Bulletin TAS
CAS Bulletin

2022/01

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

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

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2022/1

Lausanne 2022

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Editorial

On 27 June 2022, the International Council of Arbitration for Sport (ICAS), governing body of the Court of Arbitration for Sport (CAS), celebrated the completion of the new CAS headquarters at the Palais de Beaulieu in Lausanne with an official inauguration ceremony, in the presence of the Mayor of Lausanne and the sports minister of the canton of Vaud. The ceremony marked the conclusion of the building works that commenced in 2019 following the purchase by ICAS of the south wing of the Palais de Beaulieu in order to provide a permanent home for the CAS.

Since its creation in Lausanne in 1984, CAS has always been a tenant, first at the "Villa Olympique" and at the "Villa du Centenaire", near the Olympic Museum, then at the Château de Béthusy, in Lausanne. CAS now benefits for the first time in its history from purpose-built facilities designed to serve its needs. The facilities include modern offices and meeting spaces for the CAS staff as well as a cafeteria. Three hearing rooms, a mediation room, and a suite of breakout rooms now allow CAS to conduct multiple arbitration hearings simultaneously in state-of-the-art facilities incorporating video-conferencing and simultaneous interpretation equipment. A 92-seat auditorium also allows CAS to organise seminars and workshops on its own premises for the first time. The new CAS headquarters are thus perfectly designed to facilitate the CAS operations and to satisfy its users. They give also solid guarantees for the future development of the institution. It can be said that the inauguration of the new offices is the start of a new chapter in the CAS history.

In his inaugural speech, ICAS President, John Coates AC said:

"The ICAS is very pleased to give a permanent home to the Court of Arbitration for Sport in Lausanne. I thank the City of Lausanne and the Canton of Vaud for their continuous support and for their help in making this new construction possible within a reasonable time. These new facilities are outstanding and will give new perspectives to strengthen CAS arbitration throughout the world".

The cost for the work relating to the construction of the new CAS headquarters was CHF 37'176'629. Despite some minor delays due to the pandemic and global supply chain issues, ICAS is pleased to note that the project was achieved on time and with a saving of CHF 4'823'371 against the initial budget.

From a practical perspective, CAS registers around 900 arbitration procedures and organises more than 250 hearings each year. It currently has 45 employees and a recruitment campaign is currently in place to hire additional staff.

The CAS Ad Hoc Division established for the 2022 Olympic Winter Games (the Games) held from 4 to 20 February 2022 in Beijing dealt with 11 disputes that arose during the Games. The CAS Anti-Doping Division in charge of anti-doping-related matters arising during the Games as a first-instance authority handled 1 doping case referred to it by the International Testing Agency (ITA) in accordance with the International Olympic Committee (IOC) Anti-doping Rules.

As usual, because the vast majority of CAS cases are football-related, this new issue of the Bulletin includes a majority of selected "leading cases" related to football, namely nine football cases out of 10 cases.

Finally, a selection of summaries of the most recent judgements rendered by the Swiss Federal Tribunal in connection with CAS decisions have been enclosed in this Bulletin. Of particular interest is the decision 4A 520_2021 rendered in French by the Federal Tribunal which addresses the argument of the irregular composition of the CAS tribunal (Art. 190 para. 2 LDIP) and the question of recurrent appointments of arbitrators from the CAS list in cases where FIFA is a party. This judgement is significant because it

repeated the high burden of the "duty of curiosity" of the parties' counsel and the strict admissibility requirements to challenge an arbitrator i.e. as soon as the ground for challenge becomes know. The Federal Tribunal also confirmed that multiple appointments are frequent in CAS arbitration as a result of the closed list of arbitrators and notably for FIFA. In this respect, the arbitrator's failure to duly disclose any appointments with the initial declaration of independence or to regularly update such declaration during the proceedings is not as such sufficient to challenge such arbitrator. Yet, arbitrators must always act in a diligent manner and remain proactive at all times, in the interest of the smooth running of the proceedings.

We are pleased to publish in this issue an article in English on the status of minors under the World Anti-Doping Code and the CAS jurisprudence by Estelle de La Rochefoucauld, Counsel to the CAS, an article in Spanish written by Yago Vazquez, CAS ad-hoc clerck, on the burden and standard of proof and an article in French by Guido Carducci, CAS arbitrator, entitled "La révision des sentences en droit suisse de l'arbitrage international et interne, arbitrage TAS et du sport",

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

Matthieu Reeb
CAS Director General

Articles et commentaires
Articles and Commentaries
Artículos y comentarios

La révision des sentences en droit suisse de l'arbitrage international et interne, arbitrage TAS et du sport

Guido Carducci*

I. Introduction et objectifs du Conseil fédéral

Le Parlement fédéral a approuvé le 19 juin 2020 la loi de réforme du droit suisse de l'arbitrage interne et international, achevant ainsi une élaboration relativement rapide (octobre 2018 – juin 2020) rendue possible par un groupe de travail[1] et de nombreuses consultations.[2] Sans bouleverser les principes, ni la numérotation de la loi fédérale de droit international privé (ci-après LDIP) entrée en vigueur le 1er janvier 1989, cette réforme est entrée en application le 1er janvier 2021 et apporte une mise à jour utile : i) pour l'essentiel, du Chapitre XII (arbitrage international), c'est-à-dire les Articles 176-194 de la LDIP; ii) également, du droit de l'arbitrage interne régi par le Code de procédure civile ; iii) dans la mesure du nécessaire, de la loi relative au Tribunal fédéral ("LTF").[3]

La réforme a fait l'objet de commentaires d'ensemble[4] et, dans ce Bulletin, de notre étude centrée sur le droit de l'arbitrage du sport et TAS en Suisse.[5] Cet article porte sur la codification par le législateur d'un régime jurisprudentiel de révision des sentences en arbitrage international et interne. La révision

* Prof. Dr. Guido Carducci, Esq. (Paris, London, Rome) CAS Arbitrator, Attorney-at-Law, Chartered Arbitrator (FCIArb), Former Chief, International Standards Section, UNESCO (HQ Paris): carducciarbitration.com / gcarducci@noos.fr

[1] Groupe d'experts (Prof. Gabrielle Kaufmann-Kohler, Prof.Felix Dasser, Maître Elliott Geisinger, Prof.Daniel Girsberger).

[2] Tribunal fédéral, 9 cantons, 3 parties, 28 organisations.

[3] Loi sur le Tribunal fédéral (LTF), 17 June 2005 (révisée).

[4] Ph.Habegger, *Das Parlament verabschiedet die Revision von Kapitel 12 IPRG mit einem Feinschliff*, ASA Bulletin, 2020, p.549-579, G.Carducci, *The Reform of Swiss International and Domestic Arbitration Law*, Spain Arbitration Review 2021, 135-154.

[5] G. Carducci, *The New Swiss International and Domestic Arbitration Law, Sport and CAS Arbitration*, CAS / TAS Bulletin 2020, n°2, p.7-22.

et sa codification sont ainsi des exemples de la vitalité du droit jurisprudentiel et des rapports entre législateur fédéral et pouvoir judiciaire.

Il convient de rappeler brièvement trois positions de principe prises sur des questions traitées dans cet article par le Conseil fédéral dans le Message du 24 octobre 2018 concernant le projet de modification du Chapitre XII de la LDIP.

a) Quant à son objectif, le projet préserve les caractéristiques de libéralisme, de souplesse et de concision du Chapitre XII de la LDIP *"…et renonce volontairement à une révision complète du droit en vigueur. Il se base sur les règles existantes, éprouvées en pratique, et se résume à quelques améliorations ponctuelles"*.

b) Quant à l'arbitrage du sport, le Conseil fédéral suit son évolution avec attention et 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. 12 de la LDIP n'est pas approprié pour réformer le règlement des différends dans le sport international"*. Dès lors, il n'est pas étonnant que la réforme, aussi bien en général qu'en matière de révision des sentences, n'ait adopté aucune disposition réservée spécifiquement à l'arbitrage du sport et TAS en Suisse. Cet arbitrage n'est pas moins directement concerné par la réforme. D'ailleurs, l'arbitrage TAS et du sport nourrit régulièrement le contentieux devant le Tribunal fédéral et a permis à celui-ci d'affirmer notamment le statut d'ordre public procédural international de la *res iudicata* d'une décision.[6] L'arbitre ne peut ainsi ignorer l'autorité de chose jugée d'une décision précédente, sauf si celle-ci est dépourvue d'autorité de chose jugée faute d'identité de l'objet du litige, sinon des parties.[7]

c) Quant aux voies de recours contre une sentence : *"Le projet propose de régler explicitement les moyens de recours à disposition après qu'une sentence a été rendue. Sont concernés les rectifications, les interprétations, les compléments et la révision"*. En effet, *a contrario* et sauf l'ajout utile et explicite d'un délai de recours de 30 jours à compter de la communication de la sentence,[8] la révision demeure distincte du recours en annulation qui est la voie de recours par excellence. Les rectifications, interprétations et les compléments par sentences additionnelles étant des moyens de recours confiés en premier lieu au tribunal arbitral, l'essentiel de la réforme relative aux recours devant les juridictions suisses est, précisément, la révision des sentences.

II. La révision des sentences en arbitrage international

Bien que d'un usage très fréquent l'expression de "sentence internationale" est parfois source de malentendus et serait trompeuse si elle était comprise exclusivement comme synonyme de "sentence rendue par un tribunal international et/ou sentence rendue en application du droit international», c'est-à-dire comme une sentence issue d'un tribunal arbitral international établi par un traité, à l'instar de la Cour permanente d'arbitrage de La Haye dont la mission est de trancher des litiges entre Etats.[9] Dès lors, l'expression de "sentence internationale", utilisée *brevitatis causa* dans cet article, signifie simplement "sentence rendue en matière d'arbitrage

[6] ATF 136 III 345, consid. 2.2.
[7] ATF 140 III 278, consid. 3.3.
[8] Art.190, al.4, LDIP.
[9] Articles 15, 20-57, 1899 Convention for the Pacific Settlement of International Disputes.

international", sachant que l'arbitrage est "international" en droit suisse dès lors que le siège de l'arbitrage est en Suisse et qu'au moins l'une des parties n'a ni son domicile, ni sa résidence habituelle, ni son siège en Suisse au moment de la conclusion de la convention d'arbitrage.

A. *Lex arbitri*, recours en annulation et en révision

Le droit suisse de l'arbitrage permet aux parties de soumettre un arbitrage international au régime de l'arbitrage interne, et à l'inverse, un arbitrage interne au régime de l'arbitrage international.[10] Sans surprise, les parties subissent les conséquences de tels accords.[11]

Avant comme après la réforme, le Chapitre XII de la LDIP (Art.176-194) touche l'ensemble de l'arbitrage international en Suisse ainsi que les nombreuses institutions en droit du sport en Suisse telles que le Comité International Olympique (CIO), la Fédération Internationale de Football Association (FIFA),[12] l'Union des associations européennes de Football (UEFA),[13] l'Agence Mondiale Antidopage (AMA) et le TAS. Le Chapitre XII régit en tant que *lex arbitri* tout arbitrage international ayant son siège en Suisse. Tout arbitrage TAS a son siège à Lausanne, indépendamment du lieu où se tient l'audience.[14] A notre avis, la réforme du droit suisse de l'arbitrage rend certaines modifications du Code d'arbitrage du TAS souhaitables, sans imposer une réforme immédiate.[15]

Le Chapitre XII de la LDIP est libéral. Ainsi, dès lors que le tribunal arbitral garantit l'égalité entre les parties et leur droit d'être entendues en procédure contradictoire, la LDIP permet aux parties de choisir les règles de procédure applicables à l'arbitrage.[16] En revanche, une fois la procédure arbitrale terminée, la sentence rendue est soumise, sur demande d'une des parties, aux voies de recours de droit suisse devant les tribunaux suisses. Selon l'art.190a de la LDIP révisée, la réforme ajoute la révision des sentences internationales (*Révision*, *Revision*, *Revisione*) au recours en annulation ordinaire (*Recours*, *Anfechtung*, *Impugnazione*).[17] Celui-ci a une importance fondamentale car tant qu'une sentence n'est pas annulée, elle a autorité de chose jugée et ses effets juridiques.[18] La réforme prévoit un délai de 30 jours à compter de la communication de la sentence[19] sans modifier les cinq cas d'ouverture du recours et d'annulation de la sentence internationale, à savoir :[20] 1° désignation irrégulière de l'arbitre unique ou composition irrégulière du tribunal ; 2° le tribunal arbitral s'est déclaré à tort compétent ou incompétent; 3° le tribunal a statué au-delà des demandes ou il a omis de se prononcer sur un des chefs de la demande; 4° non-respect de l'égalité des parties ou de leur droit d'être entendues en procédure contradictoire ; 5° incompatibilité de la sentence avec l'ordre public.[21]

Le Tribunal fédéral a précisé que les sentences arbitrales internationales susceptibles de recours sont les: i) sentences finales (mettant fin à l'instance arbitrale pour un motif de fond ou de procédure) ; ii) sentences partielles (portant sur une partie de la prétention ou sur une des prétentions / ou mettant fin à la procédure à l'égard d'une des parties) ; iii) sentences préjudicielles ou incidentes (réglant une ou plusieurs questions préalables de fond ou de procédure). Pour la

[10] LDIP, Art.176, 2, Art.353, 2, CPC.
[11] ATF 145 III 266 « Il doit aussi être rappelé que l'*opting out* est par nature consensuel. Les éventuels désagréments qu'un changement de régime en cours d'arbitrage serait susceptible d'occasionner pour les parties, tels qu'un ralentissement de la procédure, ne sont dès lors que les conséquences de leur propre choix. »
[12] Arbitrage TAS, Articles 57-58, Statuts. FIFA
[13] Arbitrage TAS, Articles 61-63, Statuts UEFA.
[14] Article R 28 Code de l'arbitrage en matière de sport.
[15] Notre article, Bulletin TAS / CAS Bulletin, 2020/02, p.7-22.
[16] Art.182, al.3, LDIP.
[17] Art.190 LDIP.
[18] On laisse de côté la question des effets à l'étranger d'une annulation de la sentence.
[19] Art.190, al.4, LDIP.
[20] Art.190, LDIP.
[21] Art.190, al.2, LDIP.

recevabilité du recours, le contenu de la décision attaquée est déterminant, non sa dénomination.[22]

B. Une révision prétorienne depuis 1992

Entre son adoption le 18 décembre 1987 et l'entrée en vigueur de la réforme le 1er janvier 2021, la LDIP ne prévoyait pas la révision les sentences arbitrales. Ce n'est qu'à partir de son arrêt du 11 mars 1992[23] que le Tribunal fédéral décida d'analyser la question de la révision en arbitrage international en tant que lacune législative,[24] et de combler celle-ci, possibilité prévue expressément par le Code civil suisse[25] contrairement à d'autres Codes.[26] Dans l'arrêt du 11 mars 1992 précité, le Tribunal fédéral souligna que:

a) *"La LDIP ne contient aucune disposition relative à la révision des sentences arbitrales. Ni le Message du Conseil fédéral (FF 1983 I p. 255 ss, spéc. 442 ss), ni les débats parlementaires n'abordent la question. Rien ne permet cependant d'admettre qu'il s'agit d'un silence qualifié du législateur, qui lierait le juge"*;

b) tenant compte des solutions consacrées par la doctrine et la jurisprudence[27] et pour plusieurs motifs avancés par le Tribunal fédéral *«la révision des sentences arbitrales au sens de l'art. 176 ss LDIP s'impose comme une conséquence indispensable de l'état de droit. Il y a dès lors lieu de combler une lacune de la loi"*.

c) *"S'agissant des motifs de révision et de la procédure, les art. 137 et 140 à 143 OJ doivent, respectivement, s'appliquer par analogie"*.

Depuis 1992, le Tribunal fédéral admet ainsi la révision des sentences internationales, essentiellement en tant que *"conséquence indispensable de l'état de droit"*. Plusieurs de ses arrêts ont contribué à l'édifice et notamment précisé

a) le rôle essentiel de la révision, à savoir remédier à des situations extrêmes, telles que "la tromperie du juge",[28] *"où le sentiment de la justice et de l'équité requiert impérativement qu'une décision en force ne puisse pas prévaloir, parce qu'elle est fondée sur des prémisses viciées"*;[29] et
b) l'effet de l'admission de la demande de révision, le Tribunal fédéral *"ne se prononce pas lui-même sur le fond mais renvoie la cause au tribunal arbitral qui a statué ou à un nouveau tribunal arbitral à constituer"*.[30]

Dans les rapports entre pouvoirs judiciaire et législatif, le Tribunal fédéral a fait preuve de modération, et a développé un droit prétorien de la révision en arbitrage international limité à l'essentiel, sans chercher une exhaustivité de régime. En 2016, le Tribunal fédéral a invité le Parlement à combler les lacunes existantes en matière de révision par une réforme de la LDIP, notamment à l'égard des motifs de la révision et de l'exigence d'une valeur minimale pour saisir le Tribunal fédéral, par un régime légal, approprié, clair et cohérent de la révision tant au niveau de l'arbitrage interne (Code de procédure civile) qu'international (Chapitre XII LDIP).[31]

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[22] ATF 140 III 520 consid. 2.2.1.
[23] ATF 118 II 199 consid. 2.
[24] La lacune est reconnue et son comblement par le juge attendu si le comblement par une règle est nécessaire pour résoudre une question juridique. ATF 103 Ia 501 („Eine echte Gesetzeslücke liegt nur dann vor, wenn der Gesetzgeber etwas zu regeln unterlassen hat, was er hätte regeln sollen, und dem Gesetz weder nach seinem Wortlaut noch nach dem durch Auslegung zu ermittelnden Inhalt eine Vorschrift entnommen werden kann".); ATF 118 II 199, consid. 2 cc, au sujet du comblement de la lacune législative relative à la révision des sentences.
[25] Art. 1, al.2) « À défaut d'une disposition légale applicable, le juge prononce selon le droit coutumier et, à défaut d'une coutume, selon les règles qu'il établirait s'il avait à faire acte de législateur. » Al.3) « Il s'inspire des solutions consacrées par la doctrine et la jurisprudence. »
[26] Notamment, Code civil français, articles 4 (qui nie l'existence d'une lacune) et 5.
[27] Une démarche conforme à l'art.1, al.3), du Code civil.
[28] ATF 127 III 496, consid. 3bb.
[29] ATF 142 III 521, consid. 2.1.
[30] ATF 134 III 286, consid. 2.
[31] ATF 142 III 521, consid. 2.3.5. Sans oublier une différence essentielle, la révision des sentences en arbitrage interne étant, pour l'essentiel, déjà codifiée dans les articles 356, al. premier, 396-399 CPC.

Cette invitation du Tribunal fédéral au Parlement fut ouvertement appuyée par le Conseil fédéral dans le Message du 24 octobre 2018 concernant la modification du Chapitre XII de la LDIP qui prit clairement position : *"la jurisprudence, constante, et la doctrine sont unanimes: il doit être possible de demander la révision de sentences arbitrales internationales"*.

C. Une révision codifiée depuis 2021 spécifique aux sentences en arbitrage international

Par la loi de réforme de 2020, le Parlement a ainsi adopté un régime légal complet de la révision des sentences en arbitrage international, en modifiant la LDIP et quelques dispositions de la LTF. La révision des sentences en arbitrage interne, régie par le Code de procédure civile suisse, n'a fait l'objet que de l'ajout d'un nouveau cas d'ouverture (ci-dessous II).[32]

En conséquence, la réforme a consacré un régime spécifique aux sentences arbitrales internationales dont les traits essentiels sont les suivants:

a. les cas d'ouverture (ou les motifs) de la révision - les choix plus délicats pour le législateur - sont désormais au nombre de trois. Prend ainsi fin la nécessité pour le Tribunal fédéral de procéder par analogie et d'appliquer aux sentences internationales des cas d'ouverture conçus pour la révision d'autres types de décision, tels les arrêts du Tribunal fédéral en ce qui concerne les articles 123[33] et 124 (délai)[34] de la LTF ;
b. les *dies a quo* et le délai pour demander la révision, ainsi que son exception en cas de crime ou délit (art.190a (b) LDIP), sont désormais définis par le législateur spécifiquement pour les sentences internationales, sans qu'il soit nécessaire d'appliquer par analogie des délais conçus pour d'autres contextes;
c. la possibilité est accordée aux parties d'exclure la révision (ainsi que le recours en annulation) à l'exception dela révision d'une sentence internationale au sens de l'art. 190*a*, al. 1, let. b; [35]
d. la compétence du Tribunal fédéral est confirmée pour la révision des sentences internationales à l'exclusion des sentences en arbitrage interne ;
e. l'admission de mémoires rédigés en anglais devant le Tribunal fédéral est également une solution utile en droit positif spécifiquement pour l'arbitrage international où, sauf accord des parties, [36] au moins une partie n'a pas de domicile, siège ou résidence habituelle en Suisse.

Les solutions ainsi retenues (a-e) par le législateur de la réforme sont toutes conçues spécifiquement pour les sentences rendues en arbitrage international. Elles reposent sur un jugement de valeur spécifique à ces sentences, indépendamment du fait que ces solutions reprennent ou pas, ou adaptent, des solutions déjà existantes dans d'autres contextes du droit suisse de la révision.

Depuis la réforme, le nouvel Art. 190a permet à une partie de demander la révision d'une sentence rendue en Suisse dans trois situations et le Tribunal fédéral définira progressivement son interprétation. Pour simple rappel, l'art.190a comme l'ensemble du Chapitre XII de la LDIP ne sont applicables que si la condition du rattachement international, posée à l'art. 176 al. 1 LDIP, est réalisée.[37] Si l'arbitrage ne remplit pas cette condition il est "interne" et soumis à son propre régime, en partie différent, également en matière de révision (ci-dessous II). Toutefois, les parties peuvent

[32] Art. 396, al. 1, let. D, CPC.
[33] ATF 134 III 286, consid. 2.
[34] ATF 4A_597/2019, consid. 3.
[35] Art.192, LDIP.
[36] Art.176, 2, LDIP, Art.353, 2, CPC.
[37] Si le siège du tribunal arbitral se trouve en Suisse et si au moins l'une des parties à la convention d'arbitrage n'avait, au moment de la conclusion de celle-ci, ni son domicile, ni sa résidence habituelle, ni son siège en Suisse.

convenir de le soumettre au régime de l'arbitrage international.[38]

D. Premier cas d'ouverture: faits pertinents ou moyens de preuve avant la sentence arbitrale (Art.190a al. premier (a))

"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;"

La disposition est claire. Le requérant doit prouver à la satisfaction du Tribunal fédéral, avant comme après la réforme, que les faits ou les moyens de preuve qu'il allègue ne sont pas postérieurs à la sentence. Toute incohérence dans l'argumentation du requérant exclut la révision.[39] Les faits ou les moyens de preuve "nouveaux" (ou vrai *novum*),[40] postérieurs à ou survenus après la sentence[41] et qui ne pouvaient pas être portés à l'attention du tribunal arbitral, sont exclus et n'ouvrent pas la voie de la révision.[42] Par exemple, une demande en annulation du contrat pour erreur essentielle présentée après la sentence, l'erreur n'impliquant pas *ex se* l'annulation du contrat d'après la loi applicable, ne saurait ouvrir la voie de la révision.[43]

Depuis la réforme, le fait que les faits ou moyens de preuve "postérieurs à la sentence" soient exclus semble viser la date de la sentence. Une jurisprudence antérieure du Tribunal fédéral était plus restrictive et n'admettait pour justifier une révision *"que les faits qui se sont produits jusqu'au moment où, dans la procédure antérieure, des faits pouvaient encore être allégués, mais qui n'étaient pas connus du requérant malgré toute sa diligence ; en outre, ces faits doivent être pertinents, c'est-à-dire de nature à modifier l'état de fait qui est à la base de la décision entreprise et à conduire à une solution différente en fonction d'une appréciation juridique correcte".*[44]

Par ailleurs, le requérant doit prouver à la satisfaction du Tribunal fédéral l'existence de faits pertinents ou de moyens de preuve concluants, de nature à justifier la possibilité d'une conclusion différente de la sentence rendue par le tribunal arbitral qui n'a pas considéré ces faits ou moyens. A défaut de preuve à cet égard, les faits allégués ne peuvent prospérer.[45] Le Tribunal fédéral analyse et qualifie les éléments de la demande de révision.[46] Il peut notamment requalifier les "nouvelles preuves" alléguées par le requérant en "fait nouveau".[47]

Le Tribunal fédéral a souligné que la révision n'est pas une simple continuation de l'arbitrage, mais un recours extraordinaire qui exige la preuve par le requérant qu'il était dans l'impossibilité, malgré sa diligence qu'il

[38] Art. 353, CPC. L'accord des parties doit satisfaire aux conditions de forme de l'art. 358 CPC.

[39] Pour un exemple relatif à un arbitrage TAS et à l'incohérence du requérant dans ses argumentations relatives aux contrôles antidopage, ATF, 4A_237/2010, consid. 3.

[40] Un exemple assez extrême de vrai *novum*, de faits manifestement insusceptibles de justifier la révision, est offert par ATF 4A_688/2012 : le requérant invoquait le transfert de machines de Jordanie en Roumanie, de septembre à novembre 2012, puis l'inspection de celles-ci à fin janvier 2013, alors que la sentence arbitrale datait du 17 décembre 2010.

[41] Avant la réforme, l'art. 123 al. 2 let. a LTF appliqué par analogie ne permettait pas la révision demandée sur la base de "moyens de preuve postérieurs à l'arrêt".

[42] ATF 4A_222/2011, 22 août 2011, consid. 2.1.

[43] ATF 4A_645/2014, consid. 3.2.

[44] ATF 4A_247/2014, consid. 2.3.

[45] En droit du sport dans le cadre d'un contrat de sponsoring, des exemples dans ATF 4A_750/2011, ATF 4A_645/2014.

[46] Dans le cadre d'une demande de révision d'une sentence du TAS, ATF 4A_144/2010, consid. 2.3. : « Die Gesuchstellerin bringt in ihrem Revisionsgesuch keine neu entdeckten Tatsachen vor, sondern beruft sich vielmehr auf angeblich neu entdeckte Beweismittel zum Beleg ihres bereits im Schiedsverfahren vorgebrachten Einwands, sie leide unter einer Blutanomalie. »

[47] Au sujet d'une demande de révision d'une sentence du TAS, ATF 4A_222/2011 consid.2.2 : « Aussi, quoi qu'il en dise, sa demande de révision se fonde bel et bien sur un fait nouveau, les nouveaux moyens de preuve annexés à sa demande de révision n'étant destinés qu'à prouver ce fait nouveau. »

est tenu d'établir, d'apporter la preuve en question devant le tribunal arbitral.[48] Si un moyen de preuve n'est pas, ou n'est plus disponible, la diligence qui est attendue du requérant inclut notamment l'obtention par celui-ci d'un ou plusieurs autres moyens de preuve à porter à l'attention du tribunal arbitral. De plus, dès lors que le requérant accepte une procédure comme par exemple la procédure accélérée qui peut être consentie par les parties devant le TAS,[49] il ne peut attribuer aux effets de cette procédure l'impossibilité d'apporter la preuve requise dans la procédure d'arbitrage. La révision n'est pas un moyen de corriger *a posteriori* les effets de ce à quoi a consenti le requérant ou ses omissions.[50]

E. Deuxième cas d'ouverture: influence par un crime ou un délit (art.190a, al. premier (b))

"Une partie peut demander la révision d'une sentence:

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";

Selon la lettre de cette disposition, est-ce véritablement la sentence qui a été influencée, ou simplement le tribunal dans son processus décisionnel ayant abouti au contenu et à la rédaction de la sentence ? Au fond le sens de la disposition est clair, sa référence à la décision "influencée" n'est pas nouvelle et reprend le droit positif. [51]

Néanmoins, les choix terminologiques dans les trois langues de cette disposition ne sont peut-être pas neutres et identiques : en français ("la sentence a été influencée") et en italien ("il lodo a lei sfavorevole é stato influenzato") le verbe "influencer" ne présuppose pas nécessairement la volonté, alors que dans la version allemande le verbe *einwirken* ("auf den Schiedsentscheid eingewirkt wurde") présuppose en principe l'objectif d'influencer.[52]

Quant au fond, il convient d'observer que la sentence "influencée" au préjudice du recourant ouvrant la voie de la révision:

a) est conditionnée à l'établissement par la procédure pénale d'un crime ou d'un délit, cette dernière notion étant moins restrictive et de moindre gravité en droit suisse;[53]
b) fait référence à l'existence d'un crime ou d'un délit, c'est-à-dire à des notions de droit suisse pour des arbitrages se déroulant en Suisse. En principe, le droit suisse est applicable à tout crime ou délit commis en Suisse. Cela étant, la question pourrait se compliquer et le droit suisse[54] définirait s'il reste applicable ou si un droit étranger est applicable, si le(s) fait(s) constituant, en tout ou en partie, le crime ou le délit ayant influencé la sentence a (ont) été commis à l'étranger, en dépit d'un siège du tribunal arbitral en Suisse ;
c) ne nécessite pas une condamnation. Une révision hors condamnation est possible. Sans oublier toutefois qu'une procédure

[48] ATF 4A_144/2010 (« Die Revision ist ein ausserordentliches Rechtsmittel und dient nicht einfach der Weiterführung des Verfahrens. Es obliegt den Prozessparteien, rechtzeitig und prozesskonform zur Klärung des Sachverhalts entsprechend ihrer Beweispflicht beizutragen. Dass es ihnen unmöglich war, Tatsachen und Beweismittel bereits im früheren Verfahren beizubringen, ist nur mit Zurückhaltung anzunehmen"), ATF 4A_597/2019 („A prescindere da quanto precede occorre rilevare che la revisione non è semplicemente la continuazione della procedura precedente, ma è un rimedio di diritto straordinario. Giova inoltre ricordare che spetta alle parti contribuire al chiarimento della fattispecie in modo tempestivo e conforme alle regole procedurali".).

[49] Article R.52, Code de l'arbitrage en matière de sport.

[50] Rappel dans ATF 4A_597/2019 considérant n°4.2.2.

[51] Art.123, al. premier, LTF « L'arrêt a été influencé ».

[52] Au sens de « jmd. etwas gezielt beeinflussen » à s'en tenir au *Duden Universales Wörterbuch* et à sa première signification de *einwirken*. Cependant, *contra* et sans référence à « gezielt » beeinflussen, *einwirken* selon le *Wahrig Deutsches Wörterbuch*.

[53] Les crimes sont les infractions passibles d'une peine privative de liberté de plus de trois ans, les délits n'excédent pas trois ans ou ont une peine pécuniaire. Art. 10, Code pénal.

[54] Art.3, al. premier, Code pénal.

pénale, par exemple en matière d'actes de corruption (active ou passive), bénéficie d'outils probatoires importants permettant plus facilement la preuve de l'existence du crime ou délit ayant influencé la sentence;

d) la preuve de l'existence d'un crime ou d'un délit par le requérant est facilitée car elle peut être administrée autrement si l'action pénale n'est pas possible en l'espèce.

Généralement en droit suisse de la révision des décisions, le principe est que le juge de la révision est libre d'apprécier l'existence de l'infraction en l'absence de décision de l'autorité de répression, mais qu'il est lié en présence de celle-ci.[55]

Depuis la réforme d'autres dispositions de l'article 190a LDIP confirment la gravité de ce cas d'ouverture de la révision, conditionnée à un crime ou délit, et ainsi la spécificité de son régime. En effet, le droit de demander la révision pour ce motif ne se périme pas après dix ans à compter de l'entrée en vigueur de la sentence, comme les révisions demandées pour les autres motifs.[56] De même, le droit de demander la révision pour ce motif ne peut faire l'objet d'une exclusion par les parties[57] dans la convention d'arbitrage ou dans une convention ultérieure.[58]

F. Troisième cas d'ouverture: récusation de l'arbitre (Art.190a, al. premier (c))

"Une partie peut demander la révision d'une sentence:

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".

Le concordat sur l'arbitrage de 1969 ne précisait pas expressément si une demande de récusation d'un arbitre pouvait être présentée après le prononcé de la sentence arbitrale. Le Tribunal fédéral interpréta ce silence comme excluant cette possibilité mais admit que, dans le cadre du recours en nullité fondé sur la composition irrégulière du tribunal arbitral,[59] la partie qui a eu connaissance après le prononcé de la sentence d'un motif de récusation ignoré jusque-là en raison du silence de l'arbitre, pouvait s'en prévaloir et obtenir l'annulation.[60] Il était question de recours en annulation (pour constitution irrégulière), non de révision de la sentence. Certaines hésitations demeuraient quant à l'interprétation pertinente.[61]

Avant la réforme, le Tribunal fédéral a pu préciser notamment que : i) les parties ont le devoir de choisir les arbitres après avoir vérifié l'existence de causes de récusation éventuelles ;[62] ii) en vertu du principe de la bonne foi le droit d'invoquer le moyen tiré de la composition irrégulière du tribunal arbitral *"se périme si la partie ne le fait pas valoir immédiatement, car elle ne saurait le garder en réserve pour ne l'invoquer qu'en cas d'issue défavorable de la procédure arbitrale"*;[63] et iii) le principe de la bonne foi et l'interdiction de l'abus de droit excluent la possibilité d'invoquer un moyen contre une décision défavorable que les parties pouvaient soulever devant le tribunal.[64]

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55 En 1955, ATF 81 II 475, consid. 2.
56 Art.190 a, al.2, LDIP.
57 En matière de forme de l'exclusion, ATF 131 III 173, considérant 4.2.3.
58 Art.192, al.1, LDIP.
59 Art.36, a) CIA.
60 ATF 111 Ia 72, consid. 2e.
61 ATF 4A_386/2015, consid. 2.3.
62 Dans la cause A. et B. contre Comité International Olympique, Fédération Internationale de Ski et Tribunal Arbitral du Sport, du 27 mai 2003, ATF 129 III 445, consid. 4.2.2.1 : « La partie qui entend récuser un arbitre doit invoquer le motif de récusation aussitôt qu'elle en a connaissance (ATF 128 V 82 consid. 2b p. 85; ATF 126 III 249 consid. 3c et les références). Cette règle jurisprudentielle, reprise expressément à l'art. R34 par. 1 du Code [de l'arbitrage en matière de sport], vise aussi bien les motifs de récusation que la partie intéressée connaissait effectivement que ceux qu'elle aurait pu connaître en faisant preuve de l'attention voulue (arrêt 4P.217/1992 du 15 mars 1993, consid. 6 non publié in ATF 119 II 271). »
63 ATF 4A_506/2007, consid.3.1.2.
64 ATF 4A_528/2007, consid.2.5.1.

Depuis la réforme, la révision de la sentence est admise également 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, LDIP n'est découvert qu'après la clôture de la procédure arbitrale et qu'aucune autre voie de droit n'est ouverte. Des trois motifs de récusation de l'arbitre admis par la LDIP[65], le seul motif de récusation justifiant la demande de révision de la sentence intervient : *"lorsque les circonstances permettent de douter légitimement de son indépendance ou de son impartialité"*.

A ce jour, l'affaire Sun Yang est la seule demande de révision admise par le Tribunal fédéral pour défaut d'indépendance d'un arbitre en droit du sport sur la base de l'art. 180, al. 1, let. c, LDIP depuis la réforme.

En septembre 2018, Sun Yang, nageur chinois de niveau international ayant remporté plusieurs médailles olympiques et titres de champions de monde dans différentes épreuves de natation, fut sanctionné pour violation des règles antidopage à la suite d'un contrôle hors compétition. Blanchi le 3 janvier 2019 par la Commission antidopage de la Fédération internationale de natation (FINA) en raison des circonstances dans lesquelles s'était déroulé le contrôle inopiné, la décision de la FINA fit l'objet d'un appel devant le TAS le 14 février 2019 par AMA, qui requit une suspension de huit ans, s'agissant de la deuxième infraction pour dopage de l'athlète. Le 28 février 2020, la formation du TAS rendit une sentence qui, reconnut notamment une violation de l'art. 2.5 du Règlement antidopage de la FINA[66] et suspendit le nageur pour une période de huit ans. Le 28 avril 2020, l'athlète forma un recours en matière civile devant le Tribunal fédéral afin d'obtenir l'annulation de la sentence, puis le 15 juin 2020 Sun Yang introduisit une demande en révision de la sentence sur le fondement de l'art. 121 let. a LTF, l'art.190a LDIP issu de la réforme n'étant pas encore entré en vigueur. Le requérant fit valoir qu'il avait appris, à l'occasion de la parution d'un article sur le site internet x.com en date du 15 mai 2020, que le président de la formation arbitrale avait publié, sur son compte Twitter, à plusieurs reprises en 2018 et 2019, des commentaires jugés inacceptables à l'égard des ressortissants chinois, ce qui, selon l'athlète, suffisait à éveiller des doutes légitimes quant à l'impartialité du président à l'égard d'un athlète chinois. Le Tribunal fédéral a considéré que la question *"n'est pas de savoir s'il était possible ou non pour le requérant d'avoir accès aux tweets litigieux durant la procédure arbitrale mais uniquement de déterminer si on peut lui reprocher de n'avoir pas fait preuve de l'attention commandée par les circonstances au moment de rechercher les éléments susceptibles de mettre en cause l'impartialité de l'arbitre"*.

Malgré l'absence d'une demande de récusation par le demandeur dans le délai de sept jours prévu par l'article R34 du Code de l'arbitrage TAS, le Tribunal fédéral admit la demande de révision de la sentence après avoir rejeté l'existence d'une violation par le requérant du devoir de curiosité et d'investigation au-delà de la déclaration générale d'indépendance faite par chaque arbitre, quant à l'existence de motifs de récusation éventuels ou de garanties insuffisantes d'indépendance et d'impartialité susceptibles d'affecter la composition du tribunal arbitral. Il parait ainsi que le devoir de curiosité et d'investigation développé par la jurisprudence du Tribunal fédéral[67] n'est pas absolu, sa portée dépendant des circonstances. La partie qui ne prend pas connaissance d'une information librement accessible sur internet ou sur un réseau social ne viole pas nécessairement son devoir de curiosité. Dans son appréciation des circonstances, le Tribunal fédéral a considéré que Sun Yang ne l'a pas violé.[68]

[65] Art. 180, al. 1, LDIP.

[66] FINA Doping Control Rules, version 2017 (Falsification ou tentative de falsification de tout élément du contrôle du dopage de la part d'un sportif ou d'une autre personne).

[67] ATF 136 III 605, consid. 3.

[68] ATF 147 III 65, consid. 6.5.

Le fondement de la demande de révision par Sun Yang était l'art. 121 let. a LTF, appliqué par analogie à l'arbitrage international. Depuis l'entrée en vigueur de la réforme, la base légale d'une demande de révision en matière de récusation de l'arbitre est l'art.190 a), c), LDIP : la révision est admise si, bien que les parties aient fait preuve de la diligence requise - ce qui inclut le devoir de curiosité élaboré par la jurisprudence du Tribunal fédéral[69] - 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. Dans sa formulation, la disposition ne précise pas explicitement si cette absence est à apprécier au moment de la découverte du motif de récusation ou au moment de la demande en révision. Le Tribunal fédéral aura l'occasion de définir sa lecture.

Le 22 décembre 2020, le Tribunal fédéral admit la demande de révision de la sentence en raison de circonstances de nature à faire naître un doute sur l'impartialité de l'arbitre mis en cause et à créer une apparence de prévention, et prononça la récusation de l'arbitre[70]. Dans une nouvelle composition[71] le tribunal du TAS statua à nouveau, le 22 juin 2021, et infligea à Sun Yang une suspension de quatre ans et trois mois à compter du 28 février 2020. Par la suite, par arrêt du 14 février 2022 le Tribunal fédéral rejeta le recours interjeté par Sun Yang contre cette sentence au motif que celle-ci ne méconnaissait, ni les principes essentiels et largement reconnus de l'ordre juridique (ordre public), ni le droit du nageur d'être entendu par le TAS. Les dispositions de la CEDH n'étaient pas directement applicables.

Les recours en révision et en annulation coexistent, chacun opérant selon son régime. Dans un recours en annulation pour désignation irrégulière de l'arbitre unique ou composition irrégulière du tribunal, le Tribunal fédéral vérifie l'indépendance et l'impartialité des arbitres et peut prononcer la récusation de l'arbitre mis en cause.[72]

G. *Dies a quo* et délai

Tant à l'égard du *dies a quo*, le point de départ du délai, que du délai pour présenter le recours, le législateur se montre stricte à l'égard du recours en annulation qui est de 30 jours à compter de la communication de la sentence. Il se montre bien plus généreux en matière de demande de révision : son dépôt est possible dans les 90 jours à compter, non de la communication de la sentence, mais de la découverte du motif de révision.[73] Le jour de la découverte est un *dies a quo* manifestement de faveur pour le requérant.

Cependant, dans un souci de prévisibilité et stabilité des situations juridiques, le droit de demander au Tribunal fédéral la révision se périme au plus tard par dix ans à compter de l'entrée en force de la sentence. Une exception existe toutefois pour les cas plus graves prévus à l'al. 1, let. b. Art. 190a relatifs aux sentences influencées par un crime ou un délit. Dans ce cas, la révision reste possible au-delà de dix ans.

L'unique instance de recours et de révision est le Tribunal fédéral. La révision des sentences en arbitrage interne relève du tribunal supérieur désigné par le canton où le tribunal arbitral a son siège.[74]

H. Révision et estoppel

[69] Devoir qui n'impose pas que la partie « poursuive ses recherches sur internet tout au long de la procédure arbitrale, ni, a fortiori, qu'elle scrute les messages publiés sur les réseaux sociaux par les arbitres au cours de l'instance arbitrale. » ATF 147 III 65, consid. 6.5.

[70] 4A_318/2020 Sun Yang v. WADA, FINA.

[71] Dr. Hans Nater, Prof. Jan Paulsson, Prof. Bernard Hanotiau.

[72] Art. 190 al. 2, let. A, LDIP, ATF 136 III 605, consid. 3.2.

[73] Ce délai était applicable avant la réforme à une demande de révision fondée sur un fait nouveau (art. 124 al. 1 let. d LTF). Ce délai concerne la recevabilité, non le fond, contrairement à la question de savoir si le requérant a tardé à découvrir le motif de révision invoqué. (ATF 4A_222/2011, consid. 2.2)

[74] Articles 356, 396, CPC.

Voie de recours extraordinaire[75] et voie de rétractation à caractère exceptionnel,[76] la révision est disponible après la clôture de la procédure arbitrale et vise, à certaines conditions, à corriger le résultat de l'absence d'examen de certains éléments significatifs par le tribunal arbitral. Les trois cas d'ouverture de la révision considérés ci-dessus méritent ainsi d'être lus, en ce qui concerne la violation de règles de procédure, en lien avec la règle de l'estoppel consacrée tant par le Tribunal Fédéral [77] que par le législateur en arbitrage international et interne. La partie qui poursuit la procédure en arbitrage international sans faire valoir immédiatement une violation des règles de procédure qu'elle a constatée ou qu'elle aurait pu constater en faisant preuve de la diligence requise ne peut plus se prévaloir de cette violation ultérieurement.[78]

I. Procédure devant le Tribunal fédéral et effets de la révision

La réforme a modifié certaines dispositions de la LTF[79] et la procédure de révision des sentences internationales devant le Tribunal fédéral est régie par ses articles 77, 119a et 126 LTF.[80]

L'article 77 de la LTF permet aux parties de :

a) saisir le tribunal indépendamment de la valeur litigieuse - cette question qui était controversée[81] n'est ainsi plus d'actualité;

b) présenter des mémoires rédigés en anglais, ce qui était exclu avant la réforme, sans pour autant conduire nécessairement à une irrecevabilité grâce à une souplesse appréciable de la part du Tribunal fédéral.[82] Malgré la recevabilité de mémoires en anglais, le Tribunal travaille et décide dans ses langues de travail.

Ces deux dispositions (a, b) rendent le recours au Tribunal plus accessible, et moins onéreux au moins en ce qui concernait (avant la réforme) le coût (et le temps) de traduction de l'anglais à l'une des langues de travail du Tribunal.
Cependant, le recourant ne saurait négliger le fait que le Tribunal fédéral n'examine que les griefs qu'il a invoqués et motivés.

Conformément à l'article 119a de la LTF, sauf si la demande est manifestement irrecevable ou infondée le Tribunal fédéral notifie la demande de révision à la partie adverse et au tribunal arbitral pour avis. Comme illustré dans l'affaire Sun Yang, si la demande de révision est admise, le Tribunal fédéral annule la sentence et renvoie la cause au tribunal arbitral[83] pour qu'il statue à nouveau, ou fait les constatations nécessaires.

L'article 126 de la LTF permet au juge instructeur, d'office ou sur requête d'une partie, d'accorder l'effet suspensif ou d'ordonner d'autres mesures provisionnelles.

Le résultat ordinaire de l'admission de la demande de révision d'une sentence est ainsi l'annulation de celle-ci par le Tribunal fédéral. En dépit de la différence de régime (*dies a quo*, délai, cas d'ouverture, procédure) qui existe entre les deux recours, le recours en révision partage avec celui en annulation[84] le même

[75] Rappel régulier, par exemple ATF 4A_597/2019 ("ma è un rimedio di diritto straordinario"), ATF 134 III 286 ("das ausserordentliche Rechtsmittel der Revision").
[76] Rappel dans ATF 4A_688/2012.
[77] Notamment, ATF 119 II 386, consid. E 1 b).
[78] Art.182, al.4, LDIP.
[79] Loi du 17 juin 2005 sur le Tribunal fédéral (LTF).
[80] Art.191 LDIP. Voir aussi les articles 77, al. 2[bis], et 126 de la LTF.
[81] ATF 142 III 521, consid. 2.3.5; 4A_422/2015 consid. 1.2; ATF 4A_424/2018, consid. 3.
[82] Par exemple ATF 4F_8/2018: « 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. » (…) « 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 ».
[83] L'art. 179 LDIP s'applique si le tribunal arbitral n'a plus le nombre d'arbitres requis.
[84] Art.190, LDIP.

effet juridique, à savoir l'annulation de la sentence en droit suisse de l'arbitrage international et interne.[85] Cet effet commun est d'une importance capitale car toute sentence produit ses effets juridiques (et de *res judicata*) jusqu'à son annulation éventuelle.

J. Une révision particulière

Il va sans dire que toute institution juridique n'a que le rôle et le régime que son ordre juridique lui attribue. Le droit français de l'arbitrage international[86] admet le recours en révision porté devant le tribunal arbitral, ou devant la Cour d'appel si le tribunal ne peut être réuni, et pour des cas d'ouverture en partie similaires à ceux de droit suisse.[87]

En droit suisse, dans son contexte habituel, la "révision" par le Tribunal fédéral[88] - ou par les tribunaux ayant statué en dernier ressort[89] - porte sur ses/leurs propres décisions et, en cas d'admission de la révision, entraîne l'annulation de la première décision et l'adoption d'une nouvelle décision par le Tribunal fédéral[90] ou le tribunal ayant statué en dernier ressort. En revanche, lorsque la "révision" d'une sentence arbitrale est admise, le Tribunal fédéral annule la sentence et renvoie la décision au tribunal arbitral, pour qu'il statue à nouveau. Dès lors, en matière de recours en révision ou en annulation des sentences arbitrales, le Tribunal fédéral ne dispose plus du pouvoir de juger sur le fond de l'affaire.[91] Cependant, si le principe est que le Tribunal fédéral qui admet la demande de révision annule la sentence et renvoie la cause au tribunal arbitral pour qu'il statue à nouveau, la LTF permet au Tribunal fédéral de faire les constatations nécessaires.[92]

K. Révision, exclusion conventionnelle, opposabilité à l'athlète

Le recours en annulation et la révision sont les voies de recours en arbitrage international. Lorsque le siège du tribunal arbitral est le seul lien avec la Suisse car les parties n'y ont ni domicile, ni résidence habituelle, ni siège, le droit suisse permet aux parties de s'accorder par une déclaration dans la convention d'arbitrage ou dans une convention ultérieure, et d'exclure tout ou partie des voies de droit contre les sentences.[93] L'exclusion peut ainsi porter sur un ou plusieurs des cinq cas d'annulation[94] et/ou sur un ou plusieurs des trois cas de révision.[95] Avant la réforme, le Tribunal fédéral interpréta une clause d'exclusion de tout «appel"[96] contre la sentence comme excluant aussi bien le recours en annulation que le recours en révision sur la base du principe de la bonne foi.[97]

Depuis 2021, la validité de la clause d'exclusion est conditionnée à la forme écrite, ou à tout autre moyen permettant d'en établir la preuve par un texte. Par ailleurs, comme indiqué précédemment, une disposition

[85] Aussi art.399 CPC.
[86] Art.1502, CPC français.
[87] Art.595, CPC français.
[88] Articles 121, 128, LTF.
[89] Articles 328, 333 CPC.
[90] Art. 128, al. premier, LTF.
[91] Articles 77 al.2 et 107 al.2, LTF.
[92] Art.119 a, al.3, LTF.
[93] Art.192, LDIP.
[94] Art.190 (2), LDIP. Par exemple, ATF 143 III 589 consid.2.1.2.
[95] Art.190 a (1), LDIP.
[96] Plus exactment, la clause était: "Awards rendered in any arbitration hereunder shall be final and conclusive and judgment thereon may be entered into any court having jurisdiction for enforcement thereof. There shall be no appeal to any court from awards rendered hereunder".
[97] ATF 4A_53/2017 « Selon la jurisprudence, comme la révision revêt en principe un caractère subsidiaire par rapport au recours en matière civile, il paraît difficile d'admettre qu'une partie ayant expressément renoncé à recourir, et donc à se prévaloir du motif prévu à l'art. 190 al. 2 let. a LDIP, puisse néanmoins saisir le Tribunal fédéral par la bande en invoquant le même motif, découvert avant l'expiration du délai de recours, dans le cadre d'une demande de révision, faute de quoi l'art. 192 LDIP deviendrait lettre morte (…) Qu'un plaideur, ayant renoncé d'emblée, conjointement avec son adverse partie, à former un éventuel recours afin d'y dénoncer la composition irrégulière du futur tribunal arbitral à raison de tout motif susceptible de la rendre telle, y compris un cas de récusation, puisse contourner cet obstacle en déposant une demande de révision heurte au plus haut point les règles de la bonne foi. »

spécifique exclut la renonciation à la révision dans le cas plus grave prévu à l'art.190a al. premier (b) d'une sentence influencée par un crime ou un délit.

On se souvient qu'en 2007 le Tribunal fédéral a estimé que la renonciation au recours à venir *"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. La renonciation à recourir contre une sentence à venir, lorsqu'elle émane d'un athlète, est en effet considérée comme n'étant *"généralement pas le fait d'une volonté librement exprimée"*.[98] La question se pose de savoir si, depuis la réforme, cette jurisprudence demeure d'actualité à l'égard d'une renonciation au droit de demander la révision. En tout état de cause, la question ne concerne que les deux cas (a) et (c) de l'art.190a, seuls susceptibles de renonciation.

III. La révision des sentences en arbitrage interne

La loi de réforme a également apporté certaines modifications au Code de procédure civile en ce qui concerne l'arbitrage interne,[99] c'est-à-dire l'arbitrage n'ayant pas un caractère international, sauf si les parties le soumettent au Chapitre XII de la LDIP.[100]

C'est devant le tribunal supérieur compétent désigné par le canton où le tribunal arbitral a son siège[101] qu'une partie peut demander la révision de la sentence entrée en force pour l'une des raisons suivantes:[102]

a. elle découvre après coup des faits pertinents ou des moyens de preuve concluants qu'elle n'a pu invoquer dans la procédure précédente, à l'exclusion des faits ou moyens de preuve postérieurs à la sentence;

b. 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. elle fait valoir que le désistement d'action, l'acquiescement ou la transaction judiciaire n'est pas valable;

d. bien que les parties aient fait preuve de la diligence requise, un motif de récusation au sens de l'art. 367, al. 1, let. c, n'est découvert qu'après la clôture de la procédure arbitrale et aucune autre voie de droit n'est ouverte.

Ce dernier cas d'ouverture de la révision représente l'apport de la réforme à la révision des sentences en arbitrage interne.

Les cas d'ouverture (ou motifs) a), b), d), n'appellent pas d'observations particulières par rapport à la révision en arbitrage international.

Contrairement à la révision en arbitrage international, la révision des sentences en arbitrage interne peut être demandée également pour violation de la CEDH aux conditions suivantes:

a. la Cour européenne des droits de l'homme a constaté, dans un arrêt définitif, une violation de la CEDH ou de ses protocoles;

b. une indemnité n'est pas de nature à remédier aux effets de la violation;

c. la révision est nécessaire pour remédier aux effets de la violation.

En ce qui concerne le délai, la demande de révision doit être déposée dans les 90 jours à compter de la découverte du motif de révision. Le droit de demander la révision se périme dix ans après l'entrée en force de la sentence, à l'exception des cas prévus à l'art. 396, al. 1, let. b.[103]

[98] ATF 133 III 235, consid. 4.3.2.2.

[99] Avant la réforme, la révision au sens des art. 396 ss CPC est un moyen de droit extraordinaire, de nature cassatoire. En cas de révision, le tribunal cantonal doit annuler la sentence et renvoyer la cause au tribunal arbitral (art. 399 al. 1 CPC). ATF 4A_105/2012, consid. 1.2.

[100] Art.353 CPC.

[101] Art.356, al. 1, CPC.

[102] Art.396 CPC.

[103] Art.397 CPC.

Si le Tribunal supérieur du canton du siège de l'arbitrage admet la demande de révision, il annule la sentence arbitrale et renvoie la cause au tribunal arbitral pour qu'il statue à nouveau. Les règles relatives au remplacement d'un arbitre s'appliquent si le tribunal arbitral ne comprend plus le nombre d'arbitres requis.[104]

IV. Conclusion

La révision des sentences est une voie de recours extraordinaire, rarement admise par le Tribunal fédéral mais importante car elle «*s'impose comme une conséquence indispensable de l'état de droit*".[105] L'importance des situations visées par les cas d'ouverture de la révision des sentences en droit suisse de l'arbitrage international et interne confirme l'opportunité d'une codification claire, détaillée et cohérente de la révision. Cette codification complète remplace désormais pour l'essentiel, l'œuvre prétorienne du Tribunal fédéral.

[104] Art.399 et 371, CPC.

[105] ATF 118 II 199, consid. 2 cc.

The status of minors under the World Anti-Doping Code and the CAS jurisprudence

Estelle de La Rochefoucauld*

I. Introduction

The World Anti-Doping Code (WADA Code or the Code) first adopted in 2003 was subsequently amended four times. The current version of the Code has entered into force on 1 January 2021.

The aims of the WADA Code and the World Anti-Doping Program, which endorses it, are the protection of *"the Athletes' fundamental right to participate in doping-free sport"* and therefore the promotion of *"health, fairness and equality for Athletes worldwide"*, and the insurance of *"harmonized, coordinated and effective anti-doping programs at the international and national level with regard to the prevention of doping, including"* education, deterrence, detection, enforcement, rule of law.[1]

In a doping context, one may wonder whether a minor has sufficient discernment and autonomy to be considered totally responsible for his actions. Thus, should a minor be regarded as an adult or, like in the existing system of criminal law adopted in many countries, should he or she receive a different and more lenient treatment?

To date, there is no minimum age set by the IOC for participation in the Olympic Games. It is each international federation that defines the minimum age, which results in a disparity in the age of minor elite athletes within the Olympic disciplines.

* Counsel to the CAS, CAS Bulletin editor-in chief.

[1] WADC 2021, Purpose, Scope and Organization of the World Anti-Doping Program and the Code, p.9.

In order to protect the athletes' health and preserve the integrity and spirit of sport, the principle is that all athletes, including minors, are subject to the anti-doping rules and procedures regulated by the Code and the mandatory International Standards such as the International Standard for Testing and Investigations (ISTI) and the Prohibited List developed as part of the World Anti-Doping Program. Thus, if a prohibited substance is found in an athlete's biological sample following testing, it is considered an Anti-Doping Rule Violation (ADRV). Since all ADRVs are based on the strict liability standard, all athletes, including minors, are responsible for the substances found in their body. The consequence is the automatic disqualification from the competition in a context of in-competition testing and probable additional sanctions, such as an ineligibility period.

In the following pages, we will examine, in light of the WADA Code and CAS jurisprudence, the evolution of the impact of age on the applicability of the Anti-Doping rules. We will see that originally in principle the Code provided that the same regime was applicable for minors and for adults. Yet, the need to protect minors gave rise to a special status for minors in the WADA Code. This status which has evolved as the Code has been amended, results with the Code 2021 in a distinction between Minors and Protected Persons. The new version of the Code takes into consideration the notion of maturity: only the "Protected Persons" considered less mature or incapable will benefit from an increased protection under the Code with regard the applicable standards of proof and the regime of sanctions.[2]

II. Definitions

Under the Code 2021 as well as under the previous versions, a "Minor" is *"A natural Person who has not reached the age of eighteen years".*

Under the WADA Code 2021 which has introduced the notion, a "Protected Person" is *"An Athlete or other natural Person who at the time of the anti-doping rule violation: (i) has not reached the age of sixteen (16) years; (ii) has not reached the age of eighteen (18) years and is not included in any Registered Testing Pool and has never competed in any International Event in an open category; or (iii) for reasons other than age has been determined to lack legal capacity under applicable national legislation".*

Minor elite athletes are defined as *"ha[ving] superior athletic talent, undergo[ing] specialized training, receiv[ing] expert coaching and [being] exposed to early competition".*[3] Minor elite athletes are considered to have *"distinct social, emotional and physical needs which vary depending on the athlete's particular stage of maturation".* [4]

The notion of Protected Person is more restrictive than that of Minor since it encompasses athletes who at the time of the anti-doping rule violation, are either under sixteen years old, non-elite or less experienced athletes under eighteen years, or athletes lacking legal capacity regardless of their age.

III. Minors' consent and representation

Since the establishment of equal conditions for all participants is one of the central principles in the field of sport, to be eligible to compete in junior and/or adult competitions, minors must agree to the sports regulations of their respective federations. In order to do so, minor athletes generally have to sign a membership contract, employment contract or entry forms. Minors participating in a competition are therefore submitted to the same rules and procedures

[2] In contrast, minors as well as protected persons benefit from the same protection with regard the doping control testing.

[3] Mountjoy *et al.*, IOC consensus statement: "training the elite child athlete", British Journal of Sports Medicine 2008, p. 163.

[4] Ibid, p. 163.

than adults[5]. Yet, under the age of 18, minors do not generally have legal capacity and are therefore deemed unable to provide a fully informed consent to doping control measures. Thus, minor athletes must be represented by their legal guardians[6]. Therefore, the membership agreement, employment contract or entry form must be signed on behalf of the minor by his or her guardian with the relevant national or international sports governing body so that the minor athlete is bound by the sports regulations, in particular with the doping control collection.

As a result, with regard the WADA Code, "Signatories"[7] to the Code must establish procedures to ensure that legal representatives have agreed that the minors they represent are subject to the regulations of sports governing bodies and that they have agreed to the applicable anti-doping rules as a condition of the minor's participation in the competition.[8] In this respect, the World Anti-Doping Agency (WADA)'s Athlete Consent Form Template notably requires the athlete's consent to provide a sample, share information about laboratory results, to possible sanctions, and to waive the right to sue WADA and other Anti-Doping Organisations in relation to the information gathered[9].

According to CAS jurisprudence, the signing by the minor athlete and his parents of the application forms for the National and International Sport Licence has been considered a clear acceptance of the National and/or International Federation Anti-Doping Rules (ADR). Furthermore, the submission to the relevant rules adopted and published by the sporting organizations sanctioning a particular event can also be clearly inferred from the fact that both the athlete and one of his parents signed the entry form concerning that particular sport event[10].

IV. Before the World Anti-Doping Code 2021, application of almost the same regime for minors and adults

There is no wording in the versions of the Code prior 2021, or in the related official comments, indicating that the responsibility of minors should be assessed differently and foreseeing a different regime for minors. This can be explained by the fact that in order to protect the athletes' fundamental right to compete in a clean sport and thus promote health, fairness and equality for athletes worldwide, in principle, all athletes, whether minors or not, are subject to the anti-doping rules and procedures of the Code and the World Anti-Doping Program[11].

A. Submission of minors participating in a competition to the applicable anti-doping rules regardless of their age

Pursuant to the CAS jurisprudence based on the versions of the Code prior 2021, it was the participation of an athlete in sporting events and not the age of an athlete, which determined the application of the anti-doping rules[12]. Generally speaking, the young age of

[5] CAS 2010/A/2268, para. 93.

[6] The guardians of a minor athlete are the parents of the minor or any other person who has custody over the minor.

[7] "Signatories: Those entities accepting the Code and agreeing to implement the Code, as provided in Article 23", WADC 2021, Annex 1 Definitions, p. 176.

[8] "Introduction" WADC 2021, p. 17 para. 2.

[9] See in this respect Hessert B., The protection of minor athletes in sports investigation proceedings, The International Sports Law Journal (2021).

[10] CAS 2010/A/2268, paras.69 ff.

[11] CAS 2015/A/4275 para. 42: "The World Anti-Doping Code is intended to harmonise sanctions in such a way that is equally applicable to athletes young and old, amateur or professional" with references to CAS 2009/A/2012, CAS 2012/A/2959, CAS 2010/A/2268.

[12] CAS 2006/A/1032 Karantancheva v. ITF, 3 July 2006, paras. 139. "(…) [I]n order to achieve the goals of equality, fairness and promotion of health the anti-doping rules [Tennis Anti-Doping Programme (TADP) in the particular case and WADA Code] are pursuing, the anti-doping rules must apply in equal fashion to all participants in competitions they govern, irrespective of the participant's age".

an athlete was not a circumstance which, by itself, warranted an immunity from or an alleviation of anti-doping rules[13]. In other words, the anti-doping rules applied in equal fashion to all participants in competitions they govern, irrespective of the participant's age[14].

In CAS 2006/A/1032, the Panel considered the notion of capacity and maturity.

"The reason for ignoring the age of the athlete is that either an athlete is capable of properly understanding and managing her/his anti-doping responsibilities, whatever her/his age, in which case she/he must be deemed fully responsible for her/his acts as a competitor, or the athlete is not mature enough and must either not participate in competitions or have her/his anti-doping responsibilities exercised by a person – coach, parent, guardian, etc. – who is capable of such understanding and management. In the latter case, the only way to ensure equality of treatment between participants and to protect the psychological, moral and physical health of younger athletes is to require that their representatives meet the same standards as any adult athlete. Otherwise, unscrupulous or negligent coaches, parents, guardians, etc. will be in a position to take the risk of blame while knowing that their protégés are safe from sanction. That would open the door to a possible system of doping abuse that would put the youngest athletes at the highest risk when in fact they need the most protection. In other words, any attempt to reduce the responsibility of younger athletes due to their age will in fact increase their vulnerability".[15]

B. Minors subject to the same duties than adults

Like adults, every minor athlete had the duty to be aware of and comply with all applicable anti-doping policies and rules available.

Article 21.1 of the WADA Code 2015 - the version of the Code applicable before the current version - entitled *"Roles and Responsibilities of Athletes"*, provides notably:

21.1.1 To be knowledgeable of and comply with all applicable anti-doping policies and rules adopted pursuant to the Code.
21.1.2 To be available for Sample collection at all times.
21.1.3 To take responsibility, in the context of antidoping, for what they ingest and Use.
21.1.4 To inform medical personnel of their obligation not to Use Prohibited Substances and Prohibited Methods and to take responsibility to make sure that any medical treatment received does not violate anti-doping policies and rules adopted pursuant to the Code.
21.1.5 To disclose to their National Anti-Doping Organization and International Federation any decision by a non-Signatory finding that the Athlete committed an anti-doping rule violation within the previous ten years.
21.1.6 To cooperate with Anti-Doping Organizations investigating anti-doping rule violations.

Pursuant to the legal principle *ignorantia legis neminem excusat*, an athlete might not escape anti-doping liability merely because he or she was ignorant of the content of anti-doping rules. By not containing any specific provision related to minors, the above-mentioned article suggested that all athletes are concerned by this duty.

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[13] CAS 2010/A/2268, para.114 & 115 "The Appellant's arguments do not appear to take into account the need to protect the other athletes' fundamental right to compete in a clean sport. In order to protect this fundamental right, it is indispensable that all athletes be subjected to the same rules, particularly those aiming at protecting equality of arms and, thus, at avoiding that some competitors may benefit from an unfair advantage over other competitors.
In the Panel's view, the qualification of an athlete as a minor is, therefore, not a circumstance that could exempt him from being submitted to the anti-doping regulations in the same way as all the other participants to the competitions".

[14] CAS 2010/A/2311 & 2312, para. 9.22, Article 18.2 of the 2008 National Anti-Doping Regulations for Dutch Sport provides "If the articles of association and the regulations of the federation do not include or make any distinction with respect to the rights and obligations of minors and adult members, all of the rights and obligations included in these regulations shall apply equally to minor and adult members, unless these regulations and/or one or more International Standards explicitly state otherwise".

[15] CAS 2006/A/1032 para.142.

The second paragraph of Article 2 of the WADA Code entitled "Anti-Doping Rule Violations" states that *"athletes or other persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substance and methods which have been included on the Prohibited List"*.

Accordingly, an athlete, irrespective of his or her age, had the duty to ensure that any product he or she used –medication or supplement- did not contain any substance forbidden on the Prohibited List[16]. By way of example, in CAS 2011/A/2523, the Panel found that the athlete, an international-level roller sports minor athlete who tested positive for methylhexaneamine, a Specified Substance under the 2010 prohibited list, failed in her duty to verify the source and ingredients of the products she ingested and had not established that she bore No Significant Fault or Negligence. The Panel found therefore no ground to reduce the sanction according to Article 10.5.2 Fédération Internationale de Roller Sport (FIRS) Anti-Doping Program (ADP) despite the fact that the athlete was aged 16 when she tested positive. Likewise, in CAS 2015/A/4273, the Panel insisted that *"(…) an athlete has a duty of utmost caution to avoid that a prohibited substance enters his or her body"*[17]

C. Minors participating in a competition subject to the same disciplinary consequences than adults

CAS jurisprudence affirmed that in principle the young age of an athlete was not a circumstance which, by itself, warranted an immunity from or a reduction of anti-doping rules. In this respect, in CAS 2010/A/2268, the fact that a minor tested positive for the presence of "Nikethamide", a Specified Substance included in the class S6 b (stimulants) of the WADA prohibited list was considered irrelevant. The minor was a Polish kart driver aged 12 years old who, in the context of a karting competition, underwent a positive test. A young athlete should bear all the "normal" consequences of such competitions, including doping control procedures and disciplinary sanctions. The Panel also stressed that this duty was especially appropriate since one could observe the rejuvenation of athletes appearing at international events[18].

Based on the versions of the Code prior 2021, CAS panels stated that age was not considered an "exceptional circumstance" justifying a reduction of an athlete's responsibility.[19] In CAS 2005/A/830, the age of the athlete, a swimmer of 17 years old was irrelevant. The swimmer had been competing for 10 years and 17 years old athletes competing at the highest level in swimming was considered not rare.

D. Yet, youth and inexperience as relevant factor to determine the athletes' degree of fault

In CAS 2014/A/3559, the minor was a Romanian swimmer aged 14 years old who, in the context of a national swimming competition, underwent a positive test for a non-specified substance belonging to the anabolic steroid's category. The Panel recalled that although there was no special anti-doping regime for minors, the young age of an athlete and her lack of experience were

[16] CAS 2011/A/2524, para. 5.30; CAS 2007/A/1413, para. 80; CAS 2011/A/2523, para.5.34: "It is the Panel's view that an athlete, in order to fulfil his or her duty according to Art. 2.1 FIRS ADP, has to be active to ensure that a medication or a supplement that he or she uses does not contain any compound that is on the Prohibited List. In the present case, the Athlete has not done anything to ensure this, even if one considers her youth. The Panel is of the view that the Athlete has not established that she bears No Significant Fault or Negligence. Therefore, the Panel finds no ground to reduce the sanction according to Art. 10.5.2 FIRS ADP".

[17] CAS 2015/A/4273, para. 41.

[18] CAS 2010/A/2268, para.110.

[19] CAS 2003/A/447, para. 10.8: "…age does not fall within the category of "Exceptional Circumstances" which warrant consideration in reducing the term of ineligibility". In this case, the athlete had been negligent to use a medical product without the advice of a doctor and was therefore considered responsible for the doping offence.

potentially relevant factors to determine her degree of fault[20]. Yet, under the circumstances, the Panel considered that no exceptional circumstances warranted a reduction of – at the time - the standard sanction of 2 years, because the athlete acted negligently by having voluntarily and knowingly ingested pills, despite suspicions of their possibly performance enhancing effects. The fact that the athlete did not receive any formal drug education prior to her first in-competition drug testing was found irrelevant as long as the athlete was found capable of understanding anti-doping requirements.

E. Until the WADA Code 2015, obligation to establish the route of ingestion of the prohibited substance in order to benefit from a reduced sanction

On the basis of the versions of the WADA Code applicable before the entry into force of the WADA Code 2015, CAS case law consistently held that the need for an athlete to establish how a prohibited substance entered his or her system was a condition precedent to a finding of absence of fault or no significant fault[21]. All athletes including minors needed to demonstrate the route of ingestion of the prohibited substance to the CAS panel's comfortable satisfaction in order to benefit from a reduced sanction for No Fault or Negligence or for No Significant Fault or Negligence[22].

V. Rationale and consequences of the introduction of the notion of "Protected Person" by the 2021 Code

Following a two-year consultation process opened to the international community, a major change has been introduced in the WADA Code 2021 relating to minors with the addition of the notion of "Protected Persons".

The rationale for the inclusion of the notion of Protected Person in the WADA Code 2021 is to offer a different treatment to this new category of athletes *"in certain circumstances based on the understanding that, below a certain age or intellectual capacity, an Athlete or other Person may not possess the mental capacity to understand and appreciate the prohibitions against conduct contained in the Code"*..[23] The addition of this category is tantamount to the recognition that *"both age and cognitive capacity are factors affecting an ability to comprehend the terms and sanctions outlined in the Code".*[24]

In fact, the Code now distinguishes between Minors and Protected Persons, the latter being considered especially vulnerable because of their young age (under 16), their lack of experience (minors between 16 and 18 years of age, unfamiliar with the elite sport environment and the applicable rules) or their legal incapacity. Conversely, Elite Minors between the ages of 16 and 18 are considered sufficiently mature by the Code and are treated as adults.

If the duties of athletes referred to in the Code 2021 are identical to those referred to in the previous versions (see articles 2 paragraph 2 and 21.1refered above) and apply in principle to all athletes, since the entry into force of the Code 2021, Protected Persons benefit from a favorable regime in

[20] CAS 2014/A/3559 para 94 with references to CAS 2010/A/2523, para. 5.31; CAS 2010/A/2311, 2312.

[21] CAS 2009/A/1954, the Panel considered that "Notwithstanding the assessment of the Athlete's youth and inexperience, it is, nevertheless, still a pre-requisite according to Art. 10.5.2 that the Athlete can prove, how the Prohibited Substance entered his system"

[22] CAS 2009/A/1954, para. 6.14; CAS 2011/A/2336 & 2339 para. 83 & 95; CAS 2008/A/1471 & 1486, para. 9.5.2 "it has not been established to the Panel's comfortable satisfaction how, and because of what surrounding circumstances, stanozolol came to be present in the First Respondent's body. However, this is a prerequisite for being able to apply the mitigating grounds in Art. 19.5.1 and 19.5.2 NSA 2005"; CAS 2006/A/1032 paras 140 *et seq.*

[23] WADA Code Comment to Protected Person, p. 174 WADA Code 2021.

[24] Kleiderman/Thompson/Borry/Boily/ Knoppers Doping controls and the 'Mature Minor' elite athlete: towards clarification?, International Journal of Sport Policy and Politics, Volume 12, 2020 – Issue 1

terms of applicable sanctions, burden of proof, assessment of the degree of fault, and disclosure of doping cases.

A. Special status for Protected Persons regarding the regime of sanctions

Article 10.3 provides a reduced period of Ineligibility for Protected Persons, reducing the maximum sanction for a whereabouts failures or evading sample collection from 4 years to 2 years and permitting a reprimand (whereas the sanction for non-Protected Person, in principle, is 4 years[25]).

According to Article 10.6 which governs reduction of sanctions for violations of Articles 2.1 (presence), 2.2 (use or attempted use) and 2.6 (possession) of the WADA Code, the following standard applies:

"10.6.1.3 Protected Persons or Recreational Athletes

Where the anti-doping rule violation not involving a Substance of Abuse is committed by a Protected Person or Recreational Athlete, and the Protected Person or Recreational Athlete can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two (2) years Ineligibility, depending on the Protected Person or Recreational Athlete's degree of Fault".

In fact, this provision reduces the punishment for Protected Persons for all substances other than Substances of Abuse[26] to the range of reprimand to 2 years, whereas non-Protected Persons may receive that range of sanction if they are able to show No Significant Fault or Negligence involving only Specified Substances (other than a Substance of Abuse).

Pursuant to Article 10.3.3, penalties are harsher for Athlete Support Personnel committing violations of tampering or attempted tampering and administration or attempted administration involving a Protected Person. Article 10.3.3 provides in this regard that for *"violation involving a Protected Person shall be considered a particularly serious violation and, if committed by Athlete Support Personnel for violations other than for Specified Substances, shall result in lifetime Ineligibility for Athlete Support Personnel".*

B. Special status for Protected Persons regarding the assessment of fault or negligence

The fact that an athlete is a Protected Person is a factor to be taken into account in assessing the degree of fault of the athlete.

Thus, the definition of *Fault* in the Code 2021 provides *"Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete's or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Protected Person, (…)".*

C. Special status for Protected Persons regarding the standard of proof

The source of the Prohibited Substance does not have to be established by a Protected Person to prove No Fault or Negligence or No Significant Fault or Negligence. (cf. definition WADA Code 2021 *No Fault or Negligence, No Significant Fault or Negligence,)*[27].

[25] Article 10.3.1 WADA Code 2021: "For violations of Article 2.3 [evading sample collection] or 2.5 [tampering with sample collection], the period of Ineligibility shall be four (4) years except: (…); (iii) in a case involving a Protected Person or Recreational Athlete, the period of Ineligibility shall be in a range between a maximum of two (2) years and, at a minimum, a reprimand and no period of Ineligibility, depending on the Protected Person or Recreational Athlete's degree of Fault.

[26] Article 4.2.3 WADA Code 2021: Substances of Abuse For purposes of applying Article 10, Substances of Abuse shall include those Prohibited Substances which are specifically identified as Substances of Abuse on the Prohibited List because they are frequently abused in society outside of the context of sport.

[27] "No Fault or Negligence: The Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or

The Code 2021 has replaced the "Minor" in said definition by the "Protected Person" in order to avoid the problem of athletes aged below 18 years taking part in international events and being treated more favorably even though their experience and maturity implied that they should be treated like adults.

D. Different rules governing public disclosure of Anti-Doping Rule Violation (ADRV) involving Protected Persons

Article 14.3.7 WADA Code 2021 provides *"The mandatory Public Disclosure required in 14.3.2 shall not be required where the Athlete or other Person who has been found to have committed an anti-doping rule violation is a Minor, Protected Person or Recreational Athlete. Any optional Public Disclosure in a case involving a Minor, Protected Person or Recreational Athlete shall be proportionate to the facts and circumstances of the case*[28].

VI. Jurisprudence Kamilla Valieva

To date, the Valieva case is the only doping case involving a Protected Person that the CAS has had to deal with on the basis of the WADA Code 2021. Therefore, the decision taken by the CAS Ad hoc Division during the Olympic Winter Games Beijing 2022 constitutes an important jurisprudential development with regard to minors belonging to the category of Protected Persons.

On 7 February 2022, Kamila Valieva, a 15-year-old Russian figure skater placed first in the team figure skating event.

On 8 February 2022, the International Testing Agency (ITA) notified the athlete of a provisional suspension following a test dated December 2021- prior to the Olympic Games - whose results only released on 7 February 2022 – during the Olympic Games - showed an Adverse Analytical Finding (AAF) for the presence of a non-specified substance *Trimetazidine, a prohibited substance under the World Anti-Doping Agency (WADA) List.*

On 14 February 2022, the Ad hoc Division of the CAS dismissed the applications filed by the International Olympic Committee (IOC), the World Anti-Doping Agency (WADA) and the International Skating Union (ISU) against the decision issued by the Russian Anti-Doping Agency (RUSADA) Disciplinary Anti-Doping Committee on 9 February 2022 (the Challenged Decision) lifting the provisional suspension and, allowing her to continue her participation in the Olympic Winter Games Beijing 2022.

The main legal issues dealt with by the CAS Ad hoc Division were the following:

Jurisdiction of the CAS Ad Hoc Panel to decide on the provisional suspension of the athlete

As a preliminary matter, the Panel confirmed its jurisdiction contested by RUSADA. It held that its competence *rationae materiae* derived from the fact that the dispute arose *"on the occasion or in connection with the Olympic Games envisaged"* as provided by Article 61(2) of the Olympic Charter. The dispute was indeed directly connected with the Games, since the outcome of the dispute i.e. whether

suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. **Except in the case of a Protected Person** or Recreational Athlete**, for any violation of Article 2.1 (presence of a prohibited substance), the Athlete must also establish how the Prohibited Substance entered the Athlete's system".**

"No Significant Fault or Negligence: The Athlete or other Person's establishing that any Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. **Except in the case of a Protected Person** or Recreational Athlete**, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered the Athlete's system".**

[28] It should be noted that this provision is also applicable to Minors.

the provisional suspension should be reinstated or not, was relevant for the Athlete's further participation in the OWG 2022. The "dispute" was the connecting factor, irrespective of the authority that rendered the Appealed Decision (RUSADA). As a consequence, it was irrelevant that RUSADA did not act as an authority of the Games or is not listed among the sports authorities at Article 1 of the CAS Ad Hoc Rules.The jurisdiction *ratione temporis* of the CAS Ad hoc Division stemed from the fact that the decision was rendered during the period considered to be relevant under Article 1 Arbitration Rules applicable to the CAS Ad hoc Division for the Olympic Games, i.e. during the Olympic Games.

Special treatment for "Protected Persons" under the WADA Code but lacuna regarding provisional suspensions

Under Article 9.4.1 of the Russian ADR[29] and the respective provision of the 2021 WADA Code, Article 7.4.1, a provisional suspension shall be imposed immediately in the event of an Adverse Analytical Finding (AAF) for a non-specified substance. Pursuant to Article 9.4.3 of the Russian ADR, for the suspension to be lifted, the athlete must provide evidence that the violation was likely caused by the use of a contaminated product or pertaining to a substance of abuse. The Panel stressed that if Protected Persons have a special status in the WADA Code 2021 especially regarding the assessment of fault or negligence, the standard of proof and the applicable sanctions, the WADA Code was silent with respect to provisional suspensions imposed on Protected Persons.

The Panel considered that the athlete as a Protected Person - and this was highly relevant in this particular case - would potentially be subject to the minimum possible sanction if she could establish No Significant Fault or Negligence. For the Panel, under the relevant provisions of the WADA Code 2021 dealing with the notion of Fault, it is not just possible but likely that Protected Persons will receive anti-doping sanctions at the level of a reprimand or at the bottom end (a few months) of the 0 to 2 years possible suspension, principally because of their lack of legal capacity and their youth and immaturity. Moreover, even if the anti-doping results management process found a doping rule violation, the ability to show intention or fault of a Protected Person might be difficult, and, lacking that intention or fault, the sanction might likely be on the low end of the range. The Panel further held that though the WADA Code does not provide for an exemption from mandatory provisional suspension for a non-specified substance used by a Protected Person, only Protected Persons can potentially receive a reprimand and no period of ineligibility if No Significant Fault or Negligence is established. The Panel found that this different treatment for protected persons is *"inconsistent with the repeatedly expressed intention of the drafters of the Code to ensure that the Code applies more leniently and flexibly to protected persons, given their age and inexperience, as well as their lesser responsibility for rule violations"*.[30] Furthermore, the Panel insisted that strict application of the rules as written for provisional suspensions would almost certainly in every case involving a Protected Person result in a provisional suspension longer than the likely period of actual suspension, which is not satisfactory from a legal point of view.

The Panel concluded that there was a *lacuna* in the Russian ADR and the WADA Code

[29] Article 9.4.1 of the Russian ADR "If an Adverse Analytical Finding or Adverse Passport Finding is received (upon completion of verification of an Adverse Passport Finding) which revealed the presence of a Prohibited Substance or the Use of a Prohibited Method not pertaining to a Specified Substance or Specified Method, including Team Sports, Provisional Suspension shall be imposed immediately after reviewing the Adverse Analytical Finding and providing the notification stipulated by Clause 9.2 hereof".

[30] CAS OG 22/08 -CAS OG 22/09 -CAS OG 22/10, para. 195

2021. It therefore filled this *lacuna* stressing that this was its "interpretation" and not a re-writing of the rules [31]. The Panel held that provisional suspensions of Protected Persons should be evaluated as optional and not mandatory under Article 7.4.2 of the WADA Code 2021. In this particular case, the Panel determined that that *"Ms Valieva was entitled to benefit from being subject to an optional Provisional Suspension as a Protected Person and that, under the facts and circumstances, the option not to impose a Provisional Suspension should have been exercised so that she would not be prevented to compete in the OWG 2022"*[32].

Consideration of the criteria for granting provisional measures in the light of Articles R37 CAS Code and 14 Ad Hoc Rules

As an alternative basis for the Panel's decision in considering the lifting of the provisional suspension for the Athlete, the Panel recalled that Article 37 CAS Code and Article 14 of the CAS ad hoc rules permit provisional relief to be awarded by CAS. As per constant CAS jurisprudence, when deciding whether provisional measures may be granted, it is necessary to consider whether the measure is necessary to protect the applicant from irreparable harm, the likelihood of the applicant succeeding in the substantive appeal, and whether the interests of the applicant outweigh those of the Respondent.[33]

In assessing whether the criteria were met, the Panel also considered the duration taken by the laboratory to notify its report of an AAF involving the Athlete, the low level of the prohibited substance, the fact that she had tested negative in many tests before and after the test at stake, and the likely low level of sanction she will be imposed if found to have committed an ADRV.

On the basis of CAS jurisprudence, the Panel found that the risk of irreparable harm was present. Although the athlete's prevention to compete was not *per se* considered irreparable harm, the short career of athletes in general and a suspension subsequently found to be unjustified *could* cause irreparable harm [34]. The Panel further considered that the athlete should not bear the consequences of the delay in the processing and notification of the sample. Secondly, the taking place, a few days after the notification of the ADRV, of the OWG 2022 Women's Single Skating event is a significant factor. If the athlete was to remain ineligible to compete, that would give rise, on any reasonable objective view, to irreparable harm, *per se*[35].

With regard the likelihood of the applicant succeeding in the substantive appeal, the Panel held that the athlete's arguments regarding the length of her suspension or whether one will even be imposed were sufficiently plausible to consider that the possibility the provisional suspension be lifted could not be discarded at this stage, which was sufficient to satisfy the second criterion.

With respect that the balance of interest test, the applicant would need to demonstrate that the harm or inconvenience she would suffer from the refusal of the requested provisional measures would be

[31] CAS OG 22/08 -CAS OG 22/09 -CAS OG 22/10, paras 196 & 201.
[32] Op. cit. para. 202.
[33] *See* CAS 3571/72; CAS 2003/O/486; Orders of CAS 2013/A/3199; CAS 2010/A/2071; 2001/A/329; and CAS 2001/A/324. These criteria are cumulative. *See* Orders of CAS 2013/A/3199; CAS 2010/A/2071; and 2007/A/1403. *Accord*, Paolo Patocchi, "Provisional Measures in International Arbitration", in International Sports Law and Jurisprudence of the CAS (M. Bernasconi, ed.), pp. 68-72 (2012); Jeffrey Benz and William Sternheimer, "Expedited Procedures before the Court of Arbitration for Sport", CAS Bulletin 2015/1, at 6-11. These criteria are clearly enumerated in Article R37(5) of the CAS Code.
[34] CAS OG 22/08 -CAS OG 22/09 -CAS OG 22/10, para.208.
[35] CAS 2008/A/1569; Preliminary decision CAS 2008/A/1453 para. 7.1. See also "*the conservatory measure shall avoid a damage which shall be difficult to remedy if it was not ordered immediately"*. Fabienne Hohl, "Procedure Civile", Tome II, Editions Staempfli, Berne 2002, p. 234. *See* CAS 2011/A/2615.

comparatively greater than the harm or inconvenience the other parties would suffer from the granting of the provisional measures. The Panel considered that *"the balance of interests test tipped decisively in favour of the Athlete again because she is a Protected Person", (…) in the face of irreparable harm to the Athlete upon issuance of a Provisional Suspension (eventually possibly being found to be unjustified), there is no founded and equally tangible irreparable harm in case of lifting of the Provisional Suspension, neither for the Applicants nor for the other competitors".*[36]

In conclusion, the Panel determined that permitting the provisional suspension to remain lifted was appropriate[37].

VII. Conclusion

The revision of the WADA Code related to Protected Persons has for the first time taken into account the notions of vulnerability and legal capacity for minor athletes. This revision allows for a more nuanced treatment and lesser liability of Protected Persons compared to previous versions of the Code. The recent Kamilla Valieva case law illustrates these changes in practice for the first time and paves the way for further decisions involving Protected Persons belonging to the category of minors.

[36] CAS OG/08/09 – 22/10, para. 217.

[37] It is to be noted that the ISU has announced its intention to raise the minimum age for competition. It should be raised from 15 to 17 years. This measure has not yet been adopted and has been discussed at a congress held from 6 to 10 June 2022 in Thailand. If it is accepted, this decision will be imposed from the 2023-2024 season. The minimum age would then be 16, rising to 17 for the 2024-2025 season.

Nociones fundamentales de la prueba en el TAS.

Yago Vázquez Moraga*

I. Propósito

La prueba es una parte trascendental de cualquier procedimiento arbitral, pues la inmensa mayoría de las veces determinará el resultado de la disputa. Así, la actividad probatoria que se lleva a cabo en todo arbitraje, ya venga promovida por los litigantes mediante la proposición y aportación de los distintos medios de prueba en los que apoyan sus pretensiones o, en su caso, aquella que resulte de la iniciativa probatoria de la propia Formación Arbitral, debe servir, si no para acreditar, cuanto menos para convencer suficientemente a los árbitros de la realidad o certeza de los hechos que sirven de fundamento las pretensiones ejercitadas y, por consiguiente, de la viabilidad de estas últimas.

Como cualquier otra actuación procesal, la actividad probatoria está sometida a unas normas, principios, tiempos, requisitos y garantías de los que va a depender su validez y eficacia, tanto dentro del propio procedimiento arbitral como, en un momento posterior, *ad extra*, en caso de que el laudo arbitral que se dicte sea sometido al escrutinio de los tribunales estatales[1] a través de los distintos mecanismos dirigidos a la anulación del laudo con fundamento en alguna de las causas o motivos legalmente previstos. Debe tenerse presente que el derecho a la prueba forma parte del derecho a la tutela judicial efectiva y es una exigencia del debido proceso (*due process*), formando parte en Suiza del derecho de las partes a ser oídas (*right to be heard* o *droit d'être entendues en procédure contradictoire*) y a la igualdad de trato (*equal treatment* o *l'égalité des parties*), quedando incluso ciertos aspectos[2] del derecho bajo la protección del orden público procesal suizo (*ordre public procédural*).

Teniendo en cuenta lo anterior, vamos a dejar apuntados los principales conceptos e ideas que, a juicio del autor, deben tenerse en cuenta para la correcta administración y práctica de la prueba en el TAS[3].

* Abogado. Socio de Pintó Ruiz & Del Valle.

[1] E, igualmente, en caso de que se inste a un tribunal estatal la ejecución judicial del laudo a través, entre otras, de la Convención sobre el reconocimiento y la ejecución de las sentencias arbitrales extranjeras de Nueva York de 1958.

[2] A pesar de que el contenido del orden público procesal suizo hace ciertamente difícil que pueda ser infringido. Así, por ejemplo, generalmente la infracción de las normas del procedimiento (las pactadas por las partes o, incluso, las disposiciones de la Ley de Derecho Internacional Privado de Suiza), la ausencia de motivación del laudo, las contradicciones internas del laudo, el manifiesto error en la valoración de la prueba o incluso la valoración arbitraria de la prueba, no supondrán ninguna vulneración del orden público procesal suizo, a menos que ello haya producido un resultado que repela al sentimiento de justicia (*sentiment de justice*) o sea gravemente incompatible con los principios procesales generalmente reconocidos o con el sistema legal y los valores fundamentales del estado de derecho. En el resto de casos, tales eventuales infracciones carecerán de trascendencia y no justificarán una violación del orden público procesal suizo.

[3] Una visión general y rigurosa de estas cuestiones ya la dieron RIGOZZI y QUINN en un trabajo de ineludible lectura: RIGOZZI, A. y QUINN, B.; Evidentiary issues before CAS, en BERNASCONI, M. (Ed.); International Sports Law and Jurisprudence

II. Marco normativo

El sometimiento de cualquier controversia al TAS por parte de los interesados conlleva su sumisión al *Código de arbitraje deportivo* del TAS[4] ("el Código") y la aceptación sin reservas de sus normas procedimentales. En consecuencia, sin perjuicio de las reglas de procedimiento que adicionalmente puedan establecer las partes[5], el Código constituirá la norma procesal básica que regirá el arbitraje (incluyendo la actividad probatoria que se desarrolle en su seno), y que deberá complementarse con las eventuales reglas procedimentales que prevea el derecho aplicable al fondo de la controversia. Además, todo ello se deberá llevar a cabo dentro de los límites procesales fijados por la Ley de derecho internacional privado suiza (LDIP).

Efectivamente, la sumisión de una controversia al TAS necesariamente supone que las partes están dirimiendo su disputa en un tribunal arbitral con sede en Suiza, lo que ocurrirá en todo caso[6], con independencia del lugar en el que se celebre la eventual audiencia del procedimiento (art. R28 del Código). Dicha circunstancia crea un vínculo jurídico inquebrantable con el Ordenamiento Jurídico suizo[7], dado que dicho derecho será la *lex arbitri* que, junto con el Código, regirá el procedimiento arbitral.

De este modo, a salvo de los pocos casos en los que las partes tengan su domicilio en Suiza[8], los arbitrajes en el TAS quedarán sujetos a las disposiciones del Capítulo 12 de la LDIP, que establece las normas fundamentales de cualquier arbitraje internacional que se celebre en Suiza, incluyendo algunas previsiones esenciales en materia de prueba[9]. Particularmente, resultan relevantes los arts. 182, 183, 184, 185 LDIP, a los que a continuación haremos referencia, así como los arts. 190 y 190*a* LDIP que establecen algunas causas de anulación o revisión del laudo que pueden estar vinculadas a la práctica de la prueba.

En cuanto al Código, las principales normas procesales están contenidas en los Arts. **R44.1** (momento procesal para la presentación de pruebas y designación de

of the CAS – 4th Conference CAS & SAV/FSA Lausanne 2012, Editions Weblaw, 2014). Igualmente, resulta muy relevante el trabajo de LA ROCHEFOUCAULD, E.; The Taking of Evidence before the CAS, en CAS Bulletin 2015/1, pp. 28 a 39.

[4] Al momento de redactar este trabajo se tiene en cuenta la versión vigente del Código, que entró en vigor el día 1 de julio de 2021.

[5] Que no podrán contravenir las disposiciones imperativas del Código ni de la LDIP.

[6] Tal y como señala RIGOZZI (vid. International Sports Arbitration : Why does Swiss Law Matter?; en RIGOZZI/SPRUMONT/HAFNER (éd.), Citius, Altius, Fortius – Mélanges en l'honneur de Denis Oswald, Bâle (Helbing & Lichtenhahn) 2012, pp. 439-461), bajo el ordenamiento jurídico suizo no es posible excluir el derecho suizo como el derecho rector de un procedimiento arbitral con sede en Suiza, en favor de un derecho extranjero.

[7] Para un análisis completo de esta cuestión puede acudirse al trabajo de COCCIA, M.; El derecho aplicable en procedimientos ante el TAS, en PÉREZ TRIVIÑO, JL., FERRER DE ROBLES, L., GARCÍA ALCARAZ, A., GARCÍA SILVERO, E. BERNASCONI M. (Coords.), El arbitraje en el TAS. Funcionamiento, procedimiento y cuestiones prácticas más relevantes, Aranzadi, 2021, pp. 113-137. Igualmente, resulta ineludible el trabajo de HAAS, Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law; en CAS Bulletin 2015/2, pp. 7-17.

[8] En cuyo caso, al tratarse de un arbitraje doméstico, se aplicará, entre otras disposiciones, el Código Procesal Civil suizo.

[9] Aunque en la práctica no suela generar problemas, en este punto debe tenerse presente que la naturaleza procesal o sustantiva de las normas que regulan la actividad probatoria varía en función de cada jurisdicción y tradición jurídica (*civil law* vs. *common law*). Particularmente, las jurisdicciones del *common law* suelen considerar las normas de prueba como normas procesales, mientras que los países de la tradición del *civil law* las suelen considerar normas sustantivas. En consecuencia, en función del derecho aplicable al fondo de la disputa ex. Arts. R45 y R58 del Código, es posible que en ciertos casos las cuestiones de prueba a las que vamos a referirnos deban ser resueltas de acuerdo con la *lex causae*. Por ejemplo, en el caso de un arbitraje ordinario sometido a derecho suizo, el derecho de la parte a la exhibición de libros contables previsto en los arts. 415k y 541 del Código de Obligaciones suizo (de ser aplicables), resultará de dichos preceptos y no de las normas procedimentales del Código relativas a la exhibición documental (Arts. R44.3 y R57 del Código).

testigos y expertos), **R44.2** (práctica de la prueba durante la audiencia), **R44.3** (actuaciones de instrucción ordenadas por la Formación Arbitral), **R44.5** (incomparecencia de testigos) para el procedimiento ordinario, y, para el procedimiento de apelación, los Arts. **R51** (momento procesal para la presentación de pruebas y designación de testigos y expertos por el apelante), **R55** (momento procesal para la presentación de pruebas y designación de testigos y expertos por el apelado), **R56** (preclusión y presentación de pruebas en un momento ulterior), **R57** (solicitud del expediente de primera instancia, instrucciones sobre la práctica de la prueba por la Formación Arbitral, inadmisión de pruebas que estuvieran disponibles para las partes con anterioridad al dictado de la decisión apelada e incomparecencia de testigos), junto con los Arts. R44.2 y R44.3 que se aplican por remisión del Art. R57.

Como es de ver, el Código contiene una regulación mínima, limitándose a establecer los derechos y obligaciones básicos de las partes y las facultades probatorias y de administración de prueba de la Formación Arbitral, incluyendo, además, previsiones específicas para el procedimiento de apelación, dadas las peculiaridades de este último. En consecuencia, el resto de cuestiones no previstas en el Código deberán ser resueltas de conformidad con la LDIP y la interpretación y concreción que de la misma hace el TFS en su jurisprudencia.

Al respecto, en sus arts. 182 y 184, la LDIP establece unas reglas básicas que deben tenerse en cuenta para la correcta administración del arbitraje, particularmente (traducción libre del francés al español):

- Art. 182 LDIP:

1 *Las partes pueden regular el procedimiento arbitral directamente o por referencia a un reglamento de arbitraje; también pueden someterlo a la ley procesal de su elección.*
2 *Si las partes no han regulado el procedimiento, de ser necesario, éste lo determinará el tribunal arbitral, bien directamente o por referencia a una ley o a un reglamento de arbitraje.*
3 *Sea cual sea el procedimiento elegido, el tribunal arbitral deberá garantizar la igualdad de las partes y su derecho a ser oídas en un procedimiento contradictorio.*
4 *La parte que prosiga con el arbitraje sin hacer valer inmediatamente una violación de las reglas del procedimiento que haya constatado o que haya podido constatar aplicando la debida diligencia, no podrá invocar posteriormente dicha infracción.*

- Art. 184 LDIP:

1 *El tribunal arbitral administrará la prueba por sí mismo.*
2 *Si la asistencia de las autoridades judiciales estatales es necesaria para la obtención de pruebas, el tribunal arbitral, o una parte con su consentimiento, puede solicitar el auxilio del juez de la sede del tribunal arbitral.*
3 *El juez aplicará su propio derecho. A petición del interesado, podrá observar o tomar en consideración otras formas de procedimiento.*

Como resumen de lo anterior se puede concluir que, más allá de las previsiones específicas del Código en materia de prueba, el principio general es que, en los arbitrajes en el TAS, "*a menos que las partes hayan pactado otra cosa*[10], *el tribunal no está sujeto a ninguna regla específica en relación con la prueba*" (TAS 2020/A/7374) ni, particularmente, a las reglas de prueba aplicables a los tribunales

[10] O, también, cuando la normativa aplicable prevea alguna regla específica de prueba, como sería el caso paradigmático del régimen previsto por el Código Mundial Antidopaje de la AMA, que establece reglas específicas en materia de prueba, tales como (i) principios sobre la carga de la prueba, (ii) estándares de prueba aplicables, (iii) reglas de acceso a fuentes de prueba, (iv) tipos de prueba admisible, (v) presunciones probatorias, (vi) inferencias negativas derivadas de la conducta de las partes, (vii) derechos procesales mínimos como el derecho de audiencia del investigado. Igual de ilustrativo resulta el caso del Código de Ética de FIFA, que en sus artículos 43 a 49 regula (i) los tipos de prueba admisible, (ii) los testigos anónimos, (iii) la prueba ilícita, (iv) la valoración de la prueba, (v) el estándar de prueba y (vi) la carga de la prueba.

estatales suizos[11] (i.a. CAS 2009/A/1879 o CAS 2018/A/5734).

En consecuencia, la Formación Arbitral no está sometida a ninguna regla de prueba (CAS 2008/A/1574) y "*determina por sí mism*[a] *y a su sola discreción si la prueba practicada es relevante y pertinente y pondera la prueba*[12]" (TAS 2020/A/7116), pudiendo para ello la Formación Arbitral fijar las reglas del procedimiento (182.2 LDIP) y administrar libremente la prueba (184.1 LDPIP), con el único límite de garantizar la igualdad de las partes y el derecho de éstas a ser oídas en un procedimiento contradictorio, tal y como exige el art. 182.3 LDIP y como, por otra parte, impone el art. 29, números 1 y 2 de la Constitución Federal de la Confederación Suiza[13], como una de las garantías procesales de rango constitucional. De este modo, *"Le pouvoir discrétionnaire de la Formation de combler toute lacune est – en l'absence de règles expresses dans les Articles 176 ss LDIP et le Code TAS – limité que par l'ordre public procédural et les droits procéduraux des parties. Selon la jurisprudence du Tribunal Fédéral l'ordre public procédural n'est violé que lorsque des principes fondamentaux et généralement reconnus ont été violés, ce qui conduit à une contradiction insupportable avec le sentiment de justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un Etat de droit"* (CAS 2009/A/1879).

Asimismo, tal y como ha reconocido el TAS en su jurisprudencia (i.a. CAS 2011/A/2384 & CAS 2011/A/2386), en su actuación la Formación Arbitral deberá asegurar que se respetan las garantías previstas en el art. 6 del Convenio Europeo de Derechos Humanos (CEDH) que, como han puesto de manifiesto importantes y conocidas sentencias del Tribunal Europeo de Derechos Humanos (Claudia Pechstein | Adrian Mutu c. Suiza[14]), resulta indirectamente aplicable al arbitraje[15] (al menos en lo que se refiere a materia civil)[16].

Por otro lado, en la práctica es cada vez más frecuente el recurso de las Formaciones Arbitrales y de las partes a los principios y criterios establecidos en el llamado *softlaw*, particularmente en las conocidas Reglas de la International Bar Association (IBA) sobre Práctica de Prueba en el Arbitraje

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11 "*La Formation n'est pas liée par les règles régissant l'admissibilité et le choix de la preuve applicables devant les cours étatiques du siège du tribunal arbitral*" (TAS 2009/A/1879).

12 En línea con la posición de la doctrina suiza, conforme a la cual "*The arbitral tribunal's assessment of evidence is governed by the arbitration rules applicable to the proceedings. The principle of free assessment of evidence applies (Art. 9(1) IBA Rules). Unless the parties have agreed otherwise, the arbitral tribunal is not bound by any rules of evidence. It determines for itself and in its own discretion whether the evidence taken is relevant and material it weighs the evidence*" (VEIT, M.; en ARROYO (Ed.), Arbitration in Switzerland – The Practitioner's Guide, Volumen I, Kluwer Law International B.V., Holanda, 2ª Edición, 2018, pp. 181-182).

13 Conforme al cual:

"*1 Toute personne a droit, dans une procédure judiciaire ou administrative, à ce que sa cause soit traitée équitablement et jugée dans un délai raisonnable.*

2 Les parties ont le droit d'être entendues.

[…]"

14 Al respecto puede acudirse a RIGOZZI, A.; Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond; en MULLER C. et al (ed.); New developments in International Commercial Arbitration, Bern, pp 77–130.

15 Un análisis detallado de la relación entre el arbitraje en el TAS y el art. 6 CEDH puede encontrarse en THOMASSEN, W.; Arbitration and the European Convention on Human Rights, General principles, CAS Bulletin 2015/2. E igual de esclarecedor resulta el trabajo de LA ROCHEFOUCAULD, E.; The Fundamental Rights of the parties before the CAS, CAS Bulletin 2021/1.

16 En relación con esta cuestión, resulta sumamente interesante el trabajo de FUMAGALLI, L.; The right to be heard: what does it really mean? Information to heal the "due process paranoia", CAS Bulletin, Séminaire Budapest octobre 2019. En su artículo, el Prof. Fumagalli ofrece algunos consejos y soluciones para evitar la "paranoia" que, en ciertas circunstancias, sufren algunas Formaciones Arbitrales respecto del derecho de las partes a ser oídas, provocada por el miedo de los árbitros a la posibilidad de que su laudo sea anulado por el TFS o que un tribunal estatal deniegue su ejecución.

Internacional[17], que parte de la doctrina[18] recomienda utilizar como suplemento y guía para la correcta administración de la prueba, al proponer soluciones y procedimientos específicos para la práctica de la prueba. Sin duda alguna, pueden ser herramientas útiles para garantizar la correcta administración de la prueba, siempre y cuando se tenga claro que las mismas carecen de cualquier obligatoriedad y que las Formaciones Arbitrales pueden ejercer su facultad de administración del procedimiento y de la prueba con plena libertad, dentro de los límites establecidos por la LDIP.

III. Principios básicos en materia de prueba

Del anterior marco normativo, y teniendo en cuenta la jurisprudencia del TAS y del TFS, se pueden extraer los siguientes principios básicos aplicables a la administración, práctica y valoración de la prueba en el TAS:

- En la administración de la prueba, la Formación Arbitral se regirá por las disposiciones de prueba del Código y, además, por aquellas disposiciones específicas que (i) puedan haber pactado las partes del arbitraje (en el caso de un arbitraje ordinario) y (ii) establezca de forma específica la normativa aplicable al fondo de la disputa.

- Las cuestiones que no estén previstas en el Código, en las normas que eventualmente hayan pactado las partes o en la normativa aplicable, se regirán por lo que libremente disponga la Formación Arbitral, dentro de los límites establecidos por la LDIP. En consecuencia, aunque la Formación podrá acudir a las disposiciones y reglas probatorias previstas en el derecho suizo, en modo alguno estará obligado a hacerlo o a resolver dichas cuestiones de acuerdo con dicho derecho, siendo libre de administrar la prueba como considere oportuno (182.2 y 184.1 LDIP), gozando de plena autonomía procesal[19].

- El derecho a la prueba, que no es ilimitado y que debe ser ejercitado en tiempo y forma, es una manifestación y forma parte del derecho fundamental de las partes a ser oídas en un procedimiento contradictorio, debiendo garantizarse su derecho *"a expresarse sobre todos los hechos esenciales para el juicio, a representar su posición jurídica, a probar sus argumentos de hecho esenciales para la decisión con medios adecuados ofrecidos en tiempo y forma, a participar en las negociaciones y a inspeccionar los expedientes"* (4A_526/2011[20]). Por ello, en cualquier caso, en la administración y práctica de la prueba la Formación Arbitral debe garantizar la igualdad de armas y de partes y el derecho de estas a ser oídas en un procedimiento contradictorio (182.3 LDIP), lo que debe incluir el derecho a presentar pruebas para refutar las evidencias contrarias.

- En caso de ser necesario, la Formación Arbitral o las propias partes con el consentimiento de la Formación, podrá requerir el auxilio de los tribunales suizos para la práctica de alguna prueba, lo que deberá hacerse de acuerdo con la normativa procesal suiza.

- La Formación Arbitral es competente para determinar si una prueba resulta o no admisible, lo que dependerá de su licitud, pertinencia (por guardar relación con el objeto de la disputa), utilidad (por parecer

[17] IBA Rules on Taking of Evidence in Internacional Arbitration (17 December 2020), acesible en https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b

[18] Vid. RIGOZZI, A. y QUINN, B, op. cit., pág. 5.

[19] Nos permitimos utilizar el concepto que refiere ARROYO en su comentario al art. 190 LDIP ("*procedural law autonomy*"), o*p. cit.,* pág. 299.

[20] En su versión original en alemán: "*De la jurisprudencia se desprende, en particular, el derecho de las partes a expresarse sobre todos los hechos esenciales para el juicio, a representar su posición jurídica, a probar sus argumentos de hecho esenciales para la decisión con medios adecuados ofrecidos en tiempo y forma, a participar en las negociaciones y a inspeccionar los expedientes (BGE 130 III 35 E. 5 p. 38; 127 III 576 E. 2c p. 578 s.; cada uno con referencias)".*

adecuada para el esclarecimiento de los hechos o para acreditar lo que es objeto concreto de prueba) y posibilidad de su práctica (i.e. que la misma no exceda de la competencia del tribunal, por afectar a terceros ajenos al procedimiento arbitral, por ejemplo). En consecuencia, la Formación Arbitral puede inadmitir una prueba, rechazar la práctica de algún medio probatorio o denegar el acceso a una fuente de prueba que considere inútil o impertinente, lo que, claro está, exigirá una justificación razonada, a los efectos de confirmar que no se infringe el derecho a ser oído de la parte.

En base a ello, por ejemplo, la Formación Arbitral podrá rechazar la práctica de una prueba pericial, en caso de que en una valoración anticipada de la misma (*antizipierte Beweiswürdigung*) concluya que aquella no va a poder alterar el resultado de las pruebas ya practicadas y existentes (vid. 4P.115/2003 /ech[21]). No obstante, en caso de duda la Formación deberá adoptar la decisión que sea más favorable al ejercicio del derecho fundamental de la parte a ser oída, garantizando así un procedimiento justo y conforme con el *due process*.

Así, el TFS ha declarado (4A_178/2014[22],) que *"el tribunal arbitral puede abstenerse de practicar la prueba si la prueba solicitada se refiere a un hecho que no es jurídicamente relevante, si la prueba ofrecida es evidentemente inadecuada o si el tribunal se ha formado su convicción sobre la base de la prueba ya practicada y puede suponer, en una valoración anticipada de la prueba, que su convicción no cambiaría con una nueva práctica de la prueba (véase a este respecto BGE 134 I 140 E. 5.3; 130 II 425 E. 2.1 p. 429; 124 I 208 E. 4a). La valoración anticipada de la prueba por parte de un tribunal arbitral internacional sólo puede ser revisada en un procedimiento de apelación desde la perspectiva limitada de la violación del orden público (sentencias 4A_600/2010 de 17 de marzo de 2011 E. 4.1; 4P.23/2006 de 27 de marzo de 2006 E. 3.1; 4P.114/2003 de 14 de julio de 2003 E. 2.2)".*

Además, hay que tener en cuenta que, en el caso concreto de los procedimientos de apelación, aunque la prueba propuesta o aportada resulte útil o pertinente, la Formación Arbitral *"podrá inadmitir pruebas presentadas por las partes si las mismas estaban a su disposición o podían razonablemente haber sido descubiertas por tales partes con anterioridad a la emisión de la decisión apelada"* (Art. R57[23], párrafo 3, del Código[24]). En la práctica, las Formaciones Arbitrales administran esta discrecionalidad con mucha prudencia[25], conscientes de que un ejercicio riguroso y extremo de la misma podría llevar a

[21] En dicha sentencia (4P.115/2003 /ech), el TFS aclaró que el poder del árbitro de excluir prueba alcanza a la prueba pericial, razonando al respecto: "*Le juge saisi d'une demande d'annulation pour rejet d'une expertise devra donc rechercher si l'administration de ce moyen de preuve aurait pu conduire à une sentence différente, donc aborder des questions à la fois d'appréciation et de fond. Toutefois, comme, en vertu de l'art. 190 al. 2 let. e LDIP, le juge étatique ne peut contrôler l'appréciation des preuves, l'application du droit et la solution donnée au litige par le tribunal arbitral que sous l'angle restreint de l'ordre public, il ne pourra, le plus souvent, exercer qu'un contrôle très limité en ce qui concerne la violation du droit à la preuve, alors même que la loi en fait un motif de recours à part entière (dans le même sens, cf. le consid. 2b, non publié, de l'ATF 121 III 331). Au demeurant, le juge est en droit d'exclure la preuve offerte, sur la base d'une appréciation anticipée lui faisant apparaître soit qu'elle est vouée à l'échec faute de force probante suffisante, soit qu'elle est impropre à modifier le résultat des preuves déjà administrées (POUDRET, op. cit., p. 611). Ce principe, de portée générale (ATF 119 Ib 492 consid. 5b/bb et les arrêts cités), s'applique également dans le domaine de l'arbitrage - international ou concordataire - et singulièrement en matière d'expertise (arrêt 4P.23/1991, précité, consid. 5b in fine; consid. 8d, non publié, de l'ATF 102 Ia 493)*".

[22] En el mismo sentido, véase las sentencias del TFS 4A_342/2015 o 4A_462/2019.

[23] Al respecto, véase el trabajo de DESPINA MAVROMATI, The Panel's right to exclude evidence based on Article R57 para. 3 CAS Code: a limit to CAS' full power of review?, en CAS Bulletin 1/2014.

[24] Como curiosidad, tal y como apunta MAVROMATI (ibid. pág. 52), esta previsión no se aplicará a los procedimientos en materia de dopaje que se sigan bajo el Código Mundial Antidopaje de la AMA (2021), al disponer su art. 13.1 que, en los procedimientos de apelación, cualquier parte puede aportar prueba que no haya sido aportada en primera instancia.

[25] Vénase por ejemplo los laudos de los asuntos CAS 2017/A/5371 o CAS 2014/A/3486.

situaciones de indefensión y vulneraciones del derecho a ser oído. No hay que olvidar que el objeto de esta disposición es evitar amparar el ejercicio abusivo del derecho por parte de los litigantes, lo que podría producirse en casos en los que deliberadamente oculten una o varias pruebas en el procedimiento de primera instancia, al objeto de condicionar la posición de la contraparte para, en fase de recurso ante el TAS, perjudicar dicha posición aportando de forma sorpresiva y extemporánea prueba nueva y relevante, lo que puede generar una indefensión para la parte contraria.

- En determinadas circunstancias, la Formación Arbitral puede declarar admisible una prueba ilícita, que se haya obtenido con vulneración de derechos fundamentales.

  En contra de lo que ocurre en otros ordenamientos, que disponen que la prueba ilícitamente obtenida y aquella que pueda derivar de la misma (*fruits of the poisonous tree* o doctrina del fruto del árbol envenenado) deben ser excluidas y no pueden tener efecto en el procedimiento, el ordenamiento jurídico suizo no establece ninguna prohibición expresa de alcance general que impida a la Formación Arbitral admitir una prueba que resulte útil y pertinente, a pesar de que la misma se haya obtenido por medios ilícitos y siempre que ello no atente contra el orden público suizo, lo que dependerá de las circunstancias del caso.

  No obstante, bajo el derecho suizo no toda prueba ilícita resulta admisible, sino que su admisibilidad dependerá de las circunstancias del caso y de la gravedad de la violación de derechos que se haya cometido para la obtención de dicha prueba. Para ello, de acuerdo con la jurisprudencia del TFS[26], la Formación Arbitral ponderará los intereses que haya en juego, particularmente (i) el derecho que se ha violentado para la obtención de la prueba y la gravedad de dicha violación y (ii) el interés que puede existir, dada las circunstancias o naturaleza del caso, en conocer o averiguar la verdad.

  No son pocos los casos en los que Formaciones Arbitrales se han enfrentado a la tesitura de decidir si una prueba de origen ilícito debe ser admitida en un procedimiento en el TAS, lo que ha dado lugar a una afianzada jurisprudencia[27]. Así, en el "caso Valverde", la Formación recordó que *"The Swiss national legal order does not establish any general principle according to which illicit evidence is to be considered generally inadmissible in procedure before state civil courts. On the contrary, the Federal Tribunal, as set out in constant jurisprudence, is of the opinion that a decision regarding the admissibility or non-admissibility of illicit evidence must be the result of a balancing of various juridical interests. Matters considered pertinent, for example, are the nature of the violation, the interest in discerning the truth, the difficulty of adducing evidence for the concerned party, the conduct of the victim, the legitimate interests of the parties, and the possibility of acquiring the (same) evidence in a legitimate manner. The predominant Swiss doctrine follows this jurisprudence of the Federal Tribunal".*

  A modo de ejemplo, de acuerdo con lo anterior la jurisprudencia del TAS[28] ha admitido como prueba grabaciones

[26] Tal y como señala RUTZ, "T*he Swiss lawmaker has codified the principles that (i) an unlawfully obtained evidence is not per se inadmissible and (ii) that in order to determine its admissibility, the court must weigh the interest in the protection of the right infringed by the unlawful act against the interest in ascertaining the truth. According to the Federal council's commentary on the draft law, "a title obtained by threat or violence cannot be used, because personal integrity - especially in civil proceedings - is in principle more important than the interest in the truth". On the other hand, a "simply" stolen document may be used if the interest in finding the truth so requires"."* (vid. RUTZ, F.; Admissibility of Unlawfully Obtained Evidence in International Arbitration in Switzerland (August 31, 2020). SAA (Swiss Arbitration Academy) CAS in arbitration essays series, pág. 22).

[27] Véase por ejemplo el laudo del asunto CAS 2011/A/2425, que desarrolla ampliamente esta cuestión.

[28] Véase por ejemplo el asunto CAS 2014/A/3625.

telefónicas que han sido denunciadas como ilícitas por la parte afectada.

- La Formación Arbitral administrará las pruebas como considere conveniente, decidiendo celebrar o no una audiencia para la práctica de la prueba (Arts. R44.2 y R57 del Código) y, en caso de llevarse a cabo la misma, pudiendo limitar, por ejemplo, la duración del examen de expertos o del interrogatorio de peritos, así como limitar el número de preguntas o las cuestiones sobre las que las partes pueden preguntarles, tal y como ha reconocido el TFS (4A_544/2014).

- Igualmente, si las circunstancias del caso lo requieren, la Formación Arbitral podrá adoptar las medidas procesales oportunas para garantizar los derechos e intereses de las partes o de terceros, por ejemplo, imponiendo medidas de confidencialidad respecto de algunos documentos o, también, admitiendo la declaración de testigos protegidos (que declararán de manera que se preserve su identidad física, ocultándolos tras una pantalla) o, incluso, testigos anónimos, que en ciertas circunstancias resultan admisibles bajo derecho suizo.

  En relación con dicha prueba de testigos anónimos o protegidos, ello debe resultar admisible en ciertos casos dado que *"Preventing witness and whistleblower intimidation and harm of any kind and, in general, protecting witnesses whose testimony may be crucial to uncover systematic corruption cases like the Russian doping scheme, is essential to secure their cooperation to this end. Their help is essential to combat and uncover systemic corruption. For obvious reasons, the protection provided cannot be described as a benefit to the witness. To the contrary, by giving his testimony the witness is not taking any advantage of the situation; rather, he is facing an extremely difficult situation. Being a protected witness is not a privilege but a hard burden. Therefore, the Athlete's claims in this regard are flatly rejected"* (CAS 2020/O/6759).

  En este punto, la jurisprudencia del TAS ha aclarado en múltiples ocasiones que la prueba de testigos anónimos no tiene por qué ser contraria al Art. 6 del CEDH y, en determinadas circunstancias, no vulnera el derecho a ser oído de las partes. Al respecto, debe tenerse en cuenta que, tal y como aclaró la Formación Arbitral del asunto CAS 2019/A/6388, *"the Swiss Federal Tribunal (SFT), in a decision dated 2 November 2006 (6S.59/2006, ATF 133 I 33, at § 4), confirmed that anonymous witness statements do not breach the right to a fair trial when such statements support the other evidence provided to the court. According to the Swiss Federal Court, if the applicable procedural code provides for the possibility to prove facts by witness statements, it would infringe the principle of the court's power to assess the evidence if a party was prevented from relying on anonymous witness statements. In support of such conclusion, the SFT referred to the jurisprudence of the ECtHR and noted that the right to be heard and to a fair trial must be ensured through other means, namely by cross-examination through "audiovisual protection" and by an in-depth check of the identity and the reputation of the anonymous witness by the court. As a result, the CAS has also recognized that, when evidence is offered by means of anonymous witness statements, the right to be heard which is guaranteed by Article 6 of the ECHR and Article 29(2) of the Swiss Constitution is affected, but that a panel may still admit anonymous witnesses without violating such right to be heard if the circumstances so warrant and provided that certain strict conditions are met".*

- Los medios probatorios que son admisibles ante el TAS no están limitados a los que expresamente se mencionan en el Código (i.e. documentos e interrogatorio de las partes, testigos y expertos), que no es un *numerus clausus*, sino que resulta admisible cualquier medio probatorio que la Formación Arbitral considere pertinente. De este modo, aunque el Código no lo prevea y ello no sea común, la parte podrá solicitar, por ejemplo, el reconocimiento de un lugar por parte de la Formación Arbitral o de

los expertos de las partes. Es por ello que, a lo largo de los años, las Formaciones Arbitrales han admitido medios de prueba que no están expresamente previstos en el Código, como, por ejemplo, la prueba del polígrafo (vid. CAS 2011/A/2384 & CAS 2011/A/2386). Lo relevante será que dicha prueba se considere fiable y pertinente por la Formación y que se permita a la otra parte tanto la valoración de su resultado como la práctica de otra prueba en sentido contrario.

- La Formación Arbitral está facultada para ordenar de oficio la práctica de prueba (aportación de documentos, interrogatorio de testigos o nombramiento de expertos, por ejemplo) si lo considera necesario para la resolución del caso, de acuerdo con los Arts. R44.2 y R44.3, aplicables también al de apelación por remisión del Art. R57 párrafo 3. Ello es congruente con las disposiciones de otros códigos y reglamentos de arbitraje internacional[29], que también facultan a los árbitros a adoptar medidas probatorias tendentes a la averiguación y el esclarecimiento de los hechos.

- Es importante tener siempre presente que, de considerar que alguna decisión de la Formación Arbitral relativa a la administración de la prueba infringe alguna regla procesal o vulnera sus derechos, la parte afectada deberá denunciar dicha infracción o vulneración de forma inmediata, tan pronto como tenga conocimiento de ella, para no perjudicar sus derechos ante el TFS (Art. 182.4 LDIP).

- En lo que respecta a la valoración de la prueba practicada, a menos que la normativa aplicable al fondo de la disputa disponga algo distinto, rige el principio de libre valoración de la prueba (la *libre appréciation des preuves*) por parte de la Formación Arbitral[30], que coincide con el que se aplica en derecho suizo[31]. En consecuencia, la Formación determinará por sí misma, libremente, si la prueba practicada es relevante y pertinente, ponderará su valor y extraerá sus consecuencias, estando dicha operación sometida exclusivamente a las reglas de la lógica, la racionalidad, la experiencia y, en casos de una prueba técnica, la propia ciencia.

  Lógicamente, dicha libertad en la valoración de la prueba alcanzará también a las pruebas técnicas, como los informes de expertos, ante las que *"CAS arbitrators are free to assess expert evidence and its weight and may take into account whether the expert is a tied or affiliated person or a truly independent witness when assessing the expert evidence in any particular case. It is established practice in international arbitration that Parties file their own expert testimony, which can be tested in cross-examination, and if their opinions diverge, the arbitrators are free to evaluate the competing merits of that diverging evidence"* (CAS 2018/A/5734).

[29] Así lo disponen, por ejemplo, el Reglamento de la Cámara Internacional de Comercio, los de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (UNCITRAL), las Reglas Suizas de Arbitraje Internacional, el Reglamento de la Corte de Arbitraje de Madrid o, también, las Reglas de la IBA sobre Práctica de Prueba en el Arbitraje Internacional o el Código de Buenas Prácticas Arbitrales del Club Español del Arbitraje (CEA). E igual de relevante resulta al respecto lo previsto en el art. 25 del Reglamento ICC de Arbitraje, que establece que el tribunal arbitral debe proceder en el plazo más breve posible a "*establecer los hechos del caso por todos los medios apropiados*", lo que parece reconocer tal poder al tribunal arbitral.

[30] Aunque el Código guarda silencio al respecto, ello está expresamente reconocido en algunos reglamentos (por poner un ejemplo, por el Reglamento de la Corte de Arbitraje de Madrid, que establece que los árbitros valorarán la prueba libremente, de acuerdo con las reglas de la sana crítica) y, significativamente, por las Reglas de la IBA sobre Práctica de Prueba en el Arbitraje Internacional, que así lo reconocen en su art. 9.

[31] A tal efecto, el art. 157 del Código Procesal Civil suizo dispone que "*Le tribunal établit sa conviction par une libre appréciation des preuves administrées*".

Además, en la valoración de la prueba la Formación Arbitral no estará vinculada por la valoración o la decisión que otra Formación haya hecho de esa misma prueba en otro procedimiento, no estando vinculada por ésta. Un buen ejemplo de ello lo encontramos, por ejemplo, en los distintos procedimientos por dopaje que se derivaron de los Informes McLaren y de la documentación que en dicha investigación se obtuvo del laboratorio AMA de Moscú (entre otros, las famosas "*Moscow Washout Schedules*"), en los que distintas Formaciones llegaron a conclusiones distintas en cuanto a la fiabilidad y validez probatoria de dicha documentación y su suficiencia para dar por acreditada una infracción de la normativa antidopaje en el respectivo procedimiento, lo que dependió del resto de evidencias y circunstancias concurrentes en cada caso. Tal y como recoge el laudo del asunto CAS 2020/O/6759:

> *"63. In this regard, the Sole Arbitrator remarks that the necessity of a case-by-case approach is clearly evidenced by the CAS jurisprudence in cases related to potential ADRVs that might have been committed in the context of the Russian doping scheme. In particular, this can be perfectly observed if one compares the findings of the cases CAS 2017/A/5422 and CAS 2017/A/5379, where the same Panel reached different conclusions with regard to the ADRV asserted against two different Russian athletes in the context of the 2014 Olympic Winter Games in Sochi, which were primarily based on the same kind of evidence (i.e. the McLaren Reports, the Duchess List, Dr Rodchenkov's testimony). While the Panel in CAS 2017/A/5422 found that the prosecuting authority had discharged its burden of establishing to its comfortable satisfaction that the Athlete had used a prohibited substance, the Panel in CAS 2017/A/5379 did not.*
>
> *64. Therefore, the Sole Arbitrator is of the opinion that the mere presence of the Athlete's name on the Moscow Washout Schedules is not sufficient to establish to his comfortable satisfaction that the Athlete used Prohibited Substance".*

Precisamente, como ha explicado la jurisprudencia del TAS, dada la naturaleza de este tipo de asuntos (dopaje, match-fixing, ética y corrupción en general), donde las entidades investigadoras no cuentan con los poderes coercitivos de un estado, resulta especialmente trascendente para la Formación Arbitral valorar la prueba sin perder de vista dicha limitación, por cuanto *"in these types of cases, where the individuals involved follow a deliberate preestablished plan to conceal their actions, it is very difficult to obtain direct and conclusive evidence of the infringing conduct. Therefore, in cases of this kind, it is necessary to adopt a holistic approach in the fact-finding process and to refrain from assessing the evidence atomistically. In the Sole Arbitrator's view, instead of assessing each piece of evidence individually or in isolation, it is necessary to evaluate the evidence in conjunction with the rest of items of evidence available and consider it altogether. This is because, as it occurs with complex criminal cases, the weight of a piece of evidence isolated from the rest of the evidentiary context may seem insufficient to establish a given fact, while the consideration of all the items of evidence in totality can be revealing"* (CAS 2020/O/6759).

Finalmente, es importante recordar que, de acuerdo con la jurisprudencia del TFS, las incorrecciones o errores en la valoración de la prueba, incluso la arbitrariedad, no son en principio motivo para la anulación de un laudo. De acuerdo con dicha jurisprudencia, una valoración manifiestamente errónea de la prueba, que produzca un resultado notoriamente incorrecto o injusto, no es suficiente para justificar la anulación del laudo, a menos que dicho resultado sea verdaderamente incompatible con el orden público suizo (BGE 138 III 322) o suponga una denegación de justicia, lo que ocurrirá, por ejemplo, cuando la Formación Arbitral haya ignorado y desconsiderado alguna prueba relevante que pudiera influir en el

resultado de la disputa, que conllevaría una violación del derecho de la parte a ser oída (vid. 4A_240/2009).

IV. Carga de la prueba

Otra cuestión trascendental de los arbitrajes en el TAS es establecer sobre qué parte pesa la llamada carga de la prueba, que puede tener una influencia decisiva en el resultado del pleito. Sintéticamente, puede decirse que la carga de la prueba es la regla que establece, en relación con alguno de los hechos controvertidos, sobre qué parte del arbitraje recae el "deber" o la carga de probar la realidad de dicho hecho y, correlativamente, qué parte debe asumir el riesgo y las consecuencias negativas derivadas de una insuficiencia probatoria sobre el mismo.

En realidad, la carga de la prueba no es una regla probatoria ni una verdadera "carga" procesal (pues su incumplimiento no conlleva ninguna consecuencia procesal inmediata), sino que constituye una regla de juicio o enjuiciamiento, cobrando virtualidad al momento de resolver la disputa, tras haber valorado la prueba. Es en ese momento cuando, para decidir la disputa, la Formación Arbitral determinará si las partes han probado suficientemente los hechos en que fundamentan sus pretensiones para, en caso contrario, ante la ausencia de una prueba suficiente, imponer a la parte que no ha cumplido con su carga probatoria las consecuencias derivadas de la insuficiencia de la prueba. Por el contrario, si el hecho ha sido probado en el procedimiento, resultará irrelevante para la Formación Arbitral quién tenía la carga de su prueba.

A diferencia de otros reglamentos arbitrales, el Código no establece ninguna regla relativa a la carga de la prueba. No obstante, puede afirmarse que, como ocurre generalmente en el arbitraje internacional, la práctica general del TAS es que corresponde al demandante probar los hechos que alega como fundamento de su pretensión y, en contrapartida, al demandado probar los hechos que constituyen el fundamento de su excepción, debiendo soportar cada parte las consecuencias negativas que resulten de una falta de prueba. Esa es, precisamente, la regla que establece el conocido art. 8 del Código Civil Suizo (CCS), conforme al cual *"Chaque partie doit, si la loi ne prescrit le contraire, prouver les faits qu'elle allègue pour en déduire son droit"* y cuya aplicación es común en los arbitrajes TAS dada la relevancia que en los mismos tiene el derecho suizo.

No obstante, no son pocos los reglamentos y códigos de federaciones y asociaciones deportivas que establecen reglas específicas sobre la carga de la prueba, muchas veces en armonía con el citado art. 8 CCS. Así, por ejemplo, lo establece el art. 13.5 del Reglamento de Procedimiento del Tribunal del Fútbol de FIFA, estableciendo que "*La carga de la prueba recae en la parte que sostenga un hecho*". Por el contrario, dada la naturaleza del procedimiento, dicha regla es alterada en los procedimientos de naturaleza disciplinaria, para los que el art. 36.1 del Código Disciplinario de FIFA dispone que *"La carga de la prueba con respecto a las infracciones disciplinarias recae en los órganos judiciales de la FIFA"*, como igualmente impone el art. 49 del Código de Ética de FIFA para asuntos de esa naturaleza. Y lo mismo ocurre, por ejemplo, en la regulación del Código Mundial Antidopaje de la AMA, que establece diversas reglas sobre la carga de la prueba, en función de la naturaleza del hecho a probar (vid. arts. 2.10.2., 3.1, 3.2.2 ó 3.2.3, por ejemplo).

En base a todo ello, la Formación Arbitral deberá establecer la carga de la prueba que le corresponde a cada parte, circunstancia que deberá tener en cuenta al momento de decidir el caso. Al respecto, debe señalarse que la regla de la carga de la prueba está exenta de revisión por el TFS (4A_616/2016) y que la misma no forma parte del orden público procesal suizo[32].

[32] A modo de ejemplo, en su sentencia 4ª_462/2019, el TFS declaró: "*First of all, it should be recalled that the application of the rules on the burden of proof is exempted from examination by the Federal Tribunal when it is seized of an*

Por otro lado, debe señalarse que la carga de la prueba no es una regla fija e inamovible, sino que, por la dinámica y circunstancias de la disputa y, en algunos casos, por preverlo la propia normativa aplicable, se puede ir trasladando de una parte a otra. Ello ocurrirá, por ejemplo, cuando opere alguna presunción prevista en la normativa aplicable[33], que eximirá de prueba a la parte que se beneficie de dicha presunción y trasladará la carga de la prueba a la parte contraria, que deberá llevar a cabo la actividad probatoria necesaria para desvirtuar la presunción.

Véase, por ejemplo lo resuelto por la Formación Arbitral en el caso CAS 98/222, que declara: *"it is a general rule of law that each party should bear the onus probandi with respect to all facts on which it relies in its conclusions, except where such burden has been shifted by a legal presumption, which is not the case in this discussion"*. Otro ejemplo lo encontramos en el asunto CAS 2017/A/5306, en el que, en un caso de responsabilidad objetiva por la conducta de los espectadores de un partido de fútbol, la Formación Arbitral resolvió que el demandado no había desvirtuado la presunción establecida por la normativa aplicable, de que los espectadores ubicados en el sector visitante del estadio pertenecen al equipo visitante (*"the Respondent relies upon Article 65.1.3 which it contends provides a rebuttable presumption that supporters occupying the away sector of a stadium are regarded as the visiting club suppporters, unless proven to the contrary, and that the Appellant has provided no credible evidence to rebut that presumption"*).

Ello ocurre muy a menudo en materia de dopaje donde, por ejemplo, se aplica la presunción *iuris tantum* de que los laboratorios acreditados por la AMA realizan los análisis de acuerdo con el Estándar Internacional para Laboratorios aplicable (art. 3.2.2 Código Mundial Antidopaje de AMA). Dicha presunción puede ser desvirtuada por el atleta (vid CAS 2016/A/4828), demostrando que, efectivamente, no se ha respetado el citado estándar internacional, y que ello podría haber causado razonablemente su resultado analítico adverso. En tal caso, la carga de la prueba se trasladará a la organización antidopaje, que tendrá que demostrar que la desviación del estándar internacional no ha causado el resultado analítico adverso del atleta. Y lo mismo ocurre en otros casos, en los que resulten aplicables presunciones, como el resuelto en el asunto CAS 2015/A/3926, en la que la Formación advirtió: *"the statement in the UCL Delegate Report and Additional Report enjoy the regulatory assumption to be correct, thereby shifting the burden of proof on the Appellant"*.

Por otro lado, existen circunstancias que pueden justificar la dificultad o, incluso, imposibilidad para una parte de probar un hecho concreto. En tales supuestos, con fundamento en la justicia, equidad y buena fe, entrarán en juego otros principios probatorios, como el de disponibilidad y facilidad probatoria, el de proximidad de la prueba (*vicinanza della prova*), que minorarán el rigor de la carga de la prueba. Por ejemplo, en estos casos, aunque no se producirá un traslado real de la carga de la prueba a quien inicialmente no tenía el deber de probar[34], sí

appeal in civil matters concerning an international arbitration award, because such rules do not form part of substantive public policy within the meaning of Article 190(2)(e) PILA (judgment 4A_616/2016 of September 20, 2016 at 4.3.1). With all due respect to the Appellant, the same applies to disciplinary sports arbitration".

[33] Como por ejemplo, la presunción de la existencia de una transferencia puente prevista en el art. 5bis del RETJ de FIFA, o la presunción de la inducción al incumplimiento contractual del art. 17.4 del RETJ de FIFA o, también, la presunción de resolución sin justa causa por parte del club cuando la jugadora en cuestión esté embarazada (art. 18quater del RETJ).

[34] Tal y como se explica en el laudo del asunto CAS 2014/A/3615, "*such difficulties as may exist do not lead to a re-allocation of the risk if a specific fact cannot be established, but rather this risk will remain with the party who bears the burden of proof). If the person charged has provided an explanation for the source of the substance, and which, if unanswered would discharge the burden then it will be for the person charging if willing and able to do so, to seek to rebut the explanation: the evidential burden will have shifted, although the legal burden will remain where it was*".

que justificarán un deber de colaboración de la otra parte en la prueba del hecho, de cuyo incumplimiento la Formación Arbitral podrá llevar a cabo inferencias negativas[35], que deberá ponderar libremente, en conjunto con el resto de elementos de prueba.

Tal situación se produjo, por ejemplo, en el asunto CAS 2013/A/3256, en el que la Formación advirtió: "*Swiss law knows a number of tools in order to ease the – sometimes difficult – burden put on a party to prove certain facts. These tools range from a duty of the other party to cooperate in the process of fact finding, to a shifting of the burden of proof or to a reduction of the applicable standard of proof. The latter is the case, if – from an objective standpoint – a party has no access to direct evidence (but only to circumstantial evidence) in order to prove a specific fact (SFT 132 III 715, E. 3.1; BK-ZPO/BRÖNNIMANN, 2012, Art. 157 no. 41; BSK-ZPO/GUYAN, 2nd ed. 2013, Art. 157 no. 11). In the case at hand, the Panel acknowledges that there is only circumstantial evidence available to UEFA to prove the facts it relies upon*".

Así, esta situación puede darse en casos en los que para una parte resulte objetivamente muy difícil, si no imposible, evacuar su carga de la prueba y aportar evidencias sobre un hecho, encontrándose así en lo que la doctrina suiza denomina "estado de necesidad probatorio" (*Beweisnotstand*), lo que puede ocurrir, por ejemplo, porque la prueba necesaria esté bajo el control de la otra parte o, también, porque no pueda ser fácilmente probada a través de una prueba directa. Mientras que el primer supuesto justificaría la admisión de una solicitud de exhibición documental a la otra parte, el segundo podrá implicar un deber de cooperación de la otra parte en el esclarecimiento de los hechos. Al respecto tuvo ocasión de pronunciarse la Formación Arbitral en el "caso Contador", en el que resolvió:

> *"102. The exceptions concern cases in which a party is faced with a serious difficulty in discharging its burden of proof ("état de nécessité en matière de preuve", "Beweisnotstand"). A cause for the latter may be that the relevant information is in the hands or under the control of the contesting party and is not accessible to the party bearing the burden of proof (cf. ATF 117 Ib 197, 208 et seq.). Another reason may be that, by it very nature, the alleged fact cannot be proven by direct means. This is the case whenever a party needs to prove "negative facts".*
>
> *103. According to the Swiss Federal Tribunal in such cases of "Beweisnotstand" principles of procedural fairness demand that the contesting party must substantiate and explain in detail why it deems the facts submitted by the other party to be wrong (ATF 106 II 29, 31 E. 2; ATF 95 II 231, 234; ATF 81 II 50, 54 E. 3; FT 5P.1/2007 E. 3.1; KuKO-ZGB/MARRO, 2012, Art. 8 no. 14; CPC-HALDY, 2011, Art. 55 no. 6). The Swiss federal Tribunal has described in the following manner (ATF 119 II 305, 306 E. 1b) this obligation of the (contesting) party to cooperate in elucidating the facts of the case:*
>
> *"Dans une jurisprudence constante, le Tribunal fédéral a précisé que la règle de l'art. 8 CC s'applique en principe également lorsque la preuve porte sur des faits négatifs. Cette exigence est toutefois tempérée par les règles de la bonne foi qui obligent le défendeur à coopérer à la procédure probatoire, notamment en offrant la preuve du contraire (ATF 106 II 31 consid. 2 et les arrêts cités). L'obligation, faite à la partie adverse, de collaborer à l'administration de la preuve, même si elle découle du principe général de la bonne foi (art. 2 CC), est de nature procédurale et est donc exorbitante du droit fédéral – singulièrement de l'art. 8 CC –, car elle ne touche pas au fardeau de la preuve et n'implique nullement un renversement de celui-ci. C'est dans le cadre de l'appréciation des*

[35] Lo que también puede realizar en otros supuestos, por ejemplo cuando de la conducta procesal de la parte pueda hacerse tal inferencia (vid. CAS 2020/O/6579, en el que el Árbitro Único indicó "*By contrast, the Sole Arbitrator finds the Athlete's attitude very telling. She simply denies the fact but does not offer any reasonable or plausible explanation to the facts in dispute*") o, por ejemplo, cuando la propia normativa aplicable establezca que de una conducta pueda inferirse un hecho. Por ejemplo, una inferencia de este tipo está prevista en el art. 3.2.5 del Código Mundial Antidopaje de AMA.

preuves que le juge se prononcera sur le résultat de la collaboration de la partie adverse ou qu'il tirera les conséquences d'un refus de collaborer à l'administration de la preuve".

Precisamente, una situación patológica de este estado de necesidad probatorio será la prueba de un hecho negativo o la prueba de una causa unívoca de algo cuando existen varias posibles y probables, cuya exigencia supondría imponer a la parte una *probatio diabolica*. En estos casos, la Formación Arbitral deberá tener en cuenta las limitaciones probatorias de la parte derivadas de la imposibilidad lógica y racional de probar dicho hecho, lo que deberá ponderar y poner en conjunto con el resto del material probatorio.

Así, por ejemplo lo resolvió la Formación (de nuevo) en el "caso Contador", advirtiendo: "*Adducing this particular element of evidence, obviously, is impossible for the Athlete and, if it is unfeasible, cannot be demanded by international organisations of Mr Contador or of other athletes. Otherwise, not only is the "onus probando" reversed but in many cases the proof becomes a "probatio diabolica", due to having to prove the non-existence of alleged acts*". En el mismo sentido, el laudo del asunto CAS 98/222 resolvió: "*As it is well known in other fields of law, the particular problem of proof in the field of causality lies in the possible parallel impact of several causes potentially leading to the same consequence. As soon as the science admits that more than one cause can lead to the same result, the legal issue arises who has to prove the exact cause of a given consequence. However, in the majority of cases in real life, it will be impossible for any of the parties to prove that the result has occurred exactly due a specific cause ("probatio diabolica"). To charge one of the parties with such a heavy burden would, in fact, amount to a presumption, rebuttable on its face but irrebuttable in the reality".*

Asimismo, también podrá ocurrir lo contrario, que la carga de la prueba devenga irrelevante en relación con algún hecho que sea considerado notorio y que, como tal, no requiera ser probado. Así lo advirtió el Árbitro Único en el asunto TAS 2020/A/7214, señalando: "*En su contestación, al amparo de lo previsto en los Arts. R57 y R44.3 del Código de arbitraje deportivo, el Apelado solicitó que el Árbitro Único invitara tanto al propio TAS como a los órganos jurisdiccionales de FIFA a proporcionar un listado con las disputas contractuales en las que el Apelante esté involucrado como parte demandada. Con ello, el Apelado pretende probar el "hecho público y notorio que en los últimos años el Apelante se ha convertido en una "entidad incumplidora por naturaleza" al suscribir negocios jurídicos que difícilmente respeta". Al respecto, el Árbitro Único debe observar que, de ser cierto que ello es un hecho público y notorio, como afirma el Apelado, el mismo no precisaría de prueba, siendo la prueba propuesta inútil e impertinente*".

V. Estándares de prueba

Como se ha dicho, la Formación Arbitral adopta su decisión de acuerdo con el libre convencimiento que haya alcanzado tras valorar la prueba practicada. En dicha operación es posible que, bien por establecerlo la normativa aplicable, bien por considerarlo oportuno los árbitros (lo que generalmente estará vinculado a la naturaleza y gravedad de la disputa), la Formación Arbitral exija que la prueba alcance un estándar de prueba específico para dar por acreditado un hecho. Dicho estándar se dirigirá a garantizar que los árbitros han alcanzado una probabilidad de certeza sobre los hechos que la comunidad jurídica considera suficiente para que la decisión pueda considerarse justa o correcta[36].

Cada federación o asociación es libre de establecer un estándar de prueba específico[37]

[36] VÁZQUEZ MORAGA, Y.; Estándares de prueba en el Tribunal Arbitral del Deporte, en "Derecho deportivo 2021", Directores: Enrique Ortega Burgos; Miguel María García Caba; coordinadores: Ramón Terol Gómez, Alberto Palomar Olmeda, Lucas Ferrer [et al.]. Barcelona: Tirant lo Blanch, 2021. p. 725-745.

[37] Muchos son los ejemplos al respecto. Así, por ejemplo, los arts. 48 del Código de Ética de FIFA y 35.3 del Código Disciplinario de FIFA (en ambos casos, el estándar es de "*comfortable satisfaction*"). Particularmente interesante resulta la regulación del Código Mundial Antidopaje de la AMA, que establece

(vid. CAS 2011/A/2490), en cuyo caso deberá ser aplicado por la Formación Arbitral. Asimismo, aun cuando la normativa aplicable no establezca ningún estándar de prueba específico, la Formación Arbitral podrá exigirlo, teniendo en cuenta las naturaleza y circunstancias del caso[38].

Así lo ha reconocido la jurisprudencia del TAS, recordando que la Formación "*es soberan[a] para revisar los hechos y el Derecho, lo que incluye establecer el estándar de prueba que debe aplicar cuando la normativa aplicable no establezca ninguno específico, como es el caso. Así, la normativa de FIFA no establece ningún estándar de prueba que deba satisfacer el solicitante de la autorización en los procedimientos que se sustancien el amparo del art. 19 del RETJ. Por ello, ante la falta de previsión normativa, la ausencia de acuerdo entre las partes y silencio que guarda el Código del TAS en esta materia, el Árbitro Único es quien debe fijar dicho estándar probatorio, de acuerdo con lo previsto en los arts. 182 y 184.1 de la Ley Federal suiza de Derecho Internacional Privado ("LDIP"), que es la norma reguladora del presente procedimiento arbitral, por ser éste un arbitraje internacional con sede en Suiza. […] De la interpretación conjunta y sistemática de dichos preceptos, resulta que, a menos que las partes hayan pactado otra cosa, el tribunal arbitral no está sujeto a ninguna regla específica en relación con la prueba, estando por tanto facultado para fijar el estándar de prueba o el grado de convencimiento que considere apropiado teniendo en cuenta la naturaleza del asunto*". Y, por la misma razón, la Formación Arbitral no quedará vinculada por el estándar de prueba que haya establecido otra Formación en un caso anterior, pudiendo aplicar, con la debida motivación, un estándar de prueba distinto.

En la actualidad, es común que los procedimientos en el TAS se resuelvan aplicando estándares de prueba específicos, lo que ha permitido un notable desarrollo de la jurisprudencia en esta materia. Del análisis de la jurisprudencia del TAS y la normativa deportiva, se observa que estos son los principales estándares de prueba aplicables[39]:

a. Balance de probabilidades | *Balance of probabilities* o Preponderancia de la prueba | *Preponderance of the evidence*

Se trata del estándar de prueba menos exigente de todos, correspondiéndose con la regla del "más probable que no" (*more likely than not*), alcanzándose el umbral de suficiencia probatoria cuando se demuestra que es más probable que un hecho haya ocurrido que lo contrario (i.e. que no haya ocurrido). Dicho umbral "*means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred. The Player thus only needs to show that one specific way of ingestion is marginally more likely than not to have occurred*" (CAS 2018/A/5583).

b. Prueba clara y convincente | *Clear and convincing evidence*

Este estándar de prueba es utilizado en algunos casos por el TAS (vid. CAS 2009/A/1810 & 1811, CAS 2005/A/889) y exige un grado de suficiencia probatoria intermedio entre el civil ordinario (de la prueba preponderante) y el criminal (de más allá de toda duda razonable). En la práctica ello se traduce en la regla de "mucho más probable que no" (*much more likely than not*), de modo que la

estándares de prueba distintos en función de quién tiene la carga de probar: si es la organización antidopaje, se exigirá el estándar de prueba de la "*comfortable satisfaction*", mientras que si es el atleta, la prueba deberá superar un mero "*balance of probability*" (art. 3.1 del Código Mundial Antidopaje).

[38] Para ello, la Formación Arbitral no estará vinculada por el estándar de prueba del derecho suizo (una "prueba estricta" - *strikter Beweis* - que permita una "plena convicción" - *vollen Überzeugung*- o, en determinados casos, si ello no resulta posible o desproporcionado, el estándar de la "probabilidad preponderante" - *vraisemblance prépondérante* -).

[39] Para un estudio en detalle del uso de estándares de prueba en el TAS vale la pena acudir al trabajo de FERRERO, J. y DE LACALLE, I.; Análisis de los estándares de prueba, en PÉREZ TRIVIÑO, JL., FERRER DE ROBLES, L., GARCÍA ALCARAZ, A., GARCÍA SILVERO, E. BERNASCONI M. (Coords.), El arbitraje en el TAS. Funcionamiento, procedimiento y cuestiones prácticas más relevantes, Aranzadi, 2021, pp. 343-371.

probabilidad de que el hecho objeto de prueba haya ocurrido debe ser alta y convincente (*clear, convincing and satisfactory*).

c. Convicción personal | *Personal conviction*

Aunque en ocasiones se haya calificado la "convicción personal" como un estándar de prueba, en realidad es más correcto considerarla de regla de valoración de la prueba. En todo caso, de acuerdo con la jurisprudencia del TFS, la plena convicción no exige una certeza absoluta, aunque requiere que el órgano decisorio esté "objetivamente convencido", lo que implica que no tenga serias dudas sobre el hecho objeto de prueba o que éstas sean leves (ATF 130 III 321). Este era el "estándar de prueba" que hasta fechas recientes tenía, por ejemplo, el Código Disciplinario de FIFA, que establecía (art. 51 del Código de Ética de FIFA de 2012).

Tal y como puso de relieve la Formación Arbitral del caso CAS 2017/A/5003, dado que en realidad se trata más bien de una regla de valoración de prueba[40], en su aplicación las Formaciones Arbitrales suelen exigir en su lugar el estándar de la satisfacción confortable (*comfortable satisfaction*).

d. Satisfacción confortable / *Comfortable satisfaction*

Es posiblemente el estándar de prueba más utilizado en el TAS. Se trata de un estándar intermedio entre el criminal (más allá de toda duda razonable) y el civil ordinario (el mero balance de probabilidades). La jurisprudencia del TAS evidencia que, la mayoría de las veces, cuando la normativa específica no fija un estándar de prueba específico las Formaciones Arbitrales suelen acudir a este estándar de prueba.

Tal y como indica el laudo del caso TAS 2020/A/7116, "*este estándar de prueba exige una dosis de prueba mayor que el de la preponderancia de la prueba o el simple balance de probabilidades, pero menor que una convicción más allá de toda duda razonable, que requiere prácticamente de una certeza completa"*. De este modo, *"aun cuando el grado de convicción que se debe alcanzar es muy elevado, siendo un estándar de prueba riguroso, permite al mismo tiempo adecuarlo a las circunstancias y particularidades de cada caso concreto, en práctica correspondencia, teniendo en cuenta "la seriedad de la alegación [o acusación] que se realiza" ("the seriousness of allegation which is made"; cfr. CAS OG 96/003-004 o CAS 2009/A/1920, entre muchos otros). Precisamente por ello, la jurisprudencia del TAS ha calificado este estándar de prueba como una suerte de "escala móvil" que se adapta a las circunstancias y la naturaleza del caso, de modo que contra más grave son los hechos en cuestión y sus consecuencias, mayor certeza o convicción probatoria se debe proporcionar para que el tribunal arbitral pueda considerarse como "confortablemente satisfecho""* (TAS 2020/A/7116).

e. Más allá de toda duda razonable | *Beyond any reasonable doubt*

Se trata del estándar de prueba propio del proceso penal que, además, suele equipararse con el que emplean los tribunales suizos en la mayoría de los procedimientos civiles (i.a. CAS 2013/A/3256 y CAS 2018/A/5734), lo cual no es siempre correcto. Como es sabido, este estándar impide dar por probado un hecho sobre el que existe una duda razonable, esto es, cuando el conjunto de la prueba no haga

[40] "*The Panel notes that, although Article 51 FCE (2012 edition) is entitled "Standard of proof", this is a provision that seems to have less to do with the notion of standard of proof (as usually understood by arbitral tribunals, including CAS panels) than with the consistent approach of Swiss jurisprudence to adjudication, under which the judging body must not look for the objective truth but for the subjective truth, i.e. whether or not the judging body is personally convinced of a certain fact. The problematic characterization of "personal conviction" as an effective standard of proof, and the relative lacuna in FIFA rules, has led several CAS panels dealing with disciplinary cases involving FIFA officials to apply the flexible standard of proof of "comfortable satisfaction""* (CAS 2017/A/5003).

racionalmente posible excluir una hipótesis alternativa sobre dicho hecho, lo cual se aproxima a una certeza absoluta.

Este estándar de prueba es difícilmente aplicable al arbitraje deportivo, tal y como ha reconocido la jurisprudencia del TAS (i.a. CAS 98/208 y CAS 2017/A/5426), especialmente cuando el TFS ha declarado en varias ocasiones que este estándar de prueba no resulta idóneo ni proporcional para resolver disputas o asuntos de naturaleza jurídico-deportiva. Así, en su sentencia 5P. 83/1999, el TFS reconoció que, en este tipo de disputas, "*la carga de la prueba y la valoración de la prueba,* [son] *problemas que no pueden resolverse, en materia de derecho privado, a la luz de conceptos propios del derecho penal*".

VI. Conclusión

Las Formaciones Arbitrales del TAS gozan de amplísimos poderes en lo que respecta a la administración y práctica de la prueba, así como en su valoración, estando sometidas exclusivamente a las disposiciones del Código, los límites de la LDIP y el orden público procesal suizo. Ello da mucha flexibilidad y dinamismo al procedimiento y permite a los árbitros tener un gran dominio de la prueba, pudiendo incluso adoptar diligencias probatorias de oficio, para la correcta averiguación de los hechos.

Al mismo tiempo, la dilatada y consolidada jurisprudencia dictada por el TAS hasta la fecha en materia de prueba pone en valor que, a pesar de sus amplios poderes y facultades en materia de prueba, las Formaciones Arbitrales guardan generalmente un gran respeto por los derechos procesales de las partes, adoptando las decisiones y medidas oportunas para garantizar su derecho a ser oídas y a la igualdad de trato o de armas de todas las pares, adoptando, en caso de duda, la decisión que sea más favorable para los derechos fundamentales de los litigantes.

Jurisprudence majeure*
Leading Cases
Casos importantes

* Nous attirons votre attention sur le fait que la jurisprudence qui suit a été sélectionnée et résumée par le Greffe du TAS afin de mettre l'accent sur des questions juridiques récentes qui contribuent au développement de la jurisprudence du TAS.
We draw your attention to the fact that the following case law has been selected and summarised by the CAS Court Office in order to highlight recent legal issues which have arisen and which contribute to the development of CAS jurisprudence.
Llamamos su atención sobre el hecho de que la siguiente jurisprudencia ha sido seleccionada y resumida por la Secretaría del TAS con el fin de poner de relieve las recientes cuestiones jurídicas que han surgido y que contribuyen al desarrollo de la jurisprudencia del TAS.

CAS 2020/A/6941
Youness Bengelloun v. FIFA & PFC CSKA-Sofia
10 November 2021

Football; Disciplinary proceedings for failure to comply with a previous FIFA decision; Applicability of national insolvency law; Sporting succession of clubs in disciplinary cases; Determination of the due diligence of a player in national bankruptcy proceedings preventing the admission of amounts due for breach of the employment contract; Sanction

Panel
Mr Sofoklis Pilavios (Greece), President
Mr Manfred Nan (The Netherlands)
Mr Patrick Lafranchi (Switzerland)

Facts

On 23 July 2012, Mr. Youness Bengelloun, a French (currently retired) professional football player (the "Appellant" or the "Player") signed a professional contract with the football club PFC CSKA Sofia ("CSKA" or the "Old Club") valid until 30 June 2015 against a monthly salary of EUR 12,600 plus performance bonus and other benefits (the "Employment Contract").

On 26 December 2012, the Player lodged a claim against CSKA with the FIFA (the "First Respondent") Dispute Resolution Chamber (the "FIFA DRC") requesting, *inter alia*, payment of outstanding salaries in the amount of EUR 58,367.75 and EUR 400,032.25 corresponding to compensation for breach of the Employment Contract by CSKA without just cause.

On 21 May 2015, the FIFA DRC partially accepted the Player's claim and ordered CSKA to pay to the Player the amount of EUR 51,566 plus 5% interest *p.a.* corresponding to outstanding salaries and EUR 355,730 plus 5% interest *p.a.* corresponding to compensation for breach of contract (the "FIFA DRC Decision"). The FIFA DRC Decision became final and binding.

On 15 July 2015, the Player informed FIFA that CSKA had failed to comply with the terms of the FIFA DRC Decision and requested the opening of disciplinary proceedings before the FIFA Disciplinary Committee ("FIFA DC") against CSKA in accordance with Article 64 of the FIFA Disciplinary Code ("FDC").

On 2 September 2015, the FIFA DC sent a letter to the Player stating that *"We (…) wish to provide you, for your information and any action you may deem appropriate, with a copy of the documentation that we received in connection with the club PFC CSKA Sofia. (…)"*. Attached to this letter was a letter dated 26 August 2015 and signed by the Executive Director of CSKA stating that CSKA *"is commencing a procedure of insolvency and at the present time is unable to fulfil its financial commitments regulated with the above said decisions (…)"*.

On 2 October 2015, the Sofia City Court passed its decision 1581 and declared the insolvency of CSKA, initiated a *"procedure of bankrupt"*, appointed a temporary trustee in bankruptcy and summoned the first meeting of creditors. The Player was registered to a list of creditors signed by the temporary trustee for an amount of BGN 992,720.63. After the first meeting of creditors, the temporary trustee sent a notice to inform known foreign creditors of the insolvency proceedings and invite them to submit their claims in writing before the bankruptcy Sofia court. The Player, being domiciled in France at the time, did not receive such notice. The Player's claim was not registered in the Commercial Register.

On 16 December 2015, the Secretariat to the FIFA DC informed the Player and CSKA by letter, that disciplinary proceedings were formally opened against CSKA in respect of a violation of Article 64 FDC and that the proceedings would be suspended until CSKA's liquidation process *"finalises in accordance with Bulgarian law"*. Attached to this letter was an undated letter signed by the Executive Director of the BFU informing FIFA on the specifics of the insolvency procedures under Bulgarian law, as well as a letter dated 7 October 2015 and signed by the same person informing FIFA that *"by decision No 1581 of October 2, 2015, the Sofia City Court declared the insolvency of PFC "CSKA" Sofia and fixed the date of insolvency – December 31, 2014. (…)"* and enclosing a copy of said decision.

On 10 May 2016, the Sofia City Court passed its decision 2837 and ruled on the claims admitted in the bankruptcy proceedings, the Player's claim not being among them.

In June 2016, PFC Litex Lovech, having been previously excluded from the national championship by the BFU due to disciplinary offences, changed its name to PFC CSKA-Sofia (the "Second Respondent" or "PFC CSKA-Sofia"). PFC CSKA-Sofia was admitted to CSKA's home stadium and at the beginning of the 2016/2017 season (after only one season in the amateur level) was promoted into the "First Professional League", the top-tier division of professional football in Bulgaria.

On 13 July 2016, Mrs. Dora Mileva-Ivanova, the permanent trustee in the CSKA bankruptcy proceedings, informed FIFA about the status of the bankruptcy proceedings in relation to FIFA disciplinary proceedings initiated by another player, Mr. Civard Sprockel, against CSKA.

On 16 November 2016, the Player sent a letter to FIFA requesting that the disciplinary proceedings be continued and that PFC CSKA-Sofia be considered as one and the same entity as CSKA. The Player referred to the fact that he was registered on the list of creditors of the club in the national insolvency proceedings, providing an extract thereof.

On 16 June 2017, Mrs. Mileva-Ivanova published the "First partial appropriation account for distribution of funds" to CSKA creditors, the Player not being among them, amounting to BGN 7,835,367.50.

On 8 September 2017, the Secretariat to the FIFA DC acknowledged receipt of the Player's letter of 16 November 2016 and further stated that *"(…) we wish to inform the parties that we are closely investigating the current situation of the club PFC CSKA Sofia. In this sense, we would like to underline that we will inform you as soon as we have any new relevant information at our disposal"*.

On 13 September 2017, the General Secretary of the BFU wrote to FIFA that *"By decision No. 1584/09.09.2016, the Sofia City Court has declared PFC "CSKA" Sofia in bankruptcy and terminated that club's activity as well as the activity of all management bodies. It announced also the sale of all club property and the distribution of all funds received between the club creditors. On May 30, 2017, an auction for the sale of the entire property of the club, which was won for the amount of BGN 8 million (about EUR 4 090 000) was held. A breakdown has been prepared between the 143 creditors approved by the court. The Player Civard Sposkel* (sic) *is included in the list of creditors under No. 123 with an amount of BGN 19 853 (about EUR 10 150). After completing the procedure of a (possible) legal appeal by not satisfied creditors, this amount will be paid to the creditors according to the final distribution among them. According to Article 27, Paragraph 1, Item 2 of the BFU Statute, the membership of any club declared in bankruptcy shall be terminated. (…)"*.

On 19 March 2018, the Player requested FIFA

again, to execute the FIFA DRC Decision, this time against PFC CSKA-Sofia, since it was again playing in the highest division of the Bulgarian championship and, pursuant to CAS jurisprudence and FIFA practice, it should be considered as "sporting successor" of CSKA.

On 7 November 2019, the Sofia City Court passed its decision 5958 and allowed the trustee to pay the amounts listed in the 16 June 2017 list to the CSKA creditors.

On 22 January 2020, FIFA reopened the disciplinary proceedings against PFC CSKA-Sofia for potential breach of Articles 15 and 64 FDC. On 5 February 2020, PFC CSKA-Sofia submitted its position denying that it was the sporting successor of CSKA as it is a separate legal entity that was created out of PFC Litex Lovech. PFC CSKA-Sofia further submitted that the Player *"omitted to file a claim against CSKA and did not register himself in these bankruptcy proceedings"*. On 7 February 2020, the Player replied to PFC CSKA-Sofia's submission denying its arguments. On 12 February 2020, the FIFA DC passed its decision in this matter, dismissed all charges against PFC CSKA-Sofia and terminated the disciplinary proceedings (the "Appealed Decision").

On 14 April 2020, the Appellant lodged a Statement of Appeal with the CAS, challenging the Appealed Decision. On 9 October 2020, a hearing took place at the CAS Court Office in Lausanne, Switzerland.

Reasons

1. Applicability of national insolvency law

As regards applicable law, the Panel found that the relevant FIFA rules and regulations as in force at the relevant time of the dispute, including the FDC, applied primarily, and Swiss law subsidiarily. There was however disagreement between the Parties with respect to the applicability of Bulgarian insolvency law to the case. The Appellant argued that Bulgarian insolvency law should apply to determine the issue of the validity of the CSKA insolvency proceedings only. The First Respondent requested that neither Bulgarian nor EU law be formally deemed as the applicable law. The Second Respondent considered the provisions of the European Insolvency Regulation to be applicable.

The Panel found that there were no reasons to depart from the position expressed in CAS 2012/A/2750, in which it was held that insolvency proceedings are not governed by the various regulations of FIFA, but are solely governed by the law of the country where the insolvency is established. In accordance with article R58 of the CAS Code, it was therefore appropriate to apply that national law to the dispute. The application of the national law was nevertheless to be strictly limited to the insolvency proceedings insofar as the national law contravenes the application of the various regulations of FIFA.

2. Sporting succession of clubs in disciplinary cases

With regard to the merits of the case, the Panel had first to determine whether the Second Respondent was to be considered as the sporting successor of CSKA, the entity which had been the Appellant's employer and the party ordered by the FIFA DRC Decision of 21 May 2015 to pay certain amounts to the Appellant.

The Panel found that sporting succession of clubs was to be decided on a case-by-case basis taking into account the circumstances of each individual case. It held that it can occur even in the absence of formal legal links between the two entities (such as the purchase of the former's assets or federative rights) and, as such, had to be distinguished from legal

succession and made subject to the test of sporting criteria only. In the view of the Panel, this reflected to a large extent the fact that, on the one hand, a club was a sporting entity identifiable by itself that, as a general rule, transcended the legal entities which operated it. Thus, the obligations acquired by any of the entities in charge of its administration in relation with its activity had to be respected. On the other hand, the identity of a club was constituted by elements such as its name, colours, fans, history, sporting achievements, shield, trophies, stadium, roster of players, historic figures, etc. which distinguished it from all the other clubs. Hence, the continuity and permanence over time of the sports institution prevailed over the change of the entity that managed it.

The Panel also held that the concept of sporting succession of clubs had to apply not only in cases regarding employment-related disputes decided on the basis of the FIFA Regulations on the Status and Transfer of Players ("RSTP"), but equally in cases concerning the application of Article 64 FDC, considering that Article 64 FDC sought precisely to ensure compliance with FIFA decisions on employment-related disputes decided on the basis of the FIFA RSTP.

In the instant case, the Panel noted that the Second Respondent had an almost identical name and the same emblem, colours and stadium as CSKA. Moreover, the Second Respondent's website mentioned the history, trophies and sporting achievements of CSKA, thereby creating, knowingly and with no doubt, an image of continuity to the eyes of the general public, namely that CSKA and the Second Respondent were one and the same club. Therefore, the Panel confirmed the Appealed Decision with respect to the sporting succession question.

The Panel felt comfortable in reaching this conclusion due to the fact that in other FIFA decisions involving the Second Respondent regarding the matter of CSKA's sporting succession, the common conclusion had been that *"on the basis of the information and documentation at hand, there is no other alternative but to conclude that the new Club, PFC CSKA-Sofia, appears to be the sporting successor of the original Debtor, PFC CSKA Sofia"*.

3. Determination of the due diligence of a player in national bankruptcy proceedings preventing the admission of amounts due for breach of the employment contract

The Panel then had to consider whether sanctions were to be imposed on the Second Respondent for failing to comply with the FIFA DRC decision that partially accepted the Appellant's claim against CSKA. According to the arguments advanced by the Second Respondent in its Answer, it was FIFA's long-standing practice that national bankruptcy proceedings superseded its own enforcement system because of the expertise of the national courts. Moreover, Article 64 FDC could not be used if a creditor's claim was not fully paid after the conclusion of the national bankruptcy proceedings, as any other action would contravene the principle of equality of creditors and the very purpose of bankruptcy proceedings.

As a general consideration, the Panel recalled that, in principle, bankruptcy proceedings did not exclude the application of Article 64 FDC on a non-compliant party that was the successor of the bankrupt club. In addition, the Panel noted that FIFA did not seem to share the Second Respondent's views as to the non-application of Article 64 FDC. Tellingly, the practice of the FIFA DC was demonstrated in the abovementioned other FIFA decisions involving the Second Respondent regarding the matter of CSKA's sporting succession, according to which *"(…) in principle, the sporting*

successor, i.e. the new Club, of a non-compliant party, i.e. the original Debtor, shall also be considered a non-compliant party and is thus subject to the obligations under art. 64 (…)".

The last issue pertinent to the dispute was whether the Appellant had been negligent in asserting his claim against CSKA in the context of the bankruptcy procedure. Both the First and the Second Respondent had pointed out that the Appellant had failed to participate in the CSKA bankruptcy proceedings, even though he had been aware of such proceedings. Because of this unquestionably negligent approach, no action had been taken that could have eliminated the circumstances leading to a breach of Article 64 FDC by the Second Respondent. The Appellant had claimed in turn that there had been no lack of diligence on his part as he had initially been registered in the creditors' list and then removed without a warning and had not been "duly informed" about the bankruptcy proceedings as the indications received by FIFA, BFU and PFC CSKA-Sofia were belated, incomplete and unclear. In any case, the Appellant was of the view that Bulgarian law prevented the admission of amounts due for breach of the employment contract in the national bankruptcy proceedings. As a result, it would have been impossible for him to ensure full enforcement of the FIFA DRC decision via the Bulgarian bankruptcy proceedings and, therefore, it would have been impossible for him to prevent the Second Respondent's failure to comply with the FIFA DRC decision.

The Panel recalled that a creditor was expected to be vigilant and to take prompt and appropriate legal action in order to assert his claims. Therefore, it was necessary to examine whether a creditor had shown the required degree of diligence to recover the amounts he was owed. Yet, there was no blanket rule, and this assessment was to be made based on the specific circumstances of each particular case. In particular, (a) there had to be at least a *"feasible theoretical possibility"* for the creditor to receive the sum of his credit in case he had duly claimed for it in the bankruptcy proceedings; and (b) it needed to be established that the recovery of the credit would have been feasible via the bankruptcy proceedings; in other words, there had to be certainty that, in case the creditor had acted otherwise, the successor of the original debtor would not have had to face the consequences of non-compliance with the decision of the FIFA DRC.

Considering that the Second Respondent had not provided any proof to the contrary, the Panel agreed with the Appellant that Bulgarian legislation or legal authorities, prevented the admission of amounts due for breach of the employment contract in the national bankruptcy proceedings. The relevant Bulgarian provisions cited in the decision nr. 2837 of the Sofia City Court of 10 May 2016 would have allowed the Appellant to retrieve his claim only in part (EUR 51,566 corresponding to outstanding salaries) in the course of the national bankruptcy proceedings, but not in full. As a result, it would have been impossible for him to ensure full enforcement of the FIFA DRC decision via the Bulgarian bankruptcy proceedings and, therefore, it would have been impossible for him to prevent the Second Respondent's failure to comply with the FIFA DRC decision.

Since the Panel had determined that, in view of the particular circumstances of this case, the Appellant's conduct during the CSKA bankruptcy procedure was not relevant (because in the Bulgarian bankruptcy proceedings the Player would not have had a *"feasible theoretical possibility"* to receive any amount related to the compensation awarded by the final and binding FIFA DRC Decision), the Panel did not need to ascertain whether his conduct had been negligent or not in asserting his claim against CSKA in the context of the

national bankruptcy proceedings.

Consequently, the Panel ruled that PFC CSKA-Sofia was guilty of failing to comply in full with the decision passed by the FIFA DRC on 21 May 2015.

4. Sanctions

As it had overturned the decision of the FIFA DC considering that because of the lack of diligence of the Appellant in collecting his credit in the national bankruptcy proceedings, no disciplinary sanctions had to be imposed on the Second Respondent, the Panel then proceeded to determine the sanction to be imposed in accordance with Article 64 FDC.

In view of the particular circumstances of the case, the Panel deemed it appropriate to impose a fine of CHF 15,000 on the Second Respondent and grant it a final deadline of 30 days as from notification of the present decision in which to settle its debt to the Appellant. Additionally, in view of FIFA's well-established practice in cases when a long period of time has elapsed during which the decision rendered by the FIFA DRC has not been complied with, to the detriment of the Appellant, but also the aim of the provisions included in Article 64 FDC, namely, to ensure that financial decisions of a FIFA body or CAS on appeal be respected, the Panel considered a ban from registering new players (at national and international level) for two (2) entire and consecutive registration periods as an appropriate sanction, to be automatically imposed on the Second Respondent following the expiry of the granted deadline and to be lifted upon the payment of the total outstanding amount to the Appellant.

Decision

In light of the foregoing, the Panel set aside the decision passed by the FIFA DC on 12 February 2020 and found that PFC CSKA-Sofia had to comply with the decision of the FIFA DRC of 21 May 2015 to pay to the Appellant the amounts of EUR 51'566 plus 5% interest p.a. as outstanding monies and EUR 355'730 plus 5% interest p.a. as compensation for breach of contract. It also imposed the sanctions mentioned in point 4 above.

CAS 2020/A/7030
Rúben Tiago Rodrigues Ribeiro v. Sporting Clube De Portugal
CAS 2020/A/7051
Sporting Clube De Portugal v. Rúben Tiago Rodrigues Ribeiro & Al Ain FC & FIFA
14 February 2022

Football; Termination of the employment contract; Just cause of termination; Financial consequences of termination when both parties equally contribute to it; No compensation for damages; No sporting sanctions; No joint and several liability

Panel
Mr Cesare Gabasio (Italy), President
Mr Michele Bernasconi (Switzerland)
Mr Bernhard Welten (Switzerland)

Facts

On 27 December 2017, Sporting Clube De Portugal ("Sporting" or the "Club") and Rúben Tiago Rodrigues Ribeiro (the "Player"), a Portuguese professional football player who currently plays for Hatayspor, Turkey, signed an employment contract (the "Contract") valid as from 11 January 2018 until 30 June 2020.

According to Article 3 of the Contract, the Player was entitled to the following remuneration: (a) for season 2017/18: EUR 504,000.00, (b) for season 2018/19: EUR 1,008,000.00, (c) for season 2019/20: EUR 1,008,000.00. According to Article 5 of the Contract, the Player was also entitled to a signing-on fee of EUR 250,000.00.

Pursuant to Article 10 of the Contract, the Player has the right to terminate the Contract unilaterally under the following conditions: (a) the termination occurs during the period from 1 June and 1 July of each sports season, with Sporting to be notified 15 days in advance of the date when the termination shall become effective; (b) together with such notification, an immediate payment in the amount of EUR 60,000,000.00 is made to Sporting; and (c) once the conditions under the above subparagraphs a) and b) are fulfilled, Sporting undertakes to release the Player and authorise the FPF to forward the relevant International Transfer Certificate ("ITC") upon request.

In accordance with Article 11 of the Contract, Sporting and the Player agree to confer exclusive and final competence to settle any dispute arising out of the Contract or related with the same to the *"Tribunal Arbitral do Desporto (TAD)"*.

In addition, Article 12 of the Contract states that, in the event that one party terminates the Contract without just cause, the counterparty shall be compensated for damages caused as follows: (a) if Sporting terminates the Contract without just cause, it undertakes to pay to the Player compensation corresponding to the residual value of the Contract, from which it can deduct remuneration to be received by the Player under a new contract corresponding to the duration of the breached Contract; (b) if the Player terminates the Contract without just cause, notably by violation of Article 10, his transfer to a third club shall depend on the payment to Sporting of EUR 60,000,000.00, without prejudice to Sporting's right to require the Player to pay the compensation set out in the labour legislation.

On 15 May 2018, a group of around 50 Sporting supporters illegally entered the Sporting training grounds located in Alcochete, Portugal, when Sporting's first team was training, and attacked some of Sporting employees and players (the "Event"). Following the Event, on 13 June 2018, the

Player terminated the Contract, invoking just cause.

On 3 October 2018, the Player signed an employment contract with Al Ain Football Club ("Al Ain"), a football club whose registered seat is in Al Ain, United Arab Emirates, which was valid until 30 June 2019 and which contained an option for Al Ain to extend such contract until 30 June 2021.

On 30 October 2018, Sporting lodged a claim against the Player in front of the FIFA Dispute Resolution Chamber ("FIFA DRC") seeking compensation from the Player for the breach of the Contract in the amount of EUR 62,188,600.00 plus 5% interest p.a., as from 14 June 2018; according to the Claimant, Al Ain was jointly and severally liable for such sum. In addition, Sporting requested the FIFA DRC to impose a six-month ban on the Player and two consecutive registration period bans against Al Ain.

On 13 December 2018, in its response submitted before the FIFA DRC, the Player argued – *inter alia* – that the claim was not admissible. Alternatively, the Player deemed that he had just cause to terminate the Contract and lodged a counterclaim, requesting the amount of EUR 2,188,600.00 as compensation for the breach of the Contract plus 5% interest p.a. as from 14 June 2018; in addition, he requested a ban to be imposed on Sporting for two consecutive registration periods.

The Player argued that the violent and illegal attack of Sporting's "fans" of 15 May 2018 was severe and partially caused by Sporting's negligence (i.e., safety and security measures were not sufficient); the Player also suggested that Sporting's president and other officials might have been involved in the Event (on these facts, due to the Player's initiative, criminal proceedings are also pending in Portugal). Apart from the Event, the Player contended that the Club was poorly run, and the President contributed to such bad atmosphere through bullying players publicly. During the summer of 2018, according to the Player, he tried to offer amicable solutions, which all failed.

Sporting strongly denied Player's arguments. To sum up, the Event has been described as a thing that might happen to every employer, an accident that could not be avoided in advance. All the possible safety measures required by FIFA were in place. Also, the accusations as to the bad atmosphere in the Club were contested. Most importantly, Sporting highlighted that: (i) the severity of the Event did not amount to a violation of the Player's rights and, in any case, he was not involved in the violence (meaning: he was not hit); (ii) the Player did not send any formal complaint; and (iii) the termination of the Contract took place over a month after the Event, in breach of the Contract itself. Sporting stressed that after the termination letter, the Parties still negotiated a way out for the Player.

The FIFA DRC found that that the Player, in spite of having had just cause to terminate his Contract with Sporting on 13 June 2018, lost his right to receive any amount of compensation due to the point in time in which the decision to unilaterally terminate the Contract was made (i.e. one month after the Event). Furthermore, the FIFA DRC, noting that no outstanding remuneration was claimed by the Player, rejected the claim of Sporting and partially accepted the claim of the Player. The Appealed Decision, rendered on 20 February 2020, was notified with grounds on 15 April 2020.

On 4 May 2020, the Player filed a Statement of Appeal against Sporting and FIFA with the CAS challenging the Appealed Decision.

On 6 May 2020, Sporting filed a Statement of

Appeal against the Player, Al Ain and FIFA with the CAS challenging the Appealed Decision.

On 29 October 2020, after they were consulted, the Parties and their witnesses were called to appear at a hearing held by video-conference.

Reasons

1. Just cause of termination

Under a first degree of analysis, the Panel found that both Parties had played a role in what can be defined as a joint termination of the Contract. With regard to the Event, the Panel observed that there were indeed strong arguments conveyed by the Player to determine that he had had just cause to terminate the Contract. In fact, regardless of having suffered any kind of physical violence during the attack during the Event (it was undisputed that the Player had not been physically harmed), it had surely been a traumatizing event that should have never occurred in a workplace and could destabilize the person and irreparably damage the relationship of trust between players and club. As a matter of fact, following the Event, nine players had simultaneously terminated their employment contracts with Sporting. It had also been stated and confirmed that Sporting's President had contributed to creating a hostile work environment, even though – once again – the Player had not been the person mostly affected by the direct attacks (also on social media) made by the President. Moreover, the Player had pointed out that, by terminating the Contract with Sporting, he had lost guaranteed income in the amount of EUR 1,420,000 and the possibility to play in UEFA club competitions. Therefore, the decision of the Player to terminate the Contract had not been motivated by financial or sporting gains.

However, the Panel had substantial doubts about the existence of just cause, in particular due to the Player's behaviour after the Event. The Player had had two meetings with Sporting representatives: the first time, on 21 August 2018, where he had met the leaders of Sporting Management Committee, and the second time, on 19 September 2018, after the election of the new Sporting President. Other examples included that the Player had never complained against Sporting for the behaviours of the former President until the termination letter sent to the Club on 13 June 2018, almost 30 days after the Event. On 20 May 2018, only 5 days after the Event, the Player had played the Cup Final without making any complaints to the Club about the events that had occurred on 15 May 2018.

For the Panel, the approach of the Player and his behaviour during the abovementioned meetings did not really reflect the position of a player who had terminated his employment contract for just cause, i.e. a player from whom one cannot reasonably expect in good faith to continue the contractual relationship; the situation looked more like the one which occurs when a player feels himself "tied" to a club which, in turn, does not intend to field him nor to transfer him.

In the end, the Panel was satisfied that: (i) in June 2018, the Player had terminated the Contract with Sporting, claiming just cause; (ii) Sporting had objected more than one week afterwards to several of the statements made by the Player in his termination letter, but at no time had Sporting requested the Player to come back, to train with the Club and to honour his employment agreement. The Panel therefore found that the termination of the Contract had been created by both the Player and Sporting, i.e. the just cause for terminating the employment relationship did not consist, under the present circumstances, in the breach of contract by one party only. Rather, such just

cause had been the result of a situation to which both parties had equally contributed.

2. Financial consequences of the termination where both parties equally contribute to it

The Panel then had to establish the financial consequences of the termination of the Contract, deemed voluntary and reciprocal. According to the Player, Sporting's breach of contract should have triggered Article 17 of the FIFA RSTP as to compensation. Similarly, Sporting arguments' led to the automatic application of Article 12 of the Contract and its penalties to the Player.

However, the Panel found that in a case that was not a matter of unilateral breach or wrongful termination, but where both parties had equally contributed to it, a CAS panel should decide in its discretion on the financial consequences of the termination without notice, taking into account all the circumstances of the case, in accordance with Article 337b para. 2 of the Swiss Code of Obligations applying subsidiarily to the FIFA RSTP. The provisions set forth by Article 17 of the FIFA RSTP were not of immediate assistance, as they provided for some criteria for the quantification of damages only in the event a contract had been terminated because of a breach by one of the parties. Clause 12 of the Contract did not apply either, as the applicability of the clause was conditional to, again, a unilateral breach. Therefore, independent of whether the amount under the clause was fair or disproportionate and excessive, it was of little help for the Panel to determine, under the present circumstances, the financial consequences as foreseen in Clause 12 of the Contract.

In the case at hand, Sporting had paid an amount of EUR 400,000 to Rio Ave for the transfer of the Player. In addition, during the hearing, Sporting's representatives had confirmed that Sporting had refused a proposal to receive from FC Nantes about EUR 800,000, which had been the only offer Sporting had received for the transfer of the Player. Further, Sporting had never treated the Player as if he had been an important player and, therefore, an important asset for the Club. As a matter of fact, according to Sporting itself, following the Event, the Player and another player had been the only players of the club that Sporting had not intended to negotiate a new contract with.

3. No compensation for damages

All in all, the Panel came to the conclusion that both for the Player and for the Club the "prejudice" deriving from the Contract's termination somehow matched the "benefit" it had produced to each of them. As a result, the Panel found it proper to establish that no payment was to be ordered with respect to the financial consequences of the termination of the Contract.

4. No sporting sanctions

Furthermore, the lack of a unilateral breach lead to the dismissal of all the requests concerning possible sanctions.

5. No joint and several liability

The Panel also concluded that Al Ain was not jointly or severally liable in any respect, given (i) the termination of the Contract had been created by both the Player and Sporting and (ii) there were no financial consequences of the termination of the Contract.

Decision

In light of the foregoing, the Panel held that both of the appeals brought by the Player and by Sporting against the Appealed Decision

were dismissed and the Appealed Decision confirmed.

CAS 2020/A/7265
FK Ventspils v. Fédération Internationale de Football Association (FIFA)
10 November 2021

Football; Disciplinary sanction for failure to comply with a FIFA decision; Ownership of a training compensation claim after a club's disbandment and qualification of FIFA's letters; FIFA DC's power of review; Violation of the principle of legal certainty and predictability; Lack of national association's entitlements under Article 3.3 of Annex 4 FIFA RSTP; Status of indirectly affected parties

Panel
Mr Wouter Lambrecht (Belgium), Sole Arbitrator

Facts

FK Ventspils (the "Appellant", "Ventspils" or "the Club") is a football club with its registered office in Ventspils, Latvia. The Club is registered with the Latvian Football Federation (the "LFF"), which in turn is affiliated to the Fédération Internationale de Football Association.

The Fédération Internationale de Football Association (the "Respondent" or "FIFA") is an association under Swiss law with registered office in Zurich, Switzerland. FIFA is the governing body of international football exercising regulatory, supervisory and disciplinary functions over national associations, clubs, officials and football players at worldwide level.

On 26 June 2018, the FIFA Dispute Resolution Chamber ("FIFA DRC)" rendered a decision ordering Ventspils to pay EUR 87,616.43, plus 5% interest to a Nigerian club, Stallion Football Academy, Football College Abuja ("FC Abuja") as training compensation related to a player transfer carried out in 2016. Ventspils refused to pay this amount to FC Abuja because of doubts about the validity of the power of attorney provided by its counsel and the legal existence of this club, which was later found to have been disbanded.

On 10 April 2019, the National Football Federation (NFF) requested FIFA to enforce the FIFA DRC decision in its favour ("NFF's First Request for Enforcement"). It claimed that it was entitled to receive the amount awarded in place of FC Abuja, according to Article 3(3) of Annex 4 of the Regulations on the Status and Transfer of Players (RSTP), and asked to pass on the file to the FIFA Disciplinary Committee (FIFA DC) for consideration.

On 2 May 2019, FIFA invited the NFF to present a new claim in accordance with Article 9(1) of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber ("Procedural Rules") in order to establish the "possible entitlement" of the NFF, which it did.

On 7 October 2019, Ventspils filed its reply, submitting that the NFF's claim was time-barred and that it was therefore inadmissible, and that it should in any event be rejected.

On 27 January 2020, FIFA informed the NFF that its deciding bodies were not in a position to deal with its new claim, since it contained the same facts and prayers for relief as the case already decided upon by the FIFA DRC seven months earlier. It indicated, however, that it would proceed to submit the FIFA DRC initial decision to the FIFA DC.

On 18 March 2020, and in the absence of further information, the NFF requested FIFA

to confirm that the case had been transferred to the FIFA DC ("NFF's Second Request for Enforcement").

On 9 April 2020, the FIFA DC informed the LFF that disciplinary proceedings had been opened against its member club Ventspils for a potential breach of Article 15 of the FIFA Disciplinary Code (2019 edition – the "FDC") / Article 64 FDC (2017 edition). This was followed by various requests for clarification from Ventspils to the FIFA DC regarding the identity of the creditor seeking enforcement of the FIFA DRC decision, to which FIFA DC responded that the NFF was acting as the new creditor on its own behalf, further to FC Abuja's disbandment.

On 21 April 2020, Ventspils provided the FIFA DC with its written response to the NFF's claim. It asked FIFA DC to declare the request filed by the NF inadmissible and, alternatively, to reject it.

On 25 May 2020, the FIFA DC rendered its decision (the "Appealed Decision"), by which it found Ventspils guilty of failing to comply with the FIFA DRC decision, in breach of Article 15 FDC. Accordingly, it ordered the Club to pay EUR 87,616.43 plus 5% interests per annum to the NFF, to bear the costs of the proceedings to the amount of CHF 8,000, and to pay a CHF 15,000 fine.

On 15 July 2020, Ventspils lodged an appeal against the NFF in relation to the Appealed Decision pursuant to Article R48 of the CAS Code of Sports-related Arbitration (the "CAS Code").

Reasons

When a football club that has been granted the right to receive training compensation from another club by decision of the FIFA DRC is disbanded, disaffiliated and/or put into liquidation shortly thereafter, the question arises as to who holds its claim. The Parties to the dispute held diametrically opposed views to this question: the Appellant argued that such claim should be abandoned or taken over by the bankrupt estate, whereas the Respondent submitted that it should automatically be transferred to the national association to which the club was affiliated.

More specifically, the main points of disagreement between the Parties concerned whether the FIFA DC was barred from adjudicating and deciding on the NFF's request for enforcement because of FIFA's letter dated 2 May 2019 resorting *res judicata* effects, and whether the Appellant complied with the FIFA DRC Decision and should be sanctioned for a breach of Article 15 FDC.
This led the Sole Arbitrator to examine the qualification of FIFA's letters, FIFA DC's power of review, the principle of legal certainty and predictability, national association's entitlements under Article 3.3 of Annex 4 FIFA RSTP and the status of indirectly affected parties.

1. Qualification of FIFA's letters

The Appellant maintained that FIFA's letter dated 2 May 2019 put an end to the NFF's First Request for Enforcement, as it allegedly constituted a final and binding decision, that declared the NFF's claim inadmissible. In its opinion, this decision should have been appealed by the NFF to CAS, but was not, making the NFF's Second Request for Enforcement inadmissible based on the doctrine of *res judicata*, which prevents a party from re-litigating any issue already litigated.

The Respondent contended that it had never declared the NFF's First Request for Enforcement inadmissible. Further, its letter dated 2 May 2019 did not decide whether the NFF was entitled to receive the amounts due

to FC Abuja nor denied the NFF's request to transfer the case to the FIFA DC.

As a preliminary remark, the Sole Arbitrator considered that the form of communication was not decisive in determining whether a letter from FIFA was a decision in the legal sense (with legal effects), in light of CAS' prevailing jurisprudence. He then turned to the doctrine of *res judicata*, and observed, in line with the Swiss Federal Tribunal's jurisprudence, that such principle did not prevent a party to file a new claim requesting payment of a sum of money in second proceedings following an inadmissibility decision.

After applying this reasoning to the content of the exchanges of correspondence between the Parties, the Sole Arbitrator retained that FIFA's letter dated 2 May 2019 did not constitute a decision subject to appeal, since it only aimed to clarify the situation without definitively settling the issue of entitlements. Likewise, it did not render *res judicata effect* and did not bar the FIFA DC from adjudicating and deciding on the NFF's so-called subsequent request for enforcement (which was in fact a mere enquiry as to the status of the proceedings).

In similar fashion, the FIFA letter dated 27 January 2020 did not resort *res judicata* effects, since it did not contain a decision on the NFF's entitlements.

2. FIFA DC's power of review

The Appellant alleged that Article 15 FDC (and its previous versions), which governs the clubs' failure to comply with FIFA decisions, did not contain any specification that would allow the list of persons entitled to request the enforcement of FIFA decisions be extended to third parties, such as associations. Equally, in proceedings conducted under this article, the FIFA DC could not review or modify the substance of a previous decision of FIFA deciding bodies.

The Respondent rejected this interpretation, and pointed out to that it had clarified any perceived risk for the Club to pay the wrong entity, making its conduct and arguments unfounded.

The Sole Arbitrator recalled that the tasks performed by the FIFA DC under Article 15 FDC are limited and of purely vertical nature. The FIFA DC must verify whether a club failed to comply with its obligations as an indirect member of FIFA by not paying another person a sum of money even though instructed to do so by another FIFA body pursuant to a final and binding decision, and if indeed so, impose the proportionate sanction. It is not entitled to re-analyse a case already decided as its substance.

Against this background, the Sole Arbitrator retained that the FIFA DC had clearly exceeded its powers by deciding on the creditor status of the NFF, which was not apparent from the analysis of the previous instance. To the contrary, FC Abuja seemed to be the sole entity do dispose of such title and credit.

3. The principle of legal certainty and predictability

The Sole Arbitrator then spontaneously made one step further in his analysis, by examining the FDC as a whole. He observed that the FDC did not contain any provision that would give the FIFA DC the possibility to designate a new creditor (e.g. by replacing a creditor club by its national association) when undertaking such limited assessment nor impose a sanction on the debtor club. Nor was it a case of qualified silence allowing for flexibility, since the opposite situation, namely the liquidation

of a debtor, was expressly regulated by the Code.

As a result, the Sole Arbitrator found that the FIFA DC decision to re-assign and designate the NFF as a new creditor violated the principle of legal certainty and predictability.

4. National association's entitlements under Article 3(3) of Annex 4 of the FIFA RSTP

Article 3(3) of Annex 4 of the FIFA RSTP, which governs the responsibility to pay training compensation, states that: *"An association is entitled to receive the training compensation which in principle would be due to one of its affiliated clubs, if it can provide evidence that the club in question – with which the professional was registered and trained – has in the meantime ceased to participate in organised football and/ or no longer exists due to, in particular, bankruptcy, liquidation, dissolution or loss of affiliation. This compensation shall be reserved for youth football development programmes in the association(s) in question".*

The Appellant's main contention was that Article 3(3) of Annexe 4 FIFA RSTP could not be interpreted as a legal provision that assigned FC Abuja's claim to the NFF, considering the general principles of statutory interpretation under Swiss law (i.e. literal, systematic, historic and teleological interpretation). It put particular emphasis on its wording, the intent of the legislator as reflected, amongst others, in the regulatory context in which the article in question was located and its historical background. In the alternative, it highlighted that the NFF was barred from claiming training compensation beyond the limitation period set forth in Article 25(5) FIFA RSTP.

The Respondent contested this interpretation, and stated that the NFF was the ultimate and correct beneficiary of the FC DRC decision. It specifically underlined the intended wording and purpose, namely the possibility for associations to use the money due in favour of development and training programs. It qualified the Appellant's alternative plea based on Article 25(5) of the FIFA RSTP as flawed and contrary to the *rationale* of the system of training compensation.

After due consideration of the Parties' arguments, the Sole Arbitrator confirmed that Article 3(3) of Annex 4 of the FIFA RSTP was of no avail for the Respondent nor the NFF, since it does not contemplate the situation in which a final and binding decision has been issued in a horizontal dispute between two clubs. Rather, this article applies to the situation that exists prior to a decision being rendered by FIFA, the so-called (pre-) adjudication phase, as it deals with the question of who is entitled to receive the amount in the first place and who, if necessary, could claim the amount of training compensation in front of FIFA when the due payment was not forthcoming. Once a claim for training compensation is recognised in favour of a club, it can no longer be invoked by national associations and, in case of liquidation, logically fall into the bankrupt estate of the said club, so as not to harm its potential creditors.

The Sole Arbitrator considered that the Parties' discussion regarding the two-year statutes of limitations period provided for by Article 25(5) of the FIFA RSTP was moot, since the NFF did not have any right of itself to claim training compensation once a decision had already been taken in favour of the Club.

5. Status of indirectly affected parties

The Sole Arbitrator wished to clarified, regardless of the parties' arguments, that he was cognisant that his decision would have an indirect impact on the NFF while it was not a party to the proceedings. However, he considered that its absence should not be of consequence, since the case at stake was of a

disciplinary nature, aimed to rule on the situation of a debtor club, and followed a FIFA procedure in which it did not participate either.

Decision

In light of the foregoing, the Sole Arbitrator upheld the appeal filed on 15 July 2020 by FK Ventspils and set aside the decision issued on 25 May 2020 by the FIFA DC.

CAS 2020/A/7484
Sporting Clube de Portugal - Futebol, SAD v. El Zamalek Sporting Club
10 November 2021

Football; contractual dispute; Interpretation of contractual clauses related to the calculation of outstanding amounts; Assessment of the proportionality of penalty fees; default interest payable on penalty fees

Panel

Mr Patrick Stewart (United Kingdom), Sole Arbitrator

Facts

Sporting Clube de Portugal – Futebol, SAD (the "Appellant") and El Zamalek Sporting Club (the "Respondent") entered into an agreement dated 26 August 2015 (it is submitted by the parties that the Transfer Agreement was in fact signed by the parties on 18 August 2015) for the transfer of the registration of [the player X.] (the "Player") from the Appellant to the Respondent (the "Transfer Agreement"). The preamble of the Transfer Agreement provided as follows:

"Whereas Sporting SAD was initially interested to transfer the player of [sic] *USD 650.000 to be received in a lump sum, the parties has* [sic] *agreed to* ***transfer*** *the (…)* [Player] *from Sporting SAD to Zamalek SC".*

Art. 2.1 to 2.2 of the Transfer Agreement provided as follows:

"1. The parties agree that [the Respondent] *is obliged and accepts to pay to* [the Appellant] *the total amount of US dollars 650.000 (six hundred and fifty thousand dollars) paid in the following installments:*

a. First installment: USD 250,000 with the signing of this contract prior to the issuance of the ITC. [the Respondent] *shall conclude the TMS instructions no later than 24 hours after the signing of this contract.*

b. Second installment: USD 200,000 on 1 January 2016.

c. Third installment: USD 200,000 on 1 June 2016.

2. In the event the second installment is paid after 15.01.2016, [the Respondent] *pays to* [the Appellant] *200,000 as penalty.*

3. In the event the third installment is paid after 15.06.2016, [the Respondent] *pays to* [the Appellant] *200,000 as penalty.*

4. In the event there is a late payment in any of the installments, the remaining installments shall became automatically due plus and interest rate of 10% per annum".

As at 30 December 2015, the Respondent had paid the Appellant USD 139,985 of the total amount due under the Transfer Agreement (the "Transfer Fee"). On 30 December 2015, the Appellant sent the Respondent a letter by both registered post and facsimile (the "First Letter") stating:

"given that Zamalek has failed to satisfy its financial obligations arising from the agreement, Sporting hereby notifies Zamalek that pursuant to article 2.4 all the instalments are immediately due as from 19 August 2015, along with interest at a yearly rate of 10%, which on the date amounts to USD 18.723,29.

Therefore, namely for the specific purposes of article 12bis of the FIFA Regulations on the Status and Transfer of Players [RSTP]*, we are formally notifying Zamalek to proceed with the payment of the total amount of USD 528.723,29 (…) within ten days after receipt of the present communication".*

The Respondent did not formally respond to the First Letter or make any further payment of the Transfer Fee in response to the First Letter. On 16 February 2016, the Appellant

sent the Respondent a further letter by both registered post and facsimile (the "Second Letter") stating:

"for the specific purposes of article 12bis of the FIFA [RSTP]*, we are formally notifying Zamalek to proceed with the payment of the amount of USD 710.015,00 (…) within ten days after receipt of the present communication, along with interest of 10% over the amount of USD 510.015,00 from 19 August 2015 and over the amount of USD 200.000,00 from 15 January 2016. As of today, the total amount in debt is of USD 735.306,15".*

The Respondent did not formally respond to the Second Letter or make any further payment of the Transfer Fee in response to the Second Letter. On 19 July 2016, the Appellant sent the Respondent a further letter by both registered post and facsimile (the "Third Letter"). On this occasion the Appellant also sent the Third Letter by email to the Respondent's contact as registered on the FIFA transfer matching system, Mr Khaled Refaat. The Third Letter stated as follows:

"for the specific purposes of article 12bis of the FIFA [RSTP], we are formally notifying Zamalek to proceed with the payment of the amount of USD 910.015,00 (…) within ten days of receipt of the present communication, along with interest of 10% over the amounts of USD 510.015,00 from 19 August 2015; USD 200.000,00 from 15 January 2016; and 200.000,00 from 15 June 2016".

Mr Refaat from the Respondent replied to the Appellant, requesting the Appellant to forward the Third Letter to the Respondent's legal consultant, Mr Nasr Azzam. The Appellant did so. The Respondent did not formally respond any further to the Third Letter or make any further payment of the Transfer Fee in response to the Third Letter.

The Appellant filed a claim with the FIFA Players' Status Committee (PSC) on 16 March 2017 requesting to be awarded payment of the following: USD 510,015, being the outstanding amount of the Transfer Fee, USD 400,000, being the penalty payments set out in Art. 2.2 and 2.3 of the Transfer Agreement; and interest at the rate of 10% *per annum* on the amounts of USD 510,015 from 19 August 2015, USD 200,000 from 15 January 2016 and USD 200,000 from 15 June 2016.

The FIFA PSC's decision (the "Appealed Decision"), issued its on 28 July 2020, and notified to the parties in its motivated version on 10 October 2020, reads as follows:

"1. The claim of the Claimant, Sporting Clube de Portugal, is partially accepted.

2. The Respondent, Zamalek Sporting Club, has to pay to the Claimant, the following amount: - USD 510,015, plus 10% interest p.a. as from 27 August 2015 until the date of effective payment".

The FIFA PSC included the following reasons in the Appealed Decision:

"15. (…) the Single Judge underlined that in accordance with the terms of art. 2.4 of the transfer agreement all the instalments agreed by the parties became due on 27 August 2015, as the Respondent failed to pay the full amount of the first instalment on time.

16. Therefore, the Single Judge concluded that the penalties established in arts. 2.2 and 2.3 of the transfer agreement were not applicable to the matter at stake and as a consequence, the relevant request of the Claimant should be rejected".

On 2 November 2020, pursuant to Article R47 of the Code of Sports-related Arbitration (the "Code"), the Appellant filed an appeal at the Court of Arbitration for Sport (the "CAS") challenging the Appealed Decision and requested the CAS:

"(a)[to] *declare that the appeal of Sporting Clube de Portugal – Futebol, SAD is admissible;*

(b) [to] *set aside the part of the Decision that rejected the Appellant's claim for the applicable penalty clauses;*

(c) [to] *order the Respondent to pay to the Appellant:*

(i) the penalty amount of USD 200.000,00 as per article 2.2 of the Transfer Agreement;
(ii) the penalty amount of USD 200.000,00 as per article 2.3 of the Transfer Agreement;
(iii) interest at the rate of 10% per annum over the aforementioned amounts as from 15 January 2016 and 15 June 2016, respectively".

In its Answer, the Respondent requested the CAS *inter alia* to dismiss the Appellant's appeal.

The Sole Arbitrator observes that the main issues to be resolved are the following:

- Do Art. 2.2, 2.3 and 2.4 of the Transfer Agreement operate cumulatively or does Art. 2.4 operate as an alternative to Art. 2.2 and 2.3?
- If the relevant Art. are considered to be cumulative, are the penalty fees set out at Art. 2.2 and 2.3 excessive?
- Is default interest payable on penalty fees?

Reasons

1. Interpretation of contractual clauses related to the calculation of outstanding amounts

The Sole Arbitrator notes from Art. 2.4 of the Transfer Agreement that it is clear that the Appellant had no control over the accelerated payment and that default interest mechanic came into effect automatically at the point at which the Respondent failed to pay the first instalment of the Transfer Fee in full. Hence, if it were accepted that Art. 2.4 operates as an alternative remedy to Art. 2.2 and 2.3, then the automatic operability of Art. 2.4 would render Art. 2.2 and 2.3 entirely redundant as they would never apply. Art. 2.2 and 2.3 must have been included by the parties for a reason and therefore any interpretation that renders them redundant would be plainly wrong. Conversely, the Sole Arbitrator considers that Art. 2.2, 2.3 and 2.4 are clearly capable of operating separately and independently from each other.

Furthermore, it is suggested within the preamble of the Transfer Agreement that the Appellant's position at the outset of negotiations was for the Transfer Fee to be paid in a single lump sum. The Appellant clearly compromised on that point as the finally signed agreement provides for staged payments. This suggests that the clauses in the Transfer Agreement relating to the timing of payments were subject to negotiation between the parties and reflect their intention.

The Sole Arbitrator notes the parties' submissions with respect to the principle of *in dubio contra stipulatorem*. However, in line with CAS 2017/A/5172, the Sole Arbitrator also notes that application of such principle is limited to cases where the contents of a contract cannot be determined. The Sole Arbitrator does not consider the relevant clauses of the Transfer Agreement to be ambiguous and therefore does not require to apply this principle.

The Sole Arbitrator also notes CAS 2014/A/3664, in which the panel decided as follows: *"In principle, no default interest can be awarded in addition to a contractual penalty. However, if the contract is clear in determining that both can be awarded complementarily, nothing prevents an adjudicatory body from awarding both".* As the Sole Arbitrator has already determined that Art 2.2, 2.3 and 2.4 are capable of operating separately and independently from each other and that this was the intention of the parties, the Sole Arbitrator considers that the awarding of both default interest and

penalty fees in these circumstances is supported by CAS jurisprudence.

Accordingly, the Sole Arbitrator finds that: (a) Art. 2.2, 2.3 and 2.4 of the Transfer Agreement operate cumulatively; and (b) the Appellant is entitled to pursue the remedies provided by Art. 2.2 and 2.3, notwithstanding that it also benefits from the automatic effect of the accelerated payment and default interest mechanic at Art. 2.4.

2. Assessment of the proportionality of penalty fees

Penalty clauses are clearly permitted under Swiss law but a panel has an *ex officio* right to examine the amount of a penalty and reduce any excessive penalty (Art. 160, 161 and 163 of the SCO).

The penalty fees amount *in casu* to USD 400,000. This should be considered against: (a) the principal amount originally due of USD 650,000; (b) the principal amount which remains due as determined in the *res iudicata* element of the Appealed Decision (USD 510,015); and (c) the current level of default interest awarded on the unpaid principal amount pursuant to the *res iudicata* element of the Appealed Decision. As at 27 February 2021, that interest amounted to *circa* USD 280,000.

Both parties referred to the following decisions of CAS in which the panel's right to reduce penalties are addressed: CAS 2010/A/2202 (with references to TAS 2008/A/1491 and ATF 133 III 201, c. 5.2), CAS 2010/A/2317 and CAS 2011/A/2323, CAS 2012/A/2847, CAS 2014/A/3664, CAS 2015/A/4139, , CAS 2017/A/5046 (with references to ATF 114 II 264 *et seq.*, TF 4A_141/2008 at 14.1 and ATF 82 II 142), CAS 2017/A/5304. The Sole Arbitrator considers that the following common principles can be drawn from the CAS decisions cited by the parties:

- The reduction of a contractually agreed penalty is contrary to the principles of contractual freedom and therefore a panel should only reduce a penalty in extreme cases where it is so excessive that it runs contrary to the principles of justice and fairness.
- When considering whether a penalty is excessive a panel should take into account all the circumstances of the case, in particular a series of criteria, such as: (i) the creditor's interest in the other's party compliance with the undertaking; (ii) the severity of the default or breach; (iii) the intentional failure to breach the main obligation; (iv) the business experience of the parties; and (v) the financial situation of the debtor.
- The burden of proof in establishing the facts required to establish that a penalty is excessive rests with the debtor.

The Sole Arbitrator has considered the following criteria in the context of the current case: (1) The Appellant's interest in the Respondent's compliance with the undertaking; (2) the severity of the Respondent's breach; (3) the existence or otherwise of an intention to breach; (4) the business experience of the respective football clubs; (5) and the Respondent's financial situation.

First criterion: the Transfer Agreement documented a straight forward transaction. The Appellant fulfilled its primary obligation to transfer the Player's registration to the Respondent, whereas the Respondent did not pay the Transfer Fee to the Appellant in accordance with the payment schedule. Accordingly, the Appellant had a clear and material interest in the Respondent's compliance with the main undertaking.

Second criterion: the Respondent has been in breach of its payment obligations from the outset, having paid only USD 139,985 of the

USD 250,000 which was due on the date of the Transfer Agreement (in August 2015), none of the USD 200,000 due on 1 January 2016 and none of the USD 200,000 due on 1 June 2016. At the hearing, when the Sole Arbitrator asked the Respondent whether it had paid the Appellant the amount of USD 477,500 (*i.e.* the balance of the amount which the Respondent accepts is payable to the Appellant), the Respondent advised that it had not. Given that the Respondent has only paid *circa* 23% of the amount which it accepts has been payable to the Appellant since 2015/16, the Sole Arbitrator considers the Respondent's breach to be severe.

Third criterion: the Sole Arbitrator considers it highly relevant that the Respondent failed to pay the first instalment of the Transfer Fee in full as that payment was due on the date of entering into the Transfer Agreement. In the absence of any explanation from the Respondent, the Sole Arbitrator considers it reasonable to conclude that, at the time of entering into the Transfer Agreement, the Respondent was already aware that it would default on its payment obligations. The Sole Arbitrator also notes that the Appellant went to considerable efforts to remind the Respondent of its primary payment obligations by sending the Respondent formal reminder notices prior to the payment dates for the second and third instalments. Those notices also drew the Respondent's attention to the existence of the penalty clauses which would be triggered in the event of non-payment of the second and third instalments.

The parties dispute whether they were in discussion during the period from August 2015 to June 2016 regarding the Respondent's default. The Respondent submits that it was in discussions throughout and was seeking to provide explanations for the payment issues. Conversely, the Appellant submits that its notices did not provoke any response from the Respondent. It is undisputed, however, that the Respondent received the formal notices from Sporting and was therefore aware of the approaching payment deadlines. The Sole Arbitrator notes that, as it is the Respondent which is seeking to establish that the penalty fees are excessive, the burden of proof sits with the Respondent to show that its breach was unintentional. However, it did not cite any mitigating circumstances for the missed payments. Consequently, the Sole Arbitrator considers that the Respondent was fully aware of its breach and is not satisfied that the breach was unintentional.

Fourth criterion: in their oral pleadings, the parties dispute the extent of the Respondent's business experience. the Respondent submits that it does not have the same resources and organisational infrastructure as a European club, whereas the Appellant contends that the Respondent is a well-established, leading Egyptian football club with experience in negotiating international transfers. Again, the Sole Arbitrator notes that it is for the Respondent to demonstrate its relative inexperience and that the Respondent made only brief, oral submissions in this regard which the Appellant disputed. Absent more detailed submissions from the Respondent, the Sole Arbitrator is not satisfied that the Appellant and the Respondent were materially unbalanced in terms of their respective business experience at the time of entering into the Transfer Agreement.

Fifth criterion: the Respondent claims that it will be bankrupt if the penalty and default interest clauses are applied in full. Again, the Sole Arbitrator notes that it is for the Respondent to submit evidence as to its financial circumstances and the consequences which would arise if the penalty and default interest clauses were applied in full. Based on the Respondent's submissions to CAS on this point, the Sole Arbitrator is not satisfied that Zamalek would be at risk of bankruptcy if the

penalty and default interest clauses were applied in full.

The Sole Arbitrator acknowledges that the level of the penalty fee is high, particularly when considered in the context of the default interest awarded pursuant to the Appealed Decision. However, having considered the circumstances of the current case against factors which are materially similar to those put forward by both parties as being of relevance, the Sole Arbitrator is not persuaded that the circumstances justify a reduction of the penalty. Furthermore, the Sole Arbitrator is mindful of the CAS jurisprudence referred to by both parties which emphasises that: (a) the reduction of a penalty is reserved for exceptional cases only; (b) as a rule, the parties are bound by their agreement; and (c) the principle of freedom of contract commands a panel to abide by the parties' agreement. Accordingly, the Sole Arbitrator considers there to be no basis for reducing the penalty fees of USD 400,000.

3. Default interest payable on the penalty fees

The Sole Arbitrator considers that the drafting of Art. 2.4 of the Transfer Agreement indicates that the parties intended to restrict the applicability of the contractually agreed interest rate (of 10%) to the three instalments which make up the Transfer Fee of USD 650,000. In the absence of a contractually agreed position, the Sole Arbitrator relies on the position under Swiss law and, specifically, Art. 104 of the SCO which provides that *"A debtor in default on payment of a pecuniary debt must pay default interest of 5% per annum"*. The Sole Arbitrator sees no reason why default interest of 5% would not apply with respect to the penalty fees and refers to the decisions of previous CAS panels in this regard, including CAS/A/2014/3664.

Decision

The appeal filed by Sporting Clube de Portugal – Futebol, SAD against the Appealed Decision is partially upheld. The Appealed Decision is confirmed, save for point n. 3 which is amended as follows:

"3. El Zamalek Sporting Club is ordered to pay to Sporting Clube de Portugal – Futebol, SAD, within ***thirty (30) days*** *from receipt of the present award, the amount of USD 400,000 corresponding to penalty fees plus 5% interest p.a. as follows:*

- *on USD 200,000 as from 16 January 2016; and*
- *on USD 200,000 as from 16 June 2016".*

CAS 2020/A/7590
Hungarian Canoe Federation v. International Canoe Federation (ICF)
CAS 2020/A/7591
Russian Canoe Federation v. International Canoe Federation (ICF)
23 December 2021

Canoe; Olympic Games program; Existence of a decision; Standing to sue; Standing to be sued; Admissibility of declaratory reliefs

Panel
Mr Bernhard Welten (Switzerland), President;
Prof. Pascal Pichonnaz (Switzerland);
Prof. Denis Oswald (Switzerland)

Facts

The Hungarian Canoe Federation (the "First Appellant" or the "HCF") is the national governing body for the sport of canoeing in Hungary with its registered seat in Budapest, Hungary. The Russian Canoe Federation (the "Second Appellant" or the "RCF") is the national governing body for the sport of canoeing in Russia with its registered seat in Moscow, Russia.

The International Canoe Federation (the "Respondent" or the "ICF"), is an association under Swiss law with its registered seat in Lausanne, Switzerland. It is the international governing body for the sport of canoeing and recognised by the International Olympic Committee (the "IOC").

On 24 November 2020, the ICF Board of Directors decided in a virtual meeting to propose to the IOC to transfer in the Paris 2024 Olympic Games programme two medals from the canoe sprint event to the extreme canoe slalom (the "Appealed Decision"). This decision was taken with a majority of one vote; the vote was 14:14 before the President decided with his casting vote. The minutes of this meeting stated to the agenda point 3: *"The vote was 14 votes for option 1 and 14 votes for option 2, no abstentions. As agreed and general practice in ICF BoD meetings the President had the casting vote and announced that he supported option 2. The ICF BoD officially confirmed option 2 (10 Canoe Sprint medals, 4 Canoe Slalom medals and 2 Extreme Slalom medals) as the ICF recommendation to the IOC for Paris 2024 Olympic games".*

On 25 November 2020, the ICF published the Appealed Decision taken by its Board of Directors on 24 November 2020 on its official website:

"The ICF Board voted to include men's and women's extreme slalom on its proposal for the Paris 2024 canoe program as it strives to continue to innovate and to deal with a reduction of Olympic quota places. […] As the IOC has indicated no new medal events will be added to the Paris 2024 program, the ICF board voted to put a proposal to transfer two medals from the canoe sprint program, and add the two medals to extreme slalom. […] The ICF board will now examine options regarding the canoe sprint Olympic program. If the new proposal is accepted by the IOC, it will give canoe sprint 10 medals and canoe slalom six medals at the 2024 Olympics".

On 2 December 2020, several ICF member federations, including the Appellants, sent an email to the ICF Board of Directors expressing their worries about the timing of the decision to change the Olympic programme, the internal process of the ICF leading to this decision, the negative impact the decision has on the athletes, coaches and national federations and requesting to reverse the Appealed Decision.

On 4 December 2020, the ICF President replied to all member federations explaining in detail how and in what circumstances this

decision was taken. He pointed out that based on the new sports added by the IOC to the Programme of Paris 2024 Olympic Games, the IOC informed the ICF about an athlete quota reduction. To counter this athlete quota reduction, the ICF offered several options to the IOC which were all rejected, except the extreme slalom event.

On 5 December 2020, the ICF published a media release on its homepage, which stated that:

"The board approved a program it believes will provide incentives for all athletes to continue to strive to compete at the Olympics. […] The ICF canoe sprint Olympic programme proposal will be presented to the IOC Executive Board on December 7th for their consideration as part of the Olympic Games programme for Paris 2024. The men's and women's K1 200 will not be contested in Paris. […] The ICF board previously approved adding men's and women's extreme slalom to the proposed Paris 2024 canoe slalom programme".

On 7 December 2020, the IOC published on its official website that its Executive Board had accepted, amongst others, the Event Programme for the Paris 2024 Olympic Games and with this also the ICF's proposal to replace two canoe sprint events by two extreme slaloms.

On 16 December 2020, the HCF and the RCF filed their Statements of Appeal with the CAS against the ICF in relation to Appealed Decision of 24 November 2020 pursuant to Article R48 of the Code of Sports-related Arbitration (the "CAS Code"). Accordingly, the CAS Court Office opened two proceedings, docketed as CAS 2020/A/7590 Hungarian Canoe Federation v. International Canoe Federation (ICF) CAS 2020/A/7591 Russian Canoe Federation v. International Canoe Federation (ICF).

On 5 January 2021, the CAS Court Office informed the Parties that, in view of their agreement, the two procedures had been consolidated.

Reasons

The Appellants argued, in essence, that the Appealed Decision was directly prejudicial to them in many respects, including financially, and was taken in gross violation of the ICF regulations.

The First Appellant did not request the annulment of the Appealed Decision, but only a declaratory relief stating that such decision would have been issued in violation of the ICF regulations. The Second Appellant, on the other hand, requested the "cancellation" of the decision and the same declaratory relief as the HCF.

The Respondent retorted that the appeals should be declared inadmissible, or at the very least dismissed, in the absence of a proper legal decision, standing to sue and to be sued, legal interest to seek declaratory reliefs and violation of the applicable rules.

For the Panel, four issues had to be solved in priority in this appeal: 1) Does the Appealed Decision constitute a decision in the legal sense?; 2) Do the Appellants have standing to sue?; 3) Does the Respondent have standing to be sued (alone)?; and 4) Are the Appellants' declaratory reliefs admissible?

1. Existence of a decision

In the present case, there was a dispute between the Parties as to whether the Appealed Decision was to be considered as a decision in the legal sense.

The Panel recalled that the term "decision"

should be interpreted in a broad manner so as not to restrain the relief available to the persons affected. Under Swiss law, a decision is a common declaration of will resulting from multiple unidirectional declarations of individual members to determine the association's will. Overall, the principal criterion for the qualification of a communication as a decision is its binding character and the "animus decidendi", namely the intention of a sports body to decide binding on a specific subject, thus affecting the addressee(s) of the decision.

In light of the above, the Panel retained that only the IOC Executive Board's decision on the Olympic Events Programme triggered legal consequences. As international federations may only submit proposals to the IOC, the ICF Board of Directors' proposal was not a decision, and no legal effects were produced which materially affected the Appellants' interests. The appeals filed against such proposal should, therefore, be declared inadmissible. Alternatively, and in any case, these appeals should be dismissed on the merits, in light of the usual rules on standing.

2. Appellants' standing to sue

The Respondent contested the Appellants' standing to sue, since they were, it submitted, only indirectly affected.

The Panel noted that third parties have standing to sue before the CAS in two cases. First, when a regulation explicitly confers it. Secondly, when an association's measure affects not only the right of the addressee, but also and directly those of a third party, that this party is considered "directly affected" and thus enjoys standing to sue. This is consistent with the general definition of standing that parties, who are sufficiently affected by a decision, and who have a tangible interest of a financial of sporting nature at stake may bring a claim, even if they are not the addressees of the measure challenged. Consequently, third party applicants who are deemed "indirectly affected" by a measure do not, in principle, have standing.

In the Panel's opinion, the Appellants were not the addressees of the so-called "decision" of their international federation reshaping the Olympic Games programme, and their rights were not directly disposed of by such "decision". In the absence of an explicit provision to this effect, they lacked standing to challenge it.

3. The Respondent's standing to be sued (alone)

The Respondent argued that the Appellants' failure of joining the IOC as a respondent in this arbitration, together with the ICF, should result in the lack of standing to be sued of the ICF, at least of the standing to be sued alone, without the IOC.

The Panel pointed out, as a general rule, that only the association itself has standing to be sued. The subject of the appeal should concern decisions rendered by the organs of the association and rights related to the association. This means that a decision cannot be subject to an appeal where rights related to the association do not come into play.

The Panel highlighted that, in the case at stake, only the IOC had the right to modify the Olympic Games programme under Article 45 of the Olympic Charter. No international federation had any such right. As a result, the Appellant's request aimed at obtaining the annulation of the change of the Olympic Games programme should primarily have been filed directly against the IOC, which took this decision, rather than the Respondent, which "merely" proposed such solution. The Respondent, alone, lacked standing to be sued

within this framework.

4. Admissibility of declaratory reliefs

The Appellants maintained that the special legal interest needed to ask for a declaratory relief was given with the resolution of the question of whether the Appealed Decision was made in violation of the ICF rules or not.

The Respondent alleged that such legal interest did not exist, since the Appellants did not explain why there would be any unacceptable uncertainty that could not be resolved otherwise, as requested by Swiss law. In addition, the Appellants did further not prove or allege any possible emergency in resolving the purported and non-existent uncertainty in a declaratory judgment.

The Panel confirmed that declaratory reliefs could only be granted if the requesting party established a special legal interest to obtain such declaration. It found that the Appellants could at most rely on a factual interest, since they only sought to ensure that their leading sports discipline was represented in the Olympic Games programme. They lacked legal interest to pray for a declaratory relief regarding the lawfulness of their international federation's proposal.

Decision

The Panel retained that both appeals should, in principle, be declared inadmissible because the Appealed Decision did not constitute a decision in the legal sense of the term. Alternatively, the Appellants had no standing to sue and the Respondent lacked standing to be sued alone. Finally, the prayers for relief of declaratory nature did not meet the requirements set by case law, which made them inadmissible.

In view of the foregoing, the Panel dismissed the appeals in their entirety.

CAS 2021/A/7673
Club Olimpia de Paraguay v. FC Dynamo Kyiv
CAS 2021/A/7699
FC Dynamo Kyiv v. Club Olimpia de Paraguay
12 October 2021

Football; Failure to comply with the terms of a transfer agreement; Force majeure; Impossibility to perform the obligations; Burden and standard of proof and financial difficulties; Clausula rebus sic stantibus; Interpretation of a contractual clause; Penalty clause; Maximum interest rate

Panel
Mr Patrick Grandjean (Switzerland), Sole Arbitrator

Facts

X. is a professional football player of Paraguayan nationality, born [in] 1994 (the "Player"). By means of a contract dated 7 February 2020, Football Club Dynamo Kyiv ("Dynamo") accepted to transfer the Player (the "Transfer Agreement") to Club Olimpia de Paraguay ("Olimpia"), a member of the Paraguayan Football Association (Asociación Paraguaya de Fútbol – "APF").

The Player was transferred from Dynamo to Olimpia for a transfer fee of USD 5,000,000, be paid in five instalments over a period of 2 years and 4 months. Art. 4.2 of the Transfer Agreement provided that *"(…) in case of untimely or incomplete execution by [Olimpia] of any of the payments under the present Contract with a delay of 15 (fifteen) and more days, [Olimpia] shall be obliged to additionally pay to Dynamo a fine of 10% of the outstanding amount due plus 10% p.a. interest on the outstanding amount. (…).* In addition, according to Art. 4.3 of the Transfer Agreement, *"[i]n case of any delay in the payment for 45 (forty-five) or more days or in case of incomplete execution by [Olimpia] of any of the payments under the Contract, [Olimpia] would be obliged to immediately pay to Dynamo all payments of residual transfer compensation, provided by the Contract except for the sell on fees, which shall be payable on the terms and conditions provided in the present Contract".*

The Player was registered with Olimpia after the signature of the Transfer Agreement. The first instalment of USD 1,000,000 fell due on 30 March 2021; *i.e.* after 11 March 2020, when the World Health Organization (WHO) declared the COVID-19 outbreak a global pandemic ("the Pandemic").

On 25 March 2020, the President of Olimpia wrote to Dynamo to expose that the COVID-19 pandemic put his club under major financial pressure. Under these circumstances, Olimpia *"respectfully [requested] Dynamo, to postpone the payment of the first installment (only that one) for the term of 180 days".*

On 26 March 2020, Dynamo answered to Olimpia that it was not willing to postpone the payment of the first instalment of the Player's transfer fee as it was facing its own financial hardships due to the Pandemic. As a consequence, Dynamo urged Olimpia to fully comply with its contractual obligations in a timely manner.

On 31 March 2020, Dynamo complained about the fact that it did not receive the first instalment of the Player's transfer fee and warned Olimpia that the payment of the relevant amount after 14 April 2020 would trigger the penalty fee provided under Article 4.2 of the Transfer Agreement. Much more, it reminded Olimpia that a payment of the first instalment made 45 days beyond the due date would make the whole transfer fee fell due at once, in accordance with Article 4.3 of the Transfer Agreement.

On 2 April 2020, Olimpia wrote to Dynamo to seek its indulgence, considering that the Pandemic had taken a heavy toll on Paraguay's economy and public healthcare. As the county was *"in a total lockdown situation"* and the club was left without any financial resources whatsoever, Olimpia asked Dynamo to reconsider its request to *"postpone the payment of the first installment (only that one), at least for 90 days"*.

On 3 April 2020, Dynamo acknowledged Olimpia's letter of 2 April 2020 and referred it to its letter of 26 March 2020.

On 13 April 2020, Olimpia sent to Dynamo a letter dated 10 April 2020 and drafted on its behalf by its legal representative. In this document, Olimpia claimed to be *"in a situation of 'force majeure', which force [it] to suspend, for the moment, the corresponding payments, without any kind of liability"* and asserted that, on 16 March 2020, Paraguay was declared in a state of emergency and that, on 26 March 2020, the Law 6524 was passed resulting in the closure of all the non-essential activities. Olimpia reiterated that it did not have any income and called Dynamo once again to reconsider its position and to accept *"a negotiation in good faith in order to re-schedule the first payment, one time the emergency situation declared by Law in Paraguay be lifted, and Club OLIMPIA can attend their payments as always has done. (…) If 15 April we have not got an agreement with you, related this matter from your side, we will be forced to present the corresponding claim before the FIFA Player's Statuts (sic) Department, in order be declared that the penalties fixed for the breach of the term to pay the first installment due cannot be applied, since the breach of the term fixed for the first installment was due to a force majeure"*.

On 29 April 2020, Dynamo filed a claim with FIFA against Olimpia, requesting the following: (i) payment of the first instalment of the Player's transfer fee in an amount of USD 1,000,000 with 10% interest *p.a.* as from 31 March 2020 until the date of effective payment; (ii) payment of a penalty fee of USD 100,000 as provided for under Article 4.2 of the Transfer Agreement; (iii) imposition of disciplinary sanctions on Olimpia.

On 1 June 2020, Dynamo wrote to Olimpia to complain about the non-payment of the first instalment of the Player's transfer fee within the 15-day and 45-day deadlines provided, respectively, under Articles 4.2 and 4.3 of the Transfer Agreement. It insisted on the fact that *"as from 15th May 2020 [Olimpia] become obliged to pay to Dynamo all residual payments of the fixed transfer compensation in the amount of $4'000'000 (four million US dollars) in addition to the overdue amount of the first payment of transfer compensation in the amount of $1'000'000 (one million US dollars). Moreover, in view of the above and taking into account provisions of cl. 4.2 of the transfer contract (which provides financial sanctions for late execution of any of the payments under the transfer contract for more than 15 days), we would like to draw your attention that the penalty (10%) and default interest (10% p.a.) became also applicable to the residual payments of transfer compensation (in the amount of $4'000'000) as from 1 June 2020"*.

On 1 July 2020, Dynamo filed another claim with FIFA against Olimpia, requesting the following: (i) payment of USD 4,000,000 in accordance with Article 4.3 of the Transfer Agreement with 10% interest *p.a.* as from 1 June 2020 until the date of effective payment; (ii) payment of a penalty fee of USD 400,000 as provided for under Article 4.2 of the Transfer Agreement; (iii) imposition of disciplinary sanctions on Olimpia.

Between 4 September and 6 October 2020, Olimpia transferred the following sums to Dynamo: (i) USD 100,000 on 4 September 2020; (ii) USD 100,000 on 21 September 2020; (iii) USD 200,000 on 6 October 2020.

In a decision dated 29 September 2020, the

Single Judge of the FIFA Players' Status Committee ("FIFA Single Judge") examined both claims of Dynamo and partially accepted them, based upon the following considerations (the "Appealed Decision"): (i) the ongoing sanitary crisis was not a reason for Olimpia to not make the contractually agreed payments; (ii) FIFA Circular letter n° 1714 of 7 April 2020, entitled *"COVID-19: Football Regulatory Issues"* (the "FIFA Covid-19 Guidelines"), did not establish a general situation of *force majeure* and Olimpia was therefore not exempted from its financial obligations under the Transfer Agreement; (iii) bearing in mind that Olimpia had failed to pay the first instalment originally due on 30 March 2020, the rest of the transfer fee had become due on 15 May 2020, in accordance with Article 4.3 of the Transfer Agreement; and (iv) *"In relation to clause 4.2 of the Agreement, the Single Judge of the PSC proceeded to analyse it and took note that said clause established 'a fine of 10% p.a. interest on the outstanding amount'. (…) Therefore, the Single Judge came to the conclusion that despite of its unclear wording, it shall be considered as an interest clause and not as a contractual penalty clause. (…) In addition, the Single Judge was keen to emphasise that the wording of the clause 4.2 of the Agreement is clear and only establishes one way to compensate the possible delay in paying amounts contractually agreed, i.e. an annual interest of 10%. (…) Therefore, the Single Judge stated that the double request of the Claimant to apply a fine of 10% and an annual interest of 10% over the outstanding amount does not correspond to the terms agreed by the parties in the clause 4.2 of the Agreement"*. On 22 January 2021, the Parties were notified of the grounds of the decision.

On 4 February 2021, Olimpia lodged a Statement of Appeal with the CAS against the Appealed Decision. On 12 February 2021, Dynamo also lodged a Statement of Appeal with the CAS against the Appealed Decision.

A hearing was held on 12 July 2021, via video-conference. During the hearing, the Parties were questioned by the Sole Arbitrator. Relevant parts of their testimony include that: (i) during the Pandemic, Olimpia kept paying its employees' salaries. However, it had to terminate some employment contracts and some of its players accepted a salary cut; (ii) the Player is still playing for Olimpia but he is among the employees who accepted a reduction in his wages; (iii) during the Pandemic, Olimpia sold one of its players and hired a new player, whose transfer fee was paid by offsetting a claim that Olimpia had against the transferor club; (iv) considering that Dynamo did not make any effort to settle the situation in spite of the extraordinary circumstances caused by the Pandemic and in view of its rigid attitude, Olimpia had decided to settle its other debts before paying the Player's transfer fee; (v) Olimpia's financial statement for the year 2020 was not available.

Reasons

1. Force majeure

The first issue to solve was for the Sole Arbitrator to decide whether the Pandemic qualified as a *force majeure* event rendering Olimpia's performance of its contractual obligation impossible.

The Sole Arbitrator started with recalling that *force majeure* was used to describe a situation or event, which is beyond the control of the parties, which prevents them from fulfilling their contractual obligations and for which they believe they should not carry any liability or obligations. Moving to the possible consequences of the Pandemic on the contractual relationship between the Parties, the Sole Arbitrator then stressed that the resolution of the dispute would need a two-phase approach. At first, it would be necessary to assess whether the Transfer Agreement included specific provisions, which would deal with the non-performance or delay of

performance due to events like the Pandemic (e.g., a *force majeure* clause). Secondly, the situation would need to be reviewed in the light of the applicable law.

For the Sole Arbitrator, the Transfer Agreement did not contain a *force majeure* clause. The Parties had not contemplated the non-performance of the contract following the occurrence of a specified event, which was beyond the control of the Parties or which the Parties could not have anticipated. At FIFA level, there was no definition of *force majeure* in the FIFA Regulations, but the concept of *force majeure* related to the Pandemic had been addressed in several FIFA circular letters ("CL"). In particular, in CL n° 1714 of 7 April 2020 FIFA had reiterated that the Bureau of the FIFA Council recognised that the disruption to football caused by the Pandemic was a case of *force majeure* and declared *"The COVID-19 situation is, per se, a case of force majeure for FIFA and football"*. FIFA had also submitted *"proposed guiding principles"*, which covered three core matters; *i.e.* a) expiring employment agreements; b) employment agreements which cannot be performed as the parties originally anticipated; and c) registration periods. The proposed guidelines did not, however, cover payments of a transfer fee from one club to another. In CL n° 1720 of 11 June 2020, FIFA had issued a document entitled *"Frequently asked questions (FAQs) COVID-19 Football Regulatory Issues"* (the "FAQ"). The document held that the Bureau of the FIFA Council had not determined *"that the COVID-19 outbreak was a force majeure situation in any specific country or territory, or that any specific employment or transfer agreement was impacted by the concept of force majeure. For clarity: clubs or employees cannot rely on the Bureau decision to assert a force majeure situation (or its equivalent). Whether or not a force majeure situation (or its equivalent) exists in the country or territory of an MA is a matter of law and fact, which must be addressed on a case-by-case basis vis-à-vis the relevant laws that are applicable to any specific employment or transfer agreement"*.

Turning therefore to Swiss law in the present case, the Sole Arbitrator noted that although there was no statutory definition of *force majeure* under Swiss law, the Swiss Federal Tribunal (and several CAS panels referring to the SFT) had held that there was *force majeure* in the presence of an unforeseeable and extraordinary event that occurred with irresistible force. Consistently with the SFT, the CAS panels had insisted on the fact that the conditions for the occurrence of *force majeure* were to be narrowly interpreted, since *force majeure* introduced an exception to the binding force of an obligation.

2. Impossibility to perform the obligation

The Sole Arbitrator noted that, under Swiss law, the legal consequences of non-performance of a contract depended on whether the impossibility to discharge obligation was temporary or permanent and whether one of the contractual parties was at fault.

If the impossibility to fulfil the obligations was only temporary, Articles 107 to 109 of the Swiss Code of Obligations ("CO") applied. According to these provisions, the counterparty could, at its discretion, a) set an appropriate time limit for subsequent performance or ask the court to set such time limit (Article 107 CO), b) under certain circumstances, insist on performance without delay (Article 108 CO), c) waive performance and claim damages (Article 107(2) CO or d) terminate the agreement and demand the return of any performance already made. In addition, it could claim damages for the lapse of the contract, unless the debtor could prove that he had not been at fault (Article 109 CO). In accordance with Article 97 CO, the debtor's fault was presumed. Pursuant to Article 99(1&2) CO, the debtor was generally liable for

any fault attributable to him. The scope of such liability was determined by the particular nature of the transaction and in particular was judged more leniently where the obligor did not stand to gain from the transaction.

In the present case, it was undisputed that Olimpia had accepted that its impossibility to perform its side of the contract was only limited in time. It had persistently insisted on the fact that it was willing to pay the Player's transfer fee but only in accordance with a payment plan adapted to the unforeseen circumstances, which had appeared after the Transfer Agreement had been concluded.

3. Burden and standard of proof and financial difficulties

It appeared from the above considerations that Olimpia had the burden of proof that a) it had objectively been impossible for it to perform its contractual obligations in a timely manner, b) because of the Pandemic, c) there had been a causal link between the Pandemic and its failure to fulfil its side of the Transfer Agreement and d) it was not at fault.

The Sole Arbitrator reaffirmed the principle established by CAS jurisprudence on the basis of Article 8 of the Swiss Civil Code ("CC") that *"in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them. The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some facts and persuade the deciding body, it must actively substantiate its allegations with convincing evidence"* (CAS 2014/A/3546, para. 7.3 and references). He also recalled that in general, the burden of proof was satisfied whenever the judge was convinced of the truthfulness of a factual allegation based on objective grounds. Absolute certainty was not required. It was sufficient if the judge had no serious doubt about the existence of the alleged facts or if any remaining doubt appeared to be tenuous (ATF 130 III 321, consid. 3.3).

In its Appeal Brief, Olimpia had criticized the FIFA Single Judge for having failed to follow the recommendations contained in CL n° 1720. For the Sole Arbitrator however, the evidence provided by Olimpia did not reasonably allow to scrutinize the consequences of the Pandemic in Paraguay. On file, there was not any documented information related to a) whether the legislation of Paraguay had a specific definition of *force majeure,* b) the measures taken by the Paraguayan government to limit the spread of the COVID-19, c) how these measures affected the performance of contracts in the world of Paraguayan football as well as on the domestic market in general, d) whether Paraguay was effectively in a lockdown situation, for how long and to what extent, e) the potential financial relief available, f) etc. Olimpia had not even filed the regulations and guidelines adopted by its country on the basis of the Pandemic.

In any event and regarding its specific situation, Olimpia had exclusively relied on general statements according to which a) the Pandemic was worldwide, b) it was an event of *force majeure,* c) Olimpia's financial difficulties were the direct result of the Pandemic, d) Paraguay had been in a *"total lockdown situation"* and *"The economy is stopped, and we do not have any type of income"*, e) the competitions had been suspended before they had resumed behind closed doors, f) it had been impossible for Olimpia to pay the first instalment of the Player's transfer fee; but it had failed in its duty to objectively demonstrate the existence of what it alleged. For the Sole Arbitrator, it was not sufficient for Olimpia to simply assert a

state of fact for him to accept it as true. As a consequence, Olimpia had not brought forward any convincing reasons allowing the Sole Arbitrator to deviate from the principle *"pacta sunt servanda"* on the basis of a *force majeure* event. Any other approach based on so little evidence would have led to the unreasonable result that, in the presence of a worldwide pandemic, the *force majeure* exception would be applied automatically, regardless of the specific circumstances of each situation. While it could be accepted that the Pandemic would have made Olimpia's performance of its side of the contract more difficult, it was certainly not impossible. In this regard, it was well-established CAS jurisprudence that financial difficulties or the lack of financial means of a club could not be invoked as a justification for the non-compliance with a payment obligation (CAS 2018/A/5537 and references).

4. *Clausula rebus sic standibus*

The second issue for the Sole Arbitrator was whether he could revise the Transfer Agreement to adapt the payment schedule to the changed circumstances following the spread of the COVID-19. Olimpia contended that the requirements of the *clausula rebus sic stantibus* principle were met and that as a consequence, a) it should be temporarily exempted from fulfilling its contractual obligations, until better times, b) the payment schedule implemented in the Transfer Agreement should be revised in order to take into account the financial impact of the Pandemic, or c) *"On a subsidiary basis",* CAS should apply any alternative solution deemed appropriate *"to restore the balance in the contract"*.

The Sole Arbitrator held that according to the principle *pacta sunt servanda*, the terms of the contract had in principle to be respected. However, the contract could be amended by the judge when the circumstances under which it had been concluded had changed to such an extent that the continuation of the contract could not be required. Such an intervention by the judge had to remain an exception and was acceptable only if subsequent, unforeseen and inevitable circumstances resulted in an obvious disproportion between performance and consideration that would have made one party's insistence on its claim seem abusive. This concept, also known as *clausula rebus sic stantibus*, arised from the general principles of fairness and good faith based on Article 2 CC. The Sole Arbitrator recalled that the *clausula rebus sic stantibus* principle came into play if, at least, the following two requirements were met: a) the change in the contractual relationship was caused by new, unforeseeable and inevitable circumstances; and b) the performance became excessively burdensome for one party; the balance between performance and consideration was so seriously disturbed that performance of the contractual obligation could not be demanded in good faith.

In the particular case, the Sole Arbitrator had no difficulty to accept that the first requirement was met as hardly anyone would seriously argue that the Pandemic and its consequences had been foreseeable or evitable. With respect to the second condition however, Olimpia had absolutely not satisfied its burden of proof that the Pandemic had created an obvious disproportion between the transfer of the Player and the payment of the first instalment of the transfer fee and that, given the circumstances, it would have been abusive on the part of Dynamo to insist that Olimpia abided by the Transfer Agreement. In particular, considering that a) the Parties had agreed in the Transfer Agreement that the Player's transfer market value was of USD 10,000,000, b) that the agreed transfer fee was only of USD 5,000,000, c) payable over a period of 2 years and 4 months, d) that Olimpia was still enjoying the Player's services, e) that it was undisputed that the Player had been

fielded on a regular basis by Olimpia, the Sole Arbitrator did not consider that Dynamo's demand of payment of the first instalment was abusive or that there was any disproportion between the Parties' reciprocal commitments. Olimpia could not ignore that a delayed payment of the first instalment could have triggered Articles 4.2 and 4.3 of the Transfer Agreement and had to take the responsibility for it, as it had not demonstrated that it was not at fault.

5. Interpretation of a contractual clause

The third issue was for the Sole Arbitrator to assess the consequences of Olimpia's non-compliance with the terms of the Transfer Agreement. Dynamo claimed that the FIFA Single Judge had misquoted Article 4.2 of the Transfer Agreement and, therefore, had failed to correctly interpret the Parties' intention. Contrary to Dynamo's position, Olimpia was of the view that Articles 4.2 and 4.3 of the Transfer Agreement were not cumulative.

The Sole Arbitrator recalled that when the interpretation of a contractual clause was in dispute, the judge had to seek to discover the true and mutually agreed upon intention of the parties, without regard to incorrect statements or manner of expressions used by the parties by mistake or in order to conceal the true nature of the contract (Article18 para. 1 CO). When the mutually agreed real intention of the parties could not be established, the contract had to be interpreted according to the requirements of good faith. The judge had to seek to determine how a declaration or an external manifestation by a party could have been reasonably understood depending on the individual circumstances of the case. The requirements of good faith tended to give the preference to a more objective approach.

In assessing the correct interpretation of Article 4.2 of the Transfer Agreement, the Sole Arbitrator held that the findings set out in the Appealed Decision showed that the FIFA Single Judge had based his conclusions on a misquotation of Article 4.2, which he, for that reason, had found unclear. In fact, based on the actual wording of Article 4.2, the *"10% p.a"*. interest applied only to the *"outstanding amount"*. This provision made a clear difference between the *"outstanding amount"*; *i.e.* the unpaid transfer fee (which triggered the penalty) and the penalty; *i.e. "a fine of 10% of the outstanding amount"*. In other words, Article 4.2 of the Transfer Agreement used the words *"outstanding amount"* when it referred to the unpaid transfer fee, and it referred to *"fine"* for the penalty. Considering that the provision clearly stated that *"10% p.a. interest [is applicable] on the outstanding amount"*, there was no reason to believe that the said interest rate was also applicable to the *"fine"*.

Then, in coming to assess whether the Parties had intended Articles 4.2 and 4.3 of the Transfer Agreement to be cumulative or not, the Sole Arbitrator held that, in view of the wording of the disputed provisions, it appeared that Articles 4.2 and 4.3 of the Transfer Agreement dealt with two distinct situations and, thus, were cumulative. Article 4.2 set out a *"fine"* and the applicable default interest in the event of a 15-day delay of *"any of the payments under the present Contract"*. As clearly expressed, Article 4.2 was obviously applicable to *"any payment"* which fell due. Article 4.3 of the Transfer Agreement dealt exclusively with the requirements, which needed to be met for the remaining instalments of the transfer fee to be declared immediately payable. Nothing in Article 4.3 entered into conflict with what was provided for under Article 4.2 of the contract.

6. Penalty clause

Furthermore, Olimpia was arguing that the "acceleration clause" provided under Article 4.3 of the Transfer Agreement was actually a

"hidden interest clause" which increased the interest rate to an amount incompatible with Swiss public policy.

The Sole Arbitrator held that the legal principles regarding penalty and/or interest rate, and whether or not they could be deemed excessive, were to be summarised as follows:

- A penalty can be agreed for the event of non-performance or defective performance of a contract (Article 160 para. 1 CO). In such situation, the penalty clause must be considered "exclusive"; i.e. the creditor must choose between compelling the performance and claiming the penalty. At the same time, a penalty can be set for the event of failure to comply with the stipulated time or place of performance (Article 160 para. 2 CO). In such situation, the penalty is "cumulative": this means that the creditor might claim the penalty in addition to performance, provided he has not expressly waived such right or accepted performance without reservation. In such case, the creditor might as well ask for the default interest (Article 104 CO). When the parties have not expressly specified the kind of clause they intended to stipulate, the nature of the penalty depends on the nature and meaning of the main obligation that is guaranteed. The burden of proof of the "cumulative" nature of the clause falls upon the creditor (Article 8 CC).
- Pursuant to the principle of contractual freedom, the parties can freely determine the amount of the contractual penalty. However, accoding to art. 163 al. 3 CO, an excessive penalty must be reduced. This provision is mandatory and the parties cannot contractually depart from it. Therefore, the judge (or a Panel) shall examine this amount. A penalty is abusive when its amount is unreasonable and clearly exceeds the admissible amount in consideration of justice and equity. A balance of interests is required to decide whether a penalty is abusive or not in each case. For this purpose, the creditor's interest, the seriousness of the breach of the contract and the debtor's fault, along with financial situation of both parties, are determinant. The nature of the agreement, the debtor's professional background and the aim of the penalty also have to be taken into consideration in the balance. However, penalty fees may not be deemed automatically as abusive just because they exceed the costs of damages suffered by the creditor. Indeed, including a punishment aspect, the penalty does not have to meet exactly the amount of the damage.

For the Sole Arbitrator, the penalty clause contained in Article 4.2 of the Transfer Agreement qualified as a contractual penalty. Indeed, it contained all the necessary elements required for such purpose: a) the parties bound thereby were mentioned, b) the kind of penalty had been determined, c) the conditions triggering the obligation to pay a penalty were set, d) its measure was identified. In addition, in light of other precedents with similar facts, the penalty and interest rate agreed by the Parties were not deemed excessive. In reaching this conclusion, the Sole Arbitrator took account of the following considerations, *inter alia*: (i) the Transfer Agreement had been freely negotiated and willingly entered into by Olimpia, which had accepted Articles 4.2 and 4.3; (ii) Dynamo had a legitimate interest in securing payment of the agreed transfer fee, in respect of the Player, whose services it had lost to Olimpia; (iii) to date, Olimpia had not paid in full or in part any of the contractually agreed instalment, affirming that it would rather settle other debts than make any further payment to Dynamo in view of the rigid attitude the latter had shown between March and April 2020, thereby confirming that the payment of the transfer fee was not impossible; (iv) the

amounts paid to Dynamo represented 8% of the contractually agreed transfer fee and 40% of any instalment; (v) the penalty fees (USD 100,000 with respect to the non-payment of the first instalment + USD 400,000 with respect to the non-payment of the remaining instalments of the transfer fee, which fell due after a 45-day delay) amounted to 10% of the total agreed transfer fee (of USD 5,000,000).

7. Maximum interest rate

With respect to the payment of default interest, the question had to be assessed according to Swiss law as it was not governed by FIFA Regulations. According to the Sole Arbitrator, it resulted from the applicable provisions (art. 73 and 104 CO) that the default interest was of 5% but that nothing prevented the Parties from agreeing on a higher interest rate as long as it stayed within the limits of Article 73 (2) CO. The Swiss Federal Tribunal had held that an interest rate as high as 18% *per annum* was acceptable but that above this limit, the interest rate was usurious and, therefore, contrary to public morals. Hence the 10% interest agreed in the Transfer Agreement was acceptable.

Decision

In light of the foregoing, the Sole Arbitrator held that Dynamo was entitled to the following amounts: (i) USD 1,000,000 plus 10% interest *p.a.* as from 31 March 2020 until the date of effective payment; (ii) USD 4,000,000 plus 10% interest *p.a.* as from 1 June 2020 until the date of effective payment; (iii) USD 500,000 as the contractually agreed penalty, reduced by USD 400,000, corresponding to the payments made on 4 September 2020, on 21 September 2020 and on 6 October 2020, respectively. For that reason, the appeal filed by Dynamo was partially upheld and so was Olimpia's appeal, as the latter had asked the CAS to take into account the payments already made, which the FIFA Single Judge had not done.

CAS 2021/A/7720
IBV Football Club v. Clube de Futebol Os Belenenses
22 November 2021

Football; Training compensation; Admissibility of an appeal; Preclusion to address the merits of an appeal

Panel
Mrs Yasna Stavreva (Bulgaria), Sole Arbitrator

Facts

The relevant Player, born on 5 April 1997, was registered with Clube de Futebol Os Belenenses (the "Respondent") as an amateur from 5 August 2015 until 30 June 2016, during the sporting season of his 19th birthday. According to the information available in the Transfer Matching System (TMS), the Player was then registered with various clubs, always as an amateur player. On 7 March 2019, the Player was internationally transferred from the Portuguese football club GD Peniche to IBV Football Club (the "Appellant") and was registered by the Appellant as a professional player, having acquired such status for the first time in his career and still at the age of 21.

On 30 October 2020, the Respondent filed a claim against the Appellant before the Fédération Internationale de Football Association (the "FIFA"), seeking payment of EUR 18,082.19 as outstanding training compensation. On 18 January 2021, the FIFA Administration issued *via* TMS the following official proposal (the "Proposal") to the Parties:

"In accordance with Article 13 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber [the "Procedural Rules" (edition June 2020)] *(…) and the FIFA Circular 1689, please find enclosed the proposal made by the FIFA secretariat in accordance with the above-mentioned provision (Enclosure 1). In sum, the proposed amount due by the Respondent to the Claimant is as follows:*

EUR 18 082.19 as training compensation, plus 5% interest p.a. as of the due date

In accordance with Article 13 of the Procedural Rules, it is informed that the parties have to either accept or reject the proposal ***within the 15 days following this notification via TMS, i.e. until 2 February 2021****. In this regard the Claimant (Clube de Futebol Os Belenenses) is limited only to accept or reject the proposal, excluding hereby any possibility to amend its original claim.*

In case a proposal is accepted by all parties or the parties fail to provide an answer to the FIFA Player Status' Department within stipulated deadline, the proposal will become binding. (…) [I]*n case of rejection of the proposal by one of the parties, a formal decision (…) will be taken (…)".*

None of the Parties rejected the Proposal within the 15 days following its notification *via* TMS, *i.e.* until 2 February 2021. On 4 February, the FIFA Administration issued a Confirmation letter for the distribution of the training compensation with registration of the Player stating:

"As both parties either accepted the proposal or failed to respond it, we confirm that the following now constitutes a final and binding decision on all parties pursuant to the FIFA Regulations on the Status and Transfer of Players [the "FIFA RSTP"] *(…).*

Decision: IBV's Football Club shall pay Clube de Futebol Os Belenenses EUR 18 082.19 plus 5% interest per annum as from 7th, April 2019 until the date of effective payment. Payment (including any applicable interest) shall be made within 30 days as from the notification of the confirmation letter*".*

The confirmation letter was notified to the Parties on 4 February, 2021 *via* TMS (the "Appealed Decision"). On 22 February 2021, in accordance with the Code of Sports-related Arbitration (the "Code"), the Appellant filed with CAS its appeal. In its Statement of Appeal the Appellant *inter alia* requested *"CAS to issue a new decision (…) that no training compensation shall be due for the transfer of the Player"*. The Appellant's position, in essence, may be summarized as follows:

CAS has jurisdiction to decide the present matter and the challenged decision constitutes an appealable decision due to the following reasons:

The decision taken on the basis of Article 13(1) of the Procedural Rules can be qualified as a decision without grounds. The fact that FIFA opted to make a proposal in accordance said article should not leave to the Appellant being deprived of its rights to request the grounds of the decision, and furthermore, file an appeal. On the other hand the wording of Article 13(1) of the Procedural Rules must be examined in the light of the wording of Article 15(2) of the Procedural Rules which distinctly states that only failure to request grounds of the decision within the set time limit results in the parties having waived their right to file an appeal. The Appellant requested the grounds of the decision in the time limit and prior to filing an appeal as pointed in Art. 15(2) of the FIFA Procedural Rules. The Appellant did not waive its right to file an appeal and has the right to appeal.

The Respondent does not have the right to claim training compensation because it does not meet the criteria set out in Art. 6 para. 3 of Annex 4 to the RSTP [Special provisions for the EU/EEA].

On 8 March, 2021 FIFA notified CAS that it renounced its rights to request possible intervention in the present proceedings. In its statement FIFA considered the appeal inadmissible as it concerns the determination of the amount owed by the Appellant and summarized the following reasons:

"(i). The Appellant already had the possibility to object the Proposal as per applicable rules but it did not execute its right of objection.

(ii). As the Appellant did not object the Proposal it became final and binding on 2 February, 2021.

(iii). The present appeal was brought against a document that is no longer appealable".

In its Answer, the Respondent requested CAS to *"Reject the appeal, being inadmissible"* and to *"Entirely upheld the proposal"*. The Respondent's position can be summarized as follows:

The appeal against the Confirmation letter is legally inadmissible. The Proposal was not rejected by the Appellant within the established deadline. Hence it became binding and enforceable by 3 February 2021. The *"human error"*, as pointed by the Appellant is not a reason for misinterpretation of the deadline to register a rejection against the Proposal. The Confirmation letter only confirms the content of the Proposal and is not addressed to the right of collecting training compensation and consequent calculation, which are considered to be the disputed aspects. The appealable decision should be the Proposal, not the Confirmation letter and it should have been appealed within 21 days as from the date when it was served to the parties *via* TMS (*i.e.* on 18 January 2021).

If it is deemed that the Confirmation letter may be appealed then it should be recognized that the Respondent is entitled to training compensation because it had complied with the prerequisites of Art. 6 para. 3 of Annex 4 to the RSTP, which reads:

"If the former club does not offer the player a contract, no training compensation is payable unless the former club can justify that it is entitled to such compensation. The former club must offer the player a contract in writing via registered post at least 60 days before the expiry of his current contract. Such an offer shall furthermore be at least of an equivalent value to the current contract. This provision is without prejudice to the right to training compensation of the player's previous club(s)".

Following Art. 6 para. 1 of Annex 4 to the RSTP, taking into consideration FIFA Circular letter №1627 and the fact that the Player was registered with the Respondent during the sporting season of his 19th birthday, the Appellant has to pay to the Respondent a training compensation based on the average between UEFA's Categories 4 (Respondent's UEFA Category) and 3 (Appellant's UEFA Category) in the total amount of EUR 18,082.19. The Respondent is also of the opinion that the obligation to offer a contract to the Player within the context of Art. 6 para. 3 of Annex 4 to the RSTP does not apply to it. First it is because the Respondent was not the Player's former club and said article solely addresses the former club. Secondly, it is because during the 2015/2016 sporting season, the Respondent had only youth teams competing in amateur leagues.

Reasons

1. Admissibility of the appeal

The Sole Arbitrator notes that FIFA confirmed in the Appealed Decision that the content of the Proposal had entered into force. Whereas the Appealed Decision confirmed that the amount of EUR 18,082.19 was to be paid by the Appellant to the Respondent, as proposed in the Proposal, the Sole Arbitrator considers that the Appealed Decision contains some aspects that were not addressed in the Proposal, but that were only imposed on the Appellant in a final and binding manner by means of the Appealed Decision: the Appealed Decision (1) confirmed the Proposal was binding either in case it was accepted by all parties or if the parties failed to provide an answer; (ii) confirmed that the Proposal had become binding; (iii) confirmed that the Appellant had to pay the Respondent an amount of EUR 18,082.19, whereas the Proposal only refers to the amount as a proposal that could still be objected; (iv) provided for a grace period of 30 days; (v) determined that interest at the rate of 5% *p.a.* would have to be paid over the due amount as soon as the 30 day grace period elapsed; (vi) determined that the matter would be referred to the FIFA Disciplinary Committee (DC) if the Appellant would not pay the due amount within 30 days.

The amount to be paid set forth in a proposal only becomes final and binding if such proposal is accepted by both parties or if no objection is raised against it within the stipulated time limit. However, the parties to which the proposal is issued do not necessarily know whether the opposing party accepted or rejected the proposal until this is confirmed by FIFA. Accordingly, the Sole Arbitrator finds that a proposal itself cannot be considered a final and binding decision, but the elements mentioned above lead to the conclusion that only a Confirmation letter such as the Appealed Decision is a decision that definitely affects the legal position of the parties involved.

Regarding the Appealed Decision the Sole Arbitrator also notes that there is a standing practice of FIFA demonstrated in several decisions of the FIFA DC which consistently consider that letters very similar to the Appealed Decision have to *"be regarded as a decision since it materially and definitely affected the legal position of the Debtor and the Creditor, and was therefore enforceable before the competent authority".*

Such practice complies with the CAS jurisprudence (CAS 2020/A/7252), which also stands that the Confirmation letter should be considered as an appealable decision.

Thus, the allegations of the Appellant that the Appealed Decision constitutes an appealable decision are correct but not because of a *"decision without grounds"* but because of its legal nature as it is demonstrated above. For these reasons, the Sole Arbitrator finds that the Appellant's appeal against the Appealed Decision is admissible. Furthermore, the appeal was filed within the 21-day deadline foreseen in Article 58(1) of the FIFA Statutes. Whether the Appellant can still challenge the amount awarded to the Respondent by means of the Appealed Decision or whether it is precluded to do so, is a different issue and will be discussed below.

2. Preclusion to address the merits of an appeal

The Sole Arbitrator considers that it may be precluded from addressing the merits of the Appellant's appeal, because of its failure to object against the content of the Proposal by 2 February 2021. In order to determine whether or not this is the case, the Sole Arbitrator is required to verify whether the Proposal was correctly issued and notified to the Appellant, in compliance with Article 13 of the FIFA Procedural Rules.

The Sole Arbitrator finds that said provision provides a regulatory basis for the FIFA administration to issue a proposal in disputes related to training compensation, but that this authority is subject to certain preconditions that need to be complied with. The first requirement that the dispute must concern training compensation or the solidarity mechanism is undisputedly complied with in the case at hand. As to the second precondition the assessment of whether or not there are complex factual or legal issues is to be made by FIFA administration on a *prima facie* basis and on the basis of the claim alone. The Sole Arbitrator agrees with FIFA's assessment that the claim for training compensation submitted by the Respondent on 30 October 2020 did not seem *prima facie* to raise any complex factual or legal issues, thus permitting FIFA administration to issue the Proposal. For these reasons, the Sole Arbitrator considers that FIFA was entitled to issue and notify the Proposal to the Parties on 18 January 2021.

Once the Proposal has been notified to the parties *via* TMS and none of the parties rejects the proposal within the 15 days following its notification *via* TMS, it becomes binding on them. That conclusion derives from Article 13 (1) of the FIFA Procedural Rules and FIFA Circular №1689, determining that: *"proposal will become final and binding after 15 days following its notification if it is accepted by all parties or the parties fail to provide an answer within the deadline"*. The Sole Arbitrator finds that the Proposal was properly notified to the Parties on 18 January 2021 but not rejected by the Appellant within the 15-day time limit. Hence, it became binding and enforceable by 3 February 2021. The misinterpretation of the deadline day for registering an objection cannot justify its failure to respond. The Sole Arbitrator considers such reasoning quite untenable and based on the sufficient regulatory basis qualifies the failure to respond as an acceptance of the Proposal.

On account of the above-mentioned findings, the Sole Arbitrator is of the opinion that the regulatory framework implemented by FIFA precludes the Appellant from disputing the content of the Proposal after 2 February 2021. Since failure to respond is deemed acceptance under the pertinent FIFA rules, the Appellant is legally deemed to have accepted the content of the Proposal and, by the same token, to have waived its right to reject the Proposal by the elapsing of the deadline of 2 February 2021.

Although the amount to be paid to the Respondent was only formally confirmed by means of the Appealed Decision, the Appellant was already precluded from challenging the amount of EUR 18,082.19 to be paid to the Respondent by 2 February 2021. Consequently, the Sole Arbitrator concludes that the Appellant is precluded from revisiting the Appealed Decision insofar as it concerns the amount due to the Respondent.

Decision

The appeal filed by IBV Football Club, Iceland on 22 February 2021 against the Decision issued on 4 February 2021 by FIFA is admissible. The appeal filed by IBV Football Club, Iceland on 22 February 2021 against the Decision issued on 4 February 2021 by FIFA is rejected. The Decision issued on 4 February 2021 by FIFA is confirmed.

TAS 2021/A/7824
Mahamadou Traoré c. CS Constantine
3 février 2022

Football; Résiliation d'un contrat de travail par accord mutuel; Exception d'incompétence et compétence du TAS; Droit applicable; Admissibilité de moyens de preuve procurés de manière illicite; Charge de la preuve; Condition de validité d'une convention de résiliation; Conséquence de l'inefficacité de la convention de résiliation

Panel
Me Patrick Grandjean (Suisse), Arbitre unique

Faits

Le 25 juillet 2019, M. Mahamadou Traoré, joueur de football professionnel de nationalité malienne ("le Joueur") est entré en Algérie. Étant de nationalité malienne, il était exempté de visa pendant une période maximale de 90 jours.

Le 30 juillet 2019, le Joueur a signé un contrat de travail le liant au Club Sportif Constantinois ("CSC"), club de football algérien pour une période allant du jour de la signature jusqu'au 31 mai 2021 (le "Contrat de travail").

Le 27 octobre 2019, M. Denis Jean Lavagne, entraîneur principal de CSC, a établi un rapport relatif au Joueur attestant que ce dernier *"ne présente pas assez de qualités pour apporter le plus que l'on attend d'un joueur étranger au sein de l'équipe professionnelle du CSC, par conséquent il semble préférable pour lui et pour le CSC qu'il résilie son contrat et signe dans un autre club"*.

CSC a organisé un stage pour sa première équipe, lequel devait se dérouler en Tunisie à partir du 11 janvier 2020.

En date du 11 janvier 2020, vers 18 heures, et au moyen de l'application WhatsApp, le Joueur a interpellé le directeur sportif de CSC quant à sa participation audit stage. Il a alors été prié de s'adresser au directeur général du club.

La version des Parties diffère quant à ce qui s'est dit lors de la rencontre entre le Joueur et le directeur général de CSC:

- Le Joueur, dans son mémoire d'appel, soutient que *"[le] 11 janvier 2020, lors d'une entrevue en personne, le directeur général du Club a convié le Joueur à se présenter le lendemain afin de signer les documents nécessaires à la demande et l'obtention d'un "visa de travail", lui assurant qu'il pourrait entrer et sortir de Tunisie, pays dans lequel le stage se déroulait. A aucun moment l'éventualité d'une résiliation n'est exposée. Cela corrobore une discussion du 9 février 2020 dans laquelle le directeur général informait le Joueur qu'un dossier de régularisation de sa situation allait être préparé (…)"*.
- CSC, dans le mémoire réponse déposé dans le cadre de la procédure devant la FIFA, expose que *"[le] 11 Janvier 2020, jour de reprise des entrainements, nous avons reçu le joueur dans nos bureaux pour l'informer de la décision du nouvel entraineur de ne pas compter sur lui pour la suite de la compétition et que nous étions dans l'obligation de négocier une résiliation amiable du contrat et rendez-vous fut pris pour le 13 Janvier 2020"*.

Le 15 janvier 2020 et par l'intermédiaire de son ancien conseil, M. Slim Boulasnem, le Joueur a formellement mis CSC en demeure de lui verser les salaires impayés des mois de novembre et décembre 2019 et s'est plaint de ne pas avoir été convoqué au stage en Tunisie *"pour la seule raison qu'il n'a pas de carte de séjour [ce qui] constitue une défaillance administrative inacceptable"*. Il a insisté sur le fait qu'il n'avait pas pu quitter le territoire algérien depuis la signature du Contrat de travail, par crainte de poursuites judiciaires et redoutait d'être expulsé à tout moment.

Le 21 janvier 2020, CSC a accusé réception de la mise en demeure du Joueur du 15 janvier 2020, tout en exprimant sa surprise dès lors que ce dernier avait *"signé une résiliation du contrat de travail à l'amiable en date du 13 janvier 2020"*.

Le 23 janvier 2020, le nouveau mandataire du Joueur, M. Loïc Alves, a écrit ce qui suit à CSC:

"Par la présente, nous venons attirer votre attention sur la situation intolérable dans laquelle se trouve le joueur d'origine malienne M. Mahamadou Traoré.

Ce dernier a signé un contrat de travail avec le Club Sportif Constantinois le 30 juillet 2019. En raison de l'urgence de la situation, nous ne nous attarderons pas, dans la présente lettre, sur les circonstances dans lesquelles le club prétend que le contrat a été résilié.

Il convient plutôt ici d'agir vite afin que le joueur puisse quitter le pays et rentrer chez lui au Mali en toute sécurité.

En effet, le club a manqué à son obligation de régularisation administrative de son salarié afin que ce dernier puisse résider et travailler en toute légalité sur le territoire algérien. Cette obligation est notamment tirée de l'Article 18 du Règlement du Statut et du Transfer des Joueurs de la FIFA.

En raison de ce manquement du club, le visa de 90 jours avec lequel M. Traoré a pu entrer dans le pays pour rejoindre le club étant arrivé à expiration, le joueur ne dispose d'aucun document pouvant justifier sa présence en Algérie.

Nous vous invitons donc à entamer toutes les démarches nécessaires afin de régulariser cette situation dans les sept (7) prochains jours pour que M. Mahamadou Traoré puisse légalement et en toute sérénité quitter le pays sans qu'aucun risque, et en particulier de nature judiciaire, ne pèse sur lui.

Nous croyons en votre bonne volonté et attendons impatiemment un retour de votre part".

Le 31 janvier 2020, M. Loïc Alves a interpellé CSC une nouvelle fois, lui impartissant un délai de trois jours pour effectuer les formalités nécessaires permettant au Joueur de quitter le territoire algérien en toute légalité.

Le 4 février 2020, CSC a accusé réception des deux lettres envoyées par M. Loïc Alves en lui rappelant que le Joueur avait accepté de mettre fin au Contrat de travail par accord amiable intervenu le 13 janvier 2020. En outre, CSC a affirmé que les salaires des mois de décembre 2019 et janvier 2020 avaient été payés le 30 janvier 2020 et que le retour du Joueur dans son pays était prévu pour le 10 février 2020.

Le 10 février 2020, le Joueur a pu quitter l'Algérie grâce à une autorisation temporaire délivrée par les autorités locales en date du 9 février 2020, valable pour 30 jours.

Par la suite, le Joueur a conclu un contrat de travail avec le club tunisien Olympique de Béja, valable du 7 décembre 2020 au 30 juin 2023. Selon le contrat précité et pour la première saison, il a droit à un salaire mensuel de TND 3'000 ainsi qu'à une prime de rendement de TND 50'000.

Le 7 avril 2020, le Joueur a initié une procédure à l'encontre de CSC auprès de la FIFA pour rupture unilatérale du Contrat de travail.

Dans une décision rendue le 25 février 2021, la CRL a relevé avoir procédé à l'examen des versions originales et d'une version numérisée en haute définition, de l'accord amiable de résiliation du 13 janvier 2020. La CRL a estimé que le Joueur avait bel et bien signé l'accord de résiliation à l'amiable. Elle a alors rejeté la demande du Joueur au motif que *(…) la CRL a établi que [CSC] avait respecté pleinement ses obligations émanant de l'accord de résiliation à l'amiable, et par conséquent, la plainte du demandeur doit être rejetée. En effet, compte tenu du contenu clair de l'accord de résiliation à l'amiable, le joueur ne serait plus en position d'alléguer que le club aurait résilié le*

contrat sans juste cause, dans la mesure où cette question aurait été réglée par le biais de l'accord susvisé".

Le 30 mars 2021 et en application des articles R47 et suivants du Code de l'arbitrage en matière de sport (le "Code"), le Joueur a déposé une Déclaration d'Appel auprès du TAS à l'encontre de la Décision Litigieuse.

Considérants

1. Exception d'incompétence et compétence du TAS

En date du 23 juillet 2021 et pour la première fois, CSC a contesté *"la compétence du TAS LAUSANNE pour statuer dans le présent litige".*

Dès lors que le TAS a son siège en Suisse et que, au moment de la signature du Contrat de travail, aucune des Parties n'avait son domicile ni sa résidence habituelle en Suisse, le présent arbitrage est de nature internationale de sorte qu'il est régi par le chapitre 12 de la Loi fédérale sur le droit international privé ("LDIP"). Conformément à l'article 186 LDIP, le TAS statue sur sa propre compétence.

En vertu de l'article 186 (2) LDIP, l'exception d'incompétence doit être soulevée avant toute défense sur le fond. C'est un cas d'application du principe de la bonne foi, ancré à l'article 2 (1) du Code civil suisse ("CC"), qui régit l'ensemble des domaines du droit, y compris l'arbitrage (arrêt du Tribunal fédéral ("ATF") 4A_682/2012 du 20 juin 2013 consid. 4.4.2.1). Cette règle 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 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) (voir TAS 2018/A/5994 consid. 57).

Il y a lieu de relever que CSC a soulevé l'exception d'incompétence du TAS la première fois le 23 juillet 2021, puis à nouveau le 14 août 2021 ainsi que lors de l'audience du 23 août 2021. Dans tous ses courriers déposés valablement auprès du Greffe du TAS avant ces dates, CSC n'a jamais contesté la compétence du TAS. L'objection de CSC est dès lors tardive et pourrait être écartée sans autre considération supplémentaire.

Par ailleurs, il ressort du dossier de la FIFA que CSC est intervenu dans la procédure initiée par le Joueur devant la CRL, sans jamais contester la compétence de cette dernière instance. Au contraire et dans la réponse qu'il avait valablement déposée devant la CRL, CSC a pris des conclusions reconventionnelles à l'encontre du Joueur, acceptant ainsi la compétence des organes de la FIFA. La Décision Litigieuse, contre laquelle CSC n'a pas recouru, indique bien qu'elle est susceptible d'appel devant le TAS dans un délai de 21 jours à compter de sa notification selon l'article 58(1) des statuts de la FIFA.

2. Droit applicable

Les parties qui décident de soumettre leurs éventuels litiges à la compétence du TAS choisissent par là même également – implicitement, mais clairement - de se voir appliquer la réglementation instituée par ce tribunal arbitral (cf. HAAS U., Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law – in Bulletin TAS 2015/2, pp. 7ss, spéc. pp. 9-10).

Les Parties acceptent ainsi que le droit applicable au fond soit déterminé en vertu de l'article R58 du Code, qui a la teneur suivante:

"La Formation statue selon les règlements applicables et, subsidiairement, selon les règles de droit choisies par les parties, ou à défaut de choix, selon le droit du pays dans lequel la fédération, association ou autre organisme sportif ayant rendu la décision attaquée a son domicile ou selon les règles de droit que la Formation estime appropriées. Dans ce dernier cas, la décision de la Formation doit être motivée".

L'Arbitre unique partage la position exprimée dans le précédent TAS 2018/A/5896 (consid. 62), en vertu duquel *"il découle de l'art. R58 du Code que les questions litigieuses doivent, en priorité, être résolues par la Formation en application de la règlementation applicable au cas d'espèce. Les dispositions règlementaires topiques ont ainsi la primauté sur les règles de droit éventuellement choisies par les parties, par exemple dans le contrat litigieux. Ces règles de droit ne peuvent entrer en ligne de compte dans la résolution du litige que subsidiairement, comme le précise l'art. R58 du Code (voir HAAS U. précité, pp. 7ss, spéc. pp. 10ss). En l'espèce, la décision attaquée émane de la CRL de la FIFA. Par conséquent, les règlements applicables (selon l'article R58 du Code) correspondent aux statuts et règlements de la FIFA".*

En vertu de l'article 57 (2), deuxième phrase, des Statuts de la FIFA, *"Le TAS applique en premier lieu les divers règlements de la FIFA ainsi que le droit suisse à titre supplétif".*

Eu égard à ce qui précède, l'Arbitre unique appliquera d'abord et avant tout les statuts et règlements de la FIFA ainsi que le droit suisse à titre supplétif. Subsidiairement, afin de traiter de points spécifiques qui ne seraient ni réglés par les règlements de la FIFA ni par le droit suisse, l'arbitre unique se réfèrera aux règlements de la FAF ainsi qu'aux éventuelles autres règles de droit auxquels les règlements de la FAF renverraient ainsi que de la loi n° 90-11 du 21 avril 1990, relative aux relations de travail.

3. Admissibilité de moyens de preuve procurés de manière illicite

Au cours de l'audience devant le TAS, le Joueur a admis que ces enregistrements sonores produits par le Joueur à l'appui de son Appel avaient été effectués à l'insu du directeur général de CSC. A cette même occasion, CSC a relevé que ces enregistrements contrevenaient au Code pénal algérien et ne pouvaient ainsi être pris en considération.

En vertu de l'article 184 (1) LDIP, *"Le tribunal arbitral procède lui-même à l'administration des preuves"*. Cette disposition donne aux arbitres le pouvoir de statuer sur l'admissibilité d'une preuve soumise par une des parties (TAS 2009/A/1879 para. 36 et références). Lorsqu'une partie s'est procurée des moyens de preuve de manière illicite, le tribunal est libre dans sa décision de les prendre en considération ou non. Il n'y a pas de règle qui s'imposerait d'emblée à lui. L'autonomie des arbitres est de rigueur, *a fortiori*, au regard de l'article 152 CPC qui invite le juge à décider en pareil cas si l'intérêt à la manifestation de la vérité est prépondérant (Andreas Bucher, Commentaire Romand, Loi sur le droit international privé, éd. 2011, ad. art. 184, n. 23, p. 1621). Dans le même sens et de manière constante, le TAS a retenu ce qui suit (TAS 2009/A/1879 consid. 69; TAS 2011/A/2433 consid. 35; CAS 2016/O/4504 consid. 68).

4. Charge de la preuve

Le fond de l'affaire repose sur la position antagoniste des Parties quant à l'authenticité et la portée de la Convention de Résiliation à l'amiable du Contrat de travail, datée du 13 janvier 2020. Le Joueur allègue a) n'avoir jamais signé une telle convention, b) que dans l'hypothèse où la signature apposée sur ce document était effectivement la sienne, elle aurait été obtenue de manière frauduleuse ou ensuite d'une erreur essentielle de sa part, c)

que, dans tous les cas, ladite convention viole le droit impératif et est de nul effet. CSC soutient que le Joueur a signé la Convention de Résiliation en toute connaissance de cause et doit en accepter les conséquences.

Dans le cadre d'une procédure arbitrale devant le TAS, la charge de la preuve incombe à la partie qui invoque un droit découlant d'un fait qu'elle allègue (article 8 du Code civil suisse). Il ne suffit pas qu'elle fasse simplement valoir un état de fait pour que l'Arbitre unique l'accepte comme étant vrai (CAS 2017/A/5051; CAS 2014/A/3546).

Aucune preuve ne permet de favoriser la version du Joueur à celle de CSC qui soutient que ce dernier a signé la Convention de Résiliation en toute connaissance de cause. La position de CSC est renforcée par le fait que ce dernier document existe et que, jusqu'à preuve du contraire, la signature et l'empreinte digitale du Joueur y figurent.

Dans ces circonstances, l'Arbitre unique arrive à la même conclusion que la CRL, à savoir que le Joueur a bel et bien signé la Convention de Résiliation datée du 13 janvier 2020.

5. Condition de validité d'une convention de résiliation

Le RSTJ ne précise pas quelles sont les conditions que doit réunir la résiliation par accord mutuel pour être valable. Par conséquent, il y a lieu de se référer au droit suisse, lequel est applicable au présent litige en tant que droit supplétif.

Les parties peuvent à tout moment convenir, d'un commun accord, de mettre fin au rapport d'emploi (ATF 118 II 58 consid. 2a et les arrêts cités). Cette résiliation conventionnelle n'est soumise à aucune forme particulière et peut donc être donnée par écrit, oralement ou même tacitement (ATF 4C.397/2004 consid. 2.1). Cependant, l'acceptation par l'employé d'une résiliation proposée par l'employeur ne permet pas, à elle seule, de conclure à l'existence d'une résiliation conventionnelle et, par là même, à la volonté implicite du travailleur de renoncer à la protection accordée par le droit du travail (ATF 4A_376/2010 du 30 septembre 2010 consid. 3; 4A.474/2008 du 13 février 2009 consid. 3.2 et 4C.127/2005 du 2 novembre 2005 consid. 4.1). L'accord litigieux doit être interprété restrictivement; il ne peut constituer une résiliation conventionnelle que dans des circonstances exceptionnelles, notamment lorsqu'est établie sans équivoque la volonté des deux parties de se départir du contrat (ATF 4C.397/2004 consid. 2.1; 4A_362/2015 du 1er décembre 2015 consid. 3.2; 4C.127/2005 du 2 novembre 2005 consid. 4; 4A_376/2010 du 30 septembre 2010 consid. 3; 4C.27/2002 du 19 avril 2002, consid. 2). Selon les articles 341(1) CO et 336c CO, pour être valable, une convention de résiliation doit satisfaire à la condition d'un délai de réflexion au bénéfice du salarié signant ladite convention (a) (ATF 4A_364/2016 du 31 octobre 2016 consid. 3.1; 4A_103/2010 du 16 mars 2010 consid. 2.2; 4C.51/1999 du 20 juillet 1999 consid. 3c) et à l'existence de concessions réciproques de valeur équivalente (b) (ATF 4A_13/2018, 4A_17/2018 du 23 octobre 2018 consid.4.1.1 et nombreuses références).

Par Convention de Résiliation, les Parties ont accepté mutuellement de mettre un terme à leur relation de travail avec effet au 13 janvier 2020.

Il faut déduire de la chronologie des événements tels que présentés par CSC que ce dernier a informé le Joueur le 11 janvier 2020, en fin d'après-midi, de sa volonté de mettre un terme à leur relation de travail et l'a convoqué à une séance le 13 janvier 2020 pour formaliser cette résiliation. Faute d'éléments contraires, tout porte à croire que la Convention de

Résiliation a été présentée pour la première fois le 13 janvier 2020 au Joueur, lequel n'a donc bénéficié d'aucun délai de réflexion avant de la signer. Par ailleurs, il n'y a aucune concession de CSC, qui, au moyen de la Convention de Résiliation, a obtenu ce qu'il avait imposé unilatéralement au Joueur en date du 11 janvier 2020, soit la résiliation anticipée de la Convention de travail. En échange, le Joueur a renoncé à toutes les protections octroyées par le droit du travail (notamment contre les congés abusifs et/ou sans juste cause) ainsi qu'à toute prétention relative aux salaires jusqu'àl'échéance prévue dans le Contrat de travail.

Au regard de ce qui précède, il apparaît que la Convention de Résiliation ne satisfait pas aux conditions susmentionnées (délai de réflexion et concessions réciproques de valeur équivalente). Elle est donc inefficace.

6. Conséquence de l'inefficacité de la convention de résiliation

L'accord de résiliation qui ne satisfait pas aux conditions applicables en la matière, ne lie pas les parties. Dans un tel cas, il y a lieu de faire abstraction dudit accord et d'appliquer, en lieu et place de l'accord nul, les dispositions relevant du régime légal ordinaire, c'est-à-dire le régime de la rupture du rapport d'emploi (Aurélien Witzig, op. cit., p. 322, n. 932 et références).

Ainsi, dès le moment où, comme en l'espèce, il a été mis fin aux rapports de travail avant l'expiration de l'échéance contractuelle, il faut se demander si l'employeur aurait résilié le contrat de manière ordinaire ou avec effet immédiat dans l'hypothèse où l'accord de résiliation n'aurait pas été conclu. Suivant la réponse apportée à cette question, le travailleur pourra soit faire valoir une prétention de salaire jusqu'à la fin du délai de résiliation ordinaire, soit réclamer des dommages-intérêts et une indemnité; c'est au travailleur qui soutient que son employeur l'aurait licencié avec effet immédiat en pareille hypothèse d'en apporter la preuve (ATF 4A_364/2016 du 31 octobre 2016 consid. 5.2.1).

Dans son mémoire réponse déposé dans le cadre de la procédure devant la FIFA, CSC a reconnu que *"[le] 11 Janvier 2020, jour de reprise des entrainements, nous avons reçu le joueur dans nos bureaux pour l'informer de la décision du nouvel entraineur de ne pas compter sur lui pour la suite de la compétition et que nous étions dans l'obligation de négocier une résiliation amiable du contrat et rendez-vous fut pris pour le 13 Janvier 2020"* (la mise en évidence est le fait du rédacteur). CSC a donc admis qu'il n'avait pas d'autres choix que de se séparer du Joueur. Il découle de ce qui précède que, en l'absence de Convention de Résiliation, CSC aurait rompu avec effet immédiat ses rapports de travail avec le Joueur. Cela est également appuyé par le fait que CSC n'a jamais pris les dispositions nécessaires pour régulariser le séjour du Joueur, qui était en situation illégale sur territoire algérien depuis la fin du mois d'octobre 2020. L'Arbitre unique déduit de ce qui précède que CSC a résilié le Contrat de travail de manière unilatérale, sans juste cause.

A défaut de disposition contractuelle spécifique prévoyant les modalités de calcul d'une éventuelle compensation financière due en cas de rupture anticipée dudit contrat sans juste cause par l'une des Parties, l'article 17 RSTJ s'applique.

Décision

La décision du 25 février 2021 de la Chambre de Résolution des Litiges de la FIFA est réformée en ce sens que Club Sportif Constantinois doit verser à M. Mahamadou Traoré la somme de DZD 15'874'120 avec intérêt à 5 % l'an dès le 13 janvier 2020.

CAS 2021/A/7851
Mohamed Naoufel Khacef v. Fédération Internationale de Football Association (FIFA)
CAS 2021/A/7905
CD Tondela Futebol v. FIFA
11 February 2022

Football; Sporting sanctions; CAS power of review; Force majeure as a just cause to terminate the contract; Extension of the protected period; FIFA's discretion to impose sporting sanctions pursuant to Articles 17(3) and 17(4) FIFA RSTP; Difference in the legal approach between Article 17(3) and 17(4) FIFA RSTP; Proportionality of the sporting sanctions

Panel
Mr Manfred Nan (The Netherlands), President
Mr Jordi López Batet (Spain)
Mr Lars Hilliger (Denmark)

Facts

On 1 July 2016, Mr Mohamed Naoufel Khacef (the "First Appellant" or the "Player"), a professional football player of Algerian nationality and Club Nasr signed an employment contract, valid until the end of June 2021 (the "Contract").

On 30 January 2020, the Contract was extended until 30 June 2022.

On the same date, the Player, Club Nasr and the French club *Girondins de Bordeaux* ("Bordeaux") signed a *"contrat de mutation temporaire avec option d'achat"* for the loan of the Player from Club Nasr to Bordeaux until 30 June 2020.

Between 18 and 19 August 2020, Club Nasr and CD Tondela Futebol (the "Second Appellant" or "Tondela"), a football club with its registered office in Tondela, Portugal, negotiated the potential permanent transfer of the Player to Tondela.

On 20 August 2020, the Player terminated the Contract for the following grounds:

"Currently, the Player, after having completed his loan period with [Bordeaux]*, is in Europe, unable to return to Algeria due to the closure of borders for the measures adopted by the existence of the pandemic.*

In addition, the competition in Algeria is currently suspended, without there being any possibility of resumption of the competition nor guarantees so that the Players can carry out their activity with the minimum conditions of safety and health.

In this situation and taking into account that the Player will not be able to develop his activity as a footballer in Algeria, by means of this communication and on behalf of the [Player]*, I inform you the unilateral termination of the employment contract signed with* [Club Nasr] *on July 1, 2016 with immediate effect and due to the existence of force majeure".*

On 1 September 2020, the Player and Tondela signed an employment agreement valid until 30 June 2022. No transfer agreement was concluded between Tondela and Club Nasr.

On 22 September 2020, Club Nasr filed a claim against the Player and Tondela before the FIFA DRC for breach of contract and requested to be awarded compensation for breach of contract in an amount of EUR 300,000 from the Appellants jointly and additionally EUR 50,000 from Tondela as compensation for *"serious prejudice caused"*. Club Nasr also requested sporting sanctions to be imposed on the Appellants on the basis of the FIFA Regulations on the Status and Transfer

of Players (the "FIFA RSTP" or the "Regulations").

On 25 March 2021, the FIFA DRC rendered the Appealed Decision, deciding, *inter alia*, as follows:

"1. The claim of [Club Nasr] *is admissible.*

2. The claim of [Club Nasr] *is partially accepted.*

3. The [Player] *has to pay to* [Club Nasr]*,* ***within 30 days*** *as from the date of notification of this decision, EUR 160,000 as compensation for breach of contract without just cause plus 5% interest p.a. as from 22 September 2020 until the date of effective payment.*

4. [Tondela] *is jointly and severally liable for the payment of the compensation mentioned under point 3 above.*

(…)

9. A restriction of four months on his eligibility to play in official matches is imposed on the [Player]. *This sanction applies with immediate effect as of the date of notification of the present decision. The sporting sanctions shall remain suspended in the period between the last official match of the season and the first official match of the next season, in both cases including national cups and international championships for clubs.*

10. [Tondela] *shall be banned from registering any new players, either nationally or internationally, for the two next entire and consecutive registration periods following the notification of the present decision.*

(…)

On 21 April 2021, the Player filed a Statement of Appeal with CAS, naming only FIFA as respondent.

Also on 21 April 2021, Tondela filed a Statement of Appeal with CAS, naming only FIFA as respondent.

On 3 May 2021, the CAS Court Office informed the Parties, on behalf of the President of the Appeals Arbitration Division and in view of the Parties' agreement thereto, that the proceedings were consolidated within the meaning of Article R52.5 of the CAS Code.

Reasons

1. CAS power of review and Res judicata

FIFA argues that, as the present appeals have been lodged by the Appellants solely against FIFA and solely with the objective of eliminating the sporting sanctions imposed on them, the matter concerning the termination of the Contract without just cause has become final and binding.

Both the Player and Tondela explicitly submitted that the appeals are only directed against the sporting sanctions imposed on them and that in fact the amount of compensation awarded to Club Nasr in the Appealed Decision has been paid to Club Nasr already.

As such, the Panel observes that the Appealed Decision has a hybrid character.

On the one hand, the FIFA DRC acted in its adjudicatory capacity, insofar as it decided the contractual dispute between Club Nasr and the Appellants, i.e. by deciding that the Player terminated the Contract without just cause, and that therefore the Player (with Tondela jointly liable) had to pay EUR 160,000 to Club Nasr, which is a so-called horizontal dispute. As such, the standing to be sued rests with Club Nasr as the entity that avails itself of the binding effect of the decision with regard to the payment by the Player and Tondela of

EUR 160,000. As Club Nasr is not a party to the present appeal arbitration proceedings before CAS, the Appellants' payment obligation to Club Nasr has become final and binding and cannot be reversed.

On the other hand, the FIFA DRC also assumed a disciplinary role by imposing sporting sanctions on the Player and Tondela, which is a so-called vertical dispute. The Appellants' request to cancel the sporting sanctions imposed on them is directed against the disciplinary function of the FIFA DRC and therefore the only entity with standing to be sued in this respect is FIFA. FIFA decided to impose sporting sanctions on the Appellants based on the finding that the Player breached the Contract within the "protected period". As such, the Panel finds that the issue whether the Player breached the Contract, and if so, whether this breach occurred within the "protected period" can be subject of this Panel's scrutiny, but only with respect to the question whether the sporting sanctions are imposed in accordance with the applicable regulations. Any other solution would mean that the Appellants would have been required to direct their appeals, the scope of which is limited to the disciplinary sanctions, also against Club Nasr, which has no standing to be sued regarding the imposed sporting sanctions.

Consequently, the finding of breach of contract within the "protected period" in the Appealed Decision related to the vertical dispute (the disciplinary issue) is not *res judicata.*

2. Force majeure as a just cause to terminate the contract

Except for Article 14bis and Article 15 FIFA RSTP (terminating a contract for sporting just cause), the concept of "just cause" is not defined in the FIFA RSTP. Under Swiss law, 'just cause' exists whenever the terminating party can in good faith not be expected to continue the employment relationship (Article 337 para. 2 CO). The definition of 'just cause', as well as the question whether 'just cause' in fact existed, shall be established in accordance with the merits of each particular case (ATF III 153 consid. 1 a)**.** *Only a violation of a certain severity justifies the early termination of a contract; and a breach is sufficiently severe only if it excludes the reasonable expectation of a continuation of the employment relationship".* (see CAS 2015/A/4046 & 4047, at para. 98, referring to Article 337 para. 2 CO; see also CAS 2014/A/3463 & 3464, CAS 2008/A/1447 and CAS 2006/A/1180 at para. 25).

In light of this jurisprudence, the Panel must determine whether the grounds relied on by the Player for terminating the Contract were so severe that the Player could not have reasonably been expected to continue the employment relationship with Club Nasr.

The Player relies heavily on the COVID-19 pandemic, arguing that the competitions were suspended in Algeria, that he was prevented from going back to Algeria, and that he therefore could not develop his career. In fact, the Player invokes the principle of *force majeure* as a just cause to terminate the contract.

First of all, the Panel notes that no evidence was provided that the Player put Club Nasr in default for allegedly not paying his salaries. As such, Article 14bis FIFA RSTP is not applicable.

For *force majeure* to exist, there must be an objective (rather than a personal) impediment, beyond the control of the obliged party, that is unforeseeable, that cannot be resisted and that renders the performance of the obligation impossible. This definition must be narrowly interpreted because, as a justification for non-performance, it represents an exception to the fundamental obligation of *pacta sunt servanda*

(see CAS 2018/A/5607 and CAS 2018/A/5779).

Further, the FIFA COVID Guidelines related to *force majeure* are of no help to the Player, as these rules only refer to *"unilateral variations to existing employment agreements",* and do not apply to unilateral terminations like the one at stake.

The Panel finds that a temporary (worldwide) suspension of competition and the alleged impossibility of the Player to go back to Algeria, both due to the COVID-19 outbreak, do not justify the termination of the Contract.

In light of the above, the Panel has no hesitation to conclude that the Player terminated the Contract without just cause.

3. Extension of the protected period

The term "protected period" is defined as follows in the FIFA RSTP:

"Protected period: a period of three entire seasons or three years, whichever comes first, following the entry into force of a contract, where such contract is concluded prior to the 28th birthday of the professional, or two entire seasons or two years, whichever comes first, following the entry into force of a contract, where such contract is concluded after the 28th birthday of the professional".

The Appellants argue that the Contract was not validly renewed on 30 January 2020 whereas FIFA argues that an amendment to the Contract was concluded on 30 January 2020, whereby the duration of the Contract was extended until 30 June 2022. According to FIFA, by doing so, the Parties also determined the starting of a new "protected period". In this sense, Article 17(3) FIFA RSTP.

Article 17(3) FIFA RSTP provides that the *"protected period starts again when, while renewing the contract, the previous contract is extended".*

The rationale of this provision pursuant to the explanatory note in the Commentary to the FIFA Regulations on the Status and Transfer of Players (the "FIFA Commentary") is that *"when parties agree to extend the duration of an employment relationship, they do so to have longer contractual stability and it is usually linked to an improvement in the financial terms of the contract in favour of the player. The major amendments in the contract, replacing certain terms of the existing contract, have the same consequences as if the parties had signed a new agreement. Consequently, when a contract is extended, the protected period starts again".*

The Panel finds that the extension of the Contract concluded on 30 January 2020 was validly entered into, which means that a new "protected period" started as from the date of signing the extension, not as from the date the original contract expires. The fact that the financial terms of the Contract itself were not amended is neither decisive nor relevant in this regard, given that it is reasonable and logical to believe, in the Panel's view, that the extension was linked to the agreement to loan the Player to Bordeaux, granting the Player a 9 times higher salary for the loan period at Bordeaux. The extension of the Contract also provided the Player with more financial stability, as it insured him of an additional year of salary from Club Nasr.

In light of the above, the Panel finds that the Player's termination of the Contract without just cause clearly occurred during the "protected period".

4. FIFA's discretion to impose sanctions pursuant to Article 17(3) & 17(4) FIFA RSTP

Based on the wording of Article 17(3) FIFA RSTP, and since the Panel finds that the Player terminated the Contract without just cause during the "protected period", the FIFA DRC

was, in principle, in its right to impose sporting sanctions on the Player.

The Panel is satisfied that there is a well-accepted and consistent practice of the FIFA DRC, not to apply automatically a sanction as per Articles 17(3) and 17(4) FIFA RSTP, but to leave it to the free discretion of the FIFA DRC to evaluate the particular and specific circumstances on a case-by-case basis.

In the matter at hand, there are no circumstances that would allow the Panel to deviate from the general rule set forth in Article 17(3) FIFA RSTP that sporting sanctions are to be imposed in case of a breach of contract within the protected period. Despite having extended the term of his Contract recently, i.e. within the "protected period", the Player terminated the Contract and shortly afterwards concluded a lucrative employment contract with Tondela. While the Player understandably wanted to improve his financial situation by signing for Tondela, he could not do so at the expense of his contractual commitment with Club Nasr.

Consequently, the Panel finds that the FIFA DRC rightly sanctioned the Player on the basis of Article 17(3) FIFA RSTP.

5. Difference in the legal approach between Article 17(3) & 17(4) FIFA RSTP

The Panel notes that there is a difference in the legal approach between Article 17(3) and 17(4) FIFA RSTP. On the basis of Article 17(3) FIFA RSTP, sporting sanctions are in principle to be imposed, without any specific reference to a possibility to escape the imposition of sporting sanctions if the mentioned prerequisites are met. However, Article 17(4) FIFA RSTP contains a rebuttable presumption that Tondela induced the Player to breach his Contract with Club Nasr:

"It shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach".

Tondela maintains that no sanction should be imposed on it as it did not induce the Player to breach the Contract with Club Nasr.

The Panel finds that Tondela failed in rebutting this presumption.

The Panel finds that it can be inferred from the sequence of events that Tondela played an important role in the Player's decision to terminate his Contract with Club Nasr. Moreover, the rebuttable presumption of Article 17(4) FIFA RSTP cannot be escaped by merely relying on the statements of the player and the player's agent, at least not to escape the sporting sanctions imposed on it by the FIFA DRC. It is the new club duty to verify the player's contractual status with the old club, the failure of which exposes itself to the risk of sporting sanctions.

Consequently, the Panel finds that the FIFA DRC rightly sanctioned Tondela on the basis of Article 17(4) FIFA RSTP.

6. Proportionality of the sporting sanctions

The Panel now turns its attention to the question whether imposing a four month-restriction on playing in official matches on the Player, and imposing a ban from registering any new players, either nationally or internationally, for the following two entire and consecutive registration periods on Tondela is disproportionate.

The Panel observes that the Appellants submit that these measures are disproportionate, whereas FIFA maintains that the measures are justified, and that there is no room to speak

about proportionality of the sanction as the FIFA DRC does not exercise any discretion when imposing these sanctions.

Articles 17(3) and (4) FIFA RSTP merely determine that if sporting sanctions are to be imposed on a player and/or a club, these sporting sanctions shall consist of a minimum of a four month-restriction on playing official matches, and a ban from registering any new players, either nationally or internationally, for two entire and consecutive registration periods, respectively. There is, in principle, no discretion for the decision-making body to go below these minimum sanctions. In addition, since the sanctions mentioned in Article 17(3) and (4) FIFA RSTP are minimum sanctions under the relevant provisions, CAS panels, in principle, cannot reduce the sanction if it is of the view that the imposition of the sanction is warranted (CAS 2006/A/1154, para. 13; CAS 2020/A/6796, paras. 136 and 161).

In light of the above, the Panel finds that the sporting sanctions imposed on the Player and Tondela are not disproportionate.

Decision

Consequently, the Panel is satisfied to confirm the sanctions imposed on both Appellants in the Appealed Decision and to dismiss the appeals filed by Mr Mohamed Naoufel Khacef and by CD Tondela Futebol respectively against the decision issued on 25 March 2021 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association.

CAS 2021/A/8099
Málaga Club de Fútbol S.A.D v. Brighton & Hove Albion Football Club Limited
10 January 2022

Football; contractual dispute; Concept of "transfer" in football; Interpretation of a sell-on clause; Permanent transfer of a player; Consequence of the qualification of transfer on the activation of the sell-on clause

Panel
Mr Rui Botica Santos (Portugal), President;
Prof. Luigi Fumagalli (Italy);
Mr Kepa Larumbe (Spain)

Facts

On 30 December 2016, Málaga Club de Fútbol S.A.D (the "Appellant") and Brighton & Hove Albion Football Club Limited (the "Respondent") concluded a transfer agreement (the "Transfer Agreement") for the transfer of the player [X.] (the "Player"). Clause 2.2. of the Transfer Agreement (the "Sell-on Clause") stated the following:

"2.2 Should the Player' registration be transferred on a permanent basis by [the Appellant] *at any time in the future then* [the Appellant] *will pay to* [the Respondent] *12.5% (twelve and a half per cent) of any transfer fee received by* [the Appellant] *(deducting the amount corresponding to solidarity contribution) up to a maximum sum of €750,000 (seven hundred and fifty thousand euros).*

If applicable, payment will be made by [the Appellant] *within 30 working days as from the moment* [the Appellant] *receives the transfer fee of a third club, if the payment is made in several instalments by the third club, the payment to* [the Respondent] *will be made in proportion to those instalments".*

On 20 April 2017, the Appellant registered the Player and an employment agreement was signed (the "Employment Agreement"), valid until 30 June 2019. Under its Clause 10, the Appellant had the option right to extend its term for another three seasons (the "Option Right Clause").

On 22 February 2019, the Player sent to the Appellant a letter informing if of his intention to negotiate with a new club once the Employment Agreement had ended. On March 20, 2019, the Appellant and Getafe Club de Fútbol, S.A.D ("Getafe") reached an agreement by virtue of which the Option Right Clause would be waived by the Appellant in exchange for a financial compensation (the "Waiver Agreement"). Clause I of the Waiver Agreement states the following:

"GETAFE shall pay to [the Appellant]*, for the waiver of the option to extend the contract of the PLAYER (…) the amount of ONE MILLION FIVE HUNDRED THOUSAND EUROS (€1,500,000) plus VAT"* (free English translation from Spanish).

In addition, the Waiver Agreement established in Clause II, a), the following:

"a) In the event that the Player (…) rejoins the discipline of GETAFE in the 2019-2020 season:
- *FIVE HUNDRED THOUSAND EUROS (€500,000) before or on August 31, 2019.*
- *FIVE HUNDRED THOUSAND EUROS (€500,000) on or before August 31, 2020*
- *FIVE HUNDRED THOUSAND EUROS (€500,000) on or before August 31, 2021.*
- *The VAT for this operation shall be paid on the 15th day of the month following the date of issue of the invoice"* (free English translation from Spanish).

On 8 July 2020, the Respondent enquired the Appellant about the terms of the Player's transfer to Getafe and whether a payment was due from the Appellant to the Respondent. The Appellant provided the below explanations of the agreement between the Appellant and Getafe:

"the player fulfilled the entire duration stipulated in his contract and (…) negotiated his incorporation to a new club as free agent. (…) [the Appellant] *did not transfer the player's registration on a permanent basis at any time to Getafe. (…)* [the Appellant] *did not receive any money from Getafe CF for their registration of* [the Player]. [the Appellant] *agreed with Getafe to receive the amount of one million five hundred thousand euros (1,500,000.- €) as compensation for the withdrawal of the right to renewal included in the (…) player contract".*

On 3 March 2021, the Respondent lodged a claim before the Fédération Internationale de Football Associations' Players' Status Committee (FIFA PSC) and requested the payment of EUR 187,500, plus applicable interest, as a sell on fee which was due under the Sell-on Clause. In addition to this, the Respondent also requested that the amount of EUR 62,500 (equal to 12.5% of the final EUR 500,000 instalment due under the Waiver Agreement) be paid within 30 working days after the Appellant receives the last instalment agreed upon in the Waiver Agreement from Getafe.

Brighton argued in essence that the Player's move from the Appellant to Getafe was in fact a transfer of the Player's registration on a permanent basis. The Appellant, on the other hand, resisted the Respondent's claim and based its defence mainly on the fact that the contractual relationship between the Player and the Respondent had ended on 30 June 2019 and that the Waiver Agreement did not establish a compensation for the transfer of the Player, rather it was a compensation for the non-exercise of the contract extension clause and the loss of the Appellant's assets.

On 9 June 2021, the FIFA PSC communicated its decision adopted on 18 May 2021 (the "Appealed Decision"), which *inter alia* held that the contractual framework built by Getafe and the Appellant was, *de facto*, a transfer, since it had similar effects to a transfer agreement and included the payment of a significant amount. The Sell-on Clause was, as such, applicable and the material arguments shall take precedence over the literal and formalistic arguments. As a result of the above, the decision of the Single Judge of the FIFA PSC established *inter alia* the following:

"1. The claim of [the Respondent]*, is partially accepted.*

2. *The* [Appellant]*, has to pay to* [the Respondent]*, the amount of EUR 125,000, plus interest as follows:*
   - *5% interest p.a. over the amount of EUR 62,500 as from 1 September 2019 until the date of effective payment;*
   - *5% interest p.a. over the amount of EUR 62,500 as from 1 September 2020 until the date of effective payment.*
3. *Any further claims of the* [the Respondent] *are rejected.*

On 29 June 2021, in accordance with the Code of Sports-related arbitration (the "Code"), the Appellant filed with the Court of Arbitration for Sport its appeal (the "Appeal") and requested that the CAS *inter alia* concludes that the Appellant *"does not have to pay any sum to* [the Respondent] *because of the termination of the Player's contract and his subsequent bound to Getafe as a free agent".* In its Answer, the Respondent requested the CAS to, *inter alia*, *"Dismiss the appeal".*

Reasons

Against such background, the Panel found that the main issues to be determined are the following:

1. What does the concept of "transfer" encompass in football?
2. How should the Sell-on Clause be interpreted?
3. Does the movement of the Player trigger the application of the Sell-on Clause?
4. What are the legal consequences resulting from the answer to the previous issue?

1. What does the concept of "transfer" encompass in football?

According to the Definitions Chapter of the FIFA Regulations on the Status and Transfer of Players (the "RSTP"), a "transfer" is *"**21.** International transfer: the movement of the registration of a player from one association to another association"* and *"**22**. National transfer: the movement of the registration of a player at an association from one club to another within the same association"*.

CAS 2019/A/6525 and CAS 2010/A/2098 read that *"in the world of professional football a "transfer" of a Player means in general terms a change of "registration" (…) or (…) a "change of employer"* and *"a "transfer" can be equated to a "movement" in the registration/employment relation"*. Therefore, the general meaning of the concept of "transfer" is not strictly linked to a specific legal or contractual framework. In fact, the CAS (CAS 2019/A/6525) has also recognized that a transfer can occur under a contractual scheme or outside of such a framework: *"a transfer can (…) 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 expresses its agreement against the receipt of a payment – which compensates for the loss of the player's services (…). At the same time, a transfer of a player can also take place outside the scheme of a contract between the old and the new club, in the event that the player moves from a club to another following the termination of the old employment agreement as a result of (i) its expiration or (ii) its breach"*.

From the above, the Panel concludes that (i) a transfer can be simply defined as movement of the Player's registration from an association to another or between clubs under the same association and that (ii) a transfer may be integrated in a contractual scheme or not, depending on the specific circumstances in which the movement of the registration occurs. Having reached a conclusion regarding the concept of "transfer" and the usual meaning of this word in professional football, the Panel is now prepared to interpret the Sell-on Clause.

2. Interpretation of the Sell-on Clause

The main controversy between the Parties resides in knowing what types of transfer the Sell-on Clause is able to encompass.

Article 18 of the Swiss Code of Obligations (the "SCO") provides that: *"*[a]*s regards both the form and content of a contract, the real intent which is mutually agreed upon shall be considered, and not an incorrect statement or manner of expression used by the parties, whether due to error, or with the intention of concealing the true nature of the contract"* (Free translation).

Furthermore, in CAS 2016/A/4379 the Panel held that: *"*[a]*ccording to the principles established in the applicable Swiss law, the court shall first seek to bring to light the real and common intent of the parties, empirically as the case may be, on the basis of clues without regard to the inaccurate expressions or designations they may have used. Failing this, it shall then apply the principle of reliance and seek the meaning that the parties could and should give according to the rules of good faith to their reciprocal expressions of will considering all the circumstances (ATF 140 III 134 at 3.2; 135 III 295 at 5.2, p. 302 (…), ATF 4A_676/2014 at 3.3). Should the application of this principle fail to*

bring to a conclusive result, some alternate means of interpretation may be resorted to, such as the so-called rule of ambiguous clauses, pursuant to which, in case of doubt, the contract must be interpreted against the party which drafted it (in dubio contra stipulatorem or proferentem; ATF 124 III 155 at 1b, p. 158 (…))".

In light of the above, the Panel will have to begin its interpretation of the Sell-on Clause by seeking the real and common intent of the Parties, considering the clues which were made available to it.

The Sell-on Clause is undoubtedly a "sell-on clause", a type of clause which is usually used in professional football to allow the club which transfers a player to share in the benefits or profits of a future transfer of said Player. These kinds of clauses have also been deeply analysed by the CAS:

In the case at hand, it is important to notice that the wording of that clause refers to the "transfer" of the Player's registration; however, no restriction or limitation regarding the meaning of a "transfer" was inserted in the contract. Naturally, this forces the Panel to abide by the concept of "transfer" which has been explained above. With this in mind, the fact that said transfer had to be a "permanent" one appears to make reference to the fact that no fees received for any temporary transfer would be able to trigger the Sell-on Clause. In light of the above, the logical conclusion regarding the interpretation of the Sell-on Clause must be that said provision does not limit its applicability to the conclusion of a "transfer" in a specific manner or under a specific legal framework, instead it is only required that this movement of the Player's registration carried out by the Appellant acquires a permanent nature.

On the other hand, the Appellant is obliged to *"pay to* [the Respondent] *12,5% (…) of any transfer fee received"*. The wording clearly indicates that the Parties intended the Sell-on Clause to be applicable only in those cases in which the Appellant received a *"transfer fee"*. The Panel is of the opinion that the Parties were essentially concerned to establish that the Sell-on Clause could only operate when the Appellant received a sum for the transfer of the Player. In addition, the term *"transfer fee"* does not refer, *per se*, to a specific kind of contract or agreement and, as such, cannot be interpreted as a sum which is exclusively paid by virtue of a "typical" transfer agreement.

Therefore, the Panel is now able to clearly determine the conditions necessary to trigger the Sell-on Clause: (a) the Player's registration must be transferred, on a permanent basis, by the Appellant – however, this operation does not have to be concluded by virtue of a classic tripartite agreement; and (b) the Appellant has to receive a sum in exchange for the conclusion of the transfer operation.

It is then safe to assume that, when both these conditions are fulfilled, the Appellant must pay to the Respondent the amount corresponding to 12.5% of the fee received (deducting the sum corresponding to an eventual solidarity contribution due) up to a maximum of EUR 750,000. In addition, if this fee were to be received by the Appellant in several instalments, then the Respondent would have to be paid in proportion to said instalments, in accordance with the Sell-on Clause.

In light of the above, the Panel concludes that the common intent of the Parties when they agreed the Sell-on Clause would be to allow the Respondent to profit with a future transfer or "movement" of the Player's registration if the Appellant received any sum by virtue of said operation. No other specific conditions, formal or technical requirements were set by the Parties and, as such, the Sell-on Clause agreed by the Parties can encompass transfers concluded without a typical contractual scheme or even with no

contractual framework, provided that a fee in exchange for that transfer is due.

3. Does the player's movement to Getafe constitute a permanent transfer in the sense of the Sell-on Clause at stake?

The Panel notes that, unlike a "typical" transfer agreement, the Waiver Agreement provides that a compensation is due in exchange for the non-exercise of a contractually agreed right of renewal. However, the amount due under the Waiver Agreement must also be considered as a *prima facie* compensation for the loss of the Player. While the Panel agrees that the Waiver Agreement does not resemble a classic transfer agreement, there is no doubt that its operation raises doubts as to knowing if a transfer in the sense of the Sell-on Clause did or not occur.

As explained above, the Sell-on Clause does not limit what kinds of transfers are capable of triggering the application of this provision. Therefore, and unlike the outcome of the decision in CAS 2010/A/2098, the Transfer Agreement at hand did not use the word "sale" or "resale", the findings of CAS 2019/A/6525 are fully applicable: *"the Panel notes that the wording of the Sell-on Clause is 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 is put upon it, (…) as it is consistent with the general purpose of sell-on clauses, which, in the absence of specific limitations, call for their application to all cases where the intended purpose (to allow the old club to share the benefit of a subsequent transfer) can be achieved".*

The Panel is comfortably satisfied, as such, that the true and common intent of the Parties was to not exclude from the scope of the Sell-on Clause transfers which might have occurred outside a standard contractual scheme. Therefore, to understand if the Sell-on Clause is or not applicable, it suffices to establish if a "transfer" in the sense of that provision occurred.

In the present case, there remains no doubt that the movement of the Player's registration from the Appellant to Getafe was indeed a "transfer" in the meaning of the Sell-on Clause, which does not limit that concept to any specific contractual framework or scheme. Both Parties ended up referring to this movement of the Player's registration as a "transfer" in a broad sense, however, even though the Appellant argues that the Player moved to Getafe as a free agent, there are striking resemblances between the Waiver Agreement and a typical transfer agreement:

a) Much like in typical transfer agreements, the Waiver Agreement was signed by the Player, the Appellant and Getafe (hence, it was a tripartite agreement);

b) When the Waiver Agreement was signed, the Player was still under contract with the Appellant and the possibility of this contract being extended had to be considered;

c) By virtue of the Waiver Agreement, the Appellant allowed the Player's Employment Agreement to expire at the end of the season (which was only three months away), a situation which is not materially much different from agreeing to the termination of a contract;

d) The Appellant acted as the party in control of the Player's registration – the club considered that by not exercising the Option Right Clause, it was allowing the Player to move to Getafe;

e) The Waiver Agreement was conditioned to the signing of a new employment agreement between the Player and Getafe; and

f) The Player waived its right to receive any compensation provided for in Article 13.a) of the Royal Decree 1006/85 and in Article 17.3 of the Collective Bargaining

> Agreement signed between the Spanish Professional League (L.N.F.P.) and the Player's Union (A.F.E.). According to the said Spanish legal provisions, when a player is transferred from a club to another, he is entitled to receive, from the new club, the 15% of the transfer fee.

There are notorious resemblances between the Waiver Agreement and a "typical" transfer agreement, which the Panel cannot, in good faith, ignore. These characteristics clearly indicate that what the Appellant and Getafe agreed was, *de facto*, a true transfer of the Player.

The Panel also notes that the Parties' common intent did not deviate from that of a classic transfer agreement since the Waiver Agreement created a situation which, given the circumstances, generated similar effects to that of a typical transfer agreement. Therefore, the Panel is of the opinion that both the form and content of the Waiver Agreement allow for it to be considered as a "transfer agreement". This conclusion is in line with CAS jurisprudence's interpretation of Article 18 SCO, namely CAS 2018/A/5950, para. 76:

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

Furthermore, the Panel is of the firm opinion that the material effects of a contract must impose themselves on any label which the Parties choose for it. The general principle of good faith implies that the Law aims to achieve concrete and effective results and that the material aspect always takes precedence over the formal aspect. This means, in essence, that contracts and other legal agreements are to be analysed essentially with respect to their content and material effects. In fact, the Panel shares the understanding that "good faith" requires that the exercise of legal positions be carried out in terms of material truthfulness. It does not suffice to assess if there is formal compliance with the law in the actions of a person; rather, there must be a material assessment, so as to give importance and projection to the values which are effectively at stake and the consequences which they entail.

Considering the above, the Panel unanimously considers that the Waiver Agreement has produced essentially the same effects that a standard transfer agreement would and, as such, there remains no doubt that the Player was indeed transferred and that this operation still falls under the wording of the Sell-on Clause.

In light of the above and considering that the Appellant was supposed to receive a sum of EUR 1,500,000 (of which EUR 1,000,000 have already been received), it would be against the principle of good faith to consider that such amount does not constitute a "transfer fee" in the sense of the Sell-on Clause. In fact, by considering that the Waiver Agreement created a situation similar to a "typical" transfer, the Panel would be going against its own rationale if it did not consider that the sum received by the

Appellant by virtue of such contract fell under the scope of the Sell-on Clause. Furthermore, the Waiver Agreement, by virtue of its material effects and consequences, may be qualified as a true transfer agreement, even if it uses an uncommon solution to allow the Player to move from one club to another. Therefore, considering that a transfer of the Player occurred and that a fee was received by the Appellant in respect to that operation, the total sum of EUR 1,500,000 can be considered as a "transfer fee". In reality, the Panel notes that much like a common transfer agreement, the sum paid to the Appellant by virtue of the Waiver Agreement was essentially a compensation for that club's agreement regarding the expiry of an employment agreement and its loss of the Player's services; in fact, in the present circumstances, allowing a contract to expire is not much different from agreeing to its mutual termination.

4. What are the legal consequences resulting from the answer to the previous issue?

As both conditions set out for the activation of the Sell-on Clause were fulfilled, the Respondent is entitled to receive 12.5% of the total sum received by the Appellant by virtue of the Waiver Agreement. The Panel notes that the payment to be completed under the Waiver Agreement was to be made pursuant to its Clause II, a):

"- FIVE HUNDRED THOUSAND EUROS (€500,000) before or on August 31, 2019.

- *FIVE HUNDRED THOUSAND EUROS (€500,000) on or before August 31, 2020*
- *FIVE HUNDRED THOUSAND EUROS (€500,000) on or before August 31, 2021".*

According to the presented evidence, the Appellant only received, at the date of the issuance of the Appeal Decision, the first two instalments in the total amount of EUR 1,000,000. Accordingly, the Respondent is entitled to 12.5% of that sum:

- EUR 62,500 for the first instalment (*i.e.* 12.5% of EUR 500,000);
- EUR 62,500 for the second instalment (*i.e.* 12.5% of EUR 500,000).

Decision

The appeal filed by Málaga Club de Fútbol S.A.D. against the decision rendered by the Single Judge of the FIFA Players' Status Committee on 18 May 2021 is dismissed. The decision rendered by the Single Judge of the FIFA Players' Status Committee on 18 May 2021 is 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_200/2021
21 July 2021
A. v. B & C

Appeal against the arbitral decision by the Court of Arbitration for Sport of 28 May 2019 (CAS 2019/A/6404 & CAS 2019/A/6405[1]

Extract of the facts

B. and C. (hereinafter collectively referred to as the Players or Footballers) are two football Players of nationality [name of country omitted].

A. (hereinafter: the Club) is a football Club member of the Romanian Football Federation (FRF).

By an employment contract dated June 22, 2016, the Club engaged C.until June 30, 2017. The contract determined the Player's remuneration, including the granting of a bonus dependent on the team's performance in the national championship. lt provided for the jurisdiction of the FRF's sporting bodies for disputes relating to the performance of the contract.

On October 25, 2016, the Club fell into bankruptcy.

On April 27, 2017, a recovery plan for the Club was adopted by the competent Romanian state authority.

On September 26, 2017, the Club and B. signed an employment contract with retroactive effect from September 1, 2017, and expiring on June 30, 2018. The contract again provided for the payment of a bonus based on the Club's performance. It established the jurisdictional competence of the FRF's sporting bodies to hear disputes relating to the performance of the contract binding the parties, except where Romanian law refers exclusively to the state courts.

On September 21, 2018, after the end of the employment relationship, the Players demanded payment of various amounts (bonuses and back pay) from the Club.

For its part, the Club summoned, dated September 27, 2018, B. before the Chamber of Resolution of Disputes of the FRF (CRL FRF) seeking damages and suspension of the Player due to the alleged unjustified breach of the employment contract. This request was rejected. On appeal by the Club, the FRF Appeals Committee (FRF AC) confirmed the contested decision.

On October 3, 2018, the Club's bankruptcy administrator rejected the Footballers' claim for payment.

On October 12, 2018, the Players separately appealed this decision to the relevant national court.

On February 5, 2019, each of the two Players lodged an application with the FRF LRC against the Club for payment of their

[1] The decision 4A_200/2021 was issued in French. The full text is available on the website of the Federal Tribunal, 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 (operated jointly by Dr. Charles Poncet and Dr. Despina Mavromati) as a service to the international arbitration community.

respective claims arising from the employment relationship (bonuses and back pay).

On February 25, 2019, the Players withdrew the appeals they had filed with the Romanian state court. By separate decisions dated March 13, 2019, the FRF LRC declared itself incompetent to hear the two requests made by the Players.

Ruling on May 28, 2019, the FRF AC rejected the Footballers' appeals. In essence, it held that the Appellants should first assert their claims with the insolvency administrator and then appeal, if necessary, against the administrator's decision to the relevant state court.

On July 17, 2019, the Players filed an appeal with the Court of Arbitration for Sport (CAS) against the decisions made on May 28, 2019.

On July 7, 2020, the insolvency proceedings against the Club were closed and the Club was able to resume its commercial activities as normal.

By Award of February 25, 2021, the Arbitrator, after having admitted its jurisdiction, partially admitted the appeals and ordered the Club to pay EUR 15912 to B. 15'912 and C. for EUR 20'000.

With regard to jurisdiction, it is established that the relevant provisions of the regulations adopted by the FRF provide for the possibility of referring decisions taken by the FRF AC to CAS. The Respondent argues that the Appellants' pecuniary claims fall within the exclusive jurisdiction of the Romanian bankruptcy judge and that their admission on the merits would deprive it of the double level of jurisdiction provided for by the *ad hoc* sports regulations, namely the FRF LRC and the FRF AC. Moreover, the entry into the case would run counter to the *res judicata* effect of the Romanian bankruptcy administrator's examination of all the claims made against the Club before the closure of the insolvency proceedings on July 7, 2020. This objection, which is more a matter of merit than of jurisdiction, has become irrelevant as of the aforementioned date. Indeed, the two Players ceased to participate in the bankruptcy proceedings against the Club when those proceedings were not yet at an advanced stage and they are currently pleading before a specialized court against a Club which is now fully solvent and able to operate.

Thus, the jurisdiction of CAS is granted (Award, n. 60-69).

On the merits, the first question to be examined is whether, as the FRF AC held, the FRF courts lacked jurisdiction to hear the claims brought by the Appellants, having regard to the existence of the parallel bankruptcy proceedings. It is true that the CAS has consistently given priority to mandatory national bankruptcy regulations when such proceedings were pending before the competent state courts in parallel with the sports arbitration proceedings. However, the closure of the bankruptcy proceedings on July 7, 2020, significantly changed the pre-existing situation and rendered moot the question of the priority of the bankruptcy proceedings pending before that date over the proceedings pending before the FRF's jurisdictional bodies. It is a widely recognized principle that a controversy on a contentious issue should only be decided by the judge if it still exists at the time of the judgment, not only if it existed at the date of the commencement of the action. Thus, as the insolvency proceedings were closed on July 7, 2020, if the arbitrator were to refer the case to the jurisdictional bodies of the FRF, the Appellant's claim of lack of arbitrability could not be upheld because the change in the status of the Respondent (bankrupt Club

back to an ordinary legal entity) has changed the situation in this respect.

However, referring the case back to the FRF authorities could result in a breach of the *ne ultra petita* principle in this case, since the - new - question of whether they would have jurisdiction to examine the claims made by the Appellants against the Respondent Club, which is now solvent and able to function, could arise and the answer to that question would go beyond the submissions of the parties. In any event, such a remand would be contrary to the principle of procedural economy. Therefore, the question of whether the FRF's judicial bodies were competent in 2019 to decide the present dispute is irrelevant at this time (Award, n. 83-93).

On the basis of Art. R57 of the Code of Sports-Related Arbitration (hereinafter: the Code) and the relevant case law, it must be accepted that the arbitrator's consideration of the merits of the case, on which the FRF's judicial bodies did not enter into the matter, does not entail a violation of the Respondent's procedural rights. Moreover, whatever the Respondent may say, the arbitrator does not risk ruling *ultra pet/ta* by deciding himself on the merits of the claims raised by the Appellants, since the latter have made the necessary pecuniary submissions to the CAS for that purpose (Award, n. 94-112).

The Arbitrator accepts, in application of the principle of *res judicata,* that it is bound by the decision of the FRF's judicial bodies that B. did not unilaterally terminate its employment contract without just cause (Award, n. 14-122). On the other hand, it considers that the final decision to close the bankruptcy proceedings does not have the effect of *res judicata* with regard to the Players' claims since they were never definitively accepted or dismissed as creditors of the bankrupt. Moreover, the bankruptcy proceedings and the present proceedings did not involve quite the same parties (Award, n. 123-127).

From a substantive point of view, the Players' claims appear to be legally founded, at least in principle, which is why they should be accepted in part (Award, n. 128-157).

On April 6, 2021, the Club (hereinafter: the Appellant) lodged an appeal in civil matters with a view to having the Award set aside.

Extract of the legal considerations

(…)

4.

Invoking the ground for appeal under Art. 190(2)(b) PILA[2], the Appellant submits that the CAS wrongly declared itself competent to hear the appeal submitted to it.

In this regard, it submits that, according to Romanian Law no. 85/2014 on the prevention of insolvency and insolvency proceedings (hereinafter: the Romanian Insolvency Code), the norms of which are of a mandatory nature, all creditors' claims arising after the debtor's declaration of bankruptcy must be liquidated in the context of the insolvency proceedings and decided, in the event of a dispute, by the Romanian state court with jurisdiction in the matter. Therefore, the Respondents' claims were not arbitrable as of the declaration of the Appellant's bankruptcy on October 25, 2016.

As regards the argument on which the arbitrator based its jurisdiction, the Appellant considers it unfounded for several reasons.

[2] PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.

First, from a temporal point of view, the applicable procedural rules are, in principle, those in force at the time when the legally relevant facts occurred. Thus, jurisdiction would be assessed at the time of referral to the court. Therefore, neither the jurisdictional bodies of the FRF nor the CAS had jurisdiction to hear the Respondents' claims, because, at the time they were seized, the Romanian Insolvency Code excluded the arbitrability of disputes involving the bankrupt.

Secondly, the Appellant disputes the existence of the principle invoked by the Arbitrator according to which a controversy on a disputed point must be decided only if it still exists at the time when the jurisdictional authority renders its decision and not only if it existed at the date of the commencement of the action. In any event, said principle could not justify the solution adopted by the Arbitrator. Indeed, when the CAS was seized, the bankruptcy proceedings were still pending, so that the Romanian Insolvency Code remained applicable and thus prohibited the CAS from interfering in the ongoing insolvency proceedings. Moreover, the CAS jurisprudence has repeatedly stressed that the sports authorities are obliged to take into consideration the national regulations concerning bankruptcy and/or administration, which are mandatory provisions.

Thirdly, if the fact that the Appellant had regained its ordinary legal status had led to the inapplicability of the Romanian Insolvency Code, the question of the jurisdiction of the Arbitrator and of the FRF's judicial bodies would remain and would therefore not be irrelevant. As far as the Appellant was concerned, the Arbitrator had the choice of either declaring himself competent and referring the case to the lower sports courts in order to ensure that its procedural rights were respected, or confirming the contested decisions.

4.1
When a plea of lack of jurisdiction is brought before it, the Federal Tribunal is free to examine the questions of law, including preliminary questions, which determine the jurisdiction or lack of jurisdiction of the arbitral tribunal (ATF 146 III 142[3], para. 3.4.1; 133 III 139, para. 5; Judgment 4A_618/2019[4] of 17 September 2020, para. 4.1). However, this does not make it a court of appeal, so that it is not required to investigate itself, in the challenged Award, what legal arguments could justify the admission of the appeal under Art. 190(2)(b) PILA. Rather, it is up to the appellant to draw its attention to them, in order to comply with Art. 77(3) LTF[5] (ATF 142 Ill 239[6], para. 3.1). This provision establishes the same requirements for the statement of reasons as Art. 106(2) LTF. The appellant must therefore indicate which part of Art. 190(2) PILA is applicable in its view and, starting from the contested award, show in detail what, in its view, the violation of the principle invoked consists of (ATF 128 Ill 50, para. 1c; judgments 4A_7/2019 of 21 March 2019, para. 2; 4A_378/2015 of 22 September 2015, para. 3.1).

[3] The English translation of this decision is available here: https://vvww.swissarbitrationdecisions.com/atf-4a-306-2019

[4] The English translation of this decision is available here: https://vvww.swissarbitrationdecisions.com/atf-4a-618-2019

[5] LTF is the most commonly used French abbreviation for the Federal Law of June 6, 2005, organizing the Federal Tribunal (RS 173.110).

[6] The English translation of this decision is available here: https://vvww.swissarbitrationdecisions.com/unsigned-arbitration-clause-upheld

However, the Federal Tribunal will only review the facts on which the contested award was based — even if the issue is jurisdiction — if one of the grievances mentioned in Art. 190(2) PILA is raised against the said facts or if new facts or evidence (cf. (cf. Art. 99(1) LTF) are exceptionally taken into consideration in the civil appeal procedure (ATF 144 Ill 559,[7] para. 4.1; 142 III 220, para. 3.1; 140 Ill 477, para. 3.1; 138 Ill 29, para. 2.2.1).

4.2.
Arbitrability is a condition for the validity of the arbitration agreement and, therefore, for the jurisdiction of the panel (ATF 18 II 353, para. 3a and references). In its objective sense, this term refers to the cases that can be decided by arbitration (arbitrability *ratione materiae* as opposed to arbitrability *rat/one personae, i.e.* the capacity of the parties to conclude an arbitration agreement). In order to resolve the problem of arbitrability, the Swiss legislator, consciously renouncing the solution based on a conflict rule (connection to the applicable law, to the law of the parties' seat or to the *lex fori),* chose to enact a substantive rule of private international law, based on the subject-matter of the dispute, by providing for the possibility of submitting to arbitration "any cause of a pecuniary nature" (Art. 177(1) PILA; Message of 10 November 1982 concerning a Federal Act on Private International Law, FF 1983 I 445 ff.) This refers to all claims which have a pecuniary value for the parties as assets or liabilities, *i.e.* claims which have an interest for at least one of the parties which can be assessed in money (ATF 118 11 353, para. 3b).

The criterion used in Art. 177(1) PILA in principle dispenses with the need to take into account the restrictions and prohibitions of foreign law regarding the arbitrability of the case. However, the Federal Tribunal has on several occasions referred to the possibility of denying the arbitrability of claims whose treatment would have been reserved exclusively to a state court by provisions of foreign law that would have to be taken into consideration from the point of view of public policy under Art. 190(2)(e) PILA (ATF 18 11 353, para. 3c; judgments 4A_473/2018 of June 5,2019, para. 4.1.2; 4A_388/2012[8] of March 18, 2013, para. 3.3; 4A_654/2011 of May 23, 2012, para. 3.4; 4A_370/2007 of February 21, 2008, para. 5.2.2).

From the point of view of Swiss enforcement law, the Federal Tribunal ruled in an earlier decision that, since the bankruptcy court's jurisdiction for an action contesting the statement of claim under Art. 250 LP is a matter of public policy, it is not possible to derogate from it by means of an arbitration agreement (ATF 33 II 648, para. 4). Recently, the Second Civil Law Court of the Federal Tribunal, called upon to rule on the exequatur of a foreign arbitral Award, relied in particular on the above-mentioned decision to reach the conclusion that the action to contest the statement of collocation referred to in Art. 250 LP is not arbitrable. Therefore, a party who, after the bankruptcy of its debtor has been opened in Switzerland, files arbitration proceedings abroad instead of asserting its claim in a non-arbitrable collocation suit to go before the Swiss court of the bankruptcy forum, must expect recognition and enforcement of the

[7] The English translation of this decision is available here: https://vvww.swissarbitrationdecisions.com/atf-4a-396-2017.2

[8] The English translation of this decision is available here: https://vvww.swissarbitrationdecisions.com/appeal-against-interlocutory-and-partial-awards-violation-of-pub

foreign arbitral award to be refused under Art. V(2)(a) of the Convention of June 10, 1958, on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"; SR 0.277.12). This provision allows the competent authority of the country where recognition and enforcement of the award are sought to refuse them if it finds that, according to its law, the subject matter of the dispute is not capable of settlement by arbitration (judgment 5A_910/2019 of 1 March 2021, para. 3.8).

4.3.
The arbitrability of the dispute submitted to the CAS must in this case be examined in the light of Art. 177(1) PILA. It is sufficient to note here that the present case, in which two Footballers are asserting pecuniary claims against their former Club, certainly falls within the scope of the aforementioned legal provision. For the reasons given below (see para. 4.4), there is no need to examine further the question of whether the arbitrability of such claims could be denied insofar as their treatment would have been reserved exclusively for the Romanian state court by the provisions of the Romanian Insolvency Code, which would have to be taken into consideration from the point of view of the public policy referred to in Art. 190(2)(e) PILA. It should be noted, however, in passing, that the Appellant neither claims nor demonstrates that the fact of admitting the arbitrability of the dispute in this case would be incompatible with public policy under Art. 190(2)(e) PILA. Furthermore, the Appellant's peremptory assertion that the Romanian state bankruptcy court was imperatively competent to hear the claims brought by the Footballers is subject to questionable, since the challenged Award has ruled that the decisions challenged before the CAS were accompanied by a dissenting opinion of one of the members of the FRF AC, which reads, *inter alla,* as follows:

"The procedure established in the insolvency law is mandatory for all current debts, but it is not imperative and exclusive. It can co-exist with alternative jurisdictional procedures, such as the procedures regulated by FRF Regulations".

4.4.
The Appellant wrongly denies any relevance to an important factual element, namely the closure of the insolvency proceedings against it while the arbitration case was still pending before the CAS.

According to the case law of the Federal Tribunal, it is not necessary for the conditions for admissibility of the claim to be met at the outset of the arbitration proceedings; rather, it is sufficient that they be met at the time the award is made (Judgment 4A_27/2021[9] of May 7, 2021, para. 4.3.2, and the judgments cited). This was accepted by the Arbitrator in the present case, who found that the fact that the Players were pleading against a Club that had become solvent again and had regained its status as an ordinary legal entity in the course of the arbitration proceedings rendered irrelevant the question that had previously arisen of the interference between the proceedings before the FRF's judicial bodies and the state insolvency proceedings. The dispute, which had not previously been decided in the state insolvency proceedings, could therefore be dealt with, as the closure of those proceedings, by the sports bodies competent to deal with it under the FRF's Statutes, namely the FRF LRC, the FRF AC, and the CAS. In other words, there was no longer any reason, as from the end of the insolvency proceedings, to call into

[9] The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-27-2021

question the arbitrability of the dispute and, consequently, the jurisdiction of the CAS.

The objections raised by the Appellant in that context cannot be admitted. The Appellant cannot be followed when it complains of a violation of procedural rights on the ground that it was deprived of the two-tier jurisdiction normally provided for prior to referral to CAS. In the present case, it is true that the FRF's judicial bodies did not rule on the Players' claims, as they declined jurisdiction. However, this did not prevent the CAS, if it considered the decisions challenged before it to be unjustified, from ruling on the merits of the case itself (Judgment 4A_386/2010[10] of 3 January 2010, para. 5.3.4). The same competence was derived from Art. R57 para. 1 of the Code. This provision states that *"the Panel shall review the facts and the law with full power of review'* and that it may *"either issue a new decision replacing the contested decision or annul the latter and refer the case back to the authority that last ruled"*. The CAS opted for the first of these two solutions. In this respect, it does not matter what reasons led it to do so.

The Appellant is also wrong when it seems to want to blame the arbitrator for having disregarded the *res judicata* authority attached to the withdrawal of the appeals lodged by the Respondents against the rejection of their claims by the bankruptcy administrator dated October 3, 2018. Indeed, an arbitral tribunal that rules without taking into account the *res judicata* effect of a previous decision does not wrongly declare itself competent but instead violates procedural public policy (ATF 140 III 278 para. 3.1). In any event, the Appellant does not demonstrate, by reference to a legal provision or a principle of case-law, that under Romanian law the rejection of a production by the bankruptcy administrator and the subsequent withdrawal of an appeal lodged by the creditor against that decision would have the force of *res judicata*.

5.
In a second plea, the Appellant, invoking Art. 190(2)(e) PILA, contended that the contested Award was contrary to public policy.

According to it, it was deprived of a double level of jurisdiction since the claims brought against it by the Respondents had never been examined by the FRF's judicial bodies. The rule of exhaustion of prior proceedings referred to in Art. R47 of the Code was not respected. The Arbitrator thus violated the Appellant's procedural rights and the principle of the prohibition of arbitrariness.

(…)

5.2.
As presented, the plea based on Art. 190(2)(e) PILA, whose admissibility is more than doubtful, cannot succeed.

It should be noted at the outset that the requirement of a double instance or a double level of jurisdiction is not a matter of procedural public policy within the meaning of Art. 190(2)(e) PILA (judgments 4A_384/2017[11] of October 4, 2017, para. 4.2.3, and the judgments cited). In any event, the person concerned had already benefited from this dual level of jurisdiction. It was thus open to it to determine the merits of the case in the event that the FRF's judicial bodies had admitted their jurisdiction and entered into the matter. Contrary to the Appellant's

[10] The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/res-judicata-effect-foreigh-judgement

[11] The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-384-2017

assertion, the condition of exhaustion of the sporting bodies provided for in Art. R47 of the Code was fulfilled in the present case, as the Respondents had referred the matter to the FRF LRC and the FRF AC before filing an appeal with the CAS. It is irrelevant that the two FRF judicial bodies declined jurisdiction, as these bodies have been formally exhausted. In the present case, it was for the Arbitrator to decide, in the context of the appeal procedure, whether the FRF AC had rightly excluded its jurisdiction to rule on the dispute between the parties. It did so by answering this question in the negative and then deciding the merits of the case as authorized by Art. R57 para. 1 of the Code. It is not clear on what basis it could be criticized.

For the rest, the Appellant is mistaken in equating the alleged violation of the principle of the prohibition of arbitrariness with an infringement of public policy within the meaning of Art. 190(2)(e) PILA. By reasoning in this way, it loses sight of the fact that the incompatibility of the Award with public policy is a more restrictive concept than that of arbitrariness (ATF 144 III 120, para. 5.1; judgments 4A_318/2018 of March 4,2019, para. 4.3.1; 4A_600/2016[12] of June 29, 2017, para. 1.1.4).

(…)

Decision

In view of the foregoing, the appeal can only be dismissed insofar as it is admissible.

[12] The English translation of this decision is available here: https://vvww.swissarbitrationdecisions.com/cas-award-platini-case-upheld-swiss-supreme-court

4A_324/2021
3 August 2021
A. v. N. & B.

Appeal against the arbitral decision by the Court of Arbitration for Sport of 10 May 2021[1]

Extract of the facts and of the legal considerations

On April 19, 2021, A. submitted to the Court of Arbitration for Sport (CAS) a statement of appeal, sent exclusively by e-mail, challenging a decision rendered on March 25, 2021 by the National Football Tribunal.

By letter of April 20, 2021, the CAS set a time limit for the Appellant to complete its brief. Referring to Art. R31 of the Code of Sports-related Arbitration (hereinafter: the Code), it further indicated that the statement of appeal had to be filed by mail on the first working day following the expiration of the appeal deadline and invited the Appellant to provide proof of compliance with this requirement.

As of April 27, 2021, the CAS indicated that it had still not received proof of the mailing and set a three-day deadline for the Appellant to provide the required proof.

On April 28, 2021, the CAS acknowledged receipt of the Appellant's letter containing its statement of appeal and noted that it had been delivered to a private carrier on the same day. Noting that the 21-day appeal period, provided for in Art. R49 of the Code, had expired on April 19, 2021, he pointed out that the original copies of the statement of appeal should have been forwarded to him by April 20, 2021, pursuant to Art. R31 of the Code. The CAS clarified that it would therefore not proceed with the statement of appeal since it had been mailed after 20 April 2021.

On April 29, 2021, the Appellant claimed *force majeure* due to the Coronavirus crisis affecting the country in which it is based.

The following day, the CAS indicated that the situation described by the Appellant did not justify derogating from the conditions of admissibility provided for in the Code. In this respect, it noted that the Appellant had been able, notwithstanding the alleged disruptions linked to the health crisis, to reply to the letter of April 27, 2021, by mail posted the following day, which demonstrated that the interested party could organize a mailing within a short time. Moreover, the Appellant could have, even if that mailing would have been impossible, filed its brief on the CAS online filing platform and thus complied with the requirements of Art. R31 of the Code.

In response to the Appellant's request, the CAS Legal Counsel in charge of this case decided to refer the question of the admissibility of the statement of appeal to the President of the CAS Arbitration Division.

[1] The decision 4A_324/2021 was issued in French. The full text is available on the website of the Federal Tribunal, 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 (operated jointly by Dr. Charles Poncet and Dr. Despina Mavromati) as a service to the international arbitration community.

On May 10, 2021, the CAS notified the parties that the President of said division had confirmed that the appeal was inadmissible. In short, it noted that the Appellant, assisted by counsel, knew or should have known the formal requirements of Art. R31 of the Code and, in particular, the possibility of filing its statement of appeal on the arbitral institution's online filing platform. Regardless of this, the Appellant was clearly able, notwithstanding the invoked *force majeure,* to organize a one-day mailing. When it received the CAS letter dated April 20, 2021 stating that the e-mailing of the statement of appeal was insufficient, the Appellant could therefore have corrected its procedural error immediately, and not after eight days as it did.

On June 9, 2021, A. (hereinafter: the Appellant) lodged a civil law appeal for the annulment of the decision taken on May 10, 2021. N. and B. (hereinafter: the Respondents) were not invited to reply to the appeal.

It is not disputed that the present case falls within the scope of international arbitration and that the provisions of Chapter 12 of the Swiss Private International Law Act (PILA[2]) are applicable (Art. 176(1) PILA).

The civil law appeal referred to in Art. 77(1)(a) LTF[3] is only admissible against an award, which may be final (when it puts an end to the arbitration proceedings for a substantive or procedural reason), partial, or even interlocutory or interim. By contrast, a mere procedural order that may be modified or revoked during the course of the proceedings is not subject to appeal. The content of the decision, not its name, is decisive (ATF 143 Ill 462,[4] para. 2.1). In the present case, the contested decision is not a simple procedural order that can be amended or revoked in the course of proceedings. In fact, the CAS, noting that the statement of appeal had not been filed in the form prescribed by Art. R31 of the Code within the time limit for doing so, decided not to enter into the case. In so doing, the "arbitral tribunal" clearly expressed its refusal to deal with the case before it. Its decision is thus akin to a decision of inadmissibility that closes the case on procedural grounds. It is immaterial whether the decision is issued by the President of the Appeals Chamber or whether it is in the form of a letter. The fact remains that it is a decision that may be appealed to the Federal Tribunal (judgments 4A_238/2018 of September 12, 2018, para. 2.2; 4A_692/2016 of April 20, 2017, para. 2.3).

For the rest, the admissibility conditions appear to be met, including the standing to appeal, the time-limit for appeal, the submissions made by the Appellant, or the complaint itself. It remains to examine the Appeal raised by the Appellant in terms of its reasoning.

(…)

5 .

In a single plea, the Appellant alleges a breach of public policy (Art. 190(2)(e) PILA), arguing the CAS did not take into account *force majeure,* which it had invoked. The Appellant argues that it was unable to send its

[2] ~~PILA is the most commonly used~~ English abbreviation for the Federal Statute on International Private Law of December 18, 1987.

[3] LTF is the most commonly used French abbreviation for the Federal Law of June 6, 2005, organizing the Federal Tribunal (RS 173.110).

[4] The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-98-2017

statement of appeal by post because the postal services of the state in which it is based were not functioning due to the Coronavirus crisis. It further submits that the CAS did not inform the Appellant of the opportunity to file its written submission on the arbitration institution's online filing platform, but instead "forced" it to send its submission by post.

In these circumstances, the Appellant considers that the CAS should have granted it an extension of time, especially as it only missed the appeal deadline by a few days.

5.1
An award is incompatible with public policy if it disregards the essential and widely recognized values which, according to the prevailing view in Switzerland, should form the basis of any legal order (ATF 144 III 120[5], para. 5.1; 132 Ill 389, para. 2.2.3).

It is not sufficient that a reason given by an arbitral tribunal violates public policy; rather, the result of the award must be incompatible with public policy (ATF 144 III 120, para. 5.1). For there to be incompatibility with public policy, it is not sufficient that the evidence was wrongly assessed, that a finding of fact was manifestly false, or that a rule of law was clearly violated (Judgment 4A_116/2016[6] of December 13, 2016 para. 4.1).

5.2.
It should be noted at the outset that the grounds for the complaint leave much to be desired, such that there are serious doubts as to its admissibility, having regard to Art. 77(3) LTF. The few lines that the Appellant devotes to criticizing the considerations made by the CAS do not in fact constitute a statement of reasons worthy of the name, intended to demonstrate the existence of an alleged breach of public policy. The Appellant further bases its criticism on facts that differ from those found in the contested decision, in particular when it states that the postal services in its country were not functioning and that it was thus unable to send its statement of appeal by post. If admissible, the complaint, as presented, could only be rejected. With regard to the case of *force majeure* invoked by the Appellant linked to the Coronavirus crisis, it must be noted, as the CAS indeed did, that this particular situation did not prevent it from being able to reply to a CAS submission dated April 27, 2021, by post the very next day. Therefore, the Appellant has in no way established that it was, in fact, impossible for it to send its statement of appeal to the CAS by post before the expiry of the time limit for appeal.

In any event, even if it had indeed been unable to mail its statement of appeal, the Appellant could still have complied with the formal requirements of Art. R31 of the Code by filing, in due time, its statement of appeal on the CAS online filing platform provided for this purpose. While the CAS did not mention this facility in its letter of April 18, 2021, a party, assisted by a lawyer, could reasonably be expected to consult the pertinent provisions of the Code in order to validly file its appeal. The CAS further noted that the Appellant had been aware of the formal requirements of the Code at least since March 4, 2021, the date on which a letter, mentioning the possibility of filing on the CAS online platform, had been sent in the context of another procedure. The solution adopted by the

[5] The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-260-2017

[6] The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-116-2016

CAS can therefore not be brought into question.

Finally, when the Appellant argues that it missed the time-limit by only a few days, it loses sight of the fact that procedural rules are necessary to ensure that the proceedings are conducted in accordance with the principle of equal treatment and that it is therefore not possible to penalize non-compliance with a time-limit more or less severely depending on to what extent the time-limit was exceeded. It follows that the result of the contested decision does not appear to be contrary to public policy within the meaning of Art. 190(2)(e) PILA.

Decision

In view of the foregoing, the Appeal can only be dismissed to the very limited extent that it is admissible.

4A_438/2020
15 March 2021
A. FC v. B.

Appeal against the arbitral decision by the Court of Arbitration for Sport of 2 July 2020 (CAS 2020/A/7283)[1]

Extract of the facts

B. (Respondent) is a professional football player from U.

A. FC (Appellant) is a professional 1st division football club based in V., W.

It is a member of the Football Association in W., which in turn is a member of the Federation Internationale de Football Association (FIFA), an association under Swiss law with its registered office in Zurich.

The parties entered into an employment dispute regarding the employment contract concluded between them dated June 1, 2016 and expiring on May 31, 2018. The Respondent unilaterally terminated the contract on August 3, 2016 with immediate effect. Subsequently, he concluded an employment contract with Club C. from X. and then with Football Club D. Sport Club from Y.

By decision of 1 February 2019, the Dispute Resolution Chamber of FIFA partially approved the claim filed by the Respondent against his former employer A. FC and ordered the latter to pay EUR 976'666, plus interest at 5%, from February 1, 2019. In all other respects, it dismissed the Respondent's claim.

Both the Appellant and the Respondent appealed to the Court of Arbitration for Sport (CAS). The then legal representative of the Appellant made the following reservation to the "Order of Procedure of consolidated proceedings" dated February 4, 2020:

"A. FC reserves all its rights in connection with the decision of the Panel notified on 6 January 2020 whereby it rejected A. FC's requests for production of documents made in its Appeal Brief dated 4 November 2019 and its Answer to the Appeal of B. dated 18 December 2019".

An oral hearing was held in Lausanne on February 14, 2020. At the end, both parties and their legal representatives stated that they had no objections to the CAS Panel's conduct of the proceedings and that their right to be heard had been respected throughout. By an award dated July 2, 2020, the CAS dismissed the Appellant's appeal, partially upheld the Respondent's appeal, and ordered the Appellant to pay EUR 2939131, plus interest at 5%, from August 3,2016.

The Appellant made a civil law appeal to the Federal Tribunal, requesting (1) the Court

[1] The decision 4A_438/2020 was issued in German. The full text is available on the website of the Federal Tribunal, 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 (operated jointly by Dr. Charles Poncet and Dr. Despina Mavromati) as a service to the international arbitration community.

set aside the Award of July 2, 2020, and refer the case back to the CAS Panel for re-adjudication, and (2) the CAS be instructed to take into account the Appellant's right to be heard in the re-adjudication and, in particular, to address the procedural requests made in the Appellant's Appeal Brief of November 4, 2019 in the CAS 2019/N6478 proceedings.

The Respondent and the CAS requested that the appeal be dismissed.

Extract of the legal considerations

(…)

2.
In the area of international arbitration, the appeal in civil matters is admissible under the conditions of Art. 190-192 PILA (SR 291)[2] (Art. 77(1)(a) LTF). The seat of the arbitral tribunal in the present case is in Lausanne. Both the Appellant and the Respondent were domiciled outside Switzerland at the relevant time (Art. 176(1) PILA).

The appeal within the meaning of Art. 77(1) LTF is in principle of a purely cassatory nature, i.e. it can only lead to the annulment of the contested decision (cf. Art. 77(2) LTF, which excludes the applicability of Art. 107(2) LTF to the extent that the latter allows the Swiss Federal Tribunal to decide on the merits of the case). However, it is not excluded that the Swiss Federal Tribunal may refer the case back to the arbitral tribunal (judgments 4A_660/2020 of February 15, 2021 at 2.2; 4A_476/2020 of January 5, 2021 at 2.2; 4A_563/2020[3] of November 25, 2020 at 2.1). Accordingly, Appellant's request (1) is admissible, but not request (2), by which he demands that the Federal Tribunal issue instructions for the arbitral tribunal in its re-adjudication. Apart from that, the requirements for the judgment on the merits do not give rise to any further comments.

Accordingly, the appeal is admissible in this respect.

3 .
Only the objections that are exhaustively listed in Art. 190(2) PILA are admissible (BGE 134 Ill 186[4]at 5 p. 187; 128 Ill 50 at la p. 53; 127 III 279 at la p. 282). Pursuant to Art. 77(3) LTF, the Federal Tribunal only hears the complaints that have been raised and substantiated in the appeal; this corresponds to the obligation to complain provided for in Art. 106 para. 2 LTF for the violation of fundamental rights and of cantonal and intercantonal law (BGE 134 Ill 186 at 5 p. 187 with reference). Criticism of appellatory nature is inadmissible (BGE 134 III 565[5] at 3.1 p.567; 119 11 380 at 3b p. 382).

4.
The Appellant complains of a violation of the right to be heard because the CAS did not evaluate his requests for evidence.

4.1 According to Art. 190(2)(d) PILA, the arbitral tribunal must respect the right of the parties to be heard. This corresponds - with the exception of the right to a statement of reasons - to the

[2] PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.
[3] The English translation of this decision is available here: https://vvww.swissarbitrationdecisions.com/atf-4a-563-2020
[4] The English translation of this decision is available here: https://vvww.swissarbitrationdecisions.com/right-to-br-heard-equality-between-the-parties
[5] The English translation of this decision is available here: https://vvww.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-qua

constitutional right guaranteed in Art. 29(2) BV.[6] The case law derives from this, in particular, the right of the parties to express themselves on all facts essential for the judgment, to represent their legal position, to prove their factual arguments essential for the decision with suitable means offered in due time and form, to participate in the negotiations and to inspect the files (BGE 142 III 360[7] at 4.1.1; 130 III 35 at 5 p. 37 f.; 127 III 576 at 2c; each with references).

4.2 Specifically, the Appellant complains that the CAS did not accept or assess his requests for evidence submitted in the Appeal Brief of November 4, 2019. There, in connection with the Respondent's duty to mitigate damages, he requested the release of the following documents:

In relation to D. FC

- Employment contract(s) signed with D. FC in January 2018 as well as any and all annexes to said contract and/or side-agreements;

- Any and all emails exchanged between the Player, his agent and D. FC leading up to the conclusion of the employment contract with D. FC;

- Copy of any and all pre-contractual documents, offers, memorandum of understanding exchanged and/or signed with D. FC;

In relation to C.

- Employment contract(s) signed with C. in August 2018 as well as any and all annexes to said contract and/or side-agreements;

- Any and all emails exchanged between the Player, his agent and C. leading up to the conclusion of the employment contract in August 2016;

- Copy of any and all pre-contractual documents, offers, memorandum of understanding exchanged and/or signed with C. as of July to August 2016;

In relation to his agent E.

- Representation Agreement (s) signed with Mr. E. and any other third agent in relation to his agency activities with regards to him signing an employment contract with A.and/or in force during said time period". On January 6, 2020, the CAS accepted the first request for evidence and ordered FIFA to hand over the complete dossier, in particular including the contracts signed by the Player with D. Sport Club and C. However, it rejected the other requests: "All other requests for productions of documents are rejected".

After the Appellant subsequently inquired by e-mail of January 6, 2020, about the status of the handling of the further requests for production, which he quoted verbatim, the CAS confirmed on January 7, 2020, that these had been rejected by letter of January 6, 2020, and pointed to the sentence contained therein: "All other requests for productions of documents are rejected.

It follows clearly from this that the CAS did not overlook these requests for production of documents at all, but on the contrary, consciously evaluated and expressly rejected them. It also provided the reasons for the rejection of these requests for disclosure: as the Appellant itself states in the complaint, the President of the Panel stated, at the hearing of

[6] BV is the German abbreviation of the Swiss Federal Constitution (Bundesverfassung).

[7] The English translation of this decision is available here: https://vvww.swissarbitrationdecisions.com/agreed-upon-rules-procedure-do-bind-parties

February 14, 2020, that this was a kind of "fishing expedition".

In view of the vague and overly-broad wording ("any and all") of the further requests for disclosure, without any concretization of the existence of documents relevant to the decision that are to be disclosed, no further explanation was required. After this explanation by the President of the Panel, the then-representatives of the Appellant at the hearing no longer insisted on these requests and did not raise any reservation regarding a violation of their right to be heard.

The CAS therefore respected the Appellant's right to be heard according to Art. 190(2)(d) PILA and its complaint is dismissed.

Decision

Thus, the appeal is found to be unfounded. It is to be dismissed insofar as it is admissible.

4A_520/2021
4 mars 2022
A. c. Fédération Internationale de Football Association (FIFA)

Recours en matière civile contre la sentence rendue le 31 août 2021par le Tribunal Arbitral du Sport (CAS 2019/A/6344)

Extrait des Faits

A. est un ressortissant xxx, né le..., domicilié à xxx. Il était le vice-président de la Confédération Brésilienne de Football entre 2012 et 2015, avant d'en assumer la présidence du 16 avril 2015 au 15 décembre 2017. Il était aussi membre de divers Comités de la Fédération Internationale de Football Association (FIFA) ainsi que du Comité exécutif de la Confederación Sudamericana de Fútbol (CONMEBOL), association regroupant les fédérations nationales de football sud-américaines.

La FIFA, association de droit suisse ayant son siège à Zurich, est la structure faîtière du football au niveau international. Elle dispose d'un pouvoir disciplinaire sur les fédérations nationales de football, les joueurs ou les officiels qui méconnaîtraient ses règles, en particulier son Code d'éthique (ci-après: CEF).

La présente affaire concerne la participation alléguée de A. à un système de corruption impliquant d'autres officiels des organisations actives dans le domaine du football portant sur la vente de droits relatifs à plusieurs compétitions de football, qui a été révélé à la suite d'une longue enquête menée par les autorités américaines. A la suite de ces investigations, plusieurs individus, dont A., ont été inculpés aux États-Unis d'Amérique de diverses infractions, notamment de racket, de blanchiment d'argent et d'escroquerie par le moyen des télécommunications (wire fraud conspiracies). Ces événements sont connus sous le nom de "FIFA-Gate".

Le 23 novembre 2015, la Chambre d'instruction de la Commission d'éthique de la FIFA a ouvert une procédure disciplinaire contre A. en raison de la violation possible par celui-ci de diverses dispositions du CEF.

La Chambre de jugement a rendu sa décision en date du 25 avril 2018. Retenant que A. avait violé les art. 13, 15, 19, 20 et 21 CEF, elle lui a interdit, à vie, d'exercer toute activité en lien avec le football à un niveau national et international, tout en lui infligeant, de surcroît, une amende de 1'000'000 fr.

Par décision du 7 février 2019, la Commission de recours de la FIFA (ci-après: la Commission de recours), saisie par A, a confirmé intégralement la décision rendue par la Chambre de jugement.

Le 17 juin 2019, A. a interjeté appel auprès du Tribunal Arbitral du Sport (TAS) aux fins d'obtenir l'annulation de la décision précitée. Dans sa déclaration d'appel, il a désigné Martin Schimke en tant qu'arbitre.

Le 1er juillet 2019, la FIFA a choisi Massimo Coccia comme arbitre.

Le 24 juillet 2019, le TAS a avisé les parties que la Formation serait présidée par Mark Hovell et leur a transmis une déclaration d'indépendance, signée par ce dernier, indiquant ce qui suit:

"FIFA are a party in another case I have on - CAS 2019/A/6229. I am President of that Panel".

Le 24 décembre 2019, les parties ont été informées de la désignation en qualité de greffier de Tiran Gunawardena, avocat exerçant ses activités au sein de la même

étude d'avocats que le président de la Formation.

La Formation a tenu une audience par visioconférence le 13 octobre 2020. Au cours de celle-ci, l'appelant a requis la production de déclarations d'indépendance actualisées de la part des arbitres concernant d'éventuelles nominations de ceux-ci dans d'autres affaires impliquant la FIFA.

Le 16 octobre 2020, le TAS a transmis aux parties un exemplaire des documents en question. Dans sa déclaration d'indépendance actualisée, l'arbitre Hovell a notamment précisé ce qui suit:

"Prior cases involving FIFA:
Numerous, however the ongoing matters are:

- CAS 2019/A/6344
- CAS 2019/A/6463 & 6464
- CAS 2019/A/6778, 6779, 6827, 6828, 6829, 6936, 6937, 6967 (Appointed by FIFA)
- CAS 2020/A/6767
- CAS 2020/A/7008 & 7009 (Appointed by FIFA)
- CAS 2020/A/7026
- CAS 2020/A/6943
- CAS 2020/A/7092
- CAS 2020/A/7297
- CAS 2020/A/7255, 7387, 7383

Separately, I am aware that a colleague at my law firm (...) recently advised FIFA on an entirely unrelated matter involving GDPR / data protection. For the avoidance of any doubt I was not involved in that matter in any way.

I do not believe this compromises my ability to be a completely impartial and independant arbitrator in this case, however I wished to bring this to the parties' attention in the interest of complete transparency".

Le 21 octobre 2020, l'appelant s'est adressé au TAS aux fins d'obtenir des informations complémentaires de la part de Mark Hovell et du greffier Gunawardena.

En date du 23 octobre 2020, l'appelant a déposé une demande de récusation visant Mark Hovell et Tiran Gunawardena.

Le 26 octobre 2020, le TAS a indiqué aux parties que la demande de récusation était prématurée, dans la mesure où Mark Hovell et Tiran Gunawardena n'avaient pas encore répondu à la demande de renseignements complémentaires formulée par l'intéressé. Une fois ces informations recueillies, l'appelant pourrait choisir de déposer de nouveau sa demande de récusation (re-file his Challenge Petition") s'il le souhaitait.

Le 27 octobre 2020, le TAS a transmis aux parties des informations complémentaires fournies par Mark Hovell ainsi que par Tiran Gunawardena.

Le 3 novembre 2020, l'appelant a déposé une nouvelle fois une demande de récusation visant les deux hommes précités.

Par décision du 10 mai 2021 , la Commission de récusation du Conseil International de l'Arbitrage en matière de Sport (CIAS) a rejeté ladite demande.

Statuant par sentence du 31 août2021, le TAS, admettant partiellement l'appel, a confirmé la décision de la Commission de recours quant aux infractions au CEF commises par A.. Il a cependant réduit à 20 ans la durée de l'interdiction d'activité liée au football prononcée à l'encontre du prénommé, tout en entérinant le montant de l'amende qui lui avait été infligée.

Le 6 octobre2021, A. (ci-après: le recourant) a formé un recours en matière civile aux fins d'obtenir l'annulation de la sentence précitée. Il demande aussi au Tribunal fédéral de prononcer la récusation de l'arbitre Hovell et du greffier Gunawardena. Invoquant l'art. 190 al. 2 let. a et d LDIP, l'intéressé se plaint d'une composition irrégulière du tribunal arbitral et reproche aux arbitres d'avoir enfreint son droit d'être entendu.

Au terme de sa réponse du 1er décembre2021, la FIFA (ci-après: l'intimée) a conclu au rejet du recours dans la mesure de sa recevabilité.

Dans son écriture du 1er décembre2021, le TAS a déposé des observations sur le recours. En annexe à son écriture, il a produit une déclaration écrite de l'arbitre Hovell, dans laquelle celui-ci se détermine sur les critiques formulées par le recourant.

Le recourant, dans sa réplique du 20 décembre2021, et l'intimée, dans sa duplique du 4 janvier 2022, ont maintenu leurs conclusions respectives.

Extrait des considérants

(…)

5.

Dans un premier moyen, fondé sur l'art. 190 al. 2 let. a LDIP, le recourant se plaint d'une composition irrégulière de la Formation qui a rendu la sentence attaquée.

5.1.

5.1.1. Un arbitre doit, à l'instar d'un juge étatique, présenter des garanties suffisantes d'indépendance et d'impartialité. Le non-respect de cette règle conduit à une désignation irrégulière relevant de l'art. 190 al. 2 let. a LDIP en matière d'arbitrage international. Pour dire si un arbitre présente de telles garanties, il faut se référer aux principes constitutionnels développés au sujet des tribunaux étatiques, en ayant égard, toutefois, aux spécificités de l'arbitrage - surtout dans le domaine de l'arbitrage international - lors de l'examen des circonstances du cas concret (**ATF 142 III 521** consid. 3.1.1; **136 III 605** consid. 3.2.1; arrêts 4A _318/2020 du 22 décembre 2020 consid. 7.1 non publié aux **ATF 147 III 65**; 4A_292/2019 du 16 octobre 2019 consid. 3.1; 4A_236/2017 du 24 novembre 2017 consid. 3.1.1).

5.1.2. La garantie d'un tribunal indépendant et impartial découlant de l'art. 30 al. 1 Cst. permet d'exiger la récusation d'un juge dont la situation ou le comportement est de nature à susciter des doutes quant à son impartialité. Elle vise à éviter que des circonstances extérieures à l'affaire puissent influencer le jugement en faveur ou au détriment d'une partie. Elle n'impose pas la récusation seulement lorsqu'une prévention effective du juge est établie, car une disposition relevant du for intérieur ne peut guère être prouvée; il suffit que les circonstances donnent l'apparence de la prévention et fassent redouter une activité partiale du magistrat. Cependant, seules les circonstances constatées objectivement doivent être prises en considération; les impressions purement individuelles d'une des parties au procès ne sont pas décisives (**ATF 144 I 159** consid. 4.3; **142 III 521** consid. 3.1.1; **140 III 221** consid. 4.1 et les références citées; arrêt 4A_318/2020, précité, consid. 7.2 non publié aux **ATF 147 III 65**).

5.1.3. Pour vérifier l'indépendance de l'arbitre unique ou des membres d'une formation arbitrale, il est possible de se référer aux lignes directrices sur les conflits d'intérêts dans l'arbitrage international, édictées par l'International Bar Association (IBA Guidelines on Conflicts of Interest in International Arbitration, approuvées le 22 mai 2004 et révisées le 23 octobre 2014 [ci-après: les lignes directrices IBA]). Ces lignes directrices, que l'on pourrait comparer aux règles déontologiques servant à interpréter et à préciser les règles professionnelles (**ATF 140 III 6** consid. 3.1; **136 III 296** consid. 2.1), n'ont bien sûr pas valeur de loi et ce sont toujours les circonstances du cas concret qui sont décisives; elles n'en constituent pas moins un instrument de travail utile, susceptible de contribuer à l'harmonisation et à l'unification des standards appliqués dans le domaine de l'arbitrage international pour le

règlement des conflits d'intérêts, lequel instrument ne devrait pas manquer d'avoir une influence sur la pratique des institutions d'arbitrage et des tribunaux (**ATF 142 III 521** consid. 3.1.2). Les lignes directrices IBA énoncent des principes généraux. Elles contiennent aussi une énumération, sous forme de listes non exhaustives, de circonstances particulières: une liste rouge, divisée en deux parties (situations dans lesquelles il existe un doute légitime quant à l'indépendance et l'impartialité, les parties ne pouvant pas renoncer aux plus graves d'entre elles); une liste orange (situations intermédiaires qui doivent être révélées, mais ne justifient pas nécessairement une récusation); une liste verte (situations spécifiques n'engendrant objectivement pas de conflit d'intérêts et que les arbitres ne sont pas tenus de révéler). Il va sans dire que, nonobstant l'existence de semblables listes, les circonstances du cas concret resteront toujours décisives pour trancher la question du conflit d'intérêts (**ATF 142 III 521** consid. 3.2.1 et les références citées).

5.1.4. La partie qui entend récuser un arbitre doit invoquer le motif de récusation aussitôt qu'elle en a connaissance. Cette règle jurisprudentielle vise aussi bien les motifs de récusation que la partie intéressée connaissait effectivement que ceux qu'elle aurait pu connaître en faisant preuve de l'attention voulue (**ATF 129 III 445** consid. 4.2.2.1 et les références citées), étant précisé que choisir de rester dans l'ignorance peut être regardé, suivant les cas, comme une manoeuvre abusive comparable au fait de différer l'annonce d'une demande de récusation (**ATF 136 III 605** consid. 3.2.2; arrêt 4A_318/2020, précité, consid. 6.1 non publié aux **ATF 147 III 65**). La règle en question constitue une application, au domaine de la procédure arbitrale, du principe de la bonne foi. En vertu de ce principe, le droit d'invoquer le moyen tiré de la composition irrégulière du tribunal arbitral se périme si la partie ne le fait pas valoir immédiatement, car celle-ci ne saurait le garder en réserve pour ne l'invoquer qu'en cas d'issue défavorable de la procédure arbitrale. Une demande de révision fondée sur la prétendue partialité d'un arbitre ne peut ainsi être envisagée qu'à l'égard d'un motif de récusation que le recourant ne pouvait pas découvrir durant la procédure arbitrale en faisant preuve de l'attention commandée par les circonstances (arrêt 4A_318/2020, précité, consid. 6.1 non publié aux **ATF 147 III 65** et les références citées).

L'art. R34 al. 1 du Code vient concrétiser cette règle jurisprudentielle en prescrivant que la récusation doit être requise dans les sept jours suivant la connaissance de la cause de récusation (arrêt 4A_260/2017 du 20 février 2018 consid. 4.1 non publié aux **ATF 144 III 120**).

5.2.

5.2.1. Le recourant déplore le manque d'indépendance et d'impartialité de l'arbitre Hovell. Il lui reproche d'avoir enfreint volontairement et de manière répétée son devoir de révélation, en ne divulguant notamment pas une circonstance figurant dans la liste orange des lignes directrices IBA, à l'art. 3.1.3, à savoir le fait qu'il avait été nommé à deux reprises ou plus comme arbitre par l'intimée au cours des trois dernières années. Il est d'avis que le fait, pour l'arbitre, d'avoir été nommé à plusieurs reprises par l'intimée dans d'autres procédures constitue en soi une circonstance de nature à remettre en cause son indépendance et son impartialité. Le recourant fait en outre grief à l'arbitre Hovell et au greffier Gunawardena d'avoir dissimulé le fait que le cabinet d'avocats dans lequel ils exercent leurs activités avait conseillé l'intimée sur des questions ayant trait à la protection des données.

Pour étayer son moyen, le recourant relève que l'arbitre Hovell n'a révélé, dans sa première déclaration d'indépendance du 23 juillet 2019, qu'une seule affaire concernant

l'intimée sans mentionner spontanément les autres procédures impliquant celle-ci dans lesquelles il avait été nommé arbitre. Dans sa deuxième déclaration d'indépendance, transmise aux parties le 16 octobre 2020, l'arbitre a fait état de dix procédures auxquelles l'intimée était partie. Le recourant observe que la liste des dossiers figurant dans cette déclaration d'indépendance faisait état de plusieurs procédures qui avaient été jointes et qui, comptabilisées individuellement, représentaient 21 affaires, dont 10 où l'arbitre concerné avait été désigné arbitre par l'intimée. Il souligne aussi que l'arbitre, dans sa troisième déclaration d'indépendance datée du 23 octobre 2020, a révélé l'existence de 16 autres procédures impliquant l'intimée (respectivement 19 en faisant abstraction des jonctions de causes), dans lesquelles il avait été nommé arbitre au cours des trois années précédant sa nomination en tant que président de la Formation dans la présente cause. Le recourant insiste sur le fait que l'arbitre mis en cause a fait état de 26 affaires (voire même de 40 en faisant abstraction des causes consolidées) auxquelles l'intimée était partie et où il siégeait en tant qu'arbitre. Il relève que l'arbitre, durant les trois années précédant sa désignation en tant que président de la Formation dans la présente espèce, a été nommé directement par l'intimée dans onze causes, qui ont ensuite été jointes en trois procédures distinctes.

5.2.2. L'intimée objecte, principalement, que le droit du recourant d'invoquer l'art. 190 al. 2 let. a LDIP est périmé. A cet égard, elle souligne que les avocats qui représentaient le recourant devant le TAS dans le cadre de la présente cause savaient, dès le 2 octobre 2020, que l'arbitre incriminé avait été désigné dans d'autres procédures impliquant l'intimée et que l'étude d'avocats dans lequel ce dernier exerce ses activités avait conseillé l'intimée en matière de protection des données. Ces éléments mentionnés dans la deuxième déclaration d'indépendance du 16 octobre 2020 de l'arbitre mis en cause avaient en effet déjà été révélés le 2 octobre 2020 par celui-ci dans le cadre d'autres procédures arbitrales impliquant les conseils du recourant. La connaissance de telles circonstances par les mandataires de ce dernier devait ainsi être directement attribuée au représenté. Or, nonobstant le fait qu'ils avaient connaissance de ces éléments, les conseils du recourant ont attendu la fin de l'audience tenue le 13 octobre 2020, soit 11 jours plus tard, pour demander aux membres de la Formation de compléter leurs déclarations d'indépendance. L'intimée est dès lors d'avis que le recourant est forclos à demander la récusation de l'arbitre Hovell et du greffier Gunawardena puisqu'il n'a pas agi dans les sept jours suivant la connaissance des motifs de récusation ni respecté son devoir de curiosité.

A titre subsidiaire, l'intimée conteste que les raisons invoquées par le recourant suffisent à justifier la récusation de l'arbitre et du greffier mis en cause. Se référant au chiffre 5 de la partie II des lignes directrices IBA, intitulée " Application Pratique des Règles Générales ", elle souligne qu'une demande de récusation fondée sur le fait qu'un arbitre n'a pas révélé certains éléments ne devrait pas donner lieu automatiquement à une récusation ultérieure de celui-ci, dès lors que le défaut de révélation ne peut pas, en soi, rendre un arbitre partial ou non indépendant, seuls les faits ou les circonstances que l'arbitre n'a pas divulgués étant susceptibles d'établir un éventuel défaut d'impartialité ou d'indépendance de sa part. Elle soutient par ailleurs que le fait pour l'arbitre Hovell d'avoir été nommé à diverses reprises par elle au cours des trois dernières années précédant sa désignation en tant que président de la Formation dans la présente cause ne saurait justifier sa récusation. A cet égard, l'intimée souligne que, selon la note explicative 5 relative à l'art. 3.1.3 des lignes directrices IBA, si, dans certains domaines particuliers tel l'arbitrage sportif, il est d'usage pour les parties de nommer fréquemment le même arbitre dans des litiges différents, aucune révélation de ce fait n'est alors requise puisque toutes les parties à l'arbitrage

devraient être familières avec cette pratique. Elle ajoute que le nombre de nominations de l'arbitre Hovell par ses soins au cours des trois dernières années est insignifiant lorsqu'on tient compte du fait qu'elle a pris part à plus de 400 procédures devant le TAS au cours de cette même période, ce qui implique qu'elle a nécessairement dû désigner à plusieurs reprises les mêmes arbitres au cours de ce laps de temps. Elle observe, par ailleurs, que les deux autres arbitres de la Formation ayant statué dans la présente cause, Martin Schimke et Massimo Coccia, ont été nommés par elle respectivement trois et six fois durant la même période, sans pour autant être en l'occurrence visés par une demande de récusation. Quant au fait que l'étude d'avocats dans lequel l'arbitre et le greffier mis en cause exercent leurs activités a prodigué des conseils en matière de protection des données à l'intimée, celle-ci juge cette circonstance non susceptible de remettre en cause leur indépendance et leur impartialité.

5.2.3. De son côté, le TAS s'emploie à démontrer le caractère infondé du moyen pris de la composition irrégulière du tribunal arbitral. Il insiste notamment sur le fait que l'intimée joue souvent le rôle dévolu à une autorité de première instance appelée à trancher divers litiges en matière de football et qu'elle est ainsi souvent attraite devant lui, aux côtés de l'intimé principal, par précaution, afin que la sentence arbitrale lui soit opposable. L'intimée ne participe généralement pas activement à de telles procédures et laisse souvent l'intimé principal désigner un arbitre de son choix. Le TAS précise que l'arbitre Hovell a été nommé arbitre dans diverses procédures impliquant l'intimée en qualité de " co-intimée passive " à l'appel. A son avis, ces affaires-là ne devraient pas être prises en considération dans le décompte des nominations selon l'art. 3.1.3 des lignes directrices IBA. Le TAS indique que l'arbitre mis en cause a été désigné à 13 reprises dans des procédures où l'intimée était l'intimée principale. Aucune de ces causes ne portait sur des faits de corruption. Le TAS rappelle en outre que l'arbitre Hovell n'a été nommé directement par l'intimée qu'à trois reprises au cours de la période 2018-2020. Se référant à la décision rendue le 10 mai 2021 par la Commission de récusation du CIAS, le TAS souligne enfin que celle-ci a retenu que les conseils du recourant connaissaient, depuis le 2 octobre 2020, l'existence d'un mandat confié par l'intimée au cabinet d'avocats dans lequel officie l'arbitre et que ceux-ci ne s'en sont pas plaints en temps utile dans la présente cause, sous prétexte d'un problème de confidentialité inexistant.

5.2.4. Pour sa part, l'arbitre rappelle que sa pratique - jugé erronée par la Commission de récusation - consistait à ne révéler que les affaires en cours impliquant l'une des parties au litige et indique avoir modifié sa pratique depuis lors. Il conteste cependant toute intention d'avoir voulu cacher délibérément et de manière répétée certaines informations aux parties. Il estime que le recourant est forclos à fonder sa demande de récusation sur les circonstances qui ont été révélées à ses avocats dans le cadre d'une procédure parallèle le 2 octobre 2020, dès lors que ceux-ci ont attendu plus de onze jours avant de requérir des explications complémentaires de sa part. S'agissant de la problématique afférente à ses nominations répétées, l'arbitre relève que, selon l'art. 3.1.3 des lignes directrices IBA, seules les affaires dans lesquelles un arbitre est nommé par une partie doivent être prises en considération. Or, l'arbitre Hovell souligne qu'il n'a été désigné directement par l'intimée que dans trois procédures (1. TAS 2018/A/5915; 2. TAS 2019/A/6778, 6779, 6827, 6828, 6829, 6936, 6937 et 6967; 3. TAS 2020/A/7008 et 7009), en tenant compte des jonctions de causes, durant la période visée par l'art. 3.1.3 des lignes directrices IBA. Il estime que rien ne justifie de faire abstraction des jonctions de causes et de décompter celles-ci séparément. Il précise que les affaires TAS 2019/A/6778, 6779, 6827, 6828, 6829, 6936,

6937 et 6967 portaient toutes sur le point de savoir si une équipe de football avait succédé à un club tombé en faillite et devait ainsi répondre des dettes contractées par celui-ci à l'égard des divers créanciers, raison pour laquelle les parties avaient décidé de joindre les causes afin qu'une seule formation arbitrale tranche l'intégralité du litige. L'autre affaire consolidée (TAS 2020/A/7008 et 7009) concernait un seul et même club de football lequel s'était vu infliger des amendes pour avoir prétendument commis deux infractions à une seule et même réglementation édictée par l'intimée, raison pour laquelle les deux causes avaient été jointes. L'arbitre souligne que si l'on devait suivre l'approche préconisée par le recourant consistant à comptabiliser séparément chaque nomination d'un arbitre, en faisant totalement abstraction des jonctions de causes, il ne faudrait pas longtemps pour que tous les arbitres figurant sur la liste des arbitres du TAS en matière de football dépassent le nombre visé par l'art. 3.1.3 des lignes directrices IBA.

5.2.5. Dans sa réplique, le recourant fait valoir que l'arbitre incriminé n'a qu'une pratique: celle de la dissimulation assumée. Ce dernier n'a, à son avis, pas agi par erreur mais a adopté un comportement clairement intentionnel consistant à passer sous silence de nombreuses affaires dans lesquelles il avait été " impliqué aux côtés de l'intimée ". Le recourant s'emploie ensuite à démontrer que la demande de récusation a bel et bien été formée à temps, raison pour laquelle la Commission de récusation du CIAS ne l'a du reste pas jugée irrecevable. Le recourant reproche ensuite à l'arbitre Hovell de n'avoir pas adopté une attitude transparente et d'avoir dissimulé de nombreuses procédures impliquant l'intimée dans lesquelles il avait siégé en tant qu'arbitre. Elle observe en outre que ce dernier n'a pas révélé, dans sa première déclaration d'indépendance, l'existence d'une procédure arbitrale dans laquelle l'intimée l'avait choisi comme arbitre (TAS 2018/A/5915). Le recourant conteste en outre la position selon laquelle il n'existerait une obligation de révélation pesant sur l'arbitre que lorsque la partie l'ayant désigné joue un rôle " actif " dans la procédure arbitrale. Il estime, par ailleurs, que rien ne justifie de ne pas décompter séparément les procédures ayant fait l'objet d'une jonction de causes. Il relève enfin que les tentatives de l'arbitre mis en cause de justifier son comportement en vertu de pratiques contradictoires et infondées dénotent une attitude partiale de sa part justifiant sa récusation.

5.3. Avant d'examiner la recevabilité et, le cas échéant, le mérite des critiques formulées par le recourant, il sied de rappeler que la Commission de récusation du CIAS a rejeté, par décision du 10 mai 2021, la demande de récusation de l'arbitre Hovell et du greffier Gunawardena formée par le recourant. Émanant d'un organisme privé, ladite décision, qui ne pouvait pas faire l'objet d'un recours direct au Tribunal fédéral, ne saurait lier ce dernier (**ATF 138 III 270** consid. 2.2.1; arrêts 4A_404/2021 du 24 janvier 2022 consid. 5.1.2;4A_287/2019 du 6 janvier 2020 consid. 5.2 et la référence citée). La Cour de céans peut donc revoir librement si les circonstances invoquées à l'appui de la demande de récusation sont de nature à fonder le grief de désignation irrégulière de la Formation du TAS comprenant l'arbitre et le greffier incriminés (**ATF 128 III 330** consid. 2.2). Cela étant, le Tribunal fédéral examinera le moyen pris de la composition irrégulière de la Formation du TAS sur le vu des seuls faits constatés dans la décision prise par la Commission de récusation du CIAS au sujet de la demande de récusation (arrêt 4A_234/2010 du 29 octobre 2010 consid. 2.2 non publié aux **ATF 136 II 605**).

5.4. L'intimée soutient que le recourant serait, en l'occurrence, forclos à se plaindre de la composition irrégulière du tribunal arbitral.

5.4.1. La jurisprudence impose aux parties un devoir de curiosité quant à l'existence d'éventuels motifs de récusation susceptibles d'affecter la composition du tribunal arbitral (**ATF 147 III 65** consid. 6.5; **136 III 605** consid. 3.4.2). Une partie ne peut dès lors se contenter de la déclaration générale d'indépendance faite par chaque arbitre mais doit au contraire procéder à certaines investigations pour s'assurer que l'arbitre offre des garanties suffisantes d'indépendance et d'impartialité (**ATF 147 III 65** consid. 6.5).

5.4.2. En l'espèce, il ressort de la décision rendue par la Commission de récusation du CIAS (n. 53-56) que le conseil qui représentait le recourant devant le TAS a eu connaissance, dès le 2 octobre 2020, du fait que l'arbitre incriminé avait été désigné dans d'autres procédures auxquelles était partie l'intimée et de la circonstance selon laquelle l'étude d'avocats dans lequel ce dernier exerce ses activités avait conseillé l'intimée en matière de protection des données, dès lors que ces informations avaient été divulguées par l'arbitre mis en cause dans le cadre d'autres procédures arbitrales impliquant le mandataire du recourant. Selon la jurisprudence, la connaissance de telles circonstances par le conseil du recourant est imputable à son mandant directement (arrêt 4A_110/2012 du 9 octobre 2012 consid. 2.2.2). Par conséquent, les règles de la bonne foi exigeaient du recourant, sinon qu'il sollicite la récusation de l'arbitre concerné dans le délai de sept jours fixé par l'art. R34 du Code après avoir pris connaissance de ces informations, à tout le moins, pour remplir son devoir de curiosité, qu'il demande formellement au TAS, dans le respect dudit délai, des précisions complémentaires au sujet des circonstances révélées par l'arbitre. En l'occurrence, il est établi que le recourant a attendu, sans raison valable, la fin de l'audience tenue le 13 octobre 2020, soit 11 jours plus tard, avant de demander aux membres de la Formation de compléter leurs déclarations d'indépendance. Dans ces conditions, il y a lieu d'admettre que l'intéressé est forclos à remettre en cause la régularité de la composition de la Formation dès lors que ce dernier n'a pas satisfait à son devoir de curiosité. Que la Commission de récusation du CIAS soit entrée en matière sur la demande de récusation qui lui était soumise n'y change rien, dans la mesure où le Tribunal fédéral n'est pas lié par une telle décision. Il suit de là que le grief soulevé par le recourant est frappé de forclusion.

5.5. A le supposer recevable, ce qui n'est pas le cas, le moyen considéré serait de toute manière infondé.

Le recourant fonde, dans une large mesure, son argumentation sur le fait que l'arbitre mis en cause n'a pas respecté son devoir de révélation. Il insiste sur l'obligation, ancrée à l'art. 179 al. 6 LDIP (dans sa version en vigueur depuis le 1er janvier 2021) et à l'art. R33 du Code, faite à l'arbitre de révéler sans retard l'existence des faits qui pourraient éveiller des doutes légitimes sur son indépendance ou son impartialité, ladite obligation perdurant jusqu'à la clôture de la procédure arbitrale. Contrairement à ce que semble sous-entendre le recourant, la violation du devoir de révélation ne saurait cependant constituer, à elle seule et en l'absence d'autres circonstances corrobatives, un motif de récusation, étant précisé qu'un arbitre n'est tenu de révéler que les éléments qui peuvent susciter des doutes légitimes quant à son impartialité (arrêt 4A_462/2021 du 7 février 2022 consid. 4.3.3). En l'occurrence, la Commission de récusation a critiqué, à bon droit, l'approche suivie par l'arbitre mis en cause consistant à ne révéler que les affaires en cours et à ne pas tenir régulièrement informées les parties chaque fois qu'il siège en tant qu'arbitre dans une nouvelle procédure impliquant l'une des parties au litige (n. 44). Cela étant, rien n'indique que cette pratique, certes inappropriée et contraire aux exigences liées au devoir de révélation, était le fruit d'une volonté

délibérée de l'intéressé de dissimuler certaines informations aux parties. Force est du reste de souligner que l'arbitre Hovell a fini par fournir, à la demande du recourant, toutes les précisions complémentaires requises par lui. Contrairement à ce qu'affirme le recourant, on ne saurait ainsi voir dans les erreurs et les imprécisions commises par l'arbitre en matière de révélation une forme de "dissimulation assume".

Quoi qu'il en soit, les informations non révélées dans un premier temps par l'arbitre Hovell ne sauraient justifier sa récusation.

S'agissant de la problématique afférente aux nominations répétées dudit arbitre, il ressort des faits constatés par la Commission de récusation du CIAS - qui lient la Cour de céans (cf. consid 5.3) - que l'arbitre incriminé a siégé dans 26 procédures auxquelles était partie l'intimée au cours des trois années précédant sa désignation en qualité de Président de la Formation dans la présente cause (n. 68). Aussi est-ce en vain que le recourant fait état de 40 procédures car, ce faisant, il s'écarte de manière inadmissible des faits constatés par la Commission de récusation du CIAS. Au demeurant et contrairement à ce que tente de faire accroire le recourant, le nombre de procédures impliquant l'intimée dans lesquelles l'arbitre Hovell a siégé n'est pas décisif pour apprécier son indépendance et son impartialité. Seules les procédures dans lesquelles l'arbitre mis en cause a été désigné par l'intimée et non par une partie adverse ou par le TAS sont en effet des circonstances de nature à éveiller des doutes quant à son impartialité.

En l'occurrence, il ressort de la décision rendue par la Commission de récusation du CIAS que l'arbitre Hovell a été nommé à trois reprises par l'intimée directement (ou par l'une de ses co-intimées) au cours des trois années précédant sa nomination par le TAS dans la présente cause, ce qui pourrait, à première vue, susciter certaines interrogations au regard de l'art. 3.1.3 des lignes directrices IBA. Cela étant, il ne faut pas perdre de vue que ce sont toujours les circonstances du cas concret qui sont décisives pour vérifier l'indépendance et l'impartialité d'un arbitre. A cet égard, il convient de rappeler que l'arbitrage en matière de sport institué par le TAS présente des particularités qui ont déjà été mises en évidence par ailleurs (**ATF 129 III 445** consid. 4.2.2.2), telle la liste fermée d'arbitres. La note explicative 5 relative à l'art. 3.1.3 des lignes directrices IBA tient compte du reste de ces spécificités puisqu'elle mentionne qu'il peut être fait abstraction du critère formel relatif au nombre de nominations d'un arbitre dans certains domaines particuliers tel l'arbitrage sportif. En l'espèce, l'intimée a exposé, sans être véritablement contredite sur ce point par le recourant, qu'elle a pris part à plus de quatre cents procédures devant le TAS au cours des trois années précédant la nomination de l'arbitre Hovell dans la présente cause, ce qui signifie qu'elle a nécessairement dû désigner à plusieurs reprises les mêmes arbitres. Eu égard aux spécificités de l'arbitrage sportif, force est ainsi d'admettre que la désignation de l'arbitre Hovell par l'intimée, au cours de la période considérée, dans trois affaires ne présentant aucun lien avec la présente procédure, n'est, en l'absence d'autres circonstances corrobatives, pas de nature à éveiller des doutes légitimes quant à l'impartialité ou à l'indépendance dudit arbitre. Il sied au demeurant de relever que les désignations répétées d'un arbitre ne semblent pas gêner outre mesure le recourant, dès lors que l'intimée relève, sans être contredite par ce dernier, que l'arbitre qu'elle a choisi dans la présente affaire, Massimo Coccia, a déjà été nommé par elle à six reprises au cours des trois précédentes années.

Quant à l'autre motif de récusation invoqué par le recourant, il ressort de la décision rendue le 10 mai 2021 par la Commission de récusation du CIAS que le mandat unique

confié par l'intimée au cabinet d'avocats dans lequel l'arbitre Hovell et le greffier Gunawardena exercent leurs activités était un cas isolé, qu'il n'avait aucun lien avec l'affaire jugée par le TAS, qu'il concernait un domaine totalement étranger au présent litige, que les deux hommes précités n'ont pas été les interlocuteurs de l'intimée sur ce mandat, et que le montant versé par l'intimée pour les services fournis ne représentait qu'une infime partie des honoraires perçus par l'étude d'avocats en question (n. 60). Le Tribunal fédéral ne discerne dès lors pas, à l'instar de la Commission de récusation du CAS, en quoi cette circonstance serait susceptible de remettre en cause l'indépendance et l'impartialité de l'arbitre Hovell et du greffier Gunawardena.

Pour le reste, il y a lieu de faire abstraction des critiques de type appellatoire fournies par le recourant, dans la mesure où l'intéressé assoit sa critique sur des faits s'écartant de ceux constatés dans la décision rendue par la Commission de récusation du CIAS ou semble vouloir étayer sa demande de récusation sur la base des explications fournies par l'arbitre Hovell dans sa prise de position jointe aux observations du TAS sur le recours. On ne saurait en effet voir dans la réfutation de l'arbitre des reproches qui lui sont faits une quelconque forme de parti pris à l'encontre du recourant.

Au vu de ce qui précède, le moyen considéré aurait de toute manière dû être rejeté s'il avait été jugé recevable.

(…)

Décision

Au vu de ce qui précède, le recours doit être rejeté dans la mesure de sa recevabilité.

4A_666/2020
17 mai 2021
A. Club c. Fédération Internationale de Football Association (FIFA), D., E. Club

Recours en matière civile contre la sentence rendue le 30 novembre 2020 par le Tribunal Arbitral du Sport (CAS 2019/A/6253)

Extrait des faits

D. (ci-après: le footballeur ou le joueur) est un footballeur professionnel de nationalité....

Après avoir évolué sous les couleurs de A. Club (ci-après: le club), club de football membre de C., laquelle est affiliée à la Fédération Internationale de Football Association (FIFA), le footballeur a joué pour l'équipe... E. Club.

Par décision du 7 mars 2019, la Chambre de Résolution des Litiges (CRL) de la FIFA a condamné le club à verser au joueur 165'167 dollars américains (USD), à la suite de la rupture injustifiée du contrat de travail.

En date du 13 mars 2019, la CRL a communiqué aux parties uniquement le dispositif de sa décision, conformément à l'art. 15 par. 1 du Règlement de la Commission du Statut du Joueur et de la Chambre de Résolution des Litiges (ci-après: le Règlement). Le dispositif a été transmis aux parties par courrier électronique. Pour notifier la décision au club, la CRL a utilisé une adresse figurant dans le " Transfer and Matching System " de la FIFA ainsi qu'une autre adresse électronique du club enregistrée dans les dossiers de la FIFA.

Le 27 mars 2019, le conseil du footballeur a transmis une facture au club pour obtenir le paiement du montant alloué par la CRL, en joignant une copie du dispositif de la décision du 7 mars 2019.

En date du 28 mars 2019, le club a informé la FIFA qu'il n'avait pas reçu ladite décision et en a requis la motivation.

Le 2 avril 2019, la FIFA a rejeté cette requête, en précisant que la décision était devenue définitive, faute pour le club intéressé d'avoir demandé les motifs de la décision dans les dix jours suivant la notification du dispositif.

Le 3 avril 2019, le club a avisé la FIFA qu'il avait reçu le courrier électronique du 13 mars 2019 contenant la décision attaquée mais que celui-ci avait été classé dans ses courriels indésirables ("spams").

Le 3 avril 2019, le club a interjeté appel auprès du Tribunal Arbitral du Sport (TAS) contre la décision rendue le 7 mars 2019 par la CRL et le courrier de la FIFA du 2 avril 2019.

Par sentence du 30 novembre 2020, l'arbitre unique (ci-après: l'arbitre) désigné par le TAS pour juger cette affaire a rejeté l'appel formé par le club. Dans la sentence attaquée, il relève que l'art. 9bis du Règlement permet à la CRL de notifier ses décisions par courrier électronique. L'arbitre constate aussi que l'appelant connaissait cette règle et savait que la notification de la décision de la CRL était imminente. Il souligne également que le club a reconnu avoir reçu le courrier électronique du 13 mars 2019. Il estime ainsi que la décision attaquée est entrée dans la sphère d'influence de l'appelant mais que celui-ci a fait preuve de négligence en n'examinant pas régulièrement sa boîte électronique et les courriers électroniques indésirables qu'elle contenait. L'arbitre considère que la décision attaquée est devenue finale et exécutoire en

vertu de l'art. 15 du Règlement, dès lors que l'appelant n'en a pas requis la motivation dans les dix jours suivant la notification du dispositif. L'appel formé à l'encontre de la décision attaquée est dès lors irrecevable. En tant qu'il vise la lettre du 2 avril 2019, il est mal fondé pour des motifs identiques.

Le 29 décembre 200, le club (ci-après: le recourant) a formé un recours en matière civile au Tribunal fédéral, assorti d'une requête d'effet suspensif, aux fins d'obtenir l'annulation de la sentence précitée.

Dans le délai prolongé à sa demande, la FIFA (ci-après: l'association intimée) a conclu au rejet du recours dans la mesure de sa recevabilité.

Dans sa réponse du 15 février 2021, déposée dans le délai prolongé qui lui avait été fixé à cette fin, le TAS s'est référé à la sentence attaquée.

Par lettre datée du 3 février 2021, E. Club (ci-après: le club intimé) a proposé le rejet du recours.

Par courrier électronique du 23 février 2021, le footballeur (ci-après: le joueur intimé) a conclu au rejet du recours.

La requête d'effet suspensif a été rejetée par ordonnance du 16 mars 2021.

Extrait des considérants

(…)

2.
Le recours en matière civile est recevable contre les sentences touchant l'arbitrage international aux conditions fixées par les art. 190 à 192 LDIP (art. 77 al. 1 let. a LTF). Qu'il s'agisse de l'objet du recours, de la qualité pour recourir, du délai de recours, des conclusions prises par le recourant ou encore des griefs soulevés dans le mémoire de recours, aucune de ces conditions de recevabilité ne fait problème en l'espèce. Rien ne s'oppose donc à l'entrée en matière.

3.
Il convient d'examiner si le s réponses du footballeur intimé et du club intimé ont été déposées en temps utile.

3.1. Aux termes de l'art. 48 al. 1 LTF, les mémoires doivent être remis au plus tard le dernier jour du délai, soit au Tribunal fédéral, soit, à l'attention de ce dernier, à La Poste Suisse ou à une représentation diplomatique ou consulaire suisse.

3.2. En l'occurrence, le délai (judiciaire) de réponse a expiré le 26 janvier 2021. Le joueur intimé, lequel a requis une prolongation dudit délai le 2 février 2021, soit après l'expiration de celui-ci, a déposé sa réponse après l'échéance du délai de réponse. Le Tribunal fédéral ne tiendra dès lors pas compte de cette réponse.

Quant au club intimé, il a lui aussi agi tardivement puisque sa réponse est datée du 3 février 2021. Il convient dès lors d'écarter la réponse déposée par lui. On relèvera toutefois, en passant, que le club intimé a requis, en vain, du Tribunal fédéral qu'il lui communique un exemplaire de ses avis en langue anglaise. Les parties ne sauraient en effet prétendre à un quelconque droit d'obtenir que la procédure conduite par le Tribunal fédéral soit menée en anglais ou que les actes procéduraux soient traduits dans cette langue. L'art. 77 al. 2bis LTF, entré en vigueur le 1er janvier 2021, prévoit certes la possibilité pour les parties de soumettre au Tribunal fédéral des mémoires en anglais dans le cadre des procédures de recours visant une sentence arbitrale. Cette règle est toutefois sans effet sur la langue de la procédure utilisée par le Tribunal fédéral, laquelle demeure régie par l'art. 54 al. 1 LTF (Message du 24 octobre 2018 concernant la modification de la loi fédérale sur le droit international privé [chapitre 12: arbitrage international], FF 2006 p. 7193).

Ainsi, le Tribunal fédéral continuera à l'avenir à conduire la procédure dans l'une des langues nationales de la Confédération suisse même en matière d'arbitrage international.

(…)

5.
Dans un premier moyen, le recourant se plaint d'une violation de son droit d'être entendu.

5.1. Le droit d'être entendu, tel qu'il est garanti par les art. 182 al. 3 et 190 al. 2 let. d LDIP, n'a en principe pas un contenu différent de celui consacré en droit constitutionnel (**ATF 142 III 360** consid. 4.1.1 et les arrêts cités). Ainsi, il a été admis, dans le domaine de l'arbitrage, que chaque partie avait le droit de s'exprimer sur les faits essentiels pour le jugement, de présenter son argumentation juridique, de proposer ses moyens de preuve sur des faits pertinents et de prendre part aux séances du tribunal arbitral (**ATF 142 III 360** consid. 4.1.1 et les arrêts cités). En revanche, le droit d'être entendu n'englobe pas le droit de s'exprimer oralement (**ATF 142 III 360** consid. 4.1.1 et les arrêts cités).

La jurisprudence a déduit du droit d'être entendu un devoir minimum pour le tribunal arbitral d'examiner et de traiter les problèmes pertinents. Ce devoir est violé lorsque, par inadvertance ou malentendu, le tribunal arbitral ne prend pas en considération des allégués, arguments, preuves et offres de preuve présentés par l'une des parties et importants pour la sentence à rendre. Il incombe à la partie soi-disant lésée de démontrer, dans son recours dirigé contre la sentence, en quoi une inadvertance des arbitres l'a empêchée de se faire entendre sur un point important. C'est à elle d'établir, d'une part, que le tribunal arbitral n'a pas examiné certains des éléments de fait, de preuve ou de droit qu'elle avait régulièrement avancés à l'appui de ses conclusions et, d'autre part, que ces éléments étaient de nature à influer sur le sort du litige (**ATF 142 III 360** consid. 4.1.1 et 4.1.3; arrêt 4A_478/2017, précité, consid. 3.2.1). Si la sentence passe totalement sous silence des éléments apparemment importants pour la solution du litige, c'est aux arbitres ou à la partie intimée qu'il appartiendra de justifier cette omission dans leurs observations sur le recours. Ils pourront le faire en démontrant que, contrairement aux affirmations du recourant, les éléments omis n'étaient pas pertinents pour résoudre le cas concret ou, s'ils l'étaient, qu'ils ont été réfutés implicitement par le tribunal arbitral (**ATF 133 III 235** consid. 5.2; arrêt 4A_478/2017, précité, consid. 3.2.1).

5.2. A en croire le recourant, l'arbitre aurait donné arbitrairement plus de poids aux arguments avancé par l'association intimée, sans véritable justification, et tenu un raisonnement arbitraire, violant ainsi son droit d'être entendu.

Par son argumentation, au caractère appellatoire marqué, le recourant ne fait rien d'autre que critiquer le raisonnement tenu par l'arbitre, lequel a considéré que l'intéressé avait fait preuve de négligence en ne consultant pas régulièrement ses courriers électroniques indésirables, alors même qu'il s'attendait à recevoir une décision de la CRL. Or, savoir le comportement reproché au recourant peut être qualifié de négligent ou non et déterminer les conséquences juridiques qui en découlent sont autant de points qui relèvent soit de l'appréciation des preuves, soit de l'application du droit et qui, comme tels, n'ont rien à voir avec la garantie du droit d'être entendu invoquée par le recourant. En outre, le poids différent accordé par un arbitre aux arguments avancés devant lui ne met pas davantage en cause le droit d'être entendu des parties. Sous le couvert d'une prétendue violation de son droit d'être entendu, le recourant cherche en réalité à provoquer par ce biais un examen de l'application du droit de fond, ce qui n'est pas

admissible dans un recours en matière d'arbitrage international.

Pour le reste, le recourant prétend que l'arbitre aurait établi les faits en violation des garanties de procédures visées par l'art. 190 al. 2 let. d LDIP. Sa critique s'épuise toutefois dans cette seule affirmation.

Il s'ensuit le rejet, dans la mesure de sa recevabilité, du grief tiré de la violation du droit d'être entendu.

6.

Dans un second moyen, divisé en deux branches, le recourant prétend que la sentence entreprise est contraire à l'ordre public (art. 190 al. 2 let. e LDIP).

6.1. Une sentence est incompatible avec l'ordre public si elle méconnaît les valeurs essentielles et largement reconnues qui, selon les conceptions prévalant en Suisse, devraient constituer le fondement de tout ordre juridique (**ATF 144 III 120** consid. 5.1; **132 III 389** consid. 2.2.3). On distingue un ordre public procédural et un ordre public matériel.

6.1.1. Une sentence est contraire à l'ordre public matériel lorsqu'elle viole des principes fondamentaux du droit de fond au point de ne plus être conciliable avec l'ordre juridique et le système de valeurs déterminants; au nombre de ces principes figurent, notamment, la fidélité contractuelle, le respect des règles de la bonne foi, ou encore l'interdiction de l'abus de droit (**ATF 144 III 120** consid. 5.1; **132 III 389** consid. 2.2.1).

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 III 120** consid. 5.1; **138 III 322** consid. 4.1; **120 II 155** consid. 6a).

6.2. 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 État de droit (**ATF 141 III 229** consid. 3.2.1; **140 III 278** consid. 3.1; **136 III 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 III 249** consid. 3b; arrêt 4A_548/2019 du 29 avril 202 consid. 7.3).

6.3. Dans la première branche du moyen considéré, le recourant reproche à l'arbitre d'avoir commis un abus de droit en appliquant " à la lettre " l'art. 15 du Règlement, sans tenir compte des circonstances particulières de la cause et d'avoir ainsi violé l'ordre public matériel.

Semblable argumentation tombe à faux. Outre le fait qu'il n'expose pas quelles circonstances particulières l'arbitre aurait négligé de prendre en considération, le recourant reconnaît lui-même avoir violé " par inadvertance " l'art. 15 du Règlement. Aussi l'arbitre n'a-t-il commis aucun abus de droit en appliquant une règle procédurale que l'intéressé concède n'avoir pas respecté. Que le manquement procédural imputable au recourant ait entraîné de sérieuses conséquences pour lui n'y change rien.

6.4. Dans la seconde branche du moyen examiné, l'intéressé reproche à l'arbitre d'avoir versé dans le formalisme excessif, en considérant que le recourant ne pouvait pas appeler de la décision rendue par la CRL, dès lors qu'il n'en avait pas requis la motivation dans les dix jours suivant la notification du dispositif. Il insiste en outre sur le fait qu'il a saisi le TAS dans le délai prévu à cet effet.

6.4.1. Dans plusieurs arrêts, le Tribunal fédéral s'est demandé dans quelle mesure le formalisme excessif pouvait être assimilé à

une violation de l'ordre public au sens de l'art. 190 al. 2 let. e LDIP et, singulièrement, de l'ordre public procédural. Il a évoqué la possibilité de ne prendre en considération, sous l'angle de la contrariété à l'ordre public, que les violations caractérisées de l'interdiction du formalisme excessif, sans toutefois pousser plus avant l'examen de cette question dès lors que dans le cas concret, le TAS n'avait nullement fait preuve de formalisme excessif (arrêts 4A_416/2020 du 4 novembre 2020 consid. 3.3.1; 4A_556/2018 du 5 mars 2019 consid. 6.2; 4A_238/2018 du 12 septembre 2018 consid. 5.2;4A _692/2016 du 20 avril 2017 consid. 6.1).
Il ne saurait en être autrement ici.

6.4.2. Selon la jurisprudence relative à l'art. 29 al. 1 Cst., il y a excès de formalisme lorsque des règles de procédure sont conçues ou appliquées avec une rigueur que ne justifie aucun intérêt digne de protection, au point que la procédure devient une fin en soi et empêche ou complique de manière insoutenable l'application du droit (**ATF 142 I 10** consid. 2.4.2; **132 I 249** consid. 5 p. 253).

Les formes procédurales sont nécessaires à la mise en oeuvre des voies de droit, pour assurer le déroulement de la procédure conformément au principe de l'égalité de traitement et pour garantir l'application du droit matériel (arrêt 4A_238/2018, précité, consid. 5.3).
Le Tribunal fédéral a déjà eu l'occasion de préciser que le TAS ne faisait pas montre d'un formalisme excessif en sanctionnant par une irrecevabilité le vice de forme que constituait l'envoi d'une déclaration d'appel par simple télécopie (arrêts 4A _238/2018, précité, consid. 5.6; 4A_690/2016 du 9 février 2017 consid. 4.2). Il a confirmé, dans un arrêt récent, que la jurisprudence précitée valait *mutatis mutandis* pour la transmission du mémoire d'appel par simple fax (arrêt 4A_556/2018, précité, consid. 6.5).

6.4.3. Appliqués aux circonstances du cas concret, ces principes permettent d'écarter le reproche de formalisme excessif formulé par le recourant.

En l'occurrence, il est établi que le recourant connaissait les dispositions pertinentes du Règlement. Il savait que la notification de la décision était imminente, que celle-ci pouvait lui être valablement communiquée par courrier électronique et qu'il était tenu d'en requérir la motivation dans les dix jours s'il voulait la contester. Le recourant a en outre reconnu avoir reçu ladite décision par courrier électronique mais prétend ne pas en avoir pris connaissance au motif que celle-ci s'est classée parmi ses courriels indésirables.

On ne saurait suivre le recourant quand il remet en cause le but poursuivi par l'art. 15 du Règlement ou lorsqu'il affirme avoir démontré sa " volonté d'agir " contre la décision de la CRL en appelant immédiatement de celle-ci auprès du TAS. En argumentant de la sorte, l'intéressé perd en effet de vue que les formes procédurales sont nécessaires à la mise en oeuvre des voies de droit, pour assurer le déroulement de la procédure conformément au principe de l'égalité de traitement et pour garantir l'application du droit matériel. Un strict respect des règles relatives aux modalités de recours s'impose pour des motifs d'égalité de traitement et de sécurité du droit (arrêts 4A_238/2018, précité, consid. 5.3; 4A_692/2016, précité, consid. 6.2). En décider autrement dans le cas d'une procédure arbitrale particulière reviendrait à oublier que la partie intimée est en droit d'attendre du tribunal arbitral qu'il applique et respecte les dispositions de son propre règlement (arrêt4A_692/2016, précité, consid. 6.2). Il n'est dès lors pas envisageable de sanctionner plus ou moins sévèrement le non-respect d'une règle procédurale qui érige la demande de motivation en un préalable indispensable à la recevabilité de l'appel au TAS, suivant le comportement adopté ultérieurement par le recourant.

Le moyen pris d'une violation de l'ordre public procédural se révèle ainsi infondé.

Décision

Sur le vu de ce qui précède, le présent recours ne peut qu'être rejeté dans la mesure où il est recevable.

Informations diverses
Miscellanous
Información miscelánea

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