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Message of the CAS Secretary General

The majority of the “so-called” leading cases handled by the Court of Arbitration for Sports (CAS) selected for this issue deal with football. In this respect, the case *FC Girondins de Bordeaux c. FIFA* address the international transfer of a minor player and the interpretation of article 19 of the FIFA Regulations on the Status and Transfer of Players (RSTP). In *Sampdoria v. Club San Lorenzo de Almagro & FIFA*, the CAS has reviewed the FIFA “longstanding” practice regarding the assessment of its jurisdiction towards clubs undergoing restructuring or bankruptcy proceedings whereas in *Helsingborgs IF v. Parma FC* the CAS contemplates the different aspects of a sell-on clause. In other football related cases, the CAS comes back to the notion of decision and examines the standing to be sued of a club in disciplinary proceedings. Finally, in *Khaled Adenon c. FIFA*, the CAS considers the jurisdiction of CAS towards a party appealing against a disciplinary sanction and deals specifically with the exhaustion of internal remedies prior to the appeal before the CAS. Turning to doping, the key aspect addressed by CAS in the case *Andrus Veerpalu v. International Ski Federation* concerns laboratory accreditation and test decision limit. In other sporting fields, the case *Mohammad Asif v. International Cricket Council* looks at the issue of match fixing while the case *Croatian Golf Federation v. Croatian Olympic Committee* address the meaning of an arbitration agreement.

Interestingly, the article of Professor Massimo Coccia included in this issue deals with the jurisprudence of the Swiss Federal Tribunal on challenges against CAS award. The article of Ms Estelle de La Rochefoucauld, counsel to the CAS, is related to the jurisprudence of the CAS regarding the elimination or reduction of the period of ineligibility for specified substances.

In 2013 the International Council of Arbitration for Sport (ICAS) has created a new ad hoc Division for the XXII Winter Olympic Games which will take place in Sochi (Russia) from 7 to 23 February 2014. The CAS ad hoc division will be headed by Mr Michael Lenard (USA), President and by Ms Corinne Schmidhauser

(Switzerland), Co-President. It will be composed of nine arbitrators, namely Judge Annabelle Bennett (Australia), Ms Alexandra Brilliantova (Russia), Judge Robert Décary (Canada), Prof. Luigi Fumagalli (Italy), Mr Patrick Lafranchi (Switzerland), Prof. Matt Mitten (USA), Prof. Gary Roberts (USA), Prof. Brigitte Stern (France), Mr David Wu (China). The arbitrators will be based in the Olympic city. It is the tenth CAS ad hoc division since the first one in Atlanta in 1996.

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

Matthieu Reeb

The jurisprudence of the Swiss Federal Tribunal on challenges against CAS awards

Prof. Massimo Coccia*

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I. Introduction

This paper deals with the jurisprudence of the Swiss Supreme Court, i.e. the “Federal Tribunal”, related to the action to set aside *international* awards rendered by arbitral tribunals (“panels”) of the Court of Arbitration for Sport (CAS).

This paper will not address, however, the action for the so called “revision” of arbitral awards, which is an extraordinary legal remedy under Swiss law that

allows to exceptionally reopen the proceedings in front of the Federal Tribunal for very specific and limited reasons after – even long after – the arbitral award has become *res judicata* and that, if successful, causes the matter to be remitted to the same arbitrators or, should this not be possible, to a newly constituted arbitral tribunal¹.

1. For instance, a revision can be requested if it is discovered, even many years after the arbitration, that a favourable award had been obtained by corruption, fraud or other criminal means. Cf. A. RIGOZZI, *Challenging Awards of the Court of Arbitration for Sport*, in *Journal of International Dispute Settlement*, Vol. 1, No. 1 (2010), 217-265, at 255; C. PONCET,

A “Swiss international award” is one rendered in the context of a “Swiss international arbitration” governed by Chapter 12 of the Swiss Private International Law Act or “PILA”². To consider under Swiss law that an arbitration is “international” and, thus, falls under the PILA regime, there are two requirements, set forth by Article 176 PILA. First, the relevant arbitral tribunal must have its seat in Switzerland. In this regard, it is important to note that Article R28 of Code of Sports-related Arbitration (the “CAS Code”) provides that the seat of the CAS and of each CAS arbitration panel is indeed Lausanne, Switzerland. Second, at least one of the parties to the dispute must have neither his domicile nor his habitual residence in Switzerland at the time that the arbitration agreement was concluded.

An award rendered in the context of a Swiss international arbitration is, as a consequence, challengeable before the Federal Tribunal (Article 191.1 PILA). Interestingly, since 1 January 2011, the date on which the Swiss Federal Civil Procedure Code (CPC)³ entered into force, even awards rendered in a “Swiss domestic arbitration” (i.e. with all parties domiciled or habitually resident in Switzerland) are to be challenged before the Federal Tribunal (Article 389 CPC), unless the parties expressly agree that the award is to be challenged before a cantonal court (Article 390 CPC). Accordingly, the Swiss Supreme Court is not only the court having primary jurisdiction to hear actions to set aside *international* CAS awards⁴, but can also be characterized as the court which exercises a supervisory jurisdiction over *all* CAS awards.

Obviously, not all decisions taken by a panel during CAS proceedings qualify as an arbitral award under Swiss law; therefore, a party wishing to challenge a decision adopted by a CAS panel should first ascertain whether that decision is actually an award (regardless of the formal name attributed to it) and whether it can be immediately appealed before the Federal Tribunal⁵.

Obtaining Revision of “Swiss” International Arbitral Awards: Whence After *Thales*?, in *Stockholm International Arbitration Review*, 2009, no. 2, 39-53; E. LEIMBACHER, A. RIGOZZI, *The Swiss Supreme Court Refits the Frigates*, in *Journal of International Arbitration*, vol. 27, no.3, June 2010, 307-316. Incidentally, it may be noted that some of the jurisprudential citations in this paper derive from Federal Tribunal’s judgments issued on the occasion of revision proceedings.

2. *Loi fédérale sur le droit international privé*, of 18 December 1987.

3. *Code de procédure civile*, of 19 December 2008.

4. Cf. W.M. REISMAN, B. RICHARDSON, *Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration*, in *Arbitration - The Next Fifty Years* (Van Den Berg, Ed.), ICCA congress series no. 16, Alphen aan den Rijn, 2012, 17-65, according to whom the courts of the State of the seat have the right and the duty to exercise a “primary jurisdiction” over all arbitral awards issued in the context of international arbitrations that take place on their territory.

5. See C. PONCET, *When is a “Swiss” “Award” appealable?*, in *The Paris Journal of International Arbitration*, 2012, no. 1, p. 135-155.

From a Swiss procedural viewpoint, the action before the Federal Tribunal against a CAS arbitral award takes the form of a “civil law appeal” (*recours en matière civile*) which is governed, besides the PILA, by the Swiss Federal Tribunal Act or “FTA”⁶.

In principle the parties might, pursuant to Article 192.1 PILA, waive their right to challenge the arbitral award by agreeing to exclude the jurisdiction of the Federal Tribunal. However, in the *Cañas* judgment of 22 March 2007, the Federal Tribunal specified that such “waiver agreement”, if inserted in the rules of a sports organization, is not available in relation to “vertical disputes” – i.e. disputes between a sports organization and an athlete – given that, in the Federal Tribunal’s opinion, the athlete’s consent to such a waiver of any challenge against a future CAS award would not rest on a completely free will⁷. In this respect, the Federal Tribunal has acknowledged that it might seem illogical to treat differently a vertical agreement between a sports organization and an athlete that excludes all appeals against a CAS award (which is not permissible) from a vertical agreement between the same parties that requires them to arbitrate all disputes before the CAS (which is allowed with great latitude)⁸. However, the Federal Tribunal is of the view that, “*in spite of appearances, this difference in treatment is logical insofar as it promotes the swift settlement of disputes, particularly in sport, by specialised arbitral tribunals that offer sufficient guarantees of independence and impartiality, while at the same time ensuring that the parties, especially professional athletes, do not give up lightly their right to appeal awards issued by a last instance arbitral body before the supreme judicial authority of the State in which the arbitral tribunal is seated. In other words, this logic is based on the continuing possibility of an appeal acting as a counterbalance to the ‘benevolence’ with which it is necessary to examine the consensual nature of recourse to arbitration where sporting matters are concerned*”⁹.

This jurisprudence that does not permit sports organizations to exclude the control of the Swiss Supreme Court over CAS awards is all the more opportune, if one considers that a petition to set aside a CAS award submitted before a court of another State would usually (although not necessarily) yield a dismissal of the petition for lack of jurisdiction¹⁰,

6. *Loi sur le Tribunal fédéral* of 17 June 2005.

7. Federal Tribunal, Judgment 4P.172/2006 of 22 March 2007, *Cañas*, at 4.3.2.2.

8. *Id.* at 4.3.2.3; cf. *infra* section 4.2.

9. *Id.* (citations omitted).

10. Given that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 does not require nor forbids that control over awards be exerted by any given State, it may occur that the jurisdiction to set aside an award is exerted by the court of a State other than that of the arbitration seat; see L. RADICATI DI BROZOLO, *The Control System of Arbitral Awards: A Pro-Arbitration Critique of Michael Reisman’s ‘Architecture of International Commercial Arbitration’*, in

as occurred in the *Raguz* case, where an Australian court – the Supreme Court of the New South Wales Court of Appeal – declined jurisdiction to set aside a CAS award even though all the factual elements of the arbitral proceedings pointed to Australia¹¹.

II. Grounds for Annulment

There is a limited number of circumstances under which a party that has lost a CAS case may try to obtain the annulment of the arbitral award¹². Article 190.2 PILA, governing this issue, provides that only the following grounds grant to a party the possibility to challenge before the Federal Tribunal an award issued by a CAS Panel:

- 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 policy¹³”.*

In challenging an award on one of these grounds, one must take into consideration that the Federal Tribunal does not reopen the case as an appeals court would do, but rather it merely examines whether or not the arguments raised against the award are

Arbitration - The Next Fifty Years, *supra* note 4, 74-102, at 84 n. 25: “Whist annulment jurisdiction is usually exercised by the seat State, there are instances where courts of a State other than that of the seat entertain setting aside actions in relation to awards purportedly having certain links to that State”.

11. In the *Raguz* case the parties, their counsel and the arbitrators were all Australian citizens residing in Australia, the hearings were held in Sydney and the proceedings were managed from the CAS offices in Sydney. See *Angela Raguz v Rebecca Sullivan & ORS*, [2000] NSWCA 240; the judgment is reprinted in G. KAUFMANN-KOHLER, *Arbitration at the Olympics. Issues of Fast-Track Dispute Resolution and Sports Law*, The Hague, 2001, at 51-78.

12. See A. RIGOZZI, *Challenging Awards of the Court of Arbitration for Sport*, *supra* note 1; D. AKIKOL, *Review of the Recent Case Law of the Swiss Federal Tribunal, in New Developments in International Commercial Arbitration* (C. Müller, A. Rigozzi, Eds.), Zurich, 2011, 119-175.

13. The official French text of Article 190.2 PILA reads as follows:

“Elle ne peut être attaquée que:

- a. lorsque l'arbitre unique a été irrégulièrement désigné ou le tribunal arbitral irrégulièrement composé;
- b. lorsque le tribunal arbitral s'est déclaré à tort compétent ou incompétent;
- c. lorsque le tribunal arbitral a statué au-delà des demandes dont il était saisi ou lorsqu'il a omis de se prononcer sur un des chefs de la demande;
- d. lorsque l'égalité des parties ou leur droit d'être entendues en procédure contradictoire n'a pas été respecté;
- e. lorsque la sentence est incompatible avec l'ordre public.”

well-founded or not¹⁴. The Federal Tribunal issues its decisions only on the basis of the facts that were established by the CAS panel and does not rectify or supplement *ex officio* the findings of the arbitrators, even when the facts were established in a manifestly inaccurate manner or in violation of the law¹⁵. However, the Federal Tribunal does retain the possibility of reviewing the factual findings on which the challenged award is based if one of the grievances mentioned in Article 190.2 PILA is raised against the factual findings – for example, if the facts have been established in breach of the right to be heard – or when new facts or evidence are exceptionally taken into consideration in the framework of the civil law appeal¹⁶.

Hence, most of the times, it is pointless to allege before the Federal Tribunal facts that were not mentioned in the challenged award: “*Allowing the parties to rely on other facts than those found by the arbitral tribunal, other than in the exceptional circumstances reserved by case law, would no longer be consistent with such a task [of the Federal Tribunal], even though such facts may be established by the evidence in the arbitration record*”¹⁷.

It is also important to keep in mind that the Federal Tribunal merely confirms or sets aside the challenged award (or parts thereof) and, in case of annulment, it may remand the matter back to the arbitrators for a new award – with the obvious exception of cases of lack of jurisdiction¹⁸ – or, alternatively, one of the parties or the arbitral institution may set in motion again the arbitral proceedings¹⁹. In practice, this means that on some occasions a party may win the appeal before the Federal Tribunal only to then lose the case after it is remanded to the CAS, which may simply cure the procedural defect that determined the annulment of the award and issue a new award bearing the same outcome²⁰.

Another preliminary point of which a party challenging an arbitral award should be aware is that if “the award under appeal has been based on several independent reasons, whether alternative or subsidiary, all per se sufficient, each one must be

14. Federal Tribunal, Judgment 4A_234/20101 of 29 October 2010, *Valverde I*, at 2.2.

15. *Id.* at 2.1. This occurs on the basis of Article 77.2 FTA, which excludes the applicability of Article 105.2 FTA.

16. This may occur pursuant to Article 99 FTA. See Federal Tribunal, Judgment 4A_234/20101 of 29 October 2010, *Valverde I*, at 2.2; See also Federal Tribunal, Judgment 4A_456/2009 of 3 May 2010, *Thys*, at 2.5.2.

17. Federal Tribunal, Judgment 4A_234/20101 of 29 October 2010, *Valverde I*, at 2.2.

18. See D. AKIKOL, *Review of the Recent Case Law of the Swiss Federal Tribunal*, *supra* note 12, at 163.

19. See G. KAUFMANN-KOHLER, A. RIGOZZI, *Arbitrage international. Droit et pratique à la lumière de la LDIP*, 2nd ed., Berne, 2010, 483-485.

20. For example, this is what occurred in the *Cañas* case, quoted *supra* at note 7.

challenged with the appropriate ground for appeal, under penalty of the appeal being disallowed”²¹.

The five grounds for annulment set forth by Article 190.2 PILA are individually addressed in the following sections.

III. Irregular Constitution of the Panel

Pursuant to Article 190.2(a) PILA, a CAS award may be challenged if the sole arbitrator was designated irregularly or, in instances where an arbitral panel is appointed, if the panel was constituted irregularly. Such ground for annulment may be invoked if it is alleged that (i) the appointment procedure set forth by the arbitration agreement or by the applicable arbitration rules was not complied with, or that (ii) an appointed arbitrator was not independent or impartial. The first situation is unlikely to occur in CAS proceedings; in fact, only the latter situation can be considered as actually problematic and worth analyzing in this paper. Indeed, many CAS awards have been challenged before the Federal Tribunal on the basis of lack of independence or impartiality of an arbitrator although, thus far, no CAS award has been annulled based on this ground.

Accordingly, to be successful in a petition for improper constitution of the panel, the petitioner must establish that a CAS arbitrator who was appointed lacked independence or impartiality. The difference between the notions of independence and impartiality has often been discussed in the legal literature but no clear distinction seems to have been persuasively drawn²². In fact, in the case law of the Federal Tribunal “no strict distinction is drawn between the concepts of independence and impartiality”²³; for that reason, both are jointly treated here as a combined concept.

According to the jurisprudence of the Federal Tribunal, a challenge based on an alleged lack of independence or impartiality is admissible only if the ground of challenge was timely submitted during the arbitration proceedings, in compliance with the principle of good faith and the prohibition of abuse of rights codified in Article 2 of the Swiss Civil Code (“CC”)²⁴. Indeed, in accordance with “*the principle of good faith and the prohibition of abuse of rights, it is not allowed for formal means to be brought forward after an*

unfavourable result when they could have been raised earlier in the proceedings”²⁵. Hence, a party to a CAS arbitration is prevented from raising this matter before the Federal Tribunal if it had not already raised it within the time limit provided by Article R34 of the CAS Code (“*within seven days after the ground for the challenge has become known*”).

An exception to this jurisprudential canon has been made only for those cases in which the petitioner did not discover until after the award was rendered, and could not have known beforehand, about the lack of independence or impartiality of the disputed arbitrator. With reference to this exception, the Federal Tribunal places on the petitioner the burden of timely and proactively checking for conflicts of interest and other possible grounds for challenging the appointment of an arbitrator. In doing so, the petitioner must use the “*attention required under the circumstances*”²⁶ and exercise “*appropriate vigilance*”²⁷.

A. Standards to Assess the Arbitrators’ Independence and Impartiality

In order to verify the independence and impartiality of arbitrators, the Federal Tribunal has acknowledged the relevance of the IBA Guidelines on Conflicts of Interest in International Arbitration (the “IBA Guidelines”).²⁸ These are a set of guidelines that are not binding *per se*, but do constitute a widely accepted standard in the international arbitration community. The IBA Guidelines set forth some General Standards and include three illustrative lists of specific situations which may or may not give rise to justifiable doubts, from an objective point of view, as to the arbitrator’s impartiality and independence. Accordingly, there is a “red list”, i.e. an inventory of situations of conflicts of interest where an arbitrator is required to recuse her/himself (although in some situations the requirement is waivable by the parties), an “orange list”, i.e. situations where an arbitrator should disclose the potential conflict but is not supposed to automatically resign, and a “green list”, i.e. situations where there appears to be no conflict of interest or where no actual conflict of interest exists, and thus no duty of disclosure emerges²⁹.

In addressing the application of the IBA Guidelines to assess an arbitrator’s independence and impartiality, the Federal Tribunal noted that such “*guidelines*

21. Federal Tribunal, Judgment 4P.278/2005 of 8 March 2006, ATF 132 III 389, *Tensacciai*, at 1.2.2.

22. See C. PONCET, *The independence of the Court of Arbitration for Sport*, in *European International Arbitration Review*, 2012, Vol. 1, 31-56, at 40.

23. Federal Tribunal, Judgment 4A_234/2010 of 29 October 2010, *Valverde I*, at 3.3.1.

24. *Id.* at 42; Federal Tribunal, Judgment 4A.234/2008 of 14 August 2008.

25. Federal Tribunal, Judgment 4A.528/2007 of 4 April 2008, at 2.5.1.

26. Federal Tribunal, Judgment 4A.528/2007 of 4 April 2008.

27. Federal Tribunal, Judgment 4P.105/2006 of 4 August 2006.

28. The IBA Guidelines were approved on 22 May 2004 by the Council of the International Bar Association and can be found at <http://www.ibanet.org>.

29. See *infra* notes 40 and 42.

admittedly have no statutory value; yet they are a precious instrument, capable of contributing to harmonization and unification of the standards applied in the field of international arbitration to dispose of conflict of interests and such an instrument should not fail to influence the practice of arbitral institutions and tribunals" (emphasis added)³⁰.

It can be safely stated that if a CAS arbitrator conforms to the IBA Guidelines, even though *"the circumstances of the specific case will always remain decisive to dispose of the issue of a conflict of interest"*,³¹ in principle there should be no room for a challenge based on a lack of independence or impartiality.

B. Relevance of the Closed List System

In international arbitration there is a relatively small community of lawyers that are often involved in the same cases, sometimes sitting as arbitrators and sometimes pleading as counsel, but the Federal Tribunal has acknowledged that this does not automatically mean that those arbitrators are no longer independent or impartial: *"International arbitration is actually a narrow field and it is inevitable that, after a few years on the circuit, arbitrators, many of whom are lawyers themselves, will hear cases in which either a fellow arbitrator or one of the counsels has served with them on a previous panel. This does not automatically mean they are no longer independent"*³².

Obviously, such small community of international arbitration specialists is even smaller in sports arbitration since the CAS employs a closed list system of arbitrators,³³ that is, a system that finds both detractors³⁴ and supporters³⁵. In any event, according to the Federal Tribunal, the resort to a closed list does not justify a different standard than that used in regular commercial arbitration³⁶. Indeed, the Federal Tribunal's judgment in *Valverde I* confirms that there is *"no justification for a special treatment of CAS arbitrators, namely to be particularly strict in reviewing their independence and their impartiality"*,³⁷ although some commentators deem that the peculiar reality of sports

arbitration should rather require stricter standards of independence and impartiality³⁸.

It must also be added that the CAS Code, in order to further promote the independence and impartiality of the arbitrators nominated to the CAS list, provides (since 2010) that *"CAS arbitrators and mediators may not act as counsel for a party before the CAS"* (Article S18 of the CAS Code), thus avoiding the switching of roles between arbitrator and counsel that sometimes occurs in commercial arbitration.

C. Relevance of Friendly Relationship or Common Membership in an Association

The Federal Tribunal has analyzed whether a friendly relationship between an arbitrator and the counsel of a party is sufficient to create an assumption of lack of independence or impartiality. It concluded that, generally, a friendly relationship does not automatically mean that an arbitrator is not independent or impartial.

In fact, according to the IBA Guidelines, an orange list situation exists only when a *"close personal friendship exists [...] as demonstrated by the fact that the arbitrator and the counsel regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations"* (Section 3.3.6). In any case, as already mentioned, the orange list merely requires the arbitrator to disclose his situation, but does not automatically disqualify him from sitting on the panel. As was explained by some of the eminent drafters of the IBA Guidelines, the purpose of disclosure is merely *"to reveal information that can begin a dialogue about whether a conflict exists and whether an arbitrator can act independently and impartially"*³⁹. In fact the parties are deemed to have accepted an arbitrator's appointment if they do not timely object after that arbitrator discloses an orange list situation⁴⁰.

The Federal Tribunal noted that the situation where an arbitrator and another arbitrator or a party's counsel are members of a professional or social association is not problematic⁴¹. Indeed, this situation is classified in the green list of the said IBA Guidelines and,

30. Federal Tribunal, Judgment 4A_506/2007 of 20 March 2008, *Biolley*, at 3.3.2.2.

31. *Id.*

32. Federal Tribunal, Judgment 4P.267/2002 of 27 Mai 2003, 129 III 445, *Lazutina-Danilova*.

33. See A. RIGOZZI, *Challenging Awards of the Court of Arbitration for Sport*, *supra* note 1, at 238-239.

34. See e.g. A.A. SANTENS, *The Move Away from Closed-List Arbitrator Appointments: Happy Ending or a Trend to Be Reversed?*, in *Kluwer Arbitration Blog*, 28 June 2011, <http://kluwerarbitrationblog.com>.

35. See e.g. J. PAULSSON, *Moral Hazard in International Dispute Resolution*, in *Transnational Dispute Management*, 2011, 2, www.transnational-dispute-management.com, at 11-12.

36. Federal Tribunal, Judgment 4A_506/2007 of 20 March 2008, *Biolley*, at 3.1.1.

37. Federal Tribunal, Judgment 4A_234/2010 of 29 October 2010, *Valverde I*.

38. See A. RIGOZZI, *Challenging Awards of the Court of Arbitration for Sport*, *supra* note 1, at 239.

39. O.L.O. DE WITTE WIJNEN, N. VOSER, N. RAO, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, in *Business Law International*, 2004, vol. 5, 433, at 454.

40. See Part 2, Para. 3 of the IBA Guidelines: "[...] The Orange List thus reflects situations that would fall under General Standard 3(a), so that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made. [...]"

41. Federal Tribunal, Judgment 4A_506/2007 of 20 March 2008, *Biolley*, at 3.3.2.2; see also Judgment 4A_528/2007 of 4 April 2008.

thus, need not be disclosed⁴². In addition, it is a long-standing tenet of the Federal Tribunal's case law that *"the capacity of the members of an arbitral tribunal to rise above contingencies relating to their appointment when they are called upon to issue a decision in the exercise of their function must be presumed"* and only additional circumstances to the mere common membership in an association could justify a different assessment of the situation⁴³.

D. Standard to Be Applied to Party-Appointed Arbitrators

According to Articles R40.2, R40.3, R53 and R54 of the CAS Code, a three-member CAS panel consists of two party-appointed arbitrators, whose appointment must be confirmed by the President of the pertinent CAS Division (who checks *prima facie* whether they comply with the requirements set forth by Article R33 of the CAS Code), and one president, who is selected by mutual agreement of the party-appointed arbitrators in the ordinary arbitration procedure or by the President of the CAS Appeals Arbitration Division in the appeals arbitration procedure.

It has been argued sometimes, under a rather pragmatic approach, that party-appointed arbitrators should be held to a less strict standard of independence and, in particular, impartiality than that which is required from the president of an arbitral tribunal or from a sole arbitrator⁴⁴. The Federal Tribunal has not agreed with this view. On the contrary, it has held that the same standards must apply to all of the arbitrators, irrespective of whether they are appointed by a party, all the while being well aware that it would be too idealistic to demand from a party-appointed arbitrator the same exact detachment as that of an ordinary judge: *"the independence and the impartiality demanded from the members of an arbitral tribunal extend to the party-appointed arbitrators as well as to the chairman of the arbitral tribunal. While affirming this principle, the Federal Tribunal is admittedly aware that absolute independence by all arbitrators is an ideal which will only rarely correspond to reality. Indeed whether one wishes it or not, the way of appointing the members of an arbitral tribunal creates an objective nexus, subtle as it may be, between the arbitrator and the party appointing him because the former, as opposed to a state judge, derives his power and his place only from the latter's will. Yet this is an*

*inherent consequence of the arbitral procedure with which one must live. It implies that an arbitrator may not be challenged merely because he was chosen by one of the parties to the dispute. Yet the so-called system of the party-arbitrator, in which the party-appointed arbitrator would not be subject to the same requirement of independence and impartiality as the chairman of the arbitral tribunal, must be ruled out. The idea that the arbitrator may merely be the advocate of 'his' party within the arbitral tribunal must be categorically rejected, failing which the very institution of arbitration would be jeopardized"*⁴⁵.

It can also be said that some elements of CAS practice seem to demonstrate – for example, the fact that almost all CAS decisions are adopted unanimously – that the CAS closed list system actually induces most party-appointed arbitrators, in particular those who also happen to be frequently appointed as presidents, to be especially impartial and independent vis-à-vis the party who appointed them.

E. Multiple Appointments of an Arbitrator by the Same Party or the Same Counsel

An arbitration system based on a closed list of arbitrators may encourage repeated appointments of the same arbitrator by a given party or a given counsel. The IBA Guidelines provide in the orange list that the following situations may give rise to a justifiable doubt as to the arbitrator's impartiality or independence and thus need to be disclosed: (a) when a party or an affiliate thereof has appointed the same arbitrator twice (or more) within the past three years (Section 3.1.3); or (b) when the same counsel or law firm has appointed more than three times the same arbitrator within the past three years (Section 3.3.7). The duty of a CAS arbitrator to disclose any such situation of multiple appointments appears to be clear both under the IBA Guidelines and Article R33 of the CAS Code ("Every arbitrator shall be and remain impartial and independent of the parties and shall immediately disclose any circumstances which may affect his independence with respect to any of the parties") and all CAS arbitrators should scrupulously comply with it. However, the Federal Tribunal appears to have somewhat attenuated such onus of disclosure by putting a very heavy burden on the party and its counsel to deeply investigate the matter and ask the right questions to an arbitrator who has not spontaneously made a full disclosure⁴⁶.

42. See Part 2, Para. 6 of the IBA Guidelines for a definition of the green list: "The Green List contains a non-exhaustive enumeration of specific situations where no appearance of, and no actual, conflict of interest exists from the relevant objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List".

43. Federal Tribunal, Judgment 4A_506/2007 of 20 March 2008, *Biolley*, at 3.3.2.2.

44. Cf. R. COULSON, *An American Critique of the IBA's Ethics for International Arbitrators*, in *Journal of International Arbitration*, 1987, vol. 4, no. 2, 103; P. LALIVE, *Sur l'impartialité de l'arbitre international en Suisse*, in *La Semaine Judiciaire*, 1990, vol. 112, p. 362-371, at 368-371; P. LALIVE, J.F. POUDRET, C. REYMOND, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne, 1989, n° 4 ad Article 180 LDIP.

45. Federal Tribunal, Judgment 4A_234/2010 of 29 October 2010, *Valverde I*, at 3.3.1.

46. Federal Tribunal, Judgment 4A_110/2012 of 9 October 2012, *Paulisson*. This decision has been strongly criticized by H. STUTZER, *Multiple Appointments of an Arbitrator: Does the Swiss Federal Supreme Court Really See No Limit?*, in 14 November 2012, www.thouvenin.com/arbitration/arbitration_newsletter_switzerland71.pdf.

In dealing with this issue, it must be added that the IBA Guidelines include an exception in footnote 5 providing that the disclosure of repeated appointments might not be required “*in certain specific kinds of arbitration*” where arbitrators are drawn from “*a small, specialized pool*” and where “*it is the custom and practice for parties frequently to appoint the same arbitrator in different cases*”. An argument could be made that this exception might be applicable to CAS arbitration, which has a very specialized pool of arbitrators and where the same arbitrators are frequently appointed in different cases. However, given the fact that the list of CAS arbitrators currently includes about 300 arbitrators, thus allowing for a great deal of choice, footnote 5 of the IBA Guidelines does not seem to justify a party or a counsel that keeps reappointing the same arbitrator over and over again. Accordingly, even though the issue of the applicability of said footnote 5 to CAS arbitration has not yet been addressed by the Federal Tribunal, it is advisable that CAS arbitrators take a rigorous approach and disclose any situation of repeated appointments without taking into account the exception set forth in footnote 5 (unless and until specific guidance to the contrary is issued by the Federal Tribunal).

IV. Jurisdiction Wrongly Retained or Declined

A. Challenging an Award Pursuant to Article 190.2(b) PILA

According to Article 190.2(b) PILA, a party can appeal an award if it believes that the CAS panel erroneously assessed whether it had jurisdiction. Pursuant to this provision the Federal Tribunal has already set aside, at the time of this paper, the following CAS awards: CAS 2008/A/1564 *WADA v. Busch & IIHF*,⁴⁷ CAS 2009/A/1767 *Thys v. ASA*,⁴⁸ CAS 2010/O/2250 *SCB Eishockey AG v. IIHF*,⁴⁹ and CAS 2010/O/2197 *Scolari v. FC Bunyodkor*.⁵⁰

The above cases are all cases where the Federal Tribunal stated that the CAS panel had erred in retaining jurisdiction. Indeed, most of the petitions brought before the Federal Tribunal under this ground for annulment concern cases where the CAS panel had decided to retain jurisdiction notwithstanding the jurisdictional objection raised by one of the parties⁵¹. However, there have also

been (unsuccessful) challenges against CAS awards that had declined jurisdiction; this may occur, in particular, when a party attempts to appeal before the CAS a decision by a sports organization that does not have a CAS arbitration clause in its rules or has one that the CAS panel has considered not to be applicable to the case at hand⁵².

To bring before the Federal Tribunal a challenge based on lack of jurisdiction, the petitioner must have already done so immediately at the outset of the arbitration, meaning that “*the defence of lack of jurisdiction must be raised before any defence on the merits. This is in conformity with the rule of good faith embodied at Article 2.1 CC, which applies to all realms of the law, including civil procedure. Stated differently, the rule at Article 186.2 PILA means that the arbitral tribunal in front of which the respondent proceeds on the merits without reservation acquires jurisdiction from that very fact. Hence he who addresses the merits without reservation in contradictory arbitral proceedings involving an arbitral matter thereby recognizes the jurisdiction of the arbitral tribunal and definitely loses the right to challenge the jurisdiction of the tribunal. However, the respondent may state its position on the merits in an alternate way, only for the case in which the defence of lack of jurisdiction would be rejected, without thus tacitly accepting the jurisdiction of the arbitral tribunal*”⁵³.

In this type of challenge, the Federal Tribunal “*exercises full judicial review on the grievances relating to jurisdiction according to Article 186.2(b) PILA, including the preliminary issues of substantive law from which the determination of jurisdiction depends*”⁵⁴.

Further, with regard to appeals arguing that the arbitral tribunal wrongly accepted jurisdiction, the Federal Tribunal does not limit itself to reviewing only the argument upheld by the arbitrators to find that they had jurisdiction but rather “*freely reviews all legal aspects (jura novit curia), which may occasionally lead the Federal Tribunal to reject the grievance on an other ground than that which is mentioned in the award under review, as long as the facts found by the arbitral tribunal are sufficient to justify the substitution of new reasons*”⁵⁵.

2009, *Dodó*, dismissing an appeal brought against the CAS award 2007/A/1370-1376 *FIFA & WADA v. STJDE, CBF & Ricardo Lucas Dodó*.

52. See e.g. Federal Tribunal, Judgment 4A_404/2010 of 19 April 2011, *Rıza*, dismissing Mr. Rıza’s challenge against the CAS award 2009/A/1996 *Omer Rıza v. Trabzonspor Kulübü Derneği & Turkish Football Federation*, which declined jurisdiction due to the consideration that a CAS arbitration clause limited to “disputes of international dimension” was not applicable to a dispute between a Turkish player (although with dual citizenship) and a Turkish club.

53. Federal Tribunal, Judgment 4A_386/2010 of 3 January 2011, *Valverde II*, at 5.2.

54. Federal Tribunal, Judgment 4A_460/2008 of 9 January 2009, *Dodó*, at 5.1.

55. Federal Tribunal, Judgment 4A_392/2008 of 22 December 2008, *Gibraltar FA*, at 3.2.

47. Annulled by the Federal Tribunal, Judgment 4A_358/2009 of 6 November 2009, *Busch*.

48. Annulled by the Federal Tribunal, Judgment 4A_456/2009 of 3 May 2010, *Thys*.

49. Annulled by the Federal Tribunal, Judgment 4A_627/2011 of 8 March 2012, *IIHF*.

50. Annulled by the Federal Tribunal, Judgment 4A_244/2012 of 17 January 2013.

51. See e.g. Federal Tribunal, Judgment 4A_460/2008 of 9 January

However, the Federal Tribunal is not turned into a court of appeal and does not research *ex officio* in the arbitral award the legal arguments which could justify upholding the jurisdictional grievance. On the contrary, it is the responsibility of an appellant to draw to the Court's attention any legal arguments which it believes will sway the Federal Tribunal in annulling the arbitral award⁵⁶. Additionally, the Federal Tribunal "*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*"⁵⁷.

B. Jurisdiction or Admissibility?

In order to challenge a CAS award pursuant to Article 190.2(b) PILA, the appellant should first evaluate whether the specific issue to be raised will be considered by the Federal Tribunal as a true jurisdictional issue rather than one of admissibility, because the latter issue goes to the merits and is not reviewable under this ground for annulment. There is a good deal of jurisprudence on various issues within this topic.

In particular, the Federal Tribunal has ruled that the "exhaustion of internal remedies", required by Article R47 of the CAS Code in order to proceed with a CAS appeal, is a jurisdictional issue. Indeed, according to the Federal Tribunal, a CAS award may be set aside for lack of jurisdiction if the panel proceeds even though the relevant sports institution's internal remedies have not been exhausted⁵⁸.

On the other hand, the Federal Tribunal has held that issues of "standing to appeal", "standing to sue" or "legal interest to act" are not jurisdictional issues: "*Whether or not a party has standing to appeal the decision of a [sports] body according to the applicable statutory and legal provisions does not affect the jurisdiction of the arbitral tribunal*"⁵⁹. This holding derives from a challenge against two CAS awards rendered by the Ad Hoc Division of the 2008 Beijing Olympics which held that the applicants had no standing and no legal interest to make the application to the CAS Ad Hoc Division⁶⁰. In short, the Federal Tribunal's reasoning

for dismissing such petition for annulment was that the appellants tried, under cover of a grievance based on Article 190.2(b) PILA, to put forward a criticism of an appellate nature of the interpretation given by the CAS of the international federation's rules in relation to the standing of the applicants, and the "*Federal Tribunal does not review whether or not the arbitral tribunal rightly applied the law on which its decision rests*"⁶¹.

Then, the Federal Tribunal has acknowledged that to decide whether the non-compliance with the time limit for an appeal to the CAS⁶² results in a lack of jurisdiction of the CAS or merely in the inadmissibility of the appeal "is a delicate issue"⁶³. The Federal Tribunal has recognized that in commercial arbitration the expiry or not of the time of legal efficacy of an arbitration agreement "*does relate to the exercise of jurisdiction, more specifically to jurisdiction *ratione temporis* and falls accordingly within Article 190.2(b) PILA*"⁶⁴. However, it has also stated that the CAS appeal procedure cannot be equated to a "*usual or typical arbitration, finding its source in a contractual relationship and featuring an arbitration clause whose temporal effectiveness must be ascertained*" because such CAS procedure constitutes an "*atypical arbitration [...] in which the jurisdiction of the arbitral tribunal arises by reference to the statutes of a sport federation providing for arbitration in disciplinary matters*"⁶⁵.

The Federal Tribunal has specified that it finds "prima facie convincing"⁶⁶ the scholarly opinion in support of considering the time limit for CAS appeals as a peremptory time limit, which, if not complied with, results in the inadmissibility of the appeal rather than in lack of jurisdiction of the CAS, thus being a merits issue and not a jurisdictional one⁶⁷. The Federal Tribunal has remarked that, in addition to the inconvenience caused by the disparity of treatment between athletes, if the belatedness of an appeal resulted in lack of jurisdiction an appellant could simply wait for the expiry of the CAS time limit and then take the matter to the pertinent ordinary court – if the sports organization were based in Switzerland, this could be done pursuant to Article 75 CC –, with the result that a "*party would be in a position to exclude*

56. Federal Tribunal, Judgment 4A_548/2009 of 20 January 2010, *El Haddady I*, at 3.1.

57. Federal Tribunal, Judgment 4A_627/2011 of 8 March 2012, *IIHF*, at 3.1.

58. Federal Tribunal, Judgment 4P.149/2003 of 31 October 2003, *Roux*, at 2.2.

59. Federal Tribunal, Judgment 4A_424/2008 of 22 January 2009, *Azerbaijan Field Hockey*, at 3.3.

60. See CAS Ad Hoc Division OG 2008/001 of 2 August 2008, *Azerbaijan Field Hockey Federation et al. v. Federation Internationale de Hockey (FIH) et al.*; CAS Ad Hoc Division OG 2008/005 of 8 August 2008, at 3.5-3.15, *Azerbaijan Field Hockey Federation et al. v. Federation Internationale de Hockey (FIH) et al.*, at 4.5-4.20.

61. Federal Tribunal, Judgment 4A_424/2008 of 22 January 2009, *Azerbaijan Field Hockey*, at 3.3.

62. Article R49 of the CAS Code so provides: "In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against". Pursuant to Article R32, in CAS proceedings this is the only time-limit that may not be extended.

63. Federal Tribunal, Judgment 4A_488/2011 of 18 June 2012, *Pellizzotti*, at 4.3.1.

64. *Id.*

65. *Id.*

66. *Id.*

67. A. 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, 255.

arbitral jurisdiction simply by doing nothing”⁶⁸.

Therefore, it seems that in case of future challenges based on this point, the Federal Tribunal would probably hold that the expiry of the time limit for the appeal to the CAS is not a jurisdictional issue and is therefore not reviewable under Article 190.2(b) PILA. Nevertheless, the Federal Tribunal has ultimately left the issue open because it has deemed as “*not necessary to issue a definitive decision as to whether or not failure to comply with the time limit affects the jurisdiction of the CAS*”⁶⁹.

C. CAS Arbitration Clauses by Reference

In order for an international arbitral tribunal sitting in Switzerland to have jurisdiction, Article 178.1 PILA requires the existence of an arbitration agreement, and that this agreement be in writing: “*As to form, the arbitration agreement shall be valid if it is made in writing, by telegram, telex, telecopier, or any other means of communication that establishes the terms of the agreement by a text*”.

In this respect, it should be noted that the Federal Tribunal has adopted a very liberal or “benevolent” approach towards CAS arbitration: “*the Federal Tribunal reviews with ‘benevolence’ the consensual nature of sport arbitration with a view to enhancing the swift resolution of disputes by specialized arbitral tribunals presenting sufficient guarantees of independence and impartiality, such as the CAS*”⁷⁰.

Due to this benevolent approach, the Federal Tribunal has found it appropriate to give considerable weight to the parties’ behaviour when it assesses whether the requirements of Article 178.1 PILA are met, rather than limiting itself to reviewing exclusively whether the parties have met its formal requirements. The Federal Tribunal has indeed stated that “*depending on the circumstances, a given behaviour may substitute for compliance with a formal requirement pursuant to the rules of good faith*”⁷¹.

The Federal Tribunal has manifested this “pro sports arbitration” approach in cases where it had to determine whether a CAS panel had correctly retained jurisdiction on the basis of a so-called arbitration clause *by reference*⁷²: “*The liberalism of its jurisprudence in this respect clearly appears in the flexibility with which it treats*

the issue of the arbitration clause by reference”⁷³.

In fact, according to the Federal Tribunal’s case law, the CAS can retain jurisdiction on the basis of the acceptance by an athlete or a club of a set of sports rules including a general reference to federations’ statutes or regulations that include a CAS arbitration clause. The Federal Tribunal upheld the *Dodó* award,⁷⁴ where the Panel ascertained that since the statutes of the Brazilian Football Confederation (“CBF”), of which the player Ricardo Lucas (nicknamed Dodó) was a member, provided that all athletes had to comply with FIFA rules, the player was bound by the arbitration clause in the FIFA statutes providing that FIFA and WADA could appeal against national federations’ anti-doping decisions⁷⁵.

In upholding the *Dodó* award, the Federal Tribunal said that its decision was in line with “*the case law which holds valid the global reference to an arbitration clause contained in the statutes of an association*”⁷⁶. This opinion is also consistent with the previously decided *Roberts* case, where the Federal Tribunal stated that “*the reference need not explicitly cite the arbitration clause, but may include by way of general reference a document containing such a clause*” and that it “*can also be assumed that a sportsman recognizes the regulations of a federation with which he is familiar if he applies to that federation for a general competition or playing license*”⁷⁷.

Nonetheless, the Federal Tribunal does not seem to accept every kind of arbitration clause by reference. The prime example of this is the Federal Tribunal’s judgment on the appeal against the *Busch* award. In that case, the athlete signed a “Player Entry Form” practically every year in order to partake in ice hockey events organized by the International Ice Hockey Federation or “IIHF” (World Championships, etc.). The form read *inter alia* as follows:

“*I, the undersigned, declare, on my honour that a) I am under the jurisdiction of the National Association I represent. ... 1) I agree to abide by and observe the IIHF Statutes, By-Laws and Regulations (including those relating to Medical Doping Control) and the decisions by the IIHF and the Championship Directorate in all matters including disciplinary measures, not to involve any third party whatsoever outside of the IIHF Championship and/or the Statutes, By-Laws and Regulations and decisions made by the IIHF relating thereto excepting where having exhausted the appeal procedures within the IIHF*

68. Federal Tribunal, Judgment 4A_488/2011 of 18 June 2012, *Pellizzotti*, at 4.3.1.

69. *Id.*

70. Federal Tribunal, Judgment 4A_428/2011 of 13 February 2012, *Wickmayer/Malisse*, at 3.2.3; see also Federal Tribunal, Judgment 4A_246/2011 of 7 November 2011, *Mondialvas*, at 2.2.2.

71. Federal Tribunal, Judgment 4A_428/2011 of 13 February 2012, *Wickmayer/Malisse*, at 3.2.3.

72. Cf. S. NETZLE, *Arbitration Agreements by Reference to Regulations of Sports Organisations*, in *Arbitration of Sports-Related Disputes*, ASA Special Series No. 11, Basel, 1998, 45-58..

73. Federal Tribunal, Judgment 4A_428/2011 of 13 February 2012, *Wickmayer/Malisse*, at 3.2.3.

74. See *supra* note 51.

75. Federal Tribunal, Judgment 4A_460/2008 of 9 January 2009, *Dodó*, at 6.2.

76. *Id.*

77. Federal Tribunal, Judgment 4P.230/2000 of 7 February 2001, *Roberts*, at 2.a.

in which case I undertake to submit any such dispute to the jurisdiction of the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, for definitive and final resolution”⁷⁸.

Due to the broad wording of this CAS arbitration clause, the CAS Panel retained jurisdiction. The Federal Tribunal, however, annulled the CAS award for lack of jurisdiction, holding that, regardless of the wording of the arbitration clause, an athlete signing a Player Entry Form to a specific event may not be assumed to have accepted the jurisdiction of CAS for any sort of disputes “*in general and without connection to the specific championship*”⁷⁹.

Notwithstanding the appearance, the *Dodô* and *Busch* cases are reconcilable. In the *Dodô* case it is clear that the player was registered as a professional athlete with the CBF and that he signed an employment contract with his club where he explicitly declared to know all of the CBF rules, which provided that registered athletes had to comply with all FIFA rules, and pledged to respect them. In turn, the FIFA statutes provided explicitly that WADA and FIFA had the right to appeal to the CAS against national doping decisions. Thus, the Panel found that a valid arbitration clause by reference existed and the Federal Tribunal upheld such opinion.

However, in the *Busch* case, besides that fact that the CAS Panel had based its decision only on the player’s signature of the entry form (which was not sufficient as the doping violation had not occurred at an IIHF event), no employment contract signed by the player or rule of the player’s national federation (the German Ice Hockey Federation or “DEB”) provided that the athlete had to comply with the IIHF rules. In addition, the IIHF had declined jurisdiction and no DEB or IIHF rule provided that WADA or the IIHF had the right to appeal to the CAS against a doping decision adopted by the DEB. These factual differences led the Federal Tribunal to reject the argument that an arbitration clause by reference had been established.

D. Pathological Arbitration Clauses

The jurisprudence of the Federal Tribunal tells us that, while the existence of an arbitration clause is not to be admitted lightly, once that existence is found, the scope of the arbitration clause is to be interpreted liberally⁸⁰. This approach is confirmed by the upholding of a CAS award accepting jurisdiction

on the basis of a so-called pathological arbitration clause: “*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 a dispute to arbitral jurisdiction*”⁸¹.

In that case, opposing a club and a company operating as a football player’s agent in relation the transfer of a football player, the contract between the parties included the following dispute resolution clause: “*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*”⁸². The parties’ attempts to submit their disputes to FIFA or to an arbitrator appointed by the State Court of Zurich had failed because both had declined to entertain jurisdiction, while UEFA did not have any dispute resolution body for players’ transfer-related disputes. When the CAS was eventually seized of the matter, the panel deemed the CAS as the most appropriate institution to deal with the dispute and retained jurisdiction, based on the considerations (i) that the above quoted clause clearly expressed the intention of the parties to exclude the submission of their disputes to a State court and to submit their dispute to an arbitration administered by an institution with a seat in Switzerland and familiar with disputes related to the transfer of football players, and (ii) that the CAS has jurisdiction to hear any appeals filed against the FIFA decisions⁸³.

The Federal Tribunal upheld the CAS award, stating that the arbitration clause was a pathological clause that had “*to be remedied to the extent possible by supplementing the contract on the basis of the hypothetical intent of the parties*” and that the CAS panel had correctly 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*

78. Award CAS 2008/A/1564 of 23 June 2009, *WADA v. IIHF & Busch*, at para. 57.

79. Federal Tribunal, Judgment 4A_358/2009 of 6 November 2009, *Busch*, at 3.2.3.

80. Federal Tribunal, Judgment 4A_103/2011 of 20 September 2011, *AIBA*, at 3.2.1.

81. Federal Tribunal, Judgment 4A_246/2011 of 7 November 2011, at 2.2.3.

82. *Id.*, at A.b.

83. *Id.*, at 2.1.

V. Award Ultra, Extra or Infra Petita

Article 190.2(c) PILA allows a party to challenge an award if it believes that the arbitrators have made an adjudication *ultra* or *extra petita* or *infra petita*. However, until present time, no CAS award has been annulled for this reason.

In order to evaluate this ground for annulment, one must take into account that the holding in the award under scrutiny must only be compared to what the parties have actually requested in their motions (or prayers) for relief and not to the legal arguments that the parties have put forward to support their requests. Indeed, arbitral tribunals may rely on legal arguments different than those submitted by the parties, as explained by the Federal Tribunal: “*In application of the principle ‘jura novit curia’, insofar as a conclusion is sufficiently reasoned, [an arbitral tribunal] does not adjudicate ultra or extra petita if it relies on legal arguments that were not invoked, as in such instance it merely gives a different qualification to the facts of the case*”⁸⁵.

A. Adjudication Ultra Petita or Extra Petita

Therefore, a party wishing to challenge a CAS award for being *ultra petita* (literally, “more than what is asked”) or *extra petita* (“unlike what is asked”) must demonstrate that the CAS panel adjudicated beyond, or differently than, what the parties sought in their motions for relief.

For example, in the *M. v. Football Association of Serbia* case, opposing a coach to the football association which had dismissed him, the Federal Tribunal did not believe that the coach had been awarded more or something else than he had sought⁸⁶. In that case, the CAS panel had awarded to M. the amount (*inter alia*) of EUR 300’000 with interest for a “marketing fee” provided in his contract with the Serbian Football Association,⁸⁷ even though, in its prayers for relief, the coach had requested the CAS panel to grant him “EUR 300’000 in [Serbian] Dinar counter value”⁸⁸. As a consequence, the Serbian Football Association claimed that the award had to be held *ultra petita* and, thus, set aside⁸⁹. However, the Federal Tribunal rejected this claim, reasoning that the CAS panel had correctly considered that the marketing fee, according to the relevant contract, was due and payable in

Euros, thus rendering unnecessary a conversion into the Serbian national currency. Since Mr M. sought the payment of EUR 300’000, the CAS panel did not grant more than what was requested in the prayers for relief when it awarded the Euro amount without the additionally requested conversion⁹⁰.

B. Adjudication Infra Petita

The other form of challenge is called *infra petita* (literally, “less than what is asked”), i.e. when the arbitrators omit, without explanation, to adjudicate a claim included in the parties’ motions for relief.

According the Federal Tribunal, an *infra petita* omission constitutes “*a case of formal denial of justice. It refers to a situation in which the award is incomplete because the arbitral tribunal did not address some of the prayers for relief submitted to it*”⁹¹. However, to avoid an annulment for *infra petita*, essentially, it is sufficient for the arbitral panel to insert in the operative part of the award a catch-all sentence declaring that all other claims submitted by the Parties are dismissed,⁹² even if the award does not address or does not specifically reject a given request submitted by a party (for instance, if the arbitral panel does not award interest even if it was requested by the party seeking compensation). Indeed, the Federal Tribunal has often stated that “*in the framework of international arbitral jurisdiction there is no duty to issue reasons for the decision, which makes it irrelevant that the way the allegedly ignored request was handled would not appear from the reasons of the award*”⁹³.

This should not be confused with the requirement that arbitral panels, in order to respect the parties’ right to be heard, do not omit to consider, or at least to mention, some legal arguments put forward by the parties which are relevant to the outcome of the dispute⁹⁴.

VI. Violation of Due Process

Pursuant to Article 190.2(d), the parties may challenge a CAS award “if the equality of the parties or their right to be heard in an adversarial proceeding was not respected”. In essence, this provision protects the parties’ procedural rights set forth under Article 182.3 PILA by permitting the Federal Tribunal to annul an award if there exists a violation of due process during the arbitral proceedings.

84. *Id.*, at 2.3.3.

85. Federal Tribunal, Judgment AFT 120 II 172, at 175.

86. Federal Tribunal, Judgment 4A_654/2011 of 23 May 2012, *M.* at 5.2.

87. *Id.*, at B.b.

88. *Id.*, at B.a.

89. *Id.*, at 5.1.

90. *Id.*, at 5.2.

91. Federal Tribunal, Judgment 4A_635/2012 of 10 December 2012, at 4.2.

92. *Id.*

93. *Id.*

94. See *infra*, section 6.2.2.

It is important to recall that any allegation of a procedural violation must be raised without delay by the interested party, already during the arbitration proceedings, and that failure to do so would cure the violation and render such grievance unappealable to the Federal Tribunal: “a party which considers to be the victim of a violation of its right to be heard or of any other procedural violation, must raise it immediately in the arbitral proceedings under penalty of forfeiture. It is indeed contrary to good faith to invoke a procedural violation only in the context of the appeal against the arbitral award when the violation could have been raised during the proceedings”⁹⁵.

To date, the Federal Tribunal has set aside three CAS awards (or parts thereof) for having violated due process rights: CAS 2005/A/951 *Cañas v. ATP*,⁹⁶ CAS 2007/A/1371 *Urquijo Goitia v. da Silva Muñoz*,⁹⁷ and CAS 2010/O/2166 *FFE, DSB, SSB, FSU, USCF and Karпов 2010 v. Fédération Internationale des Echecs*.⁹⁸

A. Right to Equal Treatment

One of the fundamental rights guaranteed by article 182.3 PILA and sanctioned by 190.2(d) is the principle of equal treatment. Under this principle, the parties must be given the same opportunity to present their cases during the arbitral proceedings. Moreover, the arbitrators must treat the parties in a similar manner at every step of the proceedings⁹⁹.

However, the arbitrators are not obliged to treat the parties in a strictly identical way. For instance, it sometimes happens in arbitration proceedings that the respondent asks for an extension of its time limit to file a brief while the claimant has already punctually complied with its deadline; to grant the respondent such an extension (thus giving to one party more time than the other for its defence) would not be in itself a violation of the right to equal treatment if all the arbitration rules are respected.

According to the Federal Tribunal, even if one party submits its brief two days after the relevant deadline while the other party has complied with its own deadline, and both briefs are admitted, the arbitral tribunal does not violate the latter party’s right to equal treatment; the issue of unequal treatment could only arise if both parties had failed to abide by

their time limits and only one party’s brief was not admitted¹⁰⁰.

B. Right to Be Heard in Adversarial Proceedings

The second fundamental right that is guaranteed and sanctioned by the PILA is the right to be heard in adversarial proceedings. The requirement that a party be heard gives each party the right to submit evidence and arguments with respect to all the facts which are essential to the judgment, to represent their legal standpoint, to take part in the hearings and to have access to the arbitration file¹⁰¹. The requirement of adversarial proceedings (in French “*principe du contradictoire*”) guarantees that the parties will have the right to examine each others’ evidence and arguments, as well as be given the opportunity to rebut them.

1. Right to submit evidence and arguments

As mentioned, the right to be heard guarantees that each party has the right to submit evidence and arguments; however, this right is not absolute. In particular, the evidence and arguments that a party wishes to present must be submitted in a timely fashion and in accordance with the applicable rules¹⁰².

Indeed, “the parties cannot submit new allegations and evidence at any time and without restriction” and “the fact that, according to Article R56 of the CAS Code, only one set of written submissions is exchanged before the hearing takes place according to Article R57, at which the parties can comment orally, does not constitute a violation of the right to be heard”¹⁰³.

Even if evidence is duly submitted, the arbitral tribunal can refuse to examine said evidence without violating the right to be heard. According to Federal Tribunal jurisprudence, this may be the case¹⁰⁴:

- (a) if the evidence is unfit to prove a fact or to create conviction,
- (b) if the fact to be proven has already been established or is irrelevant,

95. Federal Tribunal, Judgment 4A_530/2011 of 3 October 2011, at 2.2; Federal Tribunal, Judgment 4A_198/2012 of 14 December 2012, at 3.2.1.

96. Annulled by the Federal Tribunal, Judgment 4P.172/2006 of 22 March 2007, *Cañas*.

97. Annulled by the Federal Tribunal, Judgment 4A_400/2008 of 9 February 2009, *Urquijo Goitia*.

98. Annulled by the Federal Tribunal, Judgment 4A_600/2010 of 17 March 2011, *Chess Federations*.

99. Federal Tribunal, Judgment 4A_488/2011 of 18 June 2012, *Pellizzotti*, at 4.4.1.

100. Federal Tribunal, Judgment 4A.244/2007 of 22 January 2008, at 7.1. The Federal Tribunal warns that this is so unless the arbitration rules or the terms of reference expressly provided the sanction of inadmissibility for belated submissions (*Id.* at 6.2).

101. Federal Tribunal, Judgment 4P.105/2006 of 4 August 2006, *Sheikh Hazzza*, at 7.1.

102. Federal Tribunal, Judgment 4A_600/2010 of 17 March 2011, *Chess Federations*, at 4.1.

103. Federal Tribunal, Judgment 4A_612/2009 10 February 2010 *Pechstein*, at 5.3.

104. Federal Tribunal, Judgment 4A_600/2010 of 17 March 2011, *Chess Federations*, at 4.1.

- (c) or, if the arbitral tribunal, pursuant to its prior assessment of the evidence, reaches the conclusion that it is already convinced and that the result of the requested evidentiary measure cannot modify its conviction.

2. Failure to consider relevant allegations or arguments or evidence

According to the Federal Tribunal, the right to be heard “is violated if, as the result of an oversight or misunderstanding, the arbitral tribunal fails to take into consideration the claims, arguments, evidence or offers of evidence presented by either party and relevant to the decision to be taken”¹⁰⁵. In order for a party to raise this claim successfully, it must first establish that the arbitral tribunal failed to “examine certain elements of fact, proof or law that he has properly submitted in support of his conclusions”¹⁰⁶. Second, it must establish that “these elements were likely to influence the outcome of the dispute”¹⁰⁷.

In the *Cañas* case,¹⁰⁸ the athlete dedicated 12 pages of its brief to arguments of Delaware law and of EU and US competition law which, if accepted, would have changed the outcome of the dispute. According to the Federal Tribunal, the arbitrators therefore should have at minimum indicated why they thought that the rules referred to by the appellant were not applicable. If they had purposely disregarded the arguments of the appellant, they should have at least mentioned it, even if only briefly¹⁰⁹.

3. Unpredictable grounds taking the parties by surprise

A CAS panel must render its ruling only on the grounds that the parties had the opportunity to discuss. While the principle *jura novit curia* – more precisely, *jura novit arbiter*¹¹⁰ – “is applicable to arbitration proceedings and obliges [...] arbitrators to apply the law ex officio”¹¹¹ and, thus, permits arbitral tribunals to “adjudicate based on different legal grounds from those submitted by the parties”¹¹², the arbitrators may not take the parties by surprise. In other words, a CAS panel

may not base “its decision on a provision or legal consideration which has not been discussed during the proceedings and which the parties could not have suspected to be relevant”¹¹³.

For example, in the *Urquijo Goitia* case,¹¹⁴ the Panel applied a Swiss statute (the Federal Act on Employment Services and Leasing of Services or “LSE”) to a dispute between a Spanish agent domiciled in Spain and a Brazilian player hired by a Portuguese club. The Federal Tribunal remarked that “none of the Parties invoked the LSE in the arbitration proceedings”, that the LSE applied only in Switzerland and that, given the lack of connection with Switzerland, “the Appellant could not have foreseen that the CAS would base its reasoning on a manifestly inapplicable provision of the LSE”¹¹⁵.

The remedy to a situation like this is for a CAS panel to invite the parties to express their position, at the hearing or through written submissions, on whatever legal issue not previously discussed that the panel plans to address in the award.

4. What the right to be heard does not guarantee

While the right to be heard protects the parties in the situations discussed above, it is important to point out what it does *not* guarantee.

In particular, the right to be heard does not guarantee that a CAS panel’s findings must be correct and not contradict the evidence. In this regard, the Federal Tribunal says that “a finding that is obviously wrong and in contradiction to the records is not in itself sufficient to set aside an arbitral award. The right to be heard does not contain any right to a substantively correct decision”¹¹⁶.

Second, the right to be heard does not entitle the parties to require that an international arbitral award set out full reasons for the decision taken, even though there is a “minimum requirement arising from the principle of the right to be heard (Article 190.2(d) PILA) to review the issues relevant for the decision and to address them”¹¹⁷.

Third, the right to be heard does not require that a hearing be public. Indeed, in the *Pechstein* case, the Federal Tribunal affirmed that, as a rule, international arbitration hearings are not public¹¹⁸. However, the Federal Tribunal acknowledged in *obiter dictum* that

105. Federal Tribunal, Judgment 4P.172/2006 of 22 March 2007, *Cañas*, at 5.2.

106. *Id.*

107. *Id.*

108. CAS 2005/A/951 *Cañas v. ATP*.

109. Federal Tribunal, Judgment 4P.172/2006 of 22 March 2007, *Cañas*, at 5.3.

110. See G. KAUFMANN-KOHLER, «*Jura novit arbiter*» – *Est-ce bien raisonnable?*, in *De Lege Ferenda – Réflexions sur le droit désirable en l’honneur du Professeur Alain Hirsch* (A. Héritier Lachat, L. Hirsch, Eds.), Geneva, 2004, 71-78.

111. Federal Tribunal, Judgment 4P.114/2001 of 19 December 2001, at 3a.

112. Federal Tribunal, Judgment 4A.400/2008 of 9 February 2009, *Urquijo Goitia*, at 3.1.

113. *Id.*

114. CAS 2007/A/1371 *Urquijo Goitia v. da Silva Muniz*.

115. Federal Tribunal, Judgment 4A.400/2008 of 9 February 2009, *Urquijo Goitia*, at 3.2.

116. Federal Tribunal, Judgment 4P.105/2006 of 4 August 2006, *Sheikh Hazzza*, at 7.4.

117. Federal Tribunal, Judgment 4A.162/2011 of 20 July 2011, *Milutinovic*, at 2.1.2.

118. Federal Tribunal, Judgment 4A.612/2009 of 10 February 2010 *Pechstein*, at 4.1.

public hearings might sometimes be desirable in sports arbitration: “in view of the outstanding significance of the CAS in the field of sport, it would be desirable for a public hearing to be held on request by the athlete concerned with a view to the trust in the independence and fairness of the decision making process”¹¹⁹. It is probable that the Federal Tribunal did not realize what this could mean in practice. Indeed, in sensitive CAS cases a public hearing might pose serious security problems in consideration of the fact that many parties to CAS cases are clubs or athletes with plenty of supporters, and arbitrators do not dispose of bailiffs or guards for maintaining order and security in the courtroom. It is suggested that such *obiter dictum* be quickly forsaken and forgotten by the Federal Tribunal, unless and until the European Court of Human Rights decides otherwise (as the lack of a public hearing in CAS proceedings is one of the issues that Ms Pechstein has raised before the European Court, arguing that this is incompatible with Article 6.1 of the European Convention on Human Rights)¹²⁰.

VII. Violation of Public Policy

Finally, Article 190.2(e) PILA requires the Federal Tribunal to annul an international arbitral award if it is incompatible with “public policy”, which must be distinguished between “procedural public policy” and “substantive public policy”. So far, the Federal Tribunal has annulled two CAS awards for having violated public policy: CAS 2009/A/1765 *Benfica Lisboa v. Atlético Madrid & FIFA*,¹²¹ and CAS 2010/A/2261-2263 *Matuzalem & Real Zaragoza v. FIFA*.¹²² They are both historical judgments because, after the PILA came into force in 1989, it was the first time that the Federal Tribunal set aside an international arbitral award for a violation of, respectively, procedural public policy (the *Atlético/Benfica* case) or substantive public policy (the *Matuzalem* case).

According to the Federal Tribunal, the notion of public policy (in French “*ordre public*”) has a transnational character, although filtered through the values and sensibility of Swiss judges¹²³.

Indeed, on the one hand the public policy limitation extends beyond the boundaries of national legal systems because “it is a safety valve helping to preserve

the fundamental rules of which, ideally, every State should ensure that they are respected, whilst, if necessary, sanctioning an award, however consistent with applicable procedural and material laws it may otherwise be”¹²⁴.

On the other hand, the public policy limitation has necessarily a Swiss component because it must be applied by a “*Swiss judge, who does not live in a no man’s land but in a country attached to a given civilisation where certain values are privileged as opposed to others, is led to identify these principles with his own sensitivity and on the basis of the essential values shared by this civilisation*”¹²⁵.

Therefore, a CAS award may end up being incompatible with public policy whenever it violates the essential and widely recognized values which, according to conceptions prevailing in Switzerland, should constitute the foundation of all legal systems.¹²⁶ The concrete application of the above principles by arbitrators sitting in Switzerland and deliberating an award is all but easy. In fact, the Federal Tribunal has warned on more than one occasion that public policy “is an undetermined legal concept, which is difficult to assess and which hardly lends itself to a definition by rule of thumb” and that the “essence, the nature and the boundaries of public policy remain fleeting”, possibly “due to its excessive generality”¹²⁷.

A. Procedural Public Policy

Procedural public policy is an alternative guarantee that may be invoked when none of the other grounds set forth in Article 190.2 PILA comes into play. In other words, this ground for annulment essentially targets procedural violations which the legislator did not have in mind and did not explicitly mention when it adopted Article 190.2 PILA¹²⁸. According to the Federal Tribunal “procedural public policy is breached in case of violation of fundamental and generally recognized procedural principles, the disregard of which contradicts the sense of justice in an intolerable way, so that the decision appears absolutely incompatible with the values and legal system of a state ruled by laws”¹²⁹.

For example, for an arbitral tribunal to disregard *res judicata* and adjudicate in further arbitral proceedings a claim that had already been adjudicated upon by the same or another arbitral tribunal, or by a State court, is a clear violation of procedural public policy, because

119. *Id.*

120. European Court of Human Rights, Application no. 67474/10, *Claudia Pechstein v. Switzerland*, filed on 11 November 2010 and still pending.

121. Annulled by the Federal Tribunal, Judgment 4A_490/2009 of 13 April 2010, *Atlético/Benfica*.

122. Annulled by Federal Tribunal, Judgment 4A_558/20111 of 27 March 2012, *Matuzalem*.

123. Federal Tribunal, Judgment 4P.278/2005 of 8 March 2006, ATF 132 III 389, *Tensacciai*, at 2.2.2.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*, at 2.1.

128. Federal Tribunal, Judgment 4A_488/20111 of 18 June 2012, *Pelligotti*, at 4.5.

129. Federal Tribunal, Judgment 4A_490/2009 of 13 April 2010, *Atlético/Benfica*, at 2.1.

it disregards the conclusive and preclusive effects of *res judicata*¹³⁰. It should be noted, however, that “*res indicata* is limited to the holding of the judgment [and] does not extend to its reasons”,¹³¹ as the reasons are only relevant to clarify the holding¹³². The *Atlético/Benfica* award¹³³ was set aside by the Federal Tribunal because the CAS panel disregarded a previous judgment rendered by the Zurich Commercial Court on the same matter on an application filed pursuant to Article 75 CC. The Federal Tribunal considered that, although the parties of the CAS case did not exactly coincide with those of the Zurich case (to which the Portuguese club Benfica was not a party), decisions rendered in Article 75 CC cases have *erga omnes* value for all association members and thus preclude any association member to litigate the matter again in further arbitral or State proceedings¹³⁴.

B. Substantive Public Policy

An award may also violate substantive public policy. Such a violation occurs when the award “*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*”¹³⁵.

The Federal Tribunal routinely lists as principles of substantive public policy “*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 individuals lacking the legal capacity to act*”¹³⁶. However, this is not an exhaustive list¹³⁷. For example, there can nowadays be no question that an arbitral award enforcing a contract promising a bribe would be contrary to public policy and would, thus, be annulled by the Federal Tribunal¹³⁸.

As another example, an arbitral award violating Articles 27 and 28 CC – provisions which protect personality rights, i.e. “*all of the essential values of an*

individual that are inherent to him by his mere existence and may be subject to attack”¹³⁹ – is certainly in breach of substantive public policy. Indeed, in the *Matuzalem* case the Federal Tribunal set aside the CAS award¹⁴⁰ for breach of substantive public policy, because it considered that the sanction imposed on the player by FIFA and upheld by the CAS, consisting in an unlimited ban for not having paid compensation to his former club, was in violation of the prohibition against excessive commitments set forth by Article 27.2 CC¹⁴¹. According to the Federal Tribunal, a sanction banning worldwide a player from all professional activities in connection with football for an unlimited period of time, until he could pay a huge amount of damages (more than 11 million Euros plus 5% yearly interest), determines a violation of his personality rights and, thus, a breach of substantive public policy because, instead of promoting compliance with the decision, the sanction would actually deprive him forever of the possibility to earn enough money to enable him to pay his debt¹⁴².

Some caveat is necessary with regard to the principle *pacta sunt servanda*, which the Federal Tribunal has acknowledged as being part of substantive public policy. According to the Federal Tribunal, such principle is not violated if the arbitral tribunal’s findings rest upon an erroneous interpretation of a contract: “*The principle of pacta sunt servanda [...] is violated only when the arbitrator refuses to apply a contractual clause after finding that it is binding or, conversely, when he orders the party to abide by a clause which he found inapplicable. In other words, the arbitral tribunal must have applied or refused to apply a contractual provision in a way that contradicts the results of its own interpretation as to the existence and/or the contents of the legal act in dispute. However, neither the process of interpreting the contractual agreements nor its results fall within the scope of application of the principle of contractual trust – and, thus, within Article 190.2(e) PILA – with the consequence that they escape the review of the Federal Tribunal. It has also been stated several times that almost all legal issues relating to a breach of contract are outside the scope of protection of the principle of pacta sunt servanda*”¹⁴³.

130. Cf. INTERNATIONAL LAW ASSOCIATION, *Final Report on Res Judicata and Arbitration*, Report of the ILA Seventy-First Conference, Toronto, 2006, International Commercial Arbitration Committee, in www.ila-bq.org/en/committees/index.cfm/cid/19.

131. Federal Tribunal, Judgment 4A_490/2009 of 13 April 2010, *Atlético/Benfica*, at 2.1.

132. *Id.*

133. CAS 2009/A/1765 *Benfica Lisboa v. Atlético Madrid & FIFA*.

134. Federal Tribunal, Judgment 4A_490/2009 of 13 April 2010, *Atlético/Benfica*, at 2.2.2.

135. Federal Tribunal, Judgment 4A_558/2011 of 27 March 2012, *Matuzalem*, at 4.1.

136. *Id.*

137. Federal Tribunal, Judgment 4A_458/2009 of 10 June 2010, at 4.1.

138. Federal Tribunal, Judgment 4P_208/2004 of 14 December 2004, at 6.1. See A.T. MARTIN, *International Arbitration and Corruption: An Evolving Standard*, in *Transnational Dispute Management*, 2004, vol. I, no. 2, 1-55, at 4-6.

139. Federal Tribunal, Judgment 5C_248/2006 of 23 August 2007, ATF 134 III 193, *Schaffli/Zöllig*, at 4.5. More precisely, Article 27 CC protects the personality from excessive contractual duties and Article 28 CC from illegal infringements by another party. Article 27 CC so provides: “1 No person may, wholly or in part, renounce his or her legal capacity or his or her capacity to act. 2 No person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals”. Article 28 CC reads as follows: “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”.

140. CAS 2010/A/2261-2263 *Matuzalem & Real Zaragoza v. FIFA*.

141. Federal Tribunal, Judgment 4A_558/2011 of 27 March 2012, *Matuzalem*, at 4.3.5.

142. *Id.* at 4.3.4.

143. Federal Tribunal, Judgment 4A_4/2010 of 10 March 2010, at 3.1; reprinted in *ASA Bulletin*, vol. 28, 2010, 848; see also Federal Tribunal,

Given the above restrictive case law of the Federal Tribunal, it is safe to say that any attempt to challenge a CAS award based on the violation of *pacta sunt servanda* is very unlikely to succeed.

VIII. Concluding Remarks

In the last years, the Federal Tribunal has been carefully scrutinizing many international arbitral awards rendered by CAS panels and, so far, has set aside eight awards¹⁴⁴. Considering that the number of challenges against CAS awards has increased exponentially, to the point that “*almost half of the Supreme Court’s case load relating to international arbitration now concerns CAS awards*”,¹⁴⁵ the number of annulled CAS awards is statistically aligned with that of annulled awards resulting from commercial arbitration¹⁴⁶.

In view of that, there does not seem to be a problem with the quality of CAS awards. However, as there is always room for improvement, all CAS arbitrators should make an extra effort to render awards of the highest quality and, in particular, should read carefully the jurisprudence of the Federal Tribunal to avoid issuing awards that could be later set aside.

On the other hand, despite the few CAS awards that were set aside, parties and their counsel should also read carefully the Federal Tribunal’s jurisprudence and be aware that the chances of winning a challenge against a CAS award are quite limited, while the costs are not negligible.

Certainly, the supervision of the Federal Tribunal guarantees a sort of safety valve that can safeguard the basic rights of the parties and, in particular, can operate as a deterrent to unsound procedural conduct by CAS arbitrators. Interestingly, given the resort of some athletes to the European Commission for an alleged violation of EU competition law,¹⁴⁷ and of some others to the European Court of Human Rights for an alleged violation of their human rights,¹⁴⁸ one might argue that there are even further safety valves for CAS proceedings.

Judgment 4A_176/2008 of 23 September 2008, *Bouza/Lavalle*, at 5.2.

144. See *supra* notes 47, 48, 49, 50, 96, 97, 98, 121 and 122.

145. A. RIGOZZI, *Challenging Awards of the Court of Arbitration for Sport*, *supra* note 1, at 1.

146. See H. STUTZER, M. BÖSCH, *Federal Supreme Court overturns a CAS Award for lack of jurisdiction – has the CAS a quality issue? No!*, in *Arbitration Newsletter Switzerland*, 3 April 2013, in

147. See, e.g., the *Meca Medina* case; cf. M. COCCIA, *Applicable law in CAS proceedings: what to do with EU law?*, in *Sport Governance, Football Disputes, Doping and CAS Arbitration* (M. Bernasconi, A. Rigozzi, Eds.), Berne, 2009, 69, at 75-85; R. SUBIOTTO, *How a Lack of Analytical Rigour has Resulted in an Overbroad Application of EC Competition Law in the Sports Sector*, in *International Sports Law Review*, 2009, vol. 9, no. 2, 21-29.

148. See *supra* footnote 120 and corresponding text.

CAS jurisprudence related to the elimination or reduction of the period of ineligibility for specified substances

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I. Introduction

This paper deals with the jurisprudence of the Court of Arbitration for Sports (CAS) related to the elimination or reduction of the period of ineligibility for Specified Substances.

The World Anti-Doping Code (WADAC) whose purpose is notably to ensure harmonization, coordination and effective anti-doping programs at the international and national level has established as a rule that it is the primary duty of an athlete to assume responsibility for any prohibited substance present in his sample (art 2.1.1). In this respect, WADAC underlines that as long as a prohibited substance has been found in an Athlete's sample (presence of a prohibited substance), the violation occurs whether or not the Athlete intentionally used a prohibited substance or was negligent or otherwise at fault creating therefore a strict liability rule. However, whereas the determination of the occurrence of an anti-doping rule violation is based on strict liability,

the imposition of a fixed period of ineligibility is not automatic.

In principle, WADAC imposes a two-year period of ineligibility for presence, use or attempted use or possession of Prohibited Substances and Prohibited Methods (Art. 10.2), unless the conditions for eliminating or reducing the period of ineligibility are met. In this respect, WADAC provides for the elimination or reduction of the period of ineligibility based on exceptional circumstances (Art 10.5). Art. 10.5 allows a reduction of the Art. 10.2 two-year ban for a first offence if the athlete can establish how the substance entered his system and that his ingestion was caused by No Significant Fault or Negligence. In that case, the Panel can reduce an athlete's sanction from two years to 12 to 24 months. WADAC also provides for the elimination or reduction of the period of ineligibility for Specified substances under Specific Circumstances (Art. 10.4).

Article 10.4 WADAC, states:

“10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

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”.

Art. 10.4 WADAC was incorporated in the 2009 amendment of the Code in order to introduce some flexibility in the application of the sanctions. The idea is to find a balance between inflexible sanctions related to violations involving prohibited methods and prohibited substances other than specified substances (i.e. steroids or hormones) and more flexible sanctions related to violations involving specified substances and taking into account the notion of intent of the athlete to enhance his/her sport performance and the circumstances of the case¹.

In any event, Art. 10.4 WADAC will only be applicable where the Adverse Analytical Finding (AAF) is related to a Specified Substance. In addition, two conditions must be satisfied to allow for the possibility of elimination or reduction of the period of ineligibility. The first condition that the athlete must satisfy is whether he can establish how the specified substance got into his system. The second condition is whether the athlete can establish that such specified substance was not intended to enhance his sport performance. It is only if those conditions are satisfied that the panel has the discretion to reduce the sanction from

1. The commentary to Art. 4.2.2 WADA Code states:

“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. [...]”.

the two-year period based upon the athlete's degree of fault.

II. Conditions to benefit from a reduced sanction

A. The Adverse Analytical Finding is related to a Specified Substance

The World Anti-Doping Agency (WADA) is responsible for the preparation and publication of the prohibited list which is an International Standard identifying substances and methods prohibited in-competition, out-of-competition and in particular sports. The list is updated every year.

According to Art. 4.2.2 WADAC “Specified Substances”:

“For purposes of the application of [Sanctions on Individuals], all Prohibited substances shall be ‘Specified Substances’ except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List. Prohibited Method shall not be Specified Substances”².

The commentary to Article 10.4 of WADAC underlines the particularity of Specified as compared to Prohibited Substances. *“Specified Substances are not necessarily less serious agents for purposes of sports doping than other Prohibited Substances”*. Their use can indeed lead to a two-year period of ineligibility or even to a four-year period of ineligibility in case of aggravating circumstances (Art. 10.6 WADAC) if the athlete concerned cannot satisfy the conditions justifying elimination or reduction of the period of ineligibility. However the commentary emphasizes that *“there is a greater likelihood that Specified Substances as opposed to other Prohibited Substances, could be susceptible to a credible non-doping explanation”*. In principle, in relation to specified substances there is a certain general risk in day to day life that these substances are taken inadvertently by an athlete. The question is what happens if the risk at stake is not a “general” but a very specific one that the athlete has deliberately chosen to take.

As according to the Prohibited List, Specified Substances are forbidden in-competition only, it is in principle legal to take a Specified Substance out of competition, for example during training, provided

2. Furthermore, pursuant to the note on cover page of the 2013 Prohibited List:

“In accordance with Article 4.2.2 of the World Anti-Doping Code, all Prohibited Substances shall be considered as “Specified Substances” except Substances in classes S1 [Anabolic Agents], S2 [Peptides hormones, Growth factors and related substances], S4.4 [Agents modifying myostatin function(s) including, but not limited, to: myostatin inhibitors], S4.5 [Metabolic modulator], S6.a [Non-Specified Stimulants], and Prohibited Methods M1, M2 and M3”.

it is not aimed at enhancing sports performance. The question remains however whether Specified Substances can be lawfully used to enhance the intensity of training, which indirectly will enhance performance in some future competition. According to the commentary to Article 10.4 WADAC providing a non-exhaustive list of examples of the type of objective circumstances which might corroborate an athlete's non performance-enhancing intent, "*the fact that the nature of the Specified Substance or the timing of the ingestion would not have been beneficial to the athlete*" is relevant.

B. Establishment of the Route of Ingestion of the Substance

1. Standard of Proof: balance of probabilities

Regarding the first condition, the commentary to Article 10.4 WADAC provides that "*the Athlete may establish how the Specified Substance entered the body by a balance of probability*". A panel should therefore find the explanation of an Athlete about the presence of a Specified Substance simply more probable than not which, in term of percentage means that the Panel is satisfied that there is a 51% chance of it having occurred³.

In this regard, the Swiss Federal Tribunal had the opportunity to state that there is nothing unsustainable in imposing to a rider seeking to obtain elimination or reduction of the period of ineligibility the duty to establish how the forbidden substance entered his body. If the athlete only had to plead his ignorance to reach this result, the fight against doping would be singularly complicated. Besides, it is unclear how a rider can establish his lack of negligence or of significant negligence if he is not able to demonstrate how the prohibited substance entered his body (free translation)⁴.

The requirement related to the establishment by the athlete of how the specified substance entered his/her body is therefore *prima facie* proportionate⁵.

3. See CAS 2009/A/1926 International Tennis Federation (ITF) v. Richard Gasquet & CAS 2009/A/1930 World Anti-Doping Agency (WADA) v. ITF & Richard Gasquet, award of 17 December 2009, para. 5.9.

4. A cet égard, le Tribunal fédéral suisse a eu l'occasion d'exposer qu'il n'y avait rien d'insoutenable à imposer au coureur cycliste qui veut obtenir une suppression ou une réduction de la peine disciplinaire l'obligation de démontrer comment la substance interdite s'est retrouvée dans son organisme. S'il suffisait à l'intéressé de plaider son ignorance à ce sujet pour parvenir à ce résultat, la lutte contre le fléau du dopage s'en trouverait singulièrement compliquée. On ne voit d'ailleurs pas très bien comment un coureur cycliste pourrait démontrer son absence de négligence ou de négligence significative s'il n'est pas en mesure d'établir de quelle manière la substance interdite s'est retrouvée dans son organisme (Arrêt du Tribunal fédéral du 10 janvier 2007, 4P.148/2006, consid. 7.3.1).

5. CAS 2010/A/2230 International Wheelchair Basketball Federation v. UK Anti-Doping & Simon Gibbs, award of 22 February 2011, para.

Any admissible and relevant evidence can be adduced and depending on the circumstances, a single item could suffice.

2. CAS jurisprudence

In *Kolobnev*, as a result of an Adverse Analytical Finding (AAF) during the Tour de France 2011, the athlete was found responsible for an anti-doping rule violation ("*Presence of a Prohibited Substance or its Metabolites or Markers in a Rider's bodily Specimen*") under Art. 21.1 UCI Anti-Doping Rules (ADR). On the basis of the evidence presented before the Anti-Doping Commission and in the course of the arbitration, the Panel determined that the athlete established how hydrochlorothiazide also referred to as "HCT", a prohibited Specified Substance in class S.5 (diuretics and other masking agents) of the 2011 WADA list of prohibited substances entered his body. The Panel considered that the circumstances lead to conclude that, by a balance of probability, the use of the Product "*Natural kapillyaroprotector*" was an explanation for the presence of HCT, in the athlete's body more probable than not⁶.

In *Berrios*, the explanation of the athlete, an international level volleyball player, as to how the Specified Substance entered his body was simply not contested. In May 2010, Gregory Berrios was subject to doping control while he was competing with the Puerto Rico national volleyball team on the 2010 V Men's Pan American Cup held in San Juan, Puerto Rico. The AAF revealed the presence of Sibutramine, a Specified Substance and an appetite suppressant, available by prescription only. Berrios explained that he proceeded to buy a product named "Fat Loss Slimming Beauty" from an up-market local natural products store named "Freshmart" in order to lose weight⁷.

Likewise, in *Fauconnet*, it is uncontested that the athlete established how the Specified Substance entered his body⁸. He explained that he used Rhinofluimucil (the "Product") in order to solve his breathing problems

11.12 "In the Sole Arbitrator's view, the requirement that Condition (i) be satisfied is *prima facie* proportionate. To permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination – two prevalent explanations volunteered by athletes for such presence – do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body. [...] the possible unfairness to such athletes is outweighed by unfairness to all athletes if preferred, but maybe untruthful, explanations of spiking are too readily accepted".

6. CAS 2011/A/2645 Union Cycliste Internationale (UCI) v. Alexander Kolobnev & Russian Cycling Federation, para. 72 ii – 75.

7. CAS 2010/A/2229 WADA v. FIVB & Berrios, award of 28 April 2011, para. 83.

8. CAS 2011/A/2615 Thibaut Fauconnet v. International Skating Union, CAS 2011/A/2618 International Skating Union v. Thibaut Fauconnet, award of 19 April 2012, para. 82.

due to a cold and recognized that he should have known that the Product contained Tuaminoheptane, a Specified Substance, prohibited according to the Prohibited List⁹.

In *Armstrong*, the Panel found by a balance of probability, and even to its comfortable satisfaction, that the athlete, an international curler, established how Tamoxifen, a Specified Substance, entered his body: “as a result of the stress in connection with his move to Ontario he failed to separate his late wife’s pills from his own which were equal in shape and size. He stored both pills in one container, and considerable time later when he was running out of his own medicine he used such container and accidentally took one pill of Tamoxifen instead of his own ASA 81 mg”¹⁰.

On the contrary, in *Gibbs*, the Sole Arbitrator found that the athlete, a wheelchair basketball player, did not succeed in establishing how mephedrone, a Specified Substance, entered his body. The explanation of the athlete related to the presence of mephedrone in his system was that it was the result of another person having “spiked” his drinks with a product which consisted of, or contained, mephedrone. This explanation did not convince the Sole Arbitrator. The athlete was indeed unable to provide any evidence of his own in support of this claim. Given the athlete’s basic personal duty to ensure that no prohibited substances enters his body, the Sole Arbitrator found it too easy to assert that the presence of a prohibited substance was due to the spiking of a drink without producing any corroborating evidence. A mere denial is not sufficient to establish the presence of the substance¹¹.

According to a well established jurisprudence, if the athlete cannot establish how the specified substance entered his or her body, he/she won’t be able to establish that it was not intended to enhance his or her performance¹².

9. Id. at para. 6, see also TAS 2011/A/2616 UCI c. Oscar Sevilla Riviera & RFEC, award of 15 May 2012, para. 76 & 21.

10. CAS 2012/A/2756 James Armstrong v. World Curling Federation, award of 21 September 2012, para. 8.24, 8.26.

11. Op. cit. footnote 2, para. 12.3 ff.

12. ITF v Beck, Anti-Doping Tribunal decision dated 13 February 2006, (where the athlete alleged his drink must have been spiked by a colleague who was jealous of his girlfriend). “Obviously this precondition to establishing no fault or no significant fault must be applied quite strictly, since if the manner in which a substance entered an athlete’s system is unknown or unclear it is logically difficult to determine whether the athlete has taken precautions in attempting to prevent any such occurrence”). ITF v Beck, Anti-Doping Tribunal decision dated 13 February 2006.

See also CAS 2006/A/1032 Karatantcheva v ITF, Award of 3 July 2005, para 117: “The provision thus ensures that mere protestations of innocence, and disavowal of motive or opportunity, by a player, however persuasively asserted, will not serve to engage these provisions if there remains any doubt as to how the prohibited substance entered his body. This provision is necessary to ensure that the fundamental principle that the player is responsible for ensuring that no prohibited substance enters his body is not undermined by an application of the mitigating provisions in the normal run of cases”.

C. Establishment of the absence of intent to enhance sport performance

1. Standard of Proof: comfortable satisfaction of the hearing panel

According to Article 10.4 WADAC, the absence of intent to enhance sport performance must be established to the comfortable satisfaction of the hearing panel. In this respect, the athlete must produce corroborating evidence. A mere assertion won’t suffice. This standard of proof is greater than a mere balance of probabilities but less than proof beyond a reasonable doubt.

The commentary to Article 10.4 WADAC provides a non-exhaustive list of examples of the type of objective circumstances which might corroborate an athlete’s non performance-enhancing intent. These circumstances include “the fact that the nature of the Specified Substance or the timing of the ingestion would not have been beneficial to the athlete, the athlete’s open use or disclosure of his use of the Specified Substance, and a contemporaneous medical records file substantiating the non sport-related prescription of the Specified Substance. Generally, the greater the potential performance-enhancing benefit, the higher the burden on the athlete to prove lack of an intent to enhance sport performance”¹³.

2. Interpretation of the Rule

Practically, the question is what must the athlete show to prove that he did not intend to enhance his sport performance and what is meant by enhancement of sport performance.

2.1 Oliveira approach

A first CAS jurisprudential approach was introduced by the case *Oliveira*. In that particular case, *Oliveira* admitted having taken Hyperdrive 3.0+, marketed as a stimulant, in order to combat fatigue caused by medications to treat her allergies and to maintain her stamina during cycling training sessions and competitions. Her in-competition sample tested positive for oxilofrine, a Specified Substance at 2009 Giro del Trentino cycling race. Proceeding on the basis that the athlete did not know this product contained methylsynephrine until after her urine sample tested positive for the substance, the Panel found that the athlete “did not intend to enhance her sport performance by unknowingly taking [methylsynephrine]”¹⁴.

13. Commentary to Art. 10.4;

14. CAS 2010/A/2107 Oliveira v. USADA, para, 9.18.

Under this approach, an athlete only needs to prove that he/she did not take the Specified Substance with an intent to enhance sport performance. This means that the athlete does not need to prove that he/she did not take the product -for example a nutritional supplement- with the intent to enhance sport performance. Therefore, an athlete could prove his absence of intent to enhance sport performance, by showing that he was not aware that the product he ingested contained a specified substance. This approach is based on a reading of the Second Condition -i.e. the production of corroborating evidence, in addition to the athlete's own statement, to establish the absence of intent to enhance sport performance- which differentiates between the specified substance and a product in which it may be contained. It is only the intent linked with the use of the Specified Substance which matters within this interpretation. The panel in that particular case goes on considering that nutritional supplements are generally taken for performance-enhancing purposes but are not *per se* prohibited by WADAC. Pursuant to the panel, if the second condition of Art. 10.4 requested the athlete to prove that he/she did not use the product with the intent to enhance sport performance, Article 10.4 would be inapplicable¹⁵.

The view expressed in *Oliveira* has been followed by other CAS Panels¹⁶.

The CAS panel in *Lapikov* held that Article 10.4 could apply only when an athlete was ignorant that what he did ingest contained a Specified Substance because someone who knowingly took a specified substance accepts, beyond any reasonable doubt, that it may enhance his sport performance. It follows that where the athlete knows that the product he took contained a Specified Substance, the second condition cannot be satisfied by saying that the specified substance was not intended to enhance performance. This approach is more restrictive

15. *Id.*, para. 9.14 “The Panel does not read clause two of Article 10.4 as requiring Oliveira to prove that she did not take the product (i.e., Hyperdrive 3.0+) with the intent to enhance sport performance. If the Panel adopted that construction, an athlete’s usage of nutritional supplements, which are generally taken for performance-enhancing purposes, but which are not *per se* prohibited by the WADC, would render Article 10.4 inapplicable even if the particular supplement that is the source of a positive test result contained only a Specified Substance. Although an athlete assumes the risk that a nutritional supplement may be mislabelled or contaminated and is strictly liable for ingesting any banned substance, Article 10.4 of the WADC distinguishes between specified and prohibited substances for purposes of determining an athlete’s period of ineligibility. Article 10.4 provides a broader range of flexibility (i.e., zero to two years ineligibility) in determining the appropriate sanction for an athlete’s use of a Specified Substance because “there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation.” See Comment to Article 10.4”.

16. See for example CAS 2010/A/2229 WADA v. FIVB & Berrios, award of 28 April 2011, paras. 84 & 85; CAS 2011/A/2645 UCI v. Alexander Kolobnev & RCF, award of 29 February 2012, paras. 81 & 82; CAS 2011/A/2615-2618 Thibaut Fauconnet v. ISU, award of 19 April 2012, paras. 85-87.

than the *Oliveira*’s jurisprudence¹⁷. In this particular case, the panel found that by not checking whether the substance “dimethylamylamine”, found on the Supplement’s box, was the same substance as the substance “dimethylpentylamine”, contained on the 2011 WADA List, “*the athlete took the risk of ingesting a Specified Substance when taking the Supplement and therefore of enhancing his sport performance [...] whether with full intent or per dolus eventualis*”. Moreover, the comfortable satisfaction of the Panel test would have been extremely difficult to meet in light of the mention “*enhance athletic performance*” on the supplement’s box. The panel also stressed that the case of the athlete was different from *Oliveira* and other similar cases where the athletes were able to demonstrate that the ingestion was not intentional and that it was accidental, either due to contamination, wrong labelling, or light degree of negligence.

In *Qerimaj*, the Panel followed *Oliveira* but went further in establishing a distinction between direct and indirect intent. Based on the commentary of Art. 10.4 stating “*Generally, the greater the potential performance-enhancing benefit, the higher the burden on the athlete to prove lack of an intent to enhance sport performance*”, the panel inferred an assumption that there is a sliding scale with regard to the standard of proof in relation to the absence of intent. Pursuant to the panel, the question is whether the mere fact that an athlete is unaware of a specified substance contained in the product suffices to rule out his intent to enhance sport performance. According to the panel, Art.10.4 remains applicable, if the athlete’s behaviour was not reckless, but “only” oblivious. Of course the distinction between indirect intent which would exclude the applicability of Art. 10.4 and the various forms of negligence that allow for the application of Art. 10.4, is difficult to establish in practice. As an initial matter, the panel admitted that the athlete was not aware that a Specified Substance not labelled on the product was actually contained in the supplement he ingested. Therefore, the Athlete had no *direct* intent to enhance his sports performance through the Specified Substance contained in the product. The athlete’s *indirect* intent can only be determined by the surrounding circumstances of the case. In this regard, an athlete who wrongly trusted a personal trainer’s word that a product is “safe” and at the same time lists the supplement on the doping control forms is admitted to have no *indirect* intent. It follows that Art. 10.4 is applicable¹⁸.

17. CAS 2011/A/2677 Dmitry Lapikov v. International Weightlifting Federation (IWF), award of 10 July 2012, para. 59, 61.

18. CAS 2012/A/2822 Qerimaj v. International Weightlifting Federation, award of 12 September 2012, paras. 8.13-8.16.

2.2 Foggo approach

Contrary to the *Oliveira* case, in CAS A2/2011 *Foggo*, the panel found that the mere fact that the athlete did not know that the product contained a specified substance does not itself establish the relevant absence of intent. Moreover, if the athlete believes that the ingestion of the substance will enhance his or her sport performance although the athlete does not know that the substance contains a banned ingredient, Art. 10.4 cannot be satisfied¹⁹.

In *Kutrovsky*, the majority of the Panel adopted the *Foggo* approach. Accordingly, “*an athlete’s knowledge or lack of knowledge that he has ingested a specified substance is relevant to the issue of intent but cannot, pace Oliveira, of itself decide it*”²⁰. Pursuant to the majority of the panel, the reading of the second condition should not differentiate between the Specified Substance and a product in which it may be contained. The specified substance mentioned in the second condition is the same specified substance as the one mentioned in the first condition. This interpretation is confirmed by the language of the article, in particular by the use of the word “such” attached to Specified Substance in the second condition. Precisely, according to the panel, “*the specified substance in the Second Condition refers to the specified substance in the form in which it has been established under the First Condition to enter the athlete’s body [...] It follows that in order to meet the Second Condition the athlete must establish that in taking the specified substance in the form in which he took it, he did not intend to enhance his performance*”. As a consequence, “*the First and Second Conditions must be read together since the Second Condition only falls to be considered if the First Condition is satisfied*”²¹.

In order to facilitate the evaluation of the notion of intent, the CAS panel has established in *Kutrovsky* a classification related to the various state of knowledge of the athlete as to the use of the specified substance. Pursuant to this classification, a first category covers the case of the athlete who has no knowledge that the product he took contained a specified substance (Case A). The cases of contamination and wrong labelling of the product will obviously fall into this category.

19. CAS A2/2011 Kurt Foggo v. National Rugby League, award of May 2011, para.47.

“With respect, we do not agree with the approach taken by the Panel in CAS 2010/A/2107 Flavia Oliveira v. United States Anti-Doping Agency, award dated 6 December 2010. In our view Rule 154 (WADC 10.4) would not be satisfied if an athlete believes that the ingestion of the substance will enhance his or her sport performance although the athlete does not know that the substance contains a banned ingredient. The athlete must demonstrate that the substance “was not intended to enhance” the athlete’s performance. The mere fact that the athlete did not know that the substance contained a prohibited ingredient does not establish absence of intent. We accept the Respondent’s submissions that Oliveira should not be followed”.

20. *Id.*, para. 9.15.

21. *Id.*, para. 9.15.1.

A second category covers the case of the athlete who has no knowledge that the substance, which he did know was contained in the product, was a specified substance (Case B). The third one covers the case of the athlete who knew that the product contained a substance and that it was a specified substance (Case C)²².

In *Kutrovsky*, the panel found that the athlete failed to prove, to its comfortable satisfaction, that he did not intend to enhance his sport performance by taking Jack3d. However, his ignorance that Jack3d contained a specified substance allowed the application of Article 10.5.2 WADAC.

The question of interpretation of the intent to enhance sport performance is a delicate one which has given rise to an evolutionary if not contradictory jurisprudence. In any event, Art. 10.4 will be amended by the next version of WADAC which will enter into force in 2015 (see *Infra* IV).

III. Assessment of the athlete’s degree of fault and appreciation of the sanction

A. Scope of CAS power of review in the exercise of its jurisdiction

According to Art. R57 of the Code of Sports-related Arbitration (CAS Code) “Scope of Panel’s Review – Hearing”:

The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.

[...]

Some principles have been enounced in the CAS jurisprudence with respect to the CAS’ power of review. More specifically, the *dictum* in *Hardy* under which “*the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence (see TAS 2004/A/547, FC Zürich v/ Olympique Club de Kbourigba, §§ 66, 124; CAS 2004/A/690, Hipperdinger v/ ATP Tour, Inc., § 86; CAS 2005/A/830, Squizzato v/ FINA, § 10.26; CAS 2005/C/976 & 986, FIFA & WADA, § 143; 2006/A/1175, Daninte v/ IDSF, § 90; CAS 2007/A/1217, Feyenoord v/ UEFA, § 12.4)*”²³.

The CAS panel in *Kendrick* specified such

22. CAS 2012/A/2804 Dimitar Kutrovsky v. ITF, award of 3 October 2012, para. 9.11.

23. CAS 2009/A/1870 WADA v. Hardy & USADA, award of 21 May 2010, para. 125.

jurisprudence. Accordingly, far from excluding, or limiting, the power of a CAS panel to review the facts and the law involved in the dispute heard pursuant to Article R57 of the Code, only means that a CAS panel “*would not easily ‘tinker’ with a well-reasoned sanction, i.e. to substitute a sanction of 17 or 19 months’ suspension for one of 18*”²⁴.

In light of such jurisprudence, the fact that a Panel might not lightly interfere with a well-reasoned decision, does not mean that there is in principle any inhibition to its power to do so. In other words, CAS panels have full power to review the matter in dispute pursuant to Rule 57 of the Arbitration Code²⁵. This means that CAS panels will examine with full powers what it deems the appropriate sanction to be within the bounds of the Parties’ prayers for relief. Moreover, Article 13.1.1 of the revised WADAC entitled “Scope of review not limited” provides that “[T]he [CAS] scope of review on appeal includes all issues relevant to the matter and is expressly not limited to the issues or scope of review before the initial decision maker”.

B. Principles related to the athlete’s degree of fault

According to paragraph 2 *in fine* of Art. 10.4 “*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 WADAC indicates that “[i]n assessing the Athlete’s or other Person’s degree of fault, the circumstances considered must be specific and relevant to explain the Athlete’s or other Person’s departure from the expected standard of behavior”.

The foregoing commentary goes on to underline that “*the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Athlete 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*”.

In *Kolobnev* the panel considered that the athlete’s fault has to be measured by the Panel, on the basis of specific circumstances, against the fundamental duty he had to do everything in his power to avoid ingesting any prohibited substance, weighing the circumstances adverse and the circumstances

favourable to his position²⁶.

Pursuant to CAS jurisprudence, in determining as an international appellate body the correct and proportionate sanction, CAS panels must also seek to preserve the principle of equal treatment of athletes in different sports. Besides, this duty is compliant with WADAC introduction which expressly states that two of its purposes are to promote equality for Athletes worldwide and to ensure harmonization of anti-doping programs²⁷.

In particular, with regard food supplements, a well established CAS jurisprudence stressed the large number of public warnings and internationally published cases on the risks of mislabeling and/or contamination of nutritional supplements²⁸. In this respect and since the risks linked to food supplements are “*generally known or at least foreseeable, all athletes must exercise reasonable care to ensure a nutrition supplement does not contain a banned substance*”²⁹.

C. Appreciation of the sanction

1. Regular cases

In *Oliveira*, the athlete was ultimately suspended for a period of 18 months. In this regard, the fact that (i) the athlete was an “elite-level” and a professional cyclist (despite this being her first drug test and being new to the sport), (ii) that the athlete failed to carefully check the label of a product she took for a therapeutic purpose, (iii) that the athlete did not list Hyperdrive on her anti-doping control form because she did not believe an over the counter nutritional supplement was a “pharmaceutical drug” she should disclose and (iv) that the athlete did not receive any formal drug education prior to her first in-competition drug test were taken into consideration.

In *Kolobnev*, the athlete was ultimately issued a warning with no period of ineligibility. The panel took into account the fact that the use of the Product was not associated with sporting practice. Even if considered to be a “supplement” and not a medication, its use was based on a medical recommendation linked to a specific pathology which was still valid at the time the athlete purchased and took the product, and was not in any way intended to enhance the sporting performance of the athlete. The product was bought from a reliable drugstore and the label of the product did not contain any warning of the presence of a prohibited substance. As a result, the panel found

24. CAS 2011/A/2518, *Kendrick v. ITF*, award of 10 November 2011, para. 10.7, with reference to CAS 2010/A/2283, *Bucci v. FEI*, para. 14.36.

25. CAS 2011/A/2515 *FINA v. Molina & CBDA*, award of 11 April 2012, para. 68, CAS 2010/A/2229 *WADA v. FIVB & Gregory Berrios*, award of 28 April 2011, paras. 92, 93.

26. TAS 2011/A/2645 *UCI c. Alexander Kolobnev & RCF*, award of 29 February 2012, para. 86.

27. *Id.*, at para. 91, 92.

28. CAS 2005/A/847, *Knauss v. FIS* at para. 13-14.

29. *Id.* CAS 2010/A/2229 at para. 100.

that the sanction of a reprimand was in line with the recent jurisprudence concerning specified substances detected following the use of a “supplement”³⁰.

In *Berrios*, a sanction of twelve months was imposed on the athlete who failed to exercise reasonable care to ensure that a food supplement does not contain a banned substance. The panel found the athlete to be negligent because he had no justification for using the product, had not consulted with a doctor and had not made any inquiry or research, which would have led him to discover the dangers associated with the use of that product³¹.

In *Lapikov*, the athlete was ultimately suspended for a period of 24 months. The Panel took into consideration the fact that there was a large degree of similarity between dimethylamylamine and dimethypentylamine, a named banned substance on the WADA prohibited list, the athlete was a top-level athlete with many years of experience and did not conduct any research on the substance dimethylamylamine, which was listed on the product. If he had, he would have likely learned that the substance was prohibited. Moreover, the mention “enhance athletic performance” on the supplement’s box was also taken into consideration by the Panel.

In *Qerimaj*, the athlete was ultimately suspended for a period of 15 months. The panel took into consideration the fact that the athlete ingested the product based upon assurances of his personal trainer, who he deeply trusted, that the product was acceptable and clean; the associate was neither a doctor nor a pharmacist, and he did not refer to WADA’s list of prohibited substances before advising the athlete. Instead, the associate simply contacted the online store where the product was purchased to ask whether the product was “clean”. The athlete did not get a second opinion from a doctor or pharmacist, despite having access to them and finally, the athlete did not consult his federation or the National Doping Organization of his home country. On the other hand, the panel took note that according to WADA’s 2001 Compliance Report, Albania is a non-compliant state and that witness statements establish that anti-doping has a low priority in Albania.

In the *Armstrong* case (*Supra*), the panel found on the one hand that the athlete’s negligence consisted of the fact that on the occasion of his move to a new residence he stored his own TUE-covered medication in the same bottle as his late wife’s prescription drugs which contained a substance prohibited in sport and which a few months later the athlete accidentally ingested, mistaking them for his own medication. On the other hand, several months had elapsed after the move of the athlete and the death of his wife. The athlete was in a state of emotional stress which led him to ignore the level of care which he would otherwise have observed. Taking into account all of the circumstances mentioned, a period of six months suspension was found proportionate to the Appellant’s degree of fault. According to the panel, this is a case where the absence of intent to enhance performance was obvious since logically the athlete could not have had intent if he did not know he was ingesting the substance.

In *Foggo*, having weighed up the circumstances, the panel imposed a sanction of six months on a professional rugby league player who purchased and used a supplement called “Jack3d”, which resulted in an adverse analytical finding for MHA, a Specified Substance. The use of pre-workout supplements was encouraged by the athlete’s club. The athlete himself had received very limited formal anti-doping education. However, the athlete had been assured by the store owner that the product was clean and had consulted his conditioning coach and undertaken research on the internet in respect of the ingredients of Jack3d which had not resulted in the identification of any specified substances. Moreover, the athlete had not sought or received medical advice³².

In *Kutrovsky*, the panel found that the athlete failed to establish to its comfortable satisfaction the absence of an intent to enhance his sport performance. However, his ignorance that Jack3d contained a specified substance allowed the application of Article 10.5.2 WADC (No Significant Fault). In light of Article 10.5.2 providing that only a case involving the least significant amount of fault will result in a 12 months period of ineligibility, the panel considered that a 15 months suspension was justified.

2. Cases involving minors

In principle, age and lack of experience are relevant factors to take into consideration to assess the athlete’s fault. In this regard, the CAS has examined cases involving minors using specified substances on several occasions.

30. CAS 2011/A/2645 UCI v. Alexander Kolobnev & RCF, award of 29 February 2012, paras. 91 & 92. See also CAS 2011/A/2495/2496/2497/2498 Augusto Cielo & Co v. CBDA, award of 19 July 2011: In Cielo, the CAS Panel confirmed the sanction of a warning based on the fact that the athlete had consulted a sports medicine specialist with respect to the use of the supplement which had been bought from a reliable pharmacy. The medical prescription of caffeine (which turned out to be contaminated) was justified by the need to overcome tiredness or fatigue associated with either the fact of taking tablets to help sleep or the fact of having to compete in multiple races during a single event. The explanation involved medical reasons linked to the sporting activity of the athlete.

31. *Id* CAS 2010/A/2229 WADA v. FIVB & Gregory Berrios, award of 28 April 2011.

32. *Id* CAS A2/2011 Kurt Foggo v. National Rugby League, award of May 2011.

The *Zyberi* case involved a Swiss athlete still at school age when he received what he believed to be grape sugar, in fact Nikethamide, a Specified Stimulant. He trusted his coach and obviously was unaware of what was given to him. The applicability of Art. 10.4 of the Swiss Statute on doping 2009 of the Swiss Olympic Association (the Statute) which follows WADAC was not contested. In this respect, the explanation of the athlete as to how the Specified Substance entered his body was sufficiently documented as well as the lack of intent of the athlete to enhance his performance. Moreover, according to the commentary of the Statute, youth and lack of experience are relevant factors to take into consideration to assess the athlete's fault in particular with respect to Art. 10.4 of the Statutes. Taking into account that the athlete was still at compulsory school age when he was tested, that he was thus not only minor but also young enough to have a relationship of submission towards adults, in this case his coach, who was also trusted completely by his own parents, the athlete's fault could only be considered as very light. As a result a reprimand and no suspension were found justified³³.

In *Melnichenko*, the panel found that the athlete, a gymnast, should be treated the same way as an adult in respect of the violation -presence of furosemide, a prohibited specified substance- as an anti-doping rule violation is a serious offence for an athlete who bears the ultimate responsibility. Nevertheless, the age of the athlete, 15 at the time of the offence, and the fact that she asked the doctor whether the medication prescribed could lead to a violation, must be considered in the context of the exceptional and specific circumstances and particularly when considering an appropriate sanction for the violation. Youth and lack of experience are indeed explicitly enounced in the FIG Rules as relevant elements to be taken into account in assessing an athlete's fault for a violation under Art. 10.4. The Panel found therefore that it was justified for the FIG Disciplinary Commission to reduce the penalty and to exercise its discretion under Art. 10.4 of the FIG Rules, however not to the extent they did. The Panel considered that a suspension of four months instead of two months would better reflect the seriousness of the offense, the fundamental responsibility of the athlete and her young age and lack of experience³⁴.

3. Cases involving multiple infractions

Pursuant to Art. 10.7.4 WADAC entitled "*Additional Rules for Certain Potential Multiple Violations*"

*"For purposes of imposing sanctions under Article 10.7, an anti-doping rule violation will only be considered a second violation if the Anti-Doping Organization can establish that the Athlete or other Person committed the second anti-doping rule violation after the Athlete or other Person received notice pursuant to Article 7 (Results Management), or after the Anti-Doping Organization made reasonable efforts to give notice, of the first anti-doping rule violation; if the Anti-Doping Organization cannot establish this, the violations shall be considered together as one single first violation, and the sanction imposed shall be based on the violation that carries the more severe sanction; however, the occurrence of multiple violations may be considered as a factor in determining aggravating circumstances (Article 10.6).
[...]"*

In this regard, in *Muto*³⁵, the panel considered that certain situations of fact are constituent of aggravating circumstances. Such is the case where the application of procedural constraints albeit understandable, can lead to the impossibility to qualify a second violation in case of recidivism while the reality of a double violation is indisputable. Besides, CAS jurisprudence has validated the use of aggravating circumstances in those circumstances³⁶.

The *Muto* case involved the presence of a forbidden substance in the body (EPO) sanctioned with a 2 year suspension for a first violation and the presence of a Specified Substance (ephedrine) sanctioned by a maximum suspension of 2 years. Both of the athlete's violations were therefore sanctioned by a maximum 2 years suspension.

In principle, where the duration of the suspension can be modulated, as for the presence of a Specified Substance, it has to be determined pursuant to the applicable regulations and to the principle of proportionality taking into account the circumstances of the case.

The panel considered likely that an athlete who has been tested positive twice within a period of fifteen days with two different prohibited substance, one being EPO which targets intentional doping, and the other being a specified substance, has committed doping systemically. However, even if the athlete gave neither explanations nor justification regarding the presence of the prohibited substances, the panel found that the distinction between the categories of substance cannot be erased and the suspension cannot amount to the maximum 4 year suspension

33. TAS 2011/A/2493, *Antidoping Switzerland v. Vaton Zyberi*, award of 29 November 2011 paras 45 – 50.

34. CAS 2011/A/2403 *WADA v. GIG & Anastasia Melnichenko*, award of 25 August 2011 para 7.4 ff.

35. TAS 2011/A/2684 *UCI c. Pasquale Muto & CONI*, award of 14 September 2012 paras 72 & s.

36. CAS 2008/A/1577, award of 15 December 2008 ; CAS 2008/A/1572-1632-1659, award of 13 November 2009; CAS 2009/A/1983, award of 21 July 2010.

which would have constituted the same penalty to sanction two times the presence of forbidden substances. As a result, the panel found a 3 year suspension proportionate.

IV. Amendments provided by the revised 2015 World Anti-Doping Code

The fourth revised 2015 World Anti-Doping Code released on September 2013 will be presented to WADA's Foundation Board in Johannesburg, South Africa in November 2013 for approval and shall come into force on 1 January 2015.

The revised Code provides an increase in the period of ineligibility for classes of substances or agents assumed to be more serious – 4 years of ineligibility instead of 2. This increase is significant. Nevertheless, the sanctions are adjustable. The sanction will be adjusted in consideration of the nature of the prohibited substance, the gravity of the individual fault, the behaviour during the procedure ("prompt admission"), or even the age (minors).

The revised 2015 World Anti-Doping Code (version 4.0) also clarifies the notion of intent. "[T]he term *'intentional'* is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered *'intentional'* if the Athlete or other Person can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance". (Art. 10.2.3).

As a result, in case of intentional violation involving a Specified Substance, the sanction will be more severe than in the actual version of WADAC i.e. four years instead of two years maximum (Art. 10.2.1.2).

However, the revised Art. 10.5.1 entitled "*Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Articles 2.1* (presence of a prohibited substance in an athlete's sample), 2.2 (use or attempted use of a prohibited substance or of a prohibited method), or 2.6 (possession of a prohibited substance or of a prohibited method) provides specific provisions for Specified Substances and for Contaminated Products and allows for reduced sanction where the Athlete can establish No Significant Fault or Negligence. In that case the period of Ineligibility shall be, at a minimum, a reprimand, and at a maximum, two years of

Ineligibility, depending on the Athlete's or other Person's degree of Fault (Art. 10.5.1.1 and 10.5.1.2).

The reduction of the sanction will therefore be based on two factors i.e. the establishment of No Significant Fault or Negligence and the degree of fault of the athlete. In the revised Code, it is no longer necessary for the athlete to establish how the substance entered his body, nor to prove his absence of intent. The consequence will be that the different approaches observed regarding the interpretation of the rule will become obsolete³⁷. However, since the amendments are not effective until 2015, the CAS jurisprudence will continue to guide future panels until the entry into force of the revised WADAC.

Interestingly, the revised Art. 10.5.2 entitled "Other prohibited substances" which is applicable to any anti-doping violations except those where intent is an element (Tampering, trafficking, administration of a prohibited substance to an athlete, complicity) provides for a reduction based on the establishment of No Significant Fault or Negligence and on the degree of fault of the athlete. Here again, there is no need any more for the athlete to establish how the substance entered his body.

37. See *Supra* at II C 2.

Cricket; Match fixing; Full power of review of a CAS Panel and Article 6 of the European Convention on Human Rights; Relation between Article 7.3.2 of the ICC Code and Article R57 of the CAS Code; Breach of Article 2.1.1 of the ICC Code in case of absence of financial gain

Panel:

Mr. Graeme Mew (United Kingdom), President
Mr. Romano F. Subiotto QC (Belgium and United Kingdom)
Mr. James Robert Reid QC (United Kingdom)

Relevant facts

The International Cricket Council (the “ICC”) is the international governing body for cricket. It is responsible for the organisation and governance of cricket’s major international tournaments, including Test Matches. The ICC enforces an Anti-Corruption Code for Players (the “ICC Code”).

Mr Mohammad Asif is a Pakistani national and fast-medium bowler, who played for Pakistan’s international cricket team between 2005 and 2010. Mr Asif was selected to play and did play in a Test Match for Pakistan against England, which took place between August 26 to August 29, 2010 at Lord’s Cricket Ground (the “Lord’s Test”).

In the summer of 2010, Mazhar Mahmood, an undercover reporter for a newspaper, the News of the World (the “NoTW”), posed as Mohsin Khan (“Mr Khan”), a representative of a betting syndicate, in order to befriend Mazhar Majeed, a U.K. national of Pakistani descent and agent to certain Pakistani cricketers (including Mr Salman Butt, then Captain of the Pakistani cricket team).

Messrs Khan and Majeed met on the evening of August 25, 2010 at the Copthorne Tara Hotel in West London. During that meeting, Mr Khan paid Mr Majeed £140,000 as a deposit to be drawn down over time in exchange for future inside information

about fixes involving the Pakistan cricket team (this amount was in addition to £10,000, which Mr Khan had previously paid to Mr Majeed for information about a spot fix that did not ultimately transpire; that spot fix is not considered further in this Award).

In order to give Mr Khan (and his fictional syndicate) confidence in his ability to provide inside information, Mr Majeed provided Mr Khan with information on three “no balls” that would be bowled in the Lord’s Test which was due to begin the following day.

In cricket a “no ball” is a penalty against the fielding team, usually as a result of an illegal delivery by the bowler. The delivery of a no ball results in one run being added to the batting team’s score, and an additional ball must be bowled. In addition, the number of ways in which the batsman can be given out is reduced.

According to Law 24(5) of the MCC Laws of Cricket, a “no ball” is not a fair delivery. For a delivery to be fair in respect of the feet, in the delivery stride (a) the bowler’s back foot must land within and not touching the return crease appertaining to his stated mode of delivery; (b) the bowler’s front foot must land with some part of the foot, whether grounded or raised; (i) on the same side of the imaginary line joining the two middle stumps as the return crease described in (a) above and (ii) behind the popping crease. If the bowler’s end umpire is not satisfied that all of these three conditions have been met, he shall call and signal “No ball”.

The money given to Mr Majeed was not in consideration for the information given to Mr Khan about the Lord’s Test. Mr Majeed explained that the three “no balls” were to be bowled by Mohammad Amir (two) and Mohammad Asif (one) as follows:

Mr Amir would bowl a “no ball” on the first ball of the third over;

Mr Asif would bowl a “no ball” on the sixth ball of the tenth over; and

Mr Amir would bowl a “no ball” on the last ball of the first over he bowled to a right handed batsman (which would be bowled from around the wicket).

The odds of estimating this exact sequence of events correctly are estimated (subject to certain caveats and assumptions) by an eminent cricket statistician (Frank Duckworth) to be 512,000 to 1.

On August 26, 2010, Pakistan won the toss and put England into bat. Messrs Amir and Asif opened the bowling for Pakistan. As indicated by Mr Majeed the previous night, Amir bowled a “no ball” on the first ball of the third over and Mr Asif bowled a “no ball” on the sixth ball of the tenth over.

Rain curtailed play on August 26, 2010, so the third “no ball” could not be bowled as scheduled. That night Mr Majeed instructed Mr Amir to bowl the third “no ball” on the third delivery of his third full over the following morning (*i.e.*, on the third delivery of the third over after he had completed the over from August 26, 2010, which had been stopped by rain). On August 27, 2010, Mr Amir bowled a “no ball” on the third ball of his third full over.

On August 29, 2010, the NoTW published a story that elements of the Lords Test Match had been fixed. The story included narrative, video, and audio recordings of the discussions between Messrs Majeed and Khan.

On September 2, 2010, the ICC charged Mr Asif (and Messrs Amir and Butt) with several breaches of the ICC Code, including breach of [Article 2.1.1](#), which provides that:

“Fixing or contriving in any way or otherwise influencing improperly, or being a party to any effort to fix or contrive in any way or otherwise influence improperly, the result, progress, conduct or any other aspect of any International Match or ICC Event ... shall amount to an offence by such Participant under the Anti-Corruption Code.”

The ICC also suspended Mr Asif from playing international cricket pending determination of the charges. The suspension was not challenged by Mr Asif.

Thereafter, the Chairman of the ICC Code of Conduct Commission (the Honourable Michael J. Beloff QC) convened a tribunal consisting of himself (as Chairman) Justice Albie Sachs, and Mr Sharad Rao (the “[Tribunal](#)”) to hear the matter and make a determination as to whether the charges were made out.

On December 23, 2010, the Tribunal rejected an application made by Mr Butt to stay the Tribunal proceedings pending a decision by the U.K. Crown Prosecution Service as to whether to charge the

players with criminal offences. This application was opposed by Mr Asif.

The Tribunal imposed on Mr Asif a sanction of seven years ineligibility, two years of which were suspended on condition that he commits no further breach of the ICC Code and that he participates under the auspices of the Pakistan Cricket Board in a programme of Anti-Corruption education.

On February 4, 2011, the Crown Prosecution Service announced that it had charged, among others, Mr Asif with (1) conspiracy to accept corrupt payments contrary to Section 1 of the *Prevention of Corruption Act 1906*, and (2) conspiracy to cheat at gambling, an offence under Section 42 of the *Gambling Act 2005*.

Mr Asif disputed the charges and the matter was heard by Mr Justice Cooke and a jury between October 4, 2011 and October 26, 2011. Mr Asif was found guilty of both charges and sentenced to prison for one year on each count (to run concurrently). Mr Asif served approximately six months of prison time before being released on licence.

Mr Asif applied for leave to appeal against his criminal conviction. This application was denied in writing by the English Court of Appeal. Mr Asif has since applied to be heard on the matter by the English Court of Appeal, ideally by a panel of three judges, and the Panel understands that that application is still pending.

On February 25, 2011, the CAS received Statements of Appeal against the Determination from Mr Asif, Mr Butt, and Mr Amir.

Mr Asif requests that his sanction should be removed. He does not expressly request any mitigation in relation to his sanction in the alternative, although he advances arguments which could reasonably be interpreted as going to mitigation.

The ICC contests all of Mr Asif’s due process and substantive grounds of appeal. As regards due process, the ICC submits that there was no prosecutorial misconduct, no bias or incompetence, no breach as a result of the fact that the Tribunal did not stay proceedings pending the criminal trial, and no failure to apply the proper standard of proof. As regards substance, the ICC submits that the Tribunal weighed the evidence correctly and that the sanction should not be disturbed.

A. Merits

1. Mr Asif's Due Process Grounds

Article R57 of the CAS Code confers upon CAS Panels full power to review the facts and the law. It has the power to issue a new decision which replaces the decision challenged or to annul the decision and refer the case back to the previous instance. As held in a previous CAS case *“the Panel determines that the CAS appellate arbitration procedure under Article R57 of the CAS Code entails a trial de novo which can cure such procedural defects at first instance. Before the CAS Panel, the Appellant was given the opportunity to bring forward witnesses, and make oral representations regarding his case in this hearing and therefore, any alleged departure by the ITU in this respect is made well.”* (See CAS 2011/A/2357, at paras. 8.11 and 8.12.)

Furthermore, in the recent case of *A. Menarini Diagnostics SRL v. Italy* (Case 43509/08), the European Court on Human Rights confirmed that where a party has access to a court with full judicial review jurisdiction (including on the merits), the administrative decision of a competition authority is not in breach of Article 6 of the European Convention on Human Rights.

Accordingly, even if the Panel was persuaded that the due process failures alleged by Mr Asif had merit, given that the CAS has full judicial review jurisdiction on both the facts and the law, any such defects would be cured through the recourse that Mr Asif has had to the Panel. Mr Asif also acknowledged during the Hearing that he now believes that he has had a full and fair hearing.

The Panel notes the ICC's argument that there may be a potential tension between Article 7.3.2 of the ICC Code (which permits a CAS Panel to conduct a *de novo* hearing only where required to do so *“in order to do justice”*, for example to cure procedural errors at the first instance hearing, and limits the scope of review in all other cases to the consideration of whether the decision being appealed was erroneous) and R57 of the CAS Code. However, the Panel considers that no such tension in fact exists because Article 7.3.2 of the ICC Code enables the CAS to conduct a *de novo* review where, as here, the applicant requests such review (for example because s/he feels that the interests of justice have not been served as a result of due process violations).

2. Mr Asif's Substantive Grounds

The “run faster” defence

Mr Asif submits that his “no ball” on the sixth ball of the tenth over was bowled because immediately beforehand his Captain (Salman Butt) disrupted his rhythm by requesting that he *“run faster, do it.”* Mr Asif submits that he was particularly susceptible to disruption given the importance of the match (against England) and the venue (Lord's).

Mr Asif does not submit that the cricket pitch conditions contributed to the “no ball” being bowled, notwithstanding that (1) this was his initial explanation during his police interview on September 3, 2010, and (2) immediately after bowling the “no ball”, Mr Asif checked his studs for wet dirt and appeared to blame the conditions (which contributed to another player, Mr Saeed Ajmal, placing sawdust where his back foot had landed).

For Mr Asif's version of events to be compelling to the Panel, it would need to be the case that (1) Mr Butt did instruct Mr Asif to *“run faster, do it”* in the hope that by disrupting Mr Asif's rhythm, he would inadvertently overstep, and (2) the instruction would need to have had its intended effect (*i.e.*, Mr Asif would have had to in fact run faster and/or disrupted his rhythm in some fashion).

The Tribunal discounted the possibility that Mr Butt instructed Mr Asif to *“run faster”* *inter alia* because Mr Butt denied that he said anything significant to Mr Asif before the “no ball” and because the instruction to *“run faster, do it”* made little sense in the context of the game – running faster would have disrupted his discipline rather than enhancing the chance of a wicket. Given that Mr Butt has now accepted his involvement in the fix (which was not the case during the Tribunal), the Panel does not consider that his actions should be judged by reference to what a fielding Captain would have ordinarily wanted (*i.e.*, a wicket). In this Panel's view, it is at least theoretically possible that Mr Butt, aware of and involved in the fix, tried to disrupt Mr Asif's rhythm in order to improve the chance of a “no ball” and that Mr Asif was so disrupted. However, we see little evidence of this factual matrix:

First, the video footage available does not conclusively show what Mr Butt said to Mr Asif.

Second, Mr Asif showed no visible signs of agitation either before or after he bowled the “no ball” (*e.g.*, if the “no ball” was bowled as a result of provocation by Mr Butt, one might have expected some interaction

with Mr Butt after the “no ball,” even if it was just a glare). In the event, Mr Asif calmly checked his studs for wet dirt, inspected the conditions, and instructed Mr Ajmal to place sawdust where his back foot landed.

Third, there is no discernible difference between Mr Asif’s run up for the 5th and 6th ball of the 10th over in the Lords Test Match (the time taken for each run-up is almost identical and Mr Asif’s assertion that his strides were longer than normal is difficult to reconcile with the video evidence).

In addition, the Panel is not satisfied that an experienced and highly ranked international bowler who had played 22 Test Matches before the Lord’s Test including another Test Match at Lord’s (against Australia) would be disrupted to any significant extent by a comment so innocuous from a player of broadly similar seniority. Had Mr Butt truly desired to disrupt Mr Asif’s rhythm, the Panel would have expected more significant provocation or something more directly related to the game that would have stood a better chance of securing the “no ball” (e.g., a suggestion that Mr Asif shortens or lengthens his run-up or bowls an effort ball – as to which see below).

The Panel does not therefore consider that Mr Asif’s explanation for the “no ball” withstands critical scrutiny.

A marginal infraction?

Mr Asif submits that his “no ball” was a marginal infraction which would have been difficult to bowl deliberately, that it was well within the scope of error for fast bowlers attempting to bowl a quicker ball, and that it was not consistent with Mr Majeed’s promise that the “no ball” would be “*well over*”.

In this respect, Mr Asif contends that the statistical evidence submitted by Mr Kendix as to the likelihood of a “no ball” by Mr Asif is false, misleading, and unreliable. Initially, Mr Asif claimed that this was because Mr Kendix applied simple mathematics to bare historical data and ignored the atmospheric conditions at Lords on August 26, 2010. During the Hearing, however, Mr Asif’s counsel altered his submission and contended that Mr Kendix’s erred by determining that Mr Asif was likely to bowl a “no ball” once in every 90 deliveries (i.e., had a “no ball” frequency of 1.12%). Mr Asif’s counsel claimed that the likelihood of a “no ball” should have been measured by reference to Mr Asif’s first spell only, as that was the spell in which Mr Majeed had said there would be a “no ball.” According to Mr Asif, the

relevant denominator was 30, i.e., the likelihood of a “no ball” was 1 in 30.

The Panel accepts that Mr Asif’s “no ball” was minor (around 2 inches over) relative to the “no balls” bowled by Mr Amir (who was approximately 9 inches over in his first “no ball” and approximately 12 inches over in his second). However, the questions of (1) whether it was deliberate or within the scope of error for fast bowlers attempting to bowl a quicker ball, and (2) whether it was “*well over*”, are subjective matters to be determined by reference to the particular skills and capabilities of Mr Asif.

The Panel has seen data from two eminent statisticians on the likelihood of a “no ball” by Mr Asif. As expected, the data show that the bowlers that are more prone to overstepping are the “out-and-out” fast bowlers (e.g., Brett Lee and Morne Morkel). According to Mr Kendix, in 23 Test Matches, Mr Asif, a fast-medium bowler, bowled only 58 “no balls” in 5,171 deliveries (a rate of 1.12% or 1 in 90) and 24 of those “no balls” was in one match (which could indicate that the true ratio is less than 0.7%). According to Mr Duckworth, the likelihood of Mr Asif (alone) bowling a “no ball” is 1 in 80. On the basis of this data, the Panel is satisfied that Mr Asif was not prone to overstepping (in the way that certain faster bowlers are). The Panel did not find persuasive Mr Asif’s argument that the relevant denominator should be 30, as this would require Mr Asif to bowl a “no ball” in his first spell which is by no means guaranteed by reference to the statistics mentioned above.

The Panel is also satisfied that Mr Asif was not necessarily more prone to overstepping when seeking to bowl an “effort ball” (such as a quicker ball, bouncer, or a Yorker). According to Mr Kendix, 28 of the deliveries Mr Asif bowled during the Lord’s Test were quicker than the “no ball” (which was bowled at 80.7mph), but none of these was declared a “no ball.” Mr Kendix adds that because the “no ball” in question was slower than 30% of the other 91 deliveries bowled by Mr Asif, the “no ball” was not an effort ball but was well within the range of his normal variation.

The Panel considers that Mr Asif’s run up can be described as steady, rhythmical, and controlled. With such control, Mr Asif would under normal conditions be capable of judging with some precision where his front foot would land. Given (1) according to Mr Asif, his control was not impaired by adverse weather conditions during the Lord’s Test, and (2) that Mr Asif was not prone to overstepping, even when bowling “effort balls,” the Panel is not persuaded by

Mr Asif's arguments.

Telephone and text traffic

Mr Asif contends that the volume of telephone and text message traffic between Messrs Majeed and Asif was lower than between Messrs Majeed and Butt, and Messrs Majeed and Amir. He also submits that Mr Asif did not call Mr Majeed on his “safe line” (i.e., the line Mr Majeed often used to communicate with Messrs Butt and Amir). Mr Asif also argues that it was wrong of the Tribunal to ascribe “conspiratorial intent” to phone calls from Mr Majeed late at night in the middle of a Test match (paragraph 164 of the Determination) and cites an example of late night contact between Messrs Majeed and Asif on August 18/19, 2010 where the subject matter was benign.

The Panel accepts in part based on the evidence of Mr Martin Vertigen that, in the period August 16-28, 2010, the number of calls and texts between Messrs Asif and Majeed (31) was lower than the number of calls and texts between Messrs Majeed and Butt (148) and between Messrs Majeed and Amir (112). The Panel also accepts, based on Mr Vertigen's evidence, that there was no contact between Messrs Asif and Majeed on the “safe line” during the same period, whereas Messrs Majeed and Butt used the “safe line” 17 times and Messrs Amir and Majeed used the “safe line” 10 times.

That said, it is not in dispute that there was direct or indirect contact between Mr Asif and others (potentially) involved in the fix at critical points in time:

First, the phone records show that just a few hours prior to Mr Majeed's meeting with Mr Khan at the Copthorne Tara Hotel, Mr Majeed's brother (Mr Azhar Majeed) spoke to Mr Asif for 42 seconds at 19:09.

Second, the phone records show that Mr Butt (who has accepted his involvement in the fix) sought to call Mr Asif three times on the evening of August 25, 2010 (at 19:57, 20:01, and 20:01), just a few hours before Mr Majeed met with Mr Khan. It may be the case that Mr Butt was unsuccessful in reaching Mr Asif on one of these calls (the first call at 20:01).

Third, the phone records show that immediately after his meeting with Mr Khan at the Copthorne Tara Hotel, Mr Majeed called Mr Asif at 23:16 and spoke to him for 30 seconds. The Panel was shown video evidence of a phone call that Mr Majeed had with Mr Amir on the same day at 23:10 (during the meeting with Mr Khan), which lasted only 20 seconds and

was sufficient to confirm arrangements that had been previously discussed.

The phone records show that on the evening of August 26, 2010 (i.e., the evening of the day on which Mr Asif had bowled the “no ball”), Messrs Majeed and Asif spoke to each other or sought to speak with each other a total of 12 times. Some of these calls were relatively lengthy.

The Panel understands from the Determination (paras. 115 and 153, and footnote 37) that Mr Asif was not able to advance cogent explanations for these calls. He suspected that they may have to do with sponsorship opportunities or commercial matters. Given that the Panel does not have more reliable evidence as to the nature of the conversations between Messrs Majeed and Asif, it is difficult to exclude entirely the possibility that they may have concerned commercial or sponsorship matters. However, the Panel does not find the explanation plausible given that (1) the Panel was not presented with any corroborating evidence of the explanations (e.g., evidence of sponsorships secured by Mr Majeed or as to any sponsorship proposal discussed during the relevant period potentially for Mr Asif's benefit), and (2) the length of the call immediately after the meeting at the Copthorne Hotel (30 seconds) seemed insufficient to discuss matters of commercial importance. Accordingly, the Panel is not persuaded that the arguments advanced by Mr Asif breach the inference established by the Tribunal and does not consider it dispositive that Messrs Asif and Majeed did not use a “safe line.”

No money was found in Mr Asif's room

Mr Asif submits that it is exculpatory circumstantial evidence that the NoTW's marked bills were not found in Mr Asif's possessions. While it is true that there is no evidence that Mr Asif received money from Mr Majeed, the Panel notes that an infringement of Article 2.1.1 of the ICC Code does not require a player to gain financially. The question to be answered is whether Mr Asif fixed, contrived in any way, influenced improperly, or was a party to any effort to fix, contrive in any way, or influence improperly, the result, progress, conduct or any other aspect of any International Match or ICC Event. In other words, a player who is involved in a fix breaches Article 2.1.1 notwithstanding that he does not benefit financially from doing so. Accordingly, the Panel does not consider the absence of financial gain to be determinative of the fact that there is no infringement.

Unlike for one of Mr Amir's “no ball”, Mr Butt was not

looking at the bowler when Mr Asif bowled the “no ball.”

During the Hearing, Mr Asif’s counsel submitted that unlike for at least one of Mr Amir’s “no balls,” Mr Butt was not looking at the bowler when Mr Asif delivered the “no ball” but only turned around to look at Mr Asif and the umpire’s call after the ball was bowled once the ball had been played by the batsman (Andrew Strauss) towards point. According to Mr Asif’s counsel, if Mr Butt were anxious that the “no ball” be bowled, he would have looked either at the time the ball was bowled or immediately afterwards once it was played.

The Panel did not find these submissions compelling. First, Mr Butt was fielding at silly mid-off at the time. Given the perils of that position (there is an extremely short reaction time for balls hit towards that position), we draw no inference from the fact that Mr Butt sensibly remained focused on the batsman while Mr Asif was in stride/delivering the ball. In addition, we draw no inference from the fact that Mr Butt looked around at the umpire’s “no ball” call after it was clear that the ball had not been played towards him. The Panel considers that it is instinctive to look at an umpire’s “no ball” call once it is made and after it is clear that the player has no fielding responsibility.

Conclusion on Substance

The Panel finds that there is no evidence advanced by Mr Asif which clearly exculpates him. His submissions do not break the chain of circumstantial evidence or in any way undermine the reasoning contained in the Determination. For those reasons, the Panel is satisfied beyond reasonable doubt that Mr Asif was also a party to the conspiracy in which Mr Butt and Mr Amir are admitted conspirators. The Panel dismisses all of Mr Asif’s substantive grounds of appeal.

B. Sanction

In relation to Mr Asif’s criminal sentence, Mr Justice Cooke imposed a more lenient prison term than he was otherwise minded to do precisely because the ban imposed by the ICC was “*considerable punishment for a man in [Mr Asif’s] position.*” (Sentencing remarks of Mr Justice Cook in *R v Majeed, Butt, Asif, & Amir*, Southwark Crown Court, November 3, 2011, paragraph 33). Mr Asif has therefore already had the benefit of a reduction in sentence as a result of being charged with separate offences for the same factual matrix. The Panel does not see any reason why he should have such benefit twice.

As regards Mr Asif’s pleas of financial hardship and ability to earn a living, the Panel is sympathetic. However, given the history of corruption in cricket and the considerable adverse publicity caused by this episode, the Panel considers that strong enforcement action is necessary to send a signal of deterrence. The Panel also notes that the sanction could be described as lenient when considered in context (*e.g.*, when compared against the sanctions imposed by the ECB on Mr Mervyn Westfield and Danish Kaneria for spot fixing and when compared to the jurisprudence of the CAS for match fixing). Examples include CAS 2009/A/1920, award dated April 15, 2010 (upholding a life ban on a club president who was involved in an attempt to fix a match), CAS 2010/A/2172, award dated April 15, 2010 (upholding a life ban on a referee for failing to report an approach made to him to fix a match), CAS 2011/A/2490, award dated March 23, 2012 (upholding a life ban imposed on a tennis player for offering other players bribes to lose matches), and CAS 2011/A/2621, award dated September 5, 2012 (upholding a life ban on a tennis player for offering a fellow athlete a bribe to lose the first set of a match). Indeed, in *Savic*, the CAS has previously held that lifetime bans are the only truly effective means of purging a sport of corruption (CAS 2011/A/2621, paragraph 8.33-8.35).

The Panel does not therefore make any modification to the sanction imposed by the Tribunal on Mr Asif and the appeal is dismissed.

Cross-country Skiing; Doping (recGH); Burden of proof; Laboratory accreditation; Alleged ISL violation in the performance of the test; Reliability of the test; Test's decision limit

Panel:

Mr. Romano Subiotto QC (Belgium and United Kingdom),
President

Mr. Olli Rauste (Finland)

Prof. Massimo Coccia (Italy)

Relevant facts

On January 29, 2011, the Appellant, an Estonian international level cross-country skier was subject to an out-of-competition doping examination in Estonia, performed by a Doping Control Officer ("DCO") of the World Anti-Doping Agency ("WADA").

The samples were then analyzed by the WADA-accredited Laboratory at the Deutsche Sporthochschule Köln in Germany (the "Laboratory") using human growth hormone ("hGH") Isoform Differential Immunoassays (the "Test").

The Test resulted in an adverse analytical finding ("AAF") of recombinant or exogenous human growth hormone ("recGH"). RecGH is a type of hGH that is listed on the banned substances of WADA and the use of which is a violation of Article 2.1 of the FIS Anti-Doping Rules ("FIS ADR").

On February 15, 2011, the FIS informed the Estonian Ski Association ("NSA EST") of the AAF in the original blood sample tested (the "A-sample"). FIS informed the NSA EST of the Appellant's right to promptly request the analysis of the confirmation blood sample (the "B-sample").

The Appellant and the NSA EST announced the Appellant's retirement from professional cross-country skiing on February 23, 2011.

Following a number of requests from the Appellant for postponement, the opening and analysis of the B-sample took ultimately place on April 6, 2011. The Appellant was represented by Dr. Jüri Laasik, a biotechnology expert, who, as part of his witness protocol, confirmed that he had not witnessed any irregularities in the process of the opening and analysis of the B-sample.

On April 7, 2011, the FIS received the report from the Laboratory that an AAF of recGH had also been found in the Appellant's B-sample.

In its decision date of August 21, 2011, the FIS Doping Panel held that the AAF of recGH in the Athlete's blood had been proven in violation of Article 2.1 of FIS ADR.

The FIS Doping Panel imposed a sanction on the Appellant of a three-year period of ineligibility, effective from February 23, 2011, the date on which the Appellant announced his retirement. In calculating the sanction, the FIS Doping Panel considered the Athlete's delay in requesting the opening of the B-sample "*disturbing*." The FIS Doping Panel also placed importance on the fact that recGH cannot be administered incidentally and that its administration requires sophisticated medical expertise on the part of a trained medical doctor. In light of these aggravating factors, namely the obstructive behavior and the concerted effort required to use hGH, the FIS Doping Panel increased the otherwise applicable sanction by one year, leading to the current three-year period of ineligibility.

On September 12, 2011, the Appellant appealed before the Court of Arbitration for Sport (the "CAS" or the "Court") in Lausanne, Switzerland against the FIS Doping Panel decision. The Appellant requested the annulment of the Decision, denying having violated the FIS ADR and submitting that the AAF should not be relied upon owing to the unreliability of the Test. The Appellant claimed that: i) the Test was defective and scientifically invalid (unreliable decision limits); ii) the Laboratory was not accredited to perform the Test; iii) the Test was improperly carried out and administered by the Doping Control Officer (DCO) and the Laboratory; iv) the Appellant's individual circumstances rendered any positive Test meaningless. The Appellant also denied

having admitted to use hGH. In its defence the Respondent argued that the Appellant's anti-doping rule violation had been established by three means: i) the AAFs from the A- and B- samples; ii) the alleged admissions from the Appellant of hGH use; iii) the Appellant's longitudinal profile. The Panel did not admit the Respondent's third submission regarding the Athlete's longitudinal profile because the FIS failed to submit the relevant DCO reports and laboratory documentation for verification of such results.

Extracts from the legal findings

A. The Test

HGH is a hormone that is synthesized and secreted by cells in the anterior pituitary gland located at the base of the brain. It is naturally produced in humans and necessary for skeletal growth. However, hGH is also available artificially and is believed to be abused by athletes on a wide scale in order to increase performance. The hGH isoform Test has been developed as part of an effort to combat hGH doping in sports. The Test has been designed to detect hGH administration by looking at the ratio between two types of isoforms of hGH. Even though the levels of total hGH concentration will vary substantially, it is assumed that the ratio between the relevant types of hGH isoforms measured by the Test will naturally remain relatively stable. The administration of exogenous hGH can thus be detected from an elevated ratio of the relevant hGH isoforms. The testing is done by using two distinct sets of reactive tubes coated with two different combinations of antibodies, which are referred to as Kit 1 and Kit 2 (or the "Kits"). The so-called decision limits determine the thresholds needed to assess whether an athlete's blood contains natural or doped levels of hGH.

B. Determination of a Potential Doping Violation through the Test

1. The Burden of Proof

In the context of anti-doping violations, the burden of proof affects two distinct issues: first, the burden of proving the reliability of the testing method used and, secondly, whether the Test was administered to the samples in question in accordance with the testing method and the applicable rules determining the application of a test. These are considered in turn below.

Reliability of the Test. Article 3.1 of the FIS ADR and Article 3.1 of the WADA Code state that the "FIS and its National Ski Associations shall have the burden

of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the FIS or its National Ski Association has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability [...]."

In light of the foregoing and sections 5.4.4.1.2 and 5.4.4.2.2 of the ISL, this Panel holds that the Respondent bears the burden of proving to the Panel's comfortable satisfaction that the Test is reliable, including that it is scientifically sound. This is in line with previous CAS jurisprudence, namely that "[m]ethods for the detection of prohibited substances need to be validated. Only methods which are scientifically 'fit for purpose' can be applied to analyze samples in the fight against doping."

Administration of the Test to the Appellant. As for the administration of the Test, the FIS ADR and ISL state that WADA-accredited laboratories are presumed to have conducted procedures in accordance with the ISL.

As a preliminary point regarding accreditation, the Panel draws attention to CAS precedents stating that "[a] CAS panel cannot place in question whether an ISO [International Organization for Standardization] accreditation was correctly attributed to a laboratory, because this would render the whole international standardization and certification system meaningless and because, notoriously, compliance with ISO accreditation requirements is regularly checked by external auditors."

In order to rebut the presumption that WADA-accredited laboratories conducted procedures in accordance with the ISL, athletes must establish a departure from the ISL that could reasonably have caused the AAF, and that "the occurrence of the circumstances on which the athlete relies is more probable than their non-occurrence or more probable than other possible explanations of the positive testing". Therefore, the standard to rebut a presumption of ISL compliance is to show that there was an ISL violation and that it is more likely than not that this non-compliance led to a false positive. If this is shown, the relevant respondent would then have to establish that the non-compliance did not cause the AAF.

Therefore, given that the Test was performed by a WADA-accredited laboratory, the Appellant has to show that it is more likely than not that any deviation

from the ISL could have caused a false positive finding. Only if the Appellant can establish this would the burden of proof shift to the Respondent.

Therefore, the Panel concludes that it must first judge whether the Test is reliable, and only then judge whether the Appellant has established a departure from the ISL that could have caused a false positive finding.

2. Laboratory Accreditation

The Appellant submits that the Cologne Laboratory, which analyzed its samples, was not validly accredited and that the Panel should therefore disregard the Appellant's AAF.

Change in Test method and kits since accreditation. The Panel acknowledges that not only must the Laboratory that conducts the analysis be accredited but the Test method used must also be validated and covered by the Laboratory's accreditation. Based on the documents produced by the Respondent, the Panel finds that there is no doubt that the Laboratory is WADA-accredited, and has been ISO-accredited for application of the Test by the German National Accreditation body, DAkkS, a full member of the International Laboratory Accreditation Cooperation ("ILAC") and signatory to the ILAC Mutual Recognition Agreement. In this regard the Panel notes that the accreditation of the Test for use by the Cologne Laboratory has been attested to by a WADA Director, by the quality manager at the Laboratory when the Test was carried out, who is now Chairman of the German National Anti-Doping Agency's Executive Board, and by two officials from DAkkS. Further, it is clear from both the German and English copies of the accreditation certificate that the Test is accredited for use in the Laboratory.

The Panel also sees no valid reasons to proceed on the assumption that the mere change of the coating of the testing tubes could have affected the functionality of the Test in such a magnitude that it could have been deemed to constitute a new testing method that would require re-accreditation. This technical modification had not changed the Laboratory's ability to properly analyze the Athlete's samples. The Panel further notes that even if the change of the coating was regarded as significant for the accreditation of the Test, the re-accreditation granted to the Cologne Laboratory by DAkkS on January 5, 2011 has in any event covered the Test in its altered form.

Therefore, the Panel finds that the Laboratory is properly accredited for the Test and that the

Appellant has, on the balance of probability, failed to prove otherwise.

Dynamic approach and accreditation. The Panel is of the view that accreditation may still be granted even if there is a dynamic approach to decision limits, that is, even if such test thresholds are constantly being monitored and there is a possibility that they may change. Accreditation relates to the ability of a laboratory to perform test procedures and analysis correctly; decision limits are unrelated to such abilities, and are currently not evaluated in any accreditation procedures.

3. Alleged ISL Violations in the Performance of the Test

The Appellant alleges that his AAF should be disregarded because the following principles of ISL and other relevant WADA rules were violated during the performance of the Test: (i) the blood samples were not preserved properly in the five hours immediately following their collection; (ii) the time taken to transport the samples to the Laboratory was excessive; (iii) the delay in centrifuging the samples was too great; (iv) the Laboratory failed to comply with the relevant quality control ("QC") policy; and (v) the inter-assay variability (the Coefficient of Variation ("CV") of the measurement results of the Appellant's samples was excessive.

Temperature and handling of the samples in the first five hours after collection. According to Section 7.6 of the WADA Guidelines for Blood Sample Collection (Version 2.2, August 2010):

"The Blood Samples must be stored in a cool location, preferably in a refrigerator or cool box. Temperature should be maintained between 2-12 degrees Celsius.

If the conditions of storage did not meet the guidelines for temperature in section 7.6, the DCO shall document this, and shall also contact the ADO immediately to inform them of the variation in temperature, and the length of time the samples were affected".

The Panel finds that it is unambiguously stated that the DCO must only report the exact temperature at which the samples are stored if there is a deviation from the guidelines. As the DCO did not report the exact temperature, it can be presumed, and the Panel finds, that this condition was complied with and that there was no deviation from the Collection Guidelines with regard to the preservation and handling of the samples in the five hours following their collection.

Transportation time. The Panel notes that the Collection Guidelines indicate two different preferred timeframes for arrival of the samples at the Laboratory. Section 7.6.10 denotes a preferred time of within 36-48 hours of collection, while Section 7.7.5 states a preferred time of 36 hours. The Appellant's samples arrived 42.5 hours after collection. From this, the Panel is comfortably satisfied that there was no actual breach of the Collection Guidelines. In any case, the word "preferably" does not denote an absolute and mandatory requirement. The samples were reviewed by the Laboratory upon arrival and no irregularities were found. On this basis, the Panel does not find a breach of the Collection Guidelines as regards transportation time.

Centrifugation of the blood samples. The Panel notes that there was some delay between the time of the samples' arrival at the Laboratory and their centrifugation. The samples were centrifuged 23 hours after their arrival at the Laboratory, and 65 hours and 20 minutes after they were collected. However, there is no mandatory requirement of immediate centrifugation in the ISL. ISL 6.2.2.5 stipulates that samples *should* be centrifuged immediately after Laboratory reception, but allows also their storing refrigerated at approximately 4 degrees Celsius provided that they are analyzed within 48 hours after centrifugation. The Appellant has thus not been able to establish any violation of the ISL or any other applicable rule.

The time limit of 60 hours in the Kits' instruction manuals is, according to its wording, only a recommendation. Pursuant to the expert witnesses heard at the Hearing, an excessive delay can only result in a lower ratio and false negative and not a false positive. Furthermore, it is unlikely that an additional delay of 5.5 hours after the recommended maximum delay in centrifugation time of 60 hours (i.e., less than 10 %) can have had any substantial effect on the result. Therefore, the Panel finds that this argument of the Appellant is without merit.

QC policy of the Laboratory. The Panel is convinced by the submissions of the Respondent that there is no ISL which requires that internal QC policies be provided to individuals such as the Appellant. On that basis, the Panel is not persuaded that a presumption against the application of ISL standards should be maintained where QC policies are not provided. Therefore, the Panel finds that there has been no breach of any ISL and no violation of the right of the Appellant to defend itself. The Panel rejects the Appellant's arguments on this point.

Excessive inter-assay variability of measurement results. The Panel finds that the Appellant has not been able to establish a violation of ISL or any other applicable rule in this respect. In general, the Appellant has failed to point to any rule requiring that the ratios obtained from an individual athlete's samples must not differ significantly from each other. With regard to differences between the ratios measured by different Kits (Kit 1 and Kit 2), the Panel concludes that by their very nature, Kit 1 and Kit 2 *should* give different results because different antibodies are employed by the two kits. With regard to differences between the Appellant's A- and B-samples, the Panel notes that the difference between the ratios of the Appellant's A- and B-samples as measured with Kit 2 is quite high (A- sample 3.07, B- sample 2.00). The Panel however notes that this difference has been partially caused by the quite low overall concentrations measured from the Appellant's samples, which would lead to significant differences in ratios even with only minor concentration changes in subsequent measurements. In addition, the Panel considers that the difference between the Appellant's Kit 2 A- and B-samples has been partially caused also by the 57-day delay between the two analyses. The Panel thus cannot see the difference as evidence of any irregularities in the samples or performance of the Test.

Panel's conclusions on the alleged ISL violations. In any event, the Panel finds that the Appellant has not demonstrated that any shortcomings or violations of the ISL in the pre-analytical handling, alleged or otherwise, could have led to a false positive finding. Although the Appellant argues that the alleged deviations from the ISL increased the chance of false positive results, the Appellant has not provided evidence to indicate that the particular departures at stake in these proceedings could reasonably have led to an AAF. On the other hand, the Respondent has produced testimonies from three expert witnesses alleging that any effect, which the alleged departures may have had on the samples, would have been to the benefit of the Appellant. At the Hearing, Prof. Strasburger, Prof. Ho and Dr. Barroso provided convincing explanations that any delays in the pre-analytical handling would, if at all, lead to dimerization or oligomerization of monomeric 22 kDa isoforms but not to a "*decomposition*" of the pituitary isoforms. Consequently, the rec/pit ratio would decrease and could only result in a false negative result. As a result, the Panel is satisfied that if affected, the samples were more likely to produce a false negative result than a false positive. Therefore, the Panel must reject the Appellant's submissions regarding the alleged non-compliance with the ISL.

4. The Appellant's Individual Circumstances

Impact of training and genetic predisposition.

The Appellant has not demonstrated to the satisfaction of this Panel that his prolonged intense training resulted in an elevated 22 kDa/pitGH ratio. Both the Respondent and the Appellant have submitted studies on the effects of exercise on the secretion of hGH. These studies indicate, contrary to the Appellant's submissions, that exercise-induced effects do not appear to continue to increase after 60 minutes of training, but may actually slightly decrease. Further, the Panel is convinced by the arguments of the Respondent, that even if exercise causes increased secretion of hGH, this would mainly affect the overall concentration of hGH, while the magnitude of the effects on the rec/pitGH ratio would remain limited and would not in any case explain the ratios detected in the Appellant's sample. Furthermore, the Panel agrees with the Respondent's argument that the overall concentration levels of hGH in the Appellant's samples were relatively low, indicating that the exercise did not substantially affect the Appellant's levels of hGH any longer at the time of sample collection.

With regard to the Appellant's alleged genetic predisposition, the Appellant has failed to persuade the Panel that the Athlete in fact has any such a genetic peculiarity. This assertion was not supported by any scientific proof, an analysis of the Appellant's genetic makeup or other evidence of any kind, but is, in the opinion of this Panel, just an unfounded speculation on the part of the Appellant's experts. Therefore, the Panel cannot accept the argument that a genetic peculiarity of the Appellant was the cause, or a contributing cause, of the finding which is the subject of this appeal.

Altitude-related issues. The Panel agrees with the Respondent that even if the Appellant had been in high-altitude conditions prior to the blood sample collection, this could not have produced the claimed effect on the Appellant's rec/pitGH ratio. Even though training and staying in high altitude conditions may have an impact on overall hGH secretion, there is no evidence that the magnitude of any possible effect to rec/pitGH ratio could sufficiently high as to explain the ratios detected from the Appellant's sample. The Panel is also not persuaded by the Appellant's unsubstantiated submission that such conditions would have a negative effect on the blood sample so as to result in a false-positive Test result.

Based on the above, the Appellant's arguments failed to convince the Panel that any relevant individual circumstances existed, and even if they did, the

Appellant failed to demonstrate to the required standard of proof that such individual circumstances could have caused the AAF.

5. Reliability of the Test

Panel's Conclusion on the reliability of the Test. The Panel finds that the Appellant has failed to substantiate his claim that the Test is unreliable. Contrary to the Appellant's views, the Respondent has made available sufficient information (both in writing as well as orally during the Hearing) for this Panel to review the reliability of the Test. The Respondent has shown to the comfortable satisfaction of this Panel that the hGH Test is a reliable testing method for hGH abuse in professional sports that is based on scientifically correct assumptions and methods. Furthermore, the Panel agrees with the Respondent that even if the Appellant had established a minor flaw in the reliability and validation of the Test (*quod non*), the Appellant did in any event not show to the required standard of proof that this could have caused the AAF (as a false positive finding). It follows that the Appellant's arguments on the Reliability of the Test are rejected in their entirety (subject to the section on the Test's decision limits below).

6. The Test's Decision Limits

The issue of whether the Test's decision limits have been correctly established by WADA is at the core of these proceedings. In essence, the decision limits determine whether the recGH/pitGH ratios in Kit 1 and Kit 2 qualify as an AAF. Kit 1 and Kit 2 have separate decision limits because they are coated with two distinct sets of antibodies: a rec/pit ratio exceeding 1.81 for Kit 1 and 1.68 for Kit 2 constitutes an AAF. The Appellant's A-sample yielded rec/pit ratios for Kit 1 and Kit 2 of 2.62 and 3.07, respectively, while the B-sample showed ratios of 2.73 and 2.00 respectively. According to the hGH Guidelines, an AAF requires that ratios for the athlete's A-sample exceed the decision limits for both Kit 1 and Kit 2. According to the WADA Code, this AAF will constitute proof of an anti-doping rule violation if the athlete waives analysis of the B-Sample and the B-sample is not analyzed; or, where the Athlete's B-sample is analyzed (as occurred in the case at hand), the rec-pit GH ratios in the B-sample must also exceed the decision limits for Kits 1 and 2 in order to constitute an anti-doping rule violation.

The Panel recalls that the burden is on the Respondent to show that an anti-doping violation has occurred by means of a test that is scientifically reliable. Such a burden applies to all aspects of the Test, including the determination of the decision limits.

In the Panel's view, the Respondent has, on balance, failed to establish to the comfortable satisfaction of the Panel that the decision limits were correctly determined and that they would lead to the claimed specificity of 99.99%. Despite the Respondent's ample opportunities to convince the Panel on the correctness of the decision limits including in the post-Hearing brief as well as in response to the two subsequent rounds of Panel Questions, the Panel cannot exclude to its comfortable satisfaction that the decision limits are overinclusive and could lead to an excessive amount of false positive results (beyond the claimed specificity of 99.99%). Although the Panel has found that the Test itself is undoubtedly reliable, the Panel finds that the following factors prevent it from concluding that the decision limits are equally reliable: (1) The inappropriate exclusion of certain sample data from the dataset; (2) the small sample sizes; and (3) the data provided on the distribution models used. These factors will be considered in more detail below.

The inappropriate exclusion of certain sample data from the dataset. The Panel cannot determine with a sufficient degree of certainty which samples have been excluded in the Initial Study and the Verification Studies and for which reasons. This renders it impossible for the Panel to reverse engineer the Test's decision limits. In particular, on this basis, the Panel cannot conclude that all of the results excluded from the datasets were legitimately excluded because the Respondent has provided insufficient information in this regard. For instance, the Panel is not in a position, based on the Respondent's submissions, to determine which samples have been excluded for constituting 'suspicious data' and whether correctly so. For the purposes of any further studies for determining decision limits for prohibited substances that can be produced endogenously, the Panel recommends that any exclusion of samples from the reference population data be separately documented with reasoning.

The insufficient sample size. The Panel accepts that a dynamic approach to testing may be desirable and acceptable, particularly in the field of anti-doping. However, the Panel must bear in mind the seriousness of the allegations made against the Appellant when assessing whether it is satisfied that the decision limits with regard to hGH have been correctly determined. Consequently, the Panel has placed particular importance on the Appellant's concerns about the sizes of the datasets used to calculate the decision limits. Despite the high specificity requirements and the high tolerance margins, both of which were designed to safeguard the decision limit determination within a dynamic

approach, the Panel is not comfortably satisfied that the sizes of the samples used were sufficiently large to permit an estimation of the 99.99% point that is sufficiently reliable.

In conclusion, the Panel has not been convinced by the Respondent that the decision limit especially for Kit 2 has been based on a sufficiently large sample size to provide a reliable estimation for the 99.99% point. Therefore, the Panel accepts the Appellant's arguments that the decision limits at least for Kit 2, possibly also for Kit 1, are unreliable.

The uncertainty relating to the distribution models used. It is important to the Panel that the Respondent has provided varying and initially incorrect accounts of which distribution models (and why) were used to calculate the decision limits. As outlined above, the Respondent initially provided an incorrect explanation on the distribution models used to calculate the decision limits. Here the Panel notes again Dr. Barroso's statement that "... *log-normal ... was the distribution used in calculations leading to the published Decision Limits*" and confirmed by Dr. Bassett at the Hearing that the "*large number of samples available from WADA labs*" were also fitted to such a lognormal distribution model. Discussion of the gamma distribution was notably absent from Dr. Bassett's testimony and Dr. Barroso's witness statement. The Respondent has subsequently altered its position, submitting instead that a gamma distribution model was used in the Verification Studies. The Respondent did so only at a late stage in the proceedings and only in response to the Second Set of Panel Questions that tested Respondent's statements on log-normal distribution. Although the Panel does not consider that either the Respondent or WADA sought to mislead, the Panel is of the view that the Respondent has provided insufficient explanations and details about the way in which the decision limits were calculated, to such an extent that the Panel cannot comfortably conclude that they are reliable.

The Respondent has not met the applicable standard of proof with respect to the procedure followed to set the aspects of the decision limits explained above.

The Panel's inability to conclude that the decision limits are reliable inevitably leads the Panel to conclude that the possibility of the Appellant's sample, especially his B sample as analyzed with Kit 2, being negative cannot reasonably be excluded. While the hGH Guidelines require that all four Test results (A- sample Kit 1, A- sample Kit 2, B- sample Kit 1, B- sample Kit 2) must be positive to constitute an anti-doping rule violation, this Panel is not comfortably satisfied that such a violation has occurred, bearing in

mind the seriousness of the allegation which is made.

C. Conclusion

In conclusion, the Panel finds that the **Appellant** has failed to meet the required burden of proof regarding its pleas on the reliability of the Test (except for that of the decision limits), the Laboratory's accreditation, the pre-analytical handling of the blood sample pursuant to the ISL, as well as Appellant's arguments relating to his individual circumstances. The Panel finds that the **Respondent** has failed to meet its burden of proof in relation to the reliability of the decision limits and in establishing the violation of FIS ADR by means other than the Test, namely through admission.

Therefore, on the grounds that the Respondent has not established, to the Panel's comfortable satisfaction, that the decision limits are reliable, the Panel finds that the Appellant's AAF is not upheld. The Panel reiterates its view that the Respondent has proven that the Test itself is reliable, but that, as a matter of procedure, it has not proven the same in respect of the decision limits. The Panel notes that there are many factors in this case which tend to indicate that the Athlete did in fact himself administer exogenous hGH, but that for the reason that the decision limits have not been proven as reliable in the course of this proceeding, the violation of the FIS ADR cannot be upheld on appeal. Therefore, the ban imposed by the decision of the FIS Doping Panel is overturned.

Football; Appealable decision; CAS jurisdiction; Longstanding practice; FIFA jurisdiction towards a club undergoing restructuring or bankruptcy proceedings; Penalty clause; Payment of interests

Panel:

Mr Petros C. Mavroidis (Greece), President
Mr Efraim Barak (Israel)
Mr Carlos Terán (Venezuela)

Relevant facts

U.C. Sampdoria (“the Appellant”) is an Italian football club member of the Italian National Football Association (Federazione Italiana Giuoco Calcio) whereas Club San Lorenzo de Almagro (“the Respondent 1”) is an Argentinian football club, member of the Asociación del Fútbol Argentino (“AFA”). Both national federations are affiliated to the Fédération Internationale de Football Association (“the Respondent 2”).

On 11 August 2009, the Appellant and the Respondent 1 signed an agreement (the “Contract”), which provides for the transfer of a Player’s federative and economic rights from the Appellant to the Respondent 1 for the sum of EUR 1,400,000 in five instalments. The contract also provides that in case of dispute amongst the parties, the decision will correspond to the FIFA bodies and that in case of any lack of competence by the FIFA bodies, the disputes will be directly and mandatorily brought before the Court of Arbitration for Sport (CAS).

It is undisputed that, the Respondent 1 only paid the first instalment of EUR 200,000.

On 19 July 2010, the Appellant filed a claim with FIFA. However, on 1 March 2012, FIFA sent to the Appellant a document, signed by its Director of Legal

Affairs and by the Head of its Players’ Status and Governance whereby it indicated that FIFA could not deal with cases of clubs which are in a bankruptcy proceeding.

On 16 March 2012, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (CAS). A hearing was held.

Extracts from the legal findings

A. Admissibility

The Appellant submits that FIFA’s letter dated 1 March 2012 can be challenged before the CAS as it contains all the elements inherent to an appealable decision in the meaning of articles 62 and 63 of the FIFA Statutes and article R47 of the Code of Sports-related Arbitration (“CAS Code”).

The Panel agrees with the characteristic features of a “*decision*” stated in the Swiss Federal Tribunal and in the CAS precedents, namely:

- The form of the communication has no relevance to determine whether a decision exists or not. In particular, the fact that a communication is made in the form of a letter does not rule out the possibility that it constitutes a decision subject to appeal (CAS 2005/A/899 par. 63; CAS 2007/A/1251 par. 30; CAS 2004/A/748 par. 90; CAS 2008/A/1633 par. 31).
- In principle, for a communication to be a decision, it must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties (CAS 2005/A/899 par. 61; CAS 2007/A/1251 par. 30; CAS 2004/A/748 par. 89; CAS 2008/A/1633 par. 31).
- A decision is thus a unilateral act, sent to one or more determined recipients and is intended to produce legal effects (2004/A/659 par. 36; CAS 2004/A/748 par. 89; CAS 2008/A/1633 par. 31).

In practical terms, with its letter of 1 March 2012, FIFA closed the case and refused to enter judgement on the matter brought before it by the Appellant.

FIFA's position was directly binding on all the parties in the present proceedings, as there were no remaining internal remedies left for the Appellant against such decision.

Regardless of the true meaning of the terms “*without prejudice whatsoever*”, FIFA clearly manifested the fact that it would not entertain the Appellant's claim, thereby making a ruling on the admissibility of the said claim and directly affecting the Appellant's legal situation.

With its letter, FIFA actually places the Appellant in a dead end situation. On the one hand, FIFA is compelling the Appellant to bring its claim before a national court, in full contradiction with its prevailing regulations, i.e. its Statutes. As a matter of fact, article 64 of its applicable Statutes states that “*Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations*”. Any party who fails to respect this rule is actually exposed to sanctions (article 64 par. 4 of the applicable FIFA Statutes). On the other hand, the Panel does not see how an ordinary court can possibly declare itself competent to hear and to determine a claim, based on a contract, which includes an arbitral clause referring any dispute to FIFA or to CAS.

In view of the foregoing, it appears that FIFA's letter is indeed a ruling materially affecting the legal situation of the Appellant, which is left with no alternative other than to challenge its content before the CAS.

The letter was signed in the name of FIFA by FIFA Director of Legal Affairs and by the Head of FIFA Players' Status and Governance. There is no doubt that FIFA is validly bound by the signature of those two persons, who actually signed the answer filed in the present proceedings. Thus, despite being formulated as a letter, FIFA's refusal to entertain the Appellant's claim was, in substance, a decision.

The Panel is comforted in its position by the fact that, in very similar situations, other CAS Panels came to the same conclusion (CAS 2011/A/2343 CD Universidad Catolica V. FIFA; CAS 2011/A/2586 William Lanes de Lima v. FIFA & Real Betis Balompie).

B. Jurisdiction

The jurisdiction of CAS derives from articles 62 et seq. of the applicable FIFA Statutes and R47 of the CAS Code.

Article 63 of the applicable FIFA Statutes provides that final decisions by FIFA's legal bodies may be

appealed to CAS. Taking into account the fact that the Panel has found the FIFA letter of 1 March 2012 to be a final decision rendered by FIFA, the Panel concludes that it has jurisdiction to hear the dispute.

Under article R57 of the CAS Code, the Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.

Whether or not a *de novo* award is appropriate depends on the individual facts and circumstances.

The Respondent 1 is of the opinion that the CAS should refer the case back to FIFA out of respect for the principle of double instance, which is “*a procedural right that must be guaranteed in every procedure, as it has been stated on several international treaties such as the Article 14.5 of the International Covenant on Civil and Political Rights*”.

The Panel observes that the right of double instance as recognised by article 14.5 of the International Covenant on Civil and Political Rights of 16 December 1966 applies only for criminal procedures. Furthermore, according to the well established jurisprudence of CAS, which also finds support *inter alia* in the Swiss Federal Tribunal decision, and pursuant to the rule that exists in other legal systems, a complete investigation by an appeal authority, which has the power to hear the case, remedies, in principle, most flaws in the procedure at first instance. Hence, if there had been procedural irregularities in the proceedings before FIFA, it would be cured by the present arbitration proceedings.

At the hearing, FIFA's representative, expressly accepted that article 6.2 of the Contract must be understood as an alternative path giving CAS the jurisdiction to decide on the merits of the dispute between the Appellant and the Respondent 1, within the frame of the appeal arbitration procedure.

Based on the foregoing, in view of the consent expressed by FIFA, the absence of any relevant argument raised by Respondent 1 to justify the referral of the present case to FIFA and the need for an efficient administration of justice, the Panel rules that it has jurisdiction to entertain the present matter and eventually to render a new decision.

C. Merits

1. At FIFA level, is there a customary law, according to which ordinary proceedings before FIFA should be closed if a party is undergoing restructuring or bankruptcy proceedings?

It is undisputed that the current FIFA Regulations on the Status and Transfer of Players as well as the FIFA Rules governing the procedures of the Players' Status Committee and the Dispute Resolution Chamber do not address the procedural consequences arising from the fact that a club is placed under judicial administration. It is also accepted that only article 107 of FIFA's Disciplinary Code (edition 2011) deals with such situation by stating that "*proceedings may be closed if (...) a party declares bankruptcy*".

However and according to FIFA, any proceedings before it, whether ordinary or disciplinary, "*shall be discontinued if one of the parties concerned by the relevant procedures encounters itself in a bankruptcy procedure*". This has been implemented by a constant, consistent, long-lasting and undisputed practice, which has acquired force of customary law.

- (i) The existence of a longstanding practice and the sense of legal obligation

FIFA claims that its position is supported by a constant, consistent, long-lasting and undisputed practice.

As regards the burden of proof, it is FIFA's duty to objectively demonstrate the existence of its allegations (Article 8 of the Swiss Civil Code, ATF 123 III 60 consid. 3a; ATF 130 III 417 consid. 3.1.). It is not sufficient for FIFA to simply assert a fact for the Panel to consider the matter without further treatment.

In the case at hand, FIFA has adduced no evidence as to the existence of any longstanding practice. In particular, FIFA has not established the intensity of its alleged practice, the context in which it emerged or the timeframe within which it occurred.

In the absence of any evidence of the existence of the alleged widespread practice, the Panel finds that the objective element of practice (i.e. *longa consuetudo*) is not satisfied.

Under such circumstances, the Panel is precluded from examining the subjective element of practice, i.e. whether, in the football community, FIFA's alleged practice is accepted as law.

- (ii) Is there a gap in the regulation?

According to FIFA, its regulations suffer from a loophole. FIFA argues that its practice is justified as (a) "*(...) at national level, there is a lis pendens*", (b) it tends to avoid possible conflicting decisions and (c) its aim is to respect the exclusive jurisdiction of the ordinary state courts in matters pertaining to insolvency and bankruptcy. FIFA is of the opinion that it cannot interfere with measures implemented by the State in order to restructure a club's business and satisfy its creditors.

FIFA's position does not differentiate between the recognition of the debt and its execution, which are subject to different proceedings; i.e. ordinary proceedings, respectively enforcement proceedings. As a matter of fact, in order to proceed with the enforcement of its monetary claim, the creditor must establish its validity.

The two proceedings have clearly distinct objects so that it cannot be argued that the initiation of one of them produces an effect of *lis pendens* on the other.

The fact that a distinction must be made between the recognition of the debt and its execution, is actually consistent with the present FIFA Regulations. The absence of a similar rule as article 107 of FIFA's Disciplinary Code in FIFA Regulations on the Status and Transfer of Players as well as in the FIFA Rules governing the procedures of the Players' Status Committee and the Dispute Resolution Chamber, confirms that FIFA's deciding bodies are competent as long as they are asked to address the issue of the recognition of the claim. It is only when they are seized with a request for the enforcement of the claim, that FIFA's Disciplinary Code comes into play and that "[disciplinary] *proceedings may be closed if (...) a party declares bankruptcy*" (see article 107). As a matter of fact, only a disciplinary proceeding as governed by the FIFA Disciplinary Code could interfere with measures implemented by the competent public authorities in order to restructure the commercial activities of the Respondent 1 and satisfy its creditors.

In view of the above findings, the Panel concludes that FIFA's letter of 1 March 2012 is not the result of a long-lasting practice and is actually in contradiction with FIFA's own regulations, which do not preclude its deciding bodies from ruling on questions validly brought before them in relation with the existence of a monetary claim.

As a consequence, FIFA erred in refusing to enter the merit of the claim, validly brought before it by the Appellant. In view of the valid appeal filed before it,

it is now the Panel's task to address this issue.

2. Does the Respondent 1 owe any money to the Appellant and if yes, how much?

(i) The monetary claim

The Appellant claims that the Respondent 1 must be ordered to pay in its favour the amount of EUR 1,800,000 corresponding to the outstanding debt obligation (EUR 1,200,000) and the penalty (EUR 600,000) as agreed in the Contract as well as the CHF 5,000 it incurred "*as administrative costs within FIFA*".

According to the Respondent 1, the last instalment of EUR 300,000 is not due until 31 December 2012 and both the penalty clause of EUR 600,000 and the payment of legal interest originate from the breach of the Contract by the Respondent 1. "*Therefore if the Panel considers imposing San Lorenzo a punishment for failure of payment; it shall require the payment of only one of them, the penalty clause or the legal interest, but definitely not both.*"

In view of the terms of the Contract and of the payment made to date (EUR 200,000), the amount of EUR 1,200,000 is due by the Respondent 1 to the Appellant. However, the last instalment must be paid on or before 31 December 2012.

Regarding the payment of the penalty of EUR 600,000, the interpretation of the Contract is obviously in dispute. In view of the clear terms of the Contract and particularly of its Article 4.2, the payment of the penalty clause is exclusively conditional upon the failure on the part of the Respondent 1 either to make the timely payment of one of the outstanding instalments or to deliver the contractually agreed bank guarantees. Contrary to the assertions of the Respondent 1, the Contract does not preclude the Appellant to claim the penalty in addition a) to the performance of the contract and b) to the payment of the interests. From the moment the Respondent 1 failed to comply in part or in full with its obligations arising from article 4.2 of the Contract, a new and autonomous obligation was created and became due "*within 20 days of the due date*" of the defective performance.

It appears to the Panel that the penalty clause is compatible with the freedom of contract as granted under Swiss law and complies with articles 160 et seq. of the Swiss Code of Obligations. The Respondent 1 did not offer any explanation as to why the Appellant "*shall require the payment of only one of them, the penalty clause or the legal interest, but definitely not both.*" In addition, the Panel observes that the Respondent 1 does not

question the principle or the amount of the penalty and did not even request its reduction.

In view of the above, the Panel holds that the Appellant is entitled to the payment of the penalty clause of EUR 600,000 which is due "*within 20 days of the due date*" of the defective performance (i.e. 31 January 2010), irrespective of the payment of interest on the other unpaid amounts, deriving from the Contract.

Finally, the Appellant has established that it paid CHF 5,000 for its right to file its claim against the Respondent 1 before FIFA. In view of the outcome of the present proceeding, the said amount represents a direct damage and was caused to the Appellant by the Respondent 1, which must therefore be held accountable for its repayment.

(ii) The payment of interest

As regards to the interest and in the absence of a specific contractual clause, the Panel can only apply the legal interest due pursuant to article 104 of the Swiss Code of Obligations. This provision foresees that the debtor, on notice to pay an amount of money, owes an interest at the rate of 5 % per annum. Where a deadline for performance of the obligation has been set by agreement, a notice is not necessary.

The appeal brief of the Appellant did not contain any clear indication concerning the *dies a quo* for the interest.

At the hearing before the CAS, the Appellant clarified that the interest of 5 % shall apply as of 20 days after 31 January 2010, i.e. 20 days after the date of the second instalment, which remained unpaid. At that moment and according to the Appellant, all the unpaid instalments became immediately due.

The Panel understands from the Appellant's oral explanations that the parties to the Contract put in place a tolerance time of 20 days, after the due date, for the Respondent 1 to make the agreed payments. Otherwise, the Appellant would have applied for the payment of interest of 5% on EUR 300,000 from 31 January 2010 (i.e. the due date of the second instalment) and 5% on the remaining amount of its claim from 20 February 2010 (i.e. 20 days after 31 January 2010).

Whether the Appellant's entire claim (EUR 1,800,000) has fallen due 20 days after the failure of the Respondent 1 to pay the second instalment is not supported by the terms of the Contract and the relevant provisions.

Article 4.2 of the Contract only provides that the failure on the part of the Respondent 1 either to make the timely payment of one of the outstanding instalments or to deliver the contractually agreed bank guarantees, shall entitle the Appellant to be awarded an amount of EUR 600,000.- as a penalty. This provision does not imply that in case of default of payment of any amount due, the Appellant is enabled to immediately collect the remaining sum owed to it. The Panel observes here that the Appellant has never claimed or established that it terminated the Contract following the failure of the Respondent 1 to perform its obligations. Under such circumstances, the Panel can only conclude that the Contract is still in force.

The Panel has no reason to accept that the Appellant's entire claim (EUR 1,800,000) has fallen due 20 days after the failure of the Respondent 1 to pay the second instalment, i.e. 31 January 2010.

Finally, the Appellant did not claim for interest in relation with the CHF 5,000 paid for its right to file its claim against the Respondent 1 before FIFA.

D. Conclusion

Based on the foregoing, the Panel reaches the conclusion that the Respondent 1 must pay to the Appellant the following amounts:

- EUR 300,000 with 5 % interest as of 20 February 2010
- EUR 600,000 with 5 % interest as of 20 February 2010
- EUR 300,000 with 5 % interest as of 20 February 2011
- EUR 300,000 with 5 % interest as of 20 February 2012
- EUR 300,000 will be due on 31 December 2012. This payment will be subject to 5% interests if not paid by the due date.
- CHF 5,000

Golf; CAS jurisdiction; Interpretation of Rule 61.2 of the Olympic Charter; Meaning of an arbitration agreement under Swiss law; Offer to arbitrate through a text published on the official website of a Committee

Panel:

Mr. Manfred Nan (Netherlands), President

Mr. Michael Gerlinger (Germany)

Ms. Vesna Bergant Rakoccevic (Slovenia)

Relevant facts

The Croatian Golf Federation (“the Appellant” or “CGF”) is the federation of Croatian golf clubs and has its seat in Zagreb, Croatia. The Croatian Olympic Committee (“the Respondent” or “COC”) is the highest sports body in Croatia and has its seat in Zagreb, Croatia.

On 23 January 2009 the Appellant, as a member of the COC, went into bankruptcy proceedings.

By decision of the Zagreb Commercial Court dated 29 June 2010, which decision entered into force on 20 July 2010, the Appellant exited the bankruptcy proceedings.

On 7 September 2010 the COC’s Assembly decided to exclude the Appellant from the COC.

On 8 August 2011, the Appellant filed a request to the COC’s “Sport Arbitration Council” for an extraordinary examination of the COC’s Assembly decision from 7 September 2010 and also seeking a resolution for financial issues regarding alleged non-payment from the Respondent to the Appellant of guaranteed annual grants as well as financial issues regarding the Respondents alleged responsibility because of financial losses.

On 13 April 2012, the COC’s “Sports Arbitration

Council” rejected the request of the Appellant.

The operative part of the decision of the COC’s “Sports Arbitration Council” dated 13 April 2012 reads as follows:

“Request from 10 August 2011 made by the Croatian Golf Federation, Zagreb (..) against the Croatian Olympic Committee, Zagreb (..) for extraordinary re-examination of decisions is rejected in the part as it requests to:

- 1) *Set aside decision of the Croatian Olympic Committee regarding cessation of the Croatian Golf Federation membership in the Croatian Olympic Committee because of both – procedural and substantial – reasons and determine that the Croatian Golf Federation is to be considered as a Croatian Olympic Committee full member with all rights(..)*
- 2) *Order the Croatian Olympic Committee in favour of the Croatian Golf Federation, based on the Croatian Olympic Committee official budget for 2008, 2009 and 2010, payment of (..) within 8 days counting from the date of the award.*
- 3) *Order the Croatian Olympic Committee in favour of the Croatian Golf Federation, based on the damages suffered, payment of the amount of 60.000,- EUR”.*

By Statement of Appeal dated 17 May 2012, the Appellant appealed the decision of the COC’s “Sports Arbitration Council” dated 13 April 2012 (hereinafter also referred to as “the Decision”), rejecting the Appellant’s request for an extraordinary examination of the decision of the COC Assembly nr. 1206/10 dated 7 September 2010 that ordered the exclusion of Appellant as a member of COC.

By letter dated 4 September 2012, the Panel informed the parties of its decision to bifurcate the CAS proceedings in order for the Panel to decide as a preliminary matter on jurisdiction and the admissibility of the appeal.

Extracts from the legal findings

A. CAS Jurisdiction

For CAS to have jurisdiction in a matter requires that either the parties have expressly agreed to it or that

the statutes or regulations of the body issuing the decision provide for an appeal before CAS.

1. Do the COC Statutes or Regulations provide an arbitration clause for an appeal to CAS?

The Panel first turns its attention to Article 72 of the COC Statutes, which provides:

“(1)The Council for Sports Arbitration (hereafter referred to as the CSA) takes a decision on the request for extraordinary re-examination of sports associations’ decisions when other legal redresses have been exhausted or they do not exist and performs other duties determined by this Statute, the Procedure Regulations, Arbitration Regulations of the Court of Arbitration and other NOC of Croatia and CSA acts.

(2) The CSA performs the following duties:

- *supervises the work of the Court of Arbitration within the NOC of Croatia and provides working conditions for its services;*
- *gives legal opinions at the request of the NOC of Croatia Council or at the request of national sports federations, county associations and other associations;*
- *appoints the CSA Secretary who is at the same time Secretary of the Court of Arbitration.*

(3) The Appeal against the dispute arising from or relating to the Olympic Games is submitted exclusively to the Court of Arbitration for Sport in Lausanne in accordance with the Code of Sports-Related Arbitration”.

Article 72 (3) of the COC Statutes opens the possibility to appeal to the CAS, but only for disputes arising from or relating to the Olympic Games. The Panel follows the Respondents submissions, which are not disputed by the Appellant, that *“this provision has been adopted by the COC Assembly in December 2005 in order for the COC to comply with the arbitration clause provided for under the Olympic Charter (current Rule 61 par. 2 of the Olympic Charter)”*.

Regarding the scope of Rule 61.2 of the Olympic Charter, the Panel refers to the reasoning of other CAS Panels in recent decisions in which is considered that Rule 61.2 OC requires that the dispute must be closely linked to an individual edition of the Olympic Games (see CAS 2011/A/2576 Curacao Sport and Olympic Federation v. International Olympic Committee, par. 6.13: *“if Rule 61.2 OC would be interpreted in a broad sense, this would deprive Rule 61.1 OC of any meaning (...) Rule 61.2 OC does not cover disputes concerning membership of the IOC that only indirectly affect an individual edition of the Games”*).

As a consequence, Article 72 (3) of the COC Statutes must be interpreted and applied accordingly.

The dispute between the parties relates to the rejection of the Appellant’s request for an extraordinary examination of the decision of the COC Assembly nr. 1206/10 dated 7 September 2010 that ordered the exclusion of Appellant as a member of COC.

Although golf is considered an Olympic sport from October 2009 irrespective of the fact that golf will not be part of the Summer Olympic Games schedule until 2016, the current dispute concerns the membership of the COC and therefore has no hesitation to believe that the current dispute is not closely linked to an individual edition of the Olympic Games and/or arising from or related to the Olympic Games.

As a consequence, the applicable statutes and regulations do not provide for an appeal to the CAS regarding the Decision.

Accordingly, the Panel has to consider whether a specific arbitration agreement exists for appeal to the CAS.

2. Does a specific arbitration agreement exist for appeal to the CAS?

As to this criterion, there was clearly no agreement between the parties to submit the case to the jurisdiction of CAS, not least but not only because the COC has expressly challenged such jurisdiction.

The Panel’s first issue to decide is whether the publication on the COC website must be seen as an offer to the Appellant to appeal to CAS regarding the appealed decision of the Sports Arbitration Council.

The publication on the COC website reads as follows:

“Sports Arbitration

Published 21.04.2010

Sports Arbitration: To resolve sport disputes and those related to sport, to review the decisions of sports associations, against which other means of legal protection have been exhausted or do not exist, and among other things, to provide legal opinions on the request of the Council or members of the Croatian Olympic Committee, the COC Assembly founded independent bodies within the Croatian Olympic Committee – the Sports Arbitration Tribunal and the Sports Arbitration Council – at its 19th meeting held on 25 May 1999.

The Arbitration Rules of the Sports Arbitration Tribunal,

also adopted at the 19th COC Assembly meeting, regulate in detail the issues of its jurisdiction, composition and structure, as well as the rules on the arbitration and conciliation procedure. Parties typically agree on the scope of competence of the Sports Arbitration Tribunal in advance.

The SPORTS ARBITRATION COUNCIL is especially authorised to resolve disputes and issues of importance for performing the tasks of the Croatian Olympic Committee. Particularly important among them are the decisions on disciplinary measures and those on doping, on disciplinary and other proceedings, which mean or imply long-term ban from sport competitions, decisions concerning Olympic candidates and top athletes (and athletes down to the 3rd category), principles and conditions of sports competitions and other issues regulated by the COC bylaws.

When challenging a decision of the Sports Arbitration Council, one may appeal to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, which will make a final decision on the dispute in accordance with the Code for Sport-Related Arbitration (CAS Code).

Members of the Sports Arbitration Council are elected by the COC Assembly among lawyers, who are also athletes or former athletes and sport officials. The Sports Arbitration Council office is in Zagreb (...)

SPORTS ARBITRATION COUNCIL 2009-2014:

(...)

I PERMANENT COUNCIL

(...)

II PERMANENT COUNCIL

(...)

III PERMANENT COUNCIL

(...)"

In analysing the content of the publication on the COC website in order to assess if it could be construed as an offer to arbitrate, the Panel – also - takes into consideration whether or not the publication demonstrates that the COC intended to be bound to an agreement to arbitrate and whether or not the publication could be understood in good faith by the Appellant as the expression of an intent by the COC to activate a legal transaction and to enter into a legally binding commitment towards the Appellant. As far as required to be able to make an objective interpretation, the Panel will apply the principle of mutual trust.

The Swiss Federal Tribunal repeated that the conditions of Art. 178 PILA have to be fulfilled and that the material conditions (and particularly the consent of the parties to arbitrate) have to be determined according to the second paragraph of Art. 178 PILA while the arbitration agreement has

to be interpreted in accordance with the general principles of law and particularly the principle of good faith (DFT 1300 II 66 E. 3.1 (70); DFT 129 III 675 E.2.3 (679) with further references).

The text is published on the official COC website and therefore the Panel has no hesitation to consider that the Respondent is - in principle - responsible for and bound by the content of this website.

The COC website is accessible for everybody, as no login with password is required. Therefore, the Panel has no hesitation to believe that the main goal of this website publication is for general information to everyone, and thus not limited to its members.

The complete text on this part of the website deals with a brief statement and explanation of the following issues:

- The subject of Sports Arbitration;
- A reference to the Arbitration Rules;
- The Sports Arbitration Council;

In continuation, the website publication shows the following specific referral to the applicable Arbitration Rules: “*The Arbitration Rules of the Sports Arbitration Tribunal, also adopted at the 19th COC Assembly meeting, regulate in detail the issues of its jurisdiction, composition and structure, as well as the rules on the arbitration and conciliation procedure.*”

The part of the text as referred to by the Appellant shall be interpreted and considered in conjunction with and in the context of the entire text on this page of the COC website.

The publication announces the possibility to appeal to CAS, but also refers explicitly to the applicable regulations which “*regulate in detail the issues of its jurisdiction, composition and structure, as well as the rules on the arbitration and conciliation procedure*” (emphasis added).

Therefore, all the elements of the publication on the COC website analyzed and viewed in conjunction with each other by the Panel converge towards the conclusion that the publication is intended for general information purposes regarding the subject of Sports Arbitration, the Sports Arbitration Council, their members and the applicable regulations. The text on the website only summarizes and describes the general concept regarding arbitration. To know the details of jurisdiction, composition, structure, as well as the rules on arbitration and conciliation procedure, the publication on the website refers to the applicable regulations.

As a consequence, the intention of the publication on the COC website is for information purposes only and, as such, does not qualify as an offer to arbitrate regarding any decision of the Sports Arbitration Council.

The publication is clearly incomplete – as is not unusual in case of supplying general information – and clearly needs to be amended, but the Panel finds that the publication on the website lacks some essential elements to be recognized as an offer to arbitrate, *i.e.* because it is not sufficiently precise as to the subject matter. Furthermore, there is no exchange of written documents (including data messages) between the parties supporting the Appellant's position regarding a possible arbitration agreement. The file contains only the publication on the website (as the alleged offer) and the Statement of Appeal (as the alleged acceptance of the alleged offer).

The publication on the website does not give evidence that the COC has the intention to be bound to an agreement to arbitrate at CAS in cases other than those arising from or related to the Olympic Games as governed by the applicable rules. Another interpretation would deprive the explicit rule of Article 72 (3) of the COC Statutes of its importance.

Moreover, the publication on the website could not be understood in good faith by the Appellant, being a (former) member of the COC, as the expression of an intent by the COC to activate a legal transaction and to enter into a legally binding commitment towards the Appellant.

Although the wording of the publication is clearly incomplete - it does not say that **“any”** decision of the Sports Arbitration Council may be appealed at CAS. It must have been clear to the Appellant as a (former) member of the COC, whose representative attended the Assembly which adopted the amendments of the Statutes, that it cannot rely on the wording of a part of a website publication instead of or without consulting the applicable rules. In particular, because another part of the website publication refers to the applicable rules and these applicable rules only foresee the possibility of an appeal to CAS regarding disputes arising from or relating to the Olympic Games.

As a result, the publication on the website could not be understood as referring to any and all disputes, but was limited to such disputes as described in detail in the applicable regulations.

No express declaration of intent to arbitrate at CAS in any and all disputes can be inferred from the content

of the website, which should be interpreted as to generally inform the reader of the website about the COC's Sports Arbitration and not as an offer in good faith to conclude a binding arbitration agreement.

In conclusion, there is no offer to arbitrate made by the COC, there could also not be a valid acceptance of such no-offer by the Appellant. As a consequence the Statement of Appeal of the Appellant must be considered to be an offer to the COC to arbitrate at CAS, which offer is clearly rejected by the Respondent.

B. Conclusion

In light of the foregoing, the Panel concludes that there is no arbitration clause in favour of CAS regarding the dispute between the Appellant and the Respondent. As a consequence, the Panel concludes that there is no evidence of any agreement between the parties as to CAS arbitration and the appeal is dismissed.

Football; Transfer; Meaning of an appealable decision under Article R47 CAS Code; Ruling issued by a sports-related body refusing to deal with a request; Decision rendered in the form of a letter; Possibility to bring the case before FIFA and objective effect of a decision on its addressee; Decisions taken by the competent FIFA bodies; Referral of the case back to the previous instance pursuant to Article R57 CAS Code

Panel:

Prof. Petros C. Mavroidis (Greece), President

Mr Rui Botica Santos (Portugal)

Prof. Ulrich Haas (Germany)

Relevant facts

Mr Rolla is an Argentinean football agent exercising his activity with a license delivered by the Argentinean Football Association.

Palermo is an Italian football club, affiliated with the Italian Football Association which in turn is affiliated with FIFA.

FIFA is the global governing body of football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players around the world. FIFA is an association established under Swiss law with headquarters in Zurich, Switzerland.

Edinson Cavani is a Uruguayan football player, born on 14 February 1987 (the “Player”).

On 1 April 2010, Mr Rolla and Palermo signed a representation agreement regarding Mr Rolla’s assistance in the conclusion of the transfer of the Player “to any club worldwide” (the “Representation Agreement”).

On 17 July 2010, the Player was transferred from

Palermo to Napoli on a provisional basis, with an option to conclude a permanent transfer at a later stage. The agreed compensation for the temporary transfer of the Player between the two clubs was EUR _____.

On 8 August 2010, the Appellant addressed an invoice of EUR _____ to the First Respondent regarding his involvement in the temporary transfer of the Player from Palermo to Napoli.

The First Respondent refused to pay, arguing that “no compensation [was] to be recognized as a result of the temporary transfer of the player”.

The Player was subsequently transferred on a permanent basis, as Napoli exercised the option set forth in the agreement of provisional transfer, for an additional sum of EUR _____.

Despite a request from the Appellant to pay him the agreed percentage fee, the First Respondent refused to pay any amount following the permanent transfer of the Player, arguing that the Appellant had not participated at all in the negotiation and/or conclusion of the permanent transfer of the Player to Napoli.

On 30 November 2010, the Appellant filed a claim against the First Respondent before FIFA requesting, inter alia, that the Players’ Status Committee finds that the First Respondent had breached the Representation Agreement concluded on 1 April 2010. The Appellant claimed that the breach had occurred because of the alleged non-payment of the contractually agreed fee that he was entitled to receive, because of his involvement in the transfer of the Player to Napoli.

On 17 June 2011, in a letter signed by FIFA’s Director of Legal Affairs and Deputy Head of Players’ Status, FIFA reverted to the Appellant in writing in order to inform him that, based on the provision of Article 29 par. 1 and par. 2 of the Players’ Agents Regulations, FIFA did not appear to be in a position to intervene in that matter. Additionally, the letter explicitly specified that the aforementioned information was given on the basis of the documents and information in FIFA’s possession only and was expressed without

prejudice whatsoever.

On 22 February 2012, the Appellant requested FIFA to continue the proceedings and decide the issue before it, maintaining his claim directed against the First Respondent for payment of allegedly outstanding fees.

On 21 June 2012, in a letter signed by FIFA's Director of Legal Affairs and Head of Players' Status, FIFA reiterated the content of their previous letter dated 17 June 2011, and informed the Appellant that FIFA did not appear to be in position to deal with this matter. In this letter, FIFA also confirmed that its position was based on the documents and information in FIFA's possession only and that such information was communicated without prejudice whatsoever.

This last letter, dated 21 June 2012, which forms the basis of the current proceedings, will be referred to in what follows as the "FIFA Letter".

Following receipt of the FIFA Letter, the Appellant filed a Statement of Appeal before the CAS pursuant to Article R47 of the Code of Sports-related Arbitration (the "Code") on 11 July 2012.

Extracts from the legal findings

A. The Admissibility of the appeal and CAS jurisdiction

The admissibility of an appeal before CAS shall be examined in light of Article R47 of the Code, which reads as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".

The same general principle is gathered in Article 63.1 of the FIFA Statutes, which states that:

"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".

In the present case, the admissibility of the appeal filed by Mr Rolla is being challenged by FIFA on the basis that the FIFA Letter is not a decision but a mere informative letter.

In view of the challenge, the Panel shall first determine if the FIFA Letter shall be considered an appealable decision or not.

For this purpose, the Panel deems convenient to firstly recall the jurisprudence of CAS regarding the concept of "decision", since this is an issue that has been debated on numerous occasions, and the CAS has had ample opportunity to develop its case law in linear manner.

The general principles of the CAS jurisprudence regarding the concept of "decision" were summarized in the case CAS 2008/A/1633 and can be extracted from CAS jurisprudence as follows:

The existence of a decision does not depend on the form in which it has been issued (2005/A/899 & 2007/A/1251)

A communication intended to be considered a decision shall contain a ruling which aims to affect the legal situation of its addressee or other parties (CAS 2005/A/899 & 2007/A/1251, CAS 2004/A/659).

A ruling issued by a sports-related body refusing to deal with a request can be considered a decision under certain circumstances (CAS 2007/A/1251, CAS 2005/A/994, CAS 2005/A/899, CAS 2008/A/1633)

The First Respondent stated that the FIFA Letter would not be considered to be a decision if the possible absence of the subjective intent by FIFA when issuing it to decide the matter were privileged as the decisive legal criterion. Nevertheless, the fact that FIFA addressed the merits of the case in order to declare that it was not in a position to intervene, and the fact that it returned the Appellant's advance of costs tended to demonstrate the existence of a decision which affected the Appellant's legal situation.

The Panel shall at this point apply the above-mentioned criterion in order to determine whether the FIFA Letter is actually a decision or a mere informative letter; it will address the issue whether the FIFA Letter has indeed affected the addressee's legal situation.

The Panel deems it important to check the content of the following exhibits produced to the CAS file:

The letter of FIFA dated 17 June 2011, which reads in relevant part:

"In this respect, from the correspondence received, we took note that you are claiming from the Italian club U.S. Città di Palermo a commission fee of 5% of the value of the transfer

of the player Roberto Edinson Cavani to the Italian club Società Sportiva Calcio Napoli S.p.A., in accordance with an agreement apparently concluded between you and U.S. Città di Palermo on 1 April 2010.

In this respect, we would like to draw your attention to art. 29 par. 1 of the Players' Agent Regulations (hereinafter: the Regulations), which provides that a club is strictly forbidden from paying any amount of compensation for the transfer (or the loan) of a player, either partially or wholly, to the players' agent, not even as remuneration. Furthermore, we refer to art. 29 par. 2 of the Regulations which stipulates that "Within the scope of a player's transfer, players' agents are forbidden from receiving any remuneration other than in the cases provided under Chapter IV of the present regulations [i.e. art. 19 and 20]" In this connection, we would like to remind you of the content of art. 20 par. 5 of the Regulations which states that "A players' agent who has been contracted by a club shall be remunerated for his services by payment of a lump sum that has been agreed upon in advance" (emphasis added)

On account of the above and, in particular, in view of the fact that the agreement at the basis of the present matter appears to indicate that the club US Città di Palermo had to pay you a percentage of the loan/transfer fee for the services apparently rendered in connection with the loan of the player in question as commission, we regret having to inform you that we do not appear to be in a position to intervene in this affair. For the sake of good order, please note that the given information is based on the documents currently in our possession only and that it is without prejudice whatsoever.

Finally, we would like to inform you that you will receive a refund of the procedural advance of costs paid in accordance with art. 17 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber in the amount of CHF 5,000. In this respect, we kindly ask you to send us, at your best convenience, your full bank account details in order for our services to reimburse you the said amount [the Beneficiary's Name, City, Country and the Bank (full) Name, City, Country (plus either SWIFT coder or BRANCH code)]".

In its letter dated 21 June 2012, the FIFA Letter, FIFA reiterated the contents of its previous letter dated 17 June 2011, informing the Appellant once again that it did not appear to be in a position to deal with the matter. In particular, it referred once again the Appellant to the content of Article 29 par.1 and par. 2 of the Players' Agents Regulations. Furthermore, the FIFA administration also referred the Appellant to the content of Article 20 par. 1 of the Players' Agents Regulations. Finally, the FIFA administration reiterated that the information was communicated without intent to affect the rights and obligations of the addressee.

The Panel first considers that the fact that FIFA's position was transmitted to the Appellant under the form of a letter does not, in and of itself, prevent the FIFA Letter from being considered a decision.

The Panel is also of the opinion that the legal situation of the Appellant was affected by the FIFA Letter as this letter was in substance denying FIFA's jurisdiction to deal with the Appellant's claim, as explained below.

The present situation is different from the one in CAS 2008/A/1633, in which the Panel stated that "*what FIFA is actually stating in these letters is that it is not in a position to intervene in the matter submitted by the Club in the way it has been submitted, but leaves the door open to deal with the case if appropriately filed before its bodies. And this, in the Panel's view, makes the difference with a situation of strict denial of justice eventually challengeable before CAS*".

In the case at hand, FIFA's position, expressed in the letters dated 17 June 2011 and 21 June 2012 as well as in its Answer, is that it appears that "*it is not in a position to intervene*" and that "*the given information is based on the documents currently in [its] possession and it is without prejudice whatsoever*". As FIFA was not represented at the hearing, the Panel was not in position to ask clarification about the exact meaning of this wording, in particular the terms "*without prejudice whatsoever*", which are not clear. It should be noted though, that in CAS 2011/A/2586, FIFA had explained that these very terms meant that a decision could still be taken at a later stage.

The Panel finds that the Appellant properly filed a claim before FIFA, providing it with the necessary documentation. The answers from the FIFA administration, in particular the FIFA Letter, did not leave any open door to the Appellant for remedying the situation before one of FIFA's bodies.

Even though it is stated in the FIFA Letter that "*the given information is based on the documents currently in our possession only and that it is without prejudice whatsoever*", the Panel considers that the Appellant, following this letter, did not have any other way to make his case before FIFA. This is particularly true as the Appellant twice received the same answer from FIFA, although it had requested that FIFA continues the proceedings after the first letter dated 17 June 2011 had been issued.

As to the issue whether there is an *animus decidendi* in the FIFA Letter, the Panel agrees with the Appellant who considers that what is relevant is the objective effect of a decision on its addressee, and not the subjective intent of the authority which renders the

decision. Contrary thus to the Second Respondent's position, the Panel considers that the FIFA Letter had affected the legal situation of the Appellant, and therefore should be considered a decision, irrespective whether FIFA had *animus decidendi* when issuing the FIFA Letter.

In view of the above, the Panel finds that, through the FIFA Letter, FIFA clearly manifested that it would not entertain the request, thereby making a ruling on FIFA's jurisdiction and directly affecting the Appellant's legal situation.

As there were no other internal remedies available, and as the Appellant filed his Statement of Appeal within the deadline prescribed by the FIFA Statutes and the Code, the appeal is admissible and CAS has jurisdiction to deal with it. The latter aspect has not been contested by the Parties and was expressly confirmed by their signature of the Order of Procedure.

B. Merits

1. Procedure before FIFA

The Panel is of the opinion that the procedure before FIFA was not conducted properly. It was handled by the FIFA administration instead of the competent judicial body and consequently, in the Panel's view, the relevant procedural rules were not followed.

The Panel refers in this respect to CAS 2007/A/1251, in which the Panel concluded that *"FIFA has a clear system whereby its general secretariat has no authority to decide on issues of competence but must dispatch the claims to the DRC and the PSC according to their respective scope of jurisdiction under the rules and regulations."* Moreover, as mentioned in CAS 2011/A/2586 and in CAS 2007/A/1298, 1299 & 1300, *"the Panel already found that the FIFA rules provide that decisions of the FIFA Dispute Resolution Chamber must contain reasons, and that FIFA must correctly apply its own regulations by meeting the formal requirements contained therein"*. This position is of course also applicable to the other FIFA judicial bodies, such as the Players' Status Committee.

In line with the findings in CAS 2011/A/2586, the Panel concludes that *"a decision with such important consequences for the parties involved in the proceedings must be taken by the authorized and competent judicial body rather than by the secretariat. To ensure a fair procedure, a party that is subject to jurisdiction of FIFA has the right to be given the opportunity to bring his full arguments and pleadings to the appropriate judicial body before a final decision is taken"*.

The Panel thus finds, in line with CAS 2011/A/2586,

that an administrative body of FIFA such as the Director of Legal Affairs and/or the Head of Players' Status Committee, is not competent to decide on the question of jurisdiction of the Players' Status Committee or the FIFA Dispute Resolution Chamber.

2. Jurisdiction of FIFA

The Appellant and the First Respondent stated at the hearing that the Panel should take a decision on the merits of the matter, and that it should not refer the case back to FIFA.

In its Answer, the Second Respondent stated that *"should this honourable Panel not render an award as to the substance of the matter at hand, to refer the claim back to FIFA for further investigation and possible further actions"*.

In its letter dated 19 November 2012, the Second Respondent also stated that *"should the Appellant and the First Respondent agree on having the substance of the matter directly heard by the Court of Arbitration for sport (CAS), we would not object to such course of action. From the various submissions, i.e. requests of the Appellant and answer from the First Respondent, we understand that the two aforementioned parties indeed agree that CAS decides directly as to the substance of the dispute opposing them (which was never judged by any of FIFA's competent bodies)"*. The Panel understands from this position that FIFA is of the opinion that the Panel could issue a decision on the merits as an ordinary arbitration procedure as the Appellant and the First Respondent seemed to agree thereto.

The Panel is of the opinion that the present matter is an appeals procedure against a decision by FIFA denying its jurisdiction, and shall therefore be dealt as such and not as an ordinary arbitration procedure.

Article R57 of the Code reads in particular that *"[t]he Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance"*.

The Panel finds that Article R57 of the Code allows CAS panels to render a new decision only if there was actually a decision taken in the first instance (*"it may issue a new decision which replaces the decision challenged"* (emphasis added)).

In the case at hand there was never a decision on the merits issued by FIFA, as the FIFA Letter should be properly understood as a decision declining jurisdiction. The Panel therefore finds that it has not the power to render a decision on the merits of the case and substitute a FIFA decision on this score, as there was never a decision to this effect issued by

FIFA. The fact that the FIFA administration, in the FIFA Letter, referred to provisions of the Players' Agent Regulations does not mean, in the Panel's view, that a decision was taken on the merits.

The Panel appreciates that the Appellant and the First Respondent have the right to have their case decided promptly. This consideration should not, nevertheless, take precedence over all the pertinent legal considerations mentioned above that argue in favour of remanding the present dispute back to the competent FIFA body.

Besides, the Panel reminds that the Second Respondent has not consented to the Panel deciding this case in all circumstances. The Second Respondent agreed that CAS has competence to decide this dispute if it were an ordinary procedure, *quod non*, as explained above. In the absence of explicit agreement of all Parties to this effect, the Panel is of the view that the administration of sports justice is better served if the case were remanded back to the FIFA competent body. This Panel sees itself comforted by CAS jurisprudence in comparable circumstances. In CAS 2003/O/483 (at no. 7) the Panel held as follows:

"It must however be stressed that, assuming that the motions of any Party should be upheld with respect to the appeals' admissibility issues addressed in the challenged Decision, the Panel finds that it would not be appropriate for CAS to rule a case de novo in such circumstances. Indeed, the matter has not been examined on the merits by the previous instance, which has restricted itself to rule on the admissibility requirements for lodging an appeal against the Bureau's decision. Should the CAS decide that the decision of the Executive Committee be quashed, it would thus be preferable to remit the case to FIFA in order for latter to render a new decision with full grounds".

In view of the above, the Panel concludes that the present matter shall be referred back to FIFA.

Football; Transfert international de joueurs mineurs; Interprétation des statuts et règlements d'une association; Prise en compte de l'intention des rédacteurs dans l'application de l'art. 19 du Règlement FIFA; Exceptions non-écrites au principe de l'interdiction de transfert international pour les joueurs mineurs; Application du droit communautaire; Compatibilité de l'art. 19 du Règlement FIFA avec le droit communautaire; Compatibilité de l'art. 19 du Règlement FIFA avec les traités internationaux de protection des droits de l'homme

Panel:

Me Olivier Carrard (Suisse), Président

Me Paul Mauriac (France)

Me Prosper Abega (France)

Faits pertinents

Le Football Club Girondins de Bordeaux ("l'Appelant" ou le "FCGB") est un club de football créé en 1919 à Bordeaux (France) et dont l'équipe professionnelle évolue en première division française.

M. Valentin Vada ("le Joueur"), né le 6 mars 1996 en Argentine, est un joueur de football de nationalité italienne. Au début de l'année 2011, le Joueur a quitté l'Argentine, où il était domicilié avec son père, sa mère et ses deux frères (aîné et cadet), afin de s'établir dans la région de Bordeaux. A la mi-février 2011, le Joueur a rejoint l'Appelant.

Dès lors que le Joueur évoluait précédemment dans le club de football argentin "Proyeto Crecer", le 6 mai 2011, la Fédération française de Football (FFF) a entré dans le système de régulation de transfert (le "Système TMS") une demande d'approbation de transfert international pour Valentin Vada, en invoquant le déménagement des parents de ce dernier pour des raisons étrangères au football selon l'art. 19 al. 2 lit. a) du Règlement FIFA du Statut et du

Transfert des Joueurs (le "Règlement FIFA").

Par décision du 17 mai 2011, le Juge Unique de la Sous-Commission du Statut du Joueur ("le Juge Unique") a rejeté cette demande d'approbation de transfert international, considérant en substance *"qu'il ne pouvait être établi de manière claire et indubitable que les parents du joueur s'étaient installés en France pour des raisons qui n'étaient en aucune manière liées au football"*.

En date du 29 juin 2011, l'Appelant a adressé une déclaration d'appel au Tribunal arbitral du sport (TAS), à l'encontre de la décision précitée. Dans sa sentence du 22 décembre 2011, le TAS a confirmé la décision du Juge Unique du 17 mai 2011 et rejeté la demande de délivrance d'un certificat international de transfert (CIT) pour le Joueur.

Le 7 mars 2012, l'Appelant et le Joueur ont signé une convention de formation valable jusqu'au 30 juin 2014 (la "Convention"), comportant un volet sportif et un volet scolaire. Cette Convention prévoit la prise en charge par l'Appelant de l'ensemble des frais liés à la formation (écolage, logement et restauration). Le même jour, le père du Joueur et l'Appelant ont signé un formulaire de demande de licence pour le Joueur.

Le 9 mars 2012, la FFF a entré dans le Système TMS une demande d'approbation de transfert international pour le Joueur sur la base de l'exception prévue à l'art. 19 al. 2 lit. b) du Règlement FIFA, à savoir que le joueur était âgé de plus de 16 ans et que le transfert avait lieu à l'intérieur du territoire de l'Union européenne ou au sein de l'Espace économique européen.

Par décision du 23 mai 2012 (la "Décision entreprise"), notifiée à l'Appelant le 4 juillet 2012, le Juge Unique a rejeté la demande déposée par la FFF considérant notamment ce qui suit (par. 8 et 9):

8. *En continuation, le juge unique a noté que le joueur est de nationalité italienne, qu'il est actuellement enregistré auprès d'un club affilié à l'Association Argentine de Football (AFA) et qu'il désire désormais être enregistré pour un club situé en France. Cela étant, le juge unique a conclu que la présente affaire concerne le transfert international d'un ressortissant d'un Etat européen d'une association qui ne se trouve pas dans le territoire de l'UE ou de l'EEE vers une association d'un Etat membre de*

l'UE, dont il n'a pas la nationalité.

9. Dans ce contexte, le juge unique a souligné qu'un tel transfert international ne correspond pas à la lecture stricte de l'exception en question, qui fait clairement référence à un transfert ayant lieu à l'intérieur du territoire de l'UE ou de l'EEE. En effet, le juge unique a considéré que ladite exception était basée sur un critère objectif de territorialité, sans prise en compte de critère de personnalité. De telle manière, le juge unique a considéré que l'exception en question s'applique uniquement en cas de transfert d'un joueur en provenance d'un club situé à l'intérieur de l'UE ou de l'EEE vers un autre club dans le territoire de l'UE ou de l'EEE, c'est-à-dire qu'une condition *sine qua non* de l'application de ladite exception, en cas de transfert international, est le fait que le joueur soit préalablement enregistré pour un club situé à l'intérieur de l'UE ou de l'EEE. Si tel n'est pas le cas, l'art. 19 al. 2b) du règlement ne peut donc trouver application. En outre, le juge unique a tenu à souligné (*sic*) que les considérations ci-dessus sont non seulement dictées par la lecture du règlement, mais elles reflètent également le contenu de l'accord conclu entre la commission européenne et FIFA/UEFA en 2001 relatif notamment à la protection des joueurs mineurs.

Le Juge Unique a toutefois admis que les conditions figurant à l'art. 19 al. 2b) let. i, ii et iii, à savoir celles liées à la formation sportive, l'éducation académique, scolaire et/ou une formation professionnelle et l'encadrement du joueur, étaient toutes remplies dans le cas d'espèce.

Par déclaration d'appel du 19 juillet 2012, l'Appelant a saisi le TAS. En date du 20 juillet, l'Appelant a déposé auprès du TAS un mémoire d'appel, dont la première page désignait le Joueur en tant qu' "Intervenant volontaire", représenté par les mêmes avocats que l'Appelant. Le mémoire d'appel de l'Appelant contenait les conclusions suivantes:

- Constaté que le FC Girondins de Bordeaux est bien fondé à se prévaloir des dispositions de l'article 19 alinéa 2 b) du Règlement du Statut et du Transfert du Joueur FIFA.
- Ordonner la délivrance du certificat international du transfert pour le joueur mineur Valentin VADA.

Le 10 octobre 2012, une audience s'est tenue à Lausanne, au siège du TAS. Au cours de sa plaidoirie introductive, l'un des conseils de l'Appelant s'est référé à un document, non produit dans la procédure, contenant de nombreuses références à des décisions de la Sous-Commission du Statut du Joueur et traitant spécifiquement de la problématique du transfert international des joueurs mineurs. Celui-ci consistait

en une note juridique détaillée intitulée "Protection des mineurs – Jurisprudence de la sous-commission de la Commission du Statut du Joueur" présentant la jurisprudence en lien avec à l'article 19 du Règlement FIFA. L'Intimée a indiqué à la Formation qu'elle s'opposait à la production de ce document. Après délibération, la Formation a toutefois décidé d'accepter la production de cette pièce.

S'agissant de la jurisprudence relative à l'art. 19 al. 2 let. b du Règlement FIFA, ce document contient notamment les développements suivants (pages 4 et 5):

Il n'existe pas de jurisprudence établie pour les demandes concernant des citoyens de l'UE cherchant à être transférés depuis l'extérieur de l'UE/EEE vers un club de l'UE/EEE. La sous-commission a pris des décisions différentes indiquant deux interprétations divergentes.

La première interprétation, suivie par la sous-commission dans la plupart des cas, tend à comprendre l'exception en question comme étant destinée à appliquer la liberté de mouvement des travailleurs à compter de l'âge de 16 ans conformément à la législation européenne. Il a été considéré que le droit européen doit être pris en considération lors de l'évaluation du transfert d'un joueur qui, doté d'un passeport de l'UE, souhaite s'enregistrer auprès d'un club de l'UE dont il n'a pas la nationalité. La libre circulation des travailleurs étant applicable, ces transferts relèvent de l'art. 19 al. 2b du règlement (H-0000180, H-0000225, H-0000268 et H-0000360; toutes non motivées).

[...]

Il est donc possible de noter que cette interprétation est proposée par l'administration de la FIFA et qu'elle a dans l'ensemble été acceptée par les membres de la sous-commission.

La seconde interprétation, suivie en de bien moins nombreuses occasions par la sous-commission (G-0000001, G-0000283 et H-0000344), est plus restrictive et considère la formulation de l'exception comme une tentative de restriction de la liberté de circulation des travailleurs, qui serait justifiée par l'objectif de la protection des mineurs (dérivant de l'accord conclu entre la Commission européenne et FIFA/UEFA en 2001). En effet l'application de l'exception a été considérée comme purement territoriale, c'est-à-dire un transfert au sein de l'UE/EEE ne laissant pas la moindre place pour une considération de critères personnels comme celui de la nationalité du joueur.

Il est fort probable que le TAS doive tôt ou tard clarifier ce point spécifique.

Ce document contient en outre les développements suivants en relation avec la jurisprudence de la Sous-Commission non basée sur les exceptions de l'art. 19

al. 2 du Règlement FIFA:

Il convient enfin de rappeler que la jurisprudence de la sous-commission a été très stricte en maintenant que, en principe, la liste des exceptions figurant à l'art. 19 du règlement et la jurisprudence (règle des cinq ans, cf. point 2b ci-dessus) qui s'y rapporte est exhaustive. Toutefois, si un club estime que des circonstances très particulières, qui ne répondent à aucune des exceptions prévues, justifient l'enregistrement d'un joueur mineur, l'association du club concerné peut, au nom de son affilié, soumettre une demande officielle par écrit (pas via TMS) à la sous-commission pour qu'elle considère ce cas spécifique et rendre une décision formelle.

Le même jour, les parties ont été informées que le document en question était admis à la procédure et invitées à prendre position sur celui-ci.

Par télécopie du 13 novembre 2012, le Greffe du TAS a informé les parties de ce que la Formation souhaitait la tenue d'une nouvelle audience, afin de leur permettre de commenter leurs écritures. Le 6 décembre 2012, une deuxième audience s'est tenue à Lausanne, au siège du TAS.

Extraits des considérants

Les questions essentielles posées à la Formation sont les suivantes:

- a) Le Joueur remplit-il les conditions pour bénéficier de l'exception figurant à l'art. 19 al. 2 let. b du Règlement FIFA?
- b) Est-ce que l'application de l'art. 19 al. 2 let. b du Règlement FIFA contrevient au droit du Joueur de circuler et de séjourner sur le territoire de l'Union européenne?
- c) Est-ce que l'application de l'art. 19 al. 2 let. b du Règlement FIFA contrevient au droit du Joueur au respect de ses biens garanti à l'art. 1^{er} du Protocole Additionnel de la CEDH et à son droit à la vie privée garantie à l'art. 8 CEDH?

A. Le Joueur remplit-il les conditions pour bénéficier de l'exception figurant à l'art. 19 al. 2 let. b du Règlement FIFA?

Le présent litige se concentre en premier lieu sur l'application et l'interprétation de l'art. 19 al. 2 let. b du Règlement FIFA, à savoir l'une des exceptions dérogeant au principe de l'interdiction des transferts internationaux des joueurs mineurs.

En droit suisse, les statuts d'une association doivent être interprétés selon le sens du texte, tel qu'il peut

et doit être compris, en fonction de l'ensemble des circonstances. Cette interprétation est qualifiée d' "objective" (PERRIN/CHAPPUIS, *Droit de l'association*, 3^{ème} éd., Genève 2008, ad art. 63 CC, pp. 38-39, en référence à l'arrêt du Tribunal fédéral du 27 juin 2002, 5C.328/2001). Tel doit en aller de même s'agissant de l'interprétation des règlements émanant d'une association (RIEMER H. M., *Berner Kommentar, Das Personenrecht*, 3^{ème} éd., Berne 1990, N 349 ad Systematischer Teil, p. 147; ZEN-RUFFINEN P., *Droit du sport*, Zurich, Bâle, Genève 2002, N 170, p. 63).

L'art. 19 du Règlement FIFA interdit le transfert international d'un joueur âgé de moins de dix-huit ans (art. 19 al. 1 du Règlement FIFA, *a contrario*). Toutefois, ce principe général comporte des exceptions. L'art. 19 al. 2 du Règlement FIFA énonce trois exceptions qui peuvent être résumées ainsi:

- Les parents du joueur s'installent dans le pays du club pour des raisons étrangères au football (art. 19 al. 2 let. a);
- Le transfert a lieu à l'intérieur de l'Union européenne (UE) ou de l'Espace Economique Européen (EEE), le joueur est âgé de seize à dix-huit ans et certains critères additionnels sont remplis (art. 19 al. 2 let. b);
- Le joueur vit près d'une frontière et le club auprès duquel le joueur souhaite être enregistré se trouve près de cette frontière (distance maximale, art. 19 al. 2 let. c).

Dans le cas d'espèce, la question est de savoir si le Joueur remplit les conditions lui permettant d'être mis au bénéfice de la seconde exception mentionnée ci-dessus (art. 19 al. 2 let. b du Règlement FIFA).

La Formation relève tout d'abord que l'art. 19 du Règlement FIFA ne laisse pas de marge de manœuvre au Juge Unique de la Sous-Commission. Une dérogation au principe général de l'interdiction des transferts internationaux des joueurs âgés de moins de dix-huit ans doit en effet être accordée lorsque les conditions en sont remplies. *A contrario*, il doit refuser la dérogation lorsque les conditions en font défaut.

La Formation relève ensuite que l'art. 19 al. 2 let. b du Règlement FIFA ne fait aucune référence à un quelconque critère de nationalité, mais se concentre uniquement sur le territoire dans lequel intervient le transfert: "*si le transfert a lieu à l'intérieur de l'Union européenne (UE) ou au sein de l'Espace Economique Européen (EEE)*". Le Règlement FIFA énonce ainsi un critère de territorialité, à l'exclusion de celui de la nationalité des joueurs concernés.

Au vu de ce qui précède, l'exception figurant à l'art. 19 al. 2 let. b du Règlement FIFA ne semble pouvoir s'appliquer que lorsque le transfert intervient entre des clubs situés à l'intérieur de l'UE ou de l'EEE. La nationalité du joueur souhaitant bénéficier de l'exception figurant à l'art. 19 al. 2 let. b du Règlement FIFA paraît ainsi indifférente, seule la question du territoire dans lequel se déroule le transfert international devant être examinée.

Les considérants qui précèdent devraient conduire la Formation à dénier la possibilité pour le Joueur d'être mis au bénéfice de l'exception de l'art. 19 al. 2 let. b du Règlement FIFA. En effet, il est constant que le transfert envisagé n'a pas lieu à l'intérieur de l'UE ou de l'EEE.

La Formation constate toutefois que le Règlement FIFA fait l'objet d'un commentaire (Commentaire du Règlement du Statut et du Transfert des Joueurs; le "Commentaire") disponible sur le site internet de l'Intimée duquel il découle que l'exception figurant à l'art. 19 al. 2 let. b du Règlement a été incluse dans l'accord conclu en mars 2001 entre l'UE et la FIFA/UEFA afin de respecter le principe de la libre circulation des travailleurs au sein de l'UE/EEE (note du bas de page n° 95 figurant à la page 58 du Commentaire).

Il apparaît ainsi que l'intention des rédacteurs de cette disposition était d'éviter les atteintes potentielles à la libre circulation des travailleurs au sein de l'UE/EEE qui auraient pu être engendrées par l'application stricte du principe de l'interdiction des transferts internationaux des joueurs âgés de moins de dix-huit ans. La Formation estime que l'on ne saurait faire abstraction de cette intention dans l'application de l'art. 19 du Règlement FIFA.

Par ailleurs, la Formation relève que la liste des exceptions figurant à l'art. 19 al. 2 du Règlement FIFA ne semble pas être exhaustive. Il a ainsi été jugé par une autre Formation TAS que l'art. 19 al. 2 du Règlement FIFA pouvait être interprété comme permettant l'application d'exceptions non-écrites (CAS 2008/A/1485, pp. 12-13): *"In the light of the aforementioned, the Panel deduces that the list of exceptions Art. 19 par. 2 is not exhaustive and that this provision has been construed as allowing other exceptions, concerning students"*. Le caractère non-exhaustif de la liste des exceptions ressort également de la note interne produite par l'Appelant qui précise que si un club estime que des circonstances très particulières, qui ne répondent à aucune des exceptions prévues dans le Règlement FIFA, justifient l'enregistrement d'un joueur mineur, l'association du club concerné peut, au nom de son affilié, soumettre une demande officielle par écrit

à la Sous-Commission pour qu'elle considère le cas spécifique et rende une décision formelle.

Enfin, la Formation relève que, selon la note interne produite par l'Appelant, dans la majorité des cas, la Sous-Commission prend en considération la libre circulation des travailleurs lors de l'évaluation du transfert d'un joueur qui, doté d'un passeport d'un pays de l'UE ou de l'EEE, souhaite s'enregistrer auprès d'un club d'un pays de l'UE ou de l'EEE.

Les éléments qui précèdent amènent la Formation à constater qu'il existe une exception non-écrite dans le Règlement autorisant le joueur disposant de la nationalité de l'un des pays membres de l'UE ou de l'EEE de bénéficier de l'exception figurant à l'art. 19 al. 2 let. b du Règlement FIFA, à la condition que son nouveau club garantisse son éducation scolaire et sa formation sportive (critères additionnels de l'art. 19 al. 2 let. b i, ii, iii et iv).

En l'espèce, il est constant que le Joueur est un ressortissant de l'un des pays de l'UE. En outre, le Juge Unique a constaté dans sa décision du 23 mai 2012 que les critères additionnels relatifs à l'éducation scolaire et la formation sportive étaient remplis.

Au vu de ce qui précède, la Formation considère qu'il se justifie d'accepter la demande d'approbation préalable visant la demande de CIT pour le Joueur.

B. Est-ce que l'application de l'art. 19 al. 2 let. b du Règlement FIFA contrevient au droit du Joueur de circuler et de séjourner sur le territoire de l'Union européenne?

L'argument de l'Appelant relatif à l'argument selon lequel l'application de l'art. 19 al. 2 let. b du Règlement FIFA contreviendrait au droit du Joueur de circuler et de séjourner sur le territoire de l'UE repose sur le postulat selon lequel la Formation devrait faire application du droit de l'UE. Or, tel n'est pas le cas. L'art. R58 dispose en effet que la Formation statue selon les règlements applicables et selon les règles choisies par les parties. Or, en vertu de l'art. 66 al. 2 des Statuts de la FIFA, la Formation applique en premier lieu les divers règlements de la FIFA ainsi que le droit suisse à titre supplétif.

Compte tenu de ce qui précède, l'application directe de normes émanant du droit de l'UE est exclue, étant néanmoins relevé qu'un tribunal arbitral ayant son siège en Suisse doit, dans une certaine mesure, tenir compte des normes étrangères d'application immédiate lorsque cela est justifié par des intérêts suffisants (CAS 2008/A/1485).

En toute hypothèse, force est de constater que la question de la compatibilité de l'art. 19 du Règlement FIFA avec le droit communautaire a déjà été tranchée par d'autres Formations TAS:

- Dans la procédure CAS 2005/A/955 & 956, la Formation TAS a conclu, d'une part, que l'interdiction des transferts internationaux de joueurs de moins de dix-huit ans poursuivait un intérêt légitime, à savoir celui de la protection des jeunes, et d'autre part, était proportionnée à l'objectif recherché.
- Dans la procédure CAS 2008/A/1485, la Formation TAS a considéré que les règles contenues à l'art. 19 du Règlement FIFA ne contrevenaient à aucune disposition, principe ou règle du droit communautaire.

L'argument de l'Appelant sera par conséquent rejeté.

C. Est-ce que l'application de l'art. 19 al. 2 let. b du Règlement contrevient au droit du Joueur au respect de ses biens garanti à l'art. 1er du Protocole Additionnel de la CEDH et à son droit à la vie privée garantie à l'art. 8 CEDH?

Garantis par l'Etat, les droits fondamentaux sont dirigés contre l'Etat (AUER/MALINVERNI/HOTTELIER, *Droit constitutionnel suisse*, Vol. II, 2^{ème} éd., Berne 2006, p. 6). Les droits fondamentaux constituent ainsi typiquement un instrument d'autolimitation de l'Etat. Dans cette perspective, les droits fondamentaux trouvent application dans le rapport vertical entre l'Etat et l'individu (RIGOZZI/KAUFMANN-KOHLER/MALINVERNI, *Doping and Fundamental Rights of Athletes: Comments in the Wake of the Adoption of the World Anti-Doping Code*, ISLR 2003, pp. 46-47).

En ce qui concerne la CEDH, dont se prévaut expressément l'Appelant, la Formation arbitrale souligne ainsi que, par principe, les droits fondamentaux et les garanties de procédure accordés par les traités internationaux de protection des droits de l'homme ne sont pas censés s'appliquer directement dans les rapports privés entre particuliers et donc ne sont pas applicables dans les affaires disciplinaires jugées par des associations privées (TAS 2011/A/2433). Cette position est en harmonie avec la jurisprudence du Tribunal fédéral suisse, qui, dans le cadre d'un recours formé contre une décision du TAS, a précisé (Arrêt du Tribunal fédéral du 11 juin 2001, Abel Xavier c. UEFA, consid. 2d, reproduit dans Bull. ASA, 2001, p. 566; partiellement publié aux ATF 127 III 429): "*Le recourant invoque les art. 27 Cst. et 8 CEDH. Il n'a cependant pas fait l'objet d'une mesure étatique, de sorte que ces dispositions ne sont en principe*

pas applicables".

Dans le cas d'espèce, l'Appelant se plaint de ce que l'application du Règlement FIFA, contreviendrait au droit du Joueur au respect de ses biens garanti à l'art. 1^{er} du Protocole Additionnel de la CEDH et à son droit à la vie privée garantie à l'art. 8 CEDH. Ce faisant, il perd de vue les dispositions précitées s'imposent à l'Etat et non à l'Intimée qui, nonobstant l'importance fondamentale de son rôle dans l'organisation du football, ne constitue pas un organe de l'Etat.

Partant, le grief invoqué par l'Appelant est mal fondé et sera par conséquent rejeté.

Football; Loan agreement including an option for definite transfer; Sell-on fee; CAS power of review (admissibility of new requests); Amount to be used to calculate the sell-on fee; Due date of the sell-on fee; Interests

Panel:

Mr Hendrik Willem Kesler (Netherlands), President
Mr Lars Hilliger (Denmark)
Mr Rui Botica Santos (Portugal)

Relevant facts

On 29 August 2007, Helsingborgs, a football club registered with the Swedish Football Association (the “Appellant” or “Helsingborgs”) and Parma, a football club registered in Italy entered into an agreement) regarding the loan from Helsingborgs to Parma of Mr McDonald Mariga (hereinafter: the “Player”), a professional football player of Kenyan nationality. The loan of the Player covered the 2007/2008 football season and included an option for a possible later definite transfer of the Player to Parma with a payment in several installments, and a sell-on clause in favor of the Appellant in case the option is exercised by the Respondent. On 29 April 2008, the Respondent exercised the option.

On 11 December 2009, the Appellant filed a claim with FIFA against Parma as the Respondent allegedly failed to comply with the payment schedule contained in the transfer agreement.

In the course of the FIFA proceedings, on 1 February 2010, the player was transferred from the Respondent to a third club for an alleged amount of EUR 10'000'000 and the Appellant supplemented its pending claim requesting the payment of 15% of the amount paid by the third club to Parma in excess of the fees that should have been paid by Parma to Helsingborgs regarding the transfer of the Player (the sell-on clause).

On 1 February 2010, the Respondent and the third club entered into a co-ownership agreement for the player for an amount of EUR 5'000'000 according to which the third club granted Parma the right of 50% co ownership in the economic effects of the Player.

On 7 April 2010, before the Single Judge of the FIFA Players' Status Committee (hereinafter: the “FIFA PSC Single Judge”) was able to render its decision, Parma complied with its payment obligations towards Helsingborgs concerning the outstanding transfer fee of EUR 709,657. The FIFA PSC Single Judge was therefore no longer required to render a decision in this respect.

On 25 June 2010, the Respondent sold the remaining 50% of the economic rights of the player to the third club for EUR 4'200'000, with payments to be made in installments by the latter to the Respondent.

It is therefore in dispute whether the 15% sell-on fee shall be based on a transfer fee of EUR 10,000,000 or EUR 9,200,000 and on which date(s) the sell-on fee became due.

On 30 January 2012, the FIFA PSC Single Judge rendered its decision (hereinafter: the “Appealed Decision”), deciding that the sell-on fee was to be based on a transfer fee of EUR 9,200,000 and that Parma had to pay the sell-on fee in different instalments.

On 31 July 2012, Helsingborgs filed a statement of appeal.

On 9 August 2012, Helsingborgs filed its appeal brief. The Appellant challenged the Appealed Decision taken by the FIFA PSC Single Judge on 30 January 2012.

Extracts of the legal findings

A. Preliminary Issue; new requests made before CAS that were not made before FIFA

In its answer the Respondent objects the admissibility of requests made by the Appellant in these arbitration proceedings insofar as these requests were not made in the proceedings before the FIFA PSC Single Judge. The Respondent contends that should the Appellant

wish to maintain these requests, it should start a new procedure before the competent FIFA bodies.

During the hearing, the Appellant expressed the view that the requests made in the present proceedings did not differ from the requests made in the initial proceedings before the FIFA PSC Single Judge.

Although not specifically clarified by the Respondent, the Panel understands that the alleged “new” requests made by the Appellant concern instalments that could not be awarded by the FIFA PSC Single Judge as he considered that these instalments had not fallen due on the date of rendering the Appealed Decision.

The Panel refers to article R57 of the CAS Code, which determines that the Panel has full power to review the facts and the law and it may issue a new decision that replaces the decision challenged. CAS jurisprudence shows that, in reviewing a case in full, a Panel cannot go beyond the scope of the previous litigation and is limited to the issues arising from the challenged decision (CAS 2007/A/1396 & 1402 WADA & UCI v. Alejandro Valverde & RFEC). The Panel however noted that the Appellant claimed the full sell-on fee in the proceedings before the FIFA PSC Single Judge and that the alleged “new” requests therefore fell within the scope of the previous litigation.

The Panel took into consideration that the parties’ positions did not differ regarding the fact that solely due to the passing of time, five of the total six instalments fell due at the moment this Panel rendered its decision in the present appeal proceedings, instead of only three instalments that fell due at the moment the FIFA PSC Single Judge rendered its decision.

The Panel furthermore took into account that the Respondent confirmed at the occasion of the hearing in the present appeal proceedings that, although the total amount of the sell-on fee was disputed, it did not object that it finally would have to pay to the Appellant six instalments in relation to the sell-on fee.

Consequently, the Panel finally did not have to consider the admissibility of the “new” requests as they were not disputed between the parties.

B. Merits

1. What is the relevant amount to be used as the basis to calculate the sell-on fee?

It is undisputed between the parties that Helsingborgs was entitled to 15% of the transfer fee Parma would

receive from a third club in case of a future transfer of the Player from Parma to such third club.

Article 6 of the Transfer Agreement determines the following:

“If Parma F.C. decides to take the option under the terms of the article 2), Parma F.C. undertakes to pay to Helsingborgs IF, in case of future transfer of the Player to another club, the net amount of 15% - Transfer fee minus the net amount of € Euro 2.000.000 (two million/00) paid under the terms of the article 3 before.”

Helsingborgs asserts that only the first transaction, in a line of transactions, was the full and complete transfer of all of the rights of the Player from Parma to Internazionale. The total amount of operation for that transaction was EUR 10,000,000. Helsingborgs’ right to a sell-on fee shall only be considered as relating to this first transaction. Helsingborgs therefore alleges to be entitled to EUR 1,200,000 ((EUR 10,000,000 – 2,000,000) x 15%).

According to Parma, at the moment Internazionale expressed its intention to purchase the remaining 50% of the rights for the Player and following negotiations between Parma and Internazionale, these clubs estimated these 50% in the amount of EUR 4,200,000. The said amount, and only this one, finally represented the definitive one, *i.e.* the fee Parma will gain from the transfer of the Player and payable in accordance with the agreed schedule.

The Panel is satisfied to accept that, on 1 February 2010, Parma and Internazionale initially agreed to transfer the Player to Internazionale for a transfer fee of EUR 10,000,000 and that on the same date 50% of the economic rights of the Player were sold back to Parma for an amount of EUR 5,000,000, leading to a situation where Internazionale and Parma equally shared the economic rights of the Player.

On 25 June 2010, Parma and Internazionale reached an agreement regarding the sale of Parma’s share of 50% in the economic rights of the Player for an amount of EUR 4,200,000.

The Panel finds that, in effect, on 1 February 2010, 50% of the Player’s economic rights were sold by Parma to Internazionale for an amount of EUR 5,000,000. The Panel agrees with Parma that the amount of EUR 10,000,000 was only an indicative amount for the transfer of 100% of the economic rights of the Player and that Parma and Internazionale would have to agree on the sale of the 50% of the economic rights owned by Parma, on a later date.

In the opinion of the Panel, it is common practice in the world of football that contracting parties deviate from initially agreed fictitious amounts. The Panel considers that a sell-on fee is to be based on the amount actually to be received by a club for selling a player to a subsequent club and not on an indicative amount.

The Panel has no reason to doubt the good intentions of Parma by agreeing to sell the second 50% of the Player's economic rights for a lower amount of EUR 4,200,000. Parma had an incentive to negotiate the highest price possible for the remaining 50% of the economic rights, as it would be entitled to 85% (the remaining 15% corresponds to the sell-on fee Helsingborgs was entitled to) of the amounts received from Internazionale.

Consequently, the Panel comes to the conclusion that the actual transfer fee paid (or to be paid) by Internazionale to Parma amounts to a fee of EUR 9,200,000. Pursuant to article 6 of the Transfer Agreement, an amount of EUR 2,000,000 has to be deducted from this amount of EUR 9,200,000. Helsingborgs is therefore entitled to 15% of EUR 7,200,000, *i.e.* EUR 1,080,000. The Appellant's primary request for relief is therefore dismissed. Whether the Appellant's secondary request for relief can be upheld will be assessed below.

2. On which date(s) did the sell-on fee to be paid by the Respondent to the Appellant fall due?

In light of the above, Parma is to pay Helsingborgs a total amount of EUR 1,080,000 in respect of the sell-on fee agreed upon by the parties in article 6 of the Transfer Agreement. However, Helsingborgs, as its secondary request for relief, claims to be entitled to the payment by Parma of the entire amount of EUR 1,080,000 at once. The Panel will therefore adjudicate when the relevant sell-on fee fell due.

The Panel took into consideration the absence of a contractual provision in the Transfer Agreement determining when Parma would be obliged to pay the sell-on fee in case of a subsequent transfer of the Player from Parma to a third club.

The Panel is of the opinion that a sell-on fee is related to the transfer fee actually to be received. If such transfer fee is to be paid in contingent payments and in the absence of a contractual provision determining otherwise, the contingent payment schedule has to be taken into account.

In this respect, the Panel feels comforted by the FIFA Regulations on the Status on Transfer of

Players (hereinafter: the "FIFA Regulations") in respect of the payment procedure for Solidarity Contribution. The Panel finds the concept of Solidarity Contribution similar to the concept of sell-on fees. On both occasions, a former club of a player is entitled to a percentage of a transfer fee received by the player's new club in case of a subsequent transfer of the player to a third club.

Although not directly applicable, the Panel noted that article 2(1) of Annex 5 to the FIFA Regulations determines the following:

The new club shall pay the solidarity contribution to the training club(s) pursuant to the above provisions no later than 30 days after the player's registration or, in case of contingent payments, 30 days after the date of such payments." [Emphasis added]

Finally, the Panel considers it inequitable if Parma would have to pay the entire sell-on fee of EUR 1,080,000 to Helsingborgs immediately upon Helsingborgs' first request thereof. Considering that the Player was transferred to Internazionale on 1 February 2010 and the first instalment for the transfer of the Player by Internazionale only fell due at the end of the 2009/2010 season, in such situation Parma could be forced to pay the sell-on fee even before it received any amounts from Internazionale.

Consequently, the Panel came to the conclusion that payment by Parma of the sell-on fee to Helsingborgs is related to the payment schedule agreed upon between Parma and Internazionale.

Hence, the Panel confirms the decision of the FIFA PSC Single Judge in this respect and Helsingborgs' secondary request for relief is dismissed.

The Panel understands Helsingborgs' tertiary request for relief, as requesting the Panel to confirm the Appealed Decision in respect of amounts awarded (*i.e.* EUR 199,590 related to the instalment due on the sports season 2009/2010, EUR 187,830 related to the instalment due on the sports season 2010/2011 and EUR 164,370 related to the instalment due on the sports season 2010/2011), but to add, solely due to the fact that time had elapsed, also the fourth and fifth net instalments of the sell-on fee (*i.e.* EUR 199,590 related to the instalment due on the sports season 2011/2012 and EUR 164,370 related to the instalment due on the sports season 2011/2012).

In this respect, the Panel noted that Parma does not dispute the Appealed Decision and that it confirms that the last three instalments will be paid to Helsingborgs in accordance with the payment plan agreed upon between Parma and Internazionale.

According to the same reasoning, the Panel notes that since the Appealed Decision was rendered, two more instalments fell due and that they should be paid by Parma.

3. Is any interest due?

Since the Panel has decided to dismiss the present appeal and to confirm the decision of the FIFA PSC Single Judge dated 30 January 2012, the interest awarded in the Appealed Decision in respect of the first three instalments is confirmed.

However, as correctly noted by Parma, Helsingborgs did not request for interest in its appeal.

Although the parties agreed that the fourth and fifth instalment fell due at the end of the 2011/2012 season, the Panel finds that no interest can be awarded over these amounts by this Panel since the Appellant omitted to request for interest over these amounts.

Consequently, the Appealed Decision remains in force (including interest being awarded over the first three instalments), however, the Panel awards the fourth (EUR 199,590) and fifth (EUR 164,370) instalment, but no interest can be awarded over these additional net amounts.

Football; Sanction disciplinaire;
Compétence de la formation arbitrale;
Epuisement des voies de droit préalables
à l'appel; Recevabilité de l'appel;
Exigences spécifiques au droit du sport

Panel:

Me Olivier Carrard (Suisse), Président

Me François Klein (France)

Me Ruggero Stincardini (Italie)

Faits pertinents

M. Khaled Adenon ("M. Adenon" ou "l'Appelant") est un joueur de football de nationalité béninoise et évoluant en seconde division (Ligue 2) du championnat de France au Le Mans FC. Il est également titulaire en équipe nationale du Bénin.

L'origine de la présente procédure découle d'un incident survenu en date du 10 juin 2012 lors d'un match qualificatif pour la Coupe du Monde 2014 qui se tiendra au Brésil, opposant le Rwanda au Bénin. A la suite d'un penalty accordé par l'arbitre du match à l'équipe rwandaise à la 86^{ème} minute, pour une faute de M. Adenon dans la surface de réparation, l'Appelant a été expulsé pour s'être comporté de manière incorrecte envers l'arbitre principal du match.

Par décision du 31 juillet 2012, notifiée le 22 août 2012, la Commission de discipline de la FIFA a informé l'Appelant, la FBF, la Confédération africaine de football (CAF), la Fédération française de football (FFF) et l'UEFA de la suspension automatique de M. Adenon au niveau mondial pour une durée de douze mois s'étendant à tous les matches nationaux et internationaux, amicaux et officiels. L'Appelant a été déclaré coupable de voies de fait conformément à l'art. 49 al. 1 let. b du Code disciplinaire de la FIFA (CDF).

M. Adenon a appelé de la décision de la Commission

de discipline de la FIFA par mémoire d'appel du 31 août 2012 déposé devant la Commission de recours de la FIFA.

La Commission de recours de la FIFA a rendu le dispositif de sa décision le 5 octobre 2012. Après examen des pièces du dossier, la Commission de recours de la FIFA a rejeté le recours de M. Adenon et confirmé la décision de la Commission de discipline de la FIFA du 31 juillet 2012. Il était précisé dans le dispositif que *"au cas où une partie demande une décision motivée, celle-ci sera notifiée par écrit et dans son intégralité. Si la décision peut faire l'objet d'un recours, le délai de recours ne débute qu'à compter de cette dernière notification (art. 116 al. 2 du Code disciplinaire de la FIFA)"*.

Le même jour, soit le 5 octobre 2012, M. Adenon, par le biais de son avocat, a requis la motivation de la décision auprès de la FIFA. La décision motivée a été communiquée par fax à l'Appelant, à la FFB, à la FFF, à la CAF et à l'UEFA en date du 2 novembre 2012.

En date du 18 octobre 2012, M. Adenon a déposé auprès du Tribunal Arbitral du Sport (TAS) une déclaration d'appel à l'encontre du dispositif de la décision du 5 octobre 2009 de la Commission de recours de la FIFA, ainsi qu'une requête aux fins d'effet suspensif.

Le Président suppléant de la Chambre arbitrale d'appel du TAS a rendu une ordonnance concernant la requête d'effet suspensif en date du 10 décembre 2012. Par cette décision, il a rejeté la requête d'effet suspensif formée par M. Adenon à l'encontre du jugement du 5 octobre 2012 de la Commission de recours de la FIFA.

Une audience s'est tenue le 16 janvier 2013 à Lausanne. Lors de l'audience, la FIFA a indiqué maintenir son incident d'irrecevabilité de l'appel portant sur le fait que celui-ci aurait été dirigé contre la décision non motivée rendue par la Commission de recours du 5 octobre 2012.

Extraits des considérants

A. Compétence du TAS

A titre liminaire, il convient de rappeler que les

décisions du Président de la Chambre arbitrale d'appel, lorsqu'il statue sur une requête de mesures provisionnelles, ne lie en aucune manière la Formation arbitrale ultérieurement constituée. En effet, il est intrinsèque au but même de l'art. R37 du Code, préconisant que le Président de la Chambre arbitrale d'appel a le pouvoir de prendre des décisions nécessitant l'urgence avant la transmission du dossier à la Formation arbitrale, que ces décisions reposent uniquement sur un examen *prima facie* de l'état de faits. La Formation arbitrale, une fois constituée, a ensuite tout loisir de revenir sur les décisions prises, qu'il s'agisse de juger de la compétence, de la recevabilité ou du fond d'une affaire.

A cet égard, il sied de souligner que l'art. R55 du Code prévoit non seulement que l'Intimé a le droit de soulever une exception d'incompétence dans sa réponse, mais il dispose également que la Formation statue sur sa propre compétence, sans égard à une action ayant le même objet déjà pendante entre les mêmes parties devant un autre tribunal étatique ou arbitral, sauf si des motifs sérieux commandent de suspendre la procédure. Selon cette disposition, lorsqu'une exception d'incompétence est soulevée, le Greffe du TAS ou la Formation, si celle-ci est déjà constituée, invite les parties à se déterminer par écrit à ce sujet et la Formation statue ensuite sur sa compétence soit dans une décision incidente, soit dans une sentence au fond.

En l'espèce, le fait que le Président de la Chambre arbitrale d'appel du TAS ait statué *prima facie* sur la compétence du TAS dans son ordonnance du 10 décembre 2012 ne lie ainsi nullement la Formation arbitrale, qui est libre de juger à nouveau de sa compétence dans la présente sentence.

A ce titre, l'Appelant ne peut tirer argument du fait que le Président suppléant de la Chambre arbitrale d'appel du TAS aurait reconnu sa compétence dans l'ordonnance du 10 décembre 2012. A l'inverse, il se justifie que la Formation arbitrale examine à nouveau d'office sa compétence dans la présente procédure. Au surplus, on rappellera que la question de la compétence du TAS n'avait été que peu développée par les parties dans leurs écritures concernant les mesures provisionnelles.

A cet égard, il convient de mentionner que la compétence du TAS résulte de l'art. R47 du Code, qui stipule notamment: *"Un appel contre une décision d'une fédération, association ou autre organisme sportif peut être déposé au TAS si les statuts ou règlements dudit organisme sportif le prévoient ou si les parties ont conclu une convention d'arbitrage particulière et dans la mesure aussi où l'Appelant a épuisé les voies de droit préalables à l'appel dont il dispose en*

vertu des statuts ou règlements dudit organisme sportif".

L'art. 62 des Statuts prévoit une compétence générale du TAS pour les litiges au sein de la FIFA. L'art. 63 prévoit que cet appel doit être déposé dans un délai de 21 jours après la notification de la décision.

Pour pouvoir faire appel en application de l'article R47 du Code, l'Appelant doit toutefois avoir épuisé les voies de droit préalables dont il dispose.

A cet égard, l'art. 116 du CDF dispose que:

- "1. Les organes juridictionnels peuvent rendre leur décision sans raisonnement et se contenter de notifier le dispositif uniquement. Dans le même temps, les parties sont informées qu'elles ont dix jours pour demander une décision motivée par écrit, sans quoi la décision deviendra définitive.*
- 2. Au cas où une partie demande une décision motivée, celle-ci sera notifiée par écrit et dans son intégralité. Si la décision peut faire l'objet d'un recours, le délai de recours ne débute qu'à compter de cette dernière notification (...)"*

S'il est vrai que la décision notifiée dans son dispositif sort déjà des effets juridiques à l'encontre de l'athlète sanctionné, il n'en demeure pas moins que la partie qui désire recourir contre les effets d'une décision doit donc nécessairement épuiser la voie préalable consistant à en demander la motivation auprès de l'autorité compétente, avant de décider de recourir contre la décision finale. La Formation arbitrale souligne toutefois, qu'en pratique, il serait souhaitable que la décision motivée soit notifiée le plus rapidement possible pour éviter de péjorer la situation de l'athlète.

En l'espèce, le présent appel vise la décision du 5 octobre 2012, rendue dans son dispositif par la Commission de recours de la FIFA. Il appert que cette décision ne peut être considérée comme une décision finale, ouvrant la voie à un recours auprès du TAS, car les voies préalables prévues par les Statuts et règlements de la FIFA n'ont pas été épuisées.

En effet, au regard de l'art. 116 CDF, soit l'Appelant laissait s'écouler un délai de dix jours, après quoi la décision devenait une décision définitive, soit il en demandait la motivation dans le délai de dix jours et devait alors attendre que lui soit notifiée la décision finale dans sa version motivée pour pouvoir ensuite voir s'ouvrir les voies de recours auprès du TAS.

Or, M. Adenon a déposé un recours contre le dispositif seul de la décision du 5 octobre 2012, tout en en demandant parallèlement la motivation à la Commission de recours de la FIFA. S'il était compréhensible que l'Appelant ait voulu provoquer

une décision sur la sanction infligée le plus rapidement possible, en raison du fait que celle-ci était déjà exécutoire, force est de constater que la décision motivée demandée a été notifiée par la FIFA moins d'un mois plus tard, ce qui constitue un délai raisonnable.

A partir du moment où l'Appelant s'est vu, en outre, notifier la décision motivée dans un laps de temps considéré comme raisonnable, il sied de considérer qu'il adopte un comportement procédural erroné en refusant de déposer un nouvel appel contre cette décision motivée. En effet, malgré deux avertissements extrêmement clairs, l'Appelant a préféré maintenir sa position en se référant à sa propre interprétation des textes de loi sans autre appui juridique particulier. La simple réintroduction d'un recours contre la décision motivée notifiée le 2 novembre 2012 lui aurait pourtant permis de poursuivre la procédure de manière ordinaire et rien ne l'empêchait de procéder de la sorte.

Pour le surplus, l'argument relatif à la nécessité de déposer un appel immédiat développé par l'Appelant tombe également à faux, puisqu'en l'espèce, même si un préjudice avait été subi, il aurait été guéri par le fait que l'Appelant a bénéficié de l'examen de son cas *prima facie* par le Président suppléant de la Chambre arbitrale d'appel de TAS, qui a rendu une ordonnance en la matière en date du 10 décembre 2012, rejetant la requête d'effet suspensif réclamé par M. Adenon.

Au vu de ce qui précède, les conditions fixées à l'art. R47 du Code ne sont pas remplies, l'Appelant n'ayant pas épuisé les voies de droit préalables dont il disposait en vertu des statuts et règlements de la FIFA. Partant, le TAS n'est pas compétent pour connaître du présent litige.

A toutes fins utiles, il sera également exposé ci-dessous que, même si l'appel déposé par M. Adenon contre la décision du 5 octobre 2012 avait été de la compétence du TAS, il aurait été déclaré irrecevable au vu de la procédure suivie par l'Appelant.

B. Recevabilité de l'appel

Selon l'article 116 para. 2 du CDF, un recours n'est possible qu'à partir de la notification des motifs de la décision.

La jurisprudence (CAS 2011/A/2563) a eu l'occasion de préciser que cet article était inspiré de l'art. 158 de l'ancienne loi d'organisation judiciaire de Zurich (*Gerichtsverfassungsgesetz*, GVG), abolie par le Code de procédure civile suisse (CPC) depuis 2011.

Il convient ainsi d'examiner la jurisprudence relative à un recours introduit prématurément rendue tant sous l'angle du GVG (1.) que du CPC (2.), avant d'analyser la situation du cas d'espèce (3.).

1. Sous l'angle de l'ancienne procédure zurichoise

Dans le canton de Zurich, les décisions finales de première instance sans motivation revêtaient autorité de force jugée lorsque, dans un délai de 10 jours depuis la communication du dispositif écrit, aucune motivation n'était demandée (art. 158 § 1 GVG/ZH). De cette sorte, les jugements non motivés n'étaient, jusqu'à l'écoulement du délai pour requérir la motivation, pas considérés comme ayant autorité de chose jugée, à moins que les parties aient renoncé de manière préalable à la motivation et aux moyens de recours.

La jurisprudence considérait à cet égard que lorsqu'une partie faisait valoir un recours à l'encontre d'une décision non motivée, l'autorité ne pouvait entrer en matière, car les délais de recours commençaient à courir uniquement avec la communication de la décision motivée, et non avant. La jurisprudence précisait toutefois qu'en pratique, il fallait renvoyer le recours déposé par la partie à l'autorité de première instance, afin que celle-ci le considère comme une demande de motivation et notifie un jugement motivé qui ferait partir le délai de recours à l'encontre de la décision motivée.

2. Sous l'angle de la nouvelle procédure civile suisse unifiée

A l'aune du nouveau CPC, la doctrine estime qu'une partie ne peut requérir à l'encontre d'une décision dont seul le dispositif a été rendu que la motivation de ladite décision au sens de l'art. 239 al. 2 CPC. Ce n'est, en effet, que contre la décision motivée que le recours est admis. Il serait inadéquat, lorsqu'une partie n'est pas satisfaite de la décision, qu'elle puisse recourir avant qu'elle n'ait connaissance de la motivation (uniquement par écrit) de la décision de première instance. Le recours doit en effet être introduit directement de manière entièrement motivée (Art. 321 al. 1 CPC), ce qui exige une explication sur les motivations de la décision de première instance. Une seconde écriture n'est pas prévue dans la procédure de recours. Il ne sera ainsi pas entré en matière sur un moyen de droit introduit prématurément et donc ouvertement inadmissible (Art. 312 al. 1 et 322 al. 1 CPC).

Une récente décision du 21 juillet 2011 du Tribunal supérieur de Berne vient confirmer cette opinion. Ce Tribunal a en effet jugé qu'un recours rendu à

l'encontre d'une décision non motivée était prématuré et qu'il ne pouvait entrer en matière sur l'écriture. Il a toutefois précisé que, l'écriture ayant été déposée dans le délai de 10 jours permettant de requérir la motivation de la décision, il fallait considérer celle-ci implicitement comme une demande de motivation, qui ouvrirait ensuite la voie à un recours une fois le jugement motivé notifié.

3. Du cas d'espèce

Dans le cas d'espèce, il appert que la décision de la Commission de recours de la FIFA a été notifiée une première fois aux parties le 5 octobre 2012. Cette notification ne contenait toutefois que le dispositif de la décision.

D'après le dossier à disposition de la Formation arbitrale, il appert que M. Adenon a sollicité la notification des motifs de la décision à cette même date.

Il a toutefois interjeté appel contre le dispositif de la décision du 5 octobre 2012 en date du 18 octobre, avant même d'avoir reçu la notification de la décision motivée.

La décision complète et motivée a été notifiée le 2 novembre 2012 par la Commission de recours de la FIFA.

Au vu de l'art. 116 al. 2 CDF et des jurisprudences précitées, l'appel formé par M. Adenon avant même la notification de la décision motivée doit être considéré comme prématuré.

Les arguments développés par l'Appelant ne suffisent dès lors pas à donner une autre interprétation aux textes de loi et jurisprudences existantes. Il convient ainsi de considérer que l'art. 116 CDF est une *lex specialis* qui déroge au principe posé par l'art. 63 des Statuts, et est conforme au système de nombreux systèmes juridiques, dont l'ancienne procédure zurichoise, dont il est inspiré, et la nouvelle procédure civile suisse.

La Formation arbitrale s'est bien entendu interrogée sur la particularité de la situation sportive, qui diffère forcément des cas civils réglés par l'ancienne procédure civile zurichoise et le code de procédure civile suisse, et sur la légitimité d'une application par analogie des jurisprudences mentionnées ci-dessus dans les procédures ouvertes devant le TAS.

Les aspects spécifiques au droit du sport ont ainsi été abordés par la Formation arbitrale dans l'analyse du cas d'espèce et son raisonnement final.

En premier lieu, la Formation reconnaît que la question peut en effet se poser dans des termes différents dans un cas comme celui de l'Appelant où une suspension sportive pénalise l'athlète. Il est évident qu'il y a alors urgence à rendre une décision rapidement, afin que l'athlète ne soit pas prétérité trop longtemps ou voie sa sanction finalement annulée alors qu'il l'aurait déjà subie depuis des mois.

A cet égard, la FIFA elle-même a admis, dans une jurisprudence précédente (CAS 2011/A/2563), par le biais des déclarations de son représentant, M. Ongaro, que la notification de la décision motivée pouvait parfois excéder 4 mois.

Or, il est avéré que la sanction sportive est immédiatement exécutoire, conformément à l'art. 106 CDF.

La Formation arbitrale est donc consciente de la dichotomie existante entre les art. 106 et 116 al. 1 CDF qui permettent de rendre une sanction sportive immédiatement exécutoire par le biais d'une décision non motivée et l'art. 116 al. 2 CDF qui ne donne le droit à l'athlète de recourir que contre la décision motivée. Un tel système ne permet évidemment pas de limiter au mieux le temps qui peut s'écouler entre le moment où l'athlète sera effectivement suspendu et le moment où il pourra protester contre sa suspension et il est presque inévitable, si de nombreux mois s'écoulent entre la notification du dispositif et celle de la décision motivée, que la situation contraindrait quasiment l'athlète à devoir purger la sanction et enlèverait tout intérêt à un recours.

Si le mécanisme instauré par la FIFA est compréhensible au regard de la multiplicité des dossiers qu'elle est chargée de traiter et de la rapidité de décision que ce mécanisme lui permet d'adopter dans certains cas, il est toutefois patent que certains problèmes pratiques, tels que la saisine de l'instance compétente pour des mesures provisionnelles durant la période située entre l'envoi du dispositif et celui de la décision motivée, peuvent en résulter. La question de la durée de cette période peut aussi être problématique.

En l'espèce, M. Adenon ne semble pas avoir souffert un quelconque préjudice en relation avec les risques exposés ci-dessus.

En effet, outre le fait que la Commission de recours de la FIFA a notifié la décision motivée moins d'un mois après avoir notifié le dispositif, ce qui a été considéré par la Formation arbitrale comme un délai raisonnable pour ne pas porter préjudice aux droits de l'athlète, il convient d'admettre que l'Appelant a,

pour le surplus, pu bénéficier de l'examen de son cas de manière urgente et qu'il a obtenu une décision sur effet suspensif rendue par le Président suppléant de la Chambre arbitrale d'appel du TAS dans une ordonnance du 10 décembre 2012. Par conséquent, l'Appelant n'a pas subi de conséquences négatives découlant de l'exécution immédiate de la suspension sportive infligée et il ne saurait se plaindre ainsi d'un déni de justice dans le cas d'espèce.

Au vu de ce qui précède, et même si le TAS avait été compétent pour juger du cas d'espèce, force est d'admettre que la Formation arbitrale aurait abouti à la conclusion que l'appel du 18 octobre 2012 interjeté par M. Adenon était prématuré et devait donc être déclaré irrecevable.

Football; FIFA disciplinary proceedings;
Purpose of proceedings before the
Disciplinary Committee; Standing
to be sued of a club in disciplinary
proceedings; Inadmissibility of a
posterior inclusion of FIFA in the
arbitration

Panel:

Prof. Luigi Fumagalli (Italy), President
Mr João Nogueira Da Rocha (Portugal)
Mr Patrick Lafranchi (Switzerland)

Relevant facts

Clube Desportivo Nacional (“Nacional” or the “Appellant”) is a Portuguese football club with seat in Funchal, Portugal.

FK Sutjeska (“Sutjeska” or the “Respondent”) is a Montenegrin football club, with seat in Niksic, Montenegro.

On 5 October 2012 the FIFA Disciplinary Committee (DC) issued a decision (the “DC Decision”) holding that:

*“1. The club CD Nacional is pronounced guilty of failing to comply with a decision of a FIFA body in accordance with art. 64 FDC.
[...].”*

The DC Decision was rendered on the basis of Article 64 of the FIFA Disciplinary Code (the “FDC”), providing for sanctions on “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”. The DC, in fact, noted that Nacional had failed to comply with a decision issued by the Dispute Resolution Chamber of the FIFA Players’ Status Committee (the “DRC”) on 10 August 2011 (the “DRC Decision”), whereby Nacional was ordered to pay to Sutjeska an amount of money. The DRC Decision had become final as

the appeal to the Court of Arbitration for Sport (the “CAS”) was declared inadmissible on 30 March 2012.

On 12 November 2012, Nacional filed a statement of appeal with the CAS, pursuant to the Code of Sports-related Arbitration (the “Code”), to challenge the DC Decision.

On 16 November 2012, the CAS Court Office transmitted to the Respondent the statement of appeal filed by Nacional. On the same date, the statement of appeal filed by Nacional was also forwarded to the FIFA. In the relevant letter the CAS Court Office noted that *“the appeal is not directed at FIFA, despite of the fact that the appealed decision was rendered by the FIFA DC. However, [...] if FIFA intends to participate as a party in the present arbitration, it shall file with the CAS an application to that effect [...]”*.

In a letter of 27 November 2012, the FIFA informed the CAS Court Office that it had decided to *“renounce our right to intervene in the present arbitration proceeding”*. In addition, the FIFA noted that:

“[...] in line with the longstanding jurisprudence of CAS, should a party lodge an appeal against a decision of the FIFA Disciplinary Committee, said appeal shall be directed against FIFA, which is the respondent in such disciplinary related proceedings. As a consequence, should such appeal not be directed against FIFA, it results that the appeal shall be declared inadmissible and CAS cannot review the decision of the first instance. [...]”

On 19 December 2012, the Deputy President of the CAS Appeals Arbitration Division issued an order on the Appellant’s request for provisional and conservatory measures (hereinafter referred to as the “Order on Provisional Measures”). It stated as follows:

“1. The application for provisional and conservatory measures requested by CD Nacional on 13 November 2012 in its statement of appeal, in the matter CAS 2012/A/2981 CD Nacional v. FK Sutjeska is rejected.

[...].”

On 19 December 2012, Sutjeska filed its answer to the statement of appeal lodged by Nacional, seeking *inter alia* its dismissal because of lack of standing to be

sued of the Respondent.

In a letter of 21 January 2013, the Appellant noted that “*despite not identifying FIFA as a party in the present proceedings, it is obvious from its Request for Relief in the Statement of Appeal, that – alongside Sutjeska – only FIFA can be a party in these proceedings*”. Hence the Appellant requested the following:

- i. “*that FIFA should take part in the present arbitration proceedings, and it could not renounce its right to participate*”, and
- ii. “*that based on Article R58 of the CAS Code, and due to exceptional circumstances, the President of the Panel should authorize the Appellant to correct its identification of the Respondent, replacing Sutjeska for FIFA*”.

The Appellant’s prayers for relief are the following:

- “a) *to reform the appealed decision, recognizing the amicable settlement of the matter at hand, according to which the Appellant will pay the outstanding amount in four instalments, having already paid the first one. By deciding in such fashion the Dispute Resolution Chamber, failed to uphold one FIFA’s missions and goals, which is to help clubs reach amicable solutions to their disputes;*
- b) *alternatively, to reform the appealed decision, with respect to the heavy fine in which the Appellant was convicted by FIFA’s Dispute Resolution Chamber. Said fine is manifestly excessive and disproportionate, as it takes no account of the amount in debt and completely ignores the difficult economic situation smaller clubs are facing, in the case of the Appellant partly due to the great number of cases to be decided by the DRC in which Nacional is creditor to other clubs*”.

In its answer, Sutjeska submitted the following requests:

- “1. *The Appeal of the Appellant is not admissible. In the alternative, the Appeal of the Appellant is to be dismissed.*
2. *The Appellant shall pay for the costs of the present arbitration proceedings and for the legal fees and further costs (such as interpreter etc.) of the Respondent*”.

Extracts from the legal findings

Under Swiss law, applicable pursuant to Article R58 of the Code, the defending party has standing to be sued (*légitimation passive*) only if it is personally obliged by the “disputed right” at stake (ZÜRCHER A. in: *Kommentar zur Schweizerischen Zivilprozessordnung (ZPO)* (Teil 1), 2010, N. 67 zu Art. 59 ZPO; GRAF D. in:

GesKR 2012 p. 380; BGE [Digest of the decisions of the Swiss Federal Tribunal] 107 II 82 E. 2a).

The Panel notes that the Articles 67 para. 1 of the Statutes of the FIFA in connection with the Article 64 para. 5 FDC allow a challenge of a decision rendered by the DC at the CAS.

The Panel remarks that the Appellant, while requesting the CAS to exercise its jurisdiction on the DC Decision, named Sutjeska and not the FIFA as a Respondent. This emanates unequivocal from the Statement of Appeal dated 12 November 2012 and the letter of 23 November 2012.

Even though Sutjeska *de facto* is interested in the outcome of this appeal, it was not party to the FIFA proceedings leading to the DC Decision presently challenged. In fact, the FIFA proceedings:

- i. were not directed against Sutjeska,
- ii. did not deal with Sutjeska’s behaviour, and
- iii. were solely meant to sanction Nacional for not complying with the DRC Decisions finally settling the dispute between Nacional and Sutjeska.

Sutjeska’s rights, in other words, were not the object of the dispute before the DC: Sutjeska was not a party to the FIFA proceedings leading to the DC Decision and is not concerned by it.

The proceedings before the DC, indeed, intended to protect primarily an essential interest of FIFA, i.e. the full compliance by the affiliates of the decisions rendered by its bodies. In other words, the core of the DC Decision and of the appeal brought in these proceedings against it, regards only the existence of a disciplinary infringement by Nacional and the power of FIFA to sanction it.

Therefore, Sutjeska cannot be considered as the “passive subject” of the claim brought before this Panel by way of appeal against the DC Decision, as Sutjeska’s rights are not concerned by the DC Decision and Sutjeska has no power whatsoever to sanction Nacional’s failure to comply with the DRC and CAS decisions. It is hence clear that Sutjeska does not have any standing to be sued (*légitimation passive*) and cannot, as such, be identified as a respondent in the present arbitration. The appeal filed against it is therefore not admissible. Such conclusion is consistent with a long standing jurisprudence of CAS (CAS 2006/A/1189; CAS 2006/A/1206; CAS 2007/A/1367).

In order to avoid a declaration of inadmissibility of its appeal, the Appellant sought, in a letter of 21 January 2013, to have the FIFA included in this arbitration. However, the Panel finds that the inclusion of FIFA in this arbitration is not admissible due to the following reasons:

- i. the Code provides that the name of the respondent has to be contained in the statement of appeal (Article R48) and does not allow a “correction/substitution” of respondent; in particular after the deadline for the filing of an appeal has elapsed (see CAS 2007/A/1367, § 50);
- ii. the joinder of a third party by the Appellant is not contemplated by the Code, which grants such possibility only to the respondent (Article R41.2, applicable in appeals proceedings pursuant to Article R54, last paragraph);
- iii. the possibility for a party to be authorized in exceptional circumstances to amend its requests or argument after the submission of the appeal brief and the answer (in accordance with Article R56 of the Code) does not extend to the substitution of a respondent, i.e. to a modification of the parties to the arbitration.

In light of the foregoing, the Panel concludes that the appeal brought against Sutjeska with respect to the DC Decision is not admissible. Therefore, it has to be dismissed.

Composition

Federal Tribunal Judge Klett, President
Federal Tribunal Judge Corboz
Federal Tribunal Judge Kolly
Federal Tribunal Judge Kiss
Clerk of the Court: Mr Leemann

Parties

A._____
Appellant,

versus

Bulgarian Football Union,
Respondent, represented by Dr. Bernd Ehle and Mrs. Sugandha Kumar,

* From Charles Poncet's translation, courtesy of the law firm ZPG/Geneva (www.praetor.ch).

* Translator's note: Quote as A._____ v. Bulgarian Football Union._____, 4A_388/2012. The original decision is in German.
The text is available on the website of the Federal Tribunal www.bger.ch.

Facts

A.

A.a A._____ (the Claimant, the Appellant) is a Bulgarian national living in Sofia. He was the chief coach of the Bulgarian national football team.

The Bulgarian Football Union (BFU), (the Defendant, the Respondent) is the national football federation of Bulgaria. It belongs to the Fédération Internationale de Football Association (FIFA).

A.b On January 11, 2008, the parties entered into an appointment contract, by which the Claimant was retained as chief coach of the Bulgarian national team for a fixed period until December 31, 2009, with a monthly salary of EUR 11'000 plus expenses, as well as bonuses depending on

the results obtained.

Paragraph 16 of the employment contract reads as follows:

The disputes concerning the interpretation of the meaning and the performance of the contract will be resolved amicably by agreement of the parties. In case an agreement is impossible to reach, the dispute shall be referred for resolving by the competent court. The parties to the contract recognize the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland as in this case the Statute and the regulations of BFU and the provisions of Bulgarian legislation will apply¹.

1. Translator's note: In English in the original text.

On January 13, 2009, the Defendant terminated the employment contract early and paid the Claimant one month's salary.

A.c On January 19, 2009, the Claimant initiated civil proceedings in the regional Court of Sofia and submitted that the Defendant should be ordered to pay EUR 132'000. The regional Court found that it had jurisdiction as employment relationships are not arbitrable pursuant to Art. 19 (1) of the Bulgarian Court of Civil Procedure (bCCP) and must be decided by the state Court. However, the Court rejected the claim because the contractual provision relied upon by the Claimant, according to which a contractual penalty was due in case of unilateral termination, contradicted Bulgarian employment law and was void.

Art. 19 (1) (bCCP) provides the following (in English translation):

The parties to a property dispute may agree that it be settled by a court of arbitration, unless the dispute has as its subject property rights or possession of immovable property, alimony or rights as per employment relationship².

A.d On October 13, 2011, the Claimant brought another claim in the regional Court of Sofia and demanded compensation amounting to six months of his salary for breach of contract. The regional Court again accepted the jurisdiction pursuant to Art. 19 (bCCP) because the matter was not arbitrable. The regional Court adjourned the proceedings and called the parties to a hearing on May 8, 2012.

B.

On November 8, 2011, the Claimant submitted a request for arbitration against the Respondent in the Court of Arbitration for Sport (CAS) and made the following submissions in the proceedings:

- a. Declare that the CAS has jurisdiction over the dispute and the Parties to this arbitration.
- b. Declare that the Employment Contract dated 11 January 2008 entered into by and between the Bulgarian Football Union (the Respondent) and Mr. A. _____ (the Claimant) was terminated without just cause;

2. Translator's note: In English in the original text.

- c. Order BFU to pay to the Claimant as compensation for the termination of the Employment Contract 11 salaries in the amount of EUR 121,000 corresponding to the remaining value of the Employment Contract;
- d. Order BFU to pay to the Claimant simple interest at 5 % per annum on the amount of EUR 121,000 from 15 January 2009 until full and final payment;
- e. Order BFU to pay to the Claimant further allowances and payments listed in para. 20 of the RFA [Request for Arbitration] above the amount of which is to be further specified;
- f. Order BFU to pay to the Claimant simple interest at 5 % per annum on the amounts related to further allowances and payments listed in para. 20 of the RFA from issuance of the award until full and final payment;
- g. Order BFU to pay all the costs of the arbitration, including without limitation the fees and expenses of the Panel and the CAS;
- h. Order BFU to pay to the Claimant its legal fees and expenses;
- i. Award such other relief as the Panel deems appropriate³.

The Defendant objected to jurisdiction: it argued that the dispute was not arbitrable and the state court in Bulgaria had mandatory jurisdiction, the arbitration clause was null, and the Claimant had renounced its right to rely upon the arbitration clause. Furthermore the arbitral claim was barred by the res judicata effect of the court decision already issued.

In an arbitral award of May 24, 2012, the CAS found that it did not have jurisdiction for lack of arbitrability. It held Art. 19 (1) (bCCP) was applicable, which excludes employment disputes from adjudication by an arbitral tribunal. Art. 177 PILA⁴ was not an obstacle as PILA allows the mandatory provisions of a foreign law to be taken into consideration. Furthermore, the CAS pointed to the real risk that a CAS arbitral award could not be enforced in Bulgaria.

3. Translator's note: In English in the original text.

4. 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.

C.

In a civil law appeal, the Appellant asks the Federal Tribunal to annul the arbitral award of May 24, 2012, and to declare that the CAS has jurisdiction.

The Respondents submit that the appeal should be rejected. The CAS did not submit a brief.

The Appellant submitted a reply to the Federal Tribunal on November 28, 2012, the Respondent a rejoinder on December 20, 2012.

Reasons

1.

According to Art. 54 (1) BGG,⁵ the judgment of the Federal Tribunal is issued in an official language,⁶ 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 decision under appeal is in English. As this is not an official language and the Parties used German before the Federal Tribunal, the judgment of the Federal Tribunal will be issued in German.

2.

In the field of international arbitration a civil law appeal is allowed under the requirements of Art. 190-192 PILA (SR 291) (Art. 77 (1) (a) BGG).

2.1 The seat of the Arbitral Tribunal is in Lausanne in this case. Both parties had their seat or their domicile outside Switzerland at the relevant point in time. As the parties did not opt out of the provisions of Chapter 12 PILA in writing, 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, seek only the annulment of the decision under appeal (see Art. 77 (2) BGG), which rules out the applicability of Art. 107 (2) BGG, to the extent that the latter allows the Federal Tribunal to decide the matter itself. However there is an exception to the effect that when the dispute involves the jurisdiction of the arbitral tribunal, the Federal Tribunal may decide itself the jurisdiction or the lack of jurisdiction of the arbitral tribunal (BGE 136 III 605⁷ at 3.3.4 p.616 with references). The Appellant's submission is admissible to that extent.

5. Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173 110.

6. Translator's note: The official languages of Switzerland are German, French, and Italian.

7. Translator's note: Full English translation at: <http://www.swissarbitrationdecisions.com/independence-and-impartiality-of-a-party-appointed-arbitrator-in>.

3.

The Appellant argues that the CAS was wrong to deny jurisdiction (Art. 190 (2) (b) PILA) as the dispute is arbitrable, contrary to what was held in the award under appeal.

3.1 The requirement of arbitrability is to be reviewed in the framework of a jurisdictional appeal (Art. 190 (2) (b) PILA (BGG 133 III 139 at 5 p.141; 118 II 353 at 3a p 355). The Federal Tribunal reviews the jurisdiction issue, according to Art. 190 (2) (b) PILA, freely from a legal standpoint, including the substantive preliminary issues upon which the determination of jurisdiction depends. However, even in a jurisdictional appeal, the court reviews the factual findings of the arbitral award only when some admissible grievances within the meaning of Art. 190 (2) PILA are raised against such factual findings or, exceptionally, when new evidence is taken into consideration (BGE 138 III 29⁸ at 2.2.1 p. 34; 134 III 565⁹ at 3.1 p. 567; 133 III 139 at 5 p. 141).

If lack of jurisdiction is argued in the appeal and properly reasoned, the Federal Tribunal may review all legal issues freely (*iura novit curia*) and the Court may, depending on the case, reject the argument raised for reasons other than those contained in the award under appeal (judgment 4A_392/2008 from December 22, 2008, at 3.2)¹⁰.

3.2 Whether or not a dispute can be brought before an international arbitral tribunal with its seat in Switzerland is assessed – as the appellant rightly argues – according to Art. 177 (1) PILA. According to that provision, any proprietary claim may be the subject of arbitration. The provision contains no substantive rules of arbitrability, as the legislature intentionally rejected the introduction of a conflict rule in order to avoid the resulting difficulties such a solution may have created when making a determination as to the applicable law (BGE 118 II 353 at . 3 (a) p. 355).

The monetary claim for breach of contract contained in the request for arbitration is a proprietary claim within the meaning of Art. 177 (1) PILA and the Respondent does not dispute

8. Translator's note: Full English version at <http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-apatheological-clause-has-to-be-s>.

9. Translator's note: Full English version at <http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua>.

10. Translator's note: Full English version at <http://www.swissarbitrationdecisions.com/review-by-the-federal-tribunal-of-an-award-upholding-jurisdiction>.

this before the Federal Tribunal. However it argues that Art. 19 (1) bCCP must be taken into account in the case at hand as part of the Bulgarian public policy forbidding recourse to an arbitral tribunal in employment disputes.

- 3.3 In its case law, the Federal Tribunal has taken into account the possibility that the arbitrability of the specific dispute may be negated by reference to legal provisions asserting the mandatory jurisdiction of state courts and the consideration of those legal provisions from the point of view of public policy (Art. 190 (2) (e) PILA) may be called for (BGE 118 II 353 at 3c p. 357; 4A_654/2011¹¹ of May 23, 2012, at 3.4; 4A_370/2007¹² of February 21, 2008, at 5.2.2). Contrary to what is held in the award under appeal, this cannot be understood as meaning that the provisions of a valid law to which the dispute is connected should necessarily be taken into account when they may entail a more narrow concept of arbitrability (BGE 118 II 193 at 5 at p. 196). The CAS may not be followed to the extent that it denied jurisdiction because the matter was not arbitrable. Moreover, as to the jurisdictional issue, it wrongly took into account that pursuant to Art. 19 (bCCP) and Art. V (2) (a) of the June 10, 1958, New-York Convention on the Recognition and Enforcement of Foreign Awards (SR 0.277.12), there was a risk that a CAS arbitral award may not be enforced in Bulgaria. It must be accepted that some awards of international arbitral tribunals sitting in Switzerland admitting the arbitrability of a dispute pursuant to Art. 177 (1) PILA may not be enforced in some countries, as this is the intent of the legislature which intentionally chose substantive rules of arbitrability; it therefore behooves the parties to avoid such a risk (BGE 118 II 353 at 3c p. 357 and at 3d p. 358; 4A_654/2011¹³ of May 23, 2012, at 3.4; also see BGE 118 II 193 at 5 at p. 196; also see the message of November 10, 1982, submitting the private international law, BBL 1983 I 460). Without prejudice to the forgoing, in the substantive proceedings, the arbitral tribunal cannot anticipate with certainty whether state a party may someday seek the enforcement of the arbitral award (see BERNHARD BERGER/Franz KELLERHALS, International and

Domestic Arbitration in Switzerland, 2. ed. 2010, section. 179, 256; BBI 1983 I 460).

- 3.4 The award under appeal, in which the Arbitral Tribunal found that it did not have jurisdiction, is nevertheless not objectionable as to its result. The Respondent disputed the existence of an arbitration agreement in the arbitral proceedings and rightly relies upon the invalidity of the arbitration clause in the proceedings before the Federal Tribunal.
- 3.4.1 According to Art. 178 (2) PILA, the material validity of an arbitration clause is determined according to the law chosen by the parties to govern the dispute, in particular the law applicable to the main contract or according to Swiss law. To the extent that the reference to the provision of Bulgarian law at paragraph 16 of the employment contract is understood as a choice of law as to the validity of the arbitration clause and Bulgarian law applies to the employment contract, as is argued in the answer to the appeal, it must be concluded, as argued by the Respondent, that the arbitration clause is invalid pursuant to the mandatory provisions as to the conclusion of arbitration agreements. The Appellant rightly does not argue that Bulgarian law would be more advantageous as to the substantive validity of the arbitration clause but merely relies on its validity according to Swiss law.
- 3.4.2 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 138 III 29¹⁴ at 2.2.3 p. 35; 129 III 675 at 2.3 p. 679 ff).

Should – as is the case here – no concordant will of the parties be factually certain as to the arbitration clause, it must be interpreted according to the principle of reliance, i.e. the presumptive will is to be ascertained as it could and should have been understood by the respective recipient according to the rules

11. Translator's note: Full English version at <http://www.swissarbitrationdecisions.com/motion-to-set-aside-a-tas-award-dismissed-by-the-federal-tribuna>.

12. Translator's note: Full English version at <http://www.swissarbitrationdecisions.com/appeal-against-interlocutory-and-partial-awards-violation-of-pub>.

13. Translator's note: Full English version at <http://www.swissarbitrationdecisions.com/motion-to-set-aside-a-tas-award-dismissed-by-the-federal-tribuna>.

14. Translator's note: Full English version at <http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s>.

of good faith (BGE 138 III 29¹⁵ at 2.3.1 p. 36 ff.; 129 III 675 at 2.3 p. 680 ff.; 128 III 50 p. 58 at 2c/aa). The legal nature of an agreement to arbitrate must be taken into account in its interpretation; in particular it must be taken into account that renouncing recourse to the state courts severely limits the available legal recourses. Such an intent to renounce cannot be accepted lightly, according to the case law of the Federal Tribunal, and a restrictive interpretation is required in case of doubt (BGE 138 III 29 at 2.3.1 p. 36 ff.; 129 III 675 at 2.3 p. 680 ff.; 128 III 50 S. 58 at 2c/aa). However when the interpretation shows that the parties wanted to remove the dispute from the state courts and submit it to the decision of an arbitral tribunal but that there are some differences as to the implementation of the arbitral proceedings, the principle of effectiveness applies fundamentally; according to this an understanding of the contract must be sought that will allow the arbitration clause to stand (BGE 138 III 29 at 2.2.3 p. 36; 130 III 66 at 3.2 p. 71 ff; 129 III 675 at 2.3 p. 681)

- 3.4.3 Paragraph 16 of the employment contract states that “the dispute shall be referred for resolving by the competent court”¹⁶ if some potential disputes cannot be settled amicably. An exclusion of the jurisdiction of the state courts cannot be seen there; to the contrary; the general wording speaks in favor of maintaining the jurisdiction of the state courts. While the parties recognize in the same contractual clause the jurisdiction of the CAS (“The parties to the contract recognize the Court of Arbitration for Sport ...”¹⁷), they also refer to the provisions of Bulgarian law at the same time (“... as in this case ... the provisions of Bulgarian legislation will apply”¹⁸), which does not allow arbitral proceedings but provides for the mandatory jurisdiction of the state courts. It appears therefore questionable at the very least whether the contractual understanding contained a sufficiently clear intention, according to the principle of reliance, to remove any disputes resulting from the contract from the state courts and submit them to the decision of an arbitral tribunal also see (judgment 4A_244/2012¹⁹ of January 17,

2013, at 4.4). The Appellant rightly does not claim that the contractual clause at paragraph 16 would lead to the conclusion in good faith of a presumptive intent of the parties to give the Claimant the choice between recourse to the CAS or to the state courts in Bulgaria. The principle of effectiveness, according to which, to the extent it is possible, an understanding of the contract should be sought that will uphold the arbitration clause, applies only when the result of the interpretation shows that the parties wanted to remove the dispute from the jurisdiction of the state courts (BGE 138 III 29 at 2.2.3 p. 36; 130 III 66 at 3.2 p. 71 ff; both with references).

The Appellant filed two claims against the Respondent in the state courts of Bulgaria, in which he presented the claims based on the employment contract of January 11, 2008; his course of action showed that he himself considered that the state jurisdiction should be maintained. A party may claim that its contractual partner should have understood an agreement in a certain manner according to the rules of good faith only if it has understood the provision in the same way itself (BGE 105 II 16 at 3a p. 19; 4A_538/2011 of March 9, 2012, at 2.2; 4A_219/2010 of September 28, 2010, at 1, not publ. in: BGE 136 III 528; KRAMER, in: Berner Kommentar, 1986, Nr. 122 ff. and Nr. 146 ad Art. 1 of the Swiss Code of Obligations). The Appellant cannot rely in good faith upon an interpretation that does not correspond at all to his own understanding of the contract at the time. Interpreting paragraph 16 of the employment contract according to the principle of reliance therefore cannot lead to the exclusion of the state jurisdiction in favor of an arbitral tribunal and to the validity of the arbitration clause. Therefore, the CAS reached the correct conclusion in denying jurisdiction.

4.

The appeal must be rejected to the extent that the matter is capable of appeal. In such an outcome of the proceedings the Appellant must pay the costs and compensate the other party for the federal proceedings (Art. 66 (1) and Art. 68 (2) BGG).

15. Translator's note: Full English translation at: <http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s>.

16. Translator's note: In English in the original text.

17. Translator's note: In English in the original text.

18. Translator's note: In English in the original text.

19. Translator's note: Full English translation at: <http://www.swissarbitrationdecisions.com/jurisdiction-clause-and-arbitration->

[clause-contradicting-each-other-must-be-interpreted-according.](http://www.swissarbitrationdecisions.com/jurisdiction-clause-and-arbitration-)

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 4'000, shall be borne by the Appellant.

3.

The Appellant shall pay to the Respondent an amount of CHF 5'000 for the federal judicial proceedings.

4.

This judgment shall be notified in writing to the Parties and to the Court of Arbitration for the Sport (CAS)

Lausanne March 18, 2013

In the name of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:

Klett

The Clerk:

Leemann

Keywords: Jurisdiction of the arbitral tribunal; decision of Lausanne Court of Arbitration for Sport

Title: Estoppel in invoking the principle of reliance

Stars: ***

Composition	Mmes et M. les Juges Klett, Présidente, Kolly et Kiss Greffier: M. Carruzzo
Parties	X._____, recourant, représenté par Claude Ramoni, contre The International Association of Athletics Federations, intimée, représentée par Mes Martin Bernet et Sonja Stark-Traber, & Z._____, intimée,
Objet	arbitrage international en matière de sport, recours en matière civile contre la sentence rendue le 18 octobre 2012 par le Tribunal Arbitral du Sport (TAS).

Faits

A.

X._____, né en 1979, est un athlète ... de haut niveau ayant effectué une carrière internationale couronnée de succès.

Le 11 août 2011, dans des circonstances qui constituent le noeud du litige, l'athlète se serait soustrait à un contrôle antidopage hors compétition organisé par l'Association internationale des fédérations d'athlétisme (ci-après: l'IAAF, selon son acronyme anglais).

Dénoncé pour violation des règles antidopage, X._____ a été blanchi, le 6 juin 2012, par la Fédération ... d'athlétisme.

B.

Le 6 juillet 2012, l'IAAF a déposé un appel auprès du Tribunal Arbitral du Sport (TAS) contre la décision du 6 juin 2012.

Avec l'accord des parties, le TAS a eu recours à une

procédure accélérée afin qu'une décision puisse être rendue avant le début des Jeux olympiques d'été organisés à Londres du 27 juillet au 12 août 2012, X._____ ayant rempli les critères de qualification pour y participer. Une Formation de trois arbitres a été rapidement constituée et les parties ont été conviées à une audience qui s'est déroulée le 24 juillet 2012. Donnant suite à une demande de l'IAAF, le conseil de l'athlète ... a produit, la veille de l'audience, une liasse de documents incluant des relevés téléphoniques concernant son client.

Le lendemain de l'audience, soit le 25 juillet 2012, le TAS a communiqué aux parties le dispositif de sa sentence, ainsi formulé:

"1. The appeal filed by the IAAF against the decision of 6 June 2012 rendered by the Doping Committee of the ... National Anti-Doping Organisation is upheld.

2. The decision of 6 June 2012 rendered by the Doping Committee of the ... National Anti-Doping Organisation is set aside.

3. Mr X._____ is sanctioned with a ban of two years starting from the date of the present award.

4. The issues of the costs of the arbitration and the parties' legal expenses incurred in connection with the arbitration procedure shall be decided in a separate award on costs.

5. All further claims are dismissed.”

La sentence motivée a été notifiée aux parties le 18 octobre 2012. Son dispositif énonce ce qui suit:

“1. The appeal filed by the IAAF against the decision of 6 June 2012 rendered by the Doping Committee of the ... National Anti-Doping Organisation is upheld.

2. The decision of 6 June 2012 rendered by the Doping Committee of the ... National Anti-Doping Organisation is set aside.

3. Mr X._____ is sanctioned with a ban of two years starting from the date of the present award, with credit given for any period of suspension previously served.

4. The costs of the arbitration to be calculated and communicated separately to the parties by the CAS Court Office shall be borne in the following proportion: one quarter by the IAAF and three-quarters jointly and severally by the Respondents.

5. Z._____ shall make a contribution of CHF 2,000 (...) and Mr X._____ shall make a contribution of CHF 1,000 (...) towards the IAAF's legal fees and other expenses incurred in connection with the present arbitration.

6. All further claims are dismissed.”

Les motifs qui étayent cette sentence seront indiqués, dans la mesure utile, lors de l'examen des griefs formulés à l'encontre de celle-ci.

C.

Le 13 décembre 2012, X._____ (ci-après: le recourant) a formé un recours en matière civile, assorti d'une demande d'assistance judiciaire, en vue d'obtenir l'annulation de la sentence du TAS.

Par ordonnance présidentielle du 16 janvier 2013, le recourant a été mis au bénéfice de l'assistance judiciaire gratuite et son conseil désigné comme avocat d'office.

Dans sa réponse du 1er mars 2013, le TAS, qui a produit son dossier, a conclu au rejet du recours.

L'IAAF (ci-après: l'intimée) en a fait de même au terme de ses observations du 8 mars 2013.

Quant à la Fédération ... d'athlétisme, elle n'a pas déposé de réponse dans le délai qui lui avait été imparti pour ce faire.

Le recourant a produit une réplique en date du 22 mars 2013.

L'intimée et le TAS n'ont pas fait usage de la possibilité de dupliquer qui leur avait été offerte.

Considérant en droit

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. Lorsque cette décision est rédigée dans une autre langue (ici l'anglais), le Tribunal fédéral utilise la langue officielle choisie par les parties. Devant le TAS, celles-ci se sont servies de l'anglais. Dans le mémoire qu'il a adressé au Tribunal fédéral, le recourant a employé le français. La réponse de l'intimée a été rédigée en allemand. Conformément à sa pratique, le Tribunal fédéral adoptera la langue du recours et rendra, par conséquent, son arrêt 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, de la conclusion prise par le recourant ou encore des griefs soulevés dans le mémoire de recours, aucune de ces conditions de recevabilité ne fait problème en l'espèce. Rien ne s'oppose donc à l'entrée en matière.

3.

Dans un premier groupe de moyens, le recourant soutient que deux des arguments invoqués par lui devant le TAS en rapport avec les circonstances dans lesquelles le contrôle antidopage du 11 août 2011 avait été effectué ont donné lieu à une violation de son droit d'être entendu en procédure contradictoire.

3.1 Le droit d'être entendu, tel qu'il est garanti par les art. 182 al. 3 et 190 al. 2 let. d LDIP, n'a en principe pas un contenu différent de celui consacré en droit constitutionnel (**ATF 127 III 576** consid. 2c; **119 II 386** consid. 1b; **117 II 346** consid. 1a p. 347). Ainsi, il a été admis, dans le domaine de l'arbitrage, que chaque partie avait le droit de s'exprimer sur les faits essentiels pour

le jugement, de présenter son argumentation juridique, de proposer ses moyens de preuve sur des faits pertinents et de prendre part aux séances du tribunal arbitral (**ATF 127 III 576** consid. 2c; **116 II 639** consid. 4c p. 643).

Sans doute le droit d'être entendu en procédure contradictoire, au sens de l'art. 190 al. 2 let. d LDIP, n'exige-t-il 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).

Au demeurant, il n'appartient pas au Tribunal fédéral de décider si les arbitres auraient dû admettre ou non le moyen qui leur a échappé, à supposer qu'ils l'eussent traité. Cela reviendrait, en effet, à méconnaître la nature formelle du droit d'être entendu et la nécessité, en cas de violation de ce droit, d'annuler la décision attaquée indépendamment des chances de la partie recourante d'obtenir un résultat différent (arrêt 4A_360/2011 du 31 janvier 2012 consid. 5.1 et le précédent cité).

3.2

- 3.2.1 Les circonstances dans lesquelles s'est déroulé le contrôle inopiné de l'athlète, en date du 11 août 2011, relèvent de l'appréciation des preuves. Comme telles, elles échappent à l'examen du Tribunal fédéral, lorsqu'il connaît d'un recours en matière d'arbitrage international.

Le recourant en est bien conscient, qui ne critique pas directement leur établissement par la Formation du TAS.

Sous n. 16 ss de son mémoire, le recourant déplore, toutefois, que les arbitres n'aient fait qu'une «timide allusion» aux relevés téléphoniques qu'il avait produits, à la demande de l'intimée, en annexe à sa réponse (pièce n. 9), puis la veille de l'audience (pièce n. 10), alors qu'il s'agissait, selon lui, des seuls éléments matériels susceptibles de démontrer que la personne ayant été en contact avec le contrôleur antidopage ne pouvait être qu'un tiers. En effet, aux dires du contrôleur, cette personne avait utilisé par deux fois son téléphone portable en sa présence, alors que les relevés téléphoniques produits attestaient que lui, le recourant, n'avait pas passé d'appel le jour en question. Selon l'intéressé, le déroulement du début de l'audience, retranscrit dans sa pièce n. 11, confirmerait que la sentence attaquée a été rendue sans que tous les membres de la Formation fussent en possession de l'intégralité des pièces versées au dossier de l'arbitrage.

- 3.2.2 Il ne faut pas perdre de vue, pour commencer, que la procédure d'arbitrage a été conduite in casu en la forme accélérée avec l'accord des parties. Le recourant ne peut donc pas se plaindre de la célérité avec laquelle cet arbitrage a été mené à son terme ni, partant, de l'intervalle rapproché dans lequel l'administration des preuves et le prononcé de la sentence se sont succédé. Il ressort, d'ailleurs, de la retranscription des dernières minutes de l'audience du 24 juillet 2012, telle qu'elle figure sous n. 7 de la réponse du TAS, que la Formation s'est fait confirmer par les parties que celles-ci avaient produit toutes les pièces qu'elles souhaitent déposer et qu'elles ont eu droit à un full hearing. Dans ces conditions, le reproche qui lui est fait de n'avoir pas statué en pleine connaissance de cause n'apparaît pas fondé.

Ensuite, l'existence des relevés téléphoniques n'a pas échappé aux arbitres, quoi qu'en dise le recourant, puisqu'ils en font état sous n. 42 et 62 de leur sentence, même si c'est dans le cadre de l'exposé des points de vue respectifs des parties. Certes, la Formation n'a pas fait mention expresse de cet élément de preuve dans la partie décisionnelle de sa sentence. Il est clair, cependant, qu'elle ne lui a pas accordé l'importance que lui attache le recourant puisqu'elle a énoncé, sous n.

64 ss de sa sentence, une série de données factuelles incompatibles avec la thèse fondée sur les relevés téléphoniques, dont elle a déduit souverainement que le contrôleur antidopage n'avait pu confondre le recourant avec une autre personne le jour du contrôle. L'intéressé n'explique d'ailleurs pas de façon suffisante en quoi les divers documents produits par lui sous pièces nos 9 et 10 - ils sont rédigés en langue ..., avec traduction anglaise, et comportent, pour certains, des mentions manuscrites - établiraient sans conteste qu'il n'a pas passé d'appel téléphonique le 11 août 2011. D'autres hypothèses, conciliables avec les documents produits, mais pas avec la déduction qu'en tire le recourant, ne sauraient de surcroît être exclues a priori: on peut envisager, par exemple, que l'athlète ait disposé d'un autre téléphone portable que les trois dont il est fait état dans les relevés téléphoniques ou qu'il se soit servi du téléphone portable d'un tiers ce jour-là.

Enfin, quoi qu'en dise le recourant, le cas particulier n'est pas comparable avec celui qui a fait l'objet de l'arrêt rendu le 31 janvier 2012 dans la cause 4A_360/2011 (consid. 5.2.3.2). Dans ce précédent, en effet, l'arbitre unique, même s'il avait énuméré les noms de tous les témoins dans sa narration du déroulement de la procédure, avait fait totalement abstraction, par suite d'une inadvertance quant à l'existence d'un mémoire après enquêtes déposé par une partie, de quatre témoignages susceptibles a priori de modifier son analyse du point litigieux. En l'espèce, au contraire, les trois arbitres ont pris en compte tous les éléments de preuve qui leur avaient été soumis, y compris les relevés téléphoniques, lorsqu'ils ont examiné la manière dont le contrôle antidopage du 11 août 2011 s'était déroulé. Il les ont toutefois appréciés d'une autre manière que celle suggérée par le recourant en retenant un scénario qui était incompatible avec la conclusion que celui-ci entendait tirer de ces relevés et qui impliquait le rejet implicite du caractère probant de ces preuves littérales.

Par conséquent, le recourant se plaint à tort de ne pas avoir été entendu sur ce point.

3.3

3.3.1 Dans la seconde branche du même grief, la Formation se voit reprocher de n'avoir pas pris en compte l'argumentation subsidiaire présentée dans la réponse du recourant. Selon cette argumentation, même si, par impossible,

l'existence d'un contact entre le contrôleur antidopage et le recourant, le 11 août 2011, devait être admise, force serait alors d'exclure, sur le vu des dispositions pertinentes du règlement antidopage de l'intimée et de la jurisprudence du TAS en la matière, que l'athlète puisse se voir imputer une violation des règles antidopage en raison du non-respect par le contrôleur des normes relatives à la conduite d'un contrôle antidopage (recours, n. 26 à 34).

3.3.2 Il est exact que la sentence attaquée ne fait aucune allusion à cette argumentation subsidiaire.

Dans sa réponse, le TAS souligne que, sous n. 58 de sa sentence, la Formation a clairement indiqué qu'elle avait pris en compte tous les faits, arguments juridiques et moyens de preuve soumis par les parties dans le cadre de la procédure arbitrale, mais qu'elle ne ferait référence qu'aux arguments et aux preuves nécessaires pour expliquer son raisonnement. Il s'agit là, toutefois, d'une formule stéréotypée que l'on retrouve dans la plupart des sentences du TAS et qui n'a pas plus de valeur qu'une clause de style. Dès lors, le seul fait d'en user ne suffit pas à exclure la violation du droit d'être entendu qu'un tribunal arbitral commet s'il ne prend pas en considération des allégués, arguments, preuves et offres de preuve présentés par l'une des parties et importants pour la sentence à rendre.

Cependant, en l'espèce, la partie intimée, faisant usage de la faculté que lui réserve la jurisprudence fédérale susmentionnée, s'est employée à démontrer, dans sa réponse au recours (n. 8 à 17), que l'élément omis par la Formation, c'est-à-dire l'argumentation subsidiaire du recourant, n'était pas pertinent pour résoudre le cas concret. Et elle l'a fait avec succès. Il ressort, en effet, de ses explications détaillées et convaincantes que les dispositions et la jurisprudence invoquées par le recourant ne visent pas la situation de fait, constatée par les arbitres, dans laquelle l'athlète, après que le contrôleur a pris contact avec lui à l'endroit où le contrôle antidopage doit se dérouler et l'a averti qu'il va y procéder, quitte les lieux intempestivement et part avec son véhicule pour échapper à un tel contrôle. A cet égard, on ne discerne pas en quoi l'art. 33.3 let. b des règles des compétitions 2010-2011 de l'intimée, que le recourant cite dans sa réplique, serait de nature à infirmer ces explications-là.

Partant, le recourant dénonce à tort une violation de son droit d'être entendu sur ce point également.

4.

Le recourant met en évidence, par ailleurs, une modification intervenue dans le dispositif se trouvant à la dernière page de la sentence motivée du 18 octobre 2012 par rapport au dispositif du 25 juillet 2012 qui avait été communiqué aux parties avant la motivation, conformément à l'art. 59 al. 3 du Code de l'arbitrage en matière de sport (ci-après: le Code). La modification incriminée consiste en l'ajout, à la fin du chiffre 3 de celui-là, d'un membre de phrase ne figurant pas dans le chiffre correspondant de celui-ci (with credit given for any period of suspension previously served; cf let. B. ci-dessus).

De manière assez contradictoire, le recourant fait grief aux arbitres, d'une part, d'avoir violé le principe *ne eat iudex ultra petita partium* en omettant, dans le dispositif du 25 juillet 2012, l'imputation de sa suspension provisoire, pourtant requise par l'intimée (cf. sentence, n. 5 let. iv i.f.), et, d'autre part, d'avoir méconnu son droit d'être entendu en procédant de leur propre chef à pareille imputation dans le dispositif de la sentence motivée du 18 octobre 2012.

Quoi qu'il en soit, la rectification opérée par la Formation l'a été en faveur du recourant. Celui-ci n'a, dès lors, pas d'intérêt à la remettre en question dans le présent recours (cf. art. 76 al. 1 let. b LTF). Il rétorque que la «sentence rendue au mois d'octobre» lui serait «clairement moins favorable» dans la mesure où, contrairement à «la sentence du mois de juillet», elle ordonnerait l'annulation de tous les résultats qu'il a obtenus dans des compétitions postérieures à la perpétration de la violation des règles antidopage (11 août 2011). L'objection n'est pas fondée, étant donné qu'un tel ordre ne figure dans aucun des deux dispositifs mentionnés par le recourant.

5.

En dernier lieu, le recourant se plaint de ce que la sentence du 18 octobre 2012 prononce, sinon dans son dispositif, du moins dans ses considérants, l'annulation de tous les résultats obtenus par lui depuis la commission de l'infraction aux règles antidopage, alors que la sentence du 25 juillet 2012 ne le faisait pas. Il y voit une violation de l'ordre public procédural consistant dans le fait de ne pas avoir tenu compte de l'autorité de la chose jugée de la première sentence, voire une violation de son droit d'être entendu tenant à ce que cette sentence a été rectifiée par une sentence additionnelle sans que les parties aient eu l'occasion de donner leur avis sur ce mode de faire (recours, n. 61 à 71).

Une telle argumentation apparaît pour le moins artificielle car elle présuppose l'existence de deux sentences distinctes. Or, rien ne justifie de traiter les prononcés du 25 juillet 2012 (dispositif) et du 18 octobre 2012 (sentence motivée) comme deux décisions successives et distinctes. Il ne s'agit, en réalité, que d'une seule et même sentence dont la communication aux parties, du fait de l'urgence caractérisant la procédure accélérée mise en oeuvre par la Formation avec l'accord de celles-ci, a été opérée en deux étapes ainsi que l'autorisait l'art. 59 al. 3 du Code, c'est-à-dire par l'envoi du seul dispositif avant la notification, un peu moins de trois mois plus tard, de la sentence motivée.

De toute façon, la prémisse du raisonnement tenu par le recourant est erronée. Il n'est, en effet, nullement question d'une annulation des résultats obtenus par l'intéressé dans le dispositif de la sentence attaquée, qu'il s'agisse de celui du 25 juillet 2012 ou de celui du 18 octobre 2012. A cet égard, la mise en parallèle du chiffre 1 du dispositif de la sentence motivée et du n. 84 des considérants de celle-ci n'autorise pas une autre conclusion, malgré ce que suggère le recourant (recours, n. 66). De fait, le chiffre 1 de ce dispositif se borne à énoncer que l'appel interjeté par l'intimée contre la décision prise le 6 juin 2012 par le Comité de l'organisme national ... antidopage est admis. Il ne dit pas dans quelle mesure il l'est et, en tout cas, pas qu'il le serait entièrement. C'est plutôt d'une admission partielle qu'il s'agit puisque la Formation se limite à annuler la décision attaquée et à prononcer la suspension de l'athlète, en rejetant toutes les demandes supplémentaires dont elle est saisie, au chiffre 6 du même dispositif (all further claims are dismissed). Or, l'une de ces demandes était celle de l'intimée tendant à l'annulation des résultats obtenus par le recourant (sentence, n. 5 let. v).

Il n'importe de savoir si, comme le soutient l'intimée dans sa réponse, en contradiction apparente avec la conclusion *ad hoc* qu'elle avait soumise aux arbitres, pareille annulation serait automatique en vertu de sa propre réglementation et ne nécessiterait donc pas d'être prononcée par le TAS pour être exécutoire. De même n'est-il pas non plus déterminant que l'intimée ait déjà cherché à la mettre à exécution, ainsi que le recourant l'allègue en produisant une lettre du 28 janvier 2013 qui l'invite à restituer une médaille obtenue dans une compétition ayant eu lieu après le 11 août 2011. Ce sont là des questions qui relèvent de l'interprétation et de l'exécution de la sentence attaquée.

Pour les besoins de la présente cause, il suffit de constater l'absence de toute contradiction, sur le point considéré, entre les deux dispositifs successifs

de ladite sentence. Les moyens du recourant, fondés sur la prémisse inverse, s'en trouvent ainsi privés de toute assise.

6.

Il suit de là que le recours soumis à l'examen du Tribunal fédéral doit être rejeté. Ce nonobstant, le recourant n'aura pas à payer les frais de la procédure fédérale puisqu'il a été mis au bénéfice de l'assistance judiciaire (art. 64 al. 1 LTF). Il devra, en revanche, indemniser l'intimée en application de l'art. 68 al. 1 et 2 LTF. Quant aux honoraires de son avocat d'office, ils seront supportés par la Caisse du Tribunal fédéral (art. 64 al. 2 LTF).

Par ces motifs, le Tribunal fédéral prononce:

1.

Le recours est rejeté.

2.

Il n'est pas perçu de frais.

3.

Le recourant versera à l'Association internationale des fédérations d'athlétisme (IAAF) une indemnité de 2'500 fr. à titre de dépens.

4.

La Caisse du Tribunal fédéral versera à Me Claude Ramoni la somme de 2'500 fr. à titre d'honoraires.

5.

Le présent arrêt est communiqué aux parties et au Tribunal Arbitral du Sport (TAS).

Lausanne, le 29 avril 2013

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 Niquille
Clerk of the Court: Mr Leemann

Parties

X._____ S.A. de C.V.,
Appellant, represented by Mr. Philipp J. Dickenmann and Mr. Reto Hunsperger,

versus

A._____,
Respondent, represented by Mr. Christophe Henzen and Mr. Heinz Germann.

* From Charles Poncet's translation, courtesy of the law firm ZPG/Geneva (www.praetor.ch).

* Translator's note: Quote as X._____ S.A. de C.V. v. A._____, 4A_476/2012. The original decision is in German. The text is available on the website of the Federal Tribunal: www.bger.ch.

Facts

A.

A.a X._____ S.A. de C.V. (hereafter "X._____"), in [name of city omitted], Mexico (the Defendant, the Appellant), is a professional football club and as such a member of the Mexican Football Federation. A._____ (the Claimant, the Respondent) is a Brazilian football player domiciled in [name of city omitted], Brazil.

A.b On July 23, 2007, the parties entered into an employment contract by which A._____ undertook to play for X._____ during the 2007/2008, 2008/2009, and 2009/2010 seasons. A yearly salary of USD 500'000 was agreed as compensation, payable in 10 installments of USD 50'000. Furthermore, the football club promised to the player a transfer bonus of USD

400'000 in total, payable in three installments (USD 120'000, USD 140'000, and USD 140'000).

Between August and December 2008, and between December 2008 and May 2009, A._____ was lent to a Brazilian football club pursuant to an agreement between the parties. At the end of the 2008/2009 season – the last installment of the transfer bonus amounting to USD 140'000 not having yet been paid – X._____ told the player that it wanted to terminate the contract before its term was completed. The parties then signed an Agreement of Early Termination of Contract on August 30, 2009, providing for a one-off payment of MXN 1'300'000 in the player's favor, payable by September 17, 2009. Should the compensation for termination fail to be paid within the 10 days following September 17,

2009, the Agreement of Early Termination of Contract would be invalid.

B.

B.a On March 11, 2010, A._____ filed a claim with the Dispute Resolution Chamber of the Fédération Internationale de Football Association (FIFA). The latter decided on November 20, 2010, that it did not have jurisdiction .

B.b On February 17, 2011, A._____ filed a claim with the Conciliation and Resolution of Controversies Commission (CRCC) of the Mexican Football Federation.

On July 26, 2011, the CRCC decided that it could not adjudicate the claim because the time limit to submit a claim according to Mexican employment law and Art. 11 of the CRCC Regulations had run out.

B.c On August 16, 2011, the Claimant appealed the CRCC decision of July 26, 2011, to the Court of Arbitration for Sport (CAS).

On February 10, 2012, the CAS advised the parties that the President of the Appeals Arbitration Division had appointed Ms. Margarita Echeverria Bermúdez, attorney at law, as sole Arbitrator.

After hearing the parties, the Arbitrator decided to waive a hearing.

B.d In an arbitral award of June 26, 2012, the Arbitrator upheld the Claimant's appeal (operative part § 1), she annulled the CRCC decision of July 26, 2011, (operative part § 2), and ordered X._____ to pay USD 590'000 to A._____, with interest at 5% from September 28, 2009, (operative part § 3). Furthermore, she decided on costs and compensation (operative parts § 4 and § 5) and rejected all other submissions (operative part § 6).

C.

In a civil law appeal the Defendant asks the Federal Tribunal to annul the CAS award of June 26, 2012, and to find that the Arbitrator was appointed in violation of the Rules, or, in the alternative, that the Arbitrator had no jurisdiction and that consequently the proceedings should be conducted before a three-member arbitral tribunal. In the further alternative, the arbitral award of June 26, 2012, should be annulled and the matter returned to the CAS – or, alternatively, to the Arbitrator – for a finding that the

Arbitrator was appointed in violation of the rules, or alternatively for a finding that the Arbitrator had no jurisdiction and for the appointment of a three-member tribunal. In the even further alternative, §§1-5 of the award under appeal should be annulled and the matter sent back to the Arbitrator for a new decision.

The Respondent submits that the appeal should be rejected to the extent that the matter is capable of appeal. The CAS submits that the appeal should be rejected.

The Appellant sent a reply to the Federal Tribunal on April 17, 2013. In a letter of May 6, 2013, the Respondent waived the right to a rejoinder.

D.

In a decision of December 12, 2012, the Federal Tribunal upheld the Respondent's request for security for costs and asked the Appellant to post bond in the amount of CHF 9'500 as a security for the Respondent's costs. The corresponding amount was paid to the Office of the Federal Tribunal in a timely manner.

Reasons

1.

According to Art. 54(1)BGG,¹ the decision of the Federal Tribunal is issued in an official language,² as a rule in the language of the decision under appeal. When 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 this is not an official language, and the parties used German before the Federal Tribunal, the judgment of the Federal Tribunal shall be issued in German.

2.

In the field of international arbitration, a civil law appeal is allowed under the requirements of Art. 190-192 PILA³ (SR 291) (Art. 77(1)(a) BGG).

2.1 The seat of the Arbitral Tribunal was in Lausanne in this case. Both parties had their seat or domicile outside Switzerland at the relevant time. As the parties did not waive in writing the provisions of Chapter 12 PILA, they are accordingly applicable (Art. 176(1) and (2) PILA).

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. The official languages of Switzerland are German, French, and Italian.

3. PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291

2.2 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, which rules out the applicability of Art. 107(2) BGG, to the extent that this empowers the Federal Tribunal to decide the matter itself). To the extent that the dispute concerns the jurisdiction or the composition of the arbitral tribunal, there is an exception to the effect that the Federal Tribunal may itself decide the jurisdiction of the arbitral tribunal or lack thereof and decide as to the challenge to the arbitrator concerned (BGE 136 III 605⁴ at 3.3.4, p. 616, with references).

2.3 Only those grievances listed in Art. 190(2) PILA are admissible (BGE 134 III 186⁵ 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 grievances that are raised and reasoned in the appeal brief; this corresponds to the duty to provide reasons in Art. 106(2) BGG for the violation of constitutional rights and of Cantonal and inter-Cantonal law (BGE 134 III 186⁶ at 5, p. 187, with reference). Criticism of an appellate nature is not permitted (BGE 134 III 565⁷ at 3.1, p. 567; 119 II 380 at 3b, p. 382).

2.4 The Federal Tribunal bases its judgment on the factual findings of the arbitral tribunal (Art. 105(1) BGG). This Court may not rectify or supplement the factual findings of the arbitral tribunal, even when they are blatantly inaccurate or rely on a violation of the law within the meaning of Art. 95 BGG (see Art. 77(2) BGG ruling out the applicability of Art. 97 BGG and Art. 105(2) BGG). However, the Federal Tribunal may review the factual findings of the arbitral award under appeal when some admissible grievances within the meaning of Art. 190(2) PILA are raised against these factual findings, or when new evidence is exceptionally taken into account (BGE 138 III 29⁸ at 2.2.1 p. 34; 134 III 565⁹ at 3.1, p. 567; 133 III 139 at 5,

p. 141; each with references). The party claiming an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and seeking to have the factual findings rectified or supplemented on this basis must show, with reference to the record, that the corresponding factual allegations were raised during the arbitral proceedings, in accordance with procedural rules (BGE 115 II 484 at 2a, p. 486; 111 II 471 at 1c, p. 473; each with references).

2.5 The Appellant relies, in several respects, on factual allegations that are not based on the factual findings in the award under appeal. Yet, it raises no sufficient grievances concerning the facts but merely submits that its new factual allegations should be considered as admissible new facts.

Its view that the award under appeal required new factual allegations cannot be shared. The Appellant itself submits to the Federal Tribunal that it already stated its position to the CAS as to the proposal that a sole arbitrator be appointed in a submission of October 18, 2011. Moreover it appears from the award under appeal that the parties were informed of the appointment of Ms. Margarita Echeverria Bermúdez as Arbitrator on February 10, 2012. To what extent the award under appeal calls for new factual allegations (see Art. 99(1) BGG) is therefore not understandable (see, in contrast, judgment 4A_425/2012 of February 26, 2013, at 3.1.2 with references, which will be published). To the extent that its factual allegations do not rely upon the factual findings in the award under appeal, they cannot be considered.

3.

The Appellant argues that the Arbitrator was appointed in violation of the rules (Art 190(2)(a) PILA) or that she had no jurisdiction (Art. 190(2)(b) PILA).

3.1 The party seeking the removal of an arbitrator (see Art 180(2)(ii) PILA) or a finding of lack of jurisdiction (see Art. 186(2) PILA) or which considers itself harmed by a relevant procedural violation according to Art. 190(2) PILA) forfeits its claims when it does not raise them in a timely manner in the arbitral proceedings and does not undertake all reasonable steps to remedy the violation to the extent possible (BGE 130 III 66 at 4.3 p. 75; 126 III 249 at 3c p. 253 f.; 119 II 386 at 1a p. 388; each with references). It is a violation

4. Translator's note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/node/332>.

5. Translator's note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties>.

6. Translator's note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties>.

7. Translator's note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua>.

8. Translator's note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s>.

9. Translator's note: The English translation of this decision is available

here: <http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua>.

of good faith to raise a procedural violation only in the framework of an appeal where the opportunity could have been given to the arbitral tribunal to remedy the alleged deficiency (BGE 119 II 386 at 1a p. 388). In particular, it is contrary to good faith and an abuse of rights for a party to keep a ground for appeal in reserve, only to postpone it in case of a disadvantageous outcome in the proceedings or a foreseeable loss of the case (see BGE 136 III 605¹⁰ at 3.2.2 p. 609; 129 III 445 at 3.1 p. 449; 126 III 249 at 3c p. 254). When a party participates in an arbitration without questioning the composition or jurisdiction of the arbitral tribunal – although it had the opportunity to clear the issue before the award is issued – it forfeits the right to raise the corresponding grievances before the Federal Tribunal (BGE 130 III 66 at 4.3 with references).

- 3.2 The Appellant did not challenge the jurisdiction of the Arbitrator in the arbitral proceedings. Admittedly it took the view before the Arbitral Tribunal was constituted that a three-member panel should have been appointed. Yet after the President of the Appeals Arbitration Division appointed Ms. Margarita Echeverria Bermúdez as sole arbitrator, the Appellant did not question her jurisdiction, as to which the sole Arbitrator herself had to decide according to R55(4) of the CAS Code 2010 ed. but it got involved in the proceedings (see, in contrast, judgment 4P.40/2002 of April 16, 2002, in which the Federal Tribunal reviewed the issue of the pertinent number of arbitrators after the appellant had raised objections against the jurisdiction of the arbitral tribunal after it was constituted).

As the award under appeal holds, no party raised any jurisdictional objection in the arbitration; moreover, the Appellant does not claim that it expressed some reservations to the sole arbitrator as to her appointment after the constitution of the Arbitral Tribunal. The Arbitrator heard the parties after her appointment as to whether or not a hearing should take place. The Appellant raised no objections as to the appointment or the jurisdiction; instead it requested a hearing before the sole Arbitrator without any corresponding reservations.

The Appellant must have been aware that the Arbitrator – as opposed to in a challenge (R34 CAS Code) – would decide herself as to her jurisdiction according to R55(4) of the CAS

Code. If it was of the opinion – as is now claimed before the Federal Tribunal – that there was no jurisdiction because the arbitration clause was concluded with a view to a three-member arbitral tribunal, it should have brought its objections, in good faith, to the Arbitrator after her appointment so that she could possibly issue a decision in this respect (see the facts in judgment 4P_40/2002 of April 16, 2002; see also BGE 138 III 29¹¹ p. 31) and it should not have participated in the proceedings without reservations. The Appellant raised no objections towards the Arbitrator appointed; neither did it claim any reservations as to her independence or impartiality that would have had to be decided by the Board of the International Council of Arbitration for Sport (ICAS) according to R34 of the CAS Code.

It was not acceptable to keep the grounds for appeal in reserve and to wait and see if the award would be in its favour. The Appellant thus forfeited the right to raise the alleged violations in the proceedings before the Federal Tribunal.

- 3.3 The Appellant's argument now raised in the Federal Tribunal that the parties had agreed on a three-member arbitral tribunal must be found new and therefore inadmissible (Art. 99(1) BGG) even irrespective of the fact that to substantiate its argument that the sole Arbitrator was appointed in violation of the rules (Art. 190(2)(a) PILA) it relies inadmissibly on factual allegations which are not found in the binding factual findings of the award under appeal (Art. 105(1) BGG). That it claimed such an agreement does not even appear from its own presentation of its submissions before the appointment of the sole Arbitrator. Thus its argument that the appointment of the sole Arbitrator was in violation of R50 of the CAS code and therefore contrary to the rules due to the alleged agreement of an arbitration clause providing for three arbitrators also comes to nothing for the same reason.

4.

Furthermore, the Appellant argues a violation of its right to be heard (Art. 190(2)(d) PILA).

- 4.1 It submits that, due to the Respondent's submissions in the CAS, it concentrated on the issue as to whether or not Art. 25 of the Transfer Regulations of FIFA, Art. 16 of the

10. **Translator's note:** The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/node/332>.

11. **Translator's note:** The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s>

Rules Governing the Status Committee and the Dispute Resolution Chamber of FIFA, and Art 10(4) of the FIFA Statutes would preclude the application of Art. 516 of the Mexican Employment Law. The Arbitrator did rightly decide that Art. 516 of the Mexican Employment Law was applicable despite the fact that the Respondent had invoked the FIFA rules. However, her finding that the Respondent had interrupted the time-limitation in Art. 516 by bringing his claim in the Dispute Resolution Chamber of FIFA on March 11, 2010, which caused a new time limit to begin to run from that day, so that the Respondent proceeded in a timely manner when he claimed in the CRCC on February 17, 2011, is based on legal arguments (interruption of the one year time limit by calling upon the Dispute Resolution Chamber of FIFA, compliance with the time limit by filing a claim against Y. _____¹² in the CRCC) which were not mentioned in the previous proceedings, nor raised by the parties involved. Furthermore, accepting that the time limit was neither mentioned in the previous proceedings nor raised by one of the parties involved; and accepting that the time limit was interrupted by calling upon a FIFA body devoid of jurisdiction was “blatantly wrong” so that the Appellant could not have anticipated that.

4.2

- 4.2.1 According to the case law of the Federal Tribunal there is no constitutional right of the parties to be heard specifically as to the legal assessment of the facts they submit in the proceedings. Neither does it follow from the right to be heard that the parties should be heard in advance of the facts they submit in the proceedings. Neither does it flow from the right to be heard that the parties should be advised in advance as to the set of facts relevant to the decision. However there is an exception when the tribunal intends to base its decision on a legal consideration not relied upon by the parties involved and which they could not reasonably have anticipated would be pertinent (BGE 130 III 35 at 5 p. 39; 126 I 19 at 2c/aa p. 22; 124 I 49 at 3c p. 52). The issue as to whether or not the application of the law by the arbitral tribunal must be considered as “surprising” within the meaning of the case law of the Federal Tribunal is a matter of appreciation as to which the Federal Tribunal exercises restraint in the field of international arbitration. The specificity of the proceedings – namely the mutual will of the parties not to bring their dispute in state courts and the fact

that the arbitrators come from different legal traditions – must be taken into account and the argument that law was applied by surprise must not be abused in order to obtain a review of the substance of the arbitral award by the Federal Tribunal (BGE 130 III 35 at 5 p. 39 f.).

The Appellant does not show in its submissions to what extent it would have been impossible for it to submit its point of view as to the application of the Mexican statute of limitations. After the CRCC held in its decision of July 26, 2011, that the Respondent’s claims were time-barred, the Appellant must have been aware that in the arbitral proceedings following the appeal of this decision, the issue of the statute of limitations would be at the forefront. It could not assume in this respect that the Arbitral Tribunal would limit itself to the review of the Respondent’s submissions when deciding whether or not the claim was time-barred, but instead it should have assumed that the Arbitral Tribunal would review the legal aspect of the question comprehensively on its own initiative. This also encompasses whether or not the statute of limitations was complied with or interrupted by the commencement of legal proceedings.

The Appellant itself confirms in its brief that the applicable Mexican employment law provides for the time limitation to be interrupted at Art. 521, in particular by the introduction of a claim. When it now submits in the Federal Tribunal, with the support of a legal opinion, that it was “blatantly wrong” to consider in the award under appeal that the involvement of the Dispute Resolution Chamber of FIFA prevented the statute of limitations from running out, it does not raise any ground for appeal foreseen in Art. 190(2) PILA but merely criticizes, in an inadmissible manner, the application of the pertinent provisions by the Arbitral Tribunal. There is no application of the law by surprise as to which the Appellant should have been heard.

- 4.2.2 There is no violation of the right to be heard in the fact that the Appellant was not heard with regard to the issue of whether the time limit was safeguarded by the filing of a claim with the CRCC against Y. _____¹³ which, in the meantime, had signed a Transfer Contract with the Appellant. It was clear to all the parties that another company was also

13. Translator’s note: “Y. _____” in the original text.

involved in the claim in the CRCC and that the Appellant only appeared as Respondent in the CAS proceedings even though it was easy to address this issue – also in connection with the statute of limitations – the Appellant waived the possibility to submit legal arguments in the arbitral proceedings in this respect. There can be no claim this would have prevented it from submitting its legal arguments as to the meaning of the substitution of the parties in the arbitral proceedings. Moreover its submission that the application of the law by the sole Arbitrator was “blatantly wrong” is not a ground for appeal admissible under Art. 190(2) PILA.

The argument that the sole Arbitrator violated the right to be heard (Art. 190(2)(d) PILA proves completely unfounded.

5.

The appeal is unfounded and must be rejected to the extent that the matter is capable of appeal. In such an outcome of the proceedings, the Appellant must pay the costs and compensate the other party (Art. 66(1) and Art. 68(2) BGG). The costs of the other party will be paid from the deposit made with the Office of the Federal Tribunal. The Respondent’s application for legal aid becomes moot thereby.

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 8’500 shall be borne by the Appellant.

3.

The Appellant shall pay to the Respondent an amount of CHF 9’500 for the federal judicial proceedings. This amount shall be paid from the security for costs deposited with the Office of the Federal Tribunal.

4.

This judgment shall be notified in writing to the parties and to the Court of Arbitration for Sport (CAS).

Lausanne May 24, 2013

In the name of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:
Klett

The Clerk:
Carruzzo

Keywords: Court of Arbitration for Sport, CAS, Jurisdiction of the arbitral tribunal, right to be heard, composition of the arbitral tribunal

Title: Procedural good faith requires objections to be raised immediately

Stars: *

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Chambre ad hoc du TAS pour les Jeux Olympiques de Sotchi / CAS ad hoc Division for the Olympic Games in Sotchi

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Secrétaire Général/Secretary General
- Mr William Sternheimer
Conseiller responsable arbitrage/Managing
Counsel & Head of Arbitration
- Mr Fabien Cagneux
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