement le 10 mai 2014 conformément aux instructions reçues. Par courrier du 12 janvier 2015, transmis par fax le 14 janvier 2015, l’Appelant est intervenu auprès du Président de la FRMF pour le mettre en demeure de lui fournir des informations au sujet de cette procédure, se plaignant d’un déni de justice.

Par courrier du 3 juillet 2015, le Secrétaire Général adjoint de la FRMF a informé l’Appelant que la CCA tiendrait sa réunion le 8 juillet 2015. Il est établi que ce courriel a été adressé à une adresse électronique invalide et que la convocation n’est jamais parvenue à l’Appelant.

Le 8 juillet 2015, la CCA a déclaré l’appel irrecevable, l’Appelant ne s’étant pas acquitté des droits d’appel dans le délai prescrit.

L’Appelant n’ayant pas reçu communication de la décision de la CCA, il a continué de tenter d’obtenir de la FRMF des informations sur la procédure par courriel du 20 octobre 2015, par courrier recommandé du 30 juin 2016, par mise en demeure formelle du 28 septembre 2016 et mise en demeure par voie d’huissier de justice du 4 octobre 2016. Le 8 novembre 2016, l’Appelant a déposé devant le Tribunal administratif de Rabat une requête en référé contre la FRMF tendant à ce qu’il soit ordonné à celle-ci, sous menace de sanction en cas d’inexécution, de lui faire connaître le sort de son appel. Après que le juge ait statué sur le siège, le greffe du tribunal a informé le conseil

de l'Appelant qu'une décision avait été produite par la FRMF, un clerc qui s'est rendu sur place le 27 décembre 2016 ayant pu la photographier avec son téléphone portable. C'est dans ces circonstances que l'Appelant a eu connaissance pour la première fois de la décision de la CCA.

Le 13 janvier 2017, Raphaël Hamidi a déposé au TAS une déclaration d'appel contre la décision de la CCA rendue le 8 juillet 2015 (ci-après: la "Décision attaquée"). Le 26 mars 2017, l'Appelant a déposé son mémoire d'appel, dont les conclusions sont les suivantes:

*"(i) Réformer la décision de la Commission Centrale d'appel de la FRMF du 20 juillet 2015; (ii) Dire et juger la résiliation du contrat aux torts exclusifs du WAC; (iii) Condamner le WAC au paiement de 1.212.500 MAD (Dirham Marocain) au titre des salaires restant dus jusqu'au 30 juin 2014, terme prévu de son contrat, ainsi qu'à 99.000 MAD au titre des avantages en nature dus; (iv) Dire et juger que ces sommes sont assorties d'intérêts de retard au taux de 5% l'an à compter de la date de rupture du contrat; (v) Condamner le WAC au paiement de la somme de 500.000 MAD en réparation du préjudice de carrière de Monsieur Hamidi; (vi) Condamner le WAC au paiement de la somme de 200.000 MAD en réparation du préjudice moral de Monsieur Hamidi; (vii) Condamner le WAC au paiement de la somme de 200.000 MAD correspondant aux frais de sa défense; (viii) Condamner le WAC au paiement des frais de la procédure et droit de greffe et au remboursement des frais de procédure devant la CCA d'un montant de 2.000 MAD; (ix) Dire qu'à défaut de paiement de l'ensemble des condamnations dans les 30 jours le prononcé de la sentence à intervenir, les sommes porteront intérêt au taux de 5% l'an".*

Une audience s'est déroulée au TAS le 26 octobre 2017.

### Considérants

1. Pour la première fois devant le TAS, l'Intimé a soulevé un moyen

d'incompétence selon lequel le contentieux n'aurait pas dû être soumis à la FRMF mais à la FIFA en vertu de l'art. 6 du contrat prévoyant que "[l]out litige devra être réglé à l'amiable entre les deux parties ou, à défaut, être soumis à l'arbitrage du WAC et éventuellement à celui de la FIFA, (...)".

L'Arbitre unique a rappelé qu'il résultait d'un principe général de procédure qu'une exception d'incompétence devait être soulevée préalablement à toute défense au fond. Il s'agit là d'un cas d'application du principe de la bonne foi, qui constitue un principe général du droit. Aussi l'autorité devant laquelle le défendeur procédait au fond sans faire de réserve était compétente de ce seul fait, le défendeur perdant définitivement le droit d'exciper de son incompétence. Cette règle générale pouvait également être rattachée en matière d'arbitrage international au principe dit "d'estoppel", qui interdit à une partie de se prévaloir d'une position contraire à celle qu'elle a prise antérieurement. En l'espèce, il ressortait du dossier que l'Intimé avait pris position sur le fond du litige, en exposant à la CSRL, par courrier du 5 mars 2013, les motifs justifiant selon lui le licenciement de l'Appelant. Il en résultait que l'Intimé était déchu du droit de contester la compétence de la FRMF à ce stade.

2. Après avoir rappelé que la CCA avait déclaré l'appel irrecevable au motif que les frais d'appel avaient été versés au-delà du délai de 5 jours institué par l'art. 34 du Règlement procédural de la CSRL, l'Arbitre unique a établi que si l'art. 25 du Règlement procédural disciplinaire prévoyait effectivement le versement de frais d'appel, il ne s'appliquait qu'en matière disciplinaire. Le Règlement procédural de la CSRL ne contenant pas à son art. 34 la même exigence d'avance de frais dans le cas d'un contentieux de nature contractuelle, la CCA

ne pouvait pas déclarer l'appel irrecevable au motif que les frais d'appel de 2.000 MAD n'avaient pas été versés, respectivement pas été versés dans le délai.

L'Arbitre unique a toutefois relevé que le résultat aurait été le même pour le cas où il aurait été considéré que la CCA était en droit de demander à l'Appelant de s'acquitter d'un montant de 2.000 MAD pour voir traiter son appel. En effet, il aurait été manifestement contraire au principe général de l'interdiction du formalisme excessif pour un organe juridictionnel qui prévoit la possibilité de régler les frais de procédure par un versement bancaire, mais ne rend pas aisément accessible les coordonnées bancaires permettant à la partie instante d'opérer ledit versement, de déclarer ensuite l'acte de procédure irrecevable au motif que le règlement des frais n'était pas intervenu dans un délai aussi court qu'un délai de 5 jours.

De surcroît, il aurait été contradictoire pour la CCA de communiquer par courriel ses coordonnées bancaires, en réponse au courrier accompagnant l'appel déposé le 28 avril 2014, puis de convoquer l'Appelant à une audience le 8 juillet 2015, si cette commission avait véritablement considéré qu'elle était en présence d'un motif de non-entrée en matière; une simple décision d'irrecevabilité sans fixation d'une audience aurait alors suffi.

3. Le contrat de travail liant les Parties a été résilié par l'Intimé avec effet au 30 juin 2012, au motif que l'Appelant s'était trouvé dans la situation, prévue contractuellement, de radiation du corps des entraîneurs.

L'Arbitre unique a toutefois estimé qu'il n'était nullement établi que l'Appelant avait été radié du corps des entraîneurs. Il résultait uniquement de l'instruction que

l'OPI avait considéré que la documentation dont il disposait en ce qui concerne l'Appelant n'était pas suffisante, d'une part parce qu'il y avait une différence de prénoms, qui créait un doute au sujet de la titularité du diplôme, et d'autre part parce que le diplôme en mains de l'OPI n'était pas suffisamment précis s'agissant du niveau de qualification (A, B, etc.) de son titulaire. Pour l'Arbitre unique, il aurait suffi, pour que ces deux incertitudes puissent être levées, d'abord que l'Appelant soit admis à produire un document officiel comportant ses deux prénoms, et ensuite qu'il produise sa licence UEFA A remise par la FFF le 24 avril 2012.

Aux yeux de l'Arbitre unique, il n'était ainsi pas établi que le diplôme dont disposait l'Appelant à l'époque des faits n'était pas susceptible d'être reconnu par l'OPI, ni qu'il aurait incombé à l'Appelant de contester la prise de position de l'OPI pour que les éléments à même de clarifier sa situation soient portés à la connaissance de cet organisme. Rien ne permettait par conséquent non plus de retenir que l'Appelant n'était pas en mesure d'effectuer son travail en vertu du contrat conclu avec l'Intimé. Aucun motif de rupture de la relation contractuelle n'étant réalisé, le licenciement était injustifié.

4. En ce qui concerne l'indemnité due à l'Appelant à titre de résiliation injustifiée de la relation de travail, l'Arbitre unique a jugé que les Parties ayant, à l'art. 5 du contrat, réglé les conséquences d'une résiliation "*pour quelques motifs que ce soit*", en prévoyant le paiement de l'intégralité des sommes dues jusqu'au terme du contrat (30 juin 2014) par la partie souhaitant mettre un terme au contrat, l'Appelant avait incontestablement le droit de réclamer à l'Intimé les salaires afférents à cette période. En revanche, les "*avantages en nature*" (véhicule, téléphone,

billets d'avion) également réclamés par l'Appelant constituaient en réalité des remboursements de frais effectifs liés à l'exécution du contrat de travail; dès lors que l'Appelant avait cessé son activité au service de l'Intimé, il n'avait plus à les assumer et il ne pouvait donc rien réclamer à ce titre. De même, l'Appelant n'apportait aucun élément de preuve de nature à établir le bien-fondé de sa prétention relative au préjudice de carrière, qui n'était ainsi prouvé ni dans son principe ni dans son quantum.

5. Selon l'Arbitre unique, la prétention de l'Appelant en réparation d'un préjudice moral devait également être rejetée. En effet, si l'on pouvait concéder à l'Appelant que l'Intimé avait manqué de délicatesse dans la manière dont il avait mis fin au contrat de travail, il ne s'agissait pas d'un cas d'atteinte illicite à la personnalité de l'Appelant ou d'une atteinte dont la gravité objective et subjective engendrait un droit en faveur de l'Appelant à être indemnisé par l'Intimé. En particulier, il n'était pas établi que l'Appelant ait concrètement subi une souffrance ou une perturbation psychique.

### **Décision**

Partant, l'Arbitre unique a partiellement admis l'appel déposé par Raphaël Hamidi le 13 janvier 2017, a annulé la décision de la CCA du 8 juillet 2015 ainsi que celle de la CSRL du 22 avril 2014, et a ordonné le versement par Wydad Athletic Club à Raphaël Hamidi de la somme de 1.212.500 MAD avec intérêt à 5% l'an dès le 30 juin 2012.

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CAS 2017/A/4968

**Alexander Legkov v. International Ski Federation (FIS)**

31 August 2017 (operative part of 29 May 2017)

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**Skiing (cross-country skiing); Doping (tampering or attempted tampering with doping control); Burden and standard of proof applicable to the imposition of a Provisional Suspension under the FIS ADR; Burden and standard of proof applicable to the lifting of a Provisional Suspension under the FIS ADR; Lack of infringement of the athlete's rights; Assessment of the evidence upon which the provisional suspension is based; Determination of the length of the provisional suspension**

**Panel**

Prof. Jan Paulsson (France), President  
Mr Nicholas Stewart QC (United Kingdom)  
The Hon. Michael Beloff QC (United Kingdom)

**Facts**

Mr. Alexander Legkov (the "Athlete" or the "Appellant") is an international-level Russian cross-country skier.

The International Ski Federation ("FIS", the "Federation", or the "Respondent") is the world governing body for skiing. For its part, the Cross Country Ski Federation of Russia is a member of the Russian Ski Federation ("RSF"), the national governing body for skiing in Russia. RSF is the relevant Member Federation of FIS.

The Athlete challenges an Optional Provisional Suspension, imposed on him by the FIS on 22 December 2016 based on a

potential finding of an anti-doping rule violation (ADRV) at the 2014 Sochi Winter Olympic Games. That suspension is based on evidence made available to FIS by the International Olympic Committee (IOC) concerning alleged Russian State-sponsored doping practices described in a report by Professor Richard McLaren presented in two installments on 16 July and 9 December 2016 (the "McLaren Report"). The Athlete's suspension prevents him from competing in FIS - or RSF - sanctioned cross-country skiing competitions pending the completion of an investigation by the IOC.

Part One of the report reveals the existence of doping at the State level (institutionalized system allowing doped athletes to appear "clean" that occurred before the 2014 Winter Olympics in Sochi up to the 2016 Olympics in Rio de Janeiro). Part Two released in December 2016 allowed the identification of athletes who may have been involved in doping practices. Taken together, the McLaren Reports declared "*beyond a reasonable doubt*" that Russian national institutions planned and carried out a "*carefully orchestrated conspiracy*" aimed at permitting doped Russian athletes to compete dirty while evading the detection of national and international doping controls.

Names of individual athletes in the McLaren Report were encrypted by its author prior to publication. By confidential letter dated 9 December 2016, Professor McLaren stated to the Federation that one sample indicative of potential tampering matched the Athlete. Professor McLaren further confirmed that the Athlete appeared underneath the code A0467 in his report.

Acting on this information, on 22 December 2016, the Disciplinary Commission of the IOC notified FIS that it was opening an investigation against the Appellant. It noted that, of three urine samples and one blood

sample collected and analyzed by the Sochi Laboratory, one of the Athlete's B-samples contained marks indicative of tampering.

On 22 December 2016, the Chairman of the FIS Doping Panel notified the Athlete, via the Cross Country Ski Federation of Russia, that he had been suspended with immediate effect, pending determination of whether or not he had committed an ADRV. The FIS explained the provisional suspension was imposed on the basis of allegations described by Professor McLaren concerning alleged Russian State-sponsored doping practices and the Athlete's suspected involvement in those practices.

On 25 January 2017, the Athlete requested that the IOC notify him of (i) the concrete ADRV of which he was suspected and which fell within IOC jurisdiction; (ii) the factual basis therefor; and (iii) details as to additional or ongoing investigations in his case. The IOC's response, dated 26 January 2017, read in relevant part:

*"At this stage, the IOC considers that the alleged anti-doping rule violation is, without limitation, "tampering or attempted tampering with any part of Doping Control" pursuant to Art. 2 of The International Olympic Committee Anti-Doping Rules applicable to the XXII Olympic Games in Sochi, in 2014 and the concerned samples have been collected in the context [of the] Olympic Games".*

On 25 January 2017, the FIS Doping Panel upheld the provisional suspension.

On 30 January 2017, the Appellant filed a Statement of Appeal to CAS in accordance with Article 13 of the FIS Anti-Doping Rules 2016 (the "FIS ADR") and Article R47 of the Code of Sports-related Arbitration ("CAS Code").

On 13 March 2017, the Panel was constituted as follows: Prof. Jan Paulsson, President; Mr.

Nicholas Stewart QC; and Hon. Michael J. Beloff QC.

On 15 May 2017, a hearing was held at the Court of Arbitration for Sport in Lausanne, Switzerland.

The Appellant submitted that the practices alleged in the McLaren Report did not suffice to demonstrate individual guilt adequate to justify his suspension by FIS. Both the Federation's internal rules and fundamental principles of Swiss and European law mandate, as a condition of any provisional suspension, that the Respondent adduce evidence that the Appellant himself committed an anti-doping rule violation. The McLaren Report's intended scope, moreover, was limited to examining high-level practices and not specific athletes' guilt; the Appellant accordingly submitted that the Respondent fell short of its burden and that the Optional Provisional Suspension should be lifted.

The Appellant considered that the FIS ADR Article 3.1 imposed the burden of proof on the Federation to justify a provisional suspension. According to the Appellant, assertions of an ADRV shall be grounded "*to the comfortable satisfaction of the hearing panel*". Having set forth the legal standard he deemed applicable, the Appellant submitted that the evidence on record was insufficient to uphold the provisional suspension. The McLaren Report, in particular, could not demonstrate any of the conditions which the Appellant considered it to be the Federation's obligation to satisfy.

The Federation maintained that its imposition of an Optional Provisional Suspension was necessary and legally justified. In its view, the FIS ADR require the Appellant – and not the Federation – to demonstrate certain criteria in order to lift a suspension, once one has been instituted. The Appellant in its view has failed to make out these criteria, least of all that an

eventual ADRV charge has “no reasonable prospect” of being upheld. The provisional suspension therefore survived scrutiny.

The Respondent submitted that it acted within its margin of discretion under FIS ADR Article 7.9.2 in imposing the provisional suspension. No individual piece of evidence alone sufficed to ground an ADRV. Taken together, however, the documents demonstrated the Athlete’s involvement. Both athlete-specific evidence and the “broader context” of systematic doping described in the McLaren Report established a “reasonable possibility” of doping and/or tampering with doping controls. In the Federation’s view, the Appellant’s express identification in the McLaren Report as a beneficiary of the doping scheme comfortably situated the suspension within the Federation’s margin of discretion under the FIS ADR. Having argued that the record justified its imposition of the suspension pursuant to Article 7.9.2, the Federation concluded that the Appellant fell short of his burden under Article 7.9.3.2 to warrant the setting aside of his provisional suspension.

### Reasons

1. To start with the Panel stressed that a provisional suspension occupies a space in which an ADRV is asserted, but not yet proven.

Indeed provisional suspensions have a necessarily preliminary character. The Panel considered in this respect that the burden of proof and legal thresholds applicable in this context must reflect the appealed suspension’s provisional nature and track the rules specific to its imposition. It follows that an Optional Provisional Suspension imposed pursuant to FIS ADR Article 7.9.2 is not subject to the strictures of Article 3.1, relating solely to adjudication

of an ADRV. The imposition of a provisional suspension requires a “reasonable possibility” that the suspended athlete has engaged in an anti-doping rule violation (ADRV). The Panel went on considering that a reasonable possibility is more than a *fanciful* one; it requires evidence giving rise to individualized suspicion. This standard, however, is necessarily weaker than the test of “comfortable satisfaction” set forth in Article 3.1 FIS Anti-Doping Rules (ADR), relating solely to the adjudication of an ADRV. Accordingly, a reasonable possibility may exist even if the federation is unable to show that the balance of probabilities clearly indicates an ADRV on the evidence available. Pursuant to Article 7.9.2 FIS ADR, *any* ADRV suspected of an athlete can serve as cause for a provisional suspension against him or her, should the federation so decide. The Panel therefore found that the federation’s burden under Article 7.9.2 was a limited one, but certainly not devoid of content. No plausible interpretation of Article 7.9.2 could require an athlete to disprove unsubstantiated assertions.

2. The Panel went on stating that once a suspension has been put in place and is challenged, Article 7.9.3.2 FIS ADR imposes three, independently sufficient criteria for lifting the suspension: a demonstrable lack of “fault” or “negligence” on the athlete’s part, “no reasonable prospect” of the assertion of an ADRV succeeding on the merits, or the presence of “other facts” making it “clearly unfair” to leave the suspension in place. Article 7.9.3.2 thus plainly imposes a higher threshold to lift a suspension than the FIS ADR require to impose one in the first place. Since additional evidence can be adduced in the period between a suspension’s imposition and ADRV proceedings, moreover, the rule does not

require that “prospects” be assessed by reference to currently available evidence *in isolation*. Demonstrating the negative proposition, of *no* reasonable prospects, therefore requires more than an assertion as to shortcomings with current evidence, such as a patent flaw in the case against the athlete.

3. Having set forth the standard applicable under the FIS ADR to this appeal, the Panel turned to assessing the provisional suspension against the evidence proffered in its support. Accordingly, the Panel asked whether the Federation had demonstrated that, based on the evidence before it, a “reasonable possibility” existed that the Appellant committed an ADRV. It did so *de novo* in light of Articles 13.1.1 and 13.1.2 of the FIS ADR.

The evidence in this appeal derived from one source: the McLaren Report and associated documents from the “Evidence Disclosure Package” (EDP). The McLaren Report itself, as stated, consists of two installments. Part I published on 16 July 2016 considered “*manipulation of the doping control process during the Sochi Games, including ... acts of tampering with the samples within the Sochi Laboratory*”. It concluded that doped Russian athletes were protected from at least 2011 through false reporting of positive test results by the Moscow Laboratory. During the Sochi Games, manipulation of urine samples at the Sochi Laboratory allegedly allowed Russian athletes to continue to dope undetected, even in the presence of international monitors. Part II published on 9 December 2016 focused on the identification of “*any athlete that might have benefited from those alleged manipulations to conceal positive doping tests*”. The document draws from thousands of exhibits and names hundreds of Russian athletes.

The Appellant submitted *inter alia* that he (i) has never been accused of an ADRV; (ii) is unaware what ADRV might potentially be charged; and (iii) is forced to defend himself against assumptions, not evidence.

The Panel considered that a provisional suspension – a non-punitive and interim measure – operates under a standard of scrutiny less exacting than that over ADRV proceedings. Yet, principles guaranteeing a fair hearing inhere in Swiss law. However, those principles cannot be infringed where (i) there is neither “conviction” nor yet a formal “charge” of an ADRV, (ii) the *suspected* ADRV informing the athlete’s suspension is clear i.e. tampering with doping controls, (iii) as a matter of procedural due process, the parties’ equality of arms and the athlete’s rights to a fair hearing and opportunity to present his case were satisfied at the first instance and on appeal. In contrast, the athlete’s reference to a presumption of innocence cannot be considered to be availing. In this respect, Swiss “fundamental principles” including those relating to proof of guilt vary on a spectrum depending on the type of proceeding and cannot simply be transposed from criminal to private law. What is more, since there is no finding of guilt where a provisional suspension is at stake, the latter cannot implicate, still less violate, a presumption of innocence.

Against this background, the Panel did not consider that any of the Appellant’s applicable rights were infringed so as to constitute a violation either of the *ordre public* or of Swiss substantive law.

4. The Panel was sensitive to the Appellant’s concern. His guilt or innocence, though beyond the scope of this appeal, inevitably informed the application of FIS ADR

Article 7.9. The two issues – the likelihood of an ADRV and the validity of provisional measures – were clearly intertwined. The success of any ADRV charge would depend by the Federation’s own admission on further investigations, the outcome of which was at the time of the proceedings unknown, indeed unknowable. This tension, in the Panel’s view, made it all the more imperative that Article 7.9 be applied strictly to require evidence demonstrating at least a reasonable possibility of an ADRV.

The Athlete contested at length the McLaren Report’s capacity to demonstrate his involvement in an ADRV. The Appellant disputed the evidence along multiple dimensions. For the sake of conceptual clarity, the Panel classified the Appellant’s challenges to the evidentiary record as follows:

- Factual challenges: did the Appellant appear in the documents?
- Relevance challenges: if he appeared, was the documents’ relevance to an ADRV evident or explained?
- Credibility challenges: if the McLaren Report explained the relevance of the Appellant’s appearance in a document, was this explanation compelling?

In assessing whether the provisional suspension met legal thresholds required under the FIS ADR, the Panel considered each type of challenge underlying the Appellant’s submissions. The Panel accordingly considered factual points in contention and drew links, if any, between the relevance of each document to potential misconduct. The Panel’s assessment of the documents’ individual and collective value informed its conclusion that the Federation had demonstrated a “reasonable possibility”

of an ADRV in satisfaction of FIS ADR Article 7.9.2.

As mentioned above, the likelihood of an ADRV and the validity of provisional measures are clearly intertwined. The success of any ADRV charge will depend on further investigations, the outcome of which was unknown at the time of the proceedings, indeed unknowable. This tension made it all the more imperative that Article 7.9 FIS ADR be applied strictly to require evidence demonstrating at least a reasonable possibility of an ADRV. In this regard, the implication of an athlete in a clean urine bank whose existence is adduced by a report commissioned by the IOC i.e. the McLaren Report, the existence of lists of athletes purportedly authorized to take a “boosting cocktail” and scheduled to start in medal races and who likewise enjoyed “protected” status under Russia’s doping Scheme on which the athlete’s code appeared particularly when assessed collectively with evidence of tampering with the athlete’s sample bottle, indicated a reasonable possibility of an ADRV. The Panel considered that the evidence sufficed for the limited purpose of Article 7.9.2 of the FIS ADR.

5. Concerning the determination of the length of the provisional suspension, the Panel stressed that an athlete cannot endorse an indefinite and indeterminable suspension as proportionate. Noting the athlete’s reasonable entitlement to legal certainty, it was deemed appropriate and just that the provisional suspension expire after 10 months, at which time it will be for the federation to consider whether or not to seek a further suspension justified by new developments and within the framework of the FIS ADR.

## **Decision**

In light of the above, the Panel partially upheld the Decision of the FIS Doping Panel regarding Provisional Measures in the matter of Mr. Alexander Legkov, dated 25 January 2017. The Optional Provisional Suspension was maintained until 31 October 2017, after which such suspension shall lapse and Mr. Alexander Legkov shall, in the absence of any anti-doping rule violation sanction having been assessed against him, be restored to the *status quo ante* prevailing at the time of the suspension's imposition.

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CAS 2017/A/5006

Harold Mayne-Nicholls v. Fédération Internationale de Football Association (FIFA)

14 July 2017

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**Football; Disciplinary sanctions against a FIFA official for breach of the FIFA Code of Ethics (FCE); Exclusion to the retroactive effect of the FCE edition 2012; Distinction between a request to receive an undue benefit and accepting an undue benefit; Consequence of the non prohibition of attempts to receive an undue benefit under FCE edition 2009; Distinction between an attempt to receive an undue benefit and a request to receive an undue benefit**

#### Panel

Prof. Martin Schimke (Germany), President  
Mr Bernard Hanotiau (Belgium)  
Prof. Luigi Fumagalli (Italy)

#### Facts

Mr. Harold Mayne-Nicholls (the “Appellant”) is a Chilean national. He was the Chairman of the 2018 and 2022 FIFA World Cup Evaluation Committee (the “Bid Evaluation Group”). He is also a former President of the Football Association of Chile.

The Fédération Internationale de Football Association (“FIFA”) is the global governing body for the sport of football.

On 29 March 2010, the Appellant and FIFA entered an “*Agreement (...) regarding the provision of the Services for Bidding 2018/2022 to FIFA*” (the “Consultancy Agreement”).

Under clause 1.1 of the Consultancy Agreement, the Appellant agreed to “*provide*

*FIFA with advice, assistance and other services*” as listed in an Appendix to the agreement.

Under clause 1.3 of the Consultancy Agreement, the Appellant undertook to “*refrain from providing the services when unable to guarantee impartiality, particularly where a conflict of interests exists*”. Further, “*whenever the [Appellant] finds himself in a situation that might seem to others as if he were impartial [sic] he shall immediately inform FIFA*”.

Clause 1.4 of the Consultancy Agreement provided that: “*The [Appellant] acknowledges and agrees that he shall adhere to the FIFA Code of Ethics, in particular in respect to the clauses regarding bribes, consignments and/or gifts. The [Appellant] shall immediately inform FIFA if he is offered, expressly or tacitly, any such benefit. The [Appellant] must review the code, which can be found on fifa.com*”.

Clause 13 of the Consultancy Agreement was entitled “*Anti-Corruption*”. It provided: “*The parties acknowledge that giving and taking bribes can lead to criminal proceedings in accordance with art. 4a of the Swiss Federal Law on Unfair Competition and art. 102 of the Swiss Criminal Code*”.

Between 18 July 2010 and 17 September 2010, the Bid Evaluation Group, chaired by the Appellant, conducted on-site inspection visits to each of the 11 bidding nations. Between 13 and 17 September 2010, the Bid Evaluation Group visited Qatar to conduct a technical inspection visit in respect of Qatar’s bid for the 2022 World Cup. On 15 September 2010, the Bid Evaluation Group visited the Aspire Academy for Sports Excellence (“Aspire”) in Doha, Qatar. During the visit to Aspire the Appellant met Mr. Andreas Bleicher, Aspire’s Executive Director for International Football Affairs. Aspire was referenced numerous times in the bid book submitted by Qatar to FIFA.

Two days after the Bid Evaluation Group departed Qatar, on 19 September 2010 the

Appellant sent an email to Mr. Bleicher with the subject "THANKS AND QUESTIONS". The email stated:

*"Dear Andreas,*

*Was a real pleasure to be at the Academy during our visit to Qatar. Also to play some football and to receive information from your side. After saying that I would like to ask you two questions:*

*a) Do you have possibilities to receive at the football level my son (...) and my nephew (...), during january and february to evaluate and train them?*

*b) My brother in law, former Chilean Davis Cup player, has been in Qatar for holidays a couple of times, and he is really interested in having a chance to coach tennis in a professional way in Qatar. May I give him your e-mail and inform him about any possibility?*

*Thanks and best regards,*

*Harold Mayne-Nicholls".*

Mr. Bleicher replied by email on the same day. The reply stated:

*"Dear Mr. President,*

*It's been a real honor and pleasure to receive you and the FIFA Delegation in Aspire last week. We are delighted that you enjoyed your stay on our premises.*

*It would be an honor for us to host your son and your nephew for a football evaluation and training period in Aspire. February would not be ideal as there are examinations and camps abroad, but January would be possible. (...).*

*Please feel free to provide your brother in law with my contact details. I could arrange the necessary contacts for him (we as Aspire do not hire the Tennis Coaches ourselves, as the tennis specific training is handled by the Qatar Tennis Federation under a special program).*

*Regarding the invitation for the Chile U17 National Champion, one option could be from 3rd to 9th of April, 2011. If this would be fine for you in general, I would send you a formal invitation later on.*

*Best regards,*

*Andreas".*

On the same date, the Appellant sent a further email to Mr. Bleicher which said:

*"Dear Andreas*

*Thanks for your answer.*

*Can you give me more details for my son and nephew. Mainly about the dates, accommodation and training times. And any other aspect you might think will help us to take a final decision.*

*I already gave your email to my brother-in-law. (...).*

*Champion U17. That date fix perfect for us. Please send the invitation, including the age for the players.*

*Thanks and hope to see you again soon,*

*Harold".*

On 20 September 2010, Mr. Bleicher sent an email to the Appellant which stated:

*"Dear Mr. President,*

*The accommodation including means could be in our own Aspire dormitory (they could stay together in a double room or in two single rooms; whatever they prefer) and we could cover the related cost. (...). I will check the exact dates with our Head Coach and dormitory staff after being back, but it might be around 9th to 28th January, may be one week longer, but I need to check. I will send you the formal invitation for the Chile U17 Team then.*

*I got in contact with your brother in law already and will check things for him after my return.*

*Best regards,*

*Andreas Bleicher".*

Later that day, the Appellant sent an email to Mr. Bleicher which said:

*"Dear Andreas,*

*Thanks a lot for your answer. I will come back to you after talking with my son and nephew. Besides that I have two other subjects:*

a) *Invitation in april.*

*As I have a Club General Assembly next Friday, I would like to announce it. Is possible?*

b) *Exchange*

*We have six clubs (...). I was wondering if you can receive 6 boys (one from each club) from January to April (...) as an exchange activity. We can send two U15, 2 U16 and 2 U17.*

*If you agree it can be part of a general agreement between Aspire and our Federation. Please let me know.*

*Best regards,*

*Harold”.*

On 23 September 2010, Mr. Bleicher replied to that email from the Appellant. The reply stated:

*“Dear Mr. President,*

*I just received the information that our Teams would not be available during the suggested period of time (...). Anyhow normally Teams drop out as they sometimes get other official commitments on short notice, so that there might be a good chance to come, but unfortunately I cannot confirm this today.*

*As you suggested, I believe, the best way forward might be to work on a general agreement between Aspire/QFA and your esteemed Federation to get a system in place, which would make things official and reliable for the future. The topic of the 6 boys you asked to send from Jan to April should be thought about carefully as well. So far such long visiting periods never happened before. (...) I'd need to talk to our coaches, educational and dormitory staff as well.*

*Thanks and best regards,*

*Andreas”.*

On 30 September 2010, the Appellant sent a further email to Mr. Bleicher which stated:

*“Dear Andreas,*

*Please let me know whenever you have news. I understand that in April there is no invitation, but we*

*can receive a later one. And about the 6 players, please let me know what do you think will be possible to do.*

*Best regards,*

*Harold*

*PD: And about my son and nephew going in January/February?”.*

Mr. Bleicher replied by email a short while later stating:

*“Dear Mr. President,*

*Thank you very much again for approaching Aspire on the different topics raised by you below.*

*Considering FIFA's ongoing bidding process for the FIFA World Cups 2018/2022 with the involvement of Qatar 2022, we believe it might be advisable not to follow up on these topics at this point, as this might leave space for incorrect interpretations, even though Aspire is not involved in the bidding process, of course not. But other not/wrongly informed parties might mix things up.*

*If you would deem useful, we could pick up the discussion after the bid decision in a clean state and also in the context of a cooperation between your esteemed Federation and the QFA. We believe this would be a transparent solution nobody could argue against.*

*Thank you very much for your understanding.*

*Best regards,*

*Andreas Bleicher”.*

On 17 October 2010, the Appellant replied stating:

*“Dear Andreas,*

*I fully agree. Let us wait until 2011. I think that is the best to establish a Long Term agreement.*

*Best regards,*

*Harold”.*

On 18 October 2010, Mr. Bleicher forwarded the chain of emails set out above to two senior

officials on the Qatar 2022 World Cup Bid Committee (the “Qatar Bid Committee”). The subject line of Mr. Bleicher’s email stated: “*Aspire – Harold M-N*”. The body of the message simply stated: “*Fyi Andreas*”.

On 19 November 2010, the Appellant attended a meeting of the FIFA Executive Committee in Zurich, Switzerland. During the meeting, the Appellant provided a short summary of the inspection tour and the process by which the bid evaluation reports for the various bids were compiled. The bid evaluation report for Qatar contained a short reference to Aspire in a section dealing with the ownership of Stadiums:

*“Stadium name: Khalifa International Stadium*

*[...]*

*Owner/investors/investment budget:  
ASPIRE/Government/USD 71m”.*

On 2 December 2010, FIFA’s Executive Committee met in Zurich to determine the host nations of the 2018 and 2022 World Cups. The Executive Committee voted to award the right to host the 2022 World Cup to Qatar. Since he was not a member of the Executive Committee, the Appellant did not participate in the vote.

Following extensive and persistent allegations of misconduct relating to the bidding and voting process for the 2018 and 2022 World Cups, the Investigatory Chamber of the FIFA Ethics Committee (the “Investigatory Chamber”) commenced an investigation into that process. As part of that investigation, on 22 January 2014 the Appellant voluntarily attended a deposition in New York City, at which he answered questions put to him by the Chairman of the Investigatory Chamber, Mr. Michael Garcia. During the course of the interview, the Appellant denied that he had witnessed any improper conduct or

inappropriate requests during the bid inspection and awarding process. He added that people in the world of football knew that, “*if you offer me something, I will go immediately to report it*”. Following that interview, the Qatar Bid Committee disclosed copies of various documents, including email exchanges between the Appellant and Mr. Bleicher, to FIFA.

On 20 May 2014, the Chairman of the Investigatory Chamber formally requested the Appellant to provide a statement describing all communications between the Appellant and Mr. Bleicher or anyone else affiliated with Aspire between 1 January 2010 and 31 December 2011, together with copies of any such correspondence. The Appellant replied to that request the same day, stating that he was unable to provide records of email communications with Mr. Bleicher in 2010 and 2011, in part because he was no longer able to access all of the email accounts he used during that period. The Appellant stated that he “*remember[ed] exchanging emails with him, asking for the possibility that Chilean youth football players could go to the Aspire Academy on an exchange program. This was never possible as I never received an answer*”. He added that, “*I remember that I also asked if one member of another sport (do not remember which one) from Chile could go. Never received an answer*”. In his response, the Appellant did not mention the requests he had made relating to Mr. Bleicher relating to his son, nephew and brother-in-law.

On 30 October 2014, FIFA wrote to the Appellant stating that based on a preliminary investigation concerning the 2018/2022 FIFA World Cup bidding process, the Chairman of the Investigatory Chamber had determined the existence of a *prima facie* case that the Appellant had committed violations of the FIFA Code of Ethics (“FCE”). On 18 March 2015, the FIFA Ethics Committee informed the Appellant that the investigation had concluded. The letter stated that the Investigatory Chamber had

prepared a final report that would be referred to the Adjudicatory Chamber for its consideration. On 27 March 2015, the Deputy Secretary of the Adjudicatory Chamber informed the Appellant that the Chairman of the Adjudicatory Chamber had examined the report of the Investigatory Chamber and had decided to proceed with adjudicatory proceedings against the Appellant. On 6 July 2015, the Appellant was notified of the decision of the Adjudicatory Chamber. In summary:

- (a) The Appellant was found to have violated Article 13 (General rules of conduct), Article 15 (Loyalty), Article 19 (Conflicts of interest) and Article 20 (Offering and accepting gifts and other benefits) of the FIFA Code of Ethics 2012 (the “FCE 2012”).
- (b) The Appellant was banned from participating in any football-related activity at national or international level for a period of seven years from 6 July 2015.
- (c) (...).

On 15 January 2016, the Appellant notified the FIFA Appeal Committee (the “Appeal Committee”) that he intended to file an appeal under Article 80(1) of the FCE 2012. On 25 January 2016, the Appellant submitted his petition and grounds for appeal to the Appeal Committee. On 22 April 2016, the Appeal Committee notified the Appellant that he had been convicted of violations of Articles 13, 15, 19 and 20 of the FCE 2012, but that the Appeal Committee had decided to reduce the length of the ban on participating in football-related activities from seven years to three years.

On 27 February 2017, the Appellant filed his Statement of Appeal and Appeal Brief with the CAS Court Office.

### Reasons

1. The Panel considers that the appropriate starting point for its analysis of the issue whether the Appeal Committee’s decision should be annulled on the basis that it violated the doctrine of *nulla poena sine legge praevia* is Article 3 of the FCE 2012. This provides that the FCE 2012 “*shall apply to conduct whenever it occurred including before the passing of the rules contained in this Code*”. However, the retroactive application of the FCE 2012 is subject to an important caveat, namely that: “*no individual shall be sanctioned for breach of this Code on account of an act or omission which would not have contravened the Code applicable at the time it was committed*”.

The wording of Article 3 of the FCE 2012 is not a model of clarity. Nevertheless, the essential effect of the article is clear and well established. In CAS 2016/A/4474 the Panel noted that Article 3 of the FCE 2012 applies the new edition of the FCE retroactively unless doing so is less favourable to the individual concerned than applying the version of the FCE that was in force at the time of the events in question. The Panel held that although the starting point was different, Article 3 of the FCE 2012 followed a similar approach to the traditional *lex mitior* principle, which qualifies the general prohibition against retroactive rule-making by permitting the retroactive application of a new rule where its effect is more favourable to the person concerned than the rule in force at the time of relevant events. Accordingly, it is therefore necessary to compare the scope of liability under the relevant ethical rules in force at the time of the Appellant’s dealings with Mr. Bleicher (*viz.* the FCE 2009) and to compare it with the scope of liability under the ethical rules in force at the time of the subsequent disciplinary proceedings before FIFA (*viz.* the FCE 2012). If the application of the FCE 2012 to acts that

occurred in 2010 would be less favourable to the Appellant than the application of the FCE 2009 to those acts, then Article 3 of the FCE 2012 requires the Panel to apply the more generous provisions of the FCE 2009. Article 3 of the FCE 2012 thereby acts as a safeguard against retroactive changes to the applicable rules that have the effect of penalising acts and omissions that were not unlawful at the time when they were committed.

2. The Panel notes that the Appellant's challenge based on the *nulla poena sine legge praevia* doctrine is essentially confined to his conviction under Article 20 of the FCE 2012. In this regard, the Panel notes that:
  - a) Article 20(1) of the FCE 2012 prohibits "offer[ing] or accept[ing] gifts or other benefits". Article 10 of the FCE 2009 prohibits "accept[ing] gifts and other benefits". Neither article, however, expressly prohibits the mere *requesting* of gifts and other benefits.
  - b) Article 5(2) of the FCE 2012 introduced a new provision into the FCE which expressly prohibits *attempts* to do acts that, if committed, would violate the substantive provisions of the FCE 2012. There is no equivalent provision regarding attempts in the FCE 2009.

The salient question, therefore, is whether the express prohibition on "accept[ing]" benefits – which exists in both the 2009 and 2012 versions of the FCE – is capable of being interpreted in a way that includes a situation where a person requests a benefit and intends to receive it, but does not ultimately go on to actually receive it. In seeking to answer this question, the Panel must have regard to the established principles of statutory interpretation. In CAS OG 14/002 the Panel provided the following summary of the applicable

principles of interpretation under Swiss law (see para 7.3-7.4):

*"Under Swiss law, the interpretation of statutes has to be rather objective and always start with the wording of the rule. The adjudicating body – in this instance the Panel – will have to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax. In its search, the adjudicating body will have further to identify the intentions (objectively construed) of the association that drafted the rule, and such body may also take account of any relevant historical background that illuminates its derivation, as well as the entirely regulatory context in which the particular rule is located".*

In CAS 2013/A/3324 & 3369 the Panel provided a useful summary of the relevant principles of interpretation established by the CAS case law:

*"CAS jurisprudence itself establishes the following principles of interpretation of those regulations of a federation breach of which entail disciplinary sanctions:*

*(i) They must be precise if binding upon athletes or, mutatis mutandis, clubs (cf. e.g. CAS 2007/A/1437).*

*(ii) (Accordingly) any ambiguity in the rules must be construed contra proferentem. The rule maker, not the ruled, must suffer the consequences of imprecision (cf. e.g. CAS 2011/A/2612).*

*(iii) However, the rules must be applied according to their spirit not merely according to their letter. In other words, the Panel has to interpret the rules in question in keeping with the perceived intention of the rule maker, and not in a way that frustrates it (cf. CAS 2011/A/354 & 355; CAS 2007/A/1437 and CAS OG 12/002)".*

In relation to (ii), the CAS case law has repeatedly emphasised that inconsistencies or ambiguities in disciplinary rules must be construed against the legislator in

accordance with the principle of *contra proferentem* (see, in this regard, CAS 2013/A/3324 & 3369; CAS 94/129; CAS 2009/A/1752; CAS 2009/A/1753; CAS 2007/A/1473; CAS 2011/A/2612; and CAS 2014/A/3832). Applying the principles of interpretation summarised above, the Panel rejects FIFA's principal argument that the Appellant must be considered to have accepted a benefit from Mr. Bleicher as an inexorable consequence of having requested it. The Panel considers that there is an important difference between inviting a person to provide a gift/benefit and actually receiving such a gift/benefit. In particular, as a matter of straightforward interpretation, the Panel notes that there is a qualitative distinction between accepting a benefit (which entails actual provision and receipt of the benefit) and merely requesting a benefit (which entails a desire to receive a benefit – and an attempt to procure it – but no actual receipt).

The Panel notes that there is nothing in the language of Article 10 of the FCE 2009 or Article 20(1) of the FCE 2012 to suggest that the legislator intended the word “accepts” to include both the actual receipt of a benefit and a mere request for a benefit without any actual corresponding receipt. FIFA's approach would have the paradoxical consequence that a person who requested a benefit would be deemed to have “accepted” the benefit even in circumstances where (i) the request is emphatically rejected by the addressee; and/or (ii) it would be physically impossible for the addressee to provide the benefit requested (for example, because the request relates to a physical object that does not exist). These illogical consequences of FIFA's approach fortify the Panel's conclusion that neither Article 10 of the FCE 2009 nor Article 20 of the FCE 2010

prohibited mere requests to be provided with a particular benefit.

3. Further, while Article 5(2) and Article 20(4) of the FCE 2012 prohibits attempts to accept prohibited benefits, there was no equivalent provision in force under the FCE 2009. Accordingly, pursuant to the *lex mitior* principle reflected in Article 3 of the FCE 2012, neither Article 5(2) nor Article 20(4) can be used in order to establish a violation of Article 20(1) based upon an attempt to accept a prohibited benefit.
4. In any event, however, for the reasons explained above the Panel does not consider that a request for a particular benefit can accurately be characterised as an “attempt” to “accept” the benefit. By requesting a benefit, a person does an act which signals their intention to accept that benefit if it is subsequently offered to them sometime in the future. However, this is conceptually distinct from an “attempt” to accept a benefit – which necessarily involves an attempted act of acceptance/receipt in the present, rather than a mere intention to accept/receive in the future if the request is granted. Accordingly, while it is clear in the present case that the Appellant expressly requested particular benefits from Mr. Bleicher, no benefit was ever actually provided to the Appellant or any of his relatives. While such a request would be likely to violate Article 20 read with Article 5(2) of the FCE 2012 if it was made today, the Panel concludes that it would not have violated Article 10 of the FCE 2009; nor would it have violated Article 20 of the FCE 2012 read in isolation from Article 5(2). In those circumstances, the Panel therefore concludes that the Appeal Chamber's conclusion that the Appellant was guilty of violating Article 20 of the FCE 2012 must be quashed. This conclusion does not mean that the actions

of the Appellant do not constitute a violation of the FCE or that the violation is of minor importance. It simply means that they were not a violation of Article 20 FCE 2012.

In relation to Articles 13, 15 and 19, the Panel notes that the Appellant accepts that these provisions are materially identical to the corresponding provisions regarding general conduct, loyalty and conflicts of interest under the corresponding provisions in the FCE 2009.

The Appellant argues, however, that the creation of Article 5(2) of the FCE 2012 constituted such a fundamental change to the applicable legal framework that the Appeal Committee's findings of violations of Articles 13, 15 and 19 must be set aside. The Panel is unable to accept this submission. While the argument would undoubtedly have merit if the alleged violations of Articles 13, 15 and 19 were dependent upon the express inclusion of attempts within the class of prohibited acts under Article 5(2), this was not the case here. The Appeal Committee did not find that the Appellant had violated Articles 13, 15 and 19 as a result of an attempted act. Rather, the Appeal Committee found that the mere requesting of a benefit was sufficient to constitute a substantive violation of each of those articles regardless of whether or not the benefit was ever actually provided. The Appeal Committee did not (and did not need to) invoke Article 5(2) in order to find that the Appellant had violated Articles 13, 15 and 19 of the FCE 2012. The Appellant's argument that the Appeal Committee's decision violated the *nulla poena sine legge praevia* doctrine is therefore rejected insofar as it relates to Articles 13, 15 and 19 of the FCE 2012.

Having overturned the Appeal Committee's finding of a violation of Article 20 FCE 2012, the sentence imposed by the Appeal Committee in respect of that violation must also be vacated. The two-year prohibition in respect of the violation of Article 20 of the FCE 2012 is therefore annulled. The Panel notes that the sanction imposed by the Appeal Committee in respect of the violations of Articles 13, 15 and 19 of the FCE 2012 assumed that a two-year ban had been imposed in respect of the violation of Article 20, and that any further penalty must be determined in light of that sanction. Accordingly, since the Panel has overturned the Appeal Committee's analysis in relation to Article 20, the premise underpinning the Appeal Committee's approach to the violations of Articles 13, 15 and 19 has also been obviated. In these circumstances, the Panel must re-assess the appropriate penalty on the basis of the violations found by the Panel. In re-assessing the applicable penalty, the Panel is mindful of the *ultra petita* principle. In its Answer, FIFA requested the Panel to uphold the three-year prohibition imposed on the Appellant by the Appeal Chamber. FIFA did not seek to challenge the sanction imposed by the Appeal Chamber and did not advocate for a longer ban. Accordingly, the prohibition imposed by the Appeal Chamber represents the maximum prohibition that the Panel could impose consistently with the *ultra petita* principle. Subject to that three-year maximum, however, the Panel is able to impose a proportionate prohibition which reflects the Panel's assessment of the gravity of the FCE violations that the Appellant committed.

As a preliminary observation, the Panel notes that although the majority of the seven-year ban imposed by the Adjudicatory Chamber and the majority of the three-year ban imposed by the Appeal

Committee were imposed specifically in respect of the violation of Article 20 (which the Panel has held must be quashed) there is no explicit hierarchy amongst Articles 13, 15, 19 and 20 of the FCE 2012. In other words, a violation of Article 20 is not automatically and intrinsically more serious than a violation of Article 13, 15 and 19. Each case will turn on its own individual facts. In the present case, the Panel notes that the Appellant committed serious violations of Articles 13, 15 and 19, although he did not ultimately derive any benefit (whether for himself or for any members of his family) as a result of those violations. The Panel notes that there are a number of aggravating factors in the present case, in particular:

- (a) As Chairman of the Bid Evaluation Committee, the Appellant held one of the most significant positions in the FIFA hierarchy. He was responsible for carrying out important and sensitive functions on behalf of FIFA. In light of his seniority and the high profile of the World Cup as FIFA's flagship international competition, any failure by the Appellant to comply with the ethical standards contained in the FCE was likely to have a significant adverse impact on FIFA's reputation, standing and interests.
- (b) The Appellant made improper requests to obtain a private benefit at a particularly sensitive stage of the World Cup bidding process. In so doing, he abused his position and committed serious violations of Articles 13, 15 and 19 of the FCE 2012. The Appellant's deliberate violations of his ethical obligations were liable to cause severe harm to FIFA and had the potential to jeopardise the fairness, transparency and probity of the entire World Cup bidding

process. Moreover, by actively requesting and soliciting particular benefits, the Appellant's culpability was greater than if he had merely passively accepted an entirely unsolicited benefit.

- (c) The Appellant's violations of Articles 13, 15 and 19 of the FCE 2012 were not committed on a one-off or inadvertent basis. The Appellant deliberately pursued a course of conduct over several weeks without regard to his important ethical obligations under the FCE. Moreover, the Appellant did not voluntarily terminate his misconduct following the initial unsolicited communications with Mr Bleicher. On the contrary, the Appellant persisted in his attempts to secure private benefits from Aspire and only ceased doing so when Mr. Bleicher asked to defer further discussion of the Appellant's requests until a later date in order to avoid "*incorrect interpretations*".

On the other hand, the Panel notes that there are a number of mitigating factors that must be taken into account when determining what constitutes a proportionate penalty for the FCE violations committed by the Appellant. In particular:

- (a) The Appellant has had a long and distinguished career in the sport of football. He has contributed significantly to the development and promotion of the sport around the world. This is the first occasion during the course of that career that here the Appellant has been convicted of any ethical violation.
- (b) At the hearing before the Panel, the Appellant acknowledged that he had made a major mistake by communicating with Mr. Bleicher in the way that he did.

He expressed genuine contrition and regret in respect of his actions. The Panel is satisfied that the Appellant feels sincere remorse for his serious errors of professional judgement.

(c) The Panel is also satisfied that the Appellant has provided an honest account of events since the inception of the Ethics Committee's investigation, and has cooperated in a prompt and proper manner throughout the investigation and subsequent disciplinary proceedings.

While the Appellant's breaches of the FCE were serious and repeated, the Panel does not consider that they are of the same magnitude as the ethical violations that have led to the imposition of bans of three or four years' duration in other recent cases concerning senior FIFA officials. In all the circumstances, the Panel considers that a three-year prohibition on participating in all football-related events is a disproportionate sanction for the violations of Articles 13, 15 and 19 of the FCE 2012 described above. Having regard to the above-listed matters, and having given careful and anxious consideration to the nature of the wrongdoing that the Appellant has been found guilty of, the Panel concludes that a two-year prohibition on participating in any football-related activity represents an appropriate and proportionate penalty.

### **Decision**

The appeal filed by Harold Mayne-Nicholls on 27 February 2017 against the decision of the FIFA Appeal Committee of 22 April 2016 is partially upheld.

The decision of the FIFA Appeal Committee of 22 April 2016 is amended as follows:

- a. Harold Mayne-Nicholls is guilty of violating Articles 13, 15 and 19 of the FIFA Code of Ethics 2012.
- b. Harold Mayne-Nicholls is not guilty of violating Article 20 of the FIFA Code of Ethics 2012.
- c. Harold Mayne-Nicholls is banned from taking part in any football-related activity at national and international level for a period of two years from 6 July 2015.

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**CAS 2017/A/5015**  
**International Ski Federation (FIS) v.**  
**Therese Johaug & Norwegian Olympic**  
**and Paralympic Committee and**  
**Confederation of Sports (NIF)**  
**CAS 2017/A/5110**  
**Therese Johaug v. NIF**  
21 August 2017

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**Cross-country skiing; Doping (clostebol);  
Standing to be sued of the national  
federation; Criteria for a finding of no fault  
or negligence; Duty and standard of care of  
the athlete; Assessment of the level of fault  
within the “no significant fault” category;  
Reduction of the sanction based on  
proportionality**

#### **Panel**

Mr Romano Subiotto QC (United Kingdom),  
President  
Mr Markus Manninen (Finland)  
Mr Jeffrey Benz (USA)

#### **Facts**

The Appellant, the International Ski Federation (the “FIS”), is the international governing body for skiing and snowboarding.

The First Respondent and Cross-Appellant, Ms Therese Johaug (“Ms Johaug”), is an extremely successful and experienced cross-country skier from Norway. She has been a top-level international athlete for approximately 10 years. To date, she has won seven World Championship gold medals and three Olympic medals in skiing.

The Second Respondent, the Norwegian Olympic and Paralympic Committee and Confederation of Sports/Norges Idrettsforbund (the “NIF”) is the umbrella organization of all national sports federations

in Norway. Its Adjudication Committee rendered the decision that is the subject of this appeal (the “Decision”).

At the end of August 2016, Ms Johaug sustained sunstroke while at a training camp in Seiser Alm, Italy. She developed a fever and diarrhea, and sunburn on her lip. She called the team doctor, Dr Fredrik Bendiksen and asked him if he had anything to treat her lip. Dr Bendiksen did not have the product he was looking for, Terra-Cortril. On 3 September 2016, Dr Bendiksen purchased two non-prescription pharmaceutical products at a local pharmacy, Keratoplastica and Trofodermin. He noted that Trofodermin contained the antibiotic neomycin. He also noticed that Clostebol was an ingredient, but did not identify it as a Prohibited Substance.

As with Keratoplastica, Ms Johaug’s lip had not improved, Dr Bendiksen brought her the Trofodermin ointment and explained how to use it. At that point, Ms Johaug asked him if the cream was safe to use. Dr Bendiksen assured her that the cream was “clean”. Ms Johaug took the box containing the Trofodermin cream to her hotel room. She removed the tube of cream and the accompanying insert. She noticed the insert was in Italian but threw it away as she did not understand it. She did not inspect the box and threw it away without noticing that the box carried a red “doping warning” on the side. Ms Johaug used the cream from 4 to 15 September 2016.

On 16 September 2016, Ms Johaug underwent an unannounced doping control test conducted by the Norwegian Anti-Doping Committee. She provided blood and urine samples. As requested by the Doping Control Officers, she completed a Doping Control Form, declaring “Trofodermin” as a medication that she had taken in the last seven days. Ms Johaug’s A sample was tested by the

Norwegian Doping Control Laboratory. The test report submitted on 30 September 2016 noted the presence of a Clostebol metabolite at an estimated concentration of 13 ng/mL. At the request of Anti-Doping Norway, the B sample was analyzed on 6 October 2016. This analysis confirmed the A sample results.

Ms Johaug was provisionally suspended pending a final judgment. On 25 and 26 January 2017, the Adjudication Committee of Anti-Doping Norway (the “Adjudication Committee”) conducted a public hearing in Oslo. On 10 February 2017, the Adjudication Committee issued its Decision. With respect to Ms Johaug’s particular situation, the Adjudication Committee found that she did not exercise the degree of care expected of her to show “*No Fault or Negligence*”. However, as Ms Johaug asked Dr Bendiksen whether the medicine was safe and received his assurances, and given that the possibility he might make an error in this regards was “*hardly imaginable*”, the Adjudication Committee found that the period of ineligibility should be below the 14 months requested by Anti-Doping Norway. It also disagreed with Ms Johaug that a period of ineligibility for longer than “*far less than one year*” would be disproportionate, following settled case law in the CAS. The Adjudication Committee suspended Ms Johaug for thirteen months, commencing 18 October 2016.

On 6 March 2017, the FIS filed a statement of appeal (serving as its appeal brief) against the Decision with the CAS against Ms. Johaug and the NIF.

On June 6, 2017, a hearing was held at the CAS Headquarters located in Lausanne, Switzerland.

### Reasons

1. The NIF was arguing that it was not appropriately a party to the FIS’ appeal. It considered that it was contrary to the objectives of the creation of the NIF’s independent judicial bodies, such as its Adjudication Committee, and the principle of separation of powers to make it a party in an ADRV case. The NIF was not a party in the proceedings before NIF’s Adjudication Committee.

The Panel noted that the issue of the National Federation’s standing as a party to a CAS appeal based on a decision by one of its judicial bodies had been considered in previous cases and concurred with the findings of the other panels that an appeal could be made against the National Federation that had made the contested decision and/or the body that had acted on its behalf. Accordingly, the NIF was legitimately a party in these proceedings.

2. In assessing the appropriate level of fault attributable to Ms Johaug, the Panel recalled that CAS jurisprudence was very clear that a finding of No Fault applied only in truly exceptional cases and that in order to have acted with No Fault, Ms Johaug must have exercised the “utmost caution” in avoiding doping.

For the Panel, it was clear that by failing to simply check the label, Ms Johaug had not exercised the utmost caution. Had she done so, she would most likely have noticed the doping-related warning on the box. Instead, she had thrown away the box and the accompanying leaflet. The front of the Trofodermin tube also clearly indicated “Clostebol acetate” as an ingredient. Had Ms Johaug just done a simple internet search for e.g. “Clostebol” and the “WADA Prohibited List” she would have found out very quickly that Clostebol was a prohibited substance.

3. The Panel also recalled that the CAS has specifically noted that the prescription of medicine by a doctor does not relieve an athlete from checking if the medicine contained forbidden substances or not, and that, furthermore, athletes have a duty to cross-check assurances given by a doctor even where such a doctor was a sports specialist, as they bore a personal duty of care in ensuring compliance with anti-doping obligations. Therefore, relying on the assurances of the team doctor without any further steps indicated that Ms Johaug had not exercised caution to the greatest possible extent. It was not appropriate for Ms Johaug, without any substantiation, to draw a conclusion that her doctor had carried out his responsibilities properly, and subsequently adjust her own level of diligence according to what she thought the doctor could have done.
4. The FIS was submitting that the appropriate level of fault was No Significant Fault (“NSF”) and Ms Johaug has pled this as an alternative. The FIS concurred with Ms Johaug’s submission that the Clostebol found in Ms Johaug’s system was a result of inadvertence, and that there was no intention to cheat. In light of the very small quantity of Clostebol found, the fact that it was found out-of-competition, and the credible explanation supported by documentary evidence that Ms Johaug unknowingly ingested Trofodermin provided by Dr Bendiksen to heal her lip sores, the Panel found that she had not acted with intention to cheat or gain any competitive advantage.

In order to determine the appropriate range of sanction applicable, the Panel followed the approach taken in CAS 2013/A/3327 and transposed its assessment of fault to Ms Johaug’s case. In doing so, the Panel

considered that within the NSF category, a greater degree of fault might lead to a sanction of 20 – 24 months, a normal degree of fault to a sanction of 16 – 20 months, and a light degree of fault to 12 – 16 months. Given Ms Johaug’s overall circumstances, the majority of the Panel found that a normal degree of fault was applicable.

Having determined the relevant level of NSF, the Panel turned to any subjective elements that “*can be used to move a particular athlete up or down within that category*” (CAS 2013/A/3327). Considering Ms Johaug’s extremely high level of experience and success as an international athlete, she should have been very familiar with the rigorous standards expected of an athlete such as herself. Therefore, in light of her personal capacities, Ms Johaug would certainly have been expected to at very least check the label and conduct a basic internet search. There was no evidence that indicated Ms Johaug’s mental faculties were so impaired due to the injury on her lip and the stress she had suffered as to preclude her from carrying out this basic responsibility and to warrant a derogation from her duty of care by placing full responsibility on her doctor. Consequently, the Panel considered that Ms Johaug’s overall circumstances placed her level of fault in the middle of the 16 – 20 month range.

5. Having decided on the level of fault, the Panel then turned to the question of proportionality. The FIS was submitting that Ms Johaug’s sanction was too mild and was “skeptical” of whether the Adjudication Committee had properly considered the explicit doping warning on the Trofodermin package when it had determined the sanction. On the other hand, Ms Johaug was contending that any

period of ineligibility imposed on her would be disproportionate and was arguing that this sanction should be reduced. She was also submitting that she had already been punished as this case had caused stress and stigma that would be attached to her name for the rest of her life, the provisional suspension she served had already caused significant damage to her career; she had missed the entirety of the 2016/2017 season; she was being denied the right to train with her teammates, and she had lost her main sponsor, causing a significant loss of income. Moreover, she was arguing that an extension of her current suspension period would negatively impact her chances in being selected in the Norwegian Olympic team for the 2018 Olympics which were of utmost importance as she had never won a personal Olympic gold medal.

For the Panel however, none of the reasons submitted by Ms Johaug were relevant considerations with respect to her sanction. The sanction had to be commensurate with her degree of fault and the factors she had pled did not warrant a reduction beyond the prescribed minimum. Considering the totality of the circumstances, the majority of the Panel determined that a period of ineligibility of eighteen (18) months was appropriate.

### **Decision**

As a result, the Panel decided to amend the decision rendered by the Adjudication Committee of the Norwegian Olympic and Paralympic Committee and Confederation of Sports on 10 February 2017 and to suspend Therese Johaug for a period of eighteen (18) months commencing 18 October 2016.

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CAS 2017/A/5056

Ittihad FC v. James Troisi &

CAS 2017/A/5069

FIFA & James Troisi v. Ittihad FC

23 November 2017 (operative part of 14 July 2017)

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**Football; Termination of the employment contract with just cause by the player; Contractual arrangements regarding just cause to terminate the employment contract; Sign-on lump sum as part of compensation in case of termination of employment contract; Consequences of a premature termination of an employment contract and Article 17(1) RSTP; Compensation for two consecutive employment contracts; Sporting sanctions under Article 17(4) RSTP; Repeated offender and Article 17(4) RSTP; Issuance of a warning under Article 17(4) RSTP; Discretion to reduce the sanction under Article 17(4) RSTP**

#### Panel

Mr Manfred Peter Nan (The Netherlands),  
President

Mr Rui Botica Santos (Portugal)

Mr Mark Hovell (United Kingdom)

#### Facts

Ittihad FC (hereinafter the “Appellant/Counter-Respondent” or the “Club”) is a football club with its registered office in Jeddah, Saudi Arabia. It is registered with the Saudi Arabian Football Federation (the “SAFF”), which in turn is affiliated to the Fédération Internationale de Football Association.

Mr James Troisi (hereinafter the “Respondent/Counter-Appellant” or the “Player”) is a professional football player of

Australian nationality.

The Fédération Internationale de Football Association (hereinafter the “Second Respondent” or “FIFA”) is an association under Swiss law with registered office in Zurich, Switzerland. FIFA is the governing body of international football at a worldwide level.

On 31 August 2015, the Club and the Italian football club Juventus concluded an agreement (the “Loan Agreement”) for the temporary transfer of the Player from Juventus to the Club until 30 June 2016. On the same date, the Player and the Club entered into two employment contracts, the first one (the “First Employment Contract”) being valid from 31 August 2015 until 30 June 2016 and the second one (the “Second Employment Contract”) being valid from 1 July 2016 until 30 June 2017.

According to Article 2 of the First Employment Contract, the Club “*agrees that it will, on 1 July 2016, register (...) the player, with it on a permanent basis for an additional season i.e. for season 2016/2017*”.

According to clause 4 of the First Employment Contract, the Player was entitled to receive, inter alia, as remuneration the total net wage in an amount of EUR 1,800,000 during the contract period (*i.e.* from 31 August 2015 until 30 June 2016) with an amount of EUR 800,000 net of any taxes and/or retainers, if any, in a lump sum to be paid on or before 20 September 2015, after the Player passed the medical exam. The remaining net amount of EUR 1,000,000 was to be paid in ten monthly equal instalments of EUR 100,000 by the end of each month as from 31 September 2015, the last payment to be made at the end of June 2016.

In addition, clause 4 of the First Employment Contract as well as of the Second Employment

Contract contained the following stipulation:

**Non Payment:**

*In the event that any sum due from the [Club] to the [Player] under this Agreement is outstanding for more than 3 months following the due date for payment (for any reason), the [Player] may (without prejudice to his rights under this Agreement or otherwise at law) terminate this agreement immediately by giving written notice to the [Club] and the [Club] shall be liable to pay all amounts that would have been payable to the [Player] under this Agreement (but for the termination) within 14 days”.*

On 9 November 2015, the Player sent the Club a default letter referring to clause 4 of the First Employment Contract, requesting, *inter alia*, the immediate payment of the outstanding lump sum in the amount of EUR 800,000, due on 20 September 2015, and of a further payment of EUR 100,000, due by October 2015.

On 24 December 2015, the Player sent the Club a second default letter providing the Club a deadline of 7 days to pay him the outstanding lump sum amount of EUR 800,000.

On 30 December 2015, the Club replied that its sponsor will make a payment at the end of January 2016 and that the full amount of EUR 800,000 will be paid to the Player on 1 February 2016.

On 1 January 2016, the Player sent a termination notice to the Club, referring to his letter of 24 December 2015, stating that payment of EUR 800,000, due on 20 September 2015, remained outstanding despite his repeated request for payment. Therefore, pursuant to the “Non Payment” clause in *“my contracts dated 31 August 2015, one for the 2015/16 playing season and the other for the 2016/17 playing season, I am terminating both contracts with immediate effect”*.

On 27 January 2016, the Player signed two employment contracts with the Chinese club Liaoning Football Club (“Liaoning”), the first employment contract valid as from the date of signing until 30 June 2016, according to which the Player was entitled to receive remuneration in the amount of USD 750,000, and the second employment contract, valid as from 1 July 2016 until 31 December 2016, according to which the Player was entitled to receive remuneration in the amount of USD 450,000.

On 21 April 2016, the Player lodged a claim with the FIFA Dispute Resolution Chamber (the “FIFA DRC”) against the Club, claiming payment of the amount of in total EUR 3,100,000 as residual value of the First Employment Contract (EUR 1,600,000) and the full contractual value of the Second Contract (1,500,000). The Player further requested interest at the appropriate rate and costs as well as sporting sanctions to be imposed on the Club.

On 26 July 2016, the Player and Liaoning terminated their contractual relationship and agreed that the Player would be entitled to receive USD 525,000 as outstanding part of the two Liaoning Contracts, in addition to the salaries already paid by Liaoning to the Player in the amount of USD 525,000, constituting a total amount of USD 1,050,000.

On 1 August 2016, the Player and the Australian club Melbourne Victory signed an employment contract, valid from 1 August 2016 to 31 May 2017, entitling the Player to the total amount of USD 280,000.

On 24 November 2016, the FIFA DRC rendered its decision (the “Appealed Decision”), partially accepting the Player’s claim and ordering the Club to pay the Player outstanding remuneration in the amount of EUR 1,000,000, plus 5% interest p.a. on said amount as from 21 April 2016 until the date of

effective payment. It further banned the Club from registering any new players, either nationally or internationally, for the two next registration periods following notification of its decision.

On 4 April 2017 and 5 April 2017, respectively, the Club and the Player filed a statement of appeal with the CAS against the FIFA DRC Decision.

On 13 April 2017, the Player and the Club agreed to the consolidation of the two proceedings. On 18 April 2017, FIFA declared having no objection to the consolidation in question. On the same day the CAS Court Office, on behalf of the President of the Appeals Arbitration Division informed the Parties that the two proceedings had been consolidated in accordance with Article R52 of the Code.

A hearing took place on 12 July 2017 in Lausanne, Switzerland.

### **Reasons**

1. To start with the Panel analysed whether the Player, relying on clause 4 of the First Employment Contract, had validly terminated the employment relationship with just cause.

In this context the Player maintained that he terminated the contracts because despite his two letters notifying the Club of overdue payables, the Club failed to pay him the lump sum sign-on fee of EUR 800,000 and two monthly salaries in the amount of EUR 100,000 each. Conversely, the Club purported having made offers and attempts to pay the sign-on bonus at a later point in time and that the threshold for existence of just cause was not met as it had only failed to pay the sign-on fee in time. The Club argued that a premature, unilateral

termination of an employment contract was only admitted restrictively, the termination by the Player not meeting the *ultimo ratio* test. Furthermore, the Club, referring to mandatory Swiss law, especially to Article 337(2) Swiss Code of Obligations (SCO), submitted that parties cannot define just cause in an employment contract and that therefore the ‘non-payment clause’ in the First Employment Contract is null and void, and the Player responsible for the breach of contract.

The Panel found that clause 4 of the First and Second Employment Contract – entitling the Player to unilaterally terminate the employment relationship in case any sum is outstanding for more than 3 months following the due date for payment – is in full compliance with the principle enshrined in the Commentary to the FIFA Regulations on the Status and Transfer of Players Regulations (RSTP) according to which in principle, a player has the right to terminate his employment contract if his remuneration has not been paid for a period of three months. The Panel further found that the clause in question is a contractual deviation from the standards set out in the RSTP.

Referring to CAS jurisprudence the Panel held that in principle, and given that the parties are free to arrange in the employment contract the method of compensation for breach of contract, the parties were not prevented from also defining when and under which circumstances a party may terminate an employment contract “with just cause”. However, in case the provision foreseen by the parties – as in the present case – constituted a deviation from the general principles enshrined in the applicable regulations, in principle such deviation may not be potestative, *i.e.* the conditions for

termination may not be unilaterally influenced by the party wishing to terminate the contract. Moreover, whereas a certain level of disparity of termination rights had to be accepted as such, the extent of the level of disparity was questionable. In this context the Panel, referring to Article 27(2) of the Swiss Civil Code, found that the limit of contractual freedom in this respect was formed by the prohibition of excessive self-commitment. The Panel further found that given that the Player was entitled to his remuneration on the basis of the First Employment Contract, and given that the ‘non-payment clause’ in clause 4 of the First and Second Employment Contract did not create any new obligation for the Club, such clause did not constitute an excessive commitment for the Club, and was therefore not invalid. On the contrary, the Panel considered such clause to be in accordance with Article 337 SCO and the principles enshrined in the Commentary to the RSTP. Finally even if the clause were found to be invalid, the violation of the payment obligations by the Club entailed a serious breach of confidence with the consequence that the Player had just cause to terminate the employment relationship unilaterally and prematurely on 1 January 2016.

2. The Panel thereupon addressed the Club’s request to reduce the lump sum of the amount of EUR 800,000 on a *pro rata* basis for the time the Player spent with the Club, *i.e.* to EUR 320,000.

The Panel noted that the lump sum was unconditionally due on 20 September 2015. In the absence of a provision contemplating that the Player, in case he would not finish the season with the Club, would have to reimburse such amount to the Club, there was no reason to apply a *pro rata* reduction.

3. In the following the Panel turned to the question of the consequences of the Club’s breach of the First Employment Contract.

In this context the Player maintained that the FIFA DRC had wrongly concluded that it could not apply the compensation clause under the First and Second Employment Contract in view of the fact that this clause *de facto* prevented the Player from requesting compensation for breach of contract to be paid by the Club. He further submitted that even in case the parameters set out in Article 17(1) RSTP would be applicable, the remaining value of the First and Second Employment Contract should still be taken into account. The Club purported that the ‘non-payment clause’ in clause 4 of the First Employment Contract was not clear.

In establishing the amount of compensation to be paid, the Panel observed that Article 17(1) RSTP determines the financial consequences of a premature termination of an employment contract. Article 17(1) RSTP clearly allows contractual parties to deviate from its application by determining so in their employment contract, and does not foresee any requirements for such contractual deviation. Never-the-less, in case the wording of a compensation clause and the intention of the parties in drafting such clause are unintelligible, compensation for breach of contract should be calculated based on Article 17(1) RSTP.

The Panel observed that when applied to the case at hand, the wording of the ‘non-payment clause’ in clause 4 of the First Employment Contract, interpreted/evaluated based on Article 18(1) of the SCO and corresponding jurisprudence, *i.e.* by exploring the “*real and common intent*” of the parties, beyond the literal meaning of the words used, in order

to determine the implications of this clause, if any, was ambiguous. Specifically, whereas the wording “*would have been payable*” appeared to indicate that the Player’s damages could also comprise income that the Player would have been entitled to should the Club not have breached the employment relationship, the wording “*but for the termination*” appeared to suggest that such income could not be included in the Player’s claim, as also concluded by the FIFA DRC. The Panel further noted that in addition to the unclear wording of clause 4 of the First Employment Contract, the parties had not presented any evidence to prove their joint intention with regard to such clause; it therefore did not find itself to be in a position to apply such clause and opted to apply Article 17(1) RSTP in order to determine the compensation for breach of contract to be awarded.

4. In the next step the Panel examined whether, as contended by the Club and held by the FIFA DRC, the Player’s compensation was to be based only on the First Employment Contract or whether, as argued by the Player, the ‘non-payment clause’ in clause 4 of the First and Second Employment Contract entitled him to the residual value of both the First and Second Employment Contract.

The Panel observed that on 31 August 2015, the Player was loaned from Juventus to the Club until 30 June 2016. Also on 31 August 2015, the Player concluded two employment contracts with the Club for the consecutive sporting seasons 2015/2016 and 2016/2017. The Panel further noted that according to Article 2 of the First Employment Contract, the Club had agreed to register, on 1 July 2016, the Player with it on a permanent basis for an additional season, and that Article 15 of the Second Employment Contract, in its relevant part,

provided that “[t]his contract is binding to the two parties from the date of being signed, (...)”.

The Panel underlined that the validity of the Second Employment Contract was not conditional, *i.e.* it was not specifically determined that the provisions agreed upon in such contract were subject to the continuation of the employment relationship. While the Player was only loaned to the Club by Juventus for one season (*i.e.* during the validity of the First Employment Contract), the validity of the Second Employment Contract was also not made conditional upon the consent of Juventus to extend the loan period of the Player with the Club or the permanent transfer. The Club rather committed itself towards the Player to secure his services also for the next season. Referring to the language of the Player’s termination letter, in particular the fact that the Player invoked the ‘non-payment clause’ in “*my contracts dated 31 August 2015, one for the 2015/16 playing season **and the other for the 2016/17 playing season, I am terminating both contracts with immediate effect***”, it was clear to the Panel that this was also the Player’s understanding. As such, different from the conclusion reached by the FIFA DRC, the Panel did not consider it to be correct to restrict the compensation to the value of the First Employment Contract. As the Second Employment Contract was signed on 31 August 2015, the Club was bound by it from the date of signing with the consequence that the Player should be compensated for his damages also in respect of that second contract. In conclusion the Panel held that the starting point for the calculation of the damages incurred by the Player was the remaining value of both employment contracts as from the date of termination.

5. In the following the Panel turned to the

sporting sanctions imposed on the Club for the breach of contract. Addressing the Club's arguments that FIFA's practice with regards to sporting sanctions was unclear and inconsistent and that the imposed sanction was grossly and evidently disproportionate, the Panel held to start with that Article 17(4) RSTP clearly provided a legal basis to impose sporting sanctions. The mandatory prerequisite for imposing sporting sanctions is that the club breached an employment contract within the protected period and that as such, the sanction resulting from the offence is predictable, with Article 17(4) RSTP meeting the requirement of a clear connection between the incriminated behaviour and the sanction. The Panel further decided that while in light of the wording of Article 17(4) RSTP (sporting sanctions "*shall be imposed*"), FIFA was in principle obliged to impose sanctions if the prerequisites of Article 17(4) RSTP were fulfilled. The FIFA Commentary, in determining that "*a club risks being prohibited from registering new players [...]*", left a margin of discretion to the FIFA DRC as to whether or not to impose sporting sanctions *i.e.* such sanction was not imposed *ipso facto*. Accordingly, FIFA's policy to not impose sporting sanctions in every single case did not mean that FIFA was prevented from imposing them in other situations where the prerequisites of Article 17(4) RSTP were fulfilled. However, given that FIFA did not always impose sporting sanctions in cases of breach within the protected period, certain aggravating factors had to be given in order to tip the scale towards imposing sporting sanctions, *e.g.* as in the present case the fact that a club was held liable for breaching four employment contracts with players in a period of 24 months.

6. With regards to the question of sporting

sanctions the Panel further dealt with the Club's argument that the "repeated offender" criterion relied on in this context is irrelevant when imposing sporting sanctions. The Panel found that the mere fact that there was no regulatory basis in the RSTP for the imposition of sporting sanctions in case a club can be classified as a 'repeat offender', did not entail that no sporting sanctions could be imposed. To the contrary, the exact definition of 'repeat offender' and whether reference was made to this concept in Article 17(4) RSTP was not decisive given that the Club knew that sporting sanctions could be imposed if it would breach an employment contract within the protected period and that additional circumstances could be taken into account by FIFA in determining whether such sporting sanction is warranted in a specific case.

7. Also in the context of sporting sanctions the Panel dismissed the Club's argument that the imposition of sporting sanctions was not warranted as FIFA had never issued a warning, but all of a sudden imposed the most severe sanction possible. Whereas apparently it was FIFA's practice in respect of Article 12bis RSTP to issue a warning prior to imposing sanctions, Article 12bis RSTP did not apply in the case at hand and Article 17(4) RSTP did not require the issuance of a warning prior to sporting sanctions being imposed. Therefore FIFA was not required to issue a warning that further violations would lead to the imposition of sporting sanctions.

8. Lastly the Panel decided that neither Article 17(4) RSTP nor the FIFA Commentary provide discretion as to the severity of the sporting sanctions to be imposed. Therefore also the discretion of CAS panels to reduce a transfer ban imposed on the basis of Article 17(4) RSTP was limited to

either confirming a two-period transfer ban, or disposing of it entirely. Accordingly the Panel also dismissed the Club's argument – for which it had referred to the “*gradual sanctioning mechanism*” of Article 12bis RSTP – that the FIFA DRC, instead of applying the most severe sanction available, should have first imposed a milder sanction.

### **Decision**

The Panel therefore dismissed the appeal by the Club. It further partially upheld the Appeal filed by the Player, confirming the decision rendered on 24 November 2016 by the FIFA Dispute Resolution Chamber but for point 2, which it amended as follows:

*Ittihad FC has to pay to Mr James Troisi, within 30 days as from the date of notification of the present award, outstanding remuneration in an amount of EUR 800,000 with 5% interest p.a. as from 20 September 2015, EUR 100,000 with 5% interest p.a. as from 30 November 2015, EUR 100,000 with 5% interest p.a. from 31 December 2015, as well as compensation for breach of contract in an amount of EUR 890,249.23 with 5% interest p.a. as from 15 January 2016.*

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CAS 2017/A/5065

**Jackson Ferreira Tiago v. Football Association of Penang & Football Association of Malaysia (FAM)**

25 October 2017

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**Football; Termination of employment contract between a coach and a club by the latter; Lack of jurisdiction of CAS provided by the employment contract; Lack of evidence of a pathological clause allowing an appeal to CAS; Lack of jurisdiction of CAS deriving from the Statutes of a federation**

**Panel**

Mr Rui Botica Santos (Portugal), Sole Arbitrator

**Facts**

Jackson Ferreira Tiago (the “Appellant” or the “Coach”) is a Brazilian professional football coach.

The Football Association of Penang (the “First Respondent” or the “Club”) is a Malaysian football club and a member of the Football Association of Malaysia.

The Football Association of Malaysia (the “Second Respondent” or the “FAM”) is the governing body of football in the Federal Republic of Malaysia. It is a member of the Asian Football Confederation (“AFC”) and the Fédération Internationale de Football Association (“FIFA”).

On 5 November 2015, the Parties signed a one-year employment contract valid from 1 December 2015 to 30 November 2016 (the “Employment Contract”) under which the First Respondent agreed to employ the Appellant as the Club’s head coach.

On 14 June 2016, the Club served the Coach with a notice (the “Notice of Termination”) terminating the Employment Contract.

On or about July 2015, the Coach filed a claim before the FAM Status Committee seeking compensation for the termination of the Employment Contract, which he claimed was without just cause. He sought among other things, to be either reinstated as the Club’s head coach and/or damages, being the value remaining under the employment Contract. He also sought exemplary damages against the Club amounting to RM 200,000.

On 1 August 2015, the Club filed its defence in which it justified the termination.

On 20 October 2016, the FAM Status Committee rendered its decision whereby it ordered the Respondent, Football Association of Penang to pay the salary compensation amounting to RM485,000-00 to Mr. Jackson Ferreira Tiago for illegal termination of the contract.

On 8 December 2016, the Club appealed the FAM Status Committee decision to the FAM Appeals Committee. The Club reiterated that it had just cause to terminate the Employment Contract.

The Coach filed his defence in which he asked to dismiss the appeal and to uphold the FAM Status Committee decision.

On 2 March 2017, the FAM Appeals Committee overturned the FAM Status Committee decision.

On 22 March 2017, the Appellant filed his statement of appeal before the CAS, pursuant to Article R47 *et seq* of the Code of Sports-related Arbitration (the “CAS Code”).

On 15 August 2017, the CAS Court Office informed the Parties that pursuant to Article R57.2 of the CAS Code, the Sole Arbitrator appointed in this matter pursuant to Article R54 of the CAS Code deemed himself to be sufficiently well informed and, in accordance with the position expressed by the Parties, would render a preliminary award on jurisdiction based on the Parties' written submissions.

The Coach submitted that the CAS had jurisdiction to hear and determine this dispute. According to the Coach, the CAS jurisdiction derived from the 2015 edition of the AFC Statutes, the 2016 FAM Disciplinary Code and the 2016 FIFA Statutes. The Coach further submitted that pursuant to Article 77 of the FAM Disciplinary Code, an appeal to the Malaysian Arbitration Chamber was optional as opposed to mandatory. The Coach therefore argued that he could choose between referring the appeal to CAS or the Arbitration Council. He however preferred the CAS given its expertise in sports dispute resolution, and added that referring the appeal to optional arbitration in Malaysia "(...) violates the right to a specialised court (...)".

The Coach finally submitted that clause 6.3 of the Employment Contract was pathological given its failure to provide the procedure and deadline for appealing. He argued that the pathological nature of this clause was further corroborated by the failure of the 2015 edition of the FAM Disciplinary Code (if applicable) to contain any provisions or directions regarding an appeal to the Arbitration Council. He argued that clause 6.3 of the Employment contract should therefore be construed "liberally" (SFT judgment no. 4A\_460/2008 of January 2009).

The Club's submitted that the CAS lacked jurisdiction over this matter. The Club submitted that there was no specific arbitration

agreement or clause in the Employment Contract providing for CAS jurisdiction as required under Article R27 of the CAS Code. The Club added that the appeal had also not met the prerequisites of Article R47 of the CAS Code.

The FAM's submitted that the CAS lacked jurisdiction over this matter.

### Reasons

1. To start with, the Panel noted that given that the Parties appearing before the CAS were neither domiciled nor resident in Switzerland, reference shall be made to Chapter 12 of the Swiss Private International Law Act (the "PILA") in determining the extent to which the CAS has jurisdiction to rule on its own jurisdiction.

Article 186 of the PILA reads as follows:

*"1. The arbitral tribunal shall rule on its own jurisdiction.*

*2. The objection of lack of jurisdiction must be raised prior to any defence on the merits.*

*3. In general, the arbitral tribunal shall rule on its jurisdiction by means of an interlocutory decision".*

That Article 186 of the PILA is applicable in CAS proceedings has long been settled by various CAS panels.

It follows from Article 186 of the Swiss Private International Law Act (PILA) that the CAS has the power to decide on its own jurisdiction. This power stems from the international arbitration doctrine of "Kompetenz-Kompetenz". Arbitration is by its very nature consensual. It requires an arbitral tribunal to be satisfied that the parties appearing before it have indeed mutually agreed to have their differences

resolved by way of arbitration. A literal reading and construction of an employment contract, and the application of the doctrine of *pacta sunt servanda*, may establish that there exists no specific arbitration agreement in favour of the CAS especially when the employment contract contains an arbitration agreement in favour of a national arbitration council.

2. The Sole Arbitrator noted that although clause 6.3 of the Employment Contract directs the Parties to refer any appeal against a decision rendered by the FAM Appeals Committee to arbitration, it goes a step further by expressly designating (i) the arbitral body i.e. the Arbitration Council provided for in the Malaysian Arbitration Act 1952, (ii) the country in which the arbitration should be held i.e. Malaysia and (iii) the law to be applied in conducting the arbitration proceedings i.e. the Arbitration Act 1952 which was repealed in 2005 and replaced by the Arbitration Act 2005 Laws of Malaysia.

It was therefore clear and unequivocal that the Parties intended and agreed to refer the appeal to the Arbitration Council and not the CAS. It followed from a literal reading and construction of the Employment Contract, and the doctrine of *pacta sunt servanda*, that there existed no specific arbitration agreement in favour of the CAS. To the contrary, the Employment Contract contained an arbitration agreement in favour of the Malaysian Arbitration Council.

The Appellant also contended that clause 6.3 of the Employment Contract is pathological. The Swiss Federal Tribunal has discussed the issues surrounding pathological arbitration clauses at length. For instance, at paragraph 2.2.3 of its judgment No. 4A\_246/2011, the Swiss

Federal Tribunal defined a pathological arbitration clause as one which is “[i]ncomplete, unclear or [contains] contradictory provisions”.

The Panel considered in this respect that a clause is generally said to be pathological if it contains any of the following features that are not common in arbitration agreements: a) if it is vague or ambiguous as regards private jurisdiction or contains contradicting provisions; b) if it fails to mention with precision the institution which will appoint the arbitral body chosen by the parties; c) if it fails to produce procedural mandatory consequences for the parties in the event of a dispute; d) if it fails to exclude the intervention of state courts in the settlement of the disputes, at least before the issuance of the award; e) if it does not vest powers to the arbitrators to resolve the disputes likely to arise between the parties; and f) if it does not permit the putting in place of a procedure leading under the best conditions of efficiency and speed to the rendering of an award that is susceptible of judicial enforcement.

Relating requirement (a) above to the Employment Contract, Clause 6.3 is express and unequivocal as regards private jurisdiction. It designates the Arbitration Council as the body exclusively mandated to hear and decide any appeal against the FAM Appeals Committee decision. In addition, clause 6.3 of the Employment Contract has met (b) above by designating the institution (i.e. the Arbitration Council) which will appoint the arbitral body chosen by the parties. Clause 6.3 of the Employment Contract also contains a mandatory arbitration clause directing the Parties “to refer [any appeal] to the Arbitration Council”, thereby meeting requirement (c) above. By directing the Parties to refer any appeal to the Arbitration Council, clause 6.3

has effectively excluded any appeal to a State Court, thereby fulfilling requirement (d) above. Clause 6.3 further gives the Parties the freedom to have the arbitration “(...) *presided by an arbitrator that is agreed upon by both parties*”, thereby satisfying requirement (e) above. Finally, by stipulating that the Arbitration Council is to adjudicate the appeal “(...) *in accordance to the Arbitration Act 1952*” (now the Arbitration Act 2005), clause 6.3 has effectively put in place the procedure leading to a speedy and efficient appeal mechanism that culminates in an award capable of judicial enforcement and in the process, met requirement (f) above.

It followed that the Coach had failed to discharge his burden of proving that there existed a specific arbitration agreement providing for appeal to the CAS.

3. The Panel further recalled that Article R47 of the CAS Code in its strict sense requires an appellant to move the CAS jurisdiction by relying on the statutes or regulations of the body that rendered the challenged decision. The question as to whether jurisdiction might be derived from the statutes or regulations of a national federation should be considered moot and irrelevant if the parties have expressly agreed to refer any appeals to national arbitration. In any event, the Panel found that if the national federation’s Statutes did not contain any provision allowing an appeal to CAS against a final and binding decision rendered by the federation’s judicial bodies, CAS had no jurisdiction.

### **Decision**

The Sole Arbitrator found that the CAS had no jurisdiction to decide on the dispute.

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## Jugements du Tribunal fédéral\* Judgements of the Federal Tribunal



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\* 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

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**Judgment of the Swiss Federal Tribunal 4A\_536/2016 & 4A\_540/2016**  
**26 October 2016**

**A. Appellant v. B. Respondent**

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*Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of 13 July 2016<sup>1</sup>*

**Extract of the facts**

On April 20, 2012, the professional football club B. and the professional football club A. entered into a contract concerning the transfer by the former to the latter of the professional football player V. as of July 1, 2012. The transfer amount was set at EUR 5'800'000 and payable in six installments: the first at EUR 2'300'000 was to be paid on July 1, 2012, at the latest; the following four, amounting to EUR 760'000 each, were due respectively on July 10, 2013, December 15, 2013, July 10, 2014 and December 15, 2014, at the latest; the remaining EUR 460'000 would become due on July 10, 2015, at the latest. The parties inserted the following clause at Art. 4.2 of the transfer contract:

*“In case of untimely or incomplete execution by the Club [A.] of any of the payments under the present Agreement, the Club shall be obliged to additionally pay to B. a penal clause of 10% of the respective unpaid amount, as well as a fine (financial penalty) of 1% of the amount due per each month (30 days) of the delay of such payment”<sup>2</sup>*

A. paid in a timely manner the first installment of EUR 2'300'000, which had been divided into two installments by way of an addendum to the transfer contract concluded on July 18, 2012. The club did not

make any further payments.

On January 15, 2014, the Single Judge of the Players' Status Committee of the Fédération International de Football Association (FIFA; hereafter: the PSC single judge) seized by the club of a claim concerning the two installments due in 2013, ordered A. to pay to the Claimant the amount of EUR 1'596'000 with interest at 12% yearly on the amount of EUR 760'000 from July 11, 2013. This decision was not challenged and came into force.

On November 20, 2014, the PAC single judge, seized of a new claim concerning the installment due on July 10, 2014, ordered A. to pay to B., within 30 days, the amount of EUR 760'000 with interest at 12% yearly from July 11, 2014, as well as an amount of EUR 76'000 corresponding to the stipulated penalty.

In an award of October 9, 2015, the Court of Arbitration for Sport (CAS) rejected the appeal that club [name omitted] filed against this decision, which it confirmed (case CAS 2015/A/3909). That award was not appealed to the Federal Tribunal.

On April 22, 2015, the PSC single judge, whom B. called upon with a view to obtaining the payment of the installment due on December 15, 2014, and the corresponding monetary penalty, issued a third decision pursuant to which he ordered

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<sup>1</sup> The original of the judgment of the Swiss Federal Tribunal is in French ([www.bger.ch](http://www.bger.ch)). The full English translation along with an introductory note can be found in the website “Swiss International Arbitration Decisions”

([www.swissarbitrationdecisions.com](http://www.swissarbitrationdecisions.com)), a website operated jointly by Dr. Charles Poncet and Dr. Despina Mavromati.

<sup>2</sup> In English in the original text.

the Defendant to pay the Claimant the amount of EUR 760'000 with interest at 12% yearly from December 16, 2014, as well as EUR 76'000 for the agreed-upon penalty, within 20 days. He added that the latter amount, if not paid in a timely manner, would bear interest at 5% yearly upon the time limit to pay expiring.

Seized of an appeal by A., the CAS rejected it in an award of July 13, 2016 (case CAS 2015/A/4121).

On November 24, 2015, the PSC single judge, called upon by club concerning the last installment due on July 10, 2015, namely EUR 460'000, issued a decision in this respect similar to that of April 22, 2015.

In an award of July 13, 2016, the CAS rejected the appeal made by club and confirmed the decision (case CAS 2016/A/4435).

On September 14, 2016, A. (hereafter: the Appellant) filed two civil law appeals with a view to obtaining the annulment of the awards issued in cases CAS 2015/A/4121 and CAS 2016/A/4435. In the covering letter, he asked for consolidation of the two cases.

### Extract of the legal considerations

**In a single argument, the Appellant raises a violation of substantive public policy within the meaning of Art. 190(2)(e) PILA<sup>3</sup>.**

In its view, the combined application of a contractual penalty interest of 12% yearly, of the contractual penalty of 10% of the capital due, and the statutory interest of 5% on the latter would in no way reflect the real damage sustained by the

Respondent and leads to a result approaching the award of punitive damages. Yet, according to the majority of legal writers, such damages would fall within the aforesaid legal provision. As to the penalty interest and the contractual penalties sanctioning late payment, the Appellant argues that Swiss law encompasses a limit arising from Art. 20, 21, and 163 CO<sup>4</sup>, or even from Art. 157 CP<sup>5</sup>. Moreover, it points out that it is generally held that penalty interest beyond 18% yearly is excessive and emphasizes, with reference to the topical provisions of the Belgian and German civil codes as well as a judgment of the *Bundesgerichtshof*, that the power given to the court to reduce excessive interest rates or excessive contractual penalties exists in most countries surrounding Switzerland. Therefore, the prohibition of such rates and penalties would, according to the Appellant, fall within international public policy as sanctioned by Art. 190(2)(e) PILA and not only belong to Swiss public policy.

Moreover, still according to the Appellant, the measure confirmed by the CAS is confiscatory, so the award upholding it would be incompatible with public policy.

It is doubtful that the briefs submitted to the Federal Tribunal would meet the requirement of reasons arising from Art. 77(3) LTF<sup>6</sup> in connection with Art. 42(2) LTF and case law concerning the latter provision (ATF 140 III 86 at 2 and references). Indeed, to abide by its duty to provide reasons, the Appellant must discuss the reasons of the decision under appeal and indicate precisely in what way it considers that the author of the decision disregarded the law. Yet, in the case at hand, the Appellant does not mention at all the reasons on which the CAS relied upon to reach the solution it chose. In reality, he merely puts forward some theoretical arguments mixing various concepts (contractual interest, penalty

<sup>3</sup> PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

<sup>4</sup> CO is the French abbreviation for Swiss Code of Obligations.

<sup>5</sup> CP is the French abbreviation for the Swiss Criminal Code

<sup>6</sup> LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173.110.

interest, contractual penalty, and punitive damages) without bothering with the manner in which it was specifically applied in the award under appeal and by invoking in support of its arguments some provisions and a jurisprudence drawn from foreign law, even though the case was adjudicated by the CAS on the basis of the *ad hoc* FIFA Rules and, subsidiarily, in light of Swiss law.

Be this as it may, even if the two matters are capable of appeal, they can only be rejected for the following reasons.

An award is contrary to substantive public policy when it violates some fundamental principles of substantive law to such an extent that it is no longer consistent with the governing legal order and system of values; among such principles are in particular contractual trust, compliance with the rules of good faith, the prohibition of the abuse of rights, the prohibition of discriminatory or confiscatory measures, as well as the protection of incapable persons (ATF 132 III 389 at 2.2.1).

The sovereign factual findings of the CAS show that the Appellant freely submitted to the obligation foreseen at Art. 4.2 of the transfer contract without expressing any reservation as to the allegedly excessive contractual penalty or the interest stipulated in that clause. Furthermore, it challenged neither the validity nor the proportionality of this obligation when the PSC Single Judge imposed performance of it upon the Appellant for the first time. Similarly, he did not appeal the CAS Award upholding the second decision of the same judge concerning the obligation at issue to the Federal Tribunal. Therefore, one hardly understands why the Appellant would now challenge the two subsequent awards of the CAS as to the same obligation.

It has already been decided that a contractual penalty reaching 10% of the sales price was not excessive according to Swiss law (ATF 133 III 201 at 5.5). Furthermore, a penalty interest of 12% is certainly not contrary in itself to the opportunity afforded by Ar. 104(2) CO to the parties to agree contractually upon a rate of interest above 5% yearly. A failure to pay the contractual penalty within the time limit foreseen for this purpose leads to late payment interest of 5% per annum does not appear disputable either, as this is a consequence foreseen by the law when the debtor is in default (Art. 104(1) CO). One also does not see in what way combining these three obligations, as in the case at hand, would lead to the Appellant's freedom being excessively infringed upon in the light of Art. 27(2) CC<sup>7</sup>, such that it would hand it over to co-contracting party's arbitrariness, would suppress its economic freedom, or limit it to such an extent that the very basis of its economic existence would be jeopardized (ATF 123 III 337 at 5). Merely claiming, as the Appellant does, that this is the case in the measure at issue due to its inordinate and confiscatory nature, is manifestly insufficient to demonstrate it.

Moreover, it must be recalled that, according to well-established case law, the fact that a provision such as Art. 163(3) CO is a mandatory rule does not mean that its violation would breach public policy within the meaning of Art. 190(2)(e) PILA (judgments 4A\_510/2015 of March 8, 2016, at 6.2.2 and 4A\_634/2014 of May 21, 2015, at 5.2.2). The general remark the Appellant formulates in this context as to the very restrictive nature of the concept of public policy as interpreted by the Federal Tribunal and the criticism which this interpretation may have been subjected to, in particular by a well-recognized author (Pierre Lalive, Article 190(2) PILA *a-t-il une utilité?*, Bulletin de l'Association Suisse de l'Arbitrage (ASA), 2010, p. 726 *if*, 733/734) is not sufficient to justify revisiting the case law in this respect.

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<sup>7</sup> CC is the French abbreviation for the Swiss Civil Code.

The consolidated appeals are rejected insofar as the matters are capable of appeal.

Finally, the parallels drawn by the Appellant between the amounts it was ordered to pay to the Respondent pursuant to the contractual penalty clause and the contractual interest for late payment on the one hand and punitive damages on the other hand is not appropriate. Indeed, unlike the latter concept, a contractual penalty is valid only because it was accepted by the debtor; however, punitive damages do not rely upon the debtor's agreement but are instead imposed upon him (Gaspard Couchepin, *La clause pénale*, 2008, n. 149; Andreas Hauenstein, *Punitive Damages im internationalen Zivilprozessrecht und der internationalen Schiedsgerichtsbarkeit*, 2007, p. 16 f). Moreover, no matter what the Appellant says — and he quotes only one author to substantiate its argument (Anton Heini, *Zürcher Kommentar zum IPRG*, 2<sup>nd</sup> ed. 2004, n. 46 ad Art. 190 PILA) — the majority of legal writers would reject the notion that an award is contrary to substantive public policy simply because it orders a party to pay punitive damages (Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, 3<sup>rd</sup> ed. 2015, n. 1770; Tarkan Göksu, *Schiedsgerichtsbarkeit*, 2014, n. 2135; Kaufmann-Kohler and Rigozzi, *International Arbitration*, 2015, n. 8.201; Kaufmann-Kohler and Rigozzi, *Arbitrage international, Droit et pratique à la lumière de la LDIP*, 2<sup>nd</sup> ed. 2010, n. 902; Stefanie Pfisterer, *Commentaire bâlois, Internationales Privatrecht*, 3<sup>rd</sup> ed. 2013, n. 76 ad Art. 190 PILA; Stephan Lüke, *Punitive Damages in der Schiedsgerichtsbarkeit*, 2003, p. 250 f.; Hauenstein, *op. cit.*, p. 44 f). However, there is no need to examine this issue any further, which was left open previously (judgment 4A\_16/2012 of May 2, 2012, at 4.3), as answering it would not change the fate of the appeal because the amounts that the Appellant was ordered to pay to the Respondent are not punitive damages.

### Decision

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## Judgment of the Swiss Federal Tribunal 4A\_80/2017 25 July 2017

### A. Appellant v. International Weightlifting Federation (IWF), Respondent

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*Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of 1 December 2016<sup>1</sup>*

#### Extract of the facts

A. (Appellant) is a successful Russian weightlifter at international level.

The International Weightlifting Federation (IWF, Respondent) is the International Federation of Weightlifting and is based in Lausanne.

The Appellant participated in the 2015 World Championships of Weightlifting in Houston, USA, as a member of the Russian team. He won the gold medal and set two world records.

On November 28, 2015 the IWF received and tested the urine sample No. xxx from the Appellant. This showed a deviation from the norm (or Adverse Analytical Finding, AAF) and the presence of the prohibited substance Ipamorelin, in an extremely low concentration of 0.1 ng/ml. The analysis was carried out on December 10, 2015, by the World Anti-Doping Agency (WADA)-accredited *Laboratoire de contrôle du dopage<sup>2</sup>* at Institute B. (hereafter, the B. Laboratory). The B. Laboratory applied the International Standard of Laboratories, 2015 (ISL) and the TD2015ID0R Technical Documents (Minimum Criteria for Chromatographic-Mass Spectrometry) and TD2015MRPL (Minimum Required Performance Levels [MRPL] for

detection and identification of non-threshold substances) of WADA.

On February 29, 2016, the B Laboratory performed the analysis of the B sample using the same method, which confirmed the values of the A sample.

The IWF relied on its Anti-Doping Policy 2015 (IWF ADP), which is based on the revised World Anti-Doping Code 2015 (WADC, in force since 1 January 2015).

On April 26, 2016, a hearing took place before the IWF Committee in Budapest. By decision of May 13, 2016, the Committee held that it was convinced (“comfortably satisfied”) that the analytical reports confirmed the existence of the prohibited substance Ipamorelin in the Appellant's sample, and decided to disqualify all results obtained by the Athlete at the 2015 World Championships and all results obtained in competitions subsequent to the 2015 World Championships and to impose a sanction of ineligibility for four (4) years.

On June 1, 2016, the Appellant appealed against the IWF Decision to the Court of Arbitration for Sport (CAS). The CAS rejected the appeal and confirmed the IWF decision.

The Appellant lodged a civil law appeal to the Swiss Federal Tribunal requesting that the CAS Award be annulled and the case be sent back to the CAS for a new decision.

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<sup>1</sup> The original of the judgment of the Swiss Tribunal federal is in German ([www.bger.ch](http://www.bger.ch)). The full English translation along with an introductory note can be found in the website "Swiss International Arbitration

Decisions" ([www.swissarbitrationdecisions.com](http://www.swissarbitrationdecisions.com)), a website operated jointly by Dr. Charles Poncet and Dr. Despina Mavromati

The Respondent and the CAS requested the dismissal of the civil law appeal. The Appellant subsequently filed an unsolicited reply to the Swiss Federal Tribunal.

### Extract of the legal considerations

**The Appellant argues that CAS violated its right to be heard, the principle of equality of the parties (Art. 190(2)(d) PILA<sup>2</sup>) and the (procedural) public policy (Art. 190(2)(e) PILA) in several respects.**

Art. 190(2) (d) PILA permits an appeal only when the mandatory procedural rules of Art. 183(3) PILA are violated.

Accordingly, the arbitral tribunal must, in particular, guarantee the right of the parties to be heard. This essentially corresponds to the constitutional right embodied in Art. 29(2) BV<sup>3</sup>. Case law infers from this, in particular, the right of the parties to state their views as to all facts important for the judgment with suitable evidence submitted in a timely manner and in the proper format, to participate in the hearings, and to access the record (BGE 142 III 360 at 4.1.1; 130 III 35 at 5 p. 38; 127 III 576 at 2c; each with references).

However, the arbitral tribunal can refuse to hear a piece of evidence without violating the right to be heard, when it could reach a conclusion based on the evidence already before it. The Federal Tribunal can only examine an anticipated assessment of evidence from the limited scope of a violation of public policy (BGE 142 III 360 at 4.1.1 p.361 with reference).

The right to be heard in adversarial proceedings according to Art. 182(3) and Art. 190(2)(d) PILA does not include the right to a reasoned international award, in line with well-established case law (BGE 142 III 360 at 4.1.2 p. 361; 134 III 186 at 6.1 with references). However, there is a minimal duty of the arbitrators to review and handle the issues that are important for the decision. This duty is violated when the arbitral tribunal, due to oversight or a misunderstanding, overlooks some legally pertinent allegations, arguments, evidence, or offers of evidence from a party. This does not mean that the arbitral tribunal is compelled to address each and every submission of the parties (BGE 142 III 360 at 4.1.1 p. 361; 133 III 235 at 5.2 p. 248 f. with references).

The equal treatment of the parties is also provided for in Art. 190(2)(d) and Art. 182(3) PILA. The right of equal treatment requires the arbitral tribunal to treat the parties equally at all stages of the procedure (including the hearing, with the exception of deliberations, see judgment 4A\_360/2011 of January 31, 2012 at 4.1) (BGE 133 III 139 at 6.1 p. 143) and not to deprive one party what it has granted to the other (Bernard Dutoit, *Droit international privé suisse*, 5. ed. 2016, p. 819 N. 6 ad Art. 182 PILA; Stephanie Pfisterer, in: *Basler Kommentar, Internationales Privatrecht*, 3. ed. 2013, N. 62 ad Art. 190 PILA). Both parties must have the same opportunities to present their case during the proceedings (see BGE 142 III 360 at 4.1.1 p.361).

Procedural public policy is breached where there is a violation of fundamental and generally recognized procedural principles, whose disregard contradicts the sense of justice in an intolerable way, rendering the decision absolutely incompatible with the values and legal order of a state ruled by law (BGE 140 III

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<sup>2</sup> PILA is the English abbreviation of the Federal Statute of December 18, 1987, on private international law, RS 291.

<sup>3</sup> BV (Bundesverfassung) is the German abbreviation for the Swiss Federal Constitution of 18 April 1999 (SR 101).

278 at 3.1 p. 279; 136 Ill 345 at 2.1 p. 347 f.; 132 III 389 at 2.2.1 p. 392).

The argument that the CAS, by using an incorrect concentration of Ipamorelin, namely 1 ng/mL instead of 0.1 ng/mL, violated the right to be heard and the principle of due process as part of the procedural public policy, is clearly unfounded. There is no violation of the right to be heard within the meaning of Art. 190(2)(d) PILA when an obvious mistake of the arbitral tribunal leads to a wrong decision. A manifestly false or conflicting finding alone is not sufficient to annul an international arbitration award.

The right to be heard does not include the right to a materially correct decision (BGE 127 III 576 at 2b p. 577 f.; citing judgment 4A\_612/2009 at 6.3.1). The party that seeks to establish an infringement of the right to be heard from an obvious mistake cannot simply show that the alleged mistake led to a faulty assessment of the evidence because, like in the case of an arbitrary assessment of evidence, there is no infringement of the right to be heard. The party concerned should further point out that the judicial oversight deprived him from introducing and proving his position with respect to a procedural issue (BGE 127 III 576 E. 2 f. p. 580).

In addition, there is no illegal act. It is true that the contested Award refers to a concentration of 1 ng/mL. However, the summary of the facts refers to an *“extremely low concentration (100 pg/mL)”*, which corresponds to 0.1 ng/mL. As to the arguments raised by the Appellant with respect to the required limit values for the detection of Ipamorelin, the CAS then refers to the report by Professor C. of the B. Laboratory, according to which the limit is 0.1 ng/mL before concluding that *“in light of the concentration of Ipamorelin found in the Athlete's samples of the LOD, a false-positive is excluded”*, in order to establish that the concentration in the Appellant's case was low, which obviously could not have been said in a concentration of 1 ng/mL. The phrasing thus

constitutes an obvious typographical error, as the CAS rightly asserts in its observations.

The Appellant alleges that the CAS wrongly refused to admit his request for an expert report on the Limits of Detection [LOD], on Measurement Uncertainty [MU] and another analysis of the B sample, thereby violating his right to be heard and the principle of equal treatment or equality of the parties, and possibly also the (procedural) public policy.

The Appellant does not specify in his appeal at which stage in his submissions he requested an expert report on LOD and MU parameters. In his reply and irrespective of the fact that the respective statements are late, he points again only to the fact that he requested the LOD and MU Parameters (in addition to the request for an analysis of his B-sample using to another method) (*“The Appellant has at least six times requested the method parameters including LOD [limit of detection] in order to decide reasonably whether to challenge the method as insufficiently selective or not”*). The previous instance has not determined anything else. The Appellant's plea therefore fails.

Regarding the further requested report on the analysis of the B sample, the CAS considered that the Appellant had requested the B sample be tested in a WADA-accredited laboratory, as determined by the CAS, by another method, i.e. the method HRMS (high resolution mass spectrometry), to be performed in “full MS” (or “t-SIM” [targeted-Selective Ion Monitoring]) in combination with “t-MS2” with ion mobility division, in the presence of the parties and/or their representatives. However, the Appellant had no right to an additional analysis of the sample, unless he could raise doubts about the results of the B. Laboratory. The Appellant could not, however, raise any such doubts. Furthermore, if he had actually been able to raise sufficient doubts, he would no longer have needed the additional analysis requested. In any event the CAS held that this was not a (WADA-approved) detection method for Ipamorelin.

The Appellant does not specify how the principle of the right to be heard or the principle of equal treatment of the parties in the arbitration proceedings should allow further analysis to be carried out by using other methods in addition to the testing procedures provided for by the applicable anti-doping rules (see also 4A\_178/2014 at 5.2).

The Appellant raises formal pleas according to Article 190(2) PILA. However, his reasoning deviates from the considerations of the CAS, without making a plea under Article 190(2) of the PILA. In doing so, he raises inadmissible criticisms of appellatory nature and the pleas cannot be sustained.

According to Art. 3.1 of the IWF ADP, the Respondent has the burden of proving that there is a violation of the anti-doping rules. The Respondent must be able to demonstrate this in a convincing manner (“to the comfortable satisfaction”). The standard of proof is, therefore, greater than the mere probability (“greater than a mere balance of probability”) but lower than a standard of proof excluding any doubt (“less than proof beyond a reasonable doubt”). Therefore, it is the responsibility of the athlete to rebut the justified presumption of the violation of the anti-doping rules (“to rebut a presumption”). For such rebuttal, the applicable standard of proof is that of probability (“balance of probability”).

The CAS relied on these arguments when it held that the Appellant would not have even needed the additional analysis he requested if he had been able to raise sufficient doubts about the results of the B. Laboratory. Indeed, in this case, the Appellant had not provided the proof in accordance with Article 3.1 IWF ADP, which is why a further test of proof (in support of the opposite proof) would have been redundant.

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However, the core argument of CAS was that the Appellant could not raise sufficient grounds to question the analysis of the B. Laboratory. It considered that the Laboratory had complied with the identification criteria applicable to Ipamorelin in

accordance with the WADA technical documents TD2015IDCR and the ISL, which indicates that Ipamorelin was detected. Since Ipamorelin is not a substance with a threshold value (“not a threshold substance”) according to the WADA criteria, a sample can be detected as positive regardless of the concentration found. It is undisputed that a laboratory must comply with the WADA Technical Document TD2015MRPL, which deals with the MRPL, for the detection of Ipamorelin. The B. Laboratory met these requirements, and it had shown that the estimated limit for the detection of Ipamorelin was 0.1 ng/mL. The Appellant contested this value only in an unsubstantiated manner.

The Appellant alleges a violation of his right to be heard and the obligation to state reasons, because the CAS, without further discussion, refrained from testing the LOD of 0.1 ng/mL estimated by the B. Laboratory, and did not give further reasons for this; the B. Laboratory further failed to justify the value argued by the Appellant and he met the concentration of 0.1 ng/mL “accidentally”. There is always uncertainty as to the precision of the machine and method used, which is why he could have demonstrated with the LOD and the MU that the results of the analyzes of the B. Laboratory were outside of the minimum concentration which can be determined with certainty (LOD), as well as the safety interval of the MU.

The CAS respected its obligation to state reasons. It has examined and addressed the decisive questions. In addition to the minimum obligations, it also determined that the B. Laboratory had estimated the limit value from which a finding can be obtained in accordance with the WADA Technical Document TD2015MRPL. It denied, in an acceptable manner, the doubts about the approach of the B. Laboratory because it respected the specifications of the WADA technical documents and ISL and the Appellant could not disprove the estimated limit of 0.1 ng/mL.

In his observations on the determination of the limit value, the Appellant merely criticized the content of

the contested award and submitted his own view to the Federal Tribunal, without, however, indicating a violation of his right to be heard. The CAS noted and acknowledged the Appellant's objections and thereby respected his right to be heard.

The plea of a breach of the principle of equal treatment because the CAS did not reveal a third analysis carried out by the B. Laboratory is also unfounded. The CAS accepted this analysis because, contrary to the Appellant's view, it was permissible under Article 3.2 IWF ADP and, moreover, was also in his interest. It is further not clear what the admission of this evidence has to do with the principle of equal treatment. The Appellant relies on the rejection of his own request for a further test based on another method. However, this allegation of violation of equal treatment is to be dismissed to the extent that the plea cannot be upheld with respect to the doubts as to the higher reliability of the method and the fact that it was not approved for Ipamorelin.

Finally, it was alleged that the contested award was contrary to the principle of good faith and the prohibition of abuse of rights, thereby infringing the Appellant's personal rights through the four-year ban on his professional activities, which in turn constitutes a breach of public policy. The CAS did not wish to order the requested additional expert opinion in order to avoid political problems as expressed by the fact that it did not want to "open the Pandora's Box". Thus, the CAS misused the rules in order to serve its own purposes. The Appellant therefore alleges that, according to Art. 190(2)(d) PILA, the award must be annulled. Again, the Appellant implicitly assumes that the method that he suggested was more reliable than the one applied by the B. Laboratory and should be treated in the same way as the one approved for Ipamorelin. However, he does not show the manner in which the different assessment of the CAS infringes public policy. This plea is therefore inadmissible.

The appeal must be rejected insofar as the matter is capable of appeal. In view of the outcome of the proceedings, the Appellant must pay the costs (Art. 66(1) and Art. 68(2) BGG).

## **Decision**

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## Arrêt du Tribunal Fédéral 4A\_260/2017

20 Février 2018

### ASBL Royal Football Club Seraing (recourant) c. Fédération Internationale de Football Association (FIFA) (intimée)

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*Recours en matière civile contre la sentence rendue le 9 mars 2017 par le Tribunal Arbitral du Sport (TAS)*<sup>1</sup>

#### Extraits des faits

La Fédération Internationale de Football Association (FIFA), association de droit suisse ayant son siège à Zurich, est l'instance dirigeante du football au niveau mondial. Elle a notamment édicté un Règlement du Statut et du Transfert des Joueurs (RSTJ). L'un des buts de cette réglementation consiste à limiter l'influence que peuvent exercer des acteurs extérieurs au monde du football sur ce dernier et à éviter que des tiers n'acquière la propriété des droits économiques des joueurs.

Depuis plusieurs années, s'est instaurée, dans certains pays d'Amérique du Sud et d'Europe (l'Espagne et le Portugal, en particulier), une pratique caractérisée par la dissociation des droits fédératifs et des droits économiques concernant un joueur. Appelée tierce propriété des droits économiques sur les joueurs de football et plus connue sous sa dénomination anglaise - *Third Party Ownership* (TPO), cette pratique consiste pour un club de football professionnel à céder, totalement ou partiellement, à un tiers investisseur ses droits économiques sur un joueur, de manière à ce que cet investisseur puisse bénéficier de la plus-value que le club réalisera lors du transfert futur du joueur. En contrepartie, l'investisseur fournit une aide financière à ce club pour lui permettre, entre autres motifs, de

résoudre des problèmes de trésorerie ou l'aider à acquérir un joueur. Dans cette dernière hypothèse, le club intéressé par un joueur mais n'ayant pas les moyens de payer l'indemnité de transfert exigée par l'employeur actuel de ce joueur fait appel à un investisseur qui lui fournit les fonds nécessaires au paiement de tout ou partie de l'indemnité de transfert en échange d'un intéressement sur l'indemnité obtenue en cas de transfert ultérieur du joueur.

La FIFA a adopté en 2008 l'article RSTJ 18bis ainsi libellé:

“1.

*Aucun club ne peut signer de contrat permettant au(x) club(s) adverse(s), et vice versa, ou à des tiers d'acquiescer dans le cadre de travail ou de transferts la capacité d'influer sur l'indépendance ou la politique du club ou encore sur les performances de ses équipes.*

2.

*La Commission de Discipline de la FIFA peut imposer des sanctions aux clubs ne respectant pas les obligations prévues par le présent article”.*

La FIFA a ensuite introduit dans le RSTJ l'article 18 ter interdisant avec effet au 1er mai 2015 les opérations de type TPO:

“1.

*Aucun club ou joueur ne peut signer d'accord avec un tiers permettant à celui-ci de pouvoir prétendre, en partie ou en intégralité, à une indemnité payable en relation avec le futur transfert d'un joueur d'un club vers un*

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<sup>1</sup> L'original du jugement du Tribunal fédéral est en français et disponible sur le site ([www.bger.ch](http://www.bger.ch))

*autre club, ou de se voir attribuer tout droit en relation avec un transfert ou une indemnité de transfert futur(e).*

*L'interdiction énoncée à l'alinéa 1 entre en vigueur le 1<sup>er</sup> mai 2015.*

2.

*Les accords couverts par l'alinéa 1 antérieurs au 1<sup>er</sup> mai 2015 peuvent rester valables jusqu'à leur expiration contractuelle. Cependant, leur durée ne peut pas être prolongée.*

3.

*La durée de tout accord couvert par l'alinéa 1 signé entre le 1<sup>er</sup> janvier 2015 et le 30 avril 2015 ne peut excéder un an à partir de la date effective.*

5.

*D'ici à la fin du mois d'avril 2015, tous les accords existants couverts par l'alinéa 1 doivent être entrés dans TMS. Tous les clubs ayant signé des accords de ce type doivent les soumettre — dans leur intégralité et en incluant tout amendement ou annexe — dans TMS, en spécifiant les informations relatives au tiers concerné, le nom complet du joueur ainsi que la durée de l'accord.*

6.

*La Commission de Discipline de la FIFA peut imposer des sanctions disciplinaires aux clubs ou joueurs ne respectant pas les obligations contenues dans la présente annexe”.*

Au sens du RSTJ, le “tiers” est une partie autre que les deux clubs transférant un joueur de l'un vers l'autre, ou tout club avec lequel le joueur a été enregistré.

Le 30 janvier 2015, ASBL Royal Football Club Seraing (ci-après: RFC Seraing ou le club), un club de football affilié à l'Union royale belge des sociétés de football association (URBSFA), qui évolue au troisième niveau national du football belge, d'une part, et Doyen Sports Investment Limited (ci-après: Doyen), une société d'investissement de droit maltais s'autoproclamant “the world leader in

“Third Party Ownership”, d'autre part, ont conclu un contrat de type TPO, intitulé “Cooperation Agreement”, en vertu duquel le club transférait à Doyen 30% des droits économiques afférents à trois joueurs nommément désignés contre paiement par la société maltaise de 300'000 euros en trois tranches, la dernière arrivant à échéance au mois de février 2016. Ledit contrat devait déployer ses effets jusqu'au 1<sup>er</sup> juillet 2018 et son éventuelle prolongation était réservée.

En date du 7 juillet 2015, les mêmes parties ont signé un second accord du même type par lequel RFC Seraing a vendu à Doyen 25% des droits économiques d'un joueur portugais en contrepartie d'une somme de 50'000 euros. Le club a également conclu un contrat de travail avec ce joueur, qui était un agent libre.

Ces différents accords ont été transmis à la filiale de la FIFA qui gère le TMS (*Transfer Matching System*), ou système de régulation des transferts.

Le 2 juillet 2015, le secrétariat de la Commission de discipline de la FIFA, via l'Union Royale Belge des Sociétés de Football Association (URBSFA), a ouvert une procédure disciplinaire à l'encontre de RFC Seraing pour violation des art. 18bis et 18ter RSTJ relativement à deux contrats de type TPO intitulés accords de coopération conclus avec une société d'investissement de droit maltais, Doyen Sports Investment Limited (Doyen).

La Commission de discipline de la FIFA a rendu une décision le 4 septembre 2015. Reconnaisant le club coupable d'avoir violé les art. 18bis et 18ter RSTJ, elle lui a interdit d'enregistrer des joueurs, tant au niveau national qu'international, pendant les quatre périodes d'enregistrement suivant la

notification de sa décision et l'a condamné au paiement d'une amende de 150'000 fr.

Statuant le 7 janvier 2016, la Commission de recours de la FIFA a confirmé la décision de première instance.

Le 9 mars 2016, RFC Seraing a interjeté appel auprès du Tribunal Arbitral du Sport (TAS).

Le 9 mars 2017, la Formation a rendu sa sentence finale. Admettant partiellement l'appel, elle a réformé la décision attaquée en ce sens que l'interdiction faite au RFC Seraing d'enregistrer des joueurs, tant au niveau national qu'international, a été ramenée à trois périodes d'enregistrement. Pour le surplus, la décision de la commission de recours de la FIFA a été confirmée.

Le 15 mai 2017, RFC Seraing (ci-après: le recourant) a formé un recours en matière civile au Tribunal fédéral en vue d'obtenir l'annulation de la sentence du 9 mars 2017. En bref, le recourant fait valoir que le TAS ne peut pas être considéré comme un véritable tribunal arbitral et qu'au surplus, le comportement adopté par le président de la Formation envers ses avocats pendant l'audience du 17 octobre 2016 a porté atteinte à son droit d'être entendu. Sur le fond, il soutient que la Formation a rendu une sentence incompatible avec l'ordre public matériel en avalisant l'interdiction totale des TPO signifiée par la FIFA et en lui infligeant des sanctions disciplinaires manifestement disproportionnées.

Dans sa réponse du 27 juin 2017, la FIFA (ci-après: l'intimée) a conclu principalement à l'irrecevabilité du recours et, subsidiairement, au rejet de celui-ci dans la mesure de sa recevabilité.

Le même jour, le TAS, soit pour lui son Secrétaire général, a produit le dossier de la

cause et formulé des observations au terme desquelles il a conclu au rejet du recours.

Le recourant, dans sa réplique du 14 juillet 2017, et l'intimée, dans sa duplique du 2 août 2017, ont maintenu leurs conclusions respectives.

En date du 24 janvier 2018, les conseils du recourant ont adressé au Tribunal fédéral une copie de l'arrêt rendu le 11 janvier 2018 par la 1ère Chambre de la Cour d'appel de Bruxelles dans une cause opposant RFC Seraing, parmi d'autres parties appelantes, à la FIFA, entre autres parties intimées.

### **Extrait des considérants**

Le recourant soutient que le TAS n'est pas un tribunal arbitral digne de ce nom et que les sentences qu'il prononce ne sauraient être assimilées aux jugements rendus par un tribunal étatique.

L'intimée en déduit que l'intéressé aurait dû l'assigner devant les tribunaux étatiques, par la voie d'une action en annulation au sens de l'art. 75 CC, car, pour elle, il est contraire aux règles de la bonne foi de former un recours en matière d'arbitrage au Tribunal fédéral contre une décision à laquelle on dénie soi-même le caractère d'une sentence arbitrale, tout en qualifiant cette décision de sentence arbitrale à la seule fin d'en faire l'objet de ce recours particulier. Cette contradiction dans la mise en œuvre des autorités juridictionnelles étatiques ou privées appelées à sanctionner des peines disciplinaires prononcées par une association sportive de droit suisse à l'encontre d'athlètes a été relevée, il y a une quinzaine d'années, dans un passage non publié de l'arrêt de principe *Lazutina* du 27 mai 2003 (ATF 129 III 445; ci-après: l'arrêt *Lazutina*). La Ire Cour de droit civil du Tribunal fédéral y déclarait faire abstraction

*“de l’illogisme du comportement adopté par [les recourantes] et consistant à déférer la décision contestée de l’association en cause (le CIO [pour Comité International Olympique]) à un tribunal arbitral argué de partialité (le TAS) au lieu d’ouvrir une action en annulation de cette décision, sur la base de l’art. 75 CC, devant un tribunal étatique” (consid. 2.1).*

La jurisprudence fédérale publiée à ce jour n’a apparemment pas encore sanctionné par l’irrecevabilité du recours le comportement d’une partie consistant à attaquer devant le Tribunal fédéral la décision d’un tribunal arbitral, tel le TAS, dans le but de faire constater par la plus haute instance judiciaire du pays que cette décision ne saurait être qualifiée de sentence arbitrale et, partant, d’obtenir l’annulation de la pseudo-sentence.

**Dans un premier moyen, fondé sur l’art. 192 (recte: 190) al. 2 let. a LDIP, le recourant soutient que la sentence attaquée a été rendue par un tribunal arbitral irrégulièrement composé.**

Selon le recourant, le TAS ne constitue pas un véritable tribunal arbitral au sens de la Convention de New York du 10 juin 1958 pour la reconnaissance et l’exécution des sentences arbitrales étrangères et l’obligation de recourir à l’arbitrage du TAS est d’autant plus illégale qu’elle est imposée par les statuts d’une organisation (la FIFA) qualifiée de “mafieuse” par des autorités pénales.

Le recourant se réfère à un arrêt du 12 novembre 2010, rendu par la Cour d’appel de Bruxelles, statuant dans le cadre d’une procédure en référé, indiquant que le TAS ne constitue peut-être pas un véritable tribunal arbitral, mais plutôt un organe d’appel de la fédération sportive ayant prononcé la sanction disciplinaire contestée. Le recourant cite également un article écrit par Antonio Rigozzi, conseil de l’intimée,

intitulé “L’importance du droit suisse de l’arbitrage dans la résolution des litiges sportifs internationaux” (in Revue de droit suisse 2013 I p.301 ss), où l’auteur met en évidence, entre autres critiques, le poids prépondérant des organisations sportives dans la nomination des membres du Conseil International de l’Arbitrage en matière de Sport (CIAS) et l’efficacité toute relative du processus de récusation des arbitres du TAS.

Faisant siennes les critiques de la juridiction étatique et de l’auteur précité, le recourant invite le Tribunal fédéral à revoir sa jurisprudence en la matière. Pour lui, en effet, comme l’intimée ne s’est soumise à la juridiction du TAS que postérieurement à la reddition de l’arrêt de principe *Lazutina* du 27 mai 2003 (ATF 129 III 445), lequel s’était borné à examiner les liens existant entre ce tribunal arbitral et le CIO, la relation de la FIFA avec le TAS n’a jamais véritablement été mise à l’épreuve du Tribunal fédéral à ce jour.

En résumé, le recourant remet en cause l’indépendance du TAS vis-à-vis de la FIFA.

Dans l’arrêt de principe *Lazutina* du 27 mai 2003 (ATF 129 III 445), le Tribunal fédéral, après avoir examiné la question par le menu, est arrivé à la conclusion que le TAS est suffisamment indépendant du CIO, comme de toutes les parties faisant appel à ses services, pour que les décisions qu’il rend dans les causes intéressant cet organisme puissent être considérées comme de véritables sentences, assimilables aux jugements d’un tribunal étatique (ATF 129 III 445 consid. 3.3.4). Au consid. 2.1, non publié, dudit arrêt, il déclarait déjà, en faisant référence à un premier arrêt de principe du 15 mars 1993 concernant les rapports entre la Fédération Equestre Internationale (FEI), d’une part, et le TAS dans son organisation originaire remontant au 30 juin 1984, d’autre

part (ATF 119 II 271, arrêt *Gundel*), qu'il n'est "pas douteux que les décisions attaquées revêtent la qualité de sentences en tant qu'elles ont été rendues dans les causes opposant les recourantes à la FIS [Fédération Internationale de Ski]". C'est dire que, de tout temps, le Tribunal fédéral a jugé moins problématiques, sous l'angle de l'indépendance, les liens noués par des FI olympiques de sports d'été (en l'occurrence, la FEI) ou d'hiver (en l'occurrence, la FIS) avec le TAS que ceux qui unissent ce tribunal arbitral et le CIO. Aussi ne voit-on pas, *prima facie*, pour quelles raisons il devrait en aller autrement aujourd'hui.

Depuis lors, cette jurisprudence a été confirmée à maintes reprises dans des causes où l'une ou l'autre des diverses FI existantes apparaissait comme partie (cf. par ex. les arrêts 4R149/2003 du 31 octobre 2003 consid. 1.1, 4R172/2006 du 22 mars 2007 ATF 133 III 235] consid. 4.3.2.3, 4A\_548/2009 du 20 janvier 2010 consid. 4.1 [avec la FIFA comme partie], 4A\_612/2009 du 10 février 2010 consid. 3.1.3, 4A\_640/2010 du 18 avril 2011 consid. 3.2.2 [avec la FIFA comme partie], 4A\_246/2011 du 7 novembre 2011 [= ATF 138 III 29] consid. 2.2.2, 4A\_428/2011 du 13 février 2012 consid. 3.2.3 et 4A\_102/2016 du 27 septembre 2016 consid. 3.2.3). Elle l'a été en dernier lieu dans l'arrêt 4A\_600/2016 du 29 juin 2017 opposant *Michel Platini* à la FIFA dans le cadre d'un recours visant à l'annulation de sanctions disciplinaires entérinées par la Commission de recours de la FIFA, puis réduites par le TAS.

Dans l'arrêt du 7 juin 2016 opposant *Claudia Pechstein*, une patineuse allemande sanctionnée par le TAS pour cause de dopage, à l'*International Skating Union (ISU)*, le *Bundesgerichtshof* allemand a examiné en détail la question de l'indépendance du TAS afin de déterminer si les tribunaux allemands étaient compétents pour statuer sur une demande de

dommages-intérêts formée par l'athlète allemande contre l'ISU. Admettant l'exception d'arbitrage soulevée par la défenderesse, il a rejoint le Tribunal fédéral suisse pour affirmer que le TAS est un véritable tribunal arbitral indépendant et impartial (n. 23: "*Der CAS ist ein «echtes» Schiedsgericht im Sinne der Zivilprozessordnung und nicht lediglich ein Verbandsgericht*"; n. 25: "*Der CAS stellt eine solche unabhängige und neutrale Instanz dar*").

L'arrêt invoqué par le recourant, que la Cour d'appel de Bruxelles a rendu quelque six ans plus tôt dans le cadre restreint d'une procédure de référé - arrêt dans lequel la Cour n'a fait qu'évoquer en passant l'éventualité que le TAS puisse ne pas constituer un véritable tribunal arbitral - ne soutient pas la comparaison avec l'arrêt allemand où la question de l'indépendance du TAS a été examinée avec minutie.

De toute façon, qu'elle confirme ou non la jurisprudence de l'arrêt *Lazutina*, l'opinion émise par la juridiction supérieure d'un pays membre de l'UE n'a pas davantage de poids que celle émanant de l'autorité judiciaire suprême du pays dans lequel la cause en litige est pendante, à savoir la Suisse, s'agissant de nations souveraines.

Le Tribunal fédéral n'a ainsi aucune raison de revenir sur une jurisprudence fermement établie. Seuls pourraient le pousser à le faire des motifs impérieux qui commanderaient de ne pas assimiler la FIFA aux autres FI sous le rapport de son indépendance d'avec le TAS. Or, la Cour de céans n'a pas trouvé d'arguments suffisamment forts, dans le mémoire du recourant, au point de justifier de faire de la FIFA un cas à part sous cet angle-là. Sans doute n'ignore-t-elle pas, plus généralement, les critiques formulées par un pan de la doctrine à l'encontre du TAS (cf., parmi d'autres, AXEL BRUNK, *Der Sportler*

und die institutionelle Sportschiedsgerichtsbarkeit, 2015, p. 237 ss, 262 ss, 275 ss, 305 SS et 343 as; Piermarco ZEN-RUFFINEN, La nécessaire réforme du Tribunal Arbitral du Sport, in Citius, Altius, Fortius, Mélanges en l'honneur de Denis Oswald, 2012, p. 483 ss, passim). Elle a d'ailleurs elle-même qualifié ce tribunal arbitral d' "institution perfectible" dans l'arrêt *Lazutina* (ATF 129 III 445 consid. 3.3.3.3 p. 463). Cependant, outre que des améliorations ont été effectivement apportées à cette institution, ainsi que le souligne avec raison son Secrétaire général dans sa réponse au recours, et qu'il ne paraît guère envisageable, à maints égards, de lui substituer un autre mécanisme de traitement des litiges sportifs, sauf à renvoyer les athlètes et autres intéressés devant un tribunal étatique de tel ou tel pays avec tous les inconvénients que cela comporterait, le Tribunal fédéral, en tant qu'autorité judiciaire appelée à statuer sur les recours en matière d'arbitrage international qui lui sont adressés, n'a pas pour mission de réformer lui-même cette institution, ni de refondre les règlements qui la gouvernent, mais doit uniquement veiller à ce qu'elle atteigne le niveau d'indépendance requis pour pouvoir être assimilée à un tribunal étatique. Or, tel est assurément le cas, malgré qu'en ait le recourant, sur le vu des explications convaincantes fournies par l'intimée et le TAS dans leurs réponses au recours. Il suffira d'y ajouter les quelques remarques formulées ci-après.

S'agissant de l'indépendance structurelle du TAS par rapport aux FI en général et à la FIFA en particulier, le recourant se limite, pour l'essentiel, à reproduire mot pour mot un long passage de l'article de doctrine précité publié par le conseil de l'intimée. Or, ce dernier démontre clairement dans sa réponse, que la situation a sensiblement évolué depuis lors. A titre d'exemples, le président de la Chambre d'appel, qui désigne l'arbitre unique ou le président de la

Formation arbitrale (art. R54 du Code), n'est plus, comme c'était le cas à l'époque de la parution de cet article, le vice-président du CIO, mais une ancienne athlète désignée par le CIAS à cette fin. De même, contrairement à ce qui prévalait alors, à la suite de la modification de l'art. S14 du Code intervenue entre-temps, le CIAS n'est plus tenu de faire appel à un quota d'arbitres sélectionnés parmi les personnes proposées par les organisations sportives (1/5e chacun pour le CIO, les FI et les CNO), ces dernières ne jouissant plus d'un statut privilégié puisque, à l'instar de leurs commissions d'athlètes, elles ne peuvent que porter à l'attention du CIAS les noms et qualifications d'arbitres susceptibles de figurer sur la liste ad hoc, laquelle doit comporter 150 noms au minimum (art. S13 al. 2 du Code) et en comporte en réalité plus de 370 à l'heure actuelle, qui correspondent à des arbitres provenant de 87 pays différents (MATTHIEU REEB, Le Tribunal Arbitral du Sport [TAS] en 2017, in "Justice-Justiz-Giustizia" 2017/14 n. 1). En outre, si, lorsque le Tribunal fédéral a rendu l'arrêt *Lazutina*, le président du CIAS, qui est également celui du TAS en vertu de l'art. 59 du Code, était élu par le CIAS en son sein "sur proposition du CIO", il l'est désormais après consultation avec le CIO, l'ASOIF, l'AIOVVF et l'ACNO (art. S6 al. 2 du Code) et tout membre du CIAS peut faire acte de candidature à la présidence de cet organe (art. S8 al. 3 du Code). Aussi n'est-il pas injustifié d'affirmer, comme le fait l'intimée, que l'analyse des liens entre le TAS et le CIO, à laquelle le Tribunal fédéral a procédé dans l'arrêt *Lazutina*, s'applique à fortiori à la FIFA.

En ce qui concerne l'indépendance financière du TAS relativement à l'intimée, force est de constater que les 1'500'000 fr. versés annuellement par cette dernière à titre de participation aux frais généraux du TAS représentent moins de 10% du budget de

cette institution (16'000'000 fr.), ce qui équivaut à un pourcentage inférieur à celui préconisé par Piermarco ZEN-RUFFINIEN (op. cit., p. 500 ss) et reste bien en deçà des 7'500'000 fr. payés par l'ensemble du mouvement olympique au même titre. On voit mal, au demeurant, à qui d'autres que les organisations sportives faisant appel à ses services le TAS pourrait s'adresser pour recueillir les fonds nécessaires au paiement de ses frais généraux. Et l'on n'imagine pas, sauf à léser les premiers et à leur interdire l'accès au TAS, que l'on puisse exiger des athlètes et organismes sportifs une contribution égale au financement intégral de cette institution. En cela, la situation des sportifs n'est d'ailleurs pas comparable à celle des parties à un arbitrage commercial ad hoc qui sont appelées à payer tous les frais du tribunal arbitral sur un pied d'égalité. Quant à la volonté prêtée aux arbitres et aux employés du TAS de chercher à conserver leur pré carré en faisant tout ce qui est en leurs pouvoirs pour ne pas perdre un "gros client" comme la FIFA, elle suppose un état d'esprit fort peu conforme aux qualités que l'on peut s'attendre à trouver chez des personnes œuvrant au service d'un tribunal, fût-il de nature privée. Quoi qu'il en soit, le recourant n'a pas fourni la moindre preuve à cet égard. Il n'a pas non plus cherché à démontrer, par une analyse statistique ou de toute autre manière, qu'il existerait une propension du TAS à donner raison à la FIFA lorsqu'elle est partie à une procédure arbitrale conduite par lui.

Le système du contrôle préventif de la sentence arbitrale établi par l'art. R59 al. 2 du Code (en anglais: "*Scrutiny of the award*"; cf. KAUFMANN-KOHLER/RIGOZZI, *International Arbitration, Law and Practice in Switzerland*, 2015, n. 7.157 ss, spéc, 7.161) n'est pas l'apanage du TAS puisque c'est aussi l'une des spécificités de l'arbitrage CCI. Le Tribunal fédéral n'a du reste rien trouvé à

y redire, puisque le contrôle préventif ne remet pas en cause le pouvoir décisionnel des seuls arbitres statuant dans le cadre d'une Formation (arrêt 4A\_612/2009, précité, consid. 3.3). Cet avis est partagé, de surcroît, par le *Bundesgerichtshof* allemand (cf, arrêt cité).

Les deux exemples tirés par le recourant du comportement adopté en l'espèce par la Formation et son président n'ont rien à voir avec la question de l'indépendance du TAS en tant qu'institution. L'intéressé fait, au demeurant, du premier un grief spécifique qui sera examiné plus loin. En ce qui concerne le second, par lequel il se plaint des refus répétés du TAS de suspendre la procédure jusqu'à droit connu dans les procès en cours devant les instances européennes au sujet de la légalité de l'interdiction totale des TPO, il sied de rappeler que des fautes de procédure ou une décision matériellement erronée ne suffisent pas à fonder l'apparence de prévention d'un tribunal arbitral, sauf erreurs particulièrement graves ou répétées qui constitueraient une violation manifeste de ses obligations (arrêt 4A\_606/2013 du 2 septembre 2014 consid. 5.3 et les précédents cités). Cette exception n'entre pas en ligne de compte dans le cas présent.

Dans ces conditions, le grief du recourant fondé sur l'art. 190 al. 2 let. a LDIP ne saurait prospérer.

**En second lieu, le recourant dénonce une violation de son droit d'être entendu qui résulterait de certaines déclarations faites par le président de la Formation au cours de l'audience du 17 octobre 2016.**

Le droit d'être entendu, tel qu'il est garanti par les art. 182 al. 3 et 190 al. 2 let. d LDIP, n'a en principe pas un contenu différent de celui consacré en droit constitutionnel. Ainsi,

il a été admis, dans le domaine de l'arbitrage, que chaque partie avait le droit de s'exprimer sur les faits essentiels pour le jugement, de présenter son argumentation juridique, de proposer ses moyens de preuve sur des faits pertinents et de prendre part aux séances du tribunal arbitral. En revanche, le droit d'être entendu n'englobe pas le droit de s'exprimer oralement. De même n'exige-t-il pas qu'une sentence arbitrale internationale soit motivée. Toutefois, la jurisprudence en a également déduit un devoir minimum pour le tribunal arbitral d'examiner et de traiter les problèmes pertinents. Ce devoir est violé lorsque, par inadvertance ou malentendu, le tribunal arbitral ne prend pas en considération des allégués, arguments, preuves et offres de preuve présentés par l'une des parties et importants pour la sentence à rendre (ATF 142 III 360 consid. 4.1.1 et les arrêts cités).

La partie qui s'estime victime d'une violation de son droit d'être entendue ou d'un autre vice de procédure doit l'invoquer d'emblée dans la procédure arbitrale, sous peine de forclusion. En effet, il est contraire à la bonne foi de n'invoquer un vice de procédure que dans le cadre du recours dirigé contre la sentence arbitrale, alors que le vice aurait pu être signalé en cours de procédure (arrêt 4A\_150/2012 du 12 juillet 2012 consid. 4.1). Dans le même ordre d'idées, la partie qui entend récuser un arbitre doit invoquer le motif de récusation aussitôt qu'elle en a connaissance (arrêt 4A\_110/2012 du 9 octobre 2012 consid. 2.1.2). L'art. 180 al. 2 LDIP sert d'assise à ce principe jurisprudentiel que l'art. R34 al. 1 du Code vient concrétiser en prescrivant que la récusation doit être requise dans les sept jours suivant la connaissance de la cause de récusation.

Pour étayer son grief, le recourant cite un échange verbal qui s'est déroulé au cours de la

susdite audience entre l'un de ses conseils et le président de la Formation.

Le recourant soutient qu'il aurait été empêché d'exposer que l'interdiction des TPO, mise en place prétendument au nom de la morale, avait en réalité été adoptée par un Comité exécutif de la FIFA dont au moins la moitié des membres sont à ce jour poursuivis aux Etats-Unis d'Amérique sur la base d'une loi anti-mafia. Il voit dans ce qu'il considère comme une "attitude de préjugé", le résultat direct du mode de nomination du président de la Formation par le président de la Chambre d'appel du TAS, dont les effets seraient particulièrement sensibles lorsqu'une partie tente de restreindre la marge de manœuvre régulatrice d'une fédération.

S'en prenant ensuite directement au président de la Formation, Bernard Foucher, le recourant assure que ce dernier a démontré au cours de l'audience qu'il "*fait partie du même établissement sportif que la FIFA*" et qu'il est donc "*juge et partie*":

Le recourant mélange les griefs tirés de la violation du droit d'être entendu (art. 190 al. 2 let. d LDIP) et de la composition irrégulière du tribunal arbitral (art. 190 al. 2 let. a LDIP). Le fait est, pourtant, que, dans l'intitulé et le développement du moyen considéré, il n'est question que du premier de ces deux griefs, ce qui interdit déjà la Cour de céans d'entrer en matière sur le second (cf. art. 77 al. 3 LTF). Quoi qu'il en soit, l'intéressé est forclos à invoquer l'un ou l'autre de ces deux griefs pour n'être pas intervenu sur-le-champ après avoir oui les propos du président rapportés par lui.

Au demeurant, le président de la Formation, de par ses fonctions, devait diriger les débats, veiller à ce qu'ils fussent concis et inviter les parties à se concentrer sur l'objet du litige (cf. art. R44.2 al. 2 du Code

applicable par renvoi de l'art. R57 al. 1 [aujourd'hui: al. 3] de celui-ci). C'est ce qu'il a fait en évitant que l'audience du 17 octobre 2016 ne se transformât en un procès en règle de la FIFA et, singulièrement, de la moralité de certains membres de son Comité exécutif.

Aussi n'est-il nullement établi que la Formation, de par le comportement adopté par son président, ait porté une quelconque atteinte au droit d'être entendu du recourant. Ce dernier n'est, en outre, pas crédible quand il assimile, sans raison valable, Bernard Foucher à la FIFA, motif pris de leur prétendue appartenance commune au même establishment sportif, pour le qualifier de juge et partie dans toute procédure où cette association intervient.

En tout état de cause, le recourant n'expose pas en quoi son argument relatif à la moralité de certains membres du Comité exécutif de la FIFA, qu'il aurait été empêché de développer par le président de la Formation, serait pertinent en l'espèce. Sans doute a-t-il essayé de corriger ce défaut de motivation dans sa réplique, mais il n'était pas recevable à le faire sur le vu de la jurisprudence précitée.

D'où il suit que le moyen pris de la violation du droit d'être entendu, s'il n'avait pas été atteint par la forclusion, n'aurait pu qu'être rejeté comme étant infondé.

**Dans un dernier moyen, le recourant soutient que la sentence attaquée est incompatible à maints égards avec l'ordre public matériel au sens de l'art. 190 al. 2 let. e LDIP et de la jurisprudence y relative.**

Une sentence est incompatible avec l'ordre public si elle méconnaît les valeurs essentielles et largement reconnues qui, selon les conceptions prévalant en Suisse, devraient constituer le fondement de tout ordre juridique

(ATF 132 III 389 consid. 2.2.3). On distingue un ordre public procédural et un ordre public matériel.

Une sentence est contraire à l'ordre public matériel lorsqu'elle viole des principes fondamentaux du droit de fond au point de ne plus être conciliable avec l'ordre juridique et le système de valeurs déterminants; au nombre de ces principes figurent, notamment, la fidélité contractuelle, le respect des règles de la bonne foi, l'interdiction de l'abus de droit, la prohibition des mesures discriminatoires ou spoliatrices, ainsi que la protection des personnes civilement incapables. Comme l'adverbe "notamment" le fait ressortir sans ambiguïté, la liste d'exemples ainsi dressée par le Tribunal fédéral pour décrire le contenu de l'ordre public matériel n'est pas exhaustive, en dépit de sa permanence dans la jurisprudence relative à l'art. 190 al. 2 let. e LDIP.

Dans l'arrêt de principe *Tensacciai* du 8 mars 2006, le Tribunal fédéral, après avoir examiné la question, est arrivé à la conclusion que les dispositions du droit de la concurrence, quel qu'il soit, ne font pas partie des valeurs essentielles (ATF 132 III 389 consid. 3).

Dans la présente espèce, le recourant, bien qu'il s'en défende, cherche, en quelques lignes, à remettre en cause cette jurisprudence. Selon lui, en effet, eu égard à l'incontestable généralisation au niveau mondial des règles de concurrence les plus essentielles, il conviendrait d'admettre que, si tout le droit de la concurrence ne fait pas inconditionnellement partie de l'ordre public au sens de 190 al. 2 let. e LDIP, en fait, en revanche, partie le droit de la concurrence, notamment de l'UE et de la Suisse, dans la mesure où il réprime les comportements anticonstitutionnels les plus graves, tels que

les restrictions par objet ou les abus de position dominante visant à exclure tous les “tiers” d’un marché donné (boycott) pour le réserver à quelques élus, en l’espèce les clubs (création d’un monopole ou d’un oligopole).

Point n’est besoin d’examiner ici le bien-fondé de cette seule affirmation ni, partant, de soumettre la jurisprudence critiquée à un nouvel examen. En effet, même s’il fallait entrer dans les vues du recourant et assouplir cette jurisprudence dans le sens préconisé par lui, le moyen pris de la violation de l’ordre public matériel pour cause d’atteintes gravissimes au droit de la concurrence et le grief de même nature tiré du non-respect du droit à la libre circulation des capitaux (et droits apparentés) n’en devraient pas moins être écartés.

Force est de constater, à cet égard, que, pour toute motivation, le recourant se réfère à un long article de doctrine, écrit par un auteur français (Jean-Michel MARMAYOU). Dans une critique foncièrement appellatoire, il cite des passages de cet article, voire, le plus souvent, renvoie simplement le Tribunal fédéral à la lecture d’autres passages sans se préoccuper des motifs que la Formation a développés dans sa sentence relativement au droit de la concurrence et à la libre circulation des capitaux. Or, argumenter de la sorte, c’est méconnaître gravement la jurisprudence fédérale touchant la motivation d’un recours en matière d’arbitrage, laquelle impose au recourant de discuter les motifs de la sentence entreprise et d’indiquer précisément en quoi il estime que l’auteur de celle-ci a méconnu le droit.

Par conséquent, le recours n’est pas recevable sur ces points-là.

Dès lors, c’est à juste titre que la Formation ne s’est pas sentie liée par ce

précédent et qu’elle en a fait abstraction pour rendre sa sentence.

Selon le recourant, la sentence attaquée violerait encore l’ordre public en ce qu’elle aboutit à mettre “hors commerce” une activité parfaitement licite selon le Tribunal fédéral lui-même.

On ne voit déjà pas très bien à quel élément de la définition susmentionnée de l’ordre public matériel rattacher la démarche de la Formation dénoncée par le recourant, faute de précisions suffisantes à ce sujet.

Ensuite, le fait, pour le recourant, d’étayer sa critique en se fondant aveuglément sur l’arrêt 4A\_116/2016 ne saurait remplacer une démonstration convaincante de la valeur de précédent qu’il accorde à cet arrêt, lequel concernait d’autres parties que celles dont il est ici question. Les circonstances caractérisant les deux causes n’étaient de toute manière pas identiques.

Quant aux explications supplémentaires fournies dans ce contexte par le recourant, sur un mode essentiellement appellatoire au demeurant, il n’est guère possible de les rattacher à la critique fondée sur l’arrêt fédéral 4A\_116/2016. De fait, le recourant discute la “marge d’autonomie associative” à la lumière des éléments du raisonnement de droit européen qu’il a développés devant la Cour d’appel de Bruxelles, des conditions qui doivent être remplies en matière d’exception au principe de la libre circulation, ainsi que de la jurisprudence du Tribunal fédéral concernant l’ordre public européen, sans que ne ressorte de son mémoire le rapport censé exister entre les objets discutés et les considérations émises par la Ire Cour de droit civil dans son arrêt 4A\_116/2016.

Par conséquent, le grief de violation de l’ordre public matériel doit être rejeté en tant qu’il

repose sur le prétendu blanc-seing donné par le Tribunal fédéral à l'utilisation du système des TPO.

Le recourant explique, par ailleurs, que, selon une conception généralement acceptée, quoique critiquable, les clubs sont les membres indirects des FI, si bien qu'existerait entre l'intimée et lui une relation contractuelle conformément à laquelle il s'interdirait de pratiquer avec tout "tiers" une quelconque activité de TPO. Selon lui, un tel contrat violerait l'ordre public dès lors que l'art. 27 al. 2 CC interdit les restrictions contractuelles excessives à la liberté économique des parties. Or, en l'espèce, les règles litigieuses de la FIFA supprimeraient purement et simplement toute liberté pour les clubs de football du monde entier de procéder à certains types d'investissements.

Selon la jurisprudence, la violation de l'art. 27 al. 2 CC n'est pas automatiquement contraire à l'ordre public matériel ainsi défini; encore faut-il que l'on ait affaire à un cas grave et net de violation d'un droit fondamental. Or, une restriction contractuelle de la liberté économique n'est considérée comme excessive au regard de l'art. 27 al. 2 CC que si elle livre celui qui s'est obligé à l'arbitraire de son cocontractant, supprime sa liberté économique ou la limite dans une mesure telle que les bases de son existence économique sont mises en danger (arrêt 4A\_312/2017 du 27 novembre 2017 consid. 3.1 et les précédents cités).

Les conditions posées par cette jurisprudence ne sont pas réalisées en l'espèce. En interdisant les TPO, la FIFA limite certes la liberté économique des clubs, mais sans la supprimer. Ceux-ci restent, en effet, libres de rechercher des investissements, pour peu qu'ils ne les

obtiennent pas en cédant les droits économiques des joueurs à des tiers investisseurs. Le recourant lui-même concède que la liberté supprimée n'a trait qu'à "*certain types d'investissements*". Au reste, si la violation de l'art. 27 al. 2 CC était à ce point attentatoire à la liberté économique des clubs, il faudrait alors se demander comment des clubs professionnels établis dans des pays ayant d'ores et déjà proscrit l'institution des TPO, comme la France et l'Angleterre, trouvent encore les fonds nécessaires à leur fonctionnement, ce qu'ils parviennent pourtant à faire notoirement.

Dès lors, le moyen en question n'est pas fondé.

**Dans un dernier moyen, le recourant soutient que "la sanction est gravement disproportionnée, au point de violer l'ordre public".**

Tel qu'il est présenté, cet ultime grief n'apparaît pas recevable. En effet, le recourant confond, de toute évidence, le Tribunal fédéral statuant sur un recours en matière d'arbitrage international avec une cour d'appel autorisée à revoir librement la mesure de la peine infligée à un condamné par une instance pénale inférieure et à prendre en compte, à cette fin, toutes les circonstances factuelles pertinentes. De plus, s'affranchissant de toutes les règles régissant la procédure du recours en matière civile dans le domaine de l'arbitrage international, il allègue des faits ne correspondant à aucune constatation posée par la Formation dans la sentence attaquée - en particulier, pour tout ce qui concerne la portée effective de la sanction sur la première équipe et sur les jeunes joueurs -, sans invoquer l'une des exceptions qui lui permettraient de remettre en cause l'état de fait figurant dans celle-ci, ne discute pas les motifs exposés par les arbitres pour justifier

les sanctions litigieuses et tente vainement de compléter son argumentation dans sa réplique.

### **Décision**

Le recours est rejeté dans la mesure où il est recevable.

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## Judgment of the Swiss Federal Tribunal 4A\_312/2017

27 November 2017

### Club X. Appellant v. A. Respondent

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*Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of 19 April 2017<sup>1</sup>*

#### Extract of the facts

The Court of Arbitration for Sport (CAS) rendered an award on April 19, 2017, and ordered the respondent X., a professional football club..., to pay to the claimant A., a former players' agent, the amount of EUR 2'700'000, plus interest, as a payment for a commission of EUR 3'100'000 due according to the contract concluded on August 23, 2013.

Under the contract, the former player's agent undertook to ensure the transfer of a player named B. (hereafter: the Player) to the respondent, for the payment of a commission. The transfer took place in 2014 and the Player joined the Club for a duration of five years by paying a total remuneration of EUR 1'360'000.

The Panel therefore rejected the counterclaim filed by the respondent, aiming at the reduction of the disputed commission to EUR 68'000 and, consequently, to the reimbursement of EUR 332'000 of the advance payment of EUR 400'000 made to the claimant, and even a reduction up to the latter amount which would entail the full dismissal of the main claim.

On June 12, 2017, X. (hereafter: the Appellant Club) filed a civil law appeal to the Federal Tribunal requesting annulment of the aforementioned award holding that it was

incompatible with public policy (Art. 190(2)(e) PILA)<sup>2</sup>.

In its answer filed on September 14, 2017, A. (hereafter: the Respondent), requested the appeal be dismissed, insofar as it was admissible. The CAS also requested the dismissal of the appeal in its answer filed on October 5, 2017.

The Appellant filed a reply on October 24, 2017.

#### Extract of the legal considerations

**In its sole argument, the Appellant submits that the Award under appeal is incompatible with substantive public policy.**

The Federal Tribunal first recalled the scope of the substantive public policy provided by Art. 190(2)(e) PILA (at 3.1).

An award is incompatible with public policy when it disregards the essential and broadly recognized values which, according to prevailing theories in Switzerland, should constitute the basis of any legal order (ATF 132 III 389 at 2.2.3). There is a distinction between procedural and substantive public policy. An award is incompatible with substantive public policy when it violates fundamental legal principles and consequently becomes completely inconsistent with the legal order and the system of essential values. Among such principles are, in particular, the sanctity of

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<sup>1</sup> The original of the judgment of the Swiss Federal Tribunal is in French ([www.bger.ch](http://www.bger.ch)). The full English translation along with an introductory note can be found in the website "Swiss International Arbitration Decisions" ([www.swissarbitrationdecisions.com](http://www.swissarbitrationdecisions.com)), a website

operated jointly by Dr. Charles Poncet and Dr. Despina Mavromati.

<sup>2</sup> PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

contracts, the respect of the rules of good faith, the prohibition of the abuse of rights, the prohibition of discriminatory and confiscatory measures, as well as the protection of incapable persons.

As the wording “in particular” unambiguously shows, the list of examples thus set forth by the Federal Tribunal to describe the content of substantive public policy is not exhaustive, although it is consistently expressed in case law relating to Art. 190(2)(e) PILA. The Federal tribunal stressed that it would be difficult and potentially dangerous to try to set forth all the fundamental principles that should undeniably be included as one or another may be omitted. It is therefore preferable to leave the list open.

In this respect, according to the jurisprudence, the violation of Art. 27 CC<sup>3</sup> (protection of the personality against excessive commitments including contractual restrictions of the economic freedom) does not necessarily violate substantive public policy as it is defined. There needs to be a severe and obvious infringement of this fundamental right. A contractual restriction of the economic freedom for the purposes of Art. 27(2) CC is considered to be excessive only if the obligee is given over to his contractual counterpart's arbitrariness, suppresses his economic freedom, or restricts it in such a way that the basis of his economic existence is jeopardized. Art. 27(2) CC also refers to commitments that are excessive due to their subject matter, namely those concerning certain personality rights, the importance of which is such that a person cannot commit her/himself for the future in this respect (for a general plan, in particular as to the decisive moment to decide on the excessive character of the disputed violation, cf. Judgment 4A\_45/2017 of June 27, 2017, in

sports arbitration, and particularly in football, see the judgment 4A\_458/2009 of June 10, 2010 at 4.4.3.2 and the precedent cited therein).

If it is not easy to define substantive public policy positively or to determine its scope precisely, it is easier to exclude some elements from it.

Moreover, a mere reason given by the arbitral tribunal that violates public policy is not sufficient, it is the result reached in the award that must be incompatible with public policy (ATF 138 III 322 at 4.1; 120 II 155 at 6a p. 167; 116 II 634 at 4 p. 637).

The Appellant seeks to demonstrate how the Award of April 19, 2017 is incompatible with substantive public policy within the meaning of Art. 190(2)(e) PILA. After reiterating the definition of this concept, it states that the agreement in question is a recruitment contract, which concerns the placement of an employee with an employer, and stresses that this is a sensitive and regulated area.

In this respect, it refers, first of all, to Art. 417 CO,<sup>4</sup> which urges the judge to reduce the broker's excessive salary in fairness and specifies, supported by references of case law (ATF 88 II 511 at 3b) and doctrine (Pierre ENGEL, *Contracts of Swiss Law*, 2nd edition 2000, p. 526), that this provision not only protects the inexperienced or reckless principal against the exaggerated claims of a skilled — or even experienced — broker but also seeks to avoid excessive remuneration that may have repercussions on the labor market. Secondly, the Appellant club argued for the applicability of specific Swiss laws prohibiting excessive commissions in the employment brokerages<sup>5</sup>. In

<sup>3</sup> CC is the French abbreviation for the Swiss Civil Code of December 10, 1907, RS 210.

<sup>4</sup> CO is the French abbreviation of the Federal Code of Obligations of March 30, 1911, RS 211.

<sup>5</sup> Art. 9(4) of the Federal Act of October 6, 1989, on the Service of Employment and Leasing of Services (LSE, RS 823.11), which urges the Federal Council to fix the placement commissions; Art. 20(1) of the Decree of January 16, 1991 on the Service of Employment and Leasing of Services (OSE,

RS 823.111), according to which the placement commission is calculated as a percentage of the gross annual wage agreed with the worker placed; and Art. 3(1) of the Decree of January 16, 1991 on emoluments, commissions, and securities provided for by the Employment Service Act (OEmol-LSE, RS 823.113), which specifies the placement fee of 5% maximum of the first gross annual salary.

its view, said laws demonstrate that excessive commissions in this area cannot be admitted because they are likely to influence the normal play of the relationship between an employee and his employer. Lastly, the Appellant, refers to Art. 7(3)(b) of FIFA Regulations on Working with Intermediaries. Having done so, it draws from all these provisions the conclusion that Art. 190(2)(e) PILA prohibits an excessive commission, i.e. one that exceeds a certain percentage of the worker's wages in the field of recruitment.

Finally, what the Appellant considers truly relevant is that the recruitment contract provides for a commission of EUR 3'100'000, that the salary of the Player for a period of five years was EUR 1'360'000 (that is EUR 272'000 per year) and that said commission represents 228% of the salary of the Player for the full duration of the employment contract, i.e., more than ten times the annual salary of the Player. In view of these circumstances, the Appellant submits that the Panel, by endorsing a commission percentage grossly exaggerated in relation to the Player's salary, violated a public policy principle, namely the prohibition of excessive commissions in the field of recruitment. Therefore, the Award rendered led to a result contrary to public policy and should be annulled pursuant to Art. 190(2)(e) PILA.

In his Answer, the Respondent seeks to show, first, that the Appellant's arguments are appellatory in nature and seeks merely to make the Federal Tribunal examine, with a full power of review, the questions of substantive law dealt with in the Award. Secondly, the Respondent explains why, in his view, the Appellant's arguments are manifestly unfounded. He seeks to demonstrate, first, by numerous references to jurisprudence and doctrine, that the violation of a mandatory provision of Swiss law or a provision of public interest does not amount to a violation of public order within the meaning of Art. 190(2)(e) PILA. He then asserts that the

prohibition of excessive commission is not one of the fundamental principles the violation of which is incompatible with the public policy according to this provision. Lastly, the Respondent notes that the Appellant has not established or even alleged that the result of the Award would excessively restrict its economic freedom and endanger its existence to the point of having to be qualified as a confiscatory measure or that the commitment made in the contract was contrary to Art. 27 CC.

For its part, the CAS notes that the Appellant invokes one of the Swiss law mentioned above prohibiting excessive commissions in the employment brokerages<sup>6</sup> for the first time at the stage of the civil law appeal. In any event, this law is not applicable in the present case as the mere reference to Swiss substantive law does not constitute a sufficient connection to justify its application. It is also clear to the CAS that said law could not apply in the context of an international relationship between a club and an agent, which arises solely from the contractual freedom of the parties. Therefore, it is not necessary to go further into the question of whether the commission is excessive or not.

Examined in the light of the specific concept of substantive public policy governing the field of international arbitration, as defined by the aforementioned case law, and faced with the objections lodged against it by both the Respondent and the CAS, the Appellant's plea based on Art. 190(2)(e) PILA must be dismissed.

First, citing the Judgment 4A\_416/2016 of December 13, 2016 at 4.2.3, the Tribunal Federal confirmed that even though sports arbitration features some differences compared to commercial arbitration (e.g., with respect to the waiver of the right to appeal (ATF 133 III 235 at 4.3.2.2, p. 244), these particularities should not extend to the concept of substantive public policy (at 3.3.2). Moreover, the Federal Tribunal

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<sup>6</sup> Op. cit. footnote 4: Art. 9(4) of the Federal Act of October 6, 1989, on the Service of Employment and Leasing of Services (LSE, RS 823.11).

repeated that substantive public policy should not be adapted to the specific field in question, *in casu*, the field of sport and, more particularly, football, as this could lead to lack of legal certainty.

Art. 163(3) CO orders the judge to reduce the penalties that s/he considers to be excessive and falls under the Swiss public order, in the sense that the judge must apply this mandatory provision even if the debtor of the contractual penalty did not expressly request a reduction of its amount. According to well-established case law, this does not mean that the violation of the aforementioned provision would contravene the public policy of Art. 190(2)(e) PILA (Judgments 4A\_536, 540/2016 of October 26, 2016 at 4.3.2, 4A\_510/2015<sup>19</sup> of March 8, 2016 at 6.2.2 and 4A\_634/2014<sup>20</sup> of May 21, 2015 at 5.2.2). This observation also applies to Art. 417 CO, as well as to the mandatory provisions invoked by the Appellant in support of the complaint of a breach of substantive public policy which in any event were not applicable in the present case.

Finding in principle that substantive public policy within the meaning of Art. 190(2)(e) PILA prohibits all excessive commissions in the field of recruitment, while stating that a commission is excessive if it exceeds a certain percentage of the worker's salary, is not necessary or even desirable. Such a principle is not necessary, as the definition of substantive public policy covered by this provision is already sufficient to sanction, in particular by referring to Art. 27(2) CC, the aforementioned abuses and inadmissible situations which would undermine the essential and widely recognized values that, according to the prevailing views in Switzerland, are the foundation of any legal order. Nor would it be desirable to endorse a principle that, based entirely on the vague notion of "excessive commission," would still require a "fixed percentage" of the worker's salary in order to be fixed once and for all and, irrespective of the profession exercised by the worker from whom any commission equal or superior to this percentage would render the award endorsing it incompatible with substantive public policy. Moreover, definitively setting such a percentage

in order to remunerate the placement of any worker would entail the risk of treating equally situations that require a different approach.

It remains to be considered whether the Panel, taking into account the facts of the present case, did or did not disregard substantive public policy by accepting the Respondent's submissions. A positive answer to this question requires that the result reached in the Award under appeal, and not the reasons underlying it, is incompatible with public policy.

An introductory procedural remark has been made by the Federal tribunal. The facts established in the arbitral award – such as the quality of free agent of the Player - that generally bind the federal Tribunal should not necessarily appear in the factual summary of the award but they can also be part of its legal reasoning (see Judgment 4A\_231/2010 of August 10, 2010 at 2.2; Hansjörg Seiler, in *Bundesgerichtsgesetz* (BOG), 2nd ed. 2015, n°18 ad Art. 112 LTF). It is still a finding of fact that binds the Federal Tribunal (4A\_384/2017 of October 4, 2017 at 2).

The disputed commission, which amounts to EUR 3'100'000, represents more than ten times the annual salary of the Player (EUR 272'000) and is equivalent to 228% of this salary over the full duration of the contract (EUR 1'360'000). However, this gross enumeration should be placed in its context. As such, and even though the amount of EUR 3'100'000 seemed high compared to the annual salary of the player, it should be noted that the Club is a renowned football club that discovered a young footballer and employed the services of the Intermediary in order to conclude the contract of employment. The efforts of the broker led to the conclusion of a contract of employment for a duration of five years between the Appellant and the Player. The amount was fixed and the parties had agreed it in writing, and then the Club waited until the proceedings before the CAS in order to argue that it was excessive. Such

procrastination is already, to say the least, dubious in the light of the rules of good faith.

In the particular case, the Federal Tribunal cannot set aside the award for breach of substantive public policy for the mere fact that the Panel grossly misunderstood the concept of contractual fidelity and unpredictably or arbitrarily applied the sporting regulations as to the criteria to be used in order to determine whether or not an intermediary's remuneration is excessive. The Federal Tribunal, even though it is called upon to rule on an appeal against an award rendered by an arbitral tribunal with its seat in Switzerland and authorized to apply Swiss law subsidiarily, is bound to respect, as to the manner in which this law has been applied, the same distance as it would have as to the application made of any other right and must not yield to the temptation to examine with full power of review whether the pertinent rules of Swiss law have been interpreted and/or correctly applied, as it would do if it dealt with a civil law appeal against a cantonal judgment (Judgment 4A\_32/2016 of December 20, 2016 at 4.3).

For the rest, in order to establish the current scope of the infringement that it would suffer for having signed the recruitment contract at issue in 2013, the Appellant fails to demonstrate how the fact of having to pay the Respondent the remaining sum of EUR 2'700'000 and the additional interest would make it fall into the arbitrariness of the Respondent and would suppress its economic freedom to such an extent that the basis of its existence would be endangered: in sum, how it would constitute an excessive restriction in view of Art. 27(2) CC (Judgment 4A\_668/2016 of July 24, 2017 at 4.2 and the case law cited). In the case of an operation which, taken as a whole, could prove to be ultimately neutral or even profitable for the Club, it is difficult to discern how the Award that ratifies this would be incompatible with substantive public policy.

### **Decision**

As the only argument raised by the Appellant is unfounded, this appeal must be rejected.

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**Informations diverses**  
**Miscellaneous**



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## Publications récentes relatives au TAS/Recent publications related to CAS

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- Hovell M., LawInSport, A review of key financial fair play cases through the lens of the CAS, 12 April 2018
- Karpenter K., LawInSport, Proportionality of athlete sanctions - A review of the Nick Lindahl match-fixing case. 9 March 2018
- Latty F., Interdiction de la TPO : le TAS prend les devants, TAS 2016/A/4490, RFC Seraing c. FIFA, sentence arbitrale du 9 mars 2017, Jurisport n°183, février 2018, p. 28
- Marmayou J.-M., L'effet négatif du principe de compétence-compétence au service de l'autonomie du système TAS, Note sous Cass. 1<sup>e</sup> civ., 11 octobre 2017, n°16-24590, Les Cahiers de Droit du Sport, n° 49 2018, p.115
- Ross M. / Lebbon, LawInSport, A Summary Of CAS Ad Hoc & Anti-Doping Division decisions at the 2018 Winter Olympic Games, 2 March 2018
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- Sethna R., LawInSport, When can athletes obtain a valid retroactive TUE? A review of the Samir Nasri case, 28 March 2018
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- Rechtsprechung, Internationales, CAS: Ärztliche Zusicherung entbinder Athleten bei Medikamenten nicht von Prüfungspflicht auf Doping Substanzen, Spurt 1/2018, p. 30
- Bundesgericht (Schweiz), Fall "Platini" : Sanktionen wegen Verstopes gegen FIFA-Ethik-Code bestätigt, Spurt 2/2018, p. 67
- 4A\_668/2016 du 24 juillet 2017 [FIFA rules violation not tantamount to public policy violation], ASA Bulletin, Volume 36, N°1, 2018, p. 133
- 4A\_206/2017 vom 6. Oktober 2017 [CAS decision not an arbitral award], ASA Bulletin, Volume 36, N°1, 2018, p. 193

