



# Bulletin TAS CAS Bulletin

2020/02



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

TRIBUNAL ARBITRAL DU SPORT/COURT OF ARBITRATION FOR SPORT

---

**Bulletin TAS  
CAS Bulletin  
2020/2**

Lausanne 2020

## Table des matières/Table of Contents

Editorial.....	4
Articles et commentaires / Articles and Commentaries / Artículos y Comentarios.....	6
The New Swiss International and Domestic Arbitration Law, Sport and CAS Arbitration Guido Carducci.....	7
Experts in the Hot Tub at the Court of Arbitration for Sport Doriane L. Coleman & Jonathan Taylor.....	23
La sucesión deportiva de clubes de fútbol: consideraciones a la vista de la jurisprudencia del TAS en la materia Jordi López Batet.....	31
The regulatory framework of FIFA regarding the international transfer of minor players Despina Mavromati & Jake Cohen Esq.....	41
Jurisprudence majeure / Leading Cases / Casos importantes .....	54
CAS 2018/O/5830 International Surfing Association (ISA) v. International Canoe Federation (ICF) 5 August 2020 .....	55
CAS 2018/A/5982 Al Merreikh Sport Club v. Sudan Football Association (SFA) 20 February 2020 .....	63
CAS 2019/A/617968 Gambia Football Federation (GFF) v. Confédération Africaine de Football (CAF) & Fédération Togolaise de Football (FTF) 19 June 2019.....	68
CAS 2019/A/6313 Jarrion Lawson v. International Association of Athletics Federations (IAAF) 6 March 2020.....	73
CAS 2019/A/6388 Karim Keramuddin v. Fédération Internationale de Football Association (FIFA) 14 July 2020 .....	78
TAS 2019/A/6421 Olympique des Alpes SA (OLA) c. Geoffrey Mujangi Bia & Kayserispor Kulübü Dernegi 17 juin 2020 .....	85
CAS 2019/A/6525 Sevilla FC v. AS Nancy Lorraine 14 April 2020.....	93
Jugements du Tribunal fédéral / Judgements of the Federal Tribunal / Sentencias del Tribunal Federal .....	97
4A_272/2019 4 September 2019 A. v. B.....	98

4A_485/2019	
17 août 2020	
Trabzonspor Sportif Yatirim Ve Futbol Isietmeciliği A.S., Trabzonspor Sportif Yatirim, Futbol isletmeciliği Ticaret A.S., Trabzonspor Kulübü Derneği c. Turkish Football Federation (TFF), Fenerbahçe Futbol AS, Fenerbahçe Spor Kulübü, Fédération Internationale de Football Association (FIFA) .....	102
4A_543/2019	
30 April 2020	
Kuwait Motor Sports Club v. International Motorcycling Federation .....	112
4A_618/2019	
17 septembre 2020	
Franck Herman Blahoua Betra c. Hellenic National Council for Combating Doping (ESKAN) .....	115
Informations diverses / Miscellaneous / Información miscelánea.....	121
Publications récentes relatives au TAS/Recent publications related to CAS/Publicaciones recientes relacionadas con el TAS.....	122

## Editorial

Despite the multiple implications of the Covid-19 pandemic for the world in general and for sport in particular, CAS has recorded a record number of cases in 2020 (probably more than 900 procedures), particularly in the field of football. One of the direct consequences for the CAS of the numerous restrictions due to the pandemic is the massive use of video-conferencing services for CAS hearings and the new success of the CAS e-filing platform, now generally used by parties to file their written submissions and exhibits. It remains to be seen whether those practices will continue to be largely used once the pandemic will be over.

Although delayed by a few weeks, the renovation work of the future CAS headquarters at the Palais de Beaulieu/Lausanne progresses normally so that it is likely that the future CAS premises will be available before the end of 2021.

The jurisdiction of the CAS Anti-Doping Division (ADD) designed for handling first instance doping cases in force since January 2019 is now recognised by 18 International Federations (IFs). Twenty procedures have already been filed and more are expected as the implementation of the IF's Anti-Doping Rules (ADRs) are just now going into effect alongside the new 2021 WADA International Standard for Results Management.

The coming year is also likely to generate more work for the CAS as the postponed Games of the XXXII Olympiad commonly known as the Tokyo Games are now scheduled to take place during the summer 2021 in Japan. A CAS Ad Hoc Anti-Doping Division (ADD) as well as a "regular" Ad Hoc Division (AHD) that will act as an appeal court and also as a sole instance for non-doping related matters will be established in this context with a distinct list of arbitrators for each division.

Regarding the "leading cases" selected for this issue, due to the important number of football cases registered by the CAS, they mostly remain football-related.

In the field of football, the case 5982 Al Merreikh Sport Club v. Sudan Football Federation deals with the validity of a match complaint and with the application of Articles R31.3 and R.32 of the CAS Code related to the time limit to file written submissions. In the case 6179, Gambia Football Federation v. Confédération Africaine de Football & Fédération Togolaise de Football, the eligibility to play of a player is examined with an interesting discussion on the issue of the burden and standard of proof where both parties adduce evidence of same level. The case 6388 Karim Keramuddin v. FIFA is the first decision dealing with a violation of the FIFA Code of Ethics involving sexual harassment and abuse of position committed by a football official. The transfer case 6525 addresses a transfer with a sell-on clause. Finally, the case 6421 Olympique des Alpes SA c. Geoffrey Mujangi Bia and Kayserispor deals with a unilateral and unjustified breach of contract warranting the payment of compensation.

Turning to doping, the case 6313 Jarrion Lawson v. IAAF examines the issue of the proof of lack of intent in cases where the athlete cannot establish the origin of the prohibited substance and of the overwhelming importance of the other elements of proof of lack of intent in such circumstances.

Outside football and doping, the case 5830 International Surfing Association v. International Canoe Federation concerns the governance of stand-up paddle, a sport discipline that both the ISA and the ICF considered to fall within their respective fields of competence.

We are pleased to publish for the first time in this issue a football-related article written in Spanish, now a CAS official language, by Jordi López Batet, "La sucesión deportiva de

clubes de fútbol: consideraciones a la vista de la jurisprudencia del TAS en la materia”. Furthermore, Despina Mavromati and Jake Cohen have co-written an interesting article on “The regulatory framework of FIFA regarding the international transfer of minor players” whereas professor Philippe Carducci, CAS arbitrator, has prepared a valuable paper entitled “The New Swiss International and Domestic Arbitration Law, Sport and CAS Arbitration”. Lastly, the article of Doriane Coleman & Jonathan Taylor highlights a topical issue, “Experts in the Hot Tub at the Court of Arbitration for Sport”.

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.

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

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

---

**Articles et commentaires**  
**Articles and Commentaries**  
**Artículos y comentarios**



---

# The New Swiss International and Domestic Arbitration Law, Sport and CAS Arbitration

Guido Carducci\*

---

- I. General Remarks
    - A. General legislation and consideration of sport arbitration law
    - B. Reform, sport and CAS arbitrations
    - C. Agreement of the parties and real consent
  - II. International Arbitration
    - A. Scope and applicability: objective v. subjective
    - B. Arbitration agreement
    - C. Jurisdiction of Swiss courts and arbitration
    - D. Absence of “*juge d’appui*”
    - E. Appointment, replacement
    - F. Discovery
    - G. Challenges
    - H. Removal
    - I. Estoppel
    - J. Seeking judicial assistance as to provisional and conservatory measures
    - K. Seeking judicial assistance as to the taking of evidence
    - L. Swiss judicial assistance to arbitrations abroad (CAS Arbitration is not concerned)
    - M. Error and omissions
    - N. Annulment
    - O. Revision of awards (Recours en revision)
    - P. Waivers to challenges
    - Q. Facilitating proceedings before the Federal Court
    - R. Summary proceedings
  - III. Domestic Arbitration
    - A. Arbitration agreement
    - B. Summary proceedings
    - C. Disclosure
    - D. Challenge and removal
    - E. Estoppel
    - F. Rectifying or interpreting awards, additional awards
    - G. Challenging the award
  - IV. Does the reform require a modification of the CAS Rules?
  - V. Conclusion
- 

Since January 1, 2021, is in force the reform that the Federal Parliament approved on 19 June 2020 after nearly two years (October 2018 – June 2020), earlier *travaux préparatoires*<sup>1</sup> and consultations (Federal Court, 9 cantons,

3 political parties, 28 organizations). The new law modifies three parts of Swiss law:

- i) primarily, international arbitration law (below II), meaning Chapter XII (Art.176-194) of the Federal Private International

---

\* Prof. Dr. Guido Carducci, Esc. (Paris, London, Rome) CAS Arbitrator, Chartered Arbitrator (FCIArb), Former Chief, International Standards Section, UNESCO

<sup>1</sup> Group of experts (Prof. Gabrielle Kaufmann-Kohler, Prof. Felix Dasser, Maître Elliott Geisinger, Prof. Daniel Girsberger).

Law Act (“PILA” hereafter) of 18 December 1987. Users will adapt easily to the reform which leaves unaffected structure, clear text, and even numbering of articles, in Chapter XII. PILA’s main set of provisions (Art.1-175) on private international law<sup>2</sup> are outside the scope of the reform;

- ii) significantly, as well, domestic arbitration law, governed by the Code of Civil Procedure (CPC hereafter);
- iii) only as needed, the law governing the Federal Court<sup>3</sup> (“LTF” hereafter).

This article analyses accurately, though concisely by its size, this reform as such and from the sport and CAS arbitration perspective. Only the new provisions, often new paragraphs of existing articles,<sup>4</sup> are considered. The new law is available in the Swiss Federation’s languages, not in English at present, and relevant references to Swiss law and Federal Tribunal’s rulings in this article are provided in French, both a CAS and Swiss Federation’s language.

## I. General Remarks

### A. General legislation and consideration of sport arbitration law

The reform addresses Swiss arbitration law generally (international and domestic) and amends several of its provisions. The reform entails no provisions addressing specifically only one or more sport arbitration law issues. The Swiss Federal Council’s message, dated 24 October 2018,<sup>5</sup> which submitted the draft reform to Parliament, did consider expressly the specificity of international sport arbitration, the numerous sport entities based in Switzerland (IOC/CIO, FIFA,<sup>6</sup> UEFA,<sup>7</sup> WADA, CAS/TAS, etc.), the Federal Court’s

control over sport arbitral awards made in Switzerland and concluded that no specific legislation is needed within this reform. The European Court of Justice in Pechstein (2018) regarded CAS arbitral proceedings as complying with the European Convention on Human Rights<sup>8</sup> and rejected the alleged CAS’ structural absence of independence and impartiality. CAS promptly implemented the Court’s request for CAS to allow public hearings upon a party’s request in disciplinary cases.<sup>9</sup> The Swiss Federal Council’s message concluded, in part, as follows:

Un niveau élevé de protection juridictionnelle est indispensable pour assurer la crédibilité du sport mondial. Le Tribunal fédéral a constaté que la protection offerte par les tribunaux étautiques nationaux ne permettait pas d’assurer une égalité de traitement des sportifs à l’échelon international. Un tribunal arbitral international du sport agissant selon les principes de l’état de droit est dès lors essentiel pour le sport professionnel international. Le Conseil fédéral suit l’évolution dans ce domaine avec attention. Il est d’avis qu’il appartient en premier lieu au TAS lui-même, à la fondation qui le soutient et aux associations concernées de s’atteler aux réformes en y associant les sportifs. En outre, le Tribunal fédéral pourra continuer de veiller en vertu de l’art. 190 LDIP à ce que le TAS conserve l’indépendance requise pour être à égalité avec les tribunaux nationaux, même dans un contexte changeant. Le Conseil fédéral estime que les conditions à l’adoption de prescriptions contraignantes ne sont actuellement pas réunies, d’autant que le cadre de la réforme du chap. XII de la LDIP n’est pas approprié pour réformer le

<sup>2</sup> Nevertheless, Art.7 concerns arbitration-related litigation.

<sup>3</sup> Loi sur le Tribunal fédéral (LTF), 17 June 2005.

<sup>4</sup> Consideration of the whole article, that is not possible within the size of this article, is necessary to appreciate the reform within existing law.

<sup>5</sup> Message concernant la modification de la loi fédérale sur le droit international privé (Chapitre 12: Arbitrage international) du 24 octobre 2018.

<sup>6</sup> Articles 57-58 of the FIFA Statutes, with regard to the jurisdiction of CAS.

<sup>7</sup> Articles 61-63 of the UEFA Statutes, with regard to the jurisdiction of CAS.

<sup>8</sup> Article 6 § 1, Mutu and Pechstein v. Switzerland (applications no. 40575/10 and no. 67474/10), ECHR.

<sup>9</sup> Public hearings were already organized, before Pechstein & Mutu, when the parties agree and so request.

règlement des différends dans le sport international.<sup>10</sup>

## B. Reform, sport and CAS arbitrations

Any CAS and sport arbitration seated in Switzerland is governed by Swiss arbitration law as *lex arbitri*, including the provisions amended by the reform. Swiss law is arbitration-friendly, allows flexibility and welcomes the application of arbitration rules chosen by the parties in domestic<sup>11</sup> and international arbitration.<sup>12</sup> Unless such rules conflict with mandatory Swiss law rules.

CAS Rules of Procedure are designed, certainly to capture the specificity of sport arbitration, but also to prove consistent with Swiss arbitration law, which stands as *lex arbitri* for any arbitration, of whatever nature<sup>13</sup> and dimension,<sup>14</sup> in Switzerland. CAS rules would thus most unlikely prove to conflict Swiss rules. For instance, CAS Rules on awards in ordinary and appeals arbitrations<sup>15</sup> are in line with PILA's provisions on awards<sup>16</sup> and their annulment grounds.<sup>17</sup> Another example, CAS Rules do not allow an appeal (review of the merits,<sup>18</sup> not an annulment) of a CAS award, which is final and binding, just as much as Swiss law rejects appeals in both domestic<sup>19</sup> and international arbitration<sup>20</sup> to allow only annulment proceedings. A final example, CAS Rules require that any parties' waiver to all annulment proceedings<sup>21</sup> be "expressly" included in the arbitration agreement or in a subsequent agreement, "in

particular at the outset of the arbitration".<sup>22</sup> This provision draws the parties' attention and seeks conformity<sup>23</sup> to the Federal Court's caselaw which refuses indirect waivers from athletes (see below, iii). Inversely, ordinary arbitration institutional rules that are not specific to Swiss law and to sport arbitration disputes would not provide such an information, would merely refer to a generic final character of the award leaving the waiver's conformity with Swiss law<sup>24</sup> to otherwise informed parties.

Regardless of the procedure that the parties have chosen, a mandatory rule of Swiss law of international arbitration requires the arbitral tribunal to ensure equal treatment of the parties and their right to be heard in adversarial proceedings.<sup>25</sup> The chosen arbitration rules apply to arbitrations within their scope. Swiss law applies as gap-filler, although rich and detailed institutional rules as the CAS Rules of Procedure are generally more detailed than national arbitration rules and rarely raise gaps.<sup>26</sup>

## C. Agreement of the parties and real consent

As other arbitration-friendly legislations, before and after the reform Swiss law grants significant room to the agreement of the parties allowing them to organize their arbitration as they deem fit.<sup>27</sup> The Federal Court allows arbitration agreements by

<sup>10</sup> Message, cited, 1.3.4.

<sup>11</sup> Art.373, CPC.

<sup>12</sup> Art.182. The provision allows choice of rules (as in CAS arbitration by means of R27), as well as of a procedural law governing the arbitral procedure. Failing an agreement by the parties, the tribunal determines the (law or rules of) procedure, and shall do so to the extent necessary.

<sup>13</sup> Sport, commercial, investment, etc.

<sup>14</sup> Domestic and international. While *lex arbitri* is generally used with reference to the latter, domestic arbitration is even more concerned and *lex arbitri* is an implied term.

<sup>15</sup> R.46, R.59.

<sup>16</sup> Primarily the majority principle, shared in Art.189 PILA, R.46 (1), R. 59 (1).

<sup>17</sup> Articles 189, 190.

<sup>18</sup> As in court litigation by a court of appeal. We do not refer to "internal" appeals within CAS and against

awards rendered by CAS acting as first instance tribunal (R.47.2).

<sup>19</sup> Articles 395, 399, CPC.

<sup>20</sup> Art.190, new art.190a.

<sup>21</sup> Parties that do not have in Switzerland their domicile, habitual residence, seat. See new art.192 (1), below (II).

<sup>22</sup> R 46 (3), R 59 (4).

<sup>23</sup> Whether this conformity is, indeed, full conformity and leads the Federal Court to accept the waiver remains a matter to be determined case by case.

<sup>24</sup> Assuming the seat is in Switzerland, where annulment is sought.

<sup>25</sup> Art.182 (3).

<sup>26</sup> In view of its limited size this article focuses on Swiss arbitration law, not on the CAS Rules of procedure, their interpretation and application, on the matters covered by the reform.

<sup>27</sup> Except if in conflict with mandatory rules.

reference, most common in professional sports<sup>28</sup> and federations' regulations.<sup>29</sup>

Of course, agreement requires consent. Agreement to waive the parties' right to seek the annulment of an award is particularly far-reaching. With regard to such waiver the Federal Court stresses that an explicit waiver is necessary and that an indirect agreement, by an earlier agreement to exclude annulment proceedings inserted in a separate document, is not sufficient.<sup>30</sup> In addition, specifically in sport arbitration the Federal Court drew the attention to the vertical structure of

<sup>28</sup> The Court (4A\_460/2008, 9 January 2009) found that a player, member of the Brazilian Football Federation, is bound by the FIFA Statute provision (then Art.62, 63, at present Art.57-58) and its reference to CAS arbitration, in view of the Federation regulations' reference to FIFA's regulations.

<sup>29</sup> References to CAS arbitration that are formulated often broadly, for instance under the FIFA Statutes (Art.57), to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents. The reference is narrower and some exceptions apply to CAS acting as appeal tribunal (Art.58, 3). Such reference to CAS arbitration is required from confederations, member associations, leagues, intermediaries and licensed match agents (Art.59, 1).

<sup>30</sup> 131 III 173, 4 February 2005.

<sup>31</sup> 133 III 235, 22 March 2007, "Le sport de compétition se caractérise par une structure très hiérarchisée, aussi bien au niveau international qu'au niveau national. Etablies sur un axe vertical, les relations entre les athlètes et les organisations qui s'occupent des diverses disciplines sportives se distinguent en cela des relations horizontales que nouent les parties à un rapport contractuel. Cette différence structurelle entre les deux types de relations n'est pas sans influence sur le processus volontif conduisant à la formation de tout accord. (...). La situation est bien différente dans le domaine du sport. Si l'on excepte le cas - assez théorique - où un athlète renommé, du fait de sa notoriété, serait en mesure de dicter ses conditions à la fédération internationale régissant le sport qu'il pratique, l'expérience enseigne que, la plupart du temps, un sportif n'aura pas les coudées franches à l'égard de sa fédération et qu'il devra se plier, bon gré mal gré, aux désiderata de celle-ci. Ainsi l'athlète qui souhaite participer à une compétition organisée sous le contrôle d'une fédération sportive dont la réglementation prévoit le recours à l'arbitrage n'aura-t-il d'autre choix que d'accepter la clause arbitrale, notamment en adhérant aux statuts de la fédération sportive en question dans lesquels ladite clause a été insérée, à plus forte raison s'il s'agit d'un sportif professionnel. Il sera confronté

professional sports in which, differently from the horizontal structure of most contracts, the athlete has often no other choice, in order to participate in competitions, than agreeing to the terms its counterpart requires.<sup>31</sup> In spite of the existence of an agreement, formally valid,<sup>32</sup> the Court denied the existence of the athlete's real consent to waive annulment proceedings against the award.<sup>33</sup> The Court annuls the award if there is no evidence of arbitral agreement and of consent to the waiver.<sup>34</sup> Such evidence relies on interpretation of common will, case by case.<sup>35</sup> A Federation's Player Entry Form which

au dilemme suivant: consentir à l'arbitrage ou pratiquer son sport en dilettante".

<sup>32</sup> Under Art.192 PILA.

<sup>33</sup> 133 III 235, 22 March 2007 "Par identité de motifs, il est évident que la renonciation à recourir contre une sentence à venir, lorsqu'elle émane d'un athlète, ne sera généralement pas le fait d'une volonté librement exprimée. L'accord qui résultera de la concordance entre la volonté ainsi manifestée et celle exprimée par l'organisation sportive intéressée s'en trouvera, dès lors, affecté *ab ovo* en raison du consentement obligatoire donné par l'une des parties. Or, en acceptant d'avance de se soumettre à toute sentence future, le sportif, comme on l'a vu, se prive d'emblée du droit de faire sanctionner ultérieurement la violation de principes fondamentaux et de garanties procédurales essentielles que pourrait commettre le tribunal arbitral appelé à se prononcer sur son cas. En outre, s'agissant d'une mesure disciplinaire prononcée à son encontre, telle la suspension, qui ne nécessite pas la mise en oeuvre d'une procédure d'*executatur*, il n'aura pas la possibilité de formuler ses griefs de ce chef devant le juge de l'exécution forcée. Partant, eu égard à son importance, la renonciation au recours ne doit, en principe, pas pouvoir être opposée à l'athlète, même lorsqu'elle satisfait aux exigences formelles fixées à l'art. 192 al. 1 LDIP".

The Court considered briefly this matter also beyond Art.192 (1) : "Cette conclusion s'impose avec d'autant plus de force que le refus d'entrer en matière sur le recours d'un athlète qui n'a eu d'autre choix que d'accepter la renonciation au recours pour être admis à participer aux compétitions apparaît également sujet à caution au regard de l'art. 6 par. 1 CEDH".

<sup>34</sup> 4A\_358/2009, 6 November 2009.

<sup>35</sup> 133 III 235, 22 March 2007 : "Il considère comme nécessaire, mais suffisant, que la déclaration expresse des parties manifeste, sans conteste, leur commune volonté de renoncer à tout recours. Savoir si tel est bien le cas est affaire d'interprétation et le restera toujours, de sorte qu'il est exclu de poser, à cet égard, des règles applicables à toutes les situations envisageables". This remark applies also to the determination of whether an agreement exists.

included a clause for CAS arbitration "for definitive and final resolution" that an athlete is to sign to participate in the Federation's Championship, has been considered a valid agreement by a TAS tribunal, not by the Federal Court.<sup>36</sup> Each party's consent is specific to its subject-matter and may not be extrapolated to a general agreement to any sport-related subsequent activity or event. The athlete's consent is thus to be sought specifically as to the waiver, not in general documents entered into at a time when the waiver was not, reasonably, at stake.

## II. International Arbitration

### A. Scope and Applicability: Objective v. Subjective

An arbitration with seat in Switzerland is considered « international » as soon as at least one of the parties has, neither domicile, nor habitual residence or seat in Switzerland, at the time the parties entered into the arbitration agreement.<sup>37</sup> Many parties to sport and CAS arbitrations in Switzerland do not have such link to Switzerland and their arbitrations are governed by Swiss law of international arbitration. However, in disputes with international federations, at least most of these have their seat in Switzerland.

Inversely, if such international character fails the arbitration is regarded as domestic and governed by the Swiss Code of civil procedure (below III). All CAS arbitration panels or tribunals, whether in ordinary or appeal arbitration procedures, are seated in Lausanne, also if a hearing (or more) is held elsewhere in Switzerland or abroad.<sup>38</sup>

What matters is the time the parties concluded the agreement. Subsequent events such as the acquisition or loss of domicile, habitual residence or seat, in Switzerland by

one or more parties, do not affect the domestic or international character of the arbitration at the time the agreement is concluded.

The distinction international/domestic is based on objective criteria (domicile, habitual residence, seat).

However, before and after the reform this objective distinction becomes irrelevant if the parties agree, in the arbitration agreement or in a subsequent agreement,<sup>39</sup> to subject their international arbitration to the domestic arbitration regime or,<sup>40</sup> vice versa, to subject their domestic arbitration to the international arbitration regime.<sup>41</sup>

Parties' agreement prevails over the traditional objective distinction. As to their regimes the distinction is reduced, in part, by the extension since the reform of some of the new international arbitration provisions to domestic arbitration (below III).

### B. Arbitration Agreement

The reform adds two new paragraphs.

#### Validity and Arbitrability

First of all, in a *favor validitatis* spirit<sup>42</sup> the arbitration agreement is valid if it is concluded in written form or by any means which establishes textual evidence.<sup>43</sup> Proof by text, achieved by any technical means,<sup>44</sup> is thus sufficient.

The reform does not mention arbitrability as it leaves in force the current regime. Jurisdiction of a tribunal requires a valid arbitration agreement and an arbitrable dispute. Under the current arbitrability requirements:<sup>45</sup>

<sup>36</sup> 4A\_358/2009, 6 November 2009.

<sup>37</sup> Art.176.

<sup>38</sup> R.29.

<sup>39</sup> Subject to the form requirement of arbitration agreements.

<sup>40</sup> PILA, Art.176, 2.

<sup>41</sup> Art.353, 2, CPC.

<sup>42</sup> As already former Art.178 (1).

<sup>43</sup> Art.178, 1.

<sup>44</sup> The earlier (non-exhaustive) list (telegram, telex, telecopier) is thus replaced.

<sup>45</sup> PILA, Art.177.

- objective arbitrability is granted to any dispute of financial interest (*cause de nature patrimoniale*),<sup>46</sup> which includes disputes in CAS arbitrations;<sup>47</sup>
- subjective arbitrability is often not an issue in sport disputes between individuals and/or between private entities (associations, clubs, etc.). Nevertheless, international sport disputes span significantly, in terms of both activity and nature of the parties involved.<sup>48</sup> In case a party to the dispute is a state, or an enterprise held by, or organization controlled by, a state then Swiss international arbitration law protects the consent to arbitration that these entities freely expressed in signing the arbitration agreement in case they later invoke their law to contest their capacity to arbitrate or the arbitrability of a dispute that they consented to arbitrate.<sup>49</sup>

#### Unilateral acts and byelaws

Second, more innovative is the provision which extends - expressly by analogy only - the applicability of Chapter XII (PILA) to arbitration agreements in unilateral legal acts (*actes juridiques*) or in byelaws (*statuts*).<sup>50</sup> In such cases the whole Chapter XII applies, including its liberal arbitration agreement validity requirements. Byelaws (*statuts*) are common in sport entities and associations<sup>51</sup> and this reform in PILA is welcome in sport arbitration.

As to unilateral acts, wills may be concerned, for instance.<sup>52</sup> The adoption of a future Swiss trust law is under consideration.<sup>53</sup> If it will be

---

<sup>46</sup> Or *vermögensrechtliche Anspruch*, or *pretesa patrimoniale* (Art.177, 1).

<sup>47</sup> CAS arbitration welcomes disputes related to sport, its practice and development, of a pecuniary and other interests, R.27 (2).

<sup>48</sup> This variety of disputes (subject-matter and persons concerned) is also reflected in R.27 (2), CAS Procedural Rules.

<sup>49</sup> PILA, Art.177.

<sup>50</sup> Art.178, 4.

<sup>51</sup> Also Hans-Ueli Vogt, Patrick Schmidt, *Schiedsklauseln in Vereinsstatuten. Bemerkungen zum Bundesgerichtsurteil*, ASA Bulletin, 2020, p.75.

adopted, the unilateral act by the *settlor* establishing a Trust in Switzerland may include an arbitration agreement, not only, as at present, in trusts that are established abroad and recognised in Switzerland under The Hague Trust Convention, but also in trusts established in Switzerland.

#### C. Jurisdiction of Swiss courts and arbitration

Already in 2018 the Federal Council did not request Parliament to modify the current relationship between Swiss courts and arbitration and to include the so-called negative effect of competence-competence that is retained primarily in French arbitration law.<sup>54</sup> The existence of an arbitration agreement on an arbitrable dispute does not per se preclude the jurisdiction of Swiss courts: a party may bring the dispute to court and/or challenge the arbitration agreement, and the Swiss court shall deny its jurisdiction only in the three scenarios listed in Art.7 PILA (lack of objection by respondent / arbitration agreement which is null and void, inoperative or incapable of being performed /respondent's conduct prevents the constitution of the tribunal). The second scenario's origin is, since 1958, in art. II (3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Of course, the positive effect of competence-competence is distinct from the "negative" effect,<sup>55</sup> remains fully in force before and after the reform and therefore arbitral tribunals maintain their power to decide as to their jurisdiction.<sup>56</sup>

#### D. The absence of "juge d'appui"

<sup>52</sup> Leaving here the question of arbitrability aside in case the will leads to disputes not of financial interest and nature in international arbitration (PILA Art.177), or not related to rights the parties freely dispose of in domestic arbitration (Art.354 CPC).

<sup>53</sup> A Report in favour was issued on 5 December 2019.

<sup>54</sup> Art.1448 French Code de procédure civile.

<sup>55</sup> For a criticism of such terminology, G. Carducci, *Arbitration in France: Law and Practice*, Oxford University Press, 2021.

<sup>56</sup> Art.186 (1). CAS Rules 39 (3), 55 (4).

Also with regard to judicial assistance to arbitration already in 2018 the Federal Council did not request Parliament to establish a “juge d’appui” and mainly for three reasons. Judicial assistance: i) would be useful mostly in *ad hoc* arbitrations with unclear or insufficient agreed-upon rules, less in institutional arbitrations based on clear rules; ii) would be difficult to organise in a federal judicial system; iii) would, at the national level, imply an excessive administrative charge for the Federal Court, essentially incompatible with its supreme court’s legal mandate.<sup>57</sup>

Nevertheless, in spite of the absence of a formal role of *juge d’appui*, Swiss courts assist as to the constitution of the tribunal and the appointment of arbitrators in multi-party arbitrations.<sup>58</sup>

## E. Appointment, Replacement

PILA Art. 179 is replaced by a more articulated provision which focuses only on appointment and replacement of arbitrators, leaving the earlier removal phase aside. More importantly, the new provision governs appointment and replacement directly in PILA. There is no longer reliance on the domestic arbitration regime and PILA has thus gained autonomy on these matters. Failing parties’ agreement, a three member tribunal is constituted. Swiss courts assist in various ways under the new regime.<sup>59</sup>

## F. Disclosure

An interesting provision anticipates the duty to disclose. Indeed, the duty to disclose circumstances that may raise legitimate doubts as to the independence or impartiality precedes acceptance of the offer, as the duty

<sup>57</sup> Message concernant la modification de la loi fédérale sur le droit international privé (Chapitre 12: Arbitrage international) du 24 octobre 2018. At 7167.

<sup>58</sup> Art.179.

<sup>59</sup> Art.179.

<sup>60</sup> New Art.363 (1).

<sup>61</sup> Essentially for three reasons. This provision : i) stands on its own, and appears not fully integrated in

applies as soon as a person receives an offer to be appointed.<sup>60</sup> The duty applies throughout the arbitration. We submit that this provision would have been better placed in a separate Art.179a, rather than in Art.179(6) since the reform.<sup>61</sup>

## G. Challenges

Art. 180 is significantly modified. An arbitrator may be challenged in three cases: a) he fails to meet the requirements the parties agreed upon; b) a challenge ground arises under the rules of arbitration the parties agreed upon; c) the circumstances raise a legitimate doubt as to independence or impartiality. An exception exists: the party that appointed, or contributed to appoint the arbitrator, may challenge only for a ground that the party hasn’t found out about, in spite of his diligence, before the appointment.

New Art.180a governs directly the challenge procedure that, before the reform, was left to parties’ agreement and, failing an agreement, to a court’s decision.<sup>62</sup> Since the reform, parties’ agreement prevails and, if there is no agreement, the procedure applies and requires a challenge request addressed to the concerned arbitrator within 30 days since the day the requesting party found out about the challenge ground. The party may also, in the following 30 days, request the court to challenge the arbitrator. If so, the court’s decision is definitive. Unless the parties agree otherwise, during the challenge procedure the arbitral tribunal may continue the proceedings and issue an award with the participation of the arbitrator concerned.

These provisions have less, or no, importance in CAS arbitrations in view of the detailed CAS Rules on the constitution of the tribunal

article 179; ii) by anticipating the duty to disclose before the acceptance of the offer this provision applies also to non-contractual situations (and continues to apply until acceptance) differently from paragraphs 1 to 5; iii) would have been more visible, and so its specific subject matter, in a separate art.179a.

<sup>62</sup> Former Art.180 (3). A

and related matters.<sup>63</sup> The requirement of a challenge request within 30 days is replaced by a 7 day delay in CAS arbitrations in challenges as to doubts on independence or impartiality.<sup>64</sup>

## H. Removal

Under new Art.180b any arbitrator may be removed from his office if the parties so agree. Unless the parties agree otherwise, a party may request a court to remove the arbitrator who is not in the position to perform in time, or diligently, his duties. If so, the court's decision is final. The reform leaves flexibility, case by case, and does not set a timeframe to ascertain such lack of, or insufficient, performance. Such flexibility is necessary and is the rule in terms of "reasonable time" in CAS arbitrations.<sup>65</sup>

## I. Estoppel

Over the years the doctrine of Estoppel has progressively extended its applications from an equitable remedy in English law to arbitration procedure in several jurisdictions. The reform codifies the important rule that the party which identified, or could have identified by diligence, a violation to the rules of procedure, is to raise such violation immediately. If not, the party continuing the procedure may not rely on the violation at a later stage.<sup>66</sup> This provision is useful in arbitration generally. It is also in sport arbitration, although the duty of good faith already applies and the Federal Court draws from it the exclusion of any contradictory conduct by a party.<sup>67</sup>

## J. Seeking judicial assistance as to provisional and conservatory measures

The importance of such measures is self-explanatory, particularly in sport arbitration

when competitions impose short delays for such measures, taken as appropriate, and decision as to the merits. The reform does not amend the existing regime which enables the tribunal, unless the parties agree otherwise, to order the measure(s) requested by a party.<sup>68</sup> The tribunal's order is a decision which is obligatory for the parties, though not directly enforceable, nor open to a court's enforceability order (which has only a declaratory nature)<sup>69</sup> because such decision is not an arbitral award.<sup>70</sup> If the party concerned by the measure ordered by the tribunal does not comply, then the arbitral tribunal,<sup>71</sup> or the other party since the reform, may request a court to assist.<sup>72</sup> The party may therefore take action and seek judicial assistance on its own, irrespective of the tribunal's decision and, if any, action.

Such assistance is certainly useful generally, though non-compliance with provisional measures is probably less frequent in sport CAS arbitrations, in particular if involving federations and their disciplinary power over their athletes, than in ordinary commercial arbitration.

Provisional or conservatory measures in CAS arbitrations are subject to previous exhaustion of all internal legal remedies under the relevant rules.<sup>73</sup> While PILA assumes a constituted tribunal and grants to it the power to order such measures, under the CAS Procedural Rules a party may seek such measures also at an earlier stage, by applying to the President of Division and before he transfers the file to the constituted Panel.<sup>74</sup>

## K. Seeking judicial assistance as to the taking of evidence

The tribunal's power includes taking of evidence.<sup>75</sup> Another provision, this time as to taking of evidence, shares the reform's

<sup>63</sup> Including the related matters, R.33-36, R.40, R.50, 53, R.54.

<sup>64</sup> R.34.

<sup>65</sup> Rule 35.

<sup>66</sup> Art.182 (4).

<sup>67</sup> 4A\_548/2009, 20 January 2010.

<sup>68</sup> Art.183.

<sup>69</sup> Art.193, 2.

<sup>70</sup> B. Dutoit, *Droit international privé suisse*, 2016, p.824.

<sup>71</sup> Exclusively the tribunal under former Art.183 (2).

<sup>72</sup> Art. 183, 2.

<sup>73</sup> R.37.

<sup>74</sup> R.37 (2).

<sup>75</sup> Art.184 (1).

objective of enabling a party to take action directly and independently. If the assistance of Swiss courts is necessary for the taking of evidence, the arbitral tribunal, or a party - and no longer the parties since the reform - in agreement with the tribunal, may seek such assistance.<sup>76</sup> If so, the court acts under its own law and may, upon a party's request, follow or take into account other taking of evidence procedures.<sup>77</sup>

### **L. Swiss judicial assistance to arbitrations abroad (CAS Arbitration is not concerned)**

Interesting, in terms of further assistance to international arbitration, is the new provision enabling an arbitral tribunal seated abroad, or a party to this arbitration abroad, to seek the assistance of a Swiss court where a provisional or conservatory measure is to be implemented.<sup>78</sup> A similar provision sets up the same type of judicial assistance as to taking of evidence. A slight difference exists, in the latter case a party may seek such assistance only in agreement with the tribunal.<sup>79</sup>

Both forms of assistance apply to international arbitrations with a tribunal outside Switzerland. Such requirements may accommodate other sport arbitrations, no CAS arbitrations in which each arbitration panel is seated in Lausanne irrespective of possible hearings elsewhere.<sup>80</sup>

### **M. Errors and omissions**

Differently from *ad hoc* or other sport institutional arbitrations that do not entail in their rules a scrutiny before the award is issued by the tribunal, CAS awards are

significantly less likely to entail errors or omissions than other sport arbitral awards in view of CAS Director General's scrutiny of the draft award. It concerns possible rectifications of pure form or fundamental issues of principle to which the Director may wish to draw the attention of the Panel.<sup>81</sup>

This being noted, the reform entitles any party, unless the parties agree otherwise, to request, within 30 days from the notification of the award, the tribunal to rectify any drafting or calculation error, or to interpret some parts of the award, or to issue an additional award on claims that were presented during the arbitration but omitted in the award. The tribunal may do so also on its own motion. The party's request to the tribunal does not suspend the delay to challenge the award. Nevertheless, the reform grants a new delay to any rectified or interpreted the award, or any additional award.<sup>82</sup>

The 30 days delay is shorter than the 45 days delay in CAS arbitration to request an interpretation of (ordinary or appeals) arbitration awards.<sup>83</sup>

### **N. Annulment**

One of the most important provisions in any arbitration law is the number and the scope of annulment grounds. The reform does not amend the existing regime and its five limitative grounds for annulment of an award.<sup>84</sup> Self-evidently, the award may be annulled if it is incompatible with public policy. In view of the importance and flexibility<sup>85</sup> of public policy or *ordre public* we provide some recent Federal Court's readings<sup>86</sup> of public policy generally,<sup>87</sup> and its

<sup>76</sup> Art. 184 (2).

<sup>77</sup> Art. 184. 2, 3.

<sup>78</sup> Art. 185a, 1.

<sup>79</sup> Art. 185a, 2.

<sup>80</sup> R.28.

<sup>81</sup> P.46 (2).

<sup>82</sup> Art. 189a.

<sup>83</sup> R.63.

<sup>84</sup> Art. 190.

<sup>85</sup> And, to some reasonable extent, unpredictability until a case by case analysis.

<sup>86</sup> A "narrow" reading, as in most jurisdictions. Seeking the annulment of an award for violation of public policy in international arbitration is rarely successful. One exception is the violation of *res iudicata*, part of procedural public policy, for instance by a CAS award in 136 III 345,13 April 2010.

<sup>87</sup> Most recently (4A\_70/2020, 18 June 2020) : "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

indicative content in substantive<sup>88</sup> and procedural<sup>89</sup> applications.

The reform adds in PILA an explicit 30 days delay, since the award is notified, for a party to file an annulment action.<sup>90</sup>

## O. Revision of Awards (Recours en revision)

Important is the lawmaker's decision to codify in PILA, in addition to the ordinary annulment proceedings, also a revision of the award proceedings, or *recours en revision*. Under the existing texts, before the reform, the Federal Court had jurisdiction as to the revision of its own judgments,<sup>91</sup> and the revision of awards was expressly admitted in

domestic arbitration.<sup>92</sup> However, by a 1992 landmark decision the Federal Court held that the absence of provisions governing revision of awards in international arbitration (PILA, Chapter XII) is to be construed, not as an implicit lawmaker's rejection of revision,<sup>93</sup> and merely as gap in the law that the Federal Court was to fill in. So did the Court: it admitted, before itself,<sup>94</sup> revision of awards in international arbitration by extending to it, expressly by analogy, the existing principles on revision in Swiss law.<sup>95</sup>

The Federal Court invited in 2016 the lawmaker to design and adopt clear and consistent federal law on revision of awards, actually in both international and domestic arbitrations.<sup>96</sup> So did the lawmaker, mostly

---

juridique. Tel est le cas lorsqu'elle viole des principes fondamentaux du droit de fond au point de ne plus être conciliable avec l'ordre juridique et le système de valeurs déterminants". Identical wording in an earlier ruling (4A\_494/2018, 25 June 2019).

<sup>88</sup> As to the substantive dimension of public policy (4A\_312/2017, 27 November 2017) : "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".

Also 4A\_494/2018, 25 June 2019 : "S'il n'est pas aisé de définir positivement l'ordre public matériel, de cerner ses contours avec précision, il est plus facile, en revanche, d'en exclure tel ou tel élément. Cette exclusion touche, en particulier, l'ensemble du processus d'interprétation d'un contrat et les conséquences qui en sont logiquement tirées en droit. De même, pour qu'il y ait incompatibilité avec l'ordre public, notion plus restrictive que celle d'arbitraire, il ne suffit pas que les preuves aient été mal appréciées, qu'une constatation de fait soit manifestement fausse ou encore qu'une règle de droit ait été clairement violée. Au demeurant, qu'un motif retenu par le tribunal arbitral heurte l'ordre public n'est pas suffisant; c'est le résultat auquel la sentence aboutit qui doit être incompatible avec l'ordre public".

<sup>89</sup> As to the procedural dimension of public policy, recently Federal Court (4A\_556/2018, 5 March 2019) : "Il y a violation de l'ordre public procédural lorsque des principes fondamentaux et généralement reconnus ont été violés, ce qui conduit à une contradiction insupportable avec le sentiment de la justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un Etat de droit".

Less recently : 27 May 2003, 129 III 445 : "L'ordre public procédural garantit aux parties le droit à un jugement indépendant sur les conclusions et l'état de fait soumis au Tribunal arbitral d'une manière conforme au droit de procédure applicable; il y a violation de l'ordre public procédural lorsque des principes fondamentaux et généralement reconnus ont été violés, ce qui conduit à une contradiction insupportable avec le sentiment de la justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un Etat de droit".

As noted above, *res iudicata* is part of procedural public policy. 136 III 345, 13 April 2010.

<sup>90</sup> New Art.190 (4).

<sup>91</sup> Articles 121-128, LTF.

<sup>92</sup> Art.396, Code of Civil Procedure (CPC).

<sup>93</sup> 118 II 199 : "Cette réserve du législateur tient moins à une absolue nécessité qu'à une certaine réticence à légiférer en matière d'arbitrage international eu égard à la constitutionnalité d'une telle réglementation par le droit fédéral" (...) "En définitive, aucun élément déterminant ne parle en faveur d'un silence qualifié du législateur".

<sup>94</sup> Former and new Art.191. The higher court in each Canton has jurisdiction on revision in domestic arbitration (Articles 356, 396, CPC).

<sup>95</sup> 118 II 199.

<sup>96</sup> 7 September 2016, 142 III 521 p.535 "Aussi, plutôt que de combler une lacune alors qu'il n'y a pas urgence à le faire, paraît-il préférable de laisser aux Chambres fédérales elles-mêmes, puisque telle est leur mission, le

only as to the former,<sup>97</sup> in the 2020 reform<sup>98</sup> which admits revision in three sets of circumstances where the following new elements appear *after* the closing of the arbitral proceedings and could not be raised before, in spite of the diligence he is required to prove, by the requesting party:

- a) relevant facts or concluding evidence (facts or evidence after the award are excluded from revision);
- b) evidence (acquired, in principle, in a criminal procedure) that the award has been influenced,<sup>99</sup> against the requesting party's interest, by crime or tort;
- c) a challenge ground, if no other remedy is available.<sup>100</sup>

These three circumstances are revision grounds essentially in line with the existing grounds and judge-extended by analogy<sup>101</sup> to awards in international arbitration since 1992.

soin de régler la question des motifs de révision d'une sentence arbitrale internationale, comme d'autres problèmes récurrents d'ailleurs, telle l'exigence ou non d'une valeur litigieuse minimale pour saisir le Tribunal fédéral. Cette manière de procéder permettra, de surcroît, au législateur fédéral de modifier d'autres règles de droit en vigueur, voire d'en édicter de nouvelles, par exemple dans le CPC et/ou la LTF, de manière à établir un régime, sinon similaire, du moins cohérent en matière de révision des sentences arbitrales, qu'elles relèvent de l'arbitrage international ou de l'arbitrage interne, et à renforcer la sécurité du droit en ce domaine en établissant une situation juridique claire pour les autorités judiciaires appelées à statuer sur les demandes de révision, à savoir le Tribunal fédéral dans l'arbitrage international et le tribunal supérieur du canton concerné dans l'arbitrage interne".

<sup>97</sup> To the extent that revision of awards in domestic arbitration is already governed by Articles 396-399, CPC.

<sup>98</sup> Art.190a.

<sup>99</sup> It would seem that such influence concerns more decision-making than its result, the award itself as in PILA (*la sentence a été influencée*, the award has been influenced).

<sup>100</sup> For the sake of clarity, in the official French new version of PILA Article 190a reads as follows:

1 Une partie peut demander la révision d'une sentence:  
a. si elle découvre après coup des faits pertinents ou des moyens de preuve concluants qu'elle n'a pu invoquer dans la procédure précédente bien qu'elle ait fait preuve de la diligence requise; les faits ou moyens de preuve postérieurs à la sentence sont exclus;

The three circumstances, distinct from the ordinary five annulment grounds,<sup>102</sup> arise<sup>103</sup> in a non-irrelevant volume of cases in sport arbitration. In a recent example the Federal Court denied revision, an exceptional legal remedy,<sup>104</sup> of a CAS award in an anti-doping case to the extent that the party did not prove that, in spite of his expected diligence, he could not submit the relevant evidence<sup>105</sup> during the CAS arbitration proceedings.<sup>106</sup> Failing such evidence, revision is not granted. The Court clearly denied the availability of revision if the requesting party merely seeks to correct *ex post* the consequences of an arbitration procedure, including a CAS expedited procedure,<sup>107</sup> to which the parties expressly agreed.<sup>108</sup> International sport federations may allow a revision of first instance decisions, within their internal challenges system, for new and relevant elements.<sup>109</sup>

- b. si une procédure pénale établit que la sentence a été influencée au préjudice du recourant par un crime ou un délit, même si aucune condamnation n'est intervenue; si l'action pénale n'est pas possible, la preuve peut être administrée d'une autre manière;
- c. si, bien que les parties aient fait preuve de la diligence requise, un motif de récusation au sens de l'art. 180, al. 1, let. c, n'est découvert qu'après la clôture de la procédure arbitrale et qu'aucune autre voie de droit n'est ouverte.

<sup>101</sup> Generally in relation to Art. 123(1) and 123(2)(a) LTF. Expressly in 4A\_662/2018, 14 May 2019: „Die Revision eines internationalen Schiedsspruchs kann nach bundesgerichtlicher Rechtsprechung aus den in Art. 123 BGG vorgesehenen Gründen verlangt werden“.

<sup>102</sup> Art.190, 2.

<sup>103</sup> More frequently the first circumstance (relevant facts or concluding evidence).

<sup>104</sup> 4A\_597/2019, 17 March 2020, “ma è un rimedio di diritto straordinario” or 134 III 286, 14 March 2008, “das ausserordentliche Rechtsmittel der Revision”.

<sup>105</sup> An anomalously high concentration of ADN in urine that the expert identified.

<sup>106</sup> This requirement is to be found both in the Code of Civil Procedure (Art.328, 1) and in Art.123, 2, LTF.

<sup>107</sup> R 44.4.

<sup>108</sup> 4A\_597/2019, 17 March 2020.

<sup>109</sup> For instance, under the *Fédération internationale de l'automobile*'s International Sporting Code (Art.14.1.1) a revision may be requested in case a significant and relevant new element is discovered which was unavailable to the parties seeking the review at the time of the decision concerned.

The reform allows revision requests to be filed within 30 days since the day the evidence ground is discovered. Revision is excluded ten years after the award has gained its legal effects.<sup>110</sup> No time limitation applies in the most serious case, i.e. the award has been influenced by crime or tort.<sup>111</sup> These timeframes follow essentially those for the revision of the Federal Courts' decisions.<sup>112</sup> Self-evidently such timeframes allow a party to seek revision well beyond it may seek the ordinary annulment of the award under its five grounds. This difference in timeframe, in addition to the difference of relevant circumstances ("grounds"), confirm the complementarity of annulment and revision.

The reform amends also the *loi du 17 juin 2005 sur le Tribunal fédéral* (LTF),<sup>113</sup> to clarify that:

- i) the revision grounds, the three sets of circumstances listed above, are in PILA;<sup>114</sup>
- ii) the revision procedure is governed by such *loi* (LTF);<sup>115</sup>
- iii) if the revision is successful, the Federal Court annuls the award and refers the matter to the arbitral tribunal to rule a second time or decides otherwise;
- iv) if the arbitral tribunal no longer entails the required number of arbitrators, Art.179 PILA applies if the parties do not agree.

The effect of a successful revision is the annulment of the award. In its effects revision is a type of annulment proceedings, in addition to the traditional *recours en annulation*,<sup>116</sup> in Swiss international and domestic arbitration law.<sup>117</sup> Annulment of an award is key: whether or not the award received exequatur and is enforceable, as long as an award is valid it is *res judicata* and prevents further litigation on the same dispute.

Revision by the Federal Court<sup>118</sup> or Swiss superior courts<sup>119</sup> is tantamount to "review" of their own decisions. However, revision as it is applied to arbitral awards implies no "review" of the award: the Federal Court neither reopens the merits (fact and law) of the dispute, nor decides the dispute also in view of the elements that were not presented during the arbitration. The decision as to the merits of the dispute remains in the hands of the arbitral tribunal and embodied in the award if revision fails, or is put again in the hands of the tribunal for a new decision if revision succeeds.

To put it otherwise, in the context of CAS Rules, in relation to an award the Federal Court in the context of revision does not have the "full power to review the facts and the law" that a CAS appeal panel has in examining *de novo* the facts and the law of the first decision,<sup>120</sup> including the power to authorize new prayers for relief, or new evidence or new legal arguments,<sup>121</sup> and the power to issue a new decision replacing the challenged decision or - and only here the appeal panel's power meets the Federal Court's power in revision - to annul the first decision and refer the case to the previous instance.<sup>122</sup>

## P. Waivers to challenges

Annulment and revision proceedings before the Federal Court are the ordinary challenges available in Swiss international arbitration law. Nevertheless, Swiss law is more liberal when the seat of the tribunal is essentially the main connection to Switzerland because the parties have in Switzerland neither their domicile, nor residence or seat. In such a case, Swiss law allowed the parties to agree to

<sup>110</sup> The French version of the revised PILA refers to "P entrée en force de la sentence".

<sup>111</sup> Art.190a, 2.

<sup>112</sup> Art. 124 (except 1, c, d), LTF.

<sup>113</sup> Art.119a.

<sup>114</sup> Art.190a.

<sup>115</sup> Art.77 (2), 126, LTF.

<sup>116</sup> Art.190

<sup>117</sup> Also Art.399 CPC.

<sup>118</sup> Articles 121, 128, LTF.

<sup>119</sup> Articles 328, 333 CPC.

<sup>120</sup> R.57.

<sup>121</sup> *Inter alia* and recently, Arbitration CAS 2019/A/6646 MKE Ankaragücü SKD v. Johannes Hopf, award of 4 May 2020 (operative part of 24 January 2020).

<sup>122</sup> R.57 (1).

waive their rights to challenge the award by annulment, as to all or some of the five annulment grounds.<sup>123</sup> The reform extends, again only for these parties, the right to agree to waive all, or some, of the challenges against an award, meaning both annulment and revision. Such agreement, if any, is thus a voluntary form of delocalization of the award in international arbitration: the existence of the seat in Switzerland is then no longer sufficient to grant Swiss courts jurisdiction to control and possibly annul the award. The only exception to such waiver and voluntary form of delocalization that the reform has established,<sup>124</sup> is revision of the award which remains available in the most serious circumstances: when the award is influenced by crime or tort.<sup>125</sup>

We noted above (I, iii) that in sport arbitration the Federal Court requires, in order to accept the waiver and in addition to proper form, only direct waivers involving athletes in professional sports. Such direct waivers are acceptable between parties, athletes, associations, clubs, and others that do not have in Switzerland their domicile, residence or seat. It follows also that before or after the reform the possibility for the parties to agree to waive annulment proceedings is excluded in sport and CAS arbitrations involving entities, and primarily the main sport federations, that have their seat in Switzerland. Such link prevents a waiver.<sup>126</sup>

## Q. Facilitating Proceedings before the Federal Court

The reform entails two interesting improvements that facilitate the parties in

filings before the Federal Court annulment and revision proceedings against awards made in Switzerland in international arbitration.<sup>127</sup>

Filings are admissible regardless of financial value. This matter is thus no longer disputed.<sup>128</sup>

In addition, in filing an annulment the parties may, since the reform, use English in their *mémoires*.<sup>129</sup> Many international parties in CAS and other sport arbitrations, may feel more comfortable, and find more expeditious and affordable,<sup>130</sup> filing in English. The Federal Court will reply in one of its languages.

## R. Summary Proceedings

The reform modifies also the Code of civil procedure to facilitate arbitration-related court proceedings.<sup>131</sup> The reform adds to the list of summary proceedings<sup>132</sup> before Swiss courts most of the international arbitration related judicial action under the PILA: appointment, challenge and removal of arbitrators, judicial assistance to implement provisional measures and taking of evidence, other judicial assistance to arbitrations in Switzerland and abroad, deposit and certificate of enforceability, recognition and enforcement of foreign awards.<sup>133</sup>

By operating under the summary proceedings regime Swiss courts proceed by, and the interested parties benefit from, simpler procedural requirements, establishing evidence by documents,<sup>134</sup> faster decision-making including also by excluding a hearing.<sup>135</sup>

<sup>123</sup> Former Art.192 (1).

<sup>124</sup> While no limitation existed until the reform.

<sup>125</sup> Art.192, al. 1.

<sup>126</sup> 133 III 235, 22 March 2007.

<sup>127</sup> Art.77 (1). LTF.

<sup>128</sup> 4A\_424/2018, 29 January 2019.

<sup>129</sup> Not until the reform. A recent example (4F\_8/2018, 14 March 2018) : “En vertu de l’art. 42 al. 1 LTF, les mémoires doivent être rédigés dans une langue officielle. On entend par là l’allemand, le français, l’italien et le romanche” Nevertheless, the Tribunal added : “le Tribunal fédéral n’est, en principe,

pas libre de déclarer d’emblée irrecevable un mémoire déposé dans une autre langue qu’une langue officielle; il doit bien plutôt fixer à l’auteur du mémoire un délai approprié pour traduire cette écriture, afin d’éviter tout formalisme excessif”.

<sup>130</sup> Avoiding, at least, translation costs.

<sup>131</sup> New Art.251a.

<sup>132</sup> Titre V, *Procédure sommaire* (Art.248 CPC).

<sup>133</sup> Art.251a CPC.

<sup>134</sup> Other probatory means are the exception, Art. 254.

<sup>135</sup> If so decides the court in using its discretion, Art.256.

### **III. Domestic Arbitration**

Although international arbitration attracts more visibility, the reform brings significant changes also to Swiss domestic arbitration law. Such is the arbitration with parties that do not have outside Switzerland their domicile, habitual residence or seat, at the time the parties enter into the arbitration agreement.<sup>136</sup>

In terms of relationship between courts and arbitration, the existence of an arbitration agreement concerning an arbitrable dispute implies that a Swiss court lacks jurisdiction, except if: i) the respondent does not object; ii) the agreement is invalid or non-applicable; iii) the conduct of respondent prevents the constitution of the arbitral tribunal.<sup>137</sup>

The lawmaker has extended to domestic arbitration only some, not all, of the above-considered modifications to international arbitration.

#### **A. Arbitration Agreement**

Parties to domestic arbitration may agree to opt, in writing, for the regime of international arbitration under the revised chapter XII PILA.<sup>138</sup> Such right to opt is not new per se.<sup>139</sup> New is the admission of such opting agreement in unilateral legal acts or byelaws.<sup>140</sup>

Well beyond such opting for the international regime, it is to be noted that the whole regime of the arbitration agreement<sup>141</sup> is extended, again only by analogy, to unilateral legal acts or byelaws.<sup>142</sup> We noted above the

<sup>136</sup> Combining Art.176 PILA, *a contrario*, and Art.353 (1) CPC.

<sup>137</sup> Art.61 CPC.

<sup>138</sup> Art.353 (2).

<sup>139</sup> Former Art.353 (2) CPC.

<sup>140</sup> *Actes juridiques unilatéraux* or *statuts*, Art.358 (2).

<sup>141</sup> Titre 2 Convention d'arbitrage, (Articles 357-359 CPC) that the reform slightly reformulates: Titre 2 Convention et clause d'arbitrage.

<sup>142</sup> Art.358 (2).

<sup>143</sup> Art.354 CPC.

<sup>144</sup> PILA, Art.177.

importance of this reform in sport arbitration where bylaws are common.

Because jurisdiction of a tribunal requires a valid arbitration agreement, but also an arbitrable dispute, it should be noted that arbitrability requires in domestic arbitration disputes concerning rights the parties freely dispose of, “droits disponibles”.<sup>143</sup> This notion is similar, not identical to a dispute of financial interest (*nature patrimoniale*) which is the condition for objective arbitrability in international arbitration.<sup>144</sup>

#### **B. Summary Proceedings**

Swiss domestic arbitration law requires the Cantons of the seat of the arbitral tribunal to appoint a higher instance<sup>145</sup> and a different, or differently constituted, court<sup>146</sup> to deal specifically with the arbitration. To this framework, which is already arbitration-friendly, the reform adds that such courts, in each Canton of the seat of the arbitral tribunal, operate by summary proceedings. As noted above, the advantages are significant: simpler procedural requirements, establishing evidence by documents,<sup>147</sup> faster decision-making including also by excluding a hearing.<sup>148</sup>

#### **C. Disclosure**

As noted above in international arbitration, the duty to disclose circumstances that may raise legitimate doubts as to the independence or impartiality precedes acceptance of the offer, as the duty applies as soon as a person receives an offer to be appointed.<sup>149</sup> This observation, i.e. the duty to disclose precedes

<sup>145</sup> *Tribunal supérieur*. Art.356 (1). Jurisdiction extends to : statuer sur les recours et les demandes en révision; recevoir la sentence en dépôt et attester son caractère exécutoire.

<sup>146</sup> Art.356 (2). Jurisdiction extends to : nommer, récuser, destituer ou remplacer des arbitres; prolonger la mission du tribunal arbitral; assister le tribunal arbitral dans l'accomplissement de tout acte de procédure.

<sup>147</sup> Other probatory means are the exception, Art. 254.

<sup>148</sup> If so decides the court in using its discretion, Art.256.

<sup>149</sup> New Art.363 (1).

acceptance of the offer, is more visible here in domestic arbitration, where the repealed formulation delayed the duty until the acceptance and the existence of an agreement,<sup>150</sup> than above in international arbitration where the provision is new and offers no comparison to an earlier text.

## D. Challenge and Removal

A first reform adds the diligence requirement: the party may challenge an arbitrator it appointed, or contributed to appoint, on a ground that it found out after the appointment, only if it proves it fulfilled the necessary diligence standard.<sup>151</sup>

A second reform concerns procedure : unless the parties agree upon a different procedure and if the arbitration is not completed, the procedure requires a written and motivated challenge request addressed to the concerned arbitrator within 30 days since the day the requesting party found out about the challenge ground. The party may also, in the following 30 days, request the agreed-upon entity and, failing such entity, or the court to challenge the arbitrator.<sup>152</sup>

Unless the parties agree otherwise, a party may request the agreed-upon entity and, failing such entity, a court to remove the arbitrator who is not in the position to perform in time, or diligently, his duties.<sup>153</sup>

## E. Estoppel

Not identical is the formulation of the codified estoppel in international and domestic arbitration. In the latter, a violation to the rules of procedure is to be raised immediately after the party identified it, or could have identified it by diligence. If not, the violation may not be raised subsequently.<sup>154</sup>

---

<sup>150</sup> Former Art.363 (1) : “Toute personne investie d’un mandat d’arbitre doit révéler sans retard l’existence des faits qui pourraient éveiller des doutes légitimes sur son indépendance ou son impartialité”.

<sup>151</sup> New Art.367 (2).

<sup>152</sup> New Art.369 (2, 3).

<sup>153</sup> Art.370 (2).

## F. Rectifying or interpreting awards, additional awards

A party’s request to the tribunal to rectify any drafting or calculation error, or to interpret some parts of the award, or to issue an additional award on claims that were presented during the arbitration but omitted in the award, does not suspend the delay to challenge the award. Nevertheless, any rectified or interpreted award, or any additional award, benefits from a delay.<sup>155</sup> Inversely, the older rule granted a new delay only if the interested party was affected.<sup>156</sup>

## G. Challenging the award

The reform adds a clarification.<sup>157</sup> More importantly, the reform adds a revision ground in case a ground to challenge the arbitrator(s) is discovered, in spite of proper use of diligence by the requesting party, after the conclusion of the arbitration.<sup>158</sup>

## IV. Does the reform require a modification of the CAS Rules?

While any text may be modified, the reform does not seem to impose strictly mandatory modifications to the CAS Rules. The reform and the CAS Rules coexist well and for the benefit of a particularly arbitration-friendly and sport-focused combined statutory and institutional regime. Of course, the reform has not affected the very legal basis of the applicability of the CAS Rules as chosen rules of procedure in international<sup>159</sup> and domestic<sup>160</sup> arbitrations.

Nevertheless, a modification, actually an update, seems desirable with regard to those CAS Rules that follow closely, if not literally, PILA. Rules 46 (3) and 59 (4) on awards would gain in accuracy by being amended to

<sup>154</sup> New Art.373 (6).

<sup>155</sup> New Art.388 (3).

<sup>156</sup> Former Art.388 (3).

<sup>157</sup> New Art.395 (2).

<sup>158</sup> New art.396 (1, d).

<sup>159</sup> Art.182 (1).

<sup>160</sup> Art.373, CPC.

make explicit that, since the reform, a parties' waiver:

- i) concerns annulment and, *ex lege* since the reform, revision proceedings;
- ii) requires a specific and direct consent of the parties, and of the athlete beyond a mere Player Entry Form,<sup>161</sup> to ensure acceptance by the Federal Court (see above I, iii);
- iii) parties' consent is to meet the form requirement of the arbitration agreement,<sup>162</sup> although consent may be expressed also in a subsequent agreement;
- iv) has no effect with regard to revision, which remains available, in case of award influenced by crime or tort.<sup>163</sup>

Of course, the parties may agree to waive annulments only if they have in Switzerland neither domicile, nor habitual residence or place of business. A minor difference since the reform should be included in revised Rules 46 (3) and 59 (4) in the French version: “établissement” is now replaced by “siège”.<sup>164</sup>

## V. Conclusion

Though selective and in part anticipated by caselaw, this is an important and useful reform of international and domestic Swiss arbitration law. Among other advantages, it clarifies some matters, grants more autonomy to each party, extends judicial assistance to, and simplifies judicial intervention in, arbitration, makes PILA independent from the Code of civil procedure, provides consistent codified law to the judge-made regime since 1992 of revision in international arbitration, updates also significantly domestic arbitration in a useful way for arbitration users. The reform and its benefits concern also sport and CAS arbitrations in Switzerland: the revised PILA and Code of civil procedure apply to such arbitrations, outside the scope of the agreed-upon arbitration rules that do not conflict with mandatory Swiss law, and within such scope

in case the agreed-upon rules present gaps in a given case.

---

<sup>161</sup> Or equivalent indirect agreements.

<sup>162</sup> Art.178 (1).

<sup>163</sup> New Art.190a (2).

<sup>164</sup> New art.192 (1). The former text read : *Si les deux parties n'ont ni domicile, ni résidence habituelle, ni établissement en Suisse, (...).*

---

## Experts in the Hot Tub at the Court of Arbitration for Sport

Doriane L. Coleman & Jonathan Taylor\*

---

- I. Sport's Supreme Court
  - II. How Hot Tubs Work
  - III. Testing the Waters: Reflections on the Use of Concurrent Evidence at CAS
  - IV. Could hot tubbing work well in U.S. courts?
- 

The Games of the XXXII Olympiad (Tokyo 2020) have been postponed to 2021 as a result of the novel coronavirus, but litigation at the Court of Arbitration for Sport (CAS) is ongoing, as is the practice of some CAS arbitrators of “hot-tubbing” expert witnesses.

As one legal reporter explained:

Despite the name, it does not involve installing Jacuzzis to relax witnesses.

“Hot-tubbing,” common practice in Australian courts, is also known by the less colourful label “concur-rent evidence.” It means that expert witnesses in a complex, technical trial — such as a patent dispute about pharmaceuticals, for example — can testify in court together on a panel, rather than one-by-one in the witness box. This allows lawyers and the judge to question the experts in each other’s presence.

---

\* Doriane L. Coleman is a professor of law at Duke Law School and co-director of the Duke Center for Sports Law & Policy. She is the author of a number of articles on the regulation of eligibility in international sport and was an expert witness for the IAAF (now known as World Athletics) in *Semenya v. IAAF*.

Jonathan Taylor is Queen’s Counsel, partner and head of the Sports Law Group at Bird & Bird. He is the co-editor/co-author of two leading treatises in international sports law, *Sport: Law and Practice*, 4th Ed., Bloomberg Professional (2020), and *Challenging Sports Governing Bodies*, Bloomberg Professional (2016), and lead counsel for the IAAF in *Semenya v. IAAF*.

It also allows the experts to directly challenge each other’s evidence.

Ideally, a judge with only a lay- man’s knowledge of complex technical matters can more easily pinpoint the key issues in a case.<sup>1</sup>

The CAS is a specialized forum that operates in an international setting, but its procedures and the nature of the evidence it receives are familiar, so it provides an interesting and accessible lens through which to view the production and management of concurrent evidence.

### I. Sport’s Supreme Court

The CAS was established in Switzerland in 1984 by the International Olympic Committee (IOC) as a court with arbitral, “sports-specific jurisdiction.”<sup>2</sup> Its administrative and financial

Experts in the Hot Tub at the Court of Arbitration for Sport, has first been published in 104 JUDICATURE 40 (Summer 2020).

<https://judicature.duke.edu/author/dcoleman/>

<sup>1</sup> Jeff Gray, Why Judges Like ‘Hot-Tubbing,’ *Globe & Mail* (Apr. 19, 2011), <https://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/why-judges-like-hot-tubbing/article577733>.

<sup>2</sup> History of the CAS, *Tribunal Arbitral Du Sport* [Ct. Arb. for Sport], <https://www.tas-cas.org/en/general>

ties to the IOC were mostly severed in 1994 following questions from the Swiss Federal Tribunal about its impartiality and independence. The CAS now operates under the auspices of the International Council of Arbitration for Sport (ICAS).

The ICAS remains tied to the Olympic Movement in that the majority of its independent jurist members are nominated by the IOC, the National Olympic Committees (NOCs), and the International Federations (IFs). And the CAS itself continues not only to focus on Olympic Movement issues but also to be headquartered in the IOC's hometown of Lausanne, Switzerland. Nevertheless, important enough changes were made in areas of concern so that the CAS's independence was confirmed by the Swiss Federal Tribunal in 2004, and has recently been re-affirmed by the German Federal Tribunal and the European Court of Human Rights.

Today, the CAS is governed by the Code of Sports-Related Arbitration and is divided into four divisions: (1) the Anti-Doping Division, which exercises first-instance jurisdiction over anti-doping cases; (2) the Ordinary Division, which exercises first-instance jurisdiction over other sports disputes; (3) the Ad Hoc Division, which sits at events such as the Olympic Games, the Commonwealth Games, and the FIFA World Cup, to resolve urgent disputes as

---

information/history-of-the-cas.html (last visited June 7, 2020).

<sup>3</sup> History of the CAS, Tribunal Arbitral Du Sport [Ct. Arb. for Sport], <https://www.tas-cas.org/en/general-information/history-of-the-cas.html> (last visited June 7, 2020).

<sup>4</sup> Russian Olympic Comm. v. IAAF, CAS 2016/O/4684 (Oct. 10, 2016), <https://jurisprudence.tascas.org/Shared%20Documents/4684.pdf>; Russian Paralympic Comm. v. Int'l Paralympic Comm., CAS 2016/A/4745 (Aug. 23, 2016), [https://www.paralympic.org/sites/default/files/document/161005070210720\\_RPC+vs+IPC\\_CAS+4745\\_English.pdf](https://www.paralympic.org/sites/default/files/document/161005070210720_RPC+vs+IPC_CAS+4745_English.pdf).

<sup>5</sup> Athletics S. Afr. v. IAAF, CAS 2018/O/5798 (Apr. 30, 2019), <https://www.tas-cas.org/fileadmin/>

to selection, qualification, disqualification, etc.; and (4) the Appellate Division, which is the exclusive appeals forum for decisions rendered by the IOC, including at the Olympic Games, and for disciplinary decisions rendered by the IFs that are part of the Olympic Movement.

As a result of this broad jurisdiction, the CAS has been described as "sport's supreme court."<sup>3</sup> It has adjudicated some of the most important issues and cases in the field, including whether Russia's athletes could be excluded from the Olympics and the Paralympics as a result of the state-sanctioned doping program<sup>4</sup>; whether an elite sport could restrict eligibility for the female category on the basis of biological sex<sup>5</sup>; and whether the lengthy bans and fines imposed on FIFA's former President and Secretary-General for Code of Ethics breaches were lawful and proportionate.<sup>6</sup>

In addition to the Code of Sports-Related Arbitration, the CAS works with the domestic law applicable to the parties and the dispute, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the law of Switzerland. Thus, for example, in a case between an athlete and World Athletics, the international federation which governs the sport of track and field and which has its headquarters in Monaco, the CAS works with Swiss and Monegasque law. International

user\_upload/CAS\_Award\_-\_redacted\_-\_Semenya ASA IAAF.pdf; Semenya v. IAAF, CAS 2018/O/5794 (Apr. 30, 2019), [https://www.tascas.org/fileadmin/user\\_upload/CAS\\_Award\\_-\\_redacted\\_-\\_Semenya ASA IAAF.pdf](https://www.tascas.org/fileadmin/user_upload/CAS_Award_-_redacted_-_Semenya ASA IAAF.pdf); Chand v. Athletics Fed'n of India, CAS 2014/A/3759 (July 24, 2015), <https://plawyered.files.wordpress.com/2015/09/duttee-chand-v-athletics-federation-of-india-afi-the-international-association-of-athletics-federations-iaaf.pdf>.

<sup>6</sup> Valcke v. FIFA, CAS 2017/A/5003 (July 27, 2018), [https://www.tascas.org/fileadmin/user\\_upload/Award\\_5003\\_Final.pdf](https://www.tascas.org/fileadmin/user_upload/Award_5003_Final.pdf); Blatter v. FIFA, CAS 2016/A/4501 (Dec. 5, 2016), <https://jurisprudence.tascas.org/Shared%20Documents/4501.pdf>.

law is applicable to the extent it has been incorporated into the laws of Switzerland and Monaco.

The CAS panels generally consist of three members, one nominated by each party from the closed list of arbitrators published on the CAS website, and a chair agreed by the two nominees (Ordinary Division) or appointed by the President of the Division (Appellate Division) from the same list.<sup>7</sup> Alternatively, the parties may leave the president of the relevant division to appoint a sole arbitrator, again from the closed list.

The IOC, IFs, NOCs, and their respective Athletes' Commissions may put forward candidates for appointment to the CAS's closed list of arbitrators. Candidates must have full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general, and a good command of at least one of the CAS working languages (English, Spanish, and French). The arbitrators are appointed to the list by the ICAS for a renewable period of four years.

Reflecting the global nature of sport, the CAS list of arbitrators includes lawyers from all over the world, and particular panels appointed from the list often include both common law arbitrators (who are generally more familiar with the adversarial approach to dispute resolution) and civil law arbitrators (who are generally more familiar with the inquisitorial approach), which can sometimes present interesting challenges for advocates appearing before them.

---

<sup>7</sup> The general list is at List of Arbitrators (General List), Tribunal Arbitral Du Sport, <https://www.tas-cas.org/en/arbitration/liste-des-arbitres-liste-generale.html> (last visited June 7, 2020). The list of arbitrators for football cases is at List of Arbitrators (Football List), Tribunal Arbitral Du Sport, <https://www.tas-cas.org/en/arbitration/list-of->

## II. How Hot Tubs Work

The nature of the matters before the CAS often requires the presentation of evidence through experts, including, among others, data scientists, biomedical experts, economists, and sports physiologists. As is the case in other forums, CAS arbitrators recognize not only that such expertise is relevant and useful, but also that it is expensive and — when given sequentially, under cross-examination — often inefficient and less helpful than it could be. The latter is especially true in circumstances where adversarial testimony unnecessarily complicates, restricts, or distorts the facts rather than elucidates them. The process is also entirely at odds with traditional scientific discourse, which is designed to resolve differences by identifying competing hypotheses and allowing a consensus of opinion to emerge and solidify behind the one that has the strongest arguments and evidence in support:

One reason scientists are uncomfortable in the courtroom is that they are neither trained in nor comfortable with the formalism of the legal adversary proceeding as a mechanism to resolve scientific differences. One scientist discussed the modes of debate in science, which traditionally lead to consensus, not victory or defeat. When a group of scientists is asked to address a question, the group eventually recognizes the value of the strongest evidence and opinions. At that point, even if one or a few members of the group are at extreme ends of the bell-shaped curve of opinion, the custom is for all to join in a "consensus truth."

---

arbitrators-football-list.html (last visited June 7, 2020). The list of arbitrators for cases in the Anti-Doping Division is at List of Arbitrators (ADD), Tribunal Arbitral Du Sport, <https://www.tas-cas.org/en/arbitration/list-of-arbitrators-add.html> (last visited June 7, 2020).

In the courtroom, the goal is not a consensus truth but a definitive decision. Although there may be a consensus in the scientific community about a particular question, this consensus is unlikely to appear in the courtroom. Instead, opposing attorneys search out experts from the tails of the bell-shaped curve so as to strengthen their particular arguments.<sup>8</sup>

Recognizing this problem, some judges have adopted the practice of having experts testify concurrently, also known as “hot tubbing” experts or a “conclave” of experts.<sup>9</sup> The practice has been described by Australia’s Peter McClellan, previously a judge of the New South Wales Court of Appeal (the highest court in the State of New South Wales) and one of the practice’s earliest and leading proponents, as a discussion chaired by the judge in which the various experts, the parties, the advocates and the judge engage in a co-operative endeavor to identify the issues and arrive where possible at a common resolution of them. Where resolution of issues is not possible, a structured discussion, with the judge as chairperson, allows the experts to give their opinions without the constraints of the adversarial process and in a forum which enables them to respond directly to each other. The judge is not confined to the opinion of one advisor but has the benefit of multiple advisers who are rigorously examined in public.<sup>10</sup>

Judge McClellan’s description of the procedure is standard fare:

[T]he experts retained by the parties . . . prepare a written report in the conventional fashion. The reports are exchanged and . . . the experts are required to meet without the parties or their representatives to discuss those reports. This may be done in person or by telephone. The experts are required to prepare a bullet-point document incorporating a summary of the matters upon which they agree, but, more significantly, matters upon which they disagree. The experts are sworn together and, using the summary of matters upon which they disagree, the judge settles an agenda with counsel for a “directed” discussion, chaired by the judge, of the issues in disagreement. The process provides an opportunity for each expert to place his or her view on a particular issue or sub-issue before the court. The experts are encouraged to ask and answer questions of each other. The advocates also may ask questions during the course of the discussion to ensure that an expert’s opinion is fully articulated and tested against a contrary opinion. At the end of the discussion, the judge will ask a general question to ensure that all of the experts have had the opportunity to fully explain their positions.<sup>11</sup>

McClellan argues that having experts testify concurrently maximizes transparency and the development of full factual information, which — better than the adversarial process — ensures the integrity of the evidence the court

<sup>8</sup> Nat'l Res. Council, *The Scientist's Role in the Courtroom*, in *The Age of Expert Testimony: Science in the Courtroom: Report of a Workshop* 15, 15–16 (2002).

<sup>9</sup> Ryan Thompson, *Concurrent Expert Evidence: Hot Tubbing in America? Experts Jump In*, Nat'l L. Rev. (Aug. 31, 2016), <https://www.natlawreview.com/article/concurrent-expert-evidence-hot-tubbing-america-experts-jump>.

<sup>10</sup> Concurrent Evidence — Hot-Tubbing, Acad. Experts, <http://www.academyofexperts.org/guidance/users-experts/concurrent-evidence-hot-tubbing> (last visited June 7, 2020).

<sup>11</sup> Peter McClellan, *New Method with Experts — Concurrent Evidence*, 3 J. Court Innovation 259, 264 (2010), <http://www.courts.state.ny.us/court-innovation/Winter-2010/jciMcClellan.pdf>; see also Steven Rares, Judge, Fed. Court of Austl., Using the “Hot Tub” — How Concurrent Expert Evidence Aids Understanding Issues, Address at the Judicial Conference of Australia Colloquium (Oct. 12, 2013), <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20131012>.

has as its basis for decision.<sup>12</sup> He suggests that the nature and quality of the evidence adduced through this process is especially valuable to those courts that are not only concerned with the interests of the private litigants but also imbued with a “public function.”<sup>13</sup> Finally, McClellan offers that the peer engagement and review aspects of the conclave are appealing to experts themselves:

[The] procedure has been met with overwhelming support from the experts and their professional organizations. They find that they are better able to communicate their opinions and, because they are not confined to answering the questions of the advocates, are able to more effectively convey their own views and respond to those of the other experts. Because they must answer to a professional colleague rather than an opposing advocate, experts readily confess that their evidence is more carefully considered. They also believe that there is less risk that their evidence will be unfairly distorted by the advocate’s skill.<sup>14</sup>

Although the practice has now spread beyond Australia, including to other common law systems and to “a range of quasi-legal settings such as public inquiries,” it is not without its critics.<sup>15</sup> Those wedded to the view that the adversarial system is the best way to adduce the facts often question the effectiveness of hot

---

<sup>12</sup> McClellan, *supra* note 11, at 266–67.

<sup>13</sup> *Id.* at 262.

<sup>14</sup> *Id.* at 262.

<sup>15</sup> Charlie Dobson, Methods Vignettes: Concurrent Evidence, Steps Centre, <https://steps-centre.org/pathways-methods-vignettes/methodsvignettes-concurrent-evidence> (last visited June 7, 2020).

<sup>16</sup> See, e.g., John Emmerig et al., Room in American Courts for an Australian Hot Tub?, Jones Day: Insights (Apr. 2013), <https://www.jonesday.com/en/insights/2013/04/room-in-american-courts-for-an-australian-hot-tub> (“To reform the adversarial system in the United States by employing an evidentiary practice not fitted for its adversarial system could be a serious mistake. . . . If hot-tubbing has an American future, . . . it should be used in very limited, non-jury

tubbing’s collaborative aspects.<sup>16</sup> For example, Professor Gary Edmond of the University of New South Wales has argued that, contrary to McClellan’s descriptions, hot-tubbing witnesses can “have a closing down effect” in a number of related respects: saving time can mean incomplete evidence and “funneling down to consensus . . . can lead to a closing down of issues . . . [which can be] especially problematic if there is a natural hierarchy among the experts.” Edmond suggests that advocates hold an “idealized” but not necessarily correct view that “open discussion and peer review will allow for a consensus on the ‘truth’ to emerge”; after all, experts are still selected by parties and so “biases may already be inbuilt.”<sup>17</sup>

Ultimately, those who have experienced and evaluated the method tend to agree that having a skilled and interested judge can be determinative of its utility and success. That is, “whether it broadens out and opens up very much depends on how it is applied, interpreted and led. It would seem to have high potential where the overseers of the process are well informed on the issues, enthusiastic to explore them and have an understanding of inherent uncertainties in scientific evidence.”<sup>18</sup>

### III. Testing the Waters: Reflections on the Use of Concurrent Evidence at CAS

contexts where the technical issues are so complex that a ‘discussion’ by the experts is essential for a rudimentary understanding of the dispute . . . ?); see also Thompson, *supra* note 9 (summarizing the concerns that hot tubbing runs counter to America’s adversarial system).

<sup>17</sup> Dobson, *supra* note 15; see also Gary Edmond, *Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure*, 72 Law & Contemp. Probs. 159, 171–76 (2009).

<sup>18</sup> Dobson, *supra* note 15; see also Part 3: Concurrent Evidence or “Hot Tubbing”—Hot Tubbing Heats Up! FTI Consulting: Insights (Jan. 29, 2018), <https://www.fticonsulting-asia.com/insights/articles/part-3-concurrent-evidence-or-hottubbing> (“The judge will ensure that the process is fair and effective, balanced . . . ”).

Between the two of us, we have been involved in three high-profile sports disputes that have turned on complex scientific evidence. In each of these cases, experts gave their evidence concurrently. The two at the CAS exemplified this approach at its best.

In UK *Anti-Doping v. Tiernan-Locke*,<sup>19</sup> a national-level (not a CAS) case, the issue was whether abnormal bio-marker values in a series of blood samples taken from an athlete over time were caused by blood doping. In the two CAS cases, *Chand v. IAAF* and *Semenya v. IAAF*, the issue was whether a “46 XY” athlete — i.e., a biologically male athlete with a normal complement of male chromosomes — who had been reared female due to differences of sex development derived performance advantages from their biology that made it unfair for them to compete in the female category.

In the UK *Anti-Doping* case, the advocates proposed that the expert evidence be given concurrently, and the tribunal chair allowed them to drive that evidence through their questions, rather than direct the proceedings himself. This may have been due to unfamiliarity with the process, and it meant the back-and-forth remained relatively adversarial, but still it enabled the experts to engage directly with each other, to ask each other pertinent questions, and to identify quickly assertions that were speculative rather than evidence-based.

In both the *Chand* and *Semenya* cases, the chair of the CAS panel was Annabelle Bennett, an eminent Australian federal court judge with a strong scientific background, including a biochemistry PhD. She was therefore both familiar with the technique of concurrent evidence and well able to shepherd the experts through the key issues. For example, over the five-day trial in the *Semenya* case in Lausanne

in March 2019, in addition to extensive legal arguments and conventional testimony from fact and non-scientific expert witnesses, the panel received the oral testimony of 12 scientific experts split into six different hot tubs, hearing concurrent evidence from three to nine experts at a time.

This may well sound like a recipe for disaster, but the chair was able to take each group of experts through a list of issues pre-agreed by counsel for the parties, quickly identify areas of common ground, and test the reasons for the remaining differences. The experts were clearly more comfortable with this format than they would have been with individual cross-examination, and significant time was saved. The format discouraged the experts from making unsupported points, and made it harder for them to hedge their opinions, because they knew they would be immediately challenged by learned colleagues who were fully familiar with the peer-reviewed evidence in the field. Instead of an adversarial, lawyer-driven process, there was a respectful exchange that enabled the experts to debate back and forth, to make their own points and to comment immediately on what others said. Those who strayed from this collaborative approach were quickly reined in by their peers. This allowed the key points and evidence to emerge naturally, so that the panel could understand clearly which issues remained in dispute, and why.

The process undoubtedly tested the nerves of the parties’ respective legal teams, who were all far more used to cross-examination, and were anxious about giving up the opportunity to score points. However, Judge Bennett gave counsel a fair opportunity to ask further questions, and they seldom felt the need to do so, given her skill in covering the necessary ground fully and fairly to all parties. In fact, after all the drama and controversy that the

---

<sup>19</sup> UK Anti-Doping v. Tiernan-Locke, July 15, 2014 (SR/0000120108) (UK),

[https://www.doping.nl/media/kb/2575/UKADvs\\_TiernanLocke\\_Decision\\_341%20\(S\).pdf](https://www.doping.nl/media/kb/2575/UKADvs_TiernanLocke_Decision_341%20(S).pdf).

Semenya dispute had generated in public debate, it was a relief to see such constructive work by the experts in the privacy of the arbitration setting. The fact that the eventual award was more than 160 pages long indicates how much ground was covered, and the account given in the award of the hot-tub evidence illustrates how that process helped the panel to cut through the morass of detail to the key issues it had to resolve and the key evidence it had to consider.

There is no doubt that the huge success of the hot tubbing in *Chand* and *Semenya* was due in large part to Judge Bennett's familiarity with the technique, as well as her own scientific expertise. Judges without the benefit of that background may be more inclined to stick with sequential evidence, or else might allow hot tubbing but leave the parties' counsel to drive the process, which can work but can also retain an adversarial tone that may hinder the search for "consensus truth." Given the nature of the cases that the CAS hears, however, and in particular its "public function" as "Sport's Supreme Court," it arguably has a responsibility to satisfy itself that the private disputants are not depriving it of the benefit of a complete and transparent evidentiary record, which may mean that hot-tubbing of experts stops being the exception at CAS and starts becoming the norm.

#### IV. Could hot tubbing work well in U.S. courts?

---

<sup>20</sup> See, e.g., Adam E. Butt, Concurrent Expert Evidence in the United States — Is There a Role for Hot Tubbing?, Civ. Jury Project at N.Y.U., <https://civiljuryproject.law.nyu.edu/concurrent-expert-evidence-in-the-united-states-is-there-a-role-for-hot-tubbing/> (last visited June 15, 2020); see also Adam E. Butt, Concurrent Expert Evidence in U.S. Toxic Harms Cases and Civil Cases More Generally: Is There a Proper Role For "Hot Tubbing"? 40 Houston J. Int'l L. 1 (2017); Ryan Thompson, Hot Tubbing in America? Experts Jump In, IMS Expert Servs., <https://www.ims-expertsjump-in.com/insights/hot-tubbing-in-america-expertsjump-in/> (last visited June 15, 2020) (reporting on Judge Zouhary's experience); Anjelica Cappellino,

Others before us have written about the viability of hot-tubbing in U.S. courts.<sup>20</sup> Two related arguments emerge from this commentary. The first assumes that advocates and judges in the United States are especially wedded to the adversarial system in comparison with their colleagues in other common law countries. The argument is that the method, collaborative and consensus-driven as it is, should not, as a normative matter — or could not as a practical matter — be adopted on a widespread basis in the States. The second is that hot tubbing is especially likely to be problematic in the context of jury trials given the nature of the jury as an institution and the ways in which judges and advocates engage with jurors and each other in its presence. Both are ultimately reflections on the fact that hot tubbing involves deviations from standard American practice and thus appears to be an awkward fit, perhaps without a clear upside.

Still, some U.S. judges have undertaken the experiment — it is permissible under Rule 611 of the Federal Rules of Evidence<sup>21</sup> — and their experiences and reflections shed some additional light on its prospects. For example, Adam Butt, who is both a barrister in Australia and an attorney in the United States, has reported that

Judge [Douglas] Woodlock (D. Mass) started using it after learning about the method from

'Hot Tubbing Expert Witnesses: An Experimental Technique from Australia Makes a Splash in U.S. Courts, Expert Inst. (Jan. 27, 2017), <https://www.expertinstitute.com/resources/insights/hot-tubbing-expert-witnesses-an-experimental-technique-from-australia-makes-a-splash-in-u-s-courts/> (reporting also on Judge David Laro's experience).

<sup>21</sup> Fed. R. Evid. 611(a) (explaining that a "court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence" in order to "determin[e] the truth," to "avoid wasting time," and to "protect witnesses from harassment or undue embarrassment").

Australia's Justice Heerey. Judge [Jack] Zouhary (N.D. Ohio) started using it independently, only to later find out about the Australian method. Judge [Jack] Weinstein (E.D. NY) started using hot tubbing after we first discussed the subject [in 2016]. Concurrent evidence has been used in toxics cases (e.g. Daubert hearing), a claims construction hearing, a class certification hearing and other civil matters. In general the method has not been seen as problematic in non-jury contexts; conversely, the judges and academics consulted or considered have endorsed the approach. ... Judges [Alvin] Hellerstein (S.D. NY), Weinstein, Woodlock and Zouhary do not consider that the jury is off limits but they have their certain qualifications. For example, Judge Woodlock would need to be comfortable with who the experts were in order to use hot tubbing before a jury. Judge Zouhary would support using hot tubbing in jury cases where the expert evidence was complicated (it helps to comprehend such evidence), but would avoid using it in simpler matters. Judge Weinstein has actually now used hot tubbing in one jury trial, in a birthing case. Nevertheless, he states that he would intervene less in such settings, because his intervention may be demeaning to attorneys, the jury may give greater reliance to questions/positions put forward by the judge, and the concurrent presentation of evidence (cf. sequential presentation) may create complications in relation to burdens of proof and allowing attorneys to present their case.<sup>22</sup>

From our experience in sports cases, including at the CAS, hot tubbing would seem to be a promising mode for presenting expert testimony in U.S. courts. As in sport, a lack of familiarity with the process is a hurdle that can be overcome with practice by judges and advocates. And at least in theory, despite the fealty to the adversarial process generally, there should be no normative hurdle since the goals

of concurrent evidence are the same as those of sequential evidence and specifically of Rule 611, i.e., to "determin[e] the truth," to "avoid wasting time," and to "protect witnesses from harassment or undue embarrassment."<sup>23</sup> Indeed, the case for concurrent evidence is that it can do more work than sequential evidence toward all three goals.

At the CAS what has been clear is that the better the quality and integrity of the experts, the likelier they are to recognize the benefits of concurrent evidence in building consensus and exposing speculative positions. And, for most experts, being able to engage with their colleagues in educating a lay audience without having to be on the "hot seat" is certainly less stressful and more conducive to full and thoughtful statements and responses. The more confident the lawyers are of their case, the happier they may be to let their experts loose and allow the "consensus truth" to emerge. And for the judge who has the time to prepare properly so that he or she is ready and able to guide the debate, it may be the most effective and efficient way to identify the issues that are in dispute and the evidence that is most relevant to their resolution. Ultimately, it is in the context of cases that have significance for the public beyond the concerns of the private litigants – cases in which the court serves an important "public function" – that this "conclave" model can be most valuable, ensuring that the factual bases for decision are peer-reviewed and evidence-based.

---

<sup>22</sup> Butt, *supra* note 20.

<sup>23</sup> Fed. R. Evid. 611.

---

# **La sucesión deportiva de clubes de fútbol: consideraciones a la vista de la jurisprudencia del TAS en la materia**

Jordi López Batet\*

- 
- I. Introducción
  - II. Punto de partida: el concepto de “club” a los efectos de la sucesión deportiva
  - III. Algunos principios a extraer de las resoluciones del TAS sobre sucesión deportiva de clubes de fútbol
    - A. Concurrencia o no de sucesión deportiva. Criterios. Cuestiones probatorias
    - B. Efectos materiales de la sucesión deportiva
  - IV. La sucesión deportiva y la capacidad para ser parte en el procedimiento ante el TAS
  - V. Conclusiones
- 

## **I. Introducción**

La profesionalización que tanto los clubes como el mercado futbolístico en general han ido experimentando sobre todo desde la última década del siglo pasado, unida a la globalización y creciente transnacionalidad del tantas veces denominado “deporte rey”, han traído consigo un buen número de situaciones que eran desconocidas o por lo menos poco habituales en tiempos pretéritos, en que la preponderancia del elemento puramente deportivo en el fútbol era indiscutible sobre la “industria” o el negocio que lo rodeaba.

Así, hemos venido asistiendo a lo largo de los años a la aparición y/o proliferación de fenómenos tales como la conversión de los clubes de fútbol (tradicionalmente de estructura asociativa) en corporaciones o sociedades mercantiles<sup>1</sup>, los negocios sobre las acciones o el patrimonio de dichos clubes (ventas, fusiones, cesiones de activos, etc.) o incluso la conducción de procedimientos concursales de clubes de fútbol que han concluido en ocasiones con su liquidación y consiguiente desaparición, si bien como veremos, a veces la real y efectiva “desaparición del club” como tal puede resultar, por lo menos, discutible.

Tales avatares societarios o desplazamientos patrimoniales han dado lugar a escenarios en que una entidad futbolística pueda ser considerada continuadora o sucesora de otra que por uno u otro motivo, ve extinguida su personalidad jurídica o se desprende de su actividad. Ello ha planteado en la práctica múltiples controversias acerca de la existencia o no de tal continuidad o sucesión deportiva y en especial acerca de los efectos o consecuencias de la misma, tanto desde el punto de vista material (mayoritariamente en lo que concierne a la asunción o no de deudas y responsabilidades de la entidad extinta por parte de la entidad supuestamente continuadora) como desde la perspectiva de la traba o constitución de la litis.

En este tipo de disputas se produce usualmente una colisión entre de un lado, premisas legales clásicas tales como la independencia de la personalidad jurídica de una entidad respecto a otra o respecto a sus integrantes, socios y/o gestores, o el efecto de la preclusión derivada de la falta de comunicación o reclamación de un crédito en un concurso de acreedores, y de otro los principios y efectos de la sucesión empresarial, la primacía de la sustancia sobre

---

\* Socio de Pintó Ruiz & Del Valle. Árbitro del TAS.

<sup>1</sup> Como la acaecida en España a raíz de la Ley 10/1990, del Deporte, que supuso que todos los clubes de

primera y segunda división (con muy contadas excepciones) debieran adoptar la forma de sociedad anónima deportiva.

la forma de los negocios jurídicos<sup>2</sup> o la especificidad del deporte. Dicha tensión ha sido incluso puesta de relieve de algún modo en ciertas resoluciones del TAS, en que se ha afirmado que *the issue of the succession of two sporting clubs might be different that if one were to apply civil law, regarding the succession of two separate legal entities.*<sup>3</sup>

Asimismo, no resulta infrecuente en estos conflictos la insinuación, o incluso la afirmación, que realiza el reclamante (generalmente un acreedor del club “sucedido”) acerca del fin espurio de la acción u operación que da lugar a la pretensión de sucesión: se desliza en un buen número de casos que la transmisión de activos o de la actividad futbolística de una entidad a otra se ha efectuado con la finalidad de evitar el pago de las deudas contraídas por la “cedente” con jugadores, intermediarios y cualquier otro tipo de terceros. La sombra del dolo o el fraude de acreedores se proyecta sobre tales transacciones, en reclamaciones que interponen quienes entienden que el club, o más bien sus propietarios y/o gestores, valiéndose de determinados artificios, buscan de un modo torticero eludir el cumplimiento de obligaciones válidamente contraídas y jurídicamente exigibles.

Como no podía ser de otro modo, este tipo de controversias han acabado siendo resueltas por el TAS en última instancia, en vía de apelación de decisiones adoptadas en la instancia por los órganos judiciales de FIFA. Se ha generado pues a lo largo de los últimos años un nutrido cuerpo de decisiones en esta materia que nos permite establecer una serie de líneas generales a tener en cuenta a la hora de abordar este tipo de casos en la práctica, si bien no debemos perder de vista que el

tratamiento caso por caso de cada situación litigiosa deberá ser no solo inexcusable, sino claramente necesario, por los motivos que más adelante se exponen.

## II. Punto de partida: el concepto de “club” a los efectos de la sucesión deportiva

Tal y como hemos apuntado en la introducción, la mayoría de derechos nacionales reconocen que en línea de principio, una persona jurídica no debe ser responsable por hechos o actos llevados a cabo por otra persona jurídica, si bien es cierto que tal postulado general admite excepciones en algunos casos, como pueden ser la asunción de mandatos en nombre propio, las situaciones en que proceda levantar el velo societario o aquellos supuestos específicos en que la Ley establece tal responsabilidad por actos de otros<sup>4</sup>.

Ante ello, debemos preguntarnos si dicho principio halla buen encaje o no en el ámbito de los clubes de fútbol, a la vista de ciertas dinámicas y “entornos cambiantes” a los que tales clubes se han visto sometidos en los últimos tiempos.

Para contestar a dicha pregunta procede en primer lugar analizar qué se debe entender por “club de fútbol” a efectos de la sucesión deportiva. Esta cuestión ha sido tratada de forma extensiva en diversas resoluciones del TAS, que han venido a concluir ya desde antiguo que un club de fútbol trasciende o va más allá del ente o la estructura jurídica que lo maneja u opera<sup>5</sup>. Un club tiene una serie de rasgos propios que lo identifican y distinguen respecto de los demás clubes, entre otros su nombre, los colores de la indumentaria,

<sup>2</sup> La preeminencia de la materialidad o realidad del negocio o transacción sobre la forma que las partes le hayan atribuido ha sido reconocida con carácter general en diversas decisiones del TAS, bastando citar *ad exemplum* los laudos que resuelven los casos TAS 2011/A/2449 o TAS 2011/A/2356.

<sup>3</sup> TAS 2016/A/4550 & 4576, párrafo 134, o TAS 2016/A/4918, párrafo 150.

<sup>4</sup> Como puede ser, en algunos ordenamientos jurídicos, la responsabilidad de la entidad sucesora o cesionaria

por deudas y contingencia fiscales y laborales de la sucedida o cedente en casos de sucesión empresarial. Un ejemplo de ello puede ser el artículo 333.3 del Código de Obligaciones suizo, que establece que *L'ancien employeur et l'acquéreur répondent solidiairement des créances du travailleur échues dès avant le transfert jusqu'au moment où les rapports de travail pourraient normalement prendre fin ou ont pris fin par suite de l'opposition du travailleur.*

<sup>5</sup> Véase TAS 2007/A/1355, TAS 2011/A/2614, TAS 2012/A/2778 o TAS 2016/A/4550 & 4576.

escudos y otros emblemas, sus aficionados, su historia, su palmarés deportivo, o su localidad y estadio, entre otros<sup>6</sup>. Tales circunstancias o características se gestan durante un periodo de tiempo prolongado, tienen vocación de permanencia y configuran una imagen de lo que el común del público entiende o considera como club<sup>7</sup>.

Tomando en consideración dicha noción de club consagrada por la jurisprudencia del TAS a los efectos dichos, comprobaremos a continuación que el hecho de que un club, en un momento determinado, proceda a realizar, o se vea inmerso en, una operación que implique modificaciones en su estructura o control o una cesión de sus activos y/o de su actividad a otra entidad no implicará *per se* que las relaciones jurídicas forjadas en un momento anterior se vean definitivamente frustradas o devengan inexigibles o inejecutables, o que la nueva entidad resultante de dicha operación o cessionaria de tales activos y/o actividad no pueda ser declarada responsable por actos de la entidad extinta o sucedida.

Antes lo contrario, no son pocas las decisiones de FIFA y el TAS que han establecido que la entidad sucesora en el manejo o titularidad de la actividad futbolística del club debe asumir las consecuencias de las relaciones jurídicas pasadas generadas en el seno de aquél, y ello pese a la desaparición y consiguiente desafiliación federativa formal de la entidad (persona jurídica) originariamente obligada. Dicho de otro modo, a efectos deportivos la extinción de una entidad o la transmisión de sus activos y/o rama de actividad no siempre va a suponer o llevar aparejada una total desvinculación, ruptura o liquidación de las situaciones o negocios existentes con

anterioridad a la operación traslativa de dominio o control.

Las antedichas premisas o postulados generales emanados de las resoluciones del TAS se hallan a fecha de hoy plenamente consolidados, hasta el punto de que en la modificación del Código Disciplinario de FIFA operada en 2019, se incluye una disposición específica (artículo 15.4) que los recoge expresamente<sup>8</sup> (*el sucesor deportivo de una parte infractora también se considerará parte infractora y, por tanto, estará sujeto a las obligaciones de la presente disposición. Los criterios para decidir si una entidad puede considerarse sucesora deportiva de otra son, entre otros, la sede, el nombre, la forma jurídica, los colores del equipo, los jugadores, los accionistas o grupos de interés o propietarios y la categoría competitiva*).

### III. Algunos principios a extraer de las resoluciones del TAS sobre sucesión deportiva de clubes de fútbol

La casuística de los supuestos de sucesión deportiva resulta, como bien puede imaginar el lector sobre todo a la vista de la “creatividad” desplegada en ocasiones por algunos clubes de fútbol en tiempos de crisis, de lo más variopinto, por lo que las aproximaciones realizadas por las decisiones del TAS a los distintos supuestos de hecho que se le han planteado para resolución han sido forzosamente diversas.

Dicho lo anterior, no es menos cierto que el estudio de las decisiones existentes hasta la fecha en materia de sucesión deportiva de clubes de fútbol permite extraer o identificar una serie de criterios que permiten por lo menos orientar o afinar en el “test de previsibilidad” respecto a nuevos casos que se puedan plantear en el futuro sobre la cuestión, si bien deberemos tener presente

<sup>6</sup> Véase por ejemplo TAS 2011/A/2614, TAS 2016/A/4918 o TAS 2018/A/5618.

<sup>7</sup> En estas decisiones del TAS se supera o se va más allá de la definición general de “Club” contenida en los Estatutos de FIFA, según la cual un club es un “miembro de una federación (*a su vez, miembro de FIFA*) o de una liga reconocida por una federación miembro que aporta al menos un equipo al campeonato.”

<sup>8</sup> LA ROUCHEFOUCAULD, E. Aperçu du nouveau Code Disciplinaire FIFA 2019. CAS Bulletin 2019/2: *Autre nouveauté, en application de l'article 15.4, la FIFA a la possibilité de faire respecter des décisions en imposant des sanctions au successeur sportif d'une autre partie coupable du non-respect d'une décision. Cet amendement correspond à une codification de la jurisprudence du TAS.*

que (i) las decisiones sobre la sucesión deportiva y sus efectos se deben adoptar “*on a case-by-case basis*” y (ii) que los precedentes pueden servir de guía y suponen una importante fuente de auxilio e información para las formaciones arbitrales, pero no les vinculan de un modo absoluto.

### A. Concurrencia o no de sucesión deportiva. Criterios. Cuestiones probatorias

Es un hecho que numerosas resoluciones del TAS han declarado la existencia de sucesión deportiva de clubes de fútbol, partiendo en su construcción jurídica (por lo menos en la mayoría de los casos) de la concepción de “club” descrita en el apartado II anterior.

Dicha declaración ha tenido lugar en entornos o supuestos de hecho más o menos típicos, como son los de reclamación de deudas dinerarias o de solicitud de imposición de sanciones por incumplimiento de resoluciones de condena monetaria dictadas por FIFA<sup>9</sup>. A partir de aquí, en estos procedimientos el resto de cuestiones son ya más atípicas, tanto en lo que concierne al negocio jurídico que da lugar a la sucesión como en lo que se refiere a los argumentos defensivos esgrimidos por las partes recurridas para fundar su ausencia de responsabilidad.

En tales resoluciones del TAS se observa con carácter general una tendencia clara de las

<sup>9</sup> Respecto a este último grupo de casos, debe mencionarse que el laudo que resuelve el caso TAS 2018/A/5647 determinó que los órganos disciplinarios de FIFA están en posición de revisar, valorar y decidir sobre si un club es el mismo -o el sucesor- de otro club en el seno de un procedimiento disciplinario instado debido al incumplimiento de una decisión previa de FIFA. A dicho laudo se refieren asimismo diversas resoluciones posteriores de la Comisión Disciplinaria de FIFA (Decisión 150129 PST de 25 de septiembre de 2019, Decisión 171212 PST de 7 de noviembre de 2019 o Decisión 171380 PST de 15 de octubre de 2019). Este criterio ha sido también confirmado por el laudo recaído en el asunto TAS 2019/A/6461, en cuyo párrafo 58 se establece que *it was within the purview of the FIFA Disciplinary Committee to consider whether the Appellant bears responsibility for the debts incurred by the Debtor club. Indeed, having*

*formaciones arbitrales a mostrarse más preocupadas por conocer el sustrato o la esencia que por cuestiones de tipo más formal a la hora de determinar si existe sucesión deportiva o no. Las formaciones arbitrales analizan en las citadas resoluciones los negocios jurídicos de los que trae causa la alegada sucesión, así como la identidad y características de todas las partes implicadas y todo tipo de cuestiones reglamentarias, como puedan ser la desafiliación de la entidad sucedida y la afiliación de la nueva o las categorías en que tales entidades participan en la competición. No obstante, su análisis no concluye ahí ni mucho menos, y la valoración que realizan las formaciones tiene un alcance global y trasversal a la vista de todas las circunstancias concurrentes, con una marcada voluntad de saber y determinar si realmente existe una continuidad en la actividad futbolística que funde la declaración de sucesión y sus eventuales efectos.*

En esta línea, se ha manifestado en algunas resoluciones que aun siendo indiscutido que dos entidades tengan personalidades jurídicas distintas, no debe seguirse de ello que una de ellas (la pretendidamente sucesora) no esté vinculada por una decisión que afecta a la otra (la supuestamente sucedida)<sup>10</sup>, o que la sucesión deportiva se puede determinar *irrespectively of the legal form under which the respective clubs appear to operate*<sup>11</sup>.

Del mismo modo, se ha afirmado en otras resoluciones que el hecho de que la compañía

*identified a clear case of succession between the two clubs, the FIFA Disciplinary Committee legitimately concluded that the successor club, in this case, the Appellant, is liable for the debts incurred by its predecessor, the original Debtor. This is well in line with the legal principle confirmed by CAS Panels, that the successor club is bound by the debts of its predecessor and should bear the consequences for its failure to pay (CAS 2011/A/2646 §20). Consequently, the FIFA Disciplinary Committee had a duty to address the issue and to examine the liability of the Appellant and, thus, applied correctly Article 64 of the FDC.*

<sup>10</sup> TAS 2007/A/1355, párrafo 49.

<sup>11</sup> TAS 2019/A/6461, párrafo 50. En este mismo laudo se indica asimismo que *the mere fact that the Appellant and the Debtor club appeared as two separate legal entities operating simultaneously over a certain period of time is not a decisive factor to rule out sporting succession* (párrafo 52).

encargada de la administración de un club haya cambiado no es relevante a los efectos de considerar si estamos ante una misma entidad deportiva u otra distinta cuando los elementos definitorios de la misma (nombre, logo, colores, estadio, localidad, palmarés...) se mantienen inalterados, y que tampoco lo es el hecho de que la asociación nacional otorgue a la nueva entidad un coeficiente distinto del que tenía la entidad de origen<sup>12</sup>. En otras ocasiones, lo que se ha sostenido en tales casos es que lo que se produce es una subrogación de la nueva entidad administradora en las obligaciones asumidas por cualquiera de las entidades que previamente hubieran estado a cargo del club<sup>13</sup>. Y en otras, que dos entidades se consideran el mismo club con independencia de cualquier cambio en la gestión o en la entidad jurídica que opere el club<sup>14</sup>.

En dicho afán por la búsqueda de la materialidad o de la esencia, se observa en un importante número de laudos que las formaciones arbitrales han atribuido una gran relevancia a los signos externos en su proceso de formación de la convicción acerca de la existencia o no sucesión deportiva. Por ejemplo, y dependiendo de los casos, se ha tenido en cuenta a este respecto:

- Que la nueva entidad se refiera públicamente<sup>15</sup> a la fecha de fundación de la entidad anterior, haga suya la historia<sup>16</sup> y palmarés de ésta, siga disputando sus partidos en la misma localidad y estadio, y sus colores y otros emblemas se sigan asociando a los de la entidad sucedida<sup>17</sup>.
- Que las entidades pretendidamente sucesora y sucedida tengan el mismo domicilio social y director general<sup>18</sup>.
- Que la nueva entidad incorpore en su denominación elementos de la

denominación de la antigua<sup>19</sup> o sea confundible o idéntica a aquella<sup>20</sup>.

- Que exista una cierta coincidencia entre los planteles y staff técnico de las dos entidades<sup>21</sup>
- Que determinados datos de contacto de ambas entidades, como el número de teléfono o fax<sup>22</sup> o la dirección postal, sean los mismos.
- Que una asociación nacional haya tratado en la práctica a un club como el sucesor de otro o que el sucesor haya adquirido los derechos a participar en la competición que tenía el sucedido<sup>23</sup>.

Estos y otros elementos han sido en la práctica valorados y tomados en consideración a la hora de decidir sobre si se está o no ante una misma unidad inmanente e indivisible (club) pese al negocio operado sobre su estructura o activos. La ponderación de los mismos y su mayor o menor incidencia o peso dependerán de las circunstancias concretas de cada caso. De hecho, la formulación del artículo 15.4 del Código Disciplinario de FIFA viene a recoger esta idea, pues no contiene una enumeración exhaustiva y cerrada de criterios para determinar si una entidad se considera sucesora de otra (*Los criterios para decidir si una entidad puede considerarse sucesora deportiva de otra son, entre otros, la sede, el nombre, la forma jurídica, los colores del equipo, los jugadores, los accionistas o grupos de interés o propietarios y la categoría competitiva*).

Los órganos de FIFA no han permanecido ajenos a tales razonamientos que emanen de las resoluciones del TAS, y los han recogido en diversas resoluciones recientes. Resulta a este respecto interesante por ejemplo la reflexión efectuada en la Decisión de la Comisión Disciplinaria de FIFA 150129 PST

<sup>12</sup> TAS 2011/A/2614.

<sup>13</sup> TAS 2013/A/3425, párrafo 150.

<sup>14</sup> TAS 2016/A/4550 & 4576, párrafo 139.

<sup>15</sup> Por ejemplo, en la presentación del club en su sitio web.

<sup>16</sup> Como muy gráficamente establece el laudo que resuelve el asunto TAS 2011/A/2614, *no resulta congruente sostener que se debe dividir el pasado del Club para asumir solo los “activos” y no los “pasivos” del mismo*.

<sup>17</sup> TAS 2011/A/2614.

<sup>18</sup> TAS 2016/A/4550 & 4576, párrafo 138.

<sup>19</sup> TAS 2018/A/5618, párrafo 70b).

<sup>20</sup> TAS 2019/A/6461, párrafo 51.

<sup>21</sup> TAS 2018/A/5618, párrafo 70e) y f).

<sup>22</sup> TAS 2018/A/5774, párrafo 49.

<sup>23</sup> TAS 2007/A/1355.

de 25 de noviembre de 2019 según la cual *a sporting succession is the result of the fact that 1) a new entity was set up with the specific purpose of continuing the exact same activities as the old entity, 2) the “new” club accepted certain liabilities of the “old” club, 3) after the acquisition of the assets of the “old” club, the “new” club remained in the same city and 4) the “new” club took over the licence or federative rights from the “old” club.*

Ahora bien, sentado lo anterior, debe igualmente afirmarse que no cualquier vínculo entre entidades va a dar siempre lugar a la apreciación de sucesión deportiva. La existencia de sucesión no podemos simplemente asumirla o darla por descontada, siendo preciso para ello el despliegue de la oportuna actividad probatoria, que deberá ser más o menos intensa dependiendo de las circunstancias del caso y de la mayor o menor obviedad de la sucesión. Es por tanto el interesado que pretenda la declaración de sucesión y el surgimiento de sus consecuencias el que debe acreditar que la misma ha tenido lugar<sup>24</sup>. No es pues de extrañar que el tema de la carga de la prueba<sup>25</sup> y del convencimiento o satisfacción del tribunal con la actividad probatoria desplegada acostumbren a ser los protagonistas de aquellas decisiones en que la formación arbitral (y/o su predecesora, FIFA) desestima reclamaciones de sucesión deportiva de clubes.

Generalmente, en estas resoluciones desestimatorias las formaciones arbitrales<sup>26</sup> han incidido en el tema de la separación de la personalidad jurídica entre entidades y en el hecho de que a falta de prueba en contrario aportada al procedimiento, no hay motivos para entender que una entidad deba asumir las obligaciones de otra<sup>27</sup>. Incluso en algunas

<sup>24</sup> Véase artículo 8 del Código Civil suizo.

<sup>25</sup> Véase sobre carga de la prueba por ejemplo lo dispuesto en el laudo recaído en el asunto TAS 2018/A/5774. En cuanto al estándar de prueba, no es una cuestión que por lo menos en los laudos analizados, se haya tratado de forma específica y separada por las formaciones arbitrales, con excepción del caso TAS 2018/A/5618 (párrafo 64).

<sup>26</sup> Igualmente FIFA ha realizado en algunas de sus decisiones una valoración similar a la efectuada por el TAS a este respecto. Baste citar por ejemplo la

ocasiones las formaciones han ido más allá, y aun asumiendo o reconociendo la existencia de semejanzas o similitudes entre las dos entidades supuestamente sucesora y sucedida, han entendido tras valorar la prueba que no procede declarar la sucesión a la vista de otras importantes diferencias entre ambas<sup>28</sup>.

## B. Efectos materiales de la sucesión deportiva

Visto lo anterior, ¿cuál será en principio el efecto de apreciar la existencia de la sucesión deportiva? El laudo recaído en el asunto TAS 2018/A/5618 se refiere a la cuestión de un modo muy claro y elocuente: *the effect of these decisions is that the sporting successor of a former, no longer existing club can, as a matter of principle, be liable to meet the financial obligations of that former club notwithstanding that the successor is not a party to any agreement, arrangement or understanding pursuant to which the financial obligations arose or a privy of any of the parties to any such agreement, arrangement or understanding and regardless of whether there has been a change of management or corporate structure or ownership of the club in question.* En base a dicho razonamiento, diversas resoluciones imponen condenas a entidades sucesoras por deudas o responsabilidades del *former club*.

No obstante, el estudio de la jurisprudencia del TAS nos enseña que la apreciación de la sucesión deportiva no ha sido siempre sinónimo de condena al sucesor. Existen casos en que tras declararse por la formación arbitral que efectivamente, una entidad debe ser considerada sucesora de la originariamente obligada o responsable, no se desprenden contra aquella los efectos que el reclamante interesa o persigue (el pago de la

Decisión de la Comisión Disciplinaria de FIFA 171212 PST de 7 de noviembre de 2019, en que se desestima la petición de declaración de sucesión por estar meramente sustanciada en determinados posts aparecidos en Facebook y Twitter, cuando otra prueba aportada en el procedimiento inclinaba hacia la inexistencia de sucesión deportiva.

<sup>27</sup> TAS 2004/A/790, párrafos 41 a 44.

<sup>28</sup> TAS 2016/A/4918.

deuda por parte del club sucesor, la imposición de una sanción deportiva, etc.).

Uno de estos supuestos tiene que ver con sucesiones deportivas derivadas de, o relacionadas con, procedimientos concursales de clubes de fútbol. Existen resoluciones de FIFA<sup>29</sup> y el TAS en que si bien se reconoce la existencia de una situación de sucesión deportiva, no se deriva de la misma una consecuencia sancionadora desfavorable para la entidad sucesora bajo el argumento de que el acreedor no ha desplegado, en el seno del concurso del club deudor originario, una conducta suficientemente activa en la defensa y reclamación de su crédito.

Este razonamiento es el seguido en el laudo que resuelve el asunto TAS 2011/A/2646, que tiene su origen en una decisión de la Comisión Disciplinaria de FIFA que (i) declara a una entidad culpable de incumplir una decisión de condena monetaria dictada por la Cámara de Resolución de Disputas de FIFA contra otra entidad distinta incursa en situación concursal, cuya “unidad económica” (comprehensiva de los derechos federativos del club en su asociación nacional, pases de los jugadores, trofeos, equipamiento deportivo y bienes muebles) había sido adquirida por la primera en subasta pública a raíz de dicho concurso, y (ii) le impone una sanción<sup>30</sup>.

La formación arbitral que analizó ese caso concluyó en primer lugar que efectivamente, existía una situación de sucesión deportiva como consecuencia de haber adquirido la nueva entidad la unidad productiva que le permitía continuar “*the activity formerly developed by the referred club with the same image, badge, hymn, representative colours, emblems and placements*”, siendo en base a los derechos federativos adquiridos que el club seguía participando de las competiciones<sup>31</sup>. Sin embargo, a reglón seguido la formación señaló que el acreedor (un jugador de fútbol al que se le debían

salarios), siendo consciente de la situación concursal del club deudor y habiendo anunciado que participaría en dicho concurso para reclamar su deuda, finalmente decidió no realizar tal reclamación en el concurso. Ello se interpretó por la formación como una suerte de contribución del jugador a no dejar sin efecto el presupuesto de la sanción impuesta por FIFA (el impago de la deuda), y tal falta de diligencia del acreedor en la persecución la deuda en el concurso se entendió que debía tener impacto en el procedimiento disciplinario, en el sentido de eliminarse la imposición de la sanción. Son particularmente ilustrativos de la descrita situación los párrafos 69, 70 y 71 de dicho laudo, que rezan como sigue:

*Therefore, the Player somehow contributed not to remove the prerequisite leading to the sanction imposed on the Decision: the lack of payment of the debt ordered in the FIFA DRC Decision [...]. His inactivity did not foster the recovery of the debt and hence the elimination pf the circumstances of fact which gave rise to the sanction imposed by the Decision. At the present stage the Panel cannot ascertain if the Player would have received the sum of his credit in case he had duly claimed for it in the bankruptcy proceedings, but it was at least a feasible theoretical possibility that could have happened (especially taking into account the privileged nature of his credit) and which would have provoked that the order of payment issued by the FIFA DRC was complied and thus, that the sanction imposed in the Decision became groundless. The Panel is of the view that the Player should have explored such possibility, should have communicated his credit in the bankruptcy proceedings as he previously announced, should have tried to get the money and not simply remain passive, additionally pretending that disciplinary sanctions are imposed irrespective of his diligence or negligence in trying to achieve a result (recovery of the debt) that would remove the ground of the sanction. In this state of affairs, the Panel considers that no sanction shall be applied in this case.*

Esta cuestión ha sido de nuevo tratada recientemente en el laudo recaído en el asunto

<sup>29</sup> Decisiones de la Comisión Disciplinaria de FIFA 171380 PST de 15 de octubre de 2019, 190044 PST de 7 de noviembre de 2019 o 170528 PST de 20 de noviembre de 2019.

<sup>30</sup> Todo ello ex art. 64 del Código Disciplinario de FIFA vigente en aquel momento.

<sup>31</sup> Párrafo 49 del laudo.

TAS 2019/A/6461, aunque en el sentido de entender que el comportamiento del acreedor, en ese caso concreto, no contribuyó al incumplimiento de la decisión de FIFA por parte del deudor y por ende confirmándose la decisión disciplinaria de FIFA que consideraba al nuevo club responsable de la deuda del antiguo y le imponía una sanción. En concreto, en el párrafo 59 la formación arbitral indica que *There is no doubt that a creditor is expected to be vigilant and to take prompt and appropriate legal action in order to assert his claims. So, in principle, the Panel agrees with the general stance taken by other CAS Panels and by the FIFA Disciplinary Committee, that no disciplinary sanctions can be imposed on a new club as a result of succession, should the creditor fail to claim his credit in the bankruptcy proceedings of the former club, as there is a theoretical possibility he could have recovered his credit, instead of remaining passive (CAS 2011/A/2646 §20-31).* To the understanding of the Panel, in such instances it is necessary to examine whether a creditor has shown the required degree of diligence to recover the amounts he is owed. Yet, there is no blanket rule, and this assessment should be made based on the specific circumstances of each particular case.

Sin embargo, el anterior supuesto no es el único en que no ha operado el automatismo “sucesión = condena” dicho. Así, puede citarse al respecto por ejemplo lo resuelto en el laudo TAS 2005/A/932, en que tras afirmarse por el árbitro único la existencia de sucesión deportiva en el club reclamante de una indemnización por formación, entendió que no procedía condenar al club obligado al pago de dicha indemnización dado que no se acreditó por el reclamante que por efecto de la citada sucesión, los derechos indemnizatorios de la entidad originaria se hubieran transferido a la entidad sucesora, es decir que hubiera existido una cesión del título habilitante para reclamar; o lo resuelto en el asunto TAS 2011/A/2614, en que tras declararse la sucesión deportiva, la apelación fue desestimada por cuestiones de fondo (existencia de un saldo y finiquito previo).

<sup>32</sup> En esta materia se emplaza encarecidamente a la lectura del trabajo del Prof. HAAS titulado Standing of appeal and standing to be sued, en BERNASCONI,

#### IV. La sucesión deportiva y la capacidad para ser parte en el procedimiento ante el TAS

La maraña de relaciones que pueden generarse o desprenderse de los supuestos de sucesión deportiva ha dado lugar también a que las partes en los procedimientos ante el TAS hayan esgrimido, en innumerables ocasiones, excepciones que afectan a la constitución de la relación en el procedimiento en atención al derecho material que se acciona, como son la falta de legitimación activa y la falta de legitimación pasiva, que las distintas formaciones arbitrales han tenido que ir resolviendo.

Es más, puede afirmarse que la sucesión deportiva es un terreno claramente propicio para el desarrollo de este tipo de excepciones y otras relacionadas, por cuanto a veces, la parte apelante ante el TAS no habrá sido parte del procedimiento de instancia; otras veces, la parte apelada entenderá que no siendo la obligada al pago de la deuda, carece de legitimación pasiva en el procedimiento; o incluso otras veces, podría llegar a alegarse que el deudor primigenio (club sucedido) debería haber sido llamado al proceso, siendo tal ausencia causa impeditiva de su adecuada prosecución.

La cuestión de la legitimación *ad causam*<sup>32</sup> ha sido extensamente tratada en la jurisprudencia del TAS, y ha sido abordada también de forma expresa en supuestos de sucesión deportiva. Dicho tratamiento específico se ha realizado generalmente desde el prisma de la parte recurrida, aunque no de forma exclusiva, ya que existen resoluciones en materia de sucesión deportiva en que, por ejemplo, se niega la legitimación activa del recurrente por no haber sido parte en el procedimiento en FIFA y carecer de interés

M. & RIGOZZI, A. International Sport Arbitration, 6th CAS & SAV/FSA Conference Lausanne 2016 (Editions Weblaw, Berna).

en la apelación<sup>33</sup>, o en que la parte recurrida cuestiona la legitimación activa del recurrente por entender que tal recurrente debería haber sido otra entidad distinta de la reclamante<sup>34</sup>, cuestiones ambas no exentas de controversia.

Centrándonos en la legitimación pasiva, advertimos que en los casos de sucesión, la capacidad de ocupar la posición de parte apelada va íntimamente ligada con la propia determinación de la existencia sucesión y el concepto de club manejado por la jurisprudencia del TAS en esta materia. De hecho, en laudos como el que resuelve el asunto TAS 2011/A/2614, ambas cuestiones (legitimación pasiva y sucesión deportiva) se tratan de un modo conjunto y bajo el mismo apartado, puesto que, como bien se razona en dicho laudo, para determinar si la entidad apelada tiene legitimación pasiva, es preciso “determinar si el club [...] es una entidad jurídica distinta de la sociedad que lo administraba [...] y de aquella que actualmente lo administra”.

Así, en situaciones como las de cambio de administración del club no se ha considerado que exista falta de legitimación pasiva cuando todos los elementos en liza revelan que el club sigue siendo el mismo (TAS 2011/A/2614). Cabe también destacar a este respecto la reflexión efectuada en el laudo TAS 2013/A/3425, en que el árbitro se refiere, atendidos los hechos del caso, a una situación de dependencia entre club y sociedad administradora, tanto en sede federativa como en las relaciones del club con terceros, llegando a afirmarse que *la entidad y el club necesitan del otro tanto para actuar en sede federativa como en el tráfico jurídico, en méritos lo cual se concluye que es irrelevante plantear la excepción de falta de legitimación pasiva de la sociedad administradora al margen del club* y por ende se desestima tal excepción.

Otra cuestión que igualmente se ha planteado en algunos casos por la parte apelada declarada sucesora es el hecho de que al no ser parte del procedimiento de instancia, no

puede ser condenada por el TAS dado que ello infringe el principio de *natural justice* o su derecho a ser oída: alega a este respecto la nueva entidad que el hecho que dio lugar a la supuesta sucesión se produjo después de iniciada (o incluso después de resuelta) la reclamación en FIFA, y que no habiendo sido parte en el procedimiento seguido ante FIFA, no tuvo la oportunidad de defenderse. Tal cuestión ha sido tratada y resuelta en diversos laudos: así, en los casos TAS 2018/A/5774 y TAS 2018/A/5618 se declaró que no existía tal alegada vulneración por cuanto de acuerdo con lo establecido en el artículo R57 del Código del TAS, en el procedimiento ante el TAS la revisión de los hechos y los fundamentos de derecho del caso es completa, por lo que la parte que no participó del procedimiento de instancia puede hacerlo con plenas garantías y argumentar y acreditar lo tenga por conveniente en la alzada en relación con la sucesión deportiva y sus efectos, por lo que mal puede entenderse infringido su derecho a ser oída. Y en un sentido similar se pronuncia la formación del asunto TAS 2019/A/6461, indicando que *the Appellant could have taken part in the proceedings in front of the FIFA DRC at the time when the claim lodged by the Creditor club was being adjudicated. Considering that the two clubs co-existed and shared the same contact details, there is no doubt that the Appellant had knowledge of the pending FIFA DRC proceedings against the Debtor club. In this way, the Appellant could have intervened on its own initiative, or, could have assisted to rebut the Creditor's claim, if this were the case. Secondly, the Appellant was invited to state its opinion during the disciplinary proceedings, and had ample opportunity to present its case in front of the FIFA Disciplinary Committee in order to contest the issue of succession, if this were the case.<sup>35</sup>*

Merece también la pena destacar que en algunos casos la formación arbitral, queriéndose pronunciar sobre una situación de sucesión deportiva, no ha podido hacerlo por cuanto la relación trabada en el procedimiento se lo impidió (por ejemplo,

<sup>33</sup> TAS 2004/A/790, párrafos 46 y 50.

<sup>34</sup> TAS 2013/A/3425, párrafos 117 y siguientes.

<sup>35</sup> Párrafo 55.

porque no se ha demandado a una parte que potencialmente podría ser considerada como sucesora), so pena de incurrir en una violación de la prohibición de resolver *ultra petita*.<sup>36</sup>

Por todo ello y vistas las problemáticas que se pueden plantear en la práctica, deviene imprescindible, antes de plantear un recurso ante el TAS, detenerse a reflexionar acerca de quienes deben ser realmente las partes en el procedimiento, y analizar todas las circunstancias concurrentes para asegurarse de que (i) aquello pretendido en el suplico va a poder concederse por estar llamadas al proceso todas las partes precisas y (ii) no se está llamando al procedimiento a una parte que no puede ni debe serlo.

## V. Conclusiones

No cabe duda, a la vista de lo expuesto, de que determinados principios generales acerca de la cuestión de la sucesión deportiva de clubes de fútbol se hallan en la actualidad sólidamente asentados en la comunidad jurídico-deportiva, gracias al gran número de resoluciones del TAS recaídas en la materia. Existe un extendido consenso acerca de lo que debe considerarse un club a los efectos de la sucesión deportiva y sobre una serie de criterios a considerar en la determinación de tal sucesión, lo cual aporta un importante plus de seguridad jurídica, sin perjuicio de las particularidades que cada caso presente.

No obstante, no es menos cierto que otros aspectos relacionados con la sucesión deportiva pueden dar lugar a mayores discusiones y debates, como por ejemplo la valoración de la prueba y en concreto, la forma de ponderar en cada caso los elementos que deben jugar a favor o en contra de considerar la existencia o no de sucesión deportiva. Como en todos aquellos aspectos revestidos de cierta carga valorativa, no parece sencillo establecer patrones

miméticos extrapolables de una forma general a todos los casos de pretendida sucesión, por lo que será preciso realizar un análisis pormenorizado y *ad hoc* de cada situación a tal efecto. Contando la ayuda de la experiencia de los últimos 15 años de resoluciones del TAS, por supuesto, pero sin perder de vista el tratamiento individualizado que precisan este tipo de casos.

Asimismo, no parece que en esta materia se haya recorrido ya todo el camino o se haya dicho la última palabra. Por citar algunos ejemplos, deberemos ver cómo en el futuro, el TAS aborda la aplicación del artículo 15.4 del Código Disciplinario de FIFA (cuya promulgación es relativamente reciente), o los supuestos de hecho similares o análogos a los planteados en los asuntos TAS 2011/A/2646 o TAS 2019/a/6461(es decir, la incidencia que puede tener, en un procedimiento disciplinario instado ante FIFA contra un club por incumplimiento de una condena dineraria, la mayor o menor diligencia del acreedor instante en el concurso de acreedores del club). De la misma forma, no se intuye tampoco que todas las potenciales discusiones sobre la capacidad para ser parte en este tipo de procedimientos estén ya completamente zanjadas, por lo que nos aguardan tiempos interesantes también a este respecto.

No resulta pues aventurado afirmar que estamos ante un tema que todavía va a dar mucho que hablar, por lo que deberá permanecerse atento a próximas resoluciones del Tribunal y ver la línea que adoptan.

---

<sup>36</sup> TAS 2016/A/4918.

---

# The regulatory framework of FIFA regarding the international transfer of minor players

## Protecting minors or protecting precedent?

Dr Despina Mavromati & Jake Cohen Esq.\*

---

- I. Introduction
  - II. The prohibition of minors transfers and the European exception
    - A. The European exception in Art. 19 (2) (b) FIFA RSTP
    - B. Other supranational legal orders and (their non-inclusion into) Art. 19 (2) FIFA RSTP
    - C. Selected case law of the FIFA Disciplinary Committee showing incompatibility with national immigration laws
  - III. Protecting minors or protecting the strict application of Art. 19 FIFA RSTP at all costs?
    - A. An overview of selected CAS case law where the minor players were never at risk
  - IV. The need to create more exceptions under Art. 19 (2) RSTP
    - A. Proposed solutions for the “parents exception”
    - B. Proposed solutions for clubs and academies
  - V. Conclusion
- 

### I. Introduction

Almost 20 years ago, FIFA introduced a regulatory framework for the protection of minors in its Regulations on the Status and Transfer of Players (RSTP). The effective protection of minor players, which is one of the main pillars of the FIFA transfer system, called for strict rules and an equally strict and consistent application. These rules were modified and strengthened in 2005, 2009, 2015 and 2020.<sup>1</sup>

Art. 19 RSTP (2020) generally prohibits any transfer of players under the age of eighteen (Art. 19 par. 1 FIFA RSTP) and provides only for some narrow exceptions that FIFA interprets and applies in a restrictive manner

(Art. 19 par. 2 FIFA RSTP). These exceptions are limited to the following situations:

- when the player’s parents move to the country in which the new club is located for reasons not linked to football (Art. 19 par. 2(a) FIFA RSTP);
- when the transfer takes place within the European Union (EU) / European Economic Area (EEA) and the player is between the ages of sixteen and eighteen years old<sup>2</sup> (Art. 19 par. 2(b) FIFA RSTP),
- when the player being registered lives no more than 50km away from a shared national border and the player’s new club is no more than 50km away from that border. Additionally, the player’s residence and the club’s headquarters must be no

---

\* Despina Mavromati is an attorney-at-law (SportLegis) and teaches sports arbitration and sports contracts at the University of Lausanne; Jake Cohen is an attorney-at-law. The authors would like to thank Prof. Panagiotis Delimatsis and Enric Ripoll for useful comments to previous versions of this paper.

<sup>1</sup> See more information and the various procedural steps for an application in FIFA, *Protection of Minors - Guide of Minor Application*, September 2020 Edition.

<sup>2</sup> While not codified in the FIFA RSTP, this exception has been extended through CAS jurisprudence, and recognised by FIFA, to include transfers involving players between the ages of sixteen and eighteen who possess nationality from an EU / EEA member state and who are transferring from a club outside of the EU / EEA to a club within the EU / EEA. See, TAS 2012/A/2862, *Girondins de Bordeaux v. FIFA*, award of 11 January 2013.

more than 100km apart<sup>3</sup> (Art. 19 par. 2(c) FIFA RSTP),

- when the player flees his country of origin for humanitarian reasons without his parents and is at least temporarily permitted to reside in the country of arrival (Art. 19 par. 2(d) FIFA RSTP), and
- when the player is a student and moves to a new country temporarily without his parents in order to participate in an academic exchange programme. This applies exclusively to registering for purely amateur clubs (Art. 19 par. 2(e) FIFA RSTP).

It should be noted that Art. 19 par. 2(d) and 2(e) are relatively new exceptions and only came into force on 1 March 2020.<sup>4</sup>

The transfer prohibition extends to the first registration of non-national minors, with the exception of minors who have lived continuously for at least 5 years prior to their first registration (Art. 19 par. 3 FIFA RSTP).

To the extent that the respective association must request the approval of any international transfer (or new transfer of non-nationals) from the Minors Subcommittee of the FIFA Players' Status Committee (PSC), any association not complying with this requirement is subject to sanctions under the FIFA Disciplinary Code (Art. 19 par. 4 FIFA RSTP). Furthermore, clubs that operate academies must report any minors attending such academies to the national association (Art. 19bis FIFA RSTP). While the majority of the minor applications filed by an association are approved by the FIFA Subcommittee, there are also numerous applications that are rejected. The party concerned can then file an appeal against the

decision of the Subcommittee before the Court of Arbitration for Sport (CAS).<sup>5</sup>

Against this background, we submit that the enforcement of Art. 19 FIFA RSTP is overly strict and lacking in nuance and consideration for the unique set of circumstances that each minor player and their families present. What is more, while the existing regulatory framework takes into account the European regulation and jurisprudence regarding free movement, there is no provision regarding other supranational laws that would allow for a similar solution for other countries. As a result, what is in theory a well-intentioned blanket approach intended to protect minors, in practice can actively strip guaranteed rights and freedoms away from children.

## II. The prohibition of minors transfers and the European exception

### A. The European exception in Art. 19 (2) (b) FIFA RSTP

FIFA asserts that Art. 19 “*is binding at national level and must be included without modification in the association's regulations regardless of the provisions of a country's national laws.*”<sup>6</sup>

However, in 2001, FIFA was obliged to create an exception for the specific purpose of modifying Art. 19 in order to comply with the supranational laws of the European Union relating to free movement and in particular, the 1995 Bosman decision issued by the European Court of Justice.<sup>7</sup>

The 2006 Commentary on the Regulations for the Status and Transfer of Players highlights FIFA's rationale for creating the EU/EEA exception contained in Art. 19(2)(b). According to this provision: “*In the agreement reached between the EU and FIFA/UEFA in March 2001, this provision is*

<sup>3</sup> See also Serhat Yilmaz, *Protection of minors: lessons about the FIFA RSTP from the recent Spanish cases at the Court of Arbitration for Sport*, The International Sports Law Journal (2018), Springer, p. 17.

<sup>4</sup> FIFA, Circular no, 1709.

<sup>5</sup> See Art. 19 par. 5 FIFA RSTP and Art. 23 par. 4 FIFA RSTP.

<sup>6</sup> See also Art. 1 (3) FIFA Regulations on the Status and Transfer of Players (2020 edition).

<sup>7</sup> Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman (1995) C-415/93.

*included so as not to contravene the free movement of employees within the EU/EEA. Moreover, players from a country that have a bilateral agreement with the EU on the free movement of workers (e.g. Switzerland) profit from the same conditions as EU players.”<sup>8</sup> On the creation of Art. 19 par. 2 FIFA RSTP, the EU and FIFA/ UEFA agreed as follows: “International transfer of players aged under 18 to be allowed subject to agreed conditions; the football authorities to establish and enforce a code of conduct to guarantee the sporting, training and academic education to be provided.”<sup>9</sup>*

FIFA’s rationale for the inclusion of the Art. 19(2)(b) exception has been consistent over the past twenty years. This inclusion followed the well-known Bosman ruling of 1995, which found the football transfer system at the time to be incompatible with EU law.<sup>10</sup> FIFA insists that the protection of minors is one of the key pillars of the football transfer system, and the effective protection of minors requires “robust rules and a strict and consistent application”. This language is very often used by FIFA, nearly verbatim, in its written decisions involving Art. 19 FIFA RSTP at the Disciplinary Committee.<sup>11</sup>

EU minors under the age of 16 are unable to rely on this exception but at this age, they would be unlikely to qualify as a “worker” under Art. 45 Treaty on the Functioning of the European Union (TFEU) and the relevant EU secondary law<sup>12</sup>. Still, under-16 EU minors are protected by their citizenship rights enshrined in Art. 21 TFEU or even on the free movement rights of their parents.<sup>13</sup> In this regard, Directive 2004/38 (the Citizen Rights Directive) considers as

<sup>8</sup> FIFA, Commentary on the Regulations for the Status and Transfer of Players, at footnote 95. See also CAS 2008/A/1485, *FC Midtjylland A/S v. FIFA*, award of 6 March 2009, p. 3.

<sup>9</sup> See European Commission, IP/01/314, Outcome of discussions between the Commission and FIFA/UEFA on FIFA Regulations on international football transfers, Brussels, 5 March 2001.

<sup>10</sup> Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman (1995) C-415/93.

<sup>11</sup> See e.g. Decision of the FIFA DC, Decision 180960 TMS ITA ZH, at par. 15. See also the Decision of the FIFA DC, Decision 180873 TMS, at par. 11. See also,

family members (who accordingly benefit from the right to free movement of their parents) their children until the age of 21. Even if their parents are third-country nationals, the children would still have the right to free movement if they had an EU nationality (and thus the EU citizenship).<sup>14</sup>

FIFA has, in its own words, “*for the sake of good order*,” extended the applicability of Art. 19(2)(b) to countries which have free movement agreements with the EU and/or EEA:

*“For the sake of good order, if the country of a member association has a bilateral agreement on the free movement of workers with the EU and/or the EEA, said member association could potentially also benefit from the exception in art. 19 par. 2 b). The association concerned must provide a copy of the relevant law/the applicable provisions of the law granting it such right.”<sup>15</sup>*

## B. Other supranational legal orders and (their non-inclusion into) Art. 19 (2) FIFA RSTP

While the rationale for providing exceptions for one regional community and prioritising EU law is easy to understand, it is difficult to follow why FIFA has not done the same for others who have been guaranteed the same fundamental right to move freely for the purposes of employment by the laws of their own nation(s) and supranational communities.

How can one explain acquiescence to one supranational community’s laws while

Decision of the FIFA DC, Decision 180811 TMS, at par. 10.

<sup>12</sup> See Council Directive 94/33/EC on the protection of young people at work [1994] OJ L 216/12, art. 1.

<sup>13</sup> See Kester Mekenkamp, *FIFA’s provision on the protection of minors - Part 3: The compatibility of Art. 19 with EU law*, in Asser International Sports Law Blog, 3 January 2017.

<sup>14</sup> Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Citizens Right Directive, CRD), [2004] OJ L 158/77.

<sup>15</sup> FIFA, *FIFA Protection of Minors – Guide to Submitting a Minor Application*, at FAQ 16.

actively denying the rights of other national and supranational communities who have passed similar laws.<sup>16</sup> Indeed, the European Union is not at all unique in guaranteeing free movement of workers for its community members. The Trans-Tasman Travel Arrangement has guaranteed free movement between Australia and New Zealand for citizens of these countries since 1973.<sup>17</sup> Similarly, citizens of Russia and Belarus have had the right to move freely between the two countries since the 1990s through the Commonwealth of Independent States (CIS) construct.<sup>18</sup> The Central America-4 Border Control Agreement has provided citizens of El Salvador, Guatemala, Honduras and Nicaragua free movement between these countries since 2006.<sup>19</sup> Furthermore, the African Union is working towards free movement as a key component of its Agenda 2063 platform.<sup>20</sup> Even within the EU, supranational organisations such as the Benelux Union<sup>21</sup> and the Nordic Passport Union, both of which predate the EU, guarantee free movement for citizens of their respective member states completely independent of the EU's free movement provisions.

Furthermore, there are, as a conservative estimate, at least seven and a half million people who currently have the right to work in both Mexico and the United States.<sup>22</sup>

In Mexico, the right to work is enshrined in Art. 123 of the Constitution: '*Every person has the right to have a decent and socially useful job; to this end, the creation of employment and social organization of work will be promoted, according to the law*'.<sup>23</sup> The right to work is further codified in the Federal Labour Law statutes. Provided that the individual has completed an elementary level of education, has written approval from a parent or guardian or the relevant labour board and the job does not take place in a hazardous or dangerous environment, the age of employment is fifteen.<sup>24</sup>

In the United States, the Federal Fair Labor Standards Act (FLSA) applies to all employers which engage in interstate commerce and/or generate a minimum of USD 500,000 in annual revenue.<sup>25</sup> The age of employment is sixteen for non-agricultural and non-hazardous full-time jobs.<sup>26</sup> Children under the age of sixteen may work limited hours in certain industries. Additionally, each

<sup>16</sup> One reason for this could be that other supranational entities/customs unions may not have contested such provision in the name of free movement although such challenge would seem legitimate.

<sup>17</sup> See generally, *Australian Productivity Commission and New Zealand Productivity Commission 2012, Strengthening trans-Tasman economic relations, Joint Study*, Final Report.

<sup>18</sup> See, *United Nations Treaty Series*, Volume 2121, at 13.

<sup>19</sup> See generally, Jacqueline Mazza and Eleanor Sohnen, *Labor Migration in Latin America and the Caribbean: A Look at New Trends and Policies*, Inter-American Development Bank, Labor Markets and Social Security Unit, Technical Notes No. IDB-TN-205.

<sup>20</sup> See generally, African Union, *Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons*. See also, African Union, *Progress Report on the Free Movement of Persons in Africa*.

<sup>21</sup> In any event, Benelux countries cannot discriminate vis-à-vis other EU Member States' workers – or EEA, or even Swiss nationals.

<sup>22</sup> Estimate is derived from the 5.3 million individuals of Mexican origin who have secured the right to work in the United States via permanent residency or

naturalisation between 1985 and 2010. (See, David Ayon, *The Legal Side of Mexican Immigration*, Mexico Institute). A further estimated 1.7 million individuals of Mexican origin have become permanent residents of the United States between 2010 and 2020 (See generally, *Department of Homeland Security, Office of Immigration Statistics, Annual Flow Report – August 2019*). As of 2019, there are 600,000 American-born children with dual nationality residing in Mexico with their parents who have single Mexican nationality (See, Department of State, *Niños migrantes son prioridad para Consulado*). This estimate does not include the tens of millions of Americans who are eligible for Mexican nationality but have not undertaken the process nor does it include the millions of Americans who possess temporary or permanent residency permits from the Mexican government.

<sup>23</sup> Free translation from Spanish: '*Toda persona tiene derecho al trabajo digno y socialmente útil; al efecto, se promoverán la creación de empleos y la organización social de trabajo, conforme a la ley*'.

<sup>24</sup> See generally, Art. 5, Art. 22, Art. 22bis, and Art. 23 of the Federal Labour Laws.

<sup>25</sup> 29 USC §203.

<sup>26</sup> 29 CFR 570.2.

of the fifty states have their own set of laws that must be adhered to by employers.<sup>27</sup>

As sixteen-year-old (dual national) Mexican-Americans and American-Mexicans have the inalienable right to work in either country by virtue of the respective national laws, it would be discriminatory for FIFA to deny these minor players the ability to transfer to football clubs in either country when they have granted this ability to their European counterparts. There are no doubt millions of others who possess the right to work in multiple countries through dual nationality or permanent residency and who are similarly being discriminated against because they happen to not be European.

According to the authors' view, a young dual national returning to his country of origin with his family or moving to a country with his family where he has nationality or citizenship for the purpose of exercising any rights whatsoever which he is entitled to should be considered, de facto, as a valid "*reason not linked to football*" for the purposes of satisfying the requirements of Art. 19(2)(b).

Furthermore, in cases where a young player with dual nationality moves for the purpose of exercising any of his inalienable rights, whether his parents move with him or not should be irrelevant. Until recently, FIFA was very rigid and even supported before the CAS that Art. 19(2)(a) did not apply in a situation where a club failed to prove that *both* parents moved to the new country.<sup>28</sup> However, and even though Art. 19 has no specific provision for minor players who do not have parents, the recent FIFA Guide has established the

documents to be provided when parents are not moving with the minor athlete or when said athlete does not have any parents.<sup>29</sup>

### C. Selected case law of the FIFA Disciplinary Committee showing incompatibility with national immigration laws

*Decision 180960 TMS ITA ZH and Decision 160161 TMS*

As part of Italy's efforts to integrate foreign minors into Italian life, Law 20 January 2016 n.12 was passed.<sup>30</sup> This law provides that minors who are not Italian citizens, but who legally and regularly reside in Italy, can register for and enrol in sports clubs as if they were Italian citizens. Essentially, Italy has granted "sport citizenship" to all of the young athletes legally residing in the country, regardless of whether they are Italian citizens or not.

Additional protections specifically for unaccompanied foreign minors (i.e. children who entered Italy without a parent or guardian) were implemented under Law 7 April 2017 n.47.<sup>31</sup> Colloquially known as the "Zampa Law," it has been hailed as a model for Europe and has received praise and recognition from the likes of UNICEF<sup>32</sup> and Save the Children.<sup>33</sup>

Expanded protections were also included as part of the "sport package" in Law of 27 December 2017 n.205 (the 2018 Budget

<sup>27</sup> See generally, *Department of Labor, Table of Employment/Age Certification Issuance Practice Under State Child Labor Laws*. See also, *Department of Labor, Selected State Child Labor Standards Affecting Minors Under 18 in Non-farm Employment as of January 1, 2020*.

<sup>28</sup> See CAS 2019/A/6301, *Chelsea FC Ltd v. FIFA*, award of 18 February 2020, par. 122(viii). However, see also CAS 2011/A/2354, *E v. FIFA*, award of 24 August 2011, par. 18, in which the Panel reasoned that the interpretation of the term "parents" under Art. 19(2)(a) RSTP "conceivably could cover situations beyond the natural parents."

<sup>29</sup> See the recent FIFA Guide (*Protection of Minors - Guide of Minor Application*, September 2020 Edition). See also Enric Ripoll and Augustin Amoros Martinez, *FIFA, CAS and Minors: the Return of Laudable Purposes and Disproportionate Tools*, Football Legal #7, 2017, at 89.

<sup>30</sup> Law 20 January 2016, n.20.

<sup>31</sup> Law 7 April 2017 n.47.

<sup>32</sup> UNICEF, *UNICEF hails new Italian law to protect unaccompanied refugee and migrant children as model for Europe*.

<sup>33</sup> Save the Children, *Protection beyond reach – State of play of refugee and migrant children's rights in Europe*.

Act).<sup>34</sup> With this new law, foreign minors are treated as Italian citizens for the purposes of registering for sporting clubs if they have completed a minimum of one year of school in Italy, regardless of whether they are regularly residents in Italy.

In Decision 180960, the FIFA DC found the Italian Football Federation (FIGC) liable for breaching Art. 19 when it registered Mr. Yayah Kallon with Serie D club, Savona FBC.<sup>35</sup>

Mr. Kallon arrived in Italy without his family when he was fourteen years old following a harrowing eight-month journey from Sierra Leone. His family arranged for him to leave Sierra Leone after a guerrilla organisation attempted to kidnap him and force him to fight for the organisation. As part of his escape, Mr. Kallon was locked in a car trunk with four other children and did not speak to his mother, who he thought was dead, for six months. During this time, his brother was kidnapped as well.<sup>36</sup>

By virtue of the above-referenced Italian legislation, Mr. Kallon was able to be registered, for the first time at any football club, with Savona FBC.

However, FIFA filed a claim, alleging the FIGC breached a number of rules, particularly with regards to failing to seek approval from the sub-committee of the Players' Status Committee for a first registration.<sup>37</sup>

In its pleadings, the FIGC highlighted the relevant national laws and provided FIFA with copies. The FIFA Disciplinary Committee (DC), however, determined that both Mr. Kallon's circumstances and the Italian laws protecting Mr. Kallon were irrelevant.

*"As a result, the Committee deemed that – regardless of the circumstances that led the Player to move to Italy – it had no other alternative but to conclude that the Italian FA has to be declared liable for the violation of art. 19 pars. 3 and 4 of the Regulations with respect to the first registration of the minor player for Savona, without the prior approval of the sub- committee."* (emphasis added)<sup>38</sup>

In what concerns Art. 19 of the RSTP, the FIFA DC highlighted that, in accordance with Art. 1 par. 3 lit. a) of the RSTP, it is binding at national level and must be included without modification in the association's regulations regardless of the provisions of a country's national laws.

This is an example of a rather short-sighted approach from FIFA with regard to applying Art. 19 RSTP. That the FIFA DC completely disregards the circumstances of the player signals an unwillingness to devote the necessary time and attention required to ensure each minor child is actually being protected, rather than harmed.

Fortunately, Mr. Kallon turned eighteen years old less than four months after the decision was issued and did not have to suffer what would have been extremely unjust consequences. However, had Mr. Kallon been thirteen years old, the FIFA DC would have no doubt issued the same decision and Mr. Kallon would have been denied the rights guaranteed to him by Italian government. Furthermore, Mr. Kallon's integration into his Italian community would have been severely hampered by FIFA's refusal to allow him to continue participating at his football club.

In its decision, the FIFA DC asserted unfettered dominance of Art. 19 over a country's national laws: *"In what concern Art. 19 of the Regulations, the Committee highlighted that, in accordance with art. 1 par. 3 lit. a) of the RSTP,*

<sup>34</sup> Law 27 December 2017, n. 205.

<sup>35</sup> Decision of the FIFA DC, Decision 180960 TMS ITA ZH.

<sup>36</sup> Giovanni Ciolina, [Yayah Kallon fuggito dalla Sierra Leone ora gioca nel Savona](#), La Stampa, 30 August 2018.

<sup>37</sup> Decision of the FIFA DC, Decision 180960 TMS ITA ZH, at par. 36.

<sup>38</sup> Decision of the FIFA DC, Decision 180960 TMS ITA ZH, at par. 47.

*it is binding at national level and must be included without modification in the association's regulations regardless of the provisions of a country's national laws*". The FIFA DC took the additional step of claiming that even though Art. 19 supersedes Italian law, the two are not incompatible:

*"Notwithstanding the above, the Committee was of the opinion that the existence of the aforementioned regulations at national level in Italy is absolutely not incompatible with art. 19 of the Regulations and in particular with the obligation to get the prior approval of the sub-committee prior to the first registration of a minor player as per art. 19 par. 4 of the Regulations."*<sup>39</sup>

The FIFA DC erred when it asserted that the relevant Italian legislation is not incompatible with Art. 19. The Italian legislation guarantees that foreign minors, for the purposes of participating in sport, are to be treated as Italian citizens. Italian citizens do not need to seek approval from FIFA before registering with a football club in Italy. With this fact alone, there is a *de facto* incompatibility.

#### *Decision 160161 TMS*

In its Decision 160161, the FIFA DC again sanctioned the FICG for registering fourteen minor players without prior approval of the subcommittee of the Players Status Committee.<sup>40</sup>

In its defence, the FICG brought forward several arguments, including that the registration of the relevant players was made during an uncertain time regarding the FIFA RSTP and its compliance with Italian immigration laws. The FICG acknowledged the underlying contradiction between the aforementioned Law n. 205 of 27 December 2017 and Art. 19 FIFA RSTP and suggested to meet with the FIFA Players' Status

Department in order to find a proper solution and address the protection of minor players in line with the rights of immigrants under Italian law.<sup>41</sup>

Notwithstanding the arguments raised by the FICG, the FIFA DC only considered that a) the players concerned were indeed registered for Italian clubs, b) these players were minors under the FIFA RSTP, c) they were not previously registered with another association in order to conclude that the FICG violated Art. 19 par. 3, par. 4 FIFA RSTP and Art. 1 par. 1 of Annexe 2 / Art. 1 par. 3 of Annexe 3 FIFA RSTP.<sup>42</sup>

With respect to the argument raised by the FICG fearing a departure from its national immigration laws, the FIFA DC kept its strict stance considering that an affiliation to FIFA meant an acceptance to comply with FIFA's regulations and "*in any event, the above-mentioned national law entered into force after the registration of the relevant players was made and hence, it is not applicable to the present matter*".<sup>43</sup> It is doubtful whether this last element was decisive in FIFA DC's decision.

All in all, these recent examples involving the FICG are more than sufficient for the football community to mandate that FIFA start taking a more considered approach with regards to minors.<sup>44</sup>

Indeed, it should be untenable for every national association to have FIFA, a private Swiss association, claim that its rules and regulations take precedence over a national law that was specifically drafted to protect foreign minors and allow them to integrate into the community as if they were its citizens.

FIFA consistently takes this position, except where the European Union is concerned.

<sup>39</sup> Decision of the FIFA DC, Decision 180960 TMS ITA ZH, at par. 42.

<sup>40</sup> Decision of the FIFA DC, Decision 160161 TMS.

<sup>41</sup> Decision of the FIFA DC, Decision 160161 TMS, at par. 8.

<sup>42</sup> Decision of the FIFA DC, Decision 160161 TMS, at par. 14-17 and par. 33.

<sup>43</sup> Decision of the FIFA DC, Decision 160161 TMS, at par. 55.

<sup>44</sup> By means of information, FIFA DC has issued approx. 15 decisions involving minors transfers from July 2019 until June 2020, see the FIFA Disciplinary and Ethics Report 2019/20, p. 8.

This is, as FIFA itself states, a direct result from the well-known Bosman ruling. Perhaps it is simply time for national associations to seek and secure similar judgments from the relevant national and supranational courts in their respective jurisdictions.<sup>45</sup>

To FIFA's credit, the addition of Art. 19 par. 2 (d) exception should, in theory, prevent the FIFA DC from denying minor refugees the simple pleasure of playing football in the future. However, it remains to be seen what standard of proof FIFA will impose with regard to showing that the player did "*flees his country of origin for humanitarian reasons, specifically related to his life or freedom being threatened on account of race, religion, nationality, belonging to a particular social group, or political opinion, without his parents...*"<sup>46</sup> It is suggested that such standard should not be very high.

### **III. Protecting minors or protecting the strict application of Art. 19 FIFA RSTP at all costs?**

#### **A. An overview of selected CAS case law where the minor players were never at risk**

The authors submit that in the recent CAS case law regarding the transfer of minor players to several European clubs, the safety, education and well-being of children was never at risk nor was their safety and well-being a central point of the decision. These decisions highlight the need for increased flexibility in both the wording of Art. 19 FIFA RSTP itself and the interpretation by the FIFA Subcommittee and to a certain extent the CAS.

*CAS 2014/A/3793, FC Barcelona v. FIFA*

<sup>45</sup> See also a decision issued by the Spanish Superior Council of Sports (CSD), which recalled that the Spanish federations, even though being part of the respective international federation, must comply with the laws of the Spanish legal system. Even though this decision refers to amateur clubs, it is a good example of the shift of approach from national courts. See the analysis of this decision in Amoros Martinez / Ripoll, in FIFA, CAS and Minors: the Return of the Laudable

In the *Barcelona v. FIFA CAS Award*, the Panel found that, to the extent that national law imposed the registration of players through the regional association for their participation in national competition, Barcelona could not go directly to the Spanish Football Federation (RFEF) to register the minor players. As such, Barcelona FC had not breached Art. 5 par. 1 FIFA RSTP. On the other hand, the registration of the players with the regional association was not deemed sufficient in order to comply with Art. 19bis FIFA RSTP. The Panel found that the registration and reporting obligation under Art. 19bis aims at gathering information on minors attending academies irrespective of their registration with the relevant association.<sup>47</sup>

What is important in these cases is that the CAS acknowledged—and in fact praised—the excellence of Barcelona's academy “La Masia” and its contribution to the overall development of athletes that had spent time in such academy, both on the sporting level as well on the education level.<sup>48</sup>

As the Panel noted: “Indeed, both on the sporting level (where the numbers of home grown players actually playing in the first team of FCB and elsewhere are proof enough of the quality of training received), as well on the education level, FCB is a leading institution at the European - and the world level”.<sup>49</sup>

As the aim of Art. 19 is to protect minor players, we suggest that a regulation which has the direct effect of removing minor players and / or barring them from entry into one of the world's leading sporting and education institutions must be revised accordingly.

Purposes and the Disproportionate Tools, Football Legal 2017, p. 95.

<sup>46</sup> FIFA, Regulations on the Status and Transfer of Players, Art. 19 par.2(d).

<sup>47</sup> See CAS 2014/A/3793, *FC Barcelona v. FIFA*, award of 24 April 2015, par. 9.17.

<sup>48</sup> See CAS 2014/A/3793, *FC Barcelona v. FIFA*, award of 24 April 2015, par. 9.19.

<sup>49</sup> Id.

*CAS 2019/A/6301, Chelsea FC ltd v. FIFA*

In a similar case involving the registration and transfer of minors,<sup>50</sup> Chelsea FC was imposed a transfer ban by the FIFA DC that was subsequently reduced to one year by the CAS. The substantiated arguments raised by the club that it never put the well-being of players at risk were considered irrelevant by the hearing authority.<sup>51</sup> Indeed, the Sole Arbitrator concluded that Chelsea “*absolutely did not impair [the minor players’] adequate and healthy development.*”<sup>52</sup>

*CAS 2015/A/4312, John Kenneth Hilton v. FIFA*

In the Hilton case, an International Transfer Certificate (ITC) was requested by the Dutch FA on behalf of a fourteen-year-old US citizen who claimed eligibility under the Art. 19 par. 2 (a) FIFA RSTP exception. The FIFA Subcommittee rejected the application and such decision was later upheld by the CAS.

The CAS panel offered a more lenient test on whether the Art. (19)(2)(a) exception applies: “*in such cases where the panel is convinced that the move of the family was motivated by a mixture of several reasons, and where each one of the other proven reasons is legitimate per se, the application of the exception will be assessed and decided based on the weight of the “football factor” within the whole range of reasons and the overall circumstances of the matter, such as: what were the other reasons? Whether all the family moved? To what extent the specific location to which the family decided to move was chosen with due consideration of the football activity of the minor, etc.*”<sup>53</sup>

This seemed to be more nuanced than the strict approach that has been overwhelmingly applied by the CAS in the past, simply, if the

player’s parents took football into consideration, even if football was one of many considerations, then the Art. 19(2)(a) exception would not be applicable. Still, FIFA rejected the application for the player’s ITC largely on the basis that it was not *undoubtedly clear* that the player’s mother had relocated to the Netherlands for reasons unrelated to football.<sup>54</sup>

*CAS 2013/A/3140, A. v. Atletico Madrid & RFEF & FIFA*

In this case, the ITC was requested on behalf of a thirteen-year-old American with wealthy parents claiming eligibility under the Art. 19 par. 2 (a) FIFA RSTP exception. Such request was initially rejected by the PSC but later overruled by the CAS, which allowed the registration.

The Panel held that the purpose of Art. 19(2)(a) was “*to protect the young player who follows his family moving abroad for personal reasons, and not the parents who follow their child in the view to integrate a club situated abroad. The test is thus, to assess the true intention and motivation of the player’s parents.*”<sup>55</sup>

The FIFA PSC had rejected the ITC application, largely on the basis that the timeline submitted did not show, *beyond a reasonable doubt*, that the real reason behind the parents’ move was not related to football. The application was also rejected because the PSC concluded that the parents did not prove that cultural purposes were the predominant reason behind the move.

However, the CAS Panel noted the following factors as positive evidence that the family’s move was not related to football: the family’s demonstrable commitment to being multicultural and multilingual; the family was

<sup>50</sup> See CAS 2019/A/6301, *Chelsea FC ltd v. FIFA*, award of 18 February 2020, par. 185.

<sup>51</sup> See CAS 2019/A/6301, *Chelsea FC ltd v. FIFA*, award of 18 February 2020, par. 184-185-

<sup>52</sup> See CAS 2019/A/6301, *Chelsea FC ltd v. FIFA*, award of 18 February 2020, par. 193.

<sup>53</sup> See CAS 2015/A/4312, *John Kenneth Hilton v. FIFA*, award of 9 August 2016, par. 81.

<sup>54</sup> See CAS 2013/A/3140, *A. v. Club Atlético de Madrid SAD & RFEF & FIFA*, award of 10 October 2013, par. 8.20-8.23.

<sup>55</sup> CAS 2013/A/3140, *A. v. Club Atlético de Madrid SAD & RFEF & FIFA*, award of 10 October 2013, par. 8.25.

wealthy and the parents did not need to work in any other country and the family's maintenance was not dependent on the professional evolution of their son as a footballer; the family had been planning a move (and submitted evidence to show the timeline) long before the player had come into contact with his new club, and there was no reason for Atletico Madrid to be particularly interested in the player beyond having another talented teenager living in the Madrid area in its academy.

Importantly, the player in this case was *not* rated as an "exceptional player." The latter test seems to be not only ill-fitted to lead to the desired outcome of Art. 19 (2) FIFA RSTP but also a discriminatory approach towards really talented players: in identical circumstances, a player surrounded by his (wealthy) parents would be penalized due to his talent and prevented from registering with a good club.

*CAS 2017/A/5244, Oscar Bobb & Associação Juv. Escola de Futebol HG v. FIFA*

In this case, Norwegian underage player Oscar Bobb moved to Portugal with his mother, the only one to hold parental responsibility for the player. The Portuguese FA's submitted two applications for the approval of his international transfer with two different Portuguese clubs, which were both denied by the FIFA Subcommittee.<sup>56</sup> It must be noted that the player's mother had approached the club's personnel months before the move, asking if it would be possible for her son to play with the club "*if she was required to move to Porto for some time to work.*"

The CAS subsequently confirmed the FIFA Subcommittee decision and dismissed the player's appeal. It confirmed a strict application of Art. 19 par. 2 (a) FIFA RSTP

<sup>56</sup> CAS 2017/A/5244, *Oscar Bobb & Associação Juv. Escola de Futebol HG v. FIFA*, award of 21 December 2017, par. 12.

<sup>57</sup> See CAS 2017/A/5244, *Oscar Bobb & Associação Juv. Escola de Futebol HG v. FIFA*, award of 21 December 2017, par. 55-56.

and the "reasons unrelated to football." In FIFA's – and the CAS' view, the fact that FC Porto had the chance to observe the player and to assess his talent and skills but also represent Porto FC during tournaments prior to the move to Portugal showed that the latter had a particular interest in the player. Therefore, it could not "*be excluded that the Player's football activity played a role in her subsequent decision to relocate to Portugal*".

The CAS Sole Arbitrator acknowledged that it was very difficult to determine subjective motives, and to assess professional or personal choices of parents related to the application of Art. 19 par. 2 (a) FIFA RSTP. Therefore, he focused on the timeline of events that preceded the final conclusion of the employment contract of his mother travelling to Porto. The fact that the player's mother had contacted the club prior to signing her professional contract in Portugal was deemed sufficient to deny the application based on the Art. 19 par. 2 (a) exception.<sup>57</sup> Moreover, the Sole Arbitrator also considered the fact that the player's mother maintained her permanent place of residence and her job in Oslo until 2015 even though she had a new employment contract in Portugal.<sup>58</sup>

Again, notwithstanding the fact that the player's mother had "*a permanent employment commitment in Porto (...) that enables her to provide a good standard of living for her son*", the player had to be penalized for the keen interest by a "*prominent and prestigious club*" and the mother's inquiries before the move.<sup>59</sup> The Sole Arbitrator concluded that it was not possible

<sup>58</sup> CAS 2017/A/5244, *Oscar Bobb & Associação Juv. Escola de Futebol HG v. FIFA*, award of 21 December 2017, par. 57.

<sup>59</sup> CAS 2017/A/5244, *Oscar Bobb & Associação Juv. Escola de Futebol HG v. FIFA*, award of 21 December 2017, par. 61.

to narrow the application of Art. 19 par. 1 by allowing for new exceptions.<sup>60</sup>

#### IV. The need to create more exceptions under Art. 19 (2) RSTP

##### *The Vada II case*

In this case, a dual Italian and Argentinean citizen living in Argentina wished to transfer to a French football club based on the EU / EEA rule of Art. 19 par. 2 (b) FIFA RSTP. FIFA initially rejected this request, focusing on the strict requirements of the exception and considering that the exception is based on the principle of territoriality and not nationality.<sup>61</sup> In the subsequent appeal to the CAS, the panel overturned the FIFA decision and agreed that the EU and EEA-rule only encompasses a territoriality criterion, to the extent that the objective of this provision was to respect the EU free movement rights of minor players.<sup>62</sup> Importantly, the CAS held that the list of exceptions was not exhaustive it was possible to invoke non-written exceptions.<sup>63</sup>

##### *Transfer of minors between different national associations of one single country*

FIFA has shown willingness to recognise additional exceptions to Art. 19, not only in respect of the so-called “Vada exception,” but also following the United Kingdom’s exit from the European Union.

In December 2020, “acknowledging that the United Kingdom – one state with four separate FIFA member associations – will be leaving the European Union, the [FIFA] Council approved an amendment to the regulations to avoid situations in which minors would be unable to transfer within the

same state. This amendment will apply generally to all situations where there are more than one association in the territory of a country and it will allow the transfer of players aged between 16 and 18 between those associations.”<sup>64</sup>

While we adhere to the position that FIFA has taken a positive step in recognising the fact that the United Kingdom is comprised of four distinct states with their own national associations, it is nevertheless troubling that FIFA only seems to take the necessary care to respect the fundamental and guaranteed freedoms of minor players when it comes to matters pertaining to the European Union. Would this amendment, applying to all situations where there are more than one association in the territory of a country, ever have been implemented if not for Brexit?

It is further troubling that, following the exit of the United Kingdom from the European Union, other national and supranational laws will be disregarded. More specifically, the Common Travel Area provides citizens of the United Kingdom, Ireland, the Isle of Man, Jersey and Guernsey with the right to free movement across each of these territories. The Common Travel Area predates the European Union and continues regardless of the United Kingdom’s exit from the European Union.<sup>65</sup>

However, with the United Kingdom no longer being part of the European Union, minor athletes from these countries would no longer be able to benefit from the Art. 19 para. 2 (b) exception and register with clubs in the United Kingdom, despite the fact that 16-18-year-old Irish non-footballers will continue to be able to work in the United Kingdom. This is just the most recent of a

<sup>60</sup> CAS 2017/A/5244, *Oscar Bobb & Associação Juv. Escola de Futebol HG v. FIFA*, award of 21 December 2017, par. 67.

<sup>61</sup> See TAS 2012/A/2862, *FC Girondins de Bordeaux v. FIFA*, award of 11 January 2013 (*Vada II*), par. 19.

<sup>62</sup> See TAS 2012/A/2862, *FC Girondins de Bordeaux v. FIFA*, award of 11 January 2013 (*Vada II*), par. 91.

<sup>63</sup> See TAS 2012/A/2862, *FC Girondins de Bordeaux v. FIFA*, award of 11 January 2013 (*Vada II*), par. 96,

with references to the older CAS 2008/A/1485, *Midtjylland A/S v. FIFA*, par. 19-21.

<sup>64</sup> FIFA, Media release of 4 December 2020, *FIFA Council passes landmark reforms for female players and coaches, agrees further steps in COVID-19 response*.

<sup>65</sup> See, Memorandum of Understanding between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning the Common Travel Area and associated reciprocal rights and privileges

several examples illustrating how FIFA's lack of respect and recognition of national and supranational laws creates an inherently discriminatory position that has the effect of stripping rights away from minor athletes.

### A. Proposed solutions for the “parents exception”

While one understands the rationale behind the prohibition of transfers based on Art. 19 FIFA RSTP, FIFA has itself acknowledged that “(...) international transfers might, in specific cases, be favourable to a young player's sporting career (...).”<sup>66</sup>

Art. 19 par. 2 (a) RSTP (“the parents rule”) has been criticized as being controversial or hypocritical.<sup>67</sup> Focusing on the strict rule and allowing an international transfer only if the parents move based on “reasons not linked to football” can be unfair. As FIFA acknowledged, there are cases where denying a transfer can be adverse to the interests of the minors concerned.<sup>68</sup>

This is all the more so in case of families moving to another country so that their child can fulfil its dream of becoming a professional footballer, all while having the necessary guarantees to do so. Even though the CAS has indeed taken into consideration the financial situation of the parents in some cases,<sup>69</sup> less wealthy families should also have the possibility to move to the country of the new club. What is very important is that FIFA should be provided with sufficient guarantees of education and wellbeing of the minor (currently only applicable under the EU / EEA rule of Art. 19 par. 2 (b) FIFA RSTP).<sup>70</sup>

This approach seems more tailored-made and would not go beyond what is necessary to achieve the primary aim, which is the protection of minors. In order to avoid the circumvention of such rule through legal guardianship used by human traffickers, it is possible to limit the application of this provision in principle to the biological parents, with a tailor-made test by the FIFA Subcommittee.<sup>71</sup>

Furthermore, the current standard applied for the exception (“*beyond a reasonable doubt*”) should be relaxed. It is important to take the totality of the surrounding circumstances into consideration and not dismiss the case as soon as the football factor comes into play. All this should give a greater degree of flexibility (and arguably more work) to the hearing authorities, i.e. the FIFA Subcommittee and the CAS in case of appeal, in order to weigh the various interests at stake on a case-by-case basis. Dismissing a request simply because the football factor came into consideration – among all other factors that may speak in favor of the well-being of the minor – seems to be a rather short-sighted approach. To quote an older CAS Panel, while consistency is a virtue, correctness remains a greater one, “*otherwise the too strict application of these provisions may set a wrong benchmark inimical to the interests of sport*”.<sup>72</sup>

### B. Proposed solutions for clubs and academies

The authors suggest that, instead of applying blanket bans to clubs operating academies, it would be more rational to have a new FIFA committee (perhaps sitting within the existing integrity and compliance division) which

<sup>66</sup> See FAQ Protection of Minors, FIFA September 2016.

<sup>67</sup> See Kester Mekenkamp, *FIFA's provision on the protection of minors - Part 3: The compatibility of Art. 19 with EU law*, in Asser International Sports Law Blog, 3 January 2017.

<sup>68</sup> CAS 2005/A/955, *Acuña & Cádiz v. FIFA*, award of 30 December 2005.

<sup>69</sup> CAS 2013/A/3140, *A. v. Club Atlético de Madrid SAD & RFEF & FIFA*, award of 10 October 2013, par. 8.31.

<sup>70</sup> See also the criticisms to the existing regulatory framework in Juan Pedro Barroso, *La protection des joueurs mineurs au sens de l'art. 19 RSTJ*, in CAS Bulletin 1/2019, p. 22.

<sup>71</sup> See also Kester Mekenkamp, *FIFA's provision on the protection of minors - Part 3: The compatibility of Art. 19 with EU law*, in Asser International Sports Law Blog, 3 January 2017.

<sup>72</sup> CAS 2011/A/2518, *Robert Kendrick v. ITF*, award of 10 November 2011, par. 32.

would oversee and regulate a new category of clubs and academies, focusing on the well-being and education of the players. This new category of clubs and academies could sign players at any age level.

In order to receive approval for this new category status, clubs must be able to show the committee the following:

- their minor players are receiving an excellent standard of care (defined at one uniform and very high level at a FIFA-level);
- their educational opportunities (lesson plans, syllabi, etc.) must be reviewed and approved by such committee;
- the minors' living conditions (housing) must be approved, each player is assigned a mentor / adult caretaker at the club, who must be certified for this role. Akin to FIFA TMS manager, but with a much higher standard; and
- footballing opportunities must be available (club must be able to demonstrate that there are great opportunities for the player to develop his skills and talent).

Clubs and academies wishing to sign U18 players (or for EU / EEA, U16) could then voluntarily submit to oversight and approval from this new committee.

In order to help offset FIFA's costs in operating this department, these clubs and academies could pay a fee; such fee could be on a sliding scale to ensure that smaller clubs are not priced out of this new category.

In practice, this could work similar to UEFA club licensing and Premier League Elite Player Performance Plan (EPPP) compliance in England, but with much more attention on the individual players.

## V. Conclusion

The authors are of the view that, even though the protection of minors must be preserved and FIFA should be praised for its efforts in this regard, a more tailored approach focusing on the interests of the minor players appears necessary.<sup>73</sup> Furthermore, and notwithstanding the high level of autonomy of FIFA when regulating its own activities and the ones of its members, it should still take into account national laws that were specifically drafted to protect foreign minors and allow them to integrate into the community as if they were its citizens.

FIFA has consistently refused to take into account foreign law, except where the European Union is concerned. This is, as FIFA itself states, a direct result from the well-known Bosman ruling. Perhaps it is time for national associations to enter into negotiations with FIFA or seek and secure similar judgments from the relevant national and supranational courts in their respective jurisdictions.<sup>74</sup> Indeed, extending the Art. 19 para. 2 (b) exception to other analogous supranational agreements (or simply applying this rule to all minor players between the age of 16 and 18) can be seen as levelling the playing field among young players from all over the world<sup>75</sup>.

---

<sup>73</sup> See also Enric Ripoll and Augustin Amoros Martinez, *FIFA, CAS and Minors: the Return of Landable Purposes and Disproportionate Tools*, Football Legal #7, 2017, at 91.

<sup>74</sup> See also a decision issued by the Spanish Superior Council of Sports (CSD), which recalled that the Spanish federations, even though being part of the respective international federation, must comply with the laws of the Spanish legal system. Even though this decision refers to amateur clubs, it is a good example of the shift of approach from national courts. See the analysis of this decision in Amoros Martinez / Ripoll, in *FIFA, CAS and Minors: the Return of the Landable*

*Purposes and the Disproportionate Tools*, Football Legal 2017, p. 95.

<sup>75</sup> Christian Pulisic, the highest profile player who has transferred to an EU/EEA club through the Vada extension to Art. 19(2)(b) to date, has himself questioned the logic behind the exception that allowed him to move from the United States to German club Borussia Dortmund at age sixteen while other players who do not have the benefit of ancestry in a member state of the EU which has a broad *jus sanguinis* nationality policy – in Mr Pulisic's case, Croatia – would have had to wait until they were eighteen. See Pulisic, Christian, 1,834 Days. The Players Tribune.

---

## Jurisprudence majeure\* Leading Cases Casos importantes



---

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

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

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

---

**CAS 2018/O/5830**  
**International Surfing Association (ISA) v.**  
**International Canoe Federation (ICF)**  
5 August 2020

---

**Surfing / canoeing (Stand-Up Paddleboard (SUP)); Governance of a sport by an International Federation (IF); Validity of the arbitration agreement; Scope of the arbitration agreement; Applicable law; Legal basis to adjudicate a claim regarding the governance of a sport at world level; CAS power to partially accept the parties' claim; Consequences of the inter partes effect of the award; Determination of the legal and contractual basis applicable; Recognition of the IF governing SUP at Olympic level according to the applicable criteria**

**Panel**

Mr Patrick Lafranchi (Switzerland), President  
Mr Jeffrey Benz (USA)  
Mr Nicholas Stewart QC (United Kingdom)

**Facts**

The International Surfing Association (ISA or the Claimant), is the international sports federation governing surfing, recognized as such by the International Olympic Committee (IOC). It is an American non-profit public benefit corporation with its headquarters in La Jolla (California, USA).

The International Canoe Federation (ICF or the Respondent), is the international sports federation governing canoeing, recognized as such by the IOC. It is an association incorporated under Swiss law with its headquarters in Lausanne (Switzerland) (individually, ISA and ICF shall be referred to as Party and collectively as Parties).

The present dispute relates to the governance of Stand-Up Paddleboard (SUP), a sport discipline that both the ISA and the ICF consider to fall within their respective fields of competence.

Currently, SUP is one of the fastest growing sports in the world. It has several sub-modalities and it can be practised in different bodies of water (ocean, open water, rivers, lakes, flatwater, etc.). However, in general terms, it can be defined as a water sport in which an athlete stands on a board and uses a paddle to direct and propel him or herself through the water.

In 2008, the ISA included SUP in its official ISA Guide as one of the surfing disciplines managed by the ISA.

In January 2009, the ISA issued its first technical rules for SUP activities, which were included in the "Rule Book" for the ISA 2009 World Junior Surfing Championship, held from 28 March to 5 April 2009 in Ecuador.

From 20 to 25 February 2012, the ISA organized the 2012 ISA World Stand Up Paddle and Paddleboard Championship in Peru, which was the first SUP competition at a worldwide level. Since then, the ISA has organized one annual "World Championship".

In August 2015, the ISA presented both surfing and SUP to the Tokyo 2020 Organizing Committee for inclusion in the Olympic Sports Programme. Finally surfing, but not SUP, was included in the Tokyo 2020 Olympic Sports Programme.

On 1 January 2017, the ICF's Canoe Sprint Competition Rules entered into force, which for the first time included SUP categories (SUP Men and SUP Women).

Also in 2017, the ISA entered into a partnership with the Association of Paddlesurf Professionals (APP), which is the official professional world tour for the sport of SUP.

On 16 March 2017, the ICF's SUP Canoe Racing Competition Rules entered into force, with the aim “*to provide the rules that govern the way of running ICF SUP Canoe Racing competitions*”.

On 14 March 2019, the ICF announced that from 24 to 27 of October 2019, it would organize the first ICF Stand Up Paddling World Championships in Qingdao (China). The World Championships have taken place as announced.

On 15 November 2016, the ISA sent a letter to the ICF mainly challenging any authority over SUP by the ICF and underlying that the ISA has always been the sole and exclusive International Federation managing this sport since its creation and that the ICF itself has had no relation whatsoever to any activity related to the management, development and governance of SUP until today.

On 17 November 2016, the ICF answered that ISA letter and mainly disagreed with the stance regarding the ISA and the perception over this paddling discipline.

On 13 January 2017, Mr. Pierre Fratter-Barduy, Head of Summer Sports and IF Relations of the IOC, sent a letter to the President of the ISA together with a Memorandum of Understanding (MoU), which was not signed by the Parties:

*WHEREAS the International Canoe Federation (the “ICF”) and the International Surfing Association (the “ISA”) are recognized by the International Olympic Committee (the “IOC”) as International Federations.*

*WHEREAS this memorandum of understanding (the “MoU”) shall set out a framework for the ICF and*

*ISA (hereinafter collectively referred to as the “Parties”) to find a solution regarding the governance of Stand Up Paddle, a discipline that both Parties claim to govern;*

*NOW THEREFORE, in order to reflect the key principles agreed upon during their recent discussions and meetings and recognize the existing relationship between the ICF and ISA, the Parties hereby agree to be legally bound as follows.*

- 1. The Parties shall, work closely together, in the spirit of mutual friendship and cooperation, and find a mutually agreeable solution, by 31 March 2017, as to how the discipline of Stand Up Paddle shall be governed.*
- 2. If the Parties are unable to mutually agree on a solution, the dispute shall be submitted to mediation in accordance with the CAS Mediation Rules. (...)*
- 3. If, and to the extent that, any such dispute has not been settled within 90 days of the commencement of the mediation or if, before the expiration of the said period, either Party fails to participate or continue to participate in the mediation, the dispute shall be submitted to and finally settled, to the exclusion of the ordinary courts, by CAS arbitration pursuant to the Code of Sports-related Arbitration (...)*

On 16 January 2017, the ISA and the ICF held a meeting with the President of the IOC, Mr. Thomas Bach, in order to try to reach a solution regarding the governance of SUP. No mutually agreeable solution was found. The dispute was submitted to mediation in accordance with the CAS Mediation Rules

On 4 May 2018, the ISA informed the CAS Court Office that the Parties were not able to reach a settlement agreement and requested the termination of the mediation procedure.

On 9 May 2018, the CAS Head of Mediation informed the Parties that the mediation procedure was terminated.

On 17 July 2018, the ISA lodged a request for arbitration with the Court of Arbitration for

Sport (CAS) against the ICF, in accordance with Art. R27 and R38 of the Code of Sports-related Arbitration (the CAS Code).

On 6 August 2018, the Respondent sustained that the Claimant had not properly identified the arbitration agreement on which it relied in its request for arbitration, and that no arbitration agreement existed on the terms proposed by the ISA, which therefore meant that it had not agreed to arbitrate the present dispute under the terms established by the Claimant.

On 21 November 2018, the CAS Court Office informed the Parties that pursuant to Art. R45 of the Code, the Panel will decide the present dispute in accordance with Swiss law principles and that the grounds of this decision will be set forth in the final award.

## Reasons

### 1. Validity of the arbitration agreement

In accordance with Art. R27 of the CAS Code, CAS shall have jurisdiction in the following cases:

*These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings).*

*Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests relating to the practice or the development of sport and may include, more generally, any activity or matter related or connected to sport.*

The Claimant submits that the Parties agreed with the IOC to resolve their dispute through a three-step process, consisting of (1) a conciliation meeting with the IOC, and discussions; (2) if unsuccessful, CAS mediation; and, (3) if also unsuccessful, CAS arbitration. In the Claimant's opinion, under Swiss law this already constitutes a valid arbitration agreement.

The Respondent disputes the existence of a valid arbitration agreement between the Parties on which CAS could ground its jurisdiction as it pertains to the specific claim that has been brought by the Claimant. The Respondent maintains that with its request for arbitration, the Claimant did not provide "*a copy of the contract containing the arbitration agreement or of any document providing for arbitration*" as requested by Art. R38 of the CAS Code. The Respondent submits that the only arbitration agreement on which CAS could base its jurisdiction is the one originally submitted to the Parties by the IOC in the MoU, which would cover disputes as to "*how the discipline of Stand Up Paddle shall be governed*".

Given that CAS has its seat in Switzerland and that when the purported arbitration agreement was executed the Claimant did not have its domicile in this country, the Panel considers this is an international arbitration procedure governed by Chapter 12 of the Swiss Private International Law Act ("PILA"), whose provisions are thus applicable. Art. 186(1) of the PILA states that the arbitral tribunal shall itself decide on its jurisdiction. The same is explicitly stated in Art. R39 (4) of the CAS Code, according to which the Panel has the power to decide upon its own jurisdiction. This general principle of *Kompetenz-Kompetenz* is a mandatory provision of the *lex arbitri* and has been recognized by CAS for a long time (see e.g. CAS 2004/A/748).

In this context, Art. 178 of the PILA establishes a number of prerequisites that any arbitration agreement shall meet in order to be valid. As to the form, under Art. 178.1, the arbitration agreement shall be made “*in writing ... by any means of communication that establishes the terms of the agreement by a text*”. With regard to the fulfilment of these formal requirements, when the subject-matter of the arbitration is a sports-related dispute, the jurisprudence of the Swiss Federal Tribunal (SFT) indicates that a flexible approach shall be taken (see BGE 138 III 29 at 2.2.2; 133 III 235 at 4.3.2.3, p. 244 f.; ATF 4A\_102/2016, para. 3.2.3). Such a non-formalistic approach is necessary in sports matters in order to aid CAS in fulfilling its role of true “Supreme Court for Sport”, as it has been recognized by the SFT itself (see ATF 4P.267/2002; 4A\_314 / 2017).

Thus, the parties’ will to arbitrate can be clearly evidenced in writing by a MoU, confirmed by an extensive exchange of letters, e-mails, communications and drafts of documents. The absence of the parties’ signature on the document is not relevant since this is not strictly necessary for an arbitration agreement to be valid under Swiss law.

As to the substance, under Art. 178.2, to be valid the arbitration agreement shall comply “*with the requirements of the law chosen by the parties or the law governing the object of the dispute and, in particular, the law applicable to the principal contract, or with Swiss law*”. Pursuant to the applicable Swiss law, a valid arbitration agreement exists if the parties have agreed on its essential elements (*essentialia negotii*). In this respect, a valid arbitration agreement exists within the meaning of Art. R27 of the CAS Code if the parties have carried out conclusive acts which undoubtedly confirm their acceptance of and commitment to a three-step dispute resolution process in which their failure to reach an agreement in any of the prior stages would ultimately result in arbitration before CAS,

with binding effect upon them, to the exclusion of the ordinary courts.

## 2. Scope of the arbitration agreement

The Respondent questions the scope of the arbitration agreement. The respondent submits that the only arbitration agreement on which CAS could base its jurisdiction is the one originally submitted to the Parties by the IOC in the MoU, which would cover disputes as to “*how the discipline of Stand Up Paddle shall be governed*”.

The Claimant rejects the Respondent’s objection and affirms that the present dispute has never been about “*exclusivity rights*” over SUP, and that the nature and formulation of the dispute has been always the same: to determine which of the two “*Federations, ISA or ICF, shall be the International Non-Governmental Organization in the meaning of the IOC Charter and therefore be the International Federation governing, among other disciplines, Stand Up Paddle at world and Olympic level*”. In the Claimant’s view, this would be confirmed by the content of the MoU prepared by the IOC, where the matter was circumscribed to “*find[ing] a solution regarding the governance of Stand Up Paddle, a discipline that both Parties claim to govern*”.

In principle, once the existence of an arbitration agreement has been admitted, the objective scope of the arbitration agreement is to be interpreted broadly. It should be assumed, absent any limiting language between them or other contrary indication, that the parties wish to confer jurisdiction that is as broad as possible upon the arbitrators. Bearing in mind this principle of utility, the general rules for the interpretation of contracts (i.e. Art. 1 and 18 of the Swiss Code of Obligations - SCO -, and Art. 2 of the Swiss Civil Code - SCC), ascertaining the true and common intention of the parties without dwelling on any inexact expressions or designations they

may have used either in error or by way of disinguing the true nature of the agreement, shall be applied. The original scope of the arbitration agreement cannot subsequently be altered, limited or have its framework reduced as it is against the principle of good faith established by Art. 2 of the SCC.

In this regard, the Panel observes that the MoU was intended to “*find a solution regarding the governance of Stand Up Paddle, a discipline that both Parties claim to govern*”, and that the subject-matter of the dispute was defined as “*how Stand Up Paddle shall be governed*”. Furthermore, regarding the scope of the mediation, the Panel is of the opinion that the Parties had a common intention from the very beginning that the subject-matter submitted to the 3-step resolution process was, in general and in the widest sense, the governance of SUP, both at the International and Olympic levels. Ultimately, as stated in the MoU, the Parties’ intention was “*to find a solution regarding the governance of Stand Up Paddle, a discipline that both Parties claim to govern*”, hence putting a definitive end to their conflict in the interests of the SUP athletes and the sport, as well as finally establishing which of the two International Federations shall govern SUP at International and Olympic level. Answering this question requires the Panel to decide the respective rights and responsibilities of the ISA and the ICF in relation to such governance in accordance with the applicable law. In a nutshell, this is the scope of the arbitration and hence the procedural framework of this arbitration procedure.

In the context of the Parties’ conversations to agree on the terms of the termination of the mediation process, the Respondent somehow tried to change the subject matter of the Parties’ dispute, and tried to reduce it to a legal question (i.e. does either of the Parties have an exclusive right to govern SUP?) instead of the resolution of the specific dispute that the

Parties had concerning the governance of SUP. Such attempt to unilaterally alter or limit the scope of the arbitration agreement is not admissible, as it is against the principle of good faith that is established by Art. 2 of the SCC (4A\_628/2015).

### 3. Applicable law

Article R45 of the CAS Code provides as follows:

*The Panel shall decide the dispute according to the rules of law chosen by the Parties or, in the absence of such a choice, according to Swiss law. The Parties may authorize the Panel to decide ex aequo et bono.*

The Parties did not make any express choice of law within the meaning of Art. R45 of the CAS Code and Art. 187(1) PILA (“*The arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected*”). Consequently, the dispute shall be determined according to Swiss law.

With regard to the Claimant’s request to decide the dispute *ex aequo et bono*, that is not possible, because the Respondent did not agree to authorize the Panel to decide the dispute on this basis, as is required by Art. R 45 of the CAS Code. Moreover, the references made by the parties in the correspondence exchanged and negotiations held before entering into arbitration to the regulations of the IOC is not sufficient to ground a valid implicit choice of law made by the parties in favour of the latter to the exclusion of any other applicable law. As a result, pursuant to Art. R45 of the CAS Code, the dispute shall be decided in accordance with Swiss law without prejudice to the consideration that shall be given to the regulations of the IOC.

### 4. Legal basis to adjudicate a claim regarding the governance of a sport at world level

The Claimant maintains that, in accordance with the so-called principle of “*One Sport, One Federation*”, pursuant to which only one International Federation shall govern a certain sport at the worldwide level, only one of the Parties can play this role. In the Claimant’s view, the International Federation governing SUP at the world level must be the Claimant, due to the history, activities, involvement, track record, expertise, background and funds it has invested in this sport. In addition, the Claimant affirms that this would be the appropriate resolution in light the applicable Swiss law, especially in light of Arts. 60 *et seq.* of the SCC and the regulations of the IOC which are part of Swiss law and provide that only one International Federation shall govern a sporting discipline at works level. Furthermore, in its view, such a finding would also result from the application of Art. 2 of the SCC and Arts. 2 and 5 of the Swiss Act on Unfair Competition (UWG). On the other hand, the Respondent is requesting the Panel to dismiss the claim entirely, holding that “*there is no legal basis in Swiss law at this point in time upon which one body is “entitled” to be the sole governor or organiser of SUP*”.

Swiss law does not provide for the adjudication of the governance and administration of a sport at world level to one IF. Indeed, Articles 60 *et seq.* of the SCC which regulate the rights of associations are intended to safeguard their independence and autonomy in connection with the administration of their sport but are irrelevant in the specific context of adjudicating the governance and administration of a sport at the world level (TAS 2007/A/1424). Furthermore, the principle of good faith enshrined in Article 2.1 of the SCC encompasses the interpretation of contracts, acts, and even the limitation of rights, and hence may refer to an existing legal relationship or situation, but it cannot create it (SCYBOZ/SCYBOZ/GILLIÉRON/BRACONI,

Code Civil Suisse et Code des Obligations Annotés, Basel 2008, p. 7). Hence, contrary to the claimant’s submission, this fundamental legal principle does not encompass the adjudication of the governance of a sport at world level either. Finally, the same conclusion applies to Articles 2 and 5 of the UWG whose application is subjected to the proof that the Swiss market has been impacted by the conduct of an IF concerning the governance of a sport. Therefore, considering that the findings of this award are only binding on the parties and do not have wider effect, and given the limitless scope that the reference “at world level” has, without any specific framework in which a resolution like that could be executed, a declaration such as this one would be for naught; a purely academic exercise with no real effect.

##### 5. CAS power to partially accept the parties’ claim

This being said the Panel will now decide if a different determination can be established with respect to the claimed governance and administration at the Olympic level by the ISA.

In this regard, contrary to what the Claimant asserts, the Respondent is of the opinion that despite the fact that both Parties are bound by the IOC regulations, this is legally irrelevant because these regulations govern the relationship between the IOC and their members or candidates for membership, but they do not contain any provision that purports to govern the situation where two of its members are disputing the governance of a sport, or in summary relations as between the IOC-recognized member federations. As a result, the Respondent considers that the IOC regulations are in practice inapplicable to the present dispute.

The Panel disagrees with the Respondent. An arbitral tribunal can award less than is

requested in an arbitration procedure without ruling *ultra* or *extra petita*, or impose conditions on its findings, without committing any procedural error (4A\_314/2017). Within the framework of the Olympic Movement (OM) to which both parties are bound, a legal and contractual basis exists for the adjudication of the parties' dispute concerning the recognition of a sport at Olympic level. Thus, the CAS panel has the power to partially accept the parties' claims (*qui potest plus, potest minus*) and may narrow the extent of the parties' prayers for relief – i.e. limiting its adjudication to the governance and administration of SUP at Olympic level – without engaging in any procedural flaw.

#### 6. Consequences of the *inter partes* effect of the award

Within the legal and contractual framework of the OM to which both parties are bound, a decision on the governance of a sport will bind the parties to this arbitration with no binding effect on any third party including the IOC i.e. *inter partes* effect. In particular, such decision will not imply any pronouncement with regard to the recognition of that sport at the Olympic level, its inclusion in the Olympic programme or any kind of official recognition within the OM, that are competences exclusively belonging to the IOC. For the sake of clarity, only the party that has been adjudicated with the governance of SUP at the Olympic level will be entitled to exercise any right or perform any action inherent to such entitlement. Notwithstanding this, in order to avoid any misinterpretation, the party that has not been adjudicated with the governance and administration of SUP at the Olympic level will be free to develop SUP and organise its own SUP events outside the IOC sphere. This falls in line with Swiss law.

#### 7. Determination of the legal and contractual basis applicable

In accordance with art. 3.3 of the Olympic Charter (OC), "*The IOC may recognise IFs and associations of IFs*". In particular, the IOC may recognise an International Federation as the non-governmental organisation governing one or several sports (Art. 25 of the OC). Both Parties have the status of "Recognised International Federations" before the IOC and are "constituent members" of the Olympic Movement, hence being subject to the OC. Pursuant to Art. 19.3.10 of the OC, the regulations of the IOC that are issued by the IOC Executive Board "*are legally binding*" on its members. In particular, according to the "*International Sports Federations Requesting IOC Recognition - Recognition Procedure*" (the IOC Recognition Rules), the IOC establishes some qualitative and quantitative criteria in order to recognise an IF as the non-governmental organisation governing one or several sports in the meaning of Art. 25 of the Olympic Charter (OC).

Given that pursuant to the constitutional principle of freedom of association, Swiss law gives private associations full autonomy to rule and regulate its own business and activities and their internal legal relationships, taking into account that a specific substantive legal relationship exists (as both parties are members of the IOC and are subjected to its regulations), for the limited purpose of deciding on an *inter partes* basis who of the two parties shall govern and administer a sport within the OM, the IOC regulations must be applied.

#### 8. Recognition of the IF governing SUP at Olympic level according to the applicable criteria

In deciding this matter, the Panel considers the qualitative and quantitative criteria established by the Recognition Rules of the IOC.

In addition to the general formal criteria i.e. having the status of “Recognized International Federation”, Art. 2.2 of the Recognition Rules contains a list of evaluation criteria to be considered for the recognition of an IF in connection with each sport in accordance with the evidence available. The background of the parties in the sport should also be weighed, in particular, the work that each party has done, respectively, on the promotion, development, popularity, recognition and standardisation of that sport as an international sport. In this respect, the ISA is the first federation in organizing and governing *de facto* SUP at the international level, but also the only IF that has shown a real and genuine interest in SUP, having made great efforts and spending considerable time and money in its promotion, development and governance, not only at the professional level but also in developing it at the grassroots level, giving financial aid to SUP athletes and high-level competition opportunities. The ISA *de facto* fulfils the criteria required by Art. 2.1 of the Recognition Rules of being (i) “*the only Federation governing the sport worldwide*” and (ii) “*Have existed in such capacity for at least five years*”.

## Decision

The Claim filed by the International Surfing Association on 17 July 2018 against the International Canoe Federation is partially accepted.

The request of the International Surfing Association to be recognized as the sole governing body of SUP at the world level is dismissed.

The International Surfing Association shall be the International Federation governing and administrating SUP at the Olympic level, in the terms established in the present Award.

---

**CAS 2018/A/5982**

**Al Merreikh Sport Club v. Sudan Football Association (SFA)**

20 February 2020

---

**Football; Validity of a match complaint; CAS jurisdiction; Condition for an extension of the time limit to file the answer; Valid filing of the answer; Request for intervention; Validity of a complaint signed by an “authorized” person**

**Panel**

Mr Nicholas Stewart QC (United Kingdom), President

Mr Hendrik Willem Kesler (The Netherlands)

Ms Anna Bordiugova (Ukraine)

**Facts**

Al Merreikh Sport Club (the Appellant) is a professional football club in Khartoum, Sudan, and is a member of the Sudan Football Association.

The Sudan Football Association (SFA or the Respondent) is the governing body of football in Sudan. The SFA is a member of the Fédération Internationale de Football Association (FIFA).

The Appellant played the 2018 football season in the Sudan Premier League (SPL). On 3 October 2018 the Appellant played an SPL match (the “October Match”) against Al Merreikh Al Fasher Sport Club (Al Fasher). The Appellant lost the October Match 2-1.

In the October Match Al Fasher fielded a player, Mr Suleiman, despite that player being then under automatic suspension by the SFA and therefore ineligible to play in that match.

After the October Match but on the same day 3 October 2018, the Appellant’s Football Manager signed and gave the official SFA match supervisor a written complaint (the “Match Day Complaint”) on ineligibility of the player Suleiman, with a letter heading “Al Merreikh Sport Club” and the subject shown as “Re: Complaint”.

The Appellant’s position was and is that under the SFA’s *Regulations for the 2018 Season of the Premier League Competition* (the “SPL Regulations” or the “SPLR”) the effect of the player Mr Suleiman’s ineligibility was that on complaint by the Appellant to the SFA, Al Fasher should forfeit the October Match by a score of 2-0. It would follow that the Appellant would gain three points for a win, which would make the Appellant the winner of the SPL for the 2018 season.

The Appellant’s complaint was dismissed by the SFA Competition Organizing Committee (SFA COC) on 6 October 2018 and its appeal against that decision was dismissed by a decision of the SFA Appeal Committee (SFA AC) on 10 October 2018 (the “Appealed Decision”).

By this appeal the Appellant seeks to establish the validity of the Match Day Complaint and that as a consequence the Appellant should be declared the winner of the SPL for the 2018 season.

On 27 October 2018, the Appellant filed its statement of appeal with CAS against the Appealed Decision in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the “Code” or the “CAS Code”).

By letter dated 20 February 2019 the Appellant objected to the admission of the Respondent’s Answer on the ground that it had been submitted after the deadline set by the CAS Court Office letter dated 21 January 2019. The

Appellant's letter specifically referred to Article R55 of the Code.

By two letters dated 27 March 2019 the Appellant sent to the CAS Court Office a copy of a letter dated 9 October 2018 from the SFA Secretary-General to the Secretary of Al Fasher and requested the admission of that 9 October 2018 letter into evidence. The basis of that request was that the letter was supportive of the contention in the Appeal Brief that Mr Suleiman had been ineligible to play in the October Match.

The President of the Panel accepted that the political upheaval in Sudan at that time was likely to have made it difficult to obtain the necessary documentation for the Respondent's representatives to travel from Khartoum to Lausanne in time for a hearing on 9 May 2019. On 1 May 2019 the CAS Court Office notified the parties that the President of the Panel had decided to allow the Respondent to attend the hearing by video-conference.

On 6 May 2019, the Appellant requested to attend the hearing by video-conference. Such request was refused by the President of the Panel, as (i) it was not shown that the Appellant's representatives would have any difficulty attending in person; and (ii) to have both Parties attending by videoconference was likely to make the efficient conduct of the hearing very difficult (as it undoubtedly would have done, in the light of experience of the actual hearing).

A hearing was held on 9 May 2019 at the CAS Court Office in Lausanne, Switzerland.

Despite written reminders from the CAS Court Office, by the time of the hearing the Respondent had still failed to comply with the order to state whether Mr Suleiman was eligible to play in the October Match. Accordingly, the 9 October 2019 letter mentioned above was

admitted into evidence under Article R56 of the CAS Code. The exceptional circumstances justifying that late admission of evidence were the Respondent's failure to answer the Panel's question on the same point, the significance of the point and that it was a factual matter on which the Respondent and not the Appellant had the responsibility of keeping records. It would have been unfair to the Appellant to exclude that letter from evidence.

## Reasons

### 1. CAS jurisdiction

However the jurisdiction of CAS was contested by the Respondent, the jurisdiction of CAS on this appeal is clear, by a combination of Article R47 of the Code and Article 66 of the SFA Statutes.

Indeed, it is expressly acknowledged by the Respondent that no National Tribunal for Sport has been established. Accordingly, there is an appeal to CAS under Article 66.4 of the SFA Statutes unless there is some other provision of law or the statutes or regulations of the SFA which overrides or qualifies Article 66.4 so as to exclude such an appeal.

The only provision relied upon by the Respondent as having that exclusionary effect is Article 106 E) of the General Rules of the SFA 2004 and Amendments 2014. However, it is clear to the Panel that Article 106 E) does not have that effect, for the following reasons:

- The General Rules are subordinate to the SFA Statutes and are not valid so far as they are inconsistent with the Statutes, which by Article 33.4 of the Statutes can only be amended by a two-thirds majority of Members present and voting in General Assembly.
- It follows that if Article 106 E) purported to have the effect of excluding an appeal to CAS

in a case such as the present appeal, it would be invalid to that extent.

- Moreover, Article 106 E) should be interpreted as far as possible consistently with SFA Statutes. The Panel does not interpret Article 106 E) as intended to reduce the rights of appeal under Article 66.4 of the SFA Statutes.
- In addition, Article 68.1 of the SFA Statutes provides that in accordance with the relevant provisions of the FIFA Statutes, any appeal against a final and binding decisions passed by SFA can be appealed to the CAS unless the national tribunal for sport has jurisdiction.

## 2. Condition for an extension of the time limit to file the answer

Under Article R32 para. 2 of the CAS Code, once it is clear that by the time the deadline for filing the answer expired, no application has been made for extension of time for the answer, there is no power under the Code for the President of the CAS panel (or anyone else) to extend the time limit.

## 3. Valid filing of the answer

The prior question is whether or not the Answer was actually served within the requested deadline, in which case no extension of time would have been needed anyway.

On that question, the Appellant says that “*submitting the Answer to a completely different body [i.e. FIFA instead of CAS] with a completely different address [i.e. FIFA address in Zurich instead of CAS address in Lausanne] does not affect the clear wording of the Code and strict time limit rules*”. Although not explicitly stated in such terms, the Panel takes that as a submission by the Appellant that the Answer was not filed by the requested deadline.

Pursuant to Article R31.3 second sentence of the CAS Code, if any written submissions are transmitted in advance by facsimile or by electronic mail at the official CAS email address, the filing is valid upon receipt of the facsimile or of the electronic mail by the CAS Court Office provided that the written submission and its copies are also filed by courier within the first subsequent business day of the relevant time limit. Accordingly, where the submission is otherwise sent in accordance with the time limits provided for by Article R32 CAS Code (Time limits) and the proviso in Article R31.3 is satisfied, then there is a valid filing so making the CAS Court Office’s receipt of the email the valid filing. It is clear from Article R31 that for the purposes of Article R32 anything sent must be sent to the CAS Court Office. Articles R31 and R32 of the CAS Code do not treat as critical the time taken for the relevant submission to reach CAS once it has been sent. A party who has filed the submissions in time i.e. pursuant to Articles R31 and R32 of the CAS Code has validly filed its submissions, even if the package then takes weeks to arrive or even if it never arrives but gets lost in transit. In that situation, the party will need to prove that it was sent, but the filing is validly done as soon as the package is sent on its way to CAS. There is no requirement for a party to use any form of expedited delivery or to take steps - beyond despatch within the time limit - to see that it arrives at CAS as soon as possible.

It would be artificial to draw a distinction between the identification in the Package address of “*Mr Daniele Bocucco Counsel to the CAS*” as opposed to “*the CAS Court Office*”. Sending to Mr Bocucco was the same as sending to the CAS Court Office for the purposes of Articles R31 and R32. In an obvious practical sense the Package was sent to FIFA i.e. at FIFA address in Zurich. However, that does not necessarily mean it was *only* sent to FIFA and cannot also be regarded as sent to

the CAS counsel. Despite the mistake in addressing the Package, it was practically bound to end up being delivered to the CAS counsel at CAS. On the unusual facts of this case, this is a crucial point in the Panel's decision that the Answer was validly filed. The confusion in the address on the Package was practically certain to cause some delay in arrival at the CAS Court Office, as compared with a package addressed clearly and only to the CAS Court Office at its full and correct postal address in Lausanne. However, that is not a critical point. For the purposes of Article R32 of the CAS Code, the crucial point is when and to where the Package was sent, not when it arrived at the CAS Court Office. The fact that a confusion occurred in the address on the package containing the submissions is not a critical point. It is nevertheless essential that for the purposes of Article 31.3 of the CAS Code that the Panel is satisfied that the identity and content of the items which have been sent by courier exactly match what has been sent by facsimile or electronic mail. This is not in doubt on the facts of this case.

The Panel's conclusion is that (1) the Answer was transmitted by the Respondent to the CAS Court Office by electronic mail within the time limit for filing set by the CAS Court Office i.e. 2 days before the time limit expiry, (2) the written Answer and its copies were sent by the Respondent in accordance with Article R32 of the Code within the time limit specified in the proviso in Article R31.3.

#### 4. Request for intervention

The basis of Al Hilal Club's request for intervention was that if the Appellant succeeded on this appeal to CAS, it would replace Al Hilal as the SFA Premier League Champion club for the 2018 season; and that would have significant adverse financial consequences, as well as loss of honour and prestige, for Al Hilal.

By Article R41.4 of the CAS Code, a third party may only participate in the arbitration if it is bound by the arbitration agreement or if it and the other parties agree in writing. There was no agreement by either the Appellant or the Respondent to Al Hilal's participation. The question whether Al Hilal was bound by the arbitration agreement was not addressed at all in its written submissions in support of its application. Where there is no agreement between the parties in that respect and no written submission in the third party's application regarding the question of whether it is bound by the arbitration agreement, without even deciding if the third party was so bound, a CAS panel should not exercise its discretion under Article R41.4 of the CAS Code to accept the participation of the third party considering that (i) if the appeal is otherwise successful, there is no obstacle to granting the relief requested by the appellant notwithstanding the fact that the third party has not been able to participate in the appeal but would clearly be adversely affected by that outcome, (ii) the interests of the third party are adequately protected by the participation of the respondent, of which it is a member, (iii) participation of third party would add to the costs of the arbitration for the parties and CAS, which would not be reasonable and proportionate.

#### 5. Validity of a complaint signed by an "authorized" person

The only issue raising a seriously arguable case for the Respondent in opposition to this appeal is the question whether for the purposes of SPLR Article 14.5 B) the club's football manager was "*a person authorized by the [Appellant] club's board of directors*" to sign the Match Day Complaint.

According to the applicable regulations of the federation i.e. SPLR Article 14.5 B), to be valid,

a match day complaint shall be signed by the president of the complaining club or by the person authorized by the club's board of directors. The evidence includes no express authority given to the club's football manager that signed the complaint. However, a club's football manager has the necessary authority to sign a match day complaint. Indeed, every employee has the implied authority of the board to take any step in the interests of the club which is within the scope of his or her duties and responsibilities under the terms of their employment. No express authority need be given: it is implicit in the contract of employment, provided only that the contract is validly made on behalf of the club. Signing a match day complaint is within the scope of duties and responsibilities of someone given the express job title of football manager of a club, as this is a matter directly related to a match and to the football activities of the club, potentially affecting the number of points and its position in the league.

Since an ineligible player was fielded in the October Match and a valid complaint was made by the Appellant, the forfeiture of the Match by a 2-0 score in favour of the Appellant followed automatically under SPLR Article 8.3. The SFA had no discretion to make any other decision.

### Decision

The appeal filed by Al Merreikh Sport Club against the decision issued by the Sudan Football Association Appeal Committee on 10 October 2018 is upheld. The decision issued by the Sudan Football Association Appeal Committee on 10 October 2018 is set aside. The Sudan Football Association shall declare that Al Merreikh Sport Club:

(i) is deemed to have won its Premier League match against Al Merreikh Al Fasher Sport Club on 3 October 2018 by a score of 2-0 and is awarded three points for that win; and

(ii) is the champion club of the Sudan Premier League for the 2018 season (and the Sudan Football Association shall rectify the 2018 Sudan Premier League table to show Al Merreikh Sport Club as the champion club with 34 points).

---

**CAS 2019/A/6179**

**Gambia Football Federation (GFF) v.  
Confédération Africaine de Football (CAF)  
& Fédération Togolaise de Football (FTF)**  
19 June 2019 (operative part of 6 April 2019)

---

**Football; Eligibility to play of a player;  
Applicable procedural law; Burden of  
proof; Standard of proof**

**Panel**

Prof. Martin Schimke (Germany), Sole Arbitrator

**Facts**

In the qualifying stage of the 2019 Africa Cup of Nations (the “AFCON”), organised by the CAF (the “First Respondent”), the governing body of football at the African level, the Gambia Football Federation (the “Appellant” or the “GFF”) was drawn in group D with Algeria, Benin and the Fédération Togolaise de Football (the “Second Respondent”, and together with the First Respondent the “Respondents”).

On 9 September 2018, the national football teams of Togo and Benin played a qualifying match in Lomé, Togo. Mr James Adewale Olufade (the “Player”) took part in the match for the national team of Togo and the match ended in a 0-0 draw.

On 12 October 2018, the national football teams of Togo and Gambia played a qualifying match in Lomé, Togo. The Player took part in the match for Togo and the match ended in a 1-1 draw. This was number 62 of the AFCON qualifiers (“Match 62”).

On 16 October 2018, the national football teams of Gambia and Togo played a qualifying match in Gambia. The Player was listed in the

squad on the team sheet, but he was not fielded by the Togolese coach. The match ended with Togo winning 0-1. This was match number 86 of the AFCON qualifiers (“Match 86”, and together with Match 62, the “Matches”). Prior to the match on 16 October 2018, the GFF lodged a protest against the eligibility of the Player to take part in the match, as the GFF submits that he is a Nigerian national.

On 18 October 2018, the Appellant sent an official protest letter to the CAF. Since this letter did not mention the place of birth of the Player, the Appellant did not claim at this stage that his birthplace was not in Togo.

On 25 December 2018, the CAF informed the GFF that an investigation had been opened and that the case would be submitted to the CAF Disciplinary Board in due course.

On 30 December 2018, the Second Respondent provided the CAF with the Togolese passport of the Player, his official Togolese birth certificate as well as his official Togolese nationality certificate.

On 21 January 2019, the Appellant was notified of the decision of the CAF Disciplinary Board, rendered on 13 January 2019 (the “CAF Disciplinary Board Decision”). The CAF Disciplinary Board dismissed the protest lodged by the Appellant and confirmed the eligibility of the Player.

On 31 January 2019, the GFF filed an appeal against the CAF Disciplinary Board Decision with the CAF Appeal Board. On 10 February 2019, the CAF Appeal Board held a hearing at the CAF headquarters. On 19 February 2019, the CAF secretariat notified the Appellant of the decision rendered by the CAF Appeal Board (the “Appealed Decision”), ruling:

*“1. Declare the Appeal by Gambia FF admissible in law;*

2. *Declare the Appeal by Gambia FF inadmissible in substance;*
3. *Confirm the decision of CAF Disciplinary Board with regard to the eligibility of player James Adewale Olufade to represent Togo National Team”.*

The final ranking of group D of the AFCON Qualifiers was as follows:

	Team	P	W	L	D	GF	GA	GD	PTS
1	Algeria	6	3	1	2	9	4	5	11
2	Benin	6	3	2	1	5	6	-1	10
3	Gambi	6	1	2	3	6	6	0	6
4	Togo	6	1	3	2	4	8	-4	5

On 1 March 2019, the Appellant filed a Statement of Appeal with the CAS. On 14 June 2019, the hearing was held at the CAS Headquarters in Lausanne, Switzerland.

## Reasons

### 1. Applicable procedural law

At the hearing the Parties had agreed on the application of the CAF rules and regulations (the “Applicable Regulations”) and Swiss law subsidiarily. In this regard, Article 48 of the CAF Statutes provide as follows: *“The Code of Sports-related Arbitration shall govern the arbitration proceedings. With regard to substance, CAS shall apply the various regulations of CAF and FIFA or, if applicable, of national associations, members, leagues and clubs, and, as a last resort, Swiss Law”.*

The Sole Arbitrator noted that, with regard to procedural law, the above-mentioned provision of the CAF Statutes referred to the applicability of the provisions of the CAS Code, which was therefore primarily applicable. However, if certain aspects of the procedure were not addressed by the CAS Code, i.e. if there was *lacuna*, the procedure had to be determined, to the extent necessary, either directly or by reference to a law or to

arbitration rules (Art 182.2 of the Swiss Federal Act on International Private Law, PILA). Considering (i) that the seat of the arbitral tribunal was in Switzerland and (ii) that Swiss substantive law was complementarily applicable to the merits of the present case, the Sole Arbitrator decided to apply the rules of the Swiss Civil Procedural Code (the “CPC”) in the case at hand, where/if there was a *lacuna* in the Code and if he deemed appropriate.

### 2. Burden of proof

For the Sole Arbitrator, the main substantive issue was the question of whether the Player was eligible to play for the national team of the Second Respondent. Therefore, the Sole Arbitrator focused on this core question first, as he deemed that all other topics in this case depended on the answer to said question.

The Sole Arbitrator noted that according to the relevant Regulations, the Player had to fulfil two specific requirements to be eligible to play for the national team of the Second Respondent:

- 1) he had to be a Togolese citizen according to Article 38.1 AFCON Regulations which provides that *“Each Association shall select its national representative team from Players enjoying the citizenship of its country, subject to its jurisdiction and qualified for selection in conformity with the provisions of the regulations governing the application of the FIFA statutes”*;
- 2) one of the provisions according to Article 7 Regulations governing the application of the FIFA Statutes had to apply. Article 7 provides that *“Any Player who refers to art. 5 par. 1 [“Any person holding a permanent nationality that is not depending on residence in a certain country is eligible to play for the representative teams of the association of that country”] to assume a new nationality and who has not played international Football in accordance with art. 5 par. 2 [“With the exception of the conditions*

*specified in article 8 below, any player who has already participated in a match (either in full or in part) in an official competition of any category or any type of football for association may not play an international match for a representative team of another association”] shall be eligible to play for the new representative team only if he fulfils one of the following conditions”. In casu the two Respondents asserted that the Player fulfilled the condition of Article 7 lit. a (“He was born on the territory of the relevant association”), as he was born in Togo.*

The Sole Arbitrator also noted that the Respondents did not dispute the fact that the Player held a Nigerian passport (which had expired in 2016), but the Respondents claimed that the Player had obtained (in addition) the citizenship of Togo. Furthermore, it was undisputed by the Parties that the Player had never played for the national team of Nigeria.

The Appellant and the Respondents had separately provided documents issued by state authorities of Nigeria and Togo, respectively, in order to substantiate their claims that the Player was born in Nigeria and Togo, respectively. In addition to that, the Parties had called witnesses in the hearing to further substantiate their claims. The Sole Arbitrator pointed out that according to Article 179 CPC providing that “[P]ublic registers and official records are conclusive evidence of the facts stated therein, unless their content is proven to be incorrect”, the conclusiveness of these documents was indeed very high, but that the special feature in the present case was that the documents issued by the state authorities contradicted each other, particularly regarding the Player’s place of birth.

Turning to the question of which party bore the burden of proving the player’s ineligibility, the Sole Arbitrator recalled that whereas in a disciplinary procedure involving a sanction, the burden of proof generally lied on the

disciplinary body, in a procedure where a party derived rights from the allegation that a player was not eligible to be fielded during a match, the burden of proof with respect to the player’s ineligibility lied with the party alleging this. In case the party failed to adduce such evidence, the case had to be decided against it. Furthermore, the burden of proof did not only allocate the risk among the parties of a given fact not being ascertained but also allocated the duty to submit the relevant facts before the court or tribunal. It was the obligation of the party that bore the burden of proof in relation to certain facts to also submit them to the court or tribunal.

In this case, the Appellant (by seeking to overturn the Appealed Decision) was deriving rights (i.e. the Appeal being upheld and the match being lost by forfeit) from the allegation that the Player was not eligible to take part in the Match(es) for the Second Respondent. The Sole Arbitrator thus concluded that the burden of proof with respect to the Player’s ineligibility lied with the Appellant and a possible *non-litiget* situation would have been at the expense of the latter.

### 3 Standard of proof

Turning then to the question of the standard of proof, the Sole Arbitrator observed that there was also no specific rule concerning a Player’s eligibility in the CAF Regulations and/or AFCON 2019 Regulations, and that the same applied to the Code and Swiss Law. In particular, neither the Code, nor Switzerland’s Private International Law defined any applicable standard of proof for CAS arbitrations. The Sole Arbitrator thus considered that it was up to him to determine the standard of proof in the case at hand (and in eligibility cases in general).

Referring to previous CAS cases that had already dealt with the problem of determining

said standard of proof in the absence of a corresponding provision in the relevant regulations, the Sole Arbitrator felt comfortable to state that in any case the standard of proof at hand had to be on a sliding scale from, at a minimum, a mere “balance of probabilities” up to that of “comfortable satisfaction” at the most, and that it had to take into account the specific circumstances of the case. He further recalled that a previous CAS Panel had stated: *“In assessing the evidence the Panel has borne in mind that the Player has been charged with serious offences. While this does not require that a higher standard of proof should be applied (...), the Panel nevertheless considers that it needs to have a high degree of confidence in the quality of the evidence”* (CAS 2011/A/2490), and that this standard had subsequently and consistently been applied in many CAS cases.

Although this requirement for a high degree of confidence in the evidence when “serious offences” are involved originated primarily within the framework of disciplinary cases (as opposed to a case dealing primarily with eligibility, such as this one), the context in which the allegations regarding the evidence were made in this case marked it out to the Sole Arbitrator as being clearly the correct standard to apply. Specifically, the Appellant was alleging that the birth certificate and the nationality certificate presented by the Respondents were likely to have been forged, due to inconsistencies. The inconsistencies mentioned were that the name of the mother was spelled differently on the birth certificate on the one hand and on the nationality certificate on the other hand. In addition, the father (declarant) of the Player had not signed the birth certificate, which was intended on said document. Furthermore, a witness of the Appellant, a Nigerian lawyer, had testified that his research had revealed that the Nigerian documents in any case “prevail[ed]” over the provided Togolese documents.

For the Sole Arbitrator, by accusing the Respondent(s) of having provided forged documents, the Appellant had made very serious allegations. Although, as he had recalled above, these serious allegations were not to lead to any higher standard of proof being applied overall, he repeated that he needed to have a high degree of confidence in the quality of the evidence submitted by the Appellant in order to determine, to his comfortable satisfaction, that the Togolese documents produced by the Respondents were forgeries and that the player was in fact born in Nigeria. In his view, the Appellant had not met this standard or proven that the documents provided by the Respondents were forged. The revealed “inconsistencies” as well as the misspelling of the Player’s name were not of such seriousness as to sufficiently substantiate the Appellant’s allegations. The Sole Arbitrator could also not concur with the conclusion that the Nigerian documents had to “prevail” over the Togolese documents, and stated that some questions regarding the provided Nigerian documents remain unanswered too, e.g. why the Nigerian birth certificate had been issued 8 years after the birth of the Player. The Sole Arbitrator also wished to remark that both Parties could have provided more relevant evidence as to the place of birth of the Player. For example, neither Party had called the Player’s mother as a witness at the hearing on 14 June 2019. Further measures like presenting or at least requesting an opinion of an independent expert to determine the validity of the disputed documents or presenting requests for the hospital’s birth records could have been provided to further substantiate the Player’s place of birth.

In view of the above, the Sole Arbitrator held that neither the Respondents nor – and crucially, considering where the burden of proof lies, the Appellant – had produced evidence which met the requisite standard of giving the Sole Arbitrator a “high degree of

*confidence in the evidence*" on which to come to a conclusion as to the Player's place of birth. Therefore, by taking into account all the evidence, contradictory documents from two separate state authorities, contradictory witness statements, and inconsistencies in regard of evidence submitted by the Parties, the Sole Arbitrator was not in a position to determine, to his comfortable satisfaction, in which country the Player was born. For the reasons stated above, the Appellant was burdened with a *non-liquet* situation as a result of the outcome of these proceedings.

### **Decision**

Therefore, the appeal had to be dismissed in its entirety.

---

**CAS 2019/A/6313**

**Jarrian Lawson v. International Association of Athletics Federations (IAAF)**

6 March 2020

---

**Athletics (long jump; sprint); Doping (epitrenbolone); Proof of lack of intent in cases where the athlete cannot establish the origin of the prohibited substance; Overwhelming importance of the other elements of proof of lack of intent in such cases**

**Panel**

Mr Stephen Drymer (Canada), President

Prof. Richard McLaren (Canada)

Mr Murray Rosen QC (United Kingdom)

**Facts**

On 2 June 2018, Jarrian Lawson (the “Athlete” or “Appellant”), a professional American track and field athlete competing in long jump, as well as the 100m and 200m sprints, provided an out of competition urine sample at 08h03 in Arkansas. This was approximately 19 hours after he ate a teriyaki beef bowl at a restaurant. This sample was his first urination of the day. The doping control session was completed 17 minutes later, at 08h20.

On 14 June 2018, the Athlete’s A Sample was analyzed by the WADA-accredited laboratory in Los Angeles, California (the “Laboratory”) and revealed the presence of Epitrenbolone (or otherwise known as Trenbolone) (the “AAF”). Epitrenbolone is listed as in S1.1a Exogenous Anabolic Androgenic Steroids of the World Anti-Doping Agency 2018 Prohibited List. It is a non-specified substance prohibited in- and out-of-competition at all times.

Thereafter, the Appellant competed at the U.S. National Championships in Des Moines, Iowa on 21 June 2018, a meet in Rabat, Morocco on 13 July 2018, a meet in Sotteville-lès-Rouen, France on 17 July 2018 and a meet in London, England on 22 July 2018.

On 3 August 2018, the International Association of Athletics Federations (the “IAAF” or “Respondent”), by and through the Athletics Integrity Unit (“AIU”), notified the Appellant of his positive result and provisionally suspended him from any further competition.

On 9 August 2018, the Laboratory analyzed the Athlete’s B Sample, which confirmed the presence of Epitrenbolone.

On 10 August 2018, the Appellant was informed that the concentration of Epitrenbolone in his A-sample was 0.65ng/ml and the concentration in his B-sample was 0.80ng/ml.

On 23 August 2018 and 7 September 2018, the Appellant filed various submissions and expert evidence with the AIU seeking to lift his provisional suspension noting, in particular, that the source of the Epitrenbolone was contaminated meat ingested on 1 June 2018. In support of his explanation, the Athlete adduced the following evidence: (1) evidence that he ate a teriyaki beef bowl by way of (i) a restaurant receipt; (ii) bank account records confirming the purchase of lunch at the restaurant; and (iii) text message exchanges with Ms. Alexis McCain setting up the lunch meeting at the restaurant; (2) results of a (negative) hair analysis; (3) expert report; (4) pictures of the packaged meat received by the restaurant from National Beef Packing Company; and (5) affidavit from the Co-Owner of the restaurant stating that the meat used in the teriyaki beef bowl was New York

Strip Steak sourced from the Performance Food Group.

In response to the Athlete's submissions and expert evidence, the AIU requested that the Athlete provide additional information/documentation such as (1) purchase orders, invoices, receipts, etc. relating to the New York Strip Steak ordered by the restaurant (including relevant product codes, item IDs, and further confirmation of the specific supplier; (2) confirmation of the inventory management platform/software used by the restaurant and copies of all stock inventories related to the New York Strip Steak for a certain time period; and (3) copies of all refrigerator/storage records for all New York Strip Steak in the restaurant during a certain time period. On 13 December 2018, the Athlete informed the AIU that despite his efforts, the restaurant did not have the requested information but that even if it did, they would not produce them without a subpoena.

On 27 February 2019, the AIU sent a notice of Charge to the Athlete. On 4 March 2019, the Athlete accepted that he has committed an anti-doping rule violation (ADRV) but noted that he would challenge the consequences thereof.

On 24 May 2019, the Respondent's Disciplinary Tribunal, following a full hearing, determined that Jarrion Lawson had committed Anti-Doping Rule Violations pursuant to Articles 2.1 and Art. 2.2 ADR. As a result, a period of Ineligibility of four years was imposed upon the Athlete, commencing on the date of the Tribunal Award. His results from June 2, 2018 until the date of his Provisional Suspension on August 3, 2019 were disqualified with all resulting consequences including the forfeiture of any titles, awards, medals, points and prize and

appearance money pursuant to Article 10.8 ADR (the "Appealed Decision").

Following the hearing, on 14 June 2019, the Appellant volunteered for and underwent a polygraph examination by a former FBI polygraph chief, who reported that the Athlete was truthful when he said he did not intentionally ingest Epitrenbolone.

On 5 June 2019, the Athlete filed his statement of appeal against the Respondent with respect to the Appealed Decision in accordance with Article R47 et seq. of the Code of Sports related Arbitration (the "Code").

## Reasons

### 1. The Anti-Doping Rule Violation and Sanction

As noted above, the Athlete had explicitly accepted on 4 March 2019 the presence of the Prohibited Substance and that he had committed an ADRV under Art. 2.1 and Art. 2.2 of the IAAF ADR. However, he was contesting the sanction imposed upon him, arguing that the ADRV was not intentional.

The Panel recalled that in order to establish that a violation was not intentional, an athlete usually had to establish how the substance had entered his body. However the Panel also recalled that in "extremely rare" cases, there was a possibility for the athlete to demonstrate a lack of intent even where he could not establish the origin of the prohibited substance. The burden to establish the origin of the prohibited substance or pass through the "narrowest of corridors" otherwise to rebut the presumption of intentionality, was solely lying on the athlete. The Anti-Doping Organisation did not have the burden to hypothesise, still less prove an alternative source. And the athlete had in that regard to adduce specific evidence, as opposed to mere

speculation. Evidence establishing that a scenario is possible was not enough to establish the likely origin of the prohibited substance. In alleged meat contamination cases, it was usually necessary to trace the specific source of the meat and to demonstrate the likelihood that it was contaminated. The so-called “corridor” had to be sufficiently narrow to prevent intentionally doped athletes with a means of evading due sanctions, yet still wide enough to allow unintentionally doped athletes an opportunity to exculpate themselves by means of relevant and convincing evidence.

## 2. The Scientific Debates

The scientific debates regarding this case had focused first on the possibility or likelihood of a hormone implant being mistakenly injected into a cattle’s body rather than ear, and second on the possibility or likelihood hormone residues being present in a steak cut from the cattle’s longissimus muscle in sufficient concentration to cause the Athlete’s ADRV.

From all the evidence available, the Panel concluded on the first question that it was reasonably possible that a hormone implant was misplaced, but that, if the enquiry were limited to “*actual evidence*” of the “*specific origin*” of the beef consumed by the Athlete on 1 June 2018, and of the presence of Trenbolone in that beef, it was impossible to say that this had actually occurred in this case. However, for reasons developed in the Discussion section of the award, the Panel did not consider that the relevant enquiry was so limited.

As for the second question, the Panel emphasised that the data that had been produced by an expert, director of another WADA-accredited laboratory, in this case had shown that, indeed, many urine samples in 2018/19 for athletes in America (where Trenbolone is legal as a muscle promoter in

cattle) were positive for Trenbolone metabolites at low levels (of less than 2 ng/ml) and that the Athlete’s level was below 18 out of the 21 reported since 2013.

Thus, for the Panel, the state of the relevant science as presented to it, combined with the totality of the other evidence, viewed with common sense and bolstered by the Athlete’s credibility, had opened up the corridor for him to establish his lack of intentionality without concretely proving the origin of the tiny amount of Epitrenbolone found in his urine on 2 June 2018. No one could quantify by science the percentage likelihood that the particular steak that he had consumed, from the longissimus muscle, contained hormone residues from the implant in the particular cattle, details of which were not available, or the consequent likelihood that the quantity of Trenbolone in that steak had caused his ADRV. But for the Panel that was a reasonable possibility and, even if the likelihood were to be considered scientifically less than 50%, it would have been more than unfair and harsh to treat that as negating the Athlete’s efforts to do all that he could to obtain the best possible evidence.

## 3. Discussion

The Panel recalled that although the Disciplinary Tribunal had itself acknowledged the possibility for an athlete to rebut the presumption of intentionality without establishing the origin of the prohibited substance, it had nonetheless elected to concentrate its analysis on the origin of the prohibited substance. For its part, the Panel considered it appropriate and indeed necessary in the circumstances to take to broaden the enquiry and to take a different approach than that followed by the Disciplinary Tribunal, because it considered that it was effectively impossible in the present case for the Athlete to adduce the sort of “*actual evidence*”

required by the Disciplinary Tribunal to prove the origin of the substance found in his system.

Although it agreed with the IAAF that the available evidence concerning the proper administration of Trenbolone (by implantation or otherwise) in cattle might suggest, in the abstract, that the likelihood that the portion of beef consumed by the Athlete contained any Trenbolone was small, the Panel did not agree that this was effectively the end of the story. To the contrary, the very careful review and examination of the totality of the evidence and testimony in this procedure led the Panel to accept the Athlete's explanation that he had consumed beef which, on the balance of probabilities, had most likely been contaminated with Trenbolone.

As the latter was a substance prohibited by law from being sold for use in humans in the United States, no testing on humans was possible and as a consequence, there were no reliable studies that would help to determine whether – assuming that the beef eaten by the Athlete had been contaminated, which even the Respondent conceded was possible – the quantity consumed could have resulted in his AAF. While this made it impossible – for all intents and purposes – to prove scientifically that a particular hormone implant would result in the presence of Trenbolone in the particular cattle's longissimus muscle (i.e. the location of the Strip Steak consumed by the Athlete), and that that same substance would be found in the Athlete's specimen, in the content of the totality of the evidence in this case, the Panel considered that such an implant was the likely origin of the prohibited substance found in the Athlete's urine. But even if not, the Athlete's complete inability to scientifically prove such a conclusion was, in this exceptional case, not a bar to his defence and innocence. The Panel also agreed with the Athlete that IAAF's failure to report his positive test results for almost 2 months after the test was an aggravating factor

as it might well have caused potentially relevant evidence regarding the source of the prohibited substance to have become unavailable to him.

The Panel considered that if in this case the Athlete was not required to prove "the concrete origin" of the prohibited substance in order to demonstrate lack of intentionality in the circumstances, then the other elements of his proof of lack of intention loomed especially large; they were in fact overwhelming. It accepted that it could not say with scientific certainty the extent to which the portion of beef in question was or was not actually contaminated. It also accepted the evidence proffered by the Athlete concerning his approach to training and competition, his disdain for cheating and his impeccable history and attitude to "clean" sport, while underlining that this alone was not determinative. It further did not accept that the evidence of the Athlete's polygraph had necessarily to be considered inadmissible, or otherwise ignored, on principle, such as to deprive of a potentially relevant additional means of discharging the very heavy burden on him. More to the point, the Panel found that the polygraph evidence was at the very least sufficiently credible to warrant that it be taken into consideration, as supporting the Panel's assessment of the Athlete's credibility in denying any intentionally doping. Finally, it accepted the evidence regarding the hair analysis undertaken on the Athlete's behalf, though it found that the nature of the evidence, reliable as it might be, was of little relevance or weight in the determination of whether the Athlete might have unintentionally ingested Trenbolone. As for the Panel, what it did establish was that the Athlete had not been ingesting the prohibited substance on a longer time frame than this single instance.

#### 4. Conclusions

In sum, on very careful review and examination of the evidence and testimony in this procedure, the Panel found that

- (a) the scientific evidence, such as it was, had showed that it was reasonably plausible that the positive urine sample on 2 June 2018 had resulted from consumption the previous day of beef contaminated by a hormone implant;
- (b) the Athlete's credibility and history, supported by the tests for which he had volunteered and the evidence of his manager and trainer, went beyond a mere denial and corroborated his explanation;
- (c) common sense was to count strongly against it being a mere coincidence that he had tested positive, for such a tiny amount of a dangerous and illegal prohibited substance as to be undetectable in his hair, and for no rational benefit, so soon after having eaten beef from hormone-treated cattle (after numerous tests over his previous career, always negative including tests during a period of injury in 2017/18 and in competition on 20 May 2018);
- (d) it was more likely than not, that the origin of the Epitrenbolone was contaminated beef innocently consumed and that this was indeed one of those rare cases where the impossibility of proving scientifically that the steak consumed did or did not contain hormone residues did not debar the athlete from establishing his innocent lack of intent under Art 10.2.1(a) of the IAAF ADR.

The Panel was therefore unanimously of the view that the Athlete had discharged the burden incumbent on him in the circumstances to establish that he bore No Fault or Negligence for his positive finding under Article 10.4 of the IAAF ADR, and thus for his period of ineligibility to be eliminated.

## Decision

As a result, the Panel upheld the appeal and found that the Athlete had committed an Anti-Doping Rule Violation but bore no fault or negligence and no period of ineligibility had to be imposed on him.

---

**CAS 2019/A/6388**

**Karim Keramuddin v. Fédération Internationale de Football Association (FIFA)**

14 July 2020

---

**Football; Violation of the FIFA Code of Ethics; Hearing of anonymous witnesses and fundamental right to a fair trial; Right to be heard and to a fair hearing and de novo hearing; Assessment of the evidence; Lack of protection, respect or safeguard (violation of articles 23 para. 1 FCE); Sexual harassment (violation of articles 23 para. 4 FCE); Threats and promises of advantages (violation of articles 23 para. 5 FCE); Abuse of position (violation of article 25 FCE); Proportionality of the sanction**

**Panel**

Prof. Luigi Fumagalli (Italy), President  
The Hon. Michael Beloff QC (United Kingdom)

Mr José María Alonso Puig (Spain)

**Facts**

This appeal is brought by Mr Keramuddin Karim against a decision of the Adjudicatory Chamber of the FIFA Ethics Committee taken on 8 June 2019 (the Appealed Decision), which held that Mr Karim violated Articles 23 (*Protection of physical and mental integrity*) and 25 (*Abuse of position*) of the FIFA Code of Ethics, 2018 edition (FCE), and sanctioned him with a lifetime ban from taking part in any football-related activity at national and international level (administrative, sports or any other) and a fine of CHF 1,000,000.

The Appellant, Mr Karim, is an Afghan national who was the President of the Afghanistan Football Federation (AFF) from

2004 until December 2018, when FIFA imposed on him a provisional suspension from all football-related activity. He was also a member of the Organizing Committee for the FIFA U-20 World Cup from 2012 to 2014.

The Respondent, FIFA is the world governing body of international football.

On 30 November 2018, the Chairperson of the Investigatory Chamber (IC) of the FIFA Ethics Committee (FIFA Ethics Committee) sent a letter to the AFF in which she:

- i. informed the AFF that the IC, pursuant to Article 59 FCE, had initiated a preliminary investigation into serious allegations of "*severe mental, physical, sexual and equal rights-abuse of the female players by male Afghan Football Federation-official*" made public by "Hummel" (the main sponsor of the AFF women's national team); and
- ii. requested the AFF to provide the IC with all relevant information in its possession related to the matter.

On 9 December 2018, the Attorney General of Afghanistan, Mr Mohammad Farid Hamidi, informed FIFA that his office (the AGO) had, a few days before, commenced an investigation into the matter and had provisionally suspended the Appellant.

On 10 December 2018, the IC interviewed five players – Player A, B, C, D and E – by Skype or telephone.

On 12 December 2018, the IC provisionally suspended the Appellant for 90 days.

On 7 May 2019, the Chairperson of the IC issued her final report in the investigation, concluding that the Appellant had indeed committed violations of Articles 13 and 15 FCE, of Article 23 paras. 1, 3, 4, and of Article 5 FCE.

On 8 June 2019, the Adjudicatory Chamber of the FIFA Ethics Committee issued the Appealed Decision, ordering as follows:

- "1. Mr Keramuudin Karim (sic) is found guilty of infringement of art. 23 (Protection of physical and mental integrity) and art. 25 (Abuse of position) of the FIFA Code of Ethics.*
- 2. Mr Keramuudin Karim (sic) is hereby banned from taking part in any kind of football-related activity at national and international level (administrative, sports or any other) for life as of notification of the present decision, in accordance with Article 7 lit. j) of the FIFA Code of Ethics in conjunction with Article 22 of the FIFA Disciplinary Code.*
- 3. Mr Keramuudin Karim (sic) shall pay a fine in the amount of CHF 1,000,000 within 30 days of notification of the present decision. (...) (...)"*

On 6 July 2019, the AGO issued an “accusation letter” against the Appellant and other AFF officials (the Accusation Letter) in which it concluded *inter alia* – based on the testimony of Players A, B, C and D to the AGO, as well as that of Witnesses G, H and I, AFF officials, AFF employees, and Ms Khalida Popal (a former head of the AFF women’s football department) – that the Appellant had raped Player C and Ms Neda Hussaini (another female football player) and “*intend[ed] and start[ed] to rape*” Players A, B, D and a player nicknamed “Rahima”, in violation of the penal code of Afghanistan.

In this regard, the Appellant’s counsel confirmed during the CAS hearing that there is currently an arrest warrant out in Afghanistan for the Appellant.

On 24 July 2019, the Appellant filed with the Court of Arbitration for Sport (CAS) a Statement of Appeal, in accordance with Articles R47 and R48 of the Code of Sport-related Arbitration (the CAS Code), to

challenge the Appealed Decision.

On 10 August 2019, pursuant to Article R51 of the CAS Code, the Appellant filed his Appeal Brief.

On 10 October 2019, in accordance with Article R55 of the CAS Code, the Respondent filed its Answer, along with exhibits which included anonymous witness statements from Players A, B, C, D and F. In its Answer, the Respondent made the following evidentiary requests for the Panel:

- i. to hear its witnesses anonymously;
- ii. to consider their witnesses’ statements as evidence in chief, so that the witnesses would only be subject to cross-examination by the Appellant and to questions from the Panel, in order to “*avoid further traumatization ... by making them re-live the details of what can only be qualified as a horrendous experience ...*”;
- iii. to order the Appellant to provide prior to the hearing the questions he intended to ask the Respondent’s witnesses during cross-examination, in order to ensure that the questions were limited to factual issues and not aimed at identifying the protected witnesses.

On 21 October 2019, the Panel granted the Appellant’s request to be permitted a second round of written submissions.

On 22 November 2019, the Panel informed the Parties that, after examining their arguments on the issue of protected witnesses, it had decided to grant the Respondent’s request to hear witnesses A to I anonymously, but also to grant the Appellant the opportunity to cross-examine them.

On 3 December 2019, the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure, which was accepted and

countersigned by the Appellant and the Respondent on 16 and 11 December 2019, respectively. The Order of Procedure confirmed, *inter alia*, the CAS jurisdiction to hear the appeal brought by the Appellant.

On 30 January 2020, the Appellant submitted to the Panel the List of Questions to the Respondent's Witnesses. The questions were directed to Players A, B, C, D, and F, as well as Witnesses G and I.

On 4 February 2020, the CAS Court Office informed the Parties that the Panel had decided to confirm the hearing for 11 and 12 February 2020, due to the considerable time spent and expense incurred already to arrange it, and invited the Appellant to organize his and his witnesses' participation by video-conference or telephone or to specify the detailed reasons (other than poor Internet or telephone connections) why he or his witnesses would, if that were the case, be unavailable to participate.

On 10 February 2020, the CAS Court Office informed the Appellant's counsel that he was authorized to attend the hearing by video and requested his Skype contact details. The Appellant's counsel agreed to having the Respondent's witnesses examined Day 1 and requested that after their examination, the hearing be adjourned to a later date until the Appellant had an opportunity to apply for and obtain a visa to Switzerland from Tajikistan to appear in person to the CAS, and until the Appellant's witnesses could travel from Afghanistan to another country, where they would have a better telephone or internet connection which would enable them to testify. The Respondent objected to the Appellant request to postpone the hearing. The Panel indicated it would decide on the Appellant's request in the course of Day 1 of the hearing.

The Appellant's counsel was connected to the CAS hearing room through Skype. He was not connected on a separate line with the Appellant to consult him in real time as he had indicated on 7 February 2020 he would do. As for the Respondent's witnesses and their interpreter, they were connected to the CAS hearing room though a phone call placed on a speaker. During Day 1 the Panel announced its decision to deny the Appellant's request to adjourn Day 2 of the hearing since the Appellant had ample time to make the necessary arrangements to ensure that he and his witness would be able to testify. The Panel urged the Appellant's counsel to make the Appellant and his witnesses available for examination on Day 2 of the hearing considering that it would not be possible for the witnesses to travel to Switzerland in any foreseeable future, since their visas had been denied. At the close of Day 1 of the hearing, the Appellant requested that Day 2 of the hearing be made public pursuant to Article R57 of the CAS Code. The Panel denied the Appellant's request for a public hearing for two reasons. First, the request was made untimely and, as a consequence, would not give the CAS sufficient time to prepare and organize a public hearing. Second, in accordance with Article R57 of the CAS Code, publicity would prejudice the interests of justice by creating an imbalance between the treatment of Respondent and Appellant's cases. Moreover, even if the Parties had no privacy interests of their own to protect, protection of the witnesses' private lives required such denial. The right to a fair trial under Article 6 ECHR does not preclude protection of rights under Article 8 of the ECHR (*Right to respect for private and family life*), which itself extends to witnesses.

On day 2 of the hearing, the Panel moved on to the questioning of the Appellant. Unfortunately, despite repeated attempts, it was not possible to establish a connection with the Appellant by Skype or telephone. The

Panel then tried to connect with the Appellant's witnesses, who were all together in Kabul. However, despite repeated attempts this too was not possible by Skype or telephone due to a poor connection.

At the close of the hearing, the Panel took note of the Appellant's procedural objection to the anonymity of the protected witnesses and of his request to have his witnesses testify through a post-hearing video recording. It also took note of FIFA's confirmation that it was satisfied with the manner in which the Panel conducted the hearing and that it had no procedural objections.

On 28 February 2020, the CAS Court Office informed the Parties that the Panel had decided, for reasons that would be provided in the final award, to (i) authorize the Appellant to file within 20 days a video declaration subtitled into English, but (ii) reject the Appellant's request to submit a post-hearing video-recorded examination of his witnesses followed by post-hearing briefs.

On 4 May 2020, not having received the video declaration from the Appellant or any further communication related thereto, the CAS Court Office informed the Appellant that he would no longer be allowed to submit any declaration and that the Panel would proceed with the award.

## Reasons

### 1. Hearing of anonymous witnesses and fundamental right to a fair trial

The Appellant objected to the Respondent's requests to hear its witnesses anonymously, arguing that pursuant to Article 6(1) ECHR he has the right to be heard and is entitled to a fair trial and, as such, must be given the opportunity to confront his accusers. In the Appellant's view, anonymity for the

Respondent's witnesses was not warranted because the Respondent failed to prove that the Appellant ever threatened the witnesses or their families.

As a matter of principle, the hearing of "anonymous" witnesses is not *per se* prohibited as running against the fundamental right to a fair trial, as recognized by the European Convention on Human Rights (ECHR, Article 6) and the Swiss Constitution (art. 29(2)). As a result, when evidence is offered by means of anonymous witness statements, the right to be heard and to a fair trial is affected, but anonymous witnesses may still be admitted without violating such right if the circumstances so warrant and provided that certain strict conditions are met. In this respect, cross-examination should be ensured through "audiovisual protection" and by an in-depth check of the identity and the reputation of the anonymous witness by the court.

The Panel found that the anonymity of the witnesses was necessary to avoid a risk of retaliation by the Appellant they were testifying against if their identities were known. The extension of certain deadlines imposed under the CAS Code were considered by the Panel to counterbalance the limitations placed on the right to check the identity of the witnesses.

### 2. Right to be heard and to a fair hearing and *de novo* hearing

On 28 February 2020, the Panel rejected the Appellant's request for a post-hearing video-recorded examination of his witnesses, while granting its request to submit his own video declaration subtitled into English.

At the hearing the Appellant's counsel argued that the Appellant's right to be heard would be violated if the hearing was not adjourned until the Appellant and his witnesses could attend a hearing at the CAS, or until he could make the

necessary arrangements for them to testify by video-link or phone, or unless the Panel allowed him to submit a post-hearing video declaration and conduct a post-hearing video-recorded examination of the witnesses.

In the Panel's view, the Appellant's right to be heard has not been violated by the decision not to postpone the hearing because of the unavailability of the Appellant and his witnesses on 11 and 12 February 2020 or by the Panel's decision to reject the Appellant's request to submit a post-hearing video-recorded examination of his witnesses.

Indeed, under Article R44.2 of the CAS Code, it is a party's responsibility to make itself and its witnesses available for the hearing. In this respect, the Appellant failed to exploit the opportunity to make its case by failing to be present at the hearing despite the fact that the hearing date was set by the panel in agreement with the parties and while being given the right to attend the hearing in person or through telephone or video-conference. Furthermore, allowing post-hearing video-recorded examination of the witnesses would violate the applicable rules to the proceeding, in particular Article R51 of the CAS Code. In this respect, under Swiss law, the right to produce evidence must be exercised timely i.e. before the closing of the hearing and according to the applicable formal rules i.e. the authenticity of the recording and the ability to cross-examine the witnesses should be guaranteed. In any event, the appeals arbitration proceeding rectifies any alleged procedural violations committed by the previous instance, because the CAS panel is hearing the case *de novo*.

### 3. Assessment of the evidence

The case revolves heavily around the depositions rendered by the witnesses adduced by the Respondent, alleged victims of the infringements imputed to the Appellant.

The Appellant has raised a number of alleged inconsistencies in the witnesses' depositions. However, in the Panel's view, the witnesses' depositions are fully consistent in all material respects.

Indeed, the Panel finds that there is no reason to doubt the credibility and reliability of similar witnesses' depositions where there is no satisfying evidence that the witnesses had personal undisclosed reasons to accuse a football official of violations of the FCE or that they concocted and coordinated their stories. Moreover, if an anonymous witness statement is insufficient on its own to convict an individual, the fact that there is not only *one* anonymous witness statement on file but *five* separate, coherent, consistent and reliable witness statements from anonymous witnesses who were subject to cross-examination is relevant. Furthermore, a document supporting the depositions of the witnesses before the CAS issued from the office of the attorney general of the relevant country, can be admitted as additional evidence.

#### 4. Lack of protection, respect or safeguard (violation of articles 23 para. 1 FCE)

According to Article 2.1, the FCE applies to all "*officials*". By virtue of his position as the AFF President during the time of the incidents, the Appellant was an "*official*" as defined under the FCE and, as such, bound by the FCE.

Article 23 FCE para. 1 entitled (*Protection of physical and mental integrity*) reads as follows: "*1. Persons bound by this Code shall protect, respect and safeguard the integrity and personal dignity of others*".

Under Article 23, para. 1 FCE, any football official has the duty to protect, respect and safeguard the integrity and personal dignity of others. It is without a doubt that by verbally and sexually assaulting and abusing four

players and by raping another player, a football official fails to uphold the principles of protection and safety embedded in that provision. The Appellant thus violated Article 23, para. 1 FCE.

#### 5. Sexual harassment (violation of articles 23 para. 4 FCE)

According to articles 23 para. 4 FCE, sexual harassment is forbidden.

Based on the common meaning of “*sexual harassment*” in the English language, it is without question that a football official sexually harasses players, both verbally and/or physically, by inappropriately talking to them, sexually assaulting and abusing them and even raping one.

#### 6. Threats and promises of advantages (violation of articles 23 para. 5 FCE)

Under Article 23, para. 5 FCE, a football official has a duty to refrain from threatening, coercing or making promises of advantages. A football official violates this provision by pointing a gun at a player after having raped her and threatening to fatally shoot her in the head if she does not keep quiet about the incident. Additionally, he violates this provision by offering another player sporting and financial rewards if she gives in to his sexual advances and threatening to fire her if she does not.

#### 7. Abuse of position (violation of article 25 FCE)

Article 25 FCE entitled “*Abuse of position*” provides that:

“1. Persons bound by this Code shall not abuse their position in any way, especially to take advantage of their position for private aims or gains.

2. Violation of this article shall be sanctioned with an

*appropriate fine of at least CHF 10,000 as well as a ban on taking part in any football-related activity for a minimum of two years. The sanction shall be increased accordingly where the person holds a high position in football, as well as in relation to the relevance and amount of the advantage received”.*

The Appellant used his position as the AFF President and, more specifically, the players’ sporting and financial dependency on him for private aims and gains – *i.e.*, to try to obtain sexual favors (*e.g.*, Player B to whom he offered a spot on the national team and a salary raise in exchange thereof) or simply to get the players to meet him personally in his offices so that he would be in the position to sexually harass and abuse them (*e.g.*, Player A who went to collect a letter as instructed, Player C who went to obtain money owed, and Player D who followed the Appellant’s instructions and went in the belief that she would have a meeting about her absences and potential expulsion).

The Panel found that the Appellant took advantage of his position as the AFF President for private aims or gains and thus violated Articles 25 FCE.

#### 8. Proportionality of the sanction

As the Appellant violated both Articles 23 and 25 FCE, the Panel must start by determining which breach is “*most serious*”.

While both breaches are extremely serious, the Appellant’s principal and, in turn, more serious breach is that of Article 25 FCE for the abuse of his position as the AFF President. This is because all of the Article 23 FCE violations the Appellant committed – *i.e.*, the violation of the players’ integrity and personal dignity, the sexual harassment, and the threats and promises of advantages – are only possible due to his position as the highest-ranking official of the AFF.

Abusing one's position to sexually harass, abuse and even rape is of the most serious, illegal, and immoral kind and, as such, there is an obvious and substantial need to deter similar misconduct in the future from any FIFA officials. It is an offence that is disgraceful and which cannot be tolerated from any official, let alone the president of a national federation, who bears the responsibility to set a proper example for the federation's employees, the others individuals affiliated thereto, and more generally to all those involved in the world of football. If lifetime bans from football-related activity and fines of CHF 1,000,000 have been imposed on officials for offences related to bribery, corruption and match-fixing, the same sanction – being the maximum allowable under the FIFA regulations – is certainly proportionate for a case of unprecedented gravity such as abusing one's position to sexually harass, abuse and rape.

In light of the above, the Panel confirms the sanction of a life ban and CHF 1,000,000 fine.

### **Decision**

The appeal filed by Mr Keramuddin Karim on 25 July 2019 against the decision of the Adjudicatory Chamber of the FIFA Ethics Committee rendered on 8 June 2019 is dismissed. The decision of the Adjudicatory Chamber of the FIFA Ethics Committee rendered on 8 June 2019 is confirmed.

---

**TAS 2019/A/6421**

**Olympique des Alpes SA (OLA) c.  
Geoffrey Mujangi Bia & Kayserispor  
Kulübü Dernegi**

17 juin 2020

---

**Football; Rupture unilatérale de contrat injustifiée; Analogie entre les notions de “juste cause” de résiliation et de “juste motifs” de résiliation; Paiement d’une indemnité à caractère pénal en cas de rupture injustifiée avec effet immédiat; Qualification d’un bonus comme un élément de salaire**

**Formation**

M. Jacques Radoux (Luxembourg), Président

Me Olivier Carrard (Suisse)

Me Carine Dupeyron (France)

**Faits**

Olympique des Alpes SA (“l’Appelant” ou “l’OLA”) est un club de football professionnel, membre de la Swiss Football League (“la SFL”) et de l’Association suisse de football (“l’ASF”), elle-même membre de la Fédération Internationale de Football Association (“FIFA”), participant au championnat suisse de première division sous la dénomination “FC Sion”. M. Christian Constantin est l’administrateur unique de l’OLA. Il est en outre le Président du FC Sion, organisé sous la forme juridique d’une association (cf. art. 60 ss. du [Code Civil suisse (“CC”)] CC) et membre de l’ASF.

M. Geoffrey Mujangi Bia (“le Premier Intimé” ou “le Joueur”), né le 12 août 1989, de nationalité belge, est un joueur professionnel de football.

Kayserispor Kulübü Dernegi (“le Second Intimé” ou “Kayserispor”) est un club de

football professionnel turc affilié à la Fédération Turque de Football, elle-même affiliée à la FIFA.

Cette dernière est l’instance dirigeante du football au niveau mondial. La FIFA a, notamment, adopté le Règlement sur le Statut et le Transfert des Joueurs de la FIFA (“le RSTJ”) et institué une Chambre de Résolution des Litiges (la “CRL”).

Le 31 août 2015, l’Appelant et le Joueur ont conclu un contrat de travail (“le Contrat”) portant sur la période allant du 31 août 2015 au 30 juin 2018.

L’article 4 du Contrat, intitulé “*Résiliation du contrat avec effet immédiat sans justes motifs*”, prévoit:

*“1. Si une partie résilie le contrat avec effet immédiat sans juste motif, l’indemnité sera fixée conformément à la loi (art. 337c et art. 337d CO) en tenant compte des dispositions du Règlement de l’ASF sur le statut des joueurs non amateurs et de l’art. 17 du [RSTJ] et de leur interprétation par le TAS”.*

*Inter alia* conformément à l’annexe 3 au Contrat, la rémunération du Joueur se compose notamment des montants “bruts” suivants: (i) un salaire annuel de base, versé en dix mensualités la première année et en douze mensualités les années suivantes, de EUR 34’000 nets par mois; (ii) des primes de fidélité nettes suivantes: 2 primes de chacune EUR 146’500 les 31 octobre 2015 et 30 avril 2016; 4 primes de chacune EUR 196’000 les 31 octobre 2016, 30 avril 2017, 31 octobre 2017 et 30 avril 2018, étant indiqué que “les primes de fidélités sont servies pour autant que le joueur soit encore sous contrat avec le club au moment de leur échéance”; et (iv) des primes de match prévues pour l’équipe.

Le 28 mai 2017, le FC Sion a joué un match de championnat ayant une importance certaine

dès lors qu'il avait encore la possibilité lors de ce match et du match suivant, qui étaient les deux derniers matchs de la saison, de se qualifier pour une compétition européenne. Le Joueur est rentré à la 77<sup>ème</sup> minute de jeu. L'équipe adverse égalisait à quelques minutes de la fin. Estimant que le Joueur avait, à dessein, fourni une mauvaise prestation lors dudit match, Christian Constantin a suivi l'équipe dans le tunnel qui relie le terrain aux vestiaires et a demandé des explications au Joueur quant à la qualité de sa prestation. S'en est suivi un échange verbal qui a vite dégénéré. Toutefois, les versions de cet incident d'après match divergent.

Le 31 mai 2017, l'OLA a, par lettre du même jour, résilié le Contrat avec effet immédiat pour de justes motifs, conformément à l'article 3 al. 1 dudit Contrat. La lettre précisait que le motif principal "*réside dans l'agression physique dont vous vous êtes fait l'auteur sur Christian Constantin, président du club, le dimanche 28 mai 2017 à Saint-Gall, juste après le match*".

Le 2 juin 2017, le Joueur a formellement contesté les motifs de son licenciement avec effet immédiat tels qu'ils ressortaient de la lettre du 31 mai 2017.

Le 30 juin 2017, le Joueur et Kayserispor ont conclu un contrat de travail. Aux termes de ce contrat, la rémunération du Joueur était fixée à EUR 850'000 pour la saison 2017/2018, EUR 650'000 pour la saison 2018/2019 et EUR 700'000 pour la saison 2019/2020.

Le 7 septembre 2017, le Joueur a déposé une plainte devant la FIFA contre l'OLA, demandant *inter alia* la condamnation de ce dernier au paiement d'un montant de EUR 849'193,96 et d'un montant de CHF 47'931 (*inter alia* EUR 369'260,10 au titre de primes de fidélité; EUR 34'000 au titre du salaire net de mai 2017; EUR 399,999,90 (6 x EUR 66'666,65) et CHF 34'725 (6 x CHF 5'787,50)

correspondant à six mois de rémunération en guise de compensation pour rupture du contrat en application de l'article 337c al. 3 CO; CHF 10'000, au titre de dommages moraux (article 49 CO).

À l'appui de sa plainte, le Joueur faisait, en substance, valoir que les accusations contenues dans la lettre de résiliation étaient incorrectes et que, à la suite du match du 28 mai 2017, il a été poursuivi et verbalement agressé par Christian Constantin qui lui reprochait d'avoir, à dessein, livré une mauvaise performance. Dans ce contexte, tout en admettant avoir saisi le pull-over que Christian Constantin portait sur les épaules, le Joueur nie avoir eu un contact physique avec ce dernier et avance qu'il l'a menacé du non-paiement des rémunérations dues. Lorsque d'autres personnes se sont jointes, le Président du club a prétendument perdu son calme et a injurié le Joueur. Partant, l'OLA n'aurait pas eu de juste motif pour résilier le Contrat. En outre, le Joueur soutenait *inter alia*, notamment, qu'une partie des primes de fidélité ne lui avait pas été versée, alors même que leur versement n'était soumis à aucune autre condition que celle que le Joueur soit encore sous contrat; qu'il n'avait pas reçu le salaire du mois de mai 2017 et que le fait qu'il avait trouvé un nouvel employeur, auprès duquel sa rémunération mensuelle dépassait celle perçue auprès de l'OLA, n'affectait pas son droit d'obtenir, en application du droit suisse, une compensation pour rupture du contrat de la part de l'OLA.

L'OLA, pour sa part, considérait que la plainte devait être rejetée. À l'appui de sa position, l'OLA faisait valoir que, avant l'incident du 28 mai 2017, le Joueur a été blessé à plusieurs reprises et n'a donc pas été disponible pour jouer. Ceci aurait eu une incidence sur le montant des salaires dus par l'OLA, puisqu'une partie du salaire devait être prise en charge par l'assurance-accident. Le Joueur n'ayant pas compris les incidences de ses absences pour

blessure sur son salaire, il aurait commencé à adopter une attitude négative qui aurait culminé dans le match du 28 mai 2017, qui fut un match décisif et dans lequel le Joueur aurait, à dessein, livré une piètre performance. Selon l'OLA, après la fin de ce match, Christian Constantin aurait suivi le Joueur afin d'obtenir, de la part de ce dernier, des explications quant à ses performances sur le terrain. Cette explication aurait dégénéré au point que le Joueur aurait saisi Christian Constantin à la gorge ainsi qu'au bras gauche, infligeant au Président du club des blessures constatées par certificat médical du 30 mai 2017. Dans ces conditions, l'OLA n'aurait eu d'autre solution que de résilier le Contrat avec effet immédiat. Les montants réclamés par le Joueur au titre de salaires dus ne seraient pas en ligne avec le droit suisse, dès lors que les primes de fidélité ne feraient pas partie du salaire brut du Joueur. En outre, les salaires du Joueur ayant été couvert par une assurance complémentaire jusqu'à hauteur d'un montant brut de CHF 500'000, le montant annuel dépassant cette somme ne serait pas couvert. Partant, l'OLA n'aurait pas à payer le montant total des primes de fidélité. Toujours selon l'OLA, il aurait, alors que le Joueur était encore sous contrat avec l'OLA, été contacté par Kayserispor au sujet d'un transfert potentiel du Joueur. Eu égard à toutes ces considérations, l'OLA considérait, d'une part, qu'il avait eu de justes motifs pour résilier le Contrat et, d'autre part, que le Joueur ne serait dès lors pas en droit d'obtenir un dédommagement ou une compensation au titre de l'article 337c al. 3 CO ou de l'article 49 CO. En conséquence, l'OLA a déposé une demande reconventionnelle contre le Joueur et Kayserispor sollicitant *inter alia* le paiement de EUR 1'250'000 ou CHF 1'420'000 augmentés de 5% l'an d'intérêts moratoires pour perte d'une chance de vendre le Joueur pour lequel l'OLA avait versé une somme de transfert de EUR 1'250'000 et l'imposition de sanctions au Joueur ainsi qu'à Kayserispor.

La Décision attaquée de la CRL a partiellement accepté la demande du joueur et rejeté la demande reconventionnelle du FC Sion - Olympique des Alpes SA qui a été condamné à payer au joueur les rémunérations impayées d'un montant de EUR 403'260,10, majorées des intérêts de 5 % *p.a.* dans un délai de 30 jours à compter de la date de notification de la décision et une indemnité pour rupture de contrat d'un montant de EUR 34'000, majorée des intérêts de 5 % *p.a.*

Le 19 août 2019, l'Appelant a déposé, une déclaration d'appel au Greffe du Tribunal Arbitral du Sport à Lausanne, Suisse ("le TAS"), contre le Joueur et Kayserispor concernant la Décision attaquée.

## Considérants

### 1. Analogie entre les notions de "juste cause" de résiliation et de "juste motifs" de résiliation

Les articles 13 et 14 RSTJ correspondent aux règles du droit suisse. Ainsi, il résulte de l'article 334 al. 1 CO qu'il ne peut pas être mis fin aux contrats de travail conclus pour une durée déterminée par une résiliation ordinaire préalablement à l'échéance convenue. Un accord entre les parties ou une cause extraordinaire de résiliation est nécessaire, en particulier les justes motifs au sens de l'article 337 CO (TAS 2016/A/4569).

Le TAS tend à interpréter la notion de "*juste cause*" de l'article 14 RSTJ à l'aune de la notion de "*justes motifs*" de l'article 337 CO (TAS 2006/A/1062; TAS 2008/A/1447 et CAS 2013/A/3091, 3092 & 3093), retenant que, conformément au principe général consacré à l'article 8 CC, la charge de la preuve de l'existence de justes motifs de résiliation incombe à la partie qui résilie le contrat (CAS 2013/A/3091, 3092 & 3093).

S'agissant de la résiliation avec effet immédiat pour de justes motifs, il y a lieu de relever que, d'après l'article 337 al. 2 CO, sont considérées comme de justes motifs, notamment, toutes les circonstances qui, selon les règles de la bonne foi, ne permettent pas d'exiger de celui qui a donné le congé la continuation des rapports de travail. Mesure exceptionnelle, la résiliation immédiate pour justes motifs doit être admise de manière restrictive. D'après la jurisprudence, les faits invoqués par la partie qui résilie doivent avoir entraîné la perte du rapport de confiance qui constitue le fondement du contrat de travail. Seul un manquement particulièrement grave peut justifier le licenciement immédiat du travailleur. En cas de manquement moins grave, celui-ci ne peut entraîner une résiliation immédiate que s'il a été répété malgré un avertissement. Par manquement, on entend en règle générale la violation d'une obligation imposée par le contrat mais d'autres faits peuvent aussi justifier une résiliation immédiate (ATF 4A\_622/2018, du 5 avril 2019, consid. 5; 130 III 28 consid. 4.1. p. 31 et 129 III 380 consid. 2.2 p. 382).

Le juge apprécie librement, au regard des principes du droit et de l'équité déterminant selon l'article 4 CC, si le congé abrupt répond à de justes motifs (article 337 al. 3 CO). À cette fin, il prend en considération tous les éléments du cas particulier, notamment la nature et l'importance des manquements (ATF 4A\_622/2018, du 5 avril 2019, consid 5; ATF 130 III 28 consid. 4.1 p. 32; 127 III 351 consid. 4a p. 354). Il appartient à celui qui se prévaut de l'existence de justes motifs de prouver leur existence (ATF 130 III 213 consid. 3.2).

En l'espèce, la Formation considère que l'OLA n'a pas réussi à rapporter à sa confortable satisfaction la preuve que les faits se sont déroulés tels que décrit par l'Appelant.

À cet égard, il y a lieu de constater, premièrement, qu'alors même qu'il ressort du témoignage de Christian Constantin qu'au moment de l'incident, des joueurs et des officiels de Saint-Gall et du FC Sion étaient présents, l'OLA n'a cité, à côté de la personne de Christian Constantin, qu'un seul témoin, à savoir M. Degennaro, employé du FC Sion. Il ressort du témoignage de M. Degennaro que ce dernier est un témoin crédible dès lors que sa description des faits diffère de celle fournie par Christian Constantin. Or, force est de constater que seule une de ces deux versions des faits peut être correcte et que celle livrée par M. Degennaro est plus susceptible de corroborer la version des faits avancée par le Premier Intimé, qui dit avoir tiré sur le pull qui pendait sur les épaules de Christian Constantin, que celle avancée par ce dernier.

Deuxièmement, le certificat médical soumis par l'OLA, qui a été émis par le médecin attitré du FC Sion, n'est accompagné d'aucune preuve visuelle telle une photographie. En l'espèce, ce certificat médical ne permet donc pas d'établir un lien entre les lésions et la rougeur y constatées et l'incident intervenu après ledit match. Le certificat en question n'a pas une valeur probante suffisante et ne permet pas de confirmer de manière univoque la version des faits avancée par Christian Constantin.

Ainsi, en l'absence d'autres éléments de preuves, la Formation se retrouve dans une situation où, pour considérer que l'OLA a prouvé l'existence de justes motifs, elle devrait se fier sans réserve au seul témoignage de Christian Constantin, alors même que le Premier Intimé conteste formellement la voie de fait alléguée. Or, aucun motif ne devrait amener la Formation à accorder plus de crédibilité à Christian Constantin qu'au Premier Intimé. Dans ces conditions, la Formation est empêchée d'accorder à la déclaration de Christian Constantin la force probante nécessaire pour parvenir à la

conclusion que l'OLA aurait établi l'existence du motif avancé pour justifier la résiliation avec effet immédiat du Contrat. La CRL étant arrivée à la même conclusion dans la Décision attaquée, il n'y a pas lieu pour la Formation d'annuler ou de réformer ladite décision sur ce point.

Etant donné que la résiliation avec effet immédiat du Contrat n'est pas intervenue pour de "justes motifs" au sens de l'article 337c CO et donc sans "juste cause" au sens de l'article 14 RSTJ, l'article 17 al. 1 RSTJ prévoit, notamment, que la partie ayant rompu le contrat est tenue de payer une indemnité et si rien n'est prévu par le contrat, cette indemnité est calculée en tenant compte du droit en vigueur dans le pays concerné, des spécificités du sport et de tout autre critère objectif.

Le contrat, en son article 4, se borne à prévoir que l'indemnité due sera fixée selon les dispositions du CO en tenant compte, notamment, de l'article 17 RSTJ. Il convient, dans ces conditions de se référer, d'abord, aux dispositions pertinentes du CO, à savoir son article 337c. Conformément à l'article 337c al. 1 CO, "[l]orsque l'employeur résilie le contrat sans justes motifs, le travailleur a droit à ce qu'il aurait gagné, si les rapports de travail avaient pris fin à l'échéance du délai de congé ou à la cessation du contrat conclu pour une durée déterminée". L'alinéa 2 de ce même article 337c CO précise que l'"[o]n impute sur ce montant ce que le travailleur a épargné par suite de la cessation du contrat de travail ainsi que le revenu qu'il a tiré d'un autre travail ou le revenu auquel il a intentionnellement renoncé". Ces deux dispositions correspondent, en substance, à l'article 17 al. 1 sous i.) et ii.) RSTJ.

En l'espèce, le revenu total auquel le Premier Intimé pouvait prétendre jusqu'à la fin du Contrat s'élevait à EUR 834'000 et en application de son engagement avec Kayserispor sa rémunération auprès de ce club jusqu'à l'échéance du Contrat s'élevait à EUR

850'000. Dès lors que l'imputation prévue à l'article 337c al. 2 CO ne laisse pas de montant résiduel dont le Premier Intimé pourrait se dire créancier, il convient de considérer que ce dernier n'a plus d'intérêt positif dont exiger l'indemnisation en application de cette disposition.

## 2. Paiement d'une indemnité à caractère pénal en cas de rupture injustifiée avec effet immédiat

La circonstance, relevée par le Premier Intimé, que selon la jurisprudence suisse le nouveau salaire ne peut être imputé que sur les mois pendant lesquels le travailleur a occupé son nouvel emploi et non sur la période au cours de laquelle il était sans emploi (OGer Lu, 14 avril 2008, JAR 2009, p. 552 consid. 4.1) est sans pertinence à cet égard. Ainsi, d'une part, le Premier Intimé n'a pas introduit d'appel contre la Décision attaquée de sorte qu'il ne saurait, dans le cadre de la présente procédure, reprocher à la CRL d'avoir commis une erreur en droit. D'autre part, en ce que cet argument tend à contrer l'argumentation avancée par l'Appelant, à savoir que, en application de l'article 337c al. 1 et 2 CO ainsi que de l'article 17 al. 1 RSTJ, la CRL ne pouvait condamner l'OLA à payer au Premier Intimé une indemnité correspondant à un mois de salaire au motif que ce dernier est resté sans emploi au moins de juin 2017, il est tout aussi dépourvu de pertinence puisque cette argumentation de l'Appelant est, en tout état de cause, mal fondée (inopérante). En effet, l'Appelant appuie son argumentation sur les dispositions de l'article 337c al. 1 et 2 CO, alors que, aux termes de l'alinéa 3 de l'article 337c, "[l]e juge peut condamner l'employeur à verser au travailleur une indemnité dont il fixera librement le montant, compte-tenu de toutes les circonstances; elle ne peut toutefois dépasser le montant correspondant à six mois de salaire du travailleur".

Or, il ressort de la jurisprudence du Tribunal fédéral relative à l'article 337c CO que le congé immédiat injustifié doit entraîner, sauf cas exceptionnels, le paiement de l'indemnité prévue à l'article 337c al. 3 qui a un caractère pénal (ATF 116 II 300 consid. 5a et ATF 120 II 243, consid. 3.e; REHBINDER/STÖCKLI, Berner Kommentar, 2014, Stämpfli Verlag, Art. 337c, N8). En ce qu'une telle indemnité sert à sanctionner le caractère injustifié de la résiliation d'un contrat de travail par l'employeur, il semble conséquent de ne pas faire bénéficier l'employeur du fait que, comme en l'espèce, le travailleur a retrouvé un emploi dans un bref laps de temps. Dans la mesure où la CRL, en appréciation de l'ensemble des circonstances de l'espèce, et plus particulièrement du fait que le Premier Intimé est resté sans emploi pendant un mois, a considéré qu'il convenait d'attribuer à ce dernier une indemnité pour rupture de contrat correspondant uniquement à un mois de salaire, elle a, de l'avis de la Formation, non seulement fait une application correcte du droit suisse, mais a exercé avec parcimonie la marge d'appréciation reconnue au juge par l'article 337c al. 3 CO.

### 3. Qualification d'un bonus comme un élément de salaire

En vertu du droit suisse, applicable au Contrat, et plus particulièrement des articles 319 ss CO, il convient, pour déterminer si une prime telle que les primes de fidélité en cause en l'espèce constitue une gratification ou un élément du salaire, d'interpréter les manifestations de volonté des parties. Il s'agit tout d'abord d'établir si le bonus est déterminé (respectivement déterminable) ou indéterminé (respectivement indéterminable). Si le bonus est déterminé ou objectivement déterminable, l'employé dispose d'une prétention à ce bonus. Dans cette hypothèse, l'employeur doit tenir son engagement qui consiste à verser à l'employé la rémunération convenue et le

bonus doit être considéré comme un élément du salaire (GUYOT/UNGER/ANGELOZZI/JACCARD/ORDOLLI/ROBINSON/ZAPPELLA, Le droit du travail au quotidien, Genève 2018, p. 149).

En l'espèce, le contrat de travail prévoit six primes de fidélité, échues à des dates déterminées. Le montant desdites primes a été fixé à l'avance, de sorte que leur montant est immuable, conformément au principe *pacta sunt servanda*. Leur montant constitue ainsi un élément essentiel dudit contrat. Ce dernier mentionne que ces primes doivent être versées au Joueur "pour autant que le joueur soit encore sous contrat avec le club au moment de leur échéance". Le contrat de travail prévoit ensuite qu'elles doivent être versées par l'employeur lorsqu'elles sont échues avec le salaire du mois suivant. Ces primes doivent donc être considérées comme un élément du salaire.

Il importe, dans une seconde phase, de déterminer les conséquences qui découlent de ce constat en cas d'incapacité de travailler du Joueur. À cet égard, d'une part, il ressort de l'article 22 du Contrat, qu'en cas de maladie la rémunération du Joueur se calcule d'après la réglementation légale (art. 324a CO) et selon l'échelle bernoise. D'autre part, l'article 23 du Contrat prévoit que, en cas d'accident, le Joueur est assuré selon la LAA et que les prestations à charge de l'employeur sont déterminées selon l'article 324b CO, complété par l'échelle bernoise. Pour le surplus, il y est prévu que si l'employeur a conclu une assurance collective complémentaire pour la part du salaire non couverte par la LAA, il est libéré de son obligation de verser le salaire dans la mesure où les prestations de cette assurance sont équivalentes à celles résultant de l'article 324b CO. Tel était le cas en l'espèce, l'OLA ayant conclu une assurance-accidents complémentaire prévoyant que le salaire maximum assuré est de CHF 500'000 par an et par joueur.

Il s'ensuit qu'en cas d'absence pour accident, la rémunération du Joueur était plafonnée à CHF 500'000 par an. Ainsi qu'il ressort des pièces fournies par l'Appelant, la valeur journalière de la rémunération est calculée en tenant compte que l'année compte 365 jours. Partant, en cas d'absence pour accident la rémunération journalière due s'élevait à  $500'000/365 = 1'369,86$  CHF. Dès lors qu'il ne ressort ni des conditions particulières de l'assurance en question, aux termes desquelles "*en dérogation à l'article 5.1.1 CGA 02.2008, le salaire AVS maximum assuré et de CHF 500'000 par personne et par an*", qui constitue la seule pièce relative à cette assurance contenant des signatures, ni de l'article 5.1.1 de CGA (conditions générales d'assurance) que le salaire ainsi assuré serait un salaire brut et que toutes les rémunérations prévues dans le Contrat sont désignées comme constituant du "net", la Formation estime qu'il y a lieu de retenir le montant de CHF 1'369,86 comme constituant un salaire journalier net.

En l'occurrence, le salaire net du Premier Intimé pour la première saison de contrat, allant du 31 août 2015 au 30 juin 2016, s'élevait à EUR 633'000 (EUR 340'000 de salaire au sens strict et de EUR 293'000 de primes de fidélité). Pour la seconde saison, couvrant la période allant du 1<sup>er</sup> juillet 2016 au 30 juin 2017, le salaire net annuel du Premier Intimé s'élevait à EUR 800'000 (EUR 408'000 de salaire au sens strict et de EUR 392'000 de primes de fidélité).

S'il est constant qu'au cours de la première saison, le Joueur a été absent pour blessure pendant 107 jours et que sa rémunération pour ces jours pouvait, sur base du plafond découlant de l'assurance-accident, être ramenée au montant net de CHF 1'369,86 par jour, il n'en demeure pas moins, ainsi qu'il a été reconnu, que la rémunération totale versée au Joueur pour la première saison ne tenait pas compte de ce plafond et correspondait à la

rémunération totale prévue dans le Contrat. Or, en ayant procédé à ces versements sans émettre la moindre réserve, à savoir que le montant final du salaire pouvait dépendre du point de savoir si l'empêchement de travailler devait être qualifié de maladie ou d'accident, alors même que, ainsi qu'il ressort des pièces soumises par l'OLA, ce dernier avait connaissance des jours d'incapacité de travailler du Joueur et du fait que son assurance-accident avait, avant l'établissement de deux décomptes en date du 19 septembre 2016, reconnu et pris en charge des incapacités de travail avant la fin de la première saison, l'OLA est, de l'avis de la Formation, par la suite empêché de procéder à une compensation sur des rémunérations postérieures sans en avoir informé le Joueur en invoquant le plafonnement du salaire résultant de cette incapacité de travailler. Partant, la rémunération de EUR 633'000 versée pour la première saison ne saurait être remise en question.

Pour ce qui est de la seconde saison du Contrat, le salaire journalier prévu par le Contrat s'élève à EUR 800'000/365 jours, soit EUR 2'191,78. Le salaire journalier prévu en cas d'incapacité de travail est plafonné à CHF 1'369,86. Dès lors que le Contrat a été résilié au 31 mai 2017, le nombre de jours dont il convient de tenir compte s'élève à 335 (365-30). Sur ces 335 jours, il est constant que le Premier Intimé a été en incapacité de travail pendant 109 jours. Dès lors que lors des premiers 30 jours d'incapacité de travail, l'OLA versait au Joueur les 100% de son salaire puisque l'assurance-accident complémentaire conclue par l'OLA couvrait la totalité dudit salaire pendant ces 30 jours, à savoir même pour la partie dépassant le plafond annuel de CHF 500'000 prévu dans cette assurance, et que pour le surplus, à savoir les 79 jours suivant, le montant dû au Joueur ne couvrait ce salaire que jusqu'à hauteur de ce plafond, le Joueur pouvait prétendre pour ces 79 jours à une rémunération de CHF

108'218,94 (79 x 1'369,86). Pour les 256 jours (226 + 30) restants, le Joueur pouvait prétendre au paiement d'une rémunération s'élevant à EUR 561'095,68 (256 x 2'2191,78). En prenant comme taux de change EUR/CHF un cours de 1,06, les CHF 108'218,94 correspondent à EUR 102'093,34. Au total, pour la période allant du 1<sup>er</sup> juillet 2016 au 30 Juin 2017, la rémunération due au Joueur était donc de EUR 663'189,02. Dès lors qu'il ressort des pièces soumises au TAS que, en rapport avec cette période, l'OLA a versé au Joueur EUR 388'189,90 (340,000 + 22,739.90 + 25,450), l'Appelant reste redevable du montant de EUR 274'999,12 (663'189,02 - 388.189,90).

Dans ces conditions, la Formation conclut que le montant des arriérés de paiement auquel le Premier Intimé peut prétendre s'élève à EUR 274'999,12. Il s'ensuit que la Décision attaquée, en ce qu'elle a retenu un montant de EUR 403'260,10, doit être partiellement annulée. Eu égard à toutes ces considérations, il y a lieu de faire partiellement droit à l'appel et de réformer la Décision attaquée en ce sens que l'Appelant doit payer au Premier Intimé le montant de EUR 274'999,12 au titre de rémunérations (salaires et primes de fidélité) dues en application du Contrat au moment de la résiliation de celui-ci par l'OLA. L'appel est rejeté pour le surplus.

## Décision

L'appel déposé par l'Olympique des Alpes SA contre M. Geoffrey Mujangi Bia et Kayserispor Kulübü Denergi concernant la décision rendue le 15 novembre 2018 par la CRL de la FIFA est partiellement admis. L'Olympique des Alpes SA doit verser à M. Geoffrey Mujangi Bia le montant de EUR 274'999,12 au titre de rémunérations dues en application du Contrat au moment de la résiliation de celui-ci. Ce montant produit des intérêts moratoires au taux de 5% l'an à partir du 1<sup>er</sup> juin 2017. La décision rendue le 15 novembre 2018 par la

CRL de la FIFA est confirmée pour le surplus. Toutes autres ou plus amples requêtes et conclusions des parties sont rejetées.

---

**CAS 2019/A/6525**  
**Sevilla FC v. AS Nancy Lorraine**  
14 April 2020

---

**Football; Transfer with sell-on clause; Primary goal of interpretation; Definition of sell-on clause; Definition of transfer; Transfers occurring inside a contractual scheme; Transfers occurring outside a contractual scheme; Scope of a sell-on clause referring in general terms to the “transfer” of a player**

**Panel**

Prof. Luigi Fumagalli (Italy), President  
Mr Nicholas Stewart QC (United Kingdom)  
Mr Olivier Carrard (Switzerland)

**Facts**

On 5 January 2017, AS Nancy Lorraine (“Nancy” or the “Respondent”), a French football club affiliated to the Fédération Française de Football (the “FFF”), and Sevilla FC (“Sevilla” or the “Appellant”) a Spanish football club affiliated to the Real Federación Española de Fútbol (the “RFEF”), signed a transfer agreement (the “Transfer Contract”) providing for the terms and conditions of the transfer of the player C. (the “Player”) from Nancy (therein referred to as “ASNL”) to Sevilla.

Article 3.1 of the Transfer Contract provided for the obligation of Sevilla to pay Nancy the amount of EUR 5,000,000 (five million Euros) in three instalments. Article 3.2 of the Transfer Contract [“Payment of an additional compensation”] (the “Sell-on Clause”) then read as follows: “SEVILLA FC agrees to pay to ASNL an additional transfer compensation as follows: In case a definitive transfer of the player is signed, and the player is transferred from SEVILLA FC to another club, allowing SEVILLA FC to realize a

*capital gain, 12% of this value will be transferred to the club ASNL. The capital gain must be understood as the difference between the amount received (training compensation included) by the club Seville FC from a third-party club as a result of the player’s definitive transfer to that club and the sum of 5,000,000 € paid by the SEVILLE FC in respect of the ASNL final transfer compensation, to the club SEVILLA FC”.*

On 5 January 2007, Sevilla and the Player concluded an employment agreement valid until 30 June 2021 (the “Employment Agreement”). The Third Clause of the Appendix to the Employment Agreement (the “Buy-out Clause”) stated, for the purposes of Art. 16 of the Spanish Real Decreto 1.006/85, de 26 de junio 1985 (the “Real Decreto”), that in the event of unilateral termination of the Employment Agreement by the Player, the Player would pay Sevilla, as indemnity, the sum of EUR 35,000,000, as increased by an amount corresponding to the consumer price index variation.

On 12 July 2018, FC Barcelona (“Barcelona”) deposited, with the consent of the Player, the total amount of EUR 35,910,000 in the account of the Spanish Professional Football League (the Liga Nacional de Fútbol Profesional: “La Liga”), to be paid to Sevilla for the purposes of the Buy-out Clause. The Player then joined Barcelona by executing an employment contract with such club.

On 5 November 2018, after having unsuccessfully sent various correspondence and formal notices to Sevilla, Nancy filed a claim with the FIFA Players’ Status Committee (the “PSC”) to obtain payment of the additional portion of the transfer compensation in accordance with Article 3.2 of the Transfer Contract, in the total amount of EUR 3,708,000 plus 5% interest p.a. Sevilla resisted, asserting that Nancy did not have any right to a payment according to the Sell-On Clause. Sevilla argued that no transfer of the Player had

taken place, because the Player had merely exercised his unilateral right to an early termination of the Employment Agreement by means of the payment of the compensation provided for in the Buy-out Clause.

On 24 July 2019, the Single Judge of the PSC (the “Single Judge”) issued a decision (the “Decision”) on the claim brought by Nancy, stating as follows for the most relevant points: “*1. The claim of the Claimant, AS Nancy Lorraine, is accepted. 2. The Respondent, Sevilla FC, has to pay to the Claimant the total amount of EUR 3,708,000, plus interest at a rate of 5% p.a. on the said amount as of 8 September 2018 until the date of effective payment. (...)*”.

On 3 October 2019, the grounds of the Decision were issued. They read, in the pertinent portions, as follows: “*... contrary to the CAS 2010/A/2098 case, whereby the underlying sell-on clause explicitly referred to a “resale” of the player, the sell-on clause at the basis of the present dispute solely refers to a “definitive transfer of the player [...] from [the Respondent] to another club, allowing [the Respondent] to realize a capital gain”; ... the Single Judge ... noted that [the] clause [at stake] does not seem to explicitly require the contractual scheme of a sale, “resale”, or any other determined contractual scheme in order for the 12% sell-on clause to be triggered. [It] rather seems to require only that the player is transferred to a third club and that the Respondent makes a ‘capital gain’ out of the said transfer. It appeared to the Single Judge that both circumstances undisputedly occurred in the case at hand ...*”.

On 15 October 2019, Sevilla filed a statement of appeal with the Court of Arbitration for Sport (the “CAS”), pursuant to the Code of Sports-related Arbitration (the “Code”), to challenge the Decision.

A hearing was held in Lausanne on 21 February 2020.

## Reasons

### 1. Primary goal of interpretation

In this arbitration, the Appellant was maintaining that no payment was to be made to the Respondent with respect to the amount received on the basis of the Buy-out Clause: the Sell-on Clause was triggered only in the event of a “*definitive transfer ... signed*” by Sevilla; in this case, since the Player had terminated the Employment Agreement by exercising the Buy-out Clause, there was no transfer signed by Sevilla – hence, no payment was due to Nancy. The Respondent, on the other hand, was holding the opposite view.

For the Panel therefore, the main issue concerned the interpretation of the Sell-on Clause contained in the Transfer Contract, primarily on the basis of the FIFA rules and regulations, with Swiss law applying subsidiarily. The arbitrators began by recalling that the interpretation of a contract in accordance with Article 18 of the Swiss Code of Obligations aims at assessing the intention the parties had when they concluded the contract. The primary goal of interpretation is to ascertain the true common intention (consensus) of the parties. Where a factual consensus cannot be proven, the declarations of the parties must be interpreted pursuant to the principle of good faith in the sense in which they could and should have been understood, taking into account the wording, the context as well as all circumstances.

### 2. Definition of sell-on clause

Exploring the “*real and common intention of the parties*”, the Panel recalled that the purpose of a sell-on clause is to “protect” a club (the “old club”) transferring a player to another club (the “new club”) against an unexpected increase, after the transfer, in the market value of the player’s services; therefore, the old club

receives an additional payment in the event the player is “sold” from the new club to a third club for an amount higher than that one paid by the new club to the old club. In other words, the new club agrees to share with the old club a portion of any profit made by the new club in connection with a player’s movement. In transfer contracts, for that reason, a sell-on clause is combined with the provision defining the transfer fee: overall, the parties divide the consideration to be paid by the new club in two components, i.e. a fixed amount, payable upon the transfer of the player to the new club, and a variable, notional amount, payable to the old club in the event of a subsequent “sale” of the player from the new club to a third club.

In the case at hand, Nancy (the “old club”) and Sevilla (the “new club”) had set a transfer fee (EUR 5,000,000) payable upon the transfer to Sevilla of the Player, and the Sell-On Clause, providing for an additional payment in case of “transfer signed” by Sevilla of the Player to a third club. The dispute between the parties precisely referred to this point, *i.e.* to the exact identification of the meaning and scope of this triggering element (“transfer signed” by Sevilla).

### 3. Definition of transfer

The Panel noted that in the world of professional football a “transfer” of a player meant in general terms a change of “registration” of a player or for a professional player it meant a “change of employer”. A player, registered to play for a club, becomes eligible to play for a different club, or, when employed with a club, becomes an employee of another club. In that regard, therefore, a “transfer” could be equated to a “movement” in the registration/employment relation.

### 4. Transfers occurring inside a contractual scheme

The Panel then explained that transfers could occur inside or outside a contractual scheme. First, a transfer could be the object and the purpose of the parties’ agreement. In that case, it could actually be made in two ways: (i) by way of assignment of the employment contract; and (ii) by way of termination of the employment agreement with the old club and signature of a new employment agreement with the new club. In both cases, the old club was expressing its agreement (to the assignment or to the termination of the old employment contract, as the case may be) against the receipt of a payment – which was compensating for the loss of the player’s services; the new club was accepting the assignment of the existing employment contract or consenting to enter into a new contract with the player; and the player was consenting to move to the new club.

### 5. Transfers occurring outside a contractual scheme

Second, the transfer of a player could also take place outside the scheme of a contract between the old and the new club, in the event that the player moved from a club to another following the termination of the old employment agreement as a result of (i) its expiration or (ii) its breach. In both cases, the transfer of the player from one club to another was taking place without (or even against) the consent of his old club. Therefore, it was taking place without a contract, because there was no contract in a situation in which there was no obligation freely assumed by one party towards the other. In the second case (transfer following a breach), an amount was due to the old club, but could not be defined as a price paid as a consideration for the consent to the transfer, since it was of a different character and title: it was compensation for the damage caused by the breach.

## 6. Scope of a sell-on clause referring in general terms to the “transfer” of a player

In light of the foregoing, the Panel noted that in this specific case, the wording of the Sell-on Clause was wide enough to cover every kind of transfer, both in a contractual and non-contractual framework, for which Sevilla was to receive a payment, whatever label was put upon it. This was the decisive distinction between this case and the dispute decided in CAS 2010/A/2098, where the triggering element had not been a “transfer” in general terms, but specifically a “resale”. This interpretation was confirmed by the definition of “capital gain” in Article 3.2 of the Transfer Contract, which simply made reference to the difference between the amount paid and the amount received as a result of the Player’s transfer(s), without additional qualification, and appeared to correspond to the “*real and common intent of the parties*”, as it was consistent with the general purpose of sell-on clauses, which, in the absence of specific limitations, called for their application to all cases where the intended purpose (to allow the old club to share the benefit of a subsequent transfer) could be achieved. The above conclusion also made it irrelevant to speculate about the effect under Spanish law of the exercise of the Buy-out clause. Accepting, in line with CAS 2010/A/2098, that following its exercise the Player had moved outside a contractual scheme (*i.e.* with no contract between Sevilla and Barcelona), then his transfer would still have triggered the application of the Sell-on Clause.

In summary and conclusion, the Decision that had held that the Sell-on Clause had been triggered had to be approved and confirmed: the Respondent was entitled to receive 12% of the profit made by the Appellant for the transfer of the Player to Barcelona. Such amount had to be paid to the Respondent by

the Appellant, as had already been ordered by the Single Judge.

## Decision

In light of the foregoing, the Panel found that the appeal brought by the Appellant against the Respondent with respect to the Decision was to be denied and the Decision confirmed.

---

**Jugements du Tribunal fédéral\***  
**Judgements of the Federal Tribunal**  
**Sentencias del Tribunal federal**



---

\* Résumés de jugements du Tribunal Fédéral suisse relatifs à la jurisprudence du TAS  
Summaries of some Judgements of the Swiss Federal Tribunal related to CAS jurisprudence  
Resúmenes de algunas sentencias del Tribunal Federal Suizo relacionadas con la jurisprudencia del TAS

---

**4A\_272/2019**

**4 September 2019**

**A. v. B., Fédération Internationale de Football Association (FIFA),  
interested party**

---

*Appeal against the arbitral decision by the Court of Arbitration for Sport of 15 April 2019 (CAS 2018/A/5898).<sup>1</sup>*

### **Extract of the facts**

A. (the club) is a Kazakh football club, member of the Kazakh Football Federation, which is affiliated with the Federation Internationale de Football Association (FIFA).

B. (the Player or the player) is a professional football player of Ghanaian nationality.

By employment contract of January 16, 2016, the club hired the Player until November 30, 2016. The club subsequently terminated the contract of employment, which was not accepted by the Player.

On 22 July 2016, the Player filed a claim with the FIFA Dispute Resolution Chamber (DRC), filing various claims based on the aforementioned contract.

By decision of September 21, 2017, of which only the operative part was notified to the parties on September 27, 2017, the DRC ordered the club to pay the player USD 18'000, with interest, for salary and USD 166'000, plus interest, as compensation for breach of contract without just cause.

On October 11, 2017, the club requested the grounds of the decision. On October 23, 2017, FIFA refused to grant this request, stating in particular the following:

*[...] we kindly ask you to take note that in accordance with art. 15 para. 1 of the Rules Governing the Procedures of the Player's Status Committee and the Dispute Resolution Chamber as well as the note relating to the findings of the decision concerned, the motivated decision will be communicated to the parties, if a request for the grounds of the decision is received by the FIFA general secretariat in writing within ten days as from receipt of the findings of the decision, (...)*  
*As a result, and considering all the above, particularly that the grounds of the decision have not been requested within the stipulated ten day time limit, we regret to inform you that we are not in a position to provide you with the motivated decision and that, consequently, the decision has become final and binding.*

The club renewed its request for the grounds of the decision, which was rejected on November 13, 2017, by FIFA for identical reasons to those mentioned in its correspondence of October 23, 2017.

On December 15, 2017, the club sent to the Court of Arbitration for Sport (CAS) a statement of appeal, directed exclusively against the player, in order to force FIFA to communicate to the

---

<sup>1</sup> The original decision was issued in French. The full text is available on the website of the Federal Tribunal, [www.bger.ch](http://www.bger.ch)

For the full English translations & introductory notes on the Federal Tribunal judgments in both sports- and commercial arbitration cases, you can

visit the website [www.swissarbitrationdecisions.com](http://www.swissarbitrationdecisions.com) (operated jointly by Dr. Charles Poncet and Dr. Despina Mavromati) as a service to the international arbitration community.

parties the grounds of the decision rendered by the DRC.

On August 7, 2018, the CAS issued its reasoned award.

In short, the Sole Arbitrator considered that the Player lacked standing to be sued, since the choice not to communicate to the parties the reasoned decision belonged exclusively to FIFA. The Appellant should therefore have directed its appeal against FIFA. The CAS nevertheless noted, under n. 118, that FIFA's refusal to state the reasons for the decision was unjustified.

By letter sent on August 9, 2018 to FIFA, the club, referring to n.118 of the CAS Award, again requested the reasons for the decision rendered by the DRC. FIFA forwarded to the parties the reasoned decision rendered by the DRC as well as a copy of the CAS directives concerning the appeal procedure. The decision mentioned in the end that it was subject to appeal to the CAS within 21 days.

On September 8, 2018, the Club appealed to the CAS against the reasoned decision rendered by the DRC.

In an award rendered on April 15, 2019, the CAS Panel declared the appeal inadmissible.

On June 4, 2019, the Club (the Appellant) filed a civil law appeal to the Federal Tribunal. Alleging a violation of Art. 190(2)(b) PILA, it requested the Federal

Tribunal to set aside the award of April 15, 2019.

### Extracts of the legal considerations

Pursuant to Art. 77(3) BGG<sup>2</sup>, the Federal Tribunal reviews only the grievances raised and reasoned in the Appeal Brief; this corresponds to the duty to provide reasons under Art. 106(2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186<sup>3</sup> at 5). Like the foregoing, this codifies the principle that grievances must be reasoned (*Reprinzip*). The appeal in international arbitration can only be brought for one of the reasons exhaustively listed in Art. 190(2) PILA<sup>4</sup>. The Appellant must therefore invoke one of the grievances set out exhaustively and provide precise arguments as to what constitutes a violation in the award under appeal (Judgment 4A\_378/2015 of September 22, 2015 at 3.1).

Criticism of an appellatory nature is not admissible (BGE 134 III 565<sup>5</sup> at 3.1, p.567; 119 II 380 at 3b, p. 382).

A complete appeal brief must be reasoned and filed within the time limit for appeal (Art. 42(1) BGG). If there is a second exchange of submissions, the appellant may not use its reply brief to supplement or improve its appeal brief (BGE 132 I 42 at 3.3.4). The reply brief must only be used to make points connected to the arguments in the briefs of another participant in the proceedings (see BGE 135 II 19 at 2.2).

<sup>2</sup> BGG is the abbreviation of the Swiss Federal Law of the Federal tribunal.

<sup>3</sup> The English translation of this decision is available here:

<http://www.swissarbitrationdecisions.com/frign-to-be-heard-equality-between-the-parties>.

<sup>4</sup> PILA is the most frequently used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.

<sup>5</sup> The English translation of this decision is available here:

<http://www.swissarbitrationdecisions.com/extensio-on-of-arbitration-clause-to-non-signatories-case-of-a-qua>

In the present case, the CAS considered that the FIFA decision not to issue the grounds had become final and enforceable. It is therefore wrong that FIFA had chosen to communicate the reasons for the decision dated August 31, 2018, to the parties. Indeed, the Sole Arbitrator's consideration that the refusal to transmit the reasoned decision to the parties was unjustified (Award of August 7, 2018, n.108) could not be likened to an order made to FIFA to send the reasons, all the more since the latter was not a party to the first CAS proceedings. The solution would have been different if the Appellant had directed its first appeal against FIFA and if the Arbitrator had ordered FIFA to notify the reasoned decision to the parties. Not having done so, the Club had to bear the consequences of its procedural choices. The communication of the reasons for the decision to the parties, made more than 11 months after it was rendered, could not revive the time limit for appeal to the CAS. Admitting the contrary would jeopardize the legal certainty which requires compliance with the rules concerning the time limits for appeal. Consequently, FIFA could not modify the time limits for appeal to the detriment of one of the parties. This would, in fact, prove to be particularly prejudicial to the Respondent, who could legitimately consider that the refusal to notify the reasons for the decision had become final and enforceable. Insofar as the Appellant had failed to obtain a reasoned decision, the parties were deemed to have excluded their right to appeal against the decision taken by the DRC, in accordance with Art. 15(1) of the Regulations of the

Players' Status Committee and the Dispute Resolution Chamber.

**The Appellant bases his appeal exclusively on the violation of Art. 190(2)(b) PILA. It accuses the Panel of wrongly deciding that it lacked jurisdiction.**

The case at issue, however, has nothing to do with the question of the jurisdiction of the CAS. By refusing to deal with the appeal, the Hearing Panel did not declare itself incompetent *rationae materiae* or *rationae personae*: it simply applied a procedural rule concerning the time limit for appeal. In reality, the present case raises the problem of *res judicata*, which the Appellant itself recognizes since it notes that *res judicata* is the cardinal and decisive principle invoked by the Panel in the inadmissibility decision. However, according to the settled case law of the Federal Tribunal, the problem of *res judicata* is part of procedural public policy within the meaning of art. 190(2)(e) PILA (ATF 141 III 229<sup>6</sup> at 3.2.1; 140 III 278<sup>7</sup> at 3.1; 136 III 345<sup>8</sup> at 2.1; 128 Ill 191 at 4a; judgments 4A\_247/2017 of April 18, 2018 at 4.1.1; 4A\_374/2014<sup>9</sup> of February 26, 2015 at 4.2.1). Therefore, the present appeal does not comply with the strict motivation requirements mentioned above, since the Appellant wrongly alleges the violation of Art. 190(2)(b) PILA. It is not for the Federal Tribunal to seek, in the Award under appeal, the legal arguments which could justify the admission of the grievance — incidentally, not raised — based on Art. 190(2)(e) PILA and that the Appellant did not present to it, contrary to the requirements of Art. 77(3) LTF.

<sup>6</sup> The English translation of this decision is available here:

<http://www.swissarbitrationdecisions.com/res-judicata-revisited>

<sup>7</sup> The English translation of this decision is available here:

<http://www.swissarbitrationdecisions.com/res-judicata-effect-foreign-judgment>

<sup>8</sup> The English translation of this decision is available here:

<http://www.swissarbitrationdecisions.com/setting-aside-of-award-for-violation-of-public-policy->

<sup>9</sup> The English translation of this decision is available here:

<http://www.swissarbitrationdecisions.com/public-poncv-defense-under-new-vorK-convention>

For the rest, it should be noted that the Appellant limits its criticisms to the interpretation of the regulations of a sports association, which has nothing to do with the jurisdiction of the CAS. Moreover, the question of the application of regulatory standards enacted by a sports organization under private law does not, as such, constitute a remedy within the meaning of Art. 190(2) PILA.

Finally, the Appellant is on the wrong track when it claims that the issuance of the reasoned decision by FIFA constituted an

offer to arbitrate that it accepted, by conclusive acts, by filing an appeal to the CAS directed against FIFA and the Respondent. One should not forget that this alleged arbitration agreement does not bind one of the parties to the employment contract, that is to say the Respondent, a claimant before the DRC.

### **Decision**

The appeal is therefore manifestly inadmissible and must be dismissed in application of the simplified procedure provided for in Art. 108(1)(a) LTF.

---

**4A\_485/2019**

**17 août 2020**

**Trabzonspor Sportif Yatirim Ve Futbol Isletmeciliği A.S., Trabzonspor Sportif Yatirim, Futbol Isletmeciliği Ticaret A.S., Trabzonspor Kulübü Derneği c. Turkish Football Federation (TFF), Fenerbahçe Futbol AS, Fenerbahçe Spor Kulübü, Fédération Internationale de Football Association (FIFA)**

---

*Recours en matière civile contre la sentence arbitrale rendue le 30 juillet 2019 par le Tribunal Arbitral du Sport (TAS 2018/A/5746)*

### **Extrait des faits**

Trabzonspor Sportif Yatirim Ve Futbol Isletmeciliği A.S. est une personne morale avec siège à Trabzon (Turquie), qui administre le club de football Trabzonspor Kulübü Derneği. Elle est membre de la fédération turque de football (*Turkish Football Federation*; TFF), association de droit turc affiliée à la Fédération Internationale de Football Association (FIFA) et à l'Union des Associations Européennes de Football (UEFA).

Trabzonspor Sportif Yatirim Futbol Isletmeciliği Ticaret A.S. est une personne morale dont le siège est à Trabzon (Turquie) et qui gérait le club de football Trabzonspor Kulübü Derneği jusqu'au milieu de l'année 2011.

Trabzonspor Kulübü Derneği est un club de football professionnel de première division turque (*Süper Lig*).

Ces trois organisations seront dénommées collectivement ci-après “Trabzonspor” ou “recourants”.

Fenerbahçe Futbol A.S. est une personne morale dont le siège est à Istanbul (Turquie) et qui dirige le club de football Fenerbahçe Spor Kulübü qui

évolue en *Süper Lig*. Elle est membre de la TFF.

Ces deux organisations seront dénommées collectivement ci-après “Fenerbahçe”.

La FIFA, association de droit suisse avec siège à Zurich, est la structure faîtière du football au niveau international. Elle exerce notamment un pouvoir disciplinaire sur les fédérations nationales qu'elle regroupe.

La TFF, Fenerbahçe et la FIFA seront dénommés collectivement ci-après “intimés”.

Lors de la saison 2010/2011 de *Süper Lig*, Fenerbahçe et Trabzonspor ont terminé le championnat à égalité de points, mais Fenerbahçe bénéficiait d'une différence de buts favorable dans les confrontations directes. C'est ainsi que Fenerbahçe a été sacré champion de Turquie; Trabzonspor terminant deuxième. Fenerbahçe s'est qualifié par la même occasion pour la phase de poules de l'édition 2011/2012 de la Ligue des Champions UEFA.

En date du 3 juillet 2011, plusieurs dirigeants de différents clubs de football turcs ont été arrêtés, dans le cadre d'une enquête pénale ouverte par le ministère public turc en lien avec une manipulation à grande échelle de matchs de *Süper Lig* durant la saison 2010/2011.

Le 11 juillet 2011, le Comité exécutif de la TFF a demandé au Comité d'éthique de la TFF d'investiguer concernant les soupçons de matchs truqués.

Le 24 août 2011, la TFF a décidé d'empêcher Fenerbahçe de participer à l'édition 2011/2012 de la Ligue des Champions. L'UEFA a attribué la place vacante à Trabzonspor. Le 20 décembre 2011, le Comité exécutif de la TFF a publié un rapport, établissant que plusieurs actes de manipulation de matchs (*match-fixing*) impliquaient des dirigeants de Fenerbahçe.

Le 13 avril 2012, Trabzonspor a déposé une requête auprès de la TFF, lui demandant de traiter l'affaire des matchs truqués de *Süper Lig* 2010/2011 et de lui décerner le titre en lieu et place de Fenerbahçe.

Trois fonctionnaires de Fenerbahçe ont été sanctionnés le 6 mai 2012 par la Commission disciplinaire de la TFF pour tentative de *match-fixing* durant la saison 2010/2011 de *Süper Lig*. Celle-ci n'a toutefois pas imposé de sanctions à Fenerbahçe, les activités incriminées ayant été considérées comme non imputables au club.

Le 4 juin 2012, l'Instance d'arbitrage de la TFF a rejeté l'appel formé par Trabzonspor contre la décision du 6 mai 2012, au motif que ce dernier n'était pas légitimé à contester une décision refusant de sanctionner un autre club.

Le 2 juillet 2012, un tribunal pénal turc a retenu qu'une organisation criminelle avait été formée à l'instigation du président du club de Fenerbahçe et que le résultat de 13 matchs de *Süper Lig* durant la saison 2010/2011 avait été manipulé par des fonctionnaires de Fenerbahçe. Plusieurs de ses dirigeants, dont notamment le président et le vice-président du club, ont été condamnés.

Toutefois, le 28 octobre 2015, l'ensemble des dirigeants de Fenerbahçe ont été acquittés dans le cadre d'un nouveau jugement pénal en Turquie, faute de preuves.

Entre les mois d'août 2012 et d'octobre 2013, Trabzonspor a sollicité à plusieurs reprises la TFF afin qu'elle annule les résultats des matchs truqués et lui attribue le titre de *Süper Lig* 2010/2011. Les demandes et appels de Trabzonspor ont été rejettés.

Au cours de l'année 2012, Trabzonspor s'est adressé à l'UEFA, lui demandant de prendre des sanctions concernant les actes de *match-fixing* en Turquie durant la saison 2010/2011.

L'UEFA a ouvert une procédure disciplinaire à l'encontre de Fenerbahçe, mais n'a pas engagé pareille procédure contre la TFF.

Le 10 juillet 2013, l'Instance d'appel de l'UEFA a confirmé l'exclusion de Fenerbahçe pour les deux prochaines compétitions organisées par l'UEFA auxquelles le club se qualifierait. Cette décision a été confirmée par le Tribunal Arbitral du Sport (TAS) le 28 août 2013 (TAS 2013/A/3256) et le Tribunal fédéral a rejeté le recours formé contre la sentence du TAS par arrêt du 16 octobre 2014 (arrêt 4A\_324/2014).

Le 31 janvier 2014, Trabzonspor a requis de l'UEFA qu'elle intervienne auprès de la *Süper Lig* afin de sanctionner les clubs et les particuliers qui ont commis des actes de *match-fixing* et de prendre les mesures qui s'imposent afin que le titre de champion de *Süper Lig* pour la saison 2010/2011 soit décerné à Trabzonspor.

L'UEFA a rejeté la requête de Trabzonspor par décision du 11 décembre 2014, fondée sur le défaut de compétence de l'UEFA d'intervenir au

niveau national. L'instance d'appel de l'UEFA puis le TAS ont par la suite confirmé le défaut de compétence de l'UEFA (TAS 2015/A/4343).

Dès le 2 juin 2011, Trabzonspor a informé la FIFA des actes de *match-fixing* en Turquie, lui demandant de prendre toutes les mesures nécessaires afin de protéger l'intégrité du football en Turquie. Le 8 mars 2013, Trabzonspor s'est plaint auprès de la FIFA, arguant que la TFF violait de manière continue les Statuts de la FIFA.

Aucune de ces deux lettres n'a reçu de réponse de la part de la FIFA.

Le 31 janvier et le 9 mai 2014, Trabzonspor a contacté à nouveau la FIFA, en la priant d'intervenir auprès de la *Süper Lig* afin de sanctionner les clubs et les particuliers ayant commis des actes de *match-fixing* et de prendre les mesures qui s'imposent afin que le titre de champion de *Süper Lig* pour la saison 2010/2011 soit décerné à Trabzonspor.

Le 25 juillet 2014, la FIFA a répondu à Trabzonspor en lui expliquant qu'au vu de la procédure disciplinaire initiée par l'UEFA, la FIFA estimait une intervention de sa Commission de discipline inopportun à ce stade de la procédure.

Trabzonspor a vainement sollicité une nouvelle fois la FIFA en novembre 2015, respectivement en mai 2016, afin de discuter le contenu des différentes lettres restées en souffrance.

Le 3 juillet 2017, Trabzonspor a déposé une plainte auprès de la Commission d'éthique et de la Commission de discipline de la FIFA, dirigée contre la TFF et Fenerbahge.

Par lettre du 5 février 2018 confirmée par lettre du 17 avril 2018, la Commission de discipline de la FIFA a communiqué à

Trabzonspor qu'au vu des règles applicables, celle-ci n'était pas en mesure d'intervenir dans la présente affaire et qu'il ressortait des pièces fournies que les procédures disciplinaires avaient été traitées en adéquation avec les principes fondamentaux du droit.

Trabzonspor a formé appel le 20 avril 2018 auprès de la Commission de recours de la FIFA pour déni de justice, suite à la procédure initiée devant la Commission de discipline de la FIFA.

Le 27 avril 2018, la Commission de recours de la FIFA a envoyé une lettre à Trabzonspor indiquant que les règles de procédure applicables confèrent la qualité pour agir uniquement à une partie ayant pris part à la procédure de première instance. En conséquence, Trabzonspor n'était pas légitimé à former appel devant la Commission de recours de la FIFA.

Le 8 mai 2018, Trabzonspor a interjeté appel au TAS à l'encontre de la lettre de la Commission de discipline de la FIFA du 17 avril 2018 ainsi que celle de la Commission de recours de la FIFA du 27 avril 2018. L'appel a été dirigé contre la TFF, Fenerbahge ainsi que la FIFA.

Trabzonspor, entre autres conclusions, a requis du TAS qu'il annule la décision de la FIFA refusant de statuer sur sa requête, qu'il constate que la TFF n'a pas poursuivi, en adéquation avec les règles applicables, les infractions commises par Fenerbahge au cours de la saison 2010/2011 de *Süper Lig*, et qu'il ordonne à la TFF de sanctionner Fenerbahge conformément au règlement de compétition applicable et corrige le classement de l'édition 2010/2011 du championnat de sorte que Trabzonspor soit premier et que le titre de champion 2010/2011 ainsi que tous les avantages — économiques et symboliques — y relatifs lui soient décernés.

Les défendeurs ont conclu au rejet de l'appel, dans la mesure de sa recevabilité.

Le 23 octobre 2018, Trabzonspor a demandé à ce que l'audience du 15 mars 2019 soit tenue publiquement.

Par lettre du 30 octobre 2018, la FIFA s'est opposée à la publicité de l'audience. La TFF et Fenerbahçe s'y sont également opposés par courriers du 31 octobre 2018.

La formation arbitrale a décidé le 7 novembre 2018 qu'en l'absence d'un accord des parties et dans la mesure où l'audience préliminaire ne concernerait que des questions juridiques et hautement techniques, celle-ci ne serait pas publique.

Une audience préliminaire a eu lieu le 15 mars 2019 à Lausanne, en l'absence de public et sans retransmission de celle-ci.

A l'issue de l'audience, les parties ont confirmé n'avoir aucune objection quant à la conduite de la procédure, à l'exception de Trabzonspor qui a maintenu son objection initiale concernant la non-publicité de l'audience qui représenterait - selon le club - une violation de son droit à un procès équitable.

Par sentence du 30 juillet 2019 (version motivée notifiée le 28 août 2019), le TAS a déclaré l'appel recevable, l'a rejeté pour défaut de qualité pour agir et n'a pas examiné le fond du litige.

Par acte du 27 septembre 2019, Trabzonspor a interjeté un recours en matière civile au Tribunal fédéral aux fins d'obtenir l'annulation de la sentence du TAS, au motif que celle-ci viole l'ordre public (art. 190 al. 2 let. e LDIP<sup>1</sup>), le droit d'être entendu (art. 190 al. 2 let. d LDIP) et

le droit à une audience publique (art. 6 ch. 1 CED<sup>1</sup>1).

Par réponses du 29 novembre et du 2 décembre 2019, la TFF, Fenerbahçe et la FIFA ont conclu au rejet du recours, dans la mesure de sa recevabilité.

Le TAS - en se référant aux considérants de la sentence attaquée - a renoncé à déposer d'autres observations et a proposé au Tribunal fédéral de rejeter le recours.

Le 20 décembre 2019, respectivement le 16 janvier 2020, les recourants et chacun des intimés ont déposé, respectivement, une réplique et une duplique. Ils ont maintenu leurs précédentes conclusions.

### Extrait des considérants

Dans le domaine de l'arbitrage international, le recours en matière civile est recevable contre les sentences de tribunaux arbitraux aux conditions prévues par les art. 190 et 192 LDIP (art. 77 al. 1 let. a LTF<sup>2</sup>).

Les recourants, qui ont pris part formellement à la procédure devant le TAS, sont directement touchés par la sentence attaquée, dans la mesure où celle-ci a dénié leur qualité pour agir. Ils ont ainsi un intérêt personnel, actuel et digne de protection à ce que cette sentence n'ait pas été rendue en violation des garanties découlant de l'art. 190 al. 2 LDIP, ce qui leur confère la qualité pour recourir (art. 76 al. 1 LTF).

Déposé en temps utile (art. 100 al. 1 en relation avec l'art. 45 al. 1 LTF) et dans la forme prévue par la loi (art. 42 al. 1 LTF), le recours est recevable.

Le recours ne peut être formé que pour l'un des motifs énumérés de manière

<sup>1</sup> LDIP est l'abréviation utilisée pour la loi Suisse sur le droit international privé.

<sup>2</sup> LTF est l'abréviation utilisée pour la loi Suisse sur le Tribunal Fédéral.

exhaustive à l'art. 190 al. 2 LDIP (ATF 134 III 186 consid. 5; 128 III 50 consid. 1a; 127 III 279 consid. 1a).

Pour qu'un grief admissible et dûment invoqué dans le recours en matière civile soit recevable, encore faut-il qu'il soit motivé, ainsi que le prescrit l'art. 77 al. 3 LTF. Cette disposition institue le principe d'allégation (*Rügeprinzip*) et exclut, par là même, la recevabilité des critiques appellatoires (ATF 140 Ill 278 consid. 3.4; 134 Ill 565 consid. 3.1).

De plus, les recourants ne peuvent se servir de la réplique pour invoquer des moyens, de fait ou de droit, qu'ils n'avaient pas présentés en temps utile, c'est-à-dire avant l'expiration du délai de recours non prolongeable (art. 100 al. 1 LTF en relation avec l'art. 47 al. 1 LTF) ou pour compléter, hors délai, une motivation insuffisante (ATF 132 I 42 consid. 3.3.4; arrêt 4A\_50/2017 du 11 juillet 2017 consid. 2.2).

Le Tribunal fédéral statue sur la base des faits constatés dans la sentence attaquée (art. 105 al. 1 LTF). Il ne peut rectifier ou compléter d'office les constatations des arbitres, même si les faits ont été établis de manière manifestement inexacte ou en violation du droit (cf. l'art. 77 al. 2 LTF qui exclut l'application des art. 97 al. 1 et 105 al. 2 LTF). Aussi bien, sa mission, lorsqu'il est saisi d'un recours en matière civile visant une sentence arbitrale internationale, ne consiste-t-elle pas à statuer avec une pleine cognition, à l'instar d'une juridiction d'appel, mais uniquement à examiner si les griefs recevables formulés à l'encontre de ladite sentence sont fondés ou non.

C'est le lieu d'observer que les constatations du tribunal arbitral quant aux faits de la procédure lient aussi le Tribunal fédéral, sous les mêmes réserves (ATF 140 III 16 consid. 1.3.1 et

les références citées; arrêt 4A\_54/2019 du 11 avril 2019 consid. 2.4).

**Dans un premier moyen, divisé en plusieurs branches, les recourants soutiennent que la sentence attaquée viole l'ordre public, au sens de l'art. 190 al. 2 let. e LDIP.**

Une sentence est incompatible avec l'ordre public si elle méconnaît les valeurs essentielles et largement reconnues qui, selon les conceptions prévalant en Suisse, devraient constituer le fondement de tout ordre juridique (ATF 144 III 120 consid. 5.1; 132 Ill 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 civillement incapables (ATF 144 III 120 consid. 5.1; 132 III 389 consid. 2.2.1).

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. Il serait d'ailleurs délicat, voire dangereux, d'essayer de recenser tous les principes fondamentaux qui y auraient sans conteste leur place, au risque d'en oublier l'un ou l'autre. Aussi est-il préférable de la laisser ouverte. S'il n'est pas aisé de définir positivement l'ordre public matériel, de cerner ses contours

avec précision, il est plus facile, en revanche, d'en exclure tel ou tel élément. Cette exclusion touche, en particulier, l'ensemble du processus d'interprétation d'un contrat et les conséquences qui en sont logiquement tirées en droit, ainsi que l'interprétation faite par un tribunal arbitral des dispositions statutaires d'un organisme de droit privé. De même, pour qu'il y ait incompatibilité avec l'ordre public, notion plus restrictive que celle d'arbitraire, il ne suffit pas que les preuves aient été mal appréciées, qu'une constatation de fait soit manifestement fausse ou encore qu'une règle de droit ait été clairement violée (ATF 144 III 120 consid. 5.1; 121 III 331 consid. 3a; arrêts 4A\_318/2018 du 4 mars 2019 consid. 4.3.1; 4A\_304/2013 du 3 mars 2014 consid. 5.1.1).

Au demeurant, qu'un motif retenu par le tribunal arbitral heurte l'ordre public matériel n'est pas suffisant; c'est le résultat auquel la sentence aboutit qui doit être incompatible avec l'ordre public (ATF 144 Ill 120 consid. 5.1; 138 III 322 consid. 4.1; 120 11 155 consid. 6a), étant précisé que cette règle ne s'applique pas s'il y a incompatibilité avec l'ordre public procédural (ATF 121 III 331 consid. 3c).

Il y a violation de l'ordre public procédural lorsque des principes fondamentaux et généralement reconnus ont été violés, conduisant à une contradiction insupportable avec le sentiment de la justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un Etat de droit (ATF 141 Ill 229 consid. 32.1; 140 III 278 consid. 3.1; 136 Ill 345 consid. 2.1). Une application erronée ou même arbitraire des dispositions procédurales applicables ne constitue pas, à elle seule, une violation de l'ordre public procédural (ATF 126 Ill 249 consid. 3b; arrêt 4A\_548/2019 du 29 avril 2020 consid. 7.3).

Dans la première branche du moyen, les recourants font grief au tribunal arbitral d'avoir violé le principe de publicité des audiences tel que garanti par l'art. 6 ch. 1 CEDH, en violation de l'ordre public procédural au sens de l'art. 190 al. 2 let. e LDIP.

Il sied de rappeler, à titre liminaire, qu'une partie à la convention d'arbitrage ne peut pas se plaindre directement, dans le cadre d'un recours en matière civile au Tribunal fédéral formé contre une sentence arbitrale internationale, de ce que les arbitres auraient violé l'art. 6 ch. 1 CEDH, même si les principes découlant de cette disposition peuvent servir, le cas échéant, à concrétiser les garanties invoquées sur la base de l'art. 190 al. 2 LDIP (ATF 142 Ill 360 consid. 4.1.2; arrêt 4A\_268/2019 du 17 octobre 2019 consid. 3.4.3). En effet, les motifs de recours sont énoncés de manière exhaustive à l'art. 190 al. 2 LDIP (cf. *supra* consid. 2.4.1). C'est donc à tort que les recourants invoquent directement la violation de l'art. 6 ch. 1 CEDH qui fonde, selon eux, un grief *sui generis* venant s'ajouter implicitement aux motifs de recours prévus à l'art. 190 al. 2 LDIP en relation avec l'art. 77al. 1 LDIP.

Alternativement, ils prétendent qu'une violation de l'art. 6 ch. 1 CEDH implique - *eo ipso* - une violation de l'ordre public procédural au sens de l'art. 190 al. 2 let. e LDIP, dans la mesure où cette disposition doit être interprétée à l'aune de la jurisprudence de la CourEDH. Or, une violation du droit conventionnel ne coïncidant pas *per se* avec une violation de l'ordre public au sens de l'art. 190 al. 2 let. e LDIP, il incombe aux recourants de démontrer en quoi la prétendue violation de l'art. 6 ch. 1 CEDH constituerait une violation de l'ordre public procédural, ce qu'ils ont omis de faire au mépris de l'art. 77 al. 3 LTF.

En l'espèce, l'applicabilité des garanties procédurales de l'art. 6 ch. 1 CEDH est d'emblée exclue, dans la mesure où les recourants ne sont pas affectés dans leurs "droits et obligations de caractère civil", ni ne font l'objet d'une accusation en matière pénale. Ils ne peuvent être assimilés à des sportifs parties à un litige concernant leurs droits et obligations ou contre lesquels une procédure disciplinaire est engagée. Il s'agit plutôt de simples dénonciateurs, qui ne sont pas eux-mêmes affectés dans leurs droits. Il n'existe pas de droit à ce qu'une procédure disciplinaire soit ouverte à l'encontre d'un autre club. En outre, les recourants ne peuvent être qualifiés de tiers directement touchés par une éventuelle disqualification de leur concurrent, étant établi qu'ils n'en bénéficieraient pas automatiquement. Partant, le présent litige échappe au champ d'application *ratione materiae* de l'art. 6 ch. 1 CEDH.

Même à supposer que l'art. 6 ch. 1 CEDH soit applicable et qu'une audience publique eût en principe dû être tenue, le TAS a suffisamment motivé en quoi une exception à ce principe se justifiait en l'espèce. En effet, il ressort de la sentence querellée que le tribunal arbitral a, dans le cadre d'un examen minutieux et approfondi, motivé de manière suffisamment circonstanciée son refus de tenir une audience publique à l'aune des principes jurisprudentiels de l'art. 6 ch. 1 CEDH - citant expressément l'arrêt *Mutu et Pechstein*. La formation arbitrale a souligné que l'audience du 15 mars 2019 était de nature préliminaire et ne concernait que des questions purement juridiques et hautement techniques, dont les faits sous-jacents n'étaient pas disputés. En effet, les visions opposées des parties concernaient uniquement les conséquences juridiques de faits non controversés. Par ailleurs, ces questions juridiques étaient plutôt complexes, ce qu'ont d'ailleurs admis les recourants - à demi mot - en les qualifiant, dans leur

lettre du 2 novembre 2018, de "*complex legal questions*". Les arbitres ont ainsi considéré que les conditions pour une exception au principe de publicité des débats au sens de la jurisprudence de la CourEDH étaient en l'espèce réunies, étant précisé que cette décision demeurait sans préjudice quant à la tenue d'une éventuelle audience ultérieure - traitant le fond du litige -, dans l'éventualité où leur appel ne devait pas être déclaré irrecevable ou rejeté à l'issue de l'examen préliminaire. Partant, c'est en examinant le contenu des arguments avancés par les parties et en tenant compte des principes jurisprudentiels relatifs à l'art. 6 ch. 1 CEDH que le TAS a, de manière intelligible et convaincante, rejeté la demande de tenir publiquement l'audience du 15 mars 2019.

Ainsi, au vu des explications qui précédent, le grief des recourants ne saurait prospérer.

Dans la deuxième branche du moyen, les recourants reprochent à la TFF ainsi qu'à la FIFA un comportement contraire à la bonne foi (art. 2 CC) qui, avalisé par le TAS, rendrait la sentence attaquée incompatible avec l'ordre public matériel (art. 190 al. 2 let. e LDIP).

Ils soutiennent qu'au vu de la verticalité des relations entre un club sportif et les fédérations sportives, le comportement de ces dernières doit se mesurer à la lumière des expectatives légitimes qu'elles créent à l'égard des clubs sportifs qui leur sont affiliés, qui n'ont d'autre choix que de se plier à leur volonté. Dans le cas d'espèce, Trabzonspor se trouverait dans pareille relation verticale avec la TFF et la FIFA. Ces deux structures ont mis en place un certain nombre de règles, visant notamment la lutte contre la manipulation des compétitions sportives, et ainsi fait naître des attentes légitimes au sein de Trabzonspor.

Selon les recourants, le règlement de compétition de la *Süper Lig* - édicté par la TFF - prévoyait des sanctions sous la forme de perte de points dans le championnat en cas d'actes avérés de *match-fixing*. Ainsi, Trabzonspor est d'avis qu'il pouvait de bonne foi s'attendre à ce que la TFF prenne de telles mesures, au plus tard à la suite de la condamnation de Fenerbahçe par le TAS, en raison de son implication avérée dans des matchs truqués dudit championnat. En outre, les recourants reprochent à la FIFA de ne pas être intervenue auprès de la TFF afin de contrôler si cette dernière a poursuivi les infractions avérées en conformité avec les principes fondamentaux du droit, comme le lui permettait l'art. 70 al. 2 CDF, dont la version anglophone est libellée comme suit:

*"The judicial bodies of FIFA reserve the right to sanction serious infringements of the statutory objectives of FIFA (cf. final part of art. 2) if associations, confederations and other sports organisations fail to prosecute serious infringements or fail to prosecute in compliance with the fundamental principles of law".*

La TFF n'ayant pas appliqué les "règles claires" de compétition et la FIFA déclinant à tort sa compétence, ces deux structures auraient agi au mépris d'un certain nombre de règles qu'elles ont elles-mêmes édictées, trahissant ainsi les attentes légitimes de Trabzonspor.

En appliquant les différentes règles applicables en l'espèce, le TAS est arrivé à la conclusion que, d'une part, une éventuelle sanction à l'encontre de Fenerbahçe sur le plan de la *Süper Lig* 2010/2011 n'impliquerait pas automatiquement que Trabzonspor obtienne le titre de champion à sa place et que, d'autre part, les Statuts FIFA prévoient certes un droit discrétionnaire pour la FIFA d'intervenir auprès des fédérations nationales, mais pas une obligation. Le processus d'interprétation de dispositions statutaires d'une

fédération sportive n'est pas englobé par la notion d'ordre public matériel. Par ailleurs, le Tribunal fédéral a retenu qu'il ne lui appartient pas de contrôler si le tribunal arbitral a correctement appliqué le droit sur la base duquel la qualité pour agir a été déniée (arrêt 4A\_424/2008 précité consid. 3.3). Par conséquent, les attentes des recourants selon lesquelles la FIFA interviendrait impérativement sur le plan national auprès de la TFF - pour une compétition qui ne se trouve pas sous l'égide de la FIFA - ne bénéficient pas de la protection de l'art. 2 CC. La question de savoir si les recourants pouvaient de bonne foi s'attendre à ce que la FIFA use de son pouvoir discrétionnaire pour intervenir sur le plan de la *Süper Lig* peut rester ouverte. En effet, même si les recourants rappellent à juste titre que le principe de la bonne foi doit être examiné à l'aune de la jurisprudence concernant l'art. 2 CC (arrêts 4A\_220/2007 du 21 septembre 2007 consid. 12.2.2; 4P.167/2002 du 11 novembre 2002 consid. 3.2) et que sa violation peut être inconciliable avec la notion d'ordre public matériel, une violation de l'art. 2 CC ne rend pas - *per se* - la sentence incompatible avec l'ordre public matériel. Or, on cherche en vain, dans les explications des recourants, l'indication des raisons pour lesquelles cette prétendue violation de l'art. 2 CC violerait aussi l'ordre public matériel.

Les recourants n'ayant pas fait la démonstration d'une violation grave de l'art. 2 CC ni de la contrariété de la sentence querellée avec l'ordre public matériel - ceux-ci ayant fait l'économie de toute argumentation sur ce dernier point - leur grief est dès lors voué à l'échec.

Les recourants fondent la troisième branche du moyen sur la jurisprudence du Tribunal fédéral selon laquelle les promesses de pots-de-vin contreviennent à l'ordre public international, dès lors qu'elles sont avérées (ATF 119 II 380 consid. 4b; arrêt

4P.208/2004 du 14 décembre 2004 consid. 6.1). (...) Ils prétendent que la sentence arbitrale ici en cause permet à ce que la corruption dans le sport demeure impunie et que les auteurs de tels actes conservent indûment le titre de *Süper Lig* 2010/2011.

Ils avancent que les pots-de-vin versés par Fenerbahçe ont eu pour conséquence directe l'établissement de points au classement et ainsi permis au club, par l'application du règlement de *Süper Lig*, de devenir vainqueur de son édition 2010/2011. Par conséquent, ce sont les actes entachés de pots-de-vin qui fondent directement les prétentions des recourants. Selon eux, la sentence querellée cautionne et donne effet à des actes de corruptions avérés et contrevient ainsi à l'ordre public matériel au sens de l'art. 190 al. 2 let. e LDI P.

Ce raisonnement - tel qu'échafaudé par les recourants - ne saurait convaincre. D'une part, les recourants semblent perdre de vue que l'objet du présent litige n'est pas de savoir si des actes de corruption ont été perpétrés et quelles sanctions disciplinaires seraient les plus appropriées. Il a trait exclusivement à la question de savoir si Trabzonspor est légitimé à contester la décision de la FIFA et, indirectement, à réclamer que Fenerbahçe lui restitue le titre de *Süper Lig* pour la saison 2010/2011. Ils ne sauraient agir en justice faisant valoir non pas leur propre intérêt, mais celui de l'intérêt général de la lutte contre la corruption (cf. arrêt 4A\_560/2018 du 16 novembre 2018 consid. 2.1; CORBOZ, *op. cit.*, n°22 ad art. 76 LTF). D'autre part, le tribunal arbitral est arrivé à la conclusion que la situation juridique de l'espèce ne lui permettait pas d'imposer les sanctions (supplémentaires) - suggérées par Trabzonspor - à Fenerbahçe. En outre, une fois l'absence de qualité pour agir des recourants constatée par le tribunal arbitral, il est chose logique et correcte que ce dernier ne se soit pas penché sur les différents griefs des recourants, par lesquels ils attaquaient le fond de la décision de la

FIFA (cf. arrêt 4A\_548/2019 précité consid. 6.2.2). Ce faisant, le TAS n'a - d'aucune manière - cautionné les actes de corruption qui ont secoué le football turc durant la saison 2010/2011.

D'où il suit que le grief tiré de la violation de l'art. 190 al. 2 let. e LDIP est dénué de tout fondement.

**Par un deuxième moyen, divisé en deux branches, les recourants se plaignent d'une violation de leur droit d'être entendus au sens de l'art. 190 al. 2 let. d LDIP.**

Les recourants se plaignent en premier lieu d'un abus de pouvoir d'appréciation de la part de la FIFA. Cette dernière aurait usé du pouvoir d'appréciation que lui confère l'art. 70 al. 2 CDF de manière contraire au droit. Selon eux, même en admettant que la FIFA soit au bénéfice d'un pouvoir discrétionnaire, celui-ci doit être exercé dans le sens des Statuts FIFA et de manière proportionnée. En effet, si - en l'espèce - la FIFA n'avait pas l'obligation d'intervenir sur le plan national, alors l'art. 70 al. 2 CDF resterait lettre morte, quand bien même de graves violations des Statuts FIFA ont été commises. Le TAS, en renonçant à examiner le grief invoqué par les recourants devant la FIFA - nonobstant son pouvoir décisionnel *de novo* cautionnerait le refus de la FIFA d'engager une procédure disciplinaire et violerait lui-même le droit d'être entendu des recourants.

Le TAS a décidé le 5 octobre 2018 de limiter la procédure dans un premier temps aux questions de la recevabilité, de la compétence juridictionnelle ainsi que de la qualité pour agir. Il ressort de la sentence querellée que les arbitres se sont penchés de manière approfondie sur la question de la qualité pour agir de Trabzonspor, qu'ils ont finalement déniée. Pareille scission de la procédure répond à des impératifs d'économie de

procédure dont les avantages ne sont plus à démontrer. Elle n'est d'ailleurs pas l'apanage du TAS puisque c'est aussi ce que prévoit expressément l'art. 125 let. a CPC pour les juridictions civiles ordinaires. Procédant ainsi, le TAS n'a nullement violé le droit d'être entendu des parties. Par surabondance, même si le TAS n'avait pas à titre préliminaire limité la procédure à certaines questions juridiques déterminées, celui-ci aurait tout de même pu valablement renoncer à l'examen du fond du litige, constatant que la qualité pour agir leur faisait défaut. En effet, le tribunal arbitral n'est pas tenu de répondre à tous les arguments présentés par les parties. Il peut passer sous silence ceux que les motifs adoptés dans sa sentence rendent superflus. Le droit d'être entendu ne confère pas de droit à un *obiter dictum*.

En second lieu, les recourants contestent le contenu de la sentence arbitrale, à savoir l'interprétation faite par les arbitres des différentes règles applicables.

En qualité de membre indirect de la FIFA, Trabzonspor bénéficierait de la protection de l'art. 75 CC, lui permettant de contester les décisions prises par ladite fédération. En ayant considéré - prétendument à tort - qu'une éventuelle

sanction de Fenerbahge n'entraînerait pas automatiquement l'attribution du titre de champion à Trabzonspor, avec comme conséquence le déni de sa qualité pour agir, le TAS aurait empêché les recourants de faire contrôler par un organe judiciaire indépendant la conformité légale et statutaire de la décision prise par la FIFA. De par cette interprétation soi-disant trop restrictive, le TAS aurait privé le club de la protection juridique à laquelle il a droit selon l'art. 75 CC, au mépris de son droit d'être entendu (art. 190 al. 2 let. d LDIP).

Les recourants, dont le caractère appellatoire de leur argumentation n'échappe pas au Tribunal fédéral, ne critiquent pas la manière dont la formation arbitrale a entendu leur position, mais le fait qu'elle ne l'a pas partagée. Or, le grief du droit d'être entendu ne peut être invoqué dans le but d'obtenir indirectement du Tribunal fédéral un examen sur le fond de la sentence attaquée. Partant, le grief formulé par les recourants est irrecevable.

## Décision

Le recours est rejeté dans la mesure où il est recevable.

---

**4A\_543/2019**

**30 April 2020**

## **Kuwait Motor Sports Club v. International Motorcycling Federation**

---

*Appeal against the Civil Appeal Chamber of the Vaud Cantonal Court of 24 September 2019 concerning the enforcement of the CAS arbitral award of 1 May 2017<sup>1</sup>*

### **Extract of the facts**

The International Motorcycling Federation is an association with headquarters in the canton of Vaud. Its main purpose is to promote motorcycling in all its aspects. According to its statutes, its members are national motorcycling federations as affiliate members, and other organizations active in the motorcycling sector as associate members. Only affiliated members have the right to vote at the general assembly. The International Federation can admit as an affiliate member only one national federation per country. The applications are examined by the management committee; the latter is empowered to reject them or to present a proposal for admission to the general assembly.

On May 7, 2013, the organization Kuwait Motor Sports Club in Kuwait, requested the International Federation to be admitted as an affiliate member for this country and to expel the organization Kuwait International Automobile Club, which is an affiliate member since 1980.

In an appeal filed by Kuwait Motor Sports Club, the Court of Arbitration for Sports (CAS) in Lausanne issued a final Award on May 1, 2017. It found that the International Federation (here, the Respondent) committed a denial of justice, because this organization did not rule on the application presented on May 7, 2013. The CAS ordered the International Federation to rule on this matter within nine months of the notification of the Award, based on the rules in effect at the time of the application and in respecting the right to be heard from Kuwait Motor Sports Club.

The Federal Tribunal ruled on May 28, 2018 on the civil law appeal brought by the International Federation. It dismissed this appeal, insofar as it was admissible (judgment 4A\_314/2017<sup>2</sup>).

Kuwait Motor Sports Club filed a claim before the Justice of the Peace of the district of Lausanne for the enforcement of the arbitral Award. The Justice of the Peace issued a decision on October 24, 2018. It ordered the enforcement and ordered the International Federation to rule on the application no later than December 1, 2018, based on the rules in effect on May 7, 2013 and respecting the right to be heard by the applicant organization. It declared that the International Federation, if necessary, would be subject to a fine of CHF 500 per

---

<sup>1</sup> **Translator's Note:** Quote as Kuwait Motor Sports Club v. International Motorcycling Federation, 4A\_543/2019. The decision was issued in French. The full text is available on the website of the Federal Tribunal, [www.bger.ch](http://www.bger.ch).

For the full English translations & introductory notes on the Federal Tribunal judgments in both sports- and commercial arbitration cases, you can

visit the website [www.swissarbitrationdecisions.com](http://www.swissarbitrationdecisions.com) (operated jointly by Dr. Charles Poncet and Dr. Despina Mavromati) as a service to the international arbitration community.

<sup>2</sup> The English Translation of this decision is available here:  
<http://www.swissarbitrationdecisions.com/atf-4a-314-2017>

day of non-execution, and that the first day of non-performance would be December 2, 2018.

The Civil Appeal Chamber of the Vaud Cantonal Court ruled on November 13, 2018 on the appeal of the International Federation; it dismissed the appeal and confirmed the order.

Kuwait Motor Sports Club filed a second request for enforcement with the Justice of the Peace on February 21, 2019. According to its requests, the Justice should note that its previous order remained unenforced, order the International Federation to pay the fine at the rate of CHF 500 per day as of December 2, 2018 until the day of the newly requested order, and declare that the International Federation would be liable for a fine of CHF 1'000 for each additional day of non-performance.

The International Federation requested that the application be dismissed.

The Justice of the Peace issued a decision on July 2, 2019 and rejected the request. It found in fact that on November 23, 2018, the International Federation gave the requesting party five days to communicate any new elements in support of its application, and that the management committee rejected this application on the 29th of the same month.

The Civil Appeal Chamber of the Vaud Cantonal Court ruled on September 24, 2019 on the petitioner's appeal; it dismissed the appeal and confirmed the order.

In a civil law appeal, Kuwait Motor Sports Club attacks this second judgment of the Court of Appeal; it requests from the

Federal Tribunal relief that corresponds to its second request to the Justice of the Peace.

The International Motorcycling Federation, Respondent, contends that the appeal should be dismissed. Without being invited to do so, the parties filed a reply and a rejoinder.

### **Extract of the legal considerations**

The final cantonal decisions concerning the enforcement of arbitral awards are subject to appeal in civil matters according to Art. 72(2)(b)(1) LTF<sup>3</sup> (Bernard Corboz, in *Commentaij on the LTF*, 2nd ed., 2014, no. 33 ad Art. 72 LTF) and Art. 75(1) LTF.

Disputes relating to membership to an association are not pecuniary matters under Art. 74(1) LTF (ATF 108 II 6 at 1 p. 9; 108 II 77 at la p. 79); the appeal in civil law is therefore admissible without regard to the value at stake.

The Award rendered by the CAS on May 1, 2017, is the result of an international arbitration procedure subject to Arts. 176 et seq. of the Federal Statute on Private International Law (FILM). Because this Award was subject to the appeal provided by Art. 191 PILA<sup>4</sup>, its execution in Switzerland is subject to Arts. 335 et seq. CPC (Franz Kellerhals, in *Berner Kommentar*, no. 8 ad Art. 335 CPC; Andreas Bucher, in *Commentaire Romand*, no. 4 ad Art. 194 LDIP). The Justice of the Peace ruled on October 24, 2018, and then on July 2, 2019, as an enforcement tribunal under Art. 338(1) CPC.

The same arbitral Award or the same judicial decision may, if necessary, be followed by several successive procedures before the enforcement court, in particular

<sup>3</sup> LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.

<sup>4</sup> PILA is the most commonly used English abbreviation for the Federal Statute on Private International Law of December 18, 1987, RS 291.

when the initially ordered enforcement measures do not lead to the desired result and it seems necessary to repeat or complete them (Kellerhals, op. cit., no. 48, ad Art. 343 CPC). On the other hand, a decision of the enforcement court is not itself subject to enforcement proceedings under Arts. 335 *et seq.* CPC. In the present case, the second request addressed to the Justice of the Peace could therefore only seek new measures for the execution of the arbitral Award of May 1, 2017. With respect to the pleas filed before the Federal Tribunal, the latter must verify if the refusal of these new measures is lawful or not.

The Court of Appeal noted that the Respondent had executed the arbitral Award by inviting the Appellant club to bring forward any new elements in support of its application on November 23, 2018, and by ruling on the application on November 29, 2018 of the same month. The Award being thus executed, there is no issue of enforcement any longer.

The Appellant categorically disputes that the Award is duly executed. It asserts in particular that the five-day period allowed according to the application of November 23, 2018, was all the less sufficient as this request only reached it in the early hours of the following day November 24.

The request and the time allowed should enable the Appellant to exercise the “right to be heard” provided for in the operative part of the arbitral Award. The importance of the right to be heard should not be overstated as the Appellant’s application had been pending and contentious for several years, so the position and arguments of each party were obviously well known to the other party. The Appellant should also have expected an approach from the Respondent within the time limit for execution assigned by the first order of the Justice of the Peace; it could therefore

have been prepared to make its case appropriately. It is immaterial in this respect that the order was challenged before the Court of Appeal because, according to Art. 325(1) CPC, the appeal had no suspensive effect. Finally, the Appellant fails to list the new, useful elements for its application which it allegedly could not have asserted in just four days but rather only in a longer period.

The Appellant also states that the decision to reject its application taken on November 29, 2018, was never formally notified to it and that the CAS had annulled this decision on October 14, 2019, after a new arbitration procedure. The Appellant loses sight of the fact that by the effect of Arts. 326(1) CPC and 99(1) LTF, the pleas inferred from facts which were not alleged before the enforcement court, including facts subsequent to the execution procedure, are inadmissible. For the rest, said decision was known to the Appellant when it introduced its second request on February 21, 2019. The management committee was legally competent to adopt it. By its wording, the terms of the Award of May 1, 2017, did not require a decision of the general assembly and even less a decision welcoming the application. The decision therefore corresponded to what was required by the operative part of the Award. As the Award was fully executed, there was no reason to order further enforcement. Thus, to the extent that it is admissible, the civil law appeal is unfounded.

## Decision

The appeal is dismissed in so far as it is admissible.

---

**4A\_618/2019**

**17 septembre 2020**

**Franck Herman Blahoua Betra c. Hellenic National Council for Combating Doping (ESKAN)**

---

*Recours en matière civile contre la sentence arbitrale rendue le 29 octobre 2019 par le Tribunal Arbitral du Sport (TAS 2018/A/6015)*

### **Extrait des Faits**

Franck Herman Blahoua Beira est un joueur de football professionnel de nationalité française.

Le 20 juillet 2017, le footballeur s'est engagé avec PAS Giannina, club évoluant alors en première division du championnat grec.

La Grèce s'est dotée de dispositions législatives en matière de lutte antidopage. Il s'agit en particulier de la loi n° 4373/2016 relative aux "arrangements nécessaires pour l'harmonisation de la législation grecque avec le nouveau code antidopage de l'Organisation mondiale antidopage (sic) et autres dispositions" (la loi n° 4373/2016).

A l'issue d'un match disputé le 4 février 2018 dans le cadre du championnat grec, le joueur a fait l'objet d'un contrôle antidopage révélant la présence d'un produit figurant sur la liste des substances interdites par l'Agence Mondiale Antidopage. L'examen du second échantillon a confirmé la première analyse.

Par décision du 23 avril 2018, l'ESKAN a confirmé au joueur qu'il avait commis une violation des règles antidopage au sens des art. 3.1 et 3.2 de la loi n° 4373/2016. Elle l'invitait soit à avouer les faits soit à interjeter un recours contre ladite décision, dans un délai de quinze jours, auprès du Comité disciplinaire de première instance de l'ESKAN (le Comité disciplinaire).

Le joueur a recouru et a été entendu le 11 juin 2018 par le Comité disciplinaire, qui, par décision du 19 septembre 2018, l'a suspendu pour une durée de quatre ans à compter du 4 février 2018. La décision, rédigée en grec, a été notifiée à l'intéressé le 29 octobre 2018. Elle ne comportait aucune indication des voies de droit.

Le 19 novembre 2018, le footballeur a adressé au Tribunal Arbitral du Sport (TAS) une déclaration d'appel.

Le 30 novembre 2018, le TAS a accusé réception du mémoire d'appel déposé par le joueur et a fixé à l'intimée un délai de réponse de vingt jours.

Par courriers des 13 décembre 2018 et 3 janvier 2019, le TAS a constaté que l'intimée n'avait pas déposé de réponse.

Le 20 mars 2019, le TAS a informé l'appelant que sa requête d'assistance judiciaire avait été admise et qu'une arbitre unique (l'arbitre) avait été désignée en la personne d'une avocate suisse.

Le 17 avril 2019, le Greffe a avisé les parties de la tenue d'une audience sur la compétence et le fond. L'appelant était invité à produire, d'ici le début de l'audience au plus tard, une copie de la loi n°4373/2016 accompagnée d'une traduction française ainsi que de toute autre réglementation prévoyant la compétence du TAS pour statuer sur le sort de la cause.

Le 13 juin 2019, le TAS a tenu audience à Lausanne en présence de l'appelant et de son

conseil. L'intimée n'a pas assisté à l'audience et n'y était pas représentée.

Le lendemain de l'audience, le TAS a fixé un nouveau délai à l'appelant pour lui transmettre copie de la loi n° 4373/2016 ainsi qu'une traduction des dispositions topiques de ladite loi.

Le 17 juin 2019, l'appelant a fait parvenir au TAS le texte et une traduction française de divers articles de la loi n° 4373/2016.

Sur demande du TAS, l'appelant a produit le texte de plusieurs autres dispositions de la loi n° 4373/2016, dont celui de l'art. 14.2, lequel a, selon la traduction française figurant dans la sentence attaquée, la teneur suivante:

*"14.2.1 Appels relatifs à des sportifs de niveau international ou à des manifestations internationales*

*Dans les cas découlant de la participation à une manifestation internationale ou dans les cas impliquant des sportifs de niveau international, la décision peut faire l'objet d'un appel uniquement devant le TAS.*

*14.2.2 Appels relatifs à d'autres sportifs ou à d'autres personnes*

*Dans les cas où l'art. 13.2.1 (sic) n'est pas applicable, la décision peut faire l'objet d'un appel auprès du CRSCR".*

Sur demande du TAS, un département de la Fédération Internationale de Football Association (FIFA), a confirmé, par lettre du 26 juillet 2019, que l'appelant ne revêtait pas la qualité de "joueur de niveau international".

Par courrier du 26 juillet 2019, l'appelant a reconnu qu'il n'était pas un joueur de niveau international, mais bien un joueur de niveau national, au sens du Règlement antidopage de la FIFA, du Code Mondial Antidopage et de la loi n° 4373/2016, la définition de ces notions étant la même dans tous ces textes. Nonobstant sa qualité

de joueur de niveau national, il a soutenu que le TAS était en l'occurrence compétent dès lors que l'existence de l'autorité nationale grecque censée connaître des appels contre les décisions rendues par le Comité disciplinaire n'était pas établie.

Par sentence du 29 octobre 2019, notifiée à l'appelant le 13 novembre 2019, l'arbitre s'est déclarée incomptétente.

Le 13 décembre 2019, le footballeur (le recourant) a formé un recours en matière civile dans lequel il prie le Tribunal fédéral d'annuler la sentence du 29 octobre 2019, de déclarer que le TAS est compétent pour connaître du litige et de lui renvoyer la cause afin qu'il statue sur le fond.

L'intimée n'a pas déposé de réponse dans le délai qui lui avait été imparti à cette fin.

Le TAS, qui a produit le dossier de la cause, a renoncé à formuler des observations écrites sur le recours et invité le Tribunal fédéral à se référer aux motifs de la sentence attaquée.

### **Extrait des considérants**

Dans le domaine de l'arbitrage international, le recours en matière civile est recevable contre les décisions de tribunaux arbitraux aux conditions fixées par les art. 190 à 192 LDIP<sup>1</sup> (art. 77 al. 1 let. a LTF<sup>2</sup>).

Le siège du TAS se trouve à Lausanne. Le recourant n'avait pas son domicile, au sens de l'art. 20 al. 1 let. a LDIP, en Suisse au moment déterminant. Les dispositions du chapitre 12 de la LDIP sont donc applicables (art. 176 al. 1 LDIP).

Le recours en matière civile prévu à l'art. 77 al. 1 LTF n'a généralement qu'un caractère cassatoire (cf. l'art. 77 al. 2 LTF qui exclut l'application de l'art. 107 al. 2 LTF dans la mesure où cette dernière disposition permet

<sup>1</sup> LDIP est l'abréviation utilisée pour la loi Suisse sur le Droit International Privé.

<sup>2</sup> LTF est l'abréviation utilisée pour la loi sur le Tribunal fédéral suisse.

au Tribunal fédéral de statuer sur le fond de l'affaire). Cependant, exception est faite à ce caractère-là lorsque le litige porte, comme en l'espèce, sur la compétence du tribunal arbitral. En pareille hypothèse, le Tribunal fédéral, s'il admet le recours, peut constater lui-même la compétence ou l'incompétence du tribunal arbitral (ATF 136 III 605 consid. 3.3.4 p. 616). La conclusion par laquelle le recourant invite la Cour de céans à constater elle-même la compétence du Tribunal arbitral est, dès lors, recevable.

Pour le surplus, le recours satisfait aux exigences formelles de l'art. 42 LTF et a été déposé en temps utile (art. 100 al. 1 LTF). Sur le principe, rien ne s'oppose donc à ce que l'autorité de céans entre en matière.

Le Tribunal fédéral statue sur la base des faits constatés dans la sentence attaquée (cf. art. 105 al. 1 LTF). Il ne peut rectifier ou compléter d'office les constatations de l'arbitre, même si les faits ont été établis de manière manifestement inexacte ou en violation du droit (cf. l'art. 77 al. 2 LTF qui exclut l'application de l'art. 105 al. 2 LTF).

**Dans un premier moyen, divisé en deux branches, le recourant, soutient que l'arbitre s'est déclarée à tort incompétente pour connaître de l'appel qui lui était soumis.**

Saisi du grief d'incompétence, fondé sur l'art. 190 al. 2 let. b LDIP, le Tribunal fédéral examine librement les questions de droit, y compris les questions préalables, qui déterminent la compétence ou l'incompétence du tribunal arbitral (ATF 133 III 139 consid. 5 p. 141 et les arrêts cités). Il n'en devient pas pour autant une cour d'appel, de sorte qu'il n'a pas à rechercher lui-même, dans la sentence attaquée, quels arguments juridiques pourraient justifier l'admission du grief tiré de l'art. 190 al. 2 let. b LDIP. Il incombe bien plutôt à la partie recourante d'attirer son attention sur eux, pour se conformer à l'art. 77 al. 3 LTF (ATF 142 III 239 consid. 3.1). Cette disposition

instaure les mêmes exigences de motivation que l'art. 106 al. 2 LTF. Le recourant doit donc indiquer quelle hypothèse de l'art. 190 al. 2 LDIP est réalisée à ses yeux et, en partant de la sentence attaquée, montrer de façon circonstanciée en quoi consiste, selon lui, la violation du principe invoqué (ATF 128 Ill 50 consid. 10; arrêts 4A\_7/2019 du 21 mars 2019 consid. 2; 4A\_378/2015 du 22 septembre 2015 consid. 3.1).

Le Tribunal fédéral ne revoit cependant l'état de fait à la base de la sentence attaquée — même s'il s'agit de la question de la compétence — que si l'un des griefs mentionnés à l'art. 190 al. 2 LDIP est soulevé à l'encontre dudit état de fait ou que des faits ou des moyens de preuve nouveaux (cf. art. 99 al. 1 LTF) sont exceptionnellement pris en considération dans le cadre de la procédure du recours en matière civile (cf. ATF 142 Ill 239; 129 Ill 727 consid. 5.2,2; 128 Ill 50 consid. 2a et les arrêts cités).

En vertu de l'art. R47 du Code de l'arbitrage en matière de sport (le Code), une partie peut appeler de la décision disciplinaire prise par un organisme sportif pour autant — entre autres conditions — qu'elle ait épousé les voies de droit préalables à l'appel mises à sa disposition par cet organisme. Quant à l'art. R55 al. 1 du Code, il prescrit à l'intimé de soumettre au TAS, dans les vingt jours suivant la réception de la motivation de l'appel, une réponse comprenant toute exception d'incompétence, entre autres éléments.

Pour aboutir à la conclusion qu'elle n'était pas compétente, l'arbitre a tenu le raisonnement résumé ci-après. Dans la sentence attaquée, elle rappelle tout d'abord que le tribunal arbitral doit contrôler sa compétence d'office, à la lumière des informations dont il dispose, mais sans avoir à aller au-delà ni à mener lui-même ses propres investigations, lorsque, comme en l'espèce, le défendeur fait défaut. Se référant notamment à l'art. 14.2 de la loi n° 4373/2016, l'arbitre retient que le recourant

n'est pas un sportif de niveau international et qu'il a fait l'objet d'un contrôle antidopage lors d'une manifestation nationale. Elle en conclut que le recourant aurait dû former appel de la décision rendue par le Comité disciplinaire auprès de l'instance d'appel interne grecque, conformément à l'art. 14.2.2 de la loi n°4373/2016, et non pas saisir directement le TAS. L'arbitre considère en outre que le recourant n'a pas rapporté la preuve de l'épuisement des voies de droit internes ni démontré que l'autorité d'appel nationale n'existe pas, alors qu'il supportait pourtant la charge de la preuve de ces faits. Elle relève que, selon l'article de presse produit par le recourant et traduit librement par celui-ci, l'autorité baptisée EOKAN — laquelle n'aurait pas encore été "activée" — devrait remplacer l'intimée (l'ESKAN). Cet article n'établit en revanche pas que l'autorité d'appel interne grecque, censée connaître des appels dirigés contre les décisions rendues par le Comité disciplinaire de l'intimée, n'existerait pas ou plus. Le TAS se déclare dès lors incomptént, faute d'épuisement des voies de droit préalables.

Dans la première branche de son moyen tiré de la violation de l'art. 190 al. 2 let. b LDIP, le recourant fait grief au TAS d'avoir mené ses propres investigations en vue d'examiner s'il était compétent. Selon lui, l'arbitre n'aurait pas dû requérir la production de la loi n°4373/2016 ni s'enquérir auprès de la FIFA de la qualification du joueur (joueur de niveau national ou international), mais aurait au contraire dû statuer sur la base des informations disponibles.

Aux termes de l'art. 186 al. 2 LDIP, l'exception d'incompétence doit être soulevée préalablement à toute défense sur le fond. C'est un cas d'application du principe de la bonne foi, ancré à l'art. 2 al. 1 CC, qui régit l'ensemble des domaines du droit, y compris l'arbitrage. Autrement dit, la règle de l'art. 186 al. 2 LDIP implique que le tribunal arbitral devant lequel le défendeur procède au fond sans

faire de réserve est compétent de ce seul fait. Dès lors, celui qui entre en matière sans réserve sur le fond (*Einlassung*) dans une procédure arbitrale contradictoire portant sur une cause arbitrable reconnaît, par cet acte concluant, la compétence du tribunal arbitral et perd définitivement le droit d'exciper de l'incompétence dudit tribunal (ATF 128 III 50 consid. 2c/aa et les références).

L'art. 186 al. 2 LDIP est dispositif en ce qui concerne les modalités d'exercice de l'exception d'incompétence. Aussi les règlements d'arbitrage prévoient-ils des formes et délais spécifiques (arrêt 4A\_634/2014 du 21 mai 2015 consid. 3.1), L'art. R55 al. 1 du Code exige que cette exception soit soulevée dans la réponse de l'intimé, qui doit être soumise au TAS dans les vingt jours suivant la notification de la motivation de l'appel.

La situation juridique est différente lorsque le défendeur fait défaut. Dans cette hypothèse, le tribunal arbitral doit contrôler sa compétence d'office (ATF 120 II 155 consid. 3b/bb p. 162), à la lumière des informations dont il dispose, mais sans avoir à aller au-delà ni à mener lui-même ses propres investigations (arrêt 4A\_682/2012 du 20 juin 2013 consid. 4.4.2.1 et les références).

Contrairement à ce qu'affirme le recourant, on ne saurait déduire du passage précité de l'arrêt 4A\_682/2012 qu'un tribunal arbitral ne pourrait jamais, en cas de procédure par défaut, procéder à des mesures d'instruction en vue de déterminer s'il est compétent pour trancher le litige. Que l'arbitre ne soit pas tenu de le faire est une chose. Toutefois, rien n'interdit au tribunal arbitral de recueillir certaines informations supplémentaires et de mener ses propres investigations en vue d'élucider la question de sa compétence.

En l'occurrence, le statut réglementaire du recourant (joueur de niveau international ou

national) avait une incidence sur les voies de droit et, partant, sur la compétence du TAS. Dans ces conditions, on ne saurait reprocher à l'arbitre d'avoir recueilli certaines informations supplémentaires auprès de la FIFA et du recourant.

Le recourant fait encore valoir que l'intimée a maintenu une certaine confusion en s'abstenant volontairement de participer à la procédure conduite devant le TAS jusqu'à ce que la sentence soit rendue, ensuite de quoi l'intimée a, dans le délai imparti par le TAS, manifesté son opposition à une requête de confidentialité formée par le recourant. S'il est possible que l'intimée ait choisi à dessein de se désintéresser de la procédure arbitrale, on ne saurait toutefois déduire de son seul silence qu'elle se doutait, respectivement savait, que l'autorité d'appel interne grecque prévue par l'art. 14.2.2 de la loi n°4373/2016 n'existe pas.

Dans la seconde branche du moyen considéré, le recourant reproche à l'arbitre de s'être déclarée incomptente, faute d'épuisement des instances préalables. Dans la mesure où il invoquait un fait négatif, soit l'inexistence de l'autorité d'appel prévue par l'art. 14.2.2 de la loi n° 4373/2016, l'intéressé soutient qu'il appartenait en réalité à l'intimée de prouver l'existence de cette autorité d'appel.

Il est frappant de constater que le recourant n'a pas soutenu, lorsqu'il a saisi le TAS, que l'instance d'appel interne grecque n'existe pas ni qu'il avait vainement tenté de saisir ladite autorité. Ce n'est qu'ultérieurement, à un stade avancé de la procédure, après que la FIFA eut confirmé que le recourant était un joueur de niveau national, que l'intéressé a, semble-t-il, fait valoir, pour la première fois, que l'autorité précitée n'existe pas. Semblable démarche apparaît difficilement compatible avec les règles de la bonne foi, puisqu'elle s'apparente à une tentative, pour le moins tardive, de fonder la compétence du

TAS, sur la base d'éléments que le recourant aurait pu et dû faire valoir d'entrée en cause.

Quoi qu'il en soit, l'argumentation du recourant résumée ci-dessus démontre que, sous couvert d'une prétendue violation de l'art. 190 al. 2 let. b LDIP, l'intéressé reproche en réalité à l'arbitre d'avoir enfreint les règles sur le fardeau de la preuve. Ce faisant, le recourant perd de vue que l'application des règles sur le fardeau de la preuve est soustraite à l'examen du Tribunal fédéral lorsqu'il est saisi d'un recours en matière civile visant une sentence arbitrale internationale (arrêts 4A\_668/2016 du 20 septembre 2016 consid. 4.3.2; 4A\_522/2016 du 2 décembre 2016 consid. 3.2.1).

En l'occurrence, l'arbitre s'est référée à la jurisprudence constante du TAS et à l'avis professé par deux auteurs (MAVRONATI/REEB, The Code of the Court of Arbitration for sport, 2015, n° 35 ad R47 du Code), selon lesquels il appartient à celui qui saisit le TAS de démontrer qu'il a épuisé les voies de droit internes ou que celles-ci n'existent pas. Elle a considéré que le recourant n'avait pas démontré que l'instance d'appel préalable n'existe pas ni établi avoir vainement tenté de saisir ladite autorité. Sur ce point, elle a relevé que l'article de presse produit par l'intéressé ne permettait pas de prouver l'inexistence de l'autorité d'appel de l'intimée. Le TAS a conclu qu'il n'était pas compétent dès lors que le recourant n'avait pas "*épuisé les voies de droit dont il disposait en vertu de la loi no 4373/2016*". Ce faisant, il a admis l'existence d'une instance préalable que l'intéressé aurait pu et dû, à tout le moins, tenter de saisir. Les constatations de l'arbitre touchant à l'existence de l'autorité d'appel prévue par l'art. 14.2.2 de la loi n°4373/2016, ainsi qu'à l'absence de tentative de saisine de ladite autorité, ressortissent aux domaines des faits et de l'appréciation des preuves et échappent à l'examen de la Cour de céans, puisque le recourant ne soulève aucun grief

mentionné à l'art. 190 al. 2 LDIP à l'encontre de l'état de fait à la base de la sentence attaquée. En effet, l'intéressé se lance dans une démonstration de caractère appellatoire en faisant notamment valoir que l'instance qu'il aurait dû saisir n'est pas identifiable, que son adresse est introuvable et que le règlement censé régler la procédure devant cette autorité n'existe pas. Partant, sa critique est irrecevable.

En tout état de cause, on ne saurait reprocher à l'arbitre d'avoir considéré que l'article de presse produit par l'intéressé ainsi que ses allégations, non étayées par des pièces, selon lesquelles il aurait "*procédé à des recherches poussées en sollicitant des juristes grecs*", ne suffisaient pas à établir l'inexistence de l'autorité d'appel prévue par l'art. 14.2.2 de la loi no 4373/3016.

Aussi le grief tiré de la violation de l'art. 190 al. 2 let. b LDIP doit-il être écarté.

**Dans un second moyen, le recourant dénonce une violation de l'ordre public (art. 190 al. 2 let. e LDIP) au motif que la décision rendue le 19 septembre 2018 par le Comité disciplinaire ne contenait aucune indication des voies de droit.**

Point n'est besoin de trancher ici la question de savoir si un tel grief entre dans la notion restrictive de l'ordre public au sens de l'art. 190 al. 2 let. e LDIP — même si cela semble *prima facie* très douteux —, dès lors que le moyen se révèle de toute manière infondé. Comme le concède le recourant, lorsque l'indication des voies de droit fait défaut, on attend du justiciable qu'il fasse preuve de diligence en recherchant lui-même les informations nécessaires. Le destinataire d'une décision, reconnaissable comme telle mais ne contenant pas la mention des voies de droit, doit ainsi entreprendre dans un délai raisonnable les démarches voulues pour sauvegarder ses droits, notamment se renseigner auprès d'un avocat ou de l'autorité qui a statué sur les moyens d'attaquer cette

décision et, après avoir obtenu les renseignements nécessaires, agir en temps utile.

En l'occurrence, le recourant était représenté par une avocate grecque lors de la procédure conduite par le Comité disciplinaire. De plus, la mandataire professionnelle s'est vu notifier la décision rendue par cette autorité. Aussi l'intéressé était-il en mesure de se renseigner auprès de son conseil sur les éventuelles voies de recours à disposition en vue de contester cette décision. Par ailleurs, il ressort clairement de l'art. 14.2.2 de la loi no 4373/3016 qu'un appel était possible auprès d'une autorité grecque. Dans ces conditions, force est d'admettre que le recourant, représenté par une avocate grecque, était en mesure de déterminer l'autorité d'appel compétente. Les critiques purement appellatoires dans lesquelles se lance le recourant, en soutenant que l'affaire est complexe et que le conseil de nationalité française, qui l'a assisté lors de la procédure conduite par le TAS, ne pouvait supputer l'existence d'une instance d'appel grecque ne permettent pas d'aboutir à une solution différente.

### Décision

Sur le vu de ce qui précède, le recours soumis à l'examen du Tribunal fédéral doit être rejeté.

---

**Informations diverses**  
**Miscellaneous**  
**Información miscelánea**



---

## Publications récentes relatives au TAS/Recent publications related to CAS/Publicaciones recientes relacionadas con el TAS

---

- Adyel A., La singularité du tennis dans le sport et la société, Generis Publishing 2020
- Baddeley M., The extraordinary autonomy of sports bodies under Swiss law: lessons to be drawn, The International Sports Law Journal, Volume 20, Numbers 1-2, April 2020, p. 3
- Crespo Perez J., The new CAS arbitration Code, Revista Aranzadi de Derecho de Deporte y Entretenimiento, Núm. 68, Julio-Septiembre 2020 p. 387
- De Weger F., Sell-on clauses in light of FIFA and CAS jurisprudence, Football Legal # 13, June 2020, p. 23
- Exner J., Fixed sanction frameworks in the World Anti-Doping Codes 2015 and 2021: Can hearing panels go below the limits in the pursuit of proportionate punishments?, The International Sports Law Journal, Volume 20, Numbers 3-4, November 2020, p.126
- Eidelven do Canto D., Repeated offence: the case “SC International v. Udinese Calcio S.p.A. & FIFA, Football Legal # 13, June 2020, p. 215
- Giraldo c., Delgado C. & Buitrago C., The creation of the Dispute Resolution Chamber in Colombia, Football Legal # 13, June 2020, p. 197
- Gomez Sanz, The independence and impartiality of the arbitration committees of the sports federations. ECHR: case of “ali riza and others v. Turkey”, Revista Aranzadi de Derecho de Deporte y Entretenimiento, Núm. 67, Abril-Junio 2020 p. 353
- Gonzalez Mullin H., International Transfer of minors. The Garre case: the vada doctrine and an exception imposed on force, Revista Aranzadi de Derecho de Deporte y Entretenimiento, Núm. 67, Abril-Junio 2020 p. 365
- Gradev G., The application of loss of chances, player's market value, replacement costs, and specificity of sport criteria under Art. 17 RSTP and CAS jurisprudence, Football Legal # 13, June 2020, p. 200
- Hcessert B., Cooperation and reporting obligations in sports investigations, The International Sports Law Journal, Volume 20, Numbers 3-4, November 2020, p.145
- Kleiner J. & Rapp F., Recent Jurisprudence of the Swiss Federal Tribunal on Football Matters, Football Legal # 13, June 2020, p. 190
- Krechetov E., Payment of Outstanding Salaries and Team Performance Bonuses, Football Legal # 13, June 2020, p.210
- Lopez Batet J. & Ferrer De Robles L., Strict liability of football clubs for conducts of their supporters: international sporting regulations and practical approach through the jurisprudence on this subject,”, Revista Aranzadi de Derecho de Deporte y Entretenimiento, Núm. 67, Abril-Junio 2020 p.93 – 116
- Lukomski J., On the finalisation of international football transfers and professional football players' contracts,

The International Sports Law Journal,  
Volume 20, Numbers 3-4, November  
2020, p. 157

- Marroquin Romera C., Commentary to the award 2018/A/6040 Club Atletico Boca Juniors v. CONMEBOL Etamp.; Club Atletico River Plate, Revista Aranzadi de Derecho de Deporte y Entretenimiento, Núm. 68, Julio-Septiembre 2020 p. 391
- Martin O., “This award will serve as a guide to sports lawyers in the drafting of ‘droit de suite’ clauses in transfer contract”, interview with Olivier Martin, Football Legal # 13, June 2020, p.220
- Mazuy C.-M., Lex Sportiva: Ex Jus Comparatum Ad Independentiam, Revue de l’Académie internationale de droit comparé, Volume 1 2020
- Peltier M., L’assistance judiciaire et le contentieux sportif international, Les cahiers de Droit du Sport, n° 54 2020, p.106
- Torres Montero L., Strict Liability of Football Clubs for their Supporters’ Misconduct, Special focus on the Boca Juniors v. River Plate & CONMEBOL case, Football Legal # 13, June 2020, p. 204
- Vialla T., L’affaire Caster Semenya: vers un concept “d’état sportif” de l’athlète? Les cahiers de Droit du Sport, n° 54 2020, p. 38
- The Clément Lenglet case, Football Legal # 13, June 2020, p. 218
- 4A\_238/2018 du 12 septembre 2018 [Request to set aside (CAS) award – Late filing of hard copy of CAS appeal fatal] ASA Bulletin, Volume 38, No. 3, 2020, p. 719

