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Editorial

Between the last internal CAS seminar in Budapest in 2019 and the recent one held in Geneva, the CAS has gone through a major period of adaptation. This four-year cycle marked by the COVID-19 pandemic, has led to a major evolution of internal and technical practices, including the development of hearings by videoconference and e-filing systems. Many important changes will occur soon in the CAS IT sector; more specifically, the CAS website will be refreshed, a new e-filing system will be implemented allowing automatic filings without prior intervention from the Court Office, and a new system will host the database for jurisprudence. Furthermore, a mobile application will be also developed simultaneously.

Importantly, increasing attention is being paid to human rights issues in sport with the “Guidelines for the hearing of vulnerable witnesses and testifying parties in CAS Procedures” issued by the ICAS in December 2023 to recommend best practices in this area. Each CAS Panel is encouraged to take these Guidelines into account when it faces a situation involving vulnerable witnesses, bearing in mind its duty to comply with the parties’ right to a fair trial, including the right to be heard and to benefit from equal treatment. These Guidelines are recommendations with respect to the implementation of Articles R44.2 and R57 (hearing), as well as Articles R46 and R59 (publication of award) of the Code of Sports-related Arbitration (the Code) when there is a vulnerable witness but shall not prevail over the Code. It is noteworthy that these Guidelines do not constitute mandatory procedural rules and cannot be used by parties seeking to challenge the application or non-application of these Guidelines by any CAS Panel.

The recruitment of additional staff in 2023, made necessary by the constant increase in the number of cases registered by the CAS – more than 900 cases registered in 2023 - brings the number of CAS employees to 53, all based at the new CAS premises, at the Palais de Beaulieu in Lausanne. The CAS headquarters were selected in the competition organized by the magazine Bilan Immobilier and won the 2023 award of the best real estate renovation in Suisse romande. This award was granted by a jury of experts in architecture.

We are pleased to publish in this issue an article co-written by Janie Soublière, CAS arbitrator, and Björn Hessert, CAS counsel, entitled “Safeguarding and beyond - The role of sports regulations, human rights and the balance between the rights of interested parties in sports investigations and the disciplinary proceedings that arise from them”, and an article by Alexis Schoeb, CAS arbitrator, summarising the caselaw of the Swiss Federal tribunal on appeal against CAS awards for the period from 2020 to 2023.

As usual, because most CAS cases are related to football, this new issue of the Bulletin includes a majority of selected “leading cases” related to football, that is ten football cases, three doping cases (in equestrian, powerlifting and cycling respectively), and one case of match-fixing in tennis.

At last, summaries of the most recent judgements rendered in French by the Swiss Federal Tribunal (SFT) in connection with CAS decisions have also been enclosed in this Bulletin. The decision 4A 22/2023 states that the failure to comply with the time limit referred to in article R59 paragraph 5 of the CAS Code does not automatically deprive the arbitrators of their power to rule on the merits of the dispute. In the judgement 4A 254/2023, the SFT recalls that because the filing on the

CAS platform is a condition for the validity of the statement of appeal and not a mere formality, strict compliance with Article R31 of the CAS Code (Notifications and Communications) is essential for reasons of equal treatment and legal certainty. Likewise, in 4A 580/2022, the SFT stresses that if the conditions of article R31 of the CAS Code are not met, the CAS Court Office may refuse to hear the case and there is no formal denial of justice. Finally, in 4A_170/2023, the SFT states that the fact that it is materially impossible for

the CAS to hear witnesses via a video conferencing system neither contravenes generally recognised fundamental principles nor leads to an intolerable contradiction with the sense of justice.

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



Safeguarding and beyond - The role of sports regulations, human rights and the balance between the rights of interested parties in sports investigations and the disciplinary proceedings that arise from them

Janie Soublière* and Björn Hessert**

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I. Introduction

Sports lawyers and adjudicators are well aware that properly regulating sport requires balancing the interests and rights of sporting associations, their members, athletes of all levels and ages, athlete support personnel, and other stakeholders. As the complexity of sporting disputes grows, so too does the need for investigations and disciplinary proceedings that protect the rights and interests of all these

stakeholders in an expanded effort to prevent, uncover and punish wrongdoings of all kinds that threaten the integrity of sport. This has been especially prevalent in safe sport matters, but also in anti-doping and anti-corruption matters.

Sport should be conducted in an “*environment that is respectful, equitable and free from all forms of non-accidental violence to athletes*”¹. This is what is now widely recognized as “safe sport” or

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¹ Mountjoy et al., ‘The International Olympic Committee (IOC) Consensus Statement: Harassment and abuse (non-accidental violence) in sport’, Br J Sports Med (2016) 1, 3; see also, e.g., Rule 2 para. 18 of the Olympic Charter; Article 4

“safeguarding”. Unfortunately, young athletes and other sportsmen and women are exposed on a daily basis to risks of abuse of all kinds. Menacing perpetrators have been able to weaponize fear and intimidation without facing any consequences, their misconduct concealed under a widely applied cloak of silence. Recent reports indicate that victims and survivors of, *inter alia*, physical, mental and sexual abuse, neglect, harassment and discrimination suffer not only from the physical and mental pain that has been inflicted to them, but also from the effect of the lack of clarity, independence and confidentiality in the reporting process, the distrust often shown towards victims and survivors upon reporting their complaint, the inaptitude or straight out failure of sports organizations to carry out thorough and efficacious investigations, and the absence, shortcomings or inadequacies of regulated disciplinary measures and meaningful consequences for perpetrators if and when they are effectively brought to justice.

As a result of growing allegations of abuses of all kinds, including competition manipulation, corruption and bribery, fraud or other abuses committed to the detriment of other athletes and the integrity of sport, national and international federations are increasingly investigating athletes of all levels and ages, as well as their support teams. The investigation into safe sport-related misconduct serves different purposes, i.e. (i) to assess the legal merits of a complaint or allegation (ii) to right the wrong inflicted on the victim where a complaint is established to the required legal standard by effectively and proportionally prosecuting the perpetrator and (iii) to prevent future maltreatment of any of the

of the Fédération Internationale de Gymnastique (“FIG”) Policy and Procedures for Safeguarding and Protecting Participants in Gymnastics (2018); UEFA and German FA, ‘Human Rights Declaration for UEFA EURO 2024’ (2023), p. 13, available at <https://editorial.uefa.com/resources/0287-1974889fe8d8-d387b4a44a67->

organization’s members. In an effort to safeguard that such investigations and proceedings are conducted within a proper legal framework, varying questions arise for lawyers when drafting regulations in an effort to balance the interests of all stakeholders involved or affected by the same. What are legitimate truth-finding investigatory measures? Should alleged wrongdoers be informed of the investigations being conducted against them? When does the balance of interests favor at-risk sportspersons and justify a determination that the protection of their substantive and procedural rights supersedes those of others?

Once investigations are completed and charges brought against alleged perpetrators, similar questions related to the balance of interests of parties arise for adjudicators when assessing requests for provisional measures, *de novo* hearings and the procedural axiom that the rights of natural justice of all parties must be protected in disciplinary proceedings to ensure that justice can be carried out.

This article first provides a brief overview of the terminology and legal landscape. Then it considers the varying rights of individuals involved in safeguarding sports investigations and sports proceedings, with special attention to minor athletes and the rules and regulations that apply to them. Finally, it offers suggestions on how to balance some differing rights and interests involved in investigating and prosecuting safe sport matters as well as other matters like anti-doping and anti-corruption before first instance association tribunals or the Court of Arbitration for Sport² (“CAS”). While the discussion in this paper focuses on internal

[1000/human_rights_documents_uefa_euro_2024.pdf](https://www.uefa.com/uefa/about-uefa/1000/human_rights_documents_uefa_euro_2024.pdf) (“HRD UEFA EURO 2024”).

² See e.g. CAS 20210/A/2311 & 2312 Stichting Anti-Doping Autoriteit Nederland (NADO) & the Koninklijke Nederlandsche Schaatsenrijders Bond (KNSB) v. Wesley Loomers, award of 22 August 2011; CAS 2020/A/6807 Blake Leeper v. International

measures and best practices to adopt with regards to safe sport investigations and safe sport proceedings, it is important to emphasize that – in the best-case scenario³ – victims and survivors can also find redress through the parallel investigations and criminal proceedings conducted by law enforcement agencies.

II. Basis for the subsequent discussion

Investigating and prosecuting safe sport, anti-doping and anti-corruption matters among others requires a fine balancing act in order to ensure that the rights of all involved are respected, that the integrity of sport is maintained and that the rules of natural justice and basic legal principles that arise from them prevail above all regulations, be they properly drafted and implemented or not. Accordingly, this section looks at (i) the evolution safeguarding as a right (ii) the persons whose rights need to be protected, (iii) the perpetrators they need to be protected from, who also hold certain rights, and (iv) the applicable substantive sports regulations that govern all of them.

A. How did safeguarding become a high profile topic?

Association of Athletics Federations (IAAF), award of 23 October 2020; CAS 2019/A/6388 Karim Keramuddin v. Fédération Internationale de Football Association (FIFA), award of 14 July 2020; CAS 2019/A/6669 Sayed Aki Reza Aghazada v. FIFA, award of 28 April 2022.

³ See K. Benner and J. Macur, ‘Nassar Victims Suing F.B.I. for Early Investigative Failures’ (New York Times, 8 June 2022), available at <https://www.nytimes.com/2022/06/08/us/politics/nassar-fbi-lawsuits.html>.

⁴ Independent, Former Olympic coach gets 17 years for sex attacks (28 September 1995), available at <https://www.independent.co.uk/news/former-olympic-coach-gets-17-years-for-sex-attacks-1603214.html>.

⁵ J. McPhee and J. P. Dowden, ‘The Constellation of Factors Underlying Larry Nassar’s Abuse of Athletes’

The discussion around safeguarding and child protection is not entirely new⁴. Yet, it took one major scandal to instigate a significant and concerted effort to better regulate national and international sports federations’ safeguarding rules. Safeguarding rules’ purpose is to enshrine the protection of sportspersons by expressly identifying various misconducts, regulating them and implementing concrete disciplinary action when a breach of these rules is uncovered and effectively established. Arguably, the case of Larry Nassar and USA Gymnastics was for safeguarding and child protection the equivalent of what the so-called “Festina doping scandal” was for the fight against doping. After Joan McPhee and James P. Dowden published their report⁵ on the *Nassar* case in December 2018, which was echoed to a certain extent by various other reports published worldwide regarding wrongdoing in gymnastics and other sports⁶, it became evident that more needs to be done by sports organizations, national legislators and law enforcement agencies to ensure that such wrongdoing can be prevented in the future, that better mechanisms are set up to report its occurrence and that perpetrators are more effectively prosecuted when found liable for the same. A major shift has thus occurred in the sporting world with the IOC publishing a

(10 December 2018), available at <https://www.ropesgray.com>; see also Anna Whyte, ‘The Whyte Review’ (June 2022), available at <https://sportengland-production-files.s3.eu-west-2.amazonaws.com/s3fs-public/2022-08/The%20Whyte%20Review%20Final%20Report%20of%20Anne%20Whyte.pdf?VersionId=fizNx7wABnsdz5GRldCKl6m6bYcIAqBb> (“Whyte Review”).

⁶ See the Gymnastics Australia Review (2021), the Gymnastics New Zealand Cultural Review (2021), the Switzerland National Investigation into Rhythmic and Artistic Gymnastics Incidents (2021), the Dutch Gymnastics Investigation (2020), the McLaren Independent Gymnastics Canada Review (2023) [Gymnastics-Report-Jan-22-2023.pdf](https://mclarenglobalsportsolutions.com/) (mclarenglobalsportsolutions.com); Independent Mali Basketball Abuse Investigation <https://www.mclarenglobalsportsolutions.com/pdf/FibaReport-09-2021.pdf>.

Consensus Report⁷ and Tool Kit⁸ for all IOC sports to implement. Also in the wake of the “me-too movement” sport is now, as a whole, voicing its commitment to safe sport. The IOC has further implemented Rule 2 para. 18 of the Olympic Charter which states that “*The IOC’s role is to promote safe sport and the protection of athletes from all forms of harassment and abuse*”. As a result of the importance of this high-profile topic, many sports organizations have already taken important steps in this regard. The wellbeing and protection of sportspersons is considered by many sports organizations as a fundamental legislative and operational objective⁹ and abuse and harassment are now widely considered to be a severe violation of the integrity of sport. Yet, the sporting community’s attempt to successfully address and redress these issues has faced various roadblocks, including questioning whether the rules and regulations of national and international sports organizations are suitable and effective to combat these offences of varying gravity.

B. Who needs to be protected and what legal assistance do they need?

⁷ Mountjoy et al., ‘The International Olympic Committee (IOC) Consensus Statement: Harassment and abuse (non-accidental violence) in sport’, *Br J Sports Med* (2016) 1, 3.

⁸ Duncan/Kirsty. IOC Toolkit for IFs and NOCs. Safeguarding athletes from harassment and abuse in sport. 03 November 2017.

⁹ See for example Article 4 lit. c) of the World Aquatics (“WAQ”) Constitution (2023 edition) (“*The objectives of World Aquatics are to promote safe Aquatics and the protection of Athletes from all forms of harassment and abuse*”); Article 2.1 para. 3 and 13 of the FIG Statutes (“*The objectives of the FIG are to coordinate effort for safe and healthy physical and moral developments in gymnastics and the practice of all sports activities relating to it ... to safeguard gymnasts/athletes and other participants in gymnastics from any kind of harassment and abuse*”).

¹⁰ UN General Assembly, *The Convention on the Rights of the Child*, 20 November 1989, Treaty Series vol. 1577, p. 3 (“CRC”).

¹¹ Cf. Article 2.2 of the FIG Statutes (2023 edition); Article 2 of the FIFA Statutes (2023 edition) in

Risk assessments must be conducted prior to establishing suitable and effective measures for the protection of sportspersons to determine which sportspersons are at risk and whether the scope of the applicable safeguarding policy applies to them and their perpetrator.

As a starting point, children and minors are the most vulnerable persons within society. This is no different in a sporting environment. Article 1 of the Convention on the Rights of the Child¹⁰ (“CRC”) provides that “*a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier*”. While the CRC refers to national law as opposed to sports rules and regulations, the definition of a child can nevertheless be applied by analogy to sports regulations. In other words, although most sports organizations are private entities to whom the CRC and the Convention do not directly apply (unless a sports organization has committed itself to respecting the CRC¹¹ which will be further discussed below), sports organizations’ rules and regulations generally

conjunction with articles 2, 7 and 13 of the FIFA Human Rights Policy (2017 edition); HRD UEFA EURO 2024, p. 7, in which, *inter alia*, UEFA and the German FA recognize that they are “*committed to respecting and promoting all recognised human rights and to aligning all actions during the preparation and staging of UEFA EURO 2024 with the internationally recognised UN Guiding Principles on Business and Human Rights, which have also been put on a legal footing in German law in the form of the Act on Corporation Due Diligence Obligations in Supply Chains, and to ensure that human rights are respected, also by third parties.*”; see also U. Haas and B. Hessert, ‘Sports Regulations on Human Rights – Applicability and Self-commitment’ in C. Chaussard, C. Fortier and D. Jacotot (eds), *Le sport au carrefour des droits – Mélanges en l’honneur de Gérald Simon* (LexisNexis 2021) 287–307; A. Rigozzi, ‘Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond’ in C. Müller; S. Besson and A. Rigozzi (eds), *New Developments in International Commercial Arbitration 2020* (Stämpfli 2020) 77-130.

recognize that children and minor athletes are below the age of eighteen years¹², irrespective of national laws. Further, the autonomy of sports organizations allows them to implement statutory provisions related to the age limit of sportspersons that may be different to some national laws if this appears necessary to the protection of the integrity of a sporting competition but also for the protection of the minor athletes. The purposes of these provisions are often to balance the rights of minor athletes to participate in elite sporting competitions against the importance of safeguarding these athletes' mental and physical health, safety and wellbeing. For example, the World Anti-Doping Code ("WADC") defines minors as athletes below the age of 18, but then further qualifies this by referring to athletes below 16 as "protected persons" benefiting from specific protections¹³ and does not consider athletes between the age of 16-18 to be protected persons if they compete at the international level or are included in a registered testing pool (the implication being that even if they are 16 or 17,

they have been better educated and are more knowledgeable on their rights and responsibilities in the same way as elite athletes). And, Article 19 para. 1 of the FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP") generally prohibits the transfer of minor football players unless permitted under the exceptions mentioned in para. 2 of the provision.¹⁴ The aim of Article 19 para. 1 of the FIFA RSTP is to prevent human trafficking and exploitation of young players among others.¹⁵

The wellbeing of the persons at risk is paramount to safeguarding in sport. Wellbeing as part of safeguarding "*requires a culture in which such values are not just promoted but implemented. Where standards are potentially breached, it is important that participants feel able to make disclosures to this effect*".¹⁶ Safe sport requires sports organizations to establish a reporting system through which whistleblowers and/or victims/survivors can easily and confidentially report any misconduct in order to initiate investigation against the reported person(s).¹⁷

¹² See e.g. WADC (2021 edition), Appendix 1 Definitions; Article 19 para. 1 FIFA Regulations on the Transfer and Status of Players (October 2022 edition); Article 3.11 of the WAQ Rules on the Protection from Harassment and Abuse (2023 edition).

¹³ See e.g. WADC Definitions, Articles 10.3.1, 10.3.3, 10.6.1.3, 10.14.1 and 20.5.12; CAS OG 22/08 IOC v. RUSADA / CAS OG 22/09 WADA v. RUSADA & Kamila Valieva / CAS OG 22/10 ISU v. RUSADA, Kamila Valieva & ROC, award of 17 February 2022, paras. 195 et seq.; see also WADA, 'WADA statement following CAS decision not to reinstate skater's provisional suspension' (14 February 2022), available at <https://www.wada-ama.org/en/news/wada-statement-following-cas-decision-not-reinstate-skaters-provisional-suspension>.

¹⁴ See e.g. CAS 2015/A/4312 John Kenneth Hilton v. Fédération Internationale de Football Association (FIFA), award of 9 August 2016; CAS 2016/A/4805 Club Atlético de Madrid SAD v. Fédération Internationale de Football Association (FIFA), award of 1 June 2017; CAS 2021/A/7807 Sport Lisboa e Benfica v. Fédération Internationale de Football Association (FIFA), award of 28 September 2021.

¹⁵ See FIFA Commentary (2021 edition), p. 221: "*The primary objective of article 19 is to protect the welfare of young players against exploitation and mistreatment. They aim to ensure that minors are provided with a stable environment for training in order that they may achieve their potential. At the same time, they recognise the importance of education and of the family unit, particularly for the many young players who do not turn professional. On the other hand, however, minors should be given the opportunity to make the most of the sporting opportunities available to them.*"

¹⁶ Whyte Review, para. 96.

¹⁷ See e.g. Article 6 of the FIG Policy and Procedures for Safeguarding and Protecting Participants in Gymnastics (2018); Article 5.2 of the WAQ Rules on the Protection from Harassment and Abuse (2023 edition); WADA Speak Up!: https://speakup.wada-ama.org/FrontPages/Default.aspx?gclid=CjwKCAjw5dqgBhBNEiwA7PryaOEhnces1sBShDKLpnwRP_GoAk1W4j2TK3pgnAF5-NqBKOn7XVEoORoC4cQQAvD_BwE; Swiss Sport Integrity: <https://www.sportintegrity.ch/en/organization/report-incident>.

Of course, such reporting mechanisms are only effective if sports organizations have investigative and disciplinary measures in place to respond appropriately to each complaint.¹⁸ Otherwise reporting systems are nothing more than a paper tiger or a blind alley. Ultimately, only a comprehensive investigation and resolution of all complaints can contribute to the protection of athletes and the integrity of sport. This is a tall order.

When it comes to safeguarding in sports investigations and sports proceedings, sports organizations may take guidance from the preamble and Article 19 para. 2 of the CRC which, *inter alia*, provides that “*the child, by reason of [their] physical and mental immaturity, needs special safeguards and care, including appropriate legal protection*” and “[s]uch protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement”.¹⁹ Accordingly, child safeguarding in sport must not only respond to harm that has been caused or harm that is likely to be caused (i.e. child protection) through the prosecution of all kinds of wrongdoing, such as physical, mental and psychological abuse, harassment, discrimination, economic abuse, or human trafficking,²⁰ it must primarily focus on preventive measures to protect minor athletes from such harm and promote the wellbeing and welfare, personal development

and equality of minor athletes at all levels of the sporting pyramid and beyond.²¹

Whilst children and minors are particularly vulnerable, the guidance provided by the above noted CRC principles shall also apply to all athletes of all ages. If the term “safeguarding” is often used in the context of the protection of minor athletes²² this does not mean that athletes and other sportspersons who reach the age of eighteen and beyond are no longer worthy of protection. On the contrary, safeguarding equally includes the adequate protection of adult athletes. Thus, the application of legal protective measures for major aged athletes, especially those who are vulnerable or at-risk, does not differ greatly from those of minors. An obvious difference is that athletes who have reached the age of majority are expected to have a higher level of maturity and experience. In their case, the participation of legal guardians in sports investigations and proceedings is not required. Nevertheless, adult athletes may also be vulnerable in sports investigations and sports procedures for reasons related to, for example, gender, religion, culture, sexual orientation or financial circumstances or intersectionality. Any or all of these factors may hinder a person at risk – regardless of whether a minor or adult athlete (in the following, the term ‘persons at risk’ is used for minor and adult sportspersons, unless otherwise stated) – to seek justice before association tribunals or sports arbitration tribunals. It shall be stressed that safeguarding in this sense thus not only encompasses the establishment of legal protections to prevent harm against athletes, but also the

¹⁸ K. Gallafent and R. Bush, ‘Safeguarding’ in A. Lewis and J. Taylor (eds), *Sport: Law and Practice* (4th edn, Bloomsbury Professional 2021) para. B6.34.

¹⁹ Preamble and Articles 19 para. 2 of the CRC.

²⁰ M. Lang and M. Hartill, ‘Introduction’ in M. Lang and M. Hartill (eds), *Safeguarding, Child Protection and Abuse in Sport* (Routledge 2016), p. 3 et seq.; K. Gallafent and R. Bush, ‘Safeguarding’ in A. Lewis and J. Taylor (eds), *Sport: Law and Practice* (4th edn, Bloomsbury Professional 2021) para. B6.9; Whyte Review, para. 96.

²¹ M. Lang and M. Hartill, ‘Introduction’ in M. Lang and M. Hartill (eds), *Safeguarding, Child Protection and Abuse in Sport* (Routledge 2016), p. 3 et seq.; K. Gallafent and R. Bush, ‘Safeguarding’ in Adam Lewis and Jonathan Taylor (eds), *Sport: Law and Practice* (4th edn, Bloomsbury Professional 2021) para. B6.9.

²² M. Lang and M. Hartill, ‘Introduction’ in M. Lang and M. Hartill (eds), *Safeguarding, Child Protection and Abuse in Sport* (Routledge 2016), p. 4.

establishment of legal mechanisms, like investigations, to ensure that if and when harm is committed to athletes, there are sufficiently robust regulatory mechanisms in place to verify the allegation, to satisfy the legal burden to establish its commission and to properly discipline the perpetrators.

C. Who are the perpetrators?

Anyone can potentially pose a threat to minor athletes and other sportspersons: executive staff, coaches, medical personnel, team members, club officials, volunteers, sponsors, and other persons “outside” of their sports community *per se*. In this context, it is important to understand that the investigatory and disciplinary jurisdiction of sports organizations is limited to their direct and indirect members. In other words, sports organizations can only investigate and prosecute alleged maltreatment and misconduct (i) that is sanctionable under their rules and regulations²³ (ii) against persons who have agreed to comply with them. Persons outside the sports organizations’ *ratione personae* may be subject to, for example, criminal or civil sanctions under the applicable national law. Sports organizations, however, have no reach and means to impose sporting sanctions against persons who are neither their members (e.g. family members of athletes) or employees, who may *de facto* and in law fall outside the scope of their policies. In this regard, it is also worth mentioning that the professional relationship between sportspersons and their own support personnel or the mere reference to non-members in their rules and regulations is not sufficient to extend the investigatory and disciplinary jurisdiction of sports organizations

to non-members.²⁴ This has also been confirmed in, e.g., CAS 2016/A/4607 in which the Sole Arbitrator held that:

*“[the] contractual relationship between [sports medicine specialist] and the Athlete as shown above, however, does by no way mean that the [sports medicine specialist] also automatically entered into a concurrent legal relationship with a third party (the [sports organization]), thereby conferring disciplinary powers to the [it]. This would only be true if – very exceptionally – the contract between the Athlete and the [sports medicine specialist] had to be qualified as a contract for the benefit of a third party. There is, however, no evidence on file that the Athlete and the Appellant when executing the contract between them had in mind to confer upon the [sports organization] any disciplinary competence with respect to the [sports medicine specialist]”.*²⁵

As a preventive measure, sports organizations may make use of their domiciliary rights to ensure that suspicious non-members can no longer come near sportspersons in their training and competition venues.²⁶ Other tools to extend the investigatory and disciplinary jurisdiction of sports organizations include to have volunteers or part time employees agree to abide by and sign Codes of Conduct or Letters of Engagement, which would effectively bind them to the association’s safe sport rules and other regulatory mechanisms; or to have the sportsperson’s support personnel sign a contract in form of a rules recognition contract in which they voluntarily submit to the rules of a sports organization. Finally, it goes without saying that (i) clearly defining to whom a sporting association’s athlete safeguarding policy applies is imperative to identify who is required to adhere to the organization’s policy²⁷ and (ii) clearly defining

²³ See section II.4.

²⁴ CAS 2016/A/4697 Elena Dorofeyeva v. International Tennis Federation (ITF), award of 3 February 2017, para. 92.

²⁵ *Ibid.*

²⁶ See CAS 2016/A/4697 Elena Dorofeyeva v. International Tennis Federation (ITF), award of 3 February 2017.

²⁷ For example the US Centre for SafeSport policy applies to ‘covered individuals’ who are defined as “[a]ny individual who: (a) currently is, or was at the time of a possible violation of the Code, within the governance or disciplinary

when the policy applies is equally *de rigueur* as the nature of sport requires athletes to travel to and from competition, train in other countries, stay in various overnight accommodations etc²⁸. Some associations will look to have their policy apply both in competition and out of competition, whilst others will strictly try to govern the behavior of ‘covered persons’ on site at a given competition²⁹.

All sports organizations would be well advised to conduct due diligence on any and all individuals that it may choose to employ full or part time, including staff and officials, as well as all non-paid individuals who act on behalf of or for the sports organization, including but not limited to board members and volunteers. Minimal prerequisites in this regard must be background checks, criminal checks, coaching certification, safe sport certification, and execution of agreements binding them to codes of conduct and discipline flowing from breached thereof, only to name a few.³⁰ Needless to say, a sports organization’s failure to have conducted suitable due diligence prior to employing an individual who is later found to be a perpetrator of maltreatment or other misconduct is case for civil laws suits³¹, negative press and serious long term reputational and financial repercussions.

jurisdiction of an NGB or who is seeking to be within the governance or disciplinary jurisdiction of an NGB (e.g. through application for membership), (b) is an Athlete or Non-athlete Participant that an NGB or the USOC formally authorizes, approves or appoints to a position of authority over Athletes or to have frequent contact with Athletes or (c) an NGB identifies as being within the Office’s jurisdiction.”

²⁸ International Federations will typically look to their National Members’ rules to govern the out of competition or training periods. See for example Athletics Canada’s safeguarding rules which states, *inter alia*, that Athletics Canada has jurisdiction of any violations of the safeguarding code in “*Incidents that occur during Athletics Canada’s business, activities, or events including, but not limited to, competitions, practices, tryouts, training camps, travel associated with Athletics Canada’s activities, Athletics Canada’s office environment, and any meetings*”.

D. Sports rules and regulations and mandatory statutory provisions

The “autonomy” of sports organizations

Sports organizations generally have a legitimate interest to avoid the perpetration of all incidents that can disrupt or affect the life of an association³² and to uncover the truth when allegations regarding such incidents are made or uncovered. When a violation of their rules and regulations occurs, sports associations may benefit from a certain degree of autonomy to decide on the applicable disciplinary consequences depending on the severity of the violation - so long as these are clearly provided for in their rules. Under certain circumstances, this can lead to a temporary or permanent ban from sport. Due to these potentially serious consequences for their members, including the possible effect on their personality and economic rights, the autonomy of sports organizations is limited by national mandatory provisions insofar as they are, *inter alia*, responsible for the implementation of clear and unequivocal regulations that comply with the legal principles of legality and predictability. In other words, sports rules have to be “*properly adopted, describe the infringement and provide, directly or by reference, for the relevant sanction*”.³³ In safe sport in particular, clarity in rules is all the more

²⁹ For example, the ITF Player Welfare Policy outlines “*regulations that govern respectful behaviour of all credential persons on-site at ITF sanctioned tournaments.*”

³⁰ Whyte Review, para. 487.

³¹ For example, Larry Nassar’s accusers and Gymnastics USA and Bertrand Charest’s accusers and Alpine Canada.

³² Advisory opinion CAS 2005/C/976 & 986 Fédération Internationale de Football Association (FIFA) & World Antidoping Agency (WADA), award of 21 April 2006, para. 123.

³³ CAS 2014/A/3665, 3666 & 3667 Luis Suárez, FC Barcelona & Asociación Uruguaya de Fútbol (AUF) v. Fédération Internationale de Football Association (FIFA), award of 2 December 2014, para. 73; CAS 2018/A/5864 Cruzeiro E.C. v. Fédération Internationale de Football Association (FIFA), award of

important because of the wide range of punishable behavior and the equally wide range of sanctions that could be imposed as a result. It is further necessary that the violated regulations were in force at the time the offense was committed and that the individuals to whom these rules and regulations apply have access to them and have knowledge of their contents and how they are bound by them.³⁴ All these requirements are essential so that direct and indirect members of sports associations know what behavior is expected of them (both in general and during the course of investigations) and, in turn, what behavioral breaches may lead to disciplinary measures. The conformity of sports rules and regulations with the legal principles of legality and predictability has been emphasized by CAS panels which held that:

“[t]he purpose of disciplinary sanctions is to influence the behaviour of its members, in particular to encourage them not to engage in certain unwanted activity by threatening to sanction them. In order to achieve this goal, there must be clarity for all stakeholders on what constitutes misconduct. Furthermore, equal treatment of all members is only possible if there is legal certainty with respect to the contents of the rule. In order to protect the aforementioned interests, criminal law follows the principles of nullum crimen, nulla poena sine lege scripta et certa, pursuant to which no sanction may be imposed unless there is an express provision describing in sufficient clarity and specificity, not only the misconduct but also the applicable sanction. The Panel finds that

13 February 2019, para. 66; see also CAS 2022/A/9018 UAEERF & Ismail Mohd v. FEI, award of 15 March 2023, para. 88; M. Beloff *et al.*, ‘The Court of Arbitration for Sport’ in A. Lewis and J. Taylor (eds), *Sport: Law and Practice* (4th edn, Bloomsbury Professional 2021) para. D2.127.

³⁴ CAS 2022/A/8981 Steven & Jean Lopez v. World Taekwondo, award of 5 September 2023, para. 98.

³⁵ CAS 2017/A/5272 KF Skënderbeu v. Albanian Football Association (AFA), award of 13 April 2018, para. 62 confirmed in CAS 2020/A/7019 Olympiacos Football Club (Olympiacos) v. Hellenic Football

*this principle is applicable by analogy to disciplinary proceedings”.*³⁵

Ensuring conduct is proscribed by regulation.

Instigating sports investigations into alleged maltreatment and abuses of sportspersons against the accused person hinges on the alleged misconduct being punishable under the applicable sports rules and regulations. As discussed above, there needs to be mechanisms by which such allegations may be brought forward, and these presuppose that the allegations will be about specific proscribed behavior that can effectively be prosecuted. How the regulations are worded and what behavior should be sanctioned falls within the regulatory autonomy of sports organizations and may have implications for the level of protection within different sports organization. This has led to a fragmented regulatory landscape.. In fact, some international sports federations have opted for a more general provision on the protection of physical and mental integrity, while others have implemented specific provisions on all forms of maltreatment and abuse.³⁶ While using such so-called “catch-all” provisions may serve a purpose, it is advisable that sports organizations implement specific regulations on all forms of possible wrongdoing against sportspersons as general provisions providing for “unsportsmanlike conduct” or “conduct that brought or is likely to bring the sport into disrepute” pose the risk that a potentially ambiguous wording may not comply with the

Federation (HFF) & Club Panthessalonkeios Athlitikos Omilos Konstantinoupoliton PAOK (PAOK) & “Xanthi” Athletic Group Football Club (Xanthi FC) & CAS 2020/A/7035 PAOK v. HFF, award of 14 August 2020, para. 111 and CAS 2022/A/9018 UAEERF & Ismail Mohd v. FEI, award of 15 March 2023, para. 89

³⁶ See, for example, Article 24 of the FIFA Code of Ethics (2023); Article 4.1.2 of the WAQ Rules on the Protection from Harassment and Abuse (2023 edition); Article 3 of the World Athletics Safeguarding Rules (2023 edition) and the Appendix of the World Athletics Safeguarding Policies.

principles of legality and predictability in the eye of the adjudicatory body. For example, some international sports federations have decided to introduce a specific offence for “hazing”, whereas such misconduct may be punishable under other sports regulations as a violation of psychological abuse.³⁷ In general, sports organizations may take guidance from international human rights treaties. Article 1 of the Declaration on the Elimination of Violence against Women³⁸ (“DEVAM”) defines violence against women (and girls) as “any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty”. More sport-specific guidance is offered to sports organizations by the IOC Consensus Statement³⁹ and Tool Kit⁴⁰ that the IOC has drafted to assist all its members to set up, and implement their own respective safe sport programs, rules and regulations. The Tool Kit provides extensive, definitions of all proscriptive harassment and abuse, templates, general and specific guidance in terms of regulations, investigatory tools and disciplinary mechanisms that are all imperative to establishing a robust safeguarding program. The Tool Kit also offers guidance on how to successfully implement this overall strategy within each relevant stakeholder’s legal framework. Guided by the Tool Kit, many

sports organizations have drafted regulations on maltreatment and abuse containing specific provisions on psychological abuse, physical abuse, sexual harassment, sexual abuse and neglect.⁴¹

In addition to specific provisions, it would nonetheless be judicious also to include a catch-all provision for any conduct that could not have been foreseen at the time of the drafting and adoption of the rules and regulations.⁴² For example, Article 2.3 of the Swiss Olympic Statutes on Ethics in Swiss Sport (2022 edition), *inter alia*, provides that “unsporting behaviour is deemed to include flagrant violations of fundamental value of sport in so far as they are not already covered by rules of play or competition or other provisions of these Ethics Statutes”.

Human rights considerations

Sports organizations do not act in a legal vacuum. Instead, their regulatory and disciplinary autonomy, which might affect the professional life of the person under investigation, is limited by mandatory statutory provisions⁴³ including civil law and data protection law. The latter is particularly important with regard to information gathered in investigated matters that involve a transnational context and/or information that is shared by a sports organization with third

³⁷ See e.g. Article 4.1.2 of the WAQ Rules on the Protection from Harassment and Abuse (2023 edition).

³⁸ UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104.

³⁹ Mountjoy et al., ‘The International Olympic Committee (IOC) Consensus Statement: Harassment and abuse (non-accidental violence) in sport’, *Br J Sports Med* (2016) 1, 3.

⁴⁰ Duncan/Kirsty. IOC Toolkit for IFs and NOCs. Safeguarding athletes from harassment and abuse in sport. 03 November 2017.

⁴¹ See Article 4 of the WAQ Rules on the Protection from Harassment and Abuse (2023 edition) Article 2 of Appendix 1 to the UCI Code of Ethics (2021 edition); Article 2 of the Swiss Olympic Statutes on Ethics in

Swiss Sport (2022 edition); Article 2 of the International Biathlon Union (IBU) Code of Conduct (2021 version); guidance may be taken from Article 19 of the CRC; Article 2 of the DEVAM.

⁴² K. Gallafent and R. Bush, ‘Safeguarding’ in A. Lewis and J. Taylor (eds), *Sport: Law and Practice* (4th edn, Bloomsbury Professional 2021) para. B6.110. See also, for example, Article 4 of the WAQ Rules on the Protection from Harassment and Abuse (2023 edition); Article 6.4 of the UCI Code of Ethics (2021 edition) in conjunction with Article 2 of Appendix 1 to the UCI Code of Ethics (2021 edition); Article 2 of the Swiss Olympic Statutes on Ethics in Swiss Sport (2022 edition).

⁴³ CAS 98/200 AEK Athens and SK Slavia Prague v. Union of European Football Associations (UEFA), award of 20 August 1999, para. 156

parties, such as national law enforcement agencies.⁴⁴ In abuse and maltreatment cases – as can also be observed in other sports-related matters like match manipulation cases – legal literature often calls for human rights law to safeguard the rights of athletes and other sportspersons without a thorough discussion on its applicability to private sports organizations.⁴⁵ This however is the essential first step in the discussion. While widely accepted human rights principles should inherently ensure that all human’s may benefit from dignity, e.g. “*all human beings are born free and equal in dignity and rights*”⁴⁶, human rights are primarily a protective privilege against the interference of state in human rights that has been guaranteed by international human rights conventions (so-called ‘negative obligations’).⁴⁷ States conversely hold an obligation to protect their citizens from any human right violations by third parties (so-called ‘positive obligations’).⁴⁸ The so-called “tripartite typology of duties”⁴⁹ in international human rights law, i.e. the duties to respect, protect and fulfil human rights in sports-related matters, therefore applies directly to sports

organizations if they act as a state entity.⁵⁰ The question revolving around the applicability of human rights standards to private sports organizations is, at first glance, less problematic if sportspersons’ basic rights are protected through national constitutional law. In this case, it is, nevertheless, necessary to examine whether and to what extent national constitutional law can have some kind of third-party effect on inter-individual legal relationships.⁵¹

This debate becomes more complex and controversial when it comes to the application of international human rights, guaranteed by regional (e.g. the European Convention on Human Rights (“ECHR”) and the American Convention on Human Rights) or international human rights conventions (e.g. the Universal Declaration of Human Rights (1948), the CRC, the DEVAM, the Convention on the Elimination of All Forms of Discrimination against Women⁵² and the Convention on the Elimination of All Forms of Racial Discrimination⁵³) to private sports

⁴⁴ B. Hessert, *Sports Investigations Law and the ECHR* (Routledge, 2023) pp. 217 et seq.; Emma Drake, ‘Data Protection in Sport’ in A. Lewis and J. Taylor (eds), *Sport: Law and Practice* (4th edn, Bloomsbury Professional 2021) para. A4.182.

⁴⁵ See e.g. L. Holzer, ‘What Does it Mean to be a Woman in Sports? An Analysis of the Jurisprudence of the Court of Arbitration for Sport’ (2020) 20 Human Rights Law Review, 387-411; M. Jones, ‘No Right Without a Remedy: Integrating Human Rights Protection into Sports Dispute Resolution’ (2022) 15(1) Australian and New Zealand Sports Law Journal 1, 19; P. Wiater, ‘Rechtsgutachten zum Thema ‘Menschenrechtliche Rahmenbedingungen des Ausschlusses russischer und belarussischer Athlet*innen von internationalen Sportwettkämpfen’, p. 10, available at https://cdn.dosb.de/uploads/DOSB_Gutachten_Wiater_fin.pdf.

⁴⁶ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 1.

⁴⁷ M. Freeman, *Human Rights* (4th edn, Polity Press 2022) p. 92; J. Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press 2019), p. 108; O. de Schutter, *International Human Rights Law* (3rd edn, Cambridge University Press 2019) p. 292;

Report of the United Nations High Commissioner for Human Rights, Intersection of Race and Gender Discrimination in Sport, A/HRC/44/26 (15 June 2020) para. 17.

⁴⁸ O. de Schutter, *International Human Rights Law* (3rd edn, Cambridge University Press 2019) pp. 448 et seq.

⁴⁹ *Ibid.*, p. 292.

⁵⁰ See e.g. *National Federation of Sportspersons’ Associations and Unions (FNASS) and Others v. France* App nos 48151/11 and 77769/13 (ECtHR, 18 January 2018).

⁵¹ See e.g. German Federal Constitutional Court BVerfGE 7, 198, 205 et seq.; BVerfGE 103, 89, 100; *San Francisco Arts & Athletics, Inc. and Thomas F. Waddell, Petitions v. United States Olympic Committee and International Olympic Committee* (“USOC”), 483 US 522 (1987); *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC 2197 (Admin), para. 35; *CAS 2007/A/1312 Jeffrey Adams v. Canadian Centre for Ethics in Sport* (CCES), award of 16 May 2008.

⁵² UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249.

⁵³ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660.

organizations.⁵⁴ This question is far from conclusive and is still evolving. Arguably at the core of the discussion⁵⁵ are the self-commitment of sports organizations to international human rights law⁵⁶ and the sportspersons' compulsory acceptance of sports rules and regulations.⁵⁷ As regards the (voluntary) self-commitment of sports organizations to international human rights law within their association life, some sports organizations have introduced provisions in their statutes and/or rules and regulations that refer and bind them to international human rights law. In the event that a sports organization positively commits to international human rights law and, thus, to the tripartite typology of duties, question such as these arise: what is the extent of a sports organization's obligation to protect its members from human rights violations, including maltreatment and abuse?, and what legal remedies are available against sports organizations for lack of human rights protection?

Human rights-related sports rules and regulations generally require further interpretation to assess whether the reference to human rights law (i) binds sports organizations to international human rights law internally⁵⁸, (ii) serves as guidance to promote uniform interpretation and application of

sports regulations in international sport⁵⁹ or (iii) imposes obligations on direct and indirect members to comply with international human rights law *vis-à-vis* other members of the association. Some provisions may even contain several of mentioned functions of human rights provisions⁶⁰. Often, sports federations do not commit themselves to international human rights law in a way that international human rights law is directly applicable to them internally.⁶¹ For the most part, general "catch-all" references to international human rights law are non-binding on sporting federations. Yet, some sports organizations have contractually imposed a binding human rights obligation on its members⁶² whereby any member who violates the human rights of another member can be sanctioned. However, such regulatory provisions neither specify to which human rights conventions the members are obliged to adhere in inter-member relationships, nor which human rights could possibly be infringed. Such human rights provisions are therefore incompatible with the legal principles of legality and predictability. In the event of a dispute, it will ultimately be the adjudicatory body's task to determine whether or not the applicable human rights provision creates binding human rights obligations for the sports organization concerned.

⁵⁴ See e.g. CAS 2020/O/6689 World Anti-Doping Agency (WADA) v. Russian Anti-Doping Agency (RUSADA), award of 17 December 2020, paras. 808 et seq.

⁵⁵ For the applicability of the ECHR relating to the "severity test" see A. Rigozzi, 'Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond' in C. Müller, S. Besson and A. Rigozzi (eds), *New Developments in International Commercial Arbitration 2020* (Stämpfli 2020) 77, 116 et seq.

⁵⁶ U. Haas and B. Hessert, 'Sports Regulations on Human Rights – Applicability and Self-commitment' in C. Chaussard, C. Fortier and D. Jacotot (eds), *Le sport au carrefour des droits – Mélanges en l'honneur de Gérard Simon* (LexisNexis 2021) 287–307.

⁵⁷ *Mutu and Pechstein v Switzerland* App nos 40575/10 and 67474/10 (2 October 2018, ECtHR) para. 115;

B. Hessert, *Sports Investigations Law and the ECHR* (Routledge, 2023) pp. 29 et seq.

⁵⁸ See for example Article 3 of the FIFA Statutes (2022 edition) in conjunction with Article 13 of the FIFA's Human Rights Policy (2017 edition); CAS 2020/A/6807 Blake Leeper v. International Association of Athletics Federations (IAAF), award of 23 October 2020, paras. 320 and 321.

⁵⁹ See for example. Comment to Article 8.1 of the WADA Code.

⁶⁰ See for example Article 2.2 of the FIG Statutes.

⁶¹ Cf. U. Haas and B. Hessert, 'Sports Regulations on Human Rights – Applicability and Self-commitment' in C. Chaussard, C. Fortier and D. Jacotot (eds), *Le sport au carrefour des droits – Mélanges en l'honneur de Gérard Simon* (LexisNexis 2021) 297 et seq.

⁶² See for example Article 1 lit. b) in conjunction with Article 5 lit. a) of the FIG Code of Ethics.

The autonomy of sport is thus generally limited by mandatory statutory provisions including national constitutional law and, under certain conditions, international human rights law. These limitations must be kept in mind when conducting investigations and proceedings arising out of maltreatment and other sporting misconduct.

III. Balancing legal interests and rights in sports investigations

Sport federations or associations who have enacted regulations, such as codes of ethics or anti-doping, anti-corruption or safeguarding rules, shall within these various policies have provided for an investigative mechanism by which potential wrongdoing can be prevented or alleged wrongdoing can be looked into and then prosecuted where established. In either case, the rules providing for such mechanisms and the process by which the investigation would be launched, including *inter alia* the nomination of the independent and impartial individuals tasked or nominated with taking it on, its detailed terms of reference, and the requirements for the issuance of a final report, should all be provided for in detail in the applicable regulations. In other words, sports investigations cannot occur, be carried out or be concluded in a legal vacuum and must be conducted with due regard to all parties' interests.

A. What are sports investigations?

The concept of sports investigations arguably refers to two distinct categories of

investigations⁶³. Preventive and repressive. Each carries its own functions and challenges: Preventive sports investigations have the objective of preventing sports rules violations before they occur. The key element of preventive sports investigations is that they are not specifically related to an alleged sports rule violation. Instead, all direct and indirect members of the investigating sports organization are subject to investigations on the mere basis of their membership in order to protect, for example, the association life or the wellbeing of other members.⁶⁴ Preventive investigatory measures in sports investigations may include doping control tests, x-rays of bicycles prior to the start of a race or monitoring of gambling sites and betting operators.⁶⁵ In safe sport cases, criminal record checks, the establishment of a national register for misconduct in sport or a "safeguarding license" are preventive in nature.⁶⁶

By contrast, the second category of sports investigations are "repressive". Such sports investigations encompass all procedures that are carried out to find out the truth in relation to a specific allegation of a sports rule violation, such as allegations of abuse against a direct or indirect member of a sports organization, or of match-fixing or match manipulation by athletes or officials. The regulatory and procedural requirements for the application of repressive investigatory measures often varies from preventive measures. Both may need to be taken into consideration by sports organizations in the course of investigations.⁶⁷ Both may also be imposed by the association's governing regulation itself. For example, under the

⁶³ B. Hessert, *Sports Investigations Law and the ECHR* (Routledge, 2023) pp. 61 et seq.

⁶⁴ *Ibid.*, p. 62.

⁶⁵ See also CAS 2018/O/5794 Mokgadi Caster Semenya v. International Association of Athletics Federations & CAS 2018/O/5798 Athletics South Africa v. International Association of Athletics Federations, award of 30 April 2019; CAS 2020/A/6807 Blake Leeper v. International Association of Athletics

Federations (IAAF), award of 23 October 2020; CAS 2020/A/7526 World Athletics (WA) v. Salwa Eid Naser & CAS 2020/A/7559 World Anti-Doping Agency (WADA) v. WA & Salwa Eid Naser, award of 30 June 2021.

⁶⁶ See e.g. Whyte Review, para. 487.

⁶⁷ B. Hessert, *Sports Investigations Law and the ECHR* (Routledge, 2023) p. 63 et seq.

WADC, to which all Signatories must comply, national anti-doping organizations and international sports federations must conduct investigations against a sports person who is under suspicion or alleged of having committed an anti-doping rule violation.⁶⁸

The importance of properly drafted rule and regulations

The rules and regulations of sports organizations may present an important challenge to sports investigations if they do not clearly provide for investigations to be conducted whether preventive or repressive. Although the autonomy of sport arguably grants sports organizations the general power to conduct investigations into alleged sports rule violations, sports organizations shall adopt regulations specifically to govern these investigations. Such specific provisions on sports investigations proceedings should, *inter alia*, address (i) the possibility of investigations being conducted internally or externally (ii) the basic requirements to be met for an investigation to be commenced (iii) the extent and use of investigatory powers and (iv) the outcome of the investigatory process in relation to other applicable regulations. At all stages of the investigation, investigators must keep the rights and welfare of the at-risk victim(s) and witnesses in mind, as well as the rights and welfare of the individual being investigated.

Although sports organizations have a legitimate interest in conducting investigations to protect, for example, the integrity of sport or the mental and physical wellbeing of its athletes, as with most actions taken which may lead to sporting discipline, the application of investigatory measures is generally subject to the principle of proportionality. In due consideration of the principle of legal certainty, it may be argued that the more severe the

interference into the investigated sports persons basic rights, the more necessary it is to expressly outline the investigatory measures and the requirements for the application thereof in the rules and regulations of the investigating sports organization. It is further advisable to address the consequences of non-participation for the persons involved in sports investigations, including perpetrators and victims/survivors, as well as for the potential outcome of the investigation in a clear and unambiguous manner. In addition, the weight and evidentiary value of admissions or written witness statements may also be limited if the information was not provided during sports investigations without good reason.⁶⁹ As discussed below, in appeals arbitration procedures before the CAS, the consequences of the latter provision may, however, be less severe in the light of the CAS panels' *de novo* review pursuant to Article R57 para. 1 of the CAS Code of Sports-related Arbitration (the "CAS Code") which provides that "*the Panel has full power to review the facts and the law*", so long of course as the evidence is effectively given *viva voce* before the CAS (see further below).

The value of investigations

Finally, the value of sports investigations must be emphasized. As the burden of proof for the establishment of any sports rule violation usually lies with a sports organization and given the impact that sanctions arising from the same may have on the sports person, it is incumbent upon sports organization to adduce sufficient and compelling evidence that the sports rule violation in question effectively occurred to move forward with procedures before an adjudicatory body. The outcomes of investigations – whether preventative or repressive – are likely the most critical evidentiary elements that can be adduced in the

⁶⁸ See Articles 5.1 and 5.7 of the WADC and WADA's International Standard for Testing and Investigations ("ISTI").

⁶⁹ See e.g. Article 5.5 of the WAQ Rules on the Protection from Harassment and Abuse (2023 edition).

course of a hearing⁷⁰. Sports investigations also contribute to legal peace and justice within the association and reinforce trust in sports organizations. Additionally, the commitment to seek out truth and justice can often have a healing or cathartic effect on victims in safeguarding cases. That said, the value of sports investigations can only be sustained if investigations are carried out in a lawful manner and in a balanced respect of the rights of natural justice of all involved.

B. Undertaking sports investigations

The risks faced by sportsperson under investigation during sports investigations of any kind can derive from different factors, such as age, gender, race, language, sexual orientation, religion or political opinion. Sports organizations need to be aware of such risks. They, along with all the specificities of the matter under investigation whether legal, administrative, humane or regulatory, must be considered in a sports organization's risk assessment prior to the commencement of investigations.

The commencement of the investigation

The requirements for the commencement of sports investigations depends on its repressive or preventive nature. The latter can generally be conducted without any information of a specific allegation of a risk to the integrity of sport. Sportspersons are subject to preventive investigations by virtue of being bound by the sports regulations of the investigating sports organizations. In such circumstances, a certain threshold for the commencement of sports

investigations need not be reached to commence investigations.⁷¹ Sports organizations enjoy a wide margin of discretion to initiate preventive sports investigations against all athletes that are bound by their rules and regulations in the protection of the integrity of sport, such as pre-game bag searches⁷², the collection of urine and blood samples⁷³ or COVID-19 tests⁷⁴. It therefore comes of no surprise that threshold considerations are not addressed in provisions referring to preventive investigations. For example, Article 5.2 of the WADA Code provides that “[a]ny Athlete may be required to provide a Sample at any time and at any place by any Anti-Doping Organization with Testing authority over him or her”. Another example is Article 6.1.7 of the International Cricket Council's Minimum Standards for Players' and Match Officials' Areas at International ('ICC PMOA' which provides as follows:

“At each International Match, all National Cricket Federations, Players, Player Support Personnel, Match Officials and any other visitors to the PMOA agree and acknowledge that the ICC Anti-Corruption Manager (or such other member of the ICC's ACU) shall have absolute authority, without being required to provide any explanation or reason, to require any person in the PMOA to immediately submit themselves and/or any clothing, baggage or other items in their possession, to be searched by the ICC Anti-Corruption Manager, provided that such search is carried out in the presence of a third party who shall be a member of the venue stewarding / security team”.

In repressive sports investigations procedures, a certain threshold must be reached to investigate a specific sports rule violation. This threshold is, however, fairly low.⁷⁵ For an

⁷⁰ For example: In preventative investigations, a Certificate of analysis or laboratory documentation packages. And in repressive investigations betting syndicate, social media and banking evidence in match-fixing cases or *viva voce* or social media evidence from witnesses and victims in safeguarding cases.

⁷¹ B. Hessert, *Sports Investigations Law and the ECHR* (Routledge, 2023) p. 73.

⁷² Ibid., p. 176.

⁷³ Article 5 of the WADA Code in conjunction with WADA's ISTI.

⁷⁴ CAS 2020/A/7356 SK Slovan Bratislava v. Union des Associations Européennes de Football (UEFA) & KI Klaksvik, award of 1 October 2020.

⁷⁵ For example, Chapter E, Article 3.1 of the International Biathlon Union Integrity Code requires

investigation to be initiated, it is sufficient that the investigating sports organization learn of a possible sports rule violation by its direct or indirect members, e.g., through its own investigations, other members, state authorities⁷⁶, whistleblowers⁷⁷, journalists⁷⁸ or social media⁷⁹.

Carrying out the investigation

Once there is sufficient basis to start an investigation, normally after an initial triage or preliminary assessment of the merits of the complaint, the whistleblower information or other⁸⁰, the sports organization should be guided by its regulations with regards to the process to follow in terms of identifying who will undertake the investigation, if it is an external individual – are they independent and impartial, what resources (human, financial, forensic, scientific are required), who needs to be informed or notified of the same and called upon to cooperate in the same⁸¹, setting out and communicating clear confidentiality parameters, and drafting thorough and actionable terms of reference for the investigation where necessary, including but not limited to scope of inquiry, reference to applicable rules and regulations (potentially including applicable human rights), timelines

for completion, and the necessity for the issuance of a final report with findings and recommendations where required and relevant. In this regard, it is recalled that the investigation into safe sport-related misconduct serves different purposes, i.e. (i) to assess the legal merits of a complaint or allegation (ii) to right the wrong inflicted on the victim where a complaint is established to the required legal standard by effectively and proportionally prosecuting the perpetrator and (iii) to prevent future maltreatment of any of the organization's members. With regard to repressive investigations, safe sport investigations often reveal that the abuse and mistreatment may be historical and occurred long ago, or taken place over many years and increased in egregiousness over time as a result of grooming, this often results in an internal repression of the trauma and delayed reporting. Failure to report may in itself constitute a sports rule violation if a person, for example a coach or official, who is not the perpetrator, deliberately remains silent in order to protect the offender.⁸² Sports organizations must therefore take all potential circumstances and scenarios into consideration when drafting and implementing their rules and regulations related to safe sport investigations, notably statutes of limitation.⁸³

that “*there are reasonable grounds to suspect that a Participant may have violated this Integrity Code, the [Biathlon Integrity Unit] may conduct an investigation*”.

⁷⁶ CAS 2018/A/5989 IAAF v. Qatar Athletics Federation & Musab Abdulrahman Balla, award of 12 December 2019; CAS 2018/A/6048 Daniele Bracciali v. Professional Tennis Integrity Officers, award of 15 August 2022; CAS 2018/A/6049 Potito Starace v. Professional Tennis Integrity Officers, award of 15 August 2022; CAS 2021/A/8531 Mohamd Zakaria Khalil, Soufiane El Mesbahi & Yassir Kilani v. The International Tennis Integrity Agency (ITIA), award of 9 March 2023.

⁷⁷ CAS 2011/A/2426 Amos Adamu v. Fédération Internationale de Football Association (FIFA), award of 24 February 2012.

⁷⁸ See e.g. CAS 2015/A/4328 Tema Youth Football Club v. Ghana Football Association (GFA), award of 13 July 2016; CAS 2016/A/4480 International Association of Athletics Federations (IAAF) v. All Russia Athletics

Federation (ARAF) and Vladimir Kazarin, award of 7 April 2017.

⁷⁹ See e.g. E. N. Madalin, ‘Tolerance is Tricky Business: Isreal Folau at the Court of Arbitration for Sport and the Moral Case for the Protection of Athlete’s Free Expression’ (2017–2018) Australian and New Zealand Sports Law Journal 53–76.

⁸⁰ See Articles 11 and 12 of the ISTI and for example also see the IFF Safeguarding and Case Management Procedures and World Athletics Safeguarding Rules.

⁸¹ See Article 12.2.4 of the ISTI and Section F.2 of the Tennis Anti-Corruption Program,

⁸² Cf. Articles 3.3.1 and 3.3.3 of the World Athletics Safeguarding Rules (2023 edition); it shall be noted that such reporting obligation does not apply to victims/survivors whose reports should generally be considered as “whistleblowing”.

⁸³ See, for example, Article 8.1 of the WAQ Rules on the Protection from Harassment and A

The completion of the investigation

Typically, once an investigation is completed and a detailed report issued which makes findings of wrongdoing, a sport organization will, with direct reference to the outcomes of the investigation, be in a position to formally charge the accused and propose appropriate discipline on the alleged perpetrator in accordance with the possible sanctions provided for in their applicable rules and regulations. The accused perpetrator must then of course be given the right to exercise his or her right to a hearing to challenge the formal allegations, whether before the relevant first instance adjudicatory body, the ordinary division or the appeals division of CAS if the rules provide for the same. In addition, victims and survivors who filed the complaint that triggered the investigation must be informed of the outcome of the investigation, may receive a copy of the final report (possibly redacted) if it is not confidential and shall be informed as to whether they will have standing rights in appeals proceedings against the alleged perpetrator in any first instance disciplinary decision (see discussion below).⁸⁴ Other victims/survivors/witnesses may also be granted access to the final report and/or the first-instance decision under the requirements set out in the sports rules and regulations and in due consideration of the protection of privacy and personality rights, including applicable data protection rights⁸⁵ of all the individuals who were involved or provided testimony in the course of the investigation. The publication of such documents can be crucial for victims/survivors' mental and physical wellbeing and often allows them to make informed decisions regarding their

buse (2023 edition); Article 8.1 Swiss Olympic Ethik-Statut des Schweizer Sports (2022 edition).

⁸⁴ See, for example, CAS 2021/A/7663 Marion Sicot v. Union Cycliste Internationale (UCI), award of 27 February 2023; Article 24 para. 6 of the FIFA Code of Ethics; Article 21 of the UCI Code of Ethics

⁸⁵ See Article 21 para. 3 of the UCI Code of Ethics.

potential participation in future disciplinary proceedings.

IV. The provisional suspension of the alleged rule violator and requests related thereto

The rules of sports associations will normally provide for either the mandatory provisional suspension of the accused where the allegations are egregious or give the accused the option of accepting a voluntary provisional suspension where the allegations are less severe.

In cases where a mandatory provisional suspension is imposed, there may be an opportunity for the accused to file a preliminary measure request to lift the provisional suspension pending the outcome of the matter. Regulations will typically clearly provide to this opportunity in order to safeguard an accused's rights to defend themselves and to be heard⁸⁶. However, there may be circumstances where such an appeal is rightly not provided for in the regulations and a provisional suspension must stay in force until a decision on sanction is issued⁸⁷. The sporting association's rules should expressly provide for either, and where the regulations are silent on the issue, again to protect the accused's procedural rights, the default should be for the request for provisional measures to be ruled admissible, and then for an adjudicatory body to rule on its merits.

It is desirable, as it is the case in some anti-doping rules⁸⁸, for an association to set out the requirements to be established for an accused to demonstrate why a provisional suspension should be lifted. These may include, that the

⁸⁶ See Article 7.4 WADC.

⁸⁷ See Section F.3.e of the 2023 ITIA Tennis Anti-Corruption Program.

⁸⁸ See e.g. Rule 7.10.4 of the Athletes Integrity Unit-World Athletics Anti-Doping Rules.

violation has no reasonable prospect of being upheld, for example due to a serious flaw in the case such as lack of jurisdiction, that there is a “strong *prima facie* case” or “good arguable case”⁸⁹ such that the circumstances are likely to be that no disciplinary measure will be imposed, that the exceptional existence of other facts make it unfair under the entire circumstances of the case to impose a provisional suspension as to do so would run the risk of the accused suffering irreparable harm and, that the interests of the accused outweigh those of all the other parties involved, including the victim/survivor.

It should be noted that the aforementioned criteria are assessed on a *prima facie* basis by CAS when making determinations on provisional measures or requests for the lifting of provisional suspension. It is further uncontroversial that an application for provisional relief must satisfy all three of the criteria under Article R37 para. 5 of the CAS Code. More particularly, the applicant must demonstrate that (i) he/she has a likelihood of success on the merits, (ii) he/she will suffer irreparable harm if the relief is not granted and (iii) the balance of interests is in his/her favor.

The “strong *prima facie* case” or “good arguable case” standard derives from national European jurisdictions and is used to determine if preliminary measures should be lifted or granted to prevent a risk of injustice.⁹⁰ As the

standard suggests, a factfinder cannot at this preliminary stage make an ultimate determination on the merits. Instead, when presented with the relatively low bar of the “good arguable case” standard, the factfinder can only assess whether the requesting party has presented sufficient credible evidence to provide a *prima facie* arguable basis for a case.⁹¹

Under Swiss law, provisional measures that equate to the relief on the merits are considered as “anticipated enforcement” measures.⁹² Provisional relief of this nature can only be granted restrictively and the standards to meet for the applicant are much higher than for conservatory or regulatory measures.⁹³ Indeed, “anticipated enforcement” provisional measures can be granted only when the claim appears “clearly well founded”⁹⁴. This means that an individual who has been accused of egregious safe sport rule violations is required to demonstrate that they have a clearly well-founded claim to successfully overturn the provisional suspension.

As to the criterion of irreparable harm, *[t]he Appellant must demonstrate that the requested measures are necessary in order to protect his position from damage or risks that would be impossible, or very difficult, to remedy or cancel at a later stage*.⁹⁵

⁸⁹ The strong *prima facie* or good arguable case principle has been widely recognized in most legal contexts in many jurisdictions to assess provisional measures, injunctions or rulings on jurisdiction. For example, in *Mareva* injunctions so named having adopted the name of the plaintiff company in a 1975 English Court of Appeal decision (*Mareva Compania Naviera SA v. International Bulkcarriers SA*). See also *Brownlie v Four Seasons Holding Inc* 1 WLR 1992 [2018] (Brownlie) and *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34 (Goldman Sachs).

⁹⁰ *Ibid* and High Court (IE) 14 October 2011 – [2011] IEHC 505, at para. 6.7, available at <https://www.unalex.eu/Judgment/Judgment.aspx?FileNr=IE-82&FixLng=en>. See also *COVID-19: The Test for*

Mandatory Interlocutory Injunctive Relief from the Irish Courts, McCann FitzGerald, 26 March 2020, available at <https://www.mccannfitzgerald.com/knowledge/updates/covid-19-the-test-for-mandatory-interlocutory-injunctiverelief-from-the-irish-courts>.

⁹¹ High Court (IE) 14 October 2011 – [2011] IEHC 505 at paras. 6.7 and 6.9.

⁹² Also called “performance measures”; see ARROYO, *Arbitration in Switzerland, The Practitioner’s Guide*, p. 939.

⁹³ ATF 131 III 473, para. 2.3; see also ARROYO, *op. cit.*, p. 942-943).

⁹⁴ ATF 131 III 473, para. 3.2.

⁹⁵ *Sheikh Hazza Bin Sultan Bin Zayed Al Nahyan v FEI*, CAS 2014/A/3591, Order dated 23 May 2014, para. 21.

According to CAS case law, the risk must be actual and real, not just hypothetical.⁹⁶

With regards to the balance of interest criteria, most sporting associations have a significant interest in maintaining public confidence in the integrity of their sport and in avoiding the irreparable damage that could be done to that confidence if an individual accused of serious sport violations is improperly allowed to continue to hold office, or coach or other while their case is being heard. The balance of interest favoring the sporting association has thus been consistently recognized by the CAS within the context of provisional measures applications in anti-doping⁹⁷. Basic human rights principle would also outweigh the basic personality and economic rights of the perpetrator in favor of the rights of the association and, more importantly, the victim. This is even more so when there is a possibility of additional harm, be it mental or physical, being caused to the victim. In fact, while an argument often raised by the accused is that provisional measures breach one's right to earn a livelihood, case law and safe sport regulations also generally provide that a sporting association's duty to protect children and athletes outweighs the duty of procedural fairness that may be owed to an accused⁹⁸. The evolution of safeguarding rules, and the assistance of the IOC Tool Kit have thus also paved the way for safeguarding rules and regulations expressly stating that where there is an apparent imminent danger or risk to an athlete the alleged perpetrator may be

immediately removed from the field of play or provisionally suspended.⁹⁹

V. How to balance the rights of all parties in disciplinary proceedings resulting from sports investigations

It is a fundamental principle of sports arbitration that all parties in any disciplinary proceedings are entitled to the respect of their rights of natural justice. Adjudicators must be particularly conscious of these rights in proceedings arising from investigations, notably in safe sport matters where the protection and safety of victims is paramount but so too where the right of the accused to face their accused and be fully informed of the charges against them is vital.

A. Standing to be a party in disciplinary proceedings in first instance and before the CAS in safeguarding cases

The first hurdle in safeguarding cases is the question of which party has sufficient legitimate interest to be a party in the disciplinary proceedings. Unproblematic is that the sports organization that is filing actions against one of its members has standing to sue and, in turn, the member against whom disciplinary actions are brought has standing to be sued. More difficult is the question whether victims/survivors have standing in such disciplinary proceedings. This question is important, because – at least under Swiss law – the standing to sue and the standing to be sued is not a procedural but a substantive question

⁹⁶ Fenerbahçe SK v. UEFA, CAS 2013/A/3139, Order of 3 May 2013, paras. 6.5 and 6.6.

⁹⁷ Legkov v FIS, CAS 2017/A/4968, para. 229; S. v. UCI & FCI, CAS 2002/A/378, order of 2 May 2002, p.4 Abdelrahman v Egyptian NADO, CAS OG 16/23, para 7.11, Kreuziger v UCI, CAS 2014/A/3694, para. 7.15.

⁹⁸ Smirnova and Skate Canada (C. Qualtrough May 2015) See also Article 8 of the World Athletics Safeguarding Rules.

⁹⁹ See for example Article 7.2.6 of the ISSF Policy and Safeguarding Procedures against Harassment and Abuse

which provides that: “*Should it be determined, in urgent and serious situations, that conservatory measures need to be taken to safeguard a Covered Person (such as expelling an offender from a Championship venue), such measures will be taken by the Safeguarding Officer under the official authority of the Executive Committee. Not following the usual disciplinary process in such an instance would be justified under applicable Human Rights legislation because the duty to protect outweighs the duty of procedural fairness owed to a possible offender.*”

with the consequence that the claim will be rejected if the parties to the proceedings lack standing to sue or standing to be sued.¹⁰⁰ This is a sensitive issue in safeguarding proceedings because victims are personally affected by the atrocities done to them. The question therefore arises as to whether victims and survivors are “substantially affected” by first instance decisions so as to have standing to appeal before CAS as their membership rights may not be directly substantially affected in disciplinary proceedings against their perpetrators.¹⁰¹ CAS jurisprudence offers some guidance regarding the standing to appeal in proceedings before it. The CAS panel in *CAS 2016/A/4924 & 4943* held that “when an association’s measure affects not only the rights of the addressee, but also and directly those of a third party, that third party is considered ‘directly affected’ and thus enjoys standing. 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 or sporting nature at stake may bring a claim, even if they are not addressees of the measure being challenged”.¹⁰² The burden of proof for the standing to appeal rests on the victims/survivors.¹⁰³ The consequence of decisions in disciplinary matters for “victims” was, for example, discussed in

CAS 2015/A/3874 where the CAS panel held that “the mere fact that an individual is a victim does not as such establish a standing to appeal a sanction imposed on the offender. Such an interpretation would have far-reaching consequences and could lead to the possibility of appeals from a potentially very large group of persons. Under such an interpretation, for instance, any player who is injured by a dangerous tackle or is bitten by another player would be able to appeal if he were unhappy with the sanction imposed on the offender.”¹⁰⁴ Whether victims/survivors would have standing to appeal in CAS proceedings in the absence of a specific provision in the sport organization’s rules and regulations appears to be questionable because the victim/survivor may not be directly affected by the outcome of the first instance disciplinary procedure against their offenders. They would potentially be directly affected if they would have a right to file their own internal complaint against the perpetrator before association tribunals.¹⁰⁵ However, the regulatory reality is that a victim’s complaint will not lead directly to disciplinary proceedings, it must first go through investigation proceedings. Although the outcome may be dissatisfactory, the disciplinary decision by a sports organization against the perpetrator does not dispose of the rights of the membership rights of

¹⁰⁰ Spühler, Tenchio, Infanger (eds), *Schweizerische Zivilprozessordnung* (2nd edn, Helbing Lichtenhahn Verlag, 2013), Art. 236, para. 16; M. Beloff *et al.*, ‘The Court of Arbitration for Sport’ in A. Lewis and J. Taylor (eds), *Sport: Law and Practice* (4th edn, Bloomsbury Professional 2021) para. D2.61; Football Association of Serbia v. Union des Associations Européennes de Football (UEFA), award of 24 January 2017, para. 61; CAS 2020/A/6694 Bursaspor KD v. Henri Gregoire Saivet, award of 4 August 2020, para. 79.

¹⁰¹ SFT 4A_564/2021, judgement of 2 May 2022, consid. E.5.3.

¹⁰² CAS 2016/A/4924 & 4943 Paolo Barelli v. Fédération Internationale de Natation (FINA), award of 28 June 2017, para. 85; CAS 2018/A/5746 Trabzonspor Sportif Yatirim ve Futbol Isletmeciligi A.S., Trabzonspor Sportif Yatirim Futbol Isletmeciligi A.S. & Trabzonspor Sportif Yatirim Futbol Isletmeciligi A.S. & Trabzonspor Kulübü Dernegi v. Turkish Football Federation (TFF), Fenerbahçe Futbol A.S., Fenerbahçe Spor Kulübü & Fédération Internationale de Football Association (FIFA), award of 30 July 2019, para. 173.

¹⁰³ CAS 2018/A/5746 Trabzonspor Sportif Yatirim ve Futbol Isletmeciligi A.S., Trabzonspor Sportif Yatirim Futbol Isletmeciligi A.S. & Trabzonspor Kulübü Dernegi v. Turkish Football Federation (TFF), Fenerbahçe Futbol A.S., Fenerbahçe Spor Kulübü & Fédération Internationale de Football Association (FIFA), award of 30 July 2019, para. 179; CAS 2021/A/8507 Mamdouh Abbas v. Egyptian Olympic Committee, award of 20 September 2022, para. 74.

¹⁰⁴ CAS 2015/A/3874 Football Association of Albania (FAA) v. Union des Associations Européennes de Football (UEFA) & Football Association of Serbia (FAS), award of 10 July 2015, para. 182.

¹⁰⁵ Cf. CAS 2018/A/5746 Trabzonspor Sportif Yatirim ve Futbol Isletmeciligi A.S., Trabzonspor Sportif Yatirim Futbol Isletmeciligi A.S. & Trabzonspor Kulübü Dernegi v. Turkish Football Federation (TFF), Fenerbahçe Futbol A.S., Fenerbahçe Spor Kulübü & Fédération Internationale de Football Association (FIFA), award of 30 July 2019, para. 187.

victims/survivors.¹⁰⁶ Consequently, if sports organizations fail to grant victims/survivors rights to become a party in first instance disciplinary proceedings and/or appeals proceedings against their perpetrators, the question of standing must be determined based on the national mandatory statutory provisions that apply subsidiarily to the disciplinary procedure in question, for example Swiss law.¹⁰⁷

In the event that a victim is qualified as an “indirectly affected” third party, the entitlement of direct and indirect members to become a party to disciplinary proceedings falls within the regulatory autonomy of sports organizations.¹⁰⁸ In other words, sports organizations can expand the right to participate in disciplinary proceedings to direct and indirect members whose membership rights are not substantially affected from an association law point of view.¹⁰⁹ Based on a victim-friendly procedural approach, sports organizations shall consider the issue of “standing” of victims as part of their due diligence when implementing safeguarding policies. This requires clear and unequivocal wording to avoid any discussions and disputes of the victims’ standing and related procedural rights.¹¹⁰ Accordingly, general wordings that grant, for example, “*directly affected persons*” standing rights should be avoided.

If sports organizations decide to entitle victims/survivors to be parties to disciplinary

proceedings against perpetrators in safe sport matters, their “procedural role” and the capacity of their procedural involvement in the proceedings should also be specified.¹¹¹

In first instance, the vertical nature of disciplinary matters generally prevents victims from having standing to sue (alone). Irrespective of whether or not they filed the initial complaint, victims must be expressly granted the right under the sports organization’s regulations to join the sports organization’s disciplinary action against their perpetrators as a victim plaintiff (ancillary party) which, *inter alia*, shall give them the right to file their own submissions, access the case file and attend the hearing. If the victims are granted the right to appeal the first instance decision before the CAS, regardless of whether or not they were a party to the first instance proceedings, their participation in the appeals arbitration proceedings falls under the arbitration agreement in favor of CAS contained in the rules and regulations of the respective sports organization. A victim’s appeal against the first instance decision shall always be directed against the sports organization that rendered the first instance decision (due to the vertical nature of disciplinary matters) and the alleged perpetrator, who must be granted the possibility to defend himself/herself in such appeals arbitration proceedings. In turn, if the victim files the appeal against the sports organization as a respondent, but does not

¹⁰⁶ CAS 2008/A/1583 Sport Lisboa e Benfica Futebol SAD v. UEFA & FC Porto Futebol SAD & CAS 2008/A/1584 Vitória Sport Clube de Guimarães v. UEFA & FC Porto Futebol SAD, award of 15 July 2008, para. 31.

¹⁰⁷ CAS 2020/A/7356 SK Slovan Bratislava v. Union des Associations Européennes de Football (UEFA) & KI Klaksvik, award of 1 October 2020, para. 63; U. Haas, ‘Standing to Appeal and Standing to be Sued’ in M. Bernasconi and A. Rigozzi, *International sport Arbitration – 6th Conference CAS & SAV/FSA Lausanne 2016*, 53, 57.

¹⁰⁸ CAS 2008/A/1583 Sport Lisboa e Benfica Futebol SAD v. UEFA & FC Porto Futebol SAD & CAS

2008/A/1584 Vitória Sport Clube de Guimarães v. UEFA & FC Porto Futebol SAD, award of 15 July 2008, para. 30; CAS 2016/A/4602 Football Association of Serbia v. Union des Associations Européennes de Football (UEFA), award of 24 January 2017, para. 70.

¹⁰⁹ U. Haas, ‘Standing to Appeal and Standing to be Sued’ in M. Bernasconi and A. Rigozzi, *International sport Arbitration – 6th Conference CAS & SAV/FSA Lausanne 2016*, 53, 70; SFT 4A_184/2023, judgement of 5 June 2023, consid. E.6.1.3.

¹¹⁰ See e.g. CAS 2021/A/7663 Marion Sicot v. Union Cycliste Internationale (UCI), award of 27 February 2023.

¹¹¹ *Ibid.*

name the perpetrator as a respondent, this may result in the appeal being dismissed on that ground alone due to the sports organization's lack of standing to be sued (alone).

In summary, relying on CAS jurisprudence and Swiss law, it appears that victims have no standing to appeal the first instance decision between the sports organization and their perpetrators before CAS, unless the sports organization in question has extended a right to appeal to victims and survivors.

It is noteworthy that victims/survivors bound by the arbitration agreement between the parties to the arbitration before CAS may also become a party to pending CAS proceedings through intervention pursuant to Articles R41.3 and R44.4 of the CAS Code. These provisions are also applicable in CAS appeals arbitration proceedings, cf. Article R54 para. 7 of the CAS Code. The participation in CAS proceedings through intervention requires, apart from the formal requirements¹¹² that the applicant has a legal interest in the sense that the victim/survivor is “*adversely affected in its legal sphere or position by the outcome of the arbitration procedure*”.¹¹³ Legal interest shall be accepted if regulations provide for standing rights of the victim/survivor. If this is not the case, it is up to the victim/survivor to prove their legal interest. While the legal interest threshold for an intervention may be lower

than for standing, in the absence of an explicit provision in the sports organization's rules and regulations, the victim/survivor will still have the burden to establish that the outcome of the disciplinary procedure between the sports organization and the alleged offender will have an influence on the relationship between the victim/survivor and the sports organization.¹¹⁴

Finally, victims who decide not to become a party to CAS proceedings against their perpetrators may nevertheless chose to participate by submitting an *amicus curiae* brief in accordance with Article R41.4 para. 6 of the CAS Code.¹¹⁵ This may be the case if the CAS panel considers the victims' statement to be helpful for the determination of the appeal. In the affirmative, the CAS panel shall inform the parties about their intention to ask the victim to submit an *amicus curiae* brief and invite the parties to the file their positions thereon. The CAS panel will then decide whether such *amicus curiae* brief shall be admitted, taking into account the interests of the parties and the circumstances of the individual case.¹¹⁶ If an *amicus curiae* brief is admitted, CAS panels enjoy a wide discretion in what form the *amicus curiae* may assist the CAS panel, be it in writing or verbally.¹¹⁷

B. Legal aid

¹¹² Cf. D. Mavromati and M. Reeb, *The Code of the Court of Arbitration for Sport – Commentary, Cases and Materials* (2015, Wolters Kluwer), Article R41, paras. 88 and 89; Noth/Haas ‘Article R41 CAS Code’ in Arroyo (ed), *Arbitration in Switzerland – The Practitioner’s Guide* (2nd edn, 2018, Wolters Kluwer), paras. 18 et seq.

¹¹³ Noth/Haas ‘Article R41 CAS Code’ in Arroyo (ed), *Arbitration in Switzerland – The Practitioner’s Guide* (2nd edn, 2018, Wolters Kluwer), para. 22.

¹¹⁴ *Ibid.*

¹¹⁵ D. Mavromati and M. Reeb, *The Code of the Court of Arbitration for Sport – Commentary, Cases and Materials* (2015, Wolters Kluwer), Article R41, para. 99; Noth/Haas ‘Article R41 CAS Code’ in Arroyo (ed), *Arbitration in Switzerland – The Practitioner’s Guide* (2nd edn, 2018, Wolters Kluwer), para. 23; see also M. Diaconu,

‘How “Amicus Curiae” Works At The Court Of Arbitration For Sport (LawInSport, 9 December 2022), available at <https://www.lawinsport.com/topics/item/how-amicus-curiae-works-at-the-court-of-arbitration-for-sport>

¹¹⁶ D. Mavromati and M. Reeb, *The Code of the Court of Arbitration for Sport – Commentary, Cases and Materials* (2015, Wolters Kluwer), Article R41, para. 100 et seq.; Noth/Haas ‘Article R41 CAS Code’ in Arroyo (ed), *Arbitration in Switzerland – The Practitioner’s Guide* (2nd edn, 2018, Wolters Kluwer), para. 23.

¹¹⁷ M. Beloff *et al.*, ‘The Court of Arbitration for Sport’ in A. Lewis and J. Taylor (eds), *Sport: Law and Practice* (4th edn, Bloomsbury Professional 2021) para. D2.115.

The realization of the time, energy and money that will need to be expended in order to try right a wrong that may effectively not be righted in the end often prevents many athletes or sports person from proceeding with complaints that will ensue in investigations and then disciplinary proceedings. Athletes and whistle-blowers, especially minors, are already vulnerable if they have been victims of maltreatment, if they are women, or if they are from a nation whose culture does not seem to condone the “outing” of these atrocities. Therefore, although the accuser’s rights must be respected, the victims, who can only be referred to as “vulnerable” need legal, financial and procedural support to endure the disciplinary proceedings.

Legal aid is an important protective measure for vulnerable athletes to guarantee their right of access to justice and disciplinary proceedings. It is incumbent upon sports organizations to safeguard athletes’ procedural rights in proceedings before association tribunals and/or sports arbitration tribunals. In the case of first instance tribunals, some may have in the past argued that the procedural rights of the parties needed not be observed as strictly in their proceedings considering the tribunal’s decision can be appealed to state courts or arbitration tribunals after exhausting the internal dispute resolution mechanisms. However, sport dispute resolution tribunals are becoming far more structured and as association tribunals are sometimes entrusted to make final and binding decision – notably in less egregious safe sport matters. Thus, fundamental procedural rights, such as the right to defend oneself against charges to be heard and to benefit from an equal treatment of the parties, must be respected at first instance tribunals. The biggest challenge for most athletes is securing legal representation that is affordable and qualified to represent

their interests and their rights before such tribunals.

Legal aid is an important protective measure for vulnerable athletes to guarantee their right of access to justice and disciplinary proceedings. If and to what extent legal aid may be granted in sports proceedings before association tribunals and arbitration tribunals is debatable, particularly in situations in which athletes are unable to seek justice before ordinary courts *in lieu* of sports arbitration tribunals. The Swiss Federal Tribunal excludes legal aid granted by the state in private national and international arbitration proceedings. However, this does not prevent the parties to the proceedings or the arbitration institution itself to establish a legal aid system on their own. For example, the International Council of Arbitration for Sport (“ICAS”) created a legal aid fund in 1994 which allows athletes and other natural persons to receive legal aid, i.e., assistance (i) for administrative costs, (ii) a pro bono counsel and (iii) for travel and accommodation costs, under specific conditions. Accordingly, sportspersons without the necessary financial means may, in principle, wish to seek justice directly before the CAS ordinary division to avail themselves of legal aid. Other national and international tribunals also offer this same pro bono assistance¹¹⁸. A specific example is Article 40 of the FIFA Code of Ethics which provides in its para. One that “[i]n order to guarantee their rights, individuals bound by this Code and with insufficient financial means may request legal aid from FIFA for the purpose of proceedings before the Ethics Committee”.

Finally, credit must be given, in safe sport cases in particular, to international human rights groups, such as Terre des Hommes and Human Rights Watch who take a keen interest in supporting victims of sporting misconduct and provide much needed legal aid notably to

¹¹⁸ For example, the Sport Dispute Resolution Centre in Canada.

athletes from third world countries or from countries where women's rights are repressed¹¹⁹.

C. De novo power in appeals proceedings before the CAS

Article R57 para. 1 of the CAS Code provides that the “*Panel has full power to review the facts and the law*”, meaning that the CAS panel can generally review the dispute between the parties afresh (*de novo*). The *de novo* principle is a fundamental feature of CAS appeals arbitration proceedings.

An issue may arise in relation to the *de novo* principle with regards to the victim-oriented approach that seeks to ensure that victims/survivors only testify once during the proceedings before the judicial bodies of the sports' organization and CAS.¹²⁰ As all the evidence presented in the first instance must again be presented and argued before CAS, victims/survivors would in principle again have to provide testimony and be subjected to recounting the abuse, the shame and guilt related to the same and once again fear that they will not be believed or fear of reprisal of all kinds (see the discussion on protected witnesses below). There is however the opportunity for all parties to the appeals proceedings before the CAS to agree to accept the oral testimony at first instance or the victim/survivor's written witness statement (so long as the Panel is satisfied that either or both were subject to cross examination in the first instance).¹²¹ Otherwise, should the victim or survivor choose not to provide testimony

before CAS for their mental wellbeing or other personal reasons, it may be that their testimony will not be admissible and not be considered by the CAS panel in deciding the case.

A CAS panel's *de novo* power can be limited in very few cases. For example, if the matter under appeal concerns a different issue that was not discussed in the first instance procedure.¹²² In other words, a CAS panel's power of review can never go beyond the scope of the challenged decision. If the appealed decision imposed a sanction for discrimination, the alleged person may not be sanctioned for another sports rule violation, for example psychological abuse of sportspersons, if such allegation had not formed part of the discussion or charges brought against the alleged perpetrator in the previous instance.

The *de novo* principle may thus understandably come into conflict when adjudicating safe sport matters before CAS if information and evidence that was already available during the first instance procedure is only presented in the appeal proceedings. Article R57 para. 3 of the CAS Code provides that “[t]he Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered”. Based on the wording of this provision, evidence that was already available before the previous instance is not *per se* inadmissible. Instead, the Panel holds the discretion of excluding such evidence. CAS panels apply this provision restrictively and tend to exclude newly submitted evidence only

¹¹⁹ See McLaren Mali Investigation.

¹²⁰ See R. Bush, ‘Safeguarding Proceedings – How to Balance the Rights of the Accused With Treatment of the Abused?’ (LawinSport, 20 June 2022), available at [¹²¹ See also Court of Arbitration for Sport, Guidelines for the hearing of vulnerable witnesses and testifying parties in CAS Procedures \(December 2023\) available at \[https://www.tas-cas.org/fileadmin/user_upload/ICAS_Guidelines_on_Protection_of_Witnesses_FINAL.pdf\]\(https://www.tas-cas.org/fileadmin/user_upload/ICAS_Guidelines_on_Protection_of_Witnesses_FINAL.pdf\).](https://www.lawinsport.com/topics/item/safeguarding-proceedings-how-to-balance-the-rights-of-the-accused-with-treatment-of-the-abused?highlight=WyJyaWNoYXJkIiwYnVzaCJd; FIG, ‘Internal Guidelines – Special measures for protecting vulnerable witnesses’ (2023), paras 16.</p></div><div data-bbox=)

¹²² CAS 2022/A/9325 Al Merrikh Sport Club v. Khartoum Local Football Association & Sudan Football Association with further references.

(i) if the previous is a genuine arbitral tribunal¹²³ and (ii) “if there is a clear showing of bad faith because the party deliberately retain evidence, available to it, in order to bring it for the first time to CAS”.¹²⁴ Consequently, any information or evidence collected during the investigation phase (which is often ongoing in safeguarding matters) but not presented in the previous instance because it was not yet in the control, knowledge or possession of the sanctioning authority should generally be admitted by a Panel to the case file, unless the parties withheld the information in an abusive and undue manner.

In general, discussions about who knew what at which stage of the procedure can easily be avoided if sports organizations implement provisions similar to Article 13.1.1 of the WADA Code which reads as follows:

“The scope of review on appeal includes all issues relevant to the matter and is expressly not limited to the issues or scope of review before the i

nitial decision maker. Any party to the appeal may submit evidence, legal arguments and claims that were not raised in the first instance hearing so long as they arise from the same cause of action or same general facts or circumstances raised or addressed in the first instance hearing”.

D. Burden and standard of proof

¹²³ M. Beloff *et al.*, ‘The Court of Arbitration for Sport’ in A. Lewis and J. Taylor (eds), *Sport: Law and Practice* (4th edn, Bloomsbury Professional 2021) para. D2.99;

¹²⁴ CAS 2022/A/9260 Al Naser Club Sports v. Aubin Kouakou, award of 19 July 2023, para. 55; see also e.g. CAS 2022/A/8651 Edgars Gauracs v. UEFA, award of 14 June 2023, para. 109; D. Mavromati and M. Reeb, *The Code of the Court of Arbitration for Sport – Commentary, Cases and Materials* (2015, Wolters Kluwer), Article R57, para. 52.

¹²⁵ CAS 2011/A/2384 Union Cycliste Internationale (UCI) v. Alberto Contador Velasco & Real Federación Española de Ciclismo (RFEC) & CAS 2011/A/2386 World Anti-Doping Agency (WADA) v. Alberto Contador Velasco & RFEC, award of 6 February 2012, para. 93; A. Rigozzi and B. Quinn, ‘Evidentiary Issues Before the CAS’ in Michele Bernasconi (ed), *International Sports Law and Jurisprudence of the CAS* (2014, Editions Weblaw) 1, 15.

In all disciplinary proceedings related to safe sport, anti-corruption or anti-doping, the burden of proof, which is an issue of the merits under Swiss law¹²⁵, rests with the association who has brought the charges forward.¹²⁶

In anti-doping cases, pursuant to Article 3.1 of the WADC the standard of proof has long been to the ‘comfortable satisfaction’ of the hearing panel. Generally, in safe sport and corruption matters the standard of proof that needs to be satisfied by a balance of probabilities. In other words, the alleged infraction must be established on the preponderance of the evidence¹²⁷.

The rule of thumb of course is that the standard of proof will vary depending on the infraction and sport and shall be governed by the applicable regulations which should expressly set out the same. This principle has long been established by CAS jurisprudence¹²⁸.

E. Protection of victims and witnesses

Needless to say, in all disciplinary proceedings but most notably those related to safe sport matters, there are various safeguards that can be put in place to ensure that the right to natural justice of all parties is preserved whilst carefully balancing the rights of, *inter alia*, the

¹²⁶ A. Rigozzi and B. Quinn, ‘Evidentiary Issues Before the CAS’ in Michele Bernasconi (ed), *International Sports Law and Jurisprudence of the CAS* (2014, Editions Weblaw) 1, 21; B. Hessert, *Sports Investigations Law and the ECHR* (Routledge, 2023) p. 63. See Article 3.1 of the WADC and for example Section G.3.a of the TACP and Article 7.11 Athletics Integrity Unit Report, Investigation and Prosecution rules – Non-Doping.

¹²⁷ See Section G.3.1 of the TACP, which the Swiss Federal Tribunal at paragraph 8.2 of 4A_486/2022 confirmed was the correct standard of proof to apply as provided in the TACP irrespective of the seriousness of the allegations.

¹²⁸ See CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA and CAS 2011/A/2490 Daniel Köllerer v. ATP, WTF, ITF & Grand Slam Committee.

whistleblower, the victim and the accused to (i) examination and cross examination and (ii) confidentiality or anonymousness.¹²⁹

It may often be the case that victims or witnesses/whistleblowers are minors, or culturally undermined (women in many countries), or vulnerable¹³⁰ individuals who for various valid reasons simply do not want to be persecuted for coming forwards and wish for their identity to remain confidential for fear of reprisal, being personally exposed to threats, insults, pressure and intimidation or other¹³¹.

Conversely, all accused individuals had a right to face their accuser, to be fully informed of the allegations brought against them and the evidence these allegations rely upon, and to subject them to cross-examination.

Various CAS cases have highlighted the importance of coming up with alternatives ways for a panel to receiving evidence in sensitive safeguarding cases and illustrate ways in which such challenges may be dealt with. There is no golden rule. For the most part arbitral tribunals hold a discretionary power with regards to the procedures followed at the hearing¹³² provided that such hearings are conducted in a fair manner with a reasonable opportunity for all parties to present evidence,

¹²⁹ See e.g. Court of Arbitration for Sport, Guidelines for the hearing of vulnerable witnesses and testifying parties in CAS Procedures (December 2023) available at https://www.tas-cas.org/fileadmin/user_upload/ICAS_Guidelines_on_Protection_of_Witnesses_FINAL.pdf.

¹³⁰ Ibid., which considers witnesses and testifying parties as vulnerable “*when testifying may risk (re)traumatizing the witness, present a threat to personal safety of the witness (and possibly others) or create significant risk to reputation or of retribution. Minors and witnesses with a mental disability will also generally qualify as vulnerable witnesses.*”

¹³¹ See CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA, award of 15 April 2010, para. 73.

¹³² See e.g. Articles R44.2 and R44.3 of the CAS Code.

¹³³ See Court of Arbitration for Sport, Guidelines for the hearing of vulnerable witnesses and testifying

challenge the evidence of the other party through cross-examination, address the panel and present their case in full, all the while acknowledging the necessity to protect witnesses.

In safeguarding cases, CAS panels may therefore wish to proceed with examinations *in camera*, testifying behind curtains with voice scrambling devices if a hearing is in person, image and voice scrambling devices if a hearing is by videoconference.¹³³ Alias’ or letters can be used to disguise the identity of the witnesses¹³⁴, and redacted submissions and or decision can ensure that the identity of individuals remains confidential. In CAS 2009/A/1920 in particular, “*the Panel made sure that the Appellants received the minutes of the interrogations of the protected witnesses and that the Appellants were able to directly cross-examine the protected witnesses over the phone during the Hearing. A counsel of the CAS assured that the witnesses were properly identified and that they were alone at the time of the examination-in-chief and the cross-examination*”.¹³⁵

CAS panels have also held with regards to anonymous witness statements that¹³⁶:

“When facts are based on anonymous witness statements, the right to be heard which is guaranteed by article 6 of the European Convention of Human Rights

parties in CAS Procedures (December 2023) available at https://www.tas-cas.org/fileadmin/user_upload/ICAS_Guidelines_on_Protection_of_Witnesses_FINAL.pdf.

¹³⁴ CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA, award of 15 April 2010; CAS 2021/A/8239 Oleksandr Sevidov v. Ukrainian Association of Football, award of 18 July 2023.

¹³⁵ Ibid., para. 75.

¹³⁶ CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA, award of 15 April 2010, para. 72 and CAS 2019/A/6388 Karim Keramuddin v. Fédération Internationale de Football Association (FIFA), award of 14 July 2020, paras. 125, 126 and 127.

(ECHR) and article 29 par. 2 of the Swiss Constitution is affected. According to a decision of the Swiss Federal Court dated 2 November 2006 (ATF 133 I 33) anonymous witness statements do however not CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v/ UEFA - PAGE 14 breach this right 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 witness statements if a party was prevented from relying on anonymous witness statements".

Adjudicatory panels may also wish to seek detailed will-say statements, thoroughly detailed witness statements that can replace direct examination, which may or may not be anonymous, so long as an in-depth check of the identity and reputation of the anonymous witness is conducted when relevant¹³⁷. A panel may also request, for expediency and procedural economy, but also to reduce that amount of time a protected witness or individual may be subject to examination and cross-examination, to have such will-say statements considered as the equivalent of direct examination.

Of importance is Article R43 of the CAS Code and most other Sports Association disciplinary rules which provide that proceedings under the same are confidential. However, Article R43 of the CAS Code and of most sports associations' disciplinary rules also provide for awards and decisions to be made public. There is of course a caveat to this general rule which may be used in safe sport cases to protect the identity and the sensitive nature of the evidence and information adduced throughout the proceedings, or in antidoping and anti-corruption cases to protect minors in particular.

¹³⁷ Ibid., CAS 2019/A/6388 Karim Keramuddin v. Fédération Internationale de Football Association (FIFA), para. 128.

Ultimately, it is up to the adjudicatory panel to establish a confidential process which balances the rights of all parties so as to avoid costly appeals based on procedural breaches. A balance must always be struck between the procedural rights of the party opposed to the evidence being adduced due to its anonymity, on the one hand, and the necessity to protect the life and personal safety of the witnesses and victims on the other.

V. Conclusion

All interested parties hold an important responsibility to espouse the integrity of sport and to protect its participants. In the context of sports law, the outcome of investigations, legal disputes and disciplinary proceedings that often arise from them requires a careful balancing of interests including the sporting association and all its stakeholders, the victim, the accused and the witnesses, only to name the most obvious. This article has highlighted the importance of protecting human rights, clearly drafting and properly implementing robust regulations, upholding procedural fairness, and shielding vulnerable at-risk individuals, notably minors, throughout such investigations and legal proceedings to ensure that the rights of all involved are safeguarded. Given the ever-growing complexity of sport investigations and disciplinary proceedings, this is a lofty goal; but one that is attainable.

Caselow of the Swiss Federal Tribunal on appeal against CAS awards (2020-23)

Alexis Schoeb*

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I. The Swiss Federal Tribunal

A. Introduction

This paper considers four years (2020-23) of caselaw from the Swiss Federal Tribunal ("SFT") on challenges against arbitral awards issued by the Court of Arbitration for Sport

("CAS") pursuant to its Code of Sports-related Arbitration (the "CAS Code").¹

The SFT is Switzerland's highest court. It has exclusive jurisdiction to hear appeals against awards issued by arbitral tribunals seated in Switzerland in connection with disputes

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¹ This paper reviewed SFT decisions from 1 January 2020 to 15.12.2023. During this period, the SFT issued no less than 99 decisions on appeals against CAS awards [TBC on 15.12.2023]. Only three of these appeals were successful to the annulment of the corresponding CAS award.

involving at least one foreign party (“international arbitrations”).² Since the CAS Code provides that the seat of all CAS Panels is in Switzerland,³ where a CAS arbitration involves at least one non-Swiss party, the SFT is the only Swiss court authorised to hear challenges to the CAS award.

Switzerland’s Private International Law Act (“PILA”), and in particular Chapter 12 of that Act, governs all international arbitrations seated in Switzerland. Article 191 of PILA confers exclusive jurisdiction on the SFT to hear an appeal against such an award. A CAS award will qualify as this type of award if it satisfies the requirements of Article 176 of PILA.

Article 176(1) of PILA provides that “[t]he provisions of this chapter shall apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland”.

B. Types of awards appealable

Under Article 77(1)(a) of the Swiss Federal Tribunal Act (“SFTA”), in relation to Article 190 of PILA, a challenge is available against “awards of arbitral tribunals”. Under SFT caselaw, the types of awards appealable are as follows:⁴

- **final** (bringing an end to arbitral proceedings for a substantive or procedural reason);
- **partial** (involving a quantitatively limited part of a disputed claim or one of multiple claims at issue, or bringing an end to proceedings for one or more respondents);

² Article 191 of PILA states that “[t]he only appeal authority is the Swiss Federal Supreme Court”. Article 77 of the SFTA, which sets the legal framework for appeals under the rules concerning appeals in civil matters.

³ Article R28 of the CAS Code.

⁴ 4A_432/2022 and 4A_434/2022 (para. 3.3.1 and the references cited therein).

⁵ Provisional orders dismissing a claim for lack of jurisdiction can, however, be appealed on the grounds

- **preliminary or incidental** (settling one or more preliminary question of substance or procedure).

Simple procedural orders that are modifiable or withdrawable during arbitration proceedings are not appealable to the SFT. The same applies to decisions on provisional measures.⁵ Challenges to awards issued in the context of appeal proceedings are in principle only admissible after a party has exhausted all internal channels for review available within the arbitral system.⁶

In determining the admissibility of an appeal, the decisive factor is not the name/title of the challenged decision but its content (substance controls over form).⁷ For instance, the SFT has raised doubts about the admissibility of an appeal against a CAS consent award – i.e., an award that “merely ratifies a settlement agreement between parties” – although such a document is issued in the form of an arbitral award.⁸

II. Permissible grounds of appeal

Article 190(2) of PILA exhaustively lists out the permissible grounds for appeal against an international arbitration award:

“An arbitral award may be set aside only:

- a. where the sole member of the arbitral tribunal was improperly appointed or the arbitral tribunal improperly constituted;*
- b. where the arbitral tribunal wrongly accepted or declined jurisdiction;*
- c. where the arbitral tribunal ruled beyond the claims submitted to it, or failed to decide one of the claims;*
- d. where the principle of equal treatment of the parties or their right to be heard in an adversary procedure were violated;*

of irregular composition of the Tribunal or lack of jurisdiction of the Tribunal.

⁶ 4A_612/2020, para. 5.2.3 (confirming the decision 4A_490/201).

⁷ 4A_432/2022 and 4A_434/2022 (para. 3.3.1 and the references cited therein).

⁸ 4A_432/2022 and 4A_434/2022 (para. 3.3.5).

e. where the award is incompatible with public policy”.

Further, the SFT will accept an appeal only if the grounds are sufficiently substantiated.⁹ This means that an appellant’s appeal submission must clearly indicate the specific legal basis it is relying upon and how the CAS’ award or conduct allegedly constitutes a breach. Appeals lacking these details or requesting a general review on grounds of mere criticism of a challenged award will not be admissible.

As a general rule, an appellant may not raise new facts or evidence that were not raised during CAS arbitral proceedings on appeal to the SFT.¹⁰ The SFT is bound by any findings of fact in a CAS award,¹¹ unless those facts were established through a violation of the principle of equal treatment, the right to be heard, or in a way incompatible with public policy.¹²

The SFT has summarily dismissed several appeals against CAS awards for not abiding by these strict rules.¹³

The following sections of this paper provide an overview of the SFT’s jurisprudence under Article 190 of PILA using selected cases and issues that are (in the author’s opinion) relevant to practitioners.

A. Article 190(2)(a) of PILA: Improper appointment of an arbitrator or improper constitution of the tribunal

Article 190(2)(a) of PILA provides bases of appeal on account of lack of impartiality or independence on the part of arbitrators,¹⁴ lack

of independence on the part of the CAS itself,¹⁵ and constitution of an arbitral tribunal that is in breach of the parties’ agreement.

Since CAS’ inception, numerous challenges to CAS awards relying upon an alleged lack of impartiality or independence have been brought before the SFT. None of these challenges were successful, however, until the *Sun Yang* case below.

• 4A_318/2020 (WADA v. Sun Yang & FINA)

In *Sun Yang*, the SFT vacated a CAS award (CAS 2019/A/6148) for circumstances – specifically, the content of several “tweets” published on an arbitrator’s twitter account – that justified the removal of the arbitrator. The decision shed light on two practical aspects of how an appeal alleging arbitrator bias will be assessed by the SFT.

First, on the scope of the parties’ duty to investigate an appointed arbitrator, the SFT held that while parties are expected to use the main internet search engines available and to review any sources of information likely to provide information on a possible risk of bias, they cannot be expected to continue scouring the internet throughout arbitration proceedings, or to scrutinise messages posted on social networks by arbitrators during arbitration proceedings. In addition, the SFT held that the mere fact information is freely accessible on the internet will not automatically mean a party that has not discovered that information after having performed research is in breach of its duty to investigate.¹⁶

⁹ Article 77(3) of the SFTA.

¹⁰ Article 99(1) of the SFTA.

¹¹ The SFT is bound by any fact-finding in an arbitral award under Article 105(1) of the SFTA, even if those facts were established in a manifestly inaccurate manner or in breach of the law (in conjunction Article 77(2) of the SFTA which excludes applicability of Article 105(2) of the SFTA).

¹² Articles 190(2)(d) or (e) of PILA.

¹³ For instance: 4A_160/2020, 4A_202/2020, 4A_290/2020, 4A_22/2021, 4A_284/2021, 4A_516/2022 and 4A_264/2023.

¹⁴ 4A_287/2019 (para. 5); 4A_398/2019 (para. 7); 4A_318/2020 (para. 7); 4A_166/2021 (para. 3); 4A_520/2021 (para. 5); 4A_484/2022 (para. 5); 4A_100/2023 (para. 6).

¹⁵ 4A_644/2020 (para. 4); 4A_232/2022 (para. 6).

¹⁶ 4A_318/2020, para. 6.5 (in this case, the SFT held that Sun Yang could not be found at fault for failing to carry out a search that included the word “China”,

Second, on how an arbitrator's impartiality should be assessed, the SFT held that the mere appearance of bias can be sufficient to disqualify an arbitrator, citing the maxim "*justice must not only be done: it must be seen to be done*". Doubts as to an arbitrator's impartiality must, however, be objectively verifiable. Consistent with Sections 2(b) and (c) of the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines"), doubts will be justified if a reasonable third party, having knowledge of the relevant facts and circumstances, would reach a conclusion that there is a likelihood the arbitrator at issue may be influenced by factors other than the merits of a case. The SFT has thus held that, while it is perfectly legitimate for an arbitrator to express opinions on social media, this does not mean an arbitrator can post anything he wants without giving rise to doubts as to his impartiality.¹⁷

- **4A_644/2020 (*Olga Zaytseva v. IOC*)**

In case 4A_644/2020, the SFT held that when an arbitral tribunal lacks independence or impartiality, this can qualify as irregular composition of a tribunal under Article 190(2)(a) of PILA. However, under the principle of good faith, a party's right to invoke a lack of independence or impartiality will turn stale if the party does not promptly assert it. Thus, a party cannot keep related arguments "in reserve" and only raise them in the event of an unfavourable outcome to arbitral proceedings.¹⁸

- **4A_520/2021 (*Marco Polo Del Nero v. FIFA*)**

Regarding the independence of a sole arbitrator or members of a tribunal, an appellant may rely persuasively on the IBA

as he could not have been expected to speculate from the outset that an arbitrator would have a bias on account of Sun Yang's nationality. Sun Yang's failure to discover tweets published nearly ten months before the arbitrator's appointment, which were drowned in a mass of posts on that arbitrator's

Guidelines. However, the IBA Guidelines do not have the full force of law and the circumstances of a specific case will be a determining factor.¹⁹

The SFT has held that parties to an arbitration have a duty to inquire into the existence of possible grounds for recusal that could affect the composition of an arbitral tribunal. A party cannot therefore simply rely on a general declaration of independence made by an arbitrator but must carry out reasonable investigations to ensure that arbitrator offers sufficient assurance of independence and impartiality.²⁰

In case 4A_520/2021, the SFT held that the appellant had waited, without valid reason, until the end of the arbitral hearing (i.e., 11 days after the ground for an appeal had become known) before asking the members of the arbitral tribunal to amend their declarations of independence. The SFT held that the principle of good faith required the appellant to either request a challenge to the arbitrator involved within the seven-day period laid out in Article R34 of the CAS Code after having become aware of this information, or – at the very least – to discharge his duty of investigation by formally requesting CAS, within the aforementioned time limit, to provide further details regarding the circumstances disclosed by the arbitrator. For failing to take these steps, the SFT held that appellant was ineligible to challenge the regularity of composition of the arbitral tribunal, on account of his having breached his duty of investigation.²¹

The SFT also noted that an arbitrator is obligated to disclose without delay any facts that could give rise to legitimate doubts about his independence or impartiality, and this obligation will continue until the end of the

Twitter account, could not be seen as a failure to comply with Sun Yang's duty to investigate).

¹⁷ 4A_318/2020, para. 7.

¹⁸ 4A_644/2020, para. 4.2.

¹⁹ 4A_520/2021, para. 5.1.3.

²⁰ 4A_520/2021, para. 5.4.1.

²¹ 4A_520/2021, para. 5.4.2.

arbitral proceedings. Nevertheless, a violation of this duty disclosure will not automatically constitute a ground for recusal in the absence of other circumstances, since an arbitrator is only required to disclose information that might raise a legitimate doubt as to his neutrality.²²

- **4A_100/2023 (*GNK Dinamo v. Rene Poms*)**

In case 4A_100/2023, an Austrian football coach filed a claim against a Croatian football club for improper termination of an employment contract. One arbitrator was challenged due to his connection with the Croatian Football Federation (“CFF”) Arbitral Tribunal. The International Council of Arbitration for Sport (“ICAS”) upheld the challenge and removed the arbitrator.

On appeal, the SFT held that since the decision arose from ICAS, a private organization, it was not directly appealable to the SFT. However, the decision could be reviewed in the context of an appeal against the CAS award, on grounds of irregular composition of the arbitral tribunal under Article 190(2)(a) of PILA.²³

In this respect, the SFT observed that if a party finds itself deprived of an arbitrator it initially chose and that arbitrator was validly appointed by the relevant arbitration institution, the party cannot be denied the ability to seek review of a decision ordering recusal of the arbitrator.²⁴

Furthermore, the SFT noted that an arbitrator’s duty of disclosure of facts or circumstances giving rise to doubts as to his or her independence or impartiality is not absolute: the duty exists only with respect to facts or circumstances the arbitrator has

reason to believe are unknown to a party prospectively affected by them.²⁵

In this case, the SFT held that the arbitrator at issue could have reasonably believed in good faith that the circumstances alleged in support of the recusal application were known to the parties at the time of his appointment: i.e., (i) the fact that he also acted as an arbitrator in the CFF Arbitral Tribunal was explicitly mentioned in his curriculum vitae accessible on CAS’ website and (ii) the respondent was represented during the arbitration proceedings by counsel who also appeared on the same list of twelve arbitrators for the CFF Arbitral Tribunal.²⁶

The SFT found that the challenge FIFA lodged should have been rejected by CAS and CAS should not have proceeded with a new arbitrator. FIFA was not entitled to apply for the recusal, because the factual circumstances alleged in support of its request could and should have been discovered much earlier if FIFA had complied with its duty of investigation.²⁷

B. Article 190(2)(b) of PILA: Jurisdictional defects

1. Review of CAS Jurisdiction

Article 190(2)(b) of PILA provides a basis for appeal on jurisdictional issues, including questions relating to the existence or validity of an arbitration agreement and the exhaustion of review channels available under Article R47 of the CAS Code.²⁸ To summarise legislation and caselaw on point, CAS will have jurisdiction if a claim is arbitrable,²⁹ an arbitration agreement exists that is valid in form and substance under Article 178 of PILA, and the claim submitted for arbitration comes within the scope of that agreement – all these elements must be present.³⁰ A CAS

²² 4A_520/2021, para. 5.5.

²³ 4A_100/2023, para. 6.2.

²⁴ 4A_100/2023, para. 6.7.1.

²⁵ 4A_10/2023, para. 6.7.2.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ 4A_294/2022, para. 3.2.2.

²⁹ A dispute is arbitrable under Article 177 of PILA in international arbitration proceedings or under Article 354 of the Swiss Civil Procedure Code (“SCPC”) in domestic arbitration proceedings unless the parties have opted out of the SCPC.

³⁰ 4A_420/2022, para. 5.2).

award may be appealed if CAS has wrongly declared itself competent or incompetent to hear some or all of the claims involved.

The SFT has also held that compliance with **time limits to file an appeal** before CAS' appeals panel under R49 of the CAS Code is not a jurisdictional issue but an admissibility issue, and thus does not qualify as a basis for appeal under Article 190(2)(b) of PILA.³¹ Further, the SFT has held that **arbitrability** is an essential requirement for an arbitration agreement to be valid and consequently for arbitral jurisdiction.³² When assessing whether these requirements have been met, it is sufficient that the requirements are met at the time an award is rendered.³³

The SFT has held that if an appellant demonstrates that the doctrine of *lis pendens* is triggered (i.e., the same case, as between the same parties, is brought before another authority), a breach of the *lis pendens* principle may be invoked as a ground for appeal under Article 190(2)(b) of PILA.³⁴

The SFT has also held that an **award issued after the expiration of an arbitrator's mandate** is not automatically void but can be annulled on appeal under Article 190(2)(b) of PILA.³⁵ In case 4A_22/2023, the SFT analysed Article R59(5) of the CAS Code and concluded that non-compliance with the deadline laid out in this provision will not automatically deprive arbitrators of their authority to rule on the merits of a dispute.³⁶

- **4A_344/2021 and 4A_346/2021 (*Eric Garcin v. Chinese Football Association*)**

In cases 4A_344/2021 and 4A_346/2021, the appellant did not appeal CAS' jurisdiction directly but rather appealed the jurisdiction of the previous instance, namely the FIFA

tribunal, to decide the underlying matter at first instance. The SFT reiterated its view that FIFA tribunals are not arbitral tribunals and so their decisions on disputes are merely expressions of will on the part of their association rather than arbitrations. After exhaustion of internal channels for review within FIFA, these decisions can either be challenged before national courts³⁷ or, if a valid arbitration agreement exists, before an independent arbitral tribunal such as CAS.³⁸ It follows, as a general rule, that **challenges to the internal proceedings of a sports association** will not qualify for appeals under Article 190(2) of PILA.³⁹

Further, the SFT held that to the extent the appellant appealed the FIFA decision to CAS in the case and did not challenge FIFA's jurisdictional basis, CAS' jurisdiction could no longer be challenged. If CAS had upheld its jurisdiction in a challenge to a FIFA tribunal's decision, the jurisdiction of that initial FIFA tribunal could not be challenged before the SFT under Article 190(2)(b) of PILA (which permits appeal against the jurisdiction of CAS only), except under the limited grounds of violation of public policy pursuant to Article 190(2)(e) of PILA.⁴⁰

- **4A_232/2022 (*Evgeny Ustyugov v. IBU*)**

The SFT applied similar reasoning to decide a challenge to a decision issued by CAS' Anti-Doping Division ("CAS ADD").

In case 4A_232/2022, an appellant argued that the CAS Appeal Arbitration Division had lacked jurisdiction to hear an internal appeal from CAS ADD after CAS ADD had allegedly wrongly found it had jurisdiction to hear the matter. The SFT held that an appeal for lack of jurisdiction is available only against an arbitral tribunal. That means an appeal

³¹ 4A_287/2019 (para. 4); 4A_626/2020 (para. 3.4); 4A_406/2021 (para. 4.1-4.2); 4A_2/2023 (para. 3.3).

³² 4A_200/2021, para. 4.2.

³³ 4A_200/2021, para. 4.2.

³⁴ 4A_140/2022, para. 5.4.2-5.4.3.

³⁵ 4A_22/2023, para. 6.1.2.

³⁶ 4A_22/2023, para. 6.4.

³⁷ Under Article 75 of the Swiss Civil Code ("SCC").

³⁸ 4A_344/2021 and 4A_346/2021, para. 5.2; *see also* 4A_180/2023, para. 3.3.

³⁹ *See also* 4A_2/2023, para. 3.3.

⁴⁰ 4A_344/2021 and 4A_346/2021, para. 5.4.

against the jurisdiction of a first instance tribunal such as CAS ADD's can be heard by the SFT only if that tribunal can be characterised as a genuine arbitral tribunal.

In the case, the SFT found that CAS ADD had acted as an internal body, based on the delegation of powers it received. In other words, CAS ADD had acted as a disciplinary body rather than a genuine arbitral tribunal.⁴¹

2. Validity of an Arbitration Agreement

Concerning the validity of an arbitration agreement, the SFT has held, consistent with European Court of Human Rights ("ECtHR") caselaw, that arbitration is available in sporting matters notwithstanding the absence of freely expressed consent by a party. In these so-called forced arbitrations, however, arbitral tribunals must be able to provide assurance of the requirements laid out in Article 6(1) of the European Convention on Human Rights ("ECHR"), i.e., of independence and impartiality. In the *Mutu*, *Pechstein*, and *Platini* cases, the ECHR held that CAS does provide such an assurance of independence and impartiality. Accordingly, the SFT has held that forced arbitration before CAS is permissible.⁴²

Under Swiss law, the decisive factor in determining the validity or existence of an arbitration agreement is whether the parties to it have expressed the willingness to commit certain disputes to an arbitral tribunal for resolution, to the exclusion of state court jurisdiction.⁴³ But the intent of the parties to have a sports arbitration tribunal decide specific disputes, to the exclusion of court jurisdiction, can be inferred not only from the wording of an agreement but also from actions and circumstances.

A party's limited financial capacity will not constitute a sufficient basis for finding an arbitration agreement unenforceable for lack

of consent. The SFT has held that CAS legal aid provides a mechanism for enabling a party to proceed through CAS proceedings despite financial hardship. The fundamental guarantee of access to a judge does not require that legal aid arrangements put in place by CAS overlap in every respect with state provided legal aid in court proceedings. Thus, certain alleged deficiencies in the CAS system – in particular the fact that a CAS pro bono lawyer is not remunerated, contrary to Swiss law (cf. Article 122(1)(a) of CPC) – will not be dispositive.⁴⁴

3. The Arbitral Tribunal's Determination of Its Own Jurisdiction

Article 186 (1) of PILA provides that an arbitral tribunal may decide on its own jurisdiction. It may do so on an *ex officio* basis.⁴⁵

In case 4A_420/2022 (*Nantes v. Cardiff City*), the SFT held that arbitrators must determine that a dispute is arbitrable under Article 177 of PILA, that the arbitration agreement is valid in form and substance consistent with Article 178 of PILA, and that the claims asserted during proceedings are covered by the arbitration agreement. In particular, when considering whether an arbitral tribunal has jurisdiction in a matter, the tribunal must determine, among other things, the objective scope (or *ratione materiae*) and subjective scope (or *ratione personae*) of the arbitration agreement. The tribunal must assess which disputes are covered by the agreement and which parties are bound by it.⁴⁶

Under Article 186(2) of PILA, jurisdictional challenges must be raised by a party prior to the submission of any defences on the merits. According to the SFT, this rule arises the implied duty of good faith, so if a respondent proceeds on the merits without making a jurisdictional objection, a tribunal will have

⁴¹ 4A_232/2022, para. 5.9.

⁴² 4A_600/2020 (para. 5).

⁴³ 4A_194/2022 (para. 4.4.3); 4A_294/2022 (para. 3.1.2).

⁴⁴ 4A_166/2021 (para. 4.4.2).

⁴⁵ 4A_564/2020 (para. 6.2).

⁴⁶ 4A_420/2022 (para. 5.2).

jurisdiction for this reason alone.⁴⁷ Regarding the timing and manner for raising such an objection, Article R55(1) of the CAS Code requires that jurisdictional objections be raised in the respondent's answer. A party that enters into an adversarial arbitration without making a reservation on the merits (*Einlassung*) recognises, by such an act, the arbitral tribunal's jurisdiction to decide the matter and definitively forfeits any right to contest the tribunal's jurisdiction.⁴⁸

- **4A_564/2020 (*Club Deportivo Tulua v. Club Atlético Nacional*)**

Within the period reviewed by this paper, the SFT vacated one CAS Award involving a determination of jurisdiction.

In case 4A_564/2020, the SFT noted that the only relevant question for appeal in light of Article R47 of the CAS Code was whether the applicable regulations provided for an entitlement to review by CAS of the challenged decision. The SFT held that when a party challenges CAS' jurisdiction, the party need not point to an alternative body that would have jurisdiction instead.⁴⁹

“Contrary to CAS’ holding, there is however no need to resolve the question of which authority would be competent to hear this dispute in the event that there is no channel for appeal to CAS in a case”.

“Contrairement à l’avis du TAS, point n’est en revanche besoin de résoudre la question de savoir quelle autorité serait compétente pour connaître du présent litige dans l’hypothèse où il n’existerait en l’occurrence pas de voie d’appel au TAS”.

According to the SFT, a party's silence on a question of jurisdiction, at a provisional measures stage, will not by itself imply that the party has tacitly accepted CAS' jurisdiction. The mere fact of the party's responding to a request for provisional

measures cannot be equated with unreserved acceptance of a case on its merits, or with acquiescence to CAS' jurisdiction.⁵⁰

The SFT has, however, held that when the intent of the parties to refer a dispute to arbitration and thus to avoid the jurisdiction of courts is sufficiently evident, the principle of utility (*Ütilitätsgedanke*) applies. That means a pathological clause can be construed in such a manner that allows the arbitration agreement to be upheld.⁵¹

- **4A_618/2019 (*Franck Herman Blahoua Betra v. Hellenic National Council for Combating Doping*)**

The SFT has also clarified the scope of CAS' review of its jurisdiction in the event of default by a respondent.

In case 4A_618/2019, the SFT noted that when a respondent fails to appear in arbitral proceedings, the arbitral tribunal must review its jurisdiction *ex officio*, “*in the light of the information available to it, but without having to go further or carry out its own investigations*”.⁵²

The SFT held that “*in the light of the information available to it*” does not mean that an arbitral tribunal could never, in default proceedings, carry out inquiries to determine whether it has jurisdiction to decide the dispute. While an arbitration tribunal is not required to do so, nothing prevents a tribunal from gathering additional information and performing its own investigations to confirm whether it has proper jurisdiction.⁵³

The SFT thus found that a tribunal was entitled to undertake factual inquiries of its own accord into matters relevant to its jurisdiction in a situation where a respondent has failed to participate in arbitral proceedings.⁵⁴

- **4A_420/2022 (*Nantes v. Cardiff City*)**

⁴⁷ 4A_618/2019 (para. 4.4.1); 4A_564/2020 (para. 6.3.1).

⁴⁸ 4A_618/2019 (para. 4.4.1); 4A_564/2020 (para. 6.3.1).

⁴⁹ 4A_564/2020 (para. 6.1).

⁵⁰ 4A_564/2020 (para. 6.3.2).

⁵¹ 4A_564/2020, para. 6.5.2.

⁵² 4A_618/2019, para. 4.4.1.

⁵³ 4A_618/2019, para. 4.4.2.

⁵⁴ *Ibid.*

Last but not least, in case 4A_420/2022, the SFT addressed the limits of the scope of an arbitration agreement and FIFA's jurisdiction to hear set-off claims for damages under tort against contractual claims governed by an arbitration agreement. The matter involved a player transfer agreement.

In the case, the SFT stressed that if an arbitration agreement is worded to encompass all disputes relating to a contract, it should be interpreted, under principles of good faith, to mean that the parties did not intend for claims arising from various legal aspects of their contractually governed relationship to be adjudicated separately – i.e., some by an arbitral tribunal and others by other authorities.⁵⁵ Nevertheless, a claim submitted to arbitration must still fall within the scope of the parties' arbitration agreement. In the case, the SFT held that even though the wording of the arbitration agreement at issue was not restrictive – i.e., it covered not only disputes “*arising out*” of a player transfer agreement, but also those merely “*in connection with*” it – a tort claim arising from a player's death after completion of a transfer could not reasonably qualify as being within scope of the arbitration agreement. This was primarily because the transfer agreement did not obligate the respondent to arrange the flight during which the footballer tragically lost his life.⁵⁶ The tort claim raised by the appellant was clearly distinct from the counterparty's claim for damages on the basis of the transfer contract. In other words, the appellant's claim for set-off did not relate to the relationship governed by the arbitration agreement and so it should not have been considered by the arbitral tribunal.⁵⁷

The SFT then further emphasised that CAS' determination of jurisdiction to review a determination on the arbitrability of the set-

off claim at issue presupposed that FIFA had itself been competent to hear the claim, as CAS' jurisdiction could not be broader than the jurisdiction of a body that had ruled in the first instance.⁵⁸ The answer to the question before the SFT thus turned on whether FIFA's regulations governing the jurisdiction of the FIFA Players' Status Chamber and proceedings before it required that body to declare itself competent to examine the claim for damages asserted by the appellant.⁵⁹ At the end of an interesting analysis, the SFT found that FIFA's role was not to settle civil disputes between football stakeholders that have nothing to do with the application of football regulations, and so the FIFA Players' Status Chamber had correctly rejected jurisdiction to rule on the tort set-off claim.⁶⁰

C. Article 190(2)(c) OF PILA: *Ultra, Extra or Infra petita*

No CAS award has ever been set aside for being *ultra, extra* or *infra petita* under Article 190(2)(c) of PILA. This ground for appeal is the least frequent one invoked by appellants seeking SFT review. Within the period this paper considered, only three challenges to CAS awards relied on such ground.⁶¹

In case 4A_198/2020, the SFT held that **only the conclusions of the parties are relevant** to a determination on a whether a ruling of an arbitral tribunal has been *ultra, extra* or *infra petita*. However, this ground for appeal under PILA will not allow a party to argue that an arbitral tribunal has failed to decide an issue that was important for the resolution of the dispute (although this may be an issue that can be argued under the right to be heard, see Section 4 below).⁶² In particular, the SFT held that **an award which rejects “*all other or further submissions*” will have sufficiently dealt with the conclusions of the parties**. In addition, an award by which an appeal is upheld means that the Panel

⁵⁵ 4A_420/2022, para. 5.4.3.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ 4A_420/2022, para. 5.5.5.

⁵⁹ 4A_420/2022, para. 5.5.5.

⁶⁰ 4A_420/2022, para. 5.5.5.4.

⁶¹ 4A_198/2020 (para. 4), 4A_300/2021 (para. 8) and 4A_256/2023 (para. 5).

⁶² 4A_198/2020, para. 4.1.

deemed that such appeal was admissible. CAS has found such a matter to be admissible and thus, implicitly, any objection of inadmissibility - raised by the opposing party - was dismissed (i.e. without the need for a specific decision in that regard).⁶³

In case 4A_256/2023, the SFT highlighted that under the **principle *a maiore minus***, an arbitral tribunal will not rule *ultra, extra or infra petita* if it awards less than what a party has sought by way of relief or sanctions.⁶⁴ In this case, the SFT held that in imposing a disciplinary sanction on a party that was less severe than what one of the other parties had requested, the arbitral tribunal clearly had not exceeded its limits of decision-making power and, consequently, had not ruled *ultra petita*.⁶⁵

D. Article 190(2)(d) of PILA: violation of the Right to be heard or violation of the equal treatment principle

1. Equal treatment

According to the SFT, the principle of equal treatment under Article 190(2)(d) of PILA means that an arbitral tribunal must conduct arbitral proceedings in a way that provides the parties with the same opportunity to present their cases.⁶⁶ As adversarial process, arbitration must give each party the chance to understand its opponent's case, scrutinize and debate the evidence presented by its opponent, and counter that evidence with its own evidence.⁶⁷ Further, equal treatment applies at all stages of arbitral proceedings, with the exception of a tribunal's deliberations.⁶⁸

In case 4A_166/2021 (*André Cardoso v. UCI*), an appellant argued that CAS legal aid provided to him had been inadequate, constituting a breach of his right to be treated equally. The SFT rejected this argument, holding that the appellant had failed to show a recognisable violation of his right to be treated equally. Specifically, the appellant had failed to show how such a right would imply the entitlement he had claimed to a legal representative of his free choosing and payments for that chosen representative.⁶⁹

2. Right to be Heard

The SFT has held that the right to be heard under Article 190(2)(d) of PILA is a fundamental guarantee in adversarial proceedings. It is essential for a party to be able to fully participate in arbitral proceedings and to present its arguments and evidence adequately, provided it does so in a timely and proper manner.⁷⁰

In case 4A_54/2022, the SFT held that “[...] *in the field of arbitration, it has been accepted that each party has the right to express their views on the essential facts for the judgment, to present their legal argumentation, to propose their means of proof on relevant facts, and to participate in the sessions of the arbitral tribunal (ATF 142 III 360 consid. 4.1.1 and the references cited). However, the right to be heard does not include the right to speak orally*”.⁷¹

According to the SFT, the right to be heard when relied upon as a ground for appeal must not be used to seek a review of how substantive law was applied by a tribunal. Thus a party challenging an arbitral award on this ground cannot simply criticise the

⁶³ 4A_198/2020, para. 4.3.

⁶⁴ 4A_256/2023, para. 5.1.

⁶⁵ 4A_256/2023, para. 5.3.

⁶⁶ See for instance 4A_667/2020 (para. 5.1);

4A_380/2021 (para. 4.1)

⁶⁷ *Ibid.*

⁶⁸ See for instance 4A_166/2021 (para. 5.1).

⁶⁹ 4A_166/2021, para. 5.2.2.

⁷⁰ See for instance 4A_486/2019 (para. 8.1); 4A_438/2020 (para. 4.1); 4A_666/2020 8 (para. 5.1); highlighting that the right to be heard does not include a right to plead orally); 4A_667/2020 (para. 5.1 ;

holding that an arbitral tribunal may refuse to admit evidence, without violating the right to be heard, if the evidence is unsuitable as a basis for a conviction, if a fact to be proven has already been established, if it is irrelevant, or if the tribunal, by making an anticipated assessment of the evidence, comes to the conclusion that its conviction has already made and that admission of the evidence can no longer alter its conviction.); 4A_166/2021 (para. 5.1); 4A_54/2022 (para. 4.1); 4A_300/2023 (para. 6.1); 4A_464/2023 (para. 3.1).

⁷¹ 4A_54/2022, para. 4.1.

reasoning of a CAS tribunal,⁷² but must sufficiently demonstrate that an alleged omission was of such a nature that it influenced the outcome of the dispute in a material way.⁷³ In turn, if an award is totally silent on a substantive submission that is apparently important to the resolution of a dispute, it is up to the tribunal that issued the challenged award or the respondent to justify this omission in its submissions during the appeal proceedings. They may do so by demonstrating that the omitted issue was not relevant to resolution of the case or, even if it were relevant, that the issue and its importance was implicitly refuted by the arbitral tribunal.⁷⁴

The SFT usually concludes either that the appellant has failed in such a demonstration or that the panel duly took into account – expressly or impliedly – the allegedly omitted issue:⁷⁵

In case 4A_618/2020 (*Blake Leeper v. IAAF*), the SFT found that the appellant had failed to demonstrate his argument that arbitrators had failed to consider an issue – i.e., the allegedly discriminatory nature of the “MASH” rule – was of such a nature that it influenced the outcome of the dispute. The

athlete “*merely argued that the Panel could not base its reasoning, directly or indirectly, on the MASH rule. In so doing, he is really only attacking the reasoning of the arbitrators. However, he loses sight of the fact that the arbitrators found that the athlete not only significantly exceeded his MASH height, but above all ran at a greater height than he would have if he had had intact biological legs, even with a generous margin of appreciation for the various shapes and sizes of the human body. However, the appellant leaves this second finding intact. He does not establish how the fact that the studies that led to the MASH rule did not take into account the body proportions of individuals of African or Afro-American origin could have altered the arbitrators’ assessment that the appellant was running at a higher height with his prostheses than he would have been if he had been born with intact legs, even with a generous margin of appreciation*”.⁷⁶

3. Related Duties of an Arbitral Tribunal

In its caselaw, the SFT concludes from the existence of a right to be heard under Articles 182(3) and 190(2)(d) of PILA that a duty exists for an arbitral tribunal to examine and deal with all relevant issues. While an arbitral tribunal is not required to deal with every argument put forward by parties if some of the issues involved are not essential to the

⁷² See for instance the matter *Sun Yang* 4A_406/2021 (para. 6.3.2; noting that the Appellant, under pretext of an alleged violation of his right to be heard, sought to re-discuss certain substantive issues relating to the formalities of the doping control because he was not happy with the way they were disposed of).

⁷³ 4A_536/2018 (para. 4.1); 4A_248/2019 (para. 8.1); 4A_422/2019 (para. 3.1); 4A_462/2019 (para. 6.1); 4A_62/2020 (para. 4.1); 4A_198/2020 (para. 4.1.2); 4A_384/2020 (para. 6.1); 4A_478/2020 (para. 4.1); 4A_618/2020 (para. 4.2); 4A_666/2020 8 (para. 5.1); 4A_667/2020 (para. 5.1); 4A_166/2021 (para. 5.1); holding that the right to be heard is not an end in itself and that there is no interest in annulling the contested decision if it is not clear that a non-breach of the appellant’s right to be heard would have changed the outcome in proceedings); 4A_306/2021 (para. 4.1); 4A_406/2021 (para. 6.1 and 6.3.2 ff.); 4A_484/2021 (para. 4.1); 4A_504/2021 (para. 5.1); 4A_520/2021 (para. 6.1); 4A_542/2021 (para. 5.1); 4A_10/2022 (para. 4.1); 4A_54/2022 (para. 4.1); 4A_242/2022 (para. 4.1); 4A_246/2022 (para. 5.1); 4A_312/2022 (para. 3.1); 4A_420/2022 (para. 7.1); 4A_432/2022 (para. 6.1); 4A_434/2022 (para. 7.1); 4A_436/2022 (para. 5.1); 4A_438/2022 (para. 5.1);

4A_486/2022 (para. 5.1); 4A_170/2023 (para. 5.1.1); 4A_176/2023 (para. 4.1); 4A_184/2023 (para. 5.1); 4A_300/2023 (para. 6.1).

⁷⁴ 4A_536/2018 (para. 4.1); 4A_248/2019 (para. 8.1); 4A_62/2020 (para. 4.1); 4A_384/2020 (para. 6.1); 4A_478/2020 (para. 4.1); 4A_618/2020 (para. 4.2); 4A_666/2020 8 (para. 5.1); 4A_667/2020 (para. 5.1); 4A_306/2021 (para. 4.1); 4A_406/2021 (para. 6.1); 4A_484/2021 (para. 4.1); 4A_504/2021 (para. 5.1); 4A_520/2021 (para. 6.1); 4A_542/2021 (para. 5.1); 4A_10/2022 (para. 4.1); 4A_54/2022 (para. 4.1); 4A_242/2022 (para. 4.1); 4A_246/2022 (para. 5.1); 4A_312/2022 (para. 3.1); 4A_420/2022 (para. 7.1); 4A_432/2022 (para. 6.1); 4A_434/2022 (para. 7.1); 4A_436/2022 (para. 5.1); 4A_438/2022 (para. 5.1); 4A_486/2022 (para. 5.1); 4A_170/2023 (para. 5.1.1); 4A_176/2023 (para. 4.1); 4A_184/2023 (para. 5.1); 4A_300/2023 (para. 6.1).

⁷⁵ See for instance the matter *Sun Yang* 4A_406/2021 (para. 6.3.2 ff.); 4A_484/2021 (para. 4.3); 4A_10/2022 (para. 4.2); 4A_106/2022 (para. 4.4); 4A_432/2022 (para. 6.3); 4A_434/2022 (para. 7.3); 4A_438/2022 (para. 5.1); 4A_486/2022 (para. 5.1); 4A_180/2023 (para. 4.2); 4A_300/2023 (para. 6.1).

⁷⁶ 4A_618/2020, para. 4.4.

outcome of a dispute, this duty is however breached when, through inadvertence or misunderstanding, the tribunal fails to take into consideration allegations, arguments, evidence, and offers of proof presented by one of the parties that are material to formulation of an award.⁷⁷

In case 4A_10/2022 (*Aleksandr Shustov v. World Athletics & Russian Athletics Federation*), the SFT held that **arbitrators are not obligated to discuss all arguments raised by the parties**, so they could not be faulted, pursuant to the right to be heard, for having not refuted, even implicitly, an argument objectively devoid of any relevance.⁷⁸

In case 4A_184/2023, the SFT held that a challenged CAS award showed that an arbitrator had indeed considered arguments which the appellant argued had been critical, but the arbitrator had rejected these, at least implicitly (the arbitrator correctly set out and detailed the arguments developed by the appellant, then rejected them). In this respect, the SFT noted that **parties cannot expect to receive an explicit explanation of every aspect of an arbitrator's reasoning**. Moreover, the SFT held that whether or not an arbitrator's reasoning in an award is correct is irrelevant to the issue of whether an appellant's right to be heard has been violated.⁷⁹

It is noteworthy that the SFT considers that style clauses ("boiler plates" clauses) inserted into awards – e.g., certifying that the tribunal has taken into account the allegations,

arguments, and evidence presented by the parties, or that the right to be heard has been fully honoured (as the parties themselves may admit at the end of an evidentiary hearing before an arbitral tribunal) – are not decisive and the SFT will take into account the actual circumstances of each case.⁸⁰

In case 4A_406/2021, the SFT confirmed that **a newly constituted tribunal** (subsequent to the removal of one of the arbitrators from a previous tribunal panel) does not need to repeat all previous procedural steps and may thus limit the parties' submissions without breaching their right to be heard.⁸¹

"[...] It should be noted from the outset that, according to jurisprudence, there is no general principle in international arbitration that all procedural acts should be repeated when an arbitrator has been recused and replaced.

Article R36 of the Code provides that, unless otherwise agreed by the parties or decided by the Panel, the proceedings shall continue without repetition of the procedural acts performed prior to the arbitrator's dismissal. In the present case, the new Panel, even though it was under no obligation to do so, offered the parties the opportunity to present their arguments once again on the admissibility of the appeal and on the substantive issues. It also held a new hearing and allowed the parties to question witnesses during the hearing. The Panel did its utmost to respect the parties' right to be heard".⁸²

It should also be noted that many appeals relying on the violation of the right to be

⁷⁷ 4A_536/2018 (para. 4.1); 4A_248/2019 (para. 8.1); 4A_422/2019 (para. 3.1); 4A_462/2019 (para. 6.1); 4A_486/2019 (para. 8.1); 4A_548/2019 & 4A_550/2019 (para. 6.2.1); 4A_62/2020 (para. 4.1); 4A_198/2020 (para. 4.1.2); 4A_384/2020 (para. 6.1); 4A_478/2020 (para. 4.1); 4A_618/2020 (para. 4.2); 4A_666/2020 8 (para. 5.1); 4A_667/2020 (para. 5.1); 4A_306/2021 (para. 4.1); 4A_332/2021 (para. 5.1); 4A_406/2021 (para. 6.1); 4A_484/2021 (para. 4.1); 4A_504/2021 (para. 5.1); 4A_520/2021 (para. 6.1); 4A_542/2021 (para. 5.1); 4A_564/2021 (para. 5.1); 4A_10/2022 (para. 4.1); 4A_54/2022 (para. 4.1); 4A_242/2022 (para. 4.1); 4A_246/2022 (para. 5.1); 4A_312/2022 (para. 3.1); 4A_420/2022 (para. 7.1); 4A_432/2022 (para. 6.1); 4A_434/2022 (para. 7.1);

4A_436/2022 (para. 5.1); 4A_438/2022 (para. 5.1); 4A_486/2022 (para. 5.1); 4A_170/2023 (para. 5.1.1); 4A_176/2023 (para. 4.1); 4A_184/2023 (para. 5.1); 4A_464/2023 (para. 3.1).

⁷⁸ 4A_10/2022, para. 4.1.

⁷⁹ 4A_184/2023, para. 5.3.

⁸⁰ 4A_536/2018, para. 4.2 (in French: "[...] on concédera au recourant qu'un tribunal arbitral ne saurait se prémunir définitivement d'un tel grief par la simple insertion de clauses de style certifiant que les allégations, arguments et moyens de preuves présentés par les parties ont tous été pris en compte [...], respectivement que le droit d'être entendu a été entièrement respecté, de l'aveu même des parties à l'issue de l'audience").

⁸¹ 4A_406/2021 (para. 6.2.2).

⁸² 4A_406/2021, para. 6.2.2.

heard fail because an appellant has failed to raise an objection sufficiently during arbitral tribunal proceedings when the tribunal could have rectified the issue. The SFT has held that it is contrary to the implied duty of good faith to invoke a procedural breach only in the context of an appeal, when the breach could have been pointed out and addressed earlier during arbitral proceedings. Thus, the SFT considers that a failure to raise an objection related to these rights during arbitral proceedings can bar an appellant from raising a related objection on appeal.⁸³

- **4A_170/2023 (*Yves Jean-Bart v. FIFA*)**

In case 4A_170/2023, FIFA appealed a CAS award alleging that a CAS tribunal had in fact refused to hear the purported victim because it knew she was not able to travel to Switzerland but nevertheless suggested it could hear her in person in Switzerland with security measures in place, instead of by videoconference that might distort her voice – a method of taking evidence that the CAS platform adopted for hearings by videoconference could not provide.

The SFT rejected FIFA’s argument. It held that by simply alleging that the solution provided by CAS videoconferencing was “rather unfortunate” (“*plutôt regrettable*” in the original French) and by acknowledging, at the end of the proceedings, that its right to be heard had been respected, FIFA had not raised a **concrete objection** during proceedings, thus forfeiting its right under to Article 182(4) of PILA to appeal this issue to the SFT.⁸⁴

⁸³ See for instance 4A_486/2019 (para. 8.1-8.3); 4A_332/2021 (para. 5.1); 4A_406/2021 (para. 6.2.2); 4A_170/2023 (para. 5.1.2). Since legislative amendment on 1 January 2021, Article 182(4) of PILA has expressly provided that “[a] party that continues with the arbitration proceedings without objecting immediately to a breach of the rules of procedure of which it is aware or which it would have been aware had it exercised due diligence may not invoke this breach at a later point in the proceedings”.

⁸⁴ 4A_170/2023, para. 5.2.2.

⁸⁵ 4A_332/2021, para. 5.3.

⁸⁶ 4A_62/2020 (para. 4.1); 4A_384/2020 (para. 6.1); 4A_306/2021 (para. 4.1), in which the SFT held that

- **4A_332/2021 (*World Athletics v. Shelby Houlihan*)**

In case 4A_332/2021, at the close of hearings, a CAS tribunal sought confirmation that the parties had no objections regarding the conduct of the arbitration and that their right to be heard had been respected. After confirming it had no objections to the tribunal, a party nevertheless later appealed to the SFT alleging a breach of her right to be heard. The SFT held that regardless of whether at the beginning, middle, or at the end of the merits hearing, the appellant never complained of a possible violation of her right to be heard.⁸⁵ Accordingly, it had forfeited her entitlement to raise this issue on appeal to the SFT.

4. Surprise effect

In several decisions,⁸⁶ the SFT noted that “*it is appropriate to ask the parties when the arbitral tribunal intends to base its decision on a norm or a legal consideration that has not been discussed during the procedure and whose relevance to the parties is not evident*”. Arbitral tribunals must therefore avoid creating a so-called “surprise effect” (“*effet de surprise*”) with respect to the legal grounds they base their decisions upon.

In caselaw before the period reviewed by this paper, the SFT held that this concept can be interpreted as a limitation implicit in the principle *iura novit curia* (or *iura novit arbiter*). The SFT set aside a CAS award for having offered a legal reason for decision that could not have been reasonably expected by the

the foreseeability of a legal holding is a matter of appreciation and that the SFT adopts a restrictive approach to application of the “surprise effect” rule, factoring in the particulars of the challenged proceedings and the need to avoid a substantive review of an award; 4A_504/2021 (para. 5.1; reiterating that this approach also applies to factual findings); 4A_616/2021 (para. 4.1; stating that “[...] contrary to what the appellant seems to believe, it is not for the Swiss Federal Tribunal to review whether the arbitral tribunal took all the evidence into account and understood it correctly. Even an obviously incorrect finding or one that is contrary to the file does not in itself constitute a violation of the right to be heard”).

parties, and accordingly they were denied an opportunity to make submissions on that issue.⁸⁷ (4A_400/2008 para. 3).

That said, the SFT has adopted a strict approach to this issue, as illustrated by case 4A_300/2021.⁸⁸ There the SFT held that an appellant had failed to show the extent to which an alleged violation of his right to be heard had impacted the outcome of tribunal proceedings, and so his appeal was rejected.⁸⁹

E. Article 190(2)(e) of PILA: Procedural or Substantive Public Policy

Violation of public policy is a basis for appeal under Article 190(2)(e) of PILA. According to the SFT, public policy under Article 190(2)(e) of PILA includes only those fundamental principles that are widely recognized and that underlie any system of law according to the prevailing conceptions in Switzerland.⁹⁰ Further, in analysing appeals relying on this basis, the SFT distinguishes between two types of public policy – procedural and substantive.

The SFT has held that an award is contrary to **substantive public policy** if it violates fundamental principles of substantive law to

such an extent that it can no longer be reconciled with the relevant legal order and system of values. These principles notably include contracting fidelity (*pacta sunt servanda*), respect for principles of good faith, prohibition of abuse of rights, prohibition of discriminatory or spoliatory measures, protection of persons who are civilly incapable, and prohibition on excessive commitment,⁹¹ if this constitutes an obvious and serious violation of personality rights.⁹² For a breach of substantive public policy to be recognised, the results of an arbitral decision, not just the reasoning behind it, must run contrary to substantive public policy.⁹³

According to the SFT, a violation of **procedural public policy** occurs whenever fundamental and generally recognised principles of procedure have been disregarded, leading to an intolerable contradiction with the sense of justice, so that the decision appears incompatible with the values recognised in a state governed by the rule of law. An erroneous or even arbitrary application of the applicable procedural provisions will not, however, automatically constitute a violation of procedural public policy.⁹⁴

⁸⁷ 4A_400/2008 para. 3.

⁸⁸ 4A_300/2021, para. 7.1.

⁸⁹ 4A_300/2021, para. 7.2.3.

⁹⁰ 4A_316/2021 (para. 5.1); 4A_380/2021 (para. 5.1); 4A_406/2021 (para. 7.1); 4A_484/2021 (para. 5.1); 4A_542/2021 (para. 6.1); 4A_632/2021 (para. 5.1); 4A_10/2022 (para. 5.2); 4A_54/2022 (para. 5.1); 4A_242/2022 (para. 5.1); 4A_246/2022 (para. 6.1); 4A_420/2022 (para. 8.1); 4A_432/2022 (para. 7.1); 4A_434/2022 (para. 8.1); 4A_484/2022 (para. 6.1); 4A_486/2022 (para. 7.1); 4A_22/2023 (para. 7.1); 4A_170/2023 (para. 6.1); 4A_184/2023 (para. 6.1).

⁹¹ cf. Article 27(2) of the SCC.

⁹² 4A_486/2019 (para. 3.2); 4A_70/2020 (para. 7.1); 4A_564/2021 (6.1.1).

⁹³ 4A_398/2019 (para. 9.1); 4A_70/2020 (para. 7.1); 4A_600/2020 (para. 7.1); 4A_618/2020 (para. 5.1); 4A_660/2020 (para. 3.1); 4A_666/2020 (para. 6.1.1); 4A_200/2021 (para. 5.1.1); 4A_406/2021 (para. 7.1); 4A_484/2021 (para. 5.1); 4A_542/2021 (para. 6.1); 4A_564/2021 (6.1.1); 4A_616/2021 (para. 5.1), holding for instance that the concept of “sporting succession” is not against substantive public policy, because it should be regarded as a disciplinary issue rather than a contractual issue; 4A_632/2021 (para.

5.1); 4A_10/2022 (para. 5.2); 4A_54/2022 (para. 5.1.1); 4A_242/2022 (para. 5.1); 4A_246/2022 (para. 6.1), “sporting succession”; 4A_420/2022 (para. 8.1.1), noting that a violation of substantive public policy on account of corruption can only be upheld if facts of corruption have been established and an arbitral tribunal has refused to take these into account in formulating its award (para. 8.2.2); 4A_432/2022 (para. 7.1.1); 4A_434/2022 (para. 8.1.1); 4A_484/2022 (para. 6.1); 4A_486/2022 (para. 7.1); 4A_528/2022 (para. 4.1); 4A_22/2023 (para. 7.1.1); 4A_170/2023 (para. 6.1.1); 4A_176/2023 (para. 5.1); 4A_180/2023 (para. 4.1); 4A_184/2023 (para. 6.1.1); 4A_300/2023 (para. 5.1).

⁹⁴ 4A_486/2019 (para. 3.3); 4A_548/2019 and 4A_550/2019 (paras. 7.2-7.3), noting that it is not for the SFT to lay down rules concerning passive legitimation or the possibility of bringing a third party before the CAS to examine the conformity of arbitral proceeding in the light of these rules; 4A_416/2020 (para. 3.1); 4A_476/2020 (para. 3.1); 4A_644/2020 (para. 5.2); 4A_666/2020 (para. 6.2); 4A_668/2020 (para. 4.1); 4A_200/2021 (para. 5.1.2), noting that the requirement of two instances or two levels of jurisdiction is not a matter of procedural public policy

1. Substantive Public Policy

a. European Convention on Human Rights / Swiss constitutional rights / Athletes' personality rights

- **4A_248/2019 / 4A_398/2019 - ATF 147 III 49 (*Mokgadi Caster Semenya v. IAAF & Athletics South Africa*)**

In cases 4A_248/2019 and 4A_398/2019, the SFT noted that a violation of any of the provisions of the ECHR or the Swiss Constitution will not automatically qualify as ground for appeal listed exhaustively in Article 190(2)(e) of PILA. An appellant therefore cannot rely directly on such a violation. The principles underlying the provisions of the ECHR or the Swiss Constitution may, however, be taken into account in the context of public policy – within the meaning of Article 190(2)(e) of PILA – in order to give a concrete expression to this concept.⁹⁵ According to the SFT, the determinative factor is whether or not the result of the arbitrators' legal assessment is compatible with the caselaw definition of substantive public policy.⁹⁶

In these two cases, the appellant argued that a CAS award had infringed upon her human dignity, contending the award conveyed gender stereotypes by endorsing the idea that only women with biological characteristics corresponding to a stereotypical woman are allowed to compete freely in a sport's women's category.

within the meaning of Article 190(2)(e) of PILA; 4A_332/2021 (para. 6.1); 4A_564/2021 (6.1.2); 4A_420/2022 (para. 8.1.2); 4A_432/2022 (para. 7.1.2); 4A_434/2022 (para. 8.1.2); 4A_436/2022 (para. 5.2); 4A_486/2022 (para. 8.1); 4A_22/2023 (para. 7.1.2); 4A_170/2023 (para. 6.1.2); 4A_184/2023 (para. 6.1.2); 4A_2/2023 (para. 4.1).

⁹⁵ 4A_248/2019 / 4A_398/2019 - ATF 147 III 49, para. 9.2.

⁹⁶ 4A_248/2019 / 4A_398/2019 - ATF 147 III 49, para. 9.1.

⁹⁷ "DSD" stands for Differences in Sex Development or Disorders of Sex Development, which regroups congenital conditions affecting the reproductive

The SFT held that the award did not deal with the question of what a woman or an intersex person is and that the result reached by the CAS was not incompatible with the guarantee of human dignity because, in certain contexts, such as in competitive sport, it can be accepted that biological characteristics may, exceptionally and for the purposes of fairness and equality of opportunity, overshadow a person's legal sex or gender identity.

The SFT also held that restricting the access of female athletes with "46 XY DSD"⁹⁷, who have "*naturally an insurmountable advantage over other women to certain competitions does not appear to be contrary to the human dignity of these athletes*".⁹⁸ The SFT pointed out that an athlete with "46 XY DSD" can refuse to undergo the required hormonal treatment, and while it is true that such a refusal will result in the impossibility for the athlete to taking part in certain athletics competitions, it cannot be accepted that this consequence alone will constitute a violation of the appellant's human dignity.⁹⁹

Further, the SFT held that there was no violation of substantive public policy in the case because the result of the CAS award, which weighed the various interests involved, was not untenable.

It is interesting to note that at the end of its decision, the SFT emphasised that its analysis was carried out "*within the limits that the caselaw imposes on its discretion*", and concluded that the contested CAS award was not incompatible with substantive public policy within the meaning of Article 190(2)(e) of PILA, "*whichever way one looks at it*".¹⁰⁰

system, in which the development of chromosomal, gonadal, or anatomical sex is atypical. "46 XY" is one of the DSD groups, corresponding – in essence – to people with XY chromosomes instead of XX chromosomes.

⁹⁸ 4A_248/2019 / 4A_398/2019 - ATF 147 III 49, para. 11.1.

⁹⁹ 4A_248/2019 / 4A_398/2019 - ATF 147 III 49, para. 11.2.

¹⁰⁰ 4A_248/2019 / 4A_398/2019 - ATF 147 III 49, para. 12. The limitations on the SFT's authority to review appeals led to the ECtHR faulting Switzerland in its decision *Semenya vs. Switzerland (Affaire Semenya c. Suisse, Requête no 10934/21*, decision of 11 July 2023).

- **4A_406/2021 (WADA v. Sun Yang & FINA)**

With regard to high-level sport, the SFT recognises that the rights of personality (Article 27 et seq. SCC) include the right to health, bodily integrity, honour, professional esteem, sporting activity, and, in the case of professional sport, the right to development and economic fulfilment. Depending on the circumstances of a case, an infringement of a sportsperson's personality rights may be contrary to substantive public policy. According to SFT caselaw, however, a violation of Article 27(2) of the SCC¹⁰¹ will not automatically be contrary to substantive public policy: the alleged violation must be a serious and clear-cut violation of a fundamental right.¹⁰²

An appeal arguing incompatibility with substantive public policy, within the meaning of Article 190(2)(e) of PILA and related caselaw, will not qualify as a sufficient basis for appeal if it seeks only to establish a conflict between the contested award and a guarantee under a treaty or a rule of Swiss law, even one of constitutional rank.¹⁰³

The SFT has also held that it is not “self-evident” that criminal law principles and corresponding guarantees contained in the ECHR apply to disciplinary sanctions imposed by associations governed by private law, such as a sports federation.¹⁰⁴ The SFT has noted that seeking to apply the rules governing criminal searches *mutatis mutandis* to anti-doping proceedings “could prevent the system put in place to combat the scourge of doping in sport from functioning properly”.¹⁰⁵

This case, at the time of publication of this paper, is still pending before the Grand Chamber of the ECtHR.

¹⁰¹ Article 27(2) of the SCC provides: “No person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals.”

¹⁰² 4A_406/2021, para. 7.3.

¹⁰³ 4A_406/2021, para. 7.5.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

b. Disciplinary sanctions (strict liability / proportionality / degree of proof)

- **4A_528/2022 (Heiki Nabi v. Estonian Anti-Doping and Sports Ethics Foundation)**

In case 4A_528/2022, the SFT held that strict liability in anti-doping matters did not constitute a violation of substantive public policy under Article 190(2)(e) of PILA.¹⁰⁶

The SFT noted that since the disciplinary sanctions involved were a private law matter under Swiss law, the application of such disciplinary sanctions was not to be assessed against criminal law principles such as the presumption of innocence or the principle *in dubio pro reo*.¹⁰⁷

Regarding the issue of an anti-doping ban's proportionality, the SFT held that a breach of public policy can be found only if a sanction would constitute an obvious and serious violation of personality. In the case, the SFT noted that the two-year ban from competition imposed might have been “drastic” for a professional wrestler, but it did not constitute a violation of the athlete personality rights.¹⁰⁸

- **4A_542/2021 (Ricardo Terra Teixeira v. FIFA)**

With regard to disciplinary sanctions, the SFT will only intervene against a decision rendered on the basis of a discretionary power if that decision leads to a manifestly unjust result or shocking inequity.¹⁰⁹

In case 4A_542/2021, an appellant criticised the vagueness of a sanction that prohibited

¹⁰⁶ 4A_528/2022, para. 4.3.1.

¹⁰⁷ 4A_528/2022, para. 4.3.3.

¹⁰⁸ 4A_528/2022, para. 4.3.4.

¹⁰⁹ 4A_542/2021, para. 6.3.2; See also 4A_484/2022 (para. 6.3 : “With regard to disciplinary sanctions imposed in the field of sport, it should be remembered that the Swiss Federal Tribunal only intervenes in decisions handed down by virtue of a discretionary power if they lead to a manifestly unjust result or shocking inequity.”) and 4A_486/2022 (para. 7.3).

him from engaging in “any kind of football-related activity”. The SFT held that the appellant’s argument was not entirely baseless, conceding that this wording could theoretically invite abuse. The SFT made clear that such a prohibition could not be equated with a blank cheque to the relevant international federation (FIFA), supporting the unlimited application of this prohibition to any activity even if it were unrelated to the areas governed by the FIFA or its affiliated associations, i.e., organised football competitions.

The SFT concluded that problems with the challenged CAS award did not rise to a level that justified vacating it, as it was not incompatible with substantive public policy, particularly in view of the seriousness of the acts the appellant was accused of having committed. The SFT noted that the sanction imposed was capable of being interpreted in an arguably appropriate way (in French: “*la sanction prononcée est susceptible d’être interprétée d’une manière soutenable*”). In this respect, the SFT noted that it was “*hard to imagine that FIFA would take it upon itself to encourage a particular sponsor not to use his services, or even to prohibit him from entering a stadium as a mere spectator, attending matches played by his grandson or watching a football match in his living room*”, which is pure speculation. The SFT then also referred to the concessions made in the Platini case (judgment 4A_600/2016, para. 3.7.3) if FIFA “*were to have the temerity to apply in a quibbling manner a sanction whose purpose is defined a little too broadly*”.¹¹⁰

- **4A_486/2022 (Potito Starace v. Professional Tennis Integrity Officers)**

In case 4A_486/2022, the SFT held that a restriction on a person’s economic freedoms is excessive (i.e., within the meaning of Article 27(2) of the SCC) only if that person’s economic freedoms are eliminated or

restricted to such a degree that his or her economic existence is endangered.¹¹¹ In the case, the SFT rejected a player’s attempt to compare his situation with the well-known *Matuszalem* case (ATF 138 III 322), because the player could in fact continue to pursue a professional activity – albeit limited – in the tennis sector and derive income from that.¹¹²

Regarding the degree of proof used in sanctions proceedings of this nature, the SFT held that adopting a lower standard of proof than applies in criminal proceedings to cases of match-fixing would not constitute a breach of procedural public policy. The fact that anti-doping regulations lay down a stricter standard of proof than for convicting someone of an offence is not dispositive. Given the difficulties inherent in proving corruption and manipulation of sporting events and the limited investigative powers of sports federations’ judicial bodies, the standard of proof adopted by the Uniform Tennis Anti-Corruption Program (i.e. the “preponderance of the probabilities”) did not offend notions of justice.¹¹³

- c. *Pacta sunt servanda*

The principle of *pacta sunt servanda* generally falls within the ambit of substantive public policy under article 190(2)(e) of PILA.¹¹⁴ That said, the SFT often holds that practically all legal disputes resulting from a breach of contract are excluded from the scope of the *pacta sunt servanda* principle’s protection.¹¹⁵

In case 4A_618/2020 (*Blake Leeper v. LAAF*), the SFT held that *pacta sunt servanda* is violated if an arbitral tribunal refuses to apply a contractual clause while finding that it is binding on the parties, or conversely if the tribunal requires the parties to comply with a clause that it has found not to be binding. In case 4A_660/2020, the SFT held that an arbitral tribunal will breach the principle of

¹¹⁰ 4A_542/2021, para. 6.3.2.

¹¹¹ 4A_486/2022, para. 7.1; see also 4A_484/2022, para. 6.1.

¹¹² 4A_486/2022, para. 7.4; see also 4A_484/2022, para. 6.4.

¹¹³ 4A_486/2022, para. 8.2.

¹¹⁴ 4A_380/2021 (para. 5.1); 4A_484/2021 (para. 5.1); 4A_632/2021 (para. 5); 4A_242/2022 (para. 5.2); 4A_300/2023 (para. 5.2).

¹¹⁵ 4A_660/2020, 3.2.2.

contractual fidelity if it applies a contractual provision or refuses to apply it and, in so doing, contradicts the result of its own interpretation as to the existence or content of the contract. However, the process of interpreting a contractual clause and the legal consequences drawn from it do not fall under this principle and therefore are not covered by Article 190(2)(e) of PILA.¹¹⁶

2. Procedural Public Policy

a. The *res judicata* principle

The SFT has held that an arbitral tribunal violates procedural public policy if it rules without taking into account the *res judicata* effect of an earlier decision or if it departs in its final award from an opinion it has expressed in a preliminary award deciding a preliminary substantive question.¹¹⁷ *Res judicata* prohibits re-litigation, in new proceedings between the same parties, of an identical claim that has been finally decided. A dispute is identical when, in two sets of proceedings, the parties submit the same claim, with the same request(s) for relief, and rely on the same complex of facts.¹¹⁸

The *res judicata* principle applies only to the operative part of an award but not to factual and legal findings.¹¹⁹ Thus, for instance, CAS Panels are not bound by a previous interpretation of a contractual clause.¹²⁰

b. The *ne bis in idem* principle

The SFT characterises the *ne bis in idem* principle as a corollary or negative version of *res judicata*. This principle is included in the notion of public order within the meaning of Article 190(2)(e) of PILA. That said, the SFT has expressed doubts about whether this principle is also applicable to sports disciplinary proceedings, considering that: “[i]t is one thing for a violation of the *ne bis in idem* principle to fall within the scope of Article 190(2)(e)

of PILA. Whether sports disciplinary law is also subject to this principle, which is specific to criminal law, is another matter, which is not self-evident and appears very doubtful [...]”.¹²¹

The SFT has not definitively ruled out the application of this principle to arbitral proceedings, but it has dismissed appeals brought against CAS awards relying on this principle after an analysis of how the principle would apply to the specific facts of the cases involved.

• **4A_462/2019 (KS Skënderbeu v. UEFA)**

In case 4A_462/2019, the SFT held that the *ne bis in idem* principle is breached only if there has been a repeat of proceedings (i.e., the ‘bis’ aspect of the principle). If there is a sufficiently close material and temporal link between the proceedings at issue in respect of the same constellation of facts, so that they may be regarded as two aspects of a single system, there is no duplication of proceedings contrary to the *ne bis in idem* principle.¹²²

In the case, the SFT upheld the validity of UEFA’s two-phase procedure – in relation to match-fixing allegations and its Betting Fraud Detection System – from the perspective of the *ne bis in idem* principle. It held that the UEFA’s administrative and disciplinary procedures were sufficiently closely linked to each other to be considered as two aspects of a single system.¹²³

• **4A_486/2022 (Potito Starace v. Professional Tennis Integrity Officers)**

In case 4A_486/2022, the Tennis Integrity Unit (TIU) opened its own investigation and sanctioned a tennis player for attempted match-fixing after the player’s national authority had acquitted him of all related charges.

¹¹⁶ 4A_618/2020, para. 5.4.1.

¹¹⁷ 4A_256/2023, para. 6.1.2.

¹¹⁸ 4A_256/2023, para. 6.1.3.

¹¹⁹ 4A_536/2018, para. 3.1.1.

¹²⁰ 4A_536/2018, para. 3.3.2.

¹²¹ 4A_462/2019, para. 5.1; 4A_486/2022, para. 6.1.

¹²² 4A_462/2019, para. 5.4.

¹²³ 4A_462/2019, para. 5.4.

The SFT observed that there was a sufficiently close material and temporal link between the proceedings instituted against the appellant by the judicial bodies of the national and international tennis associations. The two proceedings were instituted within a few weeks of each other following suspicions of match-fixing. According to the SFT, they were closely linked, since they both contributed to efforts against match-fixing in tennis and to the preservation of the sport's image. However, the SFT emphasised that a system put in place by international sports federations to combat the scourge of match-fixing would be jeopardised if their judicial bodies were deprived of the possibility of carrying out their own investigations into an athlete simply because the latter had previously been exonerated by his or her national federation.¹²⁴

c. Excessive formalism

The SFT has held that the defect of excessive formalism will exist if an arbitral tribunal applies procedural rules with such strictness that no proper interest could support the action, resulting in that procedural rule becoming an end in itself and preventing or complicating the application of law in an unbearable way.¹²⁵

The SFT, however, has questioned the extent to which excessive formalism can qualify as a violation of procedural public order under Article 190(2)(e) of PILA. It has suggested that it may be content to consider the types of excessive formalism alleged by an appellant only in deciding an appeal, without progressing further in analysis to the effects of the alleged formalism. In a number of cases it has summarily found that CAS had not engaged in any excessive formalism.¹²⁶

For instance, in case 4A_416/2020 (*Santos Futebol Clube c. Huachipat SADP*), the SFT held that a sanction of inadmissibility of

appeal for failure to make a timely advance of costs did not constitute excessive formalism or a denial of justice if the party involved had been appropriately notified of the amount to be paid, the deadline for payment, and the consequences of non-compliance with this deadline. The SFT also held that CAS did not display excessive formalism by ruling that sending a statement of appeal or an appeal brief by fax was inadmissible.¹²⁷ In the same matter, the SFT also held that the CAS tribunal's issuance of a termination order in connection with the appellant's appointment of an arbitrator after the deadline was not excessive.¹²⁸

In case 4A_666/2020 (*Wydad v. FIFA, Chikataru and El Gouna*), the appellant requested the reasons for a FIFA DRC decision belatedly but claimed that he had demonstrated an "*intention to act*" against the FIFA DRC decision by immediately appealing it to CAS. The SFT held that "*[f]or reasons of equal treatment and legal certainty, the rules on appeal procedures must be strictly complied with. To decide otherwise in the case of a particular arbitration procedure would be to forget that the respondent is entitled to expect the arbitral tribunal to apply and comply with the provisions of its own rules. It is therefore inconceivable that non-compliance with a procedural rule that makes a request for a statement of reasons an essential prerequisite for the admissibility of an appeal to the CAS should be penalised more or less severely, depending on the appellant's subsequent conduct*".¹²⁹ The SFT highlighted that the appellant had been aware of the relevant provisions of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber. The appellant knew that a notification of the decision was imminent, it could be validly communicated to him by email, and he was required to request a reasoned decision within ten days if he wished to contest it. The appellant also acknowledged that he had received the decision by email, but claimed he had not

¹²⁴ 4A_486/2022, para. 6.4.

¹²⁵ 4A_416/2020, para. 3.3.2.

¹²⁶ 4A_416/2020, para. 3.3.1; 4A_666/2020, para. 6.4.1.

¹²⁷ 4A_416/2020, para. 3.3.3;

¹²⁸ 4A_416/2020, para. 3.3.4.

¹²⁹ 4A_666/2020, para. 6.4.3.

read it because it had been filtered into his spam folder.¹³⁰

In case 4A_436/2022, the SFT held that a tribunal's refusal to allow a party to raise a new argument at a hearing was merely an application of the procedural rule set out in Article R56 of the CAS Code. The arbitrator did not engage in excessive formalism for making the ruling since the appellant could have requested permission to supplement his pleadings when the underlying documents at issue were produced about five months before the hearing, but the appellant had waited until the hearing to raise the argument.¹³¹

In case 4A_254/2023, the SFT held that under Article R31 of the CAS Code, the admissibility of a statement of appeal depends on whether it had successfully uploaded that statement to CAS' electronic filing platform. It was also not possible to tailor the severity of sanctions for non-compliance with the requirements provided for under Article R31 of the CAS Code. The SFT further noted that the appellant's counsel, if he really had experienced problems with CAS's electronic platform, could and should have ensured that his submission had been uploaded either by immediately contacting CAS or by logging onto that platform and checking the docket for the case to see whether document was actually in the library of uploaded documents.¹³²

d. Principle of timeliness

The SFT has never ruled that an alleged breach of the timeliness principle (*principe de célérité*) will qualify for violation of procedural public order. According to the SFT, whether a case has been judged within a reasonable timeframe depends on all the circumstances of the case and, in particular, its breadth and complexity both factually and legally, the nature of the procedure and the interests at stake, and the behaviour of the parties as well as the tribunal.¹³³

In case 4A_22/2023 (*Enrique López Pérez v. Tennis Integrity Unit*), the SFT held that in the light of all the circumstances involved, it appeared that the duration of the arbitration, i.e. less than two years, was not unreasonable and in no way led to an intolerable contradiction with the sense of justice. The SFT further held that "*although this is a long time compared to other cases decided by the CAS, it is still reasonable for cases involving the manipulation of sporting events, which generally involve a more complex investigation procedure*".

¹³⁰ *Ibid.*

¹³¹ 4A_436/2022, para. 5.2.

¹³² 4A_254/2023, para. 5.4.

¹³³ 4A_22/2023, para. 7.3.2.

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 2019/A/6594
Cardiff City Football Club Limited v.
SASP Football Club de Nantes
26 August 2022

Football; Validity of a transfer agreement; Scope of appeals arbitration proceedings; Discretion of the federations to determine the disputes submitted to them and de novo powers of the CAS; Principle “le juge de l’action est le juge de l’exception”; Principles of interpretation of a contractual clause; Interpretation of the conditions precedent

Panel

Prof. Ulrich Haas (Germany), President
Mr Andrew de Lotbinière McDougall KC (France)
Mr Nicholas Stewart KC (United Kingdom)

Facts

The present appeal procedure concerns a dispute between Cardiff City Football Club Limited (the “Appellant” or “CCFC”), a former member of the English Premier League and registered with the Football Association of Wales (the “FAW”), and SASP Football Club de Nantes (the “Respondent” or “FC Nantes”), registered with the *Ligue de Football Professionnel* (the “LFP”) and the *Fédération Française de Football* (the “FFF”), related to the late Mr Emiliano Raúl Sala Taffarel (the “Player”), a professional football player who tragically died in a plane crash across the English Channel in the night between 21 and 22 January 2019 together with Mr David Ibbotson, the pilot of the aircraft (the “Pilot”).

On 20 July 2015, the Player and FC Nantes entered into an employment contract (the “FC Nantes Employment Contract”), valid until 30 June 2020.

On 21 November 2018, FC Nantes and Mr Mark McKay, Managing Director of the company Mercato Sports (UK) Ltd (“Mercato”) entered into a contract entitled “*Contrat d’Agent Sportif*” (the “Agency Agreement”), whereby Mr Mark McKay was authorised to “*negotiate the definitive transfer of the Player with clubs in the Premier League football championship*”.

On 17 and 18 January 2019, representatives of CCFC and FC Nantes exchanged emails and text messages with Mr Mark McKay and his father Willie McKay, whereby they informally agreed on the broad contractual terms of a transfer of the Player to CCFC.

On 18 January 2019, the Player signed an employment contract with CCFC (the “CCFC Employment Contract”) for a duration of three and a half seasons, valid until 30 June 2022. Also on 18 January 2019, FC Nantes provided CCFC with a draft transfer agreement, following which CCFC proposed certain amendments thereto.

On 19 January 2019, at 15:24 CET, the Player’s agent provided FC Nantes with a copy of the agreement terminating the FC Nantes Employment Contract (the “Termination Agreement”), signed by the Player, and at 15:27 CET, FC Nantes sent back a countersigned copy. At 15:31 CET, FC Nantes returned a countersigned copy of the Transfer Agreement to CCFC, providing for the transfer of the Player from FC Nantes to CCFC for a transfer fee of EUR 17,000,000 (EUR 6,000,000 to be paid “*within five days of the Player registering with [CCFC]*”, EUR 6,000,000 on 1 January 2020 and EUR 5,000,000 on 1 January 2021), variable payments and a sell-on fee of 20%. The Parties then uploaded the Transfer Agreement and the CCFC Employment Contract into FIFA’s Transfer Matching System (“TMS”) for the Player’s International

Transfer Certificate (“ITC”) to be released by the FFF in favour of the FAW. At 17:38 CET, CCFC confirmed in TMS that all information had been entered and that all documents had been uploaded. CCFC then submitted the CCFC Employment Contract for registration with the Premier League and it received a confirmation of receipt from the Premier League at 18:04 CET. At 18:11 CET, FC Nantes “matched” the information regarding the Player’s transfer in TMS, following which the transfer status in TMS changed to “*Waiting for ITC request*”. According to FC Nantes, such ITC request had to be filed by the FAW, and as from the change of transfer status, neither CCFC nor FC Nantes were expected to complete any further actions in TMS. Around 20:00 CET, both CCFC as well as FC Nantes made public announcements as to the Player’s transfer to CCFC.

On 21 January 2019, at 11:01 CET, the FAW sent a request to receive the Player’s ITC in TMS from the FFF. At 12:00 CET, the Premier League informed CCFC that the CCFC Employment Contract could not be registered as it stood and that it had to be amended before it could be registered. At 14:08 CET, the LFP informed the FFF that it had homologated the Termination Agreement. At 14:14 CET, FC Nantes sent an invoice and bank details to CCFC for the first instalment of the transfer fee, in the amount of EUR 6,000,000. At 17:17 CET, the FFF issued the Player’s ITC and uploaded the Player’s player passport issued by the FFF. One minute later, the FFF also uploaded the Player’s player passport issued by the Argentinian Football Federation (the “AFA”). At 18:30 CET, the FAW confirmed receipt of the Player’s ITC and registered the Player with CCFC, following which the transfer status in TMS changed to “*Closed – awaiting payment*”. According to FC Nantes, at that moment the Player had become a CCFC player and all conditions precedent in the Transfer Agreement had been satisfied.

On the same day, CCFC and the Player’s Agent reopened negotiations to agree on a new set of terms of the employment relationship that would also be acceptable to the Premier League. At 21:08 CET, the Player’s Agent agreed on a series of proposed changes to the CCFC Employment Contract. CCFC maintains that it was envisaged that the new terms would be discussed with and offered to the Player at the training ground prior to the Player’s first training session with CCFC on 22 January 2019, after he returned from Nantes. According to CCFC, it was open to the Player at that time to either agree the new terms of the CCFC Employment Contract to enable the transfer to complete or bring the negotiations with CCFC to an end and return to play for FC Nantes. At 21:35 CET, CCFC sent the proposed changes to the CCFC Employment Contract in an email to the Premier League. The Premier League did not respond to that email and has since confirmed in writing that the Player was never registered with the Premier League.

In the night between 21 and 22 January 2019, but after 21 January 2019 at 21:35 CET, the Player died in a plane crash over the English Channel.

On 25 September 2019, following a claim for payment filed by FC Nantes, the Players’ Status Committee of FIFA (the “FIFA PSC”) issued a decision (the “*Appealed Decision*”), determining that the conditions precedent set forth in the Transfer Agreement had been complied with, so that the transfer had been completed and that CCFC was required to pay the first instalment of the transfer fee in an amount of EUR 6,000,000 to FC Nantes. The FIFA PSC considered that it had no jurisdiction to address CCFC’s subsidiary set-off claim.

On 20 November 2019, CCFC filed an appeal with CAS, challenging the Appealed Decision. In the course of the proceedings before the CAS, the Parties mutually agreed to extend time limits on various occasions and for relatively long periods of time, in part related to the COVID-19 pandemic and the resulting difficulties for the Parties in liaising with expert witnesses.

On 4 October 2021, the CAS Court Office informed the Parties that the Panel has decided to bifurcate the proceedings and, therefore, to preliminarily deal with the following legal issues (the “Bifurcated Issues”) on the merits: (1) if the transfer agreement entered into by the Parties was valid (with all conditions precedent being complied with); (2) if the CAS / FIFA PSC was competent to decide on the set-off with a damage claim; and (3) under the law applicable – as a matter of principle – if a claim for transfer fee could be set-off against a tort claim.

On 3 and 4 March 2022, a hearing was held in Lausanne, Switzerland.

Reasons

For the Panel, the key issue to be adjudicated and decided in the present procedure was whether the conditions precedent set forth in the Transfer Agreement had been satisfied, as a consequence of which the transfer had been completed, triggering a payment obligation of CCFC to FC Nantes of a transfer fee of EUR 17,000,000.

However, the Appellant argued that even if such payment obligation existed, it was not required to pay any transfer fee to the Respondent because the latter was liable for the Player’s death since the return flight between Nantes and Cardiff during which the Player’s death had occurred had been organised by agents and sub-agents of FC

Nantes in connection with the Agency Agreement concluded with FC Nantes for the purposes of arranging the sale of the Player, and that this tort claim was to be set-off against any payment obligation with respect to the transfer fee.

According to the Appellant, prior to considering the substance of CCFC’s civil tortious claim against FC Nantes, the Panel preliminarily needed to consider whether (i) CAS had jurisdiction to hear CCFC’s tort claim; and (ii) whether a tortious liability could be offset against a contractual liability under the applicable law. For the Appellant, these requirements were complied with, regardless of the law to be applied; for the Respondent, however, these requirements were not fulfilled.

For the Panel, while the substance of CCFC’s tort claim fell outside the scope of the Bifurcated Issues, the two preliminary issues identified by the Appellant coincided with Bifurcated Issues (2) and (3). This led the Panel to first address these two preliminary issues before dealing with the payment obligation of CCFC to FC Nantes.

1. Scope of appeals arbitration proceedings

Both Parties expressly shared the view of the Panel that the latter was only empowered to decide upon the substance of the tort claim if the FIFA PSC had been competent to do so, and *vice versa*, that the Panel could not adjudicate the substance of the tort claim if the FIFA PSC lacked the requisite mandate.

The Panel observed that CAS proceedings before the Appeals Arbitration Division were to be distinguished from those before the Ordinary Arbitration Division in the sense that the scope of the former was limited to issues that had fallen within the competence of the first instance proceedings, while in ordinary

arbitration proceedings there had been no previous instance.

2. Discretion of the federations to determine the disputes submitted to them and *de novo* powers of the CAS

The Panel recalled that although private associations had a wide discretion to determine what types of disputes and between which persons/entities those disputes should be submitted to its internal dispute resolution bodies, this did however not mean that a CAS panel was bound by any conclusion of the first instance dispute resolution body with regard to its competence to deal with a dispute. If the CAS panel found that the first instance body had wrongly denied its mandate to adjudicate and decide on a claim, it was, pursuant to Article R57 of the CAS Code, free to either adjudicate and decide on the claim itself or to refer the case back to the previous instance.

3. Principle "*le juge de l'action est le juge de l'exception*"

The Panel first observed that neither the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP") (June 2018 edition) nor the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (edition 2018) (the "FIFA Procedural Rules") specifically dealt with the question whether and to what extent the FIFA adjudicatory bodies had a mandate to decide on set-off claims. Although the FIFA Procedural Rules foresaw the possibility of filing counterclaims without any particular prerequisites (other than jurisdiction), it followed, *inter alia*, from Article 377(1) of the Swiss Code of Civil Procedure (the "CCP"), which – in the ambit of domestic arbitration – clearly distinguishes between a set-off (para. 1) and counterclaims (para. 2),

that provisions concerning set-off claims did not apply to counterclaims and *vice versa*.

This notwithstanding, the Appellant was of the view that the FIFA PSC was competent based on the principle "*le juge de l'action est le juge de l'exception*", whereby the judge that is competent for the main action is also competent to decide on objections thereto, irrespective of whether the issue raised as an objection falls within the competence of another judge.

The Panel recalled that, as a consequence of the principle "*le juge de l'action est le juge de l'exception*", a claim could be raised by set-off as a defence against a main action filed in court even if another court would have been competent to decide on that claim had the latter been filed separately. This principle was applicable in domestic arbitration proceedings on the basis of Article 377(1) CCP and thus it could in any case apply in the context of international alternative dispute resolution proceedings, including before association tribunals such as the FIFA adjudicatory bodies, only by analogy. Any transposing of Article 377(1) CCP was therefore to be made with care, taking due account of the specifics of the proceedings before association tribunals.

The Panel also observed that it was not clear whether Article 377(1) CCP gave the arbitral tribunal discretion to accept jurisdiction over the set-off claim. According to the Appellant, the French and Italian versions of the rule providing that the arbitral tribunal has jurisdiction to decide the set-off defense had to take precedence over the German version stating that the arbitral tribunal may adjudicate the set-off defense. The Panel noted that this question was disputed among legal scholars and that Swiss jurisprudence had yet to decide which of the different language versions should take precedence.

However, it held that it did not have to decide the dispute, as on either view of Article 377(1) CCP, the FIFA PSC would not have been bound to adjudicate the set-off claim. Should jurisdiction be considered mandatory, even legal authorities favouring this position allowed for exceptions to this principle, an important one being that a very specialised dispute resolution body like the FIFA PSC with a very restricted subject-matter competence could not adjudicate by way of set-off a claim that would otherwise fall outside its jurisdiction *ratione materiae*. Should jurisdiction not be considered mandatory, in view of the principles of procedural efficiency and procedural fairness, the fact that there was insufficient legal and/or factual connection between the main claim and the set-off claim and that the main claim was ripe for adjudication while the set-off claim was far from it, weighed strongly against the specialised dispute resolution body having jurisdiction to adjudicate the main claim, i.e. FIFA PSC, accepting to adjudicate the set-off claim.

On a purely subsidiary level the Panel also addressed question no. 3 of the Bifurcated Issues, i.e. whether under the applicable law of England and Wales the substantive prerequisites for a set-off were fulfilled in the case at hand. The Panel recalled that in order for a set-off claim to be admissible under English law, the cross claim had to be so closely connected with the plaintiff's demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim. In the present case, however, the Panel held that the organisation of the fatal flight giving rise to the tort claim was not part of FC Nantes' contractual duties under the Transfer Agreement and was, thus, unrelated to the contract. Furthermore, as addressed in more detail below, the Player's transfer had been completed by the time the flight was organised. For the Panel, this was

another indication that the organisation of the flight was independent of the Transfer Agreement. Consequently, the Panel also found that under the law of England and Wales the relevant test to be applied for a tribunal to adjudicate and decide on the set-off claim was not satisfied.

The Panel thus concluded that (i) CCFC was procedurally precluded from availing itself of the alleged set-off claim, and (ii) in answer to question no. 3 of the Bifurcated Issues, the substantive prerequisites for a set-off were not fulfilled. As a consequence, the Panel was not required to adjudicate and decide on the substance of CCFC's tort claim.

4. Principles of interpretation of a contractual clause

Coming to the merits of the case, the remaining issue to be resolved by the Panel was Bifurcated Issue no. 1, i.e. if the Transfer Agreement entered into by the Parties was valid (with all conditions precedent being cumulatively complied with).

In this regard, the key provision was Clause 2.1 of the Transfer Agreement, which provided that the Transfer Agreement was conditional upon: (2.1.1.) the player completing successfully medical examination with CCFC; (2.1.2.) FC Nantes and the Player agreeing all the terms of a mutual termination of FC Nantes contract of employment with the Player; (2.1.3.) the mutual termination of FC Nantes contract of employment with the Player being registered by the LFP; and (2.1.4.) the LFP and the FAW having confirmed to CCFC and FC Nantes that the Player has been registered as a CCFC player and that the Player's International Transfer Certificate has been released. The consequences of non-fulfilment of any of such conditions precedent, set forth in clause 2.2 of the Transfer Agreement, were that the Transfer Agreement

was to be null and void and no payment was to be due from CCFC to FC Nantes.

It was not contested that clause 2.1.1 of the Transfer Agreement had been complied with, but CCFC disputed that the conditions precedent in clauses 2.1.2, 2.1.3 and 2.1.4 were satisfied. Before assessing these three conditions precedent, and as the Parties had put great emphasis on the question what law applied to the interpretation of the conditions precedent in the Termination Agreement, the Panel first addressed this question.

The Appellant was of the view that the dispute should primarily be decided in accordance with the law of England and Wales, while the Respondent was submitting that any transfer-related matter arising out of the Transfer Agreement should be subject to the FIFA RSTP and subsidiarily Swiss law.

The Panel recalled that under the law of England and Wales, a contract had to be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean. According to Swiss law, on the contrary, Article 18 of the Swiss Code of Obligations first and foremost sought to establish the subjective intention of the parties and – in case the latter could not be determined – fell back on an objective interpretation of the contract. The Panel found that the differences between contractual interpretation under the law of England and Wales and Swiss law, however, did not come into play in the case at hand, since no clear subjective intention could be inferred and, thus, also from a Swiss law perspective, the objective interpretation prevailed. According to the Panel, a concrete difference between both laws related to the question of whether or not drafts of a contract might be taken into

account when interpreting and assessing the contents of the contract. Under English law this was not permitted, while under Swiss law this was, as a matter of principle, permissible. However, the Panel considered that, even under Swiss law, the various draft versions of the Transfer Agreement were irrelevant, since they did not provide much clarity as to the subjective intention of the Parties with the conditions precedent.

The Panel further found that the regulatory matrix in light of which the interpretation took place – independently of the law applicable – was the RSTP, since – obviously – the conditions in clauses 2.1.2 - 2.1.4 of the Transfer Agreement more or less mirrored the various steps to be taken according to the FIFA RSTP (Articles 5 and 13 FIFA RSTP and Articles 4 and 8 of Annexe 3 FIFA RSTP) in order to transfer a player. Consequently, irrespective of whether Swiss law or the law of England and Wales applied to clauses 2.1.2 - 2.1.4 of the Transfer Agreement, the same conclusion was to be reached on the interpretation of the conditions precedent set out therein.

5. Interpretation of the conditions precedent

The condition precedent set forth in clause 2.1.2 of the Transfer Agreement provided for “*FC Nantes and the Player agreeing all the terms of a mutual termination of FC Nantes contract of employment with the Player*”. According to the Termination Agreement concluded on 19 January 2019, the validity of the agreement was subject to (i) the Player being transferred permanently to CCFC, and (ii) the ITC having been issued by the FFF to the English Football Association. These conditions had to be fully met by no later than 22 January 2019, otherwise the termination would have been void.

CCFC was maintaining that the obvious business common sense interpretation of clause 2.1.2 of the Transfer Agreement was not that the clause could be satisfied by the Player and FC Nantes merely agreeing terms of a termination agreement but, self-evidently, that they gave effect to those terms. Since the conditions precedent in the Termination Agreement were not fulfilled by 22 January 2019 or at all, FC Nantes could not give effect to clause 2.1.2 of the Transfer Agreement.

The Panel noted that the text in clause 2.1.2 of the Transfer Agreement coincided with the wording of Article 8(2)(3) of Annex 3 to the FIFA RSTP and that the latter did not require that the mutual termination agreement was validly enforced, but simply that it was agreed upon. The Panel found that the Player had been transferred permanently to CCFC, the FFF had issued the Player's ITC to the FAW, and the FAW had registered the Player as a CCFC player, as a consequence of which the conditions precedent in the Termination Agreement had been fulfilled on 21 January 2019.

The condition precedent set forth in clause 2.1.3 of the Transfer Agreement provided that *"the mutual termination of FC Nantes contract of employment with the Player is registered by the LFP"*. The Panel found that also the wording of clause 2.1.3 of the Transfer Agreement was clear: the agreement to mutually terminate the employment relationship between FC Nantes and the Player was to be registered/homologated by the LFP, i.e. the LFP was to verify the legality of the Termination Agreement. It was not required that LFP assessed or examined whether the terms of the Termination Agreement had actually been complied with.

The condition precedent set forth in clause 2.1.4 of the Transfer Agreement provided as follows: *"[T]he LFP and the FAW have confirmed to [CCFC] and FC Nantes that the Player has been*

registered as a [CCFC] player and that the Player's International Transfer Certificate has been released".

CCFC maintained that the correct interpretation of this clause 2 provided that the Player was to play for CCFC given the use of the words *"[CCFC] player"*. However, as of 19 January 2019, the only competition in which CCFC remained entitled to play during the 2018/19 season was the Premier League. It followed that, as a matter of business common sense, for the Transfer Agreement to have practical effect, the Player had to be registered with the Premier League but this was not the case at the time of the Player's death, since the CCFC Employment Contract had to be renegotiated following the Premier League's refusal to register the CCFC Employment Contract. FC Nantes contended that clause 2.1 of the Transfer Agreement did not include any express provision that the Player had to be registered with the Premier League in order for the transfer to be completed.

The Panel recalled that from a regulatory standpoint (i.e. the FIFA RSTP), a transfer was considered executed and finalised once a player was registered with the new association. This was only possible when the new association had received the player's ITC from his former association. The Panel found that the Parties to the Transfer Agreement had not deviated from this approach. The Panel interpreted the word "registered" in clause 2.1.4 as referring to registration by the FAW and held that there was no reasonable objective construction of clause 2.1.4 of the Transfer Agreement that the completion of the transfer also required the registration of the Player with the Premier League. It was undisputed that the Player had been registered with the new association on 21 January 2019, i.e. before the Player's death. Upon registration, the Player had been at the disposal of the CCFC (and no longer at the disposal of FC Nantes).

For the Panel, this interpretation was not contradicted by the fact that the requirement for registration was followed by the wording “*and that the Player’s ITC has been released*”, as the release of the ITC and the registration of a player were two sides of the same coin. The same approach was applied in Article 8(2)(5) of Annex 3 to the FIFA RSTP, which provided that “[o]nce the ITC has been delivered, the new association shall confirm receipt and complete the relevant player registration information in TMS”. The language used in clause 2.1.4 of the Transfer Agreement in fact reflected the relevant provision in the FIFA RSTP and the standing practice of the football industry.

As a consequence, since the Player’s transfer from FC Nantes to CCFC had been completed and because all conditions precedent in clause 2.1 of the Transfer Agreement had been satisfied prior to the Player’s death, CCFC’s payment obligations towards FC Nantes were triggered.

Decision

Based on all the above, the Panel found that FC Nantes’ claim for the first instalment of the transfer fee was upheld. The Panel also found that FIFA’s rejection to adjudicate and decide on CCFC’s set-off claim was upheld, because either FIFA had no mandate over that claim irrespective of whether it had discretion to reject jurisdiction over such claim. Consequently, also the Panel had no mandate to adjudicate and decide on the set-off claim. The Appealed Decision was therefore confirmed.

CAS 2020/A/7314

Horacio Luis Rolla v. Palermo Football Club S.p.A & Fédération Internationale de Football Association (FIFA)

12 April 2023

Football; Contractual dispute; Player's agent standing to appeal against a FIFA Disciplinary Committee decision related to his debtor; Burden and standard of proof of establishing a sporting succession between two entities; Criteria for the establishment of a sporting succession between two entities; Creditor's duty of diligence to preserve his interests and consequences of a lack of diligence

Panel

Mr Rui Botica Santos (Portugal), President
Prof. Miguel Cardenal Carro (Spain)
Mr José Juan Pintó (Spain)

Facts

Mr Horacio Luis Rolla ("Appellant", "Agent" or "Creditor") is an intermediary duly licensed as Player's Agent by the Argentinian Football Federation, which is a member association of FIFA.

Palermo Football Club S.p.A. ("First Respondent" or "New Palermo") is an Italian football club affiliated to the Federazione Italiana Giuoco Calcio ("FIGC"), which is a member association of FIFA.

The FIFA ("FIFA" or "Second Respondent") is the international governing body of football.

The Agent, New Palermo and FIFA are collectively referred to as the "Parties" and

New Palermo and FIFA collectively referred to as the "Respondents".

On 7 May 2014, the Single Judge of the FIFA Player's Status Committee ("FIFA PSC") decided to reject a claim filed by the Creditor against the Old Palermo ("FIFA PSC Decision"). The Agent was claiming the amounts related to his professional services for the transfer of the player Mr [E.] to the Italian club SSC Napoli.

On 18 September 2014, the Agent appealed against the FIFA PSC Decision before the Court of Arbitration for Sport ("CAS"). On 25 May 2015, the Agent and the Old Palermo decided to settle the dispute ("Settlement Agreement"). The Settlement Agreement replaced the FIFA PSC Decision and was incorporated in a CAS consent award ("CAS Consent Award"). The Settlement Agreement stated, among others, that "*Palermo shall pay the Agent the amount of €1,000,000 (one million euros)*".

On 19 October 2018, as per the Agent's request, FIFA Disciplinary Committee (FIFA DC) passed a decision against the Old Palermo ("FIFA DC Decision against the Old Palermo"), by means of which, among others, it granted a final deadline of 90 days to comply with the Settlement Agreement.

The Old Palermo appealed to CAS against this decision. On 30 October 2019, CAS confirmed the FIFA DC Decision against the Old Palermo.

On 31 October 2019, the FIGC informed FIFA DC that the Old Palermo had been declared bankrupt by the Ordinary Court of Palermo and that, as of 25 October 2019, it was no longer affiliated to the FIGC. Immediately after, FIFA DC informed the Agent that due to the disaffiliation of the Old Palermo from the FIGC, it was not in position to further proceed with the case. Since Old Palermo lost

its indirect membership to FIFA, FIFA DC could not impose sanctions on it.

On 12 November 2019, the Agent requested FIFA DC to start disciplinary proceedings against the New Palermo as sporting successor of the Old Palermo (New Palermo and Old Palermo are collectively referred to as the “Clubs”).

The Agent argued that the New Palermo is the sporting successor of the Old Palermo and, for this reason, was liable for the payment of the consolidated obligations of his predecessor since it could not receive his credit.

On 1 April 2020, FIFA DC opened disciplinary proceedings against the New Palermo for alleged sporting successor and potential violation of Article 64 FIFA Disciplinary Code edition 2017 (“FDC”) and Article 15.4 FDC edition 2019. In this context, New Palermo was invited to provide its position regarding the Creditor’s allegations.

On 8 April 2020, the FIGC informed FIFA DC about the fact that the New Palermo, which was participating in the amateur league, became an affiliated member of the FIGC on 26 July 2019. Furthermore, FIGC informed that New Palermo was not considered the legal successor of the Old Palermo, since there was no legal connection or continuity between the Clubs. New Palermo informed the Agent to claim his credit in the bankruptcy proceedings of the Old Palermo.

In this respect, FIFA DC requested the Agent to clarify the actions taken, if any, to recover his credit from the Old Palermo under the bankruptcy proceedings. The Agent confirmed that he has exclusively claimed his credit under the FIFA DC proceedings.

On 21 May 2020, FIFA DC concluded that, based on the documentation received, it was

not possible to establish the sporting successor between the Clubs. As a result, New Palermo was not responsible for Old Palermo’s debt and the disciplinary procedure was closed.

On 23 July 2020, in accordance with Article R47 of the Code of Sports-related Arbitration (“CAS Code”), the Appellant filed its statement of appeal with the CAS challenging the above decision.

Reasons

This appeal was related to the challenging of the FIFA DC decision passed on 21 May 2020 (“Appealed Decision” or “FIFA DC Decision related to the New Palermo”), discharging the New Palermo from the liability concerning the debts incurred by the Italian club US Città di Palermo S.p.A. (“Old Palermo” or “Debtor Club”), on the basis that there is no legal or sporting succession between the referred Italian football clubs.

The Appellant *inter alia* prayed the relief that “*Società Sportiva Dilettantistica Palermo or Palermo Football Club S.p.A, or who, at the time of issuing the decision, becomes de sports successor of US Città di Palermo S.p.A., is responsible for paying [the Creditor] the sums owned according to the award (...) CAS 2014/A/3755*”.

The First Respondent *inter alia* made the following prayers for relief: “*a) REJECTING the Appellant’s requests to their entirety; b) CONFIRMING the FIFA Decision*”.

FIFA *inter alia* made the following prayers for relief: “*(a) Confirm that the Appellant lacks the required standing to appeal and (...) to reject the appeal on this basis; Alternatively to point (a); (b) Reject the Appellant’s appeal in its entirety; (c) Confirm the decision rendered by the FIFA Disciplinary Committee on 21 May 2020*”.

1. Player's agent standing to appeal against a FIFA DC decision related to his debtor

FIFA and New Palermo claimed that the Appellant lacked the required standing to appeal and challenge the Appealed Decision before CAS. The Respondents stated that Article 58.1 FIFA Statutes established two requirements for the appeal of a FIFA DC decision: (i) the Appellant must have been a party in the FIFA disciplinary proceedings; and (ii) the Appellant must have a direct legal protected interest in filing the appeal.

The Panel emphasised that the lack of standing to sue or standing to appeal was an issue related to the merits of the case (CAS 2009/A/1869; CAS 2015/A/3959; CAS 2015/A/4131 and Swiss Federal Tribunal ("SFT") SFT 128 II 50, 55) and that the prerequisite of the two requirements was not in question but only whether the said requirements were met in the present case. The Panel's views are the following:

As to whether the Appellant participated in the FIFA DC proceedings, the Panel noted that the procedural acts and actions showed that the Appellant participated, and was treated, as a party during the FIFA disciplinary proceedings. The Appellant was involved in the FIFA DC decision making process and, moreover, he was also invited to appeal the decision to CAS.

As explained in CAS 2016/A/4837 and CAS 2017/A/5359, disputes taken by FIFA bodies can be qualified of "horizontal" and "vertical" disputes. In the present case, the dispute at FIFA DC involved both disputes, because FIFA DC was requested to decide about the sporting succession of the Clubs and the enforcement of the Settlement Agreement against New Palermo. FIFA DC was not only requested to enforce a previous "obligation already decided" but was also asked to decide

on a substantive issue related to the existence or not of sporting successor between the Clubs. This explains why the Agent was treated as a "party" to the FIFA DC proceedings.

The above conclusion was not in contradiction with the case CAS 2011/A/2377. The Panel highlighted that in that case, the creditor's club was not a party to the proceedings conducted before the FIFA DC. The proceedings before FIFA DC were solely related to a matter of disciplinary nature and did not concern the potential liability of the club under "investigation".

As to whether the Appellant had a direct interest in the FDC proceedings, the Panel agreed that the primary and main objective of the FIFA Disciplinary Code (FDC) mechanism was not to assist creditors in recovering their credits. This was only a secondary aspect (and one of the intended results) of the disciplinary system. There should be no doubts that the crucial objective of the system was to protect the full compliance by the affiliates of the decisions rendered by FIFA. However, this was correct on the assumption that FIFA DC was called to have a pure disciplinary intervention. As explained in CAS 2011/A/2377, disciplinary proceedings before FIFA DC should have been restricted to matters of disciplinary nature in the relationship between a party and FIFA.

Looking to the Appellant's prayers for relief, the Panel concluded that there were also requests against New Palermo and not exclusively against FIFA. FDC addressed and dismissed the Agent's claim related to the sporting succession of the Clubs. To conclude that there was no sporting succession, FIFA DC acted as a FIFA's adjudicatory body and not as a simple FIFA's disciplinary body. FIFA decided the "horizontal" dispute between the Agent and the New Palermo, and this explained the Appellant's direct interest in the

present appeal. Even if the Panel would have considered that the Appellant was not the direct addressee of the Appealed Decision it was clear that from a material point of view the FIFA decision affected him. The closing of the FIFA disciplinary proceedings without having allowed the creditor to appeal – concluding that New Palermo was not the successor of the Old Palermo – would have caused *res judicata* on the issue without any possibility of revision of the decision. The Creditor would have lost any [chance] to recover its debt by the sporting successor of its non-compliant debtor. This result would have been unacceptable within the sporting system and against the principle of revision of the decisions.

Considering the above, the Panel concluded that the two cumulative requirements were met and that the Appellant had standing to appeal. This was also supported by the fact that the omission of the FIFA Disciplinary Code as to who has standing to appeal a FIFA DC decision rendered under Article 15.4 FDC 2019 / 64 FDC 2017 directly to CAS should be interpreted in a way to guarantee the creditors access to justice in their interest to obtain enforcement of a FIFA or CAS decision. This interpretation was also in line with the principle of *in dubio contra stipulatorem*.

Furthermore, the Panel highlighted that the Appellant's standing to sue derived also from: (i) Article 75 Swiss Civil Code in the way that the Appellant was affected by a decision of an association; and (ii) the principle of good faith, as the grounds of the Appealed Decision were issued on the Creditor's request.

To be consistent with FIFA's answer in these CAS proceedings, FIFA DC would have needed to reject the Agent's request based on the fact that his claim was not related to the pure enforcement of a FIFA/CAS decision but rather to the enforcement of a CAS consent award that required a previous decision on the

sporting succession of the Clubs. A dispute that required the intervention of FIFA as an adjudicatory body. This was the reasoning behind of the case CAS 2017/A/5460, in which the Sole Arbitrator concluded that CAS had no jurisdiction to decide the appeal. The fact that the "sporting succession" provision was integrated in Article 15 of the FDC and its wording referring the "sporting successor" as a non-compliant party may suggest that FIFA enlarged FIFA DC's competence to decide on the matter. Otherwise, the "sporting succession" regime would be inserted and treated in the RSTP.

2. Burden and standard of proof of establishing a sporting succession between two entities

Continuing its analysis, the Panel found that there was no doubt that the Appellant carried the burden of proof in establishing the New Palermo was the sporting successor of Old Palermo and that New Palermo was liable to pay the sums established in the Settlement Agreement. This understanding was confirmed by Article 8 of the Swiss Civil Code ("SCC") and as it is referred by CAS Arbitrator Jordi López in the article published in CAS Bulletin 2020/2.

Having noted the above the Panel will assess the applicable standard of proof. In the context of this matter, the Panel defined as appropriate standard "comfortable satisfaction". In practical terms, the party bearing the burden of proof must establish the facts having in mind the seriousness of the invoked allegations. Depending of the elements that integrate the criteria to establish "sporting succession", the proof required to "comfortably satisfy" the Panel can vary along a sliding scale being closer to "balance of probability" (for less relevant "elements") or close to "beyond a reasonable doubt" (for more relevant and important "elements").

3. Criteria for the establishment of a sporting succession between two entities

First turning its attention to the rationale of Article 15.4 of the FDC 2019, the Panel noted that most jurisdictions recognized in their legal systems, as a rule, that a legal entity is not responsible for obligations incurred by a third party. However, there were still legal systems that introduced the figure of “disregarding the legal personality” in order to be able, in a balanced and effective way, to hold entities that, fraudulently or in abuse of rights, used different identities to avoid the fulfilment of their obligations. Similarly, FIFA instituted the rule of Article 15.4 FDC to provide legal protection to certain sports creditors who, due to the debtor club facing insolvency / bankruptcy, extinction or simply dissipation of assets, no longer enjoyed FIFA protection for the good collection of their credit(s)).

Article 15.4 FDC provided efficient means to obtain the payment of monetary claims against the “sporting successor” of a non-compliant debtor. This provision was also the result of the codification of FIFA and CAS jurisprudence. The concept of “sporting succession” was mainly implemented to avoid abuse. This rationale was clear in FIFA Circular 1681. Although the manifestation of an “abusive situation” was not provided for in Article 15.4 FDC, the understanding that this subjective element was required was somehow supported and underlined by FIFA and CAS jurisprudence (CAS 2020/A/7902, para. 78; FIFA DC decision 150129 PST of 25 November 2019, para. 18).

In light of the above, the Panel was of the view that to assess the existence of “sporting succession” it was also important to understand the reasons and the subjective motivations that led to the emergence of the new club. This was exactly the reason why the provision contained in Article 15.4 FDC did

not create a general and strict obligation for all cases of new clubs, but set indicatively some criteria that were being taken into consideration by FIFA and CAS in order to decide whether a club shall be deemed as a sporting successor of another club or not.

The Panel did not consider itself to be bound by prior decisions of FIFA and CAS regarding this matter also because, as stated in CAS 2020/A/7902, the analysis of “sporting succession” should be made on a case-by-case basis. However, the Panel considered important to take previous CAS decisions, which are relevant, into due consideration, for reasons of legal predictability and stability. Consistency of interpretations was desirable whenever possible and justified, in order to establish and increase the level of confidence and legal certainty of the existing system.

Article 15.4 of the FIFA DC included the following non-exhaustive list of factors that should be taken into account in the criteria when making the assessment of “sporting succession”: headquarters; Name; Legal Form; Team Colours; Players; Shareholders, stakeholders, ownership, management; Category of competition concerned.

However, these were not the exclusive ones that can be taken into consideration. The relevant provisions state, “*among others*” and, the Appellant invoked the following in support of his allegations: reference to the founding year; History and objectives; Intention of New Palermo in identifying itself with the history of the city’s club: “Club Palermo”; Nickname; Team crest / logo; Stadium; Contact offices; Supporters and historic sports idols, including the social media and the inauguration of the “Palermo Museum”.

New Palermo pleaded other arguments in support of the rejection of the existence of sporting succession, which the Panel must also

take into consideration. One of these additional factors is the “*co-existence of the Clubs during a certain period*”.

As CAS Arbitrator Jordi López stated in the above-referred CAS Bulletin article, the starting point for the analysis of sporting succession must be the meaning of “sports club”, taking into consideration that “*a club has a series of specific features that identify and distinguish it from other clubs, including its name, clothing colours, crests and other emblems, fans, history, sports achievements, its town or city and stadium, among other factors. Such circumstances or characteristics develop over a long period of time and tend to be permanent and shape an image of what the general public understands or considers to be a club*” [free translation of original text in Spanish]. Later in the said article, the said author identified the following main characteristics of a “sports club” [free translation once more]: the new entity refers publicly to the date of the founding of the previous entity, adopts the history and attainments of the previous entity, continues to play matches in the same city and stadium, with colours and other emblems that are similar to those of the entity succeeded. The entity that supposedly succeeds and the entity that is succeeded have the same registered office and CEO. The name of the new entity includes parts of the name of the old entity or can be confused with, or is identical to, the name of the old entity. There is a certain coincidence between the squads and technical staff of the two entities. The contact details of both entities, such as their telephone number, fax number or postal address are the same. A national association has, in practice, treated a club as the successor of another club, or the successor club has acquired the rights to participate in the competition that were formerly held by the club succeeded.

These factors should be considered, in an open and careful manner, “*on a case by-case basis*”, as stated above. As in case 2020/A/7092, which

concerned a similar case, the Panel opted to rank the factors identified into three categories, *i.e.*: (i) minor importance; (ii) relevant; and (iii) important. The above assessments can be summarised as follows ((+) = in favour of sporting succession; (-) = not in favour of sporting succession; (0) = neutral / irrelevant):

<u>Factor</u>	<u>Minor importance</u>	<u>Relevant</u>	<u>Important</u>
Headquarters	(+)		
Name / Nickname		(+)	
Legal Form		(-)	
Team Colours		(+)	
Team Crest / Logo		(+)	
Transfer of Players / Technical Staff			(-)
Shareholders, Ownership & Management			(-)
Category of Competition Concerned			(-)
Stadium / Training Centre	(+)		
Reliance on the bankrupt club's History and Memory			(+)
Reliance on the same Supporters and Historic Sports Idols			(+)
Acquisition of sporting assets from the bankrupt club			(-)
Reliance on the sporting credits of the bankrupt club			(-)

Co-existence of the Clubs in the same period	(0)		
The reason(s) behind the appearance of the new club		(+)	
Total	2 +	3 + 1 -	3 + 5 -

The Panel could also add an additional (or complementary) intangible criterion, which the Panel considered to be of great importance: *i.e.* the transfer or use, by New Palermo, of a significant part of Old Palermo’s goodwill, as there could be no doubt that a very substantial part of the said goodwill, *e.g.* public recognition and the support of the supporters was clearly transferred, either voluntarily or involuntarily, from Old Palermo to New Palermo. This goodwill defines much of what a football club was, and the fact was that New Palermo benefitted from the said goodwill factors since it started to operate, and did nothing to expressly distance itself from or differentiate itself in relation to Old Palermo.

In casu, the reasoning and criterion to be followed was based on a criterion of the overall and qualitative assessment of the factors which were indicative of the existence of sporting succession and not of the consideration, ranking and counting of the number of relevant factors for and against the existence of sporting succession. In that case, the important thing, *in casu*, was to establish whether the important and relevant factors that indicated the existence of sporting succession, did, or did not, suffice to comply with the requirements of Article 15.4 FDC and established sporting continuity between the Clubs.

Stated in greater detail, this meant mere confirmation whether the existence of some factors classed as “important” could, because of their intensity, be a sufficient basis for a determination that sporting succession existed,

in casu. The most evident examples are the transfer of federation rights between clubs (cf. CAS 2007/A/1355) or the transfer of a significant number of players, which gives the new club a continuity with the identity of the old club. In this case, the factors considered to be important and relevant were, a sufficient basis for a determination that sporting continuity between the Clubs existed. The Panel was aware that this case reflected a new reality, which had never been addressed by FIFA, *i.e.* sporting continuity between Clubs by virtue of their umbilical connection with the history and memory of the city in which they were based and the special link between them and their supporters. The Panel unanimously recognised that there was no evidence or indication that the new club arose in improper circumstances, or with the intention to evade the “weight” of the old club’s financial obligations.

The aim of New Palermo, as a club in the city of Palermo, was to give continuity to the values and memories of the clubs that “served” the city of Palermo, which included Old Palermo. This effect and objective may not have been present in the intention of the shareholders of New Palermo, but was clearly visible in the intention of the Municipality of Palermo, because of the terms and conditions it imposed regarding the selection of the club of the city of Palermo. The Panel had no doubt that it was the status of a “city club” that gave New Palermo extra visibility and sporting success in such a short period of time.

In casu, sporting succession was not a consequence of a movement linked to or associated with the old club’s supporters. *In casu*, the sporting succession was a consequence of a requirement imposed by the Municipality of Palermo, which New Palermo consciously accepted. This imposition took care to protect all financial interests of the Municipality of Palermo (*e.g.* the transfer of the

overheads and the responsibility for the management of the Stadium and for the Stadium employees), but did not take into consideration the interests of others possibly prejudiced by the bankruptcy of Old Palermo. Likewise, it probably did not take into consideration the consequences for the Club, of the identity “allocated” to it, or even “imposed” on it, in terms of the applicable FIFA regulations. Although, it was true that the said identity enabled New Palermo to make sport-linked financial gains. As a consequence of the sporting succession, New Palermo was able to assume, acquire, capture and enjoy a number of potential benefits and synergies. These benefits and synergies were associated with the economic and social dynamics of the city of Palermo and were reflected, *inter alia*, in the rapid attraction of a significant number of supporters, the increased value of its image and brand as a club of the city, increased ticketing revenue, the attraction of sponsorship and advertising and merchandising revenues. This approach is in line with the decision in CAS 2011/A/2611.

For all the reasons stated above, the Panel considered that the prerequisites for the existence of sporting succession between the Clubs, appeared to be complied with.

4. Creditor’s duty of diligence to preserve his interests and consequences of a lack of diligence

The existence of sporting succession between the Clubs having been established, the Panel had to consider whether New Palermo was liable to pay the debt owed by Old Palermo to the Agent. In other words, what are the regulatory consequences of this sporting succession for New Palermo? In order to clarify this issue, the Panel heard the Parties regarding the importance and relevance of CAS 2011/A/2646, both at the hearing, and in the Post-Hearing Briefs.

If, on the one hand, there was a *bona fide* creditor, whose credit must be assumed by the successor club, on the other hand it should also be considered that there was a *bona fide* entity that appeared to have been “surprised” by the appearance of the unknown credit. Surprised, because it was only on 12 November 2019, that New Palermo was joined as a party in FIFA proceedings for payment of a debt, which had been at issue in FIFA since at least 2014.

The answer to this issue is complex, but cannot ignore the general principle of good faith, and the general principles of legal certainty and the predictability of the law. All the more so because in this case, New Palermo did not act in a suspect manner in order to circumvent the law and regulations and to avoid its responsibilities, while having the benefit of the enjoyment and use of the assets or benefits of the old club. For that reason, there were decisions of FIFA and CAS, which although they held for the existence of sporting succession, found that this should not have given rise to any liability on the part of the successor club, because of a lack of improper conduct on the part of the new club, or because of a manifest lack of diligence on the part of the creditor with regard to the claiming and safeguarding of its credit.

The upholding of the Agent’s credit right should be considered to be an “alternative” procedure of last resort. An alternative subsidiary procedure that could not and should not be seen as an opportunity for creditors to refrain from pursuing the recovery of debts owed to them from the original debtor.

According to the principles of good faith and legal certainty, even if New Palermo had been aware of the potential risk arising from the assumption of liabilities in consequence of the sporting succession, it had no way to be aware

of the existence of the Agent's credit. Firstly, because the credit was not claimed in the bankruptcy proceedings; and secondly, because there was no mention of the credit within the ambit of the procedure launched by the Municipality to select the new club. The Agent could not, and should not, have been unaware of the legal relevance of the measures required in order to claim credits in bankruptcy proceedings. In addition to not having taken any steps to claim his credit in the Old Palermo bankruptcy proceedings, the Agent also failed to take any extra-judicial steps to claim or safeguard his credit, prior to filing his claim with FIFA.

The foreseeability of conduct, which in this case was manifested negatively by the Agent's failure to claim his credit in the bankruptcy proceedings, had to be taken into consideration to the creditor's discredit. Only then would the new club hypothetically would have been in a position to be subsumed to the creditor's rights and to seek to be indemnified by and to recover the payment of the debt from the original debtor. As decided in Case 2011/A/2646, lack of diligence on the part of the creditor in the claiming and safeguarding of its credit in the bankruptcy proceedings, led the majority of the Panel to conclude that the said credit could not be raised against and recovered from New Palermo. The Panel underlined that this decision should be based on the evidence which was available to it at the time of the Appeal. Even if the Appellant could still register his credit under the pending bankruptcy proceedings of Old Palermo, this fact could not be taken into consideration to disregard his lack of diligence.

This position was confirmed by the decision in CAS 2019/A/6461, which confirmed that the creditor's lack of diligence should not contribute to failure to comply with the decision of FIFA, in this case, the decision of the CAS.

Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the majority of the Panel came to the conclusions that there were sufficient objective element to consider New Palermo as the sporting successor of the Old Palermo; that the New Palermo did not act in bad faith to avoid liabilities from the Old Palermo; The New Palermo was not responsible for paying the Appellant the sums owned according to the Consent Award issued in the procedure CAS 2014/A/3755, due to the Agent's lack of diligence in claiming his credit under the Old Palermo bankruptcy proceedings. As a consequence, the appeal and all further claims or requests for relief were dismissed.

Decision

The appeal filed by Mr Horacio Luis Rolla on 23 July 2020 against the decision issued by the FIFA Disciplinary Department on 21 May 2020 was dismissed. The decision issued by the FIFA Disciplinary Department on 21 May 2020 was confirmed.

CAS 2021/A/7912

Olympiakos Nicosia v. Club Necaxa

15 March 2023

Football; Transfer – Training compensation; Entitlement to training compensation; Waiver of training compensation rights; Categorization for the purpose of training compensation; Burden of proof for the purpose of categorization

Panel

Mr. Ulrich Haas (Germany), Sole Arbitrator

Facts

Olympiakos Nicosia (the “Appellant” or “Olympiakos”) is a football club with registered office in Nicosia, Cyprus. Olympiakos is affiliated to the Cyprus Football Association (the “CFA”), which, in turn, is a member of the Fédération Internationale de Football Association (“FIFA”).

Impulsora del Deportivo Necaxa S.A. de C.V. (the “Respondent” or “Necaxa”) is a Mexican football club with its seat in Aguascalientes, Mexico. It is affiliated to the Mexican Football Federation (the “Federación Mexicana de Fútbol Asociación, A.C”. or “FMF”), which is a member of FIFA.

Collectively, the Appellant and the Respondent will be referred to as the Parties.

P. a football player of Chilean nationality born on 2 June 2000 was registered with Nexaca from 14 August 2018 until 9 January 2020. According to the Sports Employment Contract (the “Employment Contract”) between Necaxa and the Player, the Player would have been under contract until the last match of the tournament of Clausura 2023. On 31

December 2019, Necaxa and the Player signed the Sports Employment Termination Agreement (the “Termination Agreement”).

On 31 January 2020, the Player, signed an employment contract with Olympiakos and was subsequently registered with Olympiakos on 3 February 2020.

On 23 September 2020, Necaxa filed a claim against Olympiakos before FIFA’s Dispute Resolution Chamber (the “FIFA DRC”). Throughout the proceedings before the FIFA DRC, Necaxa claimed to be entitled to receive from Olympiakos the sum of EUR 45,000 as training compensation, plus 5% interest per annum as from the due date.

On 18 February 2021, the FIFA DRC rendered its decision (the “Appealed Decision”), which partially accepted the claim of Necaxa and decided that Necaxa was entitled to receive EUR 41,095.89 as training compensation plus 5% interest per annum on that amount as from 5 March 2020 until the date of effective payment. Olympiakos did not participate in the FIFA DRC proceedings.

The FIFA DRC underlined in the Appealed Decision that while “*in accordance with the information included in TMS, the Respondent belonged to the category IV club at the moment the player was registered with it, i.e. on 3 February 2020*” and since such categorization was contested, “*the DRC may decide to reallocate clubs playing in the highest division of the relevant association to the highest category available*”. The FIFA DRC therefore recategorized Olympiakos to category III. Training compensation was consequently due.

On 27 April 2021, pursuant to Article R48 of the Code of Sports-related Arbitration (the “Code”), Olympiakos filed a Statement of Appeal at the Court of Arbitration for Sport (the “CAS”) appealing the FIFA Dispute Resolution Chamber Decision.

Reasons

The main dispute in these proceedings concerned the category of the Appellant and the subsequent consequences regarding training compensation entitlements for the Respondent.

Olympiakos held that Necaxa waived its right to claim training compensation as the agent of the Player sent an email to Olympiakos affirming that: *“Necaxa ... will NOT ask any payment regarding training compensation. It has been agreed before”*. Olympiakos further added that in accordance with the wording of the Termination Agreement, Necaxa’s entitlements to seek training compensation were eliminated. Finally, Olympiakos underlined that the CFA rightfully categorized Olympiakos in the Category IV and that FIFA was wrong in moving it to the Category III since Olympiakos had only just been promoted to the First Division.

On its hand, Necaxa argued that the FIFA DRC Decision should be upheld as it did not waive its right to claim training compensation in any way (via an alleged email from the agent or the Termination Agreement). Additionally, Necaxa underlined that the FIFA DRC was within its rights to recategorize Olympiakos to Category III as Olympiakos participated in the First Division and therefore could not be a Category IV club.

1. Entitlement to training compensation

The Sole Arbitrator recalled that it was undisputed that the Player was registered with the Respondent as indicated in the player passport issued by the FMF between 14 August 2018 and 30 July 2019 as well as between 14 August 2019 and 9 January 2020, so for a total of 500 days in the seasons of his 19th and 20th birthday. It is also uncontested

that the Appellant and the Player entered into an employment relationship on 31 January 2020, and he has been registered with the Appellant since 3 February 2020. Therefore, the Player was transferred between clubs of two different associations – FMF to the CFA – before the end of the calendar year of his 23rd birthday.

In this respect, the Appellant availed itself of Article 2 para.2 lit. b Annex 4 of the FIFA RSTP, arguing that it was a Category IV club, to escape liability from training compensation.

On the same point, the Respondent was of the opinion that it was entitled to training rewards as it agreed with the assessment of the FIFA DRC that Olympiakos was in fact a Category III club at the time of the registration of the Player.

The Sole Arbitrator underlined that in light of Article 20 FIFA RSTP, in conjunction with Article 1 para. 1 and Article 2 para. 1 of Annex 4 FIFA RSTP, training compensation is payable, as a general rule, for training incurred between the ages of 12 and 21 when a player is registered for the first time as a professional before the end of the season of the player’s 23rd birthday or when a professional is transferred between clubs of two different associations before the end of the season of the player’s 23rd birthday.

With all of the above in mind, the Sole Arbitrator came to the conclusion that the entitlement of the Respondent to receive training compensation was, in principle, triggered.

2. Waiver of training compensation rights

The Appellant relied on an email of the Player’s agent to Olympiakos to remonstrate that the Respondent waived its claim for training compensation. In that email, the Player’s agent

wrote, *inter alia*, that he was “... *getting the confirmation from Necaxa that they will NOT ask any payment regarding training compensation. It has been agreed before*”. The Appellant provided a Witness Statement from the Player’s Agent.

The Respondent contested such agreement and the existence of any waiver from its part.

With all this in mind, the Sole Arbitrator underlined that a club may renounce its right to training compensation or sign a binding waiver of this right in favour of the new club. Such waiver, however, cannot be accepted lightly. He recalled that as per the FIFA Commentary to the RSTP, “[...] *the waiver must be explicit. [...] only the party entitled to training compensation (i.e. the relevant training club) can waive it*”.

Having examined all the evidence and arguments provided by the Parties, the Sole Arbitrator determined that he could not accept such alleged waiver. Indeed, the Sole Arbitrator noted that it was difficult to see what incentive the Respondent would have to agree to a waiver of its claim for training compensation *vis-à-vis* the Player. Furthermore, The Sole Arbitrator underlined that there was a presumption that the Termination Agreement fully and exhaustively reflects the agreement between the Parties and that as such, had the Player and the Respondent agreed to such waiver, one would expect that such an important and unusual agreement would be incorporated into the Termination Agreement. The Sole Arbitrator found that no clause in the Termination Agreement implicitly hinted to a waiver.

3. Categorization for the purpose of training compensation

The Sole Arbitrator took note that it reminded undisputed among the Parties that the employment relationship between the Player

and the Respondent was terminated by mutual agreement. A termination of the employment contract by mutual agreement is not tantamount to a termination without just cause and, therefore, does not affect a claim for training compensation.

However, the Sole Arbitrator noted that the Parties disagreed on the Category of Olympiakos at the date of registration of the Player with it, between Category III, according to the Respondent, and Category IV, according to the Appellant.

On this point, the Sole Arbitrator recalled that following article 4 of Annex 4 of the FIFA RSTP, member associations are responsible for dividing their clubs into a maximum of four categories and to keep the data up to date. The Sole Arbitrator underlined that when categorising their clubs, the national federations shall take into consideration a club’s financial investment in training players. The Sole Arbitrator took note that FIFA has issued Circulars to member associations in order to provide further guidance on this issue. In particular, FIFA Circular 1673 of 28 May 2019 advised the member associations that CFA only had two training categories (instead of four), namely Category 3 and 4, in which it needs to place its clubs.

The Sole Arbitrator further took note that FIFA Circular 799 provided the type of costs a national association should consider when determining a club’s financial investment in training of young players.

With regards to the categorization of clubs, the Sole Arbitrator emphasized that as per FIFA Circular 1249 and Article 5 para. 4 of Annex 4 of the RSTP, the categorisation of the clubs by their national associations can be reviewed by FIFA and consequently can be re-categorized by FIFA. The Sole Arbitrator underlined that there needs to be a manifest discrepancy

between the categorisation of the national federation and the rules / guidelines issued by FIFA. The latter is only the case if the decision of the national federation is “clearly disproportionate”.

4. Burden of proof for the purpose of categorization

The Appellant argued that it was a Category IV club based on the assessment made by the CFA which held, in a Witness Statement, that Olympiakos was not an established first division club as it spent the majority of its competition history in the second division. The Appellant also argued that comparing to most of the other CFA’s first division clubs, its expenditure for young players was significantly lower.

The Respondent considered that said assessment was wrong and that since Olympiakos was in first division it could not be a Category IV club.

The Sole Arbitrator observed that except where the arbitral agreement determined otherwise, an arbitral tribunal shall allocate the burden of proof in accordance with the rules of law governing the merits of the dispute, *i.e.* the *lex causae*. Following Swiss jurisprudence, the Sole Arbitrator found that it was, in principle, the obligation of the party that bears the burden of proof in relation to certain facts to also submit them to the court/tribunal in a sufficient manner.

The Sole Arbitrator therefore determined that since the Appellant availed itself of Article 2 para. 2 lit. b Annexe 4 FIFA RSTP in order to escape liability from training compensation, the burden of proof that it was a category 4 club rested on the Appellant.

The Sole Arbitrator was of the opinion that the Appellant had met its burden to sufficiently

substantiate its position by referring to the categorisation issued by the CFA, *i.e.* the entity primarily responsible for this task. Once this was done, the Sole Arbitrator took note that it was up to the Respondent to contest such submissions in a substantiated manner. The Sole Arbitrator underlined that the Respondent needed to demonstrate (and to substantiate) that the decision made by the CFA was “clearly disproportionate”.

The Sole Arbitrator observed the elements provided by the Parties, and came to the conclusion that the CFA has not manifestly exceeded the flexibility available to it when placing the Appellant into the Category IV. He determined that the Appellant lacked the level of professionalism to be qualified as an established first division club within the meaning of the FIFA regulations and guidelines and that evidence on file did not justify a re-categorization of the Appellant to training Category III.

Decision

In view of the foregoing, the Sole Arbitrator upheld the appeal. The decision issued on 18 February 2021 by the FIFA Dispute Resolution Chamber was set aside and consequently the claim of Necaxa against Olympiakos for training compensation regarding the transfer of the Player was dismissed.

CAS 2021/A/8060

Association Sporting Club Bastiais & SC
Bastia v. Fédération Internationale de
Football Association (FIFA) & FSV Mainz
05

25 April 2023

Football; Disciplinary sanction for failure to comply with a previous FIFA decision; Applicable version of the regulations and principle of non-retroactivity; Violation of the right to be heard; Competence of the FIFA DC to issue the Appealed Decision; Definition of “club”; Distinction between sporting succession and sporting continuity

Panel

Mr Rui Botica Santos (Portugal), President

Prof. Mathieu Maisonneuve (France)

Mr José Juan Pinto (Spain)

Facts

Association Sporting Club Bastiais (the “First Appellant” or the “Association”) is a French club affiliated with the French Football Federation (the “FFF”), which runs all amateur teams of the football club named “SC Bastia”.

Société Coopérative d’Intérêt Collectif (SCIC) Sporting Club Bastia (the “Second Appellant” or “SCIC”) is a French commercial company affiliated with the Ligue de Football Professionnel (the “LFP”). SCIC is the legal entity named “Sporting Club Bastia” that deals with the professional football team of the Association and was affiliated to the LFP when its first team acceded to the professional competitions for season 2021/22.

The Fédération Internationale de Football Association (the “First Respondent” or

“FIFA”) is the international governing body for football.

FSV Mainz 05 (the “Second Respondent”, the “Creditor” or the “Mainz”) is a German football club based in Mainz, Germany, affiliated to the German Football Association (*Deutscher Fußball Bund*) (the “DFB”), which in turn is affiliated to FIFA.

On 29 August 2016, “SC Bastia” and the Creditor concluded a loan agreement (the “Loan Agreement”) for the loan of the player A. (the “Player”). For commercial purposes, it was assumed that “SC Bastia” was the legal entity “Société Anonyme Sportive Professionnelle – Sporting Club Bastia” (the “SASP”). Under the Loan Agreement, “SC Bastia” agreed to pay to the Creditor the amount of EUR 350,000 in ten monthly instalments (the “Loan Fee”), being the first instalment due on 5 September 2016 and the last instalment due on 5 June 2017. The SASP was the commercial company named “Sporting Club Bastia” that used to manage the first football team of the Association. The creation of this legal entity was due to the French legislation regarding the administration of the first team when their activities met certain thresholds. Article L122-1 of the French Code du Sport requires the first football team to be managed by a commercial legal entity linked to the Association through a management contract (the “Management Contract”) which defines the role of each contractual party. The SASP failed to comply with the Loan Agreement.

On 12 April 2017, given the failure to comply with the full payment of the Loan Fee, the Creditor initiated a claim before the FIFA Player’s Status Committee (the “FIFA PSC”). On 3 October 2017, the Single Judge of the FIFA PSC issued a decision (the “FIFA PSC Decision”) that ordered the “SC Bastia” to pay the Creditor “(...) *overdue payables in the amount*

of EUR 210,000 (...). On 9 October 2017, the FIFA PSC Decision was notified to “SC Bastia”. “SC Bastia” has never appealed or challenged the FIFA PSC Decision.

At the end of the 2016/2017 season, the football team managed by the SASP was relegated to National 1 (3rd Division) after a financial audit made by the Direction Nationale du Contrôle de Gestion (“DNCG”).

On 5 September 2017, and as per the bankruptcy proceedings, the SASP was judicially liquidated and automatically lost its affiliation to the LFP. The Creditor claimed its credit in the bankruptcy procedure but has never received any payment. After the liquidation of the SASP, the Association continued to manage the reserve team which used the name “SC Bastia” and the colours of said club.

During the sporting seasons 2017/2018 and 2018/2019, the team of the Association competed in amateur competitions, namely in the National 3 (French 5th division). At the end of the sporting season 2018/2019, the team of the Association won the competition and was promoted for the next season.

On 15 May 2019, the SCIC was created.

During the sporting season 2019/2020, the SCIC managed the reserve team (which had formerly been managed by the Association) which played in the National 2 (French 4th division) and won the competition, therefore it was promoted for the next season. During the sporting season 2020/2021, the SCIC managed the reserve team which played in the National 1 (French 3rd division) and won the competition, therefore it was promoted for the next season. During the sporting season 2021/2022, the SCIC managed the reserve team which played in the Ligue 2 (French 2nd division). After being promoted to Ligue 2,

before the season 2021/2022 started, the SCIC got affiliated to the LFP as this was mandatory in order to compete in the professional competition.

On 17 February 2021, since the outstanding amounts due to the Creditor were not paid, the latter requested the initiation of disciplinary proceedings against the First Appellant. On 23 February 2021, FIFA Disciplinary Committee (the “FIFA DC”) opened disciplinary proceedings against “SC Bastia”.

On 8 April 2021, the Single Judge of the FIFA DC passed its decision (the “Appealed Decision” or the “FIFA DC Decision”), establishing that “SC Bastia” had failed to comply in full with the decision passed by the Single Judge of the Players’ Status Committee on 3 October 2017. “SC Bastia” was ordered to pay to FSV Mainz 05 EUR 210,000 plus 5% interest p.a. until the date of effective payment and to FIFA a fine of CHF 22,500.

On 3 June 2021, the FIFA DC communicated the grounds of the Appealed Decision, which can be summarised as follows: a) A “club” is as a sporting entity that goes beyond the legal entity that operates it and its obligations must be respected; b) A “club” is identified by certain elements such as its name, colours, fans, history, sporting achievements, shield, trophies, stadium, roster of players, historic figures, etc; c) A “new club” must be considered the sporting successor of another if the “new club” created the impression that it wanted to be legally bounded and associated with the “old club” and the competent federation treated the two clubs as successor of one another; d) On 7 August 2017, after the Association recovered the sporting rights from the liquidated ASAP (i.e. on 15 May 2019), the Association then transferred those sporting rights to the newly created entity SCIC, which currently operates the club SC Bastia; e) The legal entity SCIC is the same sporting entity

called “SC Bastia”, which it has just changed its administration due to financial problems; f) FIFA DC found that there were no elements that could indicate that the Creditor remained passive during the SASP’s bankruptcy proceedings and hence it had sufficient elements to conclude that the Creditor was diligent in claiming its credit; and g) SCIC has to be held liable for the debt incurred by the former management of the “SC Bastia”.

On 22 June 2021, the Appellants filed a statement of appeal (the “Statement of Appeal”) with the CAS.

A hearing was held on 21 April 2022 in Lausanne.

Reasons

For the Panel, the present Appeal had been filed against the Appealed Decision by which the FIFA DC had found the Appellants guilty of failing to comply with the decision passed by the FIFA PSC on 3 October 2017, based on the fact that the Appellants and the SASP were considered to be the same sporting club. The main issues were therefore whether (i) the Appellants could be considered to be the same club as “SC Bastia” which had been ordered to pay an amount to the Second Respondent by the PSC Decision, and, if so, (ii) what were the legal consequences of this finding.

However, before turning to these questions, the Panel had to address some preliminary issues, namely (i) the applicable edition of the the FIFA Disciplinary Code (the “FDC”); (ii) the violation of the right to be heard during the CAS proceedings; and (iii) the incompetence of the FIFA DC to decide the dispute.

1. Applicable version of the regulations and principle of non-retroactivity

The Respondents argued that the applicable version of the FDC was the FDC 2019 because it was the one in force at the date of the FIFA disciplinary proceedings. For their part, the Appellants submitted that it had to be the version in effect at the date of the SASP’s liquidation (FDC 2017). The Appellants’ argument was based on the fact that the FDC 2019 had introduced Article 15 (4), according to which the sporting successor of a non-compliant party had also to be considered a non-compliant party and thus subject to the obligations under the provision. For the Appellants, it was a new incrimination created after the disciplinary offense had been committed; therefore, under the *in mitius* retroactivity principle, it was the FDC 2017 that had to apply to the case at hand. Since the FDC 2017 did not contain any provision on “sporting successor”, the Association, SCIC and SASP were to be considered separate legal entities, and no liabilities between them applied.

For the Panel, it could not be said that the offense in question had only been committed at a certain specific isolated time. On the contrary, the offense at issue here was a continuous action – liability for the debts of a third party – that continued over time. For this reason, it was the Panel’s view that the version applicable had to be that of the date of the assessment of the disciplinary offense and not the version existing at the date when the Appellants’ liability was considered to begin.

More importantly, the Panel could not see how the retroactivity *in mitius* could apply to the present case, since cases of sporting succession, had also been regularly decided before the introduction of the FDC 2019. Article 15(4) FDC 2019 was only a codification of the jurisprudence of the FIFA DC and CAS prior to the implementation of this provision. It was therefore not material whether the FDC 2017 or FDC 2019 applied to the matter at

hand. *Mutatis mutandis* what had been said for the sporting succession also applied to sporting continuity.

In line with the above, the Panel held that the FDC 2019 applied to the case at hand.

2. Violation of the right to be heard

According to the Appellants, their right to be heard had been violated in the face of the Panel's decision not to allow a second round of written submissions targeted at answering – in writing – to FIFA's argument that the SASP, the Association and the SCIC were the same club "SC Bastia" and that therefore it was not a question of "sporting succession" but rather of "sporting continuity" which implied a joint liability of all those entities.

The Panel emphasized that the CAS Code did not contain any provision by virtue of which a CAS panel would be forced to allow a second round of written submissions. Despite this, the CAS panel was always obliged to respect the parties' right to be heard and – when justifiable – could make adjustments to the procedure in accordance with Article R56 of the CAS Code. A second round of written submissions could be admitted in situations of evident exceptional circumstances in order to avoid delays in the procedure. However, the parties could also orally address, debate, and rebut the position and arguments presented by their counterparts in relation to the case in dispute during a hearing.

In addition, the Panel highlighted that the Appealed Decision had already addressed the alleged new argument presented by FIFA in relation to the "sports continuity". As a result, the argument that the Association and the SCIC were to be regarded as the same sporting entities as "SC Bastia", could not have come as a surprise to the Appellants. Therefore, the

Appellants had had the opportunity to address the question in their Appeal Brief.

In any case, as long as the Appellants had had the opportunity to present their arguments and views before the Panel, their right to be heard had been respected.

3. Competence of the FIFA DC to issue the Appealed Decision

The Appellants argued that the FIFA DC was not competent to issue the Appealed Decision, based on two main arguments: (i) the FIFA PSC should have closed the proceedings against the SASP on the basis of Article 55 of the FDC 2019 providing that proceedings may be closed when a party is under insolvency or bankruptcy proceedings (lit. b) and a club is disaffiliated from an association (lit. c) because the SASP had indeed been liquidated and disaffiliated from the LFP; and (ii) a "new claim" against a different entity should have been brought first by the Creditor before the FIFA PSC instead of requesting the enforcement of the FIFA PSC Decision before the FIFA DC.

With regard to the first argument, the Panel explained that Article 55 of the FDC 2019 gave FIFA a certain discretion as it merely opened a "possibility" and not an "obligation" for procedures to be closed. Moreover, a distinction had to be made between the recognition of the debt and its execution. Proceedings initiated before the FIFA Players' Status Committee (PSC) related to the recognition of a debt, whereas the proceedings before the FIFA Disciplinary Committee (DC) related to the enforcement of the FIFA PSC decision. The absence of a similar rule as Article 55 of the FDC 2019 in the RSTP as well as in the FIFA Rules governing the procedures of the Players' Status Committee and the Dispute Resolution Chamber, confirmed that FIFA's deciding bodies were competent as

long as they were asked to address the issue of the recognition of the claim. It was only when they were seized with a request for the enforcement of the claim, that the FDC came into play and that disciplinary proceedings had to be closed if a party declared bankruptcy. The Panel also clarified that it was not relevant that the SASP had lost its affiliation with the LFP. The important element was that the Association had never lost its affiliation to the FFF. The Panel reminded that FIFA's indirect membership came not from the membership of a club to its national professional league managing entity, but to its national football association and, in this case, said affiliation had never been lost.

With regard to the second argument, the Panel explained that it was clear that a club that might possibly be considered as the sporting successor of the original debtor was never a party in the proceedings which recognized said debt, as otherwise there would essentially be no need to prove any sporting succession. As a result, the Appellants' argument could never justify that a club seeking payment of a debt recognized in a final and binding decision would have to bring said case first before the FIFA PSC. The Panel also reminded that the PSC Decision had been issued against "SC Bastia" and not against the SASP. Therefore, said decision concerned the "club" in itself as the entity which comprised both the Association and the SASP, and had become final and binding since it had not been appealed by any of those Parties. Therefore, there is was doubt that the FIFA DC had had the power to impose sanctions on the Appellants as (i) the Association was affiliated with the FFF and, by virtue of this link was an indirect member of FIFA; and (ii) the SCIC was the current entity affiliated to the LFP and, via the Association, also an indirect member of FIFA. Furthermore, it was important for the Panel to note that FIFA had merely acted in a vertical dispute since it was concerned only

with determining if the Appellants were or not liable for the SASP's sporting debts and, if that was the case, what would be the correct sanction for the non-compliance of the FIFA PSC Decision.

The Panel concluded that the FIFA DC was indeed competent to issue the Appealed Decision against the Association and the SCIC, since (i) the PSC Decision had been issued against "SC Bastia", not making reference to any specific legal entity, (ii) the dispute at stake was a merely vertical dispute and (iii) based on the wording of Article 53 FDC 2019 the FIFA DC was competent, as no other body had the competence to decide on the matter of failure to respect decisions.

Having concluded its examination of the preliminary issues, the Panel turned its attention to the analysis of the substance of the appeal.

4. Definition of "club"

According to the FIFA DC, in casu, there had been no sporting succession, but rather a phenomenon of pure and simple continuity of the sporting activity of the club "SC Bastia". In other words, the club had never become extinct or stopped its activity and, therefore, a new entity could not succeed it. For the Appellants, on the other hand, it did not make sense to speak of sporting continuity or sporting succession as there were separate entities.

In analyzing the reasoning of the FIFA DC, the Panel looked at the distinction to be made between sporting succession and sporting continuity and first restated the definition of "club" that had been upheld in the CAS case law. According to the latter, a club is a sporting entity identifiable by itself that, as a general rule, transcends the legal entities which operate it. Thus, the obligations acquired by any of the

entities in charge of its administration in relation with its activity must be respected. The identity of a club is constituted by elements such as its name, colors, fans, history, sporting achievements, shield, trophies, stadium, roster of players, historic figures, etc. that allow it to distinguish from all the other clubs. The continuity and permanence over time of the sports institution prevails over the change of administrator, even in the case of change of management companies completely different from each other.

The Panel thus held that the concept of “club” went far beyond the corporate entities that managed it, the existence of which resulted from the constant professionalization of clubs and inherent creation of legal obligations of incorporation of commercial companies that aimed to provide these entities, in general, with a more robust management structure.

5. Distinction between sporting succession and sporting continuity

Coming then to the distinction between sporting succession and sporting continuity, the Panel explained that there was sporting succession, on the one hand, when a new entity, taking advantage of various elements of a club (symbol, colors, history, supporters/fans, members, history, athletes, shareholders, among others ...), sought to continue the activity of said club which, for various reasons, had ceased its commercial activity. Sporting continuity, on the other hand, was a situation in which a club, despite the disappearance of any corporate entities associated with it, remained in business, even taking over the sporting rights of the entity that had ceased to exist, without any interruption in its membership of the respective national federation, through at least one entity that subsisted. However, when a club had lost its professional management structure, whether corporate or not, and later reestablished

another one, it was not always sufficient that the club remained active to establish with certainty that sporting continuity existed. In cases where in the reality and concept of a club there fitted together an association/supporting entity and a commercial sport company/corporate entity, both of which took advantage of common elements, it was still possible that the entities managed to create a meaningful separation between each other which suited the distinct legal personalities of both. However, for this to happen, they had to consistently act independently and according to their own interests, giving third parties the idea that they were distinct from each other and that they did not assume each other’s responsibilities.

In casu, the Panel explained that when the SASP had collapsed, the Association had regained the sporting participation rights it had assigned to that entity when it had been set up. The Association had started to manage a first team identified as “SC Bastia”, the composition of which bore some similarities to the composition of the reserve team of that same club. In addition, the Loan Agreement, which had given rise to the issue of the FIFA PSC Decision, did not precise, in any of its points, the contractual legal entity associated to the club “SC Bastia”. On the contrary, only the name “SC Bastia” was identified as a party, which referred neither to the SASP, nor to the Association specifically, but to the club in general. The Panel considered that, also for this reason, the proceedings before the FIFA PSC, which had culminated in the issuance of the FIFA PSC Decision, had been brought against the entity “SC Bastia” and not against the Association or the SASP specifically. Also for this reason it was clear that the Appealed Decision was directed against the club “SC Bastia”, failing to directly refer to the SASP or to the Association. Although one could indeed theorize that the SCIC could be the sporting successor of the SASP, this would be irrelevant

to the present case, since the Loan Agreement, the FIFA PSC Decision and the Appealed Decision were all addressed to the club “SC Bastia” club and not to the SASP. The Panel thus concluded that the present case was not one of sporting succession.

The Panel then turned to the question whether there was a situation of sporting continuity between the club “SC Bastia” and the Appellants. According to the Panel, two matters were relevant to determine whether the entities that now managed the club “SC Bastia” should be held liable on account of the Loan Agreement and the PSC Decision: (i) the club’s characteristic elements and their use by the entities concerned; and (ii) the attitudes and behaviors of these entities and the effects these have on third parties which have a relation, business or other, with them.

With regard to the first matter, the Panel concluded that the Association had never broken with its past, having kept all the elements that had always characterized the club “SC Bastia”, such as the colors, the emblem, the members, the fans, and especially the history, which it had always claimed and had never stopped invoking as its own. The Association had never been extinguished and had constantly remained affiliated to the FFF, so there was no doubt that it fitted fully into the concept and universality that is the club “SC Bastia”.

The main question was whether or not SCIC had also been integrated into what was to be understood as the “SC Bastia” club, or whether, on the contrary, it could legitimately be considered an independent entity to which the responsibilities of that club could not be imputed. The Panel noted that the headquarters of “SC Bastia” had been the same for many years, and were also the headquarters of the SCIC and of the Association. The SCIC used the name “SPORTING CLUB

BASTIA”, a name that was already used by the former SASP and that also appeared in the PSC Decision and the Appealed Decision. Both the Association and the SCIC relied on, and commonly used, the name “SC Bastia”, as was evident from their website, their social networks, their registration in the TMS system and before the FFF. Considering the context of sporting continuity, the Panel was of the opinion that this factor was very relevant, since (i) the name of SCIC was the same name as the name of the club “SC Bastia” which had been condemned by the PSC Decision and (ii) this entity had the clear intention to remain associated with that same club, assuming its name in its entirety, without any change, thus also benefiting from the same support of the supporters, members and fans. The Panel also noted additional elements indicative of the Association and the SCIC’s intention to continue the club’s activity such as the use of the club’s colors, the club’s official emblem, the fact that the “SC Bastia” first team had not start its journey in the last division of the French Football League System as would have been expected from an absolutely new club, but had rather remained in the national leagues, and so on. Finally, and more importantly, the Panel noted that the Appellants had taken advantage of and used all the elements that characterized the memory and history of the club “SC Bastia”. Indeed, the Appellants had drawn on the same achievements, titles, moments and stories that had marked the existence of “SC Bastia” and all this was visible in the historical description contained in their website which was telling a continuous story from 1905 to the present day.

Considering all the above, the Panel held that the existence of sporting continuity between the Appellants and the club “SC Bastia” was evidenced at the level of the characterizing elements.

With regard to the second matter, the Panel had to determine the “appearance” of these entities in the eyes of third parties with whom they related, as well as the “consistency” of the behaviors which had created such “appearance”. In the eyes of the Panel, there was a notorious intention of the Appellants to be recognized as the “SC Bastia” club, especially with the benefits that such could imply. Said behavior was clearly consistent and coherent with the appearance they wanted to give to *bona fide* third parties. The Panel was also satisfied that business partners, sponsors or even clubs which entered into business with the Appellants, or even competed against them, would not have any reasons to doubt that this was the same club called “SC Bastia” and would trust the appearance that the Appellants intentionally tried to be identified with. In this regard, the Panel noted that the protection of legitimate expectations was a general principle of law which could not be considered to be outside the scope of the *lex sportiva*. Therefore, *bona fide* third parties had to be protected from any legal intricacies which limited their rights in favor of those which tried to take advantage of the benefits of a certain appearance but failed to honor the responsibilities that come with it. In short, the Appellants could not dispel their appearance of being fully identified with the club “SC Bastia”, which was why these entities had to be considered not as the successors, but as the same “club” that had entered into the Loan Agreement with the Second Respondent and which had been condemned by the FIFA PSC Decision.

The Panel also reminded that FIFA’s rules, like those of other international sports federations, were certainly not supreme rules that CAS could never question. They could, and indeed had to, do so on the basis of general principles of law or international public policy, within the meaning of Swiss arbitration law, or even the fundamental rules of European Union law or

the provisions of international conventions on fundamental rights. Considering the worldwide scope of such sports rules and the requirements of the principle of equality of competitors before the law, CAS could not, on the other hand, disregard the rules of international federations, in particular FIFA, on the grounds that they violated, as argued in the present case, a national public policy alien to the *lex causae*, which by definition varied according to the nationality of the parties in dispute.

Decision

Based on all the above, the Panel dismissed the appeal and found that the Appealed Decision should be confirmed in the part in which it considered the Association and SCIC as the entities that ensured the sporting continuity of “SC Bastia” and, consequently, the Appellants had to be considered as the entities responsible for the payment of the obligations assumed by the club “SC Bastia”.

CAS 2021/A/8471

Al-Hilal Khartoum Club v. Jesi Last

6 February 2023

Football; Termination of an employment contract with just cause by the player; Club's abusive conduct; Compensation for damages; Invalidity of a derogatory contractual clause

Panel

Mr Manfred Nan (the Netherlands), President
Mr Michele Bernasconi (Switzerland)
Mr Olivier Carrard (Switzerland)

Facts

Al-Hilal Khartoum Club (the “Appellant” or the “Club”) is a professional football club with its registered office in Omdurman, Sudan. The Club is registered with the Sudan Football Association (the “SFA”), which in turn is affiliated to the Fédération Internationale de Football Association (“FIFA”).

Mr Jesi Last (the “Respondent” or the “Player”), is a professional football player of Zimbabwean nationality.

On 24 September 2020, the Parties concluded an employment contract (the “Employment Contract”) for a period of three years, valid as from 20 October 2020 until 19 October 2023. Pursuant to the Employment Contract, the Player was entitled to (i) a sign-on fee of USD 45,000 net; (ii) USD 2,500 net as monthly salary, to be paid by the end of each month; and (iii) housing and car/transportation. In addition, Article 10(3)-(5) of the contract provided as follows:

“3. *This Contract may be terminated by either party, without consequences for the terminating party, where there exists just cause at the time of the*

contract termination by the knowledge and concern of SFA.

4. *If the Club terminates this Contract without having just cause, the Club shall pay to the Player compensation equal to the total amount of: MONTH SALARY.*
5. *If the Player terminates the Contract without having just cause, the Player shall pay to the Club compensation equal to the total amount of: MONTH SALARY”.*

On 2 May 2021, the Club’s Executive Director sent the Player via WhatsApp a draft of a mutual termination agreement, proposing to terminate the Employment Contract and agreeing to pay the Player an amount of USD 7,500.

On the same date, the Player invited the Club to discuss this matter with his agent. This was followed by numerous letters in which the Club tried to persuade the Player to accept its amicable proposal, failing which it would avail himself of the “facilitated unilateral termination conditions” provided for in the Employment Contract, without success.

On 7 May 2021, the Player put the Club in default and granted it a 15-day deadline to proceed with the payment of USD 5,000, corresponding to the outstanding salaries of March and April 2021.

On 27 May 2021, the Player sent the Club a second default notice, (i) reiterating his request for payment of USD 5,000; (ii) reminding the Club that the salary for May 2021 would fall due soon; (iii) urging the Club to reinstate him to full training with the first team; and (iv) requesting the Club to return his passport.

On 1 June 2021, the Club paid the Player the monthly salaries of March, April and May 2021.

On 17 June 2021, the Player repeated his request to be allowed to train with the team.

On 21 June 2021, the Player informed the Club that he had left Sudan because he was not allowed to train with the first team anymore and because he was vacated from his accommodation. He indicated that he was willing to come back, provided that the Club confirmed that (i) he was part of the first team and was able to train with the group; (ii) the Club would provide him with accommodation; and (iii) the Club counted on his services for the remainder of the Employment Contract.

On 28 June 2021, the Player, noting that the Club refused to act on his letter, unilaterally terminated the Employment Contract in writing for just cause based on Article 14 of the FIFA Regulations on the Status and Transfer of Players (FIFA RSTP).

On 2 July 2021, the Player filed a claim against the Club before the FIFA Dispute Resolution Chamber (the “FIFA DRC”). He maintained that he had just cause to terminate the Employment Contract, claiming USD 2,500 net as outstanding salary over the month of June 2021, and compensation for breach of contract in the amount of USD 160,000 net (i.e. the residual value of the contract), plus interest.

The Club filed a counterclaim for an alleged termination without just cause and requested compensation in the amount of USD 160,000. During the proceedings before the FIFA DRC, the Player signed an employment contract with the Zimbabwean club Ngezi Platinum Stars FC, valid from 1 September 2021 until 31 December 2023. This contract provided for a sign-on fee of approximately USD 1,710.97, as well as a total remuneration of approximately USD 6,095.33.

On 6 October 2021, the FIFA DRC issued the operative part of its decision in the matter (the “Appealed Decision”), by which it partially accepted the Player’s claim. It ordered the Club to pay the Player USD 2,500 net as outstanding remuneration and USD 152,193 net as compensation for breach of contract, plus interest.

On 4 November 2021, notified the Appealed Decision with grounds to the Appellant.

On 25 November 2021, the Club filed a Statement of Appeal with the Court of Arbitration for Sport (CAS) against the Appealed Decision, in accordance with the Code of Sports-related Arbitration (the “CAS Code”).

Reasons

The main dispute in these proceedings concerned the existence of a just cause of unilateral termination of the Employment Contract for the Player within the meaning of Article 14 of the FIFA RSTP, and the financial consequences thereof.

The Club argued that the Player did not have just cause for termination, since it had complied with all its contractual obligations, and stated that the Player had abandoned his employment without valid reason and sufficient notice. It requested the annulment of the FIFA DRC’s decision and claimed a compensation of USD 160,000.

The Player submitted that he had just cause for termination, since the Club had breached its contractual obligations and acted in an abusive manner aimed at forcing him to leave. He sought the confirmation of the FIFA DRC’s decision and the dismissal of the appeal.

This led the Panel to examine whether the Club had engaged in an abusive conduct, the usual regulatory principles governing the calculation of the compensation for damages and the validity of a derogatory contractual clause.

1. Club's abusive conduct

The Club denied the existence of a just cause for termination and emphasised that it had fulfilled all its contractual obligations. It accused the Player of having left his position and the country without reasonable grounds and sufficient notice.

The Player maintained that the Club had repeatedly and severely breached its contractual obligations related to training and accommodation, was no longer interested in his services and adopted an abusive stance aimed at forcing him to agree to a mutual termination.

The Panel recalled that a player can terminate his employment contract early for just cause under Article 14(2) of the FIFA RSTP when his club adopts an abusive conduct aimed at forcing him to terminate or change the terms of his contract. In this case, he can no longer be reasonably expected to continue his employment relationship, and is not bound by any formal prerequisites with respect to its default notices.

The Panel observed that, in the present case, the Player had been pressured to accept a mutual termination agreement through various communications, while being excluded from training sessions and evicted from his apartment without reason. It held that this was a clear and typical case of abusive conduct that qualified as a just cause for termination, regardless of the Player's subsequent behaviour. It also emphasised that the Player had shown great patience, and offered to return if the situation improved.

2. Compensation for damages

The Club submitted that it should receive a compensation of USD 160,000, and did not owe anything anymore to the Player.

The Player requested the confirmation of the compensation of USD 152,193 awarded in the Appealed Decision, while pointing that his salary of June 2021 remained unpaid. It also asserted that any reduction of his entitlements should not be considered, failing any subsidiary prayers for relief of the Club on this point.

The Panel stated that, in light of the conclusion that the Player had just cause for termination, the Club's claim for compensation should be dismissed. It also noted that the salary of June 2021 was still due to the Player, and decided to grant it. It then undertook to determine the amount of compensation due to the Player.

The Panel recalled that an aggrieved player is entitled to claim compensation for damages under Article 17 of the FIFA RSTP, which establishes the principle of "positive interest". Such compensation includes the residual value of the contract that was prematurely terminated, subject to any financial gains made after early termination, and can be adjusted if necessary at the adjudicatory body's discretion.

The Panel observed that the Parties agreed in this case that the residual value of the Employment Contract was USD 160,000 net, and that the Player had signed a new employment contract with Ngezi Platinum Stars FC after the early termination, valid as from 1 September 2021 until 31 December 2023, for a total amount of USD 7,803.30. It thus found that the Player was at the very least entitled to request the Club to pay a compensation for breach of contract in the amount of USD 152,193 (i.e. USD 160,000 -/- USD 7'807). Given that this was the amount of

compensation awarded to the Player by the FIFA DRC in the Appealed Decision, it considered that it was barred from awarding a higher amount of compensation. It also saw no reason to award a lower amount of compensation, especially since the Club did not clearly and explicitly advance any specific subsidiary arguments and prayers for relief in that respect.

3. Validity of a derogatory contractual clause

The Panel considered it appropriate, as a precautionary measure, to examine the validity of Article 10 of the Employment Contract, which allowed both parties to terminate their employment relationship without just cause with compensation equivalent to only one-month salary. It observed that the Club's position on this issue had evolved over time and was inconsistent, as it had first attempted to rely on it prior to the FIFA DRC proceedings, and had then distanced itself from it during the CAS proceedings, at least with regard to its main claims, and save a few isolated paragraphs.

The Panel considered that such a derogatory contractual clause should be declared invalid in view of Article 13 of the FIFA RSTP, which aims to guarantee contractual stability. Moreover, it cannot be invoked in one case and set aside in another, at the risk of contravening the principle of good faith.

Decision

In light of the foregoing, the Panel dismissed the appeal. It retained that the decision issued by the FIFA Dispute Resolution Chamber on 6 October 2021 should be upheld.

CAS 2021/A/8531

Mohamed Zakaria Khalil, Soufiane El Mesbahi & Yassir Kilani v. The International Tennis Integrity Agency (ITIA)

9 March 2023

Tennis; Match-fixing and other corruption offences; Burden of proof; Standard of proof; Standard applicable to the admissibility of evidence; Assessment of evidence; Applicability of the Tennis Anti-Corruption Program; Definition of corruption offences; Proportionality of the sanction

Panel

Mr Philippe Sands KC (United Kingdom),
President

Prof. Sophie Dion (France)

Mr Romano Subiotto KC (United Kingdom)

Facts

Mr Khalil, Mr El Mesbahi and Mr Kilani were amateur tennis players respectively born on 19 July 1999, 22 February 2001 and 10 August 2000 in Morocco, jointly referred to as the “Players” or the “Appellants”.

The International Tennis Integrity Agency (“ITIA” or the “Respondent”) is an independent body in charge of promoting, encouraging and safeguarding the integrity of tennis worldwide. It is established in London, United Kingdom.

The appeal was brought against a decision rendered by the Anti-Corruption Hearing Officer (“AHO”) on 7 December 2021, which found the Players guilty of match-fixing and other corruption offences and imposed on each of the Players a ban for a period of 9 years

in addition to a fine in the amount of US\$ 5,000.

Between 19 July and 14 November 2017, the Players respectively lost single and double matches against their partners at the ITF F1, F5 and F6 Futures Tournament in Morocco.

Between 2014 and 2018, the Belgian Federal Public Prosecutor’s Office carried out investigations into a suspected organised criminal network that was believed to be operating to fix tennis matches worldwide. In 2018, the Belgian Police executed search warrants and arrested a number of individuals. In 2018, during a search at the property of Mr Grigor Sargsyan (“GS”), an Armenian national residing in Belgium, the Belgian Police seized several mobile telephones belonging to GS, the content of which was downloaded. The messages extracted from the telephones belonging to GS revealed discussions between GS and a former Moroccan tennis player called Younes Rachidi (“YR”) and an Egyptian tennis player called Karim Hossam (“KH”). These concerned the nature of the fixes, the money to be paid to the players and intermediaries and available betting odds.

In 2019, the Belgian Federal Prosecutor’s Office charged GS with membership of a criminal organisation, fraud, money laundering, violations of the law on games of chance.

In 2020, the ITIA was granted access to certain evidence collated by the Belgian authorities, including transcripts of interviews, the contents of forensic downloads of mobile telephones, in particular those belonging to GS and records of money transfers.

Further to ITIA’s own investigation of the evidence collated by the Belgian authorities, the ITIA sent on 15 June 2021, a notice of charge to the Players (the “Notice of Charge”).

The AHO was appointed to decide upon the cases regarding the Players.

On 7 December 2021, the AHO rendered the decision with respect to the Players (the “Decision”) whereby the latter were found to have (i) contrived or alternatively attempted to contrive the outcome or another aspect of the relevant matches (Section D. 1. d of the TACP) and (ii) failed to report corruption offences (Section D. 2. a of the TACP). Accordingly, it was decided that they should serve a ban of 9 years and pay a fine of US\$ 5000.

On 30 December 2021, the Appellants filed with the Court of Arbitration for Sport (the “CAS”) a Statement of Appeal against the Respondent with respect to the Decision, pursuant to Articles R47 and R48 of the CAS Code of Sports-related Arbitration (“CAS Code”).

Reasons

The Appellants argued that the Decision which was based on illegally obtained evidence i.e. evidence obtained from Belgian authorities in violation of the secrecy of criminal investigations, should be quashed. The TACP is only applicable to *professional* tennis events and to players participating to such *professional* events. However, the matches at stake were not part of a *professional* tennis event within the meaning of Article B.10 of the TACP and Annex 1, and the Appellants were not players competing in such *professional* events since they were amateur tennis players. The Appellants further denied any involvement in the fixes. Based on common understanding, it was required to establish that the Players benefitted from a financial reward in order for the match-fixing offence to be established.

The Respondent maintained that the Players agreed to be bound by the TACP when they

signed for an ITF International Player’s Identification Number (IPIN), the TACP is not limited to “professional” players and there is no exclusion for minors either; even if the evidence had been obtained unlawfully, this would not render such evidence inadmissible, given that Article G.3.c of the TACP provides that charges under the TACP may be established by any reliable means; match-fixing does not require the ITIA to establish that the Players in fact received the sums agreed for the match they agreed to fix; The Players’ involvement in the fixes agreed between the corruptors (i.e. GS and YR) was evident since: (i) the messages between the corruptors contained references to YR liaising and conferring with the Players about what aspects of their matches they agreed to fix and for what amount; (ii) the scores of those matches were consistent with the aspects of the fixes agreed; and (iii) the messages referred to the Players more than once, indicating that the Players agreed to be involved in the fixes.

In light of the Parties’ submissions, the Panel should first determine whether, in its view, the Appellants committed the alleged violation of Sections D.1 and D.2 of the TACP. Before going through the evidence for each of the Appellants, the Panel will first recall specific evidentiary issues.

1. Burden of proof

The principles in relation to the burden of proof define which party has the obligation to persuade the Panel as to the establishment of an alleged fact.

The Panel held that except where an agreement would determine otherwise, the arbitral tribunal shall allocate the burden of proof in accordance with the rules of law governing the merits of the dispute, i.e. the *lex causae*. Accordingly, pursuant to Section G.3.a. of the TACP, “[t]he PTIO [“Professional Tennis

Integrity Officer”] ... *shall have the burden of establishing that a Corruption Offense has been committed*”. Therefore, the burden of proving the alleged facts lied with the International Tennis Integrity Agency (ITIA). That said, according to the principle *actori incumbit probatio*, each party shall bear the burden of proving the specific facts and allegations on which it relies. This is all the more relevant when, while assessing the evidence, the CAS panel has to bear in mind that corruption is, by nature, concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoing. In addition, the more detailed are the factual allegations, the more substantiated must be their rebuttal. As a result, the Players have a certain duty to contribute to the administration of proof by presenting evidence in support of their line of defence.

2. Standard of proof

Pursuant to Section G.3.c. of the TACP, *“the standard of proof shall be whether the PTIO has established the commission of the alleged Corruption Offense by a preponderance of the evidence”*. Under the preponderance standard, the burden of proof is met when the party bearing the burden convinces the fact finder that there is a greater than 50% chance that the fact claimed is established. In applying this standard, the Panel assessed the evidence before it bearing in mind the seriousness of the offences with which the Players had been charged. While this did not affect the applicable standard, the Panel was of the view that it should have a high degree of confidence in the quality of the evidence upon which its findings were based.

3. Standard applicable to the admissibility of the evidence

The Appellants contended that the Decision was based on evidence obtained from Belgian criminal authorities in violation of the secrecy

of criminal investigations and, as a result, should be quashed. The Respondent submitted that the evidence obtained by Belgian criminal authorities was wholly admissible.

The Panel reminded that the admissibility of the evidence is governed by the law applicable to the procedure and that the Parties agreed – with respect to the applicable provisions – on the CAS Code. Since the provisions of the CAS Code, the PILA and the TACP are silent in relation to the question of admissibility of the evidence before the CAS, the Panel had regard to Article 182(2) of the PILA according to which – absent any agreement of the Parties – the arbitral tribunal shall determine the law applicable to the procedure either directly or by reference to a law or to arbitration rules. In this context, the Panel was guided by Section G.3.c. of the TACP. As a result, the Panel held that the standard applicable to the admissibility of the evidence was whether the evidence adduced by the parties may be said to be “reliable” within the meaning of Section G.3 TACP. Hence, even if the evidence from national criminal authorities had been obtained by illegal means, the AHO still had the discretionary power to validly rely on such evidence to demonstrate the existence of the alleged offenses. In this respect, the Panel reminded that Article 182(3) of the PILA that states *“regardless of the procedure chosen, the arbitral tribunal shall guarantee the equal treatment of the parties and their right to be heard in adversarial proceedings”*, provides limits to the procedural rules chosen by either the parties or the arbitrators and that further limits to the law applicable to the procedure derive from the procedural public order. Against this background, the Panel considered that Section G.3.c TACP was in line with the law of international arbitration, which generally provides that *“the arbitral tribunal is not bound to follow the rules applicable to the taking of evidence before the courts of the seat”*.

4. Evaluation of evidence

The Panel held that absent any provision as to the assessment of evidence in the CAS Code, the principle of free evaluation (*“libre appréciation des preuves”*) was applicable in international arbitration in general, and in CAS proceedings in particular. Pursuant to Section G.3.c. TACP: “[...], facts relating to a Corruption Offense may be established by any reliable means, as determined in the sole discretion of the AHO”. The evidence brought forward by the parties shall therefore be freely evaluated and both direct and circumstantial evidence shall be considered by the Panel. Direct evidence is evidence that directly proves a fact. Circumstantial evidence requires a trier of fact to draw an inference to connect it with a conclusion of fact. The Panel reminded that in a case involving alleged acts of corruption, circumstantial evidence might be especially pertinent since corruption is, by nature, concealed. In this regard, the Panel held that considered altogether, the exchange of messages (screenshots and text messages) between the corruptor and the Players appear to be reliable and sufficient evidence of the Players’ involvement in match-fixing, especially where the evidence was corroborated by the correspondence between (i) the terms of the fix and the match results, (ii) the amount mentioned in the messages and the payment data once the matches were over, and (iii) a betting alert showing that suspicious bets were placed on the relevant matches. Such evidence should lead to the conclusion that the Players contrived the outcome or one aspect of the relevant matches (Section D. 1. d of the TACP) and failed to report the offer that were made to them (Section D. 2. a of the TACP).

5. The Applicability of the TACP

The Appellant argued that the TACP was only applicable to professional tennis “Events”, which was not the case for the relevant singles

and doubles matches that were held between 19 July and 14 November 2017 at the 2017 ITF Futures Tournament in Morocco. For its part, the Respondent contended that each of these matches qualified as an “Event” within the meaning of the TACP.

The Panel noted that according to Section B.10 of the TACP, the term “Event” *“refers to those professional tennis matches and other tennis competitions identified in Appendix 1”*. Based on the provision, the Panel considered that the TACP applied to professional tennis matches as well as to those other tennis competitions that were listed in Appendix 1 to the TACP and include the “ITF Pro Circuit” and therefore the relevant ITF Futures Tournaments. Consequently, the Panel concluded that the relevant ITF Tournament in Morocco qualified as an “Event” within the meaning of the TACP.

Similarly, the Appellants contended that the TACP applied only to players who were able to participate in professional competitions. The Respondent objected to such view considering that the Appellants were covered by the TACP.

According to Section C TACP, *“[a]ll Players [...] shall be bound by and shall comply with all of the provisions of this Program and shall be deemed to accept all terms set out herein as well as the Tennis Integrity Unit Privacy Policy. [...] It is the responsibility of each Player [...] to acquaint himself or herself with all of the provisions of this Program [...]”*. The Panel underlined that the term “all Players” did not on its face exclude minors. Indeed, in order to play the tournaments at stake, which were organised under the jurisdiction of the ITF, players should register for and hold an ITF International Player’s Identification Number (IPIN), which required the players’ signature of the Player Welfare Statement confirming his agreement with the rules of tennis, including, specifically, the TACP. In the case of minors, the IPIN registration process informed the

player that the minor's parent or legal guardian should sign the IPIN on the minor's behalf with the result that the minor players were subject to the rules of the TACP.

6. Definition of corruption offences

Contrary to the Respondent, the Appellants contended that it was required to establish that the Players benefitted from a financial reward in order for the match-fixing offence to be established.

The Panel held that in order for a corruption offence to exist, a mere *attempt* to contrive a match was actually sufficient (Section D.1.d of the TACP). Similarly, the fix might cover not only the outcome of a match but also one *aspect* of a particular match. Finally, it was not necessary to show the existence of a financial reward, whether money or benefit or other consideration, for a corruption offence under the TACP to exist.

7. Proportionality of the sanction

The Panel recalled that whilst a hearing before the CAS is a hearing *de novo*, the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules should be reviewed only when the sanction is evidently and grossly disproportionate to the offence. Moreover, a CAS panel applies its independent assessment of the proportionality and appropriateness of the sanctions imposed in light of the established facts.

In this respect, the fact that the offenses of match fixing require some degree of planning or premeditation was relevant to the Panel. It appeared also appropriate to the Panel to take further guidance in the ITIA 2021 Guidelines that provide, in principle, for a three-step-approach: (i) first, the CAS panel shall determine the offense category (light, medium,

high), by considering the gravity of the offences and whether the players were guilty of distinct offences on a number of separate occasions, and assess the player's level of culpability and the impact on the integrity of the sport of tennis; (ii) second, having determined the category, the CAS panel might use the corresponding starting point to reach the sanction within the category range; and (iii) third, the panel might then consider any adjustment from the starting point for any aggravating factors e. g. the lack of credible alternative interpretation as to the evidence, the players' continuous denial of any involvement in match fixing, the lack of remorse; or mitigating factors e. g. the players' young age at the time of the relevant facts. The Panel also considered that the principle of deterrence was of significant importance when it came to assessing the adequate sanction for corrupt conduct.

Decision

In light of the above considerations, the Panel found that it was not able to conclude that the period of ineligibility imposed on the Appellants i.e. a ban for a period of 9 years, was "evidently and grossly disproportionate to the offence". Furthermore, the Panel found that the amount of the fine imposed on each of the Appellants i.e. a fine in the amount of US\$ 5,000, was proportionate in the context of the matter, in particular in light of the ineligibility period imposed on them.

The appeal filed by Mr Mohamed Zakaria Khalil, Mr Soufiane El Mesbahi and Mr Yassir Kilani on 30 December 2021 were dismissed. The decision rendered by the Anti-Corruption Hearing Officer on 7 December 2021 was confirmed.

CAS 2022/A/8574

Marcos Lavín Rodríguez v. FC Voluntari

15 March 2023

Football; Contractual disputes – termination of the employment contract; Just cause; Article 14 and 14bis of the FIFA RSTP; Compensation for breach of contract payable to a club

Panel

Mr Lars Hilliger (Denmark), Sole Arbitrator

Facts

Marcos Lavín Rodríguez (the “Player” / the “Appellant”) is a professional football player of Spanish nationality.

FC Voluntari (the “Club” / the “Respondent”) is a Romanian professional football club affiliated with the Federația Română de Fotbal (the “FRF”), which in turn is affiliated with the Fédération Internationale de Football Association (“FIFA”).

Collectively, the Player and the Club will be referred to as the Parties.

On 3 September 2020, the Player and the Club entered into an employment contract (the “Contract”) valid until 30 June 2022 regarding the Player’s employment with the Club as a professional football player.

In accordance with the Contract, the Player was entitled to *inter alia*:

- a) Pursuant to Clause III 1.1, for the period 01.10.2020 - 30.06.2021, a monthly salary of EUR 6,500 payable on the 20th of the following month for the previous month.
- b) Pursuant to Clause III 2, for the period 01.07.2021- 30.06.2022, a monthly salary of

EUR 7,000 payable on the 20th of the following month for the previous month.

- c) Clause XV stated as follows:

“b) Non-observance of the contractual clauses by either party results in the obligation of the defaulting party to pay damages equivalent to the value of the contract. [...]”.

On 19 July 2021, the Club demoted the Player to its second team for a short period of time. The Club argued that said demotion was a disciplinary measure following the Player’s unacceptable conduct. .

By letter of 30 July 2021 (the “Default Letter”), the Asociación de Futbolistas Españoles (the “AFE”) on behalf of the Player put the Club in default for the amount of EUR 15,262.43 representing 2 monthly salaries (May and June 2021), several match bonuses and plane tickets reimbursement. The Player further complained about his demotion to the second team. The Player granted 15 days for the Club to remedy its default. On 6 August 2021, the Club paid EUR 6,638 to the Player.

By letter of 21 August 2021 (the “Termination Letter”), the AFE, on behalf of the Player, terminated the Contract arguing that the amount requested in his default letter had not been paid.

On 1 September 2021, the Club contested the contents of the default letter and termination letter arguing that on 30 July 2021, it was only in debt of EUR 5,500 toward the Player which is less than two monthly salaries and that on 5 August 2021, the Club had paid all the outstanding amounts to the Player.

On 3 September 2021, the Player filed a claim with the Dispute Resolution Chamber of FIFA (the “FIFA DRC”) against the Club for breach of contract claiming that he had just cause of terminate the Contract under Article 14bis of

the FIFA Regulations on the Status and Transfer of Players (the “FIFA RSTP”), requesting EUR 20,504.37 as outstanding amounts corresponding to the salaries of June, July and part of August 2021, bonuses related to match played, two round trip tickets and compensation for breach of contract of the amount of EUR 76,532.62, plus 5% interests *p.a.*

In reply to the claim, the Club lodged a counterclaim for breach of contract and requesting EUR 60,290.24 plus 5% interest *p.a.* The Club held that following the default letter, it paid all that was due to the Player and that at the date of termination less than two monthly salaries were due to the Player. The Club considered that the criteria of Article 14bis of the FIFA RSTP were not met, and that therefore the Player did not have just cause to terminate the Contract.

On 4 August 2022, the FIFA DRC determined that the Club’s debt towards the Player (roughly one month) was not sufficient to justify early termination of the Contract, whether in accordance with Article 14 or 14bis of the FIA RSTP. It therefore determined that while the Player was still entitled to payment of his outstanding remuneration until he date of termination of the Contract, in the amount of EUR 15,216.55 plus interest, in application of article 17 (1) of the FIFA RSTP, the Club was entitled to a compensation.

In this respect, the FIFA DRC determined that the Club was in principle entitled to EUR 72,259 but observed that the Club committed several irregularities during the execution of the performances, such as the non-payment of the agreed bonuses, as well as demoting the Player to the second team. As a consequence to this, the FIFA DRC decided to reduce the amount of compensation to EUR 15,000.

On 4 January 2022, pursuant to Article R48 of the Code of Sports-related Arbitration (the

“Code”), the Player filed a Statement of Appeal at the Court of Arbitration for Sport (the “CAS”) appealing the FIFA Dispute Resolution Chamber Decision.

Reasons

The main dispute in these proceedings concerned the existence of a just cause of unilateral termination of the Employment Contract for the Player within the meaning of Article 14 and 14bis of the FIFA RSTP, and the financial consequences thereof.

The Player held the DRC decision was wrong and that he had just cause to terminate the contract as at the date of termination, the Club had not fully complied with its payment obligations as set out in the Default letter and that during the duration of the Contract, his salaries were continuously paid substantially late and he was excluded from the first team.

The Club held that there was no just cause at the time of termination as less than two monthly salaries were due to the Player. The Club explained the partial and random payments as a result of the COVID-19 pandemic and the consequential financial difficulties. The Club held that the Player was only sent to the second team for a temporary period and that in any case, his contract did not specify for which team he would play. The Club does not dispute the assessment of the amount of compensation payable by the Player to the Club.

In light of the facts and the circumstances of the case, as well as considering the Parties’ submissions, the Sole Arbitrator observed that the main issues to be resolved were whether the Player had just cause to terminate the Contract on 21 August 2021 and to determine the financial consequences of the Player’s termination of the Contract, if any.

1. Just cause

The Parties agreed that the Contract had been unilaterally terminated by the Player on 21 August 2021, but disagreed on whether it was with or without just cause.

To start with, the Sole Arbitrator recalled that pursuant to article 337 par. 2 of the Swiss Code of Obligations, just cause exists whenever the terminating party cannot be expected in good faith to continue the employment relationship and that following CAS jurisprudence, only material breaches of a contract can possibly be considered just cause for the termination of an employment contract.

The Sole Arbitrator underlined that it was up to the Player to discharge the burden of proof to establish that the Contract was in fact terminated with just cause based on the circumstances of the case.

2. Article 14 and 14 bis of the FIFA RSTP

The Sole Arbitrator recalled that the Player based the termination on Article 14 bis of the FIFA RSTP arguing that he had put the Club in default of outstanding amounts, *i.e.* EUR 15,262.43 and granted it a 15-days deadline to comply which he agreed the Club failed to do so.

The Club, on its side, disputed that the Contract was terminated with just cause since the Club, with its payment of 5 August 2021, had fulfilled all payment obligations by the date of the Default Letter, which, according to the Club, amounted to EUR 5,500, and further argued that the Player's contractual salary for July 2021 only fell due on the day before the termination.

Based on the submissions of the Parties, the Sole Arbitrator determined that at the date of the Default Letter, the Player should have

received a total amount of ER 73,762.43. The Sole Arbitrator noted that the Club held that it had paid EUR 65,934.04 with some payments made in Lei, some in Euros, mostly made by bank transfers and some made by cash. The Sole Arbitrator also took note that the Player acknowledged receiving that amount, but argued that only EUR 58,500 should be taken into account and that the rest were additional "*out of contract bonuses*".

In this regard, the Sole Arbitrator did not find himself sufficiently convinced that the payments in question were in fact to be considered as out-of-contract bonuses made by the Club in addition to the payments which fell due pursuant to the Contract.

As such, the Sole Arbitrator found that on the date of the Default Letter, the amount of EUR 73,762.43 had fallen due to the Player in accordance with the Contract, while the Club discharged its burden of proof to establish that it had paid the amount of EUR 65,934.04, which means that the outstanding amount due to the Player on 30 July 2021 pursuant to the Contract was EUR 7,828.39.

Based on the above, and as "*two monthly salaries*" of the Player on the date of the Default Letter amount to EUR 13,000 pursuant to the Contract, the Sole Arbitrator concluded that on the said date, the Club had not failed to pay at least two salaries to the Player, therefore he could not rely on article 14 bis of the FIFA RSTP to justify just cause for the termination of the Contract.

Additionally, the Sole Arbitrator underlined that the fact that a player is not considered to have just cause for the termination of a contract pursuant to Article 14bis of the FIFA RSTP, is of no importance to the assessment of whether a player anyway can be considered to have just cause to terminate a contractual

relationship with a club based on the circumstances of the particular situation.

The Sole Arbitrator took note that the Player claimed that he could not be expected in good faith to continue the employment relationship with the Club as a) the Club continuously paid his salaries substantially late, which alone should be considered as just cause to terminate the Contract; b) the Club continuously tried to pressure the Player to reduce his contractual salary; and c) the Club excluded the Player from its first team based on the Player not accepting a reduction of his contractual salary or an early termination of the Contract, as suggested by the Club.

The Sole Arbitrator acknowledged that it was undisputed that the Player's salaries were, to a large extent, paid by the Club after their respective due dates, and often in smaller instalments, which, according to the Club, was the result of its poor financial situation. However, the Sole Arbitrator also took note of the efforts of the Club to fulfil its payment obligations towards the Player, that not all delays were substantial, neither in time nor in amount, and that the Player apparently was informed about the nature and reason behind such smaller and delayed payments and never complained in writing about it until the Default Letter.

Based on that and on the specific circumstances of the present dispute, the Sole Arbitrator found that the Player had in fact no just cause to terminate the contractual relationship based on the Club's late payment of his salaries and dismissed the other allegations of the Player on the basis that those were insufficiently documented.

As to the Player being sent to the second team, the Sole Arbitrator noted that the Player was only absent from the first team for two official matches and was called back at the beginning

of August 2021, before the termination of the Contract.

The Sole Arbitrator found no just cause under article 14 of the FIFA RSTP.

Based on the above considerations, the Sole Arbitrator finds that the Player terminated the Contract on 21 August 2021 without just cause

3. Compensation for breach payable to a club

As the Player was held liable for the early termination of the Contract, the Sole Arbitrator found that the Club was entitled, under Article 17 (1) of FIFA RSTP, to receive financial compensation for breach of contract.

The Club did not appeal the Appealed Decision and confirmed in its Answer that it did not dispute the compensation awarded. The Player on his side submitted that no compensation should be due to the Club as the residual amount of the Contract was in fact saved by the Club as a result of the termination of the Contract and held that money saved could not constitute damages. The Player further held that any amount of compensation payable to the Club should be reduced to zero on the basis of Article 44 of the Swiss Code of Obligations, considering the degree of fault on the Club.

The Sole Arbitrator initially took note that the injured party is entitled to a whole reparation of the damage suffered according to the principle of "*positive interest*", under which compensation for breach must be aimed at reinstating the injured party to the position it would have been in had the contract been performed until its expiry.

Regarding the arguments of the Player, the Sole Arbitrator underlined that even if the Club could be considered having "saved" the residual amount, the Club was at the same time suffering from not having the Player employed.

The Sole Arbitrator explained that following such logic, professional football clubs would never be entitled to receive any compensation from players terminating their contractual relationships with the said club, which is clearly not the intention behind Article 17 of the FIFA RSTP.

Based on that, and even if the Club did in fact commit several irregularities during the Parties' contractual relationship, the Sole Arbitrator found no basis for reducing the amount of compensation payable by the Player to the Club any further than the already substantial reduction decided by the FIFA DRC.

Decision

The appeal filed on 15 March 2023 by Marcos Lavín Rodríguez against the decision issued on 9 December 2021 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association was dismissed. The decision issued on 9 December 2021 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association was confirmed.

CAS 2022/A/8582

Dawid Lange v. International Paralympic Committee (IPC)

11 May 2023

Para powerlifting; Doping (DHCMT, Metandienone, Oxandrolone and Clomifene); CAS jurisdiction based on procedural conduct of the parties; Validity of Eligibility Agreement; Binding character of competition entry form containing a reference to anti-doping rules of an international federation; IPC right to initiate further proceedings against athlete despite IPC not having appealed second instance decision

Panel

Ms Annett Rombach (Germany), Sole Arbitrator

Facts

Mr. Dawid Lange (the “Athlete” or the “Appellant”) is a Polish national who competes in the sport of Para powerlifting.

The International Paralympic Committee (the “IPC” or the “Respondent”) is the global governing body of the Paralympic Movement and, in particular, the Paralympic Games and Paralympic Winter Games. In addition, the IPC is the international governing body for a number of Para sports, including the sport of Para powerlifting. The IPC has its registered office in Bonn, Germany.

In March 2019, the Polish Sports Association for the Disabled “START” (“PZSN START”) proposed the Athlete’s participation in the Eger 2019 World Paralympic World Cup in April 2019, organized by the IPC (the “2019 IPC World Cup”).

On 20 March 2019, the Athlete signed a 2-page document, titled “IPC Athlete Eligibility Agreement” (the “Eligibility Agreement”), which, to the extent relevant, contained the following provisions:

“This Eligibility Agreement (Agreement) is an important document [...] that governs my participation in IPC and IPC sport competitions which exclude the Paralympic Games and the Paralympic Winter Games (IPC Competitions).

This Agreement commences on the date I sign below and [...] continues [...] in full force and effect until I cease to compete in IPC Competitions (Term).

I understand that to be eligible to be licensed to participate in IPC Competitions, and in consideration of the acceptance of my participation in IPC Competitions, I agree to the terms outlined in this Agreement, including:

[...]

7. to comply with the IPC Anti-Doping Code and, in particular, not to take, possess or traffic any substance or use methods prohibited by the applicable World Anti-Doping Code Prohibited List.

[...]

I understand that my failure to adhere to any of the terms set out in this Agreement will result in disciplinary action as determined by the IPC. [...]

I confirm that I have read and acknowledge all the provisions of this Agreement and that my signature below is authentic and is the signature of the participant named above”.

On 25 March 2019, the Athlete was licensed by the IPC to compete in IPC competitions.

On 7 April 2019, the Athlete participated in the Men’s +107kg category at the Polish Weightlifting Individual Championships for People with Disabilities in Bydgoszcz, Poland (the “Competition”), organized by PZSN START. A urine sample, collected from the Athlete in-competition by the Polish Anti-

Doping Agency (“POLADA”), returned an Adverse Analytical Finding (“AAF”). Namely, the A Sample contained: Dehydrochloromethyltestosterone (“DHCMT”) metabolites, a Metandienone Metabolite, Oxandrolone metabolites and Clomifene and its metabolite. All these substances and the metabolites are Prohibited Substances under the World Anti-Doping Agency (“WADA”)’s 2019 Prohibited List.

On 28 April 2019, the Athlete competed in the 2019 IPC World Cup.

On 30 December 2019, the Athlete was charged with an Anti-Doping Rule Violation (“ADRV”) pursuant to the POLADA Anti-Doping Rules (the “POLADA ADR”) in relation to the AAF.

On 22 July 2020, a First Instance Disciplinary Panel of the POLADA ruled that the Athlete had violated the POLADA ADR and imposed a disciplinary sanction of a four-year period of Ineligibility on him (the “First Instance Decision”).

Further to an appeal by the Athlete against the First Instance Decision, on 17 February 2021, a Second Instance Disciplinary Panel of the POLADA ruled that the POLADA ADR did not apply to the Athlete and that the First Instance Decision should be repealed, and the disciplinary proceedings instituted by POLADA against the Athlete discontinued (the “Second Instance Decision”). Neither WADA nor the IPC, despite being informed of their respective right to appeal the decision before the Court of Arbitration for Sport (“CAS”), elected to appeal against the Second Instance Decision.

On 30 September 2021, the IPC notified the Athlete of the AAF and advised him that subject to Article 7.9.3 of the 2018 IPC Anti-Doping Code (the “2018 IPC ADC”), from

19:00 CET on 30 September 2021 and in accordance with Article 7.9.1 of the 2018 IPC ADC, he was provisionally suspended from participating in a range of sporting activity.

On 20 October 2021, the Appellant requested that both the IPC’s jurisdiction to bring a case against him for the AAF (the “Jurisdictional Issue”) and his request that the Provisional Suspension imposed upon him be lifted (the “Provisional Suspension Issue”) be considered as preliminary issues:

On 9 December 2021, a Single Member of the IPC Independent Tribunal rendered a decision on the Preliminary Issues (the “Appealed Decision”), holding that the IPC had had jurisdiction to bring the case against the Athlete and that the Provisional Suspension should remain in place pending a resolution of the matter.

On 30 December 2021, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (CAS) against the Appealed Decision, in accordance with the Code of Sports-related Arbitration (the “CAS Code”).

Reasons

The Parties’ dispute centres on the question whether the IPC had jurisdiction and results management authority to bring its own disciplinary proceedings under the 2018 IPC ADC against the Athlete in respect of the AAF returned by the sample taken from the Athlete at the Competition on 7 April 2019. While the Athlete argues that the Eligibility Agreement is not valid and enforceable, that he is not bound by the IPC ADC and that the IPC neither has jurisdiction nor authority to manage, prosecute and adjudicate the alleged ADRV, the IPC does not contest the facts relied upon by the Athlete in this context, but maintains that the situation does not prevent

it from exercising results management authority and jurisdiction over the Athlete under the 2018 IPC ADC because these responsibilities were validly conferred upon it by the Athlete's express agreement, through the Eligibility Agreement.

1. CAS jurisdiction based on procedural conduct of the parties

To start with, the Sole Arbitrator examined the question of CAS jurisdiction, noting that the Appealed Decision was designated as a decision on "preliminary matters", and that such types of decisions on "preliminary matters" were not expressly listed in Article 13.2 of the 2021 IPC ADC as subjects of appeal to CAS. That furthermore, the Eligibility Agreement provided for a differing jurisdictional rule, i.e. in favour of an IPC independent tribunal, to the exclusion of any appeal to an arbitral body. The Sole Arbitrator held that never-the-less, jurisdiction of the CAS had been established for the present case through the Parties' conduct and submissions. Specifically, on the one hand, the Parties had, in the course of the CAS proceedings, expressed their consent to arbitrate under the CAS' rules e.g. by filing an appeal to CAS and by making pleadings, on the Respondent's end, on the merits of the case without objecting to CAS' jurisdiction. Additionally, the Parties had confirmed CAS jurisdiction by execution of the Order of Procedure.

2. Validity of Eligibility Agreement

In the following, the Sole Arbitrator turned to the Appellant's argument that the Eligibility Agreement did not constitute a proper basis for a referral of the Athlete to the IPC's jurisdiction, as such agreement was invalid. In support of this argument the Athlete contended that while he had been presented with the second page of the Eligibility Agreement, the meaning of such document

had not been explained to him. He did not speak English, and he had not been aware, and did not understand the contents of the Eligibility Agreement. Further, his signing of the Eligibility Agreement had been on the basis that it was a "*mere formality*". Conversely, the Respondent underlined that the Eligibility Agreement is valid and applicable. The Athlete had failed to advance any evidence demonstrating that when he signed the Eligibility Agreement, the terms of the Agreement had not been explained to him, or that he had made any enquiries as to the meaning and obligations under the Eligibility Agreement. The Athlete had voluntarily signed the Eligibility Agreement and it had not been the obligation of the other parties, nor of the Athlete's representatives or colleagues, to ensure that he understood the terms he was agreeing to.

The Sole Arbitrator, in line with the Appealed Decision's finding, held that in order for the Athlete to successfully refute the validity of the written agreement between himself and the IPC, by which the Athlete had conferred jurisdiction and results management authority on the IPC for events in which he participates, the Athlete would have had to adduce specific evidence corroborating his allegations leading to nullity. A high burden was required for an individual to prove that he or she was unaware of the terms of an eligibility agreement (due to e.g. lack of understanding of the terms of the eligibility agreement because of insufficient language skills, or that the terms of the agreement had not been explained). Otherwise a dangerous precedent would be set in that it would be too easy for an individual to argue that terms and conditions of the Eligibility Agreement – which go to the very core of participation in competitions - should not apply. Furthermore, any athlete who does not understand the terms of an eligibility agreement or is unsure of the meaning of any of its terms would have to seek advice to that

extent. An athlete who, faced with those problems, simply signed the unknown document would act grossly negligently.

3. Binding character of competition entry form containing a reference to anti-doping rules of an international federation

Having held that the Eligibility Agreement was valid and binding on the Athlete, the Sole Arbitrator addressed the central question of the proceedings i.e. whether the IPC had jurisdiction and results management authority to bring its own disciplinary proceedings against the Athlete under the 2018 IPC ADC in respect of the AAF resulting from the sample taken from the Athlete at the competition in question. In this context the Athlete argued that the event in question was not a competition organised by the IPC for which the IPC had not been responsible in terms of sample collection during the competition. Accordingly, the IPC had no jurisdiction and no anti-doping authority for the competition, nor was it responsible for results management. The doping control performed on the Athlete was ordered by PZSN START and conducted by POLADA, without any involvement by the IPC. PZSN START was the only body responsible for results management. The Athlete was neither subject to the POLADA ADR nor to the IPC ADC, because the Competition was not a competition organized by the IPC, and the Athlete was not an International-Level Athlete. Even if the Eligibility Agreement were to be considered valid, it would not apply in the present case, because it was limited in scope to IPC competitions. In the IPC's view, the situation did not prevent it from exercising results management authority and jurisdiction over the Athlete under the 2018 IPC ADC because these responsibilities had been expressly conferred upon the IPC by the Athlete, through the Eligibility Agreement. Further, if the Athlete's interpretation of his

obligations under the Eligibility Agreement and the 2018 IPC ADC were accepted, it would result in the Athlete and other athletes being entitled to dope freely in non-IPC competitions if those competitions did not explicitly prohibit doping in/or in between IPC competitions. This would be a perverse outcome that would be damaging to the sporting integrity of the IPC's competitions. Fundamentally, in order for the 2018 IPC ADC to operate, it was necessary for anti-doping authorities to have jurisdiction over those athletes who are bound by the 2018 IPC ADC outside the short time period covering their competitions. Otherwise, such provisions of the 2018 IPC ADC would be rendered entirely inoperable and pointless.

The Sole Arbitrator determined that despite the fact that the IPC had not organized the Competition in question, nor was it responsible for sample collection during the Competition, the IPC had never-the-less established jurisdiction and results management authority for the event given that the Athlete, prior to the Competition, had signed a valid and enforceable individual agreement, the Eligibility Agreement, by which the Athlete had, on the one hand, conferred results management authority and jurisdiction on the IPC, and, on the other hand, acknowledged his obligation "*to comply with the IPC Anti-Doping Code*". Furthermore, despite the fact that according to the preamble to the Eligibility Agreement, it "*governs [the Athlete's] participation in IPC and IPC sport competitions*", the Athlete could not successfully argue that his duty to comply with the IPC ADC was event-specific, i.e. temporarily limited to *ongoing* IPC competitions as in the scope section of the 2018 IPC ADC, it was clarified that the IPC ADC shall be effective during "*the time of preparation for competition*". Furthermore, to deny the Athlete's permanent duty to obey to the applicable anti-doping rules would also defeat the very purpose of the fight against doping.

Efficient doping control, a secure level playing field for all athletes and the protection of athletes' health would be severely endangered if athletes' only duty was to comply with the IPC ADC *during* a competition. In conclusion, by means of the Eligibility Agreement the Athlete was bound to the 2018 IPC ADC to the extent that, at the time of the Competition, he had to comply with the IPC ADC, and any violation of these rules permitted the IPC to bring disciplinary proceedings against the Athlete under the 2018 IPC ADC.

4. IPC entitlement to initiate further proceedings against athlete despite IPC not having appealed Second Instance Decision

Lastly, the Sole Arbitrator addressed the Athlete's argument that the IPC, by not appealing the Second Instance Decision, accepted such decision and waived its right to initiate new proceedings before its own Independent Tribunal. In turn, the IPC contested having (tacitly) accepted the Second Instance Decision by not appealing it. It highlighted that neither the first, nor the second instance panel had sight of the Eligibility Agreement, and as a result little weight should be attributed to the Appealed Decision's ruling that the IPC ADC do not apply because, without considering the Eligibility Agreement, no informed decision on whether or not the IPC ADC applied to the case could be made. Rather, the IPC had separate jurisdiction to POLADA and subsequently chose to bring a case against the Athlete in accordance with its own jurisdiction.

The Sole Arbitrator found that indeed, the IPC had the right to initiate proceedings on a different basis than the POLADA ADR or the World Para-Athletics Rules and Regulations, *e.g.* on the basis of the Eligibility Agreement concluded with the Athlete prior to the event, such Eligibility Agreement having played no role in the proceedings before the POLADA

adjudicatory body. This is because the subject matter before the POLADA adjudicatory body and the subject matter in the IPC proceedings differed in that the former dealt with the question of whether POLADA (or the IPC) had jurisdiction over the Athlete under either the POLADA ADR or the World Para-Athletics Rules and Regulations, while the IPC, in order to establish jurisdiction over the Athlete for the alleged ADRV, exclusively relied on the Eligibility Agreement. Therefore, the proceedings before the IPC were entirely independent from those before the POLADA adjudicatory body, and it was not a condition for the IPC to appeal the decision of the POLADA adjudicatory body prior to initiating proceedings before the IPC Tribunal.

Decision

On the above grounds the Sole Arbitrator decided to dismiss the Appeal and confirmed the decision of the Single Member of the International Paralympic Committee Independent Tribunal rendered on 9 December 2021.

The Sole Arbitrator further clarified that while the Appellant had requested for the Provisional Suspension imposed on him by the IPC to be set aside, he did not further any arguments but for the IPC's lack of jurisdiction. While appreciating the Athlete's arguments regarding the length of the proceedings, the Sole Arbitrator underlined that the evidence supporting the alleged ADRV - the alleged ingestion of multiple prohibited substances known to (illegally) increase sporting performance - was overwhelming and remained uncontested. Given that at stake was a suspension of four years, the Respondent's interest in the adjudication of the alleged ADRV outweighed the Appellant's interest in expeditious proceedings with the result that the Provisional Suspension had to be upheld.

CAS 2022/A/8592

USD Lavagnese 1919 v. Fédération Internationale de Football Association (FIFA)

17 April 2023 (operative part of 20 June 2022)

Football; Registration of minor players in breach of Article 19 RSTP; Purpose of Article 19 RSTP; Substantive and procedural contents of Article 19 RSTP; Responsibility of an amateur club to familiarise itself with Article 19 RSTP; De novo power of the CAS to determine sanctions; Assessment of the proportionality of the sanction

Panel

Ms Leanne O’Leary (United Kingdom),
President

Mr Jacopo Tognon (Italy)

Ms Anna Bordiugova (Ukraine)

Facts

This is an appeal against the decision of the FIFA Appeals Committee passed on 11 November 2021. It arises from an investigation undertaken by the FIFA Regulatory and Compliance Department into the Appellant’s alleged involvement in a scheme known as the “Nigeria System”, and the subsequent adjudication of alleged breaches of Articles 9, 19 (1) and 19 (4) of the FIFA Regulations on the Status and Transfer of Players (“RSTP”) by the FIFA Disciplinary Committee.

USD Lavagnese (“Lavagnese” or the “Appellant”) is an amateur football club situated in Lavagna, Italy. It is affiliated to the Federazione Italiana Giuoco Calcio (the “FIGC”).

In February 2018, the Italian Police commenced an investigation into allegations of

crimes related to the illegal trade and use of doping substances for football players at the professional club Spezia Calcio s.r.l (“Spezia Calcio”). Although the investigation into those allegations was subsequently closed without prosecution, it uncovered potential breaches of Italian immigration law involving the transfer of 13 football players under the age of 18 from Nigeria to Italy.

The Police Report identified 13 players who had been brought into Italy from Nigeria, four of whom were registered with Lavagnese. A summary of the relevant details of the four Lavagnese-registered players who are known as Players 1, 2, 4 and 5, is as follows:

Player No	Name	ITC	Date of Entry into Italy	Date of FIGC Registration	Transfer to Spezia
1	[A.]	N / A	30/09/2013 (16 years old)	20/02/2014 (17 years old)	Yes 29/08/2014
2	[B.]	N / A	30/09/2013 (16 years old)	20/02/2014 (17 years old)	Yes 29/08/2014
4	[C.]	N / A	26/08/2014 (16 years old)	03/09/2015 (18 years old)	Yes 19/01/2016
5	[D.]	N / A	26/08/2014 (17 years old)	31/07/2015 (18 years old)	Yes 28/07/2016

Following receipt of information about the alleged Nigeria System, FIFA’s TMS Global Transfer and Compliance Team wrote to Lavagnese, requesting further details of the registration of Player 1 and Player 2. On 24 August 2018, Lavagnese indicated that Player 1 was in Italy for study reasons under the supervision of a tutor, that Player 1 had never been registered with another club and that Player 1 had been registered by the FIGC as an amateur. On 12 March 2019, Lavagnese indicated that Player 1 and Player 2 were

registered with the FIGC, both had registered for the first time in Italy and the players had been registered following FIGC's procedure.

On 25 November 2020, FIFA's Regulatory Enforcement Department put the club on notice that FIFA was investigating potential breaches of Articles 9, 19 and Annexes 2 and 3 of the FIFA RSTP, and seeking information regarding the registration of five Nigerian players. On 8 December 2020, Lavagnese responded that it was not involved in the Nigeria System; it had never been investigated by the La Spezia Public Prosecutor's Office; its company and representatives were not mentioned in investigation and court documents; Lavagnese had fulfilled its obligations properly; and the Nigeria System was completely unknown to the club.

On 26 April 2021, FIFA informed Lavagnese that the matter in relation to Players 1, 2, 4 and 5 had been transferred for consideration by the FIFA Disciplinary Committee. On 30 June 2021, the FIFA Disciplinary Committee concluded that the allegations were proved and banned Lavagnese from registering new players, both nationally and at an international level, for four entire and consecutive registration periods. It also ordered Lavagnese to pay a fine of CHF 4,000.

On 10 September 2021, Lavagnese filed an appeal to the FIFA Appeal Committee. By its decision dated 11 November 2021 (the "Appealed Decision"), the latter partially upheld Lavagnese's appeal. The Appeal Committee concluded that given the lack of evidence linking Lavagnese to Spezia Calcio in the Nigeria System, the Disciplinary Committee had erred in finding that Lavagnese was a part of such System. Moreover, although FIGC had been delegated with authority to approve amateur foreign minor registrations for an amateur club instead of the FIFA Sub-Committee, nonetheless, the international

transfer of a minor player and the first registration of a foreign minor player required approval from the FIFA Sub-Committee in accordance with Article 19 (4) of the FIFA RSTP. Players 1 and 2 did not satisfy any of the exceptions listed in Article 19 (2) of the FIFA RSTP. The wording of the exception was clear that the figure of guardian/tutor could not encompass the notion of parent included in Article 19 (2) (a) of the FIFA RSTP. Regarding Players 4 and 5, the Appeal Committee noted that there was no evidence of the players' participation in organized football with Lavagnese while under the age of 18, and the findings of the Disciplinary Committee in that regard were set aside. On the issue of the proportionality of the sanction, the Appeal Committee noted that the breaches regarding Players 1 and 2 were confirmed, and the violations annulled against Players 4 and 5. Taking into account the circumstances of the case, and the materials at Lavagnese's disposal to familiarise itself with the scope of Article 19 (e.g. the FIFA RSTP, its Commentary and CAS decisions) and the reference in the FIGC Guide to the FIFA Regulations, the Appeal Committee decided to halve the registration ban to two registration periods and confirm the fine of CHF 4,000.

On 8 January 2022, the Appellant filed an appeal against the Appealed Decision.

On 24 May 2022, a hearing took place by video-conference.

Reasons

The Panel considered that there were two issues for determination in this case, namely: whether Lavagnese had breached Articles 19 (1), 19 (4), 9 (1) and Article 1 (1) of Annexe 2 and Article 1 (3) of Annex 3 of the RSTP; and if so, whether the sanction imposed by the Appeal Committee was proportionate.

Lavagnese submitted that it was not liable for a breach of Article 19 (1) because it was an amateur club with no experience in international football or knowledge of FIFA regulations, and as an amateur club was required to follow the rules of its national association only. It had followed and received an exception from FIGC upon whom it had a legitimate expectation to guide it correctly.

Before considering the substance of the Parties' arguments, the Panel considered it helpful to outline generally the scope and purpose of the FIFA RSTP provisions that protect minors.

1. Purpose of Article 19 RSTP

The Panel reminded that although the regulations regarding minors had been modified since 2001, the key aim of the provisions nonetheless remained the same: to protect the welfare of young players and minimise potential for commercial exploitation or abuse of minors in the process. Article 19 of the FIFA RSTP was a very important provision that sets the key principles designated to protect the interest of minor players. The general prohibition contained in article 19(1) FIFA RSTP was based on the fact that, while international transfers might in very specific cases, be favourable to a young player's sporting career, they were very likely to be contrary to their best interest as minors. The interest of protecting the adequate and healthy developments of a minor as a whole had to prevail over purely sporting interests. The established exceptions needed to be applied in a strict, rigorous, and consistent manner.

2. Substantive and procedural contents of Article 19 RSTP

The Panel also noted that Article 19 contained both a procedural and a substantive element. The substantive element was set out in Article

19 (1) and (3) and, in effect, prohibited the registration of minors under the age of 18. Article 19 (4) was the procedural element which outlined the procedure to follow when processing an international transfer or registration of a minor that relied on an exception in Article 19 (2) or a player's first registration under article 19 (3). The process required a national association to seek approval from the FIFA Sub-Committee that considered such applications. A national association, however, was not obliged to submit a transfer application for approval if it had been granted an exemption from doing so from FIFA. The exemption was limited to the registration of an amateur player with an amateur club. FIGC had applied and had been granted such an exemption, with the effect that it could approve the registration application itself if satisfied that the requirements of an exception under Article 19 (2) were met.

It was undisputed that Lavagnese had followed the FIGC procedure for obtaining registration of Players 1 and 2 in late-2013, and that the registrations had been issued on the basis of the exception under Article 19 (2) (a), namely that the players had moved with their parents to Italy for non-football related reasons. In the Panel's view, however, the exception did not apply and the registrations had incorrectly been approved by FIGC, as the players had come to Italy on tourist visas to play football in a tournament, accompanied by an adult connected to Spezia Calcio. The players' parents had not moved but had remained in Nigeria and it appears that a legal guardian had only been appointed under Italian law after the players' arrival in Italy and not before. Even assuming the exception in Article 19 (2) (a) applied to include a legal guardian – the Panel did not consider it necessary to make a finding in that regard – the players had not moved with a legal guardian to Italy for a non-football-related reason. The players had moved to play football. Those facts alone, in the Panel's view,

were sufficient to confirm that the exception under Article 19 (2) (a) never applied, and the registrations ought not to have been made.

3. Responsibility of an amateur club to familiarise itself with Article 19 RSTP

In the Panel's view, it may have seemed unfair to hold an amateur club in the Appellant's circumstances accountable when it appeared not to have known of Article 19 and to have relied on FIGC to seek approval from the FIFA Sub-Committee. Nonetheless, even as an amateur club, it had the responsibility to familiarise itself with Article 19 (1) since it might be sanctioned for a breach of Article 19 (1) irrespective of the national association's actions or knowledge of the regulation. While, ordinarily, reliance on regulatory guidance provided by a national association would suffice, insofar as Article 19(1) was concerned, an amateur club could not rely on the registration granted by a national association as a defence to an allegation of an Article 19 (1) breach, particularly if the circumstances showed that the registration application should never have been made. It was incumbent on an amateur club to make reasonable enquiries as to how a player had come to be in the country and consider for itself whether it should apply for a foreign minor player's registration.

For the reasons set out above, the Panel found that the Appellant was liable for a breach of Article 19 (1). There had been no application for approval made to the FIFA Sub-Committee and, accordingly, Lavagnese had also breached Article 19 (4) and Article 1 (1) of Annex 2 and Article 1 (3) of Annex 3.

In respect of the alleged breach of Article 9 (1), the Panel noted that the information submitted by Lavagnese to FIGC for the players' registrations included affidavits from the mother and father of each of the players, all dated 5 December 2013, which stated that

Player 1 and Player 2 were not registered with any football club or association in Nigeria. On that basis, it appeared that, to the best knowledge of Lavagnese, on the date of request for and the registration with FIGC, the players were not registered with any football club or association in Nigeria and therefore an ITC was not required. Therefore, based on the evidence available to it, the Panel found that Lavagnese had not breached Article 9 (1) of the FIFA RSTP.

The next issues for the Panel to consider were the CAS *de novo* power to determine sanctions and the proportionality of the sanction in the present case.

4. *De novo* power of the CAS to determine sanctions

Lavagnese contended that the sanction was grossly disproportionate when considering the sanctions imposed in comparable cases involving large professional clubs that were operated by paid employees, had registered many minor players across a lengthy period, and had intentionally violated FIFA rules regarding minors for financial advantage. Furthermore, Lavagnese's players were engaged on contracts of one-year duration only. If the transfer ban of two registration periods was confirmed, Lavagnese would lose many of its players now playing in its first team and would not be able to register new ones.

The Panel observed that in the present case, the FIFA Appeal Committee had set aside the violations in respect of Players 4 and 5, and upheld the infringements of the FIFA RSTP in respect of Players 1 and 2. On the issue of sanction, the FIFA Appeal Committee had taken into consideration that there had been no evidence on file to link Lavagnese to the Nigeria System, and that Players 1 and 2 had been "irregularly registered" with FIGC. It had also noted that registration bans had been

imposed in previous cases involving professional clubs but that the bans had not been systematically linked to the number of players involved.

The Panel also observed that except for the alleged breach of Article 9 (1), it had confirmed Lavagnese's liability for breaches of the FIFA RSTP in respect of Players 1 and 2 and had now to consider whether the sanction imposed on Lavagnese was proportionate. To that end, the Panel was mindful that, while it should not easily tamper with the sanction imposed in the first instance decision, its *de novo* power of review allowed it to find that sanctions were disproportionate and to determine more appropriate sanctions. The Panel recalled that sanctions imposed in any disciplinary proceeding were case specific and turned on the facts, and the interests at stake had to be balanced in respect of the principle of proportionality.

5. Assessment of the proportionality of the sanction

In assessing the proportionality of the sanction in the present case, the Panel came to the conclusion that an amateur club that was registering a foreign minor player had to be curious as to the circumstances in which the player had come into the country and consider for itself whether registering the player would breach Article 19 of the FIFA RSTP. Violations of Article 19 had to be taken seriously and when allegations of an Article 19 breach were proved, then the sanctions against professional and amateur clubs had to be significant to deter similar conduct in the future. Moreover, imposing a tough sanction was sending a strong signal, not only to the perpetrator, but to other potential violators of this provision. Be that as it may, the fact that the sanction were imposed upon an amateur club that evolved in a very different context than professional clubs participating in highest

division competitions as well as the fact that the cases regarding professional clubs had typically involved many more infringements and a greater number of minor players, also had to be taken into account when assessing the proportionality of the sanction.

The Panel therefore concluded that the sanction imposed on Lavagnese were grossly disproportionate and that it was appropriate to reduce the registration ban to one registration period ban. It confirmed the fine of CHF 4,000.00.

Decision

Based on all the above, the Panel partially upheld the appeal. It confirmed the FIFA Appeal Committee's decision, save for the registration ban which was reduced to one period.

CAS 2022/A/8621

Nikola Djurdjic v. Chengdu Rongcheng
Football Club LTD

30 December 2022

Football; contractual dispute; Interpretation of an arbitration clause; Request for a partial award; Admissibility of documents filed after the expiry of a time limit; Presentation of new claims at appeal level; Scope of *res judicata*; Determination of the existence of a just cause to terminate an employment contract; Calculation of compensation for breach of contract; Criteria for the granting of a declaratory relief.

Panel

Prof. Ulrich Haas (Germany), Sole Arbitrator

Facts

Mr. Nikola Djurdjic (the “Appellant” or the “Player”) is a professional Serbian football player.

Chengdu Rongcheng Football Club LTD (the “Respondent” or the “Club”) is a Chinese football club that is affiliated with the Chinese Football Federation (“CFA”) that in turn is affiliated with the Fédération Internationale de Football Association (“FIFA”).

On 18 January 2020, after the Club issued *inter alia* an offer to the Player, the latter met with the Club’s team, and passed the necessary medical tests. The Club made an offer to remunerate the Player the following sums: EUR 1 million in 2020; EUR 1.2 million in 2021; EUR 1.45 million in 2022; and the possibility of doubling these amounts if the Club got promoted to the Chinese Super League (the “CSL”). However, at such time, Mr. Patel – on behalf of the Club – also

informed the Player that an employment contract and an image rights agreement needed to be signed.

On 22 January 2020, the Club and the Player had reached a verbal agreement on the Player’s employment contract and image right agreement. However, in the late-night hours, Mr. Patel allegedly came into the Player’s hotel room to explain that the image right agreement would need to be executed with a third-party company called Supervision Management ran by Mr. Patel himself. Mr. Patel allegedly informed the Player that the deal depended on this technicality.

On 23 January 2020, the Club and the Player signed an employment contract valid as from 23 January 2020 until 22 January 2022. On the same date, Supervision Management and the Club signed the image rights agreement (the “IRA”) with the written consent of the Player. Still on the same date *i.e.*, the Player signed the following consent:

“I hereby retain Supervision Management BV (...), represented by Mr. Sunir Patel, to act as my sole and exclusive representative to represent, advice and counsel me in all negotiations and contracts with regards to commercial deals and image rights throughout the People’s Republic of China”.

After the 2020 season, the Player alleged that the Club tried to force a premature termination of both another foreign player and the Player. This was allegedly done by failing to notify both players of when they were expected to return to the Club, then making unreasonable requests on their return date – *e.g.*, due to the Chinese travel restrictions arising out of the global pandemic, the two players were in mandatory quarantine for a total of 21 days. When the players returned to training on 4 February 2021, they were told that they were to train with the second team, without an explanation.

On 12 April 2021, the Club and the Chinese club Zhejiang Professional FC (“Zhejiang FC”) signed a loan agreement by means of which the Player was temporarily transferred until 31 July 2021. The Player noted that he was cut from the Respondent’s first team without an explanation or a meeting with the Club’s coach. On 8 June 2021, right after Zhejiang FC played the last match of the first stage of the 2021 season, the Player was informed that he was on vacation. The Player was aware that his contractual obligation under the loan agreement with Zhejiang FC was until 31 July 2021, and he was required to return to the Club within 7 days after the expiry of the said loan agreement. On 26 June 2021, the Club allegedly wrote to the Player to request him to return to its premises until 1 July 2021.

On 6 July 2021, the Club signed the foreign player Mr. [F.] on the team, which made it impossible for the Player to be registered for the season. On 26 July 2021, the Player sent the Club a letter requesting the Club to confirm whether it needed his services. The Player had stressed that if the termination documents were not provided by 29 July 2021, he expected to *“show up at the [C]lub on 1 August 2021 in order to resume training and honour his contract”*.

On 13 July 2021, the Club lodged a first claim against the Player before the FIFA DRC. However, since it failed to complete the claim as requested by FIFA, the file was closed. On 20 July 2021, the Club again lodged the (same) claim against the Player before the FIFA DRC.

On 30 July 2021, the Player wrote to the Club and stressed that he had not received any answer. On 2 August 2021, the Player went to the Club’s premises accompanied by two (2) witnesses, but was informed by the Club then that the claim that the Club had lodged before the FIFA DRC in July 2021 was sufficient to establish that the Contract was terminated and the Player could seek new employment.

On 11 August 2021, the Player signed a new employment agreement with the Swedish club, Degerfors IF (“Degerfors”). On 16 August 2021, the Player lodged a counterclaim against the Club before FIFA for unlawful termination of the Contract.

On 18 October 2021, the Club informed Mr. Patel *inter alia* that *“in light of Nicola, Djurdjic has terminated the Employment Contract between he and Rongcheng FC without just cause, it is impossible for Rongcheng FC to execute the right from the image rights agreement normally”*. On 25 October 2021, Supervision Management replied *inter alia* that *“player Djurdjic and RONGCHENG FC are currently involved in a FIFA procedure in which parties are blaming each other the unilateral and wrongful termination of the Player’s employment contract. In the event FIFA would conclude that RONGCHENG FC unilaterally terminated the said employment contract, you will understand that such could also have an impact upon your current termination of the Image Right Agreement”*. In this respect, it is to be noted that on 12 January 2022, the Club won the promotion/relegation playoffs and secured the promotion to the CSL.

On 25 November 2021, the FIFA DRC issued the Appealed Decision. On 24 February 2022, the Player notified the Club as follows:

“As already ruled by FIFA, your club terminated the Contract without just cause. Clearly, this was done, inter alia, to avoid the scenario described in Article 10.2. (that the Player Contract survives such termination or expiry).

Moreover, after FIFA informed your club and the Player that the investigation-phase was closed [on 7 September 2021] and that new submissions would [not] be admitted to the case file, your club informed Supervision Management that it would not extend the IRA to 2022, which triggered the application of clause 10.2. In light of the foregoing, we (...) invite you to perform the payment of EUR 1,647,058 net (...).

Apart from this, we once again invite you to make the payment of EUR 496,525.47 plus 5% interest p.a. from 10 August 2021 (EUR 509,992.87 in total) as ordered by FIFA (...)”.

Indeed, on 30 January 2022, the Player/the Appellant filed an appeal before the CAS against the Appealed Decision and submitted his Statement of Appeal according to Article R48 of the Code of Sports-related Arbitration (2020 edition) (the “CAS Code”). On 25 February 2022, the Player informed FIFA that the Club had failed to pay the amounts due under the Appealed Decision. On the same day, FIFA replied to the Appellant *“that the present proceedings are declared suspended as long as the proceedings before the CAS are pending”*.

Reasons

The award at hand could be seen as two-fold in the sense that the Appellant’s appeal contained various procedural requests on the one hand and requests for relief as to the merits of the dispute on the other hand. These two aspects would be addressed in turn. As a preliminary note, it was recalled that the Appellant had filed the following claims under two different agreements:

S/No	Amount Claimed	Description of Claim
a.	EUR 496,525.47 Interest of 5% pa from 10 August 2021	Claim awarded in the Appealed Decision (and based on the Contract) and not appealed by the Appellant
b.	EUR 181,818.00 Interest of 5% pa from 13 January 2022	Claim based on Article 2(4) of the Contract because of Club’s promotion to the CSL on 12 January 2022 (based on the Contract)
c.	EUR 2,082,922.13 Interest of 5% pa from 13 July 2021	Claim based on Article 1(3) in conjunction with Article 2(1) of the Contract for the period from 23 January 2022 to 23 January 2023

d.	EUR 2,522,075.00 Interest of 5% pa from 13 July 2021	Claim based on the IRA for the year 2022
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1. Interpretation of an arbitration clause

The arbitration clause contained in the Contract provides for jurisdiction in favour of the CAS and it was undisputed that the CAS was competent to decide on disputes arising from the Contract, *i.e.* claims “a, b. and c”. in the above chart. What was in dispute between the Parties, however, was whether the CAS was competent to adjudicate the claim arising from the IRA, *i.e.* claim “d”. in the above chart.

Article 12 of the IRA provided as follows: *“This Agreement is governed by, and shall be construed in accordance with, the laws of the Switzerland. All disputes with respect to this Agreement, including, without limitation its validity, construction and performance, shall belong to the exclusive jurisdiction of the courts of Lausanne, Switzerland”*.

The Swiss Federal Tribunal (“SFT”) defined an arbitration agreement in the case SFT 4A_342/2019 as follows (free translation): *“An arbitration agreement is an agreement by which two or more specific or identifiable parties agree to submit one or more existing or future disputes to binding arbitration in accordance with a directly or indirectly determined legal order, to the exclusion of the original state jurisdiction (...). It is decisive that the will of the parties is expressed to have certain disputes decided by an arbitral tribunal, i.e. a non-state court”*.

The Appellant was of the view that the term *“the courts of Lausanne”* did not only cover state courts in Lausanne, but also included arbitral tribunals having their seat in Lausanne.

The Sole Arbitrator disagreed with such construction of the clause. The term “courts” typically refers to state courts. In addition, the Sole Arbitrator noted that – unlike the clause

contained in the Contract – Article 12 of the IRA did not provide for an “*express waiver to the national courts*”. Furthermore, the clause in Article 12 of the IRA did not foresee – *e.g.* – first-instance proceedings before the FIFA adjudicatory bodies. Absent any clear indication or evidence submitted by the Appellant that the parties to the IRA intended the term “*courts of Lausanne*” to cover also arbitral tribunals, the Sole Arbitrator was not prepared to construe the provision as granting a mandate to CAS to adjudicate disputes arising from the IRA. While the word “Court” appeared in the English version of CAS’ name, CAS was not a court in the proper sense under domestic law but rather an arbitral tribunal.

Even, if one were to follow Appellant’s argument that the plural “courts” refer to both state courts and arbitral tribunals, this would not have been of any help to the Appellant, since a key requirement of a valid arbitration clause in Swiss law was that it excluded all recourse to state courts (which was not the case here). Furthermore, there was simply no indication on file that the parties to the IRA wanted to give a potential claimant the option either to resort to state courts or to an arbitral tribunal.

Finally, the Sole Arbitrator was minded by the jurisprudence of the SFT that a strict threshold must be applied in determining whether the parties wanted to resort to arbitration (contrary to the interpretation of the scope of an arbitration agreement). In SFT 4A_342/2019, consid 3.2, the SFT stated as follows (free translation): “*When interpreting an arbitration agreement, its legal nature must be taken into account; in particular, it must be noted that the waiver of a state court severely restricts the avenues of appeal. According to the case law of the Federal Supreme Court, such a waiver cannot be assumed lightly, which is why a restrictive interpretation is required in case of doubt*”.

The Appellant argued that the CAS was competent to decide on the claim arising from

the IRA because the IRA was part of the Contract. The Sole Arbitrator noted that nothing in the Contract pointed in such direction. Instead, Article 6 of the Contract provided: “[The Player] and [the Club], or an affiliated appointed by Party B, will conclude a separate Agreement for the use of Party B’s image rights in China”.

Contrary to what the Appellant stated, it followed from Article 6 of the Contract that any regulation pertaining to the use of the Appellant’s image rights will not be dealt with in the Contract, but remained reserved for a “*separate*” contract. Furthermore, the Sole Arbitrator noted that the parties to the Contract and to the IRA were different.

With regard to the argument that Article 8(2) of the Contract extends to the disputes arising from the IRA, the Sole Arbitrator referred to SFT 142 III 239 (consid. 5.2.3), where the SFT held (free translation): “*According to the group of contracts theory, when several contracts are materially connected, such as the framework agreement and the various related contracts, but only one of them contains an arbitration clause, it is to be presumed, in the absence of an explicit rule to the contrary, that the parties intended to make the other contracts in the same group subject to that arbitration clause as well*”.

In the case at hand, there could have been no doubt that the Contract and the IRA were materially connected. Thus, the question arose whether in light of this interconnection between the contracts, the dispute resolution clause contained in the Contract extended to the IRA.

It follows from the above jurisprudence of the SFT, however, that such extension cannot be assumed automatically, but only absent any indications to the contrary. In the case at hand, the fact that the IRA contained a separate and different dispute resolution clause spoke against extending the scope of Article 8(2) of the Contract to disputes arising from the IRA.

In light of Article 12 of the IRA, there was no indication on file that the parties to the IRA and the Contract (that again are not identical) wanted to submit all disputes arising from these contracts to the CAS.

To conclude, the Sole Arbitrator found that – absent any arbitration agreement of the Parties in favor of the CAS – CAS was incompetent to adjudicate any claims arising from the IRA. Thus, Appellant’s claim for payment in the amount of EUR 2,522,075.00 including interest had to be rejected.

2. Request for a partial award

The Player requested the CAS to issue a partial award in relation to the unchallenged part of the Appealed Decision. The Player claimed to have a legitimate interest to obtain a partial award. Furthermore, he pointed to Article 188 of the PILA, which provides that an arbitral tribunal may render partial awards, unless the parties have agreed otherwise. The Player was aware of Article 24(5) lit. b of the FIFA RSTP, which reads as follows: *“The time limit [within which the debtor must pay the full amount due] is also paused by an appeal to the Court of Arbitration for Sport”*.

The Sole Arbitrator acknowledged that there was a *“non-appealed portion”* of the Appealed Decision and that the Respondent did not appeal the FIFA decision at all. The non-appealed portion of the Appealed Decision that had become final and binding, thus, related to: *“EUR 496,525.47 as compensation for breach of contract plus 5% interest p.a. as from 10 August 2021 until the date of effective payment”*.

The Sole Arbitrator found that CAS did not have competence to issue a partial award in respect of this non-appealed portion of the Appealed Decision. The Sole Arbitrator’s mandate was limited to the matter in dispute before him. Thus, for the Sole Arbitrator to issue a decision there had to have been

something in dispute between the Parties. This also followed from Article R27 of the CAS Code according to which the CAS’ mandate is to decide *“sports-related disputes”*. As the non-appealed part of the Appealed Decision had become final and binding and no longer was in dispute between the Parties, the Sole Arbitrator was not empowered in an appeal arbitration proceeding to render a partial award on claims that became final and binding.

Finally, the Sole Arbitrator found that the Appellant’s request was directed against the wrong respondent as the Player was in essence seeking to overturn the decision of the FIFA Disciplinary Committee to suspend the enforcement proceedings pertaining to the (final and binding portion of the) Appealed Decision. The proper recourse in such circumstances would have been to lodge an appeal against the decision of the FIFA Disciplinary Committee. To conclude, therefore, the Sole Arbitrator found that the Appellant’s request for a partial award had to be rejected.

3. Admissibility of a submission filed after the expiry of a time limit

It was uncontested that the Appellant missed the deadline to timely submit his Reply. The Appellant’s counsel explained that the reasons for such late uploading were due to medical reasons *i.e.*, huge vertigo problems. The counsel of the Appellant filed medical reports to support his submissions. The Sole Arbitrator saw the evidence submitted by the Appellant and had no reason to doubt the accuracy and veracity of the submissions of the Appellant’s counsel. Thus, in view of the extraordinary circumstances in the case at hand, the Sole Arbitrator found that the Appellant’s counsel was excused for having missed the filing deadline. The Sole Arbitrator further found that the delay was minimal (1 day) and that no prejudice was caused by such delay to the Respondent’s right to be heard.

4. Presentation of new claims at appeal level

It follows from the *de novo*-principle enshrined in Article R57 of the CAS Code that the Parties may introduce, in principle, new facts and evidence before the CAS that were not available at the previous instance. Thus, the Appellant was not barred from availing himself of the fact that the Respondent got promoted to the CSL on 12 January 2022. However, Article R57 of the CAS Code does not empower an appellant to change the matter in dispute vis-à-vis the first instance. Article R47 of the CAS Code provides that an appellant must have exhausted the internal legal remedies before lodging an appeal to the CAS. Consequently, an appellant, in principle, cannot submit a matter in dispute for adjudication in CAS appeals arbitration proceedings that was not before the previous instance.

The Sole Arbitrator concurred insofar with the findings in CAS 2012/A/2874, where the panel found that *“New claims advanced in appeal, hitherto not claimed in the previous litigation, are in principle inadmissible. However, the Panel finds that claims that could, for legitimate reasons, not have been advanced in the previous litigation, but were likely to have been claimed in the absence of such legitimate reasons at that time, do fall under the de novo competence of CAS Panels and should hence be considered as admissible”*. Considering the aforementioned, the Sole Arbitrator concluded that the scope of review of CAS was not unlimited, but – instead – was restricted to the scope of the procedure before the FIFA DRC. Thus, claims made in appeal proceedings in front of CAS could not cover matters outside the scope of the appealed decision, unless exceptions like those mentioned in CAS 2012/A/2874 were present.

However, *in casu*, the two damage heads left to be adjudicated in these CAS proceedings had already submitted before FIFA. As the

Appellant only changed the quantum in relation to the requests, the matter in dispute had not changed. The core of the claims filed before the FIFA DRC and the CAS being identical, the Sole Arbitrator was mandated to adjudicate both claims.

With regards to the Appellant’s claims referred b. and c., ~~the main~~ the issues to be resolved by the Sole Arbitrator were as to whether the Club terminated the Contract? Did the Club had ‘just cause’ to terminate the Contract? If not, what was the amount of damages that the Player was entitled to?

5. Scope of *res judicata*

It is true that the Respondent did not appeal the Appealed Decision. It is equally true, however, that the binding effect of the Appealed Decision was limited to the operative part of such decision only and not to its reasoning. This followed from the simple fact that the Parties, when submitting to the FIFA adjudicatory bodies, agreed to be bound by such decision as if the latter was rendered by state court. Consequently, the binding effect of the Appealed Decision would not go beyond the *res judicata* effects of a decision by a state court (or an arbitral award). Since the operative part of the Appealed Decision did not state that the Respondent terminate the Contract with just cause, the Sole Arbitrator was not bound by the respective reasoning of the FIFA DRC.

6. Determination of the existence of a just cause to terminate an employment contract

Despite of the above, the Sole Arbitrator found that he had no reason to depart from the findings of the Appealed Decision. The Respondent could not establish any breach of the Player on or before the date the Club first lodged a claim against him for breach of contract on 13 July 2021. The Sole Arbitrator observed that the Club had – by then – signed

a contract with Mr. [F.] with the consequence that the Player could no longer be registered with the Club. Furthermore, the Respondent stopped paying the salaries due under the Contract as of 8 July 2021. On 26 July 2021, the Player sent the Club a letter requesting the Club to state whether his services were still required by the Club and set a deadline until 29 July 2021. The Player then showed up at the Club's premises where he was told by the Club that the Contract had been terminated and that the Player could seek new employment. It was only on 11 August 2021 that the Player entered a new employment contract with the Swedish club Degefors. To conclude, the Sole Arbitrator found that it was the Respondent that unlawfully terminated the Contract without just cause, and upheld the Appealed Decision in this regard.

7. Calculation of compensation for breach of contract

In case a club terminated an employment contract without just cause, Article 17(1) of the FIFA RSTP provides the consequences in favor of a player. In the case at hand, it is undisputed that the Contract did not include a provision by means of which the parties had beforehand agreed upon an amount of compensation payable in the event of breach of contract. Consequently, the amount of compensation payable by the Club to the Player had to be assessed in application of the other parameters set out in Article 17(1) of the FIFA RSTP. The Player submitted that when calculating the residual value of the Contract, the bonus provided for under Article 4(2) of the Contract and the automatic extension of the term of the Contract according to Article 1(3) of the Contract needed to be taken into account:

It was uncontested that the Club was promoted to the CSL. As explained above, this fact (not available before the first instance) should be taken into account in this appeal

arbitration proceeding. Furthermore, the Sole Arbitrator found that the bonus in question was "a benefit" within the meaning of Article 17(1) of the FIFA RSTP. The only remaining question was whether such benefit would have been due to the Player (in case the Contract would not have been terminated by the Club). The Respondent submitted that this was not the case, since the bonus was "performance-related", the promotion was achieved after the Contract was terminated (*i.e.* on 12 January 2022) and because the promotion was completely unrelated to the Player's performance.

The Sole Arbitrator was not prepared to follow this. The Club unlawfully terminated the Contract on 13 July 2021. Without such termination the Player would have trained and played with the Respondent. Consequently, it cannot be excluded that the Player would have maybe contributed to the Respondent's promotion to the CSL had the Contract continued until the end of the season. Since the Respondent – contrary to good faith – prevented the condition from materializing by terminating the Contract without just cause, the Club should be treated as if the condition had materialized in full.

It followed from the above that the Player was entitled to the bonus in the amount of "*Euro 181,818 (...) before tax, which shall be amounting to 100,000 euros after tax withheld in China*". The Player claimed the amounts brut (*i.e.* before tax) and the Respondent did not object to this. Consequently, and – since the Player was no longer resident in China – the amount shall be awarded brut. The Appellant submitted that the bonus fell due on 12 January 2022, to which the Club did not object. Hence, the Sole Arbitrator found that the bonus fell due on 12 January 2022. Furthermore, the Sole Arbitrator found that – absent any contrary submission by the Respondent – the Appellant is entitled to interest at 5% *p.a.* on the aforementioned

amount as of 13 January 2022 until the date of effective payment.

a.

b. With regard to the question of the Player's entitlement to the extended term of the Contract, the Contract provided for an automatic extension in Article 1(3), which reads: "3. *The Term has an option year from 23/01/2022 (day/month/year) to 22/01/2023 (day/ month/year). The option year will be activated when Party B reaches one or multiple of the following targets: (...) - In case Party A is promoted to the CSL (CSL) during the duration of Party B's contract*".

The Respondent sought to argue that the Contract was only extended for the optional year if three (3) conditions are satisfied, *viz*, (i) the Player reaches a target *i.e.*, the Player should be playing for the Club, (ii) the Club is promoted to the CSL, and (iii) the promotion should happen during "the duration" of the Player's Contract. The Sole Arbitrator disagreed with this reading. Article 1 of the Contract very clearly stipulated that "*the option year will be activated when [the Player] reaches one or multiple of the following targets*", which included that the Club was promoted to the CSL during the Contract Term. Article 1 did not provide that the option was only activated in case the Player "*plays for the Club*".

The Respondent also claimed that the extension of the Contract – in addition – required that the Contract had not expired otherwise by the time the promotion was secured. The Sole Arbitrator did not concur with this view. The Club would not escape its obligation arising from the Contract by simply breaching and terminating the latter on 13 July 2021. The term "*duration of Party B's contract*" in Article 1(3) of the Contract referred to the ordinary term of the Contract or to instances in which the Club would have been entitled to terminate the Contract according to Article 7 of the Contract.

Consequently, the Sole Arbitrator found that the 2022 season (*i.e.* the period between 23/01/2022 and 22/01/2023) provided for in Article 1(3) of the Contract should be taken into account when calculating the residual value of the Contract. The Player had requested the amount brut and the Respondent did not object to this. The Sole Arbitrator, thus, found that the Player was entitled to EUR 2,181.818 brut. However, the Player had to – according to Article 17(1) (ii) of the FIFA RSTP – deduct the amounts due under the new contract with Degerfors. The Player submitted that his alternative income at Degerfors for the relevant period amounted to "SEK 1,047,096.77 gross, which equals EUR 98,895.8786" and that, therefore, the "*residual value of the Contract in the period from 23 January 2022 until 22 January 2023 amounts to EUR 2,082,922.13 gross*". These submissions remained uncontested by the Respondent. Furthermore, the Appellant claimed 5% interest *p.a.* on the amount of EUR 2,082,922.13 as of 13 July 2021, *i.e.*, the date upon which the Contract was terminated without just cause. Again, these submissions have remained uncontested by the Respondent and, therefore, the Sole Arbitrator would award the aforementioned claim for interest.

8. Criteria for the granting of a declaratory relief

The Appellant did not make a specific request for declaratory relief. However, in his submissions he *inter alia* stated "*the Player respectfully requests that the CAS expressly acknowledges that he shall ultimately receive the total amount of 3,163,195.21 (plus interest), net*". The Sole Arbitrator interpreted this request of "acknowledgement" to mean that the Player requested the CAS to find that in case taxation and other public expenses imposed on the Player in Serbia exceeded a certain amount, he would be entitled to claim further damages from the Club.

The Sole Arbitrator found that such claim was premature since it was unknown what taxes and other expenses the Appellant will pay in Serbia on the amounts awarded to him under this Award. Furthermore, the Sole Arbitrator found that the request was not sufficiently substantiated.

Finally, the Sole Arbitrator did not concur with the Appellant that the Respondent should bear taxes and other public expenses incurred by the Appellant in Serbia. No such guarantee followed from the Contract. In particular, Article 2(6) of the Contract was drafted in light of the Chinese taxes and expenses. Thus, the provision sought to guarantee certain net amounts in case the Player was submitted to taxes and public expenses in China. The provision, however, was mute in respect of taxes and other expenses that the Player should pay in other countries. Consequently, the Sole Arbitrator found that the Player's request for declaratory relief should be dismissed.

Decision

In light of the foregoing, the Sole Arbitrator *inter alia* decided that the appeal filed on 30 January 2022 by Nikola Djurdjic against the decision rendered on 11 January 2022 by the FIFA Dispute Resolution Chamber was partially upheld. Point 4 of the operative part of the decision issued on 11 January 2022 by the FIFA Dispute Resolution Chamber was amended as follows: Chengdu Rongcheng Football Club LTD had to pay to Nikola Djurdjic (a) an amount of EUR 181,818, plus interest of 5% per annum from 13 January 2022 until the payment was effectively made (b) an amount of EUR 2,082,922.13, plus interest of 5% *per annum* from 13 July 2021 until the payment was effectively made. All other and further motions or prayers for relief were dismissed.

CAS 2022/A/8737

Hellas Verona FC S.p.A v. FC Sellier and Bellot Vlasim & Udinese Calcio S.p.A & Fédération Internationale de Football Association (FIFA)

7 March 2023

Football; Contribution for solidarity; Legal interest; Standing to be sued; Claim in connection with the reimbursement of a payment of solidarity contribution opposing two clubs affiliated to the same national football association

Panel

Mr Lars Hilliger (Denmark), President

Mr Michael Nicholson (United Kingdom)

Mr Patrick Lafranchi (Switzerland)

Facts

Hellas Verona FC S.p.A. (“Hellas Verona” or the “Appellant”) is a professional Italian football club affiliated with the Federazione Italiana Giuoco Calcio (the “FIGC”), which in turn is affiliated with the Fédération Internationale de Football Association (“FIFA”).

FC Sellier and Bellot Vlasim (“Sellier” or the “First Respondent”) is a professional Czech football club affiliated with the Football Association of the Czech Republic (the “FACR”), which in turn is affiliated with FIFA.

Udinese Calcio S.p.A. (“Udinese” or the “Second Respondent”) is a professional Italian football club affiliated with the FIGC.

FIFA (the “Third Respondent”) is the world governing body of football, based in Zurich, Switzerland.

Collectively, Sellier, Udinese and FIFA are referred to as the “Respondents”. Hellas Verona, Sellier, Udinese and FIFA are referred to as the “Parties”.

On 17 September 2020, Udinese and Hellas Verona concluded a loan agreement (the “Loan Agreement”) regarding the Czech professional football player [A.] (the “Player”) from Udinese to Hellas Verona as from 17 September 2020 until 30 June 2021. The Loan Agreement included an obligation for Udinese to accept to convert the Player’s loan into a permanent transfer to Hellas Verona if certain conditions were subsequently met. On 1 July 2021, the Player became permanently registered with Hellas Verona in exchange for the payment of “*EUR 3,000,000 at the start of the season 21/22; and EUR 3,000,000 at the start of season 22/23*”.

On 31 December 2021, Sellier lodged a claim [before the Dispute Resolution Chamber (DRC) of the FIFA Football Tribunal] against Hellas Verona, requesting, *inter alia*, solidarity contribution payment in connection with the transfer of the Player from Udinese to Hellas Verona. According to the [undisputed] player passports, the Player was registered as a professional (on loan) with Sellier from 24 July 2014 to 25 January 2015 and again from 19 February 2015 to 30 June 2015, *i.e.* 318 days of the season of his 20th birthday. Sellier held that it was entitled to EUR 27,226.03.

By letter dated 31 January 2022, Hellas Verona acknowledged Sellier’s entitlement to solidarity contribution in connection with the temporary transfer and subsequent permanent transfer of the Player to Hellas Verona and provided in that respect proof of payment of solidarity contribution to Sellier in the amount of EUR 2,178.08 made on 25 March 2021.

Furthermore, Hellas Verona stated, *inter alia*, that it was entitled and obligated – according

to the FIFA Regulations on the Status and Transfer of Players (the “FIFA RSTP”) – to deduct the relevant solidarity contribution of 5% from the compensation paid to Udinese in connection with the permanent transfer of the Player to Udinese, since the Loan Agreement did not stipulate the transfer compensation to be net of solidarity contribution. However, Hellas Verona argued that the deduction of solidarity contribution was precluded due to the FIGC regulations and the national “clearing house” system, after which the entire transfer compensation had to be transferred into the FIGC “clearing house” for onward transfer to Udinese.

In application of the FIFA RSTP’s prescriptions on the solidarity contribution system applicable to domestic transfers, Hellas Verona requested, *inter alia*, that Udinese was called upon as an intervening party to the matter and should be ordered to reimburse it the relevant proportion of the (overpaid) transfer compensation that was not deducted for the solidarity contribution, in line with FIFA’s jurisprudence. Hellas Verona further held that if Udinese was not included in the proceedings, then FIGC should be involved instead because it had failed to regulate this specific matter.

The FIFA DRC initially confirmed its competence and the application of the August 2020 edition of the FIFA RSTP. The FIFA DRC further noted that the obligation to pay solidarity contribution on national transfers with an international dimension was introduced with the June 2020 edition of the FIFA RSTP, which came into force on 1 July 2020, and according to Art. 26 (2) of the applicable FIFA RSTP, solidarity contribution disputes “*shall be assessed according to the regulations that were in force when the contract at the centre of the dispute was signed, or when the disputed facts arose*”. The Loan Agreement was concluded on 17 September 2020 and indicated that the loan

would become permanent at the first Serie A point scored by Hellas Verona during the 2020/2021 season as from 2 February 2021.

In continuation, and taking into consideration Art. 1 (1) of Annexe 5 of the RSTP as well as the information contained in the above-mentioned passports, the FIFA DRC found that Sellier was entitled to 8.71% of any solidarity contribution generated by the transfer of the Player. Considering that the total solidarity contribution generated by the loan and permanent transfer of the Player from Udinese to Hellas Verona corresponded to EUR 175,000, of which Sellier was entitled to receive 8.71%, *i.e.* EUR 15,242,50, the FIFA DRC decided that the residual amount to be paid to Sellier was EUR 13,064.42 (Sellier having already acknowledged having received EUR 2,178.08).

The FIFA DRC then found that Hellas Verona had not provided evidence in support of its allegations that it had been prevented from deducting 5% solidarity contribution from the loan compensation because of the regulations and payment system in place at national level at the time of issuing the payment of the loan compensation to Udinese, and that Udinese should reimburse it for the relevant proportion of the loan compensation that was not deducted for the solidarity contribution.

The FIFA DRC recalled that a player’s new club is ordered to remit the relevant proportion(s) of the 5% solidarity contribution to the club(s) involved in the player’s training in strict application of Art. 1 and 2 of Annexe 5 of the FIFA RSTP, even if the new club and the former club agreed otherwise in the relevant transfer or loan agreement. As such, the FIFA DRC noted that a potential reimbursement by Udinese could not be discussed since the Loan Agreement did not contain a clause according to which Hellas Verona and Udinese agreed to shift the

distribution of the relevant solidarity contribution to Udinese. Finally, the DRC rejected Hellas Verona's request to involve the FIGC.

On 11 February 2022, the FIFA DRC rendered the Appealed Decision and *inter alia* decided that Sellier's claim was partially accepted, that Hellas Verona had to pay to Sellier EUR 13,064.42 as solidarity contribution and that any further claim of Sellier was rejected. On 18 March 2022, the Appellant filed its Statement of Appeal in accordance with the Code of Sports-related Arbitration, 2021 edition (the "CAS Code") and on 23 March 2022, the Appellant paid the then outstanding solidarity contribution in the amount of EUR 13,064.42 to the First Respondent.

Reasons

The main dispute concerned Hellas Verona's request that Udinese Calcio S.p.A be involved in the proceedings so that the latter club shall be ordered to reimburse to Hellas Verona any and all amounts paid or due to be paid by Hellas Verona to Sellier as solidarity contribution in connection with the transfer of the Player from Udinese to Hellas Verona.

In support of its requests for relief, the Appellant submitted *inter alia* that at the time of the transfer of the Player, the national "clearing house" system in place for the payment of transfer fees between Italian clubs for a domestic transfer did not allow any deduction for solidarity contribution, which is why the Appellant had to pay the entire compensation to Udinese. The Appellant then held that Udinese should be confirmed as a party to these proceedings, even if the club was not a party before the FIFA DRC, since, according to the applicable FIFA regulations, it is Udinese, as the Player's former club, that should bear the relevant financial burden of the solidarity contribution to Sellier. The inclusion

of Udinese in these proceedings falls within the scope of the present appeal, given that one of the Appellant's requests for relief during the FIFA proceedings was for FIFA to call Udinese as a party to the matter. However, FIFA ignored this request in its legal considerations. It must be noted that in the Loan Agreement, the Appellant and Udinese did not agree that the relevant transfer compensation was to be net of solidarity contribution. The fact that the Appellant paid 100% of the transfer compensation to Udinese instead of 95% is sufficient to prove that Udinese is obliged to reimburse the overpaid transfer compensation to the Appellant. This is in line with FIFA jurisprudence in so-called "100 minus 5" cases.

In support of its requests for relief, the First Respondent *inter alia* submitted that as Hellas Verona has already fulfilled its payment obligation, it has no legal and legitimate interest in the appeal, which is therefore absolutely inadmissible. Furthermore, and in any case, the appeal did not contain any prayers for relief against Sellier, and Hellas Verona confirmed its entitlement as decided by the DRC.

In support of its requests for relief, the Second Respondent submitted, *inter alia* that it was never a party to the FIFA proceedings, which a) were not directed against it; b) did not deal with its conduct; and c) was only meant to establish the obligation of Hellas Verona as the new club of the Player to pay the solidarity contribution to Sellier as per the FIFA RSTP. The Second Respondent did not have standing to be sued and the appeal should be dismissed. The Second Respondent added that in any case, the precondition for any appeal procedure is, *inter alia*, a legitimate interest of the party appealing the challenged decision. As Hellas Verona had fulfilled its payment obligation towards Sellier, Hellas Verona has no legitimate interest in contesting the Appealed Decision. Furthermore, FIFA

correctly established its lack of competence to consider the alleged dispute between Hellas Verona and the Second Respondent. First of all, FIFA is competent to hear the disputes relating to the solidarity contribution between clubs belonging to the same association provided that the player at the basis of the dispute is transferred between clubs belonging to different associations, which condition is not fulfilled in the present case. With regard to the question of who should ultimately bear the financial burden of the solidarity contribution in question, the Second Respondent *inter alia* asserted that the Italian clearing house is not acting in contradiction to the applicable FIFA regulations, but it is making use of its discretionary power to decide that the transfer compensation between two Italian clubs is always net of solidarity contribution. Pursuant to Art. 2 (1) of Annexe 5 of the FIFA RSTP, “the new club shall pay the solidarity contribution to the training clubs”, and Hellas Verona, as the new club, does not have the possibility to shift the financial burden to the Second Respondent. This is not provided for in the applicable regulations of the FIGC. This follows, *inter alia*, from Art. 2 (2) of the FIFA RSTP which reads *inter alia*, “[t]he transfer of players between clubs belonging to the same association is governed by specific regulations issued by the association concerned in accordance with article 1 paragraph 3 below, which must be approved by FIFA”.

In support of its requests for relief, FIFA submitted, *inter alia*, that as far it is concerned, the case revolved around the issue as to whether the DRC had jurisdiction to deal with Hellas Verona’s request that Udinese be ordered to bear the financial burden of paying the solidarity contribution awarded to Sellier, through the reimbursement of the said contribution allegedly “overpaid” by Hellas Verona. The Appealed Decision correctly addressed that a) that Hellas Verona had failed to provide evidence that it had been prevented from deducting the 5% solidarity contribution

because of the national regulations, and b) that the Loan Agreement did not contain any clause providing for a shift in the distribution of the relevant solidarity contribution. In any case, since the request for reimbursement only concerned two Italian clubs, consequently lacking the necessary international dimension for FIFA to hear the dispute, the DRC would not have been competent to hear and, ultimately, decide on Hellas Verona’s reimbursement request. FIFA did not deny that a former club can be obliged to refund the relevant proportion of the solidarity contribution when there is a legal basis pursuant to the FIFA regulations. However, it must be recalled that this approach is only to be followed in disputes where the international element is present.

1. Legal interest

The First and Second Respondents submitted that since Hellas Verona complied with the Appealed Decision, the said club has no legitimate interest in contesting the Appealed Decision.

Art. 59 par. 1 of the Swiss Civil Procedure Code (SPC) reads that “The court shall consider an action (...) provided the procedural requirements are satisfied” and Art. 59 par. 2(a) of the SPC sets out the procedural requirement that “the plaintiff (...) has a legitimate interest”. Additionally, Article 60 of the SPC provides that the court must examine *ex officio* whether the procedural requirements of Article 59 of the SPC are satisfied or not and the Panel noted that the criterion of legal interest is matter of admissibility.

Legal interest as an admissibility condition has also been confirmed by CAS jurisprudence, such as in CAS 2016/A/4602, and the Panel noted that such a legitimate interest must already exist at the time the appeal is filed and must still exist when the judgment is issued, as

confirmed by the Swiss Federal Tribunal (cf. SFT 146 III 416, consid. 7.4; SFT 111 Ib 182 consid. 2a; SFT 109 II 165 consid. 2). If a legitimate interest that initially existed ceases to exist during the course of the process, the application or appeal becomes groundless and is to be dismissed as without relevance.

However, the Panel understood that the appeal was (at least in essence) directed against the DRC's findings on whether or not to include Udinese in the proceedings before it. It is undisputed that the Appellant did in fact request FIFA to include Udinese in the proceedings as an intervening party and to order Udinese to reimburse the Appellant for the relevant proportion of the transfer compensation that was not deducted for the solidarity contribution. However, such a request was not upheld by the FIFA DRC since, *inter alia*, as explained by FIFA during these proceedings, the dispute between the Appellant and the Second Respondent fell outside the competence of the FIFA DRC. As such, the Panel found that the primary scope of the appeal was in fact the alleged jurisdiction of the FIFA DRC. Consequently, the Panel found that the Appellant has a legitimate interest with regard to the question concerning the DRC's competence of the FIFA DRC. It followed that the appeal was admissible.

2. Standing to be sued

The Panel initially noted that the question of standing to be sued (or to sue) is an issue of substantive law (cf. CAS 2020/A/6694; CAS 2016/A/4602; CAS 2013/A/3047; CAS 2008/A/1639). The Panel further referred to Art. 75 of the Swiss Civil Code (the "SCC"), which reads that "*Any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such regulation in court within one month of learning thereof*".

Although the wording of Art. 75 of the SCC is ambiguous with regard to challenges against decisions made by an association other than resolutions of a general assembly, it is uncontested that the said provision applies *mutatis mutandis* to decisions of other organs of the association. The wording of Art. 75 of the SCC implies that an appeal, in principle, must be directed against the association that rendered the challenged decision (cf. BGE 136 III 345, no. E.2.2.2; RIEMER, BK-ZGB, Art. 75, no. 60; SCHERRER/BRÄGGER, BSK-ZGB, Art. 75, no. 21).

However, CAS jurisprudence allows for an exception to the above rule, in particular where the appealed decision is not of a disciplinary nature, *i.e.* where the sports association merely acts as an adjudicatory body in relation to a dispute between its members. Thus, when deciding who is the proper party to defend an appealed decision, CAS panels proceed by a balancing of the interests involved and by taking into account the role assumed by the association in the specific circumstances. Consequently, one must ask whether a party "*stands to be sufficiently affected by the matter at hand in order to qualify as a proper respondent within the meaning of the law*" (cf. CAS 2017/A/5227, para. 35). Similarly, the CAS panel in 2015/A/3910 at para. 138 held as follows: "[T]he Panel holds that in the absence of a clear statutory provision regulating the question of standing to be sued, the question must be resolved on basis of a weighing of the interests of the persons affected by said decision. The question, thus, is who (...) is best suited to represent and defend the will expressed by the organ of the association".

In the present case, the Panel understood that the appeal was (at least in essence) directed against the finding of the FIFA DRC on whether or not to include Udinese in the proceedings before the DRC.

In this regard, as the Appellant did already fulfil its payment obligations towards Sellier and as the appeal did not contain any prayers for relief against Sellier, the Panel found that Sellier was not affected by the matter at hand in such a way that it qualified it as a proper respondent. The Panel further found that the circumstance that the First Respondent was probably entitled to receive a solidarity contribution originating from the second instalment of the transfer compensation, as set out in the Loan Agreement, was not sufficient to qualify it as a proper respondent in the present dispute. As such, the Panel found that Sellier has no standing to be sued.

With regard to the Udinese, the Panel noted that the said club was never a party to the FIFA proceedings, which did not deal with the conduct of the club and which procedure was only initiated by Sellier in order to establish the obligation of the Appellant as the Player's new club to pay the solidarity contribution to Sellier in accordance with the provisions of the FIFA RSTP.

And even though the Appellant's requests for relief during these appeal proceedings were to some extent directed against Udinese, the relevance of such requests was, in any case, depending on whether the Panel ultimately finds that the DRC was wrong in not including the Second Respondent in the procedure before it, which, according to the Appellant, was the real scope of these appeal proceedings.

Furthermore, and even if the Panel was to uphold the Appellant's appeal in this regard, the Panel noted that it would probably have found that the prudent thing to do in such case would then be to refer the dispute back to the DRC in order to give Udinese the opportunity to state its case.

Based on the above, the Panel found that Udinese was not directly affected by the matter

at hand in such a way that it qualified the club to act as a proper respondent in these appeal proceedings. Furthermore, the Panel found once more that the circumstance that a similar issue regarding the question of distribution and reimbursement of the solidarity contribution originating from the second instalment of the transfer compensation as set out in the Loan Agreement might arise was not sufficient to change this. As such, the Panel found that the Udinese has no standing to be sued.

3. Claim in connection with the reimbursement of a payment of solidarity contribution opposing two clubs affiliated to the same national football association

Initially, the Panel acknowledged the wordings of Art. 20, Art. 22 lit. d), e) f) and Annexe 5(1) (1) of the FIFA RSTP.

The Panel found that the dispute between the Appellant and the Second Respondent, both before the DRC and before the CAS, was essentially a dispute regarding a claim for reimbursement of the solidarity contribution, which the Appellant never disputed Sellier's was entitled to.

The Panel noted that since both Hellas Verona and Udinese are Italian clubs affiliated with the FIGC, the said dispute was only of a national dimension. The fact that the alleged claim for reimbursement originated from a claim for solidarity contribution from a Czech football club against an Italian club regarding a Czech player's transfer did not give the present dispute between two Italian clubs a sufficient international dimension with regard to the possible jurisdiction of FIFA and the application of FIFA rules applicable to clubs belonging to different associations. As such, and pursuant to Art. 22 (f), and even pursuant to Art. 22 (d) and (e), if the dispute was to be considered a dispute relating to solidarity contribution, the Panel found that FIFA was in

fact not competent to hear and decide on the dispute between the Appellant and the Second Respondent.

The Panel noted that the Appellant submitted that the FIFA DRC did not base its dismissal of the Appellant's request to have Udinese included in the FIFA proceedings on the (alleged) incompetence, but only referred to a) the Appellant not having "*provide[d] evidence in support of its allegations that it had been prevented from deducting the 5% solidarity contribution*", which was in any case irrelevant, and b) that the Loan Agreement did "*not contain a clause according to which the [Appellant] and [Second Respondent] agreed to shift the distribution of the relevant solidarity contribution from the former to the latter*".

In this regard, the Panel noted that FIFA confirmed that in international disputes in which the parties to a transfer agreement have truly agreed to shift the financial obligation of the solidarity contribution, and where it is requested to do so, the DRC can render a decision in which it would order the former club to reimburse the solidarity compensation that it might have received from the Player's new club. As it was undisputed that the Loan Agreement did not include any provision according to which the parties to the Loan Agreement agreed to shift the obligation to distribute the relevant solidarity contribution to Sellier, and since the Panel did not find any applicable FIFA provision that would in any case have allowed to implead the Second Respondent by a process analogous to a third party notice, the Panel appreciated why the DRC apparently based its dismissal of the Appellant's request, *inter alia*, on the lack of contractual basis for the reimbursement.

As the FIFA DRC, already because of such lack of contractual basis, was not in a position to include the Second Respondent, the Panel appreciated why the FIFA DRC decided that it did not have to analyse whether the requisition

of an international dimension in order to give FIFA competence to hear and decide the dispute was in fact fulfilled.

In addition to the above, the Appellant submitted that in case FIFA did not have jurisdiction to hear the present dispute between two clubs affiliated with the same national association pursuant to the FIFA RSTP, this constituted a *lacuna* in the applicable rules, which had to be filled by FIFA and/or the CAS. As domestic transfers with an international dimension were included in the system of FIFA solidarity contribution, FIFA should also be competent to hear and decide on disputes in relation hereto, not least in order to safeguard the principle of procedural economy.

FIFA submitted that there was no *lacuna* in the rules as the amended applicable rules were very clear. It was also important for FIFA to stress that, as confirmed by the CAS, when a dispute is considered to be of a national/internal nature, one of the consequences was that the rules and regulations of the association concerned had to be applied to the matter and the deciding bodies in accordance with the relevant provisions were to rule on the issue. If FIFA's deciding body would be dealing with such an internal matter, the internal competence of a FIFA member association would be violated. Moreover, FIFA was not "*the only remedy*" for clubs in such disputes without a sufficient international dimension.

The Panel was not convinced that there existed a *lacuna* in the applicable rules regarding FIFA's competence to hear disputes between two national clubs regarding the possible reimbursement of solidarity contributions. In this regard, the Panel agreed with the Sole Arbitrator in CAS 2016/A/4441 that one of the consequences of the dispute being of a national/internal dimension was that "*the rules and regulations of the association concerned must be*

applied to the matter and the deciding bodies in accordance with the relevant provisions are to rule on the issue. If FIFA's deciding body would deal with such an internal matter, the internal competence of a FIFA member association would be violated". If FIFA was to be competent to hear and decide on such disputes between clubs affiliated with the same national association, in addition to violating the internal competence of the member association, it would also have as a consequence that the national provisions regarding solidarity contribution might not be applied, which, at least in the Panel's view, was not the intention. Based on the above, the Panel found that the FIFA DRC was correct in dismissing the Appellant's request for inclusion of the Second Respondent in the first instance procedure before FIFA. As such, the Panel found no grounds to deal with the alleged unjust enrichment of the Second Respondent or on the issue of whether the FIGC provisions regarding solidarity contribution were in conflict with the FIFA regulations on the same issue.

Decision

The appeal filed on 18 March 2022 by Hellas Verona FC S.p.A. against the decision rendered by the DRC of the FIFA Football Tribunal on 11 February 2022 was dismissed and such decision was confirmed. All other and further motions or prayers for relief were dismissed.

CAS 2022/A/9033

**International Tennis Federation (ITF) v.
Mikael Ymer**

17 July 2023

**Tennis; Doping (whereabouts failure);
DCO's duty to locate athletes; Athlete's
obligation to comply with anti-doping
regulations in connection with
whereabouts requirements; Concept of
negligence under the International
Standard for Results Management;
Sanction of ineligibility; Disqualification of
results**

Panel

Mr Romano Subiotto KC (United Kingdom),
President

Mr Jeffrey Benz (USA)

Mr Nicholas Stewart KC (United Kingdom)

Facts

The International Tennis Federation (the "Appellant" or "ITF") is the international governing body for the sport of tennis, recognized as such by the International Olympic Committee, and is a signatory to the World Anti-Doping Code (the "WADA Code").

Mikael Ymer is a 24-year-old professional tennis player from Skara, Sweden, whose highest individual ATP ranking was No. 67 (as of 19 September 2022) (the "Respondent" or the "Player"). He is also Sweden's top male tennis player.

Article 5.4.2.2 of the Tennis Anti-Doping Programme ("TADP") (which reflects Article 4.8 of the International Standard for Testing and Investigations ("ISTI")) provides for an International Registered Testing Pool ("IRTP") of tennis players, who have a

personal responsibility to advise the ITF of their whereabouts on a quarterly basis, to maintain that information accurate and complete at all times, and to make themselves available for testing at such whereabouts.

Players who fail to meet these requirements are liable to have a Whereabouts Failure recorded against them. The International Standard for Results Management ("ISRM") define a Whereabouts Failure as a failure to file or maintain accurate and complete information on an athlete's whereabouts enabling the athlete to be located for testing at the times and locations indicated (a "Filing Failure") or a failure by the athlete to be available for testing at the location and time indicated in the 60-minute time slot identified in the Whereabouts Filing for the day in question (a "Missed Test").

Article 2.4 TADP provides that a player in the IRTP commits an Anti-Doping Rule Violation ("ADRV") if he/she accrues any combination of Three Missed Tests and/or Filing Failures within a 12-month period.

On 5 December 2019, the ITF notified the Player that he had been selected for inclusion in its IRTP with effect from 1 January 2020.

The Player had three Whereabouts Failures (22 April 2021, 10 August 2021, 7 November 2021) recorded against him in the 12 months prior to 7 November 2021. At first instance, the Player accepted his first two Whereabouts Failures, but contested his third Whereabouts Failure, arguing that (a) the Doping Control Officer ("DCO") who attempted to locate the Player did not make a reasonable attempt to do so, and (b) no negligence on the part of the Player contributed to the Whereabouts Failure.

More particularly concerning the third Whereabouts Failure, the Player was scheduled to play at the 2021 Open International de Tennis de Roanne from 8-14 November (the

“Event” or the “Roanne Tournament”). On or around 5 November 2021, International Doping Tests & Management (“IDTM”) had instructed one of its DCOs to collect urine and blood samples Out-of-Competition in the period between 5 November 2021 and 8 November 2021 from the Player and another player. The DCO went online to the Anti-Doping Administration and Management System (“ADAMS”) database to see the declared location of the Player in that period. He noted that the Player had said that, between 6 am and 7 am on 7 November 2021, he would be at the ‘Hôtel Ibis Styles Roanne Centre Gare 46 Cr de la Republique Roanne FRANCE 42300’. The DCO intended to test him in that 60-minute time slot on that day.

At 5:50 am on 7 November 2021, the DCO checked the Player’s ADAMS account to see if he had changed or updated his whereabouts information at all, but he had not.

The DCO arrived at ‘Hôtel Ibis Styles Roanne Centre Gare 46 Cr de la Republique Roanne FRANCE 42300’ at 5:55 am local time on 7 November 2021. The DCO introduced himself to the hotel receptionist and explained to him the ITF hotel testing procedure and showed his credentials. The hotel receptionist checked the guest list and informed the DCO that the Player was not on the list, and that nobody with that name had checked in or was expected to check in on 7 November. The DCO stayed in the reception area until the end of the hour slot and Mr Ymer did not show up. In the last five minutes of the hour, the DCO called each of the two telephone numbers listed in the Player’s whereabouts filing: the first call rang once before the DCO heard a message in Swedish and the call was transferred to an automatic inbox, and the second call rang four times before the DCO heard a message in English and the call was transferred to an automatic inbox. The DCO’s calls were not returned. The DCO filled in an

Unsuccessful Attempt Report and a Mission Summary and sent them to IDTM.

By letter dated 12 November 2021, the ITF formally notified the Player of this apparent Missed Test.

On 26 November 2021, the Player’s legal representative responded to that letter, asserting that a Missed Test should not be recorded against the Player because he was moved to a different hotel by the tournament organiser, but the Player’s agent (who updated the Player’s whereabouts on his behalf) did not receive news of that change and therefore did not make the necessary update.

By letter dated 3 December 2021, the ITF informed the Player that it had considered his response and was recording a Missed Test and therefore a third Whereabouts Failure against him.

Pursuant to Article 7.7.7 TADP, the ITF referred the three Whereabouts Failures within a 12-month period to the independent Review Board, which reviewed the file and determined that the Player had a case to answer for breach of Article 2.4 TADP.

On 27 January 2022, the ITF sent a Charge Letter to the Player, formally charging him in accordance with Article 7.13 TADP with commission of an ADRV under Article 2.4 TADP because he appeared to have committed the three Whereabouts Failures within a 12-month period. The ITF enclosed copies of the relevant documentation and correspondence concerning the Whereabouts Failures, and gave the Player twenty days (i.e. until 16 February 2022) to respond to the charge and to request a hearing before the Independent Tribunal established in accordance with the Tennis Anti-doping Programme.

On 17 February 2022, Mr Jacobs responded to the Charge Letter on the Player's behalf, using the TADP portal. The Player denied the violation.

On 23 June 2022, the Independent Tribunal in disciplinary proceedings brought by the ITF against the Player decided (the "Decision") that the Player had not violated Article 2.4 of the TADP. The Independent Tribunal found, in connection with the third Whereabouts Failure, that the DCO did all that was required of him to locate the Player, but that no negligence could be attributed to the Player or his agent, finding that:

"On a general point of view, it has been established that no reproach can be made against the Player for the delegation of his whereabouts duties. More specifically, as the Player did not know the name of the hotel he was supposed to stay in on the 7 November 2021, he had no compelling reason to inform his agent and ask him to amend his whereabouts after he received the information that he was at the wrong hotel. The Player also confirmed that his agent usually tells him that he is staying at official hotels, rather than specifically mentioning the name of the hotels".

The ITF appealed the Decision's finding of no negligence in these proceedings before the CAS.

A hearing took place on 25 April 2023 in person at the CAS Court Office in Lausanne, Switzerland.

Reasons

According to the ITF, the Player should be found to have committed an Anti-Doping Rule Violation in breach of 2021 TADP Article 2.4 as a result of three Whereabouts Failures on 22 April 2021, 10 August 2021 and 7 November 2021 and should be sanctioned with a two-year period of Ineligibility in accordance with 2021 TADP Article 10.3.2, commencing on the date

the CAS award was issued (TADP Article 10.13).

The Player contested the third alleged Whereabouts Failure. He recalled that, under Annex B.2.4 ISRM, a "Missed Test" finding requires the ITF to prove (i) that the DCO did what was reasonable in the circumstances to locate the Player, and (ii) that the Player was negligent. The Player submitted that the DCO who attempted to test him did not do what was reasonable under the circumstances to locate the athlete on 7 November 2021, when the Player was at the only other designated athlete hotel, the Kyriad Hotel, and not the Hotel Ibis. The Player concluded that, consistent with Annex B.2.4 ISRM, the 7 November 2021 Whereabouts Failure should be set aside, because he was not negligent and because the DCO did not do what was reasonable under the circumstances to locate him.

1. DCO's duty to locate athletes

Concerning the issue of whether the DCO took reasonable steps in the circumstances to locate the Player, this Panel endorsed the findings of the Independent Tribunal, namely that the player's information for his Whereabouts Filing indicated that he would be located at the Hotel Ibis on 7 November 2021 between 06:00 am and 07:00 am, that the DCO did all that was required of him to locate the Player at the Hotel Ibis, and that it was not the duty of the DCO to try to find the athlete in another location than the athlete's specified location.

This Panel concluded, in line with the findings of the Independent Tribunal, that the requirements of Article B.2.4(c) ISRM were satisfied.

2. Athlete's obligation to comply with anti-doping regulations in connection with whereabouts requirements

Concerning the issue on appeal, namely whether the Player was negligent in not updating his whereabouts in order to enable the DCO to carry out the intended test, the Panel recalled that the obligation on athletes to comply with the antidoping regulations was personal, as reflected in the express terms of Article 1.3.1.1 TADP, and that it has consistently been held that the whereabouts regime represented a powerful and effective means of deterring and detecting doping in sport, that it was crucial to know where athletes were located at any particular time, and that the regime was necessarily strict.

The Panel noted that an athlete in the International Registered Testing Pool might seek third party assistance to comply with the onerous whereabouts requirements. In doing so, CAS held (CAS 2016/A/4643) that an athlete shall delegate the relevant tasks to a qualified person, instruct the delegate properly or set clear procedures he/she shall follow in carrying out the delegated tasks, and exercise supervision and control over the delegate in the carrying out of the tasks.

The Panel made it clear that delegation to assist in complying with the whereabouts requirements was not tantamount to delegating the athlete's responsibility to comply with those requirements. The athlete remained personally responsible, and could not delegate the requirement to comply, just as, more generally, reliance on a doctor or on the athlete's entourage could not do away with the athlete's obligation to comply with the antidoping regulations. The distinction was one that is well known in French law, between an "*obligation de moyen*" and an "*obligation de résultat*": where an athlete might choose the means, he/she was required personally to achieve the result, namely, in this case, compliance with the applicable antidoping regulations.

3. Concept of negligence under the International Standard for Results Management

The Panel further noted that the concept of negligence as employed in Article 3.6 ISRM implied unintentional carelessness, which, in turn, required one to define the standard by which to judge whether an athlete had been careless. The Panel noted that only the highest priority athletes were included in the IRTP, and found it reasonable to expect these athletes to be on high alert with respect to complying with the whereabouts requirements, and particularly so if two whereabouts failures had already occurred in any period of less than 12 months.

In the circumstances of this case, the Panel found it reasonable to expect that a tennis player in the IRTP would not have delegated the filings task entirely to a third party, but that such a player would have verified the whereabouts filing made for that day, and would thus have realized that his stay at the Hotel Kyriad, rather than the Hotel Ibis, did not correspond with his whereabouts filing for that day, enabling him to correct the filing, or, at the very least, that such a player would have made this verification on being told that he was not staying at the hotel to which he had initially travelled.

The Panel wished to stress that whether the person to whom the whereabouts filings tasks were delegated was negligent or there was a failure to inform that person of a change was irrelevant in the assessment made. The key issue was that the Player, like any other international-level athlete, could not be discharged of his whereabouts duties by delegating away his obligation to comply with the applicable regulations; but this was what he effectively did by relying without taking the steps one would expect a hypothetical tennis player to take at the very least. As a result, the

Panel was not satisfied on a balance of probability that the Player's behaviour was not negligent and did not cause or contribute to his failure to be available for testing.

4. Sanction of ineligibility

Concerning the question of ineligibility, the Panel recalled that the whereabouts regime is a cornerstone of the fight against doping, and that its rules must be applied strictly. According to Article 10.3.2 TADP, the athlete will be sanctioned with a maximum two-year ban after the third violation of this rule. This ban can be reduced to one year depending on the athlete's fault.

The standard by which respect of the rules should be assessed is the hypothetical experienced tennis player, a threshold that can reasonably be expected to be met by all athletes who are included in the IRTP, who are acutely aware of the risk of ineligibility at the third whereabouts violation within a 12-month period. The Panel recognized that compliance with the regime was onerous, and that athletes could therefore seek assistance in ensuring compliance. However, whereas an athlete might choose the means, he/she was required personally to achieve the result, namely, in this case, compliance with the applicable antidoping regulations.

The Panel found that the Player failed in ensuring his compliance with the anti-doping regulations by failing to verify his whereabouts filing for 7 November 2021, and by assuming that any discrepancy between his actual and declared whereabouts would be corrected by his agent or by the tennis authorities. The Panel found that his degree of fault was high, although the third Whereabouts Failure could be described as the result of culpable negligence. In this respect, the Panel took into account the recent CAS case law imposing sanctions ranging from 18 months (CAS

2021/A/8391; CAS 2020/A/7528) to 24 months (CAS 2020/A/7526 & 7559; CAS 2020/A/6763) depending on the degree of fault of the athlete. As a result, the majority of the Panel found that the Player should be declared ineligible for 18 months from the date of adoption of this award.

5. Disqualification of results

Concerning the question of disqualification, which would apply from 7 November 2021 until the date of adoption of this award, the Panel had not seen any evidence suggesting that the Player's results had been influenced by any doping. Evidence of the tests prior to and following 7 November 2021 adduced by the Respondent were all negative. Furthermore, the Player was exonerated by the Independent Tribunal's decision of 23 June 2022 until the date of this Award and there was no basis for him to have not participated in competitions from that time onward. Given the facts and circumstances here, the Panel was of the view that effectively extending his sanction another seven months by disqualifying these results would simply be unfair.

For all these reasons, the Panel ruled that the Player should not suffer any disqualification of his results prior to this Award.

Decision

The Appeal filed by the International Tennis Federation against Mr Mikael Ymer with respect to the decision of the Independent Tribunal of 23 June 2023 was partially upheld. The decision rendered by the Independent Tribunal on 23 June 2023 was set aside.

Mr Mikael Ymer was found to have committed an anti-doping violation under Article 2.4 of the Tennis Anti-Doping Programme and sanctioned with a period of ineligibility of 18

(eighteen) months, starting from the date of notification of this Award.

No results occurring between the time of the third missed test on 7 November 2021 and the date of this award was disqualified.

CAS 2022/A/9113

Nairo Alexander Quintana Rojas v. Union Cycliste Internationale (UCI)

5 June 2023 (operative part of 3 November 2022)

Cycling; Doping (Tramadol); Nature and value of the UCI Medical Rules; Validity of sanctions under the Tramadol Control; Absence of an obligation of B-sample in Tramadol Control and use of a laboratory not accredited by WADA; Right to be heard and Tramadol Control

Panel

Mr James Drake KC (United Kingdom),
President;

Mr Juan Pablo Arriagada (Chile)

Mr Olivier Carrard (Switzerland)

Facts

Mr Nairo Alexander Quintana Rojas (“the Appellant” or the “Rider”) is a cyclist from Colombia who competes in the sport of cycling in the discipline of road cycling. Among other notable events, the Rider has competed in the Tour de France, the Giro d’Italia (which he won in 2014) and the Vuelta a Espana (which he won in 2016).

Union Cycliste Internationale (the “Respondent” or the “UCI”) is the international federation for cycling and the world governing body for the sport of cycling recognized by the International Olympic Committee. It has its headquarters in Aigle, Switzerland.

Collectively, the parties will be referred to as the Parties.

Tramadol is a synthetic opioid analgesic prescribed for the treatment of moderate to

moderately severe pain. It is a centrally acting analgesic which works by binding to opioid receptors in the brain to block the perception of pain and also gives rise to a euphoric effect. It can have side effects, including dizziness, drowsiness, and nausea. It can also be habit-forming. It is a prodrug with two active metabolites O-desmethyltramadol (M1) and N-desmethyltramadol (M2). It is the M1 metabolite that is the principal contributor to the opioid effect of the drug.

UCI issued its “Cycling Regulations” (the “UCI Cycling Regulations”) which governed the UCI and the sport of cycling. Part XIII of the UCI Cycling Regulations was introduced as of 1 March 2019 and was headed “Medical Rules” (the “UCI Medical Rules”). Chapter III of the UCI Medical Rules was concerned with “Protection and Promotion of the Rider’s Health”, and Section 6 of Chapter III was titled “In-Competition Prohibition of Tramadol” (which was referred to by the Parties as the “Tramadol Control”) which provided, amongst other things, for a ban on the use of tramadol in-competition.

The 2022 Tour de France was held from 1 through 24 July 2022. The Rider participated in the event, finishing in sixth place overall. Immediately following the 7th and 11th stages of the event, 8 and 13 July 2022 respectively, the Rider underwent control testing pursuant to the UCI Medical Rules by which he provided dried blood samples (the “Samples”). The sample taken on 8 July was No. 101177 (“Sample 101177”) and that taken on 13 July 2022 was No.101050 (“Sample 101050”). The testing was carried out for UCI by the International Testing Agency (the “ITA”)

The Samples were sent by the ITA to the Laboratory of Clinical Pharmacology and Toxicology in Geneva (“LCPT”) for analysis. The analysis indicated the presence of tramadol for both Samples. LCPT sent the

Samples for review to the Centre of Research and Expertise in anti-Doping Sciences at the University of Lausanne (“REDS”).

By letter dated 17 August 2022, the UCI Medical Director, notified the Rider that he had *“been informed that the dried blood samples you provided on 8 and 13 July 2022 during the Tour de France 2022 revealed the presence of tramadol and its two metabolites”*. Further, the Rider was *“hereby formally notified that this constitutes an infringement of the UCI Medical Rules which prohibit tramadol in competition and which results in the disqualification of all results obtained during the Tour de France 2022”*.

In the same letter, the UCI Medical Director issued the following decision (the “Appealed Decision”): *“[...]According to Article 13.3.068 let. a (in fine) of the UCI Medical Rules, the mere presence of tramadol and its metabolites is sufficient to establish an infringement of the in-competition prohibition of tramadol. It is therefore not necessary to establish intent, fault, or negligence of the rider. In other words, a breach of the in competition Prohibition of tramadol occurs whenever tramadol is found in bodily specimen, irrespective of the reasons thereof, including whether or not a rider intentionally or unintentionally used tramadol” [...]*

“In view of the above, all of the results you obtained at the Tour de France 2022 are disqualified, including forfeiture of any medals, points and prizes, pursuant to Article 13.3.069, ch.1, let a) of the UCI Medical Rules. Moreover, a fine of 5000 CHF is imposed in accordance with Article 13.3.069, ch.1, let b) of the UCI Medical Rules.

Finally, you shall reimburse the costs of both tramadol controls pursuant to Article 13.3.069, ch.1, let c) of the UCI Medical Rules A”.

On 26 August 2022, pursuant to Article R48 of the Code of Sports-related Arbitration (the “Code”), the Rider filed a Statement of Appeal at the Court of Arbitration for Sport (the “CAS”) against the Appealed Decision.

Reasons

The main dispute in these proceedings concerned the category of the Appellant and the subsequent consequences regarding training compensation entitlements for the Respondent.

The Rider held that the UCI Medical Rules were only a set of suggestion and guidelines and could not serve as basis for a sanction against him. He held that he could only be sanctioned in application of the World Anti-Doping Code (the “WADC”). The Rider also contested the chain of custody of the Samples, and that his fundamental right as an athlete for the *“b-sample opening”* was violated since the Tramadol Control did not provide for this. Additionally, the Rider argued that the Samples had not analysed by a WADA Accredited laboratory. Finally the Rider was of the opinion that his right to be heard had been violated as he was not invited to provide his position prior to the decision of the Appealed Decision while he considered this to be a requirement as per Article 13.3.070 of the UCI Medical Rules.

On its hand, UCI underlined that there is no doubt that presence of tramadol was found in the Rider’ Samples. UCI further underlined that its ban on tramadol in competition was not an anti-doping matter. Additionally, UCI held that the testing followed the UCI procedure, including the chain of custody and the analysis of the Samples.

1. Nature and value of the UCI Medical Rules

The Rider held that the UCI Medical Rules was based on the Olympic Movement Medical Code (the “Olympic Medical Code”) which he considered to be a non-binding document and as such the UCI Medical Rules were only a set of suggestion and guidelines and could not serve as basis for a sanction against him. He held that he could only be sanctioned in

application of the World Anti-Doping Code (the “WADC”).

The UCI argued that, by requesting his licence to the UCI, the Rider submitted himself to the UCI Cycling Regulation, which were therefore binding for him.

On that point, the Panel underlined that the UCI Medical Rules are binding as part of the UCI Cycling Regulations that the Rider agreed to when he requested a licence from UCI. This is expressly set forth in the Tramadol Control itself: *“By requesting a license, any rider agrees to abide and be bound by these Rules and explicitly agrees and acknowledges that tramadol is prohibited in-competition. In this respect, any rider agrees to submit to in-competition tramadol control as provided under this Chapter”*.

2. Validity of sanctions under the Tramadol Control

The Rider was of the opinion that the Tramadol Control was clearly a doping control carried out for the UCI by the ITA. The Rider argued that said Tramadol Control was illegal as the WADC issued by WADA is the only authorised set of rules available to sports institutions to sanction an athlete for the presence of prohibited substances *“or any substance that can regulate and improve [...] health”*.

On its hand, UCI underlined that the Tramadol Control process was not an anti-doping issue, as alleged by the Rider. It held that the prohibition of tramadol in-competition was a health and safety issue *“notably because of the heavy side-effects”* of tramadol. UCI further argued that the fact that WADA had decided to place tramadol on the Prohibited List for 2024 had no bearing on the nature of the Tramadol Control as a health and safety issue for athletes. Additionally, the UCI held that it was decided to use ITA to conduct the Tramadol Control *“for simplicity, efficiency and practicality*

considerations” as ITA was already handling all other testing controls for the Respondent and was therefore already on site.

The Panel first recalled that sample collection process, transportation and analysis are governed by the UCI Technical Rules on Tramadol (the “UCI TRT”) which came into effect on 1 March 2019 with the Tramadol Control. As underlined previously, the Panel came to the conclusion that alongside the UCI Medical Rules, the Tramadol Control became binding for the Rider the moment he requested his licence with the UCI.

Additionally, the Panel was of the opinion that the fact that the ITA carried out the control, in itself, does not convert the UCI Medical Rules and the Tramadol Control into a set of anti-doping rules.

The Panel then analysed the purpose of the Tramadol Control. The Panel determined that the Tramadol Control, within the UCI Medical Rules, was promulgated in response to UCI’s stated concerns about the use of tramadol on individual riders and on the safety of the competitions generally (including the risk of altered alertness or dizziness causing or contributing to crashes by riders, especially while in the peloton).

The Panel recalled that, by virtue of their status, expertise and responsibility for protecting and reconciling the interests of all stakeholders in a particular sport, international federations such as the UCI enjoy a margin of appreciation in determining what factors are relevant and necessary to ensure the health and safety of all of their competitors and what regulatory measures are necessary in order to achieve this. Having regard to its margin of appreciation, the Panel considered that the UCI was legitimately entitled to take the view that the health and safety of the riders, individually and collectively, required that its riders should be banned from using a synthetic

opioid analgesic that has dangerous side effects, including in particular, dizziness, and can be addictive.

Taking all of the above in consideration, the Panel was of the opinion that, contrary to the assertion of the Rider, it was open to the UCI to ban a substance on health and safety grounds and doing so was not in breach of the UCI's obligations as a signatory of the WADC. The Panel recalled that any doubt about this had been dispelled by WADA itself which had confirmed, in writing, that the UCI Medical Rules was not anti-doping rules and that the Respondent was not in breach of the WADC in promulgating them.

3. Absence of an obligation of B-sample in Tramadol Control and use of a laboratory not accredited by WADA

The Rider argued that there was no provision in the Tramadol Control for an athlete to call for the testing of a B-Sample. *"The b-sample opening is a fundamental right for the athlete [...]. In this case, there was not the opportunity to open b sample, because there was no b sample. It is incomprehensible how such an important right to an athlete is ignored"*. The Rider further argued that since the Samples were not analysed by a WADA accredited laboratory, the analysis was invalid.

UCI held that the argument that the Tramadol Control did not but should have provided for a B-sample analysis "fails" because it is not an anti-doping process. The cases relied on in this respect are immaterial here where the process is not anti-doping but medical.

The Panel held that while the Tramadol Control did not contain any provision for a B sample, this did not mean that the Tramadol Control was invalid. The Panel considered that it was clear that the Tramadol Control was a medical control process and not anti-doping,

consequently there was no free-standing abstract right to a B sample and there was no express right within the UCI Medical Rules for the UCI to provide the Rider with the protection of a B sample. The Panel therefore concluded that there was no breach on the part of the UCI in failing to do so.

The Panel applied the same logic to determine that there was no requirement that the UCI uses only WADA-accredited laboratories for the testing and analysis under the Tramadol Control as it was not an anti-doping process but a medical control process.

4. Right to be heard and Tramadol Control

The Rider was of the opinion that the Respondent violated the UCI Medical Rules Article 13.3.070, and at the same time one of his "*fundamental right*", as it did not invite him to provide his position on the findings of the Tramadol Control prior to the decision of the UCI Medical Director.

UCI held that the Rider relied on the wrong provision of the UCI Medical Rules, as it was referring to Article 13.3.070(b) which relates solely to "non-analytical cases", while in cases related to presence of tramadol, which was the matter at hand, there was actually no obligation in that sense. In those cases, Article 13.3.070(a) of the UCI Medical Rules applied and provided that *"In accordance with Article 12.5.004 of the UCI Regulations, the UCI Medical Director is competent to decide and sanction all cases of Presence of tramadol for a first infringement"*.

On this matter, the Panel first recalled that article 13.3.070 provided the following:

"a) Presence of tramadol in a rider's sample. In accordance with Article 12.5.004 of the UCI Regulations, the UCI Medical Director is competent to decide and sanction all cases of Presence of tramadol for a first infringement."

b) Evading a Tramadol Sample collection, tampering or attempting to tamper with the Tramadol Sample collection process, refusing or failing to submit to Tramadol Sample collection or failure to report to the Tramadol Control Station within the time limit provided under Article 13.3.067 without compelling justification.

[...]

Before making the decision the UCI Medical Director may invite the rider to provide his/her position on the reported infringement. [...]”.

With this in mind, the Panel was of the opinion that article 13.3.070a) applied to the matter at hand – the presence of tramadol in the Rider’s Samples – and that in that case, there was no stated requirement for the UCI Medical Director to allow the rider an opportunity to be heard before sanctions are imposed. Instead, where dealing with presence of tramadol, the UCI Medical Director “*is competent to decide and sanction all cases*” for a first infringement.

In any case, the Panel underlined that while the right to be heard was a fundamental and general principle which derived from the elementary rules of natural justice and due process, any failure on the part of the UCI Medical Director to allow the Rider to explain his position has been cured by the *de novo* nature of the CAS hearing in this appeal.

The Panel concluded that there had been no breach of the Rider’s “*fundamental right*” to be heard.

Decision

In view of the foregoing, the Panel dismissed the appeal of Nairo Alexander Quintana Rojas against the decision of the UCI Medical Director issued on 17 August 2022. The sanctions imposed by the UCI Medical Director in the decision issued on 17 August 2022 were confirmed.

CAS 2022/A/9219

Jubilo Co. LTD v Fédération Internationale de Football Association (FIFA)

14 June 2023 (operative part of the award of 22 December 2022)

Football; Termination of a contract of employment between a player and a club; De novo review of the merits of the case; Burden and standard of proof; Validity of a contract; Interpretation of an automatic termination clause; Termination with no cause; Rebuttal of the presumption of inducement to breach the contract by the player's new club

Panel

Mr Patrick Stewart KC (United Kingdom),
President

Mr Marco Balmelli (Switzerland)

Mr Daniel Cravo Souza (Brazil)

Facts

Jubilo Co., LTD. is a company which runs a professional football club, Jubilo Iwata, which is a member of the Japanese Football Association, which in turn is a member of the Fédération Internationale de Football Association.

The Fédération Internationale de Football Association (the "Respondent" or "FIFA") is the governing body for international football.

Collectively, Jubilo and FIFA will be referred to as the Parties.

On 14 November 2020, Ratchaburi Mitrphol FC ("Ratchaburi"), a professional football club in Thailand, and Fabian Andres Gonzales Lasso (the "Player"), a professional football player from Colombia, signed an employment

contract with a term from 1 January 2021 to 31 December 2021 (the "First Contract").

The First Contract contained, *inter alia*, the following terms:

d) Pursuant to Clause 2.1, Ratchaburi agreed to pay the Player, *inter alia*, a monthly salary of USD 18,350 for the duration of the First Contract.

e) Clause 2.4 stated as follows (the "Automatic Termination Clause"):

"The contract will be automatically (sic) cancel without any compensation if the player failed for the medical check-up or is unable to play for any reason at the 01 January (sic) 2021".

f) Clause 11 stated as follows:

"[...] In the event that the participation has been terminated by the Club or the player prior to the expiry of the contract for any cause other than those provided in Clause 6 and 7 above, the party who cancel the contract will be entitled to pay a compensation equivalent to 3 (three) months salary maximum as full and final settlement of the playing contract (salary)".

On 28 December 2020, the Player signed a pre-contract agreement with Jubilo and, on 29 December 2020, Jubilo counter-signed that pre-contract agreement (the "Pre-Contract"). Under the Pre-Contract, the Player agreed to be a registered player with Jubilo from 1 February 2021 to 1 January 2022 and Jubilo agreed to pay the Player a total salary of USD 450,000.

On 5 January 2021:

a) Ratchaburi sent a letter to Jubilo in which it informed Jubilo that it had entered into an employment contract with the Player and that it would bring a claim before FIFA if Jubilo did not withdraw its offer.

b) The Player sent a letter to Ratchaburi in which he stated that he was not bound by

the First Contract, as the negotiations had not yet been concluded and, therefore, no valid and binding contract had been signed.

On 17 January 2021, Jubilo announced its signing of the Player on its website.

On 28 and 29 April 2021, following the lifting of COVID-19 travel restrictions, Jubilo completed its registration of the Player which involved *inter alia* signing an employment contract with the Player, uploading all necessary documents to TMS and confirming with the Japanese FA that it had received an international transfer certificate.

On 13 April 2022, Ratchaburi filed a claim with the Dispute Resolution Chamber of FIFA (the “FIFA DRC”) claiming (a) that the Player terminated the First Contract without just cause, contrary to Article 14 of the FIFA Regulations on the Status and Transfer of Players (the “FIFA RSTP”), requesting a compensation equal to the value of the First Contract (i.e. USD 220,200); (b) that Jubilo had induced the Player to terminate the First Contract without just cause, contrary to Article 17(4) of the FIFA RSTP, requesting that Jubilo be held jointly and severally liable with the Player to pay it the compensation of USD 220,200, and the imposition of sporting sanctions on Jubilo.

On 4 August 2022, the FIFA DRC determined that:

Respondent 1, Fabian Andres Gonzales Lasso, has to pay to the Claimant USD 55,050 as compensation for breach of contract without just cause plus interest of 5% p.a. as from 13 April 2022 until the date of effective payment.

Respondent 2, Jubilo Inata, is jointly and severally liable for the payment of the aforementioned amount and shall be banned from registering any new players, either nationally or internationally, for the two next entire and consecutive registration periods

On 19 October 2022, pursuant to Article R48 of the Code of Sports-related Arbitration (the “Code”), Jubilo filed a Statement of Appeal at the Court of Arbitration for Sport (the “CAS”) appealing the FIFA Dispute Resolution Chamber Decision and applying for the annulment of the sporting sanction pronounced against Appellant.

Reasons

The Appellant argued that there was never a valid contract of employment between Ratchaburi and the Player, meaning that: (a) no unilateral termination without cause could have occurred; and (b) there could not have been any inducement to do so. In the alternative, if the First Contract was considered to constitute a valid and binding contract between Ratchaburi and the Player, the Automatic Termination Clause contained conditions precedent which were not satisfied by the stipulated deadline of 1 January 2021, meaning that the First Contract never came into force and points (a) and (b) were applicable.

FIFA argued that (a) by limiting the scope of its appeal to sporting sanctions, the Appellant also limited the Panel’s scope of review with the effect that the Panel might not review the horizontal dispute between the Player and Ratchaburi. This issue was referred to in the Award as the “Preliminary Issue”; (b) in the alternative, if the horizontal dispute was within the Panel’s scope of review, then: (i) the First Contract was a valid and binding agreement; (ii) the Player unilaterally terminated that agreement without just cause; (c) Jubilo failed to produce sufficient evidence to rebut the presumption that it induced the Player’s breach.

In light of the facts and the circumstances of the case, as well as considering the Parties’

submissions in support of their claims, the Panel observed that the main issues to be resolved were (1) whether the First Contract was a valid and binding agreement between the Player and Ratchaburi? ; (2) If so, did the Automatic Termination Clause operated as a condition precedent, meaning that the First Contract effectively never existed if the conditions were not satisfied? ; (3) If the First Contract did exist, did the Player's prior actions with respect to Jubilo amounted to unilateral termination by the Player of the First Contract? (4) If the First Contract was unilaterally terminated by the Player, did Jubilo produced sufficient evidence to rebut the presumption created by Article 17(4) of the FIFA RSTP that it induced the Player to do so?

1. De novo review of the merits of the case

To start with, the Panel underlined that pursuant to Article R57 (1) of the Code, it has "*full power to review the facts and the law*". By reference to this provision the CAS appeals arbitration procedure entails a *de novo* review of the merits of the case and the CAS panel is not confined merely to deciding whether the ruling appealed was correct or not. Accordingly, it was the function of the Panel to make an independent determination as to the merits.

2. Burden and standard of proof

The Panel recalled that each party should fulfil its burden of proof to the required standard by providing and referring to evidence to convince the Panel that the facts it pleaded were established. The "comfortable satisfaction" standard is generally applied when considering cases involving the FIFA RSTP. That standard is considered to be "*higher than the civil standard of "balance of probability" but lower than the criminal standard of "proof beyond a reasonable doubt"*".

3. Validity of a contract

The Appellant argued that there was never a valid contract of employment between Ratchaburi and the Player. The Respondent argued that the First Contract was a valid and binding agreement.

The Panel reminded that the starting position for any signed contract is the legal principle of *pacta sunt servanda* (i.e. agreements must be kept). Furthermore, pursuant to consistent CAS jurisprudence and general principles of contract law: (i) a signature on a written contract binds the signatory to the terms of that contract; and (ii) the fact that a party to a written contract does not understand its terms does not preclude enforcement of that contract. These general principles will of course not apply if the signature was obtained by mistake or as a consequence of misrepresentation, fraud, duress or undue influence or if the contract is vitiated by illegality (see articles 23 *et seq.* of the Swiss Code of Obligations). The burden of proof for establishing that the First Contract was subject to one of these exceptions sited with Jubilo.

Since Jubilo had not provided sufficient evidence to establish to the Panel's comfortable satisfaction that the First Contract was subject to one of the exceptions set out in articles 23 *et seq.* of the Swiss Code of Obligations; and b), the First Contract was to be treated as valid and binding.

4. Interpretation of an Automatic Termination Clause

Jubilo argued that the Automatic Termination Clause operated as a condition precedent and that, as the relevant conditions were not satisfied by the deadline of 1 January 2021, the First Contract did not come into force. Accordingly, it was not technically possible for the Player to have unilaterally terminated the First Contract.

To recap the Automatic Termination Clause states as follows:

“The contract will be automatically (sic) cancel without any compensation if the player failed for the medical check up or is unable to play for any reason at the 01 January (sic) 2021”

The Panel was of the firm view that the Automatic Termination Clause could not be reasonably interpreted as creating a condition precedent. Rather, it operated to bring the First Contract to an end automatically (i.e. without either Ratchaburi or the Player requiring to serve notice), if either: (i) the Player failed a medical check-up; or (ii) the Player was not able to play football for Ratchaburi for any reason. Accordingly, the Panel considered that the First Contract came into existence as a valid and binding agreement immediately upon Ratchaburi and the Player executing it on 14 November 2020.

5. Termination with no cause

The Panel observed that pursuant to consistent CAS jurisprudence, a football player is deemed to have terminated an employment contract without just cause at the point at which he enters into a new employment contract with a new football club with a term which overlaps with the term of the pre-existing employment contract.

Since it was undisputed that the Player and Jubilo entered into the Pre-Contract before 1 January 2021 i.e. before the commencement of the First Contract (that had a term from 1 January 2021 to 31 December 2021), as the Player executed the Pre-Contract on 28 December 2020 and Jubilo counter-executed it on 29 December 2020, the Player unilaterally terminated the First Contract without just cause on 29 December 2020.

6. Rebuttal of the presumption of inducement to breach the contract by the player’s new club

Jubilo contented that it could not have induced the Player to terminate the First Contract without just cause because: (i) Jubilo was not aware of that contract; and/or (ii) the Player had already decided to breach that contract before Jubilo made an offer to the Player. Accordingly, there was no causal link between Jubilo’s offer and the Player’s breach.

Ppursuant to Article 17(4) of the FIFA RSTP, if a player terminates a contract without just cause during the protected period, then any club which subsequently signs that player shall be presumed to have induced the breach and shall be sanctioned accordingly, unless that club is able to rebut the presumption by providing evidence to the contrary.

The Panel found that the period to be considered in assessing adequate due diligence to rebut the presumption of inducement was before the signing of the contract between the player and his new club. In this respect, the Panel held that for a club, placing complete reliance on the player’s personal declaration amounted to “wilful ignorance”. Likewise, an online research and a review of TMS did not constitute adequate due diligence either, because they depended on the previous club either announcing its signing of the player prior to having registered the player (which a club might not always wish to do), or on the registration of the player at the start of the national registration window whereas a longer time limit for the player’s registration might be available to the previous club. Conversely, the Panel considered that having a direct discussion with the player regarding his contractual status and making contact with the player’s previous club were more in line with an adequate level of due diligence. In any event, the determination of the necessary steps for a sufficient due diligence to rebut the

presumption of inducement always depended on the specific circumstances of the case and the requirements for a sufficient due diligence should always be assessed on a case-by-case basis.

On this basis, the Panel did not consider that Jubilo rebutted the presumption created by Article 17(4) that, as the new club, Jubilo induced the Player to terminate the First Contract without just cause.

Decision

The appeal filed on 19 October 2022 by Jubilo Co. LTD against the decision issued on 4 August 2022 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association was dismissed. The decision issued on 4 August 2022 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association was 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_22/2023

16 mai 2023

A. c. Professional Tennis Integrity Officers

Recours en matière civile contre la sentence rendue le 30 novembre 2022 par le Tribunal Arbitral du Sport (CAS 2020/A/7616)

Le non-respect du délai visé à l'article 59 al. 5 du Code TAS ne saurait priver de plein droit les arbitres de leur pouvoir de statuer sur le fond du litige

Extrait des faits

A. _____ (ci-après: le joueur de tennis) est un joueur de tennis professionnel espagnol né en 1991. Il est membre de l'Association of Tennis Professionals (ci-après: ATP).

Les Officiels pour l'intégrité du tennis professionnel ("Professional Tennis Integrity Officers"; ci-après: PTIO) de l'ATP, de l'Association des joueuses de tennis ("Woman's Tennis Association"), du Conseil d'administration des Grands Chelems et de la Fédération Internationale de Tennis ("International Tennis Federation") sont responsables de la poursuite d'infractions au programme anticorruption du tennis ("Uniform Tennis Anti-Corruption Programm"; ci-après: TACP). A ce titre, il leur incombe de signaler d'éventuels cas litigieux à l'Unité d'intégrité du tennis ("Tennis Integrity Unit": ci-après: UIT), organisme chargé d'enquêter sur les affaires de corruption dans le domaine du tennis professionnel.

En 2017, les autorités espagnoles ont ouvert une procédure pénale à l'encontre du joueur de tennis en raison de soupçons quant à son implication dans des manipulations de rencontres sportives ("match-fixing"). Le 22 juin 2020, elles ont toutefois mis un terme à leurs investigations.

Le 14 mai 2019, les PTIO ont saisi le Commissaire anticorruption de l'UIT

("Tennis Integrity Unit's Anti-Corruption Hearing Officer"), lequel, par décision du 30 novembre 2020, a suspendu le joueur de tennis pour une durée de huit ans tout en lui infligeant une amende de 25'000 dollars américains (USD) pour avoir commis trois infractions au TACP.

Le 28 décembre 2020, le joueur de tennis a appelé de cette décision auprès du Tribunal Arbitral du Sport (TAS).

En application de l'art. R59 al. 5 du Code de l'arbitrage en matière de sport (édition 2021: ci-après: le Code), le TAS a prolongé à huit reprises le délai dans lequel la Formation devait rendre sa sentence finale.

Par sentence finale du 30 novembre 2022, la Formation, statuant à la majorité de ses membres, a partiellement admis l'appel interjeté par le joueur de tennis. Elle a réduit la durée de la suspension de l'intéressé à six ans et diminué le montant de l'amende prononcée à son encontre à concurrence de 15'000 USD.

Le 13 janvier 2023, le joueur de tennis (ci-après: le recourant) a formé un recours en matière civile aux fins d'obtenir l'annulation de la sentence précitée.

Extrait des considérants

(...)

5.

5.1. Le Tribunal fédéral statue sur la base des faits constatés dans la sentence attaquée (cf. art. 105 al. 1 LTF). Il ne peut rectifier ou compléter d'office les constatations des arbitres, même si les faits ont été établis de manière manifestement inexacte ou en violation du droit (cf. l'art. 77 al. 2 LTF qui

exclut l'application de l'art. 105 al. 2 LTF). Sa mission, lorsqu'il est saisi d'un recours en matière civile visant une sentence arbitrale internationale, ne consiste pas à statuer avec une pleine cognition, à l'instar d'une juridiction d'appel, mais uniquement à examiner si les griefs recevables formulés à l'encontre de ladite sentence sont fondés ou non. Permettre aux parties d'alléguer d'autres faits que ceux qui ont été constatés par le tribunal arbitral, en dehors des cas exceptionnels réservés par la jurisprudence, ne serait plus compatible avec une telle mission, ces faits fussent-ils établis par les éléments de preuve figurant au dossier de l'arbitrage. Cependant, le Tribunal fédéral conserve la faculté de revoir l'état de fait à la base de la sentence attaquée si l'un des griefs mentionnés à l'art. 190 al. 2 LDIP est soulevé à l'encontre dudit état de fait ou que des faits ou des moyens de preuve nouveaux sont exceptionnellement pris en considération dans le cadre de la procédure du recours en matière civile (arrêt 4A_478/2017, consid. 2.2).

5.2. Dans ses écritures, le recourant allègue un certain nombre de faits et produit diverses pièces ayant trait au déroulement de la procédure arbitrale après la tenue de l'audience et le prononcé de la sentence querellée. Ces faits procéduraux, non relatés dans la sentence attaquée, doivent exceptionnellement être pris en compte par le Tribunal fédéral car ils constituent le fondement même de l'argumentation du recourant voulant que la Formation ait rendu la sentence litigieuse alors qu'elle n'était plus compétente pour le faire respectivement qu'elle ait indûment tardé à statuer (arrêt 4A_490/2013 du 28 janvier 2014 non publié aux ATF 140 III 75).

Dans un moyen qu'il convient d'examiner en premier lieu, le recourant, invoquant l'art. 190 al. 2 let. b LDIP, soutient que la sentence entreprise a été rendue après l'extinction des pouvoirs de la Formation (considérant 6)

Avant d'examiner les mérites des critiques formulées par l'intéressé au soutien de ce moyen, il sied de rappeler certains principes jurisprudentiels et de reproduire le texte d'une disposition réglementaire du Code pour mieux saisir le sens des explications qui vont suivre.

6.1.

6.1.1. Saisi du grief d'incompétence, le Tribunal fédéral examine librement les questions de droit, y compris les questions préalables, qui déterminent la compétence ou l'incompétence du tribunal arbitral (ATF 134 III 565 consid. 3.1 et les références citées). En revanche, il ne revoit les constatations de fait que dans les limites usuelles, même lorsqu'il statue sur ce grief (arrêt 4A_140/2022 du 22 août 2022 consid. 5.4.2.1 et la référence citée).

6.1.2. Une sentence rendue postérieurement à l'expiration de la mission de l'arbitre unique ou du tribunal arbitral n'est pas nulle, mais annulable sur recours au titre de la violation de l'art. 190 al. 2 let. b LDIP (ATF 140 III 75 consid. 4.1).

6.2. Dans sa version régissant la présente procédure devant le TAS, l'art. R59 al. 5 du Code énonçait ce qui suit:

“Le dispositif de la sentence doit être communiqué aux parties dans les trois mois suivant le transfert du dossier à la Formation. Ce délai peut être prolongé par le/la Président (e) de la Chambre sur demande motivée du/de la Président (e) de la Formation”.

Depuis le 1er novembre 2022, le nouvel art. R59 al. 5 du Code a la teneur suivante:

“Le dispositif de la sentence doit être communiqué aux parties dans les trois mois suivant le transfert du dossier à la Formation. Ce délai peut être prolongé jusqu'à un maximum de quatre mois après la clôture de la procédure d'instruction par le/la Président (e) de la Chambre sur demande motivée

du/de la Président (e) de la Formation. En cas de non-respect du délai, la Formation peut être révoquée conformément à l'article sR35 et les honoraires des arbitres peuvent être réduits par le Bureau du CIAS, en fonction des circonstances spécifiques de chaque cas. En tous les cas, le/la Président (e) de Chambre doit informer les parties de la situation et déterminer si un ultime délai est accordé à la Formation ou quelles mesures particulières doivent être prises”.

6.3. Pour étayer son grief, le recourant expose que le TAS a prolongé à huit reprises, durant la période comprise entre le 8 février 2022 et le 25 novembre 2022, le délai dans lequel la Formation devait rendre sa sentence. Il soutient que le TAS a accordé une quatrième prolongation de délai aux arbitres le 13 juin 2022 alors que le délai dans lequel la sentence aurait dû être rendue avait déjà expiré le 10 juin 2022. Même à supposer que le TAS ait été habilité à octroyer rétroactivement une prolongation de délai, l'intéressé, citant l'art. R59 al. 5 du Code, dans sa version de 2022, prétend que la Formation aurait dû statuer au plus tard dans les quatre mois suivant la clôture de la procédure d'instruction, soit le 18 mai 2022. Se référant à l'arrêt paru aux ATF 140 III 75, il fait valoir que la Formation, en rendant sa sentence après le 18 mai 2022 respectivement le 10 juin 2022, a statué alors que sa mission avait pris fin s'arrogeant ainsi des pouvoirs qui s'étaient éteints.

6.4. Semblable argumentation n'emporte nullement la conviction de la Cour de céans. Force est d'emblée de relever que c'est en vain que l'intéressé affirme que la sentence aurait dû être rendue dans les quatre mois suivant la clôture de l'instruction en se fondant sur l'édition 2022 du Code, puisque celle-ci s'applique uniquement aux procédures mises en oeuvre par le TAS à compter du 1er novembre 2022 (cf. art. R67 du Code du 1er novembre 2022), alors que le recourant a saisi le TAS en date du 28 décembre 2020.

Le recourant ne peut pas davantage être suivi lorsqu'il soutient que la mission de la Formation aurait automatiquement pris fin le 10 juin 2022. Tout d'abord, il sied de relever que le raisonnement du recourant repose sur la prémisse de fait, non avérée, selon laquelle la prolongation de délai accordée le 13 juin 2022 en application de l'art. R59 al. 5 du Code serait intervenue tardivement. En effet, le TAS expose, preuve à l'appui, que la Présidente suppléante de la Chambre arbitrale d'appel a valablement octroyé une prolongation du délai le 10 juin 2022, et non pas le 13 juin 2022, date à laquelle cette décision a été communiquée aux parties.

En tout état de cause et indépendamment de ce qui précède, le parallèle fait par le recourant entre l'arrêt paru aux ATF 140 III 75 et la présente espèce n'est pas de mise. Dans l'affaire à laquelle se réfère l'intéressé, les parties à la procédure d'arbitrage avaient expressément mis un terme au mandat de l'arbitre unique en raison du temps, jugé excessif par elles, mis par ce dernier pour rendre sa décision. Une fois sa mission terminée, l'arbitre en question, lequel avait accepté la fin de son mandat, avait tout de même prononcé une sentence. Dans ces circonstances tout à fait singulières, le Tribunal fédéral a jugé que la sentence rendue postérieurement à l'expiration de la mission de l'arbitre n'était pas nulle, mais annulable sur recours (ATF 140 III 75 consid. 4.1). En l'espèce, la situation est tout autre, puisque les parties n'ont à aucun moment révoqué les pouvoirs de la Formation. L'art. R59 al. 5 du Code, que ce soit dans sa version applicable au moment des faits ou dans sa teneur actuelle, ne prévoit du reste nullement que le non-respect du délai pour rendre la sentence entraînerait l'extinction automatique des pouvoirs des arbitres saisis d'un litige. En outre, le Tribunal fédéral a déjà eu l'occasion de préciser que le délai visé par l'art. R59 al. 5 du Code est un délai d'ordre (arrêt 4A_600/2018 du 20 février 2009 consid. 4.2.1.1; sur la nature de ce délai, cf. aussi ANTONIO RIGOZZI, *L'arbitrage international en matière de sport*, 2005, p. 516 n. 1005; RIGOZZI/HASLER, in

Arbitration in Switzerland - The Practitioner's Guide, Arroyo [éd.], 2ème éd. 2018, no 15 ad art. R59 du Code). Aussi est-ce en vain que l'intéressé consacre d'importants développements visant à démontrer que les diverses prolongations de délai accordées sur la base de l'art. R59 al. 5 du Code seraient entachées de certaines irrégularités. Il appert ainsi que le non-respect du délai visé par l'art. R59 al. 5 du Code ne saurait priver de plein droit les arbitres de leurs pouvoirs de statuer sur le fond du litige. Il s'ensuit le rejet du grief considéré.

Dans un autre moyen, divisé en deux branches, le recourant fait valoir que la sentence attaquée est incompatible avec l'ordre public (art. 190 al. 2 let. e LDIP) (considérant 7)

7.1. 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.

7.1.1. Une sentence est contraire à l'ordre public matériel lorsqu'elle viole des principes fondamentaux du droit de fond au point de ne plus être conciliable avec l'ordre juridique et le système de valeurs déterminants (ATF 144 III 120 consid. 5.1; 132 III 389 consid. 2.2.1). Qu'un motif retenu par un tribunal arbitral heurte l'ordre public n'est pas suffisant; c'est le résultat auquel la sentence aboutit qui doit être incompatible avec l'ordre public (ATF 144 III 120 consid. 5.1). L'incompatibilité de la sentence avec l'ordre public, visée à l'art. 190 al. 2 let. e LDIP, est une notion plus restrictive que celle d'arbitraire (ATF 144 III 120 consid. 5.1; arrêt 4A_318/2018 du 4 mars 2019 consid. 4.3.1). Selon la jurisprudence, une décision est arbitraire lorsqu'elle est manifestement insoutenable, méconnaît gravement une norme ou un principe juridique clair et indiscuté, ou heurte de manière choquante le

sentiment de la justice et de l'équité; il ne suffit pas qu'une autre solution paraisse concevable, voire préférable (ATF 137 I 1 consid. 2.4; 136 I 316 consid. 2.2.2 et les références citées). Pour qu'il y ait incompatibilité avec l'ordre public, il ne suffit pas que les preuves aient été mal appréciées, qu'une constatation de fait soit manifestement fautive ou encore qu'une règle de droit ait été clairement violée (arrêts 4A_116/2016 du 13 décembre 2016 consid. 4.1; 4A_304/2013 du 3 mars 2014 consid. 5.1.1; 4A_458/2009 du 10 juin 2010 consid. 4.1). L'annulation d'une sentence arbitrale internationale pour ce motif de recours est chose rarissime (ATF 132 III 389 consid. 2.1).

7.1.2. 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). Selon une jurisprudence constante, l'ordre public procédural, au sens de l'art. 190 al. 2 let. e LDIP, n'est qu'une garantie subsidiaire ne pouvant être invoquée que si aucun des moyens prévus à l'art. 190 al. 2 let. a-d LDIP n'entre en ligne de compte (ATF 138 III 270 consid. 2.3).

7.2. Dans la première branche du moyen considéré, le recourant fait valoir que le Code est "arbitraire", car il ne fixe pas de limites au pouvoir du TAS de prolonger le délai dans lequel la Formation est tenue de rendre sa sentence. Il souligne aussi que les parties ne sont pas associées à cette prise de décision et que les prolongations de délai sont dépourvues de motivation.

Force est d'emblée de souligner qu'il n'appartient pas à la Cour de céans de déterminer, abstraitement, si une disposition réglementaire figurant dans le Code est arbitraire. Il lui incombe uniquement de trancher le point de savoir si la sentence

querellée est incompatible ou non avec l'ordre public visé par l'art. 190 al. 2 let. e LDIP. Or, en raisonnant comme il le fait, l'intéressé perd non seulement de vue que l'application erronée, voire arbitraire, d'un règlement d'arbitrage ne constitue pas en soi une violation de l'ordre public procédural (ATF 126 III 249 consid. 3b et les références citées), mais méconnaît aussi que la notion d'atteinte à l'ordre public est plus restrictive que celle d'arbitraire. La critique du recourant est dès lors irrecevable et, en tout état de cause, impropre à établir une quelconque incompatibilité de la sentence incriminée avec l'ordre public.

7.3.

7.3.1. Dans la seconde branche du moyen examiné, le recourant reproche à la Formation d'avoir enfreint le principe de célérité, lequel revêt, à son avis, une importance particulière dans le domaine sportif. A cet égard, il soutient que le TAS n'a pas rendu sa décision dans un délai raisonnable car la procédure arbitrale a duré près de deux ans, ce d'autant que la Formation n'a déployé aucune activité pendant environ une année à la suite de l'audience qu'elle avait tenue le 15 décembre 2021.

7.3.2. Le Tribunal fédéral n'a jamais tranché la question de savoir si la violation du principe de célérité peut être assimilée à une atteinte à l'ordre public procédural (cf. arrêt 4A_668/2020 du 17 mai 2021 consid. 4.2). L'intéressé ne fournit du reste aucune référence doctrinale étayant sa position. Quoi qu'il en soit, point n'est besoin de pousser plus avant l'examen de cette question, dès lors que la sentence incriminée ne saurait être taxée d'incompatible avec l'ordre public procédural pour cause de non-respect dudit principe.

Pour apprécier si une cause a été jugée dans un délai raisonnable, il convient de tenir compte de l'ensemble des circonstances du cas concret et, singulièrement, de l'étendue et de la complexité de l'affaire, tant au niveau

factuel que juridique, de la nature de la procédure et de son enjeu pour le justiciable, ainsi que du comportement des parties et de celui du tribunal (arrêt 4A_412/2021 du 21 avril 2022 et les références citées). En l'occurrence, si la cause présentait à l'évidence une importance certaine pour le recourant, il appert qu'elle revêtait une complexité non négligeable tant s'agissant des faits que du droit. Les intimés soulignent en outre que leur adversaire a assorti son appel d'une requête urgente de mesures provisionnelles, laquelle a nécessité un échange d'écritures. Le TAS a ensuite dû se prononcer, de manière incidente, sur diverses questions d'ordre procédural. On relèvera par ailleurs que le recourant n'a rien trouvé à redire aux sept premiers reports du délai imparti à la Formation pour rendre sa sentence, puisqu'il n'a attendu que le 22 novembre 2022 pour dénoncer pareil retard. Tout bien considéré, à l'aune de l'ensemble des circonstances, il apparaît ainsi que la durée de la procédure arbitrale, inférieure à deux ans, n'est pas déraisonnable et ne conduit nullement à une contradiction insupportable avec le sentiment de justice. Si cette durée est certes longue par rapport à celle d'autres affaires tranchées par le TAS, elle demeure cependant raisonnable pour les cas de manipulations de rencontres sportives, lesquels impliquent généralement une procédure d'instruction plus complexe.

Décision

Au vu de ce qui précède, le recours ne peut qu'être rejeté dans la mesure de sa recevabilité.

4A_170/2023

28 juin 2023

Fédération Internationale de Football Association c. A.

Recours en matière civile contre la sentence rendue le 14 février 2023 par le Tribunal Arbitral du Sport (TAS 2021/A/7661)

Prétendue violation du droit d'être entendu (art. 182 al. 3 et 190 al. 2 let. d LDIP) et de l'ordre public (art. 190 al. 2 let. e LDIP) - forclusion à soutenir le non-respect du droit d'être entendu après avoir reconnu que celui-ci a été "totalement respecté". Moyen en tout état de cause infondé car le défaut d'audition du témoin contestée n'a jamais été refusée. Le choix du mode d'audition du TAS vise à concilier les intérêts liés à la sécurité des personnes interrogées et les exigences liées au droit à un procès équitable. L'impossibilité matérielle pour le TAS d'entendre des témoins via un système de vidéo conférence ne contrevient ni à des principes fondamentaux généralement reconnus, ni ne conduit à une contradiction insupportable avec le sentiment de justice.

Extrait des faits

La Fédération Internationale de Football Association (FIFA), association de droit suisse ayant son siège à Zurich, est la structure faitière 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).

Depuis l'an 2000, A._____, domicilié dans l'État U._____, préside la Fédération B._____- de Football (FB F), laquelle est affiliée à la FIFA.

Dans un document diffusé le 25 avril 2020 sur sa chaîne YouTube, le journaliste

C._____ a fait état d'allégations d'abus sexuels systématiques qui auraient été commis au sein de la FB F.

Le 30 avril 2020, le journal britannique G._____ a publié un article indiquant que A._____ aurait contraint plusieurs joueuses de football du Centre technique national de U._____ à entretenir des rapports sexuels avec lui.

Le 4 mai 2020, G._____ a fait paraître un nouvel article mentionnant que l'intéressé niait toutes les accusations portées à son endroit. Le même jour, A._____ s'est adressé au Président de la FIFA afin de lui faire part de ses observations sur l'opération de démolition "menée à son encontre par le journal précité.

Le 11 mai 2020, la Chambre d'instruction de la Commission d'éthique de la FIFA a ouvert une procédure disciplinaire à l'encontre de A._____ en raison de potentielles violations du CEF. Le lendemain, elle a fait savoir à ce dernier qu'un Comité *ad hoc* avait été constitué afin de procéder localement à toutes les mesures d'instruction nécessaires.

Le 18 mai 2020, A._____ a déposé une plainte pénale en France pour diffamation publique à l'encontre de C._____.

Le 25 mai 2020, à la suite de la publication du rapport établi le 21 mai 2020 par le Réseau National de Défense des Droits Humains (RNDDH) - qui avait été chargé de mener une enquête indépendante sur les structures de la FB F et sur les allégations d'abus sexuels commis au Centre technique national de U._____ - et des recommandations émises par l'organisation Human Rights Watch (HRW) dans un document rendu public le 22 mai 2020, la Présidente de la Chambre d'instruction de la Commission

d'éthique de la FIFA a suspendu provisoirement A. _____ de toute activité liée au football pour une durée de 90 jours. Cette mesure a été prolongée le 19 août 2020 pendant 90 jours supplémentaires.

Le 5 août 2020, E. _____ Ltd, société chargée de mener une enquête numérique sur requête de la Chambre d'instruction de la Commission d'éthique de la FIFA, a rendu son rapport final, dans lequel elle a notamment souligné que plusieurs allégations d'abus sexuels avaient été formulées via les réseaux sociaux bien avant avril 2020.

Le 7 août 2020, G. _____ a publié un nouvel article révélant, en particulier, que le dénommé F. _____, lequel avait travaillé au Centre technique national de U. _____ avant 2014, avait indiqué avoir été témoin d'abus sexuels commis par A. _____ sur de jeunes joueuses de football.

Le 10 août 2020, une thérapeute a fait savoir à la Chambre d'instruction de la Commission d'éthique de la FIFA que sa clinique fournissait, depuis mai 2020, des services de traumatologie aux témoins et victimes de prétendus abus sexuels commis au sein du Centre technique national de U. _____.

Le 13 août 2020, la Fédération Internationale des Associations de Footballeurs Professionnels (FIFPRO) a transmis à la Chambre d'instruction de la Commission d'éthique de la FIFA un document dans lequel elle indiquait avoir obtenu les noms de 34 victimes supposées d'abus sexuels commis par 10 auteurs et complices, parmi lesquels figurait A. _____.

Entre le 18 mai et le 21 août 2020, le Comité *ad hoc* a publié six rapports intermédiaires relatant les résultats de ses investigations.

Sur la base des informations contenues dans le sixième rapport intermédiaire, la Chambre d'instruction de la Commission d'éthique de la FIFA a ouvert, le 21 août 2020, une

enquête préliminaire à l'encontre d'autres officiels de la FB F.

Le 14 octobre 2020, la Commission d'éthique de la FIFA a publié son rapport final. Elle a abouti à la conclusion que A. _____ avait enfreint plusieurs dispositions du CEF, en se livrant à des actes d'abus et de harcèlement sexuels sur des joueuses de football mineures, en menaçant des victimes et des témoins potentiels et en abusant de sa position au sein de la FB F.

Le 16 novembre 2020, un tribunal de l'État U. _____ a mis un terme, faute d'éléments suffisants, à la procédure pénale qui avait été ouverte à l'encontre de A. _____.

Une fois l'instruction close, la Chambre de jugement de la Commission d'éthique de la FIFA a rendu sa décision le 18 novembre 2020. Retenant que A. _____ avait violé les art. 23 (protection de l'intégrité physique et mentale) et 25 (abus de pouvoir) du CEF pour des actes de harcèlement et d'abus sexuels commis sur des joueuses de football, y compris des mineures, ainsi que des abus de pouvoir liés à sa fonction, elle lui a interdit à vie d'exercer toute activité en lien avec le football à un niveau national et international et lui a infligé, de surcroît, une amende de 1'000'000 fr.

Le 27 janvier 2021, A. _____ a interjeté appel auprès du Tribunal Arbitral du Sport (TAS) aux fins d'obtenir l'annulation de la décision précitée.

La Formation a tenu audience à Lausanne du 23 au 25 mars 2022. Elle a notamment procédé à l'audition de plus d'une vingtaine de témoins, certains étant entendus selon des modalités particulières afin d'assurer leur protection.

Par sentence finale du 14 février 2023, la Formation a admis l'appel interjeté par A. _____ et annulé la décision attaquée.

La Formation a considéré, en substance, qu'il incombe à la FIFA de démontrer l'existence d'éventuelles violations du CEF, le degré de la preuve requis étant celui de la "satisfaction adéquate". Procédant à l'examen des divers moyens de preuve à sa disposition, elle a estimé que les indications figurant dans les documents établis par les organisations FIFPRO et HRW ne constituaient pas des éléments suffisants permettant d'établir les faits litigieux, celles-ci n'étant pas corroborées par d'autres moyens de preuve régulièrement administrés. La Formation a aussi observé un manque de cohérence et des imprécisions dans les déclarations faites par les victimes supposées d'abus sexuels et les témoins cités par la FIFA au cours de l'audience. Ces témoignages provenaient du reste en grande partie de sources indirectes qui paraissaient peu crédibles. La Formation a relevé, par ailleurs, que les autorités pénales de l'État U. _____ avaient abandonné les poursuites visant A. _____, motif pris que les faits qui lui étaient reprochés n'étaient pas suffisamment établis. Au terme de son appréciation des preuves disponibles, elle a conclu qu'il n'était pas démontré que l'appelant aurait enfreint les art. 23 et 25 du CEF (sentence, n. 203-234).

Le 17 mars 2023, la FIFA (ci-après: la recourante) a formé un recours en matière civile, assorti d'une requête d'effet suspensif, aux fins d'obtenir l'annulation de la sentence précitée.

Extrait des considérants

(...)

Dans un premier moyen, divisé en deux branches, la recourante dénonce une violation de son droit d'être entendue (art. 190 al. 2 let. d LDIP) (considérant 5)

5.1.

5.1.1. Le droit d'être entendu, tel qu'il est garanti par les art. 182 al. 3 et 190 al. 2 let. d LDIP, permet à chaque partie de s'exprimer sur les faits essentiels pour la décision, de

présenter son argumentation juridique, de proposer ses moyens de preuve sur des faits pertinents et de prendre part aux séances du tribunal arbitral. S'agissant du droit de faire administrer des preuves, il faut qu'il ait été exercé en temps utile et selon les règles de forme applicables (ATF 142 III 360 consid. 4.1.1). Le tribunal arbitral peut refuser d'administrer une preuve, sans violer le droit d'être entendu, si le moyen de preuve est inapte à fonder une conviction, si le fait à prouver est déjà établi, s'il est sans pertinence ou encore si le tribunal, en procédant à une appréciation anticipée des preuves, parvient à la conclusion que sa conviction est déjà faite et que le résultat de la mesure probatoire sollicitée ne peut plus la modifier (ATF 142 III 360 consid. 4.1.1).

La jurisprudence a également 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 (ATF 142 III 360 consid. 4.1.1 et les références citées). Il incombe à la partie soi-disant lésée de démontrer, dans son recours dirigé contre la sentence, en quoi une inadvertance des arbitres l'a empêchée de se faire entendre sur un point important. C'est à elle d'établir, d'une part, que le tribunal arbitral n'a pas examiné certains des éléments de fait, de preuve ou de droit qu'elle avait régulièrement avancés à l'appui de ses conclusions et, d'autre part, que ces éléments étaient de nature à influencer sur le sort du litige (ATF 142 III 360 consid. 4.1.1 et 4.1.3). Si la sentence passe totalement sous silence des éléments apparemment importants pour la solution du litige, c'est aux arbitres ou à la partie intimée qu'il appartiendra de justifier cette omission dans leurs observations sur le recours. Ceux-ci pourront le faire en démontrant que, contrairement aux affirmations du recourant, les éléments omis n'étaient pas pertinents pour résoudre le cas concret ou, s'ils l'étaient, qu'ils ont été réfutés

implicitement par le tribunal arbitral (ATF 133 III 235 consid. 5.2).

Au demeurant, le grief tiré de la violation du droit d'être entendu ne doit pas servir, pour la partie qui se plaint de vices affectant la motivation de la sentence, à provoquer par ce biais un examen de l'application du droit de fond (ATF 142 III 360 consid. 4.1.2 et les références citées).

5.1.2. Selon la jurisprudence, la partie qui s'estime victime d'une violation de son droit d'être entendue ou d'un autre vice de procédure doit l'invoquer d'emblée dans la procédure arbitrale, sous peine de forclusion. En effet, il est contraire à la bonne foi de n'invoquer un vice de procédure que dans le cadre du recours dirigé contre la sentence arbitrale, alors que le vice aurait pu être signalé en cours de procédure (arrêts 4A_332/2021 du 6 mai 2022; 4A_668/2016 du 24 juillet 2017 consid. 3.1). Depuis le 1er janvier 2021 (RO 2020 4181), l'art. 182 al. 4 LDIP prévoit du reste expressément qu'une partie qui poursuit la procédure d'arbitrage 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.

5.2.

5.2.1. Dans la première branche du moyen considéré, la recourante reproche au TAS d'avoir refusé d'entendre l'un de ses témoins capitaux, à savoir "la victime C".

Pour étayer son grief, elle rappelle que la Formation avait elle-même jugé nécessaire de garantir l'anonymat de potentielles victimes d'abus sexuels ainsi que des témoins éventuels de tels faits. Elle relève que, dans son courrier du 28 février 2022, le TAS a indiqué que la plateforme utilisée pour ses audiences par vidéoconférence ne disposait pas d'une option permettant la déformation de la voix et ne permettait dès lors pas de préserver l'anonymat des témoins protégés. C'est pourquoi, la Formation a fait savoir aux parties que, sauf objection de leur part d'ici

au 7 mars 2022, ces personnes seraient auditionnées à distance, mais en Suisse, au moyen d'un téléphone muni d'un appareil permettant la distorsion de la voix, dans un lieu tenu secret en présence d'un collaborateur du TAS. La recourante souligne qu'elle s'est plainte, le 7 mars 2022, de ce que le système de vidéoconférence utilisé par le TAS ne permettait pas de garantir la protection des personnes appelées à témoigner, tout en mettant en avant le fait que certains témoins protégés ne pouvaient pas se rendre en Suisse en raison de circonstances indépendantes de leur volonté. L'intéressée expose que la forme arrêtée par la Formation pour l'audition des témoins protégés a eu pour effet de l'empêcher de faire entendre plusieurs personnes, et notamment la "victime C". Elle rappelle aussi qu'elle s'est plainte, une nouvelle fois, au début de l'audience tenue par la Formation, des conséquences de ce mode d'audition pour les victimes potentielles incapables de rejoindre le territoire helvétique. L'intéressée fait ainsi grief à la Formation de n'avoir pas donné suite à une offre de preuve régulièrement présentée, qui était manifestement pertinente pour le sort de la procédure arbitrale, puisque les déclarations de la "victime C" auraient permis de corroborer les indications figurant dans le rapport de la FIFPRO. Elle prétend, enfin, que la Formation aurait totalement fait fi de la proposition qu'elle avait faite tendant à ce que les témoins protégés qui ne pouvaient pas se rendre en Suisse puissent témoigner par écrit.

5.2.2. En l'occurrence, il appert que la recourante a certes fait valoir, dans son courrier du 7 mars 2022, qu'il était "plutôt regrettable" que le système de vidéoconférence utilisé par le TAS ne puisse pas garantir la protection des personnes appelées à témoigner. Elle n'a toutefois pas formulé d'objection concrète aux modalités d'audition proposées par la Formation. Par pli du 8 mars 2022, le TAS, réagissant au courrier précité, a rappelé aux parties qu'elles étaient tenues de s'assurer elles-mêmes de la disponibilité de leurs témoins et qu'il n'était

pas responsable de l'impossibilité pour certains d'entre eux de se rendre en Suisse. Ne pouvant pas garantir l'anonymat des témoins protégés via la plateforme utilisée pour les vidéoconférences, il a exposé avoir pris ses dispositions afin que les témoins protégés puissent néanmoins être entendus de manière confidentielle. Or, la recourante n'a pas formulé d'objection relative au contenu dudit courrier mais s'est uniquement référée ultérieurement à son courrier du 7 mars 2022. Au début de l'audience tenue par la Formation, l'intéressée a souligné qu'il était "malheureux" que le TAS ne soit pas capable d'assurer la protection vocale des témoins entendus par vidéoconférence et estimé qu'il "devrait être possible aussi d'assurer la potentielle distorsion de voix de ce genre de témoins dans ce genre d'affaires". A cette occasion, elle n'a toutefois jamais soutenu que les modalités d'audition des témoins protégés arrêtées par la Formation étaient viciées ou que celles-ci portaient atteinte à son droit d'être entendue. Qui plus est, à l'issue de l'audience, la Formation a interpellé les parties afin de s'assurer que leur droit d'être entendues avait été pleinement respecté. Or, il ressort de la sentence attaquée que celles-ci avaient indiqué que leur droit d'être entendues avait été "totalement respecté" (n. 109). Comme l'expose en outre l'intimé dans sa réponse, sans être contredit sur ce point par la recourante, celle-ci a indiqué n'avoir aucune objection à formuler quant à la manière dont s'était déroulée la procédure et a tenu à remercier la Formation d'avoir protégé les personnes qui avaient témoigné au cours de l'audience. Dans ces conditions, la recourante est forclose à venir soutenir le contraire aujourd'hui, après avoir pris connaissance du contenu, défavorable pour elle, de la sentence querellée (arrêts 4A_378/2015 du 22 septembre 2015 consid. 3.3; 4A_348/2009 du 6 janvier 2010 consid. 4).

Cette question de forclusion mise à part, le moyen pris de la violation de l'art. 190 al. 2 let. d LDIP n'apparaît de toute manière pas fondé. Contrairement à ce que soutient la recourante, la Formation n'a en effet jamais

"refusé" d'entendre la "victime C". Elle a simplement opté pour un mode d'audition visant à concilier, d'une part, les intérêts liés à la sécurité des personnes interrogées et, d'autre part, les exigences liées au droit à un procès équitable. Dans sa lettre du 28 février 2022, le TAS a en effet exposé en détail les modalités prévues pour l'audition des témoins protégés afin de garantir leur anonymat, tout en indiquant pourquoi il n'était pas possible de les entendre via la plateforme utilisée pour les audiences par vidéoconférence. Le 8 mars 2022, il a également rappelé aux parties qu'il leur incombait d'amener leurs propres témoins à l'audience, ce qui ressort expressément de l'art. R44 al. 2 du Code de l'arbitrage en matière de sport. Or, l'intéressée n'a non seulement pas contesté ce point mais n'a surtout pas exposé, à ce moment-là, les raisons pour lesquelles la "victime C" aurait été dans l'impossibilité de se rendre en Suisse pour y témoigner, se contentant tout au plus de faire référence à son courrier du 7 mars 2022 dans lequel elle avait affirmé de manière lapidaire, sans nullement étayer ses allégations, que certaines personnes appelées à comparaître ne pouvaient pas se déplacer pour assister à l'audience "en raison de circonstances indépendantes de leur volonté". Elle n'a pas davantage soutenu que les modalités d'audition arrêtées par la Formation étaient contraires au droit ni fait valoir qu'il convenait de trouver une solution spécifique pour entendre la "victime C". L'intéressée s'est, en réalité, contentée de faire part de ses regrets quant à l'impossibilité de pouvoir entendre certains témoins par vidéoconférence depuis l'étranger mais n'a pas formellement soulevé d'objection s'agissant des modalités procédurales d'audition fixées par la Formation. C'est également en vain que la recourante reproche à cette dernière d'avoir ignoré sa requête formulée le 7 mars 2022 tendant à ce que les témoins protégés ne pouvant pas se rendre en Suisse puissent témoigner par écrit, puisque la sentence attaquée y fait référence (n. 79), ce qui démontre que les arbitres ont exclu, à tout le moins de manière implicite, pareille possibilité, sans que l'intéressée ne s'en

plaîne du reste lors de la procédure arbitrale. Il s'ensuit que la Formation n'a jamais refusé d'entendre la "victime C" mais a simplement dû fixer des règles procédurales afin de protéger les personnes interrogées tout en garantissant dans le même temps un déroulement équitable des auditions, permettant au TAS de vérifier l'identité des témoins et de s'assurer qu'ils puissent témoigner librement sans subir d'éventuelles pressions de la part de tiers.

Il suit de là que le moyen pris de la violation du droit d'être entendu de la recourante, s'il n'avait pas été atteint par la forclusion, n'aurait pu qu'être rejeté comme étant infondé.

5.3.

5.3.1. Dans la seconde branche du moyen considéré, la recourante reproche au TAS d'avoir enfreint son droit d'être entendue en ne donnant pas suite à une offre de preuve qu'elle avait régulièrement présentée. A cet égard, elle rappelle qu'elle avait proposé à la Formation de lui transmettre les déclarations non caviardées faites par divers témoins. Or, si elle avait donné suite à cette proposition et consulté lesdits documents, la Formation, qui a précisé avoir décelé des incohérences dans les témoignages recueillis, aurait pu se rendre compte que les déclarations faites par les témoins étaient en réalité cohérentes.

5.3.2. Semblable argumentation n'emporte nullement la conviction de la Cour de céans.

Force est d'emblée de souligner que le moyen considéré est lui aussi frappé de forclusion pour les mêmes motifs que ceux déjà énoncés.

Au demeurant, le grief invoqué apparaît de toute manière infondé. Il appert, en effet, que la Formation, en date du 25 mai 2021, a demandé à la recourante de lui remettre, pour sa seule information, une copie du dossier de sa Commission d'éthique "dans son intégralité et sans anonymisation" (sentence,

n. 58). Or, il ressort de la sentence attaquée que l'intéressée a transmis au TAS un exemplaire dudit dossier "dans son intégralité" le 31 mai 2021 (n. 59). Dans ces conditions, la recourante ne saurait reprocher à la Formation de n'avoir pas requis la production de documents non caviardés. Au demeurant, si elle estimait réellement que la Formation n'avait pas tous les documents nécessaires en sa possession pour statuer en pleine connaissance des circonstances pertinentes de la cause en litige, la recourante aurait dû réagir au cours de la procédure d'arbitrage et interpeller les arbitres à cet égard, ce qu'elle s'est bien gardée de faire. Quoi qu'il en soit, la Formation a visiblement considéré qu'elle possédait toutes les informations utiles pour rendre sa sentence et, partant, qu'elle n'avait pas besoin d'éventuels autres documents non caviardés qui n'auraient pas été produits par la recourante.

En tout état de cause, l'intéressée ne parvient pas à démontrer que les incohérences des témoignages identifiées par la Formation proviendraient du fait que certaines informations topiques auraient été caviardées de sorte que l'on ne discerne pas en quoi la violation dénoncée aurait pu influencer sur l'issue du litige.

Dans un second groupe de moyens, la recourante dénonce diverses violations de l'ordre public (art. 190 al. 2 let. e LDIP) (considérant 6)

6.1. Une sentence est incompatible avec l'ordre public si elle méconnaît les valeurs essentielles et largement reconnues qui, selon les conceptions prévalant en Suisse, devraient constituer le fondement de tout ordre juridique (ATF 144 III 120 consid. 5.1; 132 III 389 consid. 2.2.3). On distingue un ordre public procédural et un ordre public matériel.

6.1.1. Une sentence est contraire à l'ordre public matériel lorsqu'elle viole des principes fondamentaux du droit de fond au point de ne plus être conciliable avec l'ordre juridique

et le système de valeurs déterminants (ATF 144 III 120 consid. 5.1; 132 III 389 consid. 2.2.1). Qu'un motif retenu par un tribunal arbitral heurte l'ordre public n'est pas suffisant; c'est le résultat auquel la sentence aboutit qui doit être incompatible avec l'ordre public (ATF 144 III 120 consid. 5.1). L'incompatibilité de la sentence avec l'ordre public, visée à l'art. 190 al. 2 let. e LDIP, est une notion plus restrictive que celle d'arbitraire (ATF 144 III 120 consid. 5.1; arrêt 4A_318/2018 du 4 mars 2019 consid. 4.3.1). Selon la jurisprudence, une décision est arbitraire lorsqu'elle est manifestement insoutenable, méconnaît gravement une norme ou un principe juridique clair et indiscuté, ou heurte de manière choquante le sentiment de la justice et de l'équité; il ne suffit pas qu'une autre solution paraisse concevable, voire préférable (ATF 137 I 1 consid. 2.4; 136 I 316 consid. 2.2.2 et les références citées). Pour qu'il y ait incompatibilité avec l'ordre public, il ne suffit pas que les preuves aient été mal appréciées, qu'une constatation de fait soit manifestement fautive ou encore qu'une règle de droit ait été clairement violée (arrêts 4A_116/2016 du 13 décembre 2016 consid. 4.1; 4A_304/2013 du 3 mars 2014 consid. 5.1.1; 4A_458/2009 du 10 juin 2010 consid. 4.1). L'annulation d'une sentence arbitrale internationale pour ce motif de recours est chose rarissime (ATF 132 III 389 consid. 2.1).

6.1.2. Il y a violation de l'ordre public procédural lorsque des principes 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). Selon une jurisprudence constante, l'ordre public procédural, au sens de l'art. 190 al. 2 let. e LDIP, n'est qu'une garantie subsidiaire ne pouvant être invoquée que si aucun des moyens prévus à l'art. 190 al. 2 let. a-d LDIP n'entre en ligne de compte (ATF 138 III 270 consid. 2.3).

6.2.

6.2.1. En premier lieu, la recourante prétend, en substance, que l'impossibilité d'entendre des témoins protégés, et singulièrement la "victime C", par vidéoconférence moyennant un système de distorsion de la voix viole l'ordre public procédural visé par l'art. 190 al. 2 let. e LDIP, étant donné que les personnes concernées étaient tenues de se rendre en Suisse pour témoigner indépendamment du point de savoir si elles étaient en mesure de le faire.

En argumentant de la sorte, l'intéressée se contente, en réalité, d'émettre, sous un autre angle, des critiques similaires formulées antérieurement à l'appui du moyen pris de la violation de son droit d'être entendue. Il n'y a dès lors pas lieu de s'arrêter ici sur les reproches formulés par la recourante au titre de la contrariété à l'ordre public procédural qui se recourent avec ceux ayant déjà été écartés précédemment. En tout état de cause, on relèvera que l'impossibilité matérielle pour le TAS d'entendre des témoins protégés via un système de vidéoconférence ne contrevient ni à des principes fondamentaux et généralement reconnus ni ne conduit à une contradiction insupportable avec le sentiment de la justice, étant précisé que la possibilité même d'entendre des témoins par vidéoconférence n'existe légalement pas dans plusieurs États, et singulièrement en Suisse, raison pour laquelle le législateur fédéral a décidé récemment d'adopter une disposition en ce sens dont l'entrée en vigueur n'a toutefois pas encore été fixée (cf. l'art. 170a de la modification du 17 mars 2023 du Code de procédure civile, FF 2023 786 [délai référendaire échéant le 6 juillet 2023]).

6.2.2. En second lieu, l'intéressée soutient que l'"acquiescement" de l'intimé serait choquant et contraire à l'ordre public matériel. A cet égard, elle fait valoir que la sanction infligée à un autre officiel de la FBF a été confirmée par le TAS et qu'il ne saurait en être autrement pour l'intimé. En outre, elle estime que le traitement procédural réservé à

la “victime C” serait contraire à sa dignité humaine.

Par sa critique purement appellatoire, la recourante ne fait rien d'autre que d'opposer son appréciation personnelle des preuves disponibles à celle ayant conduit les arbitres à retenir que l'existence des faits reprochés à l'intimé n'était pas établie. Ce faisant, elle ne démontre nullement que le résultat auquel a abouti la Formation serait incompatible avec l'ordre public matériel. Au demeurant, le seul fait que le TAS a estimé qu'un autre officiel de la FB F avait effectivement commis les actes qui lui étaient reprochés ne signifie pas nécessairement que les graves accusations portées à l'encontre de l'intimé seraient avérées. En l'occurrence, la Formation a procédé à un examen détaillé des preuves à sa disposition et a exposé les raisons pour lesquelles elle estimait que les éléments recueillis étaient incohérents, imprécis et contradictoires. Dans ces circonstances, le refus de sanctionner un individu faute d'éléments suffisants établissant sa responsabilité ne saurait être taxé d'incompatible avec l'ordre public matériel.

Enfin, la Cour de céans ne discerne pas, sur la base des faits constatés dans la sentence entreprise, en quoi le traitement procédural réservé à la “victime C” aurait porté atteinte à sa dignité humaine.

Décision

Au vu de ce qui précède, le recours doit être rejeté dans la mesure de sa recevabilité.

4A_254/2023

12 juin 2023

A. c. Fédération Internationale d’Escrime

Recours en matière civile contre la décision rendue le 17 avril 2023 par le Tribunal Arbitral du Sport (CAS 2023/A/9453)

Prétendue violation de l’ordre Public procédural (art. 190 al. 2 let. e LDIP). Formalisme excessif. Les exigences de l’Article R31 Code TAS relatives au dépôt de la déclaration d’appel ne sauraient être reléguées au rang de simple formalité administrative mais constituent bel et bien une condition de validité du dépôt de l’acte en question. Un strict respect des règles (Article R31 Code TAS) relatives aux délais de recours s’impose pour des motifs d’égalité de traitement et de sécurité du droit.

Extrait des faits

Le 31 janvier 2023, le Tribunal disciplinaire de la Fédération Internationale d’Escrime (FIE) a reconnu l’escrimeuse... A. _____ (ci-après: l’athlète) coupable d’avoir enfreint la réglementation antidopage et l’a suspendue pour une durée de deux ans.

Cette décision a été notifiée à l’athlète le 31 janvier 2023. Selon la réglementation antidopage édictée par la FIE, le délai pour contester cette décision auprès du Tribunal Arbitral du Sport (TAS) était de 21 jours et arrivait donc à échéance le 21 février 2023.

Le Code de l’arbitrage en matière de sport (ci-après: le Code), lequel régit la procédure applicable devant le TAS, énonce notamment ce qui suit, dans sa version entrée en vigueur le 1er février 2023:

“Art. R31 Notifications et communications
(...)”

La requête d’arbitrage, la déclaration d’appel et tout autre mémoire écrit, imprimé ou sauvegardé sur support numérique, doivent

être déposés par courrier au Greffe du TAS par les parties en autant d’exemplaires qu’il y a d’autres parties et d’arbitres, plus un exemplaire pour le TAS, faute de quoi le TAS ne procède pas. S’ils sont transmis par avance par télécopie ou par courrier électronique à l’adresse électronique officielle du TAS (procedures@tas-cas.org), le dépôt est valable dès réception de la télécopie ou du courrier électronique par le Greffe du TAS mais à condition que le mémoire et ses copies soient également déposés par courrier, ou téléchargés sur la plateforme de dépôt en ligne du TAS, le premier jour ouvrable suivant l’expiration du délai applicable, comme mentionné ci-dessus.

Le dépôt des mémoires susmentionnés au moyen de la plateforme de dépôt en ligne du TAS est autorisé conformément aux conditions prévues par le guide du TAS sur le dépôt par voie électronique”.

20 février 2023, le conseil américain qui assurait la défense des intérêts de l’athlète a transmis sa déclaration d’appel au TAS par courrier électronique. Le même jour, il a fait parvenir au TAS le formulaire intitulé “Case Registration Form” afin de pouvoir télécharger cette écriture sur la plateforme de dépôt en ligne du TAS.

L’avocat précité a reçu la confirmation du TAS que les accès en ligne lui étaient accordés.

L’avocat américain de l’athlète soutient qu’il se serait connecté sur la plateforme de dépôt en ligne du TAS le 22 février 2023, soit le premier jour ouvrable suivant l’expiration du délai d’appel, et qu’il aurait alors procédé au téléchargement de la déclaration d’appel sur ladite plateforme. A cette occasion, l’intéressé aurait trouvé que la plateforme de dépôt en ligne était particulièrement lente mais ne se souvient pas avoir reçu un message d’erreur à ce moment-là.

Le 26 février 2023, le mandataire de l'appelante s'est connecté sur la plateforme du TAS et y a téléchargé la déclaration d'appel.

Le 1er mars 2023, le TAS a indiqué que la déclaration d'appel lui semblait avoir été téléchargée tardivement sur sa plateforme de dépôt en ligne.

Le même jour, le conseil américain a fait savoir au TAS qu'il avait procédé au téléchargement le 22 février 2023 sur la plateforme de dépôt en ligne et qu'un problème informatique ou de serveur avait dû survenir à cette occasion. Se référant à l'art. R48 du Code, il a demandé au TAS de lui impartir un bref délai pour compléter sa déclaration d'appel.

Le 2 mars 2023, le TAS a invité le conseil américain à lui transmettre d'ici au 6 mars 2023 une copie d'un éventuel message d'erreur généré par la plateforme de dépôt en ligne le 22 février 2023. Il a ajouté que le délai prévu par l'art. R51 du Code pour le dépôt du mémoire d'appel, qui arrivait à échéance le 3 mar 2023, n'était pas suspendu.

Le 3 mars 2023, l'athlète a transmis au TAS son mémoire d'appel.

Le 6 mars 2023, le conseil américain a exposé une nouvelle fois qu'il s'était connecté le 22 février 2023 sur la plateforme de dépôt en ligne du TAS lors d'une suspension d'audience tenue à New York, qu'il avait constaté que la connexion était inhabituellement lente, qu'il ne se souvenait pas avoir reçu de message d'erreur et qu'il n'avait pas remarqué que le téléchargement de son écriture sur la plateforme de dépôt en ligne avait échoué. Il a rappelé avoir transmis un exemplaire de son écriture par courrier électronique en temps utile, raison pour laquelle un éventuel refus du TAS de procéder serait constitutif à son avis d'un déni de justice.

Le 8 mars 2023, le TAS a invité la FIE à lui indiquer si elle était d'accord qu'il entre en matière sur l'appel ou si elle voulait que la Présidente de la Chambre arbitrale d'appel du TAS statue sur la recevabilité de l'appel.

La FIE a refusé que le TAS entre en matière.

Le 12 mars 2023, le conseil américain a fait valoir que la plateforme de dépôt en ligne du TAS, contrairement à d'autres systèmes de ce genre, ne génère aucune confirmation de dépôt, raison pour laquelle il n'est pas possible de savoir si le document a été téléchargé avec succès. Il a également soutenu que sa mandante avait dû engager des frais d'avocat importants pour déposer son mémoire d'appel en temps utile, puisque le TAS avait précisé que ledit délai n'était pas suspendu.

Par décision du 17 avril 2023, le TAS a fait savoir aux parties que la Présidente de la Chambre arbitrale d'appel avait refusé d'entrer en matière sur l'appel car la déclaration d'appel avait été déposée tardivement.

Le 17 mai 2023, l'athlète (ci-après: la recourante) a formé un recours en matière civile à l'encontre de cette décision. Elle conclut à l'annulation de celle-ci et demande au Tribunal fédéral de déclarer son appel au TAS recevable ainsi que d'ordonner au tribunal arbitral de reprendre la procédure d'appel.

Extrait des considérants

En premier lieu, la recourante soutient que le TAS aurait fait preuve de formalisme excessif à son égard, violant ainsi l'art. 190 al. 2 let. e LDIP en tant qu'il commande le respect de l'ordre public procédural (considérant 5).

5.1. Il y a violation de l'ordre public procédural lorsque des principes fondamentaux et généralement reconnus ont été violés, ce qui conduit à une contradiction insupportable avec le sentiment de la justice,

de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un État de droit (ATF 132 III 389 consid. 2.2.1). 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 2020 consid. 7.3).

5.2. 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 les cas concrets, le TAS n'avait nullement fait preuve de formalisme excessif (arrêts 4A_54/2019 du 11 avril 2019 consid. 4.1; 4A_556/2018, précité, consid. 6.2; 4A_238/2018, précité, consid. 5.2; 4A_692/2016, précité, consid. 6.1).

La même conclusion s'impose ici, pour les motifs exposés ci-dessous.

5.3. Le formalisme est qualifié d'excessif 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; 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 ou courrier électronique (arrêts 4A_54/2019, précité, consid. 4.2.2; 4A_238/2018, précité, consid. 5.5; 4A_690/2016, précité, consid. 4.2). Si l'art. R31 al. 3 du Code permet certes de déposer par avance une déclaration d'appel par

télécopie ou par courrier électronique, la validité de ce dépôt est toutefois subordonnée à la condition que l'écriture soit aussi transmise par courrier ou téléchargée sur la plateforme de dépôt en ligne le premier jour ouvrable suivant l'expiration du délai applicable, étant précisé qu'une telle exigence ne saurait être reléguée au rang de simple formalité administrative mais constitue bel et bien une condition de validité du dépôt de l'acte en question (arrêts 4A_54/2019, précité, consid. 4.2.2; 4A_238/2018, précité, consid. 5.6).

5.4. Appliqués aux circonstances du cas concret, ces principes commandent d'écarter le reproche de formalisme excessif formulé par la recourante.

L'intéressée assoit toute sa démonstration sur la prémisse de fait selon laquelle son conseil américain aurait cru avoir valablement téléchargé, en temps utile, la déclaration d'appel sur la plateforme de dépôt en ligne du TAS mais qu'il n'aurait, en réalité, pas réussi à le faire en raison de défaillances techniques de ladite plateforme. Or, ces circonstances factuelles ne sont pas avérées et ne ressortent nullement de la décision entreprise. La recourante ne saurait ainsi être suivie lorsqu'elle affirme que le TAS aurait implicitement constaté que son conseil américain avait vainement tenté de procéder au téléchargement de sa déclaration d'appel le 22 février 2023. C'est également en vain que l'intéressée, se fondant toujours sur cette prémisse de fait non établie, tente de distinguer la présente espèce des autres affaires dans lesquelles le Tribunal fédéral a exclu tout formalisme excessif lorsque les parties concernées n'avaient pas respecté les exigences prévues par l'art. R31 du Code.

La recourante ne peut pas davantage être suivie lorsqu'elle tente de relativiser les conséquences juridiques attachées au non-respect des modalités de dépôt de la déclaration d'appel prévues par l'art. R31 du Code. Certes, le TAS a en l'occurrence offert la possibilité à la fédération intimée de consentir malgré tout à l'ouverture de la

procédure d'appel. Cela étant, la Cour de céans estime 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 délais de recours s'impose ainsi 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 les parties intimées sont en droit d'attendre du TAS qu'il applique et respecte les dispositions de son propre règlement (arrêts 4A_556/2018, précité, consid. 6.5; 4A_692/2016, précité, consid. 6.2). Il n'est dès lors pas envisageable de sanctionner, suivant les circonstances, plus ou moins sévèrement le non-respect des exigences prévues par l'art. R31 du Code (arrêt 4A_384/2017 du 4 octobre 2017 consid. 4.2.3).

En tout état de cause, on relèvera que le conseil américain de la recourante, s'il avait réellement constaté que la plateforme électronique du TAS rencontrait des problèmes, aurait pu et dû s'assurer que son écriture avait bien été téléchargée, soit en interpellant immédiatement le TAS soit en se connectant sur ladite plateforme sous la rubrique concernant l'affaire concernée pour vérifier que le document se trouvait effectivement dans la bibliothèque des documents téléchargés. Dans ces conditions, l'avocat en question qui, selon les constatations du TAS, est un utilisateur régulier de la plateforme de dépôt en ligne, ne pouvait raisonnablement pas attendre quatre jours pour s'enquérir de la situation auprès du TAS.

6.

En second lieu, la recourante, invoquant l'art. 190 al. 2 let. e LDIP, reproche au TAS d'avoir enfreint le principe de la bonne foi et d'avoir, partant, rendu une décision contraire à l'ordre public

matériel (considérant 6). A cet égard, la Cour rappelle que le TAS, dans son courrier du 2 mars 2023, avait indiqué, au moyen de caractères soulignés, que le délai pour introduire son mémoire d'appel n'était pas suspendu. L'intéressée soutint que le TAS aurait ainsi laissé entendre qu'il allait poursuivre la procédure. En refusant d'honorer la confiance légitime que son attitude avait générée chez la recourante, le TAS aurait dès lors violé le principe de la bonne foi.

Semblable argumentation n'emporte nullement la conviction de la Cour de céans. Si le TAS a mis en exergue l'information selon laquelle le délai pour le dépôt du mémoire d'appel n'était pas suspendu, c'est sans aucun doute pour attirer l'attention de la recourante sur le fait qu'elle ne bénéficierait pas d'un délai plus long pour transmettre au TAS son mémoire d'appel, dans l'hypothèse où sa déclaration d'appel serait considérée comme ayant été transmise en temps utile. On ne saurait en revanche voir dans cette indication une quelconque forme de signe selon lequel le TAS entendait poursuivre la procédure. Il sied du reste de souligner que le TAS avait d'ores et déjà fait savoir à la recourante, le 1er mars 2023, que sa déclaration d'appel paraissait avoir été téléchargée tardivement sur la plateforme de dépôt en ligne. Dans ces circonstances, c'est à tort que la recourante fait grief au TAS d'avoir agi de manière incompatible avec les règles de la bonne foi.

Décision

Au vu de ce qui précède, le recours doit être rejeté.

Recours en matière civile contre la décision rendue le 21 novembre 2022 par le Tribunal Arbitral du Sport

Non-ouverture d'une procédure lorsque le recours est introduit uniquement par courrier électronique. Si les conditions de l'article R31 du Code TAS ne sont pas remplies, le greffe du TAS peut refuser d'entrer en matière. Il n'y a pas de déni de justice formel.

Extrait des faits

Statuant par décision du 13 octobre 2022, la Chambre de Résolution des Litiges de la Fédération Internationale de Football Association (FIFA) a condamné le défendeur A. _____ (ci-après: le club) à payer au joueur de football B. _____ le montant de 765'000 euros, intérêts en sus, et a interdit au club d'enregistrer de nouveaux joueurs, au niveau national et international, au cours de deux périodes consécutives d'enregistrement.

Le 3 novembre 2022, le club a transmis au Tribunal Arbitral du Sport (TAS) une déclaration d'appel, laquelle a été envoyée exclusivement par courrier électronique. Le même jour, il a payé une avance de frais de 1'000 fr.

Par lettre du 14 novembre 2022, le greffe du TAS a fixé un délai de trois jours à l'appelant pour prouver que la déclaration d'appel avait été adressée par courrier ou téléchargée sur sa plateforme de dépôt en ligne ("e-filing"), tout en relevant qu'un tel envoi n'était pas intervenu à ce jour.

Par courrier électronique du 15 novembre 2022, l'appelant a demandé au TAS de pouvoir bénéficier du service de dépôt en

ligne et a exposé les raisons pour lesquelles il estimait que son appel était recevable.

Le 21 novembre 2022, le Greffe du TAS a signifié aux parties un refus de procéder concernant l'appel déposé par le club, en précisant que l'avance versée par celui-ci serait remboursée moyennant communication de ses coordonnées bancaires. Ce refus tenait au non-respect des exigences prévues par l'art. R31 al. 3 du Code de l'arbitrage en matière de sport (ci-après: le Code), lequel énonce ce qui suit:

“La requête d'arbitrage, la déclaration d'appel et tout autre mémoire écrit, imprimé ou sauvegardé sur support numérique, doivent être déposés par courrier au Greffe du TAS par les parties en autant d'exemplaires qu'il y a d'autres parties et d'arbitres, plus un exemplaire pour le TAS, faute de quoi le TAS ne procède pas. S'ils sont transmis par avance par télécopie ou par courrier électronique à l'adresse électronique officielle du TAS (procedures@tas-cas.org), le dépôt est valable dès réception de la télécopie ou du courrier électronique par le Greffe du TAS mais à condition que le mémoire et ses copies soient également déposés par courrier, ou téléchargés sur la plateforme de dépôt en ligne du TAS, le premier jour ouvrable suivant l'expiration du délai applicable, comme mentionné ci-dessus”.

Le TAS a relevé que la décision attaquée avait été notifiée aux parties le 17 octobre 2022 et que le délai d'appel avait expiré le 7 novembre 2022. Or, le club, qui avait adressé sa déclaration d'appel au TAS le 3 novembre 2022 par courrier électronique, n'avait pas transmis un exemplaire de son mémoire par courrier ni téléchargé celui-ci sur la plateforme de dépôt en ligne le premier jour ouvrable suivant l'expiration du délai applicable.

Le 21 décembre 2022, le club (ci-après: le recourant) a formé un recours en matière civile, assorti d'une requête d'effet suspensif et de mesures provisionnelles, aux fins d'obtenir l'annulation de la décision du 21 novembre 2022.

Extrait des considérants

5.1 Dans ses écritures, l'intéressé, se plaignant d'un déni de justice formel et d'une composition irrégulière du tribunal arbitral au sens de l'art. 190 al. 2 let. a LDIP, fait valoir que le Greffe du TAS n'était pas compétent pour refuser d'entrer en matière sur son appel (considérant 5). A cet égard, il soutient, en se fondant sur le texte de l'art. R49 du Code, qu'il incombait à la Présidente de la Chambre arbitrale d'appel du TAS de se prononcer sur ce point. Or, le dossier n'a pas été transmis à cette dernière, raison pour laquelle elle n'a pas pu prendre connaissance des arguments que l'intéressé avait avancés pour démontrer que son appel était recevable. Le recourant y voit dès lors un déni de justice formel. Il dénonce en outre une violation de l'art. 190 al. 2 let. a LDIP, dans la mesure où la décision querellée a été rendue à son avis par un organe incompetent du TAS, à savoir par une Conseillère appartenant au Greffe de ladite institution arbitrale et non par la Présidente de la Chambre arbitrale d'appel.

5.2. L'argumentation développée par le recourant - dont la motivation laisse à désirer - n'emporte nullement la conviction de la Cour de céans.

C'est en vain que l'intéressé se plaint d'un déni de justice formel, puisque le TAS n'a pas refusé de statuer sur le cas qui lui était soumis. L'institution d'arbitrage a simplement considéré qu'elle ne pouvait pas procéder respectivement entrer en matière sur l'affaire car le recourant ne l'avait pas saisie valablement, étant donné qu'il n'avait pas respecté les exigences formelles prévues par l'art. R31 al. 3 du Code.

Le recourant ne peut pas davantage être suivi lorsqu'il affirme, de manière péremptoire, que “d'après la lettre claire du Règlement du TAS”, il incombe au “président de la Chambre arbitrale d'appel” de décider de ne pas entrer en matière sur une déclaration d'appel. Certes, l'art. R49 du Code dispose que le Président de la Chambre concernée du TAS n'ouvre pas de procédure “si la déclaration d'appel est manifestement tardive”. Cela étant, l'intéressé perd de vue que l'application de la norme précitée n'entraîne pas en ligne de compte en l'espèce. En effet, le TAS ne reprochait pas à l'intéressé d'avoir agi tardivement mais bel et bien de ne pas avoir observé les conditions formelles afférentes au dépôt de la déclaration d'appel mentionnées à l'art. R31 al. 3 du Code. Or, il appert du texte de ladite règle que l'examen de telles exigences incombe au Greffe du TAS et non pas au Président d'une Chambre d'arbitrage du TAS, puisque l'art. R31 al. 3 du Code précise expressément que “le dépôt est valable dès réception de la télécopie ou du courrier électronique par le Greffe du TAS mais à condition que le mémoire et ses copies soient également déposés par courrier, ou téléchargés sur la plateforme de dépôt en ligne du TAS, le premier jour ouvrable suivant l'expiration du délai applicable, comme mentionné ci-dessus [passage mis en évidence par le Tribunal fédéral].

Pareille interprétation est du reste corroborée par la pratique suivie par le TAS, car le Secrétaire adjoint du TAS a déjà confirmé, dans une autre affaire soumise au Tribunal fédéral il y a plusieurs années, qu'un refus de procéder motivé par le fait qu'une partie n'avait pas observé l'art. R31 al. 3 du Code relevait de la seule compétence du Greffe du TAS (arrêt 4A_238/2018, précité, consid. 2.2).

Le recourant ne saurait également être suivi lorsqu'il prétend, en substance, que le Greffe du TAS peut refuser d'entrer en matière uniquement lorsqu'une partie n'a pas transmis un nombre suffisant d'exemplaires de sa déclaration d'appel. Certes, l'art. R31 al.

3 du Code est composé de deux phrases et l'indication selon laquelle le "TAS ne procède pas" figure au terme de la première d'entre elles, laquelle règle notamment la problématique afférente au nombre d'exemplaires à déposer. Cela ne permet toutefois pas d'en conclure, contrairement à ce que soutient le recourant, que la seconde phrase de l'art. R31 al. 3 du Code aurait en réalité trait à une question de délai dont le non-respect serait réglé par l'art. R49 du Code. Comme l'expose le TAS de façon convaincante, la première phrase de l'art. R31 al. 3 du Code énonce le principe général selon lequel la déclaration d'appel doit en principe être adressée par courrier, faute de quoi le TAS ne procède pas. La seconde phrase de la norme précitée ne fait qu'apporter des précisions quant aux modalités du dépôt de l'écriture, lorsque celle-ci a été initialement transmise par courrier électronique. L'art. R31 al. 3 du Code règle ainsi les exigences formelles à respecter pour saisir valablement le TAS tout en précisant que les mémoires qui lui sont destinés doivent être adressés au Greffe du TAS. Il prévoit en outre que l'inobservation du mode réglementaire de transmission de l'écriture destinée au TAS a pour conséquence que ce dernier ne procède pas. Force est dès lors d'admettre que le Greffe du TAS était bel et bien habilité à rendre la décision querellée.

A titre superfétatoire, on relèvera que, même si l'on suivait la thèse du recourant, l'admission du recours ne présenterait de toute manière aucun intérêt pratique pour ce dernier. En effet, la Présidente de la Chambre arbitrale d'appel a confirmé, dans la réponse au recours du TAS, sans susciter la moindre réaction de la part du recourant à cet égard, la conformité de la décision du 21 novembre 2022 avec les règles du Code, en dépit des arguments avancés par l'intéressé au sujet du non-respect des conditions de l'art. R31 al. 3 du Code.

Décision

Au vu de ce qui précède, le recours doit être rejeté dans la mesure de sa recevabilité.

Informations diverses
Miscellaneous
Información miscelánea



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