



# Bulletin TAS CAS Bulletin

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COURT OF ARBITRATION FOR SPORT

## Table des matières / Table of contents

### Message du Président du CIAS / Message of the ICAS President

Message of the ICAS President .....	1
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### Articles et commentaires / Articles and commentaries

When is a “ <i>Swiss</i> ” “ <i>award</i> ” appealable? .....	2
<i>Dr. Charles Poncet</i>	
La preuve du dopage dans les cas de présence d’une substance interdite .....	15
<i>Me Estelle de La Rochefoucauld, Conseiller auprès du TAS</i>	

### Jurisprudence majeure / Leading cases

Arbitration CAS 2011/A/2360 & CAS 2011/A/2392 .....	26
English Chess Federation & Georgian Chess Federation v. Fédération Internationale des Echecs (FIDE) 3 July 2012	
Arbitration CAS 2011/A/2425 .....	33
Ahongalu Fusimalohi v. Fédération Internationale de Football Association (FIFA) 8 March 2012	
Arbitration CAS 2011/A/2563 .....	50
CD Nacional v. FK Sutjeska 30 March 2012	
Arbitrage TAS 2011/A/2585.....	55
Agence Mondiale Antidopage (AMA) c. Ramiro Marino & Union Ciclista Republica Argentina (UCRA) 21 mai 2012	
Arbitration CAS 2011/A/2615.....	60
Thibaut Fauconnet v. International Skating Union (ISU) & Arbitration CAS 2011/A/2618 International Skating Union (ISU) v. Thibaut Fauconnet 19 April 2012	
Arbitrage TAS 2011/A/2616.....	67
Union Cycliste Internationale (UCI) c. Oscar Sevilla Rivera & Real Federación Española de Ciclismo (RFEC) 15 mai 2012	
Arbitration CAS 2011/A/2621 .....	77
David Savic v. Professional Tennis Integrity Officers (PTIOs) 5 September 2012	
Arbitration CAS 2011/A/2646.....	85
Club Rangers de Talca v. Fédération Internationale de Football Association (FIFA) 30 April 2012	
Arbitration CAS 2011/A/2658 .....	93
British Olympic Association (BOA) v. World Anti-Doping Agency (WADA) 30 April 2012	

Arbitration CAS 2011/A/2671 .....	103
Union Cycliste Internationale (UCI) v. Alex Rasmussen & The National Olympic Committee and Sports Confederation of Denmark (Dansk Idrætsforbund)	
4 July 2012	
Arbitration CAS 2011/A/2677 .....	114
Dmitry Lapikov v. International Weightlifting Federation (IWF)	
10 July 2012	
Arbitration CAS 2011/A/2678 .....	120
International Association of Athletics Federations (IAAF) v. Real Federación Española de Atletismo (RFEA) & Francisco Fernández Peláez	
17 April 2012	
Arbitration CAS 2012/A/2689 .....	131
S.C. Sporting Club S.A. Vaslui v Fédération Internationale de Football Association (FIFA)	
13 April 2012	

#### Jugements du Tribunal Fédéral / Judgments of the Federal Tribunal

4A_558/2011, Judgment of 27 March 2012, First Civil Law Court.....	135
4A_246/2011, Judgment of 7 November 2011, First Civil Law Court .....	142
4A_627/2011, Judgment of 8 March 2012, First Civil Law Court.....	148
4A_488/2011, Arrêt du 18 juin 2012, Ire Cour de droit civil .....	155
4A_636/2011, Judgment of 18 June 2012, First Civil Law Court .....	164
4A_134/2012, Arrêt du 16 juillet 2012, Ire Cour de droit civil.....	168

#### Informations diverses / Miscellaneous

Publications récentes relatives au TAS / Recent publications related to CAS.....	173
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## Message of the ICAS President

The last months have been particularly busy with a significant number of high profile cases handled by the Court of Arbitration for Sport. Among the 'leading cases' selected for the Bulletin are several cases related to doping. A few "doping" cases are of interest with respect to the recent developments regarding the conditions to benefit from a reduced sanction for the use of specified substances. The case UCI v. Rasmussen & DIF deals with the whereabouts failure issue whereas the conditions to benefit from a reduction of the sanction based on Substantial Assistance are clearly defined in the case IAAF v. RFEA & Francisco Fernandez. The CAS has also confirmed the notable "USOC award" in the British Olympic Association v. WADA case by considering that an NOC's provision providing that an athlete found guilty of a doping offence is ineligible to compete in the Olympic Games is an "extra" or "double" doping sanction not in compliance with the World Anti-Doping Code. Turning to football, the case CD Nacional v. FK Sutjeska specifically considers the meaning of Article 15 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber. The case Club Rangers de Talca v. FIFA is of interest with respect to the bankruptcy of a club while the decision rendered in Fusimalohi v. FIFA contemplates the consequences of the infringement of the Code of Ethics by a FIFA official and addresses the issue of illegal evidence in arbitration. On another sporting field, the case Savic v. PTIO looks at the issue of corruption/match fixing in tennis and to the standard of proof requested while the chess case English Chess Federation & Georgian Chess Federation v. Fédération Internationale des Echecs (FIDE) deals interestingly with the scope of Article R49 of the CAS Code.

The article of Dr. Charles Poncet entitled "When is a 'Swiss' 'award' appealable?" included in this issue is of great practical importance. In concrete terms, it aims at helping foreign readers to ascertain which "awards" issued by an international arbitral tribunal sitting in Switzerland should be appealed, as opposed to other decisions.

Last summer, the CAS ad hoc Division (CAS AHD) selected by the ICAS for the Olympic Games in London composed of twelve arbitrators rendered eleven (11) awards. Since 1996 and the first CAS ad hoc Division, only the Sydney Games generated more decisions in one edition of the Games (15). Most of the cases heard were related to the selection and qualification of athletes. During a major international sporting event such as the Olympic Games, expediency is obviously a key element of the rules applicable. Indeed, according to Art. 18 of the Arbitration Rules for the Olympic Games, the CAS AHD shall resolve any dispute arising on the occasion of or in connection with the Olympic Games within 24 hours of the lodging of the application. The "London" decisions will be gathered in a coming digest entitled "CAS Awards Olympic Games 2012".

Eight (8) new arbitrators have been appointed in order to strengthen the current group of CAS members in view of the heavy workload placed on them and the increasing number of arbitrations (297 so far in 2012). To date, five (5) mediators have been appointed this year which make a total number of fifty seven (57) mediators.

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

**John Coates**

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## When is a “Swiss” “award” appealable?\*

Dr. Charles Poncet\*

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I. The appeal.....	4
II. Grounds for appeal .....	4
III. Appealable decisions: a deceptively “simple” system .....	4
IV. “Final”.....	5
V. “Interim” or “preliminary” but “partial” .....	6
VI. Not “partial” yet appealable as “interim” or “preliminary”? .....	8
VII. “Implicitly” “interim” or “preliminary” and therefore appealable on limited grounds? .....	10
VIII. Decisions on costs: a duck-billed platypus? .....	12
IX. Practical considerations and need for a change .....	13

\* This article was first published in the the Paris Journal of International Arbitration 2012/1.

\* The author is a former Member of the Swiss Parliament and a partner in the Geneva law firm ZPG. [charles.poncet@praactor.ch](mailto:charles.poncet@praactor.ch)

International arbitral awards issued in Switzerland are “Swiss” only to the extent that they may be appealed to the Swiss Federal Tribunal (“FT”). That is their main connection with the Swiss legal system, yet an important one because ultimately Swiss judges will decide whether the award is annulled or upheld by the courts of the “seat” of arbitration. If annulled, the award will not be enforceable abroad, except in jurisdictions which recognize an award otherwise annulled by the courts of the seat<sup>1</sup>. How tenuous and even artificial the connection between the “seat” of the arbitration and the national courts is will be clear already from the fact that most arbitrations conducted in Switzerland involve foreign parties and more and more frequently, foreign arbitrators and foreign counsel with hardly any Swiss interest of any kind involved. The connection is also very questionable from a scholarly point of view, as has been authoritatively demonstrated<sup>2</sup> although some legal writing<sup>3</sup> still considers it appropriate. The same applies to other venues of international arbitrations

but Switzerland is probably the most remarkable example in view of its small size and the number of arbitrations held in that country<sup>4</sup>.

Yet the fact remains: a “Swiss” award will be subject to scrutiny by the Swiss judiciary, albeit of a limited nature, but only to the extent that it qualifies as an “award” pursuant to the *lex fori* and depending upon its nature, it may be appealable on two grounds only instead of five, or not at all. The purpose of this article is therefore to help foreign readers ascertain which “awards” issued by an international arbitral tribunal sitting in Switzerland should be appealed immediately, as opposed to other decisions. These may or may not qualify as “awards” for Swiss purposes and they may be subject to judicial review immediately, or only with the final award or on more limited grounds, or not all. The issue is of great practical importance as will be seen hereunder and

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1. See *Omnium de Traitement et de Valorisation v. Hilmarton* (June 10, 1997) 1997 Rev. Arb. 376 and note FOUCHARD, and 22 Y.B. Com. Arb. 696 (1997); *P.T. Putrabali Adyamulia v. Rena Holding* (June 29, 2007) 2007 Rev. Arb. 507; *ROSNEFT/YUKOS*, Netherlands Supreme Court, June 25, 2010 (LJN: BM1679). The decisions have been the object of many comments and the issues involved are well summarized by Bernard HANOTIAU, *International Arbitration in a Global Economy: The Challenges of the Future* in (ed) 2011 *Journal of International Arbitration* 89 – 103.

2. See Emmanuel GAILLARD *Aspects philosophiques du droit de l'arbitrage international* p.55-60 and 188-207 (2008).

3. See POUURET/SÉBASTIEN/BESSON, *Droit comparé de l'arbitrage international* p.86-91 (2002).

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4. In 2009, 630 ICC arbitrations were conducted in 53 countries. Switzerland (1.88% of the countries) was host to 119 arbitrations (18.9 % of the total) ahead of the UK (73), the USA (36) and even France (113). Also, out of a population of fewer than 8 million, Swiss arbitrators (1.73 % of 73 countries concerned) represented 202 appointments out of 1'305 or 15 %, ahead of the UK (196), Germany (104) the USA (99) and France (96). Whilst limited to ICC arbitrations, these figures clearly show that the role of the country in international arbitrations is out of proportion to its size or political importance. The figures for 2010 show more arbitrations taking place in France (124 out of a total of 591) than in Switzerland (86) but still about 15% of all ICC arbitrations and therefore considerably more than what Switzerland's population or geopolitical importance would suggest. However, Swiss arbitrators (180) were still 13.52 % of the total more than the UK (177), France (120) and the USA (100). See 21 ICC International Court of Arbitration Bulletin 5 – 17 (2010). In 2010 See 22 ICC International Court of Arbitration Bulletin 7 – 14 (2011).

it requires at first a general understanding of the functioning of the Swiss judiciary.

The FT is Switzerland's highest court. It consists of 38 full time judges, 11 of whom are women, with 19 alternate judges who sit occasionally. The judges are elected by the Swiss parliament after a screening process by a special committee of 17 MPs of both chambers and the candidates are expected to be at least loosely affiliated with one of the political parties in parliament, a somewhat questionable practice in terms of judicial independence; they are elected for a four year term, renewable – or not... – and the compulsory retirement age is 68. The FT – like the rest of the Swiss judiciary – is immaculately clean and judicial corruption is unknown in Switzerland.

The FT is divided into seven sections, dealing with various types of appeals, a detailed review of which would go beyond the scope of this article. Suffice it to say that whilst Swiss judges do *not* have the power to declare federal legislation unconstitutional – which makes the FT hardly “*supreme*” as a court compared to other federal systems – they certainly can annul international arbitral awards and they do so occasionally. Yet their law is not “*judge made*” to the extent that the grounds for appeal are contained in federal legislation<sup>5</sup>: the FT may interpret them but it does not have the power to create new ones. Appeals against international awards are adjudicated by the First Civil Court, which comprises five judges. There is no “*chief justice*” for, true to the Swiss tradition of reticence towards personal power of any kind, the FT has a rotating presidency lasting two years. In turn, each court has a presiding judge on a rotating basis. The current presiding judge of the First Civil Court is judge Kathrin Klett. The Court is trilingual and handles appeals in German, French and Italian. Materials in English – arbitral awards for instance – are frequently allowed without translations.

All legislative attempts to introduce a sort of *certiorari* system allowing the FT to hear fewer cases have basically failed in the past<sup>6</sup> although the creation of a Federal Criminal Court and a Federal Administrative Court in 2003 and 2005<sup>7</sup> has eased the burden of the FT as appeals against their decisions are somewhat limited. However the number of cases decided by the FT remains staggering: the Court handles close

to 7'500 appeals per year. The First Civil Court alone deals with more than 800 cases, arithmetically giving each judge the insurmountable burden of being in charge of about 160 opinions per year in addition to reviewing the others. Whilst a team of competent clerks help with the drafting of opinions and legal research – and a lot of appeals are quite simple – the volume remains excessive and it affects the quality of the work of the Court. Fortunately the number of international arbitration awards appealed remains modest at about 40 to 50 a year<sup>8</sup>. The recent trend shows a majority of appeals directed at awards issued by the Court of Arbitration for Sports (“CAS”) in Lausanne, some of which are quite simple or even should not have been appealed at all and are consequently rejected out of hand<sup>9</sup>. In other words, when an award raises significant and important legal issues it will probably receive the thorough review it deserves<sup>10</sup>. By the standards of the English speaking world, Swiss appeals are somewhat peculiar: hearings are almost unknown and in any event if oral arguments are allowed – a rarity – the draft court opinion is likely to be prepared *before* oral arguments, rendering the exercise somewhat futile. Most cases are thus disposed of by a three judge panel with opinions circulated among them. Five judge panels deal only with cases raising an issue of principle or upon request by one of the judges, or in certain specific cases<sup>11</sup>. On the other hand, in some cases<sup>12</sup>, a five judge panel still deliberates in open court as opposed to *in camera*. This is a very interesting practice, which used to be ubiquitous until the number of appeals made it practically impossible. It remains applicable in cases the importance of which requires debate in open court. The judge in charge of the case reads or summarizes his/her

8. See in this respect Felix DASSER, International Arbitration and Setting Aside Proceedings in Switzerland: a Statistical Analysis, 25 ASA Bulletin 444-472 (2007) and the update *ibidem* 82-100 (2010).

9. For a recent example see Azerbaijan Wrestling Federation (“AWF”) v. the World Anti-Doping Agency (“WADA”) and the International Federation of Associated Wrestling Styles (“FILA”) 4A\_416/2008 Judgment of March 17, 2009, 2010 ASA Bulletin 367; full English translation at <http://www.praetor.ch/arbitrage/cas-jurisdiction-on-a-doping-case-confirmed-no-procedural-violat/>; also see 2009 Swiss Int'l Arb.L Rep 219.

10. To give but two examples, see the “famous” Tensacciai Judgment of March 8, 2006, holding that EU competition law is not part of public policy for the purposes of art.190 (2) (e) PILA, ATF 132 III 389, 2006 ASA Bulletin 363; full English translation at <http://www.praetor.ch/arbitrage/violation-of-public-policy-notion-of-public-policy-exclusion-of-/>. For a detailed criticism of the decision see Andreas BUCHER, *op. cit.* hereunder at note 19 p.1702-1704 nr.124-128. Another example is the equally famous annulment of the 1996 Thales award in revision proceedings in 2009, 4A\_596/2008 Judgment of October 6, 2009, 2010 ASA Bulletin 318; full English translation at <http://www.praetor.ch/arbitrage/revision-of-award-accepted-arbitral-tribunal-misled-by-evidence-/>. See Charles PONCET, Obtaining Revision of “Swiss” International Arbitral Awards: Whence After Thalès? 2009 Stockholm International Arbitration Review vol.2 39-53 (2011).

11. See article 20 of the Federal Law on the Federal Tribunal of June 17, 2005 (“LFT”), which came into force as of January 1st, 2007. Appeals against cantonal laws subject to a referendum or in matters of cantonal ballot initiatives are also adjudicated by a five judge panel.

12. See art.58 LFT.

5. They are set forth in Chapter 12 of the Federal Law on Private International law of December 18 1987 (“PILA”). PILA is the most commonly used English abbreviation.

6. An attempt made in 1989 was rejected by the Swiss voters on April 1<sup>st</sup> 1990. See 1989 FF II 741.

7. Both courts were accepted by the Swiss voters on March 12, 2000. The Federal Criminal Court came into force on April 1<sup>st</sup> 2003 and the Federal Administrative Court on September 1<sup>st</sup>, 2005.

draft opinion and submits a proposal. Then each of the four other judges opines and it is by no means certain that the proposal will meet the agreement of a majority. The draft opinion is then either rewritten or supplemented with the comments and suggestions made during the deliberation. Since Swiss FT judges often have scholarly interests and publish articles in law journals<sup>13</sup> or write commentaries, these open court deliberations can be quite interesting. On the other hand, FT judges are not allowed to dissent and the opinion is supposed to reflect the majority view without any opportunity for the minority to make its point. This sometimes produces the frustrating result that a lively discussion may be reduced to a few fuzzy compromise paragraphs in the written opinion. Since 2000 the opinions of the FT are all available on the Court's web site<sup>14</sup>, generally with the names of the parties blanked out on privacy grounds, with some exceptions. Civil law systems do not (in principle) recognize the rule of *stare decisis* but a number of the FT opinions are published in the Federal Court Reporter, albeit not necessarily in their entirety and they do constitute a body of precedents to be followed by all courts of the land.

### I. The appeal

Unless the parties have opted out of appeals, which they may do in part or completely pursuant to art.192 PILA if they are not Swiss or domiciled or resident in Switzerland, international awards issued in Switzerland are subject to an appeal to the FT directly. Originally, the parties could – but rarely did – confer appeal jurisdiction to a cantonal court pursuant to the arbitration clause or (even more unlikely) in a separate agreement. This has been abolished by the new federal law organizing the FT of June 17, 2005 (“LFT”) which came into force as of January 1<sup>st</sup> 2007. An interesting feature of the new law since January 1<sup>st</sup>, 2011 is that its article 77(3) now specifically exempts international arbitration from the provisions of art. 91, 92 and 93 LFT pursuant to which a preliminary or interlocutory decision of a lower court may be appealed under certain circumstances. This had been a source of difficulties under the previous regime and the situation has now been clarified: PILA and not the LFT sets forth the grounds on which an international award issued in Switzerland may be set aside<sup>15</sup>.

13. A good example is federal judge Bernard CORBOZ, whose scholarly interests have led him to many publications. Among those related to our topic, see his commentary of Article 77 LFT in *Commentaire de la loi sur le Tribunal fédéral* (Bernard CORBOZ et al. eds., 2009); also see *Introduction à la nouvelle loi sur le Tribunal fédéral, 2006 Sem. Jud. 321-325* and *Le recours au Tribunal fédéral en matière d'arbitrage international, 2002 Sem. Jud. 1-32*.

14. www.bger.ch.

15. Although art.77 (3) LFT specifically states that the FT will review only the grievances (i) specifically raised in the appeal brief and (ii)

## II. Grounds for appeal

The grounds for appeal are spelled out at art. 190 PILA *exclusively*, which starts with a statement that the award is enforceable (“*final*”) from its notification. In line with international instruments<sup>16</sup> they are very limited and make an annulment possible only in the following cases:

190(2)(a) : irregular appointment of an arbitrator or irregular composition of the arbitral tribunal;

190(2)(b) : jurisdiction incorrectly denied or accepted;

190(2)(c) : awarding more than the submissions (*ultra petita*) or refusing to issue a decision on some of them (*infra petita*);

190(2)(d) : violating due process (“*the right to be heard in contradictory proceedings*”) or denying a party equal treatment with the other;

190(2)(e) : incompatibility of the award with public policy.

### III. Appealable decisions: a deceptively “*simple*” system

The concept of “*award*” is defined at art. 188 and 189 PILA. Art.188 empowers the arbitral tribunal to issue partial awards unless the parties agreed to the contrary. A “*partial*” award is therefore not final but as we will see it may or may not be a *Vorentscheid* (preliminary award) or even an “*award*” as “*defined*” by art. 189, which merely provides that the award is (i) issued according to the procedure and in the format agreed by the parties and (ii) in the absence of an agreement by a majority, by the chairperson in writing, with a date and a signature<sup>17</sup>. The chairperson’s signature suffices. As most arbitrations tend to be institutional nowadays, the arbitration rules of the specific institution involved will generally contain additional provisions clarifying the required contents of an “*award*” and sometimes more<sup>18</sup>. Even in *ad hoc* arbitrations the *longa consuetudo*

properly argued by the Appellant. In other words, the Court performs no *ex officio* judicial review.

16. See art. 34 of the 1985 - U□ CITRAL □ odel Law on International Commercial Arbitration, with 2006 amendments and Art V of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (□ ew □ ork Convention).

17. Similar to art.31 of the U□ CITRAL □ odel Law.

18. Thus Art. 2 (iii) of the ICC Rules includes “*partial*” “*interim*” and “*final*” in the concept of an ICC “*award*”. Art.25 states that an award should be unanimous, or issued by a majority of arbitrators and if there is no majority, by the chairperson. Reasons need to be stated. Furthermore the ICC Secretariat sends guidelines to ICC arbitrators and draft awards are reviewed (“*scrutinized*”) by the ICC Court of Arbitration, frequently resulting in useful suggestions. The same applies to other institutions such as the Court of Arbitration for Sports in Lausanne (“*CAS*”) whose Secretary General is entitled not only to

of most arbitrators and counsel makes it unlikely that any serious disagreement could arise as to what an award should contain: it is a decision as to one or several issues, notified to the parties in writing with at least some reasons in support (unless otherwise agreed by the parties, which they almost never do in commercial arbitration, let alone in investment matters).

Legal writers<sup>19</sup> have analyzed the legal provisions with a view to creating a systematic picture that can enable litigants to determine when an “award” that is not final must or can be appealed. It will be seen hereunder that case law of the FT has also made several helpful attempts at clarifying the situation. In this writer’s opinion however, it is far from assured that things have become clear enough and an overhaul of art.190 PILA is probably overdue.

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make formal modifications to draft awards but also to draw the Panel’s attention on fundamental issues of principle that the arbitrator(s) may have overlooked or misconstrued (art. R46 of the Code).

19. In the vast literature on this subject, I am particularly indebted to Andreas Bucher’s very recent and masterful commentary on Articles 187 to 194 PILA, particularly Art.190 of course. See Andreas BUCHER, *Loi sur le droit international privé - Convention de Lugano*, in *Commentaire Romand* 1639 – 1767 (2011) ; also of great interest for the issues addressed hereunder, see Gabrielle KAUFMANN-KOHLER/ ANTONIO RIGOZZI, *Arbitrage international Droit et pratique à la lumière de la LDIP* 449-570 (2010) (“KAUFMANN-KOHLER/RIGOZZI”); in English, see Elliott GEISINGER and Viviane FROSSARD, *Challenge and Revision of the Award* in Gabrielle KAUFMANN-KOHLER/ Blaise STUCKI, *International Arbitration in Switzerland, A Handbook for Practitioners* 135-165 (2004); Bernhard BERGER/Franz KELLERHALS, *International and Domestic Arbitration in Switzerland* 438-494 (2010) (“BERGER/KELLERHALS”) contains a good presentation in English; Christoph MÜLLER, *Swiss Case Law in International Arbitration* 225-319 (2010) provides a clear and systematic outline in English of Swiss case law concerning art.190 PILA. Also see Stephe V. BERTI and Anton K. SCHNYDER *International Arbitration in Switzerland* 569-587 (2000). With no pretension to being exhaustive, I have also consulted and relied on Bernard CORBOZ et al. *Commentaire de la loi sur le Tribunal fédéral* 607-656; by the same author, *Le recours au Tribunal fédéral en matière d’arbitrage international* 2002 Sem. Jud 1-32; of further interest is Cesare JERMINI’s Phd. thesis, *Die Anfechtung von Schiedssprüchen im internationalen Privatrecht* (Zürich 1997) ; Bernhard BERGER, *Appeals in International Arbitration Under the New Swiss Federal Tribunal Statute* 155-163, in *New Developments in International Commercial Arbitration* (2007) ; Sébastien BESSON, *Le recours contre la sentence arbitrale internationale selon la nouvelle LTF (aspects procéduraux)* 2007 ASA Bulletin 2-35; Myriam GEHRI, *Die Anfechtung internationaler Schiedssprüche nach IPRG* 71-116, in *Internationales Zivilprozess- und Verfahrensrecht IV* (2005); Yves DONZALLAZ, *Loi sur le Tribunal fédéral* 921-935 (2008); Philipp GELZER, *Zum Anfechtungsobjekt der Vorentscheide gemäss Art. 190 Abs.3 IPRG* 2000 ASA Bulletin 487-500 ; Jean-François POUDET, *Les recours au Tribunal fédéral Suisse en matière d’arbitrage international* 2007 ASA Bulletin 669-703; by the same author and in English, *Challenge and Enforcement of Arbitral Awards in Switzerland, 1988 Arbitration International* 278-299 ; Philippe SCHWEIZER, *L’ordre public de Part. 2* *lit.e LDIP : le caméléon court toujours* 271-285, in *Mélanges Bernard DUTOIT* (2002) ; Bernard DUTOIT, *Commentaire de la loi fédérale du 18 décembre 1987* 664-680 (2005); Erich TAGWERGER, *Zur Anfechtung schiedsgerichtlicher Vor- und Zwischentscheide nach Art.190 IPRG* (2009). Finally, in a comparative perspective, I was helped by FOUCHARD/GAILLARD/GOLDMAN *International Commercial Arbitration* 888-960 (1999); Gary B. BORN, *International Commercial Arbitration* 2551-2699 (2009); Julian D M LEW/Loukas A MISTELIS /Stefan M KRÖLL, *Comparative International Commercial Arbitration* 663-686 (2003); *The Review of International Arbitral Awards*, IAI Series No 6 (2010), particularly the articles on France by Dominique HASCHER at 97-111 and England by Jonhatan Mance 119-143. The introductory report by Bernard HANOTIAU and Olivier CAPRASSE at 7-97 is also quite useful.

When there is one award only in the arbitration and it disposes of all the issues before the arbitral tribunal – fortunately not too rare an occurrence even in the ever more litigious climate of the age – the situation is simple: the parties have thirty days to appeal the award on all the grounds spelled out at art. 190 PILA. Some tautology is unavoidable to define a “final” award: that which puts an end to the arbitration. It may do so by disposing of all the issues at hand or by incorporating a settlement between the parties into the decision of the arbitral tribunal. Yet an award is also final when it refuses to address the issues on procedural or other grounds (lack of jurisdiction for instance). Other grounds are conceivable (lack of standing to sue or defend, failure to pay the deposit) but as Andreas Bucher rightly points out<sup>20</sup>, the most likely situation in which an arbitration will terminate without a decision on the merits or a settlement is a finding that the arbitral tribunal has no jurisdiction at all or as to some parties only.

Whilst appeals against awards granting jurisdiction are relatively frequent and sometimes lead to annulment<sup>21</sup>, there are few recent<sup>22</sup> examples of a final award appealed after *denying* jurisdiction and they involved *partial* denials of jurisdiction only. In a decision of February 29, 2008<sup>23</sup> the FT reviewed a case involving a German and a Russian company bound by two agreements for the delivery of certain metals, governed by Swiss law with arbitration in Zurich. Five further agreements were concluded with Russian law governing and arbitration in Moscow. Then came an *addendum* providing for arbitration in Zurich under the Swiss Rules. When a dispute arose, the arbitrators<sup>24</sup> accepted jurisdiction on one

20. *Op.cit* 1673 nr. 12.

21. Among recent decisions see 4A□456/2009 a judgment of May 3, 2010, 2010 ASA Bulletin 786; full English translation at <http://www.praetor.ch/arbitrage/arbitration-clause-interpretation-of-declarations-based-on-the-p/>. The case involves a long-distance runner that the International Association of Athletics Federations (“IAAF”) banned from late April 25, 2006 until early December 2008 for doping. The athlete appealed the decision of the Disciplinary Committee of the IAAF to the Court of Arbitration for Sport (“CAS”). In an award issued on July 24, 2009, the CAS upheld the appeal and annulled the decision. Its award was annulled by the FT for lack of jurisdiction. For another example, see the much commented judgment in the case of Busch v. WADA of 4A□358/2009 of November 6, 2009, 2011 ASA Bulletin 166; full English translation at <http://www.praetor.ch/arbitrage/lack-of-jurisdiction-of-the-cas-arbitration-clause-by-reference/>; also see 2009 Swiss Int’l Arb.L.Rep. 495. A hockey player signed a registration form for the Ice Hockey World Championship, from which WADA sought to deduce blanket consent to CAS jurisdiction as to other issues – illicit substances – only remotely related to the event the player was signing up for.

22. Unless absolutely necessary to illustrate a specific point, the cases quoted hereunder were decided in 2008 or later, thus making reference possible to the full English translation of the opinion.

23. 4A□452/2007□Judgement of February 29, 2008, 2008 ASA Bulletin 376; full English translation at <http://www.praetor.ch/arbitrage/interpretation-of-an-arbitration-clause/>. Also see 2008 Swiss Int’l Arb.L.Rep 169.

24. Pierre A. KARRER, Daniel GIRSBERGER, arbitrators and Daniel



of the claims but not the other and the FT stated the following on appeal: “*In granting the Respondent’s partial objection on jurisdiction the Arbitral Tribunal found that it had jurisdiction on one part of the claim and not on the other. The award is appealed only to the extent that the Arbitral Tribunal denied jurisdiction. An award in which an arbitral tribunal denies jurisdiction is a final award*<sup>25</sup>”.

In the case of *Vivendi et al v. Deutsche Telekom et al*<sup>26</sup> there was a contract providing for ICC arbitration in Zurich. One of the parties was a Polish company, which went bankrupt after the arbitration had commenced. The Polish Bankruptcy Act automatically cancelled any arbitration agreements and /or proceedings entered into by the bankrupt. The arbitrators<sup>27</sup> held that the standing to act in a Swiss arbitration was determined according to the general Swiss conflict of law rules, which pointed to Polish law and accordingly they denied jurisdiction. The FT upheld the award and stated the following as to the nature of the decision: “*If the arbitral tribunal denies jurisdiction, it issues a final decision, which may be challenged before the Federal Tribunal on all the grounds set forth in Art. 190 (2) PILA. In this case, the Arbitral Tribunal issued a decision in which it denied jurisdiction with respect to Respondent 6. A decision denying jurisdiction in respect of one or several Respondents is an award (Art. 91 (b) BGG*<sup>28</sup>), *which may be appealed in accordance with Art. 190 (2) PILA in the same way as a final award*<sup>29</sup>”.

#### V. “Interim” or “preliminary” but “partial”

An “interim” or “preliminary” and “partial” award (“*Teilentscheid*”, “*sentence partielle*”) decides *some* of the substantive issues at hand and leaves others to further, subsequent proceedings. It falls squarely within art.188 PILA, which, however, contains no substantive definition of an “interim” award and there are all sorts of decisions an arbitral tribunal may issue whilst leaving some others for the future. To constitute an “award” for the purposes of art. 190 PILA – thus allowing but also *requiring* an immediate appeal under penalty of forfeiting one’s right to appeal - the decision must *really* adjudicate the matter on the merits albeit in part only. Hence the not altogether very clear concept of the interim award *stricto sensu*, as opposed, one may logically surmise, to *lato sensu* where the “interim” award would not be “partial”

enough to justify and require immediate appeal for Swiss purposes. In fairness it must be said that the very concept was developed in connection with the previous law organising the FT<sup>30</sup>, which basically required interim decisions – not only arbitral awards but any decisions – to create irretrievable harm in order to be capable of appeal. This generated a pattern of circular definitions that the new law abolished by creating in effect a special category for arbitral awards<sup>31</sup>. In several cases<sup>32</sup>, the FT wrestled with the need for a definition of the “interim partial award” that would *also* fit the requirements of the LO. In one of the latest attempts in 2002, the Court was faced with a Nigerian corporation and an allegedly Texan counterpart going into a joint venture governed by Nigerian law to gather and recycle oil residues. The arbitration clause provided for Geneva Chamber of Commerce arbitration in Geneva. When a dispute arose, the arbitrators held in an interim award issued in 2000 that the “Texan” entity had *locus standi*. However in a final award rendered in 2001, the arbitral tribunal found that the “Texan” entity was not a validly constituted legal person and accordingly terminated the arbitration. It was argued in the appeal that the contradiction between the 2000 decision and the subsequent final award violated public policy, thus requiring the FT to define the procedural nature of the first award. The FT thus considered that interim Partial awards *stricto sensu* decide part of the issues at hand and are *res judicata* but only with regard to the issues adjudicated. Other “awards” (preliminary or interlocutory awards) decide substantive or procedural preliminary issues and they are not *res judicata* but they bind the arbitral tribunal, as opposed to mere procedural orders, which may be rescinded or amended later in the proceedings. The FT added: “*Thus, to give but one example, an arbitral tribunal which issued a preliminary award deciding the principle of the Respondent’s liability is bound by its decision when, in the final award, it adjudicates the Claimant’s monetary claims*<sup>33</sup>”. Helpfully – or perhaps not – the Court added: “*Res judicata applies only to the award itself. It does not extend to the reasons. However one sometimes has to resort to the reasons to know the exact meaning, the nature and the precise scope of the award*<sup>34</sup>”. The Court then analysed the two awards and found that by deciding at the end of the arbitration that the “Texan” entity was not a validly constituted legal entity, the arbitral tribunal had not disregarded the binding effect of the previous decision holding that

WEHRLI, chairman.

25. 1.2 of the English version p.1.

26. Judgment No.28/2008 of 17 March 2009, 2010 ASA Bulletin 1000 full English translation at <http://www.praetor.ch/arbitrage/effect-of-foreign-bankruptcy-on-icc-arbitration-in-switzerland-c/> also see 2009 Swiss Int’l Arb.L. Rep 211.

27. Yves FORTIER, chairman, Karl HEMPEL and Jacques WERNER, arbitrators.

28. BGG is the German abbreviation for the LFT.

29. 2.2 of the English version p.1.

30. Loi fédérale d’organisation judiciaire (“LOJ”) of December 11, 1901, amended several times.

31. See art.77 (2) LFT.

32. See in particular ATF 110 II 80 (1990) and ATF 128 III 191 (2002). Both decisions are in French.

33. Translation of part of the opinion at p. 190 of ATF 128 III 191ff.

34. *Ibidem*.

the non-existing entity had standing to sue. In other words future litigants would have to ascertain if the award was interim *and* partial - in which case it would have to be appealed immediately – or interim but *not* partial, thus making it incapable of appeal until the final award was pronounced. That making the wrong choice in this respect might entail some very significant costs in large international arbitrations will be clear from the fact that in this case the FT imposed CHF 100'000 of court costs and CHF 400'000 of other party costs on the appellant, *i.e.* CHF 2'057 *per line* (the opinion contained 243 lines, title and signatures included) or a still impressive CHF 89.30 *per word*.

The approach was not fully persuasive and had to be modified. In 2004<sup>35</sup> the FT rejected an appeal by a Dutch company against an ICC partial award assessing the value of certain shares and reserving other issues for the subsequent proceedings. The FT stated the following: “*The nexus heretofore established by case law between art.87 LOJ and art. 190 PILA<sup>36</sup> must accordingly be broken once and for all. Consequently, whether or not an interim award lato sensu is capable of a public law appeal shall be examined exclusively under the aegis of the latter provision. As to the partial interim awards within the meaning of art.188 PILA it follows that they may be appealed under the same conditions as final awards, considering that they too are awards falling within the scope of art.190 (1) and (2) PILA. To conclude, present case law must be abandoned and it must be admitted with legal writers that three types of awards may be capable of immediate appeal to the Federal Tribunal : firstly, final awards on all the grounds set forth at art.190 (2) PILA; secondly interim partial awards on the same grounds; thirdly interlocutory awards, yet only on the grounds set forth at art.190(2) (a) and (b) PILA<sup>37</sup>.*”

Thus the subsequent formal change in the statutory law<sup>38</sup> that made somewhat redundant “*stricto*” or “*lato*” sensu “*interim partial*” or merely “*interim*” awards in 2011 was indeed welcome. Unfortunately we will see that there is still room for doubt.

The landscape being thus clarified in part, one may follow Andreas Bucher’s convincing attempt<sup>39</sup> at a typology of various awards or decisions and point out that partial awards for Swiss purposes are those which decide some but not all the substantive issues in front of the arbitral tribunal: for instance the

claim is adjudicated but the counterclaim remains outstanding, as in a case<sup>40</sup> between a French and an Italian company involving several joint venture cooperation agreements, which led to a majority award in which the arbitrators<sup>41</sup> rejected the substantive claims but allowed one of the counterclaims, reserving one or more future awards concerning the decisions still pending as well as the costs of the arbitration. In line with the new case law, the FT stated the following: “*The actual partial award or partial award stricto sensu mentioned at art. 188 PILA is that by which the arbitral tribunal decides some of the claims or one of the various claims in dispute (...). It is distinguished from the interlocutory award, which decides one or several preliminary issues, whether procedural or on the merits (...). According to case law, a partial award may be appealed immediately under the same conditions as a final award because, like the latter, it is an award falling under art. 190 (1) and (2) PILA (...).The award under appeal does not put an end to the proceedings between the parties, since the Arbitral Tribunal must still rule on the amount of the counterclaim it allowed as well as on the costs of the arbitration. However it disposed of the Claimant’s submissions. Therefore it is an actual partial award subject to Civil law appeal on all the grounds provided at art. 190 (2) PILA.*”<sup>42</sup> Conversely only the counterclaim could have been decided<sup>43</sup> with the fate of the claim differed until later.

An award rejecting jurisdiction as we have seen above<sup>44</sup> in the *Vivendi* case is final with regard to the party as to which jurisdiction is denied but partial for those as to which the arbitral tribunal accepts jurisdiction. It is also conceivable that a “*partial*” award could decide every substantive issue in the case but still leave the costs to a subsequent determination<sup>45</sup>.

The important point to bear in mind is that if an “*interim and partial*” award gets it wrong, it *must* be appealed forthwith. Swiss law does not afford a litigant the *choice* of appealing it together with the final award. If it qualifies as an “*interim and partial*” award – *i.e.* disposing of at least one substantive issue in the arbitration – failure to appeal immediately will result in the party’s total forfeiture of the right to have the same issues reviewed by the FT *at all*.

35. ATF 130 III 755 (2004) (in French).

36. Article 87 of the loi fédérale d’organisation judiciaire (“LOJ”) in force at the time read as follows: “A public law appeal for violation of art. 4 of the Federal Constitution is available only against final decisions; preliminary decisions taken in last instance are capable of appeal only if they cause irretrievable harm to the interest party”.

37. ATF 130 III at 761 and 762 (in German).

38. Art. 77(2) LFT.

39. *Op.cit* 1674 nr. 14 et 15.

40. See 4A\_584/2009 Judgment of March 18, 2010 2011 ASA Bulletin 426; full English translation at <http://www.praetor.ch/arbitrage/alleged-violation-of-due-process-rejected-no-review-of-the-arbit/>.

41. Bernard HANOTIAU, chairman, Piero BERNARDINI and this writer, arbitrators.

42. 2.2 of the English version p.5.

43. See 4P\_134/2006 Judgment of September 7, 2006, 2007 ASA Bulletin 373.

44. See above note 15.

45. Bucher *op.cit* at p.1674 nr.15.

VI. Not “*partial*” yet appealable as “*interim*” or “*preliminary*”?

It will be clear to the reader by now that the Cartesian distinction outlined above – whilst perfectly clear and sound in theory – was unlikely to stand the rigorous tests of practice: it produces some thoroughly confusing situations in which the only ones who know whether the award is indeed preliminary but partial – or interim and not partial but still appealable on limited grounds – will be the federal judges deciding the case in the end, mainly because their views are final and impermeable to challenge in a higher court. Mere mortals – such as counsel – remain confined to the realm of doubt, wondering as to the nature of the decision on which they are expected to give guidance – is it capable of appeal or not? – and reduced to suggesting an appeal as a “*precaution*”<sup>46</sup>, thereby exposing their clients to very high and perhaps totally superfluous additional costs in pursuit of an unpredictable outcome.

There are “*preliminary*” issues in almost any arbitration. International arbitrators sitting in Switzerland may address them even though they may be outside the scope of the arbitration clause. A good example is a recent case<sup>47</sup> involving basically two sets of agreements, one of which – “*the CFA*” – was not within the jurisdiction of the arbitrators<sup>48</sup>. The argument was that the arbitral tribunal had really decided pursuant to the CFA when it had jurisdiction only with regard to the other set of agreements. The respondent and the arbitral tribunal took the view that it was necessary to interpret the CFA in order to determine whether or not a portion of the customer base had been appropriated during a certain period and to determine the number of customers transferred from the one to the other, thus leading to an assessment of damages due under the agreement over which the arbitrators had jurisdiction. The FT granted that it was “(…) *clear that the Arbitral tribunal did not have jurisdiction to render a judgment having the force of res judicata on the claims that the Parties to the CFA might have submitted to it regarding the winding-up of this agreement. (...) The Arbitral tribunal itself refused to accept jurisdiction ratione materiae relating to the winding-up of the CFA.*” Yet the Court added the following: “*It is appropriate here to recall that an arbitral tribunal is authorized to decide preliminary issues that are not within the scope of the arbitration clause (...) and that it may clarify points on a preliminary basis that were not eligible for arbitration as such (...). Along the same lines and with regard*

46. If for no other reason than avoiding professional liability.

47. 4A\_482/2010 Judgment of 7 February 2011, 2011 ASA Bulletin 721; full English translation at <http://www.praetor.ch/arbitrage/jurisdiction-of-arbitral-tribunal-to-rule-upon-a-preliminary-iss/>.

48. Yves DERAINS, José PEREZ-LORCA- RODRIGO, arbitrators and Horacio GRIGERA-NAON, chairman.

*to the set-off, the tendency is to generalize the principle of “the judge of the action is the judge of the objection,” which suggests, as stated in the language of art. 21 (5) of the Swiss Rules of International Arbitration, that the arbitral tribunal has jurisdiction to hear a set-off defense even when the relationship out of which this defense is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum-selection clause (references omitted)*<sup>49</sup>”.

Such preliminary issues arise “*on the way*” as Andreas Bucher puts it<sup>50</sup> but they do not cause the award to be interim *and* partial because they are a mere preliminary to the adjudication of the real substantive issue(s) in the arbitration. In the example above – according to this logic – the arbitrators could still reject the claim on other grounds and the decision was therefore “*interim*” or “*preliminary*” but not “*partial*”. The same would apply to a claim which is allegedly time barred: if it is, the award is final; if it is not, the issue is a mere preliminary to the substantive determination of the case and any appeal can (and must) be postponed until the final award. The interim or preliminary decisions within that universe do bind the arbitral tribunal: they may not be rescinded or amended at will, as opposed to procedural orders; yet, somewhat confusingly, they do not constitute *res judicata* for they are only “*preliminary*” to the award on the merits and, one assumes, if they enjoyed *res judicata* status they would (probably) be “*partial*” – and therefore appealable – as one hardly sees how *res judicata* could extend to a non-substantive issue.

The terminology used in German is somewhat clearer than its English or French counterparts: a “*preliminary*” or “*interim*” (but not “*partial*”) award becomes a “*Vorentscheid*” – as stated at art. 190(3) and also at art. 186(3)<sup>51</sup> PILA – literally a “*pre-decision*” or a “*Zwischenentscheid*”, namely an “*in-between decision*”. Both are more precise than the French “*décision incidente*” and do suggest that the decision is either preliminary to a subsequent determination or takes place between several phases in an arbitration. However such decisions are not immune from appeal. They may be appealed – and again they must be under penalty of forfeiting one’s right<sup>52</sup> – but only on limited grounds: only those of art. 190 (3)

49. 4.3 of the English version p.7

50. *Op.cit* 1674 nr.16

51. Art. 186(3) PILA reads as follows: “The arbitral tribunal shall, in general, decide on its jurisdiction by a preliminary decision.”

52. Sébastien BESSON, La recevabilité du recours au Tribunal Fédéral contre les sentences préjudicielles, incidentes ou partielles rendues en matière d’arbitrage international, 2006 Les Cahiers de l’Arbitrage 187-193; Le recours contre la sentence arbitrale internationale selon la nouvelle LTF (aspect procéduraux) 2007 ASA Bulletin 9 n. 19 ; KAUFMANN-KÖHLER/ RIGOZZI, Arbitrage international, n. 720 and the other commentaries quoted p. 309, note 340 ; BERGER/ KELLERHALS, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, n. 1530.

(a) and (b) PILA, namely the irregular appointment or composition of the arbitral tribunal and its inaccurate assumption or rejection of jurisdiction<sup>53</sup>. Cesare Jermini suggests that it might be *either* 190 (3) (a) or 190 (3) (b)<sup>54</sup> but not both, although the literal wording of the provision and other legal writing<sup>55</sup> point in a different direction.

Be this as it may, if the arbitral tribunal *accepts* jurisdiction, a *jurisdictional* award is obviously *preliminary* in nature and appealing it on grounds of lack of jurisdiction is a simple proposition. But what if the appellant argues that his right to introduce witnesses in a jurisdictional hearing was not observed? That is within the due process of article 190 (d) PILA, yet the award is capable of appeal only for the purposes of art.190 (b) PILA, which would not encompass an argument of due process as that is in the realm of art. 190(2)(d) only. This would lead to the illogical result that the same violation of due process would cause the annulment of the award if it took place during the evidentiary hearing on the merits but not for jurisdiction purposes. It could also mean that a violation of due process may be argued in an appeal against an award denying jurisdiction – which would be final for Swiss purposes – but not if the award upheld it. This led several commentators<sup>56</sup> to hold the view that in a jurisdictional appeal the grievance that due process was violated is admissible if it is indispensable to assess the soundness of the argument based on art. 190(2)(b).

Whilst emphasizing that an appeal based on art.190 (2)(a) or (b) PILA should not be used to introduce other grievances – such as a violation of due process – in defiance of the legal provisions limiting the admissible grievances to (i) irregular composition or appointment of the arbitral tribunal and (ii) inappropriate acceptance or denial of jurisdiction, the FT seems to agree. The Court has consistently taken the view that it is bound by the factual findings of the arbitral tribunal and will not address any criticism relating to them unless a properly reasoned grievance is raised and it seems to follow the same rule even though the appeal is limited to jurisdiction. A good example is a recent case<sup>57</sup> in which a company in charge of the DVD rights for the Olympic Games in Beijing signed two “Deal

memos” subject to the subsequent execution of two license agreements. Swiss law was applicable with Court of Arbitration for Sport (“CAS” arbitration in Lausanne. A dispute arose and the respondent challenged the jurisdiction of the CAS because the license agreements had allegedly not been validly concluded. The arbitrator<sup>58</sup> rejected the argument and issued a final award. In the appeal it was argued that the arbitrator wrongly found that the license agreements had been entered into but the FT rejected the argument and restated its often expressed view on the binding character of the factual findings of the arbitral tribunal in the following terms: “*Seized of an argument of lack of jurisdiction, the Federal Tribunal freely reviews the legal issues, including the preliminary issues determining jurisdiction or lack of jurisdiction of the Arbitral Tribunal (...). However it reviews the factual findings on which the award under appeal relies only to the extent that one of the grievances mentioned at Art. 190 (2) PILA is raised against them or when some new facts or evidence are exceptionally taken into account within the frameworks of the Civil law appeal proceedings (...). (...) The Appellant claims in substance that the License Agreements containing the arbitral clause were never concluded because it is not established that it would have received a signed copy before May 20, 2009. According to the Appellant the CAS would have failed to notice that under Swiss law both an offer and its acceptance are subject to being received. The argument relies on an allegation departing from the factual findings of the CAS, yet the Appellant raised none of the aforesaid exceptions*”<sup>59</sup>.”

Admittedly, the award in that case was final – thus escaping the limitation of art.190(3) PILA - but the same was held with regard to a purely jurisdictional award in the dispute as to Gibraltar’s application for membership of the EFTA<sup>60</sup>. When a CAS Panel of three arbitrators<sup>61</sup> accepted jurisdiction, the EFTA appealed and the FT stated the following: “*In jurisdictional matters, the Federal Tribunal freely reviews the legal issues, including preliminary issues determining jurisdiction or lack of jurisdiction of the arbitral tribunal. However, it reviews the facts on which the award under appeal was based – even when the issue is jurisdiction*”<sup>62</sup> – *only if one of the grievances mentioned at Art. 190 (2) PILA is raised against the factual findings or when some new facts or evidence (see Art. 99 (1) LFT) are exceptionally taken into account in the framework of the Civil law appeal (...)*”<sup>63</sup>

53. Note that an award rejecting jurisdiction is not «preliminary» but of course final and as such not subject to the limitations in art. 190(3) PILA.

54. *Op.cit* nr. 150-152.

55. The writers quoted above at note 52 and Andreas BUCHER, *op.cit* 1675.

56. BUCHER, *op.cit* 1675; Jermini *op.cit* 250-255; KAUFMANN-KOHLER/RIGOZZI *op.cit* 717; BERGER/KELLERHALS *op.cit* 1537.

57. 4A\_579/2010 Judgment of January 11, 2011, 2011 ASA Bulletin 716; full English translation is at <http://www.praetor.ch/arbitrage/claim-of-lack-of-jurisdiction-arbitration-clause-not-signed-no-r/>.

58. Brigitte STERN.

59. 2.1 and 2.2 of the English version p.3.

60. 4A\_392/2000 Judgment of December 22, 2000, 2009 ASA Bulletin 547; full English translation at <http://www.praetor.ch/arbitrage/review-by-the-federal-tribunal-of-an-award-upholding-jurisdiction/>. Also see 2009 Swiss Int’l Arb.L. ¶ ep 1.

61. Peter LEAVER, Stephan NETZLE, arbitrators and aj HOBER, chairman.

62. Emphasis supplied.

63. 3.2 of the English version p.10.

The distinction between a “*partial*” preliminary or interim award, which must be appealed immediately under penalty of forfeiting the right to any subsequent judicial review of its contents and a preliminary or interim award that may be appealed only on the grounds at art.190 (2)(a) and (b) has become clearer with case law and the 2011 amendment of the LFT but some doubts remain: if an arbitral tribunal finds that a contract was breached pursuant to a specific submission by one of the parties but leaves the financial consequences of the breach to a subsequent determination, does it issue a partial award or not? A football player entered into a contract with a Greek club. The club had an option to extend the contract after two years and did so but the player refused to stay. The club sued and the FIFA Players Status Committee held that the option was invalid. The club appealed to the CAS and the FIFA decision was reversed: the option clause was indeed valid and the Players Status Committee must now determine the consequences of the breach of contract. Was the CAS award “*partial*” and therefore to be appealed immediately? Not according to the FT, which held that “*such a decision remanding the case is an interim decision according to case law of the Federal Tribunal (...). In international arbitration proceedings interim or preliminary awards may only be appealed in a public law appeal on the grounds contained at art.190(2)(a) and (b) PILA (appointment and composition of the arbitral tribunal; jurisdiction or lack thereof). Other grievances are not admissible (...)*”<sup>64</sup>.

Similarly, a German manufacturer of machines and an English company entered into a commission agreement containing an ICC arbitration clause with a seat in Geneva. A dispute arose and the claimant submitted that certain orders from Nigeria and Malaysia must be included in the litigious statements of commissions (submissions 1 and 2); it also asked for an order that the respondents pay a certain amount with interest (submissions 3 and 4). The arbitrators<sup>65</sup> issued an interlocutory and partial award accepting jurisdiction, finding that the orders placed by Nigeria and Malaysia were to be included in the statements of commissions, yet reserving submission 3 and the costs for a later phase whilst rejecting submission 4. On appeal the FT held the following<sup>66</sup> as to the nature of the award: “*(...) the Arbitral Tribunal found that it had jurisdiction ratione materiae, thus issuing a decision within the meaning of*

*Art. 186 (3) PILA, which could be challenged only on the grounds set forth at Art. 190 (2)(a) and (b) PILA (Art. 190 (3) PILA). (...) Whether or not it is capable of appeal is a much more delicate question with regard to paragraphs 2 and 3 of the award under appeal. The arbitrators found there that the orders from Nigeria and Malaysia should be included in the statements of commissions. Such a finding is only preliminary to the admission of Respondent’s submission 3, seeking payment of the commissions related to such orders, on which the Arbitral Tribunal will issue a decision later on. Therefore the award under appeal, which must be qualified as an interlocutory award with regard to its paragraphs 2 and 3, could be challenged, with regard to these two items, only on the grounds stated at Art. 190 (2)(a) and (b) PILA (...), to the exclusion of the grievance of a violation of the right to be heard (Art. 190 (2)(d) PILA) raised by the Appellants in that context (...). The matter is therefore not capable of appeal in this respect.”* Probably sensing that the issue was quite delicate, the Court added: “*It is true that the litigious finding was made on the basis of specific submissions made by the Respondent (...), which the arbitrators found to be acceptable notwithstanding the existence of submissions for the payment of commissions relating to the orders included in the submissions for findings. Be this as it may, notwithstanding the finding made in their respect at paragraphs 2 and 3 of the award under appeal, the litigious monetary claims have not yet been dealt with, even in parte qua, as the award does not provide the Respondent with a decision it could enforce, albeit in part, against the Appellants. In other words, this is a somewhat peculiar case in which a decision was issued on one of the submissions relating to the same monetary claim without an enforceable decision being issued in this respect. Hence, unless (formal) submissions and (mere) claim are to be confused, it must be found that with regard to the commissions relating to the orders from Nigeria and Malaysia, the Arbitral Tribunal did not issue a decision on part of the Respondent’s claim but merely found that one of the elements of that claim existed, namely the fact that the litigious orders were placed during the time frame referred to in the Commission Agreement. In doing so, it issued an interlocutory award and not a partial award, against which a violation of the right to be heard could be claimed*”<sup>67</sup>.

VII. “*Implicitly*” “*interim*” or “*preliminary*” and therefore appealable on limited grounds?

On the audacious assumption that the issues addressed so far may have become fully clear to the reader, an additional complication must now be introduced: the contents of a decision may render it “*preliminary*” but appealable on limited grounds – and therefore require an appeal under penalty of forfeiting one’s right pursuant to art. 190(3) PILA – although it appears to be an innocuous procedural order (“*P.O.*”). A preliminary “*award*” may thus lurk

64. 4P.298/2006 Judgment of February 14 2007, 2006 ASA Bulletin356 (original in German, excerpt translated by this writer). English translation in 2007 Swiss Int’l Arb.L.Rep 31.

65. Philipp HABEGGER, Rudolf FIEBINGER and Hans PATRY, chairman.

66. 4A\_438/2008 Judgement of November 17, 2008, 2011 ASA Bulletin 379; full English translation at [http://www.praetor.ch/arbitrage/distinction-between-interlocutory-and-partial-awards-legal-natur/#\\_ftn2](http://www.praetor.ch/arbitrage/distinction-between-interlocutory-and-partial-awards-legal-natur/#_ftn2); also see 2008 Swiss Int’l Arb.L.Rep 535.

67. 2.3 of the English version pp 6-7.

under the disguise of a P.O. if the arbitral tribunal, in order to issue the P.O., *implicitly* assumes jurisdiction (no arbitrator would *deny* jurisdiction under the pretense of a P.O. of course). It is more difficult to see how an arbitral tribunal could “*implicitly*” decide that it is properly composed but one could envisage that rejecting a request by a unanimous decision could perhaps reflect an “*implicit*” finding that the arbitral tribunal’s composition or independence leaves nothing to be desired. Furthermore, the “*implicit*” preliminary award may not necessarily take the form of an explicit holding in the “*procedural order*”: it might just as well be in the reasons. The “*criteria*” to decide whether it should be immediately appealed or not lie in the spirit of the document: if it merely organizes the proceedings, it is a P.O. but if it implicitly affirms the jurisdiction of the arbitral tribunal and expresses the intention of the arbitrators to assert jurisdiction or proclaim that the panel is properly composed, then it would have to be appealed immediately. In other words, a decision may have to be appealed when there is no formal disposition of any issues simply because the wording of its reasons makes it a preliminary award for the purposes of art. 190 (3) PILA. The FT’s concern in this respect is to avoid creating situations that would cause the parties to run through the entire length of the arbitration and undergo all the expenses entailed only to be told in the end that there is no jurisdiction (or that the panel was not properly composed). The preoccupation is commendable but with all due respect to the Swiss Supreme Court, requiring litigants to *guess* that a decision *implicitly* decided jurisdictional issues – or *implicitly* held that the arbitral tribunal was properly composed – even though the document notified to the parties does not say so and requiring that they immediately appeal it or forfeit their right to do so, is the source of great procedural uncertainty<sup>68</sup>, as will be clear from two recent examples.

A French football player entered into a contract with a French club in 2003, providing for his training for three years and an obligation to sign his first subsequent employment as a professional with the club. Three years later the player went off to the UK: the French club then sued the English club and the player. The FIFA Dispute Resolution Chamber (“DRC”) issued two decisions, the first (November 2, 2004) set a time limit for the two clubs to settle the matter and when they did not, the second (November 26, 2004) rejected the claim on jurisdictional and substantive grounds. The French club appealed to the Court of Arbitration for Sport (“CAS”). The CAS issued a P.O. in May, 2005 finding that it had jurisdiction based on the FIFA Statutes

and the Code of Arbitration for Sport and taking notice that the parties agreed to submit their dispute to the CAS. In October 2005 the CAS pronounced a “*partial award*” reversing the DRC in part and finding a breach of contract, with the parties to be invited to state their position on possible compensation later. In July 2007, a final award was issued, granting financial compensation. The player appealed to the FT, arguing among other things that the CAS lacked jurisdiction to award damages. The FT found that he should have appealed the *October 2005 “partial award”* and no longer could submit the jurisdictional issue to the FT. The Court stated: “*Contrary to what he is claiming, the Appellant, assisted by counsel, could not in good faith consider on the basis of the reasons of the October 2005 award that the CAS would deny jurisdiction in its final award as to the claims for damages that the Respondent may raise against the Appellant in its written pleadings to be filed. In other words, nothing allowed the Appellant to consider that the October 27, 2005 award purported to limit the number of potential debtors towards the Respondent who could be the object of a monetary award in the final award and to exclude the Appellant therefrom. Thus, the Appellant should have immediately appealed the first award (...) under penalty of forfeiting the right to appeal if he meant to deny to the CAS the jurisdiction to order him personally to compensate the Respondent. Having failed to do so, he is no longer allowed to raise the alleged lack of jurisdiction of the Arbitral Tribunal in the framework of his Civil law appeal against the final award of July 17, 2007. The matter is accordingly not capable of appeal to the extent that the Appellant seeks to demonstrate the lack of jurisdiction of the CAS racione personae, since the issue of jurisdiction was already implicitly decided in the award of October 27, 2005*”<sup>69</sup>.

Conversely in a dispute which developed into two arbitrations based on a license agreement an ICC arbitral tribunal sitting in Geneva issued a partial award in 2007 upholding the claim in principle but differing *quantum* to a later stage. The license agreement was then invalidated and a new, separate arbitration commenced<sup>70</sup>. A stay of the proceedings on *quantum* until determination by the second arbitral tribunal as to the validity of the invalidation of the license agreement was applied for but rejected in a decision entitled “*Procedural order nr.4*”. A challenge against the first arbitral tribunal was made to the ICC and rejected, then the “*Procedural order*” was appealed to the FT. The respondent claimed that as a mere procedural order it was not capable of appeal. The FT disagreed in the following terms: “*(...) in*

69. 4A\_370/2007 Judgment of February 28, 2008, 2008 ASA Bulletin 334 full English translation at <http://www.praetor.ch/arbitrage/appeal-against-interlocutory-and-partial-awards-violation-of-public-law>. Emphasis supplied. See 4.2 of the English version p.12. Also see 2008 Swiss Int'l Arb.L.Rep. 89.

70. This writer feels bound to disclose that he was on one of the two panels, but not the one whose decision was appealed to the FT and therefore feels free to comment on it.

68. And is rightly criticized by Andreas BUCHER *op.cit* 1679 nr. 32.

order to decide if the matter is capable of appeal, the decisive factor is not the name of the decision under review but its contents. From that point of view, there is no doubt that the Arbitral Tribunal did not limit itself to organizing the rest of the proceedings. (...) as appears from the reasons it stated, if the Arbitral Tribunal refused to stay the arbitral proceedings, it was because it considered that it had jurisdiction to decide the validity of the invalidation of the Second Amendment. By doing so, it issued, at least implicitly, an interlocutory decision relating to its jurisdiction *ratione materiae*, which is subject to an appeal<sup>71</sup>(...)The same reasoning may be followed with regard to the developments in the decision under appeal in which the Arbitral Tribunal rejected the argument relating to the regularity of its composition in order to decide the issue of the invalidation. Therefore, the nature of the decision under appeal does not cause the matter to be incapable of appeal<sup>72</sup> (see Art. 190 (3) LDIP)<sup>73</sup>”.

As a matter of principle it should be a rare occurrence for an arbitral tribunal seized of an objection as to jurisdiction or as to the composition of the panel (which, as is well known, would also encompass any objection made as to an arbitrator’s alleged lack of independence or objectivity) to continue the proceedings without addressing the issue(s) appropriately but experience shows that it may and does happen. Separate decisions should therefore be required to do away with the risk of an “implicit” determination in some procedural order addressing other issues. This raises no difficulties at all as it is established beyond any doubt that jurisdictional and other challenges must be raised *immediately* by the allegedly aggrieved party<sup>74</sup>.

#### VIII. Decisions on costs: a duck-billed platypus?

A bizarre duck-billed creature, *ornithorhynchus anatinus* is a mammal that lays eggs, has a beaver tail but otter feet and a venomous wasp- like sting defying naturalists’ classification: the procedural nature of a “Swiss” decision on arbitration costs appears similarly baffling. No one would deny that apportioning costs is a “decision”: after all that is how the parties know which one is going to foot the bill of the arbitration, entirely or in part. Even in institutional arbitrations, such as ICC proceedings, where the costs of the proceedings and the fees of the arbitrators are the object of a separate assessment by the institution, the award contains the decision apportioning them. In *ad*

*hoc* arbitration the arbitrators themselves determine both<sup>75</sup>. In a Zurich Chamber of Commerce arbitration initiated in 2008 the arbitrators<sup>76</sup> decided to limit the proceedings to jurisdiction at first and advised the parties as to the deposit according to the applicable Swiss Rules. The deposit was not paid and in June 2010 the arbitral tribunal stayed the proceedings, demanded payment of the deposit again and issued a decision on costs, ordering each of the parties to pay half the arbitration costs incurred so far (there were two claimants and in excess of ten respondents so it was to be “jointly and severally” within both groups). The respondents appealed and the FT found that the matter was *not* capable of appeal. To the extent that the proceedings were stayed no appeal could be made against a procedural decision that could be rescinded at any time and the same applied to the section of the “interim award” demanding payment of the deposit. The Court added that generally speaking an arbitral tribunal has no authority to issue a decision on costs which would entitle the arbitrators to collect from the parties. It is only *between the parties* that the decision on costs is *res judicata* according to the FT, which relied in this respect on legal writing<sup>77</sup> holding the view that Swiss law contains no specific provision that would empower the arbitral tribunal to issue a binding decision as to its own costs in international matters<sup>78</sup>. The Court added the following: “*This is because claims resulting from the relationship between the arbitral tribunal and the parties do not fall within the arbitration clause; also because this would be an unacceptable decision in one’s own case (...). The decision on costs in an arbitral award is therefore nothing else than a rendering of account which does not bind the parties*<sup>79</sup> (...) or a circumscription of the arbitrators’ private law claim based on the arbitration agreement on which in case of dispute the state court<sup>80</sup> will have to decide (...) It is only in the relationship between the parties that the indication of the amount of the procedural costs in the arbitral award has the effect of an enforceable judgment, namely to the extent only that it decides on the allocation of and liability for the costs between

71. Emphasis supplied.

72. Emphasis supplied.

73. 4A\_210/2008 Judgment of October 29, 2008, 2009 ASA Bulletin 309; full English translation at <http://www.praetor.ch/arbitrage/admissibility-of-appeal-against-interlocutory-decision-procedura/>. See 2.1 of the English version p.5.

74. For a recent example see 4A\_258/2009 Judgment of January 11, 2010, 2010 ASA Bulletin 540; full English translation at <http://www.praetor.ch/arbitrage/invalid-waiver-of-the-appeal-to-the-federal-tribunal-through-ref1/>.

75. And in arbitrations under the Swiss Rules, where the institution (Chamber of Commerce) puts forward its costs only but not the fees of the arbitrators. The final decision is made by the arbitral tribunal in consultation with the institution. See Articles 38 and 40(4) of the Swiss Rules.

76. Richard KREINDLER, chairman, Dominique DREYER and Laurent KILLIAS, arbitrators.

77. Anton HEINI, Zürcher Kommentar zur IPRG ad art.186 nr.26; BERGER/KELLERHALS, *op.cit* par. 1479; H.H Inderkum, Der Schiedsrichtervertrag, p. 150.

78. In national arbitrations there is a specific provision, namely art. 384 (1)(f) of the Swiss Code of Civil Procedure.

79. Emphasis supplied.

80. Emphasis supplied. It would have been interesting for the FT to explain which state court would have jurisdiction when the three arbitrators are in different countries – none in Switzerland quite often – and the parties come from five or six other and different jurisdictions. One does not see why the court at the “seat” of the arbitration would have jurisdiction as to this “rendering of account” and it is likely that if seized, a foreign court would demur precisely because the arbitration was “Swiss”, thus creating a hopeless procedural conundrum.

*the parties. (...) Lacking authority of the arbitral tribunal to decide the issue, (...) the “interim awards” under appeal may not contain decisional orders even if one were to see in them the liquidation of previously incurred costs of the arbitral tribunal and not a request for the payment of a deposit. They are therefore mere presentations of accounts which lack the characteristics of an award subject to appeal (...)*<sup>81</sup>”.

This (isolated) decision has been rightly criticized by Andreas Bucher<sup>82</sup> who points out among other things that the dichotomy between the impact as to the parties and the alleged “rendering of account” by the arbitrators would lead to the illogical result that the arbitrators could claim their fee pursuant to the *receptum arbitrii* – the “contract” between the arbitrator and the parties – even though the award may have been annulled on public policy grounds because the costs would have been entirely inappropriate. Conversely an award upheld would still not entitle the arbitrator to collect the fee “decided” in the award.

#### IX. Practical considerations and need for a change

The time-limit to appeal a Swiss award is *extremely* short: *thirty days* and unlike otherwise comparable systems a *fully reasoned and argued* brief is expected within that time limit. Any argument raised later – in a reply for instance – will be rejected by the Court if it was not already developed in the original appeal.

This makes counsel’s task quite arduous: within thirty days a file needs to be mastered, at least as to the facts, testimony and legal arguments germane to the issues to be argued in the appeal. As international arbitrations develop into ever more complex litigations this may be quite a challenge given so little time. The appealing party is unlikely to be able to handle French, German or Italian, thus making English or other translations of the draft brief a necessary, albeit almost impossible requirement because by the time one or several lawyers have (i) become acquainted with the facts and the record of the arbitration (ii) recognized the legal issues to be raised in the appeal (iii) drafted a thorough brief meeting the fairly strict requirements of the LFT and case law, there will be merely a few days – sometimes a few *hours* – left before the filing deadline. Whilst theoretically possible, appeals drafted by foreign counsel only are not advisable in practical terms. It takes a fairly experienced Swiss lawyer to work her way through the pitfalls of admissibility requirements, yet cooperation between

foreign and Swiss counsel will be reduced to a minimum by the constraints of time unless one takes the precaution of associating Swiss counsel to one’s team well in advance. Whilst undoubtedly helpful to the prosperity of Swiss law firms, this seems to defeat the very purpose of international arbitration, which is to make it possible for a party to appear with counsel it feels comfortable with without resorting to expensive and sometimes hardly useful local assistance.

*Last but not least*, as we have seen above<sup>83</sup>, the costs involved in Swiss appeal proceedings can be very significant when the amount in dispute is high, which is a very frequent occurrence in modern commercial or investment arbitration. It is hardly advisable for a jurisdiction wishing to remain a favorite venue of international arbitrations to cause litigants to spend hundreds of thousands of dollars to be told merely that the matter is not capable of appeal or that an appeal should have been made earlier.

Yet the system is unlikely to change in respect of the time limits because the Swiss parliament would be most reluctant to extend the deadline to appeal an international award to a more manageable sixty or ninety days, perhaps with a requirement that the appeal be *announced* within thirty days and the appeal brief due sixty days later<sup>84</sup>. Doing so for international arbitral awards only would fall under the suspicion of making appeals by “*foreigners*” easier than for the average Swiss litigant, a proposition unlikely to be endorsed by any member of the Swiss parliament except one remarkably keen on political suicide. Extending the time limit for *all* appeals would raise some other delicate policy issues and is probably a non-starter either. Any attempts at extending the time limits to appeal to the FT appears therefore doomed for the time being and probably for several years or even decades ahead<sup>85</sup>.

However, a parliamentary initiative by National Counselor Christian Lüscher<sup>86</sup> to amend art. 7 PILA with a view to anchoring the negative effect of the rule of *Kompetenz-Kompetenz*<sup>87</sup>, whilst already adopted

83. See section V para. 5.

84. This would not affect enforcement because the award is immediately enforceable and remains so during the appeal proceedings unless a stay of enforcement is granted by the FT, which often refuses to do so.

85. As a young Swiss MP full of eagerness and illusions, this writer raised that very issue with some colleagues in 1993, only to realize that his fellow legislators saw no wisdom at all in giving it rich lawyers (in their view) additional time and opportunities to obfuscate things and create even more confusion and delays than they already did. Interestingly, several federal judges of the time appeared to share this unquestionably pragmatic view.

86. A Swiss politician, partner of ZPG and the author of a leading commentary of the new Swiss Code of Civil Procedure. See David HOFFMANN/Christian LÜSCHER *Le Code de procédure civile* (2009).

87. Individual bill (“Parliamentary initiative”) LÜSCHER 08.417 of March 20, 2008 – Amendment of article 7 of the Federal Law of December 18

81. 4A\_391/2010 Judgment of November 10, 2010, ATF 136 III 597 (excerpts in German); 2011 ASA Bulletin 110; full English translation at <http://www.praetor.ch/arbitrage/procedural-order-of-the-arbitral-tribunal-directing-payment-of-t/>. See 5.2.1 of the English version p.7.

82. *Op.cit* 1681 nr. 37-39.



by the Swiss Parliament, might evolve towards a “*brushing up*” of the entire chapter 12 of PILA. If this view ultimately prevails in the Swiss parliament, a closer look at art.190 may be advisable as well because a redrafting of the provision appears quite necessary in light of the uncertainties described above. A possible way to address the issues the provision raises *sic stante* would be to amend it as follows:

**Art. 190<sup>88</sup>**

IX. Finality, appeal

1. General rule

(1) The award shall be final when communicated.

(2) It can be challenged only:

a. If a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly;

b. If the arbitral tribunal erroneously held that it had or did not have jurisdiction;

c. If the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims;

d. If the equality of the parties or their right to be heard in an adversarial proceeding was not respected;

e. If the award is incompatible with public policy.

**(3) (new) Decisions as to the allegedly irregular constitution of the arbitral tribunal {art. 190 (2) (a)} and as to jurisdiction {art.190 (2) (b)} shall be issued in a formal preliminary decision meeting the requirements of art. 186 (3) and 189, appealable immediately pursuant to art.191.**

**(4) (new) Other partial awards and preliminary decisions may not be appealed before the final award.**

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1987 on International Private Law, adopted by both Chambers of the Swiss Parliament. See the legislative history of the bill at [http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch\\_id=20080417](http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch_id=20080417).

88. The English translation used here is due to the Zurich law firm of Umbricht and may be found at <http://www.umbricht.ch/pdf/SwissPIL.pdf> except for art.190(2)(c) which I have slightly modified in line with the terminology used in this article.

# La preuve du dopage dans les cas de présence d'une substance interdite

Me Estelle de La Rochefoucauld, Conseiller auprès du TAS

I.	La Réglementation applicable.....	16
A.	Les textes applicables.....	16
1.	La loi fédérale suisse sur le Droit International Privé (LDIP).....	16
2.	Le Code de l'Arbitrage en matière de Sport & les règlements des organisations sportives.....	16
3.	Le Code Mondial Antidopage.....	16
B.	Le régime de la preuve selon le CMA.....	18
1.	L'article 3.1 CMA.....	18
2.	Le fardeau de la preuve.....	18
3.	Le degré de la preuve fonction de la qualité des parties.....	18
4.	Les moyens de preuve.....	18
5.	Le concept de responsabilité objective ou 'strict liability' lié à la présence d'une substance interdite.....	18
5.1	Présomption de violation de la réglementation antidopage et disqualification.....	19
5.2	Présomption de culpabilité et sanction en cas de présence de substance interdite.....	19
5.3	Présomption de culpabilité et sanction en cas de présence d'une substance spécifiée.....	19
II.	Le fardeau et de degré de la preuve au regard du droit et de la jurisprudence.....	20
A.	Le fardeau de la preuve.....	20
1.	L'application du droit applicable au fond.....	20
2.	Les cas particuliers.....	20
B.	Définition du degré de la preuve par la jurisprudence du TAS.....	20
III.	L'appréciation de la preuve.....	21
IV.	Le dopage lié à la présence d'une substance interdite dans la jurisprudence du TAS.....	22
A.	Conditions de réduction de la période de suspension lié à la présence de substances interdites: le cas du Clenbuterol.....	22
B.	Condition de réduction de la période de suspension liée à la présence de substances spécifiées.....	23
1.	Négligence non significative.....	23
2.	Négligence significative.....	23
3.	Révision du CMA.....	25

Après avoir défini les notions de fardeau et de degré de la preuve, nous nous attacherons à examiner l'administration de la preuve dans les affaires de dopage et plus particulièrement dans les cas de présence d'une substance interdite dans l'organisme d'un sportif, qui restent à ce jour, les plus nombreux devant le Tribunal Arbitral du Sport (TAS).

En matière de dopage, c'est l'autorité sportive qui rapportera la preuve du dopage commis par un athlète. Ce dernier pourra ensuite tenter de prouver son innocence.

D'une manière générale, la preuve peut être définie comme la démonstration de la réalité d'un fait. La charge de la preuve (*onus probandi*) ou encore le

fardeau, reposent sur la partie qui se prévaut de ce fait. Ainsi, la charge de la preuve est l'obligation qui est faite à l'une des parties au litige de prouver ce que celle-ci avance, soit les faits nécessaires au succès de sa prétention. On peut également noter les adages suivants, *necessitas probandi incumbit ei qui agit*, "la nécessité de la preuve incombe à celui qui se plaint" ou encore *Actori incumbit probatio*, "celui qui se prétend titulaire d'un droit doit le prouver".

Le degré de preuve requis n'est pas identique dans tous les domaines du droit. Dans les affaires civiles, le degré de preuve à atteindre pour obtenir le résultat souhaité est la prépondérance. Celle-ci est atteinte lorsque celui ou celle qui avance un fait est parvenu à convaincre le juge que l'existence d'un fait est plus probable que son

inexistence. Dans les affaires pénales, la loi exige une preuve plus convaincante. Autrement dit, le degré de preuve requis est plus élevé. Il s'agit de la preuve au-delà du doute raisonnable. En matière disciplinaire, le degré de preuve habituellement applicable est la satisfaction de l'instance d'audition. Il s'agit d'un degré de preuve moindre que la preuve au-delà du doute raisonnable et plus élevé que la prépondérance des probabilités. Comme nous le verrons, la solution retenue en matière de sport varie en fonction de la qualité de la personne ou de l'organisation sur laquelle repose le fardeau de la preuve et du système de présomptions mis en place par le Code Mondial Antidopage (CMA).

Le juste équilibre entre autonomie des associations, intégrité du sport, harmonisation au niveau international et droit de la personnalité en matière de lutte contre le dopage a donné lieu à un important débat qui a abouti à une collaboration inédite entre gouvernements et fédérations sportives. Le CMA a établi, dans ce cadre, un système de présomptions destiné à lutter efficacement contre le dopage, système qui se répercute sur l'administration de la preuve et sur les sanctions applicables.

Dans ce contexte, nous nous attacherons à étudier plus particulièrement certains cas de présence de substances interdites dans l'organisme d'un sportif comme le Clenbuterol, ainsi que des cas liées à la présence de substances spécifiées. Si le choix des sentences du TAS retenues pour illustrer notre propos n'est pas exhaustif, il nous a cependant paru représentatif des développements récents dans ce domaine.

## I. La Réglementation applicable

### A. Les textes applicables

#### 1. La loi Fédérale suisse sur le Droit International Privé (LDIP)

Le chapitre 12 de la LDIP intitulé Arbitrage international dispose à l'article 182:

“VI. Procédure

##### 1. Principe

<sup>1</sup> Les parties peuvent, directement ou par référence à un règlement d'arbitrage, régler la procédure arbitrale; elles peuvent aussi soumettre celle-ci à la loi de procédure de leur choix.

<sup>2</sup> Si les parties n'ont pas réglé la procédure, celle-ci sera, au besoin, fixée par le tribunal arbitral, soit directement, soit

*par référence à une loi ou à un règlement d'arbitrage.*

<sup>3</sup> *Quelle que soit la procédure choisie, le tribunal arbitral doit garantir l'égalité entre les parties et leur droit d'être entendues en procédure contradictoire”.*

L'art. 182 établit une hiérarchie des sources. Ainsi, en matière d'arbitrage international, le choix du règlement d'arbitrage applicable appartient en premier lieu aux parties.

En cas d'absence de choix des parties, l'art. 182 LDIP prévoit que la procédure sera fixée par le tribunal arbitral, soit directement, soit par référence à une loi ou à un règlement d'arbitrage. Dans ce cas, les arbitres ne sont pas liés par la procédure suisse et peuvent se référer à des règles transnationales comme par exemple les règles de l'International Bar Association (IBA). Dans tous les cas, les arbitres devront garantir l'égalité entre les parties et leur droit d'être entendues en procédure contradictoire.

#### 2. Le Code de l'Arbitrage en matière de Sport et les règlements des organisations sportives

Le Code de l'Arbitrage en matière de Sport (le Code) et les règles de procédure contenues dans la réglementation des fédérations sportives sont le plus souvent applicables en vertu de la reconnaissance de la compétence du TAS par les règlements des organisations sportives et de l'art. R58 du Code qui dispose “[L]a Formation statue selon les règlements applicables et selon les règles de droit choisies par les parties...”.

L'art. R58 du Code prévoit qu'à défaut de choix, la Formation statue “selon le droit du pays dans lequel la fédération, association ou autre organisme sportif ayant rendu la décision attaquée a son domicile ou selon les règles de droit dont la Formation estime l'application appropriée. Dans ce dernier cas, la décision de la Formation doit être motivée”.

#### 3. Le Code Mondial Antidopage (CMA)

Le Code Mondial Antidopage (CMA) adopté en 2003 et révisé en 2009, détermine les règles applicables au dopage. Ces règles définissent notamment les différentes violations des règles antidopage, le régime de la preuve et les sanctions applicables. L'application des principes et des règles antidopage du CMA est garantie par leur adoption et leur mise en œuvre par l'ensemble des signataires que constituent le Comité International Olympique (CIO), le Comité International Paralympique (CIP), les Fédérations Internationales (FI), les Comités Nationaux Olympiques (CNO) et Paralympiques (CNP), les organisations nationales antidopage, les organisations responsables des grandes manifestations telles que

les Jeux Olympiques (JO) et l'Agence Mondiale Antidopage (AMA). L'application de ces règles par les Fédérations Nationales (FN) est à son tour garantie par le fait que l'affiliation des FN aux FI est subordonnée à la conformité de leurs principes, règles et programmes au CMA.

L'objectif du CMA est double. Il s'agit d'une part de "[P]rotéger le droit fondamental des sportifs de participer à des activités sportives exemptes de dopage, promouvoir la santé et garantir ainsi aux sportifs du monde entier l'équité et l'égalité dans le sport" et d'autre part de "[V]eiller à l'harmonisation, à la coordination et à l'efficacité des programmes antidopage aux niveaux international et national en matière de détection, de dissuasion et de prévention du dopage" (CMA p. 11).

Concrètement, le Code Mondial Antidopage établit des règles et des principes antidopage qui, à des fins d'harmonisation, doivent être suivies par les organisations antidopage. Il existe deux types de dispositions. Certaines dispositions doivent être reprises par les signataires dans leurs propres règles sans changement de fond (les changements de forme liés à la mention du nom de l'organisation, du sport visé, des numéros de section etc. sont autorisés). Parmi ces dispositions figurent notamment les règles relatives à la définition du dopage, aux violations des règles antidopage, à la preuve du dopage, aux substances spécifiées, à l'établissement par l'AMA de la liste des interdictions, à l'annulation automatique des résultats individuels, aux sanctions à l'encontre des individus (voir art. 23.2.2 CMA).

D'autres dispositions sont transposables conformément aux directives données et laissent aux organisations sportives une plus grande latitude dans le libellé des règles ou, lorsque les exigences définies n'imposent pas nécessairement leur reprise dans des règles, le respect de ces dernières. Par exemple, l'harmonisation recherchée n'oblige pas les signataires à utiliser la même procédure d'audition.

En conséquence, ce n'est pas le CMA mais les réglementations antidopage des Fédérations qui sont directement applicables an tant que *lex specialis*. Il en résulte certaines différences selon les sports. Les groupes cibles de sportifs soumis aux contrôles et les processus de gestion des résultats ne sont ainsi pas nécessairement identiques pour chaque sport.

Dans ce contexte, le TAS a récemment eu à examiner le cas d'une FI dont la réglementation antidopage prévoyait des sanctions différant de celles figurant dans le CMA. Ainsi, l'article 10.2 du règlement antidopage de la fédération internationale d'Haltérophilie (IWF) prévoyait une suspension de 4 ans en lieu et place de la suspension de 2 ans prévue

par le CMA pour une première violation (art. 10.2 CMA). Il s'agit d'une différence substantielle, un changement de fond, contraire aux termes de l'art. 23.2.2 CMA susvisé.

Dans la jurisprudence CAS 2011/A/2612, la Formation arbitrale a tout d'abord considéré que les exigences listées dans le CMA doivent, en principe, non seulement être interprétés comme des standards minimum mais aussi comme des standards maximum<sup>1</sup> et qu'en devenant signataire du CMA, l'IWF s'était contractuellement engagée à adopter et mettre en œuvre des règles antidopage conformes au CMA. Cependant, la Formation a ajouté que selon la jurisprudence constante du TAS, le CMA n'est pas directement applicable à l'IWF et à ses athlètes affiliés<sup>2</sup>. Comme indiqué précédemment, ce sont les réglementations antidopage des Fédérations qui sont directement applicables an tant que *lex specialis*. Il s'ensuit que l'IWF peut, de façon consciente ou inconsciente, être en violation des ses obligations vis-à-vis de l'AMA et du CIO sans que cela ait un impact sur la relation contractuelle distincte existant entre l'IWF et l'athlète sanctionné par la suspension de 4 ans prévue pour une première violation. L'autonomie de la relation entre la fédération internationale et un athlète affilié n'est pas limitée par les engagements contractuels éventuels existants entre la fédération internationale et des tiers<sup>3</sup>.

Cependant, la Formation saisie a souligné que l'autonomie de l'IWF en matière de réglementation sur le dopage vis-à-vis de ses affiliées était limitée par le droit suisse de l'association applicable à titre subsidiaire. Or, selon le droit suisse de l'association, une fédération doit établir les mesures disciplinaires prises à l'encontre de ses membres sur des dispositions claires sur lesquelles repose son autorité<sup>4</sup>. Ces principes sont d'ailleurs confirmés par la jurisprudence du TAS indépendamment du droit applicable au fond<sup>5</sup>. Dans ce contexte, la Formation a souligné que l'IWF n'avait pas été particulièrement diligente dans la mise en œuvre de sa réglementation antidopage et que ces règles, vues dans leur ensemble, sont ambiguës et contradictoires. Par exemple, la préface de la réglementation antidopage de l'IWF

1. CAS 2011/A/2612 para. 90.

2. CAS 2008/A/1718-1724, para. 61.

3. CAS 2011/A/2612 para. 99.

4. CAS 2011/A/2612 para. 103 et références doctrinales citées (cf. BSK-ZGB/Heini/Sherrer, 4th ed. 2010, Art. 70 no. 22 ; Sherrer/Ludwig, Sportrecht, 2. Aufl. 2010, S. 303 ; BK-ZGB/Riemer, 1990, Art. 70 no. 210 ; Heini/Portmann/Seeman, Grundriss Vereinsrecht, 2009, no. 265).

5. CAS 94/129 (no. 30, 34): "Any legal regime should seek to enable its subjects to assess the consequences of their actions ... while "the fight against doping is arduous, and ... may require strict rules, ... the rule-makers and the rule-apppliers must begin by being strict with themselves."

stipule que les règles sont adoptées et mises en œuvre conformément aux responsabilités de l'IWF à l'égard du CMA. De même, le commentaire de l'art. 10.2 de ladite réglementation semble indiquer, contrairement aux termes de l'art. 10.2, que la sanction de base est une suspension de 2 ans et non pas de 4 ans.

En outre, la Formation a tenu compte du fait que la réglementation antidopage de l'IWF est formulée unilatéralement et que les parties à la relation contractuelle ont un pouvoir de négociation inégal. La Formation a ainsi considéré qu'il était approprié d'appliquer le principe "*contra proferentem*" avec la conséquence que les sanctions prévues par la réglementation antidopage de l'IWF doivent être atténuées afin de se conformer au CMA.

Aujourd'hui, la divergence entre le règlement antidopage de l'IWF et le CMA a cessé puisque la commission exécutive de l'IWF a, par décision du 9 mai 2012, réduit la période d'inéligibilité de 4 à 2 ans pour une première infraction à la réglementation antidopage.

## B. Le régime de la preuve selon le CMA

### 1. L'article 3.1 du Code AMA

#### 3.1 Charge de la preuve et degré de preuve

*“La charge de la preuve incombera à l'organisation antidopage, qui devra établir la violation d'une règle antidopage. Le degré de preuve auquel l'organisation antidopage est astreinte consiste à établir la violation des règles antidopage à la satisfaction de l'instance d'audition, qui appréciera la gravité de l'allégation. Le degré de preuve, dans tous les cas, devra être plus important qu'une simple prépondérance des probabilités, mais moindre qu'une preuve au-delà du doute raisonnable. Lorsque le Code impose à un sportif, ou à toute autre personne présumée avoir commis une violation des règles antidopage, la charge de renverser la présomption ou d'établir des circonstances ou des faits spécifiques, le degré est établi par la prépondérance des probabilités, sauf dans les cas prévus aux articles 10.4 et 10.6, ou le sportif doit satisfaire à une charge de preuve plus élevée”.*

### 2. Le fardeau de la preuve

En application du principe général du droit, c'est la partie revendiquant un droit reposant sur un fait qui a la charge de prouver ce fait.

Par ailleurs, selon l'Art. 3.1 CMA, la charge de la preuve repose sur l'organisation antidopage qui doit établir la violation de la règle antidopage.

### 3. Le degré de la preuve fonction de la qualité des parties

Le degré de la preuve auquel l'organisation antidopage est astreinte consiste à établir la violation des règles antidopage à la satisfaction de l'instance d'audition (art. 3.1 CMA).

En ce qui concerne l'athlète ou toute autre personne présumée avoir commis une violation des règles antidopage et devant renverser la présomption de violation des règles antidopage ou établir des circonstances ou des faits spécifiques, le degré de preuve requis est un juste équilibre des probabilités. Le degré de la preuve est moins élevé que pour l'organisation antidopage. Il ne serait en effet pas justifié de demander un degré de preuve plus élevé à l'athlète qui est confronté à la règle de 'strict liability' et aux difficultés inhérentes au régime de la preuve (Infra).

### 4. Les moyens de preuve

*“Les faits liés aux violations des règles antidopage peuvent être établis par tout moyen fiable, y compris des aveux”* (art. 3.2 CMA).

Jusqu'à présent, la preuve du dopage est le plus souvent rapportée par les autorités sportives par le biais des analyses des échantillons A et B réalisées par les laboratoires accrédités par l'Agence Mondiale Antidopage (AMA). C'est l'infraction liée à la présence d'une substance interdite dans un échantillon fourni par un sportif (art. 2.1 CMA). Lorsqu'il n'y a pas de résultat d'analyse anormal, c'est-à-dire lorsqu'il n'y a pas de test révélant la présence d'une substance interdite dans l'organisme d'un athlète, la preuve de la violation de la règle antidopage peut être rapportée par tout moyen fiable y compris les témoignages<sup>6</sup>, la compilation des profils biologiques<sup>7</sup>, et l'obtention de renseignements relatifs à la localisation des athlètes<sup>8</sup>.

### 5. Le concept de responsabilité objective ou 'strict liability' lié à la présence d'une substance interdite

En application de l'Art. 2.1.1 CMA, l'athlète est considéré responsable de toute substance interdite dont la présence est décelée dans ses échantillons indépendamment de son intention, de sa faute ou de sa négligence. Ce système de présomptions a des conséquences au regard de la preuve et des sanctions applicables.

6. Voir par exemple CAS 2004/O/649.

7. Voir par exemple CAS 2009/A/1912-1913.

8. 2009/A/1831; 2011/A/2499; 2011/A/2526; 2011/A/2671.

## 5.1 Présomption de violation de la réglementation antidopage et disqualification

Une violation des règles antidopage est établie lorsqu'une substance interdite est détectée dans l'organisme d'un athlète sans qu'il soit besoin de prouver l'intention, la faute, la négligence ou l'usage conscient de la substance interdite par l'athlète. Une telle violation conduit automatiquement à l'annulation des résultats obtenus, le cas échéant, en compétition, et à toutes les conséquences en résultant (art. 9 CMA).

Pour renverser la présomption de violation des règles antidopage ou établir des circonstances ou des faits spécifiques, l'athlète pourra tenter de démontrer qu'un écart par rapport aux Standards Internationaux est à l'origine du résultat d'analyse anormal (art. 3.2.2 CMA). Dans ce cas, l'organisation antidopage pourra à son tour tenter de renverser la preuve. L'athlète pourra aussi démontrer qu'il est autorisé à utiliser la substance ou la méthode interdite car il bénéficie d'une Autorisation d'Usage à des fins Thérapeutique (AUT) (art. 4.4 CMA).

Si l'athlète réussit à démontrer qu'un écart par rapport aux Standards Internationaux a causé le résultat d'analyse anormal ou qu'il bénéficie d'une AUT justifiée par des motifs médicaux, il n'y aura pas de violation des normes antidopage.

Les tentatives ayant pour but de contester des résultats d'analyse anormaux en faisant valoir un écart par rapport aux Standards Internationaux sont, sauf dans quelques cas<sup>9</sup>, souvent infructueuses<sup>10</sup>. En pratique, la preuve d'un écart par rapport aux Standards Internationaux est difficile à rapporter, d'autant que pour les écarts par rapports aux Standards Internationaux des Laboratoires (SIL), les laboratoires accrédités par l'AMA sont présumés avoir conduit la procédure conformément aux standards.

## 5.2 Présomption de culpabilité et sanction en cas de présence de substance interdite

Dès lors que la présence d'une substance interdite est décelée dans l'organisme d'un athlète, celui-ci est présumé fautif. Il s'agit, là aussi, d'une règle objective puisque la seule présence fonde la présomption de culpabilité. Dans ce cas, pour une première violation des règles antidopage liées à la présence d'une substance interdite dans l'organisme d'un sportif, la période de suspension sera de 2 ans (art. 10.2 CMA).

9. Voir CAS 2006/A/1119 où un coureur cycliste est parvenu à démontrer un écart par rapport aux Standards Internationaux des Laboratoires (SIL) et à renverser la présomption et CAS 2009/A/1767.

10. Par exemple CAS 2007/A/1394, CAS 2009/A/1755 paras. 76 s ; CAS 2011/A/2612 paras. 60 s.

Cependant, cette présomption peut être renversée lorsque l'athlète démontre comment la substance interdite est entrée dans son organisme et rapporte la preuve qu'il n'a pas commis de faute ou qu'il n'a pas été négligent (art. 10.5.1), ou bien que cette faute ou cette négligence n'est pas significative (art. 10.5.2). Dans ce cas, afin de démontrer l'absence de faute ou de négligence, l'athlète doit prouver qu'il ne savait pas (absence d'intention) ou qu'il ne se doutait pas (absence de négligence), même en ayant fait la preuve de la plus extrême prudence ("*utmost caution*"), qu'il avait utilisé ou qu'on lui avait administré une substance interdite<sup>11</sup>. L'enjeu de cette démonstration est l'annulation (absence de faute ou de négligence) ou la réduction (absence de faute ou de négligence significative) de la suspension<sup>12</sup>. Il va sans dire que cette preuve est difficile à rapporter comme le montrent de nombreux cas de jurisprudence<sup>13</sup>.

## 5.3 Présomption de culpabilité et sanction en cas de présence d'une substance spécifiée

L'article 10.4 a été introduit dans le Code Mondial lors de la révision de 2009 afin de garantir un "*juste équilibre entre les sanctions inflexibles qui favorisent l'harmonisation de l'application des règles et les sanctions plus souples qui tiennent davantage compte des circonstances individuelles*"<sup>14</sup>. La liste des substances interdites établie par l'Agence Mondiale Antidopage (AMA) distingue les substances et les méthodes interdites en et hors compétition des substances et méthodes interdites en compétition. Parmi les substances interdites en compétition, on trouve les stimulants (Art. S6 de la liste). Les "*stimulants non spécifiés*" font l'objet d'une liste détaillée. L'art. S6a *in fine* indique qu'un stimulant qui n'est pas expressément nommé est "*une substance spécifiée*".

Lorsqu'une substance spécifiée est en cause, que le sportif peut établir comment celle-ci s'est retrouvée dans son organisme et que l'instance d'audition est satisfaite que le sportif n'avait pas l'intention d'améliorer sa performance ni de masquer l'usage d'une substance améliorant la performance (art. 10.4 CMA), la suspension peut être annulée ou réduite. Pour une première violation, la sanction sera au moins une réprimande, sans période de suspension, et au maximum 2 ans de suspension. L'art. 10.4 prévoit que le sportif devra produire des preuves. La gravité de la faute du sportif sera le critère applicable

11. Voir CAS 2005/A/990 qui représente un cas exceptionnel d'annulation de la sanction où l'athlète est parvenu à démontrer comment la substance interdite était entrée dans son organisme et son absence de faute.

12. Voir CAS 2009/A/1870 sur la faute non significative de l'athlète justifiant une réduction de la sanction.

13. Voir par exemple CAS 2006/A/1067.

14. Voir Commentaire sur l'article 4.2.2 CMA.

pour l'examen de toute réduction de la période de suspension.

## II. Le fardeau et de degré de la preuve au regard du droit et de la jurisprudence

### A. Le fardeau de la preuve

#### 1. L'application du droit applicable au fond

Les réglementations applicables, ne définissent pas le terme "*charge de la preuve*". Dans son ensemble, la doctrine considère que, dans les affaires internationales, la charge de la preuve est régie par la *lex causae*, soit par la loi applicable au fond du litige et non par la loi applicable à la procédure<sup>15</sup>.

Selon le droit suisse, la charge de la preuve est réglementée par l'Art. 8 du Code Civil (CC), qui, en stipulant quelle partie en a la charge, détermine les conséquences de l'absence de preuve<sup>16</sup>. L'Art. 8 CC dispose que "*Chaque partie doit, si la loi ne prescrit le contraire, prouver les faits qu'elle allègue pour en déduire son droit*". Il en résulte qu'à contrario, le cas devra être décidé contre la partie qui n'a pu décharger son fardeau de preuve.

Ainsi, la jurisprudence du TAS précise qu'une simple allégation non étayée par une preuve n'est pas suffisante pour satisfaire l'obligation liée au fardeau de la preuve<sup>17</sup>.

Toujours selon le droit suisse, pour être valide, la contestation d'un fait doit être spécifique. En d'autres termes, la contestation doit être dirigée et attribuée à un fait individuel par la partie qui supporte le fardeau de la preuve<sup>18</sup>.

#### 2. Les cas particuliers

Ces cas se rencontrent lorsqu'une partie est confrontée à une difficulté sérieuse pour décharger son fardeau de preuve. C'est ce qu'on appelle l'"*état de nécessité*" ou "*Beweisnstand*". Une des raisons pouvant expliquer cette difficulté est que les informations pertinentes se trouvent être entre les mains ou sous le contrôle de la partie adverse et qu'elles sont, de ce fait, inaccessibles pour la partie ayant le fardeau de la preuve<sup>19</sup>. Une autre raison pourrait être que, de par sa nature, le fait

allégué ne peut être rapporté par des moyens directs. C'est le cas lorsqu'une partie doit prouver un "*fait négatif*"<sup>20</sup> (Infra).

Selon la jurisprudence du Tribunal Fédéral suisse (TF), dans de tels cas, les principes de bonne foi imposent à la partie adverse un devoir de coopération à l'administration de la preuve. Ce devoir se traduit par une obligation de clarification des faits de la cause. Concrètement, la partie adverse pourra par exemple donner des raisons détaillées expliquant pourquoi elle considère les faits allégués par l'autre partie comme infondés ou faux<sup>21</sup>. Ce devoir ne saurait cependant conduire à un renversement de la charge de la preuve. La coopération ou l'absence de coopération de la partie adverse sera prise en compte par le juge dans le cadre de l'appréciation de la preuve.

Le Tribunal fédéral a décrit de la manière suivante cette obligation de coopération de la partie adverse<sup>22</sup>:

*"Dans une jurisprudence constante, le Tribunal fédéral a précisé que la règle de l'art. 8 CC s'applique en principe également lorsque la preuve porte sur des faits négatifs. Cette exigence est toutefois tempérée par les règles de la bonne foi qui obligent le défendeur à coopérer à la procédure probatoire, notamment en offrant la preuve du contraire (ATF 106 II 31 consid. 2 et les arrêts cités). L'obligation, faite à la partie adverse, de collaborer à l'administration de la preuve, même si elle découle du principe général de la bonne foi (art. 2 CC), est de nature procédurale et est donc exorbitante du droit fédéral - singulièrement de l'art. 8 CC -, car elle ne touche pas au fardeau de la preuve et n'implique nullement un renversement de celui-ci. C'est dans le cadre de l'appréciation des preuves que le juge se prononcera sur le résultat de la collaboration de la partie adverse ou qu'il tirera les conséquences d'un refus de collaborer à l'administration de la preuve"*.

### B. Définition du degré de la preuve par la jurisprudence du TAS

Selon le droit suisse, le degré de la preuve est régi par les règles de droit applicables au fond du litige.

Comme indiqué précédemment, lorsque la présence d'une substance interdite dans l'organisme d'un sportif a été rapportée par une autorité sportive, l'athlète présumé avoir commis une violation des règles antidopage aura la charge de renverser cette présomption. Dans ce cas, le degré de preuve est établi par la prépondérance des probabilités (voir Supra).

15. POUURET/BESSON, Comparative Law of International Arbitration, 2nd ed., 2007, n°643 ; KAUFMANN-KOFLER/RIGOZZI, Arbitrage International, 2nd ed., 2010, n°653a ; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2nd ed., 2010, n°1203.

16. BSK-ZGB/SCHMID/LARDELLI, 4E ED., 2010, ART. 8 NO4 ; KUKO-ZGB/MARRO, 2012, ART. 8 NO 1.

17. CAS 2007/A/1413 para. 76.

18. DIKE-ZPO/Leu, 2011, Art 150 no 59.

19. ATF 117Ib 197, 208 et seq.

20. Voir dans ce sens Infra CAS 2011/A/2384 □ 2386 Contador.

21. ATF 106 II 29, 31 E. 2 ; 95 II 231, 234 ; 81 II 50, 54 E. 3 ; FT 5P1/2007 E. 3.1 ; KUKO-ZGB/arro, 2012, Art 8 no 14 ; CPC-aldy, 2011, Art 55 no 6.

22. ATF 119 II 305, 306 E 1b.

Le TAS a eu l'occasion de préciser la notion de prépondérance des probabilités.

Dans la jurisprudence CAS 2008/A/1515<sup>23</sup>, la Formation arbitrale a précisé la notion de prépondérance des probabilités qui est le degré de preuve auquel est soumis toute personne présumée avoir commis une violation des règles antidopage. Cette notion implique que l'athlète a la charge de persuader la Formation que la survenance des circonstances invoquées par l'athlète est plus probable que leur non survenance ou plus probable qu'une autre explication relative au résultat positif de l'analyse<sup>24</sup>. En tout état de cause, la théorie de l'athlète doit être établie en tenant compte des autres possibilités alléguées, la Formation ne devant pas transférer le fardeau de la preuve sur la partie adverse.

Dans la jurisprudence CAS 2009/A/1930<sup>25</sup>, la Formation arbitrale a encore précisé que lorsque plusieurs explications alternatives sont avancées relativement à l'ingestion d'une substance interdite, mais que l'une d'entre elle paraît plus probable que les autres, l'athlète a satisfait au degré de preuve requis. Dans ce cas, il est indifférent que d'autres possibilités d'ingestion existent, dès lors qu'elles sont considérées par la Formation moins probables. En d'autres termes, la Formation sera convaincue qu'un moyen d'ingestion est établi par la prépondérance des probabilités si, en termes de pourcentage, il y a 51% de chance que ce moyen ait eu lieu. L'athlète doit montrer qu'un moyen spécifique d'ingestion est légèrement plus probable d'être intervenu que le contraire.

### III. L'appréciation de la preuve

D'après l'Article 184 alinéa 1 LDIP "*le tribunal arbitral procède lui-même à l'administration des preuves*". Cette clause confère aux arbitres le pouvoir de statuer sur la recevabilité des preuves soumises par les parties<sup>26</sup>. En pratique, l'autorité arbitrale compétente est libre d'apprécier le poids de toute preuve produite par les parties.

L'art. R44.2 du Code de l'Arbitrage en matière de Sport TAS met en lumière le pouvoir de la Formation de statuer sur la recevabilité de la preuve.

Par ailleurs, selon le droit de l'arbitrage international, un tribunal arbitral n'est pas lié par les règles

applicables à l'administration de la preuve devant les tribunaux civils étatiques du siège du tribunal arbitral<sup>27</sup>. Le pouvoir du tribunal arbitral en matière d'administration de la preuve n'est limité que par l'ordre public procédural<sup>28</sup>, les droits procéduraux des parties et, le cas échéant, par les réglementations sportives applicables. Ainsi, selon une jurisprudence constante du TAS et au regard de ses pleins pouvoirs de révision des faits et du droit, une formation arbitrale n'est pas liée par les décisions d'un autre organe juridictionnel en tant que *forum* indépendant<sup>29</sup>.

A titre d'exemple, dans l'affaire Valverde, la Formation a considéré que les présumées violations des règles relatives à la coopération judiciaire qui ne sont pas de nature d'ordre public, ne font pas obstacle à la possibilité pour la Formation d'apprécier une preuve telle que le résultat des analyses d'une poche de plasma<sup>30</sup> obtenue par le biais d'une commission rogatoire.

Le pouvoir discrétionnaire de la Formation arbitrale en matière d'appréciation de la preuve est également mis en avant dans la jurisprudence Contador. Dans cette affaire, la Formation a admis, sous certaines conditions, la méthode polygraphique comme moyen de preuve. Celle-ci consiste à vérifier la véracité des déclarations des personnes relativement à des événements spécifiques faisant l'objet d'une enquête. Se fondant sur le pouvoir conféré par l'art. 184 PILA en matière d'administration de la preuve, tenant compte de l'acceptation par les Appelants de l'admissibilité de la méthode polygraphique comme preuve *per se* et de l'application du CMA, la Formation a admis que les résultats de l'analyse polygraphique de l'athlète étaient admissibles dans le cas particulier, sachant que leur crédibilité devait être vérifiés à la lumière des autres éléments de preuves soumis<sup>31</sup>.

23. CAS 2008/A/1515, p. 23 para. 116.

24. Voir aussi CAS 2006/A/1067 para. 6.8 ; CAS 2007/A/1370 & 1376 para. 127.

25. CAS 2009/A/1930 para. 5.9.

26. Antonio RIGOZZI, ARBITRAGE INTERNATIONAL, 2006, NO. 464, NO. 478.

27. Voir, POUURET/BESSON, op. cit. □ ote de bas de page 15, no. 644 "The arbitral tribunal is not bound to follow the rules applicable to the taking of evidence before the courts of the seat".

28. D'après le Tribunal fédéral, l'ordre public procédural n'est pas facilement violé. L'ordre public procédural n'est violé que "lorsque des principes fondamentaux et généralement reconnus ont été violés, ce qui conduit à une contradiction insupportable avec le sentiment de justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un Etat de droit" □TF □ull ASA 2001, 566, 570 □

29. Voir TAS 2001/A/354 et TAS 2001/A/355, para. 6; et CAS 2002/A/399, para. 13 □ De plus, spécifiquement sur l'admissibilité des preuves, la Formation "□s □not bound by the rules of evidence and may inform □itself □in such a manner as the arbitrators thin □ fit" □TAS 2008/A/1574, para. 23 □

30. TAS 2009/A/1879 Alejandro Valverde □elmonte c. Comitato □limpico □ a □ionale Italiano □C □ □ I □ sentence du 16 mars 2010 para. 97s.

31. CAS 2011/A/2384 & CAS 2011/A/2386 paras. 391-395.



#### IV. Le dopage lié à la présence d'une substance interdite dans la jurisprudence du TAS

##### A. Conditions de réduction de la période de suspension lié à la présence de substances interdites: le cas du Clenbuterol

Le Clenbuterol est une substance figurant sur la liste des substances interdites de l'Agence Mondiale Antidopage (AMA), à l'art. S1.2 (autres agents anabolisants), interdite en tout temps (en et hors compétition) et pour laquelle la seule présence dans un échantillon, aussi faible soit-elle, constitue un résultat d'analyse anormal<sup>32</sup>. Lorsque la présence de Clenbuterol est détectée dans l'organisme d'un athlète, celui-ci pourra tenter de renverser la présomption de violation en démontrant qu'un écart par rapport aux Standards Internationaux est à l'origine du résultat anormal. Il pourra aussi tenter de renverser la présomption de culpabilité en établissant comment la substance est parvenue dans son organisme et qu'il n'a pas commis de faute ou de négligence ou que celle-ci n'est pas significative. Ce dernier cas de figure a récemment été examiné à plusieurs reprises par des formations du TAS et montre combien il est difficile pour les athlètes de prouver comment une substance interdite est entrée dans leurs organismes au regard de la prépondérance des probabilités. Si cette preuve n'est pas rapportée, la première condition nécessaire à l'obtention d'une diminution de la sanction n'est pas remplie. Il s'ensuit qu'il devient superflu pour la Formation d'examiner les autres conditions requises à cette fin. Ces deux exemples en apportent une illustration.

- CAS 2011/A/2357 Raphael Menezes dos Santos v. International Triathlon Union (ITU)

Le 8 octobre 2010, un triathlète fournit un échantillon d'urine lors d'un contrôle hors compétition qui se déroula au Mexique. L'analyse révéla la présence de Clenbuterol dans l'organisme de l'athlète. La formation antidopage de l'International Triathlon Union (ITU) imposa une suspension de 2 ans à l'athlète qui forma un appel devant le TAS. L'appelant alléguait de pas avoir utilisé la substance interdite et qu'étant donné sa situation géographique lors de la prise d'échantillons, le Mexique, et son régime alimentaire la veille du contrôle (poulet et pâtes sauce bolognaise), de fortes probabilités existent que la viande consommée ait été contaminée avec du Clenbuterol.

La Formation considéra que l'athlète n'était pas parvenu, au regard de la prépondérance des probabilités, à montrer, en application de l'Art.

10.5 des Règles ITU, comment le Clenbuterol était entré dans son organisme. L'athlète n'avait pas pu prouver que du Clenbuterol avait contaminé la viande qu'il avait consommé avant le contrôle. La Formation reconnût qu'il existait une possibilité de contamination de la viande de bœuf au Mexique. Cependant, en raison de l'absence de preuve de la contamination de la viande de poulet en général, consommée avant le contrôle, et étant donné le taux élevé de Clenbuterol dans l'organisme de l'athlète, la possibilité de contamination de la viande utilisée dans les seuls spaghettis bolognaise était trop improbable. Par ailleurs, en dehors d'un prétendu mal de tête, l'athlète n'était pas suffisamment affecté au regard de la concentration de Clenbuterol trouvée dans ses échantillons. La Formation a jugé qu'il était plus probable que l'athlète ait développé une tolérance à la substance.

- 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

Le 21 juillet 2010, lors du Tour de France 2010, Alberto Contador, coureur cycliste de nationalité espagnole, fut soumis à un test antidopage. L'échantillon d'urine du coureur révéla la présence de Clenbuterol. Contador fit l'objet d'une suspension provisoire. L'analyse de l'échantillon B confirma l'échantillon A. Le 25 janvier 2011, le Comité Nacional de Competición y Disciplina Deportiva (CNCDD) de la Real Federación Española de Ciclismo (RFEC) proposa à Contador une suspension d'une année pour violation de la réglementation antidopage. Contador refusa. Le 14 février 2011, le CNCDD décida d'acquiescer Contador considérant que la contamination de la viande était hautement probable. L'UCI forma appel devant le TAS contre cette décision.

Dans le cas d'espèce, le coureur soutint que la présence de Clenbuterol dans son organisme était due à la consommation de viande contaminée. Pour renverser la présomption de violation de la règle antidopage et décharger son fardeau de la preuve, l'athlète devait prouver d'une part que (1) la contamination de la viande était possible et d'autre part que (2) la contamination de la viande était la seule source permettant d'expliquer le résultat d'analyse anormal ou une source plus probable que les autres scénarios avancés par les parties adverses. Ainsi, la Formation pourrait être convaincue si, la contamination de la viande représentait, en termes de probabilités, 50% + 1%.

32. Voir CAS 2009/A/1755 para. 69.

Comme la preuve ne pouvait être rapportée par des moyens directs et impliquait une forme de fait négatif puisque la viande en question avait été consommée, la Formation, en se fondant sur la jurisprudence du TFS précitée, imposa à l'UCI et l'AMA de collaborer à l'administration de la preuve (Supra). Cette obligation de collaboration fut déchargée par les appelants qui avancèrent des scénarios alternatifs relatifs à la contamination de la viande.

La Formation considéra que le coureur n'avait pas réussi à démontrer comment le Clenbuterol s'était retrouvé dans son organisme. La théorie de la viande contaminée ne satisfait pas le test de la prépondérance des probabilités. La Formation considéra notamment que l'Espagne, pays sur le territoire duquel le coureur aurait consommé la viande contaminée, n'est pas connue pour avoir un problème de contamination de la viande au Clenbuterol, contrairement à certains pays non européens. Par ailleurs, le fait qu'aucun athlète n'ait jamais été testé au Clenbuterol en relation avec une consommation de viande espagnole fut pris en considération. En conséquence, le coureur fut reconnu avoir commis une violation de la réglementation antidopage (présence d'une substance interdite) pour laquelle une suspension de 2 ans est applicable.

### **B. Condition de réduction de la période de suspension liée à la présence de substances spécifiées**

Depuis la modification du Code Mondial Antidopage en 2009 permettant une flexibilité de la sanction en cas de présence d'une substance spécifiée en fonction des circonstances et du degré de faute de l'athlète (Art. 10.4), le TAS a eu à connaître un nombre croissant de cas où sportifs et organisations sportives ont recouru au TAS pour obtenir une réduction ou une augmentation de la sanction décidée en amont. Afin de bénéficier d'une réduction de la sanction, les athlètes doivent, dans tous les cas, établir l'origine de la substance et l'absence de volonté d'augmenter leur performance. Lorsque ces conditions sont réunies, l'importance de la sanction dépendra du degré de la faute du sportif, comme le montrent la jurisprudence.

#### 1. Négligence non significative

- CAS 2011/A/2495-2496-1497-2498 Fédération Internationale de Natation (FINA) v. César Augusto Cielo Filho & Confederação Brasileira de Desportos Aquáticos (CBDA)

Dans cette affaire, des athlètes brésiliens firent l'objet de contrôles antidopage lors d'une compétition nationale de natation. Les échantillons A prélevés

révélèrent la présence de Furosemide, une substance appartenant à la classe des substances spécifiées (art. 4.2.2 CMA). Les athlètes ne contestèrent pas les résultats et renoncèrent à l'analyse des échantillons B devant la Confederação Brasileira de Desportos Aquáticos (CBDA). Ils expliquèrent la présence de Furosemide par la consommation de capsules de caféine contaminées. La CBDA disqualifia les athlètes pour les résultats obtenus lors de cette rencontre sportive et prononça une réprimande à leur encontre. La Fédération Internationale de Natation (FINA) déposa un appel urgent devant le TAS à l'encontre de la décision de la CBDA du fait de la sélection de M. Cielo, l'un des nageurs, pour les championnats du monde de natation de 2011 à Shanghai (Chine).

La Formation considéra que les conditions préalables à l'application de l'art. DC 10.4 du Règlement de Contrôle Antidopage de la FINA étaient réunies. En effet, aucune des allégations relatives au fait de savoir comment les substances interdites étaient entrées dans l'organisme des athlètes n'étaient contestées et il était admis que les athlètes n'entendaient pas améliorer leur performance sportive. Le degré de faute de l'athlète était, dans ce cas, le seul critère déterminant pour fixer la sanction adéquate dans la fourchette de l'art. 10.4. A cet égard, outre le fait que la caféine n'est pas en soi une substance interdite, le fait que les comprimés aient été prescrits par un médecin expérimenté et spécialisé en médecine sportive, qu'ils aient été préparés par une pharmacie de renom contrôlée qui savait qu'ils étaient destinés à des athlètes de haut niveau et que le risque de contamination devait être évité, que lesdits comprimés aient été consommés lors de plusieurs rencontres en 2010 et 2011 sans donner lieu à des résultats anormaux, que les nageurs aient demandé conseil à leur médecin avant de consommer les comprimés, qu'enfin, un certificat de pureté relatif aux comprimés ait été délivré par la pharmacie, furent pris en considération. La Formation considéra, dans ce contexte, que des précautions supplémentaires ne pouvaient pas être attendues de la part des nageurs. Au vu de ces circonstances, une réprimande fut jugée adéquate.

#### 2. Négligence significative

- CAS 2011/A/2515 Fédération Internationale de Natation (FINA) v. Fabiola Molina & Confederação Brasileira de Desportos Aquáticos (CBDA)

Le 22 avril 2011, Fabiola Molina, une nageuse brésilienne fit l'objet d'un test en compétition lors des championnats '*Seletiva Mundial*' de Rio de Janeiro. L'échantillon testé révéla la présence de methylexaneamine (MHA), substance interdite

spécifiée figurant sur la liste des substances interdites de l'AMA 2011 sous la catégorie S.6 (stimulant). Molina fut suspendue pour une durée de 2 mois. La Fédération Internationale de Natation (FINA), estimant que la suspension de 2 mois était en dehors de la fourchette acceptable des sanctions impliquant une substance spécifiée, appela devant le TAS afin d'obtenir une sanction de 6 mois au minimum. L'origine de la substance interdite (un supplément alimentaire) et le fait que la nageuse n'avait pas eu l'intention d'améliorer ses performances n'étaient pas contestés par la FINA.

La Formation considéra que les circonstances à prendre en considération pour apprécier la faute de l'athlète devaient être spécifiques et pertinentes pour expliquer le manquement de cette dernière. En outre, ces circonstances spécifiques devaient être appréciées en tenant compte du devoir de tout athlète d'éviter par tous les moyens, l'ingestion d'une substance interdite. La Formation considéra, au regard des circonstances, que la négligence de l'athlète était significative. Loin de faire tout ce qui était en son pouvoir, elle s'était aveuglément reposée sur son expérience passée avec le vendeur en ligne qui lui avait fourni les suppléments alimentaires et n'avait fait aucune vérification sur internet ni demandé conseil à quiconque. Par ailleurs l'étiquetage du produit indiquait la présence de MHA. La Formation considéra la sanction de 2 mois trop clémente et la remplaça par une suspension de 6 mois<sup>33</sup>. La Formation releva notamment que le degré exceptionnel de précaution exercé par M. Cielo était absent dans ce cas.

- CAS 2011/A/2615 Thibaut Fauconnet v. International Skating Union (ISU) & CAS 2011/A/2618 ISU v. Thibault Fauconnet

Dans cette affaire, Thibault Fauconnet, patineur sur glace, fit l'objet d'un contrôle positif à la Tuaminoheptane, une substance spécifiée, lors de la Coupe du Monde de Shanghai, en Chine, en décembre 2010. Fauconnet expliqua qu'il avait utilisé du Rhinofluimucil, un spray nasal destiné à combattre le rhume. Il reconnut qu'il aurait du savoir que le produit contenait de la Tuaminoheptane et admit qu'il avait commis une erreur. Tenant compte du fait que l'athlète avait expliqué comment la substance interdite était entrée dans son corps et qu'il n'y avait pas d'intention d'améliorer les performances sportives, la Commission Disciplinaire de l'ISU suspendit Fauconnet pour une période réduite de 18 mois. L'athlète fit appel au TAS contre cette décision afin d'obtenir une diminution de la suspension.

33. Voir dans le même sens CAS 2011/A/2518 où l'athlète légèrement plus négligent que dans l'affaire Molina a été condamné à une suspension de 8 mois.

Cette affaire donna l'occasion à la Formation arbitrale de rappeler certains principes et de préciser sa jurisprudence.

Concernant l'absence d'intention d'améliorer la performance sportive, la Formation établit que l'athlète doit seulement prouver qu'il ou elle n'a pas pris la substance spécifiée, et non le produit en question, en connaissance de cause avec l'intention d'améliorer sa performance sportive.

De manière intéressante, la Formation précisa l'étendue du pouvoir d'examen du TAS en soulignant que la compétence de l'organe disciplinaire d'une fédération en matière de sanction ne peut pas être invoquée comme principe et ce, même si la jurisprudence du TAS a considéré qu'une sanction prise par un organe disciplinaire pouvait seulement être révisée par le TAS lorsqu'elle était évidemment et grossièrement disproportionnée<sup>34</sup>. En effet, en déterminant la sanction appropriée en qualité d'instance d'appel, les formations arbitrales du TAS doivent également chercher à préserver une cohérence parmi les décisions prises par les différentes fédérations sportives dans des cas comparables afin de sauvegarder le principe d'égalité de traitement des athlètes dans les différents sports et d'assurer l'harmonisation des programmes antidopage. En outre, une formation est toujours compétente, en vertu de l'art. R57 du Code, pour revoir les faits et le droit avec un plein pouvoir d'examen.

Enfin, en appréciant le degré de la faute de l'athlète et la possibilité de réduire la sanction, la Formation prit en compte des affaires similaires et considéra qu'en utilisant le médicament contenant la substance spécifiée sans avoir pris de renseignement, l'athlète n'avait pas pris les précautions que l'on peut attendre d'un sportif expérimenté et qu'il avait été grossièrement négligent. La preuve de bonne moralité produite par l'athlète ne pouvait pas atténuer sa culpabilité et justifier une diminution de la sanction. Par ailleurs, la Formation énonça que l'absence d'infraction antérieure à la réglementation antidopage et la coopération de l'athlète, sont seulement pertinentes pour déterminer la fourchette de sanctions applicables et non pour réduire la sanction donnée pour une première violation<sup>35</sup>. Conformément au commentaire de l'art. 10.4 des Règles de l'ISU, le fait de manquer des compétitions importantes comme des championnats du monde, fut jugé non pertinent pour justifier une réduction de la sanction et considérer celle-ci comme disproportionnée. La suspension de 18 mois fut considérée appropriée et confirmée par la Formation.

34. Voir CAS 2009/A/1870, para. 48 et CAS 2009/A/1978, para. 59.

35. Voir CAS 2005/A/847, para. 30 ; CAS 2007/A/1364, para. 19 ; CAS 2010/A/2307.

### 3. Révision du CMA

Une nouvelle version du CMA doit entrer en vigueur en 2015. Le projet de code que l'on peut trouver en ligne en anglais uniquement, ne prévoit pas de modifications substantielles relativement à l'art. 10.4. Une modification terminologique figure au paragraphe 2 “ [T]o justify any elimination or reduction, the *Athlete* or other *Person* must produce **corroborating** credible evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the *Use* of a performance enhancing substance. The *Athlete's* or the other *Person's* degree of *Fault* shall be the criterion considered in assessing any reduction of the period of Ineligibility”.

Le commentaire de l'art. 10.4.1 apporte une modification plus substantielle en disposant que contrairement à la jurisprudence CAS 2010/A/2107 Oliveira v. USADA, dès lors qu'un athlète utilise ou possède un produit destiné à augmenter ses performances, l'art. 10.4.1 ne sera pas applicable indépendamment du fait de savoir si l'athlète savait que le produit en cause contenait une substance interdite.

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# Arbitration CAS 2011/A/2360 & CAS 2011/A/2392

## English Chess Federation & Georgian Chess Federation v. Fédération Internationale des Echecs (FIDE)

3 July 2012

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Chess; appointment of the FIDE Vice Presidents; application of both national laws and other applicable principles of law according to Article R58 CAS Code; appealable decision according to Article R47 CAS Code; difference between decisions null and void *eo ipso* and “*annullable*” decisions under Swiss law; relationship between Article R49 of the CAS Code and substantive Swiss law; characterisation of a decision as “*null and void*” or “*challengeable*” and admissibility of the claim under Article R49 of the CAS Code

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### Panel:

Prof. Jan Paulsson (France), President  
Prof. Ulrich Haas (Germany)  
Mr. Quentin Byrne-Sutton (Switzerland)

### Relevant facts

The two Claimants are the national chess federations of England and Georgia. They are member federations of the Respondent.

The Respondent is the Fédération Internationale des Echecs (FIDE), the governing international body of the sport of chess.

This dispute revolves around the nomination, during the 81st FIDE Congress in Khanty-Mansiysk from 29 September to 2 October 2010 (the “*FIDE Congress*”), of five individuals – Chu Bo, Ali Nihat Yazici, Israel Gelfer, Ilya Levitov and Boris Kutin – as FIDE Vice Presidents (the “*Five Vice Presidents*”).

On 17 August 2010, the agenda for the FIDE Congress was published on the FIDE web site listing, inter alia, the following:

### 3.2 Validity of the candidacies and election for the combined Presidential ticket

### 3.3 Elections for the Continental Presidents

### 3.4 Nomination of the Vice Presidents

### 3.5 Election of Additional Vice Presidents

On 29 September 2010, the elections for the Presidential ticket took place, pursuant to which Kirsan Illyumzhinov was elected as President of FIDE (the “*President*”). On that same date, the elections of Continental Presidents commenced.

On 30 September 2010, the elections of the Continental Presidents were completed. Whilst the agenda provided for the election of the Continental Presidents to be followed by the nomination of the Vice Presidents, the transcript of the FIDE Congress recordings evidence a deferral, in the following terms:

*“Our next point is the nomination from the President. Kirsan is not here you know, and in any case because he is talking with Karpov which he has invited to accept the ... the place of one of the Vice Presidents, he doesn’t – he prefers that he does not make the nominations at this moment, so we will proceed with the elections of the Vice Presidents”.*

On that same date, the elections of the three Vice Presidents to be individually elected by the FIDE General Assembly (the “*GA*”) were commenced and were completed on 2 October.

On 2 October 2010, the President announced his nominations for the position of Vice Presidents, to which Mr. Zurab Azmaiparashvili, the representative of the Georgian Chess Federation (the “*Georgian Representative*”) objected. The transcript of the FIDE Congress’s recording provides, inter alia, as follows:

*“FIDE President Kirsan Illyumzhinov*

*Dear Delegates,*

*Now I want to announce my nominations. You know that I want to concentrate all my time now for FIDE activities and chess development in all countries and you know that the main programme now for me this is Chess in schools and that’s why I need my assistants, people who help me because now as I have only one position ...*

*I want to ask your approval. [small pause] Nomination of Vice Presidents: - Mr. Chu Bo, China [applause]. You know him. Ilya Levitov, you know him [applause]. You should all know him because Ilya did a lot, did a lot for preparation and organisation of this Olympiad in Khanty-Mansiysk. Thank you. Ali Yazici, Turkey [applause]. Israel Gelfer [applause]. ...Thank you. Boris Kutin [applause]. You know him.*

...

*Mr. Azmaiparashvili*

*Dear Mr. President, dear delegates. It is strange what President is doing here because he violated our Statutes. He cannot nominate, you know, 5 Vice Presidents, we only have two places there, even Deputy President was trying yesterday to put my name there without consultation with me. I declined this because we have to follow the Statutes, I object what Mr. President offered. And it should be in the Minutes I will use all my rights if Mr. President do not change his decision. Thank you.*

*FIDE President Kirsan Il'yumzhinov*

*Thank you, Zurab, for your information. Yes, I understand. We discussed you know, that after our elections, because opposite team of Anatoly Karpov and that's why I decided to discuss how we can work for the next four years ...*

*Mr. Azmaiparashvili*

*Excuse me, objection*

*Mr. Makropoulos*

*Please*

*FIDE President Kirsan Il'yumzhinov*

*Georgios, please.*

*Mr. Makropoulos*

*There is a procedure.*

*Mr. Azmaiparashvili*

*I am a delegate and do not stop me here. I am not Mr. Kasparov. The President is lying here. I want to say that decline any position, including what they are offering now. I decline any position in FIDE.*

*Mr. Makropoulos*

*Zurab, can we respect the procedure.*

*Mr. Azmaiparashvili*

*I will go for legal procedures.*

*Mr. Makropoulos*

*There is any other objection? There is any other objection? Zurab please. There is any other objection? Thank you very much. There is one objection from Azmaiparashvili.*

The minutes of the FIDE Congress broadly reflect the transcript of the recordings, and provide as follows:

*"President announced his nominations and submitted them to the General Assembly to confirm their appointment. He said that he wanted to concentrate all his time on FIDE and he needed extra assistants to help him carry out his programme, especially with Chess in Schools. He would concentrate all his efforts, connections and all his money on FIDE activities.*

*Vice Presidents – Mr. Chu Bo (CHN), Mr. Ilya Levitov (RUS), Mr. Ali Nibat Yazici (TUR), Mr. Israel Gelfer (ISR) and Mr. Boris Kutin (SLO)*

*Honorary Vice Presidents – Prof. Kurt Jungwirth (AUT), Prof. Vanik Zakarian (ARM), Mr. Dabilani Butbali (BOT), Mr. Khalifa Al-Hitmi (QAT). FIDE Ambassador for Life – GM A. Karpov (RUS).*

*He had talked with Mr. Karpov who said that he wants to work for FIDE. He requested him to ask the delegates of the General Assembly for a position as FIDE Ambassador for Life.*

*Mr. Azmaiparashvili said that the President is violating the Statutes. He cannot nominate 5 Vice-Presidents, he only has two positions. He objected and we have to follow the statutes.*

*Mr. Il'yumzhinov thanked Mr. Azmaiparashvili and said that is why he decided to discuss with all parties how we can work for the next four years. He had invited Mr. Karpov to be a Vice President and he had asked his opinion regarding who he wants to nominate in the team. Mr. Karpov suggested Mr. Kurchenkov, head of the Karpov team to have a position in FIDE.*

*He had discussed the future work with members of his former team and with many delegates. He wanted to involve everyone and he wanted their active work, as he wants to work for FIDE 24 hours a day. He wanted chess in schools in all 170 member federations. He had announced that he will put 1 mln USD from his private foundation for the preparation of trainers and arbiters. And many FIDE people will work in this and many other Commissions.*

*Mr. Azmaiparashvili said he had declined all positions and he will go for a legal procedure, this is an official objection from Georgia.*

*The Deputy President, Mr Makropoulos, asked the meeting if there were any objections to the confirmation of the nominations. He said there is one objection from Mr. Azmaiparashvili of Georgia. He asked if there were any further objections but no other objections were raised”.*

On 8 October 2010, FIDE issued an announcement entitled “*Elections and Nominations from Khanty-Mansiysk*”, listing the Five Vice Presidents as “*Nominated Vice Presidents*”.

On 25 October 2010, Silvio Danailov, the President of the European Chess Union, sent FIDE a letter on behalf of fourteen member federations of FIDE, including the Appellants, protesting the Vice Presidential appointments on the basis that such nominations violate Article 9.6 of the FIDE Statutes and Article 2 of the FIDE Electoral Regulations. The letter requested that FIDE (i) immediately remove all the Five Vice Presidents; and ensure that a proper procedure is followed in the nomination and confirmation of vice presidents; or (ii) alternatively, that at least three of the Vice Presidential appointments be revoked.

On 10 November 2010, Mr. Makropoulos, FIDE’s Deputy President, responded to the federations’ letter noting that the decision was taken by an overwhelming majority of the GA, which exceeded the 2/3 majority required to amend the statutes. He noted that only one objection was raised to the decision, and that alterations to the FIDE statutes by the GA had taken place on a number of previous occasions, listing a number of examples.

On 7 January 2011, the President of the European Chess Union sent FIDE a letter on behalf of the Appellants and 16 other chess federations noting that they wished to appeal the nomination of the five Vice Presidents, and requesting details of the deadline and procedure for an appeal to the FIDE Presidential Board (PB). The letter noted that the FIDE Presidential Board was the appropriate body for the appeal, for the following reasons:

*According to Article 9.4 of the FIDE Statutes, “[e]very party concerned may appeal against the decisions of the President to the General Assembly”. The next General Assembly will take place in 2012. We cannot wait two years, as this would lead to deciding on the impropriety of the nominations only after the Vice Presidents had already served half their terms. Article 4.1 of the FIDE Statutes, among other things, transfers the powers of the General Assembly to the Executive Board when the General Assembly is not in session. But the Executive Board will not convene in the ordinary course for nearly another year. This is also too long a period to wait for a decision regarding the improper appointment by the FIDE President of five Vice*

*Presidents. The Presidential Board is charged with the “day-to-day management of FIDE ... and exercises the rights of the General Assembly and the Executive Board between meetings of the General Assembly and Executive Board respectively. A Court of Arbitration for Sport arbitral tribunal recently confirmed the interim decision-making power of the FIDE Presidential Board in decision CAS 2010/O/2166.*

On 21 January, Mr. Jarret, an executive director of FIDE, responded to the federations’ letter noting that the 7 January 2011 letter was unsigned. The letter noted that the “*decision of the General Assembly became final and entered into force. Nobody challenged it which is not surprising since all FIDE members (except one) agreed with the confirmation of the nominations*”.

On that same date, the Appellants submitted an appeal to the PB by means of a letter to the FIDE Secretariat, enclosing a number of factual and legal exhibits, and requesting the appeal be considered during the PB’s meeting of 3-6 February 2011 in Antalya, Turkey. The appeal contended that the appointment of the Vice Presidents was a decision of the President, and not of the GA. In the alternative, it noted that to the extent the decision was one of the GA, such decision was null and void under Swiss law. The letter requested that the PB: (a) determine that the nominations of the Five Vice Presidents were invalid; (b) immediately remove all Five Vice Presidents from office; and (c) ensure that FIDE observes the proper nomination process.

On 8 February 2011, the Georgian Representative wrote to FIDE requesting information about the pending appeal. On that same day, Mr. Jarret responded noting that the minutes of the PB meeting would state that “[t]he Presidential Board has seen Annex 34. Without discussion, it notes that the issue has been decided by the last General Assembly”. This was confirmed in an excerpt of the minutes of the PB.

In accordance with Articles R47 and R48 of the Code, the Appellants filed their Statement of Appeal in the procedure CAS 2011/A/2360 on 24 February 2011, challenging an alleged refusal by the PB to set aside the appointment of the Five Vice Presidents by the President.

On 2 March 2011, the Respondent wrote to CAS requesting the appeal be dismissed pursuant to Article R49 of the CAS Code as it was “*manifestly late*”.

On 10 March 2011, the Respondent filed a request pursuant to Article R49 of the CAS Code, arguing that the appeal filed by the Appellants was “*manifestly late*”.

On 10 March 2010, the Appellants responded to the Respondent's R49 Request.

On 16 March 2011, the Deputy President of the CAS Appeals Arbitration Division informed the parties that he was not satisfied that the appeal was “*manifestly late*” and that any issue as to the admissibility of the appeal would be considered by the Panel in due course.

In accordance with Articles R47 and R48 of the Code, on 29 March 2011, the Appellants filed a Statement of Appeal in the procedure CAS 2011/A/2392, challenging an alleged decision by the GA to confirm the appointment of the Five Vice Presidents.

In accordance with Article R51 of the Code, and in light of a decision by the Deputy Division President of CAS to consolidate the two appeal procedures, on 18 April 2011 the Appellants filed an Appeal Brief, dealing with both procedures.

#### Extracts from the legal findings

### A. Preliminary issue – the nature of the vice presidents' appointment

The rationale underlying the commencement of two separate appeals by the Appellants lies in the disputed characterisation of the initial decision to appoint the Five Vice Presidents. As outlined above, the Appellants' primary claim seeks to characterise the appointment as one made unilaterally by the President, whereas the Respondent argues that the decision was ultimately taken by the GA.

The characterisation of the appointment of the Five Vice Presidents thus goes to the heart of both appeals, and has a significant bearing on the relevance of a number of arguments made by the parties, as well as on the admissibility of each appeal. In light of this, the Panel has examined as a preliminary matter the parties' contentions as regards the precise characterisation of the original decision to appoint the Five Vice Presidents.

The Appellants argue that the appointment of the Five Vice Presidents was a decision by the President.

They explain that the Five Vice Presidents were nominated pursuant to the power granted to the President by Article 9.6 of the FIDE Statutes, and that the GA was never required to “*confirm*” the appointments. They contend that the reference to “*confirmation*” in the Electoral Regulations simply allows the GA to “*confirm that [the] appointments have been made*”. In that respect, they submit that FIDE

procedure distinguishes between elections, where votes are counted, and appointments, and that FIDE's practice of announcing nominations and asking for any objections does not transform the process into an election. They contend that the Agenda of the FIDE Congress, and the Minutes of the FIDE Congress, provide for the “*nomination*” of Vice Presidents. They explain that the power to nominate two Vice Presidents has been validly delegated under Swiss law from the GA to the President.

In the Panel's view, the characterisation of the decision to appoint the Five Vice President requires an analysis of both the constitutional framework of FIDE underpinning the decision, as well as the specific events which occurred during the GA.

Looking first at FIDE's constitutional framework, the Panel considers that the FIDE Statutes and the Electoral Regulations contemplate the GA confirming the nomination of Vice Presidents. In reaching this conclusion, the Panel acknowledges that a level of ambiguity exists insofar as Article 9.6 of the FIDE Statutes refers to a “*nomination*” of the Vice Presidents by the President whereas Article 2 of the Electoral Regulations provides for the “*nomination and confirmation*” of the Vice Presidents.

However, this ambiguity is, in the Panel's view, resolved by considering that the Electoral Regulations constitute the more detailed - the *lex specialis* – set of electoral rules against which the FIDE Statutes must be read. Thus, it becomes clear that the process of “*nomination*” set out in Article 9.6 of the FIDE Statutes is effectively completed once it is “*confirmed*” by the GA, as required by Article 2 of the Electoral Regulations, an act which formalises the appointment process. When read alongside Chapter 3 of the FIDE Statutes, which provide that “*the President and all other FIDE officials and organizations are elected or nominated and confirmed*”, it is clear to the Panel that a “*confirmation*” process by the GA is thus required for the appointment of Vice Presidents.

This interpretation of the FIDE constitutional framework is, in the Panel's opinion, borne out by the actual events during the GA. In particular, the Panel considers that the President's request for the FIDE Delegates' “*approval*” for the appointments and the fact that Mr. Makropoulos –however abruptly– made requests for objections to the appointments, clearly suggests that the process was seen as an effective confirmation by the GA, rather than a unilateral decision by the President.

For these reasons, it is the Panel's view that the decision to appoint the Five Vice Presidents was



a decision taken by the GA. However, whilst the *existence* of such a decision is accepted by the Panel, the *validity* of the decision is a matter which relates to the merits of this claim.

## B. CAS 2011/A/2360

### 1. Admissibility of the appeal

The principal admissibility thresholds relevant to this appeal are set out in Articles R47 and R49 of the CAS Code, *viz*:

*That a “decision” has been rendered by the relevant association (Article R47);*

*That the appellant has “exhausted the legal remedies available to him prior to the appeal” (Article R47); and*

*That the appeal has been filed within the time limit of “twenty-one days from the receipt of the decision appealed against” (Article R49).*

*The Panel has considered the admissibility of CAS 2011/A/2360 in light of the three admissibility thresholds set out above.*

#### 1.1. Was there an appealable decision?

The Appellants contend that the decision being appealed to CAS is the refusal of the PB to set aside the decision to appoint the Five Vice Presidents, and that this constitutes an appealable decision pursuant to Chapter 14 of the FIDE Statutes, as it has been interpreted under Swiss law.

The Appellants argue that the PB’s refusal to make a decision is appealable under CAS case law. They explain that the nature of the decision of the PB was a decision of refusal to consider a case for lack of jurisdiction, which is considered an example of negative decision. Alternatively, they note that the statement to the effect that “*the issue had been decided by the last General Assembly*”, as set out in the minutes of the PB meeting, constituted a challengeable implicit decision.

The Respondent contends that whilst formal decisions with a negative content can be challenged under Article 75 of the Swiss Civil Code and/or Article R47 of the CAS Code, these provisions do not apply in cases where no decision has been taken at all. It argues that the statement by the PB to the effect that the issue had been decided by the General Assembly was not a decision within the meaning of Article 75 SCC and/or Article R47 of the CAS Code.

It submits in any event that the PB’s statement to the effect that the decision had already been taken was correct as the Georgian Representative’s objection, during the GA, to the nomination of the Presidents was fully considered, in light of the Georgian Representative’s objection, and then rejected by the GA immediately pursuant to Article 4.4 of the FIDE Statutes. Consequently, it argues that the PB never had the power to hear the appeal raised by the Appellants, and could thus not have made a decision relating to it.

In the case at hand, the Appellants by letter dated 21 January 2011 lodged an internal appeal to the PB against the (alleged) appointments of the Vice-Presidents by the President. In this letter the Appellants made it clear that they wanted the PB – in its function as an (alleged) internal review body of FIDE – to annul the appointments made by the President. The PB refused to entertain this internal appeal and, thus, in effect, dismissed the claim of the Appellants for lack of jurisdiction. Whether the PB was materially correct or not in its appreciation of the extent of its jurisdiction as an internal reviewing body, the Panel find that this refusal of the PB amounts to a “*decision*”.

#### 1.2. Other admissibility thresholds

The Appellants lodged the appeal with CAS against the refusal of the PB to act as an internal reviewing body on 24 February 2011. This refusal of FIDE was communicated to the Appellants – pursuant to a request for information about the pending internal appeal – on 8 February 2011. Thus, the deadline for appeal to CAS provided for in Article R49 of the CAS Code was complied with.

Finally, the Panel must examine whether or not all means of internal recourse have been exhausted. In the Panel’s view that is the case. Nowhere in the statutes and regulations of the FIDE is it provided that a second internal level of review must be accessed prior to appealing to the CAS. Since the PB was called upon to decide upon the Appellants’ request dated 21 February 2011 as a first instance internal reviewing body and since the PB refused to entertain the appeal and, by doing so, drew to a close the internal reviewing process, the appeal to CAS is admissible.

### 2. On the Merits

The Panel considers that the present appeal to CAS must be dismissed on the merits whether or not the PB was correct in not entertaining the appeal. Mr. Chu Bo (CHN), Mr. Ilya Levitov (RUS), Mr. Ali

Nihat Yazici (TUR), Mr. Israel Gelfer (ISR) and Mr. Boris Kutin (SLO) acquired the position as Vice-Presidents only through the act of confirmation/approval by the GA. Hence, it is only this final act – if any – that could have interfered with and potentially violated the Appellants’ rights. However, that final act is not the object of the appeal in the case CAS 2011/A/2360. For the foregoing reasons, this appeal must be dismissed on the merits.

### C. CAS 2011/A/2392

#### 1. Admissibility

The Panel has considered the admissibility of CAS 2011/A/2360 in light of the three admissibility thresholds set out above, in turn.

##### 1.1. Was there an appealable decision?

The Panel is satisfied that the decision of the GA to appoint the Five Vice Presidents constitutes an appealable decision pursuant to Article R47 of the CAS Code.

##### 1.2 Has the Appellant exhausted internal remedies?

The Panel is satisfied that the GA is the highest decision making body in FIDE, and that no internal appeal can be made against the decisions of the GA. Thus, the Panel is satisfied that internal remedies have been exhausted as required by Article R47 of the CAS Code.

##### 1.3 Was the appeal timely?

The Appellants contend that the appeal is timely, insofar that the decision of the GA is “null and void” under Swiss law and under *lex sportiva*. The Appellants’ arguments as regards the nullity of the GA’s decision are outlined above.

The Appellants argue that a null and void decision is not subject to the time limit set out in Article 75 of the Swiss Civil Code (the “SCC”) or Article R49 of the CAS Code.

The Respondent has contested the Appellants’ characterisation of the decision as “null and void”. The Respondent’s arguments as regards the nullity of the GA’s decision are outlined above.

The Respondent also argued, during the oral hearing, that by agreeing to Article R49 of the CAS Code the Parties have altered the scope of exercise of their rights under the applicable substantive law (Swiss law), in the sense that even if the breach of

an association member’s rights is serious enough to render the association’s decision null and void *eo ipso*, the validity of that decision may only be challenged through an appeal lodged with CAS within the time limit of Article R49 of the CAS Code.

It is undisputed between the Parties that on the merits –*inter alia*– Swiss law applies. Nor do the Parties differ as to Swiss law in relation to decisions or resolutions of the general assembly of an association that breach state law or the statutes or regulations of the association. Under Swiss law, the decision or resolution may be either null and void *eo ipso* or only “*annullable*”. If a decision is null and void *eo ipso* it is deprived of any legal effect from the outset and any person can rely on this finding at any point in time, i.e. a person is not time barred in claiming that the decision is null and void. In order for an “*annullable*” decision to cease having any legal effect, a court must render a judgment in that respect in accordance with Article 75 SCC, and may do so only if seized within a time limit of 30 days.

It is further undisputed between the Parties that they agreed to the application of the CAS Code, which under Article R28 refers to Lausanne as the seat of the arbitration. Consequently, by virtue of the arbitration being seated in Switzerland and involving at least one non-Swiss party, the present appeals are subject to the Arbitration chapter of Switzerland’s Federal Code on Private International Law of 18 December 1987 (the “*Swiss PIL Code*”), as the *lex arbitri*, which provides, *inter alia*, that “*the parties may directly or by reference to rules of arbitration regulate the arbitral procedure*” (Article 182). It is also undisputed that the Parties are thus subject to Article R49 of the CAS Code, whereby appeals against decisions must be filed, in principle, within a deadline of 21 days.

What is disputed between the Parties is the relationship between Article R49 of the CAS Code and the above-summarized contents of the Swiss law applicable to the merits, since at first sight they could appear contradictory. Thus far, the cases forming CAS jurisprudence have not resolved this issue. In CAS 1997/O/168, cited by the Appellants, the Panel acknowledged that there might be a conflict between Article R49 of the CAS Code and substantive Swiss law. However, in the end the arbitrators there did not need to decide how to resolve the conflict, since the parties in that case agreed on the non-applicability of Article R49 of the CAS Code. The situation is different here, since the Respondent has not waived the applicability of Article R49 of the CAS Code.

Contrary to the view held by the Appellants, the Panel finds that Article R49 of the CAS Code is not

limited to appeals filed against “*annullable*” decisions. First, nothing in the wording indicates such a limited scope of applicability of said provision. Second, in the Panel’s opinion, the Appellants’ argument that Article R49 of the CAS Code must be applied in light of article 75 of the SCC and the distinction made in that connection between “*null and void*” decisions on the one hand and “*annullable*” decisions on the other, simply cannot fit with what must have been the intention of the drafters of Article R49, since that provision is designed to apply to all parties appealing decisions to the CAS whatever the substantive law applicable to the dispute. In other words, subject to the parties being entitled to agree on a different time limit, Article R49 purports to place an admissibility threshold upon all appeals, without reference to the substantive law applicable to a dispute before CAS. Whether an exception to this rule must be accepted and an appeal allowed after the expiry of the deadline if a decision of an association violates international public policy can be left unanswered, since in the view of the Panel no such violation has occurred in the case here.

For sake of clarity, the Panel underlines that in its view Article R49 of the CAS Code is not intended to alter the law applicable on the merits. If the latter differentiates between decisions that are null and void and those that are only “*annullable*” this situation remains unchanged. Article R49 of the Code comes into play at a different level. It only deals with the admissibility of the claim in front of the CAS and not with the merits of a specific claim. Thus, in a case where an association’s decision were null and void, it would not become materially valid merely because the time limit in R49 of the CAS Code has expired. Instead, the member would only be procedurally barred from filing a principal action against said decision. However, nothing would prevent the same member to avail himself in a different context of the fact that the decision is null and void.

Swiss law clearly gives precedence to the will of the parties as regards the applicable procedure for international arbitrations subject to the Swiss PIL Code. Therefore, the time limit for the commencement of claims set out in Article R49 of the CAS Code, being part of the procedural rules chosen by the parties to these arbitration proceedings, is applicable irrespective of the fact that other time limits may exist for filing appeals in front of State courts as provided for example by Article 75 of the SCC as interpreted by Swiss law.

Consequently, the substantive characterisation of the underlying decision as “*null and void*” or “*challengeable*” and the effect of such characterisation on the time

limit set out in Article 75 of the SCC are irrelevant to the procedural admissibility of the claim under Article R49 of the CAS Code.

It is thus unavailing for the Appellants to seek to circumvent the 21 days time limit set out in the procedural rules of the CAS Appeal procedure, as the Appellant seeks to do in the present instance, by reference to Article 75 of the SCC.

For these reasons, the Panel holds that CAS 2011/A/2392 is inadmissible, having been brought later than 21 days following the receipt of the decision being challenged.

## 2. The Panel’s finding on the merits

The Panel has reviewed and duly considered both parties’ pleadings on the merits, and notes that these at the very least raise a number of *prima facie* issues regarding the clarity of the FIDE Statutes and Electoral Regulations, and regarding the internal governance of FIDE. However, having decided that CAS 2011/A/2392 is inadmissible, the Panel will not address in this award the parties’ pleadings on the merits, which have been outlined above.

Nevertheless, the Panel would encourage FIDE to assess critically its past practice in light of the texts of its statutes and regulations, so as to maintain an appropriate level of transparency in its decision-making process.

## D. Other claims

The Panel, having considered and dismissed the Appellants’ appeals, will not address the arguments raised by the Respondent relating to the Appellants’ lack of standing to commence the proceedings, the Respondent’s allegation that the appeal is an abuse of right by the Appellants and the Respondent’s allegation that the source of financing of the Appellants’ claim raises questions of standing.

## E. Conclusion

The appeal filed by the Appellants on 24 February 2011 (CAS 2011/A/2360) is dismissed, whereas the appeal filed by the Appellants on 29 March 2011 (CAS 2011/A/2392) is inadmissible.

Football; disciplinary sanctions against a FIFA official for infringement of the Code of Ethics; duty of good faith in obtaining evidence; power to admit illegally obtained evidence; standard and evaluation of proof; admissibility of evidence; protection of personality rights; duty of loyalty and good faith; degree of guilt

Panel:

Prof. Massimo Coccia (Italy), President  
Judge Catherine Anne Davani (Papua New Guinea)  
Mr. Michele Bernasconi (Switzerland)

Relevant facts

This appeal is brought by Mr Ahongalu Fusimalohi (the “Appellant”), former member of the Executive Committee of the Fédération Internationale de Football Association (FIFA; the “Respondent”), against a decision of the FIFA Appeal Committee, which held him responsible for breaching articles 3, 9, 11 and 14 of the FIFA Code of Ethics and which imposed on him a ban from taking part in any football-related activity at national and international level for a period of two years as well as a fine of CHF 7,500.

The facts from which the appeal emanates are that the Appellant was secretly filmed and recorded by a hidden camera and an audio recording device, while meeting with an undercover *Sunday Times* journalist posing as a lobbyist purporting to support the United States football federation’s bid for the 2018 and 2022 FIFA World Cups. The video and audio recordings of that meeting (“the Recordings”), passed on by the *Sunday Times* to FIFA, are the evidentiary basis of the case against Mr Ahongalu Fusimalohi.

At the time the Appellant met with the *Sunday Times* journalist, he was the General Secretary of the Tonga Football Association (“Tonga FA”), a member of the Executive Committee of the Oceania Football Confederation (OFC) and a member of the FIFA Organising Committee for the Olympic Football

Tournaments (the “FIFA Olympic Tournaments Committee”). He had been a member of the FIFA Executive Committee from 2002 to 2007.

In relation to the 2018 FIFA World Cup, the national football federations of the following countries submitted bids for the right to host the final phase: Russia, England, Belgium jointly with the Netherlands, and Spain jointly with Portugal. The bidders to stage the 2022 edition of the FIFA World Cup were the national federations of Qatar, Australia, Korea Republic, Japan and USA. The United States federation had initially submitted bids to FIFA for both editions of the World Cup but, in October 2010, withdrew from the 2018 bid process to focus solely on the 2022 contest.

On 2 December 2010, the FIFA Executive Committee chose Russia to host the 2018 FIFA World Cup and awarded the 2022 FIFA World Cup to Qatar.

On 17 October 2010, the British weekly newspaper *Sunday Times* published an article entitled “Foul play threatens England’s Cup bid; Nations spend vast amounts in an attempt to be named World Cup host but as insight finds, \$ 800,000 offered to a FIFA official can be far more effective”. The newspaper reported strong suspicions of corruption within FIFA in connection with the selection process to host the FIFA World Cups. The article suggested that corruption was widespread within FIFA and came to the conclusion that, in the current state of affairs, it was more effective and less costly to obtain the organisation of the World Cup by offering bribes rather than by preparing and filing a thorough and well-documented bid. As a final point, the article concluded that “Football has enough trouble maintaining fair play on the field. FIFA has to ensure that there is fair play off it, too, by stamping out corruption and cleaning up the World Cup bidding process. FIFA badly needs to introduce more transparency into the process and keep its decision makers under tighter control. That means an end to payments into private bank accounts or pet projects. It means each committee member judging the merits of the bids, not the bribes on offer. The Olympics has cleaned up its act after a series of bribery scandals, culminating in Salt Lake City in 2002. We have a right to expect no less of the World Cup”.

The covert inquiry was conducted by some *Sunday Times* journalists, who had approached several current and former high-ranking FIFA officials pretending

to be lobbyists working for a private company called *Franklin Jones*, allegedly hired by a group of United States companies eager to secure deals in order to unofficially support the official bids presented by the United States football federation for the 2018 and the 2022 FIFA World Cups.

With specific regard to Mr Fusimalohi, on 22 July 2010, a *Sunday Times* journalist who did not reveal her true identity and profession but introduced herself as “*Claire Murray*”, Director of *Franklin Jones*, sent to the Appellant the following e-mail:

*“I work for a London based communication company. To meet our client’s needs we will be expanding our International Advisory Board and are looking for a small number of authoritative figures to help us develop our expertise.*

*One of the areas we are interested in developing is Sport and your name came up as someone who has tremendous expertise and contacts in this area.*

*I wonder if we could arrange a telephone call to discuss the possibility of you working with us in the future? I would very much like to arrange a meeting, but perhaps we can talk about that when we speak on the telephone”.*

On 27 July 2010, the Appellant had a first phone conversation with “*Claire Murray*”, who subsequently e-mailed him the following message:

*“[...]*

*However, our search for the right person has become more urgent as we have recently taken on a major client: a Chicago based consortium of American companies who are willing to make substantial investments to bring the USA’s faltering bid for the 2018 World Cup (the 2022 is their second target) back in contention.*

*This means that the person we require, our “Sports Board Member”, needs to be someone who is familiar with the inner workings of the [FIFA]. Our clients recognise that 2018 is a tough field and the Europeans are favourites but they want us to aim high and hope to gain some ground on the 2022 bid if they fail on 2018. If you were to become our “Sports Board Member” we would be looking for advice on how the USA could identify key decision makers and maximise its votes from the members of the FIFA executive committee.*

*We feel that a key part of our expansion involves developing our presence in Asia and the Pacific – something we think you are well placed to help us achieve in terms of contacts and location! Our board members usually do about one day a month for us, although if you wished to be more involved, we would be happy to develop your role. Other areas we are looking to develop are sports travel, ticketing and stadium security at major events. It*

*would be great if we could meet to discuss this proposal further.*

*You will appreciate that in order to give you a flavour of the job, we have had to reveal some of our business plans. So we appreciate it if you could keep the contents of this email private”.*

On 28 July 2010, the Appellant wrote back to Ms Claire Murray, confirming his interest in joining Franklin Jones in “*an advisory capacity*” and in “*receiving further information on [his] recruitment*”.

On 25 September 2010, the Appellant met an undercover reporter of the *Sunday Times* who presented himself as a colleague of “*Claire Murray*” named “*David Brewster*” (the “*Reporter*”), working for the (fictitious) company *Franklin Jones*. The meeting took place in a hotel in Auckland, New Zealand (the “*Auckland Meeting*”). It lasted about two and a half hours and was video and audio recorded by the Reporter, without the knowledge of the Appellant.

On 15 October 2010, the “*Insight Editor*” of the *Sunday Times* sent an email to the Appellant informing him of the fact that an article was about to be published in the coming week-end, and that the article would report his meetings with the supposed representatives of *Franklin Jones* and his acceptance to assist the company in its project of bribing some members of the FIFA Executive Committee. The *Sunday Times’* Insight Editor gave a short summary of what was allegedly said during the Appellant’s interaction with the undercover Reporter and gave him the opportunity to state his position, if he so wished.

On 16 October 2010, the Appellant signed a statement of apology dated 15 October 2010 to the attention of the OFC President, OFC Executive Members, OFC Member Associations’ Presidents and OFC staff. In this document, he acknowledged having declared to the Reporter (i) that the OFC members would vote for the Australian bid for the 2022 FIFA World Cup only because the Australian Football Federation persuaded its government to pay Oceania 4 million Australian dollars, (ii) that Mr Reynald Temarii – at the time OFC President and vice-president of FIFA – would vote for the Spanish bid in exchange of training facilities in South America for Oceania national teams, (iii) that Mr Temarii’s vote could certainly be bought for the American bid and that, in this regard, a direct offer should be made to him. Then, the Appellant stated (iv) that the above declarations made to the Reporter were “*pure lies*”, (v) that in a 2008 meeting, the members of the OFC Executive Committee unanimously agreed to support the Australian bid based on their common history as well as on very objective criteria, and (vi) that the OFC President committed himself to vote in

accordance with the decision of the OFC Executive Committee members, who were regularly consulted and updated about his meetings with the bidding committees.

At the hearing, the Appellant claimed that he did not write the above letter but that it was prepared for him by Mr Temarii and Mr Tai Nicholas, the OFC General Secretary, who made him sign it while he was sick at home, and that he was too sick to actually read or understand what he was signing.

On 17 October 2010, the *Sunday Times* published on paper and on its website the already mentioned article entitled “*Foul play threatens England’s Cup bid* [...]”. In particular, the article contained an account of the contacts between the undercover journalists and the Appellant as well as excerpts of the Recordings secretly taken in Auckland, quoted *verbatim*.

On 18 October 2010, upon FIFA’s request just after the publication of the article, the *Sunday Times* sent to FIFA a copy of the Recordings.

On the same day, the FIFA Secretary General requested the chairman of the FIFA Ethics Committee to commence disciplinary proceedings against the Appellant, in accordance with article 16 of the FIFA Code of Ethics (the “FCE”).

On 20 October 2010, the FIFA Ethics Committee provisionally suspended the Appellant from taking part in any football related activity at national or international level.

On 21 October 2010, the FIFA Ethics Committee commenced proceedings against the Appellant on grounds of possible violations of article 7 of the FIFA Statutes, article 62 of the FIFA Disciplinary Code (FDC) and articles 3, 5, 6, 9, 10, 11, 12 as well as 14 of the FCE. The Appellant was notified of the said charges in a letter of the same date.

On 27 October 2010, the Appellant received, via the Tonga FA, a package containing a copy of the Recordings.

On 5 November 2010, the Appellant filed his written position before the FIFA Ethics Committee within the allotted time limit. In his submission he explained, *inter alia*, that he was not in a financial position to attend, or to be represented at, a hearing to be held in Switzerland.

On 16 November 2010, the FIFA Ethics Committee decided the following:

- “1. *The official, Mr Abongalu Fusimalobi, is found guilty of infringement of art. 3 par. 1, par. 2 and par. 3 (General Rules), art. 9 par. 1 (Loyalty and confidentiality), art. 11 par. 1 (Bribery) and art. 14 par. 1 (Duty of disclosure and reporting) of the FIFA Code of Ethics.*
2. *The official, Mr Abongalu Fusimalobi, is hereby banned from taking part in any kind of football-related activity at national and international level (administrative, sports or any other) for a period of three (3) years as from 20 October 2010, in accordance with art. 22 of the FIFA Disciplinary Code and in connection with art. 17 of the FIFA Code of Ethics.*
3. *The official, Mr Abongalu Fusimalobi, is ordered to pay a fine to the amount of CHF 10,000, in accordance with art. 10 c) of the FIFA Disciplinary Code and in connection with art. 17 of the FIFA Code of Ethics. The fine is to be paid within 30 days of notification of the decision. (...)*
4. *Costs and expenses of these proceedings, in the amount of CHF 2,000 are borne by the official, Mr Abongalu Fusimalobi, in accordance with art. 105 par. 1 of the FIFA Disciplinary Code and shall be paid according to the modalities stipulated under point no. 3 above.*
5. *The official, Mr Abongalu Fusimalobi, shall bear his own legal and other costs incurred in connection with the present proceedings.*
6. *This decision has been sent to Mr Abongalu Fusimalobi [...] by fax, in accordance with art. 103 par. 1 of the FIFA Disciplinary Code”.*

On 17 January 2011, the full reasoning for such decision was issued and notified to the Appellant.

The Appellant lodged with the FIFA Appeal Committee a timely appeal against the decision of the FIFA Ethics Committee.

On 2 February 2011, the FIFA Appeal Committee held a hearing by telephone conference attended by the Appellant and his counsel. On 14 April 2011, the FIFA Appeal Committee issued its full decision (the “*Appealed Decision*”), which was received by the Appellant on 15 April 2011 (Oceania date).

The FIFA Appeal Committee found among other things that the proceedings before the FIFA Ethics Committee were properly carried out and that the Recordings constituted admissible evidence as the investigations conducted by the *Sunday Times* were necessary and appropriate, served a justified purpose (i.e. the information of the public of the possibility

of corruption among high ranking FIFA officials) and were achieved in the public interest, which “clearly outweighed any disadvantages to the Appellant that might have resulted from the breach of any law during the procurement of the information in question”. The FIFA Appeal Committee held that there was sufficient evidence to establish that the Appellant accepted unjustified advantage against his services in favour of the American bid and that the requirements of article 11 para. 1 of the FCE (Bribery) were met. The FIFA Ethics Committee deemed that the Appellant violated the principles set forth in article 9 of the FCE (Loyalty and confidentiality) as his behaviour was clearly in breach of the specific standard of conduct requested by a “CEO/Secretary of the Tonga Football Association a person who was in FIFA from 2002 to 2007 and during this time was a member of several FIFA committees among which the FIFA Executive Committee, a member of the Executive Committee of the OFC and of the board of the OFC”. The FIFA Appeal Committee also confirmed that the Appellant did not respect his general obligations (as provided by article 3 of the FCE) as well as his duty of disclosure of illicit approaches prescribed by the applicable regulations, in failing immediately to report to FIFA that he had been in receipt of offers by certain individuals to take an active part in their illegitimate scheme. On account of his violation of article 11 para. 1 of the FCE, the FIFA Appeal Committee deemed appropriate to sanction the Appellant with a 16 months ban from taking part in any football-related activity, to be increased due to the violation of articles 3, 9 para. 1 and 14 para. 1 of the FCE by 8 months to a total of two years.

The FIFA Appeal Committee also imposed upon the Appellant a fine of CHF 5,000 for the infringement of article 11 para. 1 of the FCE and a fine of CHF 2,500 for the infringement of articles 3, 9 para. 1 and 14 para. 1 of the FCE, to a total fine of CHF 7,500.

As a consequence, the appeal lodged by the Appellant was partially upheld as the decision of the FIFA Ethics Committee was confirmed but the sanctions were reduced to a two-year ban from taking part in any football-related activity (instead of a three-year ban) and a fine of CHF 7,500 (instead of CHF 10,000).

On 2 May 2011, the Appellant filed a statement of appeal before the Court of Arbitration for Sport (CAS). On 16 May 2011, he lodged his appeal brief.

#### Extracts from the legal findings

##### A. Admissibility of the evidence

According to the Appellant, the Recordings that FIFA obtained from the *Sunday Times* must be

considered as illegally obtained evidence because the journalists’ undercover investigation deceived the Appellant, did not serve to achieve a justified purpose, used unnecessary and inappropriate methods and compromised the Appellant’s right to privacy by pursuing a less significant interest than that of the Appellant. Therefore, it is the Appellant’s case that the evidence is procedurally inadmissible.

##### 1. Illegal nature of the evidence?

Preliminarily, with regard to the alleged illegality of the evidence, the Panel notes that pursuant to the general duties of good faith and respect for the arbitral process a party to an arbitration may not cheat the other party and illegally obtain some evidence. Should that happen, the evidentiary materials thus obtained may be deemed as inadmissible by the arbitral tribunal (cf. BERGER/KELLERHALS, *International Arbitration in Switzerland*, 2<sup>nd</sup> ed., London 2010, p. 343). A couple of examples can be given of arbitral proceedings where a violation of the principles of good faith and of respect for the arbitral process occurred:

- an international arbitral tribunal made clear that all parties owe a general duty to the others and to the tribunal to conduct themselves in good faith during the arbitration proceedings and that it is not acceptable for a party to an arbitration to gather evidence by having private detectives covertly trespassing into the other party’s office building (UNCITRAL, *Methanex Corp. v. United States*, Final Award, 3 August 2005, pt. II, ch. A, at 13);
- another international arbitral tribunal, in a situation where a State who was a party to an ICSID arbitration had used its police powers and intelligence services to eavesdrop on the other party’s telephone conversations, stated that “parties have an obligation to arbitrate fairly and in good faith and [...] an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with; this principle applies in all arbitration” (ICSID Case No. ARB/06/8, *Libananco Holdings Co. v. Turkey*, Award on Jurisdiction, 23 June 2008 at 78).

On the basis of the evidence before it, the Panel finds that the case at hand is very different from the just mentioned examples, as FIFA did not perform any illegal activity and did not cheat the Appellant in order to obtain the Recordings. There is no evidence on file, and the Appellant does not contend, that the *Sunday Times’* investigation was prompted or supported by FIFA or by anybody close to FIFA. FIFA transparently solicited and received such evidentiary material from the *Sunday Times* immediately after the publication of the article on 17 October 2010 and the

disclosure of important portions of the Recordings' content. The Panel thus finds that FIFA did not violate the duties of good faith and respect for the arbitral process incumbent on all who participate in international arbitration; as a consequence, such procedural principles may not constitute a legal basis to exclude the disputed evidence from these arbitration proceedings.

However, the Appellant argues that the *Sunday Times*' Reporter intentionally intruded into his private life to gather the Recordings and, consequently, such evidence cannot be used in these arbitration proceedings, even if FIFA itself is not responsible for the journalists' conduct.

The Panel observes that, in assessing the lawfulness or not of the journalists' conduct, two different rights would have to be comparatively weighed – the right to respect for private life and the right to freedom of expression. Both rights are protected in any democratic society but neither one is absolute, being subject to a number of legitimate exceptions and restrictions (cf. articles 8.2 and 10.2 ECHR). According to the current jurisprudence of the European Court of Human Rights, neither right has automatic precedence over the other and, in principle, both merit equal respect (European Court of Human Rights, Judgment 23 July 2009, *Hachette Filipacchi Associés "Ici Paris" v. France*, Application no. 12268/03, at para. 41).

With specific regard to interferences by the media in a person's private life, the European Court of Human Rights has recently emphasised the vital role of the press in informing the public and being a "public watchdog", underlining that not only does the press have the task of imparting information and ideas on matters of public interest but the public also has a right to receive them (European Court of Human Rights, Judgment 10 May 2011, *Mosley v. UK*, Application no. 48009/08, at para. 112). According to the European Court (*ibidem*, at para. 114):

*"the pre-eminent role of the press in a democracy and its duty to act as a 'public watchdog' are important considerations in favour of a narrow construction of any limitations on freedom of expression. However, different considerations apply to press reports concentrating on sensational and, at times, lurid news, intended to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life. [...] the Court stresses that in assessing in the context of a particular publication whether there is a public interest which justifies an interference with the right to respect for private life, the focus must be on whether the publication is in the interest of the public and not whether the public might be interested in reading it"* (citations omitted).

The Panel notes that the *Sunday Times* did not look for sensational or lurid aspects of the Appellant's strictly private life to lure the curiosity of the public. Rather, the *Sunday Times* tried to expose possible cases of corruption in the FIFA World Cup bidding process, thus acting as "public watchdogs" (to use the European Court's terminology). The Panel finds it difficult to maintain that the exposure of illegal conduct in relation to important sports events – be it corruption, doping or match-fixing – would not be in the interest of the public. Taking into account the above recent jurisprudence of the European Court of Human Rights, it is not self evident that the Reporter's conduct, albeit sneaky, was unlawful; if it were, the Appellant would be entitled to seek justice on that count by filing a criminal complaint and/or a civil action against the *Sunday Times* or its journalists. The fact that at the time of the hearing – about one year after the relevant facts – the Appellant had not started any lawsuit certainly does not lend support to the argument that the journalists illegally obtained the Recordings.

In any event, the Panel deems it unnecessary to assess whether or not the Recordings were illegally procured and whether or not the evidence remained illegal when it arrived in the hands of FIFA. The Panel is even prepared to assume in the Appellant's favour that the evidence was illegally obtained, given that an international arbitral tribunal sitting in Switzerland is not necessarily precluded from admitting illegally procured evidence into the proceedings and from taking it into account for its award (see BERGER/KELLERHALS, *op. cit.*, p. 343). Indeed, an international arbitral tribunal sitting in Switzerland is not bound to follow the rules of procedure, and thus the rules of evidence, applicable before Swiss civil courts, or even less before Swiss criminal courts. As emphasized in the Swiss legal literature on international arbitration (translated in English):

*"Arbitral proceedings are not subject to the rules applicable before State tribunals. This is, after all, an often mentioned benefit of arbitration"* (KAUFMANN-KOHLER/RIGOZZI, *Arbitrage international. Droit et pratique à la lumière de la LDIP*, 2<sup>nd</sup> ed., Bern 2010, at 294).

Accordingly, with regard to the admissibility of evidence, the Panel endorses the position articulated by a CAS panel in the recent matter CAS 2009/A/1879, paras. 134 ff (the "A. case"; translated in English):

*"The internal Swiss legal order does not set forth a general principle according to which illicit evidence would be generally inadmissible in civil proceedings before State courts. On the contrary and according to the long-standing jurisprudence of the Federal Tribunal, whether the evidence is admissible or*



*inadmissible depends on the evaluation of various aspects and legal interests. For example, the nature of the infringement, the interest in getting at the truth, the evidentiary difficulties for the interested party, the behaviour of the victim, the parties' legitimate interests and the possibility to obtain the (same) evidence in a lawful manner are relevant in this context. The prevailing scholarly writings agree with the jurisprudence of the Swiss Federal Tribunal. The approach taken by the Federal Tribunal and by most of the scholars has actually been codified in the new Swiss Code of Civil Procedure (CCP) (Article 152 paragraph 2), which will come into force on 1 January 2011 [...].*

*The above described principles are only a feeble source of inspiration for arbitral tribunals. [...] In particular, the prohibition to rely on illegal evidence in State court proceedings is not binding per se upon an arbitral tribunal. According to international arbitration law, an arbitral tribunal is not bound by the rules of evidence applicable before the civil State courts of the seat of the arbitral tribunal. As seen above, the discretion of the arbitrator to decide on the admissibility of evidence is exclusively limited by procedural public policy. In this respect, the use of illegal evidence does not automatically concern Swiss public policy, which is violated only in the presence of an intolerable contradiction with the sentiment of justice, to the effect that the decision appears incompatible with the values recognized in a State governed by the rule of law”.*

In light of these principles and under the particular circumstances of that matter, the CAS panel in the A. case considered as admissible a piece of evidence – a blood sample – which a Spanish first instance judge, whose order was subsequently confirmed by the Madrid Court of Appeals, (a) had expressly declared to have been illegally obtained and (b) had expressly prohibited to be used in any judicial or disciplinary proceedings. The CAS panel in the A. case held on the basis of such evidence that the athlete had at least tried to engage in prohibited doping practices and, consequently, imposed on him a disciplinary sanction. A. lodged an appeal before the Swiss Federal Tribunal, which upheld the decision without however dealing with this evidentiary issue (Judgment of 29 October 2010, 4A\_234/2010, ATF 136 III 605).

The Panel remarks that, in the case at hand, not only has there been no judicial court finding that the evidence was unlawfully obtained and prohibiting its use but, as observed, it is open to debate whether the *Sunday Times* Reporter acted illegally. In light of the foregoing considerations the Panel finds that, even assuming in the Appellant's favour the illegal acquisition of the Recordings, this does not prevent their use as evidence in disciplinary proceedings conducted within a private association or in related appeal proceedings before an arbitral institution, in this case the CAS.

## 2. The applicable rules of evidence

### 2.1 Private autonomy and Swiss evidentiary rules

Chapter 12 PILA grants an important role to private autonomy in international arbitration, as it gives the parties the option to determine their own procedural rules, including rules relating to evidence. In particular, article 182 para. 1 PILA states that “[t]he parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice”.

This provision confirms the A. panel's statement that “an arbitral tribunal is not bound by the rules of evidence applicable before the civil State courts of the seat of the arbitral tribunal”. This is particularly so if the parties make use of their private autonomy to lay down some rules of evidence.

The Panel notes that the parties to this arbitration did make use of their private autonomy – FIFA by adopting its rules and the Appellant by accepting them when he voluntarily became an indirect member of FIFA – and did agree to the application of rules of evidence in FIFA disciplinary proceedings. Therefore, the Panel finds that the evidentiary issues in this case will be addressed applying those rules privately agreed between the parties and not the rules of evidence applicable before Swiss civil or criminal courts.

As a consequence, the criteria on the admissibility of evidence that can be found in the Swiss civil or criminal jurisprudence will not be relied on by the Panel. In particular, the Panel will not discuss some decisions of the Swiss Federal Tribunal, such as the judgments of 2 July 2010 (5A\_57/2010, ATF 136 III 410) and of 15 June 2009 (8C\_807/2008, ATF 135 I 169), that concern covert surveillance and secret video recordings of insured individuals made by private or public insurance bodies. Indeed, those cases do not concern arbitration proceedings but the application of Swiss rules of civil procedure. Incidentally, the Panel observes that those Swiss cases can be distinguished from the case at hand, as they concern intrusions into privacy committed with the objective of gathering evidence by the same party which then introduced the evidence before the court, whereas FIFA – as already noted – cannot be blamed for having spied on the Appellant. Rather FIFA was confronted with evidence derived from a *fait accompli*.

The applicable FIFA evidentiary rules in this case are those set forth by the FDC, which includes rules governing (i) the burden of proof, (ii) the standard and evaluation of proof, and (iii) the admissibility of evidence.

## 2.2 The FIFA rule on burden of proof

With regard to burden of proof, article 99 para.1 of the FDC provides as follows:

*“Article 99 Burden of proof*

1. *The burden of proof regarding disciplinary infringements rests on FIFA”.*

The Panel notes that this FIFA provision is in line with the general principle for disciplinary cases, which is that the burden of proof lies with the accuser. Hence, notwithstanding the fact that FIFA is the Respondent in this arbitration, it is up to FIFA to prove its case against the Appellant.

## 2.3 The FIFA rule on standard and evaluation of proof

With regard to standard and evaluation of proof, article 97 of the FDC provides as follows:

*“Article 97 Evaluation of proof*

1. *The bodies will have absolute discretion regarding proof.*
2. *They may, in particular, take account of the parties’ attitudes during proceedings, especially the manner in which they cooperate with the judicial bodies and the secretariat (cf. art. 110).*
3. *They decide on the basis of their personal convictions”.*

The Panel notes that, under article 97 FDC, the Panel has wide powers and may freely form its opinion after examining all the available evidence. The applicable standard of proof is the *“personal conviction”* of the Panel.

The Panel is of the view that, in practical terms, this standard of proof of personal conviction coincides with the *“comfortable satisfaction”* standard widely applied by CAS panels in disciplinary proceedings. According to this standard of proof, the sanctioning authority must establish the disciplinary violation to the comfortable satisfaction of the judging body bearing in mind the seriousness of the allegation. It is a standard that is higher than the civil standard of *“balance of probability”* but lower than the criminal standard of *“proof beyond a reasonable doubt”* (cf. CAS 2010/A/2172, para. 53; CAS 2009/A/1920, para. 85). The Panel will thus give such a meaning to the applicable standard of proof of personal conviction.

## 2.4 The FIFA rule on admissibility of evidence

With regards to the admissibility of evidence – the evidentiary issue in controversy here – article 96 of the FDC provides as follows:

*“Article 96 Various types of proof*

1. *Any type of proof may be produced.*
2. *Proof that violates human dignity or obviously does not serve to establish relevant facts shall be rejected.*
3. *The following are, in particular, admissible: reports from referees, assistant referees, match commissioners and referee inspectors, declarations from the parties and witnesses, material evidence, expert opinions and audio or video recordings”.*

The Panel notes that, pursuant to Article 96 para. 1 FDC, all means of evidence may be admitted without restriction in disciplinary proceedings to which FIFA rules are applicable. The Panel also notes that para. 3 of this provision expressly includes *“audio or video recordings”*. It thus appears that the FDC allows virtually all types of evidence, with the exception of those that violate *“human dignity”* or that are obviously immaterial (para. 2), the latter exception being clearly irrelevant in the case at hand. Incidentally, the Panel observes that such a liberal attitude in the admission of evidence should not come as a surprise, given that intra-association disciplinary proceedings (and thus the ensuing appeal arbitration proceedings) are, by their very nature, less formalistic and guarantee-driven than criminal proceedings.

According to the Swiss Federal Tribunal, the normative content of *“human dignity”* cannot be determined explicitly and exhaustively. Nevertheless, the Federal Tribunal stressed that human dignity is inseparable from the human condition and from the human beings (ATF 132 I 49, at consid. 5.1). In view of this, the Panel is of the opinion that the quoted FIFA rule tends to exclude from the evidentiary process proofs obtained as a result of, or connected with, acts of physical or psychological violence, brutality or any other forms of inhuman or degrading treatment. In the Panel’s view, the facts of this case do not allow to conclude that the taking of the Recordings violated human dignity. The Panel remarks that the Appellant was not subject to any threat or violence, his meeting with the Reporter was freely agreed upon and was comfortably held in a hotel bar, and his video images do not show him in any degrading situation. In short, the Recordings appear to be permissible evidence under article 96 of the FDC.

Nevertheless, it is not enough for FIFA to respect its own rules. Indeed, while Swiss law endows associations with a large autonomy, their regulations cannot infringe their members' personality rights, unless such infringement is legitimate within the meaning of Swiss law (JEANNERET/HARI, in PICHONNAZ/FOËX (eds.), *Commentaire romand – CC I*, Basle 2010, ad art. 63, paras. 2 ff, p. 474; PERRIN/CHAPPUIS, *Droit de l'association*, 3rd ed., Geneva *et al.* 2008, ad art. 63, p. 41).

Accordingly, the evidence allowed by article 96 para. 2 FDC must in any event be in compliance with the principle of protection of personality rights within the meaning of article 28 of the Swiss Civil Code ("CC").

### 3. The protection of the Appellant's personality rights

The legal basis for personality rights are articles 27 and 28 CC. Article 27 CC protects the personality from excessive contractual duties and article 28 CC from illegal infringements by a third party. Only the latter provision is relevant here.

Article 28 CC states the following:

- “1 *Any person whose personality rights are unlawfully infringed may apply to the court for protection against all those causing the infringement.*
- 2 *An infringement is unlawful unless it is justified by the consent of the person whose rights are infringed or by an overriding private or public interest or by law”.*

The guarantee of article 28 CC extends to all of the essential values of an individual that are inherent to him by his mere existence and may be subject to attack (ATF 134 III 193, at consid. 4.5, p. 200). According to article 28 para. 2 CC, an attack on personality is unlawful, unless it is justified by (i) the victim's consent, (ii) an overriding private or public interest, or (iii) the law. It follows from this provision that such an attack is in principle unlawful but it can be redeemed to lawfulness if one of the three listed justifications is proven by the perpetrator. Unlawfulness is an objective concept, such that it is not crucial that the perpetrator be in good faith or be ignorant that he is involved in harming a personality right (ATF 134 III 193, at consid. 4.6.2, p. 201). The Panel will need to assess the situation on the basis of an objective scale of values and not in consideration of the victim's perception or sensitivity (JEANDIN N., in PICHONNAZ/FOËX (eds.), *Commentaire romand – CC I*, Basle 2010, ad art. 28, paras. 67 ff, p. 261).

The Panel harbours no doubt that, in general terms, the right to privacy lies within the personality rights protected by article 28 CC. The Panel is also convinced that the Reporter's furtive conduct intruded into the Appellant's private life, as he was not advised that his private conversation was being recorded. However, the question here at stake is not whether the Reporter violated the Appellant's right to privacy but, rather, whether the use of the Recordings as evidence in this arbitration might violate his personality rights.

Taking into account the three possible justifications under article 28 para. 2 CC, two can be easily discarded – the victim's consent and the law – as they are clearly inapplicable to the case at hand. Therefore, the case falls on the evaluation whether there is an “*overriding private or public interest*” that might justify the use of the Recordings as evidence in these proceedings.

### 4. The balance between the Appellant's and other private or public interest

The Panel has to conduct a balancing exercise to decide which interest should prevail, namely the Appellant's private interest in not suffering an attack on his personality or the private interest of other individuals or entities, or the public interest, in perpetrating such attack. In this case, the balancing exercise must assess whether the Appellant's interest to keep his conversation private prevails over the FIFA's (and others') interest in disclosing them within these disciplinary proceedings.

With regard to the Appellant's interest, the Panel observes that at the time of the disciplinary proceedings some details of the Appellant's conversation with the undercover Reporter – including the most relevant and sensitive parts of the Recordings – had already fallen into the public domain with the publication of the article in the *Sunday Times* and on the Internet (publication that the Appellant, as said, has not attempted to judicially impede or restrain). The newspaper had not only reported the existence of the Recordings but also disclosed some of their contents. As a result, the Appellant's sphere of privacy with respect to his conversation with the Reporter has already been significantly narrowed. He can no longer reasonably expect to fully protect the privacy of a conversation that has already been partially read by hundreds of thousands of people. However, the Panel is persuaded that there still is a residual sphere of privacy of Mr Fusimalohi which is worth protecting, as (i) a good portion of his conversation with the Reporter has never been disclosed to the public so far and (ii) the publication of this award, including the transcript of the Auckland Meeting, will draw the public attention once again on that private

conversation. Therefore, Mr Fusimalohi retains a concrete interest to impede the full disclosure of his conversation with the Reporter and, to that end, to block the use of the Recordings as evidence in these arbitral proceedings.

Yet, the Panel finds that the Appellant's interest in keeping the Recordings confidential is contradicted by the interest of FIFA and of other private and public stakeholders in disclosing the full content of the Recordings and in using them for disciplinary purposes:

- There certainly exists a general public interest in the exposure of illegal or unethical conduct, such as corruption or other forms of dishonesty in relation to the awarding of the organization of a renown sporting event;
- There certainly is a private interest of FIFA to verify the accuracy and veracity of the information included in the *Sunday Times* article and, if necessary, to restore the truth and its image, given that the article described the whole FIFA organization as prone to corruption and questioned the impartiality and transparency of the bidding process for the organization of the World Cup;
- FIFA, like any other private association, has also a vested interest in identifying and sanctioning any wrongdoing among its officials and its direct or indirect members so as to dissuade similar conducts in the future;
- There is also a private interest of all the national football associations which were or will be candidates to host the FIFA World Cup in being fully informed and possibly reassured about the efficacy, transparency and correctness of the bidding process;
- Given the amount of public money notoriously spent by governments and public organisations to support the bids presented by their football federations and the well-known impact of the FIFA World Cup on a country's economy, there clearly is a public interest of each government pledging to support a bid (as well as of its taxpayers) to know whether the awarding of the FIFA World Cup is conditioned or altered by corrupt practices of football officials;
- Finally, there is an interest of the general public, and especially of the football fans and of the peoples of the unsuccessful candidate countries, in being comforted about the fact that the FIFA

2018 and 2022 World Cups were awarded in a fair, impartial and objective manner.

In light of the above, the Panel has no difficulty in finding that the balance of interests definitely tilts in favour of the disclosure and utilization as evidence in these arbitral proceedings of the evidentiary material collected by the *Sunday Times* and passed on to FIFA. Considering that the infringement of the Appellant's personality rights is justified by overriding public and private interests, the Panel thus holds that the Recordings submitted by the Respondent must be admitted as evidence into these arbitral proceedings.

The Panel must also ascertain whether the use of the Recordings might be in violation of Swiss procedural public policy. To this end, the Panel deems it appropriate to take particularly into account the following elements:

- (i) the nature of the conduct in question and the seriousness of the allegations that have been made;
- (ii) the ethical need to discover the truth and to expose and sanction any wrongdoing;
- (iii) the accountability that in a democratic context is necessarily linked to the achievement of an elite position (be it in a public or private organization);
- (iv) the general consensus among sporting and governmental institutions that corrupt practices are a growing concern in all major sports and that they strike at the heart of sport's credibility and must thus be fought with the utmost earnestness (cf. TRANSPARENCY INTERNATIONAL – CZECH REPUBLIC, *Why sport is not immune to corruption*, Council of Europe – EPAS, 1 December 2008); and
- (v) the limited investigative powers of sports governing bodies in comparison to public authorities.

On the basis of those considerations, the Panel is of the view that in this case the use of the Recordings in a disciplinary context does not lead to an *"intolerable contradiction with the sentiment of justice"* and is not *"incompatible with the values recognized in a State governed by the rule of law"*. Therefore, the Panel holds that the admission of the Recordings as evidence in these arbitration proceedings does not violate Swiss procedural public policy.

Finally, the Panel is not persuaded by the Appellant's contention that the evidentiary value of the

Recordings is impaired by the fact that FIFA allegedly refused to obtain from the *Sunday Times* further phone conversations that the Appellant had with the supposed representatives of *Franklin Jones* and which were probably recorded. First, the Panel notes that FIFA did request all the recordings and that if the *Sunday Times* did not provide everything it had, this is not the responsibility of FIFA. Second, the Panel is of the opinion that even if further recordings did exist, whatever their content, they could not change the content of what was said in the Auckland Meeting.

In this connection, the Panel remarks that the Appellant has not claimed, nor is there any proof, that the Recordings are not authentic or have been manipulated. In addition, the arbitrators have extensively and personally listened to and watched the Recordings, and find them to be absolutely reliable in showing in all details the Appellant's attitude and conduct during the Auckland Meeting with regard to the FIFA World Cup bidding process.

In conclusion, the Panel finds that the Recordings are admissible and reliable evidence in this arbitration and that no proof or convincing argument was adduced in this case indicating that FIFA has been acting improperly in relying on such evidence in the disciplinary proceedings against the Appellant and in the ensuing appellate arbitration.

However, these findings do not imply that the Panel believes FIFA is entitled to remain passive and to occasionally rely on accidental evidence in addressing issues of corruption. In order to promote transparency in its organization and correctly implement its ethical rules, FIFA is expected to continue to be proactive to prevent risks of corruption among its officials and to vigorously investigate, with lawful means and possibly seeking cooperation with judicial authorities, any attitudes or acts that appear suspicious.

## B. Merits

The FIFA Appeal Committee found the Appellant guilty of infringement of article 3 para. 1, article 3 para. 2, article 3 para. 3 (General Rules), article 9 para. 1 (Loyalty and confidentiality), article 11 para. 1 (Bribery) and article 14 para. 1 (Duty of disclosure and reporting) of the FCE. In this appeal arbitration the Appellant claims to be innocent while FIFA confirms its charges against him.

### 1. Article 11 para. 1 FCE (Bribery)

In essence, the Appellant claims that the available evidence does not establish that he has breached the FCE. He contends that the requirements of article

11 FCE are not met, because the Reporter made no unequivocal offer or promise to him in return for the information given and the Appellant has never confirmed that a salary for his services as a board member of *Franklin Jones* was agreed. In addition, he has not accepted nor taken any money. Any possible salary including any possible involvement was still being negotiated and the *"information that was given at the 25 September meeting was given freely and without any certainty or commitment of a money payment or actual engagement for services on the Advisor Board"*. According to the Appellant, Article 11 para. 1 FCE *"requires that the official must not accept a bribe i.e. actually do it. To merely discuss, negotiate or do something that appear to be a bribery or possible bribery is not sufficient for a conviction under article 11"*. The Appellant alleges that, in his mind, he was having a job interview and was simply trying to impress his prospective employers.

Article 11 para. 1 FCE reads as follows:

#### *"11. Bribery*

*1. Officials may not accept bribes; in other words, any gifts or other advantages that are offered, promised or sent to them to incite breach of duty or dishonest conduct for the benefit of a third party shall be refused"*.

The Panel observes that article 11 para. 1 FCE consists of two phrases. The first phrase reflects the basic principle according to which officials may not accept bribes. The second phrase makes clear that football officials must be liable to a high standard of ethical behaviour and actively turn down any potential involvement in dishonest practices, by setting out three cumulative elements of the offence:

- a) A gifts or other advantage must be offered, promised or sent to an official;
- b) The official must be incited to breach some duty or to behave dishonestly for the benefit of a third party;
- c) The official has an obligation to refuse.

Article 11 FCE requires that these three elements are all present in order to find a violation. They will be separately examined hereafter.

#### 1.1 Gifts or other advantages offered, promised or sent

With respect to the first element, the Panel notes that the wording of article 11 para. 1 FCE – *"any gifts or other advantages that are offered, promised or sent"* – is deliberately broad. The advantage can take any form

and need not actually materialize as it is sufficient that someone “offers” or “promises” it. In other words, article 11 para. 1 FCE does not require that a gift or other advantage is actually agreed upon or received by the official.

The Panel also notes that article 11 para. 1 FCE makes reference to the offer, promise or delivery of “any” gifts or other advantage. In the Panel’s view, this means that the type or form of the advantage is of no relevance; it can be money or any other benefit, even not economically quantifiable (for instance, a career advancement).

The Panel is of the view that in the case at hand an advantage was indeed offered to the Appellant in connection with the pursuit of votes for the American bid. The offered position on the *Franklin Jones* advisory board would have been well paid and was clearly connected, at least in the first period, to the lobbying activity within FIFA. While the preliminary emails from “*Claire Murray*” could still be taken as making reference to a wholly transparent activity – this might explain why, when a Tongan lawyer (Mr [...]) read those emails, that he did not find them suspicious or objectionable – the proposition made by the Reporter very early in the Auckland Meeting obviously linked the offered position to the Appellant’s task of lobbying in favour of the United States bid among the FIFA Executive Committee members:

“... if we were to hire you, then you might be able to open doors for us, talk to people you knew in FIFA, maybe sound out some of the FIFA Executive Committee members ...”.

The evidence demonstrates that, immediately after that clear proposition, the Appellant wanted to know how his collaboration with *Franklin Jones* would benefit him, what it would cover and how much his remuneration would amount to. The Appellant confirmed that he would not work for less than the rate fixed at FIFA level, which amounted to approximately USD 100,000 a year. The Appellant also entered into the details of his travelling expenses and daily pocket allowance. Concerning the expenses incurred by the Appellant in connection with the Auckland Meeting, the Reporter expressly gave his word that they would be paid for.

In the Panel’s view, the Appellant’s explanation according to which he only went to a job interview does not lend much support to his case. The Panel remarks that the job for which the Appellant was being interviewed quickly appeared to be of objectionable nature; however, this did not hold him back and did not make him try to disengage from the interview. As already noted, at the outset of the Auckland Meeting

the Reporter made clear that the idea was to find unofficial ways to promote the American bid, by looking for behind-the-scenes deals. This was clearly understood by the Appellant, who rapidly addressed the core issue, i.e. who were the members of the FIFA Executive Committee whose voting could be influenced.

The Panel finds also quite unpersuasive the Appellant’s argument that he could perform a legitimate testimonial campaign for the United States’ bid in the same way as Zinedine Zidane supported the Qatari bid. The argument is implausible because, independently of whether Mr Zidane is or is not a FIFA official, Mr Zidane’s support for the Qatari bid was public and transparent while the Appellant did not want to be publicly acknowledged for his role in helping the American bid (he said: “*I need to be kept quiet*”, “*I’m supposed to be silent on all of this*” and “*this is all strictly confidential*”). In addition, the notoriety of Mr Fusimalohi is not even comparable to that of Mr Zidane and it does not seem that he can seriously claim to be a celebrity that could play a testimonial role in a marketing campaign in favour of a bidding country.

The Panel is also not persuaded by the Appellant’s argument that in Auckland he simply gave away his information and advice for free. In the Panel’s opinion, the Appellant was clearly expecting to be rewarded for his valuable insider information. The careful manner in which he negotiated with the Reporter the details of his remuneration, his reimbursements and his daily pocket allowance proves beyond any doubt that he expected a financial return.

At the hearing, the Appellant declared that he was interested in the position at *Franklin Jones* not so much with regard to the activity related to the awarding of the FIFA World Cups but for the other aspects involved, such as marketing and communication. However, as acknowledged by the Appellant himself, those other aspects of the job were not specifically discussed during the Auckland Meeting. The Panel notes that the Reporter made it clear that the Appellant’s assistance was required until December 2010 but that their collaboration might be extended, depending on the success obtained with the World Cup bid project.

On the basis of the evidence before it, the Panel is of the view that the Appellant realized that he was offered some significant money in exchange for an improper and shady lobbying activity. In spite of this awareness, the Appellant set out the conditions under which he would assist *Franklin Jones*. The attitude of the Appellant throughout the whole Auckland

Meeting clearly establishes that his collaboration with the alleged lobbyists was linked to the personal profit he could make.

In short, the Panel is comfortably satisfied that a gift or other advantage was offered to the Appellant and that, accordingly, the first requirement of article 11 para. 1 FCE is met.

#### 1.2 Incitement to breach duty or behave dishonestly for the benefit of a third party

This second element of article 11 para. 1 FCE relates to the purpose for which the advantage is offered and focuses on the offeror's intent, not the offeree's. The offeror must aim at inciting football officials to breach their duties or to engage in dishonest conduct which would – if it eventually occurs – benefit a third party. It results from the wording of the provision that the offeror is not necessarily the beneficiary of the offence and that there is no need for an actual breach of duty or dishonest conduct to occur, as it is enough for the offeror to “*incite*” (i.e. to encourage, instigate or provoke) such behaviour.

In view of the foregoing, it appears that the advantage offered or promised need not have effectively influenced the conduct of the official. As a matter of fact, article 11 para. 1 FCE links the official's obligation to refuse the offer to the purpose for which the offer is made, that is to incite breach of duty or dishonest conduct. Article 11 para. 1 FCE does not require that the official actually breach duty or behave dishonestly. Obviously, the official must realize that the offer of an advantage is linked to some breach of duty or dishonest conduct that the offeror requires from him; otherwise, the official's obligation to refuse would not be prompted.

In the Panel's opinion, the evidence clearly shows that the offer made by the Reporter was to incite the Appellant to breach his duty or to act dishonestly for the benefit of a third party. The supposed lobbyist expressly mentioned the link between the advantage offered and the way the Appellant was required to act. In particular and in the beginning of the Auckland Meeting, the Reporter pointed out that the Appellant's role was to use his connections to open doors, to approach members of the FIFA Executive Committee in order to influence their vote and/or to advise *Franklin Jones* on the best possible ways to assist the American bid. In response, the Appellant confirmed that his personal status due to the various former and present positions within FIFA and OFC “*doesn't deny [him] the many privileges of contacts at FIFA*” and so “[*he has*] a great deal of friends out there” and that he was “*happy to give [the Reporter/consortium] as much*

*advice and inside information to what's going on*”.

The Panel finds that the Appellant understood the Reporter's intention and purpose very well, because of the following circumstances:

- At an early stage of the conversation, the Appellant offered to “*sit down, go through the list of the 24 members*”, obviously in order to identify who could and who could not be influenced and on whom *Franklin Jones* should concentrate its efforts. The Appellant even offered to gather as much information as possible during the FIFA and OFC meetings to be held in October 2010, then to report to *Franklin Jones*, before they “*go one by one with the whole 24 members*” and work out exactly how to proceed from there. The Appellant also concluded: “*As I said, I should know everything by then. And then we can use it as a benchmark to other offers, but I don't think it's gonna be ten million. It would be a bit outrageous for anyone to offer ten million to us*”.
- More than once the Appellant gave his guidance or assent on how to influence members of the FIFA Executive Committee. He suggested or approved the ideas to offer assistance in training and development for the national teams of the concerned members of the FIFA Executive Committee, to buy the votes with plain money or with real estate in the United Kingdom owned by an off-shore company. He even said that to offer real estate owned by an off-shore company was a better solution than money as it does not leave any trace. The Appellant also suggested *Franklin Jones* to organize meetings in Zurich to meet as many people as possible.
- The Appellant was also aware of the unethical nature of what he was doing and ready to do, as he underlined that he was “*supposed to be silent on all of this*”, and despite the fact that “*this is all strictly confidential*”, he was letting the Reporter “*in a lot of information*”. He did not ignore the conflict of interests between his assistance to *Franklin Jones* and his position within the OFC, as he could not be seen “*to not support Australia*” or to be seen as being actively involved for another bid.
- When the Reporter asked him “*if FIFA were to find out that we were offering members incentives, would they do anything about it?*”, the Appellant answered that “*Oh yes, yes, it's going to be a big problem*”, that “*It has to be strictly confidential*” and he suggested that many FIFA officials abide by the alleged eleventh commandment of the CIA “*just don't get caught, don't get caught*”.

- The Appellant appears to be perfectly proficient in English. His international career, his conversations with the Reporter and his testimony at the hearing prove beyond any doubt that he understands and expresses himself in English very well.

In view of the above circumstances, the Panel is comfortably satisfied that the Appellant well understood that he was being incited by some American companies to behave dishonestly – i.e. to actively cooperate in corrupting the voting process related to the awarding of the FIFA World Cups – in order to enhance the chances of the United States bid and benefit the American companies. Accordingly, the Panel holds that the second requirement of article 11 para. 1 FCE is thoroughly satisfied in accordance with the required standard of proof.

### 1.3 Obligation to refuse the improper offer

The third element of article 11 para. 1 FCE is the obligation for an official who receives an improper offer to positively refuse such offer upon its making rather than to merely omit to act upon it. In other words, an official cannot escape liability by remaining inactive or silent in response to an attempt to corrupt him. In that regard, the Panel remarks that if no obligation were provided to actively refuse an improper offer, bribery could only be found once the bribe was actually accepted and collected, which would often be impossible to prove for a private association with no investigative powers, compared to those of a judicial authority.

The Panel is of the view that there cannot be any ambiguity or uncertainty in fighting corruption in sports (cf. CAS 2009/A/1920, para. 85). By the same token, there cannot be any ambiguity or uncertainty on the part of officials in refusing any improper offer. In particular, officials as highly ranked as the Appellant must always, in all manner of circumstances, display a behaviour that is completely honest and beyond any suspicion. In the absence of such flawless, impeccable and transparent behaviour by top football officials, the public at large and football stakeholders will seriously doubt the rectitude and integrity of football organizations as a whole. This public distrust may eventually extend to the authenticity of sporting results and can destroy the essence of the sport. In this respect, the Panel wishes to refer to a previous CAS award, whose words, *mutatis mutandis*, could serve as guidance in this case:

*“The Panel notes, quite obviously, that honesty and uprightness are fundamental moral qualities that are required in every field of life and of business, and football is no exception. More specifically, however, the Panel is of the opinion that the notion*

*of integrity as applied to football requires something more than mere honesty and uprightness, both from a sporting and from a business point of view. The Panel considers that integrity, in football, is crucially related to the authenticity of results, and has a critical core which is that, in the public’s perception, both single matches and entire championships must be a true test of the best possible athletic, technical, coaching and management skills of the opposing sides”* (CAS 98/200, para. 56).

Indeed, in the Panel’s opinion, the football officials’ obligation to actively and unambiguously – one could even say loudly – refuse any bribe or other forms of corruption is importantly related to the fact that the public must perceive football organizations as being upright and trustworthy, otherwise both the sporting and business appeal of football would quickly decline. It is not merely of some importance but is of crucial importance that top football officials should not only be honest, but should always be seen to be honest. The required standard of behaviour for top football officials is very high; therefore, their conduct both on and off the field, must be impeccable. They must not allow themselves to be dissuaded by an improper interference.

Therefore, the question is whether the Appellant’s conduct was such that it was unambiguously a rejection of the offered bribe and that the offeror (as well as any bystander) would imply and conclude that the attempted corruption failed.

In the Panel’s view, the answer to that question is clearly negative. For the reasons referred to above, the Appellant agreed to work for *Franklin Jones* and was ready to start “*at any time*”. He is the one who suggested to meet again in the second half of October 2010 to discuss more thoroughly “*the list of 24 members*”, in order to “*quickly go through everything before the Ex-Co meeting of the 22<sup>nd</sup>*”.

The Appellant contends that, after the Auckland Meeting, there were some further phone conversations between him and the Reporter, implying that in those conversations he might have refused the *Franklin Jones*’ offer. The Appellant argues that he has been prevented from proving his case because FIFA did not try to obtain those recordings from the *Sunday Times*. In this respect, the Panel is of the view that the recordings of those alleged further conversations would not have helped the Appellant’s case. Indeed, even if he had in fact rejected the offer at that stage, it would have been too late. An obviously dishonest, shady and illegal offer such as that put forward by *Franklin Jones* should have been refused by the Appellant on the spot. As already noted, top football officials are held in high regard and must display a very high standard of behaviour, to prevent the obvious suspicion that they



are being lured into a dishonest conduct. In short, the Panel is of the view that the supposedly missing evidence, whatever its content, would not affect the outcome of this case.

In conclusion, in view of the evidence before it, the Panel is fully satisfied, bearing in mind the seriousness of the charge, that the Appellant actively, explicitly and specifically “*accepted*” the improper offer, rather than refused it by his conduct, as he claims. Accordingly, the Panel holds that the third requirement of article 11 para. 1 FCE is also met.

## 2. Article 14 para. 1 (Duty of disclosure and reporting)

In his appeal brief, the Appellant did not submit any argument in relation to his alleged breach of duty of disclosure and reporting. At the hearing before the CAS Panel, he simply explained that he had nothing to report to FIFA as he felt like he had done nothing wrong.

Article 14 para. 1 FCE reads as follows:

### *“14. Duty of disclosure and reporting*

1. *Officials shall report any evidence of violations of conduct to the FIFA Secretary General, who shall report it to the competent body”.*

This provision lays down an obligation to disclose, in the sense that the officials must fully and immediately report to FIFA “*any evidence of violations of conduct*”, which obviously include any inappropriate approach made.

There is no doubt that the Appellant was well aware of the fact that the objectives pursued by *Franklin Jones* constituted a “*violation of conduct*”. He even informed the Reporter that, should FIFA know about the lobbyists’ scheme and intention, “*it’s going to be a big problem*”. He insisted on the fact that their collaboration had to remain “*strictly confidential*”. In that context, he even made reference to the alleged eleventh commandment of the CIA “*just don’t get caught, don’t get caught*”.

In other words, the Appellant deliberately wanted concealed from FIFA deeds which he knew to be in breach of the FIFA rules of conduct. The evidence shows that he never had the intention to report to FIFA or to the OFC the fact that a company operating under the name *Franklin Jones* approached him and asked him to assist it in its scheme to bribe some members of the FIFA Executive Committee.

Finally, at the hearing before the CAS, the Appellant declared that, after the Auckland Meeting and because he had doubts about *Franklin Jones’* true identity, he allegedly contacted the Reporter to let him know that he would not work with him as long as he did not get more information regarding the said company. However and in spite of his suspicions, the Appellant did not feel compelled to immediately and spontaneously report to FIFA the Reporter’s approach.

In conclusion, the Panel is comfortably satisfied, in accordance with its personal conviction and keeping in mind the seriousness of the allegation, that the Appellant did violate article 14 para. 1 FCE.

## 3. Article 3 (General Rules) and Article 9 para. 1 FCE (Loyalty and Confidentiality)

The Appellant is of the opinion that during the Auckland Meeting he was not acting “*in the performance of his duties*” as he genuinely believed that he was being interviewed for a job. Besides, the Appellant asserts that the type of advice he gave to the Reporter was general and could have been given by anybody and was definitely not linked to his position as a FIFA official. Therefore, the requirements of articles 3 and 9 FCE are not met. He further insists that in the absence of any ethical guidelines from FIFA, officials cannot be expected to guess when the boundaries of what is acceptable are overstepped.

Article 3 FCE reads as follows:

1. *Officials are expected to be aware of the importance of their function and concomitant obligations and responsibilities. Their conduct shall reflect the fact that they support and further the principles and objectives of FIFA, the confederations, associations, leagues and clubs in every way and refrain from anything that could be harmful to these aims and objectives. They shall respect the significance of their allegiance to FIFA, the confederations, associations, leagues and clubs and represent them honestly, worthily, respectably and with integrity.*
2. *Officials shall show commitment to an ethical attitude while performing their duties. They shall pledge to behave in a dignified manner. They shall behave and act with complete credibility and integrity.*
3. *Officials may not abuse their position as part of their function in any way, especially to take advantage of their function for private aims or gains”.*

This provision of the FCE provides for the manner in which an official can behave. The standards are high as the officials are required to “*refrain from anything*

that could be harmful to these [FIFA's] objectives" (article 3 para. 1 FCE), "behave with complete credibility and integrity" (article 3 para. 2 FCE) and "not abuse their position as part of their function in any way, especially to take advantage of their function for private aims or gains" (article 3 para. 3 FCE).

Article 9 para. 1 FCE states as follows: "While performing their duties, officials shall recognise their fiduciary duty, especially to FIFA, the confederations, associations, leagues and clubs". This provision imposes on officials the duty to comply with obligations of loyalty and good faith, which include the obligation to put FIFA's interest first and abstain from doing anything which could be contrary to FIFA's interests.

The Panel is not persuaded by the Appellant's argument that he was not "performing his duties" when he took part in the Auckland Meeting and that, therefore, articles 9 para. 1 and 3 para. 2 FCE should not be applied. It is the Panel's view that an official is "performing his duties" whenever he/she is involved in something (a conversation, an activity, etc.) that is related to or connected with his position(s) in football. The Panel finds that the Appellant was given an offer exactly because he still held important positions in football, both at national and international level; indeed, at the commencement of the Auckland Meeting the Appellant told the Reporter of his positions within the Tonga FA and the FIFA Olympic Tournaments Committee as well as his former position as a member of the FIFA Executive Committee. The Appellant thus took part in the meeting being aware that he was sought after for his high-ranking positions within football; accordingly, the Panel is of the view that the Appellant was (disloyally) "performing his duties" during the Auckland Meeting and that, whilst performing these duties, he always had to bear in mind, as a high ranking official, his "fiduciary duty" to FIFA, the OFC and the Tonga FA. The intent of articles 9 para. 1 and 3 para. 2 of the FCE should not be interpreted the way the appellant submits, that a violation may occur only during official meetings, because if that were to be so, then the rule would specifically state that officials perform their duties only during official meetings. But that is not the case here.

This said, the Panel is convinced that, through his actions (as described above in relation with article 11 FCE), the Appellant damaged FIFA's image and credibility. The Appellant's conduct was obviously harmful to FIFA's objective of preventing all methods or practices which might jeopardise the integrity of matches or competitions or give rise to abuse of Association Football (article 2 b and e of its Statutes). By giving insider information to *Franklin Jones* on the Executive Committee members likely to be bribed,

the Appellant took an active part in attempting to compromise the bidding process to host the World Cup. As said, the Appellant was approached by the journalists because of his former and present positions within FIFA and OFC and because of his connections which could "open doors" for *Franklin Jones* and give access to "inside information", which the Appellant was "happy to give", in particular after he had attended an OFC meeting. He was eager to accept a job which was in clear contradiction with the interests of FIFA and of his own confederation, the OFC, which had a member federation (Australia) having submitted a bid for the right to host the World Cup. The Appellant was aware of this conflict of interests. Besides, he was willing to use his position as a member of the OFC Executive Committee to "question Australia's stand in [an] Ex-Co meeting" and to help evaluate the chances of bribing the OFC President, Mr Reynald Temarii.

Therefore and contrary to his contentions, it appears that the Appellant did abuse his position and did not behave with integrity when he made himself available to assist *Franklin Jones* in its project.

Finally, in this regard, the Panel finds unconvincing the Appellant's contentions that, in the absence of clear ethical guidelines from FIFA, he was not in a position to appreciate whether his actions were in compliance with the standards of conduct and duty of loyalty expected from officials. On the one hand, in case of any doubt, he could have contacted FIFA and sought assistance to assess whether there was a contradiction between his official duties and the job offered by *Franklin Jones*. For the reasons already raised in relation to article 11 para. 1 FCE, the Appellant was very much aware of the said contradictions.

On the other hand, the Appellant was approached by a company willing to pay him a considerable amount of money for his active assistance to buy votes in favour of the American bid for the 2018 and 2022 FIFA World Cups. The alleged representative of the said company seemed all the more determined to implement his project laced with bribes, as he travelled across the world to meet the Appellant and was considering paying members of the FIFA Executive Committee several millions in cash and/or in properties. Under such circumstances, the Appellant cannot reasonably contend that he failed to see that such an approach would not be acceptable to FIFA or not be compliant with articles 3 and 9 FCE.

In view of the above, the Panel is comfortably satisfied, in accordance with its personal conviction and keeping in mind the seriousness of the allegation, that the Appellant breached article 3 para. 1, article 3 para. 2, article 3 para. 3 and article 9 para. 1 FCE.

### C. Sanction

Article 17 FCE together with article 59 of the FIFA Statutes and articles 10 ff FDC indicate which types of sanctions are applicable.

As held above, the Panel found the Appellant guilty of breaching article 3 FCE (general rules), article 9 para. 1 FCE (loyalty and confidentiality), article 11 para. 1 FCE (bribery) and 14 para. 1 (duty of disclosure and reporting) FCE.

Match-fixing, money-laundering, kickbacks, extortion, bribery and the like are a growing concern in many major sports. The conduct of economic and business affairs related to sporting events requires the observance of certain “*rules of the game*” for the related activities to proceed in an orderly fashion. The very essence of sport is that competition must be fair. This is also true for the organization of an event of the importance and magnitude of the FIFA World Cup, where dishonesty has no place. In the Panel’s view, it is therefore essential for sporting regulators not to tolerate any kinds of corruption and to impose sanctions sufficient to serve as an effective deterrent to people who might otherwise be tempted to consider adopting improper conducts for their personal gain. FIFA insiders are an obvious target for those who wish to influence the appointment of the host country for the FIFA World Cup.

When evaluating the degree of the Appellant’s guilt, the Panel must take into account the objective and subjective elements constituting the infringement, the seriousness of the facts as well as the damage that the Appellant’s deeds have caused, namely to those who are directly and indirectly involved with the FIFA World Cup selection process, to the image of the FIFA and to the sport of football in general.

In the present case, considering the extent and consequences of the Appellant’s misconduct and the positions he held at the time of the relevant facts, the various violations of the FCE must be regarded as serious.

To summarize, the Appellant was involved in a bribery scandal over FIFA World Cup votes, which has received extensive media coverage. The Appellant did not act only in a negligent way but deliberately violated several provisions of the FCE. In spite of the fact that the alleged lobbyist rapidly revealed his intention to corrupt members of the FIFA Executive Committee, the Appellant continued to converse with the lobbyist for more than two hours and to actually offer his services, even though he was expected not to act against the general interest of FIFA and the

specific interest of his own Confederation. For the reasons already stated and revealed, the fact that the Appellant did not receive anything is of no relevance. Significantly, the Appellant was willing to engage in this illicit activity and his conduct was obviously motivated by the pursuit of personal benefit and gain.

The Appellant’s behaviour is particularly reprehensible given his position as a member of the OFC Executive Committee and of the FIFA Olympic Tournaments Committee, and even as a public figure politically involved at national level. Whilst holding those positions and necessarily being familiar with the FCE, the Appellant could not have ignored the unethical and unlawful nature of the *Franklin Jones* lobbyists’ approach. In fact, in light of his responsibilities within FIFA and OFC, he had an ethical duty to act responsibly, to comply with ethical standards and to be a role model.

In view of the importance of the FIFA World Cup, of the level of this competition and of the sporting and financial interests at stake, the highest standards of behaviour must be demanded of all the people involved, in particular of members of Executive Committees at Confederation level. The whole bribery scandal and in particular the allegation related to the manipulation of the voting process regarding the FIFA World Cup selection, tarnished the reputation of the entire FIFA organization.

In setting the sanction, it is also necessary to take into account the range of the applicable sanctions, which include a warning, a reprimand, a fine that shall be no less than CHF 200 or 300 and no more than CHF 1,000,000, a ban from dressing rooms and/or the substitutes’ bench, a ban from entering a stadium and a ban from taking part in any football-related activity. These sanctions equally apply for each of the relevant violations (article 3, article 9 para. 1, article 11 para. 1 and article 14 para. 1) of the FCE.

As a source of inspiration, it is interesting to observe that article 62 FDC (which is not applicable under the *lex specialis* principle) punishes active as well as passive corruption with the three following cumulative sanctions: a) a fine of at least CHF 10,000, b) a ban on taking part in any football-related activity, and c) a ban on entering any stadium. In serious cases and in the case of repetition, the ban on taking part in any football-related activity may be pronounced for life (article 62 para. 3 FDC).

In the present case, the FIFA Appeal Committee confirmed the decision of the FIFA Ethics Committee but reduced the sanctions to a two-year ban from taking part in any football-related activity (instead of

a three-year ban) and a fine of CHF 7,500 (instead of CHF 10,000).

The Panel finds no mitigating factor in the Appellant's case. Indeed, the Appellant did not express any regrets for the bad publicity and damage caused to FIFA's image by the coverage of his meeting with the Reporter. Moreover, he has constantly denied any wrongdoing, let alone the violation of any provision of the FCE. At the hearing before the CAS Panel, the Appellant even claimed that he had been forced to sign the statement of apology dated 15 October 2010, thus turning down another chance to at least partially redeem himself.

The Appellant submits that, given his clean record and the fact that he was not the instigator of the bribery, the sanction imposed is by far too severe. The Panel accepts that, until the recent events under scrutiny in this appeal, the Appellant's reputation was untarnished.

In weighing the proportionality of the sanction, the Panel has also taken into account a precedent CAS case where a life ban was imposed upon a referee who failed to report repeated contacts with a criminal organization which offered him EUR 50,000 to influence a UEFA Europa League match in November 2009 (CAS 2010/A/2172).

Accordingly, the Panel finds that, pursuant to articles 22 and 10.c FDC in connection with art. 17 FCE, a ban from taking part in any football-related activity at national and international level (administrative, sports or any other) for a period of two years as from 20 October 2010 as well as a fine of CHF 7,500 is not a disproportionate sanction and might even be deemed to be a relatively mild sanction given the seriousness of the offence. Therefore, the Panel holds that the Appealed Decision must be upheld in its entirety, without any modification.

This conclusion makes it unnecessary for the Panel to consider the other requests submitted by the parties. Accordingly, all other motions or prayers for relief are rejected.

Football; compensation for training; conformity of a time limit to request the grounds of a decision with fundamental rights and principles; conformity of that time limit with the FIFA Statutes; principles of interpretation of the rules and statutes of an association; meaning of Article 15 of the FIFA Rules Governing the Procedures of the PSC and the DRC

Panel:

Mr. Mark Hovell (United Kingdom), President  
Mr. João Nogueira da Rocha (Portugal)  
Mr. Michele Bernasconi (Switzerland)

Relevant facts

Club Desportivo Nacional (“Nacional” or the “Appellant”) is a football club with its registered office in Funchal, Portugal. It is a member of the Portuguese Football Federation (PFF) and plays in the Portuguese First Division, Primeira Liga.

FC Sutjeska (“Sutjeska” or the “Respondent”) is a football club with its registered office in Nikšić, Montenegro. It is a member of the Football Association of Montenegro (FAM) and plays in the First League of Montenegro.

On 17 June 2010 the footballer V. (the “Player”) and the Respondent entered into an agreement to terminate the professional contract between them (the “Rescission Agreement”).

On 11 August 2010 the Player signed for the Appellant, entering into a professional contract with it. A reference was included on the Transfer Matching System (TMS) by the Respondent that it was claiming training compensation for the Player.

On 7 March 2011 the Respondent lodged a complaint with the Fédération Internationale de Football Association (FIFA) requesting the payment of EUR 340,000. On 10 August 2011 the FIFA Dispute

Resolution Chamber (the “FIFA DRC”) awarded the Respondent training compensation in relation to the Player in the sum of EUR 335,000 (the “*Appealed Decision*”).

On 17 August 2011 the *Appealed Decision* was notified to the parties. Annexed to the *Appealed Decision* was a notice from FIFA that advised the parties that they had 10 (ten) days to request the grounds of the *Appealed Decision*, else the same would become “*final and binding*”.

On 1 September 2011 the Appellant wrote to FIFA:

*“(..) we kindly request the findings of the decision, whose deadline we request you to be extended based on FIFA’s current jurisprudence (...). We inform you that we’ll make the payment of the costs immediately”.*

On 5 September 2011 FIFA wrote to the Appellant stating that the request was outside the given deadline.

On 6 September 2011 the Appellant lodged its Statement of Appeal with the Court of Arbitration for Sport (CAS) submitting the following request for relief:

- a) *“to reform the *Appealed Decision* recognizing that the hiring of the Player *Giljen Vladan*, by *Nacional*, should not be considered as a transfer during the contract period of the employment contract that linked him to the previous Club, here Respondent, because such expiry was imposed to the Player by the previous Club, here Respondent, due to failure by the Respondent of its obligations, including wages;*
- b) *there cannot be training compensation because on the date of his hiring by *Nacional* the Player already had the professional status; and*
- c) *was a free Player, was unemployed, whose unemployment was assigned to him by the Club *Sutjeska*, here Respondent”.*

On 8 October 2011 the Respondent filed its Answer with the CAS with the following request for relief:

- a) *“The CAS shall not deal with the appeal of the Appellant against the FIFA DRC Decision dated 10 August 2011 – case reference ROV.11-00670. However*

*the Appellant's appeal against the FIFA DRC decision dated 10 August 2011 – case reference ROV.11-00670 shall be dismissed and the FIFA DRC decision dated 10 August 2011 shall be confirmed.*

- b) *The Appellant shall bear all costs of the procedure before the CAS.*
- c) *The Appellant shall compensate the Respondent all expenses of this appeal arbitration procedure.*
- d) *The Appellant to pay the Respondents total expenses for legal representatives of the Respondent, also legal assistance and all the expenses of the Respondent related to this appeal arbitration procedure”.*

On 12 October 2011 FIFA wrote to the CAS and gave its view on the applicable time limits.

A hearing was held on 24 January 2012 at the CAS premises in Lausanne, Switzerland.

#### Extracts from the legal findings

##### A. In general

Article R49 of the Code directs the Panel to look within the statutes and regulations of the federation issuing the Appealed Decision for the time limit for bringing the appeal.

The Respondent submitted that as the Appellant had failed to request the grounds of the Appealed Decision within 10 (ten) days of receipt, the Appellant has not fulfilled the terms and conditions of the relevant Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (the “FIFA Procedural Rules”). Reference was made to Article 15 of the FIFA Procedural Rules:

- “1. *The Players Status Committee, the DRC, the Single Judge and the DRC Judge may decide not to communicate the grounds of a decision and instead communicate only the findings of the decision. At the same time, the parties shall be informed that they have 10 days from receipt of the findings of the decision to request, in writing, the grounds of the decision, and that failure to do so will result in the decision becoming final and binding.*
- 2. *If a party requests the grounds of a decision, the motivated decision will be communicated to the parties in full, written form. The time limit to lodge an appeal begins upon receipt of this motivated decision.*
- 3. *If the parties do not request the grounds of a decision, a short explanation of the decision should be recorded in the case files.*

- 4. *All decisions that lead to sporting sanctions may only be communicated with grounds”.*

The Panel noted that on 17 August 2011 FIFA notified the parties of the Appealed Decision by fax. The Appellant therefore had until 27 August 2011 to request the grounds for the Appealed Decision to comply with the FIFA Procedural Rules.

Further the Panel noted that the Appealed Decision contained the following addendum:

*“Note relating to the findings of the decision (article 15 and 18 of the Rules governing the procedures of the Players Status Committee and the Dispute Resolution Chamber):*

*A request for the ground of the decision must be sent, in writing, to the FIFA General Secretariat within 10 days of receipt of notification of the findings of a decision. Failure to do so within the stated deadline will result in the decision becoming final and binding.*

*No costs (cf. point 5.) shall be charged if a party decides not to ask for the grounds of the decision any advance of costs shall be reimbursed to the party concerned”.*

The Panel noted that by a fax to FIFA on 1 September 2011, the Appellant requested the grounds for the Appealed Decision and requested an extension of the 10-days deadline. On 5 September 2011, FIFA replied, stating the Appellant was too late and could not request the grounds.

The Panel noted that the Appellant referred to FIFA Statutes at Article 63.1, which provides:

*“Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, members or leagues shall be lodged with CAS within 21 days of notification of the decision in question”.*

The Appellant argued that the FIFA Statutes allowed it 21 days in which to bring its appeal to CAS. It did so on 5 September 2011, as such the appeal should be admissible.

##### B. Validity of Art. 15 FIFA Procedural Rules

The Panel notes the common view of previous CAS panels that the FIFA Procedural Rules do not infringe any fundamental rights and adopts that position too: As stated in the case CAS 2008/A/1705, it is true that “the time limit of ten days is short. However, little is required from an appellant within this time frame. He doesn't need to file a full brief that outlines his legal position. He is not even required to file specific motions or requests. The only thing he has to do in order to preserve his right of appeal is to solicit (in

writing) a reasoned decision. In addition, the provision applies to all appellants and, thus, guarantees equal treatment among all (indirect) members of FIFA. Additionally, the 10 days-deadline of Art. 15(1) of the DRC Procedural Rules does not shorten the deadline which is applicable for filing an appeal, once the grounds of the decision are served to the parties. Indeed, the relevant 21 days-deadline remains untouched by Art. 15(1) of the DRC Procedural Rules” (paragraph 8.2.8).

Furthermore, the provision serves a legitimate purpose, which is a more efficient administration of the dispute resolution system offered by FIFA to its (direct and indirect) members. Furthermore, such purpose has been well accepted within the international football community, as submitted by FIFA during the hearing.

The Panel further notes that the provision is indeed not an “*invention*” of FIFA and that a similar restriction can be found also in relation to access to state courts: In fact, as indicated above, it is accepted under Swiss law that a party may be deemed to have waived its right to challenge a decision by appeal or objection if that party does not request the grounds of the decision within a certain deadline (cf. Art. 239(2) of the Swiss Code of Civil Procedure).

For all the above reasons the Panel is satisfied that Article 15 of the FIFA Procedural Rules is compatible with the fundamental legal principles belonging to the *ordre public* and does not infringe any fundamental rights nor any Swiss mandatory provision.

In principle, Swiss associations have the right to freely establish the rules governing their internal life. Swiss law has a well established tradition of respect of the freedom of the associations and their right to set up the legal framework for the association and its members. The number of mandatory provisions to be respected is indeed very low.

The statutes of an association are, similar to the articles of incorporation of other legal entities, the fundamental set of rules of an association (cf. RIEMER H.M., Berner Kommentar, Die Vereine – Systematischer Teil vor Art. 60-79 ZGB, N 320). But statutes are often not the only source of valid and binding legal rules of an association: rules of a higher federation, decisions of the association, regulations, agreements with a member or with a third party and even simply stable consistent practice within the association can contain part of the legal binding set of rules.

In Swiss jurisprudence it is disputed whether a stable, consistent practice can deviate from the rules originally set out in the statutes (cf. RIEMER, *op. cit.*, N

354). It seems questionable that the above mentioned principle of hierarchy of norms must always be applied in a strict way. In any event, whether or not a specific regulation of an association that deviates from the original content of the statutes is *per se* invalid is a legal issue that can be left open in the present case, because Article 15 of the FIFA Procedural Rules does not contradict nor change the FIFA Statutes. The Panel shares the view of the Sole Arbitrator in the case CAS 2011/A/2439 according to which “*the 10-days time limit to request the grounds of a decision shall be deemed complementary to the deadline of 21 days foreseen in article 63 of the FIFA Statutes*” (paragraph 51).

In fact, the existence of Article 15 of the FIFA Procedural Rules triggers *de facto* an extension of the 21-days deadline foreseen in the FIFA Statutes. A party, after having requested the grounds of the decision, will have several weeks to consider whether or not to appeal, first on the basis of the simple ruling received from FIFA. Upon receipt of the reasoned decision, the 21-days deadline will start: “*It is not only that the term of 21 days to lodge an appeal remains the same, but also that in practice, it becomes enlarged as regards of the time that FIFA takes in issuing the full motivated decision*” (case CAS 2011/A/2439, paragraph 53).

Finally, the Panel wishes to add that whether or not CAS, pursuant to Article R57 of the Code can hear any appeal *de novo*, does not prohibit to an association to set up rules which govern its dispute resolution system and the compliance of which, for instance, limits the possibility for a party to appeal against a decision (cf. CAS 2004/A/674, paragraph 47).

To sum up, for all the reasons above, the Panel concludes as a first interim result, that Art. 15 of the FIFA Procedural Rules is neither incompatible with Swiss mandatory rules nor with fundamental legal principles nor is in contradiction with the Statutes of FIFA.

### C. Meaning of Art. 15 FIFA Procedural Rules

The Panel first notes FIFA’s position regarding its refusal to grant to the Appellant an extension of the 10-days deadline, when asked to do so by the Appellant in its fax of 1 September 2011. Having missed that deadline, FIFA stated, the Appealed Decision became “*final and binding*”.

The issue is what does “*final and binding*” mean? Does it mean the decision is no longer capable of being appealed or not?

On one side, the Panel is aware that there are references within the FIFA Statutes dealing with the

process of appealing an “*internally final and binding*” decision to the CAS. The Panel notes in particular references within Article 63 of the FIFA Statutes itself. At Article 63.5 and again at article 63.6 there is scope for FIFA and WADA respectively “*to appeal to CAS any internally final and binding doping-related decision*”.

On the other side, the rules and the statutes of an association have to be interpreted either in accordance with the subjective will of the rulemaking persons (the so-called “*Willensprinzip*”, i.e. principle of the will) or with the objective meaning that the addressees of the rule would give to that rule, in good faith (the so-called “*Vertrauensprinzip*”, i.e. principle of confidence or of good faith). Swiss jurisprudence has applied from time to time one or the other principle (cf. RIEMER, *op. cit.*, N 329 *et seq.*). However, in the present case, the Panel is satisfied that the rule at stake, i.e. Article 15 FIFA Procedural Rule, can and shall be interpreted in the same way, independently on which principle is applied.

“*Subjective*” point of view: The Panel found it extremely helpful to hear from FIFA in this matter and to be provided with information on the context behind the FIFA Procedural Rules. The genesis of the rule, its drafting, the way its conception and introduction was communicated by FIFA to its members, all this clearly show that FIFA’s intention was to give to the users of the FIFA dispute resolution process the possibility to accept a decision on the basis of its ruling only, and by doing so to save time and money, or ask the grounds of the decision to be issued, postponing the party’s own decision about filing of an appeal against the FIFA’s decision at a later stage, after receipt of the grounds. The goal of FIFA was therefore evidently to facilitate a more efficient administration of the caseload within the FIFA dispute resolution bodies, by offering to the parties a “*two-steps*” system already in use in relation with the access to state courts and giving to parties a possibility of better considering whether or not a dispute should be continued at CAS level.

Further, by declaring that the parties had to ask for the reasons of the decisions with 10 days of the notification, failing which the decision would become “*final and binding*”, the intention of FIFA was also clear: first of all, it was using the words explicitly suggested by the CAS in the case CAS 2008/A/1708. Second, it was also using the same terms used by the Para. 158 of the Law governing the Organization of the Judiciary of the Canton of Zurich (see its translation in case CAS 2008/A/1705, paragraph 8.2.8). Third, FIFA clarified its will even more by indicating, in the second paragraph of Article 15 of the FIFA Procedural Rules, that the deadline “*to lodge an appeal*

*begins upon receipt of this motivated decision*”.

There can be therefore no doubt that the intention of the rule maker when introducing the system of Article 15 of the FIFA Procedural Rules – and even more when amending its wording to “*comply*” with the suggestion of the CAS Panel of the case CAS 2008/A/1708 – was to introduce a 10 days-deadline for a party to request the grounds of a decision, failing which the FIFA decision would become final and binding and no appeal against it would be possible any longer.

“*Objective*” point of view: The same conclusion is reached if instead of focusing on the meaning resulting from the will of the rule maker one does look at the way the addressees of Art. 15 of the FIFA Procedural Rules could have and should have interpreted in good faith the rule.

First, the information submitted by FIFA at the hearing in relation with the almost unanimous interpretation, understanding and acceptance of the rule given by hundreds of parties has remained undisputed. The Panel has not been provided with any other information and it has indeed no reason to believe that the numbers provided by FIFA were incorrect: it seems therefore clear that for the vast majority of the users of the FIFA dispute resolution system an appeal against a FIFA decision is only possible if (i) one does request the grounds of it within the deadline of 10 days and (ii) one does file an appeal with CAS within 21 days upon receipt of the reasoned decision.

Second, and differently from the situation existing in 2008 when the two-steps system of notification of decisions without grounds was introduced, the Panel is satisfied that FIFA (i) has removed such inconsistencies in the wording of the rules that were held against FIFA for instance in the case CAS 2008/A/1705, (ii) has amended the wording of the rules to follow the suggestions of CAS and of the case CAS 2008/A/1708 in particular and (iii) issued notices to the parties in a clear way so that in good faith no doubt can exist on what action a party is requested and entitled to do upon receipt of a FIFA decision without grounds.

Third, in the present case, the Appellant was made aware of the FIFA Procedural Rules in advance of the receipt of the Appealed Decision. A first time was when FIFA forwarded the Respondent’s original complaint to the Appellant via the Portuguese Football Federation on 14 April 2011, numerous references and directions were made to the FIFA Procedural Rules. The Panel also noted the express



reference in the notice annexed to the Appealed Decision, directing the parties to Article 15.1.

Fourth and finally, the Panel notes *ad abundantiam* that the Appellant clearly showed to be well aware of the FIFA Procedural Rules: in fact, Appellant requested the grounds before filing any appeal with CAS. However, it made a mistake and missed the 10-days deadline. It asked FIFA to extend the deadline, which FIFA, in line with its rules, refused to do.

The Panel is therefore satisfied that in general the addressees of the FIFA Procedural Rules do, in good faith, correctly understand Article 15 FIFA Procedural Rules in the meaning it was enacted, i.e. as a first deadline of 10 (ten) days to request the grounds, failing which no appeal against the FIFA decision would be possible, and with an untouched deadline of 21 days to file an appeal with CAS, such deadline starting upon receipt of the reasoned decision.

The Panel therefore determines that the Appellant was aware and accepted the FIFA Procedural Rules as part of the FIFA dispute resolution process. The Panel is satisfied that from a subjective and from an objective point of view the wording of Article 15 FIFA Procedural Rules shall be interpreted in the way that a party wishing to appeal against a FIFA decision must first request the grounds of the decision. If no grounds are requested within said deadline, FIFA as well as the other party affected by the FIFA decision, can consider that the other party has waived its right to appeal against the decision.

Accordingly, in the case at hand, Article 15 of the FIFA Procedural Rules can be held against the Appellant: it filed its request for grounds when the applicable deadline had already expired and, therefore, the appeal filed against the Appealed Decision of 17 August 2011 is inadmissible.

As a final comment, the Panel wishes to clarify that it can see circumstances in which a party that did not request the grounds of a FIFA decision within the 10-days deadline may nevertheless not be considered to have waived its right to appeal against the decision. This would be the case where a party upon receipt of a FIFA decision without grounds would file within the 10-days deadline directly an appeal against the decision, independently on whether such appeal would be filed with FIFA or with CAS directly. These two alternatives have to be considered separately, as follows:

In the event that – instead of a request for issuance of the grounds – an appeal against an unreasoned decision would be filed within ten days *with FIFA*,

the Panel submits that FIFA would have to inform the parties that such “*appeal*” would be treated as a request to issue a reasoned decision. The affected party will have 21 days to appeal (in other words: to “*confirm its will to appeal*”) at a later stage, i.e. upon receipt of the reasoned decision.

In the event that – instead of a request for issuance of the grounds – an “*appeal*” against an unreasoned decision would be filed within ten days *with CAS* directly, the Panel, taking into due consideration the statements made by FIFA at the occasion of the hearing, submits that CAS would have to inform the parties that (a) the “*appeal*” seems to be premature, (b) the “*appeal*” would be forwarded to FIFA which shall consider such “*appeal*” as a proper request to issue a reasoned decision and (c) upon receipt of the reasoned decision the appellant would then have a deadline of 21 days to decide whether he/it would file or not an appeal against the (reasoned) decision of FIFA.

Finally, even though the vast majority of the parties to FIFA dispute resolution cases seem to well understand the meaning of Article 15 of the FIFA Procedural Rules, FIFA may consider to follow the example of the Swiss federal rule maker and indicate in the said provision and/or at the end of its decisions that failing a request for grounds within the applicable deadline, the FIFA decision would become final and binding and the parties will be deemed to have waived their rights to file an appeal with CAS. Since such a provision does not contradict the FIFA Statutes, an amendment of those is not necessary but may be taken nevertheless into consideration by FIFA.

The Panel determines that the Appellant’s appeal is inadmissible and therefore cannot be entertained and is rejected.

Cyclisme; dopage (méthylhexaneamine); fardeau de la preuve pour l'athlète; degré de la faute ou négligence; annulation des résultats; amende

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**Formation:**

**Me Jean Gay (Suisse), Président**

**Me Olivier Carrard (Suisse)**

**Me Jean-Mathias Goerens (Luxembourg)**

**Faits pertinents**

L'Agence Mondiale Antidopage (AMA) est une fondation internationale indépendante, responsable de promouvoir, coordonner et superviser la lutte contre le dopage dans le sport.

M. Ramiro Marino ("*M. Marino*") est ressortissant de la République d'Argentine. Il est domicilié à Buenos Aires en Argentine. Coureur cycliste de BMX, il est titulaire d'une licence UCI lui ayant été accordée par l'Union ciclista de la Republica Argentina.

L'Union ciclista de la Republica Argentina (UCRA) est la fédération nationale de cyclisme en Argentine, membre de l'Union Cycliste Internationale (UCI) et de la fédération panaméricaine de cyclisme. En particulier, l'UCRA adopte des mesures de prévention et de répression à l'égard de la prise de substances altérant les prestations physiques des athlètes durant leur activité sportive. La Commission Antidopage de l'UCRA est l'organisme chargé d'enquêter sur les violations des normes antidopage conformément au Code Mondial Antidopage (le "Code AMA") de l'AMA.

Le 26 février 2011, M. Marino a participé à une compétition officielle de BMX à Paulinia, au Brésil, la *Copa Internacional de BMX*. Lors du déroulement de cette épreuve sportive, l'UCI a diligenté et conduit un

contrôle antidopage auquel M. Marino a été soumis en date du 26 février 2011. L'échantillon d'urine de M. Marino, portant le no 2582486, a été communiqué pour analyse au Laboratoire de contrôle du dopage INRS - Institut Armand-Frappier à Montréal, Canada.

L'examen de cet échantillon, intervenu le 5 avril 2011, a révélé la présence de Méthylhexaneamine, soit l'une des substances énoncées dans la liste des substances interdites établie par l'UCI. Par courrier du 23 mai 2011, l'UCI a transmis un rapport analytique du laboratoire confirmant la présence de Méthylhexaneamine dans l'échantillon B de l'athlète. L'UCI a dès lors requis l'ouverture d'une procédure disciplinaire par l'UCRA au regard des articles 249 à 348 du Règlement antidopage de l'UCI (le "*RAD*"). Elle a confirmé également par ce courrier que M. Marino avait décidé de s'auto-suspendre de manière volontaire depuis le 9 mai 2011.

En date du 21 juin 2011, M. Marino a écrit à l'UCRA pour lui donner ses explications quant à la présence de la substance interdite dans son sang. Il a allégué avoir eu de la fièvre 48 heures avant la compétition et avoir ingurgité un analgésique, qui était selon ses dires, soit du paracétamol, soit du diclofénac, que son entraîneur serait allé acheter à la pharmacie.

En date du 5 juillet 2011, la Commission Antidopage de l'UCRA a prononcé contre M. Marino un avertissement, assorti d'un blâme, en lui rappelant qu'en cas de nouveau résultat non négatif, il encourra la peine maximum. En outre, la Commission Antidopage de l'UCRA a décidé de renoncer à infliger une quelconque période de suspension à M. Marino. A l'appui de sa décision, la Commission Antidopage de l'UCRA a retenu que, même si la présence de substances interdites avait effectivement été trouvée dans les analyses de M. Marino, sans que celui-ci ne l'ait par ailleurs contestée, il fallait toutefois considérer qu'il s'agissait d'une quantité si minime que cela ne permettait pas de considérer que M. Marino avait eu l'intention d'améliorer son rendement sportif par l'absorption de telles substances. La Commission Antidopage de l'UCRA a également mentionné qu'il fallait tenir compte, à titre de circonstance atténuante, de la prise d'analgésiques pendant une période de temps très courte.

Par courriel du 2 août 2011, l'UCI a accusé réception de la décision de la Commission Antidopage de l'UCRA. L'UCI n'a pas recouru contre cette décision.

Le 3 octobre 2011, l'AMA a déposé auprès du TAS une déclaration d'appel contre la décision rendue le 5 juillet 2011 par l'UCRA à l'encontre de M. Marino. Dans sa déclaration, l'AMA a précisé fonder son appel sur les articles 272, 329 à 348 du RAD. L'AMA a en outre mentionné avoir été avertie par l'UCI que l'UCRA envisageait une reconsidération de sa décision prise le 5 juillet 2011. L'Appelante a dès lors conclu à l'opportunité de suspendre la procédure devant le TAS jusqu'à clarification de la situation par l'UCRA.

Par courrier du TAS du 5 octobre 2011, les parties ont été informées de l'ouverture d'une procédure devant cette juridiction. Un délai de 10 jours a été accordé aux Intimés pour désigner un arbitre, ainsi que pour faire part de leurs observations sur la demande de suspension de la procédure requise par l'AMA. L'attention des Intimés était attirée sur le fait que *“leur silence sera considéré comme un accord avec cette requête”*. Les Intimés n'ont pas déposé d'observations ni désigné d'arbitre dans le délai qui leur avait été imparti.

En date du 17 octobre 2011, le Conseil de l'Appelante a confirmé au TAS que la décision entreprise faisait actuellement l'objet d'un réexamen de la part de l'UCRA, ainsi qu'il le lui avait été annoncé par un courrier de l'UCI du 13 octobre 2011. L'Appelante a par conséquent requis une prolongation de la suspension de la procédure devant le TAS jusqu'au prononcé d'une nouvelle décision de l'UCRA. Par courrier du 8 novembre 2011, le TAS a confirmé aux parties que la procédure était suspendue jusqu'à nouvel avis.

Parallèlement à la procédure devant le TAS, l'UCRA a effectivement rendu une seconde décision dans l'affaire impliquant M. Marino en date du 5 décembre 2011, dans laquelle elle a conclu au maintien de sa décision du 5 juillet 2011. En substance, l'UCRA a justifié la confirmation de sa décision du 5 juillet 2011 en invoquant de nouveaux éléments à décharge qui auraient été présentés par M. Marino et son père en date du 21 novembre 2011. En effet, l'Intimé aurait expliqué avoir subi une transplantation de la rate le 12 mai 1999, comme cela résulte des pièces produites par l'Appelante, contenant un certificat médical non daté et une attestation du médecin de M. Marino datée du 21 novembre 2011. Il aurait également expliqué que la présence de substances interdites dans son sang serait due à la prise de médicaments antigrippaux et fébrifuges, qui avait pour seul but d'éviter au cycliste d'avoir des symptômes de fièvre qui pourraient

se révéler dangereux dans son état particulier de personne ayant subi une greffe. M. Marino aurait en effet invoqué avoir été pris de fièvre la veille de la *Copa Internacional de BMX*, raison pour laquelle son entraîneur lui aurait fait prendre des comprimés de diclofénac contenant du paracétamol, toutes les six heures pendant 24 heures. Selon les explications de l'athlète, la découverte des substances interdites dans son sang ne résulterait ainsi pas d'une intention d'améliorer ses performances sportives mais découlait de la situation particulière de personne greffée de M. Marino. Sur la base de ces explications, la Commission Antidopage de l'UCRA a dès lors estimé que la présence de la substance interdite était justifiée par la situation personnelle du coureur, en raison de sa greffe de la rate, et ne constituait pas une infraction au RAD. La Commission Antidopage de l'UCRA a par conséquent décidé de *“conserver, en tous ses points, la décision adoptée dans la résolution du 5 juillet 2011 (...)”*.

Le 23 décembre 2011, l'AMA a déposé auprès du TAS un *“document valant mémoire d'appel ou nouvelle déclaration d'appel et mémoire d'appel”*. L'Appelante a allégué que, à la suite de la décision de l'UCRA du 5 décembre 2011, il fallait se demander si cette seconde décision constituait une nouvelle décision ou une simple confirmation de la décision du 5 juillet 2011. Elle a indiqué s'en remettre au TAS quant à la qualification de la décision du 5 décembre 2011, mentionnant que, dans tous les cas, elle avait respecté le délai d'appel. Elle a en effet allégué, à l'appui de son argumentation, que l'art. 334 RAD octroyait à l'AMA un délai de vingt et un jours après la date finale à laquelle toute autre partie à l'affaire aurait pu faire appel pour déposer elle-même un appel. En l'espèce, que la décision du 5 juillet 2011 ou celle du 5 décembre 2011 soit considérée comme décision querellée, le délai d'appel avait en tous les cas été respecté par l'AMA, celle-ci ayant pris la précaution de recourir contre les deux décisions dans le délai imparti de vingt et un jours.

Une audience de jugement a eu lieu le 1er mai 2012 au TAS. M. Marino et l'UCRA n'ont pas pris part et n'étaient pas représentés à cette audience.

#### Extraits des considérants

### A. Recevabilité de l'appel

A titre liminaire, il convient d'examiner quelle décision de l'UCRA, du 5 juillet 2011 ou du 5 décembre 2011, devait faire l'objet d'un appel devant le TAS.

A cet égard, il sied de constater que la décision du 5 décembre 2011 ne fait que confirmer la sentence rendue dans la décision du 5 juillet 2011. On en veut

pour preuve la décision du 5 décembre 2011, dans laquelle la Commission Antidopage de l'UCRA a clairement mentionné *“conserver, en tous ses points, la décision adoptée dans la résolution du 5 juillet 2011 (...)”*.

En outre, même si la décision du 5 décembre 2011 évoque effectivement un nouveau motif invoqué par M. Marino, à savoir l'ablation de la rate subie en 1999 et la prise de médicaments fébrifuges et antigrippaux avant la *Copa Internacional de BMX*, force est de constater que cet argument ne constitue nullement un fait nouveau. En effet, l'Intimé avait déjà connaissance de cette opération lorsque la première décision datée du 5 juillet 2011 a été rendue, et il aurait dû déjà lors de la première procédure devant l'UCRA soulever ce point. En l'espèce, on constate que ce n'est qu'ultérieurement que M. Marino a donné cette explication, qui n'a de toute manière pas modifié la décision du 5 juillet 2011.

Au vu de ce qui précède, il est dès lors judicieux de considérer que la décision contre laquelle il fallait déposer un appel était la décision du 5 juillet 2011.

Pour le surplus, on soulignera que l'AMA a, ainsi qu'il le sera démontré ci-dessous, de toute évidence également respecté le délai d'appel contre la seconde décision du 5 décembre 2011, qui est identique à la décision du 5 juillet 2011, de sorte que la question de savoir contre quelle décision l'AMA a agi est purement académique.

En outre, la question d'un *“fait nouveau”* peut parfaitement être prise en considération dans le cadre d'un appel devant le TAS, celui-ci bénéficiant d'un pouvoir d'examen complet au fond et en fait dans l'instruction de la cause.

La Formation arbitrale a donc examiné si l'appel formé contre la décision du 5 juillet 2011 de l'UCRA était recevable.

En application de l'art. 330 RAD, *“dans les cas relevant des articles 329.1 à 329.7, les parties suivantes ont le droit de faire appel devant le TAS: (...) f) l'AMA”*. La qualité pour appeler de l'AMA est donc établie.

Le délai pour former appel est d'un mois suivant la réception de l'intégralité du dossier par l'UCI, si cette dernière a requis ce dossier à l'intérieur du délai de quinze jours dès réception de la décision intégrale (art. 334, 1<sup>ère</sup> phrase RAD). L'art. 334, 2<sup>ème</sup> phrase RAD dispose en outre qu' *“en tout état de cause, l'AMA dispose d'un délai d'appel de vingt et un jours après le dernier jour où toute autre partie en cause aurait pu faire appel”*.

En l'espèce, il ressort du dossier que l'UCRA a

confirmé l'envoi de la totalité du dossier à l'UCI par courriel du 10 août 2011. L'UCI avait donc jusqu'au 10 septembre 2011 pour faire appel de la décision rendue par l'UCRA le 5 juillet 2011.

L'UCI n'ayant pas fait appel de la décision de l'UCRA au 10 août 2011, l'AMA disposait donc d'un délai supplémentaire de 21 jours pour déposer elle-même un appel auprès du TAS. Le délai de 21 jours arrivant à échéance le samedi 1er octobre 2011, l'AMA a déposé sa déclaration d'appel le 3 octobre 2011, soit le premier jour utile à teneur de l'art. R32 du Code TAS. L'appel a donc été formé dans le délai prescrit.

Par ailleurs, la déclaration d'appel répond aux exigences de forme de l'art. R48 du Code TAS.

Par conséquent, l'appel est, pour cette première raison déjà, recevable.

A titre supplétif, la Formation arbitrale analysera toutefois également la situation dans le cas où la décision du 5 décembre 2011 devait être considérée comme une décision indépendante et propre.

En tout état de cause, et même dans cette situation, il convient de reconnaître que l'AMA a respecté le délai d'appel de 21 jours qui lui était accordé en vertu des art. 330 et 334 RAD susmentionnés. En effet, l'AMA a déposé sa *“déclaration d'appel et mémoire”* auprès du Greffe du TAS en date du 23 décembre 2011, soit moins de 21 jours après que l'UCRA a rendu sa seconde décision.

Dès lors, l'appel est en tout état recevable.

## **B. Examen des moyens de droit**

### **1. La sanction: suspension**

L'Intimé a expliqué la présence de Méthylhexaneamine dans son organisme par l'ingestion d'un médicament de type *“paracétamol / daine”* au Brésil, la veille de la compétition *Copa Internacional de BMX*. Celui-ci aurait été ingurgité pour soigner une forte fièvre qui pouvait être dangereuse pour M. Marino en raison de l'ablation de la rate qu'il avait subie en 1999. Il n'aurait donc commis aucune faute ou négligence. L'UCRA fait sienne cette argumentation.

En outre, l'UCRA allègue que, seule une quantité minimale de Méthylhexaneamine aurait été décelée et que celle-ci serait insuffisante pour avoir le moindre effet stimulant.

L'absence de faute ou négligence se définit comme suit: *“Démonstration par le coureur du fait qu'il ignorait ou ne*

*soupçonnait pas, et n'aurait raisonnablement pas pu savoir ni soupçonner, même en faisant preuve de la plus grande vigilance, qu'il avait utilisé ou s'était fait administrer une substance interdite ou une méthode interdite*" (annexe 1 RAD). En outre, l'avertissement de l'article 21.1 RAD est absolument limpide: *"Les coureurs doivent s'abstenir d'utiliser toute substance, denrée alimentaire, complément alimentaire ou boisson dont ils ignorent la composition"*.

Selon la jurisprudence constante du TAS, les exigences quant au fardeau de la preuve reposant sur l'athlète pour établir qu'il n'aurait commis aucune faute ou exigence sont extrêmement élevées (CAS 2005/A/847; CAS 2006/A/1025, n°11.4). Les sportifs doivent par conséquent démontrer qu'ils ont respecté un très haut degré de vigilance ou une prudence extrême.

Dans le cas d'espèce, l'Intimé n'a jamais démontré les mesures de précaution qu'il aurait prises avant d'ingérer les prétendus médicaments contaminés. En particulier, il ne semble avoir effectué aucune recherche sur le produit utilisé, alors qu'il était dans un pays étranger et qu'il allègue ne pas connaître le médicament. La Formation relève à ce sujet que M. Ramiro Marino n'a pas apporté la preuve que les substances retrouvées dans ses analyses étaient dues à la contamination d'un médicament antigrippal et fébrifuge.

En outre, selon le Dr Mario Zorzoli, médecin et conseiller scientifique de l'UCI entendu en qualité de témoin lors de l'audience du 1<sup>er</sup> mai 2012, il n'existe à l'heure actuelle aucun médicament comportant de la Méthylhexaneamine. Le Dr Zorzoli a par ailleurs confirmé que la prise des médicaments paracétamol et ibufenac, que l'athlète soutient avoir pris, ne peut permettre d'expliquer la présence de la substance interdite dans son sang. En effet, selon son expérience, il n'a jamais été démontré que la prise de paracétamol ou d'ibufenac pouvait contenir un échantillon de Méthylhexaneamine. La Méthylhexaneamine serait en revanche fréquemment retrouvée dans des suppléments nutritionnels.

S'agissant de l'intention, l'UCRA a retenu que M. Marino n'aurait pas cherché à améliorer artificiellement ses performances en ingérant cette substance, dès lors que la quantité ingérée était si minime que les effets supposés l'auraient été d'autant moins. Sur ce point, les Intimés n'ont toutefois produit aucune pièce permettant d'étayer leurs allégués. Au contraire, la Formation retient que la Méthylhexaneamine faisant partie de la famille des substances spécifiées proscrites par le Règlement de l'UCI, il n'y a dès lors pas lieu de remettre en question les effets de cette substance sur l'organisme d'un coureur, sa seule consommation

étant en soi constitutive d'une violation et emportant une présomption d'intention de dopage.

Il a en outre été confirmé par les experts qu'une concentration de Méthylhexaneamine supérieure à 3 µg/ml était déjà considérée comme très forte. En l'espèce, la quantité de Méthylhexaneamine retrouvée dans le sang de M. Marino fait près de sept fois ce chiffre: elle ne peut dès lors pas être considérée comme minime. La présence d'un taux de Méthylhexaneamine de 22 µg/ml justifie déjà, à elle seule, une sanction.

Au bénéfice des explications qui précèdent, le caractère significatif de la négligence dont a fait preuve M. Marino est incontestable, de sorte que les conditions énoncées par l'article 295 RAD ne sont manifestement pas remplies en l'espèce. En conclusion, la Formation estime qu'il n'y a pas matière à prononcer une diminution de la période de suspension, celle-ci étant ainsi maintenue à deux ans. Il convient ainsi de réformer en ce sens la décision de la Commission Antidopage de l'UCRA.

## 2. Annulation des résultats

Conformément à l'article 288 RAD, une violation des règles antidopage en liaison avec un contrôle en compétition entraîne automatiquement l'annulation du résultat individuel obtenu dans cette compétition. En outre, selon l'article 313 RAD, *"outre l'annulation automatique des résultats dans la compétition conformément à l'article 288 et sauf dispositions des articles 289 à 292, tous les autres résultats de compétitions obtenus à partir de la date de prélèvement d'un échantillon positif (tant en compétition que hors compétition) ou de la date où une autre violation des règles antidopage a été commise, jusqu'au commencement de toute période de suspension provisoire ou de suspension, sont annulés à moins que l'équité ne s'y oppose"*.

La Formation considère qu'il serait inéquitable de faire subir à M. Marino les conséquences de l'appréciation erronée qu'a faite la Commission Antidopage de l'UCRA dans sa décision du 5 juillet 2011, confirmée le 5 décembre 2011. En effet, cette dernière l'a libéré, à tort, de toute sanction, ce qui lui a permis de reprendre et continuer la compétition. Les résultats qu'il a alors pu obtenir à la suite de cette décision infondée ne doivent, dans ces circonstances, pas être annulés. Seuls doivent l'être les résultats obtenus lors de la compétition du 26 février 2011 durant laquelle s'est déroulé le contrôle antidopage, soit la *Copa Internacional de BMX* à Paulinia, au Brésil.

## 3. L'amende

La Formation examinera ci-dessous les conclusions

de l'AMA, qui demande le prononcé en faveur de l'UCI d'une sanction financière de CHF 3'000.- en application de l'art. 326 RAD, lequel prévoit clairement le principe d'une telle sanction financière.

Par ailleurs, selon l'art. 286 RAD, les dispositions de ce règlement seront interprétées et appliquées conformément aux droits de l'homme et aux principes généraux du droit, en particulier celui de la proportionnalité. Selon la jurisprudence, il faut considérer que la réglementation UCI accorde une certaine importance à la notion d'équité, notamment afin d'éviter de pénaliser l'athlète pour des circonstances qui ne lui seraient pas imputables (TAS 2007/A/1368).

Ainsi, la Formation arbitrale considère en l'espèce qu'il serait injuste de pénaliser l'athlète en raison d'une décision prise par l'UCRA, contre laquelle l'UCI n'a de toute manière pas recouru. La Formation arbitrale constate ainsi que l'UCI n'est pas partie à la présente procédure et qu'il n'y a dès lors pas de raison d'infliger une amende à M. Marino requise par l'AMA en faveur d'un tiers.

Pour le surplus, il convient de préciser que le BMX n'est de toute évidence pas un sport d'équipe et que M. Marino ne dispose pas d'un contrat avec une équipe de cyclisme. Il concourt à titre personnel et ne peut donc se voir infliger une amende au sens de l'art. 326 RAD.

Par conséquent, la Formation arbitrale décide de ne pas appliquer l'art. 326 RAD au cas d'espèce et de libérer M. Marino de toute amende.

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## Arbitration CAS 2011/A/2615

### Thibaut Fauconnet v. International Skating Union (ISU)

&

## Arbitration CAS 2011/A/2618

### International Skating Union (ISU) v. Thibaut Fauconnet

19 April 2012

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Short track speed skating; doping (tuaminoheptane); CAS power of review and right to be heard; conditions to benefit from a reduced sanction; CAS scope of review of the applicable sanction; degree of fault; starting date of the ineligibility period; disqualification of the results

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#### Panel:

**Mr. Romano Subiotto QC (United Kingdom), President**

**Mr. François-Charles Bernard (France)**

**Mr. Beat Hodler (Switzerland)**

#### Relevant facts

Thibaut Fauconnet (“*Fauconnet*”, the “*Athlete*” or the “*Skater*”) is an international level short track skater, who was 26 at the time of the in-competition doping control that gave rise to this case. He is a member of the Fédération Française des Sports de Glace (FFSG) and is registered as an “*elite*” athlete in the list of high level athletes of the French Ministry of Sports.

The International Skating Union (ISU) is the international governing body of speed skating, short track speed skating, figure skating, and synchronized skating based in Lausanne, Switzerland.

In December 2010, Fauconnet competed in the Short Track World Cup held by the ISU in Shanghai, China. On December 12, 2010, Fauconnet was subject to a doping control. He signed the doping control form in which he declared that he was not taking any medication or other pharmaceutical substances at the time of the control. Following the test, the ISU received an adverse analytical finding for sample 1930429. Said sample was found to contain Tuaminoheptane, a substance that is listed as a Specified Substance under the 2010 World Anti-Doping Agency (“*WADA*”) List of Prohibited Substances and Methods which

forms an integral part of the ISU Anti-Doping Rules (the “*ISU Rules*”) on the basis of Article 4.1 of these rules (the “*Prohibited List*”).

On March 23, 2011, Fauconnet explained, by letter, that he used Rhinofluimucil (the “*Product*”) in order to solve his breathing problems due to a cold that occurred first in Changchun and then in Shanghai during World Cups 3 and 4. Fauconnet recognized that he should have known that the Product contained Tuaminoheptane, a prohibited substance according to the Prohibited List. The athlete also admitted that he had made a mistake. He acknowledged that he made another mistake by not notifying the use of the product to the ISU in order to obtain a therapeutic use exemption. In the same letter, Fauconnet waived his right to have the B sample examined and mentioned that he had had 8 urine tests during the season starting in October 2010 and 3 blood tests during the season starting in January 2011. Finally, Fauconnet apologized for his carelessness.

On April 1, 2011, the ISU’s General Secretary requested, by letter, additional information concerning the circumstances in which Fauconnet acquired and used the Product.

On April 11, 2011, Fauconnet answered with a letter, explaining (i) that he took the Product only once in the morning, in Changchun, during the 3<sup>rd</sup> world cup, due to a cold; (ii) that he took the Product during the 4<sup>th</sup> world cup in Shanghai for the first 3 days with the same dosage; (iii) that he took the Product from his girlfriend’s shelf and put it into his first aid box; (iv) that he had made a mistake by failing to check whether it was prohibited; (v) that he thought that it was an insignificant product; and (vi) that no team doctor accompanied the French delegation during the two world cups.

After the doping test of December 12, 2010, Fauconnet competed in the 2011 ISU European Championships in Heeren, in the 2010/2011 ISU World Cup in Moscow and Dresden and in the 2011 ISU World Track Championships in Sheffield. There has been no suggestion or evidence to indicate that Fauconnet has

ever ingested performance-enhancing substances, or that his results were affected in any way by his anti-doping rule violation on December 12, 2010. On the contrary, Fauconnet was subject to multiple doping controls during these championships, which were all negative. Finally, at the time of these competitions, Fauconnet had no reason to believe that the ISU's investigation would lead to proceedings against him. The adverse analytical findings were notified to the athlete on March 17, 2011.

On October 10, 2011, the ISU Disciplinary Commission issued a decision (the "ISU Decision") in which Fauconnet was found to have committed an anti-doping offence contrary to Article 2.1 of the ISU Rules. Article 10.2 of the ISU Rules provides for a sanction of up to two years of ineligibility for such an offence. However, the Disciplinary Commission found that – taking into account the specific circumstances of the case – Fauconnet had explained how the substance had entered his body and had had no intention of enhancing his sporting performance. As a result, pursuant to Article 10.4 of the ISU Rules, the Disciplinary Commission sanctioned Fauconnet with a reduced suspension of eighteen months. The ISU Decision considered that, pursuant to Article 10.9.2 of the ISU Rules, the period of ineligibility would start as early as the date of sample collection, December 27, 2010 and would end on June 26, 2012.

On October 21, 2011, Fauconnet filed a Statement of Appeal against the ISU Decision (CAS 2011/A/2615) with the Court of Arbitration for Sport (CAS). Together with his Statement of Appeal, Fauconnet filed a request for a stay of the challenged decision. On November 23, 2011 Fauconnet sent a letter to the CAS insisting that exceptional circumstances justified the acceleration of the procedure. In that letter, Fauconnet insisted that he had already been excluded from the Korean Air ISU World Cup Short track held in Salt Lake City, USA from October 21-23, 2011 and from the Korean Air ISU World Cup Short Track held in Saguenay, in Canada, from October 28-30, 2011. In the letter, Fauconnet also insisted that, should he be excluded from the two world championships in Nagoya, Japan, December 2-4, 2011 and in China, December 9-11, 2011, his sports career would be definitively damaged. The President of the Appeals Arbitration Division granted the stay by Order of November 28, 2011.

On October 24, 2011, Fauconnet sent a letter with evidence of a medical prescription of the Product dated June, 17, 2008.

On October 31, 2011, the ISU filed its Statement of Appeal, which shall be considered as the Appeal

Brief, against the ISU Decision (CAS 2011/A/2618). The ISU's Appeal Brief contains the following Request for Relief:

*All competitive results obtained by Respondent from December 12, 2010, to date, including but not limited to:*

- *his results obtained at the 2011 ISU European Championships in Heerenveen (14. – 16.01.2011);*
- *his results obtained at the ISU World Cup 2010/2011 in Moscow (11. – 13.2.2011);*
- *his results obtained at the ISU World Cup 2010/2011 in Dresden (18. – 20.02.2011);*
- *his results obtained at the 2011 ISU World Short Track Championships in Sheffield (11. – 13.3.2011),*  
*are disqualified with all the resulting consequences including for feature of any medals, points and prizes.*

*All competitive results obtained by any Short Track Team in which the Respondent competed as a member of the team from December 12, 2010 to date, including but not limited to the 6<sup>th</sup> place reached by the French team at the ISU European Championships in Heerenveen (14. – 16.01.2011), in 5'000 meter relay, the second place reached by the French team at the ISU World Cup 2010/2011 in Moscow (11. – 13.2.2011) in 5'000 meter relay and the 8<sup>th</sup> places reached by the French team at the ISU World Championships in Sheffield (11. – 13.3.2011) are disqualified with all the resulting consequences including for feature of any medals, points and prizes.*

On November 30, 2011, Fauconnet filed his answer to the ISU's Appeal with his Appeal Brief pursuant to Rule 51 of the Code, which contains the following Request for Relief:

*It is hereby asked to the Court of Arbitration for Sport*

- *to reject the appeal lodged by the International Skate Union on October 31<sup>st</sup>, 2011, registered under the reference CAS 2011/A/2618*
- *to annul the challenged decision as having infringed the principles of fair hearing*

*In the alternative, and in the event that the CAS does not annul the challenged decision, it is hereby asked of the Court of Arbitration for Sport:*

- *to amend the decision of October 10<sup>th</sup>, 2011, rendered by the Disciplinary Commission of International Skate Union (case n°01/2011)*
- *to impose on Mister Thibaut Fauconnet the penalty of*



*reprimand without period of ineligibility, under Article 10.4 of the ISU Anti-doping rules.*

*In the alternative, and in the event that the CAS imposes on the athlete a period of ineligibility,*

- *to take under consideration the period of effective ineligibility running from October 10<sup>th</sup>, 2011, until November 28<sup>th</sup>, 2011, and remove it from the total period of ineligibility imposed by the final award;*
- *to maintain the challenged decision inasmuch as it provided for the disqualification of the athlete only on December 12<sup>th</sup>, 2010, without cancelling the results obtained both individually and as a member of the French team since December 2010, in accordance with Article 10.8 of the ISU Anti-doping rules.*

On December 22, 2011, the ISU filed its Answer, which contained the following Request for Relief:

*For all the above reasons, Appellant's appeal is to be dismissed, the 18 months' ineligibility period imposed on him by the attacked decision to be confirmed and supplemented according to point I.4 of Respondent's statement of appeal and appeal brief of October 31, 2011.*

#### Extracts from the legal findings

##### **A. Fulfilment of the Conditions to Benefit from a Reduced Sanction**

As indicated above, Tuaminoheptane is a component of Rhinofluimucil, which appears in category S6(b) (Specified Stimulants) on the Prohibited List of the WADA Code (implemented by Article 4.1 of the ISU Rules). Tuaminoheptane is thus a Specified Substance.

The commentary to Article 4.2.2 of the WADA Code, which provides a definition of Specified Substances, (and which is implemented by Article 4.2.2 of the ISU Rules) explains the reason for providing specific rules for Specified Substances:

*In drafting the Code there was considerable debate among stakeholders over the appropriate balance between inflexible sanctions which promote harmonization in the application of the rules and more flexible sanctions which better take into consideration the circumstances of each individual case. This balance continued to be discussed in various CAS decisions interpreting the Code. After three years experience with the Code, the strong consensus of stakeholders is that while the occurrence of an antidoping rule violation under Articles 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers) and 2.2 (Use of a Prohibited Substance or Prohibited Method) should still be based on the principle of strict liability, the Code sanctions should be made more flexible where the*

*Athlete or other Person can clearly demonstrate that he or she did not intend to enhance sport performance. The change to Article 4.2 and related changes to Article 10 provide this additional flexibility for violations involving many Prohibited Substances.*

Article 4.2.2 of the WADA Code thus sought to introduce some flexibility when determining a sanction for an athlete that has ingested a Specified Substance.

Article 10.4 of the ISU Rules provides for more flexible sanction, and the commentary to Article 10.4 further explains why Specified Substances are treated differently to other Prohibited Substances:

*[T]here is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation.*

Nevertheless, to benefit from the elimination or reduction of the period of ineligibility under article 10.4 of the ISU Rules, an athlete must establish:

- a) How a Specified Substance entered his or her body or came into his or her possession; and
- b) That such Specified Substance was not intended to enhance the athlete's sporting performance or mask the use of a performance-enhancing substance.

Regarding the first condition, the commentary to Article 10.4 of the ISU Rules provides that "*the Skater may establish how the Specified Substance entered the body by a balance of probability*". In other words, a panel should simply find the explanation of a Skater concerning the presence of a Specified Substance more probable than not.

With respect to the second condition, a panel must be "*comfortably satisfied by the objective circumstances of the case that the Skater in taking or possessing a Prohibited Substance did not intend to enhance his or her sport performance*". In case CAS 2010/A/2107, para. 9.14, the panel clarified that an athlete only needs to prove that he/she did not knowingly take the specified substance, rather than the product, with an intent to enhance his sporting performance.

It follows that the second condition is met when a skater can produce corroborating evidence in addition to his or her word, which establishes to the comfortable satisfaction of a panel that he or she ingested a specified substance unknowingly, e.g., by ingesting a contaminated product.

As already indicated, it is uncontested that Fauconnet meets the two foregoing conditions, *i.e.*, that he established how the Product entered his body and that he did not knowingly ingest the Specified Substance in question, *i.e.* Tuaminoheptane (contained in the Product), with the intent of enhancing his performance.

Consequently, the question that remains to be addressed is what sanction must be applied to the Athlete in the circumstances of this case.

## B. Applicable sanction

### 1. Scope of review

The ISU requests that the period of ineligibility of eighteen months decided in the first instance be confirmed.

Furthermore, the ISU claims that the applicable sanction set by the Disciplinary Commission falls within its discretion.

The Panel disagrees that such discretion can be invoked as a matter of law and principle, even if CAS panels may consider that the circumstances warrant it following a disciplinary body's judgment and if in certain cases CAS has considered that the sanction should only be reviewed if it is evidently and grossly disproportionate to the offence (see *e.g.* cases CAS 2009/A/1870, para. 48 and references therein; CAS 2009/A/1918, para. 59 and references therein).

Indeed, in determining, as an international appellate body, the correct and proportionate sanction, CAS panels must also seek to preserve some coherence between the decisions of the different federations in comparable cases in order to preserve the principle of equal treatment of athletes in different sports. In that connection the introduction to the WADA Code expressly states that two of its purposes are to promote equality for Athletes worldwide and to ensure harmonization of anti-doping programs. As the Panel in CAS 2010/A/2107 notes, a sanction must further comply with WADA's "*objective of proportionate and consistent sanctions for doping offences based on an athlete's level of fault under the totality of circumstances*".

Moreover, the Panel has full power to review the matter in dispute pursuant to Article R57 of the Arbitration Code.

The Panel will therefore examine with full powers what it deems the appropriate sanction.

As shall now be examined, in making that determination, the Panel must focus on the Skater's degree of fault.

### 2. The degree of fault

In keeping with Article 10.4 of the WADA Code, Article 10.4 of the ISU Rules provides that "*The Skater or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility*".

The commentary to Article 10.4 of the ISU Code indicates that "*[i]n assessing the Skater's or other Person's degree of fault, the circumstances considered must be specific and relevant to explain the Skater's or other Person's departure from the expected standard of behaviour*".

Fauconnet argues that the case shows significant overlap with six decisions from sports disciplinary commissions and the French Anti-doping Agency sanctioning athletes for using Tuaminoheptane through the use of Rhinofluimucil. Three of these decisions were first instance decisions and, as such, cannot be relied on. Regarding the two decisions of the French Anti-Doping Agency, the circumstances of these cases cannot be compared to the circumstances in the current case due to the substantial differences between the applicable anti-doping rules and the ISU Rules. As for the decision of the International Olympic Committee dated February 10, 2010, the circumstances of that case differed from the present case since it concerned an out-of-competition anti-doping test.

However, a large number of cases may usefully guide the Panel in determining the appropriate sanction. In general, the Panel distinguishes between three categories of cases.

The first category concerns cases in which circumstances are of such exceptional nature that a tribunal substantially lowered the period of ineligibility (often up to the date of the decision) (see *e.g.* CAS 2005/A/826). In line with CAS jurisprudence, a reduction of a sanction is possible in extremely rare and unusual circumstances (see *e.g.* CAS 2010/A/2307). Such circumstances do not apply in the present case. For instance, in CAS 2006/A/1025, the athlete tested positive for etilefrene, a prohibited substance, after drinking water he had poured into a glass he believed to be his own, but which had in fact been used by his wife moments earlier to take a colorless, odorless, and tasteless liquid medication to ease hypertension and menstrual pain. Unlike this athlete, the Skater was not a victim of "*an extraordinary and unpredictable sequence of events*". The Skater voluntarily took the Product.

The second category consists of cases where a tribunal finds that an athlete has exercised at least a certain degree of care or where other mitigating circumstances lead to a reduction in the sanction (see e.g. CAS 2005/A/847; CAS 2005/A/958; CAS 2008/A/1490). All concern cases whereby the panel took into consideration factors such as inexperience at the professional level, the lack of any formal drug education, the athlete's age and the fact that the athlete made inquiries about the product with the distributor.

The third category of cases concerns those in which a panel finds that a reduction to the period of ineligibility would not be appropriate. A number of these cases show similarities with the present case.

Case CAS 2003/A/484 concerned an athlete who had taken a contaminated vitamin supplement. The athlete had failed to make "*even the most rudimentary inquiry*" about the product and relied solely on the product labels and statements of friends. The panel found that the athlete's conduct amounted to "*a total disregard of his positive duty to ensure that no prohibited substance enters his body*" and applied no reduction to the sanction.

Case CAS 2008/A/1489 also concerned an athlete, who had taken a contaminated supplement. According to the panel, the athlete – who had only conducted limited internet research – had failed to take "*clear and obvious precautions*". The panel found that the circumstances were not truly exceptional, and applied no reduction to the sanction.

Cases CAS 2008/A/1588 and 1629 concerned an athlete who had ingested a contaminated supplement without making any enquiries about the nature of this product. The panel found that the athlete had "*committed gross negligence which does not justify that the period of suspension be reduced*".

Case CAS 2010/A/2229 concerned an athlete who had ingested a contaminated supplement and merely conducted a limited internet search and relied on a health shop employee's recommendation. The panel found that the athlete's degree of negligence was quite significant and, as a result, refused to reduce the sanction below the one-year suspension that was requested by WADA.

Fauconnet's "*unreasonable conduct*" – ingesting a nasal decongestant containing Tuaminoheptane, a Specified Substance, without making any enquiries – is comparable to the conduct of the athletes in the above-mentioned cases. In all of these cases, the panel decided not to reduce the period of ineligibility

initially imposed. The Panel believes that these cases provide useful analogies for the present case, particularly the last case since it concerned a Specified Substance.

The Panel finds that Fauconnet has failed to exercise at least some degree of reasonable care, and finds, on the contrary, that he was grossly negligent, notably for the following reasons combined:

- It is within the athletes' responsibilities to take care to avoid the use of any doping products. Athletes in general must be on their guard when considering the ingestion of any medication.
- As a very experienced international athlete required to be knowledgeable of doping issues and risks, Fauconnet had no excuse not to be very careful in that respect.
- Fauconnet however overlooked even the most basic prudent steps, which he could easily and should have taken in the circumstances, particularly in the case of a pharmaceutical product. He could have conducted research on the Internet, which would have warned him that the Product contained Tuaminoheptane, a substance that could induce positive results to an anti-doping test. Indeed, a simple internet search shows that Rhinofluimucil contains a substance that could register as positive to anti-doping controls and that athletes ought to be careful in using the Product.
- Fauconnet failed to follow another basic prudent step, which would have been to consult his doctor (or his team's medical staff), who could have warned him that the Product contained Tuaminoheptane. The circumstance that there was no team doctor present at the time Fauconnet used Rhinofluimucil did not prevent him from seeking advice from another physician present in Changchun or in Shanghai or from a doctor in France by any means of communication.
- Fauconnet first stated that he took the medication from his girlfriend's shelf. He then explained that the Product was prescribed by a doctor in 2008. Regardless of whether Fauconnet actually took the medication from his girlfriend's shelf or whether he obtained it through an old medical prescription, by packing it into his first aid kit without making any enquiry as to the nature of such product, Fauconnet demonstrated a lack of the most basic care that can be expected from a high level athlete.
- Fauconnet did not mention taking the medication

during the doping control.

- Fauconnet kept neither the box nor the leaflet of the Product. The leaflet of the Product specifically mentions that it contains Tuaminoheptane and warns athletes that it may lead to positive results in anti-doping controls.

Such carelessness is reinforced by Fauconnet's age, experience and drug education. Indeed, Fauconnet participated in ISU events since 2002 and was a member of the French Olympic team twice. Fauconnet is 26 years old and has already been submitted to various anti-doping controls. As such, it cannot be claimed that Fauconnet was not sufficiently aware of an athlete's duty to ensure that he did not ingest any prohibited substance.

In addition, the Panel does not accept Fauconnet's argument according to which the better the results before and after a doping test, the less the Athlete should be sanctioned. The Panel takes the view that good results reinforce the Athlete's responsibility to be extremely careful regarding doping offenses.

Moreover, the Panel finds that the good character evidence submitted by the Athlete, which the Panel accepts, cannot mitigate his culpability so as to reduce his sanction. The absence of past anti-doping offences and the athlete's cooperation is solely relevant for determining the applicable range of sanctions, not to reduce the sanction given for a first offence (see *e.g.* CAS 2005/A//847, at para. 30, CAS 2007/A/1364, at para. 19, CAS 2010/A/2307).

Finally, the Respondent's submission that the sanction is disproportionate since it has caused Fauconnet to miss the first two World Cups of season 2011-2012 must be rejected. As the commentary to Article 10.4 of the ISU Rules explains, "[t]he fact that a Skater would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Skater only has a short time left in his or her career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Article". These facts can therefore not be taken into consideration by the Panel when determining the sanction.

Having found that Fauconnet's degree of negligence is significant for the above reasons and in light of the above-mentioned cases, the Panel considers it was not disproportionate to reduce the period of ineligibility by one quarter of the maximum sanction of two years, as stipulated in Article 10.4 of the ISU Rules.

In conclusion, the Panel wishes to underline that it believes that Fauconnet did not intend to cheat or

enhance his sporting performance. It is therefore unfortunate that he made this mistake that is inconsistent with his otherwise clean anti-doping record. To be in keeping with the applicable rules and to meet the need of promoting equality of athletes worldwide, the Panel must nevertheless apply a sanction that is proportionate to the quite significant lack of diligence Fauconnet demonstrated in ingesting the Product. Thus, for the reasons indicated above, Fauconnet is declared ineligible to compete in all sporting competitions for a period of eighteen months.

### 3. Start Date of Ineligibility Period

The Panel is of the opinion that Article 10.9.1 and 10.9.2 of the ISU Rules are both applicable in the present matter. The Panel takes note of the fact that when confronted with the results, Fauconnet waived his right to have the B sample tested, thereby acknowledging the anti-doping rule violation. Fauconnet responded promptly to all the ISU letters so as to obtain an explanation relating to the offence.

Despite Fauconnet's cooperative attitude in advancing the process, it took almost ten months, from the date of the sample collection, for a decision to be rendered. Due to this duration of the adjudicating process, not attributable to the Athlete, the Panel deems it fair to apply the principle set forth in Article 10.9.1 of the ISU Rules and start the period of ineligibility at an earlier date than the day of notification of this award.

Based on article 10.9.1 and 10.9.2 of the ISU Rules which enables to "(...) start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection (...)", the Panel determines that Fauconnet's suspension will run from December 12, 2010. The Panel does not find any element in the file justifying starting the ineligibility period on December 27, 2010. On the contrary, the Panel finds that evidence provided by the Athlete specifically state that the date of Sample collection was December 12, 2010. The Panel therefore considers December 12, 2010 as the starting date of the ineligibility period and amends the ISU Decision in that respect.

### 4. Disqualification of the Results

In his answer, Fauconnet submits that it is abusive to request the disqualification of both the athlete and the French team results obtained from December 2010 until October 2011 because the delay in rendering a decision is attributable to the ISU Disciplinary Commission and the ISU are responsible for the delay. Fauconnet argues that, should the ISU Decision have been rendered earlier, the question of the results'

disqualification would not have been an issue.

The ISU submits that Article 11.4 and Article 10.8 clearly provide that the individual results and the team results obtained from December 12, 2010 must be disqualified.

The Panel considers that the considerations invoked by the Athlete do not apply in this case because he is in effect requesting that results obtained after the commencement of the ineligibility period be maintained.

According to CAS jurisprudence, “[t]hat would not only be in contradiction with the sanction of ineligibility itself, but would also be unfair compared to the treatment of the majority of athletes who are provisionally suspended from the outset due to non-contested positive anti-doping test and whose provisional sanction is never lifted, thereby never having the opportunity to enter any competitions and obtain results/prizes pending the final resolution of the anti-doping violations charges. For reasons of fairness, the Panel has decided above to start the Athlete’s ineligibility period at a much earlier date than what would in principle apply. The consequence of that cannot be that the results obtained after the beginning of such period would not be affected” (CAS 2011/A/2384-2386; CAS 2008/A/1744, para. 55; CAS 2008/A/1675, para. 47; CAS 2007/A/1362, para. 64).

Moreover, the Panel considered whether it should refrain from disqualifying Fauconnet’s results during the period of ineligibility prior to this award (This issue does not arise with respect to prospective ineligibility because it implies disqualification by virtue of the bar on the athlete’s participation in competitions during the prospective period of ineligibility). The Panel has concluded that ineligibility cannot be severed from disqualification in the absence of a clear provision in the applicable rules supporting such severance, which might plausibly have been justified in cases, such as the present one, in which the period of ineligibility begins before the date of the award and where the nature of the violation of the applicable rules is such that it can be presumed that the violation has not affected the results in other competitions in which the athlete has participated during the period of ineligibility prior to the award.

For the above reasons, the Panel decides that the results obtained by Fauconnet from December 12, 2010, which is the date when, according to the Panel’s decision, the ineligibility period is deemed to have started, including the ones obtained from November 28, 2011 (date of the CAS Order for stay) are disqualified. Pursuant to Article 11.4 of the ISU Rules, the results of Fauconnet’s Team, when Fauconnet competed as a member of the Team,

during the latter period shall be disqualified.

Cyclisme; dopage (hydroxyethylamidon–HES); mesures d'instructions complémentaires; fardeau de la preuve; élimination ou réduction de la période de suspension; degré de la preuve; élimination ou réduction de la période de suspension en vertu de circonstances particulières; degré de la faute en vertu de l'art. 295 RAD; examen de la faute ou négligence; responsabilité objective

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#### Formation:

M. Bernard Foucher (France), Président

Prof. Massimo Coccia (Italie)

Me José Juan Pintó (Espagne)

#### Faits pertinents

L'Union Cycliste Internationale (UCI) est une association de droit suisse, dont le siège est à Aigle, en Suisse. L'activité de l'UCI est réglementée par ses statuts ainsi que par différents règlements, dont le "Règlement UCI du sport cycliste" et le "Règlement antidopage de l'UCI" (le "RAD").

M. Oscar Sevilla Rivera ("l'Athlète") est né le 29 septembre 1976 et est de nationalité espagnole. Il est coureur cycliste de la catégorie élite. Il a été professionnel durant de nombreuses années et a fait partie d'équipes prestigieuses. Il est titulaire d'une licence délivrée par la Real Federación Española de Ciclismo, mais est actuellement domicilié en Colombie.

La Real Federación Española de Ciclismo (RFEC) est la fédération nationale espagnole du cyclisme. Elle a son siège à Madrid, en Espagne, et est affiliée à l'UCI.

L'Athlète a participé à la course cycliste "Vuelta Pilsen a Colombia", qui s'est déroulée du 1<sup>er</sup> au 15 août 2010 en Colombie. Il a terminé deuxième au classement général, à 1 minute 49 secondes du vainqueur. La "Vuelta Pilsen a Colombia" est inscrite au calendrier international de l'UCI et est de classe 2.2, ouverte

notamment aux équipes régionales et de clubs. Au moment de cette compétition, l'Athlète ainsi que tous les membres de son équipe étaient des coureurs cyclistes non professionnels et courraient au sein d'une équipe colombienne non-enregistrée auprès de l'UCI.

Le 12 août 2010, au cours d'une étape longue de 204 kilomètres et se terminant à Pereira, en Colombie, l'Athlète a été victime d'une chute suffisamment grave pour l'obliger à se soumettre à un contrôle médical. Néanmoins, il franchit la ligne d'arrivée de l'étape en 7<sup>ème</sup> position, à 3 secondes du vainqueur. Le 13 août 2010, l'Athlète termina deuxième d'une étape longue de 117 kilomètres, à 2 secondes du vainqueur. Le lendemain, il termina neuvième d'une étape de montagne de 206 kilomètres.

Le 15 août 2010, à l'occasion d'un contre-la-montre qu'il remporta, l'Athlète a fait l'objet d'un contrôle antidopage, au cours duquel des échantillons d'urine ont été prélevés. Sur le formulaire de contrôle du dopage, l'Athlète a signé une déclaration par laquelle il reconnaissait a) que la procédure de prélèvement avait été conduite de manière conforme, b) qu'elle n'appelait pas de commentaire et c) qu'il consentait à se soumettre audit contrôle. Sur ce même document, il a déclaré avoir pris comme seuls médicaments de la triamcinolone ainsi que de la lidocaïne.

Les échantillons de l'Athlète ont été acheminés au "Laboratorio de Control al Dopaje Coldeportes Nacional", à Bogota en Colombie, qui possède l'accréditation de l'Agence Mondiale Antidopage (AMA). Le laboratoire a procédé à l'analyse de l'échantillon A de l'Athlète, laquelle a révélé la présence de métabolites de Hydroxyethylamidon (HES). Selon le rapport du 7 septembre 2010 de ce laboratoire, le HES est un produit compris dans la liste des interdictions 2010 de l'AMA et est plus spécifiquement connu pour être un agent masquant.

Le 16 septembre 2010, l'UCI a notifié les résultats de l'analyse à l'Athlète. Considérant – à tort – que le HES n'est pas une "substance spécifiée" et se fondant sur l'article 235 RAD, l'UCI a informé l'Athlète qu'il était suspendu avec effet immédiat jusqu'à ce que sa culpabilité soit ou non reconnue par l'instance d'audition. Le 17 septembre 2010, l'Athlète a requis

qu'il soit procédé à une contre-analyse. Le 7 octobre 2010 et en présence de l'Athlète, l'échantillon B a été ouvert puis analysé par le "Laboratorio de Control al Dopaje Coldeportes Nacional" à Bogota, Colombie. La présence du HES a été confirmée dans un rapport daté du 11 octobre 2010.

Le 22 novembre 2010 et conformément à l'article 234 RAD, l'UCI a invité la RFEC à ouvrir une procédure disciplinaire à l'encontre de l'Athlète. Dans ce même courrier, l'UCI a précisé que, contrairement à ce qui avait été indiqué dans son courrier du 16 septembre 2010, le HES est une "substance spécifiée" aux termes de la liste des interdictions, et que, dès lors, l'Athlète n'avait pas à être suspendu provisoirement.

Par courrier du 25 novembre 2010, la RFEC a chargé son comité national de compétition et de discipline sportive (CNCDD) de mener la procédure disciplinaire à l'encontre de l'Athlète. Au cours de la procédure devant le CNCDD, l'Athlète a présenté deux lignes de défense radicalement opposées, la première contestant le bien-fondé des résultats positifs au HES et la seconde expliquant comment et à quelles fins le HES est entré dans son organisme.

En ce qui concerne la deuxième ligne de défense de l'Athlète et dans la prolongation du délai qui lui a été accordée, l'Athlète a adressé au CNCDD, le 11 août 2011, un nouveau mémoire, où il a évoqué, pour la première fois, sa chute du 12 août 2010 et les soins reçus. Il a notamment relevé ce qui suit:

*"En effet, le 12 août 2010, au sein du service des urgences médicales de l'hôpital Luis Carlos Galan Sarmiento, M. le Docteur J. a administré au concluant un traitement à base de substances liquides intraveineuses, et notamment le produit dénommé Hestar 10 %, dans la composition duquel entre la substance dénommée Hydroxyéthylamidon.*

*Ledit traitement a dû être administré suite à la chute subie par le cycliste le jour même, à savoir le 12 août 2010, date à laquelle, une fois l'étape de la course cycliste finalisée, il a dû être pris en charge par le service d'urgences médicales de l'hôpital précité. La gravité des lésions subies à l'occasion de ladite chute a eu pour conséquence que M. Oscar Sevilla ait été contraint de continuer de recevoir, une fois le Tour cycliste colombien finalisé, des soins médicaux au sein des services médicaux officiels de l'État colombien (Coldeportes)".*

Cette version des faits était appuyée a) par une déclaration devant notaire datée du 10 août 2011 du Dr J., b) par le descriptif du produit "Hestar" mis à disposition par son fabricant sur internet, c) par une attestation datée du 10 août 2011 de P., présenté comme étant le directeur administratif de l'équipe de l'Athlète et d) par un certificat de consultation

médicale daté du 17 août 2010 et dressé par le Dr M. Le 16 septembre 2011, le CNCDD a tenu audience et, par décision du même jour, a notamment considéré a) qu'il n'y avait pas de motifs à mettre en doute les résultats des analyses effectuées par le laboratoire accrédité de contrôle du dopage de Bogota, b) que la présence dans l'organisme de l'Athlète du HES, avait été établie à satisfaction, c) que le HES est une substance spécifiée qui fait partie de la liste des produits interdits de l'AMA, d) que l'Athlète s'est rendu coupable d'une violation d'une règle antidopage devant être sanctionnée par une période de suspension de 2 ans, conformément à l'article 293 RAD, e) qu'en vertu de l'article 295 RAD et en présence de substance spécifiée, cette période peut être éliminée ou réduite pour autant que l'Athlète ait pu établir de manière convaincante comment le HES est entré dans son organisme et que ce produit n'a pas été utilisé en vue d'améliorer ses performances sportives, f) qu'en l'espèce il a su apporter cette preuve et doit dès lors être mis au bénéfice de l'article 295 RAD, réduisant ainsi la période de suspension de 2 ans à 9 mois, g) qu'il "est impossible d'affirmer qu'aucune faute ou négligence n'a été commise par le cycliste dans le cadre de l'infraction susmentionnée, et ainsi d'éliminer la période de suspension pouvant lui être infligée" comme le prévoit l'article 296 RAD, mais h) que la faute ou la négligence de l'Athlète peut être considérée comme étant non significative, ce qui permet de réduire encore une fois la période de suspension, conformément à l'article 297 RAD et, donc, de la ramener de 9 mois à 6 mois.

Le 16 septembre 2011, le CNCDD a rendu la décision suivante:

*"DE SANCTIONNER M. Oscar SEVILLA RIVERA, titulaire de la licence Elite no 44394926, conformément aux dispositions de l'article 295, en relation avec les dispositions de l'article 297, du Règlement de l'UCI, par une SUSPENSION DE SIX MOIS DE LICENCE, à compte de la notification de la présente, pour violation des règles antidopage de l'article 21.2 du Règlement susmentionné, du fait de la présence dans son organisme d'HYDROXYETHYLAMIDON (HES) détectée lors du contrôle antidopage réalisé lors de la Vuelta Ciclista a Colombia 2010, dans la ville de Medellin (Colombie) le 15 août 2010 et d'annuler tous les résultats obtenus depuis la date de collecte du premier échantillon (15/09/2010) (sic).*

*Obligation lui est faite d'assumer le paiement d'une amende de 1 500 CHF, conformément: aux dispositions de l'article 326.1 b) du RAD, ainsi que des frais de procédure, conformément aux dispositions de l'article 275 du RAD, repartis comme suit:*

*- Frais relatifs aux démarches de la présente procédure établis de manière définitive par le CNCDD et la RFEC, fixés*

*prudentiellement à 900 euros (neuf cents euros)*

- 1 000 CHF, fixés par l'UCI pour la gestion des résultats réalisée par la Commission antidopage
  - Coûts d'analyse de l'échantillon B
- Conformément aux dispositions des articles 329.1 et 333 du Règlement antidopage de l'UCI, la présente résolution peut faire l'objet d'un recours devant la cour d'arbitrage du sport (TAS/CAS) dans un délai d'un mois à compter de sa notification".*

Par déclaration d'appel du 27 octobre 2011, l'UCI a saisi le Tribunal Arbitral du Sport (TAS). Dans son mémoire d'appel, daté du 14 novembre 2011, l'UCI a formulé les conclusions suivantes:

- 1) *de réformer la décision du Comité National de Compétition et Discipline de la RFEC;*
- 2) *de condamner M. Sevilla à une suspension de 4 ans, conformément aux articles 293 et 305 RAD;*
- 3) *de condamner M. Sevilla au paiement d'une amende de CHF 100'000.-;*
- 4) *de prononcer la disqualification de M. Sevilla de la Vuelta a Colombia 2010 (article 288 RAD) et d'annuler tous les résultats obtenus à partir du 15 août 2010 (article 313 RAD). Il résulte de l'article 313 RAD que tous les résultats obtenus par M. Sevilla à partir du 15 août 2010 doivent être annulés;*
- 5) *de condamner M. Sevilla à payer à l'UCI un montant de CHF 1'000.- à titre de frais de gestion des résultats (art. 275.2 RAD);*
- 6) *de condamner M. Sevilla et la RFEC, solidairement à rembourser à l'UCI l'émolument de CHF 500.- et à tous les autres frais, y compris une contribution aux frais de l'UCI".*

Au cours de l'audience qui s'est tenue devant le TAS en date du 21 mars 2012, l'UCI a précisé sa 3<sup>ème</sup> conclusion de manière à ce que l'amende soit fixée à CHF 9'000, conformément à la nouvelle teneur de l'article 326 RAD, qui est entré en vigueur le 1<sup>er</sup> octobre 2011 et qui doit être appliqué en vertu du principe de la *lex mitior*.

Par courrier du 16 décembre 2011, l'Athlète a déposé sa réponse, laquelle contient les conclusions suivantes:

*"Au vu de ce qui précède,*

*JE SOLLICITE AU TRIBUNAL ARBITRAL:*

- 1.- *De rejeter le recours en appel de l'UCI.*
- 2.- *De confirmer la décision de la RFEC.*
- 3.- *De condamner l'UCI à payer les frais de procédure.*
- 4.- *De condamner l'UCI à payer les frais du coureur dans*

*cette procédure, soit une somme de CHF 10'000".*

Par courrier du 19 décembre 2011, la RFEC a déposé sa réponse, laquelle contient les conclusions suivantes:

*"La Real Federación Española de Ciclismo prie le Tribunal que*

- a) *L'UCI soit intégralement déboutée de l'appel qu'elle a interjeté contre la décision du [CNCDD] de la RFEC du 16 septembre 2011.*
- b) *Que la décision du 16 septembre 2011, prononcée par le [CNCDD] de la RFEC soit confirmée, à tous les niveaux.*
- c) *Que la décision prononcée par le TAS condamne expressément l'UCI aux dépens.*
- d) *Que dans le cas improbable où le TAS estimerait que la sanction prononcée par le [CNCDD] de la RFEC contre le sportif ne serait pas proportionnée et que celui-ci a commis une quelconque violation du RAD, la RFEC n'ait pas à payer les frais de la procédure".*

En date du 21 mars 2012, une audience a été tenue à Lausanne, au siège du TAS. La Formation arbitrale a entendu le témoignage des personnes suivantes, après les avoir invitées à dire la vérité, ce qu'elles se sont expressément engagées à faire:

- Dr R., médecin adjoint au service de médecine intensive adulte du centre hospitalier universitaire vaudois (CHUV).
- Dr J. Ce dernier a été entendu par téléconférence avec l'accord de la Formation arbitrale, en application de l'article R44.2 du Code de l'arbitrage en matière de sport (le "Code"). Son identité ainsi que ses états de services auprès de l'hôpital Doce De Octubre Luis Carlos Galán Sarmiento, à Medellín ont été vérifiés et confirmés au moyen d'une mesure d'instruction complémentaire diligentée par la Formation arbitrale (voir ci-après).

#### Extraits des considérants

#### A. Mesures d'instruction complémentaires

Après en avoir préalablement informé les parties en cours d'audience et en application des articles R44.2 et R44.3 du Code, la Formation arbitrale a souhaité procéder à l'établissement de l'identité et du profil professionnel du Dr J., lequel n'a pas pu témoigner par vidéo conférence, faute de moyens techniques à disposition.



Ainsi, par courrier du 22 mars 2012, le Dr J. a été invité à adresser au Greffe du TAS:

- Une copie de son passeport, carte d'identité, ou tout autre moyen permettant d'établir son identité.
- Une copie de sa carte professionnelle, ou tout autre document permettant d'établir sa profession.
- Une attestation de l'hôpital qui l'emploie, sur papier à en-tête officiel de l'hôpital, qui certifie qu'il fait partie du personnel médical de cet hôpital et qui permette d'établir quelle est sa fonction au sein de l'institution.

Il a également été demandé au Dr J. d'indiquer s'il existe un site internet qui permette de trouver son nom parmi les médecins qui officient pour le compte de l'Hôpital Doce De Octubre Luis Carlos Galán Sarmiento. A ce sujet, la Formation arbitrale lui a fait part de son étonnement quant au fait que son nom ne figure pas dans le "*Guía Médica y Hospitalaria de Medellín*" ([www.guiamedicahospitalaria.com](http://www.guiamedicahospitalaria.com)), lequel indique pourtant l'Hôpital Doce De Octubre Luis Carlos Galán Sarmiento parmi les "*Instituciones*" qu'il recense.

En date du 30 mars 2012, le Dr J. a adressé au Greffe du TAS les documents suivants:

- Une déclaration qui est attribuée à la directrice générale de "*Guía Médica y Hospitalaria de Medellín*", mais qui est transmise dans un courrier électronique du Dr J.

Ce document comprend toutefois le sigle du "*Guía Médica y Hospitalaria de Medellín*", le nom, prénom de la directrice ainsi que ses coordonnées, son numéro de téléphone et son adresse e-mail.

Il résulte de ce document que le site "*Guía Médica y Hospitalaria de Medellín*" ne répertorie pas tous les médecins de Medellín, seuls les praticiens privés et/ou issus de certaines institutions y étant recensés. Par ailleurs, ne figurent pas sur ce site, les médecins qui ne désirent pas y être désignés, pour des raisons personnelles.

- Une copie de sa pièce d'identité confirmant sa citoyenneté colombienne ainsi qu'une attestation à l'en-tête de Metrosalud confirmant qu'il est employé auprès de Metrosalud depuis le 26 septembre 1984 et qu'il travaille actuellement à plein temps comme médecin généraliste au sein de l'Hôpital Doce De Octubre Luis Carlos Galán Sarmiento.

La Formation arbitrale observe que la signature figurant sur la pièce d'identité précitée présente de très grandes similarités avec celle figurant sur les autres pièces versées au dossier par les parties, en particulier sur le document intitulé "*Atencion de Urgencias, epícrisis – resumen de atencion - contrarreferencia*", avec l'en-tête "*Metrosalud*". Il est ici à noter que le Dr J. a apposé sa signature ainsi que son sceau (J., Medico U. de A, Reg: 15337) sur ce dernier document à plusieurs endroits.

A cela s'ajoute le fait qu'au cours de l'audience du 21 mars 2012, le Dr J. a su répondre de manière précise et circonstanciée tant aux questions liées au fonctionnement de Metrosalud qu'à celles liées aux caractéristiques du Hestar et aux spécificités du traitement administré à l'Athlète.

Par courrier du 17 avril 2012, l'UCI s'est référée aux pièces remises par le Dr J. et s'est étonnée de a) "*l'homonymie des patronymes du Dr J., de la personne ayant conduit ce dernier à l'hôpital de San Luis (Mr J.) et de la personne ayant signé l'attestation de l'hôpital de Luis Carlos Galan du 22 mars 2012 (Mme J.)*"; b) du fait que "*sur l'attestation délivrée par l'hôpital Luis Carlos Galan le 22 mars 2012, il est indiqué que le Dr J. est médecin généraliste*" et c) du fait que "*M. Sevilla a été soigné au service des urgences par un médecin généraliste le 12 août 2010 plutôt que par un médecin urgentiste*". Sur la base de ces constats, l'UCI a demandé à la Formation arbitrale qu'elle sollicite "*la production de la liste des médecins urgentistes de l'hôpital Luis Carlos Galan*".

Le 24 avril 2012, le Greffe du TAS a informé les parties que la Formation arbitrale avait rejeté cette nouvelle demande de l'UCI du 17 avril 2012.

D'une manière générale, et selon le droit suisse, applicable à titre supplétif, "*Chaque partie doit, si la loi ne prescrit le contraire, prouver les faits qu'elle allègue pour en déduire son droit*" (article 8 du Code civil suisse). Cette disposition répartit le fardeau de la preuve et détermine sur cette base qui doit assumer les conséquences de l'échec de la preuve (ATF 126 III 189; ATF 129 III 18; ATF 132 III 449). En l'espèce, l'UCI n'a pas apporté un seul élément permettant de mettre sérieusement en doute l'identité ou la fonction médicale du Dr J., se contentant à chaque fois d'inviter la Formation arbitrale à procéder elle-même à des mesures d'investigations. L'UCI s'est limitée à de vagues recherches sur internet et indique avoir interpellé par téléphone, une personne qu'elle n'a pas pu identifier auprès de Metrosalud pour savoir si cette dernière pouvait confirmer que le Dr J. travaillait bien auprès de l'Hôpital Doce De Octubre Luis Carlos Galán Sarmiento. Ces démarches se sont révélées infructueuses. Si l'UCI avait vraiment souhaité faire

la démonstration de l'imposture alléguée du Dr J., elle aurait au moins pu interpellé par écrit Metrosalud et/ou charger un avocat local d'entreprendre les démarches nécessaires auprès de l'hôpital pour en connaître ses éventuels liens avec le Dr J.

Plus particulièrement et en ce qui concerne la demande de l'UCI formulée après l'audience, tendant à "la production de la liste des médecins urgentistes de l'hôpital Luis Carlos Galán", il apparaît qu'elle vise à nouveau, à combler des lacunes dans les preuves qu'il lui appartenait d'apporter à l'appui de son appel. Dès lors, la Formation arbitrale estime qu'elle n'a pas à entrer en matière et, à cet égard, fait siennes les considérations formulées dans un arrêt récent du TAS (TAS 2009/A/2014, par. 34):

*"Quoi qu'il en soit, l'article R44.1 alinéa 2 du Code TAS exprime très clairement le principe de la responsabilité des parties en matière de production de pièces: "Les parties produisent avec leurs écritures toutes les pièces dont elles entendent se prévaloir". Elles ne sauraient dès lors tirer argument, a posteriori, du caractère incomplet du dossier dont elles seraient elles-mêmes à l'origine. De même, elles ne sauraient reprocher au TAS de vouloir statuer sur la base du dossier dans son état au jour de la clôture de l'instruction écrite. Ces principes ont notamment été rappelés dans une jurisprudence CAS 2003/O/506: "On a preliminary basis, the Panel points out that in CAS arbitration any party wishing to prevail on a disputed issue must discharge its "burden of proof", i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. Indeed, Art. R44.1 of the CAS Code provides that "together with their written submissions, the parties shall produce all written evidence upon which they intend to rely", and that "the parties shall specify any witnesses and experts which they intend to call and state any other evidentiary measure which they request". Therefore, the Panel does not accept the Respondent's submission that "the Panel has an obligation to instruct the case ex officio and cannot simply take its decision on the basis of the evidence submitted by the parties, if it deems it insufficient" (...) Surely, Art. R44.3 of the CAS Code empowers the Panel to order further evidentiary proceedings "if it deems it appropriate to supplement the presentations of the parties". However, in the Panel's opinion, this is clearly a discretionary power which a CAS panel may exert with an ample margin of appreciation - "if it deems it appropriate" - and which cannot be characterized as an obligation. In particular, the CAS Code does not grant such discretionary power to panels in order to substitute for the parties' burden of introducing evidence sufficient to avoid an adverse ruling; this is clearly confirmed by the circumstance that, in CAS practice, panels resort very rarely to such power. Indeed, it is the Panel's opinion that the CAS Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one".*

Au vu de ces éléments, des pièces au dossiers ainsi que

des propos tenus par le Dr J. lors de son témoignage au cours de l'audience du 21 mars 2012, la Formation arbitrale estime que l'identité de ce dernier ainsi que ses liens professionnels avec l'Hôpital Doce De Octubre Luis Carlos Galán Sarmiento, ont été établis de manière suffisante au vu du degré de preuve applicable aux faits à prouver par l'Athlète (dans ce cas "prépondérance des probabilités" selon l'article 22 RAD).

## B. Le fond

Les faits suivants sont admis par les parties: i) le HES est une substance interdite, au sens de la "liste des interdictions 2010", qui fait partie intégrante du RAD en vertu de son article 29; ii) Le HES est incorporé dans la classe "S5. Diurétiques et autres agents masquants" de la "liste des interdictions 2010" et doit dès lors être qualifié de substance spécifiée; iii) la présence d'une substance interdite, de ses métabolites ou de ses marqueurs dans un échantillon fourni par un coureur constitue un cas de violation des règles antidopage (article 21 RAD); iv) l'Athlète a été déclaré positif au HES à la suite du contrôle antidopage effectué le 15 août 2010; v) c'est la première fois que l'Athlète se voit formellement reprocher la violation d'une règle antidopage.

Il résulte de ce qui précède que l'UCI a établi la violation d'une règle antidopage. En application de l'article 293 RAD, l'Athlète doit être suspendu pour une durée de deux ans pour une première violation des règles antidopage.

Toutefois, le RAD offre à l'Athlète la possibilité d'obtenir une élimination ou une réduction de la période de suspension, à condition qu'il prouve comment la substance spécifiée a pénétré dans son organisme, que ladite substance spécifiée n'était pas destinée à améliorer les performances sportive ou à masquer l'usage d'une substance améliorant les performances (article 295 RAD) et/ou qu'il n'a commis aucune faute ou négligence significative (article 297 RAD).

Dès lors, seules sont litigieuses les questions de savoir si l'Athlète a valablement établi l'existence d'un motif de réduction de la période de suspension et, le cas échéant, si les sanctions prononcées par le CNCDD sont en adéquation avec la faute ou la négligence commise par l'Athlète.

D'un côté, l'UCI estime que la version des faits présentée par l'Athlète dans sa deuxième ligne de défense n'est pas crédible, ni vraisemblable et qu'elle constitue une circonstance aggravante justifiant une suspension de 4 ans. De l'autre côté, les intimés sont d'avis que l'Athlète a su expliquer la présence du HES

dans son organisme et le fait que le HES avait été utilisé exclusivement à des fins thérapeutiques. Selon les intimés, la suspension prononcée par le CNCDD est juste et doit être confirmée.

1. L'Athlète a-t-il établi un motif de réduction de la période de suspension au sens de l'article 295 RAD?

1.1 Le degré de la preuve qui incombe à l'Athlète

A la lecture de l'article 295 RAD et pour être en mesure de requérir une réduction de la période de suspension, l'Athlète doit établir:

- *“comment une substance spécifiée a pénétré dans son organisme”* et
- *“que ladite substance spécifiée n'était pas destinée à améliorer [ses] performances sportives (...) ou à masquer l'usage d'une substance améliorant les performances”*.

A titre liminaire, se pose donc la question de savoir quelles sont les exigences minimales auxquelles doit satisfaire l'Athlète en relation avec son fardeau de la preuve.

Le RAD ayant été adopté conformément aux dispositions applicables du Code Mondial Antidopage, il doit être interprété d'une manière cohérente par rapport à ce code. Le cas échéant, les commentaires annotant les diverses dispositions du Code Mondial Antidopage peuvent aider à la compréhension et à l'interprétation du RAD (voir article 369 RAD).

Le commentaire sur l'article 10.4 du Code Mondial Antidopage, qui est la disposition correspondante à l'article 295 RAD, précise ce qui suit:

*“(...) il est plus vraisemblable que la présence de substances spécifiées, par opposition aux autres substances interdites, puisse s'expliquer par une cause crédible non liée au dopage.*

*Cet article s'applique seulement dans les cas où l'instance d'audition est satisfaite, eu égard aux circonstances objectives entourant l'affaire, que le sportif, lorsqu'il a absorbé ou eu en sa possession la substance interdite, n'avait pas l'intention d'améliorer sa performance sportive. Le type de circonstances objectives dont la combinaison pourrait satisfaire l'instance d'audition de l'absence d'intention d'amélioration de la performance comprendrait, par exemple: le fait que la nature de la substance spécifiée ou le moment de son ingestion n'aurait pas été bénéfique pour le sportif; l'usage non dissimulé ou la déclaration d'usage de la substance spécifiée par le sportif; et un dossier médical récent corroborant le fait que la substance spécifiée fait l'objet d'une ordonnance médicale non liée au sport. En règle générale, plus le potentiel d'amélioration de la performance est grand, plus la charge de la preuve imposée au*

*sportif en ce qui concerne l'absence d'intention d'amélioration de la performance sportive est élevée.*

*L'absence d'intention d'amélioration de la performance sportive doit être établie à la satisfaction de l'instance d'audition, mais le sportif peut établir comment la substance spécifiée s'est retrouvée dans son organisme par la prépondérance des probabilités”*.

Il résulte de ce qui précède que la prépondérance des probabilités est le degré de preuve à apporter par l'Athlète quant à la question de savoir comment le HES est entré dans son organisme. Il lui appartient de convaincre la Formation arbitrale qu'il est plus probable que les faits qu'il allègue se sont bien déroulés comme il le prétend et non autrement (CAS 2010/A/2230, par. 11.7; CAS 2009/A/1926 & 1930, par. 3.6.1 et arrêts cités; CAS 2008/A/1515, par. 116 et arrêts cités, CAS 2011/A/2384, par. 259 ss; CAS 2010/A/2107, par. 9.2).

Il incombe à l'Athlète d'établir que le HES *“n'était pas destinée à améliorer [ses] performances sportives (...) ou à masquer l'usage d'une substance améliorant [ses] performances”* à la satisfaction de l'instance de jugement, qui appréciera la gravité des accusations. Il en découle que le degré de preuve doit être plus important que le standard de simple prépondérance des probabilités, mais moins important que le standard de preuve allant au-delà d'un doute raisonnable. Des preuves corroborantes doivent en outre être produites à l'appui des assertions de l'Athlète (CAS 2010/A/2230, para. 11.7; CAS 2010/A/2229, para. 84 ss; CAS 2010/A/2107, para. 9.2).

1.2 L'Athlète a-t-il valablement établi comment la substance spécifiée a pénétré dans son organisme?

L'Athlète explique la présence du HES dans son organisme par le traitement qui lui a été administré dans un hôpital de Medellin par le Dr J., suite à sa chute intervenue le 12 août 2010, lors d'une étape de la *“Vuelta Pilsen a Colombia”*. A l'appui de ses dires, l'Athlète a produit une série de pièces.

De son côté, l'UCI estime que l'authenticité des documents est douteuse et que, dans le meilleur des cas, ils ont été établis de manière complaisante.

Les documents corroborant la version des faits présentée par l'Athlète sont les suivants:

- Une déclaration signée par le Dr F., datée du 25 novembre 2011, figurant sur une page blanche, sans en-tête. Cette personne se présente comme le médecin officiel de la *“Vuelta Pilsen a Colombia”*. Son nom figure sur une copie a) d'une pièce d'identité ainsi que b) sur une liste d'une brochure

publicitaire liée à la “*Vuelta Pilsen a Colombia*” 2010.

Selon le Dr F., l’Athlète est tombé lors de l’étape 9, ce qui lui a valu de multiples lacérations et abrasions ainsi que des traumatismes aux tissus mous. Trois jours plus tard, lors de la 12<sup>ème</sup> étape, l’Athlète est à nouveau tombé. Au vu de ses douleurs, l’Athlète a d’abord été amené à l’hôpital universitaire San Jorge de Pereira afin de prendre les mesures permettant d’évaluer son état de santé ainsi que ses chances de poursuivre sa course. Compte tenu du volume important de patients, la prise en charge de l’Athlète le jour même n’était pas garantie. C’est la raison pour laquelle le Dr F. a suggéré à l’Athlète ainsi qu’à son directeur d’équipe de se rendre dans un autre hôpital. Il est toutefois précisé que ni la vie ni la santé de l’Athlète n’était en péril. Le Directeur sportif de l’Athlète a alors déclaré avoir un contact dans un hôpital de Medellin, situé à environ deux heures. En raison de ses fonctions au sein de la “*Vuelta Pilsen a Colombia*”, le Dr F. n’a pas pu accompagner l’Athlète à Medellin.

- Différentes coupures de presse, relatant les difficultés financières et logistiques rencontrées par le passé par l’hôpital universitaire San Jorge de Pereira.
- Une déclaration signée par Mr J., datée de novembre 2011, figurant sur une page blanche, sans en-tête. Cette personne confirme avoir amené l’Athlète à l’hôpital Doce De Octubre Luis Carlos Galán Sarmiento, à Medellin, en date du 12 août 2010, sur recommandation du Dr F.
- Un document intitulé “Atencion de Urgencias, epicrisis – resumen de atencion - contrarreferencia”, avec l’en-tête “*Metrosalud*”, qui est la raison sociale d’un réseau de soins en Colombie. Cette pièce est datée du 12 août 2010 et est émise dans le cadre de soins apportés au sein de l’Hôpital Doce De Octubre Luis Carlos Galán Sarmiento, à Medellin.

Il apparaît que c’est le Dr J. qui a traité l’Athlète, lequel était accompagné par Mr J. La consultation a eu lieu à 17 heures 10 et fait suite à une chute de vélo au cours d’une compétition. L’Athlète présentait un état neurologique normal et avait la pression artérielle, les pulsations et une fréquence respiratoires d’une personne en bonne santé. Toutefois, il avait plusieurs lacérations prononcées au genou gauche, des saignements modérés et ressentait des douleurs au toucher.

Un polytraumatisme a été diagnostiqué par le Dr J., lequel a alors administré un litre de Hestar (qui

contient du HES) à l’Athlète par voie intraveineuse, durant 3 heures.

- Une déclaration devant notaire du Dr J., établie le 10 août 2011. Une traduction de ce document a été versée au dossier par l’UCI et a le contenu suivant:

*“En date du 12 août de l’année 2010, j’ai pris en charge, à l’hôpital Luis Carlos Galán, le patient M. OSCAR SEVILLA RIVERA, avec carte nationale d’identité no 44.394.925, hospitalisé dans ledit établissement alors qu’il présentait de multiples lacérations et contusions, provoquées par sa chute de vélo. Il y a été procédé à un lavage abondant de ses blessures, ainsi qu’à l’application de substances liquides intraveineuses (expansion plasmatique (Hestar 10 %), d’une anatoxine tétanique et d’antibiotiques prophylactiques (ceftriaxone). Après deux heures d’observation, le patient a été autorisé à quitter l’hôpital, avec des consignes à respecter et sans que quelque complication que ce soit ne soit intervenue”.*

- Un document intitulé “Apoyo Rendimiento Deportivo – Historica Clinica” avec l’en-tête “*Coldportes*”. Cette pièce est datée du 17 août 2010 et a été signée par le Dr M. Seule la première page de ce document (qui en comporte quatre) a été versée au dossier.

Selon cette pièce, la consultation avait pour objet la contusion du genou de l’Athlète. Le médecin déclare que l’Athlète a été victime d’une chute au cours de la “*Vuelta Pilsen a Colombia*” ayant entraîné une contusion au genou gauche, lequel a été traité dans un hôpital à Medellin. Les douleurs et les inflammations sont persistantes.

Il est à relever que l’UCI a produit un document de contenu et de format similaires, daté du 17 août 2010, également signé par le Dr M. mais qui concerne exclusivement le genou droit de l’Athlète. Seule la deuxième page de ce document (qui en comporte deux) a été produite.

Dans le cadre de l’examen de la probabilité de la version des faits présentée par l’Athlète, la Formation arbitrale a d’abord déterminé quel crédit il y avait lieu d’accorder aux documents produits. A cet égard, elle relève qu’elle ne dispose d’aucun élément concret lui permettant de conclure qu’il s’agit de faux ou que ces pièces ont été établies de manière complaisante.

Il est vrai que les auteurs de toutes les pièces en cause ne peuvent pas être identifiés avec certitude. En outre, la production tardive de preuves en cours de procédure ne manque pas de susciter des interrogations légitimes. De même, la Formation arbitrale a été troublée par la constatation que le Dr M. a rempli deux formulaires quasi identiques, à la

seule exception que l'un concerne le genou droit de l'Athlète et l'autre le genou gauche. La Formation arbitrale ne peut pas exclure que le Dr M. ait choisi de rédiger un formulaire par genou, ce qui semble douteux mais pas de nature à remettre en cause les autres documents produits par l'Athlète. Cela est d'autant plus vrai que les documents liés au Dr M. n'ont été que partiellement produits et ont trait à un contrôle médical intervenu plusieurs jours après les soins apportés par le Dr J. et le contrôle antidopage.

Parmi les documents dont l'auteur, le Dr J., doit être considéré comme identifié, figurent la déclaration notariée ainsi que le *“Atencion de Urgencias, epicrisis – resumen de atencion – contrarreferencia”*. Lors du témoignage de ce dernier, au cours de l'audience du 21 mars 2012, celui-ci a confirmé le contenu de ces deux pièces, qui authentifient la présence de l'Athlète et sa prise en charge au sein de l'hôpital de Medellin en date du 12 août 2010. Par là, la vraisemblance des autres pièces (qui tendent à expliquer pourquoi, comment et avec qui l'Athlète s'est rendu à Medellin) est renforcée. Soutenir le contraire, reviendrait à dire que le Dr J. a non seulement commis des faux mais qu'il a menti tant devant le notaire que devant la Formation arbitrale dans l'intérêt de l'Athlète. Or, aucun élément dans le dossier ne permet de penser que le Dr J. connaissait l'Athlète, ce qu'il a démenti lors de son témoignage.

En outre, si le Dr J. avait participé à une collusion de personnes mal intentionnées pour fabriquer de toutes pièces un scénario disculpant l'Athlète, l'intervention d'autres acteurs aurait été inévitable. En l'état actuel, une telle théorie du complot relève de la pure spéculation et l'UCI ne produit, en tout cas, aucun élément concret permettant d'en établir l'existence ou même un début d'existence.

Au vu de ce qui précède, il est plus probable que les pièces produites par l'Athlète présentent plus un caractère d'authenticité que de fausseté.

Dès lors que les preuves soumises par l'Athlète sont admises comme étant vraisemblables, il est également plus que probable que ce dernier se soit effectivement rendu à Medellin pour y être traité ensuite de sa chute au cours de la *“Vuelta Pilsen a Colombia”*.

La Formation arbitrale n'est pas sceptique quant aux explications de l'Athlète, selon lesquelles il a choisi de se rendre à Medellin, une fois que l'hôpital universitaire San Jorge de Pereira lui a fait savoir qu'il ne pouvait lui assurer une prise en charge le jour de l'accident. En effet, elle ne trouve pas déraisonnable de penser que l'équipe de l'Athlète souhaitait pouvoir évaluer précisément les chances pour l'Athlète de

poursuivre la course, au vu des douleurs dont il se plaignait et de son excellent classement. Enfin, il est à noter que la 12<sup>ème</sup> étape s'est achevée aux alentours de 13 heures. L'UCI estime qu'il y a 2h30 de route entre Pereira et Medellin. Selon le document *“Atencion de Urgencias, epicrisis – resumen de atencion – contrarreferencia”*, l'Athlète a été pris en charge par le Dr J. à 17h10. De même, il ressort de la déclaration notariée du Dr J. que l'Athlète a pu quitter l'hôpital deux heures après son admission.

La chronologie des événements n'est donc pas incompatible avec la version des faits présentée par l'Athlète.

Pour toutes ces raisons, la Formation arbitrale est d'avis qu'il est également plus que probable que l'Athlète se soit effectivement rendu à Medellin le 12 août 2010 pour y être traité médicalement et qu'à cette occasion du HES lui a été administré.

Pour les motifs évoqués ci-dessus, l'Athlète a pu faire la démonstration à la Formation arbitrale qu'il est plus probable que les faits qu'il allègue se sont bien déroulés comme il le prétend et non autrement. Par conséquent il a satisfait au fardeau de la preuve qui lui incombait pour démontrer comment la substance spécifiée a pénétré dans son organisme.

1.3 L'Athlète a-t-il valablement établi que le HES *“n'était pas destiné à améliorer [ses] performances sportives (...) ou à masquer l'usage d'une substance améliorant [ses] performances”*?

L'UCI estime que le traitement à base de Hestar, administré par le Dr J. à l'Athlète, était déplacé et n'a pas pu être utilisé à des fins thérapeutiques. Elle s'appuie sur une expertise commandée au Dr R., médecin adjoint au service de médecine intensive adulte du CHUV.

En audience, le Dr R. a confirmé à la Formation arbitrale que le HES n'est utilisé que pour des patients qui souffrent de lésions bien plus sévères que celles de l'Athlète et/ou qui ont perdu un tel volume sanguin, qu'il leur faut plusieurs jours de récupération. Au vu des données comprises dans le document *“Atencion de Urgencias, epicrisis – resumen de atencion – contrarreferencia”*, en particulier celles liées à la pression artérielle, les pulsations et la fréquence respiratoire qui indiquent que l'Athlète était en parfaite santé, le Dr R. n'aurait jamais eu recours au HES. Ce dernier a cependant confirmé que le HES est un médicament très controversé et qu'il n'y a pas de contre-indication à l'administrer même pour des lésions superficielles. Dans un tel cas, le recours au HES présente le risque de favoriser des hémorragies ou des saignements,

sans aucun bénéfice thérapeutique.

Interpellé par la Formation arbitrale, le Dr J. a justifié l'administration du HES par le fait que l'Athlète avait manifestement beaucoup saigné. Sa chute remontait à plusieurs heures et les plaies saignaient encore lors de son admission à l'Hôpital Doce De Octubre Luis Carlos Galán Sarmiento, à Medellin. Ignorant précisément quelle quantité de sang avait été perdue, l'administration du HES était parfaitement indiquée puisqu'il s'agit d'un expanseur de plasma permettant de combler des pertes de sang qui, en l'occurrence, pouvaient être importantes. L'usage de ce médicament est courant.

Il apparaît comme étant incontesté, d'une part, que l'Athlète a perdu du sang et que, d'autre part, le HES a comme propriété de compenser la perte de sang. Dans ce contexte, le recours par le Dr J. au HES paraît défendable. Le fait que l'usage de cette substance dans une telle situation soit controversé et/ou contre-indiqué ne change pas le fait que ce médicament a été administré sur la seule initiative du Dr J. dans le but de compenser l'éventuelle perte de sang de l'Athlète et non afin d'améliorer les performances sportives ou à masquer l'usage d'une substance améliorant les performances de l'Athlète.

A partir du moment où la Formation arbitrale admet comme étant plus que probable que 1) l'Athlète est lourdement tombé en date du 12 août 2010, b) qu'il n'était pas certain qu'il puisse être soigné à Pereira, Colombie, c) qu'il était raisonnable de penser qu'au vu des circonstances, un examen médical s'imposait, d) que de l'avis du médecin de la "Vuelta Pilsen a Colombia", la structure hospitalière la plus adaptée se trouvait à Medellin, e) que la chronologie des événements est cohérente, f) que l'Athlète n'a pas de lien particulier avec le Dr J., elle estime qu'il a été démontré que le recours au HES n'était pas destiné à améliorer les performances sportives de l'Athlète ou à masquer l'usage d'une substance améliorant ses performances.

Par voie de conséquence, l'Athlète a établi un motif de réduction de la période de suspension au sens de l'article 295 RAD.

Au regard de cette conclusion, il y a lieu de rejeter sans autre considération l'argumentation de l'UCI, selon laquelle "le caractère improbable de la nouvelle défense de M. Sevilla présentée le 11 août 2011" constitue une circonstance aggravante "justifiant l'imposition d'une période de suspension de 4 ans et ce conformément à l'article 305 RAD". A ce titre, la Formation arbitrale souligne qu'il ne peut être reproché *ab initio*, à un prévenu de présenter tous les moyens de défense à sa disposition,

au besoin en faisant évoluer leur contenu, sans que cela ne porte atteinte au droit de la défense.

2. Si les conditions de l'article 295 RAD sont remplies, quelle doit être la période de suspension?

L'UCI voit des analogies entre le cas de l'Athlète et celui de l'Athlète L. (TAS 2009/A/1766). Contrairement à ce que soutient l'UCI, l'affaire L. présente plusieurs grandes distinctions avec la présente cause:

- D'une part, la substance interdite retrouvée dans l'organisme de Mme L. n'était pas une substance spécifiée aux termes de la liste des interdictions de l'AMA. A ce propos, il y a lieu de rappeler que selon le commentaire sur l'article 10.4 du Code Mondial Antidopage, "(...) *il est plus vraisemblable que la présence de substances spécifiées, par opposition aux autres substances interdites, puisse s'expliquer par une cause crédible non liée au dopage*".
- D'autre part, et c'est essentiel, la formation arbitrale appelée à se pencher sur l'affaire L. a constaté que les explications fournies par l'athlète roumaine pour justifier la présence de l'EPO dans son organisme révélaient des contradictions et n'avaient pas déchargé Mme L. du fardeau de la preuve lui incombant.
- Dans l'affaire L., la "Formation est ainsi convaincue qu'aucune des circonstances invoquées par l'Appelante – même si elles étaient établies – n'est propre à constituer une «circonstance exceptionnelle» ouvrant la voie à une réduction de la sanction de deux ans" (para. 76, pages 22 et 23). Or les cas relevant de circonstances exceptionnelles tombent sous le coup de l'article 296 RAD et non 295, qui ne vise "que" des "circonstances particulières".

Le titre de l'article 295 RAD est "Elimination ou réduction de la période de suspension pour des substances spécifiées en vertu de circonstances particulières". Comme déjà évoqué, pour que l'article 295 RAD soit applicable, il n'est pas nécessaire que les circonstances soient exceptionnelles.

En outre et en vertu de l'article 295 RAD, dernière phrase, le "degré de faute du licencié est le critère pris en compte pour évaluer toute réduction de la période de suspension". Dans le cadre de l'examen de la réduction de la période de suspension fondée sur l'article 295 RAD, il n'y a pas lieu de déterminer si la faute ou la négligence de l'Athlète est "significative", comme le prévoit l'article 297 RAD (CAS 2010/A/2107, para. 9.32, page 21).

L'examen de la faute ou négligence doit être fait en fonction des circonstances particulières de chaque

cas d'espèce. Il doit nécessairement tenir compte du but – à la fois répressif et éducatif – recherché par les règles disciplinaires applicables. Il serait particulièrement inéquitable de sanctionner de la même manière, d'une part, celui qui refuse d'admettre avoir pris intentionnellement des produits dopants et qui conteste les résultats pourtant clairs des analyses et, d'autre part, un sportif tel que l'Athlète qui a su démontrer de manière satisfaisante comment la substance spécifiée a pénétré dans son organisme et que cette substance n'était pas destinée à améliorer ses performances sportives ou à masquer l'usage d'une substance améliorant ses performances.

Il n'est pas contesté que l'Athlète se soit montré particulièrement négligent à plus d'un titre et qu'il en est d'autant plus responsable qu'il est un coureur cycliste expérimenté. Au moment de son admission à l'hôpital Doce De Octubre Luis Carlos Galán Sarmiento, l'Athlète était en possession de toutes ses facultés et était dès lors en mesure de s'enquérir sur le traitement qui allait lui être appliqué. Le simple fait que l'Hestar lui ait été administré a) par voie intraveineuse et b) pendant plusieurs heures, auraient dû amener l'Athlète à procéder aux vérifications nécessaires et, cas échéant, à demander une autorisation d'usage à des fins thérapeutiques. En outre, la faute et/ou négligence de l'Athlète est d'autant plus importante qu'il a omis d'invoquer son traitement à l'Hestar au cours du contrôle antidopage intervenu deux jours plus tard. De même, ce n'est que dans la dernière phase de la procédure disciplinaire ouverte à son encontre par la RFEC, que l'Athlète a finalement fait état pour la première fois, des incidents intervenus le 12 août 2010.

Toutefois, dès lors qu'il a été démontré a) que le HES a été administré sur la seule initiative du Dr J., b) afin de traiter les pertes de sang consécutives à des lésions provoquées lors d'une chute intervenue le jour même et c) sans intention d'améliorer les performances sportives de l'Athlète ou de masquer l'usage d'une substance améliorant ses performances, il paraît disproportionné de sanctionner l'Athlète qui a commis une négligence isolée aussi sévèrement que le tricheur, pris *“la main dans le sac”* (normalement sanctionné par une période de suspension de 2 ans). Par conséquent, en application de l'article 295 RAD, la Formation arbitrale estime une réduction jusqu'à 12 mois de la période de suspension comme étant proportionnée aux faits retenus à charge de l'Athlète.

En revanche et contrairement à ce qu'à retenu le CNCDD dans sa décision du 16 septembre 2011, au vu de l'article 297 RAD, la Formation arbitrale est d'avis que la négligence et la faute imputables à l'Athlète sont d'un degré élevé. En effet, l'Athlète a manifestement

fait preuve d'une très grande désinvolture lorsqu'il a accepté sans autre investigation le traitement administré par le Dr J. Ce faisant, il a fait très peu de cas du principe cardinal selon lequel un *“traitement médical ne constitue pas une excuse à l'usage de substances interdites ou de méthodes interdites, sauf en cas de conformité avec les règles relatives aux autorisations d'usage à des fins thérapeutiques”* (article 21.1.1 RAD).

En sanctionnant l'Athlète avec une suspension de six mois, le CNCDD minimise l'obligation faite à l'Athlète *“de s'assurer qu'aucune substance interdite ne pénètre dans son organisme”* (article 21.1.1 RAD). Cette règle de conduite a d'ailleurs été qualifiée par d'autres formations arbitrales comme étant absolue (CAS 2003/A/484, para. 62). Il y a lieu de dissuader les sportifs, en particulier s'ils sont aussi expérimentés que l'Athlète, de s'en remettre aveuglément aux soins ou aux conseils de médecins, surtout s'ils ne sont pas spécialisés en médecine sportive. Le fait d'adopter l'attitude du *“ne rien dire, ne rien voir, ne rien entendre”* et de ne prendre aucune précaution est incompatible avec le rôle que les athlètes sont appelés à jouer dans un univers sportif bien trop gangrené par le fléau du dopage (CAS 2007/A/1370-1376, para. 142 et suivants). De plus, selon le commentaire sur les articles 10.5.1 et 10.5.2 du Code Mondial Antidopage (équivalents aux articles 296 et 297 RAD), *“[L]es articles 10.5.1 et 10.5.2 ne trouvent application que dans les cas où les circonstances sont véritablement exceptionnelles et non dans la grande majorité des cas”*.

Au vu de ce qui précède et des circonstances particulières du cas d'espèce, la Formation arbitrale est d'avis qu'une suspension de 12 mois permet de distinguer le cas de l'Athlète de celui du sportif qui commet volontairement une violation d'une règle antidopage, tout en n'atténuant pas de manière inacceptable l'obligation élémentaire faite à un sportif de haut niveau de *“s'assurer qu'aucune substance interdite ne pénètre dans son organisme”*.

Il résulte de ce qui précède que l'Athlète ne peut pas se prévaloir de l'absence de faute ou de négligence significative au sens de l'article 297 RAD. Par ailleurs, il faut noter que le commentaire sur l'article 10.5.2 du Code Mondial Antidopage (équivalent à l'article 297 RAD) précise ce qui suit: *“L'article 10.5.2 ne devrait pas s'appliquer dans les cas où l'article 10.3.3 ou 10.4 [équivalent à l'article 295 RAD] s'applique, car ces articles tiennent déjà compte de la gravité de la faute du sportif ou de l'autre personne aux fins de l'établissement de la période de suspension applicable”*.

Au vu de ce qui précède, il y a lieu de rejeter les arguments des intimés en relation avec l'article 297 RAD, sans autre considération.

Tennis; corruption/match fixing; standard of proof; proportionality of the sanction

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**Panel:**

**Mr. Dirk-Reiner Martens (Germany), President**  
**Mr. Michael J. Beloff QC, United Kingdom**  
**Mr. David W. Rivkin (USA)**

Relevant facts

David Savic (the “Appellant”) is a Serbian professional tennis player who is a member of the Association of Tennis Professionals (“ATP”).

The Professional Tennis Integrity Officers (“PTIOs” or the “Respondent”) are appointed by each of the following governing bodies of professional tennis: ATP Tour, Inc. (ATP Tour), Grand Slam Committee (GSC), International Tennis Federation (ITF) and WTA Tour, Inc. (WTA). These governing bodies participate in the Uniform Tennis Anti-Corruption Program, which they adopted in 2009 in order to put in place a stringent code of conduct to combat gambling-related corruption worldwide. The objectives of the Uniform Tennis Anti-Corruption Program (2010 version, “UTAP” or the “Program”), as stated in the Program’s introduction, are to:

*“(i) maintain the integrity of tennis, (ii) protect against any efforts to impact improperly the results of any match and (iii) establish a uniform rule and consistent scheme of enforcement and sanctions applicable to all professional tennis events and to all Governing Bodies”.*

M. is a professional tennis player and a member of the ATP. He and the Appellant came to know each other and became close friends. They last met in person in Belgrade, Serbia, and on that occasion they exchanged their mobile telephone numbers.

M. was in his hotel room in Beijing. Late in the evening he received two calls on his mobile phone from the telephone number +381 638 493 231, which is the mobile telephone number that the Appellant had provided to M. in Belgrade. He did not answer the calls. Soon after that, M. answered a call on his hotel room telephone. M. claims to have recognised the voice of the caller as that of the Appellant, who also identified himself by the Appellant’s name. Shortly thereafter, they agreed to continue their conversation on Skype. On the Skype call, the caller who was using the Skype account name “David Savic”, offered M. USD 30,000 if he would agree to lose the first set of his first round match. The caller added that if M. would do so, A. would allow him to win the second and third set and, therefore, the match itself. No Skype video call was used and both conversations were held in English. M. rejected the offer.

M. reported the telephone and Skype conversations.

Jeff Rees, Director of Integrity at the Tennis Integrity Unit (“TIU”), together with Nigel Willerton, an investigator with the TIU, interviewed M. about the events of [...]. The interview was recorded. During the interview, M. also showed the TIU investigators the missed calls on the display of his mobile phone, as well as the contents of his Skype account.

[...] M. received a text message on his mobile telephone from the Appellant’s telephone number +381 638 493 231, which read: “I have the same question for u like 2 weeks ago ... Did u change your mind? David”. M. phoned Rees immediately and, since they were both staying at the same hotel in Moscow, they met shortly thereafter. M. showed Rees the text message on his mobile telephone and Rees advised him to reply “No”, which he did. Rees also asked M. to forward to Willerton the text message he had received, which he did as well.

Following M’s’ allegations, TIU initiated an investigation against the Appellant in order to ascertain whether he had committed an offence of corruption contrary to the UTAP regulations.

On 21 December 2010, Willerton contacted the Appellant by e-mail and requested him to provide to TIU all information related to the telephone and mobile telephone numbers in his possession, the



billing records of such telephone numbers, as well as statements of his bank accounts and betting accounts, if any.

On 11 January 2011, the Appellant replied to Willerton and confirmed that his mobile telephone number is +381 638 493 231 and that he owns two bank accounts but no betting accounts. He also sent to him scanned copies of the contract and the billing records of his mobile telephone. These records did not show any outgoing calls made from the Appellant's mobile telephone number to M's mobile telephone or his hotel [...]. There was only one entry of a text message sent through the server of the Appellant's mobile telephone service provider [...] at 14:22:51.

On 15 February 2011, the Appellant was interviewed by Willerton and Dee Bain, who is also a TIU investigator. The Appellant denied all the allegations [...] and was not able to provide an explanation for them.

On 22 March 2011 in Miami, USA, Willerton and Bain interviewed A. and A's coach. They both denied being aware of any of M's allegations and also denied having any information relative to attempts by the Appellant or anyone else to influence the outcome of [...] the match [...].

On 24 May 2011, the PTIO sent an e-mail to the Appellant charging him with Corruption Offences under the UTAP.

A copy of the e-mail was sent to Professor Richard H. McLaren who holds an appointment as the Anti-Corruption-Hearing Officer under Article F.1 of the UTAP ("AHO").

On 12 September 2011, the case was heard in London, UK, where both parties presented their case before the AHO.

On 30 September 2011, the AHO issued a decision ("*AHO Decision*"), finding that the Appellant had violated three sections of the Corruption Offences portion of the Program and ordered that:

*"Savic (a Covered Person) having committed a Corruption Offense under Article D.1.c, d. and f. is to be fined in the amount of US \$100,000 and declared to be permanently ineligible to compete or participate in any event organized or sanctioned by any Governing Body as all of these terms are defined under the 2010 Program and in particular Rule H.1.c."*

On 4 October 2011 the Appellant received the AHO Decision.

On 27 October 2011, the Appellant filed a statement of appeal dated 18 October 2011 with the Court of Arbitration for Sport (CAS) pursuant to the Code of Sports-related Arbitration (the "*Code*") to challenge the AHO Decision. He submitted the following prayers for relief:

*"... this Court is invited to re-visit the facts and the law de novo, annulling the original Decision and either substituting its own Decision or remitting the case for re-hearing by a different AHO",*

and/or

*"... to impose a different and much lower fine which there is some hope of the Appellant being able to pay within a reasonable period of time, which is proportionate and which the public would consider fair".*

On 4 November 2011, the Appellant filed the Appeal brief including an expert report from the telecommunications expert Goran Bozic.

By letter dated 8 November 2011, CAS acknowledged receipt of the Court Office fee, notified the appeal to the Respondent and noted that English would be the language of the present arbitration proceedings.

By letter dated 16 November 2011, the Respondent requested a thirty day extension of the deadline to submit its answer in order to be able to consult with an expert with respect to the issues raised by the expert report filed on behalf of the Appellant.

On 24 November 2011, the CAS Court Office granted the Respondent an extension of time until 29 December 2011 to file its answer.

By letter dated 20 December 2011, the Respondent requested an additional thirty day extension for its response in order to complete its examination and report.

By letter sent on 23 December 2011, the Appellant agreed to an extension of time for a maximum of two (2) weeks for the Respondent to file its answer.

On 23 December 2011, the Panel granted the Respondent until 16 January 2012 to file its answer.

On 13 January 2012, the Respondent filed its answer to the appeal. The Respondent requested CAS to decide that:

*"... the sanction of a lifetime period of ineligibility and a \$100,000 fine imposed by the Anti-Corruption Hearing Officer is not disproportionate to the offences committed by*

*Mr. Savic and should be upheld by the Panel”.*

On 17 January 2012, the CAS Court Office informed the parties that in accordance with Article R56 of the Code,

*“unless the parties agree otherwise or the Panel order otherwise on the basis of exceptional circumstances, the parties shall not be authorised to supplement or amend their requests or their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer”.*

By letter dated 10 February 2010, the CAS Court Office invited the parties pursuant to Article R44.3 of the Code to file a second round of submissions, in order to allow the Appellant to respond to the PTIO’s answer.

By letter to the CAS Court Office dated 22 February 2012, the Appellant requested an extension of time of ten days to file its second written submission.

On 28 February 2012, the Appellant filed with CAS his second submission, including his response to the answer and statement of defence of the Respondent.

On 19 March 2012, the Respondent filed with CAS its reply to the Appellant’s response to the answer and statement of defence.

On 27 March 2012, the Respondent informed the CAS Court Office that he would not be able to attend the hearing in person, but would give his testimony during the hearing via video-conference, assisted by his counsel.

A hearing was held on 29 March 2012 at the CAS premises in Lausanne, Switzerland.

By CAS letters dated 13 and 19 April 2012, the parties were invited to comment on whether the Judgment of the Swiss Federal Tribunal in *Matuszalem v. FIFA* (4A\_558/2011), issued on 27 March 2012, and of the award in *CAS 2011/A/2490*, issued on 23 March 2012 would have any impact on the present case.

On 27 April 2012 the Appellant submitted his comments.

On 30 April 2012 the Respondent submitted its comments.

## A. Applicable Law

Article R58 of the Code provides as follows:

*“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*

Pursuant to Article C.1 of the UTAP, *“(A)ll Players, Related Persons, and Tournament Support Personnel 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”.* Furthermore, Article B.18 of the UTAP provides that *““Player” refers to any player who enters or participates in any competition, event or activity organized or sanctioned by any Governing Body”.*

The Appellant is a member of the ATP and, therefore, the Panel finds that in this case the applicable regulations are all pertinent UTAP rules and regulations. Since the alleged offences occurred in 2010, the 2010 version of the Program shall be applicable.

The applicable UTAP rules are the following:

### *“D. Offenses*

*Commission of any offense set forth in Article D or E of this Program or any other violation of the provisions of this Program shall constitute a Corruption Offense for all purposes of this Program.*

#### *1. Corruption Offenses*

*(...)*

*c. No covered Person shall, directly or indirectly, contrive or attempt to contrive the outcome or any other aspect of any event.*

*d. No covered Person shall, directly or indirectly, solicit or facilitate any Player to not use his or her best efforts in any event.*

*(...)*

*f. No covered Person shall, directly or indirectly, offer or provide any money, benefit or Consideration to any other Covered Person with the intention of negatively influencing a Player’s best efforts in any event.*

G. Due Process

(...)

3. Burdens and Standards of Proof

a. The PTIO (which may be represented by legal counsel at the Hearing) shall have the burden of establishing that a Corruption Offense has been committed. The standard of proof shall be whether the PTIO has established the commission of the alleged Corruption Offense by a preponderance of the evidence.

(...)

H. Sanctions

1. The penalty for any Corruption Offense shall be determined by the AHO in accordance with the procedures set forth in Article G, and may include:

a. With respect to any Player, (i) a fine of up to \$250,000 plus an amount equal to the value of any winnings or other amounts received by such Covered Person in connection with any Corruption Offense, (ii) ineligibility for participation in any event organized or sanctioned by any Governing Body for a period of up to three years, and (iii) with respect to any violation of clauses (c) - (i) of Article D.1, ineligibility for participation in any event organized or sanctioned by any Governing Body for a maximum period of permanent ineligibility.

(...)

c. No Player who has been declared ineligible may, during the period of ineligibility, participate in any capacity in any event (other than authorized anti-gambling or anti-corruption education or rehabilitation programs) organized or sanctioned by any Governing Body. Without limiting the generality of the foregoing, such Player shall not be given accreditation for, or otherwise granted access to, any competition or event to which access is controlled by any Governing Body, nor shall the Player be credited with any points for any competition played during the period of ineligibility.

(...)

I. Appeals

1. Any Decision (i) that a Corruption Offense has been committed, (ii) that no Corruption Offense has been committed, (iii) imposing sanctions for a Corruption Offense, or (iv) that the AHO lacks jurisdiction to rule on an alleged Corruption Offense or its sanctions, may be appealed exclusively to CAS in accordance with CAS's Code of Sports-Related Arbitration and the

special provisions applicable to the Appeal Arbitration Proceedings, by either the Covered Person who is the subject of the Decision being appealed, or the TIB.

2. Any Decision appealed to CAS shall remain in effect while under appeal unless CAS orders otherwise.

3. The deadline for filing an appeal with CAS shall be twenty business days from the date of receipt of the Decision by the appealing party.

4. The decision of CAS shall be final, non-reviewable, non-appealable and enforceable. No claim, arbitration, lawsuit or litigation concerning the dispute shall be brought in any other court or tribunal."

Article J.3 of the UTAP further provides that:

"This Program shall be governed in all respects (including, but not limited to, matters concerning the arbitrability of disputes) by the laws of the State of Florida, without reference to conflict of laws principles".

It follows that the laws of the State of Florida also apply complementarily.

**B. Merits**

According to Article R57 of the Code, the Panel has "full power to review the facts and the law". As repeatedly stated in CAS jurisprudence, by reference to this provision the CAS appellate arbitration procedure entails a de novo review of the merits of the case, and is not confined merely to deciding whether the ruling appealed was correct or not. Accordingly, it is the function of this Panel to make an independent determination as to merits (see CAS 2007/A/1394, para. 21).

In that context, the Panel must address the following three main issues:

- A. the applicable standard of proof;
- B. whether the evidence relative to the alleged events of [...] supports a finding of violation and
- C. if a finding of violation be established, the proportionality of the imposed sanctions.

1. The applicable standard of proof

Pursuant to Article R58 of the Code, the regulations and rules of law that govern the present dispute are primarily those chosen by the parties. Accordingly, the regulations of the UTAP and the law of the State of Florida are applicable.

The UTAP provides that the applicable standard of proof shall be whether the PTIO have established the commission of the alleged corruption offences by a preponderance of the evidence (Article G.3).

With respect to the limits in the application of the rules of law chosen by the parties, the Panel endorses the position articulated in CAS 2009/A/1926 & CAS 2009/A/1930, para. 11:

*“(...) The application of the (rules of) law chosen by the parties has its confines in the ordre public (HEINI A., Zürcher Kommentar zum IPRG, 2nd edition 2004, Art. 187 marg. no. 18; see also KAUFMANN-KOHLER/RIGOZZI, Arbitrage International, 2006, marg. no. 657). Usually, the term ordre public is thereby divested of its purely Swiss character and is understood in the sense of a universal, international or transnational sense (KAUFMANN-KOHLER/RIGOZZI, Arbitrage International, 2006, margin no. 666; HEINI A., Zürcher Kommentar zum IPRG, 2nd edition 2004, Art. 187 margin no. 18; cf. also PORTMANN W., causa sport 2/2006 pp. 200, 203 and 205). The ordre public proviso is meant to prevent a decision conflicting with basic legal or moral principles that apply supranationally. This, in turn, is to be assumed if the application of the rules of law agreed by the parties were to breach fundamental legal doctrines or were simply incompatible with the system of law and values (TF 8.3.2006, 4P.278/2005 marg. no. 2.2.2; HEINI A., Zürcher Kommentar zum IPRG, 2nd edition 2004, Art. 190 margin no. 44; CAS 2006/A/1180, no. 7.4; CAS 2005/A/983 & 984, no. 70).”*

Therefore, the Panel notes that the applicable standard of proof in this particular case will be “preponderance of the evidence”, unless (i) the law of the State of Florida mandatorily suggests otherwise, or (ii) the application of such standard is incompatible with some relevant aspect of *ordre public*.

## 2. Evaluation of the evidence relative to the alleged events of [...].

When evaluating the evidence, the Panel is well aware that corruption is, by its very nature, likely to be concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoing.

In the appealed Decision, the AHO reached the following conclusions:

*“I have found that it has been proven on a preponderance of the evidence that in the Skype conversation during the late evening on [...], Savic by verbal communication approached M. and offered to pay him if he would contrive to lose the first set of his professional tennis match [...]. In so doing, a Corruption Offence was committed under the provisions of*

*D.1.c to contrive the outcome of a professional tennis match. The Player also committed an offence under D.1.d in that he directly solicited M. to not use his best efforts in the first set of the match. Finally, in committing the above two offences a third rule infraction occurred in that he offered money to M. with the intention of negatively influencing his best efforts in the first set of the match in violation of D.1.f of the 2010 Program. [...] an SMS was sent by Savic to M. in a further attempt to entice M. to contrive the outcome of some future match in violation of Article D.1.c of the Program”* (paragraphs 30, 31 of the AHO Decision).

As previously explained, the Appellant alleges that he never attempted or successfully managed to contact M. by using telephone and Skype calls or text messages, either on [...], and that it was some third person who contacted M. on all occasions.

The Panel will examine separately the two occasions on which the contested facts allegedly occurred, and will then establish if the disputed offences took place or not.

### 2.1 The telephone and Skype calls of [...]

The Panel is satisfied that on [...] M. received two calls on his mobile telephone from a number that was the same as the one the Appellant had provided to M.[...]. The Panel also accepts the testimony of M. that later that night he received a Skype call by someone who was using the Skype account name “David Savic”.

M. indeed showed to Rees and Willerton the entry of a missed call dated [...] from the Appellant’s mobile telephone number appearing on the display of his mobile telephone, as well as the screen of his laptop on which the Appellant’s name was shown as a friend on M.’s Skype account. Photographs were taken of both the telephone and the laptop.

The Panel notes that, contrary to the Appellant’s submission, M. testified not only at the hearing before the CAS, but also before the TIU investigators and the AHO, that he recognised the voice of the Appellant in the person who called him on his hotel room telephone and on Skype [...] and that the Appellant made him an offer to fix his [...] first round match [...]. During the video-conference on the day of the CAS hearing, he clearly stated that he was certain that it was the Appellant’s voice, and that the voice was not distorted as a result of the long-distance calls.

The Appellant suggested that the billing records of his mobile telephone provided no evidence of him making any calls to M.

The Panel notes, however, that, as both experts of the parties agreed in their common statement of 23 March 2012, missed calls are not billable and therefore they do not appear on the billing records. Moreover, the call on M.'s hotel room telephone could have easily been made using another telephone number or even the same Skype account that was used for the Skype call to M. later that same evening and would therefore also not have appeared in the Appellant's billing records.

The Appellant further suggested that voice recognition cannot be a reliable form of identification, given the fact that during the last years he and M. had met only very rarely.

The Panel is of the opinion that it is possible to recognise a person's voice if one was a close friend of that person and has spent considerable time with him, even if only when both were younger. In addition, the Appellant had met with M. in [...], where they discussed for a few minutes and M. was thus acquainted with the adult voice of the Appellant as well. It accepts M.'s testimony that he accurately recognized the Appellant on the occasions in issue.

The Appellant's explanation for those calls was that some third person impersonated him by "*spoofing*" his mobile telephone and Skype communications.

The Panel accepts that it is possible to "*spoof*" telephone, text message and Skype communications, in line with the joint statement of both parties' experts of 23 March 2012.

However, the Appellant failed to provide any evidence that such an impersonation actually occurred on the occasions in issue or any reason why someone would choose to impersonate him or who that person might be, in particular since such person must have been able convincingly to imitate the Appellant's voice, tone and content, which would significantly limit the field of potential candidates.

It is true that the former relationship between the Appellant and M. could explain why an alleged impersonator would choose to impersonate the Appellant to approach M.. It is equally true, however, that the very fact of the relationship between the two would also explain why the Appellant himself might select M. as the object of his corrupt offer.

Finally, it was suggested by the Appellant that there was no evidence that A. was approached in order to fix his match with M.; in fact, A. denied that such an approach was made. This, however, does not seem to the Panel to be of itself significant. There

are a number of explanations, all as consistent with the Appellant's guilt as with his innocence, the most obvious being that without M.'s cooperation, no purpose would be served by approaching A. as well.

The Panel therefore accepts the testimony of M. as to the existence and content of the telephone and Skype calls of [...] and as to the fact that he was able to recognise the voice of the Appellant over the phone. There is no apparent reason why M. would try to invent such a story so damaging to the Appellant – and none was successfully advanced by the Appellant either; the Panel discounts the suggestion that M. had himself unsuccessfully invited the Appellant to 'throw' a match when both were juniors.

Furthermore, voice recognition over the phone has been also accepted by the CAS in its award in the *Köllerer* case (cf. para. 113), which was the first case brought before this Court under the UTAP.

## 2.2 The text message [...]

The Panel notes that the content of the text message is undisputed.

The Appellant argued that the mere coincidence of timing of the text messages on his billing records and on M.'s mobile telephone is not sufficiently strong evidence to inculpate him.

The Panel agrees that it cannot be determined from the billing records of the Appellant who was the final recipient of the text message. However, the Panel also notes that the Appellant has made no efforts to prove who that final recipient was - for instance, by requesting information from the mobile telephone service provider or by conducting a forensic examination of his telephone, even if the chances of gathering such information may have been low because of the lapse of time.

The Panel notes that the content of the text message received by M. [...], as well as its relationship in terms of subject matter with the communication that took place [...], convincingly demonstrate that the sender of that text message was the same person who initiated the calls [...].

In addition, as regards the third person scenario put forward by the Appellant, the Panel is of the opinion that it would make little sense, if any, for any such third person to try to approach M. impersonating the Appellant for a second time, given the outcome of his first effort.

The Panel in summary finds that the logical

explanation for both telephone calls and text is that they were initiated by the Appellant and not by any third person. Not only is the Appellant's version entirely speculative but it defies common sense. Why, for example, should a third person having reached M. by telephone [...] hang up and start a new Skype call? The Panel had the advantage of seeing and hearing both the Appellant and, albeit by video conferencing facility only, M.. It does not accept the former's evidence, and does accept the latter's.

### 2.3 The applicable standard of proof

In the light of the above, the Panel concludes that the disputed facts have been proven not only by preponderance of the evidence, but indeed to the Panel's comfortable satisfaction. The evidence provided by the Respondent was sufficiently strong and convincing to persuade the Panel even if applying a higher standard of proof than that required under Article G.3 of the Program.

Therefore, the Panel finds it does not need to determine what standard of proof was required. However it would, given the debate, make these observations.

- Florida law does not seem to prevent an application of preponderance of the evidence as a standard of proof, since it accepts that such a standard does not violate due process (see *The Florida Bar v. Mogil*, 763 So.2d 303 (Fla. 2000)). The same opinion is endorsed in CAS 2011/A/2490, para. 85.
- The comfortable satisfaction standard applied by the Panel is in line with constant CAS jurisprudence and does not constitute a violation of *ordre public*. According to CAS 2011/A/2490, para. 87, even the application of a lower standard of proof, such as the preponderance of the evidence, cannot lead to a violation of public policy.
- The Judgment of the Swiss Federal Tribunal in *Matuzalem v. FIFA*, while acknowledging that public policy has both substantive and procedural contents and is violated when some fundamental legal principles are disregarded (para. 4.1), says nothing more precise about the applicable standard of proof in a case such as the present.
- In principle, the criminal standard "*beyond reasonable doubt*" does not apply in a disciplinary case in the context of a private association. The Swiss Federal Tribunal has pointed out in its review of several CAS decisions that: "*the duty of proof and assessment of evidence are problems which cannot be regulated, in private*

*law cases, on the basis of concepts specific to criminal law*" (2nd civil Division, Judgement of 31 March 1999, 5P.83/1999, para. 3.d).d).

- According to constant CAS jurisprudence in doping cases: "*To adopt a criminal standard (at any rate where the disciplinary charge is not of one of a criminal offence) is to confuse the public law of the state with the private law of an association (...)*" (CAS 98/208, para. 13).

### 3. Proportionality of the sanctions

#### 3.1 The lifetime ban

The Panel takes account of the following matters:

- Pursuant to the provisions of the Program, the AHO has a measure of discretion in setting a sanction.
- According to CAS jurisprudence, the sanction imposed on an athlete must not be disproportionate to the offence and must always reflect the extent of the athlete's guilt (CAS 2001/A/330).
- CAS has accepted in match-fixing cases in football that a life ban can constitute a proportionate sanction because of the damage caused to the integrity and the image of the sport (CAS 2010/A/2172).
- Match fixing is the most serious corruption offence in tennis and a threat to the integrity of professional sport, as well as to the physical and moral integrity of players. It also constitutes a violation of the principle of fairness in sporting competitions.
- In the case at hand, the Appellant tried to corrupt another player.
- Applying a similar reasoning, the Panel in CAS 2011/A/2490, deemed it irrelevant whether a person is successful in actually fixing a match or not (para. 120) and found for the reasons expressed there:
 

*"no option other than to confirm the lifetime ban imposed by the AHO. As explained in detail by the Governing Bodies, the sport of tennis is extremely vulnerable to corruption as a match-fixer only needs to corrupt one player (rather than a full team). It is therefore imperative that, once a Player gets caught, the Governing Bodies send out a clear signal to the entire tennis community that such actions are not tolerated. This Panel agrees that any sanction shorter than a lifetime ban would not have the deterrent effect that is required to*

*make players aware that it is simply not worth the risk. Therefore, the Panel concludes that the sanction of a life ban imposed by the AHO Decision is not disproportionate to the offence” (para. 123).*

The Panel agrees with that reasoning. (Moreover while stare decisis does not apply to CAS decisions, comity suggests that respect ought in any event be paid to previous decisions of obvious relevance).

- In *Matuzalem*, the Swiss Federal Tribunal approached the question of whether disciplinary sanctions violated public policy not *in abstracto*, but by reference to the specific interest the sanctioning sport governing body wishes to pursue.

*“The measures taken by such sport federations which gravely harm the development of individuals who practice the sport as a profession are licit only when the interests of the federation justify the infringement of privacy” (para. 4.3.3 in fine).*

Applying that test in the present case, the interest that the sanctioning authority is seeking to enforce is the protection of the integrity of sport against corruption, a fundamental sporting principle explicitly mentioned in the UTAP provisions. This is a compelling interest to balance against the Appellant’s rights to work unlike the obviously lesser interest of contractual stability sought to be relied on by FIFA in *Matuzalem* to justify a life ban. There are other means to enforce a debt than as lifetime ban; but such a ban is the only truly effective means of purging a sport of corruption.

Therefore for all these reasons, the Panel concludes that the sanction of a life ban imposed by the AHO Decision does not violate public policy and is not disproportionate to the offences committed in the present case.

### 3.2 The fine of USD 100,000

In CAS 2011/A/2490, where, as noted, a professional tennis player was found guilty of match-fixing under the provisions of the UTAP. The Panel upheld the imposed sanction of a lifetime ban on the athlete for the reasons there expressed, but did not confirm the financial penalty of USD 100,000 imposed by the AHO in the contested decision.

In the same award, the Panel expressly acknowledged that any sanction should be sufficiently high to confirm that corruption offences are not taken lightly. It added however that

*“it would be inappropriate to impose a financial penalty in addition to the lifetime ban, as the sanction of permanent ineligibility provides for the deterrence that corruption offences call for” (CAS 2011/A/2490, para. 127)*

taking into account that

*“The lifetime ban also has a considerable financial effect on the Player because it significantly impacts the Player’s future earnings by eliminating tennis as a source of revenue. In this respect, the AHO noted that the Player’s means are limited (...). Indeed, no evidence was put forward that the Player benefited (financially or otherwise) from any of the charges for which he has been found liable” (CAS 2011/A/2490, para. 129).*

In the present case, the Panel is content to adopt the position articulated by the CAS in the *Köllerer* case for the reasons expressed there and, therefore, considers that the life ban in itself is sufficiently severe to reflect the gravity of the corruption offences. The Panel therefore sets aside the part of the AHO Decision imposing a fine of USD 100,000.

The Panel finds, consistently with the AHO, that the Appellant has committed the corruption offences under Articles D.1.c, d and f of the Program.

The Panel finds that the life time ban is not disproportionate given the nature of the offences committed and, therefore, upholds the sanction of life time ineligibility of the Appellant to compete or participate in any event organised or sanctioned by any Governing Body under the Program.

The Panel lifts the fine of USD 100,000 imposed by the AHO Decision.

As a result, for all the above reasons, the Appeal is partially upheld.

Football; bankruptcy of a club; succession of the club; inequity in the football market due to the bankruptcy proceedings; inactivity of the player in the bankruptcy proceedings

Panel:

Mr. José Juan Pintó Sala (Spain), President  
Mr. Hernán Jorge Ferrari (Argentina)  
Mr. Rui Botica Santos (Portugal)

Relevant facts

Club Rangers de Talca (the “*Appellant*”) is a professional football club with seat in Talca (Chile), affiliated to the Chilean Football Federation.

Fédération International Football Association (FIFA; the “*Respondent*”) is an association submitted to Swiss Law governing the sport of football worldwide with seat in Zurich, Switzerland.

On 8 May 2009, the Courts of Talca (Chile) declared the football club “*Club Social y Deportivo Rangers de Talca*” in bankruptcy.

On 18 June 2009, the FIFA Dispute Resolution Chamber (DRC) rendered a decision ordering Club Social y Deportivo Rangers de Talca to pay to its former player Mr Horacio José Chiorazzo (the “*Player*”) the amount of USD 21.000 plus interest.

On 10 September 2009, the Player sent a letter to FIFA requesting the application of disciplinary measures against Club Social y Deportivo Rangers de Talca in light of the failure of such club to pay the amount due within the given deadline.

On 4 August 2010, the Player claimed again that FIFA disciplinary bodies opened proceedings against Club Social y Deportivo Rangers de Talca.

On 10 August 2010, within the referred bankruptcy proceedings followed before the Courts of Talca, the Extraordinary Assembly of Creditors of Club Social y Deportivo Rangers de Talca agreed on the terms for sale, in public auction, of the economic unit composed of the assets of the referred club (the “*Terms*”). Among these Terms, the following are to be highlighted in light of the object of the dispute having given rise to these arbitration proceedings (informal translation):

*General Terms:*

*These terms shall apply to the sale, in public auction to the highest bidder, of the economic unit composed of all the assets seized under the bankruptcy proceedings of CLUB DEPORTES RANGERS DE TALCA.*

(..)

1.2 *Bankruptcy*

*Club de Deportes Rangers de Talca requested the declaration of bankruptcy by virtue of an agreement taken by its General Assembly.*

*The bankruptcy decision was issued by the 3<sup>rd</sup> Court of Talca, in the proceedings 840-2009, on 8 May 2009, folio 167, and was published in the Official Gazette on 27 May 2009, folio 236.*

*Nowadays the decision declaring the bankruptcy is final and binding.*

II *PUBLIC AUCTION*

2.1 *The economic unit is composed of:*

- *Federative Rights at the National Association of Professional Football.*
- *Player’s transfers*
- *Trophies*
- *Sporting equipment, and*
- *All the goods inventoried in the bankruptcy proceedings until the award’s date which are not excluded due to legal reasons during the usual activity of the bankrupt entity. It*



shall be noted that these assets have been subject to regular use and/or consumption derived from the continuity of the ordinary activities of the bankrupt entity.

In this regard, it shall be noted that all the assets to be auctioned are related to Club de Deportes Rangers de Talca, which articles of association still in force were granted in public document dated 28 December 1955, with the purpose of developing and fostering the practice of sport in general and football in particular, promoting the moral and intellectual improvement of the members of the community, looking for the development of the community and the social solidarity among its members, observing the strictest political and religious impartiality.

(...)

2.2 The purchaser shall devote the auctioned assets corresponding to Club Deportivo Rangers Talca to the development of sporting activities.

2.3 Furthermore, the purchaser undertakes to fulfil with the National Association of Professional Football all the pecuniary, administrative, sporting and any other kind of obligations which are currently held by the bankrupt entity and the Professional Sport Fund of Club de Deportes Rangers de Talca and which are in relation, directly or indirectly, to its affiliation to the referred body and the practice of professional sport.

2.4 The following elements are essential, and therefore, the purchaser is obliged to maintain them unaltered and indivisible:

- The image of Club de Deportes Rangers de Talca, its names, badges, hymns, emblems, t-shirts and colours red and black.

- Club de Deportes Rangers shall remain in the city of Talca, as it is traditional, and shall maintain its domicile for sporting events in this city, unless temporary impediment due to act of god or force majeure takes place and only during the period of time in which the impediment exists.

- The purchaser shall respect the name of the institution and shall not use it for political purposes.

(...)

3.1 (...) Furthermore, Act 20.019 stipulates that the foundations, corporations or legal entities which by means of any act, agreement or legal fact acquire or enjoy the same federative right and place in the sporting professional association, are considered as legal successors of the current clubs.

(...)

3.5. The participation in the auction implies the express consent and knowledge of these terms as well as the legal and commercial obligation to be submitted to the conditions, requirements and obligations stipulated therein.

On 19 August 2010, the company Piduco S.A.D.P. ("Piduco") was set up in accordance with Chilean Law, with the following corporate purpose as per article 4 of its articles of association (informal translation):

The company shall have as exclusive purpose the organization, production, commercialization and participation in professional sporting activities or others related to or deriving from them, in the terms stipulated in Act 20019 and its Regulations. To such effects and in accordance with article 17 of Act 20019, the essential assets of the company for the purpose of developing the sporting project of Club de Deportes Rangers de Talca are the following: (a) the federative and association rights of Club de Deportes Rangers de Talca at the Chilean National Association of Professional Football; (b) The image of Club de Deportes Rangers de Talca, its names, badges, hymns, t-shirts and the colours red and black; (c) The sporting premises that the company would build for the execution of the referred project or premises that would use or enjoy for the development of the activities related to Club de Deportes Rangers de Talca.

On 26 August 2010, the public auction of Club Social y Deportivo Rangers de Talca's assets took place. Piduco became the awardee in such auction, offering a price of 550.000.000 Chilean Pesos.

On 25 November 2010, the above-mentioned acquisition of assets was formalized in public document granted before a Notary of Talca.

On 14 June 2011, the Appellant sent a letter to FIFA in the following terms (informal translation):

In response to the letter dated 10 June 2011, referred to FIFA's communication of 7<sup>th</sup> June, regarding the player Horacio José Chiorazzo, we hereby inform you of the following:

1. Club Social y Deportivo Rangers de Talca was declared bankrupt in accordance with Chilean Law. Therefore the bankruptcy receiver sold off all the assets of the entity and PIDUCO S.A.P.D. acquired in public auction the economic unit comprising the participation rights in the Chilean football championship, the use of the name Rangers de Talca and the use of the traditional colors, which are red and white, this being executed on 15 November 2010.

2. The receiver was in charge of selling off the assets of Club Social y Deportivo Rangers de Talca and was also in charge of verifying and challenging the debts that this entity had. As a result, the receiver established a deadline to accredit debts and paid the creditors with the amounts

collected in the sale of assets of the entity.

3. Therefore, PIDUCO SADP, as the owner of the federative rights which were acquired in public auction, has not assumed any prior debt corresponding to Club Social y Deportivo Rangers de Talca or any other debt which is not foreseen in the document of acquisition of the economic unit.

For the above mentioned reasons, I hereby inform FIFA that Club Social y Deportivo Rangers de Talca has no corporate relationship with PIDUCO SADP and the latter has only acquired in public auction the rights mentioned in point 1.

On 15 August 2011, FIFA, in accordance with article 64 of its Disciplinary Code, opened disciplinary proceedings against Club Social y Deportivo Rangers de Talca as regards the failure of such club to comply with the terms of the FIFA DRC's decision dated 18 June 2009 mentioned above.

On 26 August 2011, FIFA informed Club Social y Deportivo Rangers de Talca and the Player that the case would be submitted to the Disciplinary Committee on 13 September 2011 and also granted a final deadline to Club Social y Deportivo Rangers de Talca for the payment of the amount due as regards the DRC's decision dated 18 June 2009.

On 1 September 2011, the Appellant sent a letter to FIFA in the following pertinent terms (informal translation):

*In response to your letter dated 26 August 2011 (...), we hereby inform you that:*

1. Club Social y Deportivo Rangers de Talca was declared bankrupt in accordance with Chilean Law and as such, it does not exist anymore. For your reference, PIDUCO SADP has only acquired the federative rights of the relevant club for competing as such in the championships organized by the Chilean National Association of Professional Football.
2. Therefore, PIDUCO SADP has not assumed any prior debt corresponding to Club Social y Deportivo Rangers de Talca or any other debt that is not provided for in the document of acquisition of the economic unit.

On 6 September 2011, FIFA sent a letter to the Chilean Football Federation asking for some information on the situation of Club Social y Deportivo Rangers de Talca, this request being answered by the referred federation on 12<sup>th</sup> October 2011 in the following terms (informal translation):

1. Is Club Social y Deportivo Rangers de Talca still affiliated to your Federation?

*In order to avoid any terminological or semantic confusion, it shall be clarified that Corporación Civil Club Social y Deportivo Rangers de Talca, to which this answer refers to, is not affiliated to this Association anymore as it was declared bankrupt, being it acquired by new owners.*

2. Does the Chilean Football Federation recognize Club Rangers de Talca as the owner of the Federative Rights of the Club Social Rangers de Talca?

*I refer to my precedent answer.*

3. Once the winding up proceedings of the Club Social Rangers de Talca have ended, does Club Rangers de Talca remain in the same division than the winded-up club?

*The bankruptcy proceedings are still ongoing. Rangers de Talca is nowadays a new entity (PIDUCO SADP) that competes in the same category of the bankrupt club.*

*Furthermore, PIDUCO SADP is not a successor and it did not assume any liability or claim which corresponds to the bankrupt entity Club Social Rangers de Talca, being all those issues object of the referred bankruptcy proceedings and, thus, it has no link or corporate, economic, sporting or disciplinary relationship with such entity. Both are different legal entities.*

4. Did Club Rangers de Talca maintain the same name, colors and sporting rights of the players that previously belonged to Club Social Rangers de Talca?

*PIDUCO S.A.D.P. maintained the same sporting purposes, name and colours of the bankrupt club but it did not assume the sporting right of the players, who terminated their labour relationship due to the bankruptcy of the precedent club.*

*In accordance with our records, the current Club Deportivo has no relationship of any kind with the claimant in these proceedings.*

On 13 October 2011, the FIFA Disciplinary Committee passed the following decision (the "Decision") in the proceedings opened on the basis of article 64 of the FIFA Disciplinary Code (informal translation):

1. Club Rangers de Talca is found guilty of failing to comply with a decision of a FIFA body in accordance with art. 64 of the FDC.

2. *Club Rangers de Talca is ordered to pay a fine for an amount of CHF 2,000. The fine is to be paid within 30 days of notification of the decision.*
3. *The debtor is granted a final period of grace of 30 days as from notification of the decision to settle the debt.*
4. *If payment is not made within this deadline, the creditor may demand in writing from FIFA that three (3) points be deducted from the debtor's first team in the domestic championship. Once the creditor has filed this request, the points will be deducted automatically without a further formal decision having to be taken by the FIFA Disciplinary Committee. The order to implement the points' deduction will be issued to the association concerned by the secretariat to the FIFA Disciplinary Committee.*
5. *If the debtor still fails to pay the amount due even after deduction of the points in accordance with point III./4., the FIFA Disciplinary Committee will decide on a possible relegation of the debtor's first team to the next lower division.*
6. *As a member of FIFA, the Chilean Football Federation is reminded of its duty to implement this decision and, if so requested, provide FIFA with proof that the points have been deducted. If the Chilean [sic.] Football Federation does not comply with the decision despite being ordered to do so, the FIFA Disciplinary Committee will decide on appropriate sanctions on the member. This can lead to expulsion from all FIFA competitions.*
7. *The costs of these proceedings amounting to CHF 500 are to be borne by the debtor. The costs shall be paid according to modalities established under point III./2. above.*
8. *The creditor is directed to notify the secretariat to the FIFA Disciplinary Committee of every payment received.*

FIFA mainly grounds this Decision in the fact that even if Club Social y Deportivo Rangers de Talca became bankrupt, the sanction based on article 64 of the FIFA Disciplinary Code is extendable to the Appellant as sporting successor of the former entity, given that it (i) has recognized being the owner of the federative rights of the former club, (ii) competes in the same category of the former club, (iii) maintains the name, badge, and colours of the former club and (iv) assumes as its own history the one of the former club.

On 23 November 2011, the Appellant filed the relevant Statement of Appeal against the Decision before the CAS, and a request for provisional measures (stay of execution of the Decision), which afterwards was withdrawn given that the Respondent

did not oppose to the referred stay.

On 5 December 2011, the Appellant filed its Appeal Brief before the CAS, in which it requested the CAS (informal translation):

1. *The decision of the FIFA Disciplinary Committee is left without effect.*
2. *PIDUCO S.A., CLUB RANGERS DE TALCA is not liable for the payment of the labour debt to the player Horacio Chiorazzo.*
3. *There is no legal ground under Swiss Law (art 333. CO) for extending to PIDUCO S.A. the liability for the labour debts accrued before the bankruptcy of the Asociación Civil Rangers.*
4. *PIDUCO S.A., CLUB RANGERS DE TALCA acquired the federative registry of the club, being obliged to use the name, records and colours, in a public auction celebrated within the frame of bankruptcy proceedings, in which it was established -with res judicata nature- that PIDUCO SA would not assume any of the debts prior to the acquisition in auction.*
5. *Therefore, the fine of CHF 2.000 is also left without effect (point 2 of the appealed decision).*
6. *Therefore, the sanction of 3 points deduction if the payment to Chiorazzo is not verified within 30 days (point 4 of the appealed decision), is left without effect.*
7. *All other sanctions provided for and/or envisaged by the appealed decision (points 5 and 6 of the appealed decision) are left without effect.*
8. *The costs of the disciplinary proceedings (CHF 500, point 7 of the appealed decision) are left without effect.*
9. *The costs of the present proceedings shall be borne by FIFA in its entirety, as well as an amount of CHF 10.000 as contribution for the costs incurred by the Appellant.*

On 9 January 2012, FIFA filed its answer to the Appeal Brief, in which it requested the CAS to render an award in the following terms:

1. *To reject the Appellant's requests' for relief in their entirety.*
2. *To confirm the decision hereby appealed.*
3. *To order the Appellant to bear all costs incurred with the present procedure and to cover all legal expenses of the Respondent related to the present procedure.*

A hearing took place in Lausanne on 20 March 2012.

## Extracts from the legal findings

### A. The object of the dispute

According to the parties' written submissions and the arguments raised by them in the hearing, the object of the dispute may be briefly summarized as follows:

- (i) The Appellant considers that the Decision should be set aside as, in its opinion, the sanction imposed therein (a) does not refer to it, but to a club (Club Social y Deportivo Rangers de Talca) which does not exist anymore, and (b) is not extendable to the Appellant, which is a different entity that only purchased assets from the former extinct club.
- (ii) The Respondent claims that the Decision, based on article 64 of the FIFA Disciplinary Code, be confirmed, essentially on the basis that the Appellant is a mere successor of Club Social y Deportivo Rangers de Talca and thus the sanction imposed in the Decision has to be served by it.

### B. Club Social y Deportivo Rangers de Talca vs. Club Rangers de Talca (Piduco). Succession

In light of the argumentation followed by FIFA in its Decision, the Panel shall start its considerations and the examination of the *quaestio litis* by determining if the Appellant is to be considered a successor of Club Social y Deportivo Rangers de Talca, the entity which was ordered by the FIFA DRC to pay the sum of 21.000 USD to the Player and against which the disciplinary proceedings under article 64 of the FIFA Disciplinary Code were opened.

In this respect the Panel, after examining the facts and evidence brought to the proceedings, has noted that:

- (i) Piduco was set up with the specific purpose of acquiring the assets of Club Social y Deportivo Rangers de Talca. The terms of Piduco's incorporation deed are crystal clear in this regard.
- (ii) The Appellant acquired from Club Social y Deportivo Rangers de Talca, within the frame of the bankruptcy proceedings followed before the Courts of Talca, the "*economic unit composed of all the assets seized under the bankruptcy proceedings of CLUB DEPORTES RANGERS DE TALCA*, this including (i) *Federative Rights at the National*

*Association of Professional Football, (ii) Player's transfers, (iii) Trophies, (iv) Sporting equipment and (v) All the goods inventoried in the bankruptcy proceedings until the award's date which are not excluded due to legal reasons during the usual activity of the bankrupt entity*", with the purpose of devoting such economic unit to the development of sporting activities (clauses 2.1 and 2.2 of the Terms).

- (iii) In the referred acquisition, the Appellant accepted and committed itself to maintain unaltered "*the image of Club de Deportes Rangers de Talca, its names, badges, hymns, emblems, t-shirts and colours red and black*" (clause 2.4 of the Terms), and in fact it complied with this commitment, at least according to the parties' statements and the evidence taken in these proceedings.
- (iv) After the acquisition of assets and until today's date, Club Rangers de Talca remained in the city of Talca as requested in the Terms (clause 2.4).
- (v) Clause 3.1 of the Terms expressly states in pertinent part that "*Act 20.019 stipulates that the foundations, corporations or legal entities which by means of any act, agreement or legal fact acquire or enjoy the same federative right and place in the sporting professional association, are considered as legal successors of the current clubs*" [emphasis added].
- (vi) Clause 2.3 of the Terms foresees the obligation of the assets' purchaser of fulfilling some commitments of the bankrupt entity (not all of them, as FIFA wrongfully holds in its answer to the appeal, but some of them):

*"Furthermore, the purchaser undertakes to fulfil with the National Association of Professional Football all the pecuniary, administrative, sporting and any other kind of obligations which are currently held by the bankrupt entity and the Professional Sport Fund of Club de Deportes Rangers de Talca and which are in relation, directly or indirectly, to its affiliation to the referred body and the practice of professional sport"* [emphasis added].

In the same line, the Panel shall underscore that Club Rangers de Talca took the position formerly held by Club Social y Deportivo Rangers de Talca in the Chilean sporting institutions and championships. In fact, one of the assets acquired by Piduco is the "*federative rights in the Asociación Nacional de Fútbol Profesional*". This has been confirmed by the Appellant in (i) its letter of 14 June 2011, in which it is stated that the Appellant acquired from Club Social y Deportivo Rangers de Talca "*the participation rights in the Chilean football championship*", and (ii) in its letter of 1<sup>st</sup> September 2011, in which the Appellant

acknowledges to have “*acquired the federative rights of the relevant club for competing as such in the championships organized by the Chilean National Association of Professional Football*”. The Chilean Football Federation, in its letter of 30 September 2011, confirmed this position as well.

All the above-mentioned considerations have led the Panel to conclude that indeed, the Appellant is to be understood as a successor of Club Social y Deportivo Rangers de Talca. It is clear for the Panel that with the assets purchased to Club Social y Deportivo Rangers de Talca, it continued the activity formerly developed by the referred club with the same image, badge, hymn, representative colours, emblems and placement, and is on the basis of the federative rights acquired in the auction that it has been participating, and currently participates, in the Chilean competitions replacing the former club. In other words and in practice, the “new club” took the position and activities performed by the former one, with the consent and approval of the Chilean Football Federation.

It is precisely on the basis of this situation of succession that FIFA, even if it was entitled (not obliged) to close disciplinary proceedings under article 107 of the FIFA Disciplinary Code in light of the situation of bankruptcy of Club Social y Deportivo Rangers de Talca, could legitimately decide to continue with such proceedings as it did, being unacceptable, in the Panel’s view, that in this case FIFA was compelled to drop or close the case by any customary practice on the application of the mentioned article 107, which in addition, if such practice exists, has not been sufficiently proven by the Appellant.

### **C. Effects of the succession in the case at stake. Does it necessarily mean that the Appellant is to be sanctioned?**

The next issue to be addressed by the Panel is if in spite of its quality of successor of Club Social y Deportivo Rangers de Talca, the Appellant is to be sanctioned in the way foreseen in the Decision or not.

#### **1. General considerations**

In this respect, the Panel shall firstly recall that the sanction imposed in the Decision is based on the previous failure to comply with a FIFA order to pay a sum deriving from a labour credit.

In accordance with Swiss Law, and in particular with article 333 para. 3 of the Swiss Code of Obligations, the new employer (acquirer) and the former employer (transferor) are joint and severally liable for any claims

of an employee which fell due prior to the transfer of the company or of part of it (“*L’ancien employeur et l’acquéreur répondent solidairement des créances du travailleur échues dès avant le transfert jusqu’au moment où les rapports de travail pourraient normalement prendre fin ou ont pris fin par suite de l’opposition du travailleur*”).

Taking this provision into account, in the case at stake one could hold that the Appellant, which acquired an “*economic unit*” from Club Social y Deportivo Rangers de Talca, should be liable for labour debts of such former club, and that the effects of the failure to pay these debts (*i.e.* sanctions under article 64 of the FIFA Disciplinary Code) should be also applied on it as successor.

Against the above-explained position the Appellant has argued that in this specific case, the fact that the sanctioned club was in bankruptcy makes a difference and prevents the application of the effects of the succession on the Appellant (*i.e.* the sanction imposed by Decision).

The Appellant intends to rely on a Decision of the Swiss Federal Court (ATF 129 III 335) related to article 333 of the Swiss Code of Obligations (the “*TF Decision*”), which considers that an exception to the cited principle of succession has to be made in certain cases of acquisition of bankrupt entities (informal translation):

*The purchaser of a company which keeps the employees which contracts existed before the re-activation is not liable for pending salary credits which have become demandable before the re-activation, if such re-activation takes place following the bankruptcy of the former employer.*

After analyzing this argument raised by the Appellant, the Panel cannot share its view on the non-applicability of the Decision on the Appellant based on the cited alleged exception to the general principle of succession in cases of bankruptcy, mainly for the following reasons:

- (i) The Panel is not persuaded that the exception gathered in the TF Decision shall apply to the present case, as the circumstances of one case and the other are neither equivalent nor completely comparable. In our case, the transaction involved was a transfer of assets from a bankrupt entity to a newly incorporated company (and not of a bankrupt company or entity), and no re-activation of the transferring entity (Club Social y Deportivo Rangers de Talca) took place – in fact it was not possible, as this entity disappeared and did not exist anymore. Needless to say that only this TF Decision, and

not broad and consolidated Swiss jurisprudence, has been brought by the Appellant to sustain its position.

- (ii) In any case, at the time of the opening of the disciplinary proceedings (August 2011), the situation of bankruptcy had been removed months ago, and thus payment of credits were at that time not restricted at all by legal provisions ruling the bankruptcy proceedings.

The Panel is aware that in most bankruptcy legal systems worldwide (including the Chilean “*Ley de Quiebras*”), a bankrupt entity, while the bankruptcy proceedings are still going on, cannot freely pay the debts accrued before the declaration of bankruptcy, this mainly as regards the general principle of *par conditio creditorum*. In fact, in the last times it is not unusual to see in the market of football that clubs which are declared bankrupt become, in accordance with the national laws ruling the bankruptcy proceedings, prevented from paying their debts in an immediate and entire manner. This situation is logically provoking undesired inequities in the referred market at international level, where clubs in bankruptcy enjoy the privileges of the bankruptcy proceedings while the other clubs are forced to honour their commitments in full and timely manner, all of them playing in the same competitions. Such inequity of treatment and opportunities is clearly against the essential principles of the so-called “*lex sportiva*”.

It may be thus discussible that a club which in accordance with its national laws, is not allowed to make payments due to its situation of bankruptcy, can be sanctioned as regards a failure to pay something which it is not allowed to pay, but this is not the case hereto, as no restriction to the capacity to pay could take place in August 2011, as the bankruptcy proceedings had finalized well before (it shall be recalled that the sale of assets was formalised in public deed on 25 November 2010). In other words, it was on the Appellant’s hands to pay and avoid the sanction, not being limited by any legal prohibition or restriction.

Therefore, in the Panel’s opinion, the Appellant, successor of the entity obliged to the payment of the labour debt ordered in the FIFA DRC in its Decision of 18 June 2009, (i) became bound to pay such debt, (ii) was not legally prevented from paying it and (iii) thus, should, at least theoretically, bear the consequences of such failure to pay.

In line with the above-mentioned, the Panel resolves that the requests for relief contained in points 2, 3 and 4 of the Appeal’s brief petition, even if it is discussible that a decision on them shall be rendered given its declarative nature and the scope of this appeal (confirm or revoke a sanction), are in any case to be dismissed.

## 2. *In casu*

At this stage, the Panel shall decide if in this particular case and in spite of the considerations made above, the Appellant shall bear the consequences (sanctions) foreseen in the Decision.

For the reasons explained below, the Panel considers that it shall not.

The Panel shall remind again in this respect that the Decision, and the sanctions imposed therein under article 64 of the FIFA Disciplinary Code, are based on the previous failure of a club to comply with an order of FIFA to pay a labour credit to a player.

Having this in mind, in accordance with the letter sent by the Player to FIFA on 10 September 2009, the Panel deems undisputed that the Player (i) knew from the very beginning about the existence of the bankruptcy proceedings and (ii) even declared his intention to claim for his credit in these proceedings. This letter, in pertinent part, reads as follows (translation into English):

*We hereby inform FIFA that this party has notified the Respondent and this Respondent has informed us about its inability to pay the amounts due as it is under bankruptcy proceedings before the Ordinary Court of Talca.*

*This statement leads us to request that this issue is dealt with in the Disciplinary Committee.*

*Furthermore, should these requests or sanctions of the Disciplinary Committee have no effect, we request to be provided with the decision of the Dispute Resolution Chamber in writing, with the apostille of The Hague, by regular post to Sarmiento 1574, piso 3° of “D” (CP 1042) of Buenos Aires in order to allow this player (regardless the actions that FIFA could take) to file its claim before the Court dealing with the bankruptcy of the condemned club.*

It is also clear that in accordance with Chilean Law (and in particular with article 148 of the “*Ley de Quiebras*” and article 2472 of the Chilean Civil Code), the salary credits, as it happens in other bankruptcy legal systems like the Swiss one, are considered privileged credits in the bankruptcy proceedings, that is to say, with priority of recovery before the ordinary

ones, and are claimable within the bankruptcy proceedings.

This being said, in accordance with the evidence taken in these proceedings (*i.e.* the letter of the bankruptcy's receiver – "*sindico*" – dated 6 March 2012, not challenged by FIFA), the Player apparently decided not to claim for his labour debt in the bankruptcy proceedings, in spite of (i) being aware of these proceedings and (ii) having announced his intention to do so.

This, in the Panel's opinion, is to be considered as a lack of diligence of the Player in recovering his credit that shall have an impact in the present case.

It has been proven in the present proceedings that the Appellant paid a considerable amount of money to acquire the assets of the bankrupt entity, and that this amount was used to pay the credits of such entity. The Player, who held a privileged labour credit, could thus have moved forward to recover such priority credit from this amount arising out of the assets' sale, but he failed to do so.

Therefore, the Player somehow contributed not to remove the prerequisite leading to the sanction imposed on the Decision: the lack of payment of the debt ordered in the FIFA DRC decision of 18 June 2009. His inactivity did not foster the recovery of the debt and hence the elimination of the circumstances of fact which gave rise to the sanction imposed by the Decision.

At the present stage the Panel cannot ascertain if the Player would have received the sum of his credit in case he had duly claimed for it in the bankruptcy proceedings, but it was at least a feasible theoretical possibility that could have happened (especially taking into account the privileged nature of his credit) and which would have provoked that the order of payment issued by the FIFA DRC was complied and thus, that the sanction imposed in the Decision became groundless. The Panel is of the view that the Player should have explored such possibility, should have communicated his credit in the bankruptcy proceedings as he previously announced, should have tried to get the money and not simply remain passive, additionally pretending that disciplinary sanctions are imposed irrespective of his diligence or negligence in trying to achieve a result (recovery of the debt) that would remove the ground of the sanction.

In this state of affairs, the Panel considers that no sanction shall be applied in this case.

Therefore, in this specific case and given the

particularities described above, the Panel resolves that the Decision shall be revoked and thus that the sanctions imposed on the Appellant therein are left without effect.

Doping; Legal nature of the WADA Code; purpose of the WADA Code; meaning of a sanction according to the WADA Code; appeal procedure at national level and non-compliance with the WADA Code; inconsistency of a regulation of a National Olympic Committee (NOC) with the WADA Code

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**Panel:**

**Prof. Richard H. McLaren (Canada), President**

**Mr. Michele A.R. Bernasconi (Switzerland)**

**Mr. David W. Rivkin (USA)**

**Relevant facts**

The British Olympic Association (BOA or the “*Appellant*”) is the National Olympic Committee of the United Kingdom (UK), responsible for UK Olympic Teams. It is a company incorporated under the laws of England with registered company number 01576093. Its address is 60 Charlotte Street, London W1T 2NU.

The World Anti-Doping Agency (WADA or the “*Respondent*”) is a Swiss private law foundation whose headquarters is in Montréal, Canada, but whose seat is in Lausanne, Switzerland. WADA is the global regulator of the World Anti-Doping Agency Code (WADA Code).

This Award concerns a Bye-Law that the BOA adopted about twenty years ago and has been amended several times since; the most recent version is in force since 1 January 2009. The Bye-Law essentially provides that any British athlete “*who has been found guilty of a doping offence ... shall not ... thereafter be eligible for consideration as a member of a Team GB or be considered eligible by the BOA to receive or to continue to benefit from any accreditation as a member of the Team GB delegation for or in relation to any Olympic Games, any Olympic Winter Games or any European Olympic Youth Festivals*” (the “*Bye-Law*”).

WADA challenged the Bye-Law following and on

the basis of an award of the Court of Arbitration for Sport (CAS) issued by a panel on 4 October 2011: *U.S. Olympic Committee v. International Olympic Committee*, CAS 2011/O/2422 (the “*USOC Award*”). The USOC Award, which is described in more detail below, considered the validity of a rule of the International Olympic Committee according to which “*any person who has been sanctioned with a suspension of more than six months by any anti-doping organization for any violation of any anti-doping regulations may not participate ... in the next edition of the Games of the Olympiad and of the Olympic Winter Games following the date of expiry of such suspension*” (the “*IOC Regulation*”). The USOC Award held that the IOC Regulation was invalid and unenforceable because it violated Article 23.2.2 of the WADA Code, which provides that a Signatory must implement enumerated Articles of the Code “*without substantive change*” and that no Signatory to the WADA Code may “*add additional provisions*” to its rules “*which change the effect of ...*” the enumerated Articles. The IOC Regulation was found to have changed the substance of the sanctions imposed in the WADA Code.

After the USOC Award was issued, the WADA Foundation Board reviewed at its 20 November 2011 meeting in Montréal, Canada, a document entitled “*WADA Compliance Report*” (the “*Compliance Report*”) and available at the website of WADA. The Compliance Report, under the heading “*National Olympic Committees*”, stated the following: *The BOA’s non-compliance is based on the Court of Arbitration for Sport (CAS) decision of October 4, 2011 that advised the International Olympic Committee (IOC) that its Rule 45 was non-compliant because it was, in effect, a double sanction. In light of this ruling, the BOA’s bye-law number 74 [sic: 7.4] renders the BOA non-compliant.*

Therefore, in a letter dated 21 November 2011, WADA advised the BOA “*... that the British Olympic Association has been determined to be non-compliant with the (WADA) Code because your rule on selection for the Olympic Games is an extra sanction, and non-compliant for the same reason the IOC eligibility rule was deemed non-compliant by the Court of Arbitration for Sport*”. This determination constitutes the decision against which BOA appeals in this proceeding (the “*Decision*”).

As noted above, the Bye-Law has been in effect for about twenty years, including for more than 10 years



before the WADA Code was introduced in March 2003 (and came into effect on 1 July 2004). The current revised version of the Bye-Law has been in effect since 1 January 2009.

The present Bye-Law, titled “Bye-Law of the National Olympic Committee: Eligibility for Membership of Team GB of Persons Found Guilty of a Doping Offence” contains six recitals and reads, in part, as follows:

- “1. Any person who has been found guilty of a doping offence either
- (i) by the National Governing Body of his/her sport in the United Kingdom; or
  - (ii) by any sporting authority inside or outside the United Kingdom whose decision is recognised by the World Anti-Doping Agency (a “Sporting Authority”)

*shall not, subject as provided below, thereafter be eligible for consideration as a member of a Team GB or be considered eligible by the BOA to receive or to continue to benefit from any accreditation as a member of the Team GB delegation for or in relation to any Olympic Games, any Olympic Winter Games or any European Olympic Youth Festivals”.*

...

Paragraphs 2 through 7 provide for the establishment of an Appeals Panel (“AP”) and the procedures to be followed “to consider any appeal by a person made ineligible pursuant to paragraph 1 above” (the text of the By-Law is set out in detail below under “applicable law”).

Since March 1992, a number of British athletes have been ineligible for selection for the Olympic Games as a result of the Bye-Law. Leaving aside equine cases relating to the doping of horses, to date there have been 25 appeals under the procedures described in paragraphs 2 through 7 of the Bye-Law. All but one of the 25 athletes who appealed the effect of the Bye-Law have been successful in having the application of the Bye-Law ameliorated. Two athletes (Dwain Chambers, sprinting, and David Millar, cycling) affected by the Bye-Law never activated the AP process, and one (Carl Myerscough, shot put) was unsuccessful in commencing the AP process.

Prior to the hearing in this matter, the most recent oral hearing in a non-equine appeal under the Bye-Law had been that of Christine Ohuruogu (“*Ohuruogu*”). In December 2007, Ohuruogu had received a one-year ban for a third missed doping control test. Ohuruogu successfully invoked the Bye-Law appeal process, so she could represent the country as part of Team GB

after her one year ban was served (Decision of the Appeal Panel of the British Olympic Association, dated 4 December 2007).

As part of the implementation of the 2009 version of the WADA Code, each National Olympic Committee (NOC) had to present to WADA its WADA Code compliant anti-doping rules (WADA Code Article 20.4.1 and 2.4.2). On 11 February 2008, the BOA submitted to WADA a draft of its anti-doping rules, which included a reference to the Bye-Law. In a letter dated 3 March 2009, WADA advised the BOA that: “... the Rules are **in line** with the 2009 World Anti-Doping Code. This correspondence therefore constitutes your assurance that the Rules are in line with the 2009 World Anti-Doping Code”. [Emphasis Added].

Therefore, on 11 March 2009, the BOA accepted the revised 2009 WADA Code as a Signatory. On that day, the BOA adopted a “Bye-Law Relating to Anti-Doping” (the “*Anti-Doping Bye-Law*”). The Anti-Doping Bye-Law refers to and incorporates in Rule 7.4 the Bye-Law under consideration in this matter in the following manner:

“7.4 Any Person who is found to have committed an Anti-Doping Rule violation will be ineligible for membership or selection to the Great Britain Olympic Team or to receive funding from or to hold any position with the BOA as determined by the Executive Board in accordance with the BOA’s Bye-Law on Eligibility for future membership of the Great Britain Olympic Team”.

From March 2009 until the USOC Award of 4 October 2011 was issued, both Parties acted under the presumption that the Bye-Law was not contrary to the WADA Code. However, in a letter dated 7 October 2011, the day following the publication of the USOC Award, WADA wrote to the BOA about the impact of that award. WADA stated that it had previously viewed the Bye-Law as being a selection policy and not an anti-doping rule and therefore not falling within the scope of the WADA Code. This position had been consistent with WADA’s view that Rule 45 of the Olympic Charter had been considered by the IOC to be an ineligibility rule and not a sanction. However, WADA elaborated that because the USOC Award “has determined Rule 45 to be non-compliant with the Code, [i]t is possible that your selection policy [i.e. the Bye-Law] now falls into the same category” (In the 8 July 2011 version of the Olympic Charter (OC), Rule 45 is renumbered as Rule 44). WADA invited the BOA to consider the Bye-Law in light of the USOC Award (WADA sent similar letters to the NOCs of Canada, Denmark and New Zealand, which had provisions similar to the IOC Regulation. These NOCs subsequently abandoned their respective rules

following the CAS decision in the USOC Award. None of the remaining 199 NOCs in the Olympic movement has ever adopted a provision similar to the BOA Bye-Law, except for Norway, which dropped it upon the introduction of the 2003 version of the WADA Code).

Following this letter, there was various correspondence between the BOA and WADA, in which the BOA took the position that the Bye-Law was a selection policy and neither a rule of ineligibility nor a sanction, and that it therefore did not fall within the scope of the WADA Code. The BOA also noted that, as WADA had itself noted in its 7 October 2011 letter, WADA had previously found the Bye-Law to be compliant with the WADA Code.

As noted above, on 20 November 2011, the WADA Foundation Board found that the Bye-Law was not compliant with the WADA Code, and WADA so advised the BOA on 21 November 2011.

On 12 December 2011, the BOA filed an appeal against the Decision with the CAS in accordance with Article R47 of the 2010 Edition of the Code of Sport-related Arbitration and Mediation Rules (the CAS Code).

In the Statement of Appeal, the BOA advised the CAS that the Parties had agreed to a timetable for the filing of the Appeal Brief, including a request to extend the time for filing and to have a second round of written submissions. These and other interim relief matters were set out in the Statement of Appeal and were the subject of agreement by the Parties or disposal by CAS or by the Panel.

The Parties executed a Procedural Order on 12 January 2012, which was subsequently amended by agreement of counsel for the Parties and the Panel on 3 February 2012.

The BOA filed its Appeal Brief on 13 January 2012. It sought the following relief pursuant to Articles R57 and R64.5 of the CAS Code:

*The annulment of the WADA Decision;*

*The issue of a new Decision replacing the WADA Decision, to the effect that:*

1. *The BOA's rule on selection for the Olympic Games is not an extra sanction for commission of a doping offence contrary to the WADA Code;*
2. *The BOA is therefore compliant with the WADA Code;*

*Costs (At the Hearing, the BOA stated that its preferred position was that each party bear its own costs).*

WADA filed its Answer Brief on 10 February 2012. Its requests for relief were as follows:

*The Bye-Law is correctly characterized as a doping sanction additional to those set out in Code Article 10;*

*The BOA Bye-Law is therefore contrary to Code Article 23.2.2;*

*The BOA is therefore non-compliant with the Code;*

*The WADA Foundation Board's Decision is therefore correct, and the BOA's appeal should be dismissed in its entirety;*

*In accordance with Article R65.3 of the CAS Code, the BOA should be required to pay the costs that WADA has been forced to incur on this appeal (which have been unnecessarily increased by the voluminous and largely irrelevant submissions and evidence submitted by the BOA on this appeal); and finally*

*The fees and costs of the CAS Panel should be borne by the CAS, in accordance with Article R65.2 of the CAS Code.*

#### Extracts from the legal findings

### A. Applicable Law

Article R58 of the CAS Code provides as follows:

*The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*

The “applicable regulations” within Article R58 of the CAS Code are those of the WADA Code, the Bye-Law and the BOA Anti-Doping Bye-Law.

The BOA submitted that the WADA Code should be interpreted according to the special principles applicable to international treaties between state parties. WADA submitted the applicable principles are those of the private law of contract. The Panel held in the USOC Award at paragraph 8.21 that “the WADA Code is neither a law nor an international treaty. It is rather a contract instrument binding its signatories in accordance with private international law”. The Panel is applying its prior conclusion to this proceeding.

Both Parties agree that the Bye-Law is governed by

and is to be construed in accordance with English law.

The Bye-Law reads in full:

*“Bye-law of the National Olympic Committee: Eligibility for Membership of Team GB of Persons Found Guilty of a Doping Offence*

*Whereas*

- (i) the British Olympic Association (the “BOA”) is responsible for the selection of athletes and other support personnel to represent Great Britain and other territories as specified by the International Olympic Committee (“Team GB”);*
  - (ii) the BOA strongly disapproves of doping in sport and does not regard it as appropriate that Team GB should include athletes or other individuals (including but not limited to coaches, medical and administrative staff) who have doped or been found guilty of a doping offence including but not limited to the supply or trafficking of prohibited substances;*
  - (iii) the BOA, in compliance with the World Anti-Doping Code (“the WADC”), recognizes adjudication of competent authorities under the WADC by not selecting athletes or other individuals for accreditation to Team GB while they are subject to a ban from competition under such adjudications;*
  - (iv) the BOA does not regard it as appropriate to select athletes or other individuals for accreditation to Team GB who have at any point committed a serious doping offence involving fault or negligence and without any mitigating factors;*
  - (v) the BOA regards it as appropriate to take as a starting point that any athlete or individual guilty of a doping offence at any point should be ineligible for selection for Team GB, but to provide that an athlete or individual who can establish before an Appeals Panel that on the balance of probabilities his or her offence was minor or committed without fault or negligence or that there were mitigating circumstances for it, may be declared eligible for selection;*
  - (vi) the BOA has accordingly adopted this bye-law.*
- 1. Any person who has been found guilty of a doping offence either*
    - (i) by the National Governing Body of his/her sport in the United Kingdom; or*
    - (ii) by any sporting authority inside or outside the United*

*Kingdom whose decision is recognised by the World Anti-Doping Agency (a “Sporting Authority”)*

*shall not, subject as provided below, thereafter be eligible for consideration as a member of a Team GB or be considered eligible by the BOA to receive or to continue to benefit from any accreditation as a member of the Team GB delegation for or in relation to any Olympic Games, any Olympic Winter Games or any European Olympic Youth Festivals.*

- 2. The Executive Board of the BOA shall establish an Appeals Panel made up of three individuals (two of whom shall be drawn from members of the Executive Board or elsewhere and the third of whom, the chairman, shall be appointed by the Sports Dispute Resolution Panel (SDRP)) to consider any appeal by a person made ineligible pursuant to paragraph 1 above. The respondent to the appeal will be the British Olympic Association. None of the members of an Appeals Panel shall (a) be from or connected with the National Governing Body of the appellant, (b) have presented an appeal under this bye-law for an/or on behalf of the BOA or (c) discuss any appeal in progress with any member of the BOA, the BOA Executive Board or the National Olympic Committee unless such member is a member of such an Appeals Panel hearing such an appeal.*
- 3. The Executive Board shall instruct the SDRP to act as secretariat to the Appeals Panel. The costs associated with SDRP carrying out its duties as secretariat will be borne by the BOA.*
- 4. The Appeals Panel shall first consider written submissions by or on behalf of the appellant and the respondent and shall, where possible, render its decision based on those submissions. If the Appeals Panel is not minded to allow an appeal based on written submissions or if requested by an appellant the Appeals Panel shall allow the parties to appear in person and/or be represented before it. Subject thereto, it shall regulate its own procedure as set out in the BOA’s Rules for the Appeal Panel under the BOA Bye-law (in force at the time any appeal is commenced).*
- 5. A person made ineligible pursuant to paragraph 1 above may appeal on one or more of the following grounds (but not otherwise)*
  - (i) the doping offence was minor; or*
  - (ii) for an offence that was committed after the WADC came into force and was adopted by the relevant body, that there was a finding of no fault or negligence or of no significant fault or negligence in respect of the doping offence; or*
  - (iii) the appellant can show that, on the balance of probabilities, significant mitigating circumstance existed in relation to*

the doping offence.

In the event of a successful appeal, the Appeals Panel shall restore eligibility for selection at such time and subject to such conditions as it considers appropriate.

6. In determining whether a doping offence is minor for the purposes of paragraph 5 above, the Appeals Panel shall take account of the Olympic Movement Anti-Doping Code or the World Anti-Doping Code in force at the time the offence was committed (the “Codes”) and the rules relating to doping of the National Governing Body or the International Federation of the appellant. The Appeals Panel shall consider as minor any offence which under the Codes carries a suspension of less than or equal to six months.
7. In determining whether significant mitigating circumstances exist the Appeals Panel shall take account of all relevant facts and matters including any circumstances permitting greater leniency under the Codes. The Appeals Panel shall not consider as a significant mitigating circumstance (without more) any admission of guilt by or on behalf of the appellant.
8. The above provisions apply only to persons found guilty of a doping offence as referred to in paragraph 1 above committed on or after 25th March 1992.
9. Each National Governing Body in membership of the BOA shall inform the Chief Executive of the BOA forthwith of the name of any person found guilty under the rules relating to doping of that National Governing Body or any Sporting Authority and supply a certified copy of the decision of the body making such findings and, where possible, a full transcript of the proceedings.

This bye-law was passed by the National Olympic Committee on 25th March 1992 and modified on 25th March 1998, 14 February 2001 and 3 November 2004”.

WADA Code, Article 23.2.2, reads as follows:

“The following Articles (and corresponding Comments) as applicable to the scope of the anti-doping activity which the Anti-Doping Organization performs must be implemented by Signatories without substantive change (allowing for any non-substantive changes to the language in order to refer to the organization’s name, sport, section numbers, etc.):

- Article 1 (Definition of Doping)
- Article 2 (Anti-Doping Rule Violations)
- Article 3 (Proof of Doping)

- Article 4.2.2 (Specified Substances)
- Article 4.3.3 (WADA’s Determination of the Prohibited List)
- Article 7.6 (Retirement from Sport)
- Article 9 (Automatic Disqualification of Individual Results)
- Article 10 (Sanctions on Individuals)
- Article 11 (Consequences to Teams)
- Article 13 (Appeals) with the exception of 13.2.2 and 13.5
- Article 15.4 (Mutual Recognition)
- Article 17 (Statute of Limitations)
- Article 24 (Interpretation of the Code)
- Appendix 1 – Definitions

No additional provision may be added to a Signatory’s rules which changes the effect of the Articles enumerated in this Article”.

WADA Code, Article 10.2, reads as follows:

“Ineligibility for Presence, Use or Attempted use, or Possession of Prohibited Substances and Prohibited Methods

The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Prohibited Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:

First violation: Two (2) years Ineligibility”.

## B. Merits

Based on the information disclosed by the Parties, the Panel does not have any reason to doubt that both Parties are strong advocates in the fight against doping in sport. In fact, BOA and WADA both recognise that doping is fundamentally contrary to the spirit of sport. Neither party condones doping in sport and both recognise the need to pursue aggressively the goal of its eradication. Therefore, neither party should be seen to be “soft” or easy on doping in sport. The dispute between the Parties here involves one

means of pursuing the fight against doping, not the fight itself. The Bye-Law prevents an athlete who has had a doping offence from being selected to represent the British Olympic Team. The core issue to be determined here is whether BOA may pursue that policy on its own or whether that policy must be pursued, if at all, through the world-harmonized WADA Code.

The essential issues for this appeal are framed by this Panel's decision in the USOC Award. As described above, that decision involved an IOC Regulation that any athlete suspended for doping and sanctioned for a period of six months or more may not participate in the next Olympic Games following the end of the suspension. The CAS Panel in the USOC Award held that the IOC Regulation violated Article 23.2.2 of the WADA Code, because it made a "*substantive change*" to the sanctions for doping found in Article 10 of the WADA Code. The IOC Regulation was incorporated into the Olympic Charter ("*OC*") in violation of the WADA Code and of the principles of the OC itself. Therefore, the IOC Regulation was held to be invalid and unenforceable because the IOC had not complied with its own statutory rules.

In reaching the decision in the USOC Award, the Panel noted that sanctions under Article 10 of the WADA Code are described as a "*period of ineligibility*", which in turn is defined as the athlete being "*barred for a specified period of time from participating in any Competition*". The Olympic Games are such a Competition. Thus, the requirement in the IOC Regulation that an athlete "*may not participate*" in the next Olympic Games is identical to the WADA Code's definition of "*ineligibility*". The essence of both provisions is disbarment from participation (USOC Award, para. 8.12.).

As a result, the IOC Regulation operated as a sanction in the same manner as Article 10 of the WADA Code. The effect on the athlete – ineligibility to participate in a Competition, the Olympic Games – is the same. However, the IOC Regulation prevents an athlete from participating in a Competition after the sanction provided in the WADA Code has been completed. By implementing this additional sanction, the IOC Regulation made a substantive change to Article 10 of the WADA Code, which Article 23.2.2 WADA Code does not permit. The Panel added, "*Even if one accepts that the Regulation has elements of both an eligibility rule and a sanction, it nevertheless operates as, and has the effect of, a disciplinary sanction*" (USOC Award, para. 8.19).

The WADA Foundation Board Decision followed and was based upon the reasoning of the USOC Award.

The WADA Foundation Board determined that the BOA was likely non-compliant with the WADA Code because the Bye-Law was an "*extra sanction*" and "*non-compliant for the same reason the IOC eligibility rule was deemed non-compliant by the Court of Arbitration for Sport*" in the USOC Award. The WADA Compliance Report used by the WADA Foundation Board to inform its decision described the non-compliance as "*in effect, a double sanction*".

The issue before this Panel is thus whether the Bye-Law is not compliant with the WADA Code because it is an extra sanction, in the same way that the IOC Regulation was held to be non-compliant in the USOC Award.

#### 1. The Roles of Selection Policies and the WADA Code

The BOA states that the Bye-Law is part of an overall team selection policy. That policy is aimed at choosing the most appropriate athletes to be representatives of Team GB at a sporting festival that celebrates athleticism and fair play. In developing a selection policy, and in selecting appropriate athlete representatives for Team GB, the BOA enjoys autonomy as expressed in the OC (Rules 27(3), 27(7) and Rule 28; together with the Bye-Law to Rules 27 and 28 in particular 2.1).

When the Bye-Law has effect on an athlete, it operates to preclude selection of that person to Team GB. The BOA calls this effect "*non-selection*". The BOA argues that the non-selection is not a sanction, but rather is the simple application of a selection policy. According to the BOA, the non-selection results from the fact that the athlete is not an appropriate person to represent the country in sporting competition in relation to any Winter or Summer Olympic Games or European Olympic Youth Festivals, and it is based on the spirit of Olympism.

The Panel accepts the proposition of counsel for the BOA that generally the application of a selection function is separate and distinct from the imposition of a sanction for a doping offence. NOCs may develop criteria for selection to their Olympic teams. At the same time, the WADA Code prescribes the various forms of doping infractions and the consequent sanctions arising from such infractions.

As the BOA argued, NOCs have great autonomy to develop their selection of representatives to a national Olympic team. The WADA Code does not and is not intended to intrude upon the autonomy of an NOC (such as the BOA) in developing these policies. In the normal course of events, the WADA Code and

an NOC's selection policy rarely intersect each other.

However, NOCs like BOA have agreed to limit their autonomy by accepting the WADA Code. In particular, Article 23.2.2 WADA Code, requires that its Signatories, including NOCs, do not make any additional provisions in their rules which would change the substantive effect to any enumerated provisions of the WADA Code, including its sanctions for doping. The purpose of Article 23.2.2 WADA Code is indeed the very purpose of the WADA Code: the harmonization throughout the world of a doping code for use in the fight against doping. This worldwide harmony is crucial to the success of the fight against doping. The WADA Code is intended to be an all-encompassing code that directs affected organizations and athletes. The WADA Code ensures that, in principle, any athlete in any sport will not be exposed to a lesser or greater sanction than any other athlete; rather, they will be sanctioned equally. By requiring consistency in treatment of athletes who are charged with doping infractions or convicted of it – regardless of the athlete's nationality or sport – fairness and proper enforcement are achieved. Any disharmony between different parties undermines the success of the fight against doping. For these good reasons, NOCs and other Signatories agreed to limit their autonomy to act within their own spheres with respect to activities covered by the WADA Code.

The Panel determines that the Bye-Law operates within the sphere of activity governed by the WADA Code. The Panel comes to this conclusion because:

The Bye-Law is based on the same considerations and operates in connection with the same behaviour as the WADA Code; and

The Bye-Law has the same effect as a sanction under the WADA Code: “*ineligibility*”.

Moreover, because the Bye-Law imposes an additional sanction beyond those provided in the WADA Code, it is not compliant with the Code.

## 2. The Characterisation and Operation of the Bye-Law

While BOA has argued that it is applying principles of character and Olympism in defining the policies of the Bye-Law, an examination of the Bye-Law terms and the manner in which it has been applied shows that in fact the Bye-Law relies on the same principles and conduct as the WADA Code. This can be seen immediately in the Recitals to the Bye-Law:

*Recital 2 states that the BOA strongly disapproves of doping in sport;*

*Recital 3 references compliance with the WADA Code; and Recital 5 sets out the need for an Appeal Panel to assess if a doping offence is minor, committed without fault or negligence, or where other mitigating circumstances make it suitable to declare the athlete as eligible for selection.*

Once an athlete has been found guilty of committing a doping offence pursuant to the WADA Code, a sanction may be imposed under Article 10 of the WADA Code. That same doping offence also triggers the application of the BOA selection policy: Under the Bye-Law, the individual who committed the doping offence is ineligible for membership in Team GB. Without a sanction under the WADA Code, the Bye-Law has no applicability: The foundation for the application of the Bye-Law is not present.

The non-selection, or ineligibility, effect of the Bye-Law may be reversed by the Appeal Panel (AP). However, once again, the provisions of the WADA Code are essential in guiding the AP in its assessment of the application of the Bye-Law to the particular athlete. Notably, paragraph 5 of the Bye-Law permits a person to appeal the effect of the Bye-Law on three grounds:

- (i) *Minor offences;*
- (ii) *There was a finding under the WADA Code of no fault/negligence or no significant fault/negligence; or*
- (iii) *If significant mitigating circumstances existed in relation to the doping offense.*

In applying these criteria, paragraph 6 of the Bye-Law guides the AP in its assessment of “*minor offence*” by referring to the WADA Code. The AP is specifically directed, in determining whether a doping offence is minor for the purposes of paragraph 5, to “*take account*” of the WADA Code, among others and to find that it is minor if the offence carries a suspension of six months or less “*under the Code*” (the Bye-Law in paragraph 6 also makes reference to the Olympic Movement Anti-Doping Code (the OMADC). That Code is based upon the WADA Code but is implemented by the IOC for the particular Olympic Games and carries with it the same obligation as Article 23.2.2 of the WADA Code. This process of adopting the WADA Code by the IOC is similar to the exercise engaged in by the International Federations).

Similarly, the second ground of appeal to the AP is if the offence committed was one which would be considered under the WADA Code to be of “*no fault or negligence or no significant fault or negligence*”. The AP must thus assess the athlete's degree of fault in

respect of the doping offence within the framework of the WADA Code.

The other ground of appeal under paragraph 5 is if “*significant mitigating circumstances existed in relation to the doping offence*”. It is only on this ground that the AP is relatively free to exercise its discretion in a manner less directly connected to the WADA Code. However, even on this ground of appeal, paragraph 7 directs the AP to take account of any “*circumstances permitting greater leniency under the Codes*”.

These provisions of the Bye-Law itself show that, far from being divorced from the WADA Code, the Bye-Law rests on the foundation of the WADA Code. It follows the same rationale – “*strongly disapproves of doping in sport*” – and, the applicability of the Bye-Law, both in determining the initial non-selection and in considering an appeal of that non-selection, depends on the same criteria as laid out in the WADA Code.

### 3. The Effect of the Bye-Law

Once an athlete is found guilty of a doping offence in accordance with the WADA Code, that finding, by operation of the Bye-Law, automatically makes an athlete ineligible to be selected to Team GB: “*Any person ... found guilty of a doping offence ... shall not ... thereafter be eligible for consideration as a member of a Team GB ... in relation to any Olympic Games ...*”. (paragraph 1 of the Bye-Law).

As described in the USOC Award, e.g., paragraphs 6.9 and 8.12, in dealing with “Sanctions on Individuals” Article 10.2 of the WADA Code prescribes a “period of ineligibility” to be imposed for a doping offence.

The Panel there found that the IOC Regulation was a sanction because it made an athlete ineligible to participate and, thus, compete in the next Olympic Games (see USOC Award, para. 8.12). That ineligibility fell squarely within the nature of sanctions provided in the WADA Code. Once the IOC Regulation was used to bar the participation of an athlete from the Olympics, its effect was disqualification from the Olympics, a Competition within the meaning of the WADA Code. Such a consequence, according to the Panel, was undeniably disciplinary in nature and within the scope of the WADA Code.

Similarly, the effect of the Bye-Law in rendering the athlete found guilty of a doping offence to be ineligible to be selected to Team GB is immediate, automatic and for life (In contrast, the IOC Regulation discussed in the USOC case had only a one time effect at the next Olympic Games, and there could be no appeal of that effect. In the Panel’s view

while these are distinctions in the operation of the IOC Regulation and the BOA Bye-Law, they have no impact upon the substantive merits of the analysis). While the BOA argues that the athlete is ineligible for “*consideration to be a member of Team GB*” and not to compete, disbarment from the Team for life carries with it the direct consequence of never being able to participate in the Olympics and as a consequence to compete in the Games. That is the underlying reality of ineligibility.

The difference in the wording of the Bye-Law and the IOC Regulation is inconsequential. Any athlete who had committed an anti-doping offence as described in the Bye-Law for which he or she was sanctioned becomes, by virtue of the operation of the Bye-Law, automatically ineligible for consideration as a member of the Team GB delegation in relation to any Summer or Winter Olympic Games or any European Olympic Youth Festivals. Whether he or she cannot be selected or whether he or she is ineligible is, as counsel for WADA stated, a distinction without a difference. As has been noted, the WADA Code itself defines “*ineligibility*” as the inability to “*participate*” in a Competition, including the Olympics. The fact of the matter is that, by operation of the Bye-Law, an athlete is unable to participate in the Olympics.

Accordingly, this Panel finds that the Bye-Law renders an athlete ineligible to compete – a sanction like those provided for under the WADA Code.

The availability of the AP does not change this analysis. While the BOA argued that this ability to apply to the AP has the effect of ensuring that only deliberate cheats are affected by this rule, the Panel finds that this is not exactly the case (the same observation was made in passing by Nicholas Stewart QC in the most recent oral hearing under the appeal process involving the athlete Christine Ohuruogu in December 2007). In order to avoid the ineligibility that arises from the first paragraph of the Bye-Law, an athlete must choose to activate the appeals process. Otherwise, the Bye-Law automatically makes the athlete ineligible for membership of Team GB and, therefore, participation on the Olympic Team at the Olympics.

Moreover, this ineligibility is caused by an anti-doping violation as the relevant prior undesirable behaviour, which is the hallmark of an anti-doping sanction (see USOC Award at para. 8.10). The foregoing analysis of the operation and text of the Bye-Law reveals that such criteria as Olympism and appropriate representation may be values reflected in the Bye-Law, but they are not what actually triggers the operation of the Bye-Law. While the BOA claims

this selection policy is part of a greater policy that the BOA will select only athletes of good character, the fact is that the only behaviour that is explicitly referred to in the Bye-Law and that renders one ineligible to compete is the commission of a doping violation under the WADA Code.

The focus by the Bye-Law on the behaviour of the athlete can be further illustrated by a review of the appeals process. If the selection policy were purely designed as a means by which the BOA could have only the athletes of the best character, it would be unnecessary to have an appeals process to assess the “proportionality” of the application of the Bye-Law. In other words, the only thing that matters in a proportionality determination is the behaviour of the individual. Whether the punishment fits the crime is purely an analysis of an individual’s character and prior behaviour.

It is also noted that the Rules for the AP at paragraph 1.2 explicitly state that in the event of a finding in favour of the athlete, “*the Panel shall restore eligibility at such time and subject to such conditions and/or impose such penalty as it considers appropriate*”. [Emphasis added]

An examination of the AP decision in the Whitlock case is helpful in describing the purpose of the Bye-Law as nothing other than sanctioning an athlete for prior undesirable behaviour (see Janine Whitlock – Decision of Appeals Panel of British Olympic Association dated 9 March 2004). In that case, Ms. Whitlock contended that significant mitigating circumstances existed in relation to her doping offence which ought to allow her to compete in the Olympics in Athens in 2004. The BOA had considerable sympathy for Ms. Whitlock’s position in that case and itself did not seek to suggest that there was evidence to indicate that she had deliberately cheated. However, the BOA stressed the importance of ensuring that athletics was “drug-free” and therefore nevertheless sought to have her appeal denied. The AP likewise in its reasoning stated that, while there was no reason not to accept the statement of Ms. Whitlock that she did not knowingly ingest the banned substance, “*drug use is a cancer on the good name of the sport*”. The AP relied on this reasoning in choosing not to restore Ms. Whitlock’s eligibility. Unfortunately, it simply does not follow that, if the purpose of the rule is to select persons of good character, Ms. Whitlock ought not be selected.

In the Ohuruogu matter, the AP specifically stated that “*we also reject the related submission by the BOA that the BOA Bye-law is a selection rule and not an anti-doping rule. We see no value in any such distinction. It is clearly an anti-doping rule*”. Inherent in any anti-doping rule is the

imposition of a sanction on an athlete for engaging in the undesirable behaviour of committing a doping offence. Furthermore, the factors on which the AP chose to restore Ms. Ohuruogu’s eligibility were all related to her behaviour and degree of fault, namely:

*The fact that she had never intended to use prohibited substances;*  
*The fact that she never sought to deliberately avoid an advance notice out of competition testing;*  
*There were deficiencies and difficulties in training athletes about providing whereabouts information during the relevant time;*  
*and*  
*This was her first and only offense.*

For all of the foregoing reasons, the Panel finds that the Bye-Law renders an athlete ineligible to compete and does so on the basis of prior undesirable behaviour: the commission of a doping offence under the WADA Code. The fact that the Bye-Law foresees a possibility of an Appeal Procedure is certainly a good instrument to avoid totally disproportionate decisions. However, this does not change the nature of the (disciplinary) consequences of the Bye-Law and, accordingly, its non-compliance with the WADA Code: The proportionality of sanctions for anti-doping offences shall be evaluated within the worldwide harmonized system of the WADA Code – and cannot be the object of an additional disciplinary proceedings triggered by the same offence.

#### 4. Inconsistency with the WADA Code

The WADA Code defines Ineligibility as “*the Athlete or other Person is barred for a specified period of time from participating in any Competition or other activity or funding*”. [Emphasis added]

A Competition, according to the WADA Code is “*A single race, match, game or singular athletic contest. For example, a basketball game or the finals of the Olympic 100-meter race in athletics [...]*”. The Olympic Games is, according to the WADA Code definition of an Event, a series of individual Competitions.

When an athlete is, by virtue of the operation of the Bye-Law, not eligible “... *for consideration as a member of Team GB*”, he or she is barred from ever being selected to Team GB, assuming either no appeal or an unsuccessful appeal to the AP. The Panel finds that the effect of that non-selection or inability to be selected to the Olympic team is (permanent) disbarment from participating in a Competition, the Olympic Games. That inability to participate is similar in effect to the sanction provided in the WADA Code for a doping offence. The Bye-Law imposes a permanent ineligibility to participate in the Olympic Games, which does not appear in Article 10



of the WADA Code or anywhere else in that Code. Therefore, the non-selection is a sanction in addition to those in the WADA Code, and it is of a much lengthier duration.

Article 23.2.2 of the WADA Code provides that certain provisions must be implemented by Signatories without substantive change (including the provisions regarding sanctions found in Article 10 WADA Code). Article 23.2.2 WADA Code further provides that: “*no additional provision may be added to a Signatory’s rules which changes the effect of the Articles enumerated in this Article*”. [Emphasis added]

As a Signatory to the Code, the BOA bound itself through Article 23.2.2 of the WADA Code not to add any additional provision to its “*rules which changes the effect of the Articles enumerated in this Article* [being 23.2.2]”.

The Bye-Law has the effect of changing the sanctions and their effect under the WADA Code as set out in the above analysis. Therefore, the BOA has breached its obligation not to add any provisions to its rules that change the effect of Article 10 WADA Code.

When the BOA chose to become a Signatory of the WADA Code, it in fact gave up – like any other Signatory – some of its autonomy, including agreeing not to impose a sanction other than those imposed by Article 10 WADA Code. Contrary to this obligation, no British athlete can ever compete in the Olympic Games as a result of a doping offence. That consequence is an “*extra*” or a “*double sanction*”, as referred to in WADA’s Decision.

In making the foregoing determination, the Panel wishes to reiterate its comments in paragraph 8.27 of the USOC Award, which indicate that the Panel’s Award is not an opposition to the sanctions imposed by the IOC Regulation or, in this case, the BOA Bye-Law. Rather, the awards in both cases simply reflect the fact that the international anti-doping movement has recognized the crucial importance of a worldwide harmonized and consistent fight against doping in sport, and it has agreed (in Article 23.2.2 WADA Code) to comply with such a principle, without any substantial deviation in any direction. In addition to those comments, the Panel notes that the BOA and the IOC are free, as are others, to persuade other stakeholders that an additional sanction of inability to participate in the Olympic Games may be a proportionate, appropriate sanction of an anti-doping offence and may therefore form part of a revised WADA Code. At the moment, the system in place does not permit what the BOA has done. It is for this reason that the Panel said at the outset that

the Parties are apart only on an isolated issue as to the appropriate process to further the fight against doping. They are not apart on the fundamental issue of the eradication of doping.

### C. Conclusion

The Panel concludes that the Bye-Law is a doping sanction and is therefore not in compliance with the WADA Code. It confirms the view of the WADA Foundation Board as indicated in its Decision. Therefore, the appeal of BOA is rejected, and the Decision of the WADA Foundation Board is confirmed.

Based on the prayers for relief submitted by the Parties, the Panel does not have any jurisdiction to implement further directions. It is up to the Parties to give effect to the present Award in good faith and in accordance with the spirit of Olympism shown by the Parties already in the course of these proceedings.

All further and other claims for relief are dismissed.

Cycling; doping; whereabouts failure within a period of 18 months; departure from the rule providing for a notice within 14 days of the unsuccessful testing attempt; sanction.

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Panel:

Mr. Luigi Fumagalli (Italy), President  
Mr. Michele Bernasconi (Switzerland)  
Mr. Lars Halgreen (Denmark)

Relevant facts

The Union Cycliste Internationale (UCI or the “*Appellant*”) is the international governing body for the sport of cycling. UCI is an association under Swiss law and has its headquarters in Aigle (Switzerland).

Mr Alexander Rasmussen (“*Rasmussen*” or the “*First Respondent*”) is a professional road racing cyclist of Danish nationality, born on 4 May 1981, holding a license issued by the Danish Cycling Federation (*Danmarks Cykle Union*).

The National Olympic Committee and Sports Confederation of Denmark (*Danske Idrætsforbund*) (“*DIF*” or the “*Second Respondent*”) is the National Olympic Committee in Denmark and is the confederation of the Danish sports federations.

Rasmussen and the DIF are hereinafter jointly referred to as the “*Respondents*”.

According to the rules governing the doping control program of UCI (the UCI Anti-Doping Rules: “*UCI ADR*”) and of DIF (the Danish National Anti-Doping Rules: “*NADR*”), Rasmussen has been included since 2009 in the Registered Testing Pool of athletes (RTP) both of DIF (“*DIF RTP*”) and UCI (“*UCI RTP*”).

The World Anti-Doping Code (WADC) of the World Anti-Doping Agency (WADA), in fact, requires the signatories, which include UCI and DIF, to define a group of athletes as their RTP. Each athlete included in the RTP has the obligation to provide regular and updated whereabouts information, i.e. a three month schedule containing information, before the commencement of each quarterly period, about where he or she can be met for unannounced out-of-competition testing. In order to avoid unnecessary burden on athletes obliged to provide such information both to their National Anti-Doping Organisations and to the International Federation they belong to, WADA has developed a web-based application, called ADAMS – Anti-Doping Administration and Management System (“*ADAMS*”) to enable athletes to enter their whereabouts into a single system. International Federations are then provided access by the relevant National Anti-Doping Organisation to the information entered into ADAMS by each athlete.

As a result of the above, Rasmussen had the obligation to enter, and keep updated, his whereabouts into ADAMS. UCI was allowed to access such information.

On 1 February 2010, officers of the Danish National Anti-Doping Organisation (Anti-Doping Denmark, ADD) unsuccessfully tried to locate Rasmussen for an out-of-competition doping control at the place he had indicated on ADAMS for that day: instead of being in Denmark, he was in Germany competing in the Berlin Six Days (from 28 January to 2 February 2011). A whereabouts failure was therefore recorded pursuant to Article 5.4.5 NADR and notified to Rasmussen on 16 February 2010, as the explanations he had provided were considered to be insufficient by ADD.

On 4 October 2010, ADD notified Rasmussen of a potential failure to file his whereabouts information for the fourth quarter of 2011 by the deadline of 30 September 2010: at the same time, ADD indicated to Rasmussen that it had remarked “*that you did not state your participation in the World Championships in Australia that has just taken place*”. Following said notification, Rasmussen filed the missing information on 5 October 2010, without providing any explanations.

Therefore, on 26 October 2010, ADD recorded and notified to Rasmussen a filing failure for the purposes of Article 5.4.5 NADR.

On 28 April 2011, officers of the UCI unsuccessfully tried to locate Rasmussen for an out-of-competition doping control at the place in Spain he had indicated in ADAMS for that day: the UCI officers could only get in touch with Rasmussen on the phone, to discover that he was in Denmark, for his sister's confirmation. On 14 July 2011, UCI notified Rasmussen of such potential missed test, which was recorded on 18 August 2011.

On 13 September 2011, UCI informed ADD of the recording of the missed test of 28 April 2011, being "the 3<sup>rd</sup> whereabouts failure of ... Rasmussen", to indicate that according to Article 110 of the UCI ADR, ADD was "responsible to bring proceedings against Rasmussen under art. 21.4 [UCI] ADR as his previous whereabouts failures were recorded by your organization". On the same day, ADD referred the case to the Anti-Doping Committee (*Dopingudvalg*) of DIF for further proceedings.

On 14 September 2011, the Anti-Doping Committee of DIF imposed on Rasmussen a provisional suspension pursuant to Article 7.6.2 NADR.

On 12 October 2011, the Anti-Doping Committee sent to WADA an email as follows:

*"... the Doping Commission of the NOC and Sports Confederation of Denmark urgently needs WADA's advice in an unusual case we are currently reviewing..."*

*While reviewing the case, we have noticed a slight, but probably important difference between the whereabouts regulations of WADA's International Standard for Testing and the whereabouts regulations of the IF. A difference in the procedural rules that is to the disadvantage of the athlete.*

(...)

*Our question is therefore if WADA can confirm that the International Standard for Testing is indeed considered mandatory for IFs and NADOs and, consequently, that no changes from the Standard should be made when drafting the principles and procedural guidelines in the regulations of the IFs and the NADOs?"*

In an email of 13 October 2011, the Anti-Doping Committee then added the following:

*"The case we are reviewing involves one missed test and one filing failure both recorded by ADD in accordance with WADA's International Standard for Testing and one missed test recorded*

*by the UCI in accordance with UCI Antidoping Rules.*

*The problem in the current case is the difference between WADA's International Standard for Testing art. 11.6.3.b and the UCI's ADR art. 105.*

(...)

*As can be seen, the UCI has not in its own rules repeated the obligation for the ADO to notify the rider no later than 14 days after the missed test. In fact, the UCI has not set up a deadline for itself at all, (...)*

*In fact, in the case we are currently reviewing, the UCI notified the rider of the missed test 10 weeks after the day of the unsuccessful attempt. (...)*

*As the notification was 8 weeks late according to the mandatory rules in the International Standard for Testing, the athlete and his lawyer has challenged whether the missed test can be considered properly recorded according to mandatory rules in the World Anti Doping Code/International Standard for Testing.*

*As the late notification was nevertheless in accordance with a UCI Rule that differs from the "mandatory" WADA Standard, we believe the matter needs to be clarified, which is why we seek WADA's advice on the matter".*

On 13 October 2011, WADA answered as follows:

*"In our opinion, for the UCI recorded strike, UCI rules shall apply as an athlete shall be able to rely on his IF rules first, even if the Standard is mandatory.*

*We will contact UCI to ensure their rules are amended shortly in order to properly implement the IST rules.*

*In the case at hand, if the UCI strike has been notified to the rider before the next filing failure/missed test occurred, the delay taken by the UCI should not constitute an issue.*

*This was the rationale of this 14-day rule".*

After an exchange of submissions with the counsel for Rasmussen, on 27 October 2011, the Anti-Doping Committee brought the case of Rasmussen before the Anti-Doping Board (*Dopingnaevn*) of DIF in accordance with Article 8 NADR. In its referral to the Anti-Doping Board, the Anti-Doping Commission requested that Rasmussen "be banned for one year from all sport under the auspices of DIF, and this ban be counted from 28 April 2011" and that Rasmussen "be disqualified from all competitions he has participated in during the period 28 April 2011 – 14 September 2011".

On 17 November 2011, the Anti-Doping Board issued a decision ("Decision") holding as follows:

*“Alex Rasmussen is hereby acquitted”.*

In support of its Decision, the Anti-Doping Board stated the following:

“(…)

*The World Anti-Doping Code and the associated international testing standard, ITS, constitute the overarching set of rules, which are supplemented by UCI’s rules and by the national anti-doping rules in Denmark. UCI’s rules must therefore be interpreted in accordance with the rules that are mandatory in the WADA rules, including the ITS rules, cf. the preamble to ITS. Compliance with the international standards, including ITS, is also mandatory according to the national Danish anti-doping rules, cf. the preface to these rules.*

*It emerges from ITS art. 11.6.3.b that the athlete must be informed and be consulted concerning any violation of the whereabouts rules no later than 14 days after the violation in question occurred. This was not done in time after UCI’s attempt to perform an anti-doping test on 28 April 2011, with notification and consultation only being given on 14 July 2011.*

*Because UCI did not meet the deadline in ITS art. 11.6.3.b, the third violation of the whereabouts rules on 28 April 2011 cannot result in sanctions in the form of a ban or disqualification”.*

On 22 December 2011, UCI filed a statement of appeal with the Court of Arbitration for Sport (CAS), pursuant to Article R48 of the Code of Sports-related Arbitration (“Code”), to challenge the Decision.

The UCI’s requests for relief, as indicated in its appeal brief, is the following:

*“May it please to the Arbitration Tribunal:*

- *To set aside the contested decision;*
- *To sanction Mr Rasmussen with a period of ineligibility of two years starting on the date of the Panel’s decision;*
- *To state that the period of provisional suspension from 14 September 2011 until 17 November 2011 shall be credited against the period of ineligibility;*
- *To disqualify Mr Rasmussen’s results from 28 April 2011 until the date of the CAS award;*
- *To condemn Mr Rasmussen to repay all the prizes money he won from 28 April 2011 until the date of the CAS award;*
- *(…)*

In their answer, the Respondents requested the CAS to rule:

*“a. That the appealed Decision rendered on 17th of November 2011 by the Doping Board of the National Olympic Committee and Sports Confederation of Denmark in the*

*matter of Mr Alex Rasmussen is upheld.*

- and -

b. *(…)*

c. *(…)*

- or -

d. *That the Court sanctions Mr Rasmussen by a period of ineligibility no longer than one year, to be started from the time of the 3rd inaccuracy on 28th of April 2011”.*

Finally, the Respondents request the Panel, should it find that Rasmussen has to be sanctioned, to impose a sanction of “no more than a 12 months period of ineligibility, starting from the missed test of 28<sup>th</sup> of April 2011”,

(…)

At the same time, and in any case, the Respondents request that “the DIF is not condemned”, since it correctly implemented the WADA rules.

#### Extracts from the legal findings

### A. Applicable law

The law applicable in the present arbitration is identified by the Panel in accordance with Article R58 of the Code.

Pursuant to Article R58 of the Code, the Panel is required to decide the dispute

*“... according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*

As a result of such provision, the Panel considers that the DIF rules (and more specifically those adopted in the NADR) are the applicable regulations for the purposes of Article R58 of the Code, with a possible reservation for the application on specific points of the UCI ADR (below). The laws of Denmark apply subsidiarily. However, no party led any evidence of the content of relevant Danish law, nor was the Panel asked to consider or apply any provision of Danish law.

The provisions set in the IDF ADR in force in July 2011 which are relevant in this arbitration include the following:

#### Article 1

*“... These anti-doping rules apply to Anti Doping Denmark, the Sports Confederation of Denmark, all member organisations*

under the NOC and Sports Confederation of Denmark (hereafter “national federations”), and all persons involved in activities by membership, accreditation or participation in any activity under a national federation under the NOC and Sports Confederation of Denmark.

Exempted from these rules are athletes who neither participates in sport at an international or national level, but who exclusively participates in sport at a recreational level, including competitions at a lower level under the NOC and Sports Confederation of Denmark. These persons are covered by the Danish Anti-Doping Regulations for Recreational Athletes ...”

#### Article 2

“Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.8 of these Anti-Doping Rules (Anti-Doping Rule Violations). ...

2.4 Violation of applicable requirements regarding Athlete availability for Out-of-Competition Testing, including failure to file required whereabouts information and missed tests which are declared based on rules which comply with the International Standard for Testing. Any combination of three missed tests and/or filing failures within an eighteen-month period as determined by Anti-Doping Organizations with jurisdiction over the Athlete shall constitute an anti-doping rule violation”

#### Article 3.2

“Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases: ...

3.2.2 Departures from any other International Standard or other anti-doping rule or policy which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such results. If the Athlete or other Person establishes that a departure from another International Standard or other anti-doping rule or policy which could reasonably have caused the Adverse Analytical Finding or other anti-doping rule violation occurred, then the Doping Commission under the NOC and Sports Confederation of Denmark shall have the burden to establish that such a departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation”

#### Article 5.4.2

“Anti Doping Denmark shall notify all athletes of his/her inclusion in the national registered testing pool and inform him/her of his/her responsibilities according to these anti-doping rules. All athletes included in the national registered testing pool shall file whereabouts with Anti Doping Denmark in accordance with the international standard for testing and the guidelines provided by Anti Doping Denmark. Athletes must specify on a daily basis the locations where he/she will be

training, and/or competing each day of a quarter or conduct any other regular activity. Athletes shall update their information as necessary so that it is current at all times. In addition to this information athletes shall also specify for each day during the following quarter a 60 minutes testing slot where the athlete must be available for sample collection at the specified location. However, this does not limit in any way the possibility to test the athlete at any time or place outside the 60 minutes time slot”

#### Article 5.4.3

“Where athletes are included in Anti Doping Denmark’s registered testing pool and a registered testing pool under his/her international federation and who are required to provide whereabouts to her/his international federation shall provide Anti Doping Denmark with a copy”

#### Article 5.4.4

“Failure by any athlete included in Anti Doping Denmark’s registered testing pool to submit a mandatory whereabouts or failure to submit correct whereabouts will be considered an anti-doping rule violation in accordance with article 2.4 of the Code where the conditions of Article 11.3.5 of the International Standard for Testing are met”

#### Article 5.4.5

“Unsuccessful attempts made by Anti Doping Denmark to locate an athlete during the 60 minute time slot specified by the athlete in his/her whereabouts will be reported to Anti Doping Denmark in accordance with the International Standard for Testing.

Anti Doping Denmark will subsequently evaluate the circumstances described in the report and determine whether the failure by the athlete to be present constitutes a missed test. 3 missed tests within an 18 month period will be considered an anti-doping rule violation according to article 2.4 of the Code where the conditions or Article 11.4.3 of the International Standard for Testing are met.

Written notification shall be sent to the athlete in respect of each missed test”

#### Article 10.3

“The period of Ineligibility for anti-doping rule violations other than as provided in Article 10.2 shall be as follows: ...

10.3.3 For violations of Article 2.4 (Whereabouts Filing Failures and/or Missed Tests), the period of Ineligibility shall be at a minimum one (1) year and at a maximum two (2) years based on the Athlete’s degree of fault”

#### Article 10.8

“In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9 (Automatic Disqualification of Individual Results), all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-

*Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all the resulting Consequences including forfeiture of any medals, points and prizes”*

#### Article 10.9.1

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

#### Article 10.9.2

*“Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility imposed”*

#### Article 10.9.3

*“Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the Doping Tribunal may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred”.*

The provisions set in the UCI ADR in force in July 2011 which have been invoked in this arbitration include the following:

#### Article 21

*“The following constitute anti-doping rule violations: ...*

*4. Violation of applicable requirements regarding Rider availability for Out-of-Competition Testing. Any combination of three Missed Tests and/or Filing Failures (as defined in chapter V) committed within an eighteen-month period, as declared by UCI or any other Anti-Doping Organization with jurisdiction over the Rider, shall constitute an anti-doping rule violation”*

#### Article 25

*“Departures from any other International Standard, these Anti-Doping Rules, the Procedural Guidelines set by the Anti-Doping Commission or any other applicable anti-doping rule or policy or technical document which did not cause an Adverse Analytical Finding or the factual basis for any other anti-doping rule violation shall not invalidate such findings or results. If the License-Holder establishes that any such departure which could reasonably have caused the Adverse Analytical Finding or factual basis for any other anti-doping rule violation occurred, then the UCI or its National Federation shall have the burden to establish that such a departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation”*

#### Article 99

*“A Rider in a Registered Testing Pool shall be deemed to have committed an anti-doping rule violation under article 21.4 if he commits a total of three Whereabouts Failures (which may be any combination of Filing Failures and/or Missed Tests adding up to three in total) within any 18 (eighteen) month period, irrespective of which Anti-Doping Organization(s) has/have declared the Whereabouts Failures in question”*

#### Article 105

*“UCI shall give notice to the Rider of any apparent Whereabouts Failure inviting a response within 14 (fourteen) days of receipt of the notice”*

#### Article 110

*“Where it is alleged that a Rider has committed 3 (three) Whereabouts Failures within any 18-month period and two or more of those Whereabouts Failures were alleged by an Anti-Doping Organisation that had the Rider in its Registered Testing Pool at the time of those failures, then that Anti-Doping Organization (whether the UCI or a National Anti-Doping Organisation) shall be the responsible Anti-Doping Organization for purposes of bringing proceedings against the Rider under article 21.4. If not (for example, if the Whereabouts Failures were alleged by UCI and two National Anti-Doping Organizations respectively), then the responsible Anti-Doping Organisation for these purposes will be the Anti-Doping Organization whose Registered Testing Pool the Rider was in as of the date of the third Whereabouts Failure. If the Rider was in both UCI's and a national Registered Testing Pool as of that date, the responsible Anti-Doping Organization for these purposes shall be the UCI”*

#### Article 111

*“Where the UCI is the responsible Anti-Doping Organization and does not bring proceedings against a Rider under article 21.4 within 30 (thirty) days of WADA receiving notice of that Rider's third alleged Whereabouts Failure in any 18-month period, then it shall be deemed that the UCI has decided that no anti-doping rule violation was committed, for purposes of triggering the appeal rights set out at article 329”.*

The provisions set in the IST in force in July 2011 which are relevant in this arbitration include the following:

#### Article 11.4.3

*“An Athlete may only be declared to have committed a Missed Test where the Responsible ADO, following the results management procedure set out in Clause 11.6.3, can establish each of the following:*

- a. that when the Athlete was given notice that he/she had been designated for inclusion in a Registered Testing Pool, he/she was advised of his/her liability for a Missed Test if he/she was unavailable for Testing during the 60-minute time slot specified in his/her Whereabouts Filing at the*

- location specified for that time slot;*
- b. *that a DCO attempted to test the Athlete on a given day in the quarter, during the 60-minute time slot specified in the Athlete's Whereabouts Filing for that day, by visiting the location specified for that time slot;*
  - c. *that during that specified 60-minute time slot, the DCO did what was reasonable in the circumstances (i.e. given the nature of the specified location) to try to locate the Athlete, short of giving the Athlete any Advance Notice of the test;*
  - d. *that the provisions of Clause 11.4.4 (if applicable) have been met; and*
  - e. *that the Athlete's failure to be available for Testing at the specified location during the specified 60-minute time slot was at least negligent. For these purposes, the Athlete will be presumed to have been negligent upon proof of the matters set out at sub-Clauses 11.4.3(a) to (d). That presumption may only be rebutted by the Athlete establishing that no negligent behaviour on his/her part caused or contributed to him/her (i) being unavailable for Testing at such location during such time slot; and (ii) failing to update his/her most recent Whereabouts Filing to give notice of a different location where he/she would instead be available for Testing during a specified 60-minute time slot on the relevant day"*
- ii. *of the consequences to the Athlete if a hearing panel upholds the alleged Missed Test.*
- c. *Where the Athlete disputes the apparent Missed Test, the Responsible ADO must re-assess whether all of the Clause 11.4.3 requirements are met. The Responsible ADO must advise the Athlete, by letter sent no later than 14 (fourteen) days after receipt of the Athlete's response, whether or not it maintains that there has been a Missed Test.*
  - d. *If no response is received from the Athlete by the relevant deadline, or if the Responsible ADO maintains (notwithstanding the Athlete's response) that there has been a Missed Test, the Responsible ADO shall send notice to the Athlete that an alleged Missed Test is to be recorded against him/her. The Responsible ADO shall at the same time advise the Athlete that he/she has the right to request an administrative review of the alleged Missed Test. The Unsuccessful Attempt Report must be provided to the Athlete at this point if it has not been provided earlier in the process.*
  - e. *Where requested, such administrative review shall be conducted by a designee of the Responsible ADO who was not involved in the previous assessment of the alleged Missed Test, shall be based on written submissions alone, and shall consider whether all of the requirements of Clause 11.4.3 are met. If necessary, the relevant DCO may be asked to provide further information to the designee. The review shall be completed within 14 (fourteen) days of receipt of the Athlete's request and the decision shall be communicated to the Athlete by letter sent no more than 7 (seven) days after the decision is made.*

### Article 11.6.3

*"The results management process in the case of an apparent Missed Test shall be as follows:*

- a. *The DCO shall file an Unsuccessful Attempt Report with his/her ADO, setting out the details of the attempted Sample collection, including the date of the attempt, the location visited, the exact arrival and departure times at the location, the step(s) taken at the location to try to find the Athlete, including details of any contact made with third parties, and any other relevant details about the attempted Sample collection.*
- b. *If it appears that all of the Clause 11.4.3 requirements relating to Missed Tests are satisfied, then no later than 14 (fourteen) days after the date of the unsuccessful attempt, the Responsible ADO (i.e. the ADO on whose behalf the test was attempted) must send notice to the Athlete of the unsuccessful attempt, inviting a response within 14 (fourteen) days of receipt of the notice. In the notice, the Responsible ADO should warn the Athlete:*
  - i. *that unless the Athlete persuades the Responsible ADO that there has not been any Missed Test, then (subject to the remainder of the results management process set out below) an alleged Missed Test will be recorded against the Athlete; and*
- f. *If it appears to the designee that the requirements of Clause 11.4.3 have not been met, then the unsuccessful attempt to test the Athlete shall not be treated as a Missed Test for any purpose; and*
- g. *If the Athlete does not request an administrative review of the alleged Missed Test by the relevant deadline, or if the administrative review leads to the conclusion that all of the requirements of Clause 11.4.3 have been met, then the Responsible ADO shall record an alleged Missed Test against the Athlete and shall notify the Athlete and (on a confidential basis) WADA and all other relevant ADOs of that alleged Missed Test and the date of its occurrence"*

### Article 11.6.5

*"The Responsible ADO shall keep a record of all Whereabouts Failures alleged in respect of each Athlete within its Registered Testing Pool. Where it is alleged that such an Athlete has committed 3 (three) Whereabouts Failures within any 18-month period:*

- a. *Where two or more of those Whereabouts Failures were*

*alleged by an ADO that had the Athlete in its Registered Testing Pool at the time of those failures, then that ADO (whether the IF or a NADO) shall be the Responsible ADO for purposes of bringing proceedings against the Athlete under Code Article 2.4. If not (for example, if the Whereabouts Failures were alleged by three different ADOs), then the Responsible ADO for these purposes will be the ADO whose Registered Testing Pool the Athlete was in as of the date of the third Whereabouts Failure. If the Athlete was in both the international and a national Registered Testing Pool as of that date, the Responsible ADO for these purposes shall be the IF.*

- b. *Where the Responsible ADO fails to bring proceedings against an Athlete under Code Article 2.4 within 30 (thirty) days of WADA receiving notice of that Athlete's third alleged Whereabouts Failure in any 18-month period, then it shall be deemed that the Responsible ADO has decided that no anti-doping rule violation was committed, for purposes of triggering the appeal rights set out at Code Article 13 (in particular Article 13.2)"*

#### Article 11.6.6

*"An Athlete alleged to have committed an anti-doping rule violation under Code Article 2.4 shall have the right to have such allegation determined at a full evidentiary hearing in accordance with Code Article 8. The hearing panel shall not be bound by any determination made during the results management process, whether as to the adequacy of any explanation offered for a Whereabouts Failure or otherwise. Instead, the burden shall be on the ADO bringing the proceedings to establish all of the requisite elements of each alleged Whereabouts Failure".*

### **B. Merits**

As a result of the parties' submissions and requests, there are two main questions that the Panel has to examine in these proceedings:

- a. the first concerns the determination of whether the First Respondent committed the anti-doping rule violation contemplated by Article 2.4 NADR (corresponding to Article 21.4 UCI ADR), i.e. whether Rasmussen committed, under the rules held to be applicable, three whereabouts failures within a period of eighteen months;
- b. the second, to be addressed in the event such anti-doping rule violation is found, concerns the identification of the consequences to be imposed on Rasmussen.

The Panel shall consider each of said questions separately.

1. Has the anti-doping rule violation contemplated by Article 2.4 NADR been committed by Rasmussen?

Under Article 2.4 NADR (as well as under the corresponding provision – Article 21.4 – of the UCI ADR), any combination of three missed tests and/or filing failures within eighteen months constitutes an anti-doping rule violation. Such provision matches the obligation of the athletes, included in a RTP, to provide, and keep updated, his/her whereabouts information, in order to be located for out-of-competition testing. Out-of-competition testing is at the heart of any effective anti-doping programme. To carry out effective testing of this nature, it is vital that athletes produce accurate and timely whereabouts information, so that they can be tested by surprise. The question in this case, as already mentioned, is whether Rasmussen committed within a period of eighteen months three missed tests and/or filing failures, which, under the applicable rules, could be considered to be violations of his whereabouts obligations.

In this respect, it is common ground between the parties that a first whereabouts failure, in the form of a missed test, was committed by Rasmussen on 1 February 2010, when the ADD unsuccessfully tried to locate him at the place he had indicated for such date; and that a second whereabouts failure, in the form of a filing failure, was committed when, at the end of the third quarter of 2010, Rasmussen failed to timely provide his whereabouts information for the following, fourth quarter.

The parties, however, disagree as whether Rasmussen committed a third whereabouts failure, when on 28 April 2011 the UCI anti-doping officers could not meet him at the place he had indicated: the Respondents defend the Decision that held that such missed test could not be recorded as a whereabouts failure; the Appellant submit that the Decision is wrong, and that on 28 April 2011 (i.e. within an eighteen month period of the first failure, committed on 1 February 2010) a third whereabouts failure was committed by Rasmussen, triggering the application of Article 2.4 NADR.

More specifically, the parties do not argue on the fact that the Rasmussen had been included in the UCI RTP, that he had been informed of his responsibilities according to the relevant anti-doping rules, and that on 28 April 2011 a doping control officer of UCI could not locate him by visiting the location specified for the time slot indicated in his whereabouts filing for that day. Such points, corresponding to the conditions indicated in Article 11.4.3(a)-(c) IST, are not disputed.



On such basis, it is also common ground that that the whereabouts information provided by Rasmussen through ADAMS for 28 April 2011 were not correct.

The dispute concerns the way the apparent missed test of 28 April 2011 was managed by the UCI, which (the parties agree also on this point) was the responsible anti-doping organization for such purposes, since the test was attempted on its behalf. In essence, on one hand, the Respondents submit that UCI failed to comply with the rule set by Article 11.6.3(b) IST, since the notice of the unsuccessful attempt was sent to Rasmussen much later than fourteen days after its date; on the other hand, UCI contends that it complied with Article 105 of the UCI ADR, which does not provide for any deadline for such notice, that Article 11.6.3(b) IST does not apply and that in any case a deviation from that provision cannot invalidate the recording of a missed test on 28 April 2011.

Indeed, different rules can be found in Article 105 UCI ADR and Article 11.6.3(b) IST. While the former simply indicates that the “*UCI shall give notice to the Rider of any apparent Whereabouts Failure inviting a response within 14 (fourteen) days of receipt of the notice*”, the latter specifies that the notice of the unsuccessful attempt must be sent by the responsible anti-doping organization “*no later than 14 (fourteen) days of the attempt*”. As a result, the question, discussed by the parties in this arbitration, concerns the binding force for UCI of Article 11.6.3(b) IST, and the effects for Rasmussen of the non compliance by UCI with the provisions therein established.

This Panel, however, finds it unnecessary to settle the issue: the Panel, in fact, finds that, even conceding that Article 11.6.3(b) IST had to be applied, the failure by UCI to send a notice to Rasmussen within fourteen days of the unsuccessful attempt of 28 April 2011 did not prevent UCI from recording it as a missed test. The Decision, which held otherwise, is wrong.

The Panel is led to such conclusion by several reasons.

The first reason relates to the wording of Article 11.6.3 IST. Under such provision, at its para. (c), in fact, in the event the athlete, who has received the notice of the unsuccessful testing attempt, disputes the apparent missed test, a re-assessment procedure must be started by the responsible anti-doping organization. Such process is intended to determine whether the requirements set by Article 11.4.3 IST are met: a missed test can be recorded as such only if the responsible anti-doping organization concludes that said conditions are satisfied. Therefore, no weight is given in this re-assessment procedure to a deviation

from the 14-day rule contained in Article 11.6.3(b). In the same way, in the event an administrative review is subsequently conducted upon request, the subject in charge of it shall only consider (again) the requirements set by Article 11.4.3 IST: only if it is determined that these conditions are not satisfied shall the unsuccessful attempt not be treated as a missed test. No room is given for any consideration, in the determination of a missed test, of the respect by the responsible anti-doping organization of the deadline to send a notice of the unsuccessful testing attempt. Therefore, the Panel finds in the wording of Article 11.6.3 IST no basis for finding that a deviation from the 14-day rule mentioned at para. (b) of that provision affects the possibility that a missed test be recorded as such.

The second reason refers to the purpose of the notice mentioned by Article 11.6.3(b) IST. Its function, indeed, appears that of offering the athlete the opportunity to give explanations – before a missed test is recorded – with respect to the fact that an anti-doping officer had failed to meet him/her for unannounced testing, and therefore persuade the responsible anti-doping organization that there has been no missed test. In that context, the notice to the athlete plays an important role. Article 11.6.3 IST describes the results management process in the case of an apparent missed test; in such “*administrative*” process, the fundamental rights of the athlete must be respected: the athlete must be informed and be given the opportunity to state his/her case and persuade the responsible anti-doping organization that the apparent missed test must not be registered as such. Said role, however, defines also the consequences of the failure by the responsible anti-doping organization to respect the 14-day rule mentioned at Article 11.6.3(b) IST. In fact, the purpose of the notice of the attempted test can be considered satisfied even though the notice has been given after the 14-day deadline had passed, in the event the athlete has had the actual possibility to give explanations – before a missed test is recorded – with respect to the fact that an anti-doping officer had failed to meet him/her for unannounced testing, and indeed has exercised the right to state his/her case. In that situation, no breach of the athlete’s right to be heard is committed. This is the situation that occurred in the Rasmussen’s case. Indeed, as the parties themselves concede, the First Respondent was put in the position to give reasons for his failure to be at the place he was supposed on 28 April 2011 to be according to the whereabouts details he had provided; reasons which were re-assessed by the UCI, but found unsatisfactory. Therefore, the recording as such of the missed test of 28 April 2011 by the UCI, even though notice of the unsuccessful attempt had been given past the 14-day deadline contemplated by

Article 11.6.3(b) IST, was not inconsistent with the respect of Rasmussen's rights and did not run against the purposes of the rule intended to protect them.

The third reason is linked to the effects of a violation of Article 11.6.3(b) IST. The Panel underlines that a violation of the deadline contemplated by Article 11.6.3(b) IST is relevant in the results management process of an apparent missed test also in another direction, producing effects which, however, do not preclude the finding that, in the Rasmussen's case, a missed test occurred on 28 April 2011. As mentioned by WADA in an email of 13 October 2011 to the Anti-Doping Committee of DIF (above), and stated in the CAS award of 24 August 2011 (CAS 2011/A/2499, at para. 27) with respect to filing failures, notice of a whereabouts failure is necessary in order to prevent an athlete from committing unknowingly the same infringement again. In other words, an athlete cannot be notified of a second (or third) failure unless the first (or second) failure has been properly notified to him/her: the athlete must be given the opportunity to rectify his/her failure and to know how many violations he/she has committed. This principle means that a fourth (hypothetical) failure could not be recorded against Rasmussen if committed before the notice of the missed test of 28 April 2011; but does not preclude the recording as a missed test of the unsuccessful attempt to test him on 28 April 2011.

The fourth, and final, reason relates to the impact of Article 3.2.2 NADR on a deviation from Article 11.6.3(b) IST. Under Article 3.2.2 NADR, a departure from the IST can invalidate the finding of an anti-doping rule violation only in the event said anti-doping rule violation has been caused by the departure itself. In the Rasmussen's case, a departure from the rule providing for a notice within fourteen days of the unsuccessful testing attempt on 28 April 2011 did not cause the anti-doping rule violation for which the First Respondent is held responsible: the basis of the anti-doping rule violation contemplated by Article 2.4 NADR is (in addition to the first two failures) the fact that on 28 April 2011 Rasmussen was not met by the competent anti-doping officer for out-of-competition testing at the time and place he had indicated in compliance with his obligation to provide accurate whereabouts information. Such factual basis is obviously not affected by events pertaining to the subsequent administration process regarding it: the fact that an unsuccessful testing attempt was notified within, or past, fourteen days thereof does change the fact that a test was missed by Rasmussen on 28 April 2011. Therefore, also pursuant to Art. 3.2.2 NADR, a departure from Article 11.6.3(b) IST cannot be invoked to invalidate the missed test of 28 April 2011. Whether in another set of circumstances a non-

respect of the notice period would make impossible for an athlete to state the reasons for his/her failure and whether such impossibility could have an impact on the acceptance of the existence of a failure is an issue that, for the above reasons, can be left open in the present case.

The above finding leads to the conclusion that a whereabouts failure was committed by the First Respondent on 28 April 2011. Such failure was the third in an eighteen month period, as it followed the missed test of 1 February 2010 and the filing failure for the fourth quarter of 2011. As a result of the above, the Panel holds that Rasmussen committed the anti-doping rule violation contemplated by Article 2.4 NADR.

2. What are the consequences to be applied for the anti-doping rule violation committed by Rasmussen?

The second question that the Panel has to answer concerns the consequences of the anti-doping rule violation committed by Rasmussen: while the Appellant holds that the maximum sanction of two years of ineligibility, together with the ensuing disqualification of results and other consequences, has to be applied, the Respondents allege that only the minimum sanction of one year, with the starting date backdated to the moment of the missed test of 28 April 2011, has to be imposed.

The first point, therefore, concerns ineligibility. The period of ineligibility which, under Article 10.3.3 NADR, could be imposed on Rasmussen for the anti-doping rule violation contemplated by Article 2.4 NADR ranges from one to two years. The closing period of Article 10.3.3 NADR makes it clear, then, that the measure of the sanction depends on the assessment of Rasmussen's degree of fault: the Anti-Doping Board decided not to impose any period of ineligibility; the UCI disputes this conclusion, and maintains that the level of negligence shown by the First Respondent in dealing with his whereabouts obligations was such as to command a sanction of two years' ineligibility.

The Panel finds that a period of eighteen months is the appropriate measure of ineligibility for the First Respondent, proportional to his degree of fault. On one side, the Panel notes that the behaviour of Rasmussen shows a patent disregard of his whereabouts obligations, commanding a sanction much higher than the minimum stipulated by Article 10.3.3 NADR: the missed tests for which he is responsible were in fact due not to unexpected occurrences, but to circumstances (participation in a

competition in Germany or attendance at the sister's confirmation in Denmark) which had been scheduled in advance, and therefore had left him with sufficient time to keep his whereabouts information updated; the filing failure concerning the fourth quarter of 2010 was explained by an oversight (amounting to carelessness). On the other hand, the Panel remarks that there is no suggestion (let alone evidence) that Rasmussen committed the whereabouts failures, for which he is held responsible, in order to hide from testing and undergo a doping practice. For instance, when the first missed test occurred, on 1 February 2010, Rasmussen was publicly competing in Berlin, available for any form of doping control; then, on 28 April 2011, his location could be immediately traced. A sanction lower than the maximum therefore appears to be proportionate.

With respect to disqualification, however, the parties dispute as to its starting date. Pursuant to Article 10.9.1 NADR, the period of ineligibility starts on the date of the decision imposing the sanction. Therefore, as in the present case this Panel is imposing a sanction not applied by the Anti-Doping Board, the date of this award would be the starting moment of the ineligibility. Article 10.9.3 NADR, however, gives this Panel the possibility to start the period of ineligibility at an earlier date than the date of this award, if *"there have been substantial delays in the hearing process or other aspects of doping control not attributable to the athlete"*. Such earlier date could be the date on which the anti-doping rule violation last occurred.

On the basis of Article 10.9.3 NADR, and by taking into due consideration the chronology of this case and factual elements, but without making any strict arithmetical calculation, the Panel finds it proper to set on 1 October 2011 the starting moment of the period of ineligibility imposed on Rasmussen. The Panel comes to this conclusion by considering that on 17 November 2011, when the Decision was issued, Rasmussen was ready to accept an ineligibility sanction of one year. If not for the Decision, which went beyond the parties' requests and expectations, Rasmussen would have started to serve the sanction on that date. In addition, the Panel notes that delays occurred in the results management of the third whereabouts failure by UCI. The failure of the UCI to comply with the deadline indicated in Article 11.6.3(b) IST delayed in fact by around two months the administrative procedure for the recording of the missed test of 28 April 2011, and therefore the ensuing disciplinary proceedings before the DIF anti-doping bodies, which could in that event be completed by 1 October 2011.

Pursuant to Article 10.9.2 NADR, any period of provisional suspension is to be credited against the total period of ineligibility imposed. Rasmussen was provisionally suspended on 14 September 2011. The period of provisional suspension served by Rasmussen between 14 September 2011 and 1 October 2011, the starting date of the ineligibility, is to be credited against the eighteen months of ineligibility imposed on him.

The second point concerns disqualification. The UCI, in fact, requests that Rasmussen's results between 28 April 2011 and the date of the CAS award be disqualified.

Under Article 10.8 NADR, all competitive results obtained from the date an anti-doping rule violation occurred, through the commencement of any provisional suspension or ineligibility period, shall, unless fairness requires otherwise, be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.

In this case, the Panel finds that fairness requires that no disqualification be imposed on the First Respondent with respect to the results obtained in the period between 28 April 2011, date of the third whereabouts failure, and 14 September 2011, date of the provisional suspension. In addition to the fact that Rasmussen was not responsible for the delay in the management of his case, the Panel finds it important to emphasize the circumstance that, as conceded by the UCI at the hearing, the First Respondent's competitive results after 28 April 2011 had not been affected by any doping practice, and were fairly obtained by Rasmussen. Therefore, the Panel sees no reason to disqualify them. At the same time, the Panel underlines that the declaration that Rasmussen is ineligible to compete as from 1 October 2011 implies the forfeiture of the results (including medals, points and prizes) achieved in the period for which ineligibility is retroactively imposed (award of 27 July 2009, CAS 2008/A/1744, para. 79-80).

In connection with above, the Appellant requests the Panel also to condemn the First Respondent *"to repay all the prizes money"* Rasmussen has won after 28 April 2011. The Panel, however, finds that, in addition to the holding concerning disqualification as well as forfeiture of results in the period of ineligibility, it has no power, failing a legal basis, to condemn Rasmussen to such repayment. Therefore, the request of the UCI in that respect cannot be granted. The Panel only notes that repayment of all prize money forfeited is a condition of regaining eligibility pursuant to Article 10.8.1 NADR.

### **C. Conclusion**

In light of the foregoing, the Panel holds that the appeal brought by UCI against the Decision is to be partially granted: the Decision is to be set aside; Rasmussen, having committed an anti-doping rule violation under Article 2.4 NADR, is sanctioned, in accordance with Article 10.3.3 NADR, with a period of ineligibility of eighteen months, starting on 1 October 2011, with credit given for the period of provisional suspension at that time already served. The relief requested by the UCI with respect to disqualification of results and repayment of prize money is, on the other hand, to be dismissed to the extent not covered by the sanction of ineligibility.

Weightlifting; doping; specified substance; Methylhexanamine (dimethylpentylamine) / S6 Stimulant; lex mitior; intent to enhance performance; conditions of application of the reduction of the period of ineligibility provided for under art. 10.4 IWF ADP

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**Panel:**

**Mr. Martin Schimke (Germany), President**

**Ms. Alexandra Brilliantova (Russia)**

**Mr. Denis Oswald (Switzerland)**

**Relevant facts**

Mr Dmitry Lapikov (*“the Appellant”* or *“the Athlete”*) is an international athlete practicing weightlifting and a member of the national team of the Russian Weightlifting Federation (RWF).

The International Weightlifting Federation (*“the Respondent”* or *“the IWF”*) is a permanent not for profit organization composed of 189 affiliated national federations worldwide, from all five continents. It has its seat in Lausanne, Switzerland. The IWF is governed by Swiss law, in particular Articles 60-79 of the Swiss Civil Code.

On 19 and 26 August 2010, the Appellant underwent two operations at the St Petersburg State Clinical Hospital in order to address calculus (stones) in his salivary glands. He was kept in hospital until early September 2010. The Appellant caught the flu in early January 2011.

The Appellant was advised by the then RWF team doctor, Dr Alexander Cheliumov, to supplement his daily food intake with more vitamins and amino acids as a means of helping to prevent a recurrence of his illness.

The Appellant consulted the internet, and with the support of Dr Petrov, the RWF’s vice-president for medical and anti-doping support, a qualified but non-practicing doctor, selected the supplement M5 Extreme (*“the Supplement”*) produced by the company Cellucor. The Appellant and Dr Petrov compared the ingredients listed on the Cellucor website with the 2011 Prohibited List of the WADA Code. No reference was made on the website to *“methylhexanamine”* or *“dimethylamylamine”* as being an ingredient of the Supplement.

In order to obtain the Supplement more quickly, the Appellant asked the RWF Vice-President, Maxim Agapitov, who was visiting the USA between 15 and 23 January 2011, to take delivery of the Supplement while in the USA, which Mr Agapitov did.

Mr Agapitov passed the Supplement over to Dr Petrov, who gave it to the Appellant. On the Supplement’s box, reference was made to *“dimethylamylamine”* as being an ingredient of the Supplement. On the box it was also explicitly mentioned: *“[...] enhances athletic performance”*.

Despite the reference to *“dimethylamylamine”* on the Supplement’s box, Dr Petrov still advised the Appellant to take the Supplement in four courses, these being 7-13 February, 28 February – 6 March, 21-27 March and 10-16 April 2011.

The Appellant was tested ahead of the 2011 European Weightlifting Championships in Kazan by the Russian National Anti-Doping Agency on 31 March 2011 and 4 April 2011, four respectively eight days after the end of the third course of intake of the Supplement by the Appellant. No trace of a Prohibited Substance was found in the sample.

On 17 April 2011, the Appellant won a gold medal. He was then subjected to a drug test. The Appellant disclosed on the doping control form that he had been taking vitamins and amino acids.

On 13 May 2011, the Respondent notified the Russian Weightlifting Federation (*“the RWF”*) of an Adverse Analytical Finding (*“AAF”*) of the presence of a specified substance within the meaning of the World Antidoping Code of the World Antidoping Agency (*“the WADA Code”*), namely *“methylhexanamine*

(*dimethylpentylamine*)” ( “*the Specified Substance*”), in the urine sample taken from the Appellant on 17 April 2011.

The Appellant did not request an analysis of the B sample, and he was provisionally suspended from 13 May 2011 onwards.

A hearing of the IWF Doping Hearing Panel (“*the IWF Panel*”) took place in Paris on 7 November 2011. The Appellant did not attend the hearing but was represented by Mr Syrtsov, the President of the RWF, who was accompanied by Dr Petrov and Mr Krokhin.

During the hearing, Dr Petrov informed the IWF Panel that the Appellant had not spoken to any coach or team doctor before purchasing the Supplement. Dr Petrov added that the Appellant was a very experienced sportsman who would not have willingly broken anti-doping rules, knowing particularly that he would in any case be tested during the European championships and that an AAF would prevent him from competing in the London Olympics.

Following the hearing, the IWF Panel passed a decision sanctioning the Appellant with four years’ ineligibility starting on 13 May 2011. Such decision, dated 23 November 2011, was communicated to the Appellant on 5 December 2011.

The Appellant filed his statement of appeal to CAS on 26 December 2011 and his appeal brief on 3 February 2012.

Based on the submissions made in his appeal brief, the Appellant “*reduced*” his requests for relief, inviting the CAS Panel to “*allow his appeal, and to substitute a sanction of 9 months from 13 May 2011, alternatively a sanction which would not prevent him from competing at the London Olympics*”.

The Respondent submitted its answer on 29 February 2012.

The award requested by the Respondent is as follows:

*“I. The Appeal filed by Mr. Dmitry Lapikov is dismissed.*

*II. The International Weightlifting Federation is granted an award for costs”.*

On 15 May 2012, the Respondent informed CAS that the IWF executive board had met on 9 May 2012 and had decided *inter alia* “*to amend the IWF Anti-Doping Policy (IWF ADP) in the sense that the sanction for specified substances is reduced to two years, with immediate effect*”. The

Respondent therefore confirmed that, in application of the principle of the *lex mitior*, the Appellant should be sanctioned with a two-year period of ineligibility.

## Extracts from the legal findings

### A. Applicable law

Article R58 of the CAS Code sets out the law applicable to resolving disputes using the Appeal Arbitration Procedure. That provision provides as follows:

*“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rule of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*

In the case at hand, the applicable regulations are the IWF ADP, which is not in dispute after both parties had confirmed at the hearing that the issue related to the four-year ban had been resolved. Subsidiarily, Swiss law is applicable as the IWF is domiciled in Switzerland, which is also not in dispute.

### B. Merits

1. The four-year ban and the issue of proportionality

Article 10 of the IWF ADP “*Sanctions on Individuals*” states:

(..)

*10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods*

*The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:*

*First violation: Four (4) years’ Ineligibility.*

(..)”

The wording of Article 10.2 of the IWF ADP is identical to the wording of Article 10.2 of the WADA

Code, with the sole exception that the WADA Code provides for two (2) years' ineligibility for a first offence. At the outset of the appeal proceedings, the parties were arguing about the compatibility of article 10.2 IWF ADP with the WADA Code and about the proportionality and compatibility with Swiss law, and the Appellant's personality rights pursuant to the latter law.

With the decision passed on 9 May 2012 by the IWF Executive Board to reduce the ineligibility period from 4 to 2 years, the discrepancy between the IWF ADP and the WADA Code no longer exists.

In other words, since 9 May 2012, article 10.2 of the IWF ADP provides a two-year ineligibility period for a first offence. In application of the principle of the *lex mitior*, the Panel decides that the Appellant is to benefit from the amended version of article 10.2 of the IWF ADP. This has been put forward by the Respondent itself in its letter to CAS dated 15 May 2012. In addition, both parties have agreed on this during the hearing, so that the application of the amended article 10.2 of the IWF ADP to the present proceedings is undisputed.

Based on the above, and in the absence of any of the aggravating circumstances alleged by the Respondent, the Panel finds that the Appellant's period of ineligibility is not to exceed two years starting on 13 May 2011.

## 2. Reduction of the period of ineligibility based on article 10.4 of the IWF ADP

The second of the Appellant's grounds for appeal is that the period of ineligibility should be eliminated altogether or reduced pursuant to article 10.4 of the IWF ADP.

The relevant parts of Article 10.4 IWF ADP provides as follows:

*"Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the use of a performance-enhancing substance, the period of ineligibility found in Article 10.2 shall be replaced with the following:*

*First violation: At a minimum, a reprimand and no period of ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.*

*To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his*

*or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance. The Athlete's or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of ineligibility".*

The commentary to article 10.4 IWF ADP explains the scope of the article in the sense that *"there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non doping explanation"*.

The Appellant tested positive to methylhexanamine (dimethylpentylamine) following the anti-doping control of 17 April 2011. Methylhexanamine (dimethylpentylamine) is a Specified Substance listed under class S6 Stimulants and is prohibited in competition according to the IWF ADP and the 2011 WADA list of prohibited substances. All this is not in dispute.

The Appellant was able to explain the presence of the Specified Substance in his bodily sample by the ingestion of the Supplement M5 Extreme. This is not disputed either.

What the parties are arguing about are the reasons why the Athlete took the Supplement.

The Appellant claims that he had to recover from two surgical operations and from the flu and was advised by his team doctor to take vitamins and amino acids. With the approval of Dr Petrov, a non-practicing doctor but a vice-president of the RWF for anti-doping support, the Appellant took the supplement M5 Extreme in order to recover from his operations and from the flu. Before the IWF Hearing Panel, the Appellant explained that he took the Supplement for *"ergogenic effect and better well feeling"*. During the hearing, the Appellant's counsel maintained the argument that a Specified Substance could actually be taken during training and was only prohibited during competition. According to the Appellant's counsel, what is crucial is that the Appellant did not intend to enhance his athletic performance during the competition.

The Respondent argues that the clear description on the Supplement's box of its effects on the user, as well as the contradictions between the first and second and last statements of the Appellant, show that his intention was to improve his athletic performance.

After having carefully reviewed all the evidence produced during the proceedings, notably the statements of the Appellant and Dr Petrov, the Panel finds that the Appellant was not able to establish to

the Panel's comfortable satisfaction that it was not the Appellant's intention to enhance his athletic performance.

Indeed, the Panel finds that article 10.4 IWF ADP covers cases where a Specified Substance enters an athlete's body without him knowing it at the time of the intake. This point is essential in order to give any sense to the possibility of reducing a sanction on the basis of article 10.4 IWF ADP. It goes without saying that an athlete who knowingly takes a Specified Substance and who is eventually tested positive cannot benefit from a reduction of the period of ineligibility simply by arguing that he did not take the Specified Substance to improve his athletic performance, as allowed for by article 10.4 IWF ADP.

The Panel also refers here to the possibility of granting TUEs, which when granted allow an athlete to take a Prohibited Substance, notably a Specified Substance. If article 10.4 IWF ADP were to apply to cases where athletes knowingly ingested Specified Substances, the system of granting TUEs would be rendered useless, which obviously is not the intention of the IWF ADP.

It is therefore worth pointing out that all of the athletes in, for example, CAS 2007/A/1395, 2010/A/2107, CAS A2/2011, CAS 2011/A/2645 did not know that the supplement they had taken contained a Specified Substance. It is only in such cases where the athlete does not know that the supplement contained a Specified Substance will such athlete only have to prove that he/she did not take the Specified Substance with the intent to enhance athletic performance and will not have to prove that he/she did not take the product (e.g. a food supplement) with the intent to enhance athletic performance (see the discussions in CAS 2011/A/2645 para. 80 sec.; CAS 2010/A/2107 para. 9.14 and 9.17; against it CAS A2/2011 para. 47).

In the present case, the Panel thus finds it decisive that the Athlete confirmed on 5 July 2011 and – on explicit request – at the hearing that he and Dr Petrov checked the ingredients contained in the Supplement against the WADA-List and had noticed the presence of dimethylamilamine. The Athlete admitted in his statement dated 5 July 2011 that this substance had a “*similar name however not from the WADA list of prohibited substances*”. Dr Petrov admitted that the name was similar, but apparently had realized that this was the same substance only upon further inquiries after the Appellant had been tested positive.

However, a quick research in the internet would have directly revealed to the Appellant and Dr Petrov that “*dimethylamilamine*” was another word for the Specified

Substance “*Methylhexanamine (dimethylpentylamine)*”.

In light of:

- the large degree of similarity between the description of the Supplement on its box, which contained a clear reference to its performance-enhancing effect, and the relevant WADA-List of prohibited substances with;
- the numerous warnings made by WADA, the IOC, and nearly all of the sport federations on the risks associated with the intake of food supplements (see notably CAS 2003/A/484; 2005/A/847 or CAS 2009/A/1915);
- the fact that the Appellant, a top professional athlete with many years of experience, had to have known that he was personally responsible for checking whether or not the Supplement contained a Specified Substance; and
- the fact that the 2011 WADA list, which the Appellant had admitted on several occasions to have carefully consulted both on his own and with his doctor, makes reference to “*methylhexaneamine (dimethylpentylamine) (...) and other substances with a similar chemical structure or similar biological effect(s)*”. [Emphasis added],

the Panel holds that by not checking whether the substance “*dimethylamilamine*”, which the Athlete had found on the Supplement's box, was the same substance as the substance “*dimethylpentylamine*”, which the Athlete had found on the 2011 WADA List, the Athlete took the risk of ingesting a Specified Substance when taking the Supplement and therefore of enhancing his athletic performance. In other words, whether with full intent or per “*dolus eventualis*”, the Panel finds that the Appellant's approach indicates an intent on the part of the Appellant to enhance his athletic performance within the meaning of Art. 10.4. IWF ADP.

Based on the foregoing, the Panel finds that this degree of intent on the part of the Appellant excludes any application of the reduction provided for under article 10.4 IWF ADP. Indeed, an athlete who intentionally ingests a Prohibited Substance accepts, beyond any reasonable doubt, that it may enhance his/her athletic performance. The Appellant's intent to ingest the Prohibited Substance therefore prevents him *per se* from comfortably satisfying the Panel that he did not intend to enhance his performance. Notwithstanding this, the requirements for such proof would have been extremely difficult in light of the fact that the supplement's box explicitly mentions



the quality/feature “[...] enhances athletic performance”.

In his situation, the Athlete should have clearly switched to another product that contained vitamins and amino acids, bearing in mind that his doctor had not advised him to take any other type of supplements. Alternatively, the Athlete should have made sure that no trace of the Specified Substance would remain in his body during the competition. In this respect, Dr Petrov himself admitted that the intake program of the Athlete had perhaps been “*too ambitious*”.

The Athlete not only took the risk of ingesting a Prohibited Substance, but decided to take it up to the last moment in order to benefit from the effects of the Supplement as long as possible. This double acceptance of the risk by the Athlete led to the Adverse Analytical Finding.

Again the Panel stresses that it carefully reviewed the extensive case law put forward by the Appellant and found support for its interpretation of article 10.4 IWF ADP. In all of the cases cited by the Appellant, there was no intent on the part of the athlete to ingest the prohibited substance. The athletes in those cases were able to demonstrate that the ingestion was not intentional and that it was accidental, either due to contamination, wrong labelling, or light degrees of negligence. The case of the Appellant - who was ingesting a Supplement that contained a prohibited substance indicated on its box - is therefore not comparable to the cases cited in the appeal brief and at the hearing.

After a careful review of the relevant case law, the Panel is thus convinced that a period of ineligibility of two years is appropriate as far as article 10.4 IWF ADP is concerned.

### 3. Reduction of the period of ineligibility based on article 10.5.2 of the IWF ADP

Article 10.5.2 IWF ADP provides in its relevant part as follows:

*“If an Athlete or other Person establishes in an individual case that he or she bears no Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable (...) when a Prohibited Substance or its Markers or Metabolites is detected in an Athlete’s Sample in violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced”.*

The Appellant’s arguments in relation to this ground

of the appeal are similar to those in relation to the previous one, namely that the Appellant did not know that the Supplement contained a Prohibited Substance and that it was not his intention to enhance his athletic performance.

The Panel finds again here that the approach taken by the Appellant speaks against him. Referring to the reasoning developed above, the Panel stresses again that the Supplement’s box indicated the presence of a Prohibited Substance in that product and that the Appellant can therefore not insist on benefitting from a reduction of the applicable period of ineligibility only for the simple fact that he could explain that the Prohibited Substance entered his system through the intentional intake of such Prohibited Substance, which was expressly indicated on the Supplement’s box, with reference to the 2011 WADA List.

Furthermore, under this article 10.2.5 IWF ADP, the Panel considers that even without reference to the Athlete’s intention to take the Prohibited Substance, the approach taken by the Athlete lacks any satisfactory justification and excludes any reduction of the period of ineligibility provided for under article 10.2 IWF ADP.

After a careful review of article 10.5.2 and its related case law, notably CAS 2011/A/2518, 2010/A/2107, 2010/A/2229, 2008/A/1489 and 2009/A/1870, where all the athletes did not know about the presence of the Prohibited Substance in the food supplement they had ingested before being tested positive, the Panel is thus convinced that this article does not apply to the present case, and that in any case, the approach taken by the Appellant cannot allow a reduction of the period of ineligibility of two years.

The Panel eventually wishes to underline that it is perfectly aware of the harsh consequences of its decision, which will prevent the Appellant from taking part in the London 2012 Olympics. Nevertheless, for all the reasons explained above, the Panel does not see any legal justification for a reduction of the period of ineligibility, for example and in particular based on the doctrine of proportionality. Proportionality has focused on perceived fairness to the athlete based upon the pretence that the sanction imposed is deemed excessive or unfair on its face (see Richard H. McLaren, CAS Doping Jurisprudence: What Can We Learn?, Paper delivered at the seminar for the members of CAS held in Divonne, France on 15<sup>th</sup> & 16<sup>th</sup> June 2005, p. 26, 27). Accordingly, CAS case law shows that an athlete has a high hurdle to overcome if he or she wants to prove the existence of such exceptional circumstances (see for example CAS 2005/A/830, 10.24 *et seq.*, CAS 2010/A/2268, 133 *et*

*seq.*). Likewise the Swiss Federal Court held that the issue of proportionality would only be a legitimate issue if a CAS award constituted an infringement on individual rights that was extremely serious and completely disproportionate to the behaviour penalised (see Richard H. McLaren, *ibidem*, p. 30). In the case at hand such exceptional circumstances have neither been asserted by the Appellant, nor are they evident. The risk that an important sports event such as the Olympic Games may accidentally fall within the period of a ban is inherent in the system and even constitutes a crucial element of this sanction. Therefore, a reduction solely based on the occurrence of an important sports event would undermine the whole system of doping sanctions.

Based on all of the above, and after reviewing the evidence, the submissions, and the case law produced in the written proceedings and at the hearing, the Panel comes to the conclusion that the Appellant is to be sanctioned with a period of two years of ineligibility starting on 13 May 2011.

Athletics; doping; Substantial Assistance; international Federations' power of review of decision taken at national level in doping cases; condition to benefit from a reduction of the sanction based on Substantial Assistance; scope of the factors considered in assessing Substantial Assistance

Panel:

Mr. Romano Subiotto QC (Belgium and United Kingdom),  
Sole Arbitrator

Relevant facts

The International Association of Athletics Federations (IAAF), the Appellant, is the international governing body for track and field athletics.

The Real Federación Española de Atletismo (RFEA) is the national federation of athletics in Spain and is a member of the IAAF.

Francisco Fernández Peláez (the “Athlete” or “Fernández”), the second Respondent, is a Spanish race walker. Fernández is a member of the RFEA and has competed at an international level for Spain on numerous occasions. The IAAF, the RFEA and the Athlete are collectively referred to as the “Parties”.

In November 2009, the Spanish *Guardia Civil* carried out a number of police raids in locations across Spain that targeted an alleged doping ring involving doctors, pharmacists and athletes. This police operation, called “*Operación Grial*”. Fernández’s home was one of the locations raided by the Civil Guard, where EPO and other performance-enhancing drugs were reportedly found. These substances feature in the list of Prohibited Substances under the 2010 World Anti-Doping Agency (WADA) List of Prohibited Substances and Methods, which forms an

integral part of the 2011 IAAF Anti-Doping Rules (the “*IAAF Rules*”), as provided by the IAAF Rules themselves (the “*Prohibited List*”).

On February 10, 2010, Fernández appeared voluntarily at the *Guardia Civil*’s Central Operative Unit (the “*UCO*”) headquarters in Madrid.

On the same day, Fernández also appeared voluntarily (and absent disciplinary proceedings or adverse analytical findings formally lodged against him) before the Chairman of the RFEA and declared that (i) to date, no prohibited substance had ever been detected in his body; (ii) he violated the IAAF Rules due to the possession of substances included in the Prohibited List; (iii) he was not aware of the exact composition of these substances, which were provided by a doctor, but he believed they featured in sections S1 and S2 of the Prohibited List (iv) he had cooperated with the Spanish judicial authorities and the police, providing testimony in the context of “*Operación Grial*”; (v) his cooperation aimed at revealing information about medical treatments, the sale and distribution of prohibited substances, the organisation of the doping ring, and other data; and (vi) the Spanish police considered his cooperation to be substantial for the purpose of establishing criminal violations by third Parties in a Spanish Criminal Court.

On February 11, 2010, Fernández was provisionally suspended from competitions.

On February 25, 2010, Fernández appeared voluntarily for a second time before the UCO.

On June, 10, 2010, Fernández appeared before the Spanish judge in charge of the criminal case at the Investigating Magistrate’s Court no.14 in Valencia and confirmed the evidence that he had previously given to the police.

On November 30, 2010, the Parties signed an “*Agreement to Co-operate*” (the “*Agreement*”).

On April 7, 2011, Fernández informed the IAAF that the criminal proceedings were now before the Audiencia Nacional de Madrid and that, pursuant to Article 301 of the Spanish Law on criminal

proceedings, proceedings had to remain secret until the oral phase, and that he would therefore be unable to provide more information to the IAAF at this stage.

#### A. Proceedings at national level

In December 2009, the Commission for Control and Monitoring Health and Doping of the Council for Sport (the “*CMHD Commission*”) decided to start proceedings against Fernández.

On February 11, 2010, the Competition and Jurisdiction Committee, (the “*RFEA Committee on Sports Discipline*”) initiated disciplinary proceedings against Fernández and provisionally suspended the athlete.

On February 24, 2010, the case-handler within the RFEA Committee on Sports Discipline proposed that Fernández be suspended for a period of two years due to a breach of the IAAF Rules, pursuant to Article 15.1 of the Organic Act of 7/2006 of November 21, 2006 on the protection of health care and against doping in sport (the “*Organic Act*”), Article 40.2 of the IAAF Rules, and Article 10.2 of the World Anti-Doping Code (the “*WADA Code*”).

On March 18, 2010, Fernández’s request for a reduced penalty was rejected, because of the lack of evidence on the extent of his cooperation with the authorities, and the case was referred to the RFEA Committee on Sports Discipline for further review.

On March 24, 2010, the RFEA Committee on Sports Discipline found Fernández guilty of an anti-doping rule violation, declared him ineligible for 2 years, and disqualified his results pursuant to the Organic Act, the WADA Code and the IAAF Rules. This period was reduced by the period already served by the Athlete during his provisional suspension. This decision did not take Fernández’s cooperation with the UCO into consideration, given that this cooperation had not been sufficiently evidenced.

On March 29, 2010, Fernández forwarded a statement to the RFEA Committee on Sports Discipline which he had obtained from the Police Chief in charge of the UCO, which sought to confirm the nature of his assistance to the police authorities.

On April 7, 2010, the RFEA informed the IAAF that Fernández had been found guilty of an anti-doping rule violation.

On April 9, 2010, Fernández appealed the decision dated March 24, 2010 before the Spanish Committee

on Sports Discipline.

On April 12, 2010, upon receipt of the UCO’s certificate, the RFEA Committee on Sports Discipline requested the CMHD Commission to provide a report concerning Fernández’s assistance to the Spanish authorities.

On April 20, 2010, the CMHD Commission issued an official statement concerning the cooperation of Fernández.

On May 10, 2010, the RFEA Committee on Sports Discipline decided (i) to send to the Spanish Committee on Sports Discipline the report favouring exoneration Article 26 of the Organic Act issued by the CMHD Commission on April 20, 2010; (ii) to notify the IAAF of the petition for exoneration and of the reports favouring exoneration dated April 20, 2010, and (iii) to declare that the RFEA Committee on Sports Discipline did not have jurisdiction to decide on Fernández’s exoneration, since such a decision was within the exclusive competence of the IAAF’s Doping Review Board (DRB).

On June 11, 2010, the Arbitrator of the Spanish Committee on Sports Discipline decided to reject Fernández’s appeal against the decision of the RFEA Committee on Sports Discipline, and to refer the appeal back to the RFEA Committee on Sports Discipline.

On June 28, 2010, the RFEA Committee on Sports Discipline decided to reduce the 2-year penalty period of ineligibility and to reduce his ineligibility to one year, on the grounds that it had been proven that Fernández was cooperating as a witness in the case of an alleged crime.

On July 16, 2010, the IAAF informed the RFEA that pursuant to Article 40.5(c) of the IAAF Rules, any reduction of a sanction based on Substantial Assistance could only be decided after the DRB had determined that there was Substantial Assistance and even then, only if the WADA agreed with such consideration.

On May 17, 2011, the RFEA Committee on Sports Discipline agreed not to extend the Athlete’s ineligibility beyond the reduced one-year term (the “*RFEA Decision*”).

Upon receipt, the IAAF wrote, by letter dated July 7, 2011, to the RFEA that only a final decision adopted by the RFEA would be open to an appeal before the CAS either by the IAAF or the WADA. The IAAF then invited the RFEA to provide further

clarification as to its position and in particular, as to the final status of the RFEA Decision, by July 13, 2011 at the latest.

Since the RFEA had not provided the information the DRB had requested, the DRB extended the time for an appeal to the CAS several times.

Fernández's case was subsequently referred back to the DRB pursuant to IAAF Rule 42.15 to decide whether to appeal the RFEA Decision to the CAS. The DRB therefore decided, given the continuing absence of any evidence of Substantial Assistance in accordance with the IAAF Rules, that the RFEA's decision was erroneous and that there was no option but to file an appeal with the CAS.

On December 9, 2011, the DRB re-imposed a provisional suspension on Fernández pending the CAS hearing (the "IAAF Decision").

### **B. Proceedings before the CAS**

On December 20, 2011, the IAAF filed its Statement of Appeal against the RFEA and Fernández with respect to the RFEA Decision.

On February 24, 2012, the IAAF filed its Appeal Brief with the CAS requesting the CAS set aside the RFEA Decision and impose a two-year ineligibility period on Fernández, less the period of ineligibility already executed by him.

On February 28, 2012, Fernández filed his Answer to the IAAF's Appeal Brief arguing that the appeal was inadmissible and subsidiarily, that the RFEA Decision be confirmed.

On March 1, 2012, the IAAF filed its Reply Brief.

On March 5, 2012, the RFEA informed the CAS that it did not intend to take any action in its defense in the proceedings before the CAS. However, the RFEA explained, in that letter, the actions of the RFEA Committee on Sports Discipline.

On March 5, 2012, Fernández filed his Reply Brief to the CAS.

#### Extracts from the legal findings

### **A. Applicable Law**

Article R58 of the CAS Code provides as follows:

*Article R58 Law Applicable*

*This Arbitrator shall decide the dispute according to the applicable regulations and the rules of law chosen by the Parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Arbitrator deems appropriate. In the latter case, the Arbitrator shall give reasons for its decision.*

The Sole Arbitrator notes that the decisions of the RFEA applied the IAAF Rules in determining whether an anti-doping rule violation had been committed and in setting the sanctions to be imposed on Fernández.

The Sole Arbitrator therefore concludes that this dispute has to be determined on the basis of the IAAF Rules, and this is not contested by the Parties.

### **B. Admissibility**

Article R49 of the CAS Code provides as follows:

*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the Parties, the Division President may refuse to entertain an appeal if it is manifestly late.*

Article 42.13 of the IAAF Rules provides as follows:

*Unless stated otherwise in these Rules (or the Doping Review Board determines otherwise in cases where the IAAF is the prospective appellant), the appellant shall have forty-five (45) days in which to file his statement of appeal with CAS starting from the date of communication of the written reasons of the decision to be appealed (in English or French where the IAAF is the prospective appellant) or from the last day on which the decision could have been appealed to the national level appeal body in accordance with Rule 42.8(b). Within fifteen (15) days of the deadline for filing the statement of appeal, the appellant shall file his appeal brief with CAS and, within thirty (30) days of receipt of the appeal brief, the respondent shall file his answer with CAS.*

As a preliminary point, the Arbitrator wishes to recall the facts relevant to the deadline to file the appeal in this case.

On November 30, 2010, the Parties signed the Agreement in which they agreed that the decision of the RFEA would be subject to appeal to the CAS, in accordance with the IAAF Rules.

On February 10, 2011, the IAAF requested, by e-mail, that the RFEA review Fernández's case as

provided for by the Agreement. This e-mail was left unanswered.

On May 12, 2011, the IAAF sent a letter to the RFEA reminding it that it had to review Fernández's case pursuant to the Agreement and that, since the date had passed, the IAAF asked the RFEA what steps had been taken to review the matter.

On May 17, 2011, the RFEA Committee on Sports Discipline approved the one-year sanction imposed on the Athlete. On May 18, 2011, the RFEA answered the IAAF and informed it of the result of the hearing of the RFEA Committee on Sports Discipline.

On July 7, 2011, the IAAF wrote to the RFEA in an attempt to obtain clarification of the RFEA Committee on Sports Discipline's ruling and to seek whether the RFEA would take a subsequent decision, in conformity with the Agreement, which would then be subject to appeal to the CAS. The IAAF requested the RFEA to answer by July 13, 2011. This was left unanswered.

Pending such clarification, on July 4, 2011, the IAAF took the precaution to extend the time for appealing to the CAS until August 5, 2011, and this was communicated to the RFEA on July 7, 2011, by letter.

Since the IAAF's request for clarification was left unanswered, on July 18, 2011, the IAAF reminded the RFEA to provide the IAAF with clarification as to Fernández's case. This was left unanswered.

On August 3, 2011, the IAAF reminded the RFEA, again, that it had failed to answer the request for clarification on Fernández's case. This communication was left unanswered.

Since the IAAF's communication remained unanswered, on August 3, 2011, the DRB further extended time for appealing to the CAS until September 16, 2011.

The RFEA finally replied, by e-mail, on August 5, 2011, attaching a letter of the RFEA Committee on Sports Discipline, confirming that it had taken a final decision on May 17, 2011, and explaining the reasons for such decision.

The second extension of the deadline was notified to the RFEA on August 15, 2011, along with a request for information concerning the facts and documents relied upon in reaching the RFEA Decision. This attempt of clarification was left unanswered. A reminder was sent on September 8, 2011, requesting clarification by September 9, 2011. The reminder was

also left unanswered.

Due to the absence of the information requested (either from the RFEA or from Fernández), on September 16, 2011, the DRB further extended time for appealing under Article 42.13 of the IAAF Rules until October 17, 2011. This was notified to the RFEA by letter on September 16, 2011, along with a request to provide information as to Fernández's case by September 23, 2011.

On October 17, 2011, after a meeting with the RFEA to advance the IAAF's previous request, which had hitherto remained unanswered, the DRB further extended the time for an appeal under Article 42.13 until October 25, 2011, and then until November 30, 2011, in order to allow the members to meet in person to review the updated information in Fernández's case and to discuss the IAAF's position on appeal. This was notified to the RFEA, by letter, on October 22, 2011.

On November 30, 2011, the DRB finally extended the time for appealing to CAS until 20 December 2011. This was notified to the RFEA on November 30, 2011.

In accordance with the DRB's final extension of time on November 30, 2011, the IAAF filed its appeal with the CAS on December 20, 2011.

Concerning the first deadline of 45 days, the Sole Arbitrator holds that time could not run before August 5, 2011 since the IAAF, despite numerous reminders, had not received any answer to its basic question of whether the RFEA Decision was a binding act against which an appeal could be filed.

The Sole Arbitrator acknowledges that the RFEA mentioned in its Decision that it was a final decision, but such statement was contested because it did not comply with the Agreement and this was precisely the reason why the IAAF was seeking clarification. In addition, Article 40.5 of the IAAF Rules provides that "*If the Member suspends any part of the period of Ineligibility under this Rule, the Member shall promptly provide a written justification for its decision to the IAAF and any other party*". Since no justification had been provided concerning the RFEA's departure from the terms of the Agreement, the IAAF could justifiably question the binding character of the RFEA Decision. Fernández's allegation that the RFEA Decision was identical to the communication of the reasoning dated August 5, 2011 is therefore rejected.

In any case, according to Article 42.13 of the IAAF Rules, "*the appellant shall have forty-five (45) days in which*

to file his statement of appeal with CAS starting from the date of communication of the written reasons of the decision to be appealed". Since the written reasons of the RFEA Decision were communicated on August 5, 2011, the Sole Arbitrator considers that the 45-day deadline had not passed when the DRB took the first decision to extend it.

The Sole Arbitrator acknowledges that, should the deadline have started to run on May 18, 2010, the IAAF extended the time to file an appeal, pursuant to Article 42.13, on July 4, 2011, which was clearly within the deadline of 45 days from the date of the reception of the RFEA Decision.

As to the second extension of the deadline to file an appeal, the Sole Arbitrator notes that, on August 3, 2011, the IAAF extended the deadline to file an appeal until September 16, 2011, in conformity with Article 42.13 of the IAAF Rules.

Concerning the extension of the deadline agreed on November 30, 2011, the Sole Arbitrator considers that it was duly extended, in conformity with Article 42.13, until December 20, 2011.

The Sole Arbitrator finds that, in deciding whether a decision to extend the deadline was duly adopted before the expiration of the applicable deadline at that time, the date of the notification of the extension to the relevant entity, rather than the minutes of meetings at which the decision to extend was taken, or the decision itself, is relevant.

The Sole Arbitrator further finds that the IAAF Rules do not provide for a notification of the DRB's decisions to the Athlete. The IAAF's contractual relationship is with the RFEA. In any case, Article 30.7 of the IAAF Rules mentions expressly that "*Notice under these Anti-Doping Rules to an Athlete or other Person who is under the jurisdiction of a Member may be accomplished by delivery of the notice to the Member concerned. The Member shall be responsible for making immediate contact with the Athlete or other Person to whom the notice is applicable.*" Therefore, the Sole Arbitrator considers that the IAAF did not need to notify the DRB's decisions to Fernández.

The Sole Arbitrator holds that, since the decisions to extend the deadlines were notified to the RFEA within the required deadlines and in conformity with the IAAF Rules, they were not arbitrary.

The Sole Arbitrator finds that the IAAF Rules do not require a particular justification for extending the deadline to file an appeal. However, it cannot be contested that administrative efficiency, and in

particular the desirability for the IAAF, and any international federation for that matter, to have all the elements in its possession in order to take a reasoned decision on whether to appeal (particularly when the prospective appellant was not a party to the first instance proceedings), are sufficient grounds to warrant a postponement of the deadlines to appeal a decision rendered by a national federation until such time as the IAAF has been sufficiently informed on the meaning, nature, and scope of the national federation's decision.

In this case, the correspondence shows that the IAAF addressed questions repeatedly to the RFEA; it either received no answers, or received them very late. The Sole Arbitrator considers that the difficulties encountered by the IAAF in obtaining information from the RFEA, and in particular on such a basic issue as the binding nature of the RFEA Decision, clearly justified the extensions of the deadline to appeal in this case. Taking into consideration all the documents submitted by the Parties, it clearly appears that the IAAF made its best efforts to seek clarification from the RFEA from the outset of the case. It is unfortunate that its numerous attempts were left unanswered. The absence of clarification on the part of the RFEA was precisely the reason why the IAAF was left with no other choice but to extend the deadline to file an appeal, in order for its rights of appeal to remain unaffected. The Sole Arbitrator acknowledges that the IAAF extended the deadline to file an appeal, in conformity with Article 42.13, in an attempt to protect its rights, given that the RFEA was not answering its requests for clarification.

For all the above-mentioned reasons, the Sole Arbitrator finds that the appeal was filed within the deadline provided by the IAAF Rules. It complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court office fee. It follows that the appeal is admissible.

### **C. Violation of doping Rule**

Article 32.2(f) of the IAAF Rules prohibits the possession of prohibited substances.

Fernández does not contest the fact that he was found in possession of sport enhancing substances and that these substances appear on the Prohibited List.

Fernández therefore admits to having committed a doping offence under the IAAF Rules.

## D. Merits

### 1. Applicability of Spanish Law within the RFEA Decision

The IAAF considers that, in taking the RFEA Decision, the RFEA Committee on Sports Discipline was wrong to have given precedence to Spanish Law over the IAAF Rules.

The Sole Arbitrator notes that the RFEA is the Member Federation of the IAAF for Spain, and is, as such, required to apply the IAAF Rules. Indeed, Member Federations are required to comply with all applicable IAAF Rules and Regulations pursuant to Article 4.8 of the IAAF Constitution. Furthermore, according to Article 30.1 of the IAAF Rules, the IAAF Rules shall apply to the IAAF, its Members and to Athletes. Finally, Article 30.2 of the IAAF Rules provides that all Members and Area Associations are required to comply with the IAAF Anti-Doping Rules and Regulations. The RFEA recognized itself in its Decision that Fernández “*is subject to the Spanish disciplinary rules and administrative procedure, without prejudice to his also being subject to the rules of the IAAF*”.

Moreover, Fernández acknowledged, at various stage of the procedure, that the IAAF Rules are applicable. Indeed, he referred the case to the DRB pursuant to Article 40.5 (c) of the IAAF Rules; and he signed the Agreement according to which the issue of Substantial Assistance would be determined under the IAAF Rules.

Therefore, the Sole Arbitrator considers that, while deciding to disregard the IAAF Rules, the RFEA violated its obligations as a member of the IAAF.

### 2. Violation of the Agreement by the RFEA

On November 30, 2010, the Parties signed the Agreement. The Sole Arbitrator finds that the Agreement provides clearly that the RFEA had to review the Athlete’s case so as to verify that Fernández had complied with the conditions set forth in the DRB’s Decision. However, the RFEA deliberately violated the terms of the Agreement it had signed by deciding to take a final decision confirming a reduction of the sanction to one year, without explaining Fernández’s fulfilment of the conditions and without requiring any further assistance after the adoption of the RFEA Decision.

Fernández’s allegation that the Agreement was not renewed must be rejected since Fernández provides no evidence to support this statement. In addition, the IAAF contests such allegation. In any case,

even in the absence of the Agreement, the Sole Arbitrator’s reasoning would not change materially for the following reasons.

### 3. Clash between Disciplinary Proceedings and Criminal Proceedings

The Sole Arbitrator notes that the Athlete invoked Spanish Law, according to which the Athlete’s testimonies must remain secret, to justify why he could not provide information on his assistance to the Spanish Authorities in the context of the criminal investigation.

Moreover, the RFEA itself, in its decisions and in its declaration to the CAS, invoked Spanish Law and mentioned that there was a clash between disciplinary and criminal proceedings.

The Sole Arbitrator acknowledges the potential difficulties resulting from the interplay of criminal and sport disciplinary proceedings. However, the rules and procedures in one of these proceedings cannot interfere with the other proceedings. In this case, the Sole Arbitrator holds that the Spanish criminal law provisions concerning confidentiality cannot justify non-compliance with the relevant IAAF provisions in order to obtain a reduction in the ineligibility period pursuant to the IAAF provisions, for the following reasons.

The IAAF Rules provide for anti-doping sanctions that apply to athletes licensed by the IAAF. In cases of Substantial Assistance, the IAAF has provided for a possible reduction in the ineligibility periods resulting from doping violations. The IAAF Rules provide that the arbiter of whether an athlete has provided Substantial Assistance is the DRB. Allowing national courts or others to judge whether Substantial Assistance has been given in any given case would effectively delegate the key decision on whether the applicable conditions have been met to entities or persons other than the DRB, with the result that (i) the consistent application of this provision could not be ensured, and (ii) its application could well be influenced by a range of factors and considerations straying from the need to fight doping.

More generally, the enforcement of anti-doping provisions contained in the rules of sports federations cannot be subject to provisions of national law that may or may not reflect the same anti-doping spirit and objectives, nor can they be subject to the vagaries of national judicial systems, particularly at a time when not all countries have shown the same degree of devotion to fighting doping.



As a result, the provisions of Spanish criminal law that prevent, or that are interpreted as preventing, athletes from complying with the relevant IAAF provision have the direct consequence that Spanish athletes will be unable to avail themselves of the Substantial Assistance ground to reduce their sanctions, until and unless such provisions are changed or interpreted in a manner that allows athletes to comply with the relevant provision of the IAAF Rules.

That the division between criminal and disciplinary anti-doping enforcement, as currently reflected in Spain, is not indispensable to protect any fundamental human rights is demonstrated by the approach adopted in a number of other countries in Europe, for example Italy, where criminal and administrative anti-doping enforcement work hand-in-hand, thereby achieving a more effective system to fight doping (as was obvious in case CAS 2009/A/1879).

It is of utmost importance that national sporting federations be controlled by international bodies, of which they are members, in order to promote, coordinate and monitor the fight against doping in all its forms internationally and on a level playing field. Moreover, the CAS must also seek to preserve some coherence between the decisions of the different federations in comparable cases in order to preserve the principle of equal treatment of athletes in different sports. If athletes were able to invoke their national laws to justify departures from international standards, the fundamental principle of equality between athletes would be severely undermined.

According to CAS jurisprudence (CAS 96/156; CAS 98/214; CAS 2005/A/872; CAS 2006/A/1119; CAS 2009/A/2014; CAS 2009/A/2020; CAS 2009/A/2021), it is fundamental that decisions taken at a national level in doping cases, particularly regarding the imposition of sanctions, be subject to the review of the relevant international sporting federations. The power conferred to the national federation aims, *inter alia*, at maintaining the integrity of international competitions by preventing national federations from not imposing any sanction at all on an athlete or imposing a less severe sanction than justified merely in order to allow the athlete to compete at international level.

Furthermore, the Sole Arbitrator takes account of Fernández's statement of January 3, 2012, according to which, his status under Spanish Law had changed and he was therefore allowed to provide clarification during a meeting to be held on February 3, 2012. Then, Fernández mentioned that he would not be able to participate in the meeting for personal reasons, without further specification, and that he

wished the case to proceed to the CAS. Later, in his Reply Brief, Fernández retracted from his statement that personal reasons had caused the cancellation of the meeting and mentioned that his cancellation of the meeting was due to confidentiality issues. The Sole Arbitrator considers that the Athlete has not sufficiently assessed why his status changed in the first place, and then suddenly changed again due to a publication in the Spanish media. Furthermore, it does not appear from the file that Fernández sought confidentiality for the meeting.

The Sole Arbitrator would also refer to the Athlete's signature of an agreement according to which he would provide full cooperation in the investigation and adjudication of *any* case related to information in his possession. The agreement specifically provides that "*for the avoidance of doubt, this condition relates to the investigation and adjudication of both criminal cases under Spanish or other applicable law and to cases brought under IAAF Anti-Doping Rules and/or the rules of any other sport compliant with the World Anti-Doping Code*".

To conclude, the decision regarding the exception for Substantial Assistance must, in the last instance, remain under the control of the entity charged with enforcing the corresponding anti-doping rules, or to a body appointed by that entity. This is why it is indispensable to comply with the IAAF rules provisions, which require the DRB to sign off on the application of this exception.

#### 4. Existence of the Anti-Doping Rule Violation

It is undisputed that Fernández committed an anti-doping rule violation within the meaning of the IAAF Rules.

According to Article 40.3 of the IAAF Rules, such a violation is sanctioned with a two-year period of ineligibility, unless the conditions for eliminating, reducing or increasing this period are met.

Since the IAAF Rules apply in this case, the question that must therefore be decided is whether the conditions of Article 40.5(c) of the IAAF Rules concerning a reduction of sanctions on the grounds of Substantial Assistance are met, and whether the appropriate sanction was imposed, given all the relevant circumstances.

#### 5. Fulfilment of the Conditions to Benefit from a Reduction of the Sanction according to Article 40.5(c) of the IAAF Rules

As indicated above, the Athlete was found guilty of a serious anti-doping rule violation under the IAAF

Rules resulting from the possession of more than one prohibited substance listed under S1 and S2 of the Prohibited List.

Article 40.5(c) of the IAAF Rules provides as follows:

*Substantial Assistance in Discovering or Establishing Anti-Doping Rule Violations: The relevant tribunal of a Member may, prior to a final appellate decision under Rule 42 or the expiration of the time to appeal (where applicable in the case of an International-Level Athlete having referred the matter to the Doping Review Board for its determination under Rule 38.16) suspend a part of the period of Ineligibility imposed in an individual case where the Athlete or other Person has provided Substantial Assistance to the IAAF, his National Federation, an Anti-Doping Organisation, criminal authority or professional disciplinary body resulting in the IAAF, National Federation or Anti-Doping Organisation discovering or establishing an antidoping rule violation by another Person or resulting in a criminal or disciplinary body discovering or establishing a criminal offence or the breach of professional rules by another Person. After a final appellate decision under Rule 42 or the expiration of time to appeal, an Athlete or other Person's period of Ineligibility may only be suspended by a Member if the Doping Review Board so determines and WADA agrees. If the Doping Review Board determines that there has been no Substantial Assistance, the determination shall be binding on the Member and there shall be no suspension of Ineligibility. If the Doping Review Board determines that there has been Substantial Assistance, the Member shall decide on the period of Ineligibility that shall be suspended. The extent to which the otherwise applicable period of Ineligibility may be suspended shall be based on the seriousness of the anti-doping rule violation committed by the Athlete or other Person and the significance of the Substantial Assistance provided by the Athlete or other Person to the effort to eliminate doping in Athletics. No more than three-quarters of the otherwise applicable period of Ineligibility may be suspended. If the otherwise applicable period of Ineligibility is a lifetime, the non-suspended period under this Rule must be no less than eight (8) years. If the Member suspends any part of the period of Ineligibility under this Rule, the Member shall promptly provide a written justification for its decision to the IAAF and any other party having a right to appeal the decision. If the Member subsequently reinstates any part of the suspended period of Ineligibility because the Athlete or other Person has failed to provide the Substantial Assistance which was anticipated, the Athlete or other Person may appeal the reinstatement.*

In other words, in order to benefit from the reduction of the period of ineligibility under Article 40.5(c) of the IAAF Rules, it must be established that (i) the Athlete has provided Substantial Assistance to the IAAF, his National Federation, an Anti-Doping Organisation, criminal authority or professional disciplinary body, (ii) resulting in the IAAF, National

Federation or Anti-Doping Organisation discovering or establishing an anti-doping rule violation by another Person, or, (iii) resulting in a criminal or disciplinary body discovering or establishing a criminal offence or the breach of professional rules by another Person.

The Athlete alleges that his Assistance was Substantial given that, inter alia, he cooperated with the Spanish Civil Guard and provided it information about (i) Dr Virú's codes to hide the names of the medical substances being used; (ii) other persons accused of doping in addition to Dr. Virú; and (iii) issues related to doping in general. The Athlete also submits that the Guardia Civil affirmed that his behaviour was constructive in connection with the fight against doping, and the Council for Sport stated that it was able to continue its investigation as a consequence of the sportsman's assistance.

As a preliminary point, the Sole Arbitrator wishes to underline that the existing mechanism, which facilitates the provision of information by athletes in order to discover anti-doping offenses, is essential in the fight against doping. It is therefore important that the objective of Article 40.5(c), i.e., to encourage and incite athletes to come forward if they are aware of doping offenses committed by other persons, should not be undermined by an overly restrictive application of the provision (See e.g. CAS 2007/A/1368). However, it is equally important that reductions in sanctions for serious anti-doping violations are not handed down lightly without clear evidence of Substantial Assistance. In this context, each word used to express the nature and scope of the exception to the normal duration of an anti-doping sanction must be weighed carefully and interpreted strictly.

In order to evaluate whether the Assistance was Substantial pursuant to Article 40.5(c) of the IAAF Rules, the assistance must result in discovering or establishing an anti-doping rule violation by another Person, or, discovering or establishing a criminal offence or the breach of professional rules by another Person. The Sole Arbitrator considers that these words must be interpreted literally, in the sense that assistance will not qualify as substantial unless and until it actually results in the discovery or establishment of an anti-doping rule violation by a third party, or unless and until it actually results in the discovery or establishment of a criminal offence or of a breach of professional rules by a third party. The discovery or establishment of an illegal act by a third party as a direct result of the information provided by the athlete seeking to benefit from the Substantial Assistance exception is the cornerstone of this mechanism, as there would otherwise be

no incentive for an anti-doping authority to apply lesser sanctions, unless it received something in return, which contributes to fighting doping in sport. However, the Sole Arbitrator finds that such a concrete result has not been demonstrated in this case.

Taking into account the nature of the conduct in question and the paramount importance of fighting against doping networks of any kind in sport as well as the restricted powers of the investigation authorities of the governing bodies of sport as compared to national authorities, the Sole Arbitrator is of the opinion that cases concerning doping networks should be dealt with in line with the consistent CAS jurisprudence on disciplinary doping cases. Therefore, the IAAF must establish the relevant facts “to the comfortable satisfaction of the Court having in mind the seriousness of allegation which is made” (See e.g., for match-fixing cases; CAS 2005/A/908 para. 6.2; CAS 2009/A/1920).

In addition, according to CAS 2007/A/1368, the Substantial character of the Assistance must be assessed on the basis of the qualitative and quantitative value of the evidence provided by the athlete, and on its scope and effectiveness in implicating third parties. That the assistance has been given spontaneously and voluntarily must also be taken into consideration.

In the present case, the Athlete relies on two letters from the Guardia Civil and the Council for Sport, acknowledging that he had assisted the police in its investigation, and provided cooperation as a witness to an alleged crime. But none of these letters mention the implication of third parties resulting directly from the Athlete’s assistance.

The Athlete also relies on a written statement evidencing the fact that he was interviewed by the Guardia Civil. This statement provides no information on the implication of third parties resulting directly from the Athlete’s assistance. Neither does the press release submitted by the Athlete.

Finally, the Athlete relies on an order from the Investigating Court no. 14 of Valencia. However, it appears from that order that, while it confirms that the investigation is still on-going against 4 named persons, it does not ascertain that there have been third party violations. It also appears from the order that Fernández’s name is not included in the names of individuals required to testify in the procedure. Also, the order confirms that Fernández himself is still subject to criminal proceedings. The Sole Arbitrator considers that no element of the order confirms an anti-doping rule violation by another person directly

as a result of Fernández’s assistance.

In the Sole Arbitrator’s view, a simple indication of cooperation, which could hypothetically result in the discovery of a criminal offense, is not sufficient for the Assistance to be Substantial pursuant to Article 40.5(c) of the IAAF Rules.

Accordingly, the Sole Arbitrator is comfortably satisfied that the relevant facts on which Fernández relies do not meet the criteria set forth in Article 40.5(c) of the IAAF Rules. Indeed, there is no evidence in the file establishing that the Athlete’s assistance led to the discovery or the establishment of an anti-doping rule violation or criminal offense or breach of professional rules by another Person pursuant to Article 40.5(c), neither at the level of the IAAF nor at the level of the RFEA or at any other level.

On the contrary, it appears from the file that Dr. Virú, along with various other persons, was already incriminated from the beginning of the investigation, at the same time as Fernández. Fernández’s assistance may have improved the case brought against the person’s involved, but the Sole Arbitrator is not even in a position to determine whether this is actually the case.

Furthermore, Fernández was given the opportunity to explain his case in front of the IAAF at a meeting scheduled for February 3, 2012, in order to provide further evidence or clarification as to the substance of his assistance, but he voluntarily did not attend the meeting for “*personal reasons*” without further explanation.

The Sole Arbitrator acknowledges that assistance may be provided after a case is initiated, as long as this assistance results in discovering or establishing doping or criminal offenses or a violation of professional rules by third parties. The voluntary character of the assistance is a factor that can be taken into account in order to assess the extent of the reduction of the sanction in the case of Substantial Assistance. However, the sine qua non condition that the assistance result in discovering or establishing doping or criminal offenses or a violation of professional rules by third parties must first be satisfied. In any event, the Sole Arbitrator notes that it is questionable whether the assistance provided by the Athlete was spontaneous nor voluntary. Indeed, it is only after his implication into the “*Operacion Grial*” and after the RFEA had already taken steps before the CMHD Commission to obtain information from the police record that Fernández decided to come forward.

The Sole Arbitrator considers that the fact that assistance might potentially be given in the future does not alter the fact that, to date, there is no evidence in the file demonstrating that Fernández's Assistance satisfied the conditions of Article 40.5(c) of the IAAF Rules. In addition, Fernández has only affirmed that a judge will summon him on the day that the hearing will be held, in order to confirm his previous statements. As stated, such confirmation cannot, in this case, suffice to adduce the evidence required by Article 40.5(c) of the IAAF Rules. Furthermore, the order provided by Fernández himself does not confirm his alleged future testimony.

Concerning Fernández's reliance on CAS 2011/A/2368, the Sole Arbitrator considers that the circumstances of that case cannot be compared to the circumstances in this case, since the Substantial character of the Assistance was not contested in CAS 2011/A/2368.

Furthermore, the commentary of Article 10.5.3 of the WADA Code provides as follows:

*Factors to be considered in assessing the importance of the Substantial Assistance would include, for example, the number of individuals implicated, the status of those individuals in the sport, whether a scheme involving Trafficking under Article 2.7 or administration under Article 2.8 is involved and whether the violation involved a substance or method which is not readily detectable in Testing. The maximum suspension of the Ineligibility period shall only be applied in very exceptional cases. An additional factor to be considered in connection with the seriousness of the anti-doping rule violation is any performance-enhancing benefit which the Person providing Substantial Assistance may be likely to still enjoy.*

The Athlete considers that the factors set forth in the commentary of the WADA Code are applicable given (i) the Athlete's cooperation in a criminal investigation involving a group of people; (ii) the status of the people involved, which include people holding and not holding a license, and include people from various sports (iii) the doping network involved in the trafficking of prohibited substances and (iv) the Athlete did not benefit from any improvement in his performance.

The Sole Arbitrator does not contest that such factors are relevant in assessing the importance of Substantial Assistance, as the commentary just cited states. However, the commentary's text itself is clear: these criteria are relevant to assess the importance of the Substantial Assistance, but not the existence of Substantial Assistance. In other words, the *sine qua non* condition that that the assistance result in discovering or establishing doping or criminal

offenses or a violation of professional rules by third parties must first be satisfied. The factors set forth in the commentary can then be taken into account in assessing the importance of the Substantial Assistance in order to determine the extent of the reduction of the ineligibility period in each particular case. In addition, a commentary of a legal provision cannot replace the substance of that provision. A commentary is designed to assist in the interpretation of a provision. Both the WADA Code and the IAAF Rules expressly provide that “[r]esults in the Anti-Doping Organization discovering or establishing an anti-doping rule violation by another Person or which results in a criminal or disciplinary body discovering or establishing a criminal offense or the breach of professional rules by another Person”. As explained above, these conditions are not satisfied in this case.

Therefore, while the Sole Arbitrator acknowledges that Fernández provided at least some assistance to the authorities, the Sole Arbitrator finds that it cannot qualify as Substantial within the meaning of Article 40.5(c) of the IAAF Rules.

The Sole Arbitrator adds that, even if the Athlete had been found to have given Substantial Assistance, past CAS decisions in this area suggest that a one-year reduction would have been excessive. An overview of these cases is set forth below.

In CAS 2005/A/847, the information provided by the athlete resulted in a large amount of nutritional supplements being seized and confiscated and, as a result, products could not have been given to other athletes. The efficiency of the information provided was proven at the time of the appeal to the CAS and a reduction of 6 months was deemed proportionate.

In CAS 2007/A/1368, the athlete's Substantial Assistance resulted in the condemnation of third parties and the panel decided that a reduction of 3 months was appropriate.

In CAS 2008/A/1461-1462, the panel refused to reduce the sanction given that “while Mr. J. may have offered as much assistance as he reasonably could have under the circumstances, this assistance did not lead to the discovery or establishing of any anti-doping rule violation by any person”.

In CAS 2010/A/2203-2214, the panel decided not to rule on the question of Substantial Assistance since it had very little information but, taking into consideration the circumstances of the case, it suspended the sanction for 6 months.

In CAS 2011/A/2368, the existence of the Substantial Assistance was not contested and yet the panel

decided to reduce the sanction to a period of 18 months of ineligibility.

In light of the above-mentioned cases, the Sole Arbitrator considers that it was, in any event, disproportionate to reduce the period of ineligibility in this case by one half of the usually applicable sanction of two years.

#### 6. Start Date of Ineligibility Period

Article in 40.10 of the IAAF Rules determines that:

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

Article 10.9.2 of the WADA Code provides that:

*Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the body imposing the sanction may start the period of Ineligibility at an earlier date, commencing as early as the date of Sample collection or the date on which another Anti-Doping Rule violation last occurred.*

The Athlete considers that substantial delays in the case are not attributable to him and that the ineligibility period should start on May 17, 2011. The Athlete further argues that he should not suffer as a result of the decision of the IAAF to extend the deadlines to appeal to the CAS and that, should the Sole Arbitrator decide to impose an ineligibility from the date of this award, namely March 14, 2012, he would suffer significant harm because he would not be able to participate in the 2012 Olympic Games in London.

The IAAF submits that Fernandez should be required to serve a two-year period of ineligibility from the date of the hearing of this matter, less any period of provisional suspension and/or ineligibility that he has already served.

The Sole Arbitrator recalls that the above provisions do not provide an automatic right to start the period of Ineligibility at an earlier date than that stated, but a discretionary power to appreciate whether, taking into consideration the circumstances of the case, the ineligibility period should start earlier.

In light of all the circumstances of this case, the Sole Arbitrator holds that no grounds justify modifying the start date of the period of ineligibility

of the Athlete. However, Article 40.10(b) provides as follows:

*If a Provisional Suspension is imposed and respected by the Athlete, then the Athlete shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed.*

As a result, the Sole Arbitrator finds that the period of ineligibility should be a period of 2 years, commencing on the date of this award, March 14, 2012, less the period of provisional suspension and/or ineligibility that he has already served namely one year, three months and four days.

Football; conflicting awards; applicable law; CAS scope of review; lis pendens

Panel:

Mr. Mark A. Hovell (United Kingdom), President  
Mr. José Juan Pintó (Spain)  
Mr. Luc Argand (Switzerland)

Relevant facts

S.C. Sporting Club S.A. Vaslui (the “Appellant” or the “Club”) is a professional football club with its registered office in Vaslui, Romania. It is a member of the Romanian Football Federation (the “RFF”) and plays in Romania’s top division, Liga I.

The Federation Internationale de Football Association (the “Respondent” or “FIFA”) is the world governing body for the sport of football, having its headquarters in Zurich, Switzerland.

On 13 October 2010 the FIFA Dispute Resolution Chamber (DRC), adjudicating a dispute related to the termination of the employment relationship between the Club and Marko Ljubinkovic (the “Player”) ruled as follows (the “DRC Decision”):

1. *The claim of the Claimant, Marko Ljubinkovic, is partially accepted.*
2. *The Respondent, FC Vaslui, has to pay the Claimant, Marko Ljubinkovic, outstanding remuneration in the amount of EUR 96,535 plus 5% interest p.a. as from 29 January 2010, within 30 days as from the date of notification of this decision.*
3. *The Respondent, FC Vaslui, has to pay to the claimant, Marko Ljubinkovic, the amount of EUR 385,000 as*

*compensation for breach of contract within 30 days as from the date of notification of this decision. In the event that this amount of compensation is not paid within the stated time limit, interest at the rate of 5% p.a. will fall due as of expiry of the above-mentioned time limit until the date of effective payment.*

4. *In the event that the above-mentioned amounts due to the Claimant, Marko Ljubinkovic, are not paid by the Respondent, FC Vaslui, within the stated time limits, the present matter shall be submitted, upon, request, to the FIFA Disciplinary Committee for consideration and decision.*
5. *Any further request filed by the Claimant is rejected.*
6. *The Respondent, FC Vaslui, shall be banned from registering any new players either nationally or internationally, for the two next entire and consecutive registration periods following the notification of the present decision.*
7. *The Claimant, Marko Ljubinkovic, is directed to inform the Respondent, FC Vaslui, immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received”.*

In parallel to the proceedings before FIFA, on 15 June 2010, the Dispute Resolution Chamber of the Romanian Professional Football League (the “DRC of the RPFL”) passed a decision arising from exactly the same dispute between the Player and the Club and sanctioned the Player with an obligation to pay the Club EUR 502,458.50 combined with a suspension of 16 competition rounds (the “RPFL Decision”).

On 24 November 2010, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (CAS) against the DRC Decision

Following a hearing held on 11 May 2011, the appointed CAS panel issued its award on case CAS 2010/A/2289 on 17 June 2011, ruling as follows (the “CAS Decision”):

1. *S.C Sporting Club S.A. Vaslui’s appeal against the decision dated 13 October 2010 of the FIFA Dispute Resolution Chamber is dismissed and the decision of*

*FIFA Dispute Resolution Chamber is upheld.*

2. *The costs of the arbitration to be determined and served on the Parties by the CAS Court Office shall be borne by S.C. Sporting Club S.A. Vaslui.*
3. *S.C. Sporting Club S.A. Vaslui is ordered to pay CHF 6,000 (six thousand Swiss Francs) to Mr Marko Ljubinkovic as a contribution towards his legal and other costs in this arbitration.*
4. *All other motions or prayers for relief are dismissed”.*

On 1 August 2011 the Club had the RPFL Decision affirmed in the Vaslui Court of Law.

On 15 August 2011 and on 8 September 2011, the RFF and the legal representative of the Appellant respectively petitioned the FIFA Disciplinary Committee (the “*FIFA DC*”) to take into account the RPFL Decision. The RFF referred to Romanian Civil Law which provides for mutual debts between parties to be compensated up to the minor amount.

On 29 September 2011 the secretariat to the FIFA DC urged the Appellant to pay the outstanding amount by 4 October 2011 and informed the Appellant that failing this the case would be submitted to the FIFA DC on 13 October 2011.

On 13 October 2011 the FIFA DC passed decision 110441 PST ROU ZH (the “*FIFA DC Decision*”) and decided that in the most relevant part:

- “1. *The club S.C. Sporting Club S.A. Vaslui is pronounced guilty of failing to comply with a decision of a FIFA body in accordance with art.64 of the FDC.*
2. *The club S.C. Sporting Club S.A. Vaslui is ordered to pay a fine to the amount of CHF 25,000. The fine is to be paid within 30 days of notification of the decision (...)*
3. *The club S.C. Sporting Club S.A. Vaslui is granted a final period of grace of 30 days from notification of the decision in which to settle its debt to the creditor.*
4. *If payment is not made by this deadline, the creditor may demand in writing from FIFA that six (6) points be deducted from the debtor’s first team in the domestic league championship. Once the creditor has filed this request, the points will be deducted automatically without a further formal decision having to be taken by the FIFA Disciplinary Committee.*
5. *If the club S.A. Sporting Club S.A. Vaslui still fails to pay the amount due even after deduction of the points*

*in accordance with point [4], the FIFA Disciplinary Committee will decide on a possible relegation of the debtor’s first team to the next lower division.*

7. *The costs of these proceedings amounting to CHF 2,000 are to be borne by the club S.C. Sporting Club S.A. Vaslui. (...)*”

On 5 January 2012 the Club lodged a Statement of Appeal with the CAS against the FIFA DC Decision.

On 14 January 2012 the Appellant filed its Appeal Brief with the following revised prayers for relief:

On 6 February 2012 FIFA submitted its Answer.

Neither of the Parties requested a hearing and as per R57 of the Code of Sports-related Arbitration and Mediation Rules (the “*CAS Code*”) the Panel concluded that a hearing was not required as it was sufficiently able to render this award from the written submissions and evidence.

#### Extracts from the legal findings

### A. Applicable Law

Art. R58 of the CAS Code provides as follows:

*“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*

Art. 62.2 of the FIFA Statutes provides the following:

*“The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss Law”.*

The Appellant has argued that Romanian Law and the Lugano Convention apply in this case, whereas the Respondent maintains that the Lugano Convention does not apply to appeals from decisions of arbitral bodies such as the DRC or the FIFA DC that FIFA regulations and Swiss law applies, not Romanian Law.

The “*Federation*” in the sense of Art. R58 of the CAS Code i.e. FIFA is domiciled in Switzerland, a fact that requires that Swiss Law be applied.

As there is a dispute to the law which applies, the Panel has decided that in this case, the FIFA

regulations will be applied primarily, and Swiss law shall be applied subsidiarily.

## B. Scope of Review

The CAS panel which rendered an award in case CAS 2010/A/2135 *Football Federation Islamic Republic of Iran v Mr Branko Ivankovic & FIFA* stated the following:

*“(...) as the authority of the FIFA DC is limited, pursuant to article 64 of the FIFA Disciplinary Code, to verifying whether anyone has failed to comply with a previous decision rendered by a body, a committee or an instance of FIFA or CAS, the Panel’s scope of review in this appeal is restricted to the same mandate, because an appeal may not, by definition, go beyond the formal and substantive scope of the procedure and decision of first instance.*

*This means in particular that this CAS Panel has no authority to deal with the merits of the dispute between the IRIFF and the Coach which led to the decision of the FIFA PSC of 23 September 2008 and to the subsequent CAS award of 4 November 2009. Indeed, the merits of that dispute are clearly outside the scope of the review of this Panel.*

*In other terms, this Panel may only deal with the event which gave rise to the disciplinary proceedings culminated in the Appealed Decision (i.e. whether the IRIFF complied or not with the decision taken by FIFA PSC and confirmed by the CAS) and with the consequence thereof (i.e. whether the disciplinary sanction imposed on the IRIFF was appropriate, respectful of the applicable rules and the proportionate to the violation).*

*As a consequence, the Panel must discard as inappropriate and not consider all the arguments and exhibits submitted by the Appellant with reference to the substance of the dispute decided by the FIFA PSC and upheld in full by the CAS award of 4 November 2009”.*

The Panel follows this previous decision of the CAS and has determined not to revisit the merits that have previously been considered by the panel that delivered the CAS Decision. Rather, this Panel will concern itself with the decision taken by the FIFA DC pursuant to the FIFA Disciplinary Code, which sought to enforce the CAS Decision, not review it.

## C. Merits of the Appeal

In these present proceedings, the Panel had to determine the following:-

- had the Appellant complied with the CAS Decision?
- should the FIFA DC have “set off” the sums

awarded to the Appellant from the Player pursuant to the Court of Vaslui’s award?

- What amounts, if any, should be paid by the Appellant?

It is clear to the Panel, and not contested by the Appellant, that the financial sums awarded to the Player pursuant to the CAS Decision remain outstanding. The Panel notes the Appellant has attempted to discharge such sums, but that FIFA is unable to operate an escrow account in these circumstances.

The main issue to consider is whether the award in favour of the Appellant made by the DRC of the RPFL and confirmed by the Court of Vaslui should have been taken into account by the FIFA DC and set against the award in favour of the Player contained in the CAS Decision. The Appellant, referring to Romanian Law and the Lugano Convention, submits it should and, as the award in its favour is larger than that in favour of the Player, the FIFA DC should have determined that it had no obligation to pay anything further to the Player.

FIFA, on the other hand, point to the non-application of Romanian Law or the Lugano Convention in these proceedings or indeed those of the FIFA DC. FIFA also noted that the panel that delivered the CAS Decision had already expressed its opinion that the DRC of the RPFL should never have rendered a decision as it was the DRC that correctly seized jurisdiction of the original dispute between the Player and the Appellant.

The Panel notes that the applicable law in these proceedings is Swiss Law and that pursuant to Arts. 120 and 124 of the Swiss Code of Obligations the FIFA DC does have to consider “set off” claims.

Art. 120 states:

*“If two persons owe each other a sum of money or another performance where the subject of the performance is of the same kind, each may set off his obligation against his claim, provided both claims are due.*

*The obligor may set off even if his counterclaim is contested.*

*A claim forfeited by the statute of limitations may be set off, if at the time when it could have been set off against the other claim, it was not yet forfeited under the statute of limitations”.*

Art. 124 states:

*“A set off only becomes effective to the extent that the obligor demonstrates to the oblige that he wishes to take advantage of his right of set off.*



*If this has occurred, it is considered that the claim and counterclaim, insofar as they compensate each other, have already been discharged at the earliest possible time they could have been set off.*

*The special practices of commercial transactions on current account remain reserved”.*

The Panel further notes that in this particular instance the two awards both stem from exactly the same dispute between the Player and the Appellant. The CAS has already determined that the Appellant should not have taken its claim to the DRC of the RPFL; instead leaving the DRC to deal with the dispute. As such, that CAS panel did not recognize the decision of the DRC of the RPFL. As mentioned above, it is not in the scope of this Panel’s jurisdiction to review the CAS Decision, nor was it for the FIFA DC to do so either. Further the Panel notes the Appellant then continued to exacerbate the situation by asking (without the Player being present) the Court of Vaslui to confirm the decision of the DRC at the RPFL.

The Panel notes the principle of “*lis pendens*” and that the parties should seek to avoid parallel proceedings which can (and, in this case, has) result in conflicting awards.

The Panel determines that the FIFA DC correctly disregarded the award in favour of the Appellant and only considered the award in favour of the Player, as set out in the CAS Decision. This is not a situation where there is a claim and counterclaim; there is but one claim or dispute; but it has been dealt with in two separate forums. The FIFA DC correctly determined that only one award should prevail and there should not therefore be two awards to set against each other, just one. It was not for the FIFA DC (nor is it for this Panel) to determine which award should prevail, as that determination had already been taken by the CAS and, once the time for any possible appeal to the Swiss Federal Tribunal had elapsed, the CAS Decision became final and binding on the parties and in accordance with the FIFA Disciplinary Code, the FIFA DC’s role was to deal with the enforcement of the CAS Decision.

The Panel determines that the FIFA DC correctly dealt with the matter and upholds its decision entirely. Much as Swiss law recognizes the possibility of setting one claim off against another, in this case there is no application, as in reality there is one claim and one final and binding decision already taken in regard of that which is contained within the CAS Decision. The role of the FIFA DC was to see that award was enforced, which it did in the FIFA DC

Decision.

#### **D. Conclusion**

The Panel determines to dismiss the Appellant’s appeal and uphold and confirm the FIFA DC Decision.

The Panel determines that all other claims or prayers for relief are hereby dismissed.

**Composition**

Federal Tribunal Judge Klett, President  
Federal Tribunal Judge Corboz  
Federal Tribunal Judge Rottenberg Liatowitsch  
Federal Tribunal Judge Kolly  
Federal Tribunal Judge Kiss  
Clerk of the Court: Mr Leemann

**Parties**

Mr. Francelino da Silva Matuzalem, c/o Gianpaolo Monteneri, Monteneri sports law & management IIC,  
Appellant, represented by Dr. Hansjörg Stutzer and Dr. Patrick Rohn,

**versus**

Fédération Internationale de Football Association (FIFA),  
Respondent, represented by Mr Christian Jenny

\* From Charles Poncet's translation, courtesy of the law firm ZPG/Geneva ([www.praetor.ch](http://www.praetor.ch)).

\* Translator's note: Quote as Francelino da Silva Matuzalem v. Fédération Internationale de Football Association (FIFA), 4A\_558/2011. The original of the decision is in German. The text is available on the website of the Federal Tribunal [www.bger.ch](http://www.bger.ch)

**Facts**

**A.**

A.a Francelino da Silva Matuzalem, in Rome (The Appellant), borne on June 10, 1980 is a professional football player of Brazilian citizenship. He presently plays with the football club SS Lazio Spa in Rome.

The Fédération Internationale de Football Association (FIFA; Respondent) is an association governed by Swiss law (Art. 60 ff ZGB<sup>1</sup>) headquartered in Zurich.

Real Saragossa SAD is a Spanish football club. It is a member of the Spanish football federation which in its turn belongs to FIFA.

A.b On June 26, 2004 the Appellant entered into an employment contract with the Ukrainian football club FC Shakhtar Donetsk for the time from July 1st, 2004 until July 1st, 2009. On July 2, 2007 the Appellant terminated his employment contract with FC Shakhtar Donetsk without notice yet not for just cause<sup>2</sup> nor for sporting just cause<sup>3</sup>.

In a letter of July 16, 2007 Real Saragossa SAD undertook to hold the Appellant harmless for any possible damage claims as a consequence of the premature termination of the contract.

On July 19, 2007 the Appellant entered into a new employment contract with Real Saragossa SAD and undertook to play with them for the

1. Translator's note: ZGB is the German abbreviation for the Swiss Civil Code.

2. Translator's note: In English in the original text.

3. Translator's note: In English in the original text.

next three seasons until June 30, 2010.

At the end of the 2007/2008 season Real Saragossa SAD descended into the second Spanish football league.

Pursuant to a July 17, 2008 agreement Real Saragossa SAD transferred the Appellant temporarily for the 2008/2009 season to the SS Lazio Spa football club in Rome. On July 22, 2008 the Appellant accepted this temporary transfer and entered into an employment contract with the Italian club for the period between July 22, 2008 and June 20, 2011.

At the end of the 2008/2009 season Real Saragossa SAD returned to the first league.

On July 23, 2009 Real Saragossa SAD agreed to the definitive transfer of the Appellant to football club SS Lazio Spa against payment of a transfer fee of € 5.1 million. On the same day the SS Lazio Spa entered into a new employment agreement with the Appellant which substituted the July 22, 2008 contract and set a fixed contractual duration until June 30, 2014 as well as a salary of € [figure omitted] net per season (in addition to some unspecified bonuses).

A.c In a decision of November 2, 2007, the Dispute Resolution Chamber of FIFA awarded Shakhtar Donetsk damages as a consequence of the illicit termination of the contract in the amount of € 6.8 million with interest at 5% from 30 days after the award. On May 19, 2009 the Court of Arbitration for Sport (CAS) annulled the decision of November 2, 2007 in part and ordered the Appellant and football club Real Saragossa SAD severally to pay € 11'858'934 with interest at 5% from July 5, 2007.

A Civil law appeal by the Appellant and Real Saragossa SAD against the CAS award of May 19, 2009 was rejected by the Federal Tribunal in a judgment of June 2, 2010<sup>4</sup> to the extent that the matter was capable of appeal.

## B.

B.a On July 14, 2010 the Deputy Secretary of the Disciplinary Committee of FIFA informed the Appellant and Real Saragossa SAD (a) that disciplinary proceedings were commenced against them because they had not complied with the CAS award of May 19, 2009, (b) that

the corresponding sanctions according to Art. 64 of the FIFA Disciplinary Code (2009 edition) would be imposed and (c) that the case would be decided during the next meeting of the Disciplinary Committee.

The FIFA Disciplinary Code applicable at the time (2009 edition) provided among other things for the following:

*“Article 22 Ban on taking part in any football-related activity*

*A person may be banned from taking part in any kind of football-related activity (administrative, sports or any other).*

...

*Section 8. Failure to respect decisions*

*Article 64 [only]*

*1. Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or CAS (financial decision), or anyone who fails to comply with another decision (non-financial decision) passed by a body, a committee or an instance of FIFA or CAS:*

- a) will be fined at least CHF 5,000 for failing to comply with a decision;*
- b) will be granted a final deadline by the judicial bodies of FIFA in which to pay the amount due or to comply with the (non-financial) decision;*
- c) (only for clubs:) will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, points will be deducted or demotion to a lower division ordered. A transfer ban may also be pronounced.*

*2. If the club disregards the final time limit, the relevant association shall be requested to implement the sanctions threatened.*

*3. If points are deducted, they shall be proportionate to the amount owed.*

*4. A ban on any football-related activity may also be imposed against natural persons. ...”<sup>5</sup>*

On July 26, 2010 Real Saragossa SAD advised the Disciplinary Committee that it was in serious financial difficulties which could lead to insolvency and bankruptcy; the requirements

4. Translator's note: Full translation available at <http://www.praetor.ch/arbitrage/facts-not-reviewed-by-federal-tribunal-claims-of-violation-of-du/>

5. Translator's note: In English in the original text.

for a sanction according to Art. 64 of the FIFA Disciplinary Code were not met as the club was attempting to settle the debt.

On August 20, 2010 the Appellant sent to the Disciplinary Committee a copy of his letter of August 19, 2010 by which he had requested payment of the amount due to FC Shakhtar Donetsk by Real Saragossa SAD and also of the statement by which Real Saragossa SAD held him harmless on July 16, 2007.

In a decision of August 31st, 2010 the Disciplinary Committee found the Appellant and football club Real Saragossa SAD guilty of breaching their obligations under the CAS award of May 19, 2009 (§ 1 of the award). Furthermore the Disciplinary Committee ordered the Appellant on the basis of Art. 64 of the FIFA Disciplinary Code to pay a fine of CHF 30'000 severally with the club (§ 2 of the award and disposed a last time limit of 90 days to pay the amount due (award § 3), under penalty for the Appellant of a prohibition of any activity in connexion with football without the necessity of any further decision by the Disciplinary Committee (award § 4):

*“4. If payment is not made by this deadline, the creditor may demand in writing from FIFA that a ban on taking part in any football related activity be imposed on the player Matuzalem Francelino da Silva and/or six (6) points be deducted from the first team of the club Real Zaragoza SAD in the domestic league championship. Once the creditor has filed this/these requests, the ban on taking part in any football-related activity will be imposed on the player Matuzalem Francelino da Silva and/or the points will be deducted automatically from the first team of the club Real Zaragoza SAD without further formal decisions having to be taken by the FIFA Disciplinary Committee. The association(s) concerned will be informed of the ban on taking part in any football-related activity. Such ban will apply until the total outstanding amount has been fully paid. ...”<sup>6</sup>*

On September 1st, 2010 Real Saragossa SAD paid € 500'000 into an account opened in the name of the FC Shakhtar Donetsk. There were no further payments by either Real Saragossa SAD or the Appellant.

B.b The Appellant and Real Saragossa SAD appealed the decision of the FIFA Disciplinary Committee of August 31st, 2010 to the Court of Arbitration for Sport (CAS). In an award of June

29, 2011 the CAS rejected the appeal by Real Saragossa SAD (award § 1) and the Appellant's (award § 2) and confirmed the decision of the Disciplinary Committee of FIFA of August 31st, 2010 (award § 3). The CAS rejected all other submissions (award § 4) and disposed of the costs of the proceedings (award § 5 and 6).

### C.

In a Civil law appeal the Appellant submits that the Federal Tribunal should annul the CAS arbitral award of June 29, 2011.

The Respondent submits that the appeal should be rejected to the extent that the matter is capable of appeal. The CAS did not take a position in the appeal proceedings.

### D.

On October 24, 2011 the Federal Tribunal stayed the enforcement of the arbitral award.

### E.

On January 25, 2010 the Appellant submitted a reply to the Federal Tribunal and the Respondent submitted a rejoinder on February 10, 2012. Furthermore on February 29, 2012 the Appellant sent to the Federal Tribunal a fax of February 24, 2010 from the Respondent concerning the bankruptcy proceedings initiated in the meantime against football club Real Saragossa SAD.

## Reasons

### 1.

According to Art. 54 (1) BGG<sup>7</sup> the Federal Tribunal issues its judgment in an official language<sup>8</sup>, as a rule in the language of the decision under appeal. If the decision is in another language, the Federal Tribunal resorts to the official language chosen by the parties. The award under appeal is in English. As it is not in an official language and the Parties used German in front of the Federal Tribunal, the decision of the Federal Tribunal shall be issued in German.

### 2.

In the field of international arbitration a Civil law appeal is allowed pursuant to the requirements of Art. 190-192 PILA<sup>9</sup> (SR 291) (Art. 77 (1) (a) BGG).

7. Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

8. Translator's note: The official languages of Switzerland are German, French and Italian.

9. Translator's note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

6. Translator's note: In English in the original text.

- 2.1 The seat of the Arbitral tribunal is in Lausanne in this case. At the relevant time the Appellant had his domicile outside Switzerland. As the Parties did not rule out in writing the provisions of chapter 12 PILA they are applicable (Art. 176 (1) and (2) PILA).
- 2.2 A Civil law appeal within the meaning of Art. 77 (1) BGG may in principle only seek the annulment of the decision under appeal (see Art. 77 (2) BGG ruling out the applicability of Art. 107 (2) BGG to the extent that it empowers the Federal Tribunal to decide the case itself). The Appellant's submission that the CAS award of June 29, 2001 should be annulled is sufficient and appropriate here.
- 2.3 Only the grievances limitatively contained at Art. 190 (2) PILA are admissible (BGE 134 III 186 at 5 p. 187; 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282). According to Art. 77 (3) PILA the Federal Tribunal reviews only the grievances brought forward and reasoned in the appeal; this corresponds to the duty to submit reasons in support of the appeal according to Art. 106 (2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186 at 5 p. 187 with references).

The Appellant argues that the award under appeal violates the right to be heard (Art. 190 (2) (d) PILA) and public policy (Art. 190 (2) (e) PILA). Therefore he submits some admissible grievances in this respect. However he does not explain to what extent a complete annulment of the CAS award of June 29, 2011 under appeal would be justified (see BGE 117 II 604 at 3 p. 606). Paragraph 1 of the award rejected the appeal by Real Saragossa SAD. Nothing in the appeal is aimed at that first paragraph. To the extent that it aims at paragraph 1 of the award under appeal, the matter is not capable of appeal.

### 3.

The Appellant argues a violation of the right to be heard (Art. 190 (2) (d) PILA).

He claims exclusively a violation of his right to be heard in the proceedings in front of the FIFA Disciplinary Committee; however he does not claim that in the CAS proceedings he would not have had the possibility to participate in the proceedings. His argument is not persuasive as he claims that, contrary to what was held in the award under appeal, it would have been impossible to cure in the appeal proceedings in front of the CAS the allegedly insufficient hearing in the disciplinary proceedings, irrespective of the

full power of review of the CAS (see R57 (1) of the CAS Code). Contrary to what the Appellant seems to assume, the principle of the right to be heard (Art. 190 (2) (d) PILA) contains no entitlement to a double degree of arbitral proceedings or to two degrees of jurisdiction (see judgment 4A\_530/2011 of October 3, 2011 at 3.3.2; 4A\_386/2010 of January 3, 2011 at 6.2 with references).

### 4.

The Appellant argues a violation of public policy within the meaning of Art. 190 (2) (e) PILA.

4.1 Public policy (Art. 190 (2) (e) PILA) has both substantive and procedural contents (BGE 132 III 389 at 2.2.1 p. 392; 128 III 191 at 4a p. 194; 126 III 249 at 3b p. 253 with references). The substantive adjudication of a dispute violates public policy only when it disregards some fundamental legal principles and consequently becomes completely inconsistent with the important, generally recognized values, which according to dominant opinions in Switzerland should be the basis of any legal order. Among such principles are the rule of *pacta sunt servanda*, the prohibition of abuse of rights, the requirement to act in good faith, the prohibition of expropriation without compensation, the prohibition of discrimination and the protection of incapables (BGE 132 III 389 at 2.2.1; 128 III 191 at 6b p. 198 with references). However the enumeration is not exhaustive (judgment 4A\_458/2009 of June 10, 2010 at 4.1, in: SJ 2010 I p. 417). The promise of bribes would also violate public policy to the extent that it can be proved (BGE 119 II 380 at 4b p. 384 f.; judgment 4P.208/2004 of December 14, 2004 at 6.1). Furthermore the Federal Tribunal held that a judgment which would violate, albeit indirectly, such a fundamental principle of law as the prohibition of forced labour, would violate public policy (judgment 4A\_370/2007 of February 21, 2008 at 5.3.2). A breach of public policy is thus conceivable in case of a violation of Art. 27 ZGB (see judgment 4A\_458/2009 of June 10, 2010 at 4.4.3.2, in: SJ 2010 I p. 417; 4A\_320/2009 of June 2nd, 2010 at 4.4; 4P.12/2000 of June 14, 2000 E. 5b/aa with references). The arbitral award under appeal is moreover annulled only when its result contradicts public policy and not merely its reasons (BGE 120 II 155 at 6a p. 167).

4.2 The Appellant argues that he would in fact be subject to a prohibition of working as a football player worldwide and forever should the creditor so request, because he would not be in a position to pay to its previous employer FC

Shakhtar Donetsk the damages of € 11'858'934 with interest at 5% since July 5, 2007. He sees there a grave violation of the freedom of profession guaranteed at Art. 27 (2) of the Federal Constitution (BV) and in international treaties, as well as an excessive limitation of personal freedom as substantiated in Art. 27 of the Swiss Civil Code (ZGB). Contrary to the view expressed in the award under appeal, the Federal Tribunal did not forestall in its judgment of June 2, 2010 the issue as to whether the threat of the imposition of disciplinary measures may be a grave violation of personality rights, which could lead to a violation of public policy by the award under appeal. The Federal Tribunal merely pointed out that the Appellant's obligation to a five years employment contract was not illicit from the point of view of privacy protection and also that it could not be found that the Appellant was bound too tightly simply because he would have to answer for the damages arising as a consequence of a breach of contract (judgment 4A\_320/2009 of June 2, 2010 at 4.4). The aforesaid judgment did not decide the compatibility with public policy of disciplinary measures imposed by a federation in case of a failure to pay damages (also see as to the comparable issue of contractual damages, judgment 4A\_458/2009 of June 10, 2010 at 4.4.8, in: SJ 2010 I p. 417 in which the Federal Tribunal specifically left open the issue of the violation of public policy by a sanction issued by the competent FIFA body as a consequence of failure to pay).

### 4.3

4.3.1 As a fundamental legal value, the personality of the human being requires the protection of the legal order. In Switzerland it is protected constitutionally through the guarantee of the right to personal freedom (Art. 10 (2) BV<sup>10</sup>, which entails all liberties constituting the elementary manifestations of the unfolding of personality, in addition to the right to physical and mental integrity or to freedom of movement (BGE 134 I 209 at 2.3.1 p. 211; 133 I 110 at 5.2 119; all with references). The free unfolding of personality is also guaranteed among other by the constitutional right to economic freedom, which contains in particular the right to choose a profession freely and to access and exercise an occupational activity freely (Art. 27 (2) BV; see BGE 136 I 1 at 5.1 p. 12; 128 I 19 at 4c/aa p. 29).

The free unfolding of personality is not protected merely against infringement by the state but also by private persons (see Art. 27 (f) ZGB which substantiates personal freedom in private law in Switzerland). It is generally recognized therein that a person may not legally pledge to relinquish his freedom entirely and that there are limits to the curtailment of one's freedom. The principle anchored at Art. 27 (2) ZGB belongs to the important generally recognized order of values, which according to dominant opinion in Switzerland should be the basis of any legal order.

4.3.2 A contractual curtailment of economic freedom is considered excessive within the meaning of Art. 27 (2) ZGB according to Swiss concepts when the obligee is subjected to another person's arbitrariness, gives up his economic freedom or curtails it to such an extent that the foundations of his economic existence are jeopardized (BGE 123 III 337 at 5 p. 345 f. with references; see also judgement 4P.167/1997 of November 25, 1997 at 2a). Whilst public policy must not be identified with mere illegality (Bernard DUTOIT, *Droit international privé suisse*, 4. ed. 2005, nr. 8 to Art. 190 PILA p. 678) and its violation is to be assessed more restrictively than a breach of the prohibition of arbitrariness (BGE 132 III 389 at 2.2.2 p. 393), a commitment may be excessive to such an extent that it becomes contrary to public policy when it constitutes an obvious and grave violation of privacy (see judgement 4A\_458/2009 of June 10, 2010 at 4.4.3.2, in: SJ 2010 I p. 417; 4A\_320/2009 of June 2nd, 2010 at 4.4; 4P.12/2000 of June 14, 2000 at 5b/aa with references; see also Eugen BUCHER, *Berner Kommentar*, 3rd ed: 1993, nr. 26 to Art. 27 ZGB; Walter/Bosch/Brönnimann, *Internationale Schiedsgerichtsbarkeit in der Schweiz*, 1991, p. 236; Anton HEINI, in: *Zürcher Kommentar zum IPRG*, 2nd ed.: 2004, nr. 45 to Art. 190 PILA; Wolfgang PORTMANN, *Einseitige Optionsklauseln in Arbeitsverträgen von Fussballspielern*, Causa Sport 2006 p. 209).

4.3.3 The limits to legal commitments due to the protection of privacy do not apply only to contractual agreements but also to the statutes and decisions of legal persons (BUCHER, a.a.O., nr. 18 to Art. 27 ZGB; see already BGE 104 II 6 at 2 p. 8 f). Sanctions imposed by a federation, which do not merely ensure the correct course of games but actually encroach upon the legal interests of the person

10. Translator's note: BV is the German abbreviation for the Swiss Federal Constitution

concerned are subject to judicial control according to case law (BGE 120 II 369 at 2 p. 370; 119 II 271 at 3c; 118 II 12 at 2 p. 15 ff.; see already BGE 108 II 15 E. 3 p. 19 ff). This applies in particular when sanctions issued by a federation gravely impact the personal right to economic development; in such a case the Federal Tribunal has held that the freedom of an association to exclude its members is limited by their privacy right when it is the body of reference for the public in the profession or the economic branch concerned (BGE 123 III 193 at 2c/bb und cc p. 197 ff). This corresponds to the view that was adopted in particular for sport federations (BGE 123 III 193 E. 2c/bb p. 198 with references; see also BGE 134 III 193 at 4.5 p. 200). In such cases the right of the association to exclude a member is not reviewed merely from the point of view of an abuse of rights but also by balancing the interests involved with a view to the infringement of privacy in order to assess whether some important reason is at hand (BGE 123 III 193 at 2c/cc p. 198 f.; see also BGE 134 III 193 at. 4.4).

These principles also apply to associations governed by Swiss law and headquartered in Switzerland which – like FIFA – regulate international sport. The measures taken by such sport federations which gravely harm the development of individuals who practice the sport as a profession are licit only when the interests of the federation justify the infringement of privacy.

4.3.4 As a professional football player the Appellant violated his contractual obligations towards the Ukrainian association FC Shakhtar Donetsk and was therefore ordered to pay damages severally with the football club which hired him at a time when his contract was still in force (see judgment 4A\_320/2009 of June 2nd, 2010). The Federation sanction under dispute, which the CAS based on the Appellant being legally bound by the sanctions contained at Art. 64 of the FIFA Disciplinary Code, is in service of private enforcement of the decision granting damages if the claim remains unpaid. Upon a simple request by the creditor the Appellant should undergo a ban from all professional activities in connexion with football until a claim in excess of € 11 million with interest at 5% from the middle of 2007 (*i. e.* € 550'000 yearly) is paid. This is supposed to uphold the interest of a member of FIFA to the payment of damages by the employee

in breach and indirectly the interest of the sport federation to contractual compliance by football players. The infringement in the Appellant's economic freedom would be suitable to promote the willingness to pay and to find the funds for the amount due; however if the Appellant rightly says that he cannot pay the whole amount anyway, the adequacy of the sanction to achieve its direct purpose – namely the payment of the damages – is questionable. Indeed the prohibition to continue his previous economic and other activities will deprive the Appellant from the possibility to achieve an income in his traditional activity which would enable him to pay his debt. Yet the sanction of the Federation is however not necessary to enforce the damages awarded: the Appellant's previous employer can avail itself of the New York Convention on the Recognition and Enforcement of Arbitral Awards of June 10, 1958 (SR 0.277.12) to enforce the award, as most states are parties to that treaty and in particular Italy, which is the Appellant's present domicile. The sanction issued by the Federation is also illegitimate to the extent that the interests which the world football federation seeks to enforce in this way do not justify the grave infringement in the Appellant's privacy. The abstract goal of enforcing compliance by football players with their duties to their employees is clearly of less weight as the occupational ban against the Appellant, unlimited in time and worldwide for any activities in connexion with football.

4.3.5 The threat of an unlimited occupational ban based on Art. 64 (4) of the FIFA Disciplinary Code constitutes an obvious and grave encroachment in the Appellant's privacy rights and disregards the fundamental limits of legal commitments as embodied in Art. 27 (2) ZGB. Should payment fail to take place, the award under appeal would lead not only to the Appellant being subjected to his previous employer's arbitrariness but also to an encroachment in his economic freedom of such gravity that the foundations of his economic existence are jeopardized without any possible justification by some prevailing interest of the world football federation or its members. In view of the penalty it entails, the CAS arbitral award of June 29, 2011 contains an obvious and grave violation of privacy and is contrary to public policy (Art. 190 (2) (e) PILA).

5.

Paragraphs 2-6 of the CAS arbitral award of June 29, 2011 must be annulled and the appeal upheld to the extent that the matter is capable of appeal. In view of the outcome of the proceedings the Respondent will pay the costs and compensate the other party (Ar. 66(1) and Art. 68 (2) BGG).

**Therefore the Federal Tribunal pronounces:**

1.

The appeal is admitted to the extent that the matter is capable of appeal and paragraphs 2-6 of the CAS award of June 29, 2011 are annulled.

2.

The judicial costs set at CHF 25'000 shall be borne by the Respondent.

3.

The Respondent shall pay to the Appellant CHF 30'000 for the federal judicial proceedings.

4.

This judgment shall be notified in writing to the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne, March 27, 2012

In the name of the First Civil Law Court of the Swiss Federal Tribunal.

The Presiding Judge:

Klett(Mrs)

The Clerk:

Leeman



**Composition**

Federal Tribunal Judge Klett, President  
Federal Tribunal Judge Corboz  
Federal Tribunal Judge Rottenberg Liatowitsch  
Federal Judge Kolly  
Federal Judge Kiss  
Clerk of the Court: Mr Leemann

**Parties**

X. \_\_\_\_\_  
Appellant,

**versus**

Y. \_\_\_\_\_ Sàrl,  
Respondent, represented by Mr Antonio Rigozzi.

\* From Charles Poncet's translation, courtesy of the law firm ZPG/Geneva ([www.praetor.ch](http://www.praetor.ch)).

\* Translator's note: Quote as X. \_\_\_\_\_ v. Y. \_\_\_\_\_ Sàrl, 4A\_246/2011. The original of the decision is in German. The text is available on the website of the Federal Tribunal [www.bger.ch](http://www.bger.ch)

Facts

**A.**

A.a X. \_\_\_\_\_ (the Appellant) is a football club based in Z. \_\_\_\_\_. It belongs to the football federation of Q. \_\_\_\_\_ which in its turn is a member of the Fédération Internationale de Football Association (FIFA) with headquarters in Zurich. Y. \_\_\_\_\_ Sàrl (the Respondent) is a football agent based in R. \_\_\_\_\_.

A.b On February 19, 2003 the Appellant and the Respondent entered into an agreement concerning the transfer of player A. \_\_\_\_\_. According to that agreement the parties would jointly bear the transfer fee for the future transfer of player A. \_\_\_\_\_ to a foreign club. Article 4 of the Agreement provides the following (according to the undisputed English translation): "the competent instance in case of a dispute concerning this Agreement is the FIFA Commission, or the UEFA Commission, which will have to decide the dispute that could arise

between the club and the agent"<sup>1</sup>. In connection with A. \_\_\_\_\_'s transfer and that of two other players some disputes arose between the Parties with regard to the transfer fees.

**B.**

B.a On September 10, 2008 the Respondent initiated arbitral proceedings based on paragraph 4 of the February 19, 2003 agreement in front of the FIFA Players Status Committee and submitted that the Appellant should be ordered to pay € 534'186 and USD 100'000. In a letter of December 10, 2008 the FIFA Players Status Committee took the view that it had no jurisdiction based on article 6.1 of its Rules as the Claimant was a company and not a natural person. When the Respondent questioned that decision FIFA maintained that its Players Status Committee had no jurisdiction in a letter of January 15, 2009.

1. Translator's note: In English in the original text.

B.b On February 25, 2009 the Respondent applied to the High Court of the canton of Zurich for the appointment of an arbitrator. On October 20, 2009 the High Court of the canton of Zurich decided that there were enough clues to the existence of an arbitration clause and that the Appellant had not succeeded to produce summary evidence that there was no arbitration clause, whereupon the Court appointed Urs Scherrer as arbitrator.

B.c In an award of April 10, 2010 the arbitrator found that he did not have jurisdiction. He held that the parties had obviously intended to submit the existing dispute to an arbitral tribunal specializing in sport law as the Appellant even took the view that the dispute should be submitted to a sport arbitral tribunal constituted according to the rules of a sport arbitration organization. Therefore the arbitrator considered that it was not justified to let the arbitration clause become ineffective; however there was no direct or indirect intent of the parties to submit their dispute to a sole arbitrator, which is why he found that he had no jurisdiction. The Respondent appealed the arbitral award of April 13, 2010 to the Federal Tribunal by way of a Civil law appeal (case 4A\_280/2010). The proceedings were subsequently stayed until a decision in this case.

B.d On May 14, 2010 the Respondent filed a claim against the Appellant in front of the Court of Arbitration for Sport (CAS) essentially submitting that the Appellant should be ordered to pay USD 100'000 with interest at 6% from February 9, 2006 and € 534'186 with interest at 8% since February 1st, 2008. The Appellant disputed the CAS jurisdiction. In an interim award of March 17, 2011 the CAS held that it had jurisdiction on the basis of the arbitration clause contained in the agreement of February 19, 2003, with regard to the dispute between the Parties in connection with the transfer of player A.\_\_\_\_\_ (award paragraph 1). Simultaneously, the Arbitral tribunal found that it had no jurisdiction as to the Respondent's other submissions (award paragraph 2). Furthermore it decided the costs of the proceedings and those of the parties (award paragraph 3 and 4).

### C.

In a Civil law appeal the Appellant submits to the Federal Tribunal that paragraphs 1, 3 and 4 of the CAS interim award of March 17, 2011 should be annulled and asks for a finding that the CAS has no jurisdiction. The Respondent submits that the appeal

should be rejected. The Arbitral tribunal did not express a position. The Appellant submitted a reply and the Respondent a rebuttal.

### Reasons

#### 1.

In the field of international arbitration a Civil law appeal is allowed under the requirements of Art. 190-192 PILA<sup>2</sup> (SR 291) (Art. 77 (1) (a) BGG<sup>3</sup>).

1.1 The seat of the Arbitral tribunal is in Lausanne in this case. Both the Appellant and the Respondent had their domicile or their seat outside Switzerland at the decisive time. As the Parties did not rule out in writing the provisions of chapter 12 PILA they are applicable (Art. 176 (1) and (2) PILA).

1.2 A Civil law appeal within the meaning of Art. 77 (1) BGG may in principle seek only the annulment of the decision under appeal (see Art. 77 (2) BGG ruling out the applicability of Art. 107 (2) BGG to the extent that it allows the Federal Tribunal to decide the matter itself). To the extent that the dispute involves the jurisdiction of the arbitral tribunal there is however an exception to that effect, namely that the Federal Tribunal itself can decide the jurisdiction or lack of jurisdiction of the arbitral tribunal (BGE 136 III 605 at 3.3.4 p. 616 with references). The Appellant's submission is admissible to that extent.

#### 2.

The Appellant argues that the Arbitral tribunal wrongly accepted jurisdiction (Art. 190 (2) (b) PILA).

2.1 Based on Art. 178 (2) PILA the Arbitral tribunal examined whether or not the Parties had entered into a valid arbitration clause according to Swiss law. According to Art. 1 (1) and Art. 2 (1) OR<sup>4</sup> a contract is entered into when the parties agreed on all the essential points. The materially essential points of an arbitration clause include the intent of the parties to bind themselves to submit their dispute to decision by an arbitral tribunal and furthermore the determination of the object of the dispute, which is to be submitted to the arbitrators. Additional items,

2. Translator's note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

3. Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

4. Translator's note: OR is the German abbreviation for the Swiss Code of obligations.

such as the seat of the arbitral tribunal, the rules as to the composition of the arbitral tribunal, the designation of an arbitral institution, the choice of the language of the proceedings and the determination of the applicable procedural rules, do not belong to the essential contractual points unless a party would have seen them as *conditio sine qua non* for the conclusion of the agreement in a way that was recognizable for the other party. Should the interpretation of the arbitration clause show that the parties wanted to submit their dispute to an arbitral tribunal but that there was no agreement as to the course of the arbitral proceedings, an understanding of the contract must in principle be sought which will be in favour of the arbitration clause. Article 4 of the February 19, 2003 agreement clearly shows the intention of the Parties to exclude state courts and to let possible disputes be decided in arbitral proceedings instead. The Parties had initially designated an organization, namely FIFA or UEFA which should decide the dispute. To the extent that they anticipated that a committee of FIFA or UEFA would have to decide a possible dispute in connection with their agreement, the Parties had clearly agreed on an institution, which was not a state court and that was not based in the state of one of the Parties, yet which would be particularly familiar with the possible object of the dispute. An interpretation of article 4 according to the principle of trust shows that the Parties wanted to submit the dispute originating from the agreement to an arbitral tribunal. Except in extraordinary cases the designation of an arbitral institution or an arbitral body should be considered as not subjectively essential to the parties. There were no indications that the Appellant would have considered the institution designated in the arbitration clause as so important that it would not have decided in favour of arbitration had it known of the FIFA refusal to adjudicate the dispute. The CAS saw another indication that the “FIFA Commission” mentioned in article 4 was not an essential point in the fact that the clause provided for the alternative jurisdiction of UEFA besides FIFA. This was an important indication that the Parties wanted an institution specialized in sport, which was familiar with disputes involving the transfer of players but that they were not set on a specific organization. Moreover it was to be taken into account that the FIFA Statutes provide for a general right of appeal to the CAS of a decision of the FIFA Committee for the Status of Players. Had the FIFA Committee not declined jurisdiction to decide the dispute between the Parties, the CAS

would thus have had jurisdiction on appeal. For these reasons the validity of the arbitration clause should be upheld. Yet it was unclear and needed to be interpreted and supplemented as to the specifically competent arbitral tribunal. In this respect the Parties had wanted to submit their dispute to an arbitral tribunal with several arbitrators. The Parties had clearly wanted to submit the dispute to an arbitral tribunal sitting in Switzerland, whereupon they let the specific seat open by choosing alternatively FIFA (based in Zurich) and UEFA (based in Nyon, VD). Therefore a finding of jurisdiction for the CAS, which is based in Lausanne – and therefore also in the canton of Vaud – corresponded to the choice of venue according to the arbitration clause. Further interpretation of the clause showed that the Parties intended to entrust the decision to an institution specialized in sport law (in particular in the field of football). In this respect it was generally known that since 2003 the CAS has jurisdiction to decide appeals against FIFA decisions. Thus the CAS had been able to develop comprehensive case law in the field of football, in particular as to the FIFA Rules. For these reasons the CAS was in the best position to decide the dispute between the Parties once FIFA denied jurisdiction and the Appellant had not argued that UEFA would actually decide the matter. Accordingly the CAS found that it had jurisdiction as to the Respondent’s claims in connection with player A.\_\_\_\_\_’s transfer on the basis of article 4 of the February 19, 2003 agreement.

## 2.2

2.2.1 The Federal Tribunal exercises free judicial review according to Art. 190 (2) (b) PILA as to jurisdiction, including the substantive preliminary issues from which the determination of jurisdiction depends. However even in the framework of an appeal on jurisdiction the Court reviews the factual findings of the award under appeal only when some admissible grievances within the meaning of Art. 190 (2) PILA are brought against such factual findings or exceptionally when new evidence is taken into account (BGE 134 III 565 at 3.1 p. 567; 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733).

2.2.2 The arbitration clause must meet the requirements of Art. 178 PILA as to form (Art. 178 (1) PILA). In sport cases the Federal Tribunal reviews with a certain “benevolence” the agreement of the parties to call upon an arbitral tribunal; this is with a view to

promoting quick disposition of the dispute by specialized courts which, as the CAS, offer comprehensive guarantees of independence and objectivity (BGE 133 235 at 4.3.2.3 p. 244 ff with references). The generosity of federal case law in this respect appears in the assessment of the validity of arbitration clauses by reference (judgement 4A\_\_460/2010 of April 18, 2011 at 3.2.2; 4A\_548/2009 of January 20, 2010 at 4.1; 4A\_460/2008 of January 9, 2009 at 6.2 with references). According to Art. 178 (2) PILA the validity of an arbitration clause is assessed as to its contents according to the law chosen by the parties and applicable to the dispute, in particular as to the principal agreement, or according to Swiss law. In the arbitral proceedings none of the Parties took the view that as to the validity of the arbitration clause the law applicable to the February 19, 2003 agreement had to be determined first; in particular, the Respondent did not claim that another law would be more advantageous than Swiss law as to the material validity of the arbitration clause. The CAS reviewed the existence of the arbitration clause in dispute on the basis of Swiss law according to Art. 178 (2) PILA, which is not disputed by any of the Parties in front of the Federal Tribunal.

2.2.3 An arbitration clause is an agreement by which two determined or determinable parties agree to submit one or several existing or future disputes to the binding jurisdiction of an arbitral tribunal to the exclusion of the original state jurisdiction, on the basis of a legal order determined directly or indirectly (BGE 130 III 66 at 3.1 p. 70). It is decisive that the intention of the parties should be expressed to have an arbitral tribunal, *i. e.* not a state court, decide certain disputes (BGE 129 III 675 at 2.3 p. 679 ff). The arbitral tribunal called upon to decide must be either determined or in any case determinable. The appointment of the arbitral tribunal may take place according to the rules chosen by the parties (Art. 179 (1) PILA) or by decision of the court at the seat of the arbitral tribunal (Art. 179 (2) PILA) (BGE 130 III 66 at 3.1 p. 70 ff; 129 III 675 at 2.3 p. 680). Incomplete, unclear or contradictory provisions in arbitration clauses create pathological clauses. To the extent that they do not concern mandatory elements of the arbitral agreement, namely the binding submission of the dispute to a private arbitral tribunal, they do not necessarily lead to invalidity. Instead, a solution must be sought by interpretation and if necessary by supplementing the contract

with reference to general contract law, which respects the fundamental intent of the parties to submit to arbitral jurisdiction (BGE 130 III 66 at 3.1 p. 71). Should no mutual intent of the parties be factually certain as to the arbitration clause, it must be interpreted according to the principle of trust, *i. e.* the putative intent is to be ascertained as it could and should have been understood by the respective parties according to the rules of good faith (BGE 130 III 66 at 3.2 p. 71; 129 III 675 at 2.3 p. 680). When interpretation shows that the parties intended to submit the dispute to an arbitral tribunal and to exclude state jurisdiction, but with differences as to how the arbitral proceedings should be carried out, the rule that a contract should be given effect applies and an understating of the contract must be sought which will uphold the arbitration clause. Imprecise or flawed designation of the arbitral tribunal does not necessarily lead to invalidity of the arbitral agreement (BGE 130 III 66 at 3.2 p. 71 ff; 129 III 675 at 2.3 p. 681).

## 2.3

2.3.1 The Appellant firstly challenges that an arbitral agreement would have come into force. In this respect it wrongly denies that the expressions of intent in the contractual clause in dispute, once interpreted according to the rules of good faith, shows that the Parties wanted to have possible disputes as to their contractual relationship decided by committees of the football bodies FIFA or UEFA instead of going to their respective state courts. The Appellant merely claims generally that the finding of the CAS that state jurisdiction was renounced would violate the recognized principle of federal case law according to which such renunciation could not be accepted lightly but instead should be interpreted restrictively in case of doubt (see BGE 129 III 675 at 2.3 p. 680 ff). However he does not explain to what extent the contractual clause would have to be understood in this respect as meaning that state jurisdiction should be upheld and concedes that according to Art. 4 of the agreement “the respective Commission of the football bodies FIFA or UEFA should have jurisdiction to decide the dispute” and also sees in another place the clear intent of the Parties “to submit their dispute to an arbitral institution, namely to the FIFA Committee”. Article 4 does not expressly mention “arbitral jurisdiction” “arbitral tribunal” “arbitrator” “arbitration clause” or similar wording (see WERNER WENGER/CHRISTOPH MÜLLER,

in: Basler Kommentar, Internationales Privatrecht, 2 Aufl. 2007, N. 32 to Art. 178 PILA) but provides for alternate jurisdiction of two international football bodies to decide a possible dispute under the contract. Contrary to what the Appellant appears to claim, the wording “competent instance”<sup>55</sup> as well as “decide the dispute”<sup>56</sup> cannot be understood as meaning that the two private sport bodies mentioned, both familiar with the world of professional football, would merely mediate or advise in case of disputes under the contract. It is instead to be concluded according to good faith that the Appellant as an internationally known football club and the Respondent as a broker of professional football players, wanted the binding jurisdiction of one of the two international football organizations as to a possible dispute based on their transfer agreement, yet without reserving at the same time the possibility to go to the state courts of their respective states. The Appellant itself takes the view moreover that a decision of the FIFA Committee for the Status of Players could have been appealed to the CAS. Under such circumstances the renunciation of state jurisdiction is not doubtful, which would call for restrictive interpretation. The Appellant’s argument that the interpretation of the statements of intention of the Parties according to the principle of trust would not lead to the exclusion of state jurisdiction is unfounded. The CAS assumed the existence of an arbitration clause without violating federal law.

2.3.2 The Appellant further argues that the designation of the competent “UEFA Committee” would be obviously flawed as it is generally known that no UEFA body accepts to decide disputes between brokers and football clubs. Such disputes are within the exclusive jurisdiction of the FIFA Committee for the Status of Players which, however, found that it had no jurisdiction in this case as according to its practice it decides only disputes between player agents and football clubs when the broker is a natural person. As the aforesaid FIFA Committee did not accept the dispute, the arbitration clause must be considered extinguished according to the Appellant or impossible to begin with. The Appellant rightly points out that the designation of both FIFA and UEFA Committees proved to be

impossible to begin with (Art. 20 (1) OR) as both bodies could not address the dispute due to their internal rules. However this does not lead to the nullity of the arbitration clause; instead the CAS rightly analysed whether or not the bodies designated at article 4 of the February 19, 2003 agreement were of such importance that the Parties would have decided against arbitral jurisdiction had they known these could not decide a dispute (see also Jean-François POUDRET/Sébastien BESSON, Comparative law of international arbitration, 2 ed. 2007, Rz. 161, mentioned in the appeal, according to whom the designation of an inexistent arbitral institution does not lead in all cases to the nullity of the arbitration clause but only under specific circumstances). Thus the CAS examined what the Parties would have agreed according to their hypothetical intent (see BGE 131 III 467 at 1.2 p. 470) if they had been aware of the nullity of the flawed language already at the time the contract was concluded (see Art. 20 (2) OR). Contrary to what the Appellant seems to argue, the CAS did not merely proceed from a general premise in its conclusion that an arbitration clause would also have been entered into if the Parties had been aware that none of the bodies designated would decide a dispute as to a transfer agreement. Instead it recognized specific indications in support of that view by considering the individual relationships: thus the alternative reference to two football bodies suggests that the Parties were not set upon one specific institution but principally wanted an arbitral tribunal familiar with issues as to the transfer of professional football players. Moreover the CAS convincingly rejected the Appellant’s argument that it would not have entered into an arbitral agreement if it had known the lack of jurisdiction of the FIFA Committee for the Status of Players by stating that a decision of this FIFA Committee could have been appealed to the CAS according to the applicable FIFA Rules, which is also accepted by the Appellant. It is actually not apparent that the Parties would have anticipated the possibility to appeal a decision of the FIFA Committee for the Status of Players to the CAS whilst maintaining the jurisdiction of the respective national courts merely in view of a possibility to seize the CAS or another arbitral tribunal directly. Why this should be so is not explained by the Appellant. Moreover it disregards that according to the general rules of contract, partial nullity must be given preference in case of doubt as to the

5. Translator’s note: In English in the original text.

6. Translator’s note: In English in the original text.

existence of complete nullity arising from the hypothetical intent of the Parties (judgment 4C.156/2006 of August 17, 2006 at 3.2). The CAS did not violate federal law when despite the invalid designation of the bodies mentioned in article 4 of the February 19, 2003 agreement it upheld the arbitration clause.

2.3.3 When the parties excluded state jurisdiction in favour of an arbitral tribunal, as they did in this case, it is possible – contrary to the opinion advanced in the appeal – to seek a solution which takes into account the fundamental intent of the parties to submit to arbitral jurisdiction (see BGE 130 III 66 at 3.2 p. 71 ff). For that purpose the contract may not only be interpreted but also supplemented (BGE 130 III 66 at 3.1 p. 71; see WENGER/MÜLLER, a.a.O., n. 53 ff to Art. 178 PILA). Partial nullity (Art. 20 (2) OR) of the arbitration clause concluded on February 19, 2003 is to be remedied to the extent possible by supplementing the contract on the basis of the hypothetical intent of the parties (see BGE 120 II 35 at 4a p. 40 ff; 114 II 159 at 2c p. 163; 107 II 216 at 3a and b p. 318 ff). One must enquire as to what the parties would have agreed had the partial flaw be known to them already at the time the contract was concluded (see as to the ascertainment of the hypothetical intention of the Parties BGE 107 II 216 at 3a p. 218; judgement 4C. 156/2006 of August, 17 2006 at 3.3; 4C.9/1998 of May, 14 1998 at 4b). Without breaching federal law the CAS found that the Parties wanted to submit their dispute to an arbitral tribunal sitting in Switzerland, which would know sport law particularly well. The designation of FIFA as well as UEFA suggests that the Parties wanted to have a sport body decide their possible disputes under the transfer contract, which would be familiar with transfers in the business of international football. It must be noticed in particular that the CAS can review FIFA decisions concerning the transfer of players on appeal and the Appellant itself acknowledges that an appeal to the CAS would have been allowed against the decision of the FIFA Committee for the Status of Players if it had accepted jurisdiction in the case at hand. On the basis of these circumstances it must be assumed that the Parties would have submitted the possible disputes arising from their transfer agreement of February 19, 2003 to the CAS, which regularly addresses transfers of football players, had they known that the bodies mentioned in article 4 would not have

jurisdiction. The Appellant's objection that direct jurisdiction of the CAS would cause it to lose some of its rights as a possibility to appeal pursuant to the pertinent FIFA Rules would not be available, is not convincing because the alleged disadvantage arises directly from the lack of jurisdiction of the aforesaid FIFA Committee. Moreover the Appellant disputes the jurisdiction of the CAS merely in general, yet without showing to what extent the Parties in the case at hand would have insisted on a double degree of jurisdiction. The reference in the appeal to two decisions of the CAS in which a refusal to accept jurisdiction by FIFA was upheld is equally unconvincing as in these cases the jurisdiction of FIFA was to be decided and a direct claim in front of the CAS was not at issue. The CAS therefore did not break federal law when it found that it had jurisdiction to decide the dispute between the Parties in connection with the transfer of player A.\_\_\_\_\_.

**3.**

The appeal proves unfounded and is to be rejected to the extent that the matter is capable of appeal. In view of the outcome of the proceedings the Appellant must pay the judicial costs and compensate the other party (Art. 66 (1) and Art. 68 (2) BGG).

**Therefore the Federal Tribunal pronounces:**

**1.**

The appeal is rejected to the extent that the matter is capable of appeal.

**2.**

The judicial costs set at CHF 10'000 shall be borne by the Appellant.

**3.**

The Appellant shall pay to the Respondent an amount of CHF 12'000 for the federal judicial proceedings.

**4.**

This judgment shall be notified in writing to the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne, November 7, 2011

In the name of the First Civil Law Court of the Swiss Federal Tribunal.

The Presiding Judge:  
Klett(Mrs)

The Clerk:  
Leeman

**Composition**

Federal Tribunal Judge Klett, President  
Federal Tribunal Judge Corboz  
Federal Tribunal Judge Rottenberg Liatowitsch  
Federal Judge Kolly  
Federal Judge Kiss  
Clerk of the Court: Mr Hurni

**Parties**

International Ice Hockey Federation (IIHF),  
Appellant, represented by Mr. Daniel Eisele and Mr. Tamir Livschitz,

**versus**

SCB Ice Hockey AG,  
Respondent, represented by Mr. Michael Bader and Mrs. Elena Valli.

\* From Charles Poncet's translation, courtesy of the law firm ZPG/Geneva ([www.praetor.ch](http://www.praetor.ch)).

\* Translator's note: Quote as International Ice Hockey Federation v. SCB Ice Hockey AG, 4A\_627/2011. The original of the decision is in German. The text is available on the website of the Federal Tribunal [www.bger.ch](http://www.bger.ch)

**Facts**

**A.**

A.a The International Ice Hockey Federation (IIHF, Appellant) is an association under Swiss law based in Zurich and registered at the Registry of commerce. Among its members is the Swiss Ice Hockey Federation (SIHF), also an association under Swiss law based in Zurich. The Swiss National Hockey League GmbH (NL-GmbH) based in Ittigen (Bern) belongs to this parent organization.

SCB Ice Hockey AG (SCB AG, the Respondent) is a corporation headquartered in Bern. Its goal is to conduct, organize and manage a professional hockey team (SCB, Skating Club Berne), including the conduct of games and the handling of transfers. It is a member of SIHF and of NL-GmbH.

A.b In April 2008 the Appellant entered into an

agreement with SIHF and NL-GmbH as to the participation of Swiss clubs to the Champions Hockey League, a European hockey tournament of high level (the CHL-Agreement). This provides among other things for some financial contributions for a total amount of € 10'000'000 in favor of the participating clubs (Art. 8) as well as the rules pursuant to which the clubs become entitled to participate (Art. 10). The CHL-Agreement provides for Swiss law to be applicable and states that "any dispute between the parties under or relating to the subject matter of this agreement<sup>1</sup>" is to be decided exclusively and finally by an award of the Court of Arbitration for Sport in Lausanne (CAS).

Art. 10 of the CHL-Agreement ("Entries for the Competition<sup>2</sup>") contains the following provisions:

1. Translator's note: In English in the original text.

2. Translator's note: In English in the original text.

“10.1 European IIHF member national association / leagues shall enter a certain number of clubs for this competition (...).

10.3 (...) For the first season, national associations / leagues shall be represented on the following basis: (...)

c) Switzerland (...) : One representative being the top league national champion (...).

10.4 Clubs must be entered by the National Association / League by means of the official entry form (...).<sup>3</sup>”

The Respondent made an application to the Appellant to participate in the CHL 2008/2009 by way of a letter of May 19, 2008. The application form signed by the Respondent (“Entry Form<sup>4</sup>”) provides that the competition shall be conducted according to the rules contained in the corresponding agreements between the Appellant and the national federation of the applicant club as well as in the rulebook of the Appellant and that the applicant club accepts all obligations contained in these applications and rules.

On the basis of its results in the national championship the Respondent met the requirements to participate in the 2009/10 and 2010/11 CHL.

A.c In January 2009 the company sponsoring the CHL suspended its payments as a consequence of the financial crisis. On April 9, 2009 the Appellant terminated its agreement with that company and informed various national federations, including the SIHF, that it was no longer in a position to finance the CHL 2009/10 and 2010/11 and that it could not guarantee the prize money of € 10’000’000 each time. In the middle of June the Appellant decided to suspend the CHL 2009/10 due to the lack of new investors. At the end of 2009 the Appellant, the SIHF and NL-GmbH entered into a “Settlement agreement<sup>5</sup>” with a view to conducting the CHL in the season 2010/11 again.

## B.

B.a In a request for arbitration of October 13, 2010 the Respondent submitted to the CAS that the Appellant should be ordered to pay € 107’600 (reduced to € 53’800 later), with interest.

3. Translator’s note: In English in the original text.

4. Translator’s note: In English in the original text.

5. Translator’s note: In English in the original text.

The first two amounts correspond to the alleged prize money that the Respondent would have received in any event for participating in the CHL 2009/10 and 2010/11 pursuant to the CHL-Agreement. The third amount corresponds to the damages that the Respondent would have suffered as a consequence of the fact that it bought three players with a view to participating in the CHL 2009/10.

In its answer of November 11, 2010 the Appellant mainly submitted that the CAS should decline jurisdiction. Alternatively it submitted that the claim should be rejected.

B.b In a “Partial Award on Jurisdiction<sup>6</sup>” of September 13, 2011 the CAS found that it had jurisdiction.

The main reason for that finding was that Art. 10 of the CHL-Agreement, which defines which clubs are entitled to participate in the CHL on the basis of their performance in the national championships, constitutes a pure contract in favor of third parties (namely in favor of the clubs entitled to participate) within the meaning of Art. 112 (2) OR<sup>7</sup> and that consequently the arbitration clause contained in the CHL agreement is also applicable to such third parties.

## C.

In a Civil law appeal the Appellant submits that the Federal Tribunal should annul the partial award of September 13, 2011 and deny the CAS jurisdiction.

The Respondent submits that the appeal should be rejected. The CAS submitted some comments and the Parties filed a reply and a rejoinder.

A stay of enforcement was granted by the Presiding judge on November 7, 2011.

### Reasons

#### 1.

In front of the Federal Tribunal the Parties used German. The judgment of the Federal Tribunal is therefore to be issued in German.

#### 2.

2.1 The award under appeal concerns two parties that are both based in Switzerland. The parties to the contract or the parties in the arbitration did not stipulate in the arbitration clause or

6. Translator’s note: In English in the original text.

7. Translator’s note: OR is the German abbreviation for the Swiss Code of Obligations.



later that the provisions as to international arbitration (Art. 176 ff PILA<sup>8</sup>) should be applied (see Art. 353 (2) CCP<sup>9</sup>). The provisions as to internal arbitration are accordingly applicable as provided by Title III of the CCP (Art. 353 ff).

- 2.2 The award under appeal is an interim award on jurisdiction. It may be appealed to the Federal Tribunal by way of a Civil law appeal on the grounds stated at Art. 393 (a) and (b) CCP (Art. 77 (1) (b) BGG<sup>10</sup> compared with Art. 392 (b) CCP).
- 2.3 A Civil law appeal within the meaning of Art. 77 (1) BGG may in principle result only in the decision under appeal being annulled and not modified (see Art. 77 (2) BGG ruling out the applicability of Art. 177 (2) BGG to the extent that the latter provision empowers the Federal Tribunal to decide the matter itself). To the extent that the dispute concerns jurisdiction however, there is an exception and the Federal Tribunal may find itself in favor or against jurisdiction (BGE 136 III 605 at 3.3.4 p. 616 with references). The Appellant's submission for a finding that the CAS has no jurisdiction in the case at hand is accordingly admissible.
- 2.4 The Federal Tribunal reviews only the grounds for appeal which are brought forward and reasoned in the appeal (Art. 77 (3) BGG). This corresponds to the duty to submit reasons with regard to the violation of constitutional rights (Art. 110 (2) BGG). As before, the strict requirements for reasons developed by the Federal Tribunal under the aegis of Art. 90 (1) (b) of the previous law remain valid (BGE 134 III 186 at 5). The Appellant must specify which of the various grounds for appeal are met in its view. It is not for the Federal Tribunal to research which ground for appeal according to Art. 393 (a) and (b) CCP should be invoked with the various arguments raised if that is not specified by the Appellant in relation to them. Thus the Appellant must show in details why the requirements of the grounds for appeal invoked are met and point out in its criticism which of the reasons of the lower Court are legally inaccurate (see BGE 128 III 50 at 1c; further: BGE 134 II 244 at 2.1 p. 245 f.; 133 IV 286 at 1.4 p. 287;

134 V 53 at 3.3). Mere references to the record are inadmissible; to what extent the grounds for appeal relied upon are met must be explained in the appeal brief itself (see BGE 133 II 396 at 3.1 p. 400; 126 III 198 at 1d; 116 II 92 at 2; 115 II 83 at 3 p. 85).

### 3.

The Appellant argues that the Arbitral tribunal wrongly accepted jurisdiction.

- 3.1 The jurisdictional appeal provided by Art. 393 (b) CCP as to internal arbitration corresponds to the one contained at Art. 190 (2) (b) PILA as to international arbitration (see message of June 28, 2006 as to the Swiss Code of Civil procedure § 5.25.8 ad Art. 391 E CCP, BBl<sup>11</sup> 2006 7405).

As to jurisdiction the Federal Tribunal exercises free judicial review including as to the substantive preliminary issues from which the determination of jurisdiction depends. However this Court does not review the factual findings of the award under appeal, even in an appeal concerning jurisdiction, as it is bound by the factual findings of the arbitral tribunal, which it may neither supplement nor rectify (see Art. 77 (2) in conjunction with Art. 97 and Art. 105 (2) BGG). It is only when some admissible grievances within the meaning of Art. 393 CCP are brought against the factual findings or when exceptionally some new evidence is taken into account that the Federal Tribunal may review the factual findings of the award under appeal (Art. 99 BGG; see BGE 4A\_246/2011<sup>12</sup> of November 7, 2011 at 2.2.1).

- 3.2 The issue as to the jurisdiction of the arbitral tribunal also includes the subjective scope of the arbitration clause. In its review process the arbitral tribunal must clarify which persons are bound by the arbitration clause (BGE 134 III 565 at 3.2 S. 567 with references). According to the principle of the relativity of contractual commitments (*alteri stipulari nemo potest*; ULP. D. 45,1,38,17) an arbitration clause contained in a contract basically binds only the parties to the contract. However the Federal Tribunal has long held that an arbitration clause may under certain circumstances also bind persons that did not sign the contract and are not mentioned there, for instance when a claim is assigned, in case of

8. Translator's note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

9. Translator's note: CCP stands for Code of Civil Procedure, the English abbreviation for the new Swiss Code of Civil Procedure in force since January 1st, 2011, RS 272.

10. Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

11. Translator's note: BBl is the German abbreviation for the Swiss Federal Reporter.

12. Translator's note: Full English translation at <http://www.praetor.ch/arbitrage/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s/>

the simple or joint assumption of an obligation, or when a contractual relationship is taken over (BGE 134 III 565 at 3.2 p. 567 ff; 129 III 727 at 5.3.1 p. 735). When a third party involves itself in the performance of a contract containing an arbitration clause it is furthermore accepted that by doing so the third party ratifies the arbitration clause by conclusive behavior and makes known its intent to become a party to the arbitration agreement (BGE 134 III 565 at 3.2 p. 568; 129 III 727 at 5.3.2 p. 737). Finally the objective scope of an arbitration clause is extended to the beneficiary in case of a pure contract in favor of a third party within the meaning of Art. 112 (2) OR: when such a contract contains an arbitration clause the third party may rely on it to enforce its claim against the promisor unless the arbitration clause excludes that possibility (judgment 4A\_44/2011<sup>13</sup> of April 19, 2011 at 2.4.1; Pierre-Yves TSCHANZ, in: Commentaire romand, 2011, N. 136 ad Art. 178 IPRG). On objective interpretation of the CHL-Agreement the Arbitral tribunal reached the conclusion that the national clubs meeting the requirements set forth at Art. 10 of the CHL-Agreement had obtained their own independent right to claim performance of the various clauses of the Agreement as provided in a pure contract in favor of third parties.

- 3.3 As to issues of consent and interpretation Swiss contract law recognizes the principle that concurring subjective intent prevails on what is stated objectively, yet differently understood subjectively (BGE 123 III 35 at 2b p. 39). In a dispute relating to consent and interpretation the Court must first determine whether the parties actually expressed the same thing or not, understood the same and united in this understanding (subjective interpretation). Is this the case there is actual consent (BGE 132 III 626 at 3.1 p. 632).

When the parties concurred in their expression but not in their understanding there is a hidden disagreement, which results in the contract being concluded when one of the parties must be protected on the basis of the principle of trust in its understanding of the other's statement of intent and that accordingly the latter must suffer objective interpretation of its statements. When the addressee of a statement of will understands it differently from the one who makes it or when it is impossible to ascertain an actual

understanding, the party making the statement must accept that it be understood as the addressee could in good faith according to the wording and context as well as under the circumstances (objective or normative interpretation). In such a case there is normative consent (BGE 135 III 410 at 3.2 p. 413; 133 III 675 at 3.3 p. 681; 123 III 35 at 2b p. 39 ff).

- 3.4 The Appellant criticizes the factual finding of the Arbitral tribunal that an actual common intent of the Parties to create rights in favor of third parties through the CHL-Agreement cannot be proved. It argues that the finding is arbitrary within the meaning of Art. 393 (e) CCP, in particular because some clear statements of witnesses would have been disregarded. By entering into the CHL-Agreement it would not have intended to entitle the clubs to have their own claims.

- 3.4.1 The Arbitral tribunal did not issue a finding as to how SHIF and NL-GmbH as counterparties understood the text of the CHL-Agreement in this respect. It does not appear from the arbitral award that SIHF and NL-GmbH or their representatives were heard at all as to this. Only the general secretary of the German Ice Hockey Federation, Franz Reindl, was interrogated for in some of the meetings Mr. Reindl took also part on behalf of the SIHF14 as he had been called as a witness upon the Appellant's request. Mr. Reindl testified that it had been the intention of the parties to regulate in the CHL Agreement the rights and obligations of the signatory parties only and that there had been no intention to create any rights and obligations for the benefit of third parties<sup>15</sup>. The Arbitral tribunal held that his statement was not decisive to deny the existence of a contract in favor of third parties because it emanated from a person without legal background. Finally the arbitral award held that the possibility of a contract for the benefit of a third party was apparently not discussed or analyzed in the course of the negotiations<sup>16</sup> and that it was not proved that at the time the agreement was concluded the parties wanted to exclude such an entitlement in favor of third parties ("such an unanimous will of the contracting parties cannot be established<sup>17</sup>") that the Appellant on the one hand and SIHF and NL-GmbH on the other hand both

13. Translator's note: Full English translation at <http://www.praetor.ch/arbitrage/arbitral-clause-as-contract-in-favor-of-a-third-party-binding/>

14. Translator's note: In English in the original text.

15. Translator's note: In English in the original text.

16. Translator's note: In English in the original text.

17. Translator's note: In English in the original text.

agreed to create an entitlement in favor of the clubs is not proved. Neither is it established that they agreed in wanting to exclude such a right. Finally it is not established factually that SIHF and NL-GmbH wanted to grant the clubs an entitlement anyway and that they understood the agreement differently from the Appellant in this respect. Therefore neither factual consent nor hidden disagreement is established or excluded.

3.4.2 According to Art. 393 (e) CPC an award may be appealed when it is arbitrary in its result because it relies on factual findings obviously contrary to the record or on a blatant violation of the law or equity. The Appellant – and the Respondent incidentally – disregard the scope of this ground for appeal, which was taken over from the earlier Concordate on Arbitration of March 27, 1969 (Art. 36 (f) KSG<sup>18</sup> (messages at 5.25.8 Art. 391 Draft CPC, BBI 2006 7405). An arbitral tribunal issues factual findings blatantly contrary to the record when due to oversight it puts itself in contradiction with the record, whether by overlooking parts of the record or by giving them other contents than the accurate ones, or because it mistakenly assumes that a fact is proved on the record whilst the record in reality provides no conclusion in this respect. Contradicting the record is not equal to arbitrary assessment of the evidence. The result of the assessment of the evidence and the evaluations contained there are not subject to recourse for being arbitrary but only the factual findings that are undisputedly contradicted by the record (BGE 131 I 45 at 3.6 p. 50). Furthermore a blatant violation of the law means only a violation of substantive law and not a procedural violation (BGE 131 I 45 at 3.4 p. 48; 112 Ia 350 at 2 p. 352); a blatant violation of equity may only be claimed when the arbitral tribunal was entitled to decide *ex aequo et bono* or when it applied a norm referring to equity (BGE 107 Ib 63 at 2a p. 65 ff). The Appellant does not demonstrate any contradiction with the record in the aforesaid meaning; its argument is basically criticism of the assessment of the evidence, which is not admissible. Moreover the Appellant does not claim that the Arbitral tribunal would have rejected any submissions of evidence in respect of the factual issues that were pertinent and formulated in the prescribed format. Under such circumstances it was not objectionable for the CAS to assume

the absence of proof of factual consent and to resort objective interpretation (see BGE 123 III 35 at 2b p. 39 ff).

3.5 The Appellant criticizes the objective interpretation of the CHL-Agreement by the Arbitral tribunal. Contrary to the opinion of the CAS this would not be a pure contract in favor of a third party.

3.5.1 In a pure contract in favor of a third party (Art. 112 (2) OR) the two parties create a right for the third party to demand independently and to claim performance from the obligee of what was promised. The third party becomes a creditor without being party to the contract. The imperfect contract in favor of a third party (Art. 112 (1) OR) however entitles only the obligor to claim performance in favor of the third party from the obligee. The third party has no immediate claim and is entitled only to receive performance as a beneficiary. Whether the third party has an independent immediate right to claim performance is decided in principle on the basis of the statements made by the parties to the contract, alternatively through a corresponding exercise. The third party claiming a direct right to claim and correspondingly alleging the existence of a contract in favor of a third party has the burden of proof (Rolf H. WEBER, *Berner Kommentar*, N. 6 ff. and 190 to Art. 112 OR). A pure contract in favor of a third party cannot be assumed (BGE 123 III 129 at 3d p. 136).

3.5.2 The CAS stated the following with regard to the issue as to whether or not SIHF and NL-GmbH, at the time of concluding the CHL-Agreement and in particular its Art. 10, on the basis of its wording and the overall circumstances, must have understood it objectively in good faith as meaning that a direct right and therefore a claim was given to the participating clubs: admittedly no provision of the CHL-Agreement uses the concept of a contract in favor of third parties but there is also no clause which would exclude interpreting the CHL-Agreement as a contract in favor of third parties. Art. 10 of the CHL-Agreement limitatively spells out the rules to determine which clubs are entitled to participate. They rely on some purely objective criteria and the national federations therefore could not decide freely if they wanted to register a club. The wording of the registration form shows that the Respondent itself registered for the CHL and that SIHF merely confirmed the

18. Translator's note: KSG is the German abbreviation for the old Intercantonal Concordate on Arbitration of March 27, 1969.

registration. For its part the Appellant could not reject the registration of a club that met the requirements for participation as stated in Art. 10 of the CHL-Agreement. From all of this the CAS concludes that Art. 10 of the CHL-Agreement confers a right for the benefit of the clubs<sup>19</sup> and that the right conferred therein to a club consists of a claim against both contracting parties to be admitted [...]<sup>20</sup>.

Finally the CAS stated the following: the German Ice Hockey League together with two clubs, initiated arbitration proceedings against the Appellant seeking damages in connection with the CHL, which would lead to the conclusion that the German league assumes a right of the clubs to claim directly. The Settlement agreement at the end of 2009 provides that the national federations renounce any claims against the Appellant as a consequence of the cancellation of the 2009/10 CHL season and also represent that the clubs will renounce such claims (“the National Association/League, by signing this agreement, waive, and ensure that all clubs will waive, any potential claim they may have against die IIHF based on the alleged breach by the IIHF of the CHL Agreement in connection with the cancellation of the CHL Season 2009/2010”<sup>21</sup>), which presupposes that claims by the clubs must be considered possible. The CHL-Agreement was created in the interest and to the advantage of the clubs and they were not included as contractual parties because it was not known in advance which clubs would be entitled to participate to the CHL. The clubs were admittedly not involved in the negotiations but they were informed early and approved the conclusion of the CHL-Agreement at the general meetings of the national federations. Taking part in the CHL was obviously causing the clubs to undergo expenses and therefore they needed certain guarantees, which speaks in favor of a direct right to claim.

3.5.3 The CHL-Agreement refers neither explicitly nor tacitly to a direct claiming right of the participating clubs. According to the CAS at first sight Art. 10.4 of the CHL Agreement speaks against such a right to the benefit of the clubs<sup>22</sup>. However, contrary to the opinion of the CAS even a second look at the matter does

not change this. Indeed the CHL-Agreement contains some wording according to which the clubs could not register themselves but had to register for the competition through their national federations (“national associations/ leagues shall enter a certain number of clubs for this competition. [...] clubs must be entered by the National Association / League by means of the official entry form<sup>23</sup>”) or according to which the clubs took part in the CHL as representatives of their national federations (“national associations / leagues shall be represented [...]”<sup>24</sup>). On the other hand there is no word in the CHL-Agreement as to any independent rights of the participating clubs. The wording of the CHL-Agreement therefore contains nothing that would speak in favor of a pure contract in favor of third parties. As the CAS stated the Agreement rather speaks against it.

The question arises therefore whether CHL and NL-GmbH should nonetheless have understood CHL-Agreement differently in this respect. Nothing can be deducted from the contractual negotiations in this respect as the issue of an entitlement of the clubs was not discussed at all. The CAS attributes great significance to the fact that the national federations could not decide freely which club could participate in the CHL but that they had to register those which met the qualifying criteria in the CHL-Agreement. However it is not clear why this would lead to the conclusion that the corresponding club had its own right to claim participation and why it would not be a simple beneficiary without any creditor position. Finally it is not explained on what basis the German federation is claiming together with two clubs so that nothing can be concluded from this. In any event a possible opinion of this federation – obviously not shared by its own general secretary incidentally – would not be relevant as to the rights of the clubs. Indeed even if this federation had understood the agreement it signed as a pure contract in favor of third parties, this would not mean that SIHF and NL-GmbH should have understood the CHL-Agreement in the same way in good faith at the time of conclusion, even if it had the same wording.

19. Translator’s note: In English in the original text.

20. Translator’s note: In English in the original text.

21. Translator’s note: In English in the original text.

22. Translator’s note: In English in the original text.

23. Translator’s note: In English in the original text.

24. Translator’s note: In English in the original text.

The Settlement agreement says nothing about possible claims of the clubs. However this is inconclusive as to the issue at hand namely how SIHF and NL-GmbH should have understood the CHL-Agreement six months earlier. Yet that clause of the Settlement agreement could be used as a clue in the ascertainment of the subjective intent of the Parties when they entered into the CHL-Agreement; however this is irrelevant to objective interpretation.

Finally the CAS held that granting the clubs their own direct rights would have been advantageous in various ways. This may be so but it is not decisive for objective interpretation. This circumstance would be important however if the CHL had been inapplicable or difficult to apply without such a right for the clubs. However this was not found and it cannot be assumed that the implementation of the CHL would have been markedly simpler for the Appellant and for the national federations with such a right being granted. Why SIHF and NL-GmbH thus would have had to understand the CHL-Agreement due to the situation with regard to the interests of the clubs as meaning according to good faith that it and the Appellant were granting the clubs a primary entitlement is not apparent.

Accordingly the grievance with regard to the objective interpretation of the CHL-Agreement appears well founded. A direct entitlement of the participating clubs cannot be derived from the CHL-Agreement and therefore the subjective scope of its arbitration clause cannot be extended to the Respondent.

**4.**  
The appeal shall be granted, the award under appeal annulled and it shall be found as requested that the CAS has no jurisdiction in the dispute at hand.

In such an outcome of the proceedings the Respondent must pay costs and compensate the other party (Art. 66(1) BGG and Art. 68 (2) BGG).

**Therefore the Federal Tribunal pronounces:**

**1.**  
The appeal is upheld and the award under appeal of September 13, 2011 is annulled.

**2.**  
The Court of Arbitration for Sport (CAS) has no jurisdiction in the dispute at hand.

**3.**  
The costs of CHF 8'000 shall be paid by the Respondent.

**4.**  
The Respondent shall pay CHF 9'000 to the Appellant for the federal proceedings.

**5.**  
This judgment shall be notified in writing to the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne March 8, 2012

In the name of the First Civil law Court of the Swiss Federal Tribunal.

The Presiding Judge:  
Klett(Mrs)

The Clerk:  
Hurni

<b>Composition</b>	Mmes et M. les Juges Klett, Présidente, Corboz et Rottenberg Liatowitsch Greffier: M. Carruzzo
<b>Parties</b>	X._____, recourant, représenté par Me Rocco Taminelli,  <b>contre</b>  Union Cycliste Internationale (UCI), intimée, représentée par Me Jean-Pierre Morand; & Comitato Olimpico Nazionale Italiano (CONI), intimé; & Federazione Ciclistica Italiana (FCI) intimée.
<b>Objet</b>	arbitrage international;  recours en matière civile contre la sentence rendue le 8 mars 2011 par le Tribunal Arbitral du Sport (TAS).

#### Faits

##### A.

L'Union Cycliste Internationale (UCI) est l'association des fédérations nationales de cyclisme. Afin de lutter contre le dopage dans ce sport, elle a édicté un règlement antidopage (ci-après: RAD). Elle a, en outre, élaboré un programme, intitulé "Passport biologique de l'athlète" (ci-après: le passeport biologique), qui constitue une méthode indirecte de détection du dopage sanguin.

X.\_\_\_\_\_, coureur cycliste professionnel de nationalité italienne, est l'un des sportifs inclus dans le programme du passeport biologique.

En décembre 2009, un groupe de neuf experts, désignés par l'UCI pour examiner anonymement les profils sanguins du prénommé, a conclu, à l'unanimité, que celui-ci avait utilisé une substance ou une méthode prohibée. Après avoir pris connaissance des commentaires du coureur cycliste, un collègue de trois experts, considérant qu'ils n'expliquaient pas de manière satisfaisante les anomalies relevées,

a recommandé l'ouverture d'une procédure pour violation des règles antidopage.

Le 3 mai 2010, l'UCI a informé X.\_\_\_\_\_ que, conformément au RAD, elle allait demander à la Federazione Ciclistica Italiana (FCI) d'ouvrir une procédure disciplinaire. A la suite de cette communication, le sportif a interrompu toute participation aux compétitions cyclistes à partir du 4 mai 2010.

L'affaire disciplinaire a été déférée au Tribunale Nazionale Antidoping (TNA) du Comitato Olimpico Nazionale Italiano (CONI) le 27 juillet 2010. L'UCI est intervenue formellement dans la procédure en déposant un mémoire en date du 6 septembre 2010. Par décision du 21 octobre 2010, transmise aux parties le 19 novembre 2010, le TNA, constatant que la violation des règles antidopage imputée à X.\_\_\_\_\_ n'avait pas été établie avec le degré de probabilité requis, a libéré le coureur cycliste de l'accusation de dopage et mis les frais de la procédure à la charge de l'UCI.

**B.**

Le 6 décembre 2010, X.\_\_\_\_\_ a interjeté appel contre cette décision auprès du Tribunal Arbitral du Sport (TAS). Il a conclu à ce que l'UCI et le CONI fussent condamnés à lui rembourser un total de 54'964,70 euros comprenant les honoraires de ses avocats et de son expert, ainsi que ses frais de voyage.

De son côté, l'UCI a déposé sa déclaration d'appel le 13 janvier 2011. Selon elle, il convenait de suspendre le coureur cycliste pour une durée de quatre ans, d'annuler les résultats obtenus par lui en compétition à partir du 29 février 2008 et de lui infliger une sanction financière de 404'999,72 euros.

Le 11 février 2011, les deux appelants ont adressé au TAS un mémoire d'appel motivé. Les 21 et 22 du même mois, chacun d'eux a déposé son mémoire de réponse.

En date du 2 mars 2011, X.\_\_\_\_\_ et l'UCI ont assisté à l'audience du TAS et ont été entendus, de même que leurs experts. La FCI et le CONI n'ont pas participé à cette audience.

Par sentence du 8 mars 2011, dont les motifs ont été communiqués ultérieurement aux parties, le TAS a rejeté l'appel du coureur cycliste et admis partiellement celui de l'UCI. Il a annulé la décision du TNA, constaté la violation par X.\_\_\_\_\_ de l'art. 21.2 RAD, suspendu le coureur cycliste pour deux ans à compter du 3 mai 2010, ordonné la disqualification de tous les résultats obtenus par ce dernier à partir du 7 mai 2009 et condamné l'appelant à verser à l'UCI un montant de 115'000 euros à titre de sanction financière.

**C.**

Le 19 août 2011, X.\_\_\_\_\_ a interjeté un recours en matière civile au Tribunal fédéral aux fins d'obtenir l'annulation de ladite sentence.

Au terme de sa réponse du 3 octobre 2011, l'UCI (ci-après: l'intimée) a conclu au rejet du recours dans la mesure de sa recevabilité.

Par lettre du 31 octobre 2011, le TAS a fait savoir qu'il ne déposerait pas de réponse. La FCI et le CONI ont, eux aussi, renoncé à se déterminer sur le recours au motif qu'ils n'avaient pas pris une part active à la procédure arbitrale.

Dans une réplique du 22 novembre 2011 et une duplique du 9 décembre 2011, le recourant et l'intimée ont maintenu leurs conclusions respectives.

**1.**

D'après l'art. 54 al. 1 LTF, le Tribunal fédéral rédige son arrêt dans une langue officielle, en règle générale dans la langue de la décision attaquée. Le TAS a rendu sa sentence en français. Dans les mémoires qu'elles ont adressés au Tribunal fédéral, les parties ont utilisé, qui l'italien (le recourant), qui le français (l'intimée). Dès lors, conformément à la règle générale, le présent arrêt sera rédigé en français.

**2.**

Dans le domaine de l'arbitrage international, le recours en matière civile est recevable contre les décisions de tribunaux arbitraux aux conditions fixées par les art. 190 à 192 LDIP (art. 77 al. 1 LTF). Qu'il s'agisse de l'objet du recours, de la qualité pour recourir, du délai de recours ou encore des conclusions prises par le recourant, aucune de ces conditions de recevabilité ne fait problème en l'espèce. Rien ne s'oppose donc à l'entrée en matière.

**3.**

Le Tribunal fédéral statue sur la base des faits établis par le Tribunal arbitral (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). En revanche, comme c'était déjà le cas sous l'empire de la loi fédérale d'organisation judiciaire (cf. **ATF 129 III 727** consid. 5.2.2; **128 III 50** consid. 2a et les arrêts cités), 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 (cf. art. 99 al. 1 LTF).

**4.**

Le recourant avait excipé de la tardiveté de l'appel interjeté par l'intimée. Le TAS a écarté ce moyen en s'appuyant sur l'art. 334 RAD (version 2009). Dans la mesure où elle est pertinente pour la solution du cas particulier, cette disposition prévoit que l'UCI doit déposer sa déclaration d'appel au TAS dans un délai d'un mois suivant la réception de l'intégralité du dossier de la part de l'instance d'audition de la fédération nationale; elle ajoute que, si la partie appelante ne demande pas le dossier dans un délai de quinze jours suivant la réception de la décision intégrale au sens de l'art. 277 RAD, le délai en question court dès la réception de cette décision. Quant à la seconde disposition citée, elle précise

qu'une copie intégrale de la décision, signée au moins par le président de l'instance d'audition, est envoyée au licencié et à l'UCI par courrier recommandé avec accusé de réception, faute de quoi le délai d'appel ne court pas.

4.1 Selon le TAS, il n'est pas contesté que l'intimée a reçu la décision du TNA le 19 novembre 2010 et a demandé une copie du dossier complet au CONI le 3 décembre 2010, soit en temps utile. Comme le dossier intégral, incluant huit pièces dont l'intéressée n'avait pas pris connaissance auparavant, lui a été transmis le 13 décembre 2010, l'intimée, en déposant sa déclaration d'appel le 13 janvier 2011, a agi dans le délai d'un mois prévu par l'art. 334 RAD. Pour le TAS, il n'y a pas lieu de déroger à l'application de cette disposition, quoi qu'en dise le recourant: d'abord, l'intimée n'a participé que partiellement à la procédure de première instance, le premier acte effectué par elle en tant que partie à cette procédure ayant été le dépôt de son mémoire du 6 septembre 2010; ensuite, ce n'est que le 13 décembre 2010 que l'intimée a reçu l'intégralité des pièces versées au dossier et qu'elle a ainsi pu fonder son appel sur un dossier complet conformément à la ratio de l'art. 334 RAD; enfin, il ne saurait être reproché à l'intimée de ne pas avoir été en possession de la version intégrale du dossier avant cette date.

4.2

4.2.1 Invoquant l'art. 190 al. 2 let. b LDIP, le recourant fait grief au TAS de s'être déclaré à tort compétent pour connaître de l'appel interjeté par l'intimée. A l'appui de ce grief, il expose que l'art. R47 du Code de l'arbitrage en matière de sport (ci-après: le Code) rendait applicable, en l'espèce, l'art. 4 ch. 23 de l'annexe H des normes antidopage italiennes (NSA), en vertu duquel l'appel visant une décision du TNA doit être déposé dans les trente jours à réception de la décision motivée. La décision rendue le 21 octobre 2010 par le TNA ayant été notifiée le 19 novembre 2010 aux parties, par fax selon la pratique usuelle de cette autorité, l'intimée aurait dû déposer sa déclaration d'appel dans les trente jours dès cette date, ce qu'elle n'a pas fait.

S'agissant de l'art. 334 RAD, le recourant estime que cette disposition n'était pas applicable en l'espèce, étant donné que l'intimée était déjà intervenue comme partie au plein sens du terme devant le TNA. En effet, c'est elle qui avait demandé, le 3 mai 2010, au CONI d'ouvrir une procédure disciplinaire contre lui;

qui détenait toute la documentation technique utilisée par les parties; qui avait transmis, le 5 juillet 2010, une note explicative à l'Ufficio di Procura Antidoping du CONI (UPA); qui avait déposé, les 6 et 10 septembre 2010, deux mémoires accompagnés d'une volumineuse documentation incluant diverses expertises; qui avait fait intervenir comme expert, devant le TAS, le professeur A. \_\_\_\_\_, l'un de ses neuf experts spécialisés dans l'examen des passeports biologiques, auquel l'UPA avait également fait appel in casu; qui avait enfin participé à l'audience du 21 octobre 2010 devant le TNA par le truchement du médecin responsable de son agence antidopage, lequel avait pris la parole à cette occasion. Dans de telles circonstances, permettre à l'intimée de se prévaloir de l'art. 334 RAD revenait à cautionner un abus de droit commis par l'intimée et à violer le principe général de la bonne foi procédurale ainsi que les règles du Code Mondial Antidopage (CMA), tels les art. 8.1 et 13.2.2, prévoyant la tenue d'une audience dans un délai raisonnable. A supposer d'ailleurs que l'intimée ne disposât point de l'intégralité du dossier de la cause lorsqu'elle avait comparu devant le TNA, elle devrait alors se laisser opposer sa propre négligence.

Dans le même contexte, le recourant se plaint encore d'une violation de l'égalité des parties, sanctionnée par l'art. 190 al. 2 let. d LDIP, du fait qu'il était lié par le délai d'appel fixé à l'art. 4 ch. 23 de l'annexe H des NSA, alors que l'intimée disposait d'un délai d'appel extensible quasiment ad libitum puisqu'il lui suffisait d'attendre avant de réclamer la transmission du dossier complet pour pouvoir bénéficier d'un délai d'appel supplémentaire.

Enfin, aux yeux du recourant, le TAS aurait rendu une sentence incompatible avec l'ordre public procédural (art. 190 al. 2 let. e LDIP) en déclarant recevable un appel interjeté en violation des règles de la bonne foi.

4.2.2 A l'encontre de cette argumentation, l'intimée souligne, d'abord, qu'il n'est pas contesté qu'elle a déposé son appel dans le délai prévu par l'art. 334 RAD. Elle expose ensuite les différentes étapes de son intervention, expliquant que, au début de la procédure disciplinaire, elle n'a fait que répondre à diverses demandes de renseignements, son premier acte formel en tant que partie ayant été le dépôt du mémoire du 6 septembre 2010. Aussi, à en croire l'intimée, son intervention en cours de procédure aurait



eu notamment pour effet qu'elle n'avait pas reçu l'intégralité des pièces, en particulier celles ayant trait à la phase préliminaire d'instruction. Dès lors, elle n'aurait pas commis d'abus de droit en déposant son appel, dans le respect non seulement de la lettre mais aussi de l'esprit de l'art. 334 RAD, une fois en possession de l'intégralité du dossier.

A titre subsidiaire, l'intimée soutient qu'elle a déposé son appel en temps utile, même en faisant abstraction de l'art. 334 RAD, dans la mesure où la notification de la décision motivée du TNA, le 19 novembre 2010, n'avait pas déclenché le cours du délai d'appel puisqu'elle avait été faite par fax, contrairement aux exigences de l'art. 277 RAD précité. Ainsi, pour l'intimée, seule la réception par courrier, le 13 décembre 2010, du dossier intégral contenant ladite décision avait fait courir le délai d'appel, conformément à cette dernière disposition.

L'intimée conteste, par ailleurs, avoir violé d'une quelconque manière la bonne foi procédurale et dénie au recourant le droit d'invoquer la prétendue incompatibilité de la sentence avec l'ordre public procédural pour étayer d'une autre manière le grief se rapportant au respect du délai d'appel.

4.3 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 133 III 139** consid. 5 p. 141 et les arrêts cités). En revanche, il ne revoit les constatations de fait que dans les limites susmentionnées (cf. consid. 3).

4.3.1 Le recours pour le motif prévu à l'art. 190 al. 2 let. b LDIP est ouvert lorsque le tribunal arbitral a statué sur des prétentions qu'il n'avait pas la compétence d'examiner, soit qu'il n'existât point de convention d'arbitrage, soit que celle-ci fût restreinte à certaines questions ne comprenant pas les prétentions en cause (extra potestatem). Un tribunal arbitral n'est en effet compétent, entre autres conditions, que si le litige entre dans les prévisions de la convention d'arbitrage et que lui-même n'excède pas les limites que lui assignent la requête d'arbitrage et, le cas échéant, l'acte de mission (arrêt 4A\_210/2008 du 29 octobre 2008 consid. 3.1 et les références).

Il ne va pas de soi que le grief formulé par le recourant s'inscrive dans le cadre tracé par la disposition citée et la jurisprudence y relative. Savoir si la tardiveté du dépôt de l'appel entraîne l'incompétence du TAS ou simplement l'irrecevabilité, voire le rejet, de ce moyen de droit est une question délicate. A suivre le recourant, le Tribunal fédéral aurait déjà tranché cette question au consid. 4.2.3.3 de son arrêt du 22 décembre 2008 en la cause 4A\_392/2008. Il n'en est rien. Dans le passage cité de ce précédent, la Ire Cour de droit civil a simplement constaté que le TAS n'avait pas fait une interprétation incorrecte des dispositions statutaires pertinentes en admettant sa compétence de jugement comme tribunal ordinaire plutôt que comme juridiction d'appel, raison pour laquelle elle a estimé qu'il n'était pas nécessaire d'examiner les arguments avancés par l'intimée au recours, laquelle faisait valoir, en particulier, que, dans l'hypothèse où le TAS aurait dû statuer comme autorité d'appel, le dépôt tardif de l'appel n'aurait pas eu d'incidence sur sa compétence (arrêt cité, consid. 4.2.3.3, dernier §, en liaison avec le consid. 3.1, 2e §).

Sans doute le reproche fait à un tribunal arbitral de n'avoir pas respecté la limite de validité temporelle de la convention d'arbitrage ou un préalable obligatoire de conciliation ou de médiation a-t-il trait aux conditions d'exercice de la compétence, plus précisément à la compétence *ratione temporis*, et relève-t-il, comme tel, de l'art. 190 al. 2 let. b LDIP (arrêts 4P.284/1994 du 17 août 1995 consid. 2 et 4A\_18/2007 du 6 juin 2007 consid. 4.2; KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2e éd. 2010, n° 813a; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2e éd. 2010, nos 532a ss). Force est, toutefois, d'observer que ce principe jurisprudentiel vise essentiellement l'arbitrage typique ou usuel, qui prend sa source dans une relation contractuelle et se caractérise par l'existence d'une clause arbitrale dont il convient de rechercher la portée dans le temps. En revanche, il est douteux qu'il vaille aussi pour l'arbitrage atypique, tel l'arbitrage sportif, et qu'il envisage en particulier l'hypothèse dans laquelle la compétence du tribunal arbitral résulte du renvoi aux statuts d'une fédération sportive prévoyant une procédure d'arbitrage pour régler les litiges de nature disciplinaire. En ce domaine, le Tribunal fédéral a déjà jugé que le point de savoir si une partie est recevable à attaquer la décision prise par

l'organe d'une fédération sportive sur la base des règles statutaires et des dispositions légales applicables ne concerne pas la compétence du tribunal arbitral saisi de la cause, mais la question de la qualité pour agir, c'est-à-dire un point de procédure à résoudre selon les règles pertinentes dont le Tribunal fédéral ne revoit pas l'application lorsqu'il est saisi d'un recours contre une sentence arbitrale internationale (arrêts 4A\_428/2011 du 13 février 2012 consid. 4.1.1 et 4A\_424/2008 du 22 janvier 2009 consid. 3.3).

Un auteur s'est penché plus avant sur la question examinée ici. Il signale le résultat insatisfaisant auquel conduirait la transposition au délai d'appel prévu par l'art. R49 du Code du principe général voulant que le dépassement du délai convenu par les parties entraîne l'incompétence du tribunal arbitral (en l'occurrence, le TAS) et, par ricochet, la compétence des tribunaux étatiques: en bref, l'application de ce principe aurait pour conséquence qu'après l'expiration du délai d'appel de vingt et un jours fixé par cette disposition, les décisions des fédérations sportives dont le siège est en Suisse pourraient être portées devant les tribunaux suisses jusqu'à l'échéance du délai d'un mois prévu par l'art. 75 CC; une telle conséquence serait sans doute contraire à l'esprit de l'arbitrage international dans le domaine du sport, en ce qu'elle ne permettrait pas de faire en sorte que les sportifs soient jugés de la même manière et selon les mêmes procédures; elle occasionnerait, en outre, des complications difficilement surmontables. Aussi, pour cet auteur, le délai d'appel devant le TAS doit-il être considéré comme un délai de péremption dont l'inobservation entraîne, non pas l'incompétence de cette juridiction arbitrale, mais la perte du droit de soumettre la décision entreprise à tout contrôle juridictionnel et, partant, le déboutement de l'appelant (ANTONIO RIGOZZI, *Le délai d'appel devant le Tribunal arbitral du sport: quelques considérations à la lumière de la pratique récente*, in *Le temps et le droit*, 2008, p. 255 ss; le même, *L'arbitrage international en matière de sport*, 2005, nos 1028 ss). Semblable opinion apparaît convaincante *prima facie*. Au demeurant, s'il suffisait à une partie d'attendre l'expiration du délai d'appel de l'art. R49 du Code pour saisir les tribunaux étatiques suisses, cette partie serait en mesure de court-circuiter la juridiction arbitrale sportive par sa seule inaction. Cela étant, il n'est pas nécessaire de trancher ici

définitivement la question de savoir si le non-respect du délai d'appel met ou non en cause la compétence du TAS. En effet, pour les motifs indiqués ci-après, le grief tiré de la violation de l'art. 190 al. 2 let. b LDIP, à le supposer recevable, apparaît de toute façon mal fondé.

4.3.2 S'agissant de l'art. 334 RAD, le recourant ne semble pas vouloir soutenir que cette disposition serait de toute façon inapplicable en l'espèce, même si ses conditions d'application étaient réalisées, au motif qu'elle devrait céder le pas à l'art. 4 ch. 23 de l'annexe H des NSA, voire aux art. 8.1 et 13.2.2 CMA. Il le ferait du reste en pure perte. Aussi bien, le TAS constate, de manière à lier le Tribunal fédéral, d'une part, que les parties n'ont pas remis en cause l'application du RAD dans la présente procédure (sentence, n. 29) et, d'autre part, que les NSA et le droit italien n'étaient applicables qu'à titre subsidiaire (sentence, n. 32). Quant aux deux dispositions du CMA invoquées par le recourant, elles ne règlent pas la question du délai d'appel mais prescrivent, entre autres choses, la tenue d'une audience dans un délai raisonnable.

Il n'est pas non plus contesté, ni contestable d'ailleurs, que la déclaration d'appel a bien été déposée par l'intimée dans le délai d'un mois suivant la réception de l'intégralité du dossier communiqué par le CONI à la demande de cette partie, ni que cette dernière a demandé le dossier dans les quinze jours suivant la réception de la décision intégrale. Toutes les conditions d'application de l'art. 334 RAD étaient donc remplies en l'occurrence. Elles l'étaient d'autant plus, au demeurant, si, comme l'intimée le soutient dans son argumentation subsidiaire, la communication par fax, le 19 novembre 2010, de la décision du TNA n'était de toute manière pas propre à faire courir le délai d'appel puisque l'art. 277 RAD prévoit que seule la réception d'une copie intégrale de la décision notifiée par courrier recommandé avec accusé de réception est apte à produire pareil effet. Il n'est toutefois pas nécessaire d'examiner plus avant cette argumentation subsidiaire, non plus que les objections que le recourant soulève quant à sa recevabilité.

Le seul point litigieux en ce qui concerne la recevabilité de l'appel de l'intimée consiste dans l'abus de droit qu'aurait commis cette partie, au dire du recourant. Le TAS a retenu, à cet égard, qu'il ne saurait être reproché à l'UCI de ne pas avoir été en possession de

la version intégrale du dossier avant le 13 décembre 2010. Quoi qu'en dise le recourant, cette appréciation juridique du comportement incriminé n'est pas critiquable. Le TAS constate en effet, de manière à lier la Cour de céans, que l'intimée n'a participé que partiellement à la procédure de première instance, à compter du 6 septembre 2010, la note explicative adressée par elle le 5 juillet 2010 à l'UPA du CONI n'étant qu'une réponse à une requête d'information de cet organisme. Il était donc compréhensible que cette partie usât de son droit de réclamer l'intégralité des pièces du dossier, y compris celles relatives à la phase préliminaire de l'instruction, afin de pouvoir décider en pleine connaissance de cause s'il y avait matière à interjeter appel contre la décision du TNA et, dans l'affirmative, pour être en mesure de motiver son appel sur la base de tous les éléments pertinents ressortant du dossier de cette affaire disciplinaire. Il faut bien voir, par ailleurs, qu'entre la saisine du TNA, le 27 juillet 2010, et le prononcé de la décision de cette autorité, en date du 21 octobre 2010, moins de trois mois se sont écoulés, de sorte qu'il serait irréaliste de venir reprocher à l'intimée d'avoir volontairement temporisé en ne réclamant pas l'intégralité du dossier alors que la cause était encore pendante devant le TNA. On peine à discerner du reste, sur un plan plus général, quel eût été l'intérêt de l'intimée à différer le plus possible le moment où elle déposerait son appel au TAS, si l'on se souvient que le coureur cycliste soupçonné par elle de s'être dopé avait été blanchi par la juridiction sportive compétente de son pays. Il était, bien plutôt, dans son intérêt et même de son devoir d'agir avec diligence afin d'obtenir dans les meilleurs délais la suspension de l'intéressé, une fois établi le bien-fondé de ses soupçons. Enfin, le recourant est d'autant plus malvenu à fustiger le comportement de l'intimée que, à sa demande, il a lui-même obtenu une prolongation substantielle du délai, prévu à l'art. 51 al. 1 du Code, dans lequel il aurait dû déposer son mémoire d'appel (dix jours suivant l'expiration du délai d'appel).

4.4

4.4.1 L'égalité des parties implique que la procédure soit réglée et conduite de manière à ce que chaque partie ait les mêmes possibilités de faire valoir ses moyens. En vertu de ce principe, le tribunal arbitral doit traiter les parties de manière semblable à toutes les étapes de la procédure (**ATF 133 III 139** consid. 6.1 p. 143 in medio). Encore faut-il préciser la

notion de procédure. Selon la jurisprudence et la doctrine, il faut entendre par là la phase de l'instruction, c'est-à-dire la période allant de la constitution du tribunal arbitral jusqu'à la clôture de la procédure d'instruction, débats inclus le cas échéant, à l'exclusion de la délibération du tribunal arbitral (arrêt 4A\_360/2011 du 31 janvier 2012 consid. 4.1; BERGER/KELLERHALS, op. cit., nos 1020 s.; voir aussi: JEAN-FRANÇOIS POUDRET, in POUDRET/LALIVE/REYMOND, *Le droit de l'arbitrage interne et international en Suisse*, 1989, n° 1 ad art. 25 CA, p. 137).

4.4.2 L'argument du recourant tiré de la durée différente des délais dans lesquels l'intimée et lui-même devaient interjeter appel contre la décision du TNA a trait à une phase de la procédure antérieure à la constitution de la Formation du TAS désignée pour connaître des appels de ces deux parties. Il est ainsi exorbitant du champ d'application ratione temporis de la garantie en cause.

Au demeurant, il est faux de prétendre, comme le fait le recourant, que l'intimée pouvait retarder à discrétion le moment du dépôt de son appel en ne réclamant pas le dossier complet de la cause. C'est oublier que l'art. 334 RAD lui commandait de demander ce dossier dans les quinze jours à réception de la décision intégrale, sous peine de voir le délai d'appel commencer à courir dès la réception de cette décision.

4.5 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 à d LDIP n'entre en ligne de compte. Ainsi conçue, cette garantie constitue une norme de précaution pour les vices de procédure auxquels le législateur n'aurait pas songé en adoptant les autres lettres de l'art. 190 al. 2 LDIP. Elle n'a nullement pour but de permettre à une partie de soulever un moyen entrant dans les prévisions de l'art. 190 al. 2 let. a à d LDIP, mais irrecevable pour une autre raison (arrêt 4A\_14/2012 du 2 mai 2012 consid. 2.3).

Le recourant méconnaît cette jurisprudence lorsqu'il soutient que le TAS aurait rendu une sentence incompatible avec l'ordre public procédural en déclarant recevable un appel interjeté en violation des règles de la bonne foi. Il a, en effet, présenté le même argument, mais

sans succès, sous l'angle de l'art. 190 al. 2 let. b LDIP.

4.6 D'où il suit que toutes les critiques formulées par le recourant en rapport avec la recevabilité de l'appel de l'intimée tombent à faux.

## 5.

Le recourant reproche, par ailleurs, au TAS d'avoir violé son droit d'être entendu en ne se prononçant pas sur un certain nombre d'arguments qu'il lui avait soumis.

5.1 Le droit d'être entendu en procédure contradictoire, au sens de l'art. 190 al. 2 let. d LDIP, n'exige certes pas qu'une sentence arbitrale internationale soit motivée (**ATF 134 III 186** consid. 6.1 et les références). Il impose, toutefois, aux arbitres un devoir minimum d'examiner et de traiter les problèmes pertinents (**ATF 133 III 235** consid. 5.2 p. 248 et les arrêts cités). 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 décision à rendre. 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 appartient de justifier cette omission dans leurs observations sur le recours. Il leur incombe de démontrer 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. Cependant, les arbitres n'ont pas l'obligation de discuter tous les arguments invoqués par les parties, de sorte qu'il ne peut leur être reproché, au titre de la violation du droit d'être entendu en procédure contradictoire, de n'avoir pas réfuté, même implicitement, un moyen objectivement dénué de toute pertinence (**ATF 133 III 235** consid. 5.2 et les arrêts cités).

5.2 Le recourant rappelle qu'il a fondé une grande partie de sa défense, devant le TAS, sur le fait qu'un bon nombre des contrôles effectués auraient débouché sur des résultats de laboratoire inutilisables en raison de graves lacunes analytiques et pré-analytiques. Il énumère, à cet égard, les contrôles incriminés, qu'il s'agisse du Giro d'Italia 2009 (18 et 31 mai) ou du Tour de France 2009 (2, 10 et 20 juillet), précise quels sont les vices les affectant et indique où et quand ceux-ci ont été soulevés dans la procédure probatoire écrite de même qu'à l'audience du

2 mars 2011, laquelle a été enregistrée sur un disque compact audio (CD) versé au dossier de la cause.

Selon le recourant, le TAS se serait soustrait à son devoir d'examiner les critiques soulevées par lui quant à la fiabilité des résultats en se reposant à tort sur la présomption posée à l'art. 24 RAD, correspondant à l'art. 3.2.1 CMA, d'après laquelle les laboratoires accrédités par l'Agence Mondiale Antidopage (AMA) sont censés avoir effectué les analyses des échantillons et respecté les procédures de la chaîne de sécurité conformément au standard international pour les laboratoires, à charge pour le coureur cycliste de démontrer qu'un écart par rapport à ce standard est survenu et pourrait raisonnablement avoir causé un résultat d'analyse anormal. Il lui aurait échappé que la présomption en question ne vaut qu'en présence d'un tel résultat et non pas, comme en l'espèce, quand aucun des résultats inscrits dans le passeport biologique n'apparaît anormal.

5.3 L'argumentation développée par le recourant ne suffit pas à établir une violation des principes jurisprudentiels susmentionnés, relatifs à l'un des éléments constitutifs de la garantie du droit d'être entendu, ancrée à l'art. 182 al. 3 LDIP.

Il en appert déjà que, si le TAS n'a prétendument pas pris en compte certaines critiques formulées devant lui, ce n'est pas par inadvertance ou malentendu, mais, à suivre le recourant même, en raison de l'interprétation qu'il a faite d'une disposition particulière du RAD, c'est-à-dire consciemment. Or, l'interprétation d'une norme figurant dans un règlement antidopage d'une association sportive ressortit à l'application du droit et échappe, partant, à l'examen du Tribunal fédéral lorsqu'il est saisi d'un recours dirigé contre une sentence arbitrale internationale.

Quoi qu'il en soit, la question de la régularité des procédures analytiques et pré-analytiques a été largement débattue lors de l'audience du 2 mars 2011, avec l'aide des experts des parties, et le TAS l'a traitée spécifiquement dans sa sentence, sous le titre "la fiabilité des résultats" (n. 54 à 65), en y consacrant de longs développements, pour aboutir, entre autres conclusions, à la constatation de la validité des échantillons prélevés sur le recourant lors du Giro d'Italia 2009 et du Tour de France 2009 (n. 60). Les considérations détaillées émises par le TAS, quant à la validité des échantillons et à d'éventuelles irrégularités susceptibles d'avoir

influé sur les résultats des analyses, relèvent de l'appréciation des preuves et sont soustraites, comme telles, à l'examen du Tribunal fédéral. Dès lors, le recourant les critique en vain par des arguments qui revêtent, de surcroît, un caractère clairement appellatoire. C'est l'état de fait à la base de la sentence attaquée qu'il tente de remettre en cause, sous le couvert du grief tiré de la violation de son droit d'être entendu, comme s'il plaiderait devant une juridiction pouvant revoir librement les faits.

Il s'ensuit que le moyen soulevé au titre de la violation du droit d'être entendu n'apparaît pas fondé, si tant est qu'il soit recevable.

## 6.

En dernier lieu, le recourant fait grief au TAS d'avoir rendu une sentence incompatible avec l'ordre public au sens de l'art. 190 al. 2 let. e LDIP.

6.1 Une sentence est incompatible avec l'ordre public si elle méconnaît les valeurs essentielles et largement reconnues qui, selon les conceptions prévalant en Suisse, devraient constituer le fondement de tout ordre juridique (**ATF 132 III 389** consid. 2.2.3).

L'ordre public procédural garantit aux parties le droit à un jugement indépendant sur les conclusions et l'état de fait soumis au Tribunal arbitral d'une manière conforme au droit de procédure applicable; il y a violation de l'ordre public procédural lorsque des principes fondamentaux et généralement reconnus ont été violés, ce qui conduit à une contradiction insupportable avec le sentiment de la justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un Etat de droit (arrêt cité, consid. 2.2.1).

Une sentence est contraire à l'ordre public matériel lorsqu'elle viole des principes fondamentaux du droit de fond au point de ne plus être conciliable avec l'ordre juridique et le système de valeurs déterminants; au nombre de ces principes figurent, notamment, la fidélité contractuelle, le respect des règles de la bonne foi, l'interdiction de l'abus de droit, la prohibition des mesures discriminatoires ou spoliatrices, ainsi que la protection des personnes civilement incapables (arrêt cité, *ibid.*).

6.2 Le recourant soutient, en substance, que le passeport biologique, à partir duquel le TAS s'est forgé une conviction au sujet de la violation des règles antidopage qu'il lui impute, ne repose

pas sur une base scientifique suffisante et indiscutée, constitue une preuve administrée à titre exclusif par l'intimée sans aucune garantie d'indépendance, revêt un caractère indéterminé, en ce sens qu'il ne permet pas d'établir une infraction concrète, enfin, et qui plus est, entraîne un renversement du fardeau de la preuve, contraire au principe *in dubio pro reo*, puisqu'il impose au sportif impliqué dans une procédure disciplinaire de démontrer que les variations anormales des marqueurs biologiques le concernant ont une origine physiologique, tandis que l'autorité antidopage n'a, de son côté, pas à prouver une violation concrète.

L'argumentation ainsi résumée est de nature manifestement appellatoire, étant donné que la plupart des allégations de fait qui en constituent le fondement vont bien au-delà des constatations figurant dans la sentence attaquée, voire les contredisent, en violation des principes applicables en la matière (cf. consid. 3 ci-dessus). Tel est, en particulier, le cas des affirmations reproduites sous ch. 143 let. a à c du mémoire de recours, qui reposent sur le seul enregistrement de l'audience du 2 mars 2011.

Pour le surplus, on ne voit pas qu'il soit possible de rattacher les critiques formulées par le recourant à la notion spécifique et strictement limitée de l'ordre public, telle qu'elle a été définie par le Tribunal fédéral. C'est d'ailleurs le lieu de rappeler que, selon une jurisprudence bien établie, la question du renversement du fardeau de la preuve dans le domaine du droit disciplinaire sportif n'a pas trait à l'ordre public mais à la charge de la preuve et à l'appréciation des preuves, problèmes qui ne peuvent pas être réglés, en matière de droit privé, à la lumière des notions de droit pénal, telles que la présomption d'innocence et le principe *in dubio pro reo*, et des garanties correspondantes figurant dans la Convention européenne des droits de l'homme (arrêt 4A\_612/2009 du 10 février 2010 consid. 6.3.2; arrêt 5P.83/1999 du 31 mars 1999 consid. 3d; arrêt 4P.217/1992 du 15 mars 1993, consid. 8b non publié in **ATF 119 II 271**). Par conséquent, le recourant tente en vain de démontrer, à ce stade de la procédure, le manque de fiabilité et les autres défauts qui affecteraient, selon lui, la méthode indirecte de détection du dopage sanguin que constitue le passeport biologique. En le faisant, il se borne à remettre en cause le caractère adéquat du moyen de preuve utilisé pour le confondre ainsi que la manière dont ce moyen de preuve a été administré dans le cas concret. Cela ne concerne pas l'ordre public au

sens de l'art. 190 al. 2 let. e LDIP.

Le recourant en est du reste bien conscient, qui propose d'interpréter cette notion d'ordre public avec moins de rigueur que dans le domaine de l'arbitrage international classique lorsque le litige a pour objet des sanctions disciplinaires infligées à des sportifs. Sans doute est-il exact que les particularités de l'arbitrage sportif ont été prises en considération par la jurisprudence fédérale dans le traitement de certaines questions de procédure spécifiques, telle la renonciation à recourir (**ATF 133 III 235** consid. 4.3.2.2 p. 244). Il ne s'ensuit pas pour autant qu'il faille en faire de même à l'égard du moyen de caractère général tiré de l'incompatibilité de la sentence avec l'ordre public, sauf à créer une véritable *lex sportiva* par la voie prétorienne, ce qui pourrait soulever des problèmes du point de vue de la répartition des compétences entre le pouvoir législatif et le pouvoir judiciaire de la Confédération. Plus fondamentalement, l'intimée relève, non sans pertinence, dans sa réponse au recours, que, si la mise en oeuvre du principe *in dubio pro reo* ne prête pas à discussion dans une procédure disciplinaire ou pénale ordinaire, en raison des pouvoirs d'investigation et de coercition étendus dont dispose l'Etat, l'application stricte du même principe dans le cas de procédures disciplinaires conduites par des organismes privés ne pouvant pas s'appuyer sur un tel rapport de puissance vis-à-vis des sportifs soupçonnés de pratiques interdites pourrait empêcher le système mis en place pour lutter contre le fléau que constitue le dopage sportif de fonctionner correctement.

Cela étant, le dernier moyen soulevé par le recourant n'apparaît pas plus fondé que les précédents. Partant, le présent recours doit être rejeté.

7.

Le recourant, qui succombe, devra payer les frais de la procédure fédérale (art. 66 al. 1 LTF). Il versera des dépens à l'intimée (art. 68 al. 1 et 2 LTF), mais pas à la FCI ni au CONI, puisque ceux-ci n'ont pas déposé de réponse.

**Par ces motifs, le Tribunal fédéral prononce:**

1.

Le recours est rejeté dans la mesure où il est recevable.

2.

Les frais judiciaires, arrêtés à 6'000 fr., sont mis à la charge du recourant.

3.

Le recourant versera à l'Union Cycliste Internationale une indemnité de 7'000 fr. à titre de dépens.

4.

Le présent arrêt est communiqué aux parties et au Tribunal Arbitral du Sport.

Lausanne, le 18 juin 2012

Au nom de la Ire Cour de droit civil du Tribunal fédéral suisse

La Présidente:

Klett

Le Greffier:

Carruzzo

**Composition**

Federal Tribunal Judge Klett, President  
Federal Tribunal Judge Corboz  
Federal Tribunal Judge Kolly  
Clerk of the Court: Mr Hurni

**Parties**

X.\_\_\_\_\_ Federation,  
Appellant, represented by Dr. Lucien W. Valloni and Dr. Thilo Pachmann,

**versus**

Fédération Internationale de Hockey (FIH),  
Respondent, represented by Dr. Xavier Favre-Bulle and Mrs. Marjolaine Viret,

\* From Charles Poncet's translation, courtesy of the law firm ZPG/Geneva ([www.praetor.ch](http://www.praetor.ch)).

\* Translator's note: Quote as A.\_\_\_\_\_ v. X.\_\_\_\_\_ Federation, 4A\_636/2011. The original of the decision is in German. The text is available on the website of the Federal Tribunal [www.bger.ch](http://www.bger.ch).

**Facts**

**A.**

A.\_\_\_\_\_ (the Appellant), born on September 12, 1997, is a Polish karting driver. He is a member of Y.\_\_\_\_\_ racing club, which belongs to the Polish Motor Racing Federation. The latter in its turn is a member of X.\_\_\_\_\_ Federation with headquarters in Z.\_\_\_\_\_.

Between July 16 and 18, 2010, the Appellant, then twelve years old, and the holder of a karting driver license of the Polish Motor Racing Federation and of X.\_\_\_\_\_, took part in a race in the framework of the German Junior Karting Championship in Q.\_\_\_\_\_ (Germany) and achieved second place.

On July 18, 2012 he was subjected to a doping test undertaken by the German national Anti-Doping Agency (NADA) upon request of the German Motor Racing Federation (DMSB), which is also a member of X.\_\_\_\_\_. The laboratory found the presence

of the illicit substance Nikethamide, which was then confirmed by a blood test.

**B.**

B.a On October 11, 2011 the Medical Panel of the Anti-Doping Committee of X.\_\_\_\_\_ held a hearing in Z.\_\_\_\_\_. By decision of the same day the Panel banned the Appellant from competitions for two years from July 18, 2010 until July 18, 2012. Furthermore the Panel banned the Appellant from competing in Q.\_\_\_\_\_ on July 18, 2010 and annulled all his results and prizes from that date.

B.b The Appellant appealed the decision of the Medical Panel of the X.\_\_\_\_\_ Anti-Doping Committee to the CAS.

In an award of September 15, 2011 (CAS 2010/A/2268) the CAS upheld the appeal in part (award § 1) reversed the decision of the Medical Panel of the X.\_\_\_\_\_ Anti-Doping

Committee of October 11, 2010 (§ 2) and banned the Appellant from competitions for 18 months beginning on July 18, 2010 (§ 3). Furthermore the CAS banned the Appellant from competing in Q.\_\_\_\_\_ on July 10, 2010 and annulled all his results and prizes since that date (§ 4). The administrative costs of CHF 500 were to be paid by the Appellant; the CAS did not impose any other arbitration costs (§ 5) and let the Parties pay their own costs (§ 6).

### C.

In a Civil law appeal of October 17, 2011 the Appellant asks the Federal Tribunal to annul the CAS award of September 15, 2011 (CAS 2010/A/2268). Alternatively, § 3 (ban) and § 4 concerning the annulment of all other results and the ban from the race in Q.\_\_\_\_\_ Germany on July 18, 2010 should be annulled, as well as § 5-6 (costs and award of costs). Even more in the alternative, the award under appeal should be annulled and the matter sent back to the CAS for a new decision.

On November 7, 2011 the Appellant filed a new appeal brief with identical submissions and a procedural motion asking for the submission of October 17, 2011 to be substituted with the new one in case the Federal Tribunal would consider it as a timely filed. Otherwise the appeal of October 17, 2011 would be maintained.

The Respondent submits in its brief of December 12, 2011 that the appeal should be rejected to the extent that the matter is capable of appeal. The CAS submits in its brief of January 26, 2012 that the appeal should be rejected. The Parties filed a reply and a rejoinder. The arbitration file was submitted to the Federal Tribunal.

### Reasons

#### 1.

According to Art. 54 (1) BGG<sup>1</sup> the Federal Tribunal issues its decision in an official language<sup>2</sup>, as a rule in the language of the decision under appeal. Should the decision be in another language, the Federal Tribunal resorts to the official language used by the parties. The award under appeal is in English. As this is not an official language and the Parties used various languages in front of the Federal Tribunal, the judgment of the Federal Tribunal will be issued in the language of the appeal in accordance with practice.

1. Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

2. Translator's note: The official languages of Switzerland are German, French and Italian.

#### 2.

In the field of international arbitration a Civil law appeal is allowed pursuant to the requirements of Art. 190-192 PILA<sup>3</sup> (SR 291) (Art. 77 (1) (a) BGG).

2.1 The seat of the arbitral tribunal is in Lausanne in this case. At the relevant time both Parties had their headquarters outside Switzerland. As the Parties did not rule out in writing the provisions of chapter 12 PILA they are applicable (Art. 176 (1) and (2) PILA).

#### 2.2

2.2.1 An appeal against an award must be filed with the Federal Tribunal within 30 days after notification of a full copy (Art. 100 (1) BGG). The time limit cannot be extended (Art. 47 (1) BGG) and applies also to the filing of additional appeal briefs.

According to the case law of the Federal Tribunal the notification through the mail determines the start of the time limit to appeal the award of the CAS, as opposed to a fax notification (judgment 4A\_392/2010<sup>4</sup> of January 12, 2011 at 2.3.2).

2.2.2 The decision under appeal is dated September 15, 2011 and was sent to the Appellant by fax on the same day. The notification through the mail took place on October 6, 2011 only. Thus the appeal brief filed on November 7, 2011 was submitted timely (Art. 44 (1) compared to Art 100 (1) BGG). In view of its statement that should the second brief considered timely it would be the decisive one, the brief of November 7, 2011 is the only one to be addressed here.

#### 2.3

2.3.1 A matter is only capable of appeal when the Appellant has an interest worth protecting, i.e. a present and practical interest to the annulment or the modification of the decision under appeal (Art. 76 (1) (b) BGG; see BGE 133 III 421 at 1.1 p. 425 ff; 127 III 429 at 1b p. 431). The Federal Tribunal may exceptionally leave aside the requirement of an interest worthy of protection when the issue at hand can be repeated and appear again in similar circumstances and when there is sufficient public interest to its being addressed due to

3. Translator's note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

4. Translator's note: Full English translation at <http://www.praetor.ch/arbitrage/notification-of-an-award-by-fax-time-limit-to-appeal-does-not-ru/>



its fundamental nature and when it would be hardly possible to adjudicate it timely in the case at hand (BGE 137 I 120 at 2.2; 135 II 430 at 2.2 S. 434; 135 I 79 at 1.1). If there is a practical interest at the time the appeal is filed, which however disappears subsequently, the case is to be considered as moot according to Art. 72 FCP<sup>5</sup> (SR 273) in connection with Art. 71 BGG.

The Federal Tribunal reviews in principle *ex officio* whether a matter is capable of appeal or not (Art. 29 (1) BGG). However the grounds for appeal must be explained adequately (Art. 42 (1) and (2) BGG) and the Appellant must show that the legal requirements for an appeal according to Art. 76 (1) BGG are met. When this is not obvious or not immediately so, it does not behoove the Federal Tribunal to search the record or to require additional documents in order to determine whether and to what extent an appeal is admissible (see BGE 133 II 353 at 1 p. 356, 400 at 2 p. 404; judgment 4A\_566/2009 of March 22, 2010 at 1.2, publ. in: ASA Bulletin 2/2011, p. 433 ff., 435<sup>6</sup>).

- 2.3.2 The Civil law appeal at hand does not stay the enforcement of the decision under appeal *per se* (Art. 103 (1) BGG). The Appellant did not seek a stay of enforcement. Therefore the ban imposed on him pursuant to § 3 of the award under appeal expired on January 18, 2012 and the Appellant can participate in competitions again since that date. The Appellant's situation would not be changed were § 3 of the award under appeal annulled as requested from this Court. Therefore there is no obvious interest in principle that would be personal, actual and practical and require the annulment of a ban that expired in the meantime.

In his appeal brief the Appellant bases his standing to appeal exclusively on the fact that the decision under appeal prevents him from practicing his sport. He does not explain and does not argue that besides the annulment of the ban that expired in the meantime, he would have an interest worthy of protection to the annulment of the decision under appeal or that public interest would require the issue to be addressed because of its fundamental

importance and because timely adjudication would hardly be possible in the case at hand. The appeal has therefore become moot as a consequence of the loss of the standing to appeal, to the extent that it is made against § 3 of the award under appeal (competition ban).

- 2.3.3 Pursuant to § 4 of the award under appeal, the CAS disqualified the Appellant from the race in Q.\_\_\_\_\_ on July 18, 2010 and canceled all his results and prizes since that date (§ 4).

The Appellant retains a present and practical interest to the annulment of his ban from the race in Q.\_\_\_\_\_ on July 18, 2010 as according to the factual findings of the CAS, which bind this Court (Art. 105 (1) BGG) he achieved second place there (also see judgment 4A\_456/2009 of May 3, 2010 at 2.2, publ. in: ASA Bulletin 2010, p. 786 ff., 789). As to the annulment of the results and the prizes he obtained since that date there is no obvious present and practical interest for the Appellant to seek annulment. Indeed it does not appear from the award under appeal or from the briefs of the Parties that the Appellant would have taken part in competitions, let alone obtained results that could be cancelled, between the race in Q.\_\_\_\_\_ and the expiry of the ban in January 2012. The Appellant does not claim that he would have participated in additional races since. Future results are no longer subject to annulment as a consequence of the ban expiring pursuant to § 4 of the award under appeal. The matter is therefore also incapable of appeal with regard to the cancellation of all results and prizes obtained since the race in Q.\_\_\_\_\_ on July 18, 2010 (§ 4).

- 2.4 In the framework of an appeal pursuant to Art. 75 BGG the only admissible grounds for appeal are those limitatively listed at Art. 190 (2) PILA (BGE 134 III 186 at 5 p. 187; 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282). According to Art. 77 (3) BGG the Federal Tribunal reviews only the arguments that are brought forward and reasoned in the appeal. This corresponds to the requirement to submit reasons contained in Art. 176 (2) BGG as to the violation of constitutional rights and cantonal and intercantonal law (BGE 134 III 186 at 5 p. 187 with reference). Criticism of an appellate nature is not allowed (BGE 119 II 380 at 3b p. 382).

The Appellant presents his grounds for appeal only against the ban. As to his disqualification from the race in Q.\_\_\_\_\_ on July 18,

5. Translator's note: FCP is an English abbreviation for the federal law of civil procedure of December 4, 1947.

6. Translator's note: Full English translation at <http://www.praetor.ch/arbitrage/arbitration-clause-interpretation-of-declarations-based-on-the-p/>

2010, with regard to which he would have standing to appeal, the Appellant submits no arguments. Moreover he acknowledges that in the case at hand it was “absolutely correct that the Appellant was excluded from the race in Q.\_\_\_\_\_, especially because he had in his body some substances which were not allowed in competition as this could distort the sporting balance” (appeal, p. 14 at 35). The matter is therefore not capable of appeal due to the absence of pertinent and developed arguments as to the ban from the race in Q.\_\_\_\_\_ on July 10, 2010.

**3.**

Should an appellant lack the standing to appeal or no longer have a present interest to the annulment of the main holding of the decision under appeal, he may nonetheless appeal the costs as they affect his personal and direct interests (BGE 117 Ia 251 at 1b p. 255; judgment 4A\_604/2010<sup>7</sup> of April 11, 2011 at 1.2; 4A\_352/2011 of August 5, 2011 at 2). However the imposition of costs does not make it possible to obtain indirectly judicial review of the merits of the case (BGE 100 Ia 298 at 4 p. 299). The Appellant may only claim that the apportionment of the costs was contrary to the law for another reason than simply because he lost on the merits (BGE 109 Ia 90; judgment 4A\_352/2011 of August 5, 2011 at 2), which means that in the case at hand only the grounds for appeal at Art. 190 (2) PILA would be available. As the Appellant does not raise any of the corresponding grounds of appeal against the decision concerning costs, the matter is not capable of appeal with regard to § 5 and 6 of the award under appeal.

**4.**

In view of the foregoing the matter is not capable of appeal to the extent that the case has not become moot. As a rule the costs of the proceedings are to be imposed on the losing party (Art. 66 (1) (1) BGG) to the extent that the appeal has become moot however, the decision as to the costs of the federal proceedings is based on Art. 71 BGG in connection with Art. 72 CCP. According to that provision the Court issues a summary decision on costs on the basis of the factual situation before the matter became moot. Should the outcome of the proceedings in the case at hand be hard to ascertain, the normal procedural criterias shall be applied. According to these, the party that pays the costs and must compensate the other party will be the one that initiated the proceedings that became moot or the one that has responsibility for the reasons for which the proceedings lost their

purpose (BGE 118 Ia 488 at 4a p. 494).

As the Appellant initiated the proceedings that became moot and it is not immediately apparent that the arguments against the ban would have been admitted, the Appellant must pay the costs and compensate the other party.

**Therefore the Federal Tribunal pronounces:**

**1.**

The matter is not capable of appeal to the extent that it has not become moot.

**2.**

The court costs at CHF 3'000 shall be paid by the Appellant.

**3.**

The Appellant shall pay CHF 3'500 to the Respondent for the federal judicial proceedings.

**4.**

This judgment shall be notified in writing to the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne June 18, 2012

In the name of the First Civil law Court of the Swiss Federal Tribunal.

The Presiding Judge:  
Klett(Mrs)

The Clerk:  
Hurni

<sup>7</sup> Translator's note: Full English translation at <http://www.praetor.ch/arbitrage/form-of-the-appeal-to-federal-tribunal-legal-interest-to-appeal/>

<b>Composition</b>	Mmes et M. les Juges Klett, Présidente, Kolly et Kiss Greffière: Mme Godat Zimmermann
<b>Parties</b>	Olympique des Alpes SA, défenderesse et recourante, Me Philippe Schweizer,  <b>contre</b>  Atlético de Madrid SAD, intervenant et intimé, représenté par Me Juan de Dios Crespo Pérez, & Stade Rennais Football Club, intervenant et intimé, représenté par Me Juan de Dios Crespo Pérez, & Celtic PLC, intervenant et intimé, représenté par Me Matthew Bennett et Me Chris Anderson, & Udinese Calcio SpA intervenant et intimé, représenté par Me Gianpaolo Monteneri.
<b>Objet</b>	arbitrage interne,  recours contre la sentence rendue le 31 janvier 2012 par le Tribunal Arbitral du Sport (TAS).

## Faits

**A.**

A.a L'Union des Associations Européennes de Football (UEFA) est une association de droit suisse, inscrite au registre du commerce; son siège est à Nyon. Elle constitue l'une des six confédérations continentales de la Fédération Internationale de Football Association (FIFA). L'UEFA a pour but de traiter toutes les questions qui concernent le football européen. Elle organise des compétitions et tournois internationaux de football, dont l'UEFA Europa League (UEL), compétition ouverte aux équipes de football professionnelles du continent européen.

Olympique des Alpes SA (OLA) est un club de football professionnel, constitué sous la forme d'une société anonyme de droit suisse; son siège social est à Martigny-Combe. Ce club se

présente usuellement sous le nom de "FC Sion". Il dispute le championnat suisse de première division ("Super League"). Il est membre de la "Swiss Football League" (SFL) et, partant, de l'Association Suisse de Football (ASF). Cette dernière est membre de l'UEFA.

A.b Le 15 février 2008, OLA conclut un contrat de travail avec un joueur égyptien lié jusqu'en 2010 à un club égyptien. Ce dernier cita le joueur et OLA devant la Chambre de Résolution des Litiges de la FIFA (CRL-FIFA) pour cause de rupture injustifiée de contrat, respectivement incitation à une telle rupture. Par décision du 16 avril 2009, la CRL-FIFA interdit à OLA, à titre de sanction, de recruter de nouveaux joueurs durant les deux périodes d'enregistrement suivant la notification de sa décision. OLA interjeta un recours auprès du Tribunal Arbitral du Sport (TAS), à Lausanne; ce dernier le déclara irrecevable. Par arrêt du 12 janvier 2011, le Tribunal fédéral rejeta dans

la mesure de sa recevabilité le recours déposé par OLA contre l'arrêt d'irrecevabilité du TAS (cause 4A\_392/2010).

A.c Le 9 mai 2011, Christian Constantin, président du conseil d'administration de OLA, signa au nom du club la formule d'inscription à l'UEFA 2011/2012, sans faire de réserve.

Cette formule précise entre autres que le signataire s'engage à respecter les statuts, règlements, directives et décisions de l'UEFA, ainsi qu'à reconnaître la compétence du TAS telle que prévue dans les statuts de l'UEFA. L'art. 61 des statuts précise que le TAS est seul compétent, à l'exclusion de tout tribunal ordinaire ou de tout autre tribunal arbitral, pour traiter en tant que tribunal arbitral ordinaire des litiges entre l'UEFA et les associations, ligues, clubs, joueurs ou officiels ainsi que des litiges de dimension européenne entre associations, ligues, clubs, joueurs ou officiels. L'art. 62 des statuts prévoit que toute décision prise par un organe de l'UEFA peut être exclusivement contestée auprès du TAS en tant que tribunal arbitral d'appel, à l'exclusion de tout tribunal ordinaire ou de tout autre tribunal arbitral.

A.d Les 5 et 6 juillet 2011, OLA demanda à la SFL de qualifier six nouveaux joueurs. Se référant à la décision de la CRL-FIFA du 16 avril 2009, la SFL s'y refusa. OLA et les six joueurs saisirent le Tribunal de recours de la SFL, lequel rejeta le recours en date du 29 juillet 2011. Le 2 août 2011, OLA recourut au TAS contre cette décision et requit des mesures provisionnelles.

Le 3 août 2011, les six joueurs déposèrent une requête de mesures provisionnelles dirigée contre la SFL et la FIFA auprès du Tribunal des districts de Martigny et St-Maurice, au motif que la décision du Tribunal de recours de la SFL portait atteinte à leurs droits de la personnalité. Dans une décision rendue le jour même à titre superprovisionnel, le juge de district déclara que les six joueurs devaient être considérés, tant par la SFL que par la FIFA, comme qualifiés en tant que joueurs de OLA, que cette dernière pouvait valablement les faire jouer et qu'il était fait interdiction à la FIFA d'entraver la remise du certificat international de transfert, ce jusqu'à droit connu sur la requête de mesures provisionnelles.

Le 5 août 2011, se pliant à l'injonction du juge de district, la SFL avisa OLA qu'elle pouvait valablement faire jouer les six joueurs jusqu'à droit

connu sur la requête de mesures provisionnelles. La FIFA fera de même ultérieurement. Le 5 août 2011 également, OLA retira la requête de mesures provisionnelles déposée trois jours plus tôt auprès du TAS.

A.e Le 8 août 2011, OLA soumit à l'UEFA sa liste de joueurs pour l'UEFA 2011/2012; cinq des six nouveaux joueurs y figuraient. La liste fut confirmée par l'ASF et approuvée par l'administration de l'UEFA.

Les 18 et 25 août 2011, OLA joua deux parties de barrage de l'UEFA 2011/2012 contre le club écossais de Celtic. Les parties furent jouées sous protêt de Celtic; ce dernier reprochait à OLA d'aligner des joueurs qui n'avaient pas le droit de jouer. La première partie se termina sur un score nul, la seconde sur une victoire de OLA.

Par décision du 2 septembre 2011, l'Instance de contrôle et de discipline de l'UEFA (ICD-UEFA) retint que les cinq nouveaux joueurs de OLA n'étaient pas qualifiés au vu des règles de la SFL et de la FIFA. Elle admit les protêts de Celtic et déclara que OLA avait perdu les deux matches par forfait. OLA était ainsi éliminée de l'UEFA 2011/2012.

A.f Le 2 septembre 2011 également, le Tribunal des districts de Martigny et St-Maurice rejeta une requête de mesures provisionnelles que les nouveaux joueurs, invoquant une violation de leurs droits de la personnalité, avaient introduite le jour précédent contre l'UEFA, cette fois-ci. Les joueurs déposèrent une nouvelle requête le 5 septembre 2011; elle sera derechef rejetée quelques jours plus tard.

Le 6 septembre 2011, OLA requit des mesures provisionnelles contre l'UEFA devant le Tribunal cantonal valaisan, au motif que l'UEFA violait la législation suisse sur la concurrence. Le lendemain, le Tribunal cantonal déclara la requête irrecevable, pour défaut de compétence *ratione loci*.

A.g Le 9 septembre 2011, OLA requit des mesures provisionnelles contre l'UEFA devant le Tribunal cantonal vaudois. Elle soutenait qu'elle était victime d'une restriction illicite d'accès à la concurrence résultant de la décision de l'ICD-UEFA du 2 septembre 2011, laquelle constituait à son sens un abus de position dominante (cf. art. 7 al. 1 de la loi fédérale sur les cartels et autres restrictions à la concurrence [LCart; RS 251]).

Par ordonnance de mesures superprovisionnelles du 13 septembre 2011, le juge délégué de la Cour civile du Tribunal cantonal vaudois ordonna à l'UEFA d'admettre le club valaisan comme participant à l'UEFA 2011/2012 et de prendre toutes mesures utiles aux fins de l'intégrer dans la compétition, ainsi que de considérer les six nouveaux joueurs comme qualifiés en tant que joueurs de OLA et de les admettre dans la compétition de l'UEFA 2011/2012, jusqu'à droit connu sur le sort de la requête de mesures provisionnelles et sous la menace de la peine prévue à l'art. 292 CP. Par ordonnance de mesures provisionnelles du 5 octobre 2011, le juge délégué, après avoir tenu audience, confirma la décision rendue à titre superprovisoire, jusqu'à droit connu sur l'action au fond; en outre, il interdit à l'UEFA de prononcer un forfait au préjudice de OLA en raison de la participation des nouveaux joueurs, également jusqu'à droit connu au fond.

A.h Le 13 septembre 2011, l'Instance d'appel de l'UEFA rejeta le recours déposé par OLA contre la décision de l'ICD-UEFA du 2 septembre 2011, confirma les deux défaites par forfait de OLA contre Celtic et refusa de prononcer les mesures provisionnelles requises par le club valaisan. Par la suite, OLA contestera cette décision de l'Instance d'appel et ouvrira action contre l'UEFA pour violation des droits des sociétaires (art. 75 CC) devant le Tribunal d'arrondissement de Nyon.

## B.

Le 26 septembre 2011, l'UEFA adressa une requête d'arbitrage au TAS. Elle concluait à ce qu'il fût dit et prononcé que la réglementation de l'UEFA, en particulier celle relative à l'UEFA 2011/2012, ainsi que les mesures disciplinaires prises par l'UEFA et ses organes à l'encontre de OLA n'étaient pas contraires au droit suisse des cartels et de la concurrence, que OLA n'était pas en droit d'être réintégrée dans la compétition de l'UEFA 2011/2012, que l'UEFA n'avait pas violé le droit suisse ni les droits de la personnalité tant de OLA que des nouveaux joueurs du club, que ces joueurs n'étaient pas habilités à participer à l'UEFA 2011/2012, que les mesures provisionnelles prises par le Tribunal cantonal vaudois étaient levées, que tout droit à demander des dommages-intérêts à l'UEFA était nié et que toute autre conclusion appropriée de l'UEFA était admise.

OLA conclut à ce que le TAS déclînât sa compétence et déclarât la requête de l'UEFA irrecevable.

Les quatre clubs de football Atlético de Madrid,

Udinese, Celtic et Stade Rennais furent admis comme parties intervenantes. A ce titre, ils ne pouvaient pas prendre de conclusions propres, mais uniquement soutenir celles des parties principales.

Par sentence arbitrale du 31 janvier 2012, la Formation du TAS constituée pour connaître de la cause (ci-après: la Formation) admit d'abord sa compétence pour statuer par la voie de l'arbitrage ordinaire et rejeta l'exception d'incompétence soulevée par OLA. Sur le fond, elle admit partiellement la requête; elle confirma ainsi que OLA n'était pas en droit d'être réintégrée dans l'UEFA 2011/2012 et leva les mesures provisionnelles prononcées le 5 octobre 2011 par le Tribunal cantonal vaudois. Pour le surplus, elle déclara irrecevables les conclusions au fond de l'UEFA: celles en constatation de la conformité des règles et décisions de l'UEFA avec le droit suisse des cartels et de la concurrence, faute d'intérêt légal; celles en constatation relatives à la violation des droits de la personnalité des joueurs de OLA, parce que ceux-ci n'étaient pas parties à la procédure; celles en constatation que ces joueurs étaient exclus de l'UEFA 2011/2012, parce qu'elles portaient sur une question juridique abstraite; celles visant à nier tout droit à des dommages-intérêts contre l'UEFA, faute de motivation; celles relatives à d'éventuelles autres conclusions appropriées, faute de spécification. La Formation mit deux tiers des frais d'arbitrage à la charge de OLA; en outre, elle condamna le club valaisan à verser 40'000 fr. à l'UEFA pour ses dépens.

## C.

Par mémoire non daté remis à la poste le 7 mars 2012, OLA (ci-après: la recourante) interjette un recours en matière civile, concluant à l'annulation de la sentence arbitrale du 31 janvier 2012.

L'UEFA (ci-après: l'intimée) ainsi que les intervenants Udinese, Atlético de Madrid et Celtic concluent principalement à l'irrecevabilité du recours et subsidiairement à son rejet. L'intervenant Stade Rennais n'a pas pris position.

Invité à déposer des observations en qualité d'autorité précédente, le TAS, par son secrétaire général, a mandaté un avocat pour y donner suite; il confirme sa sentence et propose le rejet du recours.

La recourante s'est déterminée sur ces écritures.

Par la suite, l'intimée a encore fourni des observations.

Considérant en droit

## 1.

Les parties principales à la procédure arbitrale, à savoir

l'intimée et la recourante, ont leur siège en Suisse, si bien que la procédure est un arbitrage interne (art. 353 al. 1 CPC; art. 176 al. 1 LDIP). Le fait que les parties intervenantes, non habilitées à prendre des conclusions propres, ont leur siège à l'étranger est sans pertinence à cet égard.

Pour l'arbitrage interne, le recours en matière civile est recevable aux conditions prévues aux art. 389 à 395 CPC (art. 77 al. 1 let. b LTF). Faute de déclaration expresse des parties principales prévoyant un recours devant le tribunal cantonal compétent en vertu de l'art. 356 al. 1 CPC (art. 390 al. 1 CPC), la sentence, contre laquelle aucune voie de recours arbitrale n'existe (art. 391 CPC), peut faire l'objet d'un recours devant le Tribunal fédéral (art. 389 al. 1 CPC). La procédure est régie par la LTF, sauf disposition contraire du CPC contenue aux art. 389 à 395 (art. 389 al. 2 CPC).

Sauf exception qui n'entre pas en ligne de compte en l'espèce (cf. art. 395 al. 4 CPC), le recours en matière civile dirigé contre une sentence arbitrale interne est de nature cassatoire (cf. art. 77 al. 2 LTF; art. 395 al. 1 CPC; arrêt 4A\_424/2011 du 2 novembre 2011 consid. 1.2). La recourante l'a bien vu en concluant à l'annulation de la sentence attaquée et l'intimée erre lorsqu'elle prétend que ladite conclusion est irrecevable.

Le recours porte sur la constatation que la recourante n'est pas en droit d'être réintégrée dans l'UEL 2011/2012 et sur la levée des mesures provisionnelles prononcées le 5 octobre 2011 par le Tribunal cantonal vaudois, ainsi que sur la question accessoire des frais et dépens. La recourante n'est en revanche pas lésée par les points du dispositif déclarant irrecevables les autres conclusions de l'intimée.

## 2.

Le Tribunal fédéral contrôle d'office et librement la recevabilité des recours qui lui sont soumis (**ATF 137 III 417** consid. 1 et les arrêts cités), ce qui implique notamment d'examiner la qualité pour recourir.

2.1 Selon l'art. 76 al. 1 let. b LTF, le recourant doit notamment avoir un intérêt digne de protection à l'annulation de la décision attaquée. Cette exigence est identique à celle posée par l'art. 89 al. 1 let. c LTF pour le recours en matière de droit public (cf. Message du 28 juin 2006 relatif au code de procédure civile suisse, FF 2006 6890 ch. 5.3.2). L'intérêt digne de protection consiste dans l'utilité pratique que l'admission du recours apporterait à son auteur, en lui évitant de subir un préjudice de nature économique, idéale, matérielle ou autre que la décision attaquée lui occasionnerait (**ATF 137 II 40** consid. 2.3 p. 43).

L'intérêt doit être actuel, c'est-à-dire qu'il doit exister non seulement au moment du dépôt du recours, mais encore au moment où l'arrêt est rendu (**ATF 137 I 296** consid. 4.2 p. 299; **137 II 40** consid. 2.1 p. 41). Le Tribunal fédéral déclare le recours irrecevable lorsque l'intérêt digne de protection fait défaut au moment du dépôt du recours. En revanche, si cet intérêt disparaît en cours de procédure, le recours devient sans objet (**ATF 137 I 23** consid. 1.3.1 p. 24 s. et les arrêts cités). Il est dérogé exceptionnellement à l'exigence d'un intérêt actuel lorsque la contestation à la base de la décision attaquée est susceptible de se reproduire en tout temps dans des circonstances identiques ou analogues, que sa nature ne permet pas de la trancher avant qu'elle ne perde son actualité et que, en raison de sa portée de principe, il existe un intérêt public suffisamment important à la solution de la question litigieuse (**ATF 137 I 23** consid. 1.3.1 p. 25; **136 II 101** consid. 1.1 p. 103; **135 I 79** consid. 1.1 p. 81).

2.2 Dans son mémoire de mars 2012, la recourante fait valoir que la compétition de l'UEL 2011/2012 est alors toujours en cours, tout en observant qu'en cas d'admission du recours, sa réintégration "semble difficile, sinon impossible". Elle voit néanmoins un intérêt au recours dans le fait qu'elle pourrait mettre en cause la régularité de la compétition et obtenir des dommages-intérêts si son exclusion se révélait injustifiée. Dans sa prise de position, le TAS émet de sérieux doutes sur l'intérêt actuel de la recourante à obtenir l'annulation de la sentence du 31 janvier 2012, alors que la recourante reconnaît elle-même qu'une réintégration dans la compétition semble difficile, sinon impossible en cas d'admission du recours. A cela, la recourante répond, dans ses observations de juin 2012, que si l'annulation de la sentence ne permet pas sa réintégration dans une compétition désormais achevée, c'est parce que le TAS a tardé à statuer et qu'en agissant de même à l'avenir, le TAS pourrait "échapper à toute sanction" chaque fois qu'une situation comparable se présenterait.

Devant le Tribunal fédéral, la querelle porte sur la confirmation que la recourante n'est pas en droit d'être réintégrée dans l'UEL 2011/2012 et sur la levée des mesures provisionnelles prononcées par le Tribunal cantonal vaudois.

Il est notoire que la compétition de l'UEL 2011/2012 est aujourd'hui terminée. Dans ces circonstances, on ne discerne pas l'intérêt de la recourante à obtenir l'annulation d'une sentence

constatant qu'elle n'a pas le droit d'être réintégrée dans cette compétition et levant des mesures provisionnelles qui ordonnent qu'elle puisse y participer. Même si le défaut d'intérêt au recours était dû, comme la recourante le soutient, aux lenteurs du TAS à statuer, cela ne changerait rien au fait qu'il n'existe plus, à l'heure actuelle, d'intérêt à une décision au fond. L'intention de la recourante de demander ultérieurement réparation du dommage qui aurait été causé par son exclusion prétendument illicite de la compétition ne fonde pas, à elle seule, un intérêt digne de protection; la décision attaquée ne peut d'ailleurs pas lui être opposée dans une éventuelle procédure ultérieure en dommages-intérêts (**ATF 126 I 144** consid. 2a p. 148; **125 I 394** consid. 4a p. 397). En outre, la recourante n'allègue pas - et rien ne permet de retenir - que la situation ayant conduit à son exclusion de l'UEFL 2011/2012 soit susceptible de se répéter à l'avenir. Une dérogation à l'exigence de l'intérêt actuel ne se justifie donc pas.

Il s'ensuit que le recours est sans objet sur la question principale.

### 3.

La sentence attaquée met des frais et dépens à la charge de la recourante. Cette dernière a certes un intérêt légitime et actuel à obtenir l'annulation de cette condamnation (cf. **ATF 117 Ia 251** consid. 1b p. 255). Mais cela ne signifie pas qu'elle peut, par le biais d'une contestation de sa condamnation à des frais et dépens, faire examiner de manière indirecte des griefs sans objet ou irrecevables contre la décision au fond (cf. **ATF 129 II 297** consid. 2.2 p. 300; **100 Ia 298** consid. 4 p. 299). Lorsqu'il ne peut pas être entré en matière sur les griefs soulevés contre la décision au fond, le recourant peut faire valoir uniquement que la décision sur les frais et dépens doit être annulée ou modifiée pour des motifs autres que ceux qu'il invoquait à propos de la question principale (cf. **ATF 109 Ia 90**; plus récemment, arrêt 4A\_637/2010 du 2 février 2011 consid. 4).

En l'espèce, le recours ne contient pas de moyens spécifiques contre la décision sur les frais et dépens (cf. art. 393 let. f CPC), qui seraient différents de ceux articulés contre la décision au fond; les griefs contre la condamnation aux frais et dépens se confondent avec ceux contre la décision au fond. Le recours est dès lors irrecevable sur la question des frais et dépens (cf. art. 77 al. 3 LTF).

### 4.

Sur le vu de ce qui précède, le recours est irrecevable dans la mesure où il n'est pas sans objet.

En règle générale, les frais judiciaires et les dépens de la partie qui a obtenu gain de cause sont mis à la charge de la partie qui succombe (art. 66 al. 1 et art. 68 al. 1 LTF). Dans la mesure où le recours est sans objet, il convient d'appliquer aux frais et dépens l'art. 72 PCF, par renvoi de l'art. 71 LTF. Le Tribunal fédéral statue alors par une décision sommairement motivée en tenant compte de l'état de choses existant avant le fait qui met fin au litige. Il se fonde en premier lieu sur l'issue probable qu'aurait eue la procédure. Si cette issue ne peut être déterminée dans le cas concret sans plus ample examen, les règles générales de la procédure civile s'appliquent: les frais et dépens seront mis à la charge de la partie qui a provoqué la procédure devenue sans objet ou chez laquelle sont intervenues les causes ayant conduit à ce que cette procédure devienne sans objet (cf. **ATF 118 Ia 488** consid. 4a p. 494; plus récemment, arrêt 4A\_636/2011 du 18 juin 2012 consid. 4).

En l'espèce, la recourante a provoqué la procédure déclarée sans objet et il n'apparaît pas sans autre que les griefs soulevés dans le recours étaient bien fondés. En conséquence, la recourante prendra à sa charge les frais de la procédure et versera des dépens à l'intimée ainsi qu'aux trois intervenants qui ont déposé de très brèves réponses.

### Par ces motifs, le Tribunal fédéral prononce:

#### 1.

Le recours est irrecevable dans la mesure où il n'est pas sans objet.

#### 2.

Les frais judiciaires, arrêtés à 15'000 fr., sont mis à la charge de la recourante.

#### 3.

La recourante versera, à titre de dépens, une indemnité de 17'000 fr. à l'intimée et une indemnité de 2'000 fr. à chacun des intervenants Atlético de Madrid SAD, Celtic PLC et Udinese Calcio SpA.

#### 4.

Le présent arrêt est communiqué aux mandataires des parties et au Tribunal Arbitral du Sport (TAS).

Lausanne, le 16 juillet 2012

Au nom de la Ire Cour de droit civil du Tribunal fédéral suisse

La Présidente:  
Klett

Le Greffier:  
Godat Zimmermann

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## Publications récentes relatives au TAS / Recent publications related to CAS

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- Blackshaw I., CAS at the London 2012 Olympics, Association for International Arbitration In Touch, July 2012
- Crespo Perez J. D. (dir.), Tribunal Arbitral, Revista Aranzadi de Derecho de Deporte y Entretenimiento, Año 2012-1, Número 34 p. 391 ss
- Haas U./Hossfeld A., Die (neue) ZPO und die Sportschiedsgerichtsbarkeit, Bull ASA 2/2012 p. 312
- Haas U., Ex-Doper willkommen?, Jusletter 2. April 2012, no. 20 et seq.
- Haas U./ Köppel J., Abwehrensprüche des Sportlers gegen (angeblich rechtswidriges) Verbandsverhalten vor dem Court of Arbitration for Sport (CAS/TAS), in: Jusletter 16. Juli 2012
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- Lambertz p./Longree S., WADA Code 2015- Abschaffung der B-Probe: Angriff auf die Athletenrechte?, Spurt 4/2012
- Marmayou J-M, Le TAS et la juste proportion entre ordre sportif et ordre public, Editorial, Les Cahiers de Droit du Sport, n°27-2012, p. 9 ss
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- Patochi P-M. & Favre-Bulle X., Case Notes on International Arbitration, part II, Revue suisse de droit international et européen (RSDIE), 2/2012 p. 384
- Patochi P.M. & Scherer M., The Swiss International Sports Arbitration Reports 1, Juris, 2012
- Vogel O./Bocucci D., “Timely Admission” nach Art 10.9.2 WADC/NADC, insbesondere bei Verstößen gegen “Whereabouts Information”.; Jusletter 16 juillet 2012