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## Message from the CAS Secretary General

The majority of the so called “leading cases” selected for this issue are related to football. In this respect, the case SCS Fotbal Club Cluj v. Romanian Football Federation addresses the application of the principle of free movement of workers to professional players and its compatibility with European law. In Racing Club v. Genoa Cricket & Football Club S.p.A., the nature of the relationship between a bankrupt club and a company managing the football related activities of that club as well as the consequences of a transfer agreement entered into between the said company and another club have been examined. The case FC Zenit St Petersburg v. Russian Football Union contemplates the issue of disciplinary sanctions for improper conduct of supporters whereas the case Malaga v. UEFA deals with the UEFA Financial Fair Play Regulations and particularly with “overdue payable”. In other football related cases, the CAS considers the termination of contracts of employment and underlines that a player’s low performance does neither justify a reduction of salary nor a unilateral termination. In the same context, the CAS also specifies the principle of specificity of sport regarding the obligation to mitigate the damage. Finally, in FC Seoul v. Newcastle Jets, the CAS establishes that where FIFA regulations contain a *lacuna*, it must be possible for a limitation period to be interrupted in case the parties have mutually agreed on a new payment schedule. In other sporting fields, a basketball related case deals with CAS jurisdiction while the case Riis Cycling v. The Licence Commission of the UCI looks at the issue of the “Neutralisation rule” and at its compatibility with the World Anti Doping Code. Eventually, in Koji Murofushi & JOC v. IOC, the CAS contemplates the breach of the rules of conduct applicable to campaigns for election to the IOC Athlete’s Commission.

The four decisions rendered by the *ad hoc* Division created by the International Council of Arbitration for Sport (ICAS) for the XXII Winter Olympic Games held in Sochi (Russia) last February 2014 have been included in this Bulletin. The awards are mainly related to selection and eligibility issues. The last applications filed before the Sochi CAS *ad hoc* Division are linked to a violation of the international freestyle skiing competition rules regarding ski suits. In this regard, the requested disqualification of all three of the French Competitors who won the gold, silver, and bronze medals respectively during men’s Ski Cross Big Final competition was rejected due to the failure to file a timely protest.

Also included in this Bulletin an interesting article prepared by Mr Efraim Barak dealing with the match fixing issue in football and in other sports. The mediation issue has also been examined in this Bulletin by Professor Ian Blackshaw who highlights the settling of dispute by CAS mediation whereas Mr Max Duthie addresses the experience of a sports lawyer in this particular field. Ms Despina Mavromati analyses the amendments brought to Article R57.3 of the Code of Sports-related Arbitration in 2013. Finally, the article of Ms Estelle de La Rochefoucauld sums up the major modifications of the revised World Anti-Doping Code adopted in November 2013 in Johannesburg (South Africa) which will enter into force on 1 January 2015.

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

**Matthieu REEB**  
CAS Secretary General

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**Articles et commentaires**  
**Articles and Commentaries**

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# Match-fixing. The aftermath of *Pobeda* – what have the past four years brought us?

Mr Efraim Barak<sup>1</sup> & Mr Dennis Koolgaard<sup>2</sup>

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## I. Introduction

On 15 April 2010, CAS issued its arbitral award in the appeal submitted by FK Pobeda, Aleksandar Zabrcanec and Nikolce Zdraveski against UEFA.<sup>3</sup> The panel dealing with the *Pobeda* case was not only the first CAS panel sanctioning a club and its president for match-fixing in a European competition,<sup>4</sup> it was also the first CAS panel confronted with procedural and evidentiary issues as well as matters of essence that needed to be dealt with in the framework of a match-fixing case. In light of this, the panel decided for the first time on the issues of protected witnesses and the standard of proof to be applied in match-fixing cases. Since then, the international regulatory developments regarding match-fixing and the number of CAS awards dealing with match-fixing, or other corruption-related issues, followed each other at a rapid pace.

Following the publication of the *Pobeda* award a previous contribution on match-fixing was published.<sup>5</sup> This previous article presented an overview on how international sports-governing bodies dealt – at that time – with the phenomenon of match-fixing in their regulations. Also, the article elaborated on some practical issues relating to match-fixing that had already been dealt with by CAS panels in the very few CAS cases of match fixing that had been rendered at the time the article was published. Finally, some issues were presented that we expected to require future consideration by CAS panels.<sup>6</sup>

The present contribution is intended to provide the readers with an overview of the most notable developments in CAS jurisprudence and regulations of various international sports-governing bodies since *Pobeda*. Special attention is given to two issues that have been extensively discussed in recent CAS jurisprudence: the standard of proof to be applied in match-fixing cases and the

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<sup>3</sup> CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA.

<sup>4</sup> Jean-Samuel Leuba, Match-Fixing: FK Pobeda et al. V. UEFA (CAS 2009/A/1920), in: ANDERSON, BLACKSHAW, SIEKMANN, SOEK (Eds.), Sports Betting: Law and Policy, ASSER International Sports Law

Series 2012, p. 162-172.

<sup>5</sup> Efraim Barak, Match-fixing / Illegal betting and CAS jurisprudence, in: REEB, MAVROMATI (Eds.), Séminaire du TAS / CAS Seminar 2011, p. 182 *et. seq.*

<sup>6</sup> At the time of publication of the previous article CAS had rendered three awards on match-fixing; CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA; CAS 2010/A/2172 Oleg Orikhov v. UEFA and CAS 2010/A/2266 Mészáros & Poleksic v. UEFA.

correlation between parallel criminal proceedings and disciplinary proceedings. Finally, an overview is presented on the jurisprudence of CAS on hearing protected witnesses following *Pobeda*.

Before entering into more detail, it is worth observing some statistics on match-fixing in order to obtain a picture of the magnitude of the problem, justifying the question whether match-fixing is maybe an even bigger threat to sport than doping. Parallels are frequently drawn between corruption in sport and the doping scandals that also undermine sport. Even though both threaten the integrity of competitions, there are nevertheless fundamental differences between doping and betting-related corruption in sport. To begin with, doping concerns one or more athletes who are cheating to win. Corruption linked to sports betting involves teams or players who often cheat to lose. This difference is fundamental to understanding the issues involved and the fight against fraud. Secondly, sport betting, which generates or induces match-fixing in a large number of cases, represents a worldwide market that is disproportional to the market for doping products, and has grown considerably in recent years, to the point of constituting what is now a significant and substantial economic activity. In a recent investigation conducted by the University Paris 1 Panthéon-Sorbonne and the International Centre for Sport Security (ICSS) it is concluded that manipulation takes place in the context of a growing sports economy, which now accounts for 2% of the global GDP, with a transnational sports-betting market of estimated wagers worth between EUR 200 - 500 billion, more than 80% of which is illegal. Also, the same investigation reveals that USD 140 billion is laundered annually through sport betting.<sup>7</sup> Previously, Interpol revealed

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<sup>7</sup> Protecting the Integrity of Sport Competition, The Last Bet for Modern Sport, University Panthéon-Sorbonne and the International Centre for Sport Security (ICSS), May 2014.

<sup>8</sup> Robin Scott-Elliott, FIFA aware of match-fixing fears, independent.co.uk, 11 March 2011.

<sup>9</sup> Match-fixing revenues comparable to global firms – Interpol, bbc.com, 17 January 2013.

that the volume of illegal betting and match-fixing is worth USD 500 billion on the Asian market alone.<sup>8</sup> It has been contended that revenues from illegal betting are on the same scale as the Coca-Cola company.<sup>9</sup>

Betting-related match-fixing can present itself in many ways. It can be used to influence the result of a match (win, loss, draw), but also for spot-fixing (also referred to as “proposition bets” - the total number of goals in a match, who receives the first yellow card, throwing of no-balls in cricket, etc.). It is even submitted that a bookmaker may accept bets on aspects of a sporting event that do not impact at all on the course or outcome of the contest in question. For example, it may be possible to bet on what colour shirt a player will wear in a particular match (tennis), which fielding position a particular player will take at the start of an innings (cricket), how many players will wear long sleeves or gloves (football), how many players will wear a particular colour of boots (rugby), and so on.<sup>10</sup> Although no underperformance is involved and the outcome of the match is not affected, such conduct nevertheless should cause the regulator serious concern, because it engages the participant in the manipulation of what happens on the field of play in order to fix a betting market, and therefore, to some extent, may be considered by some as corruption in itself, as well as having a clear potential to develop into something even more sinister.<sup>11</sup> Other inappropriate conduct would be the disclosure of “inside information” that could be used for placing bets.

As Richard Pound, founding president of the World Anti-Doping Agency and former vice-president of the IOC, put it at the Play the Game Conference on 3 October 2011, in sport it is of the essence that the outcome of

<sup>10</sup> Mark Warby QC, Iain Higgins, Jonathan Taylor, fighting match-fixing and related corruption in sport, in: LEWIS, TAYLOR (Eds.), Sport: Law and Practice, Third edition, 2014, p. 232.

<sup>11</sup> Mark Warby QC, Iain Higgins, Jonathan Taylor, fighting match-fixing and related corruption in sport, in: LEWIS, TAYLOR (Eds.), Sport: Law and Practice, Third edition, 2014, p. 232.

any contest is uncertain, depending upon a combination of factors, including the skill of the players, the playing conditions, tactics, conditioning and many others. This is what makes sport interesting and exciting for player and spectator alike. Activities which put in doubt the reality of the competition destroy the essence of the competition.<sup>12</sup> Put differently, the difference between sport and entertainment is the unpredictability of sporting outcomes versus the planned and executed event that provides entertainment. Corruption robs sport of its essential feature of uncertainty of the outcome and accelerates its spin into the forum of entertainment, and thus no longer is sport.<sup>13</sup> The risk of sponsors and broadcasters pulling their investments from sports that do not take rigorous action against match-fixing should not be underestimated.<sup>14</sup>

## II. Regulatory amendments

Until recently, match-fixing itself was not specifically incriminated in the regulations of most major sports-governing bodies. These bodies relied on general catch-all provisions prohibiting conduct that is contrary to general principles such as loyalty, integrity and sportsmanship.<sup>15</sup> An exception thereto is governing body of international football at worldwide level.<sup>16</sup>

The first CAS panels dealing with match-fixing issues were required to assess whether the behaviour in question constitutes a violation of such general values. Although the

CAS panel in *Pobeda* came to the conclusion that match-fixing could be sanctioned on the basis of this general provision as it “*touches at the very essence of the principle of loyalty, integrity and sportsmanship because it has an unsporting impact on the result of the game by inducing players not to perform according to their real sporting capacities and because they get rewarded for their misconduct*”.<sup>17</sup> It is therefore a good development that sports-governing bodies (in this case UEFA) took due note and considered the comments of the CAS panels in this respect, did not rest on their laurels and replaced such catch-all provisions by provisions specifically and verbally referring to match fixing and specifically designed to combat match-fixing more effectively.

It is submitted that a crucial aspect of addressing the threats to integrity in sports is an effective education and awareness program for all players, players’ support staff, officials and other relevant persons.<sup>18</sup> Players and all those connected with the sport concerned must understand the nature of the threats and the penalties that are incurred if one gets caught, as well as the need to act responsibly in enhancing the integrity of the sport.<sup>19</sup> Another action required from sports-governing bodies is obviously the implementation of a sophisticated set of regulations enabling the competent authorities to effectively undertake action. It is argued that the starting point of any code in the area of match-fixing must be a clear and broad prohibition of any deliberate underperformance for fixing purposes.

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<sup>12</sup> Mark Warby QC, Iain Higgins, Jonathan Taylor, fighting match-fixing and related corruption in sport, in: LEWIS, TAYLOR (Eds.), Sport: Law and Practice, Third edition, 2014, p. 205.

<sup>13</sup> Richard H. McLaren, Corruption: Its Impact on Fair Play, 19 Marq. Sports L. Rev. 15 (2008), p. 15.

<sup>14</sup> Mark Warby QC, Iain Higgins, Jonathan Taylor, fighting match-fixing and related corruption in sport, in: LEWIS, TAYLOR (Eds.), Sport: Law and Practice, Third edition, 2014, p. 207.

<sup>15</sup> See for example article 5(1) of the UEFA Disciplinary Regulations (2004 version).

<sup>16</sup> The 2004 edition of the FIFA Disciplinary Code already provided in article 76 of such code that “[a]nyone who conspires to influence the match in a manner contrary to sporting ethics shall be sanctioned (...)”. In article

69 of the 2009 edition of the FIFA Disciplinary Code a second paragraph was added determining that the club or association to which the player or official that unlawfully influenced the result of a match belongs may be fined or, in case of serious offences, may be expelled from a competition or relegated to a lower division. This provision remained unchanged in the 2011 FIFA Disciplinary Code.

<sup>17</sup> CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA, §78.

<sup>18</sup> Lawrence B. Pedowitz, Report to the Board of Governors of the National Basketball Association 1, 2008, p 107-109.

<sup>19</sup> Richard H. McLaren, Corruption: Its Impact on Fair Play, 19 Marq. Sports L. Rev. 15 (2008), p. 38.

However, care must be taken not to make the prohibition too narrow or too broad, or to include any unnecessary elements.<sup>20</sup> Most sports have taken the view that the better approach is to define a list of specific offences that targets specified acts and omissions, even if they then proceed to conclude that list with a general offence that is intended to operate as a catch-all.<sup>21</sup>

A good example of such an evolution in regulations specifically intended to combat match-fixing are UEFA's amendments to its Disciplinary Regulations. In the 2004 version of the UEFA Disciplinary Regulations that were applicable in the *Pobeda* case, article 5 provided for general principles of conduct. Whereas article 5(1) determined that "[m]ember associations, clubs, as well as their players, officials and members, shall conduct themselves according to the principles of loyalty, integrity and sportsmanship", article 5(2) provided for specific examples of when a breach of these principles would be committed. Although rather broadly formulated, the most relevant in the prevention of match-fixing is article 5(2)(a) ("[anyone] who engages in or attempts to engage in active or passive bribery and/or corruption"). In the 2008 version, two other, more specific corruption-minded examples were added to the list: article 5(2)(j) ("[anyone] who acts in a way that is likely to exert an influence on the progress and/or the result of a match by means of behaviour in breach of the statutory objectives of UEFA with a view to gaining an undue advantage for himself or a third party") and article 5(2)(l) ("[anyone] who participates directly or indirectly in betting or similar activities relating to UEFA competition matches, or who has a direct or indirect financial interest in such activities"). One should note that, despite the extension of the list of examples constituting an infringement of UEFA's principles of loyalty, integrity and sportsmanship, still no

specific reference was made to match-fixing.<sup>22</sup> In the 2011 edition of the UEFA Disciplinary Regulations, article 5(2)(j) and 5(2)(l) were basically replaced by a new article 5bis, headed "*Integrity of matches and competitions*". In the substantially revised 2013 edition of the UEFA Disciplinary Regulations, article 5bis was amended and transformed into article 12 and was headed "*Integrity of matches and competitions **and match-fixing***", thus for the first time clearly covering the offence of match-fixing.

It must be welcomed that specific provisions are implemented in the disciplinary regulations of sport-governing bodies in order to combat match-fixing more effectively. If this is done in accordance with the jurisprudence developed by CAS, it appears that CAS is serving its purpose in contributing to – as some might call it – the *lex sportiva*. As another example, it appears that UEFA implemented article 33bis and 33ter on hearing protected witnesses in the 2011 version of the UEFA Disciplinary Regulations following the considerations of the panel in *Pobeda*, because in these new provisions UEFA adopted the modalities that were established by that panel.

Whereas national match-fixing or corruption cases will, in principle, be dealt with by national adjudicating bodies, it is likely that international cases will finally transpire to CAS. As a substantial portion of international match-fixing cases will be adjudicated by CAS, it appears to be worthwhile for national as well as international sports-governing bodies to monitor the jurisprudence of CAS on integrity-related issues. In doing so, governing bodies could learn from each other's practices and evaluate which practices were endorsed by CAS, and which were rejected,<sup>23</sup> and for what reasons. This would

<sup>20</sup> Mark Warby QC, Iain Higgins, Jonathan Taylor, fighting match-fixing and related corruption in sport, in: LEWIS, TAYLOR (Eds.), Sport: Law and Practice, Third edition, 2014, p. 223.

<sup>21</sup> Mark Warby QC, Iain Higgins, Jonathan Taylor, fighting match-fixing and related corruption in sport, in: LEWIS, TAYLOR (Eds.), Sport: Law and Practice, Third edition, 2014, p. 222.

<sup>22</sup> See: Efraim Barak, Match-fixing / Illegal betting and CAS jurisprudence, in: REEB, MAVROMATI (Eds.), Séminaire du TAS / CAS Seminar, 2011, p. 183-184.

<sup>23</sup> In this respect, reference could be made to the fine prescribed in section H(1)(a) of the Uniform Tennis Anti-Corruption Program (UTACP) which provides for the possibility to impose: "(i) a fine up to \$250,000 plus an amount equal to the value of any winnings or other

clearly contribute to the establishment of a best practice in fighting match-fixing.<sup>24</sup> It is however pivotal to be careful in drawing general conclusions from CAS jurisprudence and to examine this jurisprudence on the basis of a case-by-case analysis as the applicable regulations differ from case to case. In this respect, the panel in the *Köllerer* case – be it in respect of the standard of proof to be applied – stated the following: “[w]hile the Panel acknowledges that consistency across different associations may be desirable, in the absence of any overarching regulation (such as the WADA Code for doping cases), each association can decide for itself which standard of proof to apply, subject to national and/or international rules of public policy. The CAS has neither the function nor the authority to harmonize regulations by imposing a uniform standard of proof, where, as in the present case, an association decides to apply a different, specific standard in its regulations.”<sup>25</sup>

It may however be submitted that CAS has established certain general principles on the standard of proof to be applied in match-fixing cases, on parallel proceedings and on the prerequisites for hearing protected witnesses. These issues will be examined in more detail below.

### III. The standard of proof

The standard of proof to be applied in match-fixing and corruption cases has not been entirely consistent in CAS jurisprudence and has been comprehensively debated since the *Pobeda* case. This is not surprising. First of all, sports-governing bodies may adopt a specific

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*amounts received by such Covered Person in connection with any Corruption Offense*”. The request for the imposition of a fine of USD 100,000 was dismissed by the panel in CAS 2011/A/2490 *Daniel Köllerer v. ATP et al.* The panel determined that “taking into account the particular circumstances of the current case [under which at least the considerable financial effect of the lifetime ban on the Player because it significantly impacts the Player’s future earnings by eliminating tennis as a source of revenue], the Panel considers that it would be inappropriate to impose a financial penalty in addition to the lifetime ban, as the sanction of permanent ineligibility provides for the deterrence that corruption offences call for.” This approach was confirmed in CAS 2011/A/2621 *Savic v. PITOs*, §8.38.

pre-determined standard of proof in their regulations. Second, inconsistencies may be strengthened by the fact that CAS is an international arbitral tribunal with a pool of arbitrators from a variety of legal backgrounds. Arbitrators may have different perspectives on legal concepts such as the standard of proof. In this respect, it has been argued that common law systems are very familiar with the standard of proof applicable in civil cases, which is predominantly a *preponderance of the evidence* standard. This system is different in civil law countries where the concept of a standard of proof is foreign and less understood.<sup>26</sup>

In view of the above-mentioned, it appears opportune to make a distinction between evaluating the standard of proof to be applied in cases where the applicable regulatory framework provides for a specific standard and the situation in which such a prescribed standard is absent.

#### A. Standard of proof provided in regulatory framework

Certain sports-governing bodies have indeed determined the standard of proof to be applied in match-fixing cases in their regulations. For example, the Uniform Tennis Anti-Corruption Program provides that “the standard of proof shall be whether the Professional Tennis Anti-Corruption Officer has established the commission of the alleged Corruption Offense by a preponderance of evidence”.<sup>27</sup> The arguments submitted by parties to CAS with a view to applying a different standard have

<sup>24</sup> The European Commission plans a Recommendation on best practices in the prevention and combating of betting-related match-fixing in 2014.

<sup>25</sup> CAS 2011/A/2490 *Daniel Köllerer v. Association of Tennis Professionals, Women’s Tennis Association, International Tennis Federation & Grand Slam Committee*, §86.

<sup>26</sup> This issue was discussed by a panel at the 2014 conference of the International Council for Commercial Arbitration (“ICCA”), see: Francisco Rodriguez, ICCA 2014. Standard of Proof: A Plea for Precision or an Unnecessary Remedy?, *Kluwer Arbitration Blog*, 10 April 2014.

<sup>27</sup> Section G(3)(a) of the Uniform Tennis Anti-Corruption Program.

been unsuccessful. Both in the *Köllerer* case<sup>28</sup> and in the case concerning *Savic*,<sup>29</sup> CAS determined that the applicable standard of proof is *preponderance of the evidence*, unless (i) the law of the State of Florida mandatorily suggests otherwise, or (ii) the application of such a standard is incompatible with some relevant aspect of public policy. In both cases the CAS panels came to the conclusion that neither of these exceptions were applicable.<sup>30</sup>

Article 3.1 of the International Cricket Council's Anti-Corruption Code for Participants is also interesting, as it provides for a flexible standard; "*the standard of proof in all cases brought under the Anti-Corruption Code shall be whether the Anti-Corruption Tribunal is comfortably satisfied, bearing in mind the seriousness of the allegation that is being made, that the alleged offence has been committed. This standard of proof in all cases shall be determined on a sliding scale from, at a minimum, a mere balance of probability (for the least serious offences) up to proof beyond a reasonable doubt (for the most serious offences)*". In the CAS proceedings involving *Mohammad Asif*,<sup>31</sup> the standard of proof applied by the CAS panel was *beyond any reasonable doubt*, which was also the standard applied by the ICC Tribunal in the first instance.<sup>32</sup>

In article 97(3) of the 2011 version of the FIFA Disciplinary Code it is determined that "[t]hey [the disciplinary bodies of FIFA] *decide on the basis of their personal conviction*". In the *Adamu* case, the CAS panel found that "*in practical terms, this standard of proof of personal conviction coincides with the "comfortable satisfaction" standard widely applied by CAS panels in disciplinary proceedings*".<sup>33</sup>

UEFA displayed the standard of proof to be applied in match-fixing cases in article 2.05 and 2.06 of the Regulations of the UEFA Champions League (hereinafter: the

"UCLR") and in article 2.08 and 2.09 of the Regulations of the UEFA Europa League (hereinafter: the "UELR"), determining respectively that:

*"If, on the basis of all the factual circumstances and information available to UEFA, UEFA concludes to its **comfortable satisfaction** that a club has been directly and/or indirectly involved, since the entry into force of Article 50(3) of the UEFA Statutes (edition 2007), i.e. 27 April 2007, in any activity aimed at arranging or influencing the outcome of a match at national or international level, UEFA shall declare such club ineligible to participate in the competition. Such ineligibility is effective only for one football season. When taking its decision, UEFA can rely on, but is not bound by, a decision of a national or international sporting body, arbitral tribunal or state court. UEFA can refrain from declaring a club ineligible to participate in the competition if UEFA is comfortably satisfied that the impact of a decision taken in connection with the same factual circumstances by a national or international sporting body, arbitral tribunal or state court has already had the effect to prevent that club from participating in a UEFA club competition."* (emphasis added)

*"In addition to the administrative measure of declaring a club ineligible, as provided for in paragraph 2.05, the UEFA Organs for the Administration of Justice can, if the circumstances so justify, also take disciplinary measures in accordance with the UEFA Disciplinary Regulations."*

As determined in the recent *Fenerbahçe* case,<sup>34</sup> the standard of *comfortable satisfaction* of article 2.05 UCLR is only applicable in the event a maximum one-year period of ineligibility to

<sup>28</sup> CAS 2011/A/2490 Daniel Köllerer v. Association of Tennis Professionals, Women's Tennis Association, International Tennis Federation & Grand Slam Committee.

<sup>29</sup> CAS 2011/A/2621 Savic v. PITOs.

<sup>30</sup> It must be noted that the panel in the *Savic* case only came to its conclusion *obiter dictum*, as the panel concluded that the disputed facts had been proven not

only by a *preponderance of the evidence*, but indeed to the panel's *comfortable satisfaction*.

<sup>31</sup> CAS 2011/A/2362 Mohammad Asif v. ICC.

<sup>32</sup> Determination of the ICC Tribunal, dated 5 February 2011, §198.

<sup>33</sup> CAS 2011/A/2426 Amos Adamu v. FIFA, §88.

<sup>34</sup> CAS 2013/A/3256 Fenerbahçe Spor Kulübü v. UEFA.

participate in the UEFA Champions League - or UEFA Europa League - is sought. As such, this standard is only applicable in case of application of article 2.05 UCLR or 2.08 UELR, but not necessarily in case of application of 2.06 UELR or 2.09 UELR.<sup>35</sup> The legality of such deviation between a first period of ineligibility *vis-à-vis* a possible subsequent disciplinary sanction in light of a possible infringement of the general legal principle of *ne bis in idem*, has been confirmed in the *Fenerbahçe* case.<sup>36</sup>

In the *Olympiakos Volou* case,<sup>37</sup> the panel concluded that it was established *à sa propre satisfaction*, in application of article 2.08 of the UELR, that Olympiakos Volou was “*directly or indirectly involved in an activity aimed at arranging the outcome of a match at national or international level*”.<sup>38</sup> Although the French word *propre* is not an exact equivalent of the English word *comfortable*, it appears that the Panel in fact applied the standard of *comfortable satisfaction*, as the English language of the UELR prevails over the French.<sup>39</sup>

In the *Besiktas* case,<sup>40</sup> UEFA sought an exclusion of Besiktas from its European competitions for a period of one year pursuant to article 2.08 UELR. The standard of proof to be applied according to the regulations was thus *comfortable satisfaction*. The panel maintained the following concerning the appropriateness of this standard:

*“The Panel first notes that by its submission to the [UELR], [Besiktas] implicitly agreed to the application of this particular standard. In this regard, the UEFA [Appeals Body], in the Appealed Decision, held that the*

*applicable competition rules, recognised and accepted by [Besiktas], foresee comfortable satisfaction as relevant standard of proof (...)*

*Furthermore, CAS jurisprudence is clear that the applicable standard of proof in match fixing cases is indeed “comfortable satisfaction”, if not even the lower one of balance of probabilities (...)*

*In [the Metalist case<sup>41</sup>], the Panel held that even absent a specific identification and agreement of the standard of proof (as in Art. 2.05 UCLR and Art. 2.08 UELR), the standard of proof to be applied in match-fixing cases is the standard of “comfortable satisfaction”. CAS first rejected the proposition that the standard of proof was the criminal standard of “beyond reasonable doubt”, stating that in the normal course the standard would be the civil standard of the “balance of probabilities”, and then went on to find that in the context the standard should be “comfortable satisfaction”, taking into account that match-fixing is by its nature concealed (...)*

*The same has been confirmed in [the Oriekhov case<sup>42</sup>] and in [the Olympiakos Volou case<sup>43</sup>].*

*As the UEFA [Appeals Body] also pointed out, the test of comfortable satisfaction must also take into account the circumstances of the case. That includes:*

- *That “corruption is, by its nature, concealed as the parties involved will seek to use evasive means to ensure that they*

<sup>35</sup> CAS 2013/A/3256 *Fenerbahçe Spor Kulübü v. UEFA*, §273-274.

<sup>36</sup> CAS 2013/A/3256 *Fenerbahçe Spor Kulübü v. UEFA*, §156-168.

<sup>37</sup> CAS 2011/A/2528 *Olympiakos Volou FC c. UEFA*.

<sup>38</sup> CAS 2011/A/2528 *Olympiakos Volou FC c. UEFA*, §134. In the original French language: “*En conséquence, la Formation estime que c’est à bon droit, en application de l’article 2.08 du Règlement de l’Europa League 2011/2012, après avoir conclu “à sa propre satisfaction”, comme le lui permet cet article, que l’Olympiakos Volou était*

*“impliqué directement ou indirectement (...) dans une activité propre à influencer de manière illicite le résultat d’un match au niveau national ou international (...)”*

<sup>39</sup> Article 34.04 of the UELR (version 2011/2012).

<sup>40</sup> CAS 2013/A/3258 *Besiktas Jimnastik Kulübü v. UEFA*.

<sup>41</sup> CAS 2010/A/2267-2281 *Football Club “Metalist” et al. v. FFU*.

<sup>42</sup> CAS 2010/A/2172 *Oleg Oriekhov v. UEFA*.

<sup>43</sup> TAS 2011/A/2528 *Olympiakos Volou FC c. UEFA*.

*leave no trail of their wrongdoing”* ([the Oriekhov case])

- *“The paramount importance of fighting corruption of any kind in sport and also considering the nature and restricted powers of the investigating authorities of the governing bodies of sport as compared to national formal interrogation authorities”.* ([the Pobeda case<sup>44</sup>])

*With regard to this last element, the restricted powers of investigation of sports governing bodies, the Appellant considers that in the case at hand, UEFA and CAS can actually benefit from the broad investigatory powers of the Turkish authorities as in particular “the full transcripts of recorded phone calls, intercepted text messages as well as various protocols of formal interrogations and witness statements” are available as evidence. This, according to the Appellant, implies that this case is different from the usual disciplinary case where the standard of “comfortable satisfaction” is applied and that therefore the standard of “beyond any reasonable doubt” shall apply in the present proceedings.*

*The Panel is of the opinion that this position cannot be followed. Even if it is true that in the case at hand the Panel enjoys the important investigatory work of the Turkish authorities, it does not change the nature of the present proceedings, which are fundamentally of a civil nature. The Panel notes that it was provided with the elements from the investigations conducted by the Turkish authorities not because of its particular investigatory powers, but as a result of the cooperation of the parties, the latter being allowed to file whatever evidence they feel would be beneficial to their case. This confirms the private nature of the present proceedings and excludes, in principle, the application of the standard of proof applicable in criminal proceedings.*

*In view of the above, the Panel considers that the standard of proof to be applied in the present dispute is “comfortable satisfaction”.*<sup>45</sup>

From these cases it may be concluded that it is unlikely that CAS will deviate from a standard of proof provided in the regulations of sports-governing bodies. As suggested in the *Köllerer* case, this would in principle only be different if (i) mandatory law suggests otherwise, or (ii) if the application of such a standard is incompatible with some relevant aspect of *ordre public* (public policy). As the standard of proof to be applied is an issue of substance,<sup>46</sup> the only ground for challenging the award is article 190(2)(e) of Switzerland’s Federal Code on Private International Law. This review is confined to the question of whether the arbitral award is compatible with public policy.<sup>47</sup> The substantive assessment of a disputed claim is contrary to public policy only if it ignores fundamental legal principles and is therefore simply incompatible with the essential and largely recognized system of values, which, according to the prevailing opinion, is supposed to form the basis of any legal system.<sup>48</sup> It appears this burden is not easily met.<sup>49</sup>

## **B. Standard of proof absent guidance in regulatory framework**

There are also numerous sets of rules lacking any guidance as to the standard of proof to be applied. Whereas there appears to be a general consensus towards accepting the application of the standard of *comfortable satisfaction*, this is not always the case and even though some CAS panels came to the conclusion to apply the standard of *comfortable satisfaction*, the reasons relied on by these panels in applying this standard vary and may lead to different conclusions in the future.

<sup>44</sup> CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA.

<sup>45</sup> CAS 2013/A/3258 Besiktas Jimnastik Kulübü v. UEFA, §117-125.

<sup>46</sup> CAS 2013/A/3256 Fenerbahçe Spor Kulübü v. UEFA, §274.

<sup>47</sup> BGE 121 III 331 E. 333, p. 333.

<sup>48</sup> Stephan Netze, Appeals against Arbitral Awards by the CAS, CAS Bulletin 2/2011, p. 257-258.

<sup>49</sup> The Swiss Federal Tribunal has only once upheld an argument for breach of substantive public policy in the past 20 years (SFT 4A\_558/2011).

In our previous contribution on match-fixing,<sup>50</sup> it was submitted that just as *beyond any reasonable doubt* is the usual standard of proof in criminal proceedings, the *balance of probability* is the common standard in civil proceedings.<sup>51</sup> Departing from this assumption, the panel in the *Pobeda* case dealt with the question of the applicable standard of proof in match-fixing cases and explained as follows:

*“Taking into account the nature of the conflict in question and the paramount importance of fighting corruption of any kind in sport and also considering the nature and restricted powers of the investigating authorities of the governing bodies of sport as compared to national formal interrogating authorities, the Panel is of the opinion that cases of match-fixing should be dealt in line with the CAS constant jurisprudence on disciplinary doping cases. Therefore, the UEFA must establish the relevant facts to the comfortable satisfaction of the Court having in mind the seriousness of the allegation which is made.”*<sup>52</sup>

In the *Oriekhov* case, the panel endorsed the reasoning of the panel in the *Pobeda* case with the addition that, *“when assessing the evidence, the Panel has well in mind that corruption is, by nature, concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoing”*.<sup>53</sup> Nevertheless, the panel finally concluded that *“it has been proven not only to its comfortable satisfaction but indeed beyond reasonable doubt that there were repeated contacts between the Appellant and members of a criminal group involved in match fixing and betting fraud”*.<sup>54</sup>

In the match-fixing case concerning *Mészáros & Poleksic*,<sup>55</sup> the parties agreed on the application of the standard of *balance of*

*probabilities*. Nevertheless, the panel reasoned as follows:

*“With respect to the standard of evidence, it is the Panel’s opinion that the party bearing the burden of evidence, in order to satisfy it, does not need to establish “beyond any reasonable doubts” the facts that it alleges to have occurred; it needs to convince the Panel that an allegation is true by a “balance of probability”, i.e. that the occurrence of the circumstances on which it relies is more probable than their non-occurrence (see CAS 2008/A/1370 & 1376, FIFA & WADA v/ CBF, STJD, Dodó, § 127; CAS 2004/A/602, Lienhard v/ FISA, § 5.15; TAS 2007/A/1411, Flachi v/ UPA-CONI, § 59). In this context, as indicated in a CAS precedent relating to “integrity issues” (CAS 2009/A/1920, Pobeda), the Panel needs however to be comfortably satisfied that the relevant facts have been established, bearing in mind the seriousness of the allegation which is made. Yet, the Panel, while assessing the evidence, has well in mind that “corruption is, by nature, concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoing” (CAS 2010/A/2172, Oriekhov, § 54). Furthermore, the parties agreed that the standard of evidence applicable in the proceedings is the “balance of probabilities”.*

*In this respect, it must be noted that disciplinary rules enacted by sports authorities are private law (and not criminal law) rules (see on the point the advisory opinion CAS 2005/C/841, CONI, at § 78). Consequently, in the Panel’s view, any legal issue concerning the satisfaction of such burden of proof should be dealt within the context of the principles of private law of the country where the interested sports authority is*

<sup>50</sup> Efraim Barak, Match-fixing / Illegal betting and CAS jurisprudence, in: REEB, MAVROMATI (Eds.), Séminaire du TAS / CAS Seminar 2011, p. 182 *et seq.*

<sup>51</sup> This point of departure has however recently been criticized in the match-fixing case of the Turkish football club *Fenerbahçe*, where it was argued that the standard of proof to be applied in civil cases is *beyond reasonable doubt*. See: CAS 2013/A/3256 *Fenerbahçe Spor Kulübü v. UEFA*, §276; with references to SFT

132 III 715, E. 3.1; BK-ZPO/Brönnimann, 2012, Art. 157 no. 40.

<sup>52</sup> CAS 2009/A/1920 *FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA*, §85.

<sup>53</sup> CAS 2010/A/2172 *Oleg Oriekhov v. UEFA*, §53-54.

<sup>54</sup> CAS 2012/A/2172 *Oleg Oriekhov v. UEFA*, §70.

<sup>55</sup> CAS 2010/A/2266 *Mészáros & Poleksic v. UEFA*.

domiciled. In this respect, the Panel notes that in Swiss law (being the law subsidiarily applicable in these proceedings: § 56 above) Article 8 of the Civil Code, which establishes the rule on the burden of proof (“Chaque partie doit, si la loi ne prescrit le contraire, prouver les faits qu’elle allègue pour en déduire son droit”<sup>56</sup>), allows the adjudicating body to base its decision also on natural inferences (see the award CAS 96/159 & 96/166, A., C. F. & K. v/ FEI, at § 16).<sup>57</sup>

Applying such a standard of proof, the panel concluded that “on a balance of probability, it has been proven to its comfortable satisfaction that there were contacts between Mr Poleksic and the members of a criminal group involved in match fixing and betting fraud. Mr Poleksic, indeed, admitted to such contacts, even though not with respect to the Match, but to a different one. Mr Poleksic was obliged to report the said contacts to UEFA. By failing to make such a report, Mr Poleksic violated the principles of conduct as set forth under Article 5 DR.” Contrarily, in respect of Mr Mészáros the Panel found that “the elements offered by UEFA [...] are not sufficient to establish to its comfortable satisfaction that there were contacts between Mr Mészáros and the members of a criminal group involved in match fixing and betting fraud”. As such, the panel concluded that “it is not possible to conclude on a balance of probability that Mr Mészáros violated the principles of conduct set forth under Article 5 DR”.

The use of terms in assessing the evidence and the reference to both the standards of *comfortable satisfaction* and *balance of probability* in these paragraphs and even in the same sentence may create some confusion. To suggest a possible explanation, it appears that the panel assessed individual allegations on a standard of *balance of probability*, but that it found that the overall assessment should be made to the standard of *comfortable satisfaction* and that it thus had to be *comfortably satisfied* that the relevant facts had been established,

bearing in mind the seriousness of the allegation which is made.

In the *Metalist* case,<sup>58</sup> the panel reasoned as follows:

*“With respect to the standard of proof, the Panel finds that the party bearing the burden of evidence, in order to satisfy it, does not need to establish “beyond any reasonable doubt” the facts that it alleges to have occurred. The Panel stresses, that under Swiss law sanctions or disciplinary measures are not the exercise of power delegated by the state, but rather an expression of the freedom of associations and federations based on civil law and not on criminal law (cf. CAS 2008/A/1583 & CAS 2008/A/1584, para 41). According to the jurisprudence of the Swiss Federal Tribunal:*

*“the duty of proof and assessment of evidence [...] cannot be regulated, in private law cases, on the basis of concepts specific to criminal law such as presumption of innocence and the principle of “in dubio pro reo” and the corresponding safeguards contained in the European Convention on Human Rights.” (cf. Judgement of the Swiss Federal Tribunal dated 31 March 1999, 5P.83/1999, consid. E 3.d).*

*Accordingly, the Panel is not, in principle, bound by the criminal law standard requiring that the facts of the case have to be established “beyond any reasonable doubt.” As confirmed by the Swiss Federal Tribunal, “the duty of proof and assessment of evidence are problems which cannot be regulated, in private law cases, on the basis of concepts specific to criminal law” (cf. Judgement of the Swiss Federal Tribunal dated 31 March 1999, 5P.83/1999, consid. E 3.d).d).*

*In general, the Panel needs to be convinced that an allegation is true by a “balance of*

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<sup>56</sup> Free translation: “Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact.”

<sup>57</sup> CAS 2010/A/2266 Mészáros & Poleksic v. UEFA, §67-68.

<sup>58</sup> CAS 2010/A/2267-2281 Football Club “Metalist” et al. v. FFU.

*probability*”, i.e. that the occurrence of the circumstances on which it relies is more probable than their non-occurrence (see CAS 2008/A/1370 & 1376, para 127; CAS 2004/A/602, para 5.15; TAS 2007/A/1411, para 59). However, in the CAS case FK Pobeda, Aleksandr Zabrcanec, Nikolce Zdraveski v UEFA, the Panel dealing with the match-fixing allegations accepted the standard of proof “to comfortable satisfaction” which was suggested by UEFA in the absence of any standard of proof specified in the respective regulations (...)

The application of this standard of proof was further confirmed by the CAS Panel dealing with issues of corruption and match-fixing in particular in the case Mr Oleg Oriekhov v UEFA (cf. CAS 2010/A/2172, para 53).

Due to the lack of the specific regulations stipulating the standard of proof in the [Disciplinary Regulations of the Football Federation of Ukraine] and in view of the established CAS jurisprudence in the match-fixing cases in football, the Panel will consider whether the Respondent has established to its comfortable satisfaction that Appellants committed the alleged violations bearing in mind the seriousness of Respondent’s contentions. Thereby, the Panel notes that the existence of serious allegations as such does not automatically raise the standard to the level of the criminal law standard of “beyond any reasonable doubt”. In addition, while assessing the evidence, the Panel will have well in mind that “corruption is, by nature, concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoing” (CAS 2010/A/2172, para 54).<sup>59</sup>

As such, although this panel appears to be of the view that it had to be convinced that an allegation was true on a *balance of probability*, due to the CAS precedents it finally applied the standard of *comfortable satisfaction*.

In the *Fenerbahçe* case,<sup>60</sup> the CAS panel reasoned as follows:

*Article 2.06 of the [UEFA Champions League Regulations] does not define the standard of proof to be applied. In principle, therefore, the answer to this question is to be followed from Swiss law that applies subsidiarily in the case at hand (cf. §115 et seq.), since the standard of proof – according to Swiss law – is an issue of substantive law.*

The Panel observes that CAS jurisprudence is inconsistent in its approach to the standard of proof to be applied in civil cases. On the one hand, it is held that “[u]nder Swiss law, the standard of proof normally applied to a civil claim is whether the alleged facts have been established beyond reasonable doubt, thereby leading to the judges’ conviction that the claim is well founded” (CAS 2006/A/1130). However, on the other hand, CAS jurisprudence determines that the standard of proof in civil law cases is “balance of probability” (e.g. CAS 2011/A/2426, §88, with references to CAS 2010/A/2172, §53; CAS 2009/A/1920, §85); “the Panel needs to be convinced that an allegation is true by a “balance of probability”, i.e. that the occurrence of the circumstances on which it relies is more probable than their non-occurrence” (CAS 2010/A/2267, §732, with references to CAS 2008/A/1370 & 1376, §127; CAS 2004/A/602, §5.15; TAS 2007/A/1411, §59).

This Panel finds that the standard of proof to be applied in civil cases is “beyond reasonable doubt” (SFT 132 III 715, E. 3.1; BK-ZPO/BRÖNNIMANN, 2012, Art. 157 no. 40).

The Panel observes that CAS jurisprudence has sometimes found that the applicable standard of proof in match-fixing cases is “comfortable satisfaction” in analogy to doping cases according to the WADC ([Pobeda case], §85; [Olympiakos Volou case],

<sup>59</sup> CAS 2010/A/2267-2281 Football Club “Metalist” et al v. FFU, §730-734.

<sup>60</sup> CAS 2013/A/3256 Fenerbahçe Spor Kulübü v. UEFA.

§134; [Oriekhov case], §53; [Metalist case], §732). According thereto, the standard of comfortable satisfaction is a flexible one, i.e. greater than a mere balance of probability but less than proof beyond a reasonable doubt bearing in mind the seriousness of the allegation which is being made (CAS 2004/A/607, §34).

The justifications put forward by CAS panels for this departure from the normally applicable standard of proof in civil cases vary. (...)

In [the Oriekhov case] the panel found that the application of the standard of comfortable satisfaction could also be justified because “corruption is, by nature, concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoing” (CAS 2010/A/2172, §70).

The reasoning in [the Pobeda case] is not easy to follow. Disciplinary proceedings are – according to constant CAS jurisprudence – considered to be civil in nature (CAS 2005/C/976&986, §127). It is, however, typical and usual in disputes of a civil nature that the parties involved never have investigative powers like “national formal interrogation authorities”. Therefore, at least according to Swiss law, the “restricted investigative powers” of a party can never justify a reduced standard of proof in civil matters, since otherwise the normal standard of proof in civil matters (“beyond reasonable doubt”) would never be applicable.

However, this being said, the Panel also notes that Swiss law is not blind vis-à-vis difficulties of proving (“Beweisnotstand”). Instead, Swiss law knows a number of tools in order to ease the – sometimes difficult – burden put on a party to prove certain facts. These tools range from a duty of the other party to cooperate in the process of fact finding, to a shifting of the burden of proof or to a reduction of the

applicable standard of proof. The latter is the case, if – from an objective standpoint – a party has no access to direct evidence (but only to circumstantial evidence) in order to prove a specific fact (SFT 132 III 715, E. 3.1; BK-ZPO/BRÖNNIMANN, 2012, Art. 157 no. 41; BSK-ZPO/GUYAN, 2<sup>nd</sup> ed. 2013, Art. 157 no. 11). In the case at hand, the Panel acknowledges that there is only circumstantial evidence available to UEFA to prove the facts it relies upon. In view of these difficulties of proving, the Panel is prepared to apply the standard of comfortable satisfaction to the case at hand.

Consequently, the Panel has no hesitation to apply the standard of comfortable satisfaction as the standard of proof to which extent the Panel must be convinced that the Appellant was involved in match-fixing. The burden of proof necessarily lies with UEFA.<sup>61</sup>

As such, the CAS panel in the Fenerbahçe case also applied the standard of *comfortable satisfaction*. The reasons relied upon in coming to this standard, however, appear to be fundamentally different from the reasons set out in previous CAS jurisprudence.

### C. Conclusions

Analysing the above, it must be concluded that where the standard of proof to be applied is specifically provided in the applicable regulations, CAS tends to follow such a standard. If the regulations are silent on this matter, the standard applied in the awards that have been rendered until now rather consistently apply the standard of *comfortable satisfaction*. However, if one analyses the reasoning of the panels in coming to the conclusion that the applicable standard shall be *comfortable satisfaction*, tracings may be found that the standard of proof may well vary between a *balance of probability*<sup>62</sup> and proof *beyond any reasonable doubt*.<sup>63</sup> It must also be

<sup>61</sup> CAS 2013/A/3256 Fenerbahçe Spor Kulübü v. UEFA, §274-282.

<sup>62</sup> CAS 2010/A/2266 Mészáros & Poleksic v. UEFA.

<sup>63</sup> If the reasoning of CAS 2013/A/3256 Fenerbahçe Spor Kulübü v. UEFA is followed, and in the event a

panel would find that there is no ‘Beweisnotstand’, such a panel may well apply the higher standard of proof of *beyond any reasonable doubt*.

noted that CAS panels consistently reject the notion that they apply a doctrine of *stare decisis*, i.e. the adherence of courts to abide principles established by decisions in earlier cases, and that all CAS awards have to be analysed on a case-by-case analysis.<sup>64</sup> Therefore, this issue is still open for discussion in further cases to come.

In legal literature it has been argued that the practice of applying a lower standard of proof in disciplinary cases as opposed to applying a higher standard of proof in parallel criminal proceedings, and the possible consequence of being acquitted in criminal proceedings, but being convicted in disciplinary proceedings, is “*really doubtful*”, especially if the sanction is severe.<sup>65</sup> If a sanction is severe, the procedure of proving should be proportionate to the sanction. If the disciplinary sanction is severe, then higher standards of proof (those compatible with criminal law) should be considered.<sup>66</sup> This view is consistent with the flexible standard of article 3.1 of the ICC Anti-Corruption Code for Participants, but is not generally accepted.<sup>67</sup>

CAS has not been blind to such a view. Although the CAS panel dealing with the

*Köllerer* case<sup>68</sup> specifically rejected the application of the standards of *beyond any reasonable doubt* and *comfortable satisfaction* and applied the standard of *preponderance of evidence* (equivalent to the standard of *balance of probability*), the panel took into account that the player had been charged with serious offences and considered it necessary to have “*a high degree of confidence in the quality of the evidence*”.<sup>69</sup> It also appears that the reasoning of the panel in the *Mészáros & Poleksic* case departs from this view.

In CAS jurisprudence the application of the standard of proof of *beyond any reasonable doubt* has so far been dismissed on the basis of the different nature of disciplinary proceedings as opposed to criminal proceedings and the fact that disciplinary proceedings in general do not qualify as a “criminal charge” under the criteria set by the European Convention on Human Rights.<sup>70</sup>

In the absence of a consistent approach towards match-fixing by international sports-governing bodies and states, the idea has been proposed of a World Anti-Corruption Agency, equivalent to the World Anti-Doping Agency.<sup>71</sup> Arguments pro such an

<sup>64</sup> It has however been argued that “[a]lthough CAS panels unambiguously reject the notion that they apply a doctrine of *stare decisis*, this study illustrates panels’ *de facto* adherence to precedent. As long as CAS panels continue to assert their authority to depart from past precedent, the CAS approach appears more akin to one of *jurisprudence constante* than *stare decisis*”. See: Annie Bersagel, *Is There a Stare Decisis Doctrine in the Court of Arbitration for Sport*, *Pepperdine Dispute Resolution Law Journal*, vol. 12: 189, 2012, p. 204, with further references to: Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 *ARB. INT’L* 357, 366 (2007), arguing that CAS awards “*demonstrate the existence of a true stare decisis doctrine within the field of sports arbitration*” and BLACKSHAW, *Sport Mediation and Arbitration*, 155, 2009, observing that “*CAS arbitrators (...) are not generally obliged to follow earlier decisions (stare decisis), but they usually do so in the interests of legal certainty*”.

<sup>65</sup> Salomeja Zaksaitė, *Match-fixing: the shifting interplay between tactics, disciplinary offence and crime*, *Int Sports Law J* (2013), vol. 13, p. 291-292.

<sup>66</sup> Salomeja Zaksaitė, *Match-fixing: the shifting interplay between tactics, disciplinary offence and crime*, *Int Sports Law J* (2013), vol. 13, p. 292.

<sup>67</sup> See: *Cavanagh v. The FA*, decision of the FA Appeal Board, 23 October 2009, §32, where it was held that

“*it is clear that, in relation to the disciplinary proceedings which are the subject of these appeals, the standard of proof is the balance of probabilities, and that there is no “sliding scale” or intermediate standard of proof between the civil and the criminal standard*”.

<sup>68</sup> CAS 2011/A/2490 *Daniel Köllerer v. Association of Tennis Professionals, Women’s Tennis Association, International Tennis Federation & Grand Slam Committee*.

<sup>69</sup> CAS 2011/A/2490 *Daniel Köllerer v. Association of Tennis Professionals, Women’s Tennis Association, International Tennis Federation & Grand Slam Committee*, §97.

<sup>70</sup> CAS 2010/A/2266 *Mészáros & Poleksic v. UEFA*, §68 ; CAS 2010/A/2267-2281 *Football Club “Metalist” et al v. FFU*, §730, with further references to CAS 2008/A/1583 & CAS 2008/A/1584, §41 and a Judgement of the Swiss Federal Tribunal dated 31 March 1999, 5P.83/1999, consid. E 3.d;

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<http://www.playthegame.org/news/detailed/europe-an-betting-agencies-call-for-independent-global-sports-anti-corruption-agency-4525.html> (last accessed: 20 May 2014).

establishment are clear as it would lead to a more coherent and wide-ranging approach to this problem and, as with WADA, would be able to be part of a multi-agency approach together with law enforcement bodies such as Interpol. There would also be the opportunity to pool resources and allow the type of forensic investigation that is required to unravel the financial complexities inherent in corrupt financial dealings.<sup>72</sup>

The concept of standard of proof is indeed an important issue in match-fixing cases as the application of a different standard may well lead a CAS panel to a different conclusion. Although a CAS panel may determine that it need to be convinced to its *comfortable satisfaction*, it may well transpire that such panel is convinced *beyond any reasonable doubt*, making the considerations regarding the establishment of the lower standard of proof (*comfortable satisfaction*) considerations *obiter dictum*. Nevertheless, in case a panel is not convinced *beyond any reasonable doubt*, the determination regarding the standard of proof to be applied may well mean the difference between an acquittal and a conviction in an individual case.

#### IV. Parallel criminal and disciplinary proceedings (*lis pendens*)

The European Union has recommended member states to adopt provisions in national criminal laws to combat match-fixing. On 13 November 2012, the European Commission recommended the Council of Europe to authorise the European Commission to participate, on behalf of the EU, in the negotiations for an international convention of the Council of Europe to combat the manipulation of sports results. From this document it becomes clear that various initiatives have been taken at a European level to combat match-fixing.<sup>73</sup> For example, in June 2011, the European Parliament

adopted a Written Declaration on combating corruption in European sport and, in February 2012, a Resolution on Developing the European Dimension in Sport called for increased international cooperation to tackle match-fixing. On 29 November 2011, the EU Council adopted Conclusions on combating match-fixing inviting the Commission, Member States and non-governmental stakeholders to cooperate and take action at different levels to improve the way match-fixing is addressed in the EU. Indeed, because match-fixing is closely connected to tax laundry, bribery and other criminal offences, it is not only a problem for sports, but also for national authorities. As a result, a suspect may well be subjected to both criminal proceedings for violating criminal laws and disciplinary proceedings for violating the regulations of the sports-governing body.

In March 2012, the European Commission released a report, conducted by KEA European Affairs, concluding that the above-mentioned documents have not been followed uniformly by EU member states.<sup>74</sup> Whilst some countries focus on general offences of corruption or fraud, others have implemented specific sport offences to cope with match-fixing – contained either in their criminal codes (Bulgaria, Spain), sports laws (Cyprus, Poland, Greece) or special criminal laws (Italy, Malta, Portugal). In the UK, betting-related match-fixing episodes are punished under the offence of cheating at gambling. Overall, these provisions differ greatly as regards the act to be criminalised as well as the scope, objective and subjective elements of the offences or the relevant sanctions.

The diverse implementation by the EU Member States and the consequences thereof left aside, it is important to observe that manipulation of sport in Europe is regulated by at least three legal systems: EU law,

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<sup>72</sup> GARDINER, O'LEARY, WELCH, BOYES, NAIDOO (Eds.), *Sports law*, Fourth edition, 2012, p. 300-301.

<sup>73</sup> Recommendation for a Council Decision authorising the European Commission to participate, on behalf of the EU, in the negotiations for an

international convention of the Council of Europe to combat the manipulation of sports results, 13 November 2012, p. 2.

<sup>74</sup> Match-fixing in sport, A mapping of criminal law provisions in EU 27, March 2012.

criminal law and disciplinary law. Salomeja Zaksaitė concludes, *inter alia*, that it should be stressed that manipulations which are linked to organised crime and cover more than the sports community need to be criminalised to avoid the problem of non-liability.<sup>75</sup> This is true because not all persons involved in match-fixing are members of sports associations and can be sanctioned under the relevant sports regulations, *i.e.* the sports-governing body would lack jurisdiction *ratione personae*. Match-fixing *per se* is a very broad phenomenon, there are many ways of manipulating, and some forms of manipulation are not a threat, but a normal element of sport.<sup>76</sup> The distinction, as well as the contributory interaction, is possible when the functions of each legal system and the nature of the offence, as well as the sanction for the offence, are taken into account. Criminal law as *ultima ratio* can be applied only when the harm of the offence is relatively large (obvious), while (only) disciplinary law is applied when the harm is small. From a practical point of view, disciplinary liability should be applied first, as criminal law might differ in various jurisdictions and match-fixing is more likely to violate disciplinary law, but not necessarily criminal law.<sup>77</sup>

Consequently, as not every match-fixing allegation will lead to the instigation of criminal proceedings, not even in case of legislation specifically designed to combat match-fixing, it is recommended that sports-governing bodies do not only point their fingers at national governments to fight match-fixing, but indeed attempt to combat match-fixing themselves by adopting effective regulations against it and educating

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<sup>75</sup> Salomeja Zaksaitė, Match-fixing: the shifting interplay between tactics, disciplinary offence and crime, *Int Sports Law J* (2013), vol. 13, p. 292.

<sup>76</sup> In this respect, Salomeja Zaksaitė, who herself is a Woman International Master (WIM) in chess, refers to the example that it is allegedly generally accepted in the sport of chess that before a game the players agree not to fight or even rehearse the “peaceful” game in advance. Such tactics are allegedly quite widespread, especially in cases where the design of the tournament is stressful. Even in the 2013 World Cup top-players allegedly agreed to draw in the very early stage of their games (14 and 16 moves, yet not before the game, thus

their members. Sport-governing bodies could also seek to establish cooperation with public authorities and/or gambling organisations.

With the adoption of specific provisions that incriminate match-fixing and/or illegal betting in national criminal laws, there is a high degree of likelihood of parallel criminal proceedings before state authorities and disciplinary proceedings before sports-governing bodies. This raises questions relating to the general legal principles of *ne bis in idem*, *res judicata* and *lis pendens*.<sup>78</sup> It also raises questions concerning the admissibility of evidence deduced from state authorities in disciplinary proceedings and *vice versa*. Issues regarding these parallel proceedings were raised in the CAS proceedings concerning *Olympiakos Volou*, *Mohammad Asif*, *Metalist*, *Besiktas* and *Fenerbahçe*.

There is no strict legal rule determining that disciplinary proceedings must be stayed pending criminal proceedings. In this respect, article R55 the CAS Code of Sports-Related Arbitration determines that a CAS panel “shall rule on its jurisdiction irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless substantive grounds require a suspension of the proceedings”.

The CAS panel in the *Olympiakos Volou* case dealt with a request from the Greek club to suspend the proceedings pending the national criminal proceedings. The panel determined that: “[b]ased on said [article 2.08 of the UELR 2011/2012] and on the elements produced before the UEFA and before the Panel, the latter also underlines that *Olympiakos Volou* cannot effectively

strictly speaking the games were not “fixed”, such an example simply explains the culture of early draws in contemporary chess) and the reaction of the commentators (including a former World Champion Candidate) was that “it is understandable that players do that, but it is not understandable that the rules allow to do that”.

<sup>77</sup> Salomeja Zaksaitė, Match-fixing: the shifting interplay between tactics, disciplinary offence and crime, *Int Sports Law J* (2013), vol. 13, p. 292.

<sup>78</sup> These questions have been addressed extensively in CAS 2013/A/3256 *Fenerbahçe Spor Kulübü v. UEFA*.

*rely on the fact that all remedies, especially criminal remedies before the Greek or the European courts, have not been exhausted by Mr Achilleas Beos [President of Olympiakos Volou], to force UEFA or even CAS to suspend their proceedings while an effective struggle for integrity of sport advocates for a rapid reaction, especially considering the seriousness of the case targeting the president of a club. The Panel also notes that the applicable rules, both in terms of procedure, evidence (means and threshold) and merits are not the one applicable before UEFA and CAS.”<sup>79</sup>*

Although there were simultaneous criminal proceedings, in the *Mohammad Asif* case,<sup>80</sup> the panel was not required to render a decision in this respect as it found that “[e]ven if [...] the ICC and/or the Tribunal would be in contempt of court and/or that there would be prejudice to the criminal proceedings. These factors would not necessarily have any impact on the substance of the findings, which were considered and decided upon before publication of the Determination (publication *ex post* cannot impugn analysis conducted *ex ante* and any prejudice to the subsequent criminal proceedings does not impugn the analysis contained in the Determination). In addition, the Panel notes that Mr Asif was himself eager for the Tribunal proceedings to advance and that when afforded the opportunity, he did not object to the Tribunal proceedings advancing ahead of the criminal proceedings. He cannot therefore now claim that such advancement was to his detriment.”

Although considered only *obiter dictum*, it appears that the possibility that fair criminal proceedings are prejudiced by publicity relating to a disciplinary conviction is indeed one of the few reasons that could well lead future CAS panels to a decision to suspend the disciplinary proceedings pending a criminal trial. As stated by the Chairman of the ICC Code of Conduct Commission (the Hon. Michael J. Beloff QC) in *ICC v. Butt et al.*, relating to an application to stay the disciplinary proceedings in the context of British criminal law, “[t]here is no automatic right

*to have disciplinary proceedings postponed until criminal charges arising out of the same factual matrix have been finally determined.”* and that “[w]here (*inter alia*) the [prosecution] has not yet decided whether to bring criminal charges, the potential criminal charges are different from the disciplinary charges (albeit that they arise out of the same facts), the standard of proof in the disciplinary proceedings is lower than the criminal standard, any criminal trial will not take place for several months at least after the disciplinary proceedings are over, and the judge presiding over the criminal trial can protect against unfairness by directing the jury to ignore anything other than the evidence before them, the threshold of serious risk of serious prejudice to a criminal trial (if any) is certainly not reached.”

In the *Metalist* case,<sup>81</sup> this issue was more extensively elaborated. Three of the twelve appellants argued that the Appellate Committee of the Football Federation of Ukraine “failed to recognize the value of the criminal investigations carried out by the Office of the Public Prosecutor of the Kharkiv Region, the findings of which were confirmed by a Ukrainian court. While it is clear that not all disciplinary violations in sports are criminally punishable, findings of fact by the law enforcement authorities confirmed by a court of law should be treated as having maximum persuasive, if not binding, authority.” Although a Ukrainian criminal court allegedly acquitted *Metalist*, the panel did not consider itself bound by the court decisions in the criminal matters because this was not anticipated in the Disciplinary Regulations of the Football Federation of Ukraine,<sup>82</sup> and relied on several authorities in this respect, including a decision of the Swiss Federal Tribunal, where it was held that: “It is generally accepted that the penalty stipulated in the regulations represents one of the forms of penalty fixed by the contract, is therefore based on the autonomy of the parties and may thus be the subject of an arbitral award [...]. In other words, the penalty stipulated in the regulations has nothing to do with the power to punish reserved by the criminal

<sup>79</sup> Unofficial translation from the original French language in CAS 2011/A/2528 Olympiakos Volou c. UEFA, §136.

<sup>80</sup> CAS 2011/A/2362 Mohammad Asif v. ICC.

<sup>81</sup> CAS 2010/A/2267-2281 Football Club “Metalist” et al v. FFU, §735 *et seq.*

<sup>82</sup> CAS 2010/A/2267-2281 Football Club “Metalist” et al v. FFU, §741.

*courts, even if it is punishing behaviour which is also punished by the State.*<sup>83</sup>

In the Turkish match-fixing scandal, which led to CAS proceedings in respect of *Besiktas* and *Fenerbahçe*, there were also criminal proceedings pending at the same time. The criminal court of first instance had already concluded the matter when proceedings before CAS were initiated, but the appeal of this first instance decision was still pending before the Turkish Supreme Court at the time CAS issued the operative parts of its awards.

In the *Besiktas* case, reference was made to the *Oriekhov* case in arguing that it is legitimate for UEFA to rely on the findings of a state court in match-fixing, as it considered that in the context of sport it is essential that sports-governing bodies should be able to rely on such decisions, as they do not have the same resources and are not able to undertake investigations, as held by CAS in the *Pobeda* case.<sup>84</sup> The panel also considered as follows:

*“Furthermore, the Panel agrees with the findings in [the Olympiakos Volou case] that an effective fight to protect the integrity of sport depends on prompt action. In this context, CAS, or UEFA, cannot wait until states proceedings are over, i.e. after all internal remedies have been exhausted, to take its decision. However, CAS, or UEFA, must be particularly careful when decisions it relies on are not final, as it is the case of the decision of the High Court. The panel considers that the possibility offered by Article 2.08 for UELR to rely on decisions from other instances shall be used carefully and does not allow UEFA to blindly rely on a particular decision, without assessing the evidence assessed in the context of these decisions, if this evidence is available to it. The Panel will therefore, in the present Award, take into consideration all evidence available to it, and pay a particular attention to all decisions rendered by previous*

*authorities, state and sportive, in the case at hand.”*

In the *Fenerbahçe* case, the panel stated that it drew its own conclusions and did not give particular importance to the conclusions drawn by the bodies that have examined the present matter in the past, but that it nevertheless felt “*comforted in its conclusion that Fenerbahçe officials attempted to fix all four of the individual matches that have been investigated by the Panel, by the fact that almost all the bodies that have examined the match-fixing allegations of Fenerbahçe (the TFF Ethics Committee, the TFF PFDC, the TFF Board of Appeals, the 16<sup>th</sup> High Criminal Court, the UEFA CDB and the UEFA Appeals Body) came to the conclusion that at least one of Fenerbahçe’s officials was guilty of having attempted to fix the matches investigated in the present appeal arbitration proceedings. The Panel took into account that the decision of the [Turkish Criminal Court in first instance] did not yet become final and binding since several individuals appealed this decision. Although the Panel restrained itself from drawing clear conclusions from this decision and made its own evaluation of the facts, the Panel observes that the Supreme Court Prosecutor confirmed the convictions of all the Fenerbahçe officials. The Panel finds that a criminal conviction, although not yet final and binding, can be taken into account to corroborate the conclusions reached in the decision challenged.*”<sup>85</sup> With reference to the considerations of the panel in the *Metalist* case, the panel adhered to UEFA’s statement that “*the fact that CAS does not have to follow a criminal acquittal does not mean that CAS will not have to take into account a criminal conviction. While a criminal conviction on the higher standard is not automatically conclusive, it is very unlikely that proceedings before CAS, on the lower standard of comfortable satisfaction, will result in a contrary conclusion.*”<sup>86</sup>

One should however be careful in extending a criminal conviction to a disciplinary conviction, since the requirements to come to a conviction may well be different. This may be due to the mandatory elements in culpable

<sup>83</sup> Judgement of the Swiss Federal Tribunal, dated 15 March 1993, ATF 119 II 271, p. 275 *et seq.*

<sup>84</sup> CAS 2013/A/3258 *Besiktas Jimnastik Kulübü v. UEFA*, §146.

<sup>85</sup> CAS 2013/A/3256 *Fenerbahçe Spor Kulübü v. UEFA*, §541-542.

<sup>86</sup> CAS 2013/A/3256 *Fenerbahçe Spor Kulübü v. UEFA*, §543-544.

behaviour,<sup>87</sup> or the particular circumstances of the case.<sup>88</sup>

## V. Hearing of protected witnesses

Since *Pobeda*, two other CAS panels were required to deal with questions relating to the hearing of protected witnesses.<sup>89</sup> Although the requests to hear protected witnesses in these cases were dismissed, the principles established in *Pobeda* were largely endorsed. In *Pobeda* it was considered by the panel that:

*“[w]hen facts are based on anonymous witness statements, the right to be heard which is guaranteed by article 6 of the [ECHR] and article 29 of the Swiss Constitution is affected. According to a decision of the Swiss Federal Court dated 2 November 2006 (ATF 133 I 33) anonymous witness statements do however not breach this right when such statements support the other evidence provided to the court. According to the Swiss Federal Court, if the applicable procedural code provides for the possibility to prove facts by witness statement, it would infringe the principle of the court’s power to assess the witness statements if a party was prevented from relying on anonymous witness statements. The Swiss Federal Court refers to the jurisprudence of the European Court of Human Rights which recognizes the right of a party to rely on anonymous witness statements and to prevent the other party from cross-examining the witness, if “la sauvegarde d’intérêts dignes de protection” (i.e. if the personal safety of the witness is at stake). With reference to the ECHR-cases Doorson, Van Mechelen and Krasniki, the Swiss Federal Court then noted that the use of anonymous witnesses, although admissible, was subject to strict conditions. The right to be heard and to a fair trial must be ensured through other*

*means, namely by cross-examination through “audiovisual protection” and by an in-depth check of the identity and the reputation of the anonymous witness by the court.”<sup>90</sup>*

The modalities established by the panel in *Pobeda* were the following:

1. Witnesses were available in Switzerland in a secured place.
2. An independent person, a CAS Counsel, was present in the same room with each one of the witnesses when they gave their testimonies.
3. The witnesses had with them their passports, the CAS Counsel identified them and confirmed their identity to the President of the Panel.
4. An independent translator was in the room with the witnesses.
5. Apart from the CAS Counsel, an interpreter and, if needed, a technical assistant, nobody else was present in the protected witnesses hearing room in order to ensure that no one is influencing the testimonies or is giving directions to the witnesses.
6. Technical equipment was installed in order to scramble the voices of the protected witnesses.
7. All the parties and the Panel addressed questions to the protected witnesses.

In the case concerning the Spanish cyclist Alberto Contador another CAS panel was confronted with the issue of hearing an anonymous witness.<sup>91</sup> Although this panel found that it was not directly bound by the provisions of the ECHR, it found that the ECHR nevertheless had to be taken into account within the framework of procedural

<sup>87</sup> It may occur that an – unnecessarily narrow – condition for a conviction under a particular disciplinary code may be absent, whereas such a condition is not a requirement for a criminal conviction.

<sup>88</sup> In the *Fenerbahçe* case, one of the allegedly fixed matches was not subject to criminal review as the match was played before match-fixing was incriminated in Turkish law. This did however not

prevent the panel from reviewing this particular match under the applicable disciplinary regulations.

<sup>89</sup> CAS 2011/A/2384 & 2386 UCI & WADA v. Alberto Contador Velasco & RFEF; CAS 2010/A/2267-2281 Football Club “Metalist” et al. v. UEFA.

<sup>90</sup> CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA, §72.

<sup>91</sup> CAS 2011/A/2384 & 2386 UCI & WADA v. Alberto Contador Velasco & RFEF.

public policy. Regarding the personal safety of the proposed protected witness, the Panel determined that according to the predominant view an abstract danger in relation to the personality rights as well as the personal safety of the protected witness is insufficient. Rather there must be a concrete or at least a likely danger in relation to the protected interests of the person concerned. Whereas the CAS panel in the *Pobeda* case came to the conclusion that these criteria were complied with, the CAS panel in the *Contador* case found that the measure requested by WADA was disproportionate in view of all the interests at stake. In particular the panel found that “*it was insufficiently demonstrated that the interests of the witness worthy of protection were threatened to an extent that could justify a complete protection of the witness’ identity from disclosure to the Respondents, thus, curtailing the procedural rights of the Respondents to a large degree*”.<sup>92</sup>

In the *Metalist* case the panel was offered testimonies of protected witnesses during the hearing.<sup>93</sup> These witnesses were allegedly players that had participated in the match concerned and had stated to one particular appellant that the match had been fixed. During his testimony, this particular appellant subsequently clarified to the panel that if these witnesses would be granted complete anonymity and confidentiality, it would be possible that they would testify. As a result of this explanation the respondent requested that these football players be heard. The possibility to hear these witnesses was only raised during the hearing and was not anticipated in previously submitted witness statements. In accordance with Article R56 of the CAS Code and in the absence of a mutual agreement between the parties, the panel found that it could only admit the hearing of new witnesses on the basis of exceptional circumstances.<sup>94</sup> After consulting the

language of Article R56 and other provisions of the CAS Code, the Panel concluded that it was not sufficient just to offer evidence, but that the party offering evidence was rather required to specify the evidence offered.<sup>95</sup> As the respondent neither indicated the number of witnesses, nor specified the arguments in support of which such evidence was offered, the panel found that the potential witnesses had not been sufficiently specified. Furthermore, the panel noted that no arguments had been submitted as to their testimony’s relevance and materiality to the case, which led the Panel to decline the requested examination of an unknown number of witnesses, with unknown identity and unknown scope of testimony.<sup>96</sup>

## VI. Final remarks

As we can see, some of the issues discussed above can be considered to have been more or less established. There are nevertheless numerous issues that are still open for discussion, if only because of the fact that CAS awards have to be analysed on a case-by-case basis and that the doctrine of *stare decisis* is not formally known in CAS jurisprudence, although in the appropriate cases and as long as there is no justification (in law or in facts) to deviate from the principles laid down in previous awards, CAS panels tend to pay a high degree of respect towards the decisions of previous panels in respect of identical issues. Considering the fact that the CAS award in *Pobeda* was only rendered four years ago, the body of CAS jurisprudence on match-fixing and corruption-related matters is relatively young and the fight against match-fixing is only in its initial steps and will most likely intensify in the years to come. Also in light of the regulatory amendments that are implemented from time to time and the initiatives undertaken in the fight against match-fixing

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<sup>92</sup> CAS 2011/A/2384 & 2386 UCI & WADA v. Alberto Contador Velasco & RFEF, §184.

<sup>93</sup> CAS 2010/A/2267-2281 Football Club “Metalist” et al. v. UEFA.

<sup>94</sup> CAS 2010/A/2267-2281 Football Club “Metalist” et al. v. UEFA, §599.

<sup>95</sup> CAS 2010/A/2267-2281 Football Club “Metalist” et al. v. UEFA, §602.

<sup>96</sup> CAS 2010/A/2267-2281 Football Club “Metalist” et al. v. UEFA, §603-604.

by the different international and national sports-governing bodies, several regulatory discrepancies will remain to exist between the different sports, paving the way for new legal discussions that will have to be decided upon by future CAS panels. There is thus ample ground for development in future CAS jurisprudence.

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# Settling Sports Disputes by CAS Mediation

Prof. Dr Ian Blackshaw\*

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- I. **Introductory remarks**
- II. **CAS Mediation**
- III. **The New CAS Mediation Rules**
- IV. **CAS ‘Med-Arb’**
- V. **Express Mediation Clause or ‘Ad Hoc’ Reference to Mediation?**
- VI. **Concluding Remarks**

## I. Introductory Remarks

Alternative Dispute Resolution (ADR) has developed in the last thirty years or so because traditional methods of settling disputes through the Courts have become too expensive; too inflexible; and too dilatory.

As an ‘*extra-judicial*’ method of dispute resolution, ADR particularly lends itself to the settlement of sports-related disputes because of the special characteristics and dynamics of sport<sup>1</sup> – not least where sporting deadlines are in play, which is often the case! Also, the sporting world prefers to settle sports disputes within ‘the family of sport’ - in other words, confidentially and without ‘washing their dirty sports linen in public’. Another advantage of ADR over litigation is that the process is non-confrontational and produces a ‘win-win’ rather than a ‘win-lose’ mentality and outcome.

Of the various forms of ADR, Mediation is particularly useful in settling amicably sports

disputes, because, primarily, it gets the parties in dispute talking and negotiating with one another and facilitates the restoration and maintenance of personal, sporting and business relationships.<sup>2</sup>

Mediation is also a ‘without prejudice’ process of dispute resolution, which allows the parties in dispute greater flexibility and openness in trying to reach an amicable settlement of their disputes. In particular, any admissions or concessions made in the course of the Mediation in an endeavor to reach a settlement will not be held against the parties if the Mediation fails and the parties finally have to resort to the Courts (see later).

As Mediation is a consensual dispute resolution process, it will only be successful where the parties in dispute are ready, able and willing to try to settle their disputes amicably. In one English case involving a rugby club dispute in which Mediation was proposed, an official of the club remarked that “if the Queen of England herself were to come and Mediate, it would not make any

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<sup>1</sup> These characteristics have been recognised by the European Union in the White Paper on Sport of 11 July, 2007 and have been encapsulated in the expression ‘specificity of sport’. See further: ‘The “Specificity of Sport” and the EU White Paper on Sport: Some Comments’ by Ian Blackshaw in ISLJ 2007/3-4 at pp. 87 & 88. The EU concept of the ‘specificity of sport’ (the special nature of sport) has been incorporated in the new so-called ‘sport article’ of the Lisbon Treaty (article 165), which came into force on 1 December, 2009.

<sup>2</sup> See ‘*Sports Mediations: Preserving Sporting and Business Relationships*’ by Prof Ian Blackshaw International Association for Arbitration (AIA), Brussels, Belgium, November 2010 Newsletter, at pp. 9 & 10.

difference at all!” Obviously, in such a case, Mediation was bound to fail.

A hybrid form of Mediation known as ‘Med-Arb’, which combines the processes of Mediation and Arbitration – Mediation to identify the issues and, if not successful,<sup>3</sup> Arbitration to settle them – is also proving an effective method of dispute resolution in the sporting arena (again, see later) and is well worth considering by parties involved in a dispute.

## II. CAS Mediation

The CAS Mediation service<sup>4</sup> was introduced on 18 May, 1999<sup>5</sup>. And, as Ousmane Kane, the former Senior Counsel to the CAS and, during his tenure as such, responsible for Mediation, remarked at the time:

*“The International Council of Arbitration for Sport took the initiative to introduce mediation alongside arbitration. As the mediation rules encourage and protect fair play and the spirit of understanding, they are made to measure for sport.”*<sup>6</sup>

As will be seen from the CAS Mediation Rules, CAS Mediation is generally offered for disputes falling within the purview of the CAS Ordinary Division (any sports-related dispute that is not an appeal from the decision of a Sport’s Governing Body or the World Anti-Doping Agency) and does not, in general, apply to disciplinary matters, such as doping issues, match-fixing and corruption.

However, the Rules now expressly provide that, in appropriate cases and where the parties expressly agree, it may be possible to

invoke CAS Mediation for the settlement of other disciplinary disputes (see Article 1).

See further on the subject of mediating disciplinary disputes the recent article by Jacqueline Brown entitled, ‘Mediation of Disputes in Equestrian Sports: An English Perspective’,<sup>7</sup> in which Brown makes the following pertinent comments:

*“The reservation about mediating disciplinary matters ... perhaps stems from a perception of conflict were they to “bargain” on sanctions ... many other facets of disagreement there may be in a disciplinary case and which need to be resolved before a decision can be made on sanction. There is, for example, often disagreement upon the facts which surround the alleged offence; there may also be points of legal construction of the meaning and effect of the rules; and there may even be broader legal issues such as Human Rights or European legislation to be tackled, before a tribunal can reach its decision and consider the appropriate level of sanction.”*

However, it should be noted that, in any case, Mediation is a useful way of settling disputes relating to any commercial and financial fallout resulting from decisions in disciplinary cases, for example, loss of lucrative sponsorship and endorsement contracts, particularly where the sports person concerned has been wrongly accused of being, say, a drugs cheat. For example, Dianne Modahl would probably have been better advised to try to settle her claims for compensation against the British Athletic Federation through Mediation rather than through the Courts in which she lost at considerable financial expense<sup>8</sup>.

<sup>3</sup> Where Mediation is appropriate, it enjoys a general success rate of 85%.

<sup>4</sup> See Booklet ‘Mediation Guide’ published by and available from CAS.

<sup>5</sup> There are currently some 65 CAS Mediators.

<sup>6</sup> On the value of Mediation generally for settling sports disputes, see ‘*Mediating Sports Disputes – National and International Perspectives*’ by Prof Ian S. Blackshaw 2002 TMC Asser Press The Hague, The Netherlands; and also ‘*Sport, Mediation and Arbitration*’ by Prof Ian S. Blackshaw 2009 TMC Asser Press The Hague, The Netherlands.

<sup>7</sup> ‘Global Sports Law and Taxation Reports’, March 2014.

<sup>8</sup> *Modahl v British Athletic Federation* [2001] All ER (D) 181 (Oct). See also ‘Modahl Loses Appeal For Compensation’, I Blackshaw, November/December, 2001 issue of the ‘Sports Law Bulletin’, Vol. 4 No. 6 at pp. 1,3 & 4. See further on this subject: ‘Doping: The Commercial and Financial Effects and How Best to Deal with Them’, Global Sports Law and Taxation Reports (GSLTR), September, 2011 at pp. 5-7.

For the reasons mentioned later, it would be advisable to include an express reference to CAS Mediation in Sports Bodies' Disciplinary Rules and Regulations framed in respect of such particular situations that may arise in a given dispute, but, again, expressly excluding any Mediation over sanctions, which are non-negotiable.

### III. The New CAS Mediation Rules

CAS is promoting its Mediation service and has recently updated its Mediation Rules (Rules).

The new Rules, which are clear and self-explanatory, became effective as of 1 September, 2013, and are deemed to have been incorporated in any Mediation Agreement providing for CAS Mediation (see Article 3), although the parties in dispute may agree to apply any other rules of procedure (ibid.) - characteristic of the flexibility of the Mediation process.

Article 1, para 1 of the Rules defines Mediation in the following terms:

*“CAS Mediation is a non-binding and informal procedure, based on a mediation agreement in which each party undertakes to attempt in good faith to negotiate with the other party, and with the assistance of a CAS mediator, with a view to settling a sports-related dispute”.*

Article 2 of the Rules defines a 'Mediation Agreement' as follows:

*“A mediation agreement is one whereby the parties agree to submit to mediation a sports-related dispute which has arisen or which may arise between them.*

*A mediation agreement may take the form of a mediation clause inserted in a contract or that of a separate agreement.”*

In other words, an express or an 'ad hoc'

mediation reference clause (see later).

If the parties in dispute prefer to settle their differences by Mediation - and many do because of the special characteristics and dynamics of sport<sup>9</sup> - the CAS model Mediation clause is as follows:

*“Any dispute, any controversy or claim arising under, out of or relating to this contract and any subsequent of or in relation to this contract, including, but not limited to, its formation, validity, binding effect, interpretation, breach or termination, as well as non-contractual claims shall be submitted to mediation in accordance with the CAS Mediation Rules.”*

Whilst on the subject of referring disputes for settlement by Mediation, it may be noted, *en passant*, that in a landmark ruling in the English Courts in the case of *Cable & Wireless PLC v IBM United Kingdom* [2002] 2 All ER (Comm) 1041, Mr Justice Colman held that an agreement to refer disputes to mediation is contractually binding. In this case, IBM called on Cable and Wireless to mediate a dispute that had arisen under a contract in which the parties had agreed to mediate future disputes. Cable and Wireless refused to do so, claiming that the reference to mediation in the contract was legally unenforceable because it lacked certainty and was like an unenforceable agreement to negotiate. The judge rejected this argument, holding that the agreement to try to resolve a dispute, with identification of the procedure to be used, was sufficient to give certainty and, therefore, legal effect to the clause.

It may be added that, in England too, parties, who, under English Court rules, refuse to try - or even *consider* the possibility of mediating - to settle their disputes by Mediation at an early stage in the litigation process, may run the risk of being denied their legal costs if ultimately successful, contrary to the normal

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<sup>9</sup> See the case of Richie Woodhall and Frank Warren involving a time-critical dispute under certain management and promotion agreements entered into between them, which was settled within 72 hours by

mediation, discussed at page 182 in *'Mediating Sports Disputes – National and International Perspectives'* by Prof Ian S. Blackshaw 2002 TMC Asser Press The Hague, The Netherlands.

rule that ‘costs follow the event’.<sup>10</sup> In other words, the successful party is awarded its legal costs.

Pursuant to Article 6 of the Rules, the CAS President chooses the Mediator from the list of CAS Mediators drawn up in accordance with the provisions of Article 5. The Mediator appointed must be and remain independent of the parties (ibid.).

The role of the CAS Mediator is set out in Article 9 of the Rules. The Mediator is expected to take a more active role in the Mediation, rather than purely facilitating the parties’ negotiations, and actually propose solutions to the parties for settling their dispute, but may not impose such solutions on them (see Article 9 c.).

The parties in a CAS Mediation may be represented and, in such cases, their representatives, who may or may not be lawyers, must have full authority from them to settle the dispute alone (see Article 7). Such authority is usually proved by a corresponding Power of Attorney.

The procedure and timings of the Mediation is determined by the Mediator at the outset, unless the parties in dispute decide to proceed otherwise (see Article 8). Again, this reflects the flexibility of Mediation.

Article 10 of the Rules includes comprehensive provisions on the confidentiality and ‘without prejudice’ nature of the proceedings, both during the Mediation and afterwards in any arbitral or judicial proceedings - both of which are hallmarks of the process of Mediation. In particular, the obligation not to disclose confidential information relating to the Mediation is now expressly qualified in the following terms: “unless required to do so by applicable law and in the absence of any agreement of the parties to the contrary.” This, of course, reflects and reminds

one of the general legal position regarding disclosure of confidential information.

On the matter of Mediation being a ‘without prejudice’ process, Article 10 of the Rules provides as follows:

*“The parties shall not rely on, or introduce as evidence in any arbitral or judicial proceedings:*

- a. views expressed or suggestions made by a party with respect to a possible settlement of the dispute;*
- b. admissions made by a party in the course of the mediation proceedings;*
- c. documents, notes or other information obtained during the mediation proceedings;*
- d. proposals made or views expressed by the mediator;*
- e. the fact that a party had or had not indicated willingness to accept a proposal.”*

Article 12 of the Rules requires that any settlement of the Mediation must be in writing and signed by the Mediator and the parties. Such a Mediation Settlement Agreement constitutes a legally binding contract, which, if necessary, can be sued on before the Courts

Article 12 further provides that:

*“Each party shall receive a copy thereof. In the event of any breach, a party may rely on such copy before an arbitral or judicial authority.*

*A copy of the settlement is submitted for inclusion in the records of the CAS Court Office.”*

The new Rules include, as Appendix I, a new itemised Schedule of CAS Mediation Costs, which became effective as of 1 July, 2013.

Reference should also be made to the provisions of Article 14 of the Rules, which deal with advances and payment by the parties of the CAS and Mediator’s costs. In

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<sup>10</sup> See *Susan Dunnett v Railtrack PLC* [2002] EWCA Civ 302; and *Leicester Circuits Limited v Coats* [2003] EWCA Civ 333. But see also *Halsey v Milton Keynes General NHS Trust* and *Steel v Joy and Halliday* [2004]

EWCA Civ 576; [2004] 4 All ER 920, collectively known as the ‘Halsey’ case and described by Lord Phillips of Worth Matravers as “the most important English judgement about ADR”.

this latter connection, Article 11 of the Rules now includes a new ground (para d.) for the termination of the Mediation where “*one of the parties, or both, refuse(s) to pay its (their) share of the mediation costs within the time limit fixed pursuant to Article 14 of the Rules.*”

#### IV. CAS ‘Med-Arb’

If Mediation proves to be unsuccessful, although Mediation providers usually, as already mentioned, claim a success rate of around 85%, the CAS recommends the following additional clause to be inserted in a contract to cover that contingency:

*“If, and to the extent that, any such dispute has not been settled within 90 days of the commencement of the mediation, or if, before the expiration of the said period, either party fails to participate or continue to participate in the mediation, the dispute shall, upon the filing of a Request for Arbitration by either party, be referred to and finally settled by CAS arbitration pursuant to the Code of Sports-related Arbitration. When the circumstances so require, the mediator may, at his own discretion or at the request of a party, seek an extension of the time limit from the CAS President.”*

Thus, the CAS offers disputing parties the possibility of a ‘Med-Arb’ dispute resolution process: mediation to identify the issues; and arbitration to settle them.<sup>11</sup>

Article 13 of the Rules foresees and provides for the possibility of using ‘Med-Arb’ as a procedure for settling disputes. Under this procedure, in those cases where the CAS Mediation fails - in general, Mediation enjoys a success rate of 85% in appropriate cases - the parties may proceed to CAS Arbitration. ‘Med-Arb’ is a useful form of ADR in which the Mediation identifies the issues involved and the Arbitration settles them. However, this procedure raises the controversial matter of whether the CAS Mediator should also act as the CAS Arbitrator, even where, as now provided in Article 13, the parties agree!

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<sup>11</sup> See ‘Settling Sports Business Disputes by ‘Med-Arb’ in the Court of Arbitration for Sport’ by Prof Ian Blackshaw, AIA Newsletter September, 2011.

Personally and professionally speaking, I do not generally favour such an arrangement. In the old Rules, there was no such qualification to the specific prohibition of the Mediator acting as the Arbitrator in subsequent Arbitration proceedings

#### V. Express Mediation Clause or ‘Ad Hoc’ Reference to Mediation?

Because of its popularity in the sporting world, many International and National Sports Federations now include specific provisions for Mediation of appropriate sports disputes in their Statutes and Constitutions. Others should be encouraged to do likewise.

As to the legal validity of a so-called CAS Arbitration or Mediation ‘clause by reference’ in such Statutes and Constitutions, see the decision of the Swiss Federal Tribunal of 31 October 1996 in the case of *N. v Federation Equestre Internationale*.<sup>12</sup> In that case, the Court held that by agreeing to abide by the rules of the Federation, which included a provision to refer all disputes exclusively to the CAS, the sports person concerned was bound to submit the dispute to the CAS, even though he had not expressly agreed to CAS Arbitration or Mediation. So-called ‘sports association law’ applied in such a case.

As Mediation is a consensual dispute resolution process, the necessary agreement to refer disputes to Mediation may be evidenced by either an Express Mediation Clause included in Sports Governing Bodies Statutes and Regulations or in Sports Contracts, such as Host City, Broadcast, Event Management and Sponsorship Agreements, or in ‘Ad Hoc’ Agreements entered into by the parties at the time a dispute arises between them.

The questions, therefore, arise as to which option, in general, should be favoured and why?

<sup>12</sup> *Nagel/FEI*, CAS-Digest I, p.585.

In practice, it is preferable to foresee Mediation in advance and provide for it with an Express Mediation Clause, rather than rely on an 'Ad Hoc' Agreement at the time a dispute arises.

Leaving matters to be decided until a dispute arises may be pragmatic and attractive, from the point of view of leaving one's options open, but is less secure, from a legal point of view, as one party, at that time, may be agreeable to referring their dispute to Mediation, whilst the other party is not so agreeable.

The agreement to refer a dispute to settlement by Mediation must be mutual to be legally enforceable and, therefore, in such a case of deadlock between the parties in dispute, there would be no binding legal obligation for Mediation of the dispute.<sup>13</sup>

## VI. Concluding Remarks

CAS Mediation is a useful form of ADR for settling a wide range of sports-related disputes, including, to a limited extent, disciplinary ones, for all the reasons mentioned in this article.

Furthermore, the new CAS Mediation Rules are user-friendly and add legal and procedural clarity to the conduct of CAS Mediations.

As such, they are to be generally welcomed and may be downloaded from the CAS official website at 'www.tas-cas.org'.

It is to be hoped that the international sporting community and their federations will, in the future, embrace CAS Mediations, wherever and whenever it is appropriate and suitable do so, in the same way that they have embraced CAS Arbitrations to date!

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<sup>13</sup> For further information on this subject, see Chapter 17 on 'Alternative Dispute Resolution' in the Book '*Sports Marketing Agreements: Legal, Fiscal and*

*Practical Aspects*' by Prof Ian S Blackshaw, 2012 TMC Asser Press, The Hague, The Netherlands.

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## Experience of a sports lawyer in mediation

Max Duthie\*

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- I. **Why don't Sports Lawyers Embrace Mediation?**
  - A. Lack of Familiarity
  - B. Fear
  - C. The Wrong Type of Dispute
- II. **Why Should Sports Lawyer Should Embrace Mediation?**
  - A. Reduction of the Client's costs
  - B. Getting a Result for their Clients
  - C. Getting a platform on which to show off their talents
  - D. Getting to spend quality time with the client
  - E. Enjoyment of benefits even from a failed mediation

This article is based on two propositions: (1) sports lawyers don't embrace mediation, and (2) sports lawyers should embrace mediation, and the two questions that follow: (1) why don't sports lawyers embrace mediation? And (2) why should sports lawyers embrace mediation?

### I. **Why don't sports lawyers embrace mediation?**

The proposition that sports lawyers don't embrace mediation is slightly provocative. Some sports lawyers do embrace mediation, of course. But the number of sports mediations that are held (for example, approximately just 40 by CAS in over 15 years), relative to the number of sports disputes that occur, shows that the take-up of mediation in the sports industry is very low. There might be many reasons for that, but one reason— in my view - is that sports lawyers don't embrace mediation. There are a number of reasons for that: these include

lack of familiarity, fear, and having the 'wrong type of dispute'.

#### A. **Lack of familiarity**

Many lawyers – including sports lawyers – are unfamiliar with mediation and the benefits it can bring. That is a problem for mediation generally, not just in sport. When I was first accredited as a mediator, I spoke to a few partners and other experienced practitioners at others sports law practices in the UK. I explained that I was now a mediator and asked them what they knew about mediation. By and large they each told me that they knew all about mediation. I said that if their clients became involved in disputes, they might like to consider using me as a mediator, but some pulled their face and said words, to the effect of: 'I am not going to do that. What if you decide the case against our client?'

As a mediator, of course, I would have no opportunity to decide any case. My role

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spots tribunals (including CAS) regularly, and has been involved in a number of arbitrations and mediations in sport. Since 2008 Max has also worked as a mediator and is on the panels of CEDR and Sport Resolutions in the UK.

This article was adapted from a presentation given at the CAS mediation conference in Lausanne on 16 May 2014.

would be limited to facilitating the parties negotiation, and no matter how robust that facilitation might become, it will never extend – in a mediation - into my making findings or rulings in favour of one party over another. So it turns out that these people (and perhaps many other people) don't know enough about what mediation is and isn't, but what they do know (some of which might be wrong) can put them off.

### B. Fear

Another reason why sports lawyers don't embrace mediation is fear. This can take several forms:

- fear of the unknown: if they don't know what mediation is (and it seems many don't), and they *know* they don't know what it is (unlike my friends above), it is only natural they will be slow to recommend it to clients;
- fear of losing fees: this is not uncommon - lawyers will inevitably generate more fees from a case that proceeds to trial from one that settles at mediation, and therefore there might be a tendency to avoid mediation and ADR generally (as to how this fear can be negated, see below);
- fear of appearing weak: there are still hard-as-nails litigators out there who are slow to offer or agree to settlement negotiations (or a mediation) as they are concerned that that might disclose weakness on their part or that of their client; and
- fear that mediators will use the mediations they work on for marketing purposes: seriously, in the same conversations I had with partners and other experienced practitioners one or two complained that if they recommended mediation to a client and the client went ahead with it, they (the lawyers) would be worried that the mediator 'would try

to nick their clients' (this beggars belief: aside from how shabby and unprofessional that would appear, the truth is that a mediator has enough on his/her plate during a mediation to even contemplate touting for business from the parties).

### C. The wrong type of dispute

Some disputes in sports are commercial: for example, when a sports rights owner (like the British and Irish Lions in rugby union) takes action against ticket touts and unauthorised travel companies that are unlawfully claiming an association with the famous brand. Other disputes in sports are regulatory: for example, when an event organiser (like English football's Premier League) takes action against football clubs and others within the sport who have breached the organiser's rules on various aspects of the competition.

There is a view among some lawyers that while commercial sports disputes (which would include employment, IP and personal injury disputes) are (or at least might be) suitable for mediation, regulatory sports disputes are not. One reason for this view is that regulatory disputes are often not simply disputes between two parties (as a commercial dispute might be). So, if in a given commercial dispute (for example, if a manager of a football club sues the club for wrongful dismissal and breach of contract), you might have two parties (the manager and the club), regulatory disputes are different. Regulatory disputes (for example in disciplinary, anti-doping or selection contexts) are not so simple and might involve multiple interested third parties.

By way of example, imagine that one club (X) in a given sports competition complained to the regulator of that sport that in its match against another club (Y), that other club (Y) had breached the rules governing the competition (which affected the result of the match and the respective league standings of

X and Y). If the regulator investigated Y's conduct and considered that there was a prima facie case against Y, could (or should) the regulator and Y – instead of proceeding to a hearing before a tribunal – mediate the dispute before a mediator and seek to agree an outcome? It is a vexed question, and there is much disagreement within those involved in sports disputes work as to whether mediation is appropriate in such a case. Those who say the dispute should not be mediated would argue:

- that if it were simply a two-party mediation (between the regulator and Y), X's absence would prove very difficult to justify (to X and others);
- that if it were a three-party mediation (between the regulator, X and Y), X would be unlikely to negotiate in any meaningful way because, unlike the other two parties (the regulator and Y), X would have nothing to lose: X would probably insist on a guilty finding and a significant sanction, failing which it would advocate that the case went to a tribunal (which would mean no such mediation would be likely to result in settlement);
- that many other clubs might arguably have an interest in the outcome of the mediation, for example, all that clubs that could feasibly be affected by a sanction being imposed on Y, or even all the clubs that have steadfastly refused to breach the rules and who might wish to see a certain sanction imposed on one that has breached (and including all such clubs in the mediation process would make it unmanageable); and
- that negotiated pleas and sanctions have an air of impropriety and will lead to press and public dissatisfaction with justice being done.

These are all good arguments, and if they are

to prevail, that would require that no such regulatory disputes can ever be mediated. And yet, my mediator training and experience (which says we should be able to mediate any dispute, or at least any dispute that is capable of being negotiated), and the roll-your-sleeves-up optimism that mediators live by, makes me question the wisdom of the proposition that no such regulatory disputes can be mediated. What is more, we know that regulatory cases are often negotiated: doping regulators have on many occasions agreed sanctions with athletes in doping cases, UEFA's Club Financial Control Body recently reached negotiated settlements with Manchester City, Paris Saint-Germain and other clubs accused of breaching UEFA's financial fair play rules, and outside sport, other regulators (like HM Revenue and Custom in the UK) negotiate settlements with wrongdoers.

So perhaps some lawyers are right to say that they don't embrace mediation because their disputes are not appropriate for it, but I would encourage an open mind. And one solution might be to have any settlement reached in a mediated regulatory dispute subject to ratification by the appropriate tribunal.

## II. Why should sports lawyers embrace mediation?

All lawyers, not just sports lawyers, should embrace mediation. Why? Well for one thing, mediation allows lawyers to look good in front of their clients and opponents. And lawyers love nothing more than looking good in front of their clients and opponents. Why does mediation allow them to do that? For the following five reasons:

### A. They will reduce their client's costs

Although comprehensive, objective and audited statistics are hard to come by, the general consensus appears to be that mediations result in a successful settlement (either on the day of the mediation or shortly afterwards) in 65-80% of cases. So, if a lawyer

recommends mediation to his/her client, and it is successful (as it will probably be, statistically), then ordinarily the client will save money – perhaps considerable sums of money – in legal costs. What an excellent way for a lawyer to show a client that he/she has the client's interests at heart: recommending a process that saves the client costs and thereby openly reduces the lawyer's own revenue. And surely that client is then more likely to come back to that lawyer again and again, meaning that the lawyer builds a long-term relationship.

And this won't be lost on the client. I have been in many mediations in which the mediator has gone out of his way to congratulate the lawyers – in front of their respective clients - for having the wisdom, selfless integrity, and long-term vision to recommend mediation to their clients (I often do this myself when I am acting as a mediator). And in most mediations, there will be a careful examination of the parties' respective costs positions, at the time of the mediation and what is estimated up to the end of trial (when I am acting as a mediator, I often do this on a flipchart at the start of the mediation). Although not its primary purpose, this will also highlight to the clients how much revenue the lawyers are going to forego as a result of the parties reaching settlement.

### **B. They will get a result for their client**

If a lawyer recommends mediation to his/her client, and it is successful (which, as I have said, it will probably be), then ordinarily the client will get a timely and confidential result that avoids the distraction, wasted time and inherent risk of going to court or arbitration. Valuable in any sector, but in sport it could be vital if it means an event going ahead on schedule or a difficult issue being kept from the media. All of this is likely to be beneficial to the client, which reflects well on the lawyer who recommended the mediation.

And there is no question that lawyers can play a central role in making a mediation

successful. While mediators often tell the parties that it is the parties who are the most important people in the process (which is right), the lawyers can make a real difference to determining whether or not a mediation results in a settlement. A lawyer can, for example:

- make sure the client representatives at the mediation understand the need for authority to settle, and have sufficient authority;
- help the client to focus on what it really needs from the settlement (rather than simply the position that has been adopted to date);
- help the client to succinctly frame the arguments that are put to the other side and the mediator;
- help the client construct and present offers clearly and compellingly;
- advise the client quickly and clearly on counter-offers and the consequences of accepting them; and
- help the mediator if he/she is trying to give the client a 'reality check' (a mediator might say to the lawyer words to the effect of, 'I am not giving legal advice, but does your client appreciate that there are significant risks for him/her in adopting that position?' and it will be for the lawyer to assist in getting that message to the client).

### **C. They will get a platform on which to show off their talents**

Mediation allows lawyers to perform: for example, they get to show the client, the mediator and the other side how smart they are, how experienced they are, how well they know the case, how sensible and reasonable (or aggressive and determined) they can be in negotiations, and how thorough and exacting when drafting settlement clauses. Lawyers don't get that many opportunities to do all of that in front of an audience, and mediation is one of them.

For example, if a mediation involves (as many do) an opening statement in a joint meeting at the start of the day, that is a real opportunity for the lawyer and the client to have their 'day in court'. When acting as a mediator, I have seen lawyers really set the tone for the mediation by the quality and conviction of their opening statements. And I have witnessed the effect that a good or bad opening statement by a lawyer can have on the other side and on the client.

And the advice to be given to a client in a mediation is often of the 'here-and-now' type. I have seen clients turn to their lawyers at a critical stage in a mediation (for example, when an offer has come in from the other side) and ask, 'what shall we do?' This is an opportunity -- perhaps a rare opportunity -- to give a client meaningful, practical advice in real time. Stripped of the usual qualifications and the 'on the one hand ... but on the other hand' type of preamble that we often resort to. It requires the lawyer to say, 'if I was in your shoes, this is what I would do'. Clients value that and the trust it builds up makes for long-standing relationships.

#### **D. They will get to spend quality time with the client**

Mediations can take a long time, and for long periods the lawyer and his/her client might be stuck in a meeting room alone (without the mediator and the other side), waiting. This is precious time for a lawyer to spend with a client, to talk about other matters, or get to know each other more, and cement the relationship. And not only that, mediation can be an emotional experience, and one that goes late into the night, so that when settlement is finally achieved -- and I have seen this a lot -- there is a heightened sense of camaraderie and loyalty between lawyer and client, borne out of a difficult but rewarding shared experience.

#### **E. They will enjoy benefits even from a failed mediation**

Parties -- and their lawyers - will invariably

still benefit from the (relatively) few mediations that do not result in a settlement. Even in a failed mediation, the parties' settlement needs have usually become clearer and the difference between the respective parties' positions has narrowed. And, in any event, each party -- and its lawyer - will have had the opportunity to learn more about the other party's case, and perhaps see one or two of the other party's witnesses talking about the case (for example, in the opening statements), which will inform the lawyers how those witnesses will perform at trial. So even with a mediation that fails, the lawyers will be able to say to the client -- genuinely -- that it was worth a shot and that the information gained from the experience will be useful in any event.

So, for all those reasons, I think sports lawyers should embrace mediation and that we should see more sports cases coming through to mediation, whether at CAS or through domestic mediation providers. There is relatively little to lose, and so much to gain.

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## WADA Code Review Summary

Estelle de La Rochefoucauld\*

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### I. Review of the Sanctioning Regime

- A. Stricter Penalties for real cheats
  - 1. Longer Penalties for Intentional Cheats and Definition of Intentional Anti-Doping Rules Violation
  - 2. Stricter Regime in case of Prompt Admission than in the 2009 WADA Code
  - 3. Introduction of a separate Anti-Doping Rules Violation for Complicity
  - 4. Automatic Publication of the sanction
  - 5. Financial sanctions
- B. Distinguished regime based on the type of substance banned In-Competition in the definition of “intentional”
- C. Increased flexibility for inadvertent dopers
  - 1. Specified Substances
  - 2. Contaminated Products
  - 3. Additional Flexibility to the No Significant Fault or Negligence Standard
  - 4. Return for training
  - 5. New Regime in connection with whereabouts failure

### II. Introduction of new means to reach Athlete Support Personnel

- A. Prohibited Association
- B. Extended obligations of Athlete Support Personnel and extended investigations towards Athlete Support Personnel
- C. Responsibility of Athlete Support Personnel for use and possession of Prohibited Substances

### III. Evidence Gathering and Investigations Improvement, “Smart Testing”

- A. Clarification and innovations regarding Anti-Doping Organisation’s (ADO) Duties
  - 1. Gathering of Anti-Doping Intelligence
  - 2. Cooperation with other stakeholders
- B. Tools to improve Intelligence-Gathering and Investigations
  - 1. Substantial Assistance
  - 2. Extension of the Statute of Limitations
- C. Improvement of the Testing and Analysis Process
  - 1. Adoption of a Technical Document and of Sample Analysis Menus
  - 2. Presumption of validity of analytical methods
  - 3. Cut off point for further analysis
- D. Balance of the interests of International Federations and National Federations
  - 1. Responsibility for Testing
  - 2. Results Management
  - 3. Granting Therapeutic Use Exemptions

### IV. Procedural Issues

- A. Fair hearing
- B. Judicial Review before the Court of Arbitration for Sport
- C. Cross Appeals and other subsequent appeals
- D. *De Novo* Hearings

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\* Counsel to the CAS

After almost two years of consultation and over 2000 amendments, a revised World Anti-Doping Code has been adopted in November 2013 in Johannesburg (South Africa). The new Code will come into force on 1 January 2015.

By modifying the sanctioning regime, the new Code aspires to be fairer than in the past. To achieve this goal, the revised Code has introduced provisions targeting and imposing stricter penalties for real cheats while inadvertent dopers may benefit from more flexibility. The 2015 Code has defined the notion of “intention” which becomes a central element of the Code. In this context, the new Code has implemented a distinguished regime based on the type of substance banned In-Competition in the definition of “intentional”.

Another ambition of the revised Code is to improve the effectiveness of doping control. To achieve this purpose, some amendments are aimed to improve intelligence gathering and investigations and to strengthen cooperation between Anti-Doping Organization (ADO) and public authorities.

Finally, the Code is designed to be in compliance with recognized principles of international law and human rights.

## I. Review of the Sanctioning Regime

### A. Stricter Penalties for real cheats

#### 1. Longer Penalties for Intentional Cheats and Definition of Intentional Anti-Doping Rules Violation

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<sup>1</sup> Regarding the compatibility of the new regime of sanctions with the principles of international law and human rights, the Legal opinion regarding the draft World Anti-Doping Code authored by Jean-Paul Costa considers that the revised Article 10.2 (Version 3) is compatible with the principles of international law and human rights and that the increase in the level of sanctions envisaged is *moderate* in relative terms and the outcome itself is not excessive. Whereas, on the

Under the new Code, the rigour of the sanction depends on the intentional nature of the anti-doping rule violation.

The WADA Code 2015 introduces a period of ineligibility of four years in Article 10.2 for all intentional Anti-Doping Rules Violations (ADRV) involving the presence, use and possession of Prohibited Substances (Articles 2.1, 2.2 and 2.6) regardless of the type of substance concerned instead of the two years ineligibility period provided under the 2009 Code<sup>1</sup>.

The notion of intentional Anti-Doping Rules Violation includes the situations where the substance involved is not a Specified Substance and the lack of intention cannot be established by the athlete concerned (Article 10.2.1.1), or where the substance is a Specified Substance and the proof of the intentional violation has been reported by the Anti-Doping Organization (Article 10.2.1.2).

On the contrary, where the athlete can establish that the use of the non-Specified Substance is not intentional or where the Anti-Doping Organization cannot prove the intentional use of a Specified Substance, the period of ineligibility will be two years (Article 10.2.2).

Under Article 10.3.1 of the WADA Code 2015, because Anti-Doping Rule Violations covering Evading (newly added to Article 2.3), Refusing or Failing to submit to Sample Collection (Article 2.3) and Tampering (Article 2.5) are considered intentional, they are also sanctioned by a four year period of ineligibility. However, where the failures to submit to Sample collection are not intentional, a two year period of ineligibility will apply.

other hand, according to Antonio Rigozzi/Marjolaine Viret/Emily Winoski, Does the World Anti-Doping Code Revision Live up to its promises? In: Jusletter 11 November 2013: [Rz 93] “[...]stricter sanctions resulting in longer initial periods of Ineligibility will inevitably raise concerns about the principle of proportionality, fairness, and the fundamental rights of Athletes”.

The scope of the term “intentional” is central in the new Code and has therefore been defined in Article 10.2.3 as follows:

*“As used in Articles 10.2 and 10.3, the 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 Rules Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rules Violation and manifestly disregarded that risk.*

*An Anti-Doping Rules Violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An Anti-Doping Rules Violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance”.*

The definition of “intentional” creates a different regime based on the type of substance banned In-Competition: Specified Substances and non-Specified Substances are ruled by a different regime of presumption (see *Infra I B*).

## 2. Stricter Regime in case of Prompt Admission than in the 2009 WADA Code

Under the 2009 WADA Code, the application of aggravating circumstances provided by Article 10.6 could be avoided by the athlete making a prompt admission of an ADRV. The prompt admission could allow a two year suspension instead of a four year ineligibility period.

Under the WADA Code 2015, the prompt admission covers all intentional violations subject to a four-year period of ineligibility

(Article 10.2.1). However, under the revised provision, prompt admission no longer automatically reduces a potential four-year anti-doping rule violation for an Adverse Analytical Finding. The reduction of the period of ineligibility is subject to both the approval of the Anti-Doping Organization and WADA and is also dependant on the degree of fault and on the severity of the violation.

Given the rather stringent conditions that must be met, the reduction of the sanction - which in any event must remain a minimum of two years- will likely, be applied in rare circumstances.

## 3. Introduction of a separate Anti-Doping Rules Violation for Complicity

The revised Article 2.9 has introduced a separate Anti-Doping Rules Violation for Complicity and has extended to the definition of complicity to “assisting”, “conspiring” involving an Anti-Doping Rule Violation, as well as the prohibition of participation during a period of ineligibility.

## 4. Automatic Publication of the sanction

Article 10.13 of the WADA Code 2015 establishes the principle of the automatic public disclosure in the sanctioning regime. The publication of the sanction represents itself a sanction and will, as such, be assessed by the hearing panels under the principle of proportionality of the sanction.

However under Article 14.3.6 of the WADA Code 2015, the publication is not mandatory for a Minor Athlete.

## 5. Financial sanctions

Article 10.10 of the WADA 2015 Code provides that *Anti-Doping Organizations* may “provide for proportionate recovery of costs or financial sanctions [...] However, only [to] impose financial sanctions in cases where the maximum period of Ineligibility otherwise applicable has already been imposed. Financial sanctions may only be imposed

*where the principle of proportionality is satisfied. No recovery of costs or financial sanction may be considered a basis for reducing the Ineligibility or other sanction which would otherwise be applicable under the Code”.*

The imposition of financial sanctions in addition to a period of ineligibility implies that the maximum period of ineligibility provided by the Code in a given situation is regarded as not sufficient by the relevant authority.

### **B. Distinguished regime based on the type of substance banned In-Competition in the definition of “intentional”**

Under Article 10.2.3 (see Supra), the definition distinguishes between Specified Substances and non-Specified Substances.

On the one hand, the use of substances that are only prohibited in competition shall be rebuttably presumed to be not intentional provided the prohibited substance concerned is a Specified Substance and the athlete can establish that it was used out-of-competition. This Anti-Doping Rule Violations will be sanctioned by a two year period of ineligibility.

On the other hand, the use of substances that are only prohibited in competition but that are not Specified Substance shall not be considered intentional provided the athlete can establish that the Prohibited Substance was used Out-of-Competition in a context unrelated to sport performance. Those ADRV will also be sanctioned by a two year period of ineligibility.

The new article will obviously address the violations arising from the use of social drugs (e.g. cannabis, cocaine) in a more lenient way than under the 2009 WADA Code. The often inexistent link to sport performance enhancement and intention to gain an unfair advantage has been taken into consideration in the context of social drugs.

Article 10.2.1 reads as follows:

*“10.2.1 The period of Ineligibility shall be four years where:*

*(...)*

*10.2.1.2 The anti-doping rule violation involves a Specified Substance and the Anti-Doping Organization can establish that the antidoping rule violation was intentional.*

*10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years”.*

Read together, Article 10.2.1.2 and Article 10.2.3 seem to establish a different standard for the Athlete to benefit from a rebuttable presumption related to the use of Specified Substances. Under Article 10.2.1.2, unless the Anti-Doping Organization establishes the proof of the intentional use of a Specified Substance, the Athlete will be sanctioned by a period of ineligibility of two years. In other words, in those circumstances, the Athlete will benefit from a rebuttable presumption that the use of a Specified Substance was not-intentional whereas under Article 10.2.3, the Athlete will benefit from a rebuttable presumption if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. The burden of proof is stricter in the last case.

In practice, due to WADA’s policy regarding flexibility for inadvertent dopers (see Infra) combined to the regime applicable to Specified Substances, a four-year period might likely only be imposed in few cases.

### **C. Increased flexibility for inadvertent dopers**

The revised WADA Code 2015’s approach to intentional cheats is offset by additional flexibility to impose reduced sanctions for certain types of offences involving Specified Substances and Contaminated Products and in cases of No Significant Fault or Negligence. Moreover, additional flexibility has been introduced in connection with return for training and whereabouts failure.

## 1. Specified Substances

Article 4.2.2 of the WADA Code 2015 defines the term Specified Substances:

*“For purposes of the application of Article 10, 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. The category of Specified Substances shall not include Prohibited Methods”.*

Under Article 10.5.1.1 of the new Code, to benefit from the flexibility or special treatment provided by the revised Code i.e. a reprimand and no period of ineligibility at a minimum and two years of ineligibility at a maximum, the athlete is required to establish how the substance entered his or her system and No Significant Fault or Negligence. Where the athlete has established those two elements, the period of Ineligibility will range from a reprimand and two years depending on the Athlete’s or other Person’s degree of Fault. Reversely, the period of ineligibility involving a Specified Substance won’t be reduced below two years if the Athlete is not able to establish the route of ingestion of the substance and No Significant Fault.

At this point, it should be noted that due to the ambiguity in determining the absence of intent to enhance performance, its establishment required under the 2009 Code has been removed under the new Code. However, as mentioned above, the notion of intention remains a central part of the sanctioning regime under Article 10.2 and has been defined under Article 10.2.3 of the revised Code for violations of Articles 2.1, 2.2 or 2.6 i.e. presence, use and possession of Prohibited Substances)<sup>2</sup>.

## 2. Contaminated Products

The WADA Code 2015 introduces a new Article 10.5.1.2 related to Contaminated Products:

In order to benefit from the special treatment provided by Article 10.5.1.2 i.e. a period of ineligibility ranging from at a minimum a reprimand and at a maximum two years, the athlete is required to establish that he bears No Significant Fault or Negligence and that the route of entry of the product was via a Contaminated Product.

This new provision creates a possibility for a reduced period of ineligibility or for its elimination for contamination with any Prohibited Substance (rather than just Specified Substances) provided the Athlete has reported the two factors.

## 3. Additional Flexibility to the No Significant Fault or Negligence Standard

According to the Definition of No Significant Fault in the new Code, Minor Athletes are no longer required to establish how a Prohibited Substance entered their system to establish No Significant Fault.

In the WADA Code 2015, the Comment to Article 10.5.2 (Application of No Significant Fault or Negligence beyond the Application of Article 10.5.1 (Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Articles 2.1, 2.2 or 2.6 i.e. presence, use and possession of Prohibited Substances) states that *“Article 10.5.2 may be applied to any anti-doping rule violation, except those Articles where intent is an element of the anti-doping rule violation (e.g., Article 2.5, 2.7, 2.8 or 2.9 [i.e tampering, trafficking, administration to any Athlete of any Prohibited Substance, complicity]) or an element of a particular sanction (e.g., Article 10.2.1) or a range of Ineligibility is already provided in an Article based on the Athlete or other Person’s degree of Fault”.* Therefore, apart from the cases

<sup>2</sup> According to Antonio Rigozzi/Marjolaine Viret/Emily Winoski, Latest Changes to the 2015 WADA Code- Fairer, Smarter, Clearer...and not quite finished, in: Jusletter 20 January 2014, [Rz 111], CAS

panels will be brought to clarify the notion of “intentional” and of its interaction with the “Fault and Negligence” concept used in doping matters.

expressly mentioned in the Comment to Article 10.5.2, the application of the No Significant Fault or Negligence standard in the context of the Specified Substances and Contaminated Product can be given a broader application by the hearing authorities. However, in any cases Athletes under the new definition of No Significant Fault or Negligence are required to establish how the substance entered their body.

In addition, the Comment to the definition of No Significant Fault or Negligence found in Appendix 1 establishes that *“For Cannabinoids, an Athlete may establish No Significant Fault or Negligence by clearly demonstrating that the context of the Use was unrelated to sport performance”*. Under this modification, Athletes testing positive for Cannabinoids may avoid that the violation was intentional and benefit from an easier way in connection to the finding of No Significant Fault or Negligence.

#### 4. Return for training

The purpose of the new Article 10.12.2 is to give Athletes in certain sports the chance to be fully ready to resume competition at the end of a period of ineligibility. The Comment to Article 10.12.2 recognises that in many team sports and in some individual sports (*e.g., ski jumping and gymnastics*) in order to be ready to compete, the Athletes need access to training prior to the end of the ineligibility period.

*“As an exception to Article 10.12.1, an Athlete may return to train with a team or to use the facilities of a club or other member organization of a Signatory’s member organization during the shorter of: (1) the last two months of the Athlete’s period of Ineligibility, or (2) the last one-quarter of the period of Ineligibility imposed”*.

#### 5. New Regime in connection with Whereabouts Failure

Another example of the flexibility introduced by the WADA Code 2015 is the reduction of the window from eighteen months to twelve

months in which an Athlete in a Registered Testing Pool may accumulated three whereabouts failure and/or missed tests which trigger an Anti-Doping Rule Violation (Article 2.4 WADA Code 2015).

In this regard, the revised 2015 International Standard for Testing and Investigations (ISTI) leaves important freedom to International Federations and National Anti-Doping Organization (NADO) in establishing their different testing pools. Moreover, the whereabouts data retention times have not been reduced to twelve months but still amount to eighteen months.

## II. Introduction of new means to reach Athlete Support Personnel

The need to institute legal mechanisms to reach the Athlete’s entourage appeared to be a priority. As coaches, trainers or others Athlete Support Personnel are frequently involved in a doping scenario and as the so-called “Athlete Support Personnel” usually fell outside the jurisdiction of Anti-Doping Organizations, the WADA Code 2015 has introduced new amendments to reach Athlete Support Personnel through efficient means.

### A. Prohibited Association

Article 2.10 prevents athletes from knowingly associating with Athlete Support Personnel who are serving a period of ineligibility (Article 2.10.1) or have been convicted or found in a criminal, disciplinary or professional proceeding to have engaged in conduct which would have constituted a violation of anti-doping rules if Code-compliant rules had been applicable to such person (Article 2.10.2) or such person is serving as a front or intermediary for an individual described in Article 2.10.1 or 2.10.2. Before an Athlete is found to have violated this article, he must have received notice of the Athlete Support Personnel’s

disqualified status and of the consequences of continued association<sup>3</sup>.

### **B. Extended obligations of Athlete Support Personnel and extended investigations towards Athlete Support Personnel**

In addition to the Athlete Support Personnel existing obligation under the 2009 Code to be bound by anti-doping rules, Article 20.3.5 of the WADA Code 2015 introduces a new responsibility for International Federations to ensure that their National Federations establish rules requiring Athlete Support Personnel to agree to be bound by Anti-Doping Organization results management authority in conformity with the Code, if they are involved in events or activities that are organised by the National Federations.

Article 20.3.10 and 20.5.9 create an obligation for International Federations and National Anti-Doping Organization (NADOs) to conduct automatic investigations of Athlete Support Personnel in circumstances where minors or more than one athlete to whom they provided support is found to have committed an Anti-Doping Rules Violation.

### **C. Responsibility of Athlete Support Personnel for use and possession of Prohibited Substances**

WADA Code 2015 introduces a new Article 21.2.6 forbidding the Use or Possession of any Prohibited Substance or Prohibited Method without valid Justification for Athlete Support Personnel. Although these provisions are not considered to be Anti-Doping Rules Violations, they can lead to sports disciplinary rules.

As underlined in the Comment to Article 21.2.6: “*...Coaches and other Athlete Support Personnel are often role models for Athletes. They*

*should not be engaging in personal conduct which conflicts with their responsibility to encourage their Athletes not to dope”.*

To enforce this provision, Articles 20.3.15 and 20.4.13 add new duties on International federations and National Olympic Committees by inserting disciplinary rules in order to prevent Athlete Support Personnel who use Prohibited Substances or Prohibited Methods from providing support to Athletes.

### **III. Evidence Gathering and Investigations Improvement, “Smart Testing”**

The Working Group established by the WADA Foundation Board on 18 May 2012 observed that “[T]o date, testing has not proven to be particularly effective in detecting dopers/cheats”. In this respect, the Working Group has enacted some recommendations in relation to WADA and Sports International Organizations. In particular, the Working Group has recommended that “*WADA shall fundamentally recast its budgets to reflect its primary focus on Code compliance and the efficacy of testing and other means of detecting doping practices*”. Regarding testing, the Working Group recommended that Sports International Organizations should change their focus from the number of tests performed to the effectiveness of such tests. On the other hand, Whistle-blowing should be promoted and “*Organizations shall have a positive obligation to follow-up complaints of doping [...], and should renew and enhance efforts to obtain information from public authorities and NADOs*”.

The new Code places greater emphasis on intelligent evidence gathering and methods of investigation in addition to traditional drug Testing and analysis. This follows from recent high profile cases, such as the Armstrong and the Puerto affairs in which the athletes were found having committed an

and on the other hand the support personnel is now given the same safeguards as the athletes themselves with respect to information being furnished in advance.

<sup>3</sup> According to the Legal opinion regarding the draft World Anti-Doping Code authored by Jean-Paul Costa, the new regime of sanctions is compatible with the principles of international law and human rights as on the one hand the notion of association is specified,

Anti-Doping Rules Violation only through investigations and collaborations among Anti-Doping Organizations.

In this context, the WADA Code 2015 must be read in conjunction with WADA International Standard for Testing renamed International Standard for Testing and Investigations (ISTI).

Both the new Code and the ISTI do not define the terms “intelligence” or “investigations”. However, three types of investigations can be found in Article 5.8 of the WADA Code 2015 and in Article 12.1.1 of the 2015 ISTI: (i) investigations based on Atypical Findings and Adverse Passport Findings, (2) investigations of any other analytical/non-analytical information where there is reasonable cause to suspect that an Anti-Doping Rules Violation was committed, and (iii) where an Anti-Doping Rules Violation by an Athlete is established, the investigation into whether Athlete Support Personnel or other Persons may have been involved in that violation.

### **A. Clarification and innovations regarding Anti-Doping Organisation’s Duties**

#### **1. Gathering of Anti-Doping Intelligence**

Article 11.2 of the 2015 ISTI contains five Anti-Doping Organization’s duties.

*- Anti-Doping Organizations shall do everything in their power to ensure that they are able to capture or receive anti-doping intelligence from all available sources, including Athletes and Athlete Support Personnel and members of the public, Sample Collection Personnel, laboratories, pharmaceutical companies, National Federations, law enforcement, other regulatory and disciplinary bodies, and the media (Article 11.2.1 ISTI).*

*- Anti-Doping Organizations shall have policies and procedures in place to ensure that anti-doping intelligence captured or received is handled securely and confidentially, that sources of intelligence are protected (Article 11.2.2).*

*- Anti-Doping Organizations shall ensure that they are able to assess all anti-doping intelligence upon receipt for relevance, reliability and accuracy, taking into account the nature of the source and the circumstances in which the intelligence has been captured or received (Article 11.3).*

*- Anti-doping intelligence shall be used to assist in developing, reviewing and revising the Test Distribution Plan and/or in determining when to conduct Target Testing, in each case in accordance with Section 4.0 of the International Standard for Testing and Investigations, and/or to create targeted intelligence files to be referred for investigation in accordance with Section 12.0 of the International Standard for Testing and Investigations. (Article 11.4.1).*

*- Anti-Doping Organizations should also develop and implement policies and procedures for the sharing of intelligence with other Anti-Doping Organizations and/or law enforcement and/or other relevant regulatory or disciplinary authorities (Article 11.4.2).*

Moreover, Article 12.3 of the 2015 ISTI includes more specific directives regarding the gathering of anti-doping intelligence, namely the duty of the Anti-Doping Organization to keep WADA updated on the status and findings of the ongoing investigation (Article 12.3.2), the duty of the Anti-Doping Organization to gather and record all relevant information and documentation promptly (Article 12.3.3), the duty to conduct investigations fairly, objectively and impartially at all times (Article 12.3.3), and the duty to consider all possible outcomes at each key stage of the investigation, and all available evidence (Article 12.3.3).

#### **2. Cooperation with other stakeholders**

Under the revised Article 20 of the WADA Code 2015 (Additional Role and Responsibilities of Signatories), International Federations (Article 20.3.6) and National or Paralympic Olympic Committees (Article 20.4.4) commit to require National

Federations “to report any information suggesting or relating to an Anti-Doping Rules Violation to their National Anti-Doping Organization (NADO) and International Federation and to cooperate with investigations conducted by an Anti-Doping Organization with authority to conduct the investigation”.

Likely, Athletes (Article 20.3.6) and Athlete Support Personnel (Article 21.2.5) have “To cooperate with Anti-Doping Organizations investigating Anti-Doping Rules Violations”. As mentioned above for Athlete Support Personnel, the failure to cooperate may be the basis for disciplinary action under a stakeholder’s rule (see Comment to Article 21.2.5).

Article 22.2 also provides that “Each government will put in place legislation, regulation, policies or administrative practices for cooperation and sharing of information with Anti-Doping Organizations and sharing of data among Anti-Doping Organizations as provided in the Code”<sup>4</sup>.

## **B. Tools to improve Intelligence-Gathering and Investigations**

### 1. Substantial Assistance

Article 10.6.1 of the WADA Code 2015 has been amended in order to further encourage athletes or other persons to provide Substantial Assistance. Article 11.2 of the 2015 ISTI includes Substantial Assistance as a tool to capture or receive anti-doping intelligence. Athletes who are providing Substantial assistance to investigations may be given assurances by WADA regarding the effect of a sanction and regarding confidentiality. In particular, the new article gives assurance to an Athlete or Other Person willing to provide Substantial Assistance that the agreed-upon reduction in the period of ineligibility cannot be challenged on appeal.

<sup>4</sup> In this respect, in Antonio Rigozzi/Marjolaine Viret/Emily Winoski, op. cit. Footnote 2 [Rz 27], the authors raise doubts regarding the applicability of Article 22.2 of the revised WADA Code due to the

The Comment to Article 10.6.1 states that the cooperation of Athletes, Athlete Support Personnel and other Persons who acknowledge their mistakes and are willing to bring other Anti-Doping Rules Violations to light is the only circumstance under the Code where the suspension of an otherwise applicable period of Ineligibility is authorized.

### 2. Extension of the Statute of Limitations

Article 17 of the WADA Code 2015 extends the Statute of Limitation from eight to ten years.

This extension is aimed at helping investigators, specifically in situation involving complex doping schemes.

## **C. Improvement of the Testing and Analysis Process**

### 1. Adoption of a Technical Document and of Sample Analysis Menus

One of the aims of the new Code is to extend the principle of “Smart Testing” with the establishment of a Technical Document that identifies Prohibited Substances or Prohibited Methods that are most likely to be used in particular sports and sports disciplines. That Document is aimed to be used by Anti-Doping Organizations in test distribution planning and by laboratories in the analysis Samples. The ambition of both the Technical Document and of the Sample Analysis Menu is to detect doping more efficiently, to reduce the number of sample analysed and the costs involved.

According to Article 5.4.1 of the WADA Code 2015, a Technical Document will be adopted by WADA in consultation with International Federations and other Anti-Doping Organization’s “that establishes by means of a risk assessment which Prohibited

fact that Governments are not Signatories of the WADA Code and are therefore not bound by its content.

*Substances and/or Prohibited Methods are most likely to be abused in particular sports and sport disciplines”.*

Under Article 5.4.2 of the WADA Code 2015, in order to fix priorities between disciplines, categories of athletes, type of testing, type of samples collected, and types of analyses, Anti-Doping Organizations are requested to establish and implement their Test Distribution Plan on the basis of the risk assessment component of the Technical Document.

Moreover, under Article 6.4 of the WADA Code 2015, the new Technical Document will create Sample Analysis Menus appropriate for particular sports and sport disciplines, and laboratories shall analyse Samples in conformity with those menus.

## 2. Presumption of validity of analytical methods

The existing presumption under the WADA Code 2009 is that a laboratory acted in compliance with the International Standards for Laboratories whereas Article 3.2.1 of the new Code extends the scope of the presumption to the scientific reliability of these applicable procedures.

## 3. Cut-off point for further analysis

Contrary to the 2009 WADA Code which provides that the re-testing of a Sample is possible at any time at the discretion of WADA or of the Anti-Doping Organization that collected the Sample, the new Article 6.5 provides that after the analytical results of the A and B samples have been communicated to the Athlete, the Sample cannot be re-tested.

### **D. Balance of the interests of International Federations and National Federations**

#### 1. Responsibility for Testing

To render the system more effective, the new Code has clarified the responsibilities of

International Federations and National federations. In principle, under Article 5.3 of the WADA Code 2015 only a single organization should be responsible for initiating and directing Testing at Event Venues during an Event Period. One simplification brought by the new Code is that Testing are limited at Event Venues whereas under the 2009 Code, testing are extended at the Event Period. At International Events, the international organization which is the ruling body for the Event will be responsible and at National Events, the collection of Samples shall be initiated and directed by the National Anti-Doping Organization of that country.

## 2. Results Management

Under the new Code as under the 2009 Code, the conduct of results management for a potential violation belongs to the ADO that initiated Sample collection. Under the Code 2015, if no collection is involved, the responsibility for results management belongs to the ADO that first provides notice to an Athlete or other Person of an asserted Anti-Doping Rule Violation and then pursues that Anti-Doping Rule Violation but not any more to the ADO that “*discovered the anti-doping rule violation*” (Article 7.1).

## 3. Granting Therapeutic Use Exemptions

Under the WADA Code 2009, International Federations grant Therapeutic Use Exemptions (TUE) at the request of International Level Athlete while National Anti-Doping Organization grant TUE at the request of national-Level Athlete.

The new Code requires mutual recognition of Therapeutic Use Exemptions (TUE) between International and National Federations.

## **IV. Procedural Issues**

### **A. Fair hearing**

Article 8.1 of the WADA Code 2015 recalls that each Anti-Doping Organization must provide a hearing process to Athletes and other persons consistent with the principles of fairness:

*“For any Person who is asserted to have committed an anti-doping rule violation, each Anti-Doping Organization with responsibility for results management shall provide, at a minimum, a fair hearing within a reasonable time by a fair and impartial hearing panel. A timely reasoned decision specifically including an explanation of the reason(s) for any period of Ineligibility shall be Publicly Disclosed as provided in Article 14.3”.*

The comment to Article 8.1 underlines that *“these principles are also found in Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms and are generally accepted in international law”.*

Even if the current Code is far more detailed than the revised version, Jean-Paul Costa, the author of the Legal opinion regarding the draft World Anti-Doping Code mentioned above, considers that this is no problem in itself and that whenever disciplinary anti-doping procedures concern rights and obligations of a civil nature, they fall under the scope of application of Article 6 § 1 of the European Convention for the Protection of Human Rights Convention regarding the right to a fair trial. As indicated above<sup>5</sup>, the author regards Article 8.1 as compatible with the principles of international law and in particular with Article 6 § 1 of the Convention regarding the right to a fair trial.

According to the article co-written by Antonio Rigozzi/Marjolaine Viret and Emily Winoski, the safeguards to a fair trial which should benefit to any athlete accused of an Anti-Doping Rule Violation imply the intervention of a judicial body securing all legal remedies. However, even if the hearing panels dealing with the initial hearing process respect the basic notions of due process they

do not comply with all requirements of Article 6.1 of the ECHR Convention<sup>6</sup>.

## **B. Judicial Review before the Court of Arbitration for Sport**

A number of amendments related to the CAS have been adopted in the new Code.

Pursuant to Article 3.2.1, at WADA's request, the CAS panel shall appoint an appropriate scientific expert to assist the panel in its evaluation of the challenge of the presumption of scientific validity of Analytical methods or decision limits approved by WADA.

Article 7.1 establishes that WADA's decisions regarding conflicts between ADOs that are responsible for conducting result management according to their procedural rules over which ADO has results management responsibility shall be dealt with by CAS in an expedited manner and shall be heard before a single arbitrator.

To reduce the hearings costs, the WADA Code 2015 has introduced a new Article 8.5 entitled “Single Hearing Before CAS”, which upon the stakeholders approval, allows for a single hearing before the CAS, avoiding therefore the expenses linked to a first hearing.

In this respect, the Jusletter's authors of the above mentioned article held that the consequence of this new provision might be the overload of the CAS as well as the fact that any dispute brought before the CAS under Article 8.5 of the revised Code might be considered as “ordinary” arbitration proceedings with a dispute resolution slower than the “appeal” arbitration proceedings. Moreover, ordinary arbitration proceedings do not benefit from the “free of costs” provision exclusively intended to Athletes appealing against decisions issued by

<sup>5</sup> See footnotes 1 & 3.

<sup>6</sup> In Antonio Rigozzi/Marjolaine Viret/Emily Winoski, op. cit. Footnote 2 [Rz 186, 187].

International Federations in disciplinary cases (see Article R65 CAS Code)<sup>7</sup>.

### C. Cross Appeals and other subsequent appeals

Article 13.4 has been added to the WADA Code 2015 in order to diverge from the 2010 Code of Sports-related Arbitration which has suppressed the possibility offered to the Respondent to bring a counterclaim in appeal arbitration proceedings before the CAS. Taking into account the fact that doping cases are often multipartite, the drafters have added “Subsequent appeals” to cross appeals.

The question is whether by submitting to the arbitration rules of the CAS the parties should comply with all provisions of the CAS Code or might depart from some of its rules.

### D. *De Novo* Hearings

The new Article 13.1 WADA Code makes clear that CAS panels have an unrestricted power to review the facts and the law. The comment to Article 13.1 of the new WADA Code confirms the *de novo* character of the CAS proceedings and reiterates that “*prior proceedings do not limit the evidence or carry weight in the hearing before CAS*”. All issues relevant to the matter are encompassed by the CAS scope of review and therefore CAS panels might not be prevented to defer to all issues relevant to the matter even when the lower hearing body declined its jurisdiction.

The revised WADA Code has not inserted the modification of the 2013 version of Article R57 para. 3 granting the CAS panel the right to refuse evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered<sup>8</sup>.

<sup>7</sup> In Antonio Rigozzi/Marjolaine Viret/Emily Winoski, op. cit. Footnote 2 [Rz 193].

<sup>8</sup> Art. R57 para. 3 CAS Code provides that “[T]he Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. Articles R44.2 and R44.3 shall also apply”.

Some authors have reckoned that the WADA Code shall be considered as *lex specialis* for cases falling under its scope. In other words, the scope of review provided under Article 13.1 WADA Code will supersede the general procedural provision of Article R57 para. 3 CAS Code<sup>9</sup>.

### Conclusion

CAS panels will play a key role in ensuring that the new regime is aligned with the proportionality, human rights and other related international law principles.

They will also likely be brought to consider whether by submitting to the arbitration rules of the CAS the parties should comply with all provisions of the CAS Code or might depart from some of its rules. In such case, CAS Panel will need to define the relevant provisions

<sup>9</sup> See Mavromati D., The Panel’s right to exclude evidence based on Article R57 para. 3 CAS Code: a limit to CAS’ full power of review? in CAS Bulletin 1014-1.

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## The Panel's right to exclude evidence based on Article R57 para. 3 CAS Code: a limit to CAS' full power of review?

Dr Despina Mavromati\*

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  - D. Potential violation of Article 190 para. 2 of the Swiss Private International Law Act (PILA) if unjustified refusal to admit evidence?
- IV. Article R57 para. 3 CAS Code and Article 317 Swiss CCP
- V. CAS case law with respect to Article R57 para. 3 CAS Code
- VI. Concluding remarks: is there an inconsistency between the de novo review of Article R57 and the newly inserted provision of Article R57 para. 3?

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The views expressed in this paper are those of the

author and do not necessarily reflect the views of the CAS.

## Summary

The CAS Panels' power of review of a decision appealed against is a well-known feature and fundamental principle of the appeals against decisions issued by the jurisdictional instances of federations and sports-governing bodies to the Court of Arbitration for Sport (CAS). In essence, it means that the CAS Panels will hear all arguments of the case anew, and will not be limited by the argumentation contained in the decision of the previous instance. Notwithstanding the Panel's full power of review, a newly inserted paragraph in Article R57 gives the possibility to the Panel to refuse evidence submitted by the parties "*if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered*". This paper examines the rationale and the conditions for the application of this new provision as well as the implications with other legal provisions with a view to avoiding problems and inconsistencies in the future.

### I. Introduction: the full power of review based on Article R57 CAS Code

Article R57 (inserted in the 1994 version of the CAS Code) refers to the scope of review of the CAS Panels when dealing with an appeal against a decision rendered by the internal bodies of sports federation. The Swiss Federal Tribunal (SFT) first referred to the possibility of appeal to the CAS in the widely known Gundel case: "*[T]he provisions governing the conduct of proceedings before the CAS are clearly aimed at the so called initial or originating procedure (...) however, numerous international sports associations have also made use of the possibility offered to them to appoint the CAS as a body of appeal charged to examine the validity of the penalties pronounced by their organs.*"<sup>1</sup>

<sup>1</sup> See Judgment of the SFT, 4P.217/1992, at 3b.

<sup>2</sup> Judgment of the SFT, 4A\_386/2010 of 3 January 2011 at 6.1.

<sup>3</sup> Ibidem, at 6.2b.

<sup>4</sup> Swiss Law on the Supreme Court, Loi sur le Tribunal Fédéral; see also DFT 4P.152/2002 of 16 October 2002, at 2.2.

<sup>5</sup> See Judgment of the SFT 4A\_530/2011 of 3 October 2011 at 3.3.2. In this case, the SFT referred

The Panel's full power of review has also been reviewed -and its legality has been confirmed- by the SFT.<sup>2</sup> The Supreme Court first affirmed the legality of Article R57 para. 1 by holding that said provision gives the Panel a large power of review and by confirming the Panel's freedom to choose any of the actions mentioned in Article R57.<sup>3</sup>

Moreover, the SFT confirmed that it is not compulsory to have two instances or a double degree of jurisdiction (and therefore, the sole degree of jurisdiction does not violate the procedural public policy rule of Article 190 para. 2 (e) PILA). According to the SFT, such obligation of a double degree of jurisdiction is not formulated in Article 75 para. 2 LTF.<sup>4</sup> The same was re-confirmed by the SFT in one of its subsequent judgments.<sup>5</sup>

The SFT has also confirmed the legality of the curing effect of the CAS *de novo* review. Accordingly, infringements of the parties' right to be heard can generally be cured when the procedurally flawed decision is followed by a new decision, rendered by an appeal body which had the same power to review the facts and the law as the tribunal of first instance and in front of which the right to be heard had been properly exercised.<sup>6</sup>

The full power of review basically means that the panel may examine all facts and legal issues of a dispute and will hold a trial *de novo*. By so doing, the panel is not limited in reviewing the legality of the attacked decision, but can issue a new decision without being limited by the legal and factual argumentation provided by the first-instance decision. Such a full review has the following implications: first, the panel reconsiders and evaluates the legal arguments and evidence

*mutatis mutandis* to its previous jurisprudence when assessing the appeal brought by an athlete sanctioned to a life ban by CAS who sustained that the healing effect of the appeal to CAS could not heal the alleged lack of independence and impartiality of the previous instance.

<sup>6</sup> See Judgement of the SFT 124 II 132 of 20 March 1998, p. 138; see also Judgment of the SFT 118 I b 111 of 29 June 1992, p. 120.

provided by the parties a new. Second, procedural flaws occurred through the previous instances are cured by the *de novo* appeal to the CAS.<sup>7</sup> Several CAS awards have defined the full power to review the facts and the law as a complete rehearing of the dispute and the healing of any allegations of denial of natural justice or defect or procedural error occurred at the previous instance.<sup>8</sup> The healing effect of the (*de novo*) appeal to the CAS was equally confirmed by the SFT.<sup>9</sup>

Logically, the full power of review cannot be wider than that of the appellate body<sup>10</sup> and is limited with regard to the appeal against and the review of the appealed decision, both objectively and subjectively: if a motion was neither object of the proceedings before the previous authorities, nor in any way dealt with in the appealed decision, the Panel does not have the power to decide on it. Another limit indirectly imposed on Article R57 CAS Code by Article 190 (1) Swiss PILA is the respect of the principle *Ne ultra petita*.<sup>11</sup>

Notwithstanding the aforementioned limitations to the full power of review, the Panel has the power to order (even *ex officio*) the production of (further) evidence if it deems this necessary for the resolution of the case based on Article R44.2 and R44.3 (also applicable in appeal proceedings based on Article R57 para. 3 CAS Code).<sup>12</sup> Based on the wording of Article R44.3, “the panel may at any time order the production of additional documents

or the examination of witnesses, appoint and hear experts, and proceed with any other procedural act”.<sup>13</sup>

Article R57 para. 3 CAS Code must be further distinguished from the late evidence submitted to the Panel, and which the Panel has the authority to accept if there are exceptional circumstances in accordance with Article R56 CAS Code. As confirmed by the SFT, the parties must respect the CAS rules on the time limits to file evidence, and the parties’ right to be heard is not violated if the CAS denies a piece of evidence that was not submitted in a timely manner. Therefore, the Panel’s decision to reject untimely filed evidence if it considers that there are no “exceptional circumstances” of Article R56 of the CAS Code cannot be reviewed by the SFT on the basis of the violation of the parties’ right to be heard.<sup>14</sup>

Up until 2013, Article R57 did not contain any provision limiting the admission of (written or oral) evidence where the parties submit such evidence for the first time with their appeal to the CAS (i.e. not before the previous instance proceedings). Since the 2013 modification of the CAS Code, a new provision has been inserted in the third paragraph of Article R57, whereby “The Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. Articles R44.2 and R44.3 shall also apply.” The new provision raised

<sup>7</sup> See Mavromati/Pellaux, Article R57 of the CAS Code: a purely procedural provision? In ISLR, 2 /2013, p. 36-37.

<sup>8</sup> From the rich CAS case law see in particular the recent CAS 2012/A/2836, Eintracht Braunschweig GmbH & Co. KG a. A. v. Olympiakos FC, award of 24 January 2013, paras. 76-77.

<sup>9</sup> See Judgment of the SFT, 4A\_386/2010, judgment of 3 January 2011.

<sup>10</sup> See CAS 2010/A/2090, Saarinen & FSA v. FIS, award of 7 February 2011. See also CAS 2008/A/1396 & 1402, WADA & UCI v. Valverde & RFEC, award of 31 May 2010, para. 72, 73.

<sup>11</sup> See CAS 2007/A/1233 & 1234, FC Universitatea Craiova, award of 19 December 2007, para 66. The Panel found that the Respondent would be entitled to a larger amount under Swiss law than the one awarded by the first-instance body (i.e. the FIFA

DRC). However, since Respondent had asked the Panel to reject the Appeal filed by Appellant and to confirm the decision of the FIFA DRC, the Panel could not rule ultra petita and had to abide by the figures awarded by the DRC.

<sup>12</sup> See also CAS 2010/A/2235.

<sup>13</sup> See Mavromati/Pellaux, (see fn. 7 above) p. 37, p. 43. The SFT recently issued a decision in which it distinguished between party-appointed evidence (R44.2) and panel-appointed evidence (R44.3) and delimited the discretion of CAS Panels to deny evidence based on Article R44.3, see 4A\_274/2012, Turkish Chess Federation, judgment of 19 September 2012.

<sup>14</sup> See Judgement of the SFT 4A\_274/2013, Banik Ostrava, of 5 August 2013, at 3.2. See also Judgement of the SFT\_312/2012, FC Dynamo, of 1 October 2012, at 4.3.2.

some criticisms<sup>15</sup> and it has been (rightly) supported that it should be used with restraint in order to preserve the fundamental *de novo* character of the review by the CAS. In the following pages we will examine the scope and rationale of the new provision, the possible conflicts with other provisions and Swiss law and we will propose some conditions for its application.

## II. Rationale and particularities of the newly inserted provision of Article R57

The newly inserted provision grants the CAS panel the right to refuse evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. From the very wording of the provision “*the Panel has discretion...*”, “*La Formation peut exclure des preuves...*”) we understand that this is not a limitation imposed on the panel but rather a right to refuse to admit all evidence filed by the parties. In this respect, the panel’s right to conduct the hearing *de novo* is not influenced.

What is the scope of the new provision? Again, from its wording, we can see that it does not comprise all evidence but merely a) evidence that was available to the parties before the challenged decision was rendered or b) evidence that could reasonably have been discovered by the parties before the challenged decision was rendered.

The new provision does not clarify how the procedure for the admission of new evidence shall take place. Who bears the burden to establish that such (new) evidence was not available or it could not have been discovered before the challenged decision was rendered? Should the panel *ex officio* require justifications in case of production of any new evidence or only react if the other party raises the subject? Since the Panel has the discretion to refuse new evidence on the

conditions mentioned above, we assume that the Panel has also (theoretically) the discretion to admit evidence even if the party submitting such evidence does not provide justified grounds for such late submission. Nevertheless, deciding to follow the one way or the other without other criteria would lead to arbitrary solutions that may lead to divergent treatment of the parties according to the personal choice and severity of each arbitrator. To our view, it would be desirable, if not necessary, to establish some guidelines as to the conditions for the application of this provision, also taking into account its rationale.

The rationale of Article R57 para. 3 is to avoid evidence submitted in an abusive way and / or retained by the parties in bad faith in order to bring it for the first time before CAS. Moreover, traditionally, the debate between the full power of review and the limitation of the admission of evidence is about finding the right balance between the search for a judicial truth and the economy of procedure.<sup>16</sup> Indeed, in some cases parties may not show the required level of diligence at the proceedings of the previous instance and submit an incomplete file, knowing that, in any event, their case may be heard anew and in full by the CAS. This may engender substantial delays in the process of the case before the CAS, delays that could otherwise have been avoided if the case had been rightly dealt with (and all evidence had been presented) already at the previous instance. At the same time, the newly inserted discretion of the panel to deny new evidence seems to be in indirect contradiction with the well-established full power of review of Article R57 as a procedural guarantee for the parties. Therefore, the full power of review must be preserved for a number of reasons that will be exposed below. In turn, this will also impact on the conditions for the use of Article R57 para. 3.

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<sup>15</sup> Rigozzi/ Hasler, Commentary on the CAS Code, ad Art. R57, n. 4 p. 1036, in: Arroyo M. (ed.) *Arbitration in Switzerland – The practitioner’s guide*, 2013, Kluwer Law International, The Hague.

<sup>16</sup> See Jeandin, N., ad Art. 317 CCP, n 2, p. 1265, in: Bohnet F. et al (ed.), *Code de procédure civile commenté*, Basle, 2011.

### III. Potential problems linked to Article R57 para. 3 with regard to the Panel's full power of review

#### A. Exclusion of the review by the state courts through the full review by the CAS

The full review by the CAS is the principal reason for excluding a full review by the state courts (i.e. in case of a subsequent appeal against a CAS award to the SFT, the latter will not fully review the case but will act as a cassatory court based on the exhaustively enumerated grounds of Article 190 para. 2 PILA). Indeed, to the extent that the decisions rendered by the jurisdictional instances of sports federations do not constitute "*arbitral awards*" but merely internal decisions of associations, the full review of the case by a CAS panel accompanied by the healing effect of procedural irregularities is essential in order to guarantee the parties' access to justice and a full review by an independent arbitral tribunal.<sup>17</sup>

As found by the SFT in one of its judgments, Article 190 para. 2 (e) PILA does not require two instances or a double degree of jurisdiction.<sup>18</sup> However, we would add that this applies to cases where the CAS panel, acting as an independent arbitral tribunal, had the opportunity to conduct a full review of the case. Therefore, it has been supported that a restriction of the full power of review based on article R57 para. 3 should be limited in those cases where the last instance proceedings were conducted by an independent tribunal and parties were given the opportunity to submit their arguments and evidence, whereas the newly adduced evidence constitutes an evidently abusive behaviour by one of the parties.<sup>19</sup>

#### B. Healing effect of the appeal to the CAS and restricted admission of evidence

One of the principal consequences / implications of the full power to review the decision appealed against is the well-established "healing effect" of the appeal to the CAS. This means that all violations of procedural rights occurred at the previous instance may be cured by a full appeal to the CAS. Such healing effect ("*effet guérisseur*") has been confirmed through rich CAS jurisprudence.<sup>20</sup>

The healing effect of the appeal to the CAS does not seem to be imperilled by the new provision: this would have been possible if the new provision empowered the Panel to refuse to repeat evidential acts that had already taken place in the previous instance (e.g. hearing of witnesses etc.), so that e.g. the Panel could no longer dismiss arguments related to the procedural errors occurred in the previous instance based on the healing effect of the CAS. However, the new provision only gives the prerogative to the Panel to refuse evidence adduced for the first time before it (without justified grounds to do so), and does not relate to procedural steps that already took place in the previous instance.

At this point, it should be noted that, with regard to the production of evidence provided for in article R44.2 and R44.3, one should distinguish between written and oral evidence along the following lines. In some appeals against decisions rendered by the internal bodies of sports federations, the previous instance does not allow oral evidence but bases its decision merely on written submissions. In those cases, the CAS panel has no discretion to use Article R57 para. 3 and should imperatively admit new (oral) evidence because it was not possible

<sup>17</sup> Mavromati/ Pellaux, (fn. 7 above) p. 40.

<sup>18</sup> Judgment of the SFT, 4A\_386/2010, at 6.2.

<sup>19</sup> Rigozzi / Hasler (see fn. 15 above), n. 4, p. 1036.

<sup>20</sup> See inter alia CAS 94/129, USA shooting & Quigley v. International Shooting Union (UIT),

Award of 23 May 1995, para. 59. CAS 2006/A/1175, Edita Daniute v. International Dance Sport Federation, and CAS 2009/A/1920, FK Pobeda, Zabrcanec & Zdraveski v. UEFA, Award of 15 April 2010, para. 87.

for the parties to bring such evidence in the previous instance.

### **C. Future provision of Article 13.1 of the WADC and unrestricted scope of review for doping cases**

Article 13.1 of the future WADA Code 2015 (currently available in its 4.0 version) will very likely contain a provision that is different from the one of Article R57 para. 3 of the CAS Code in terms of review. According to the forthcoming Article 13.1 of the 4.0 version of the WADA Code 2015, the CAS' scope of appeal in doping cases has remained unrestricted, i.e. the new WADA Code has not inserted the modification of the 2013 version of Article R57 para. 3. Article 13.1.2 has the title "*CAS shall not defer to the findings being appealed*". Furthermore, Article 13.1.2 reads as follows: "*In making its decision, CAS need not give deference to the discretion exercised by the body whose decision is being appealed.*" The comment to this provision reiterates the *de novo* character of the CAS proceedings and repeats that "*prior proceedings do not limit the evidence or carry weight in the hearing before CAS*".

This means that Article R57 para. 3 CAS Code will not apply to cases conducted under the WADA Code, where CAS Panels will basically have no discretion in order to refuse evidence submitted for the first time before them based on Article R57 para. 3 CAS Code. This is so because the WADA Code must be considered as *lex specialis* and, specifically for cases falling under its scope, the scope of review provided under Article 13.1 WADA Code will supersede the general procedural provision of Article R57 para. 3 CAS Code.

### **D. Potential violation of Article 190 para. 2 of the Swiss Private International Law Act (PILA) if unjustified refusal to admit evidence?**

Irrespective of the discretion given to the panel by Article R57 para. 3 to refuse new evidence, CAS Panels should always act within the limits established by the Swiss PILA, which sets forth the grounds for a

motion to set aside arbitral awards before the SFT. The grounds for a successful appeal are exhaustively enumerated in Article 190 para. 2 PILA and comprise, *grosso modo*, a) the irregular constitution of the arbitral tribunal, b) the incorrect tribunal's decision on jurisdiction, c) the violation of the principles of *ne ultra petita* and *ne infra petita*, d) the violation of the parties' right to be heard and e) the violation of (procedural or substantial ) public policy. We will now examine whether – and to what extent – some of the aforementioned grounds could be put into question from the application of Article R57 para. 3 of the CAS Code.

The first three grounds and the fifth ground for appeal of Article 190 para. 2 PILA do not seem to be influenced by the newly inserted provision of Article R57 para. 3. More specifically, in terms of Article 190 para. 2 (b) PILA, an award may be annulled if "*the arbitral tribunal erroneously held that it had or did not have jurisdiction*". Although one could argue that the evidence mentioned in Article R57 para. 3 is not limited to evidence to substantiate the appeal but may also be evoked in order to justify the jurisdiction (or lack of jurisdiction) of the arbitral tribunal in a given case, it seems rather unlikely that such evidence could be relevant and could / should have been used and mentioned in the previous instance proceedings where the appeal to the CAS was not yet put into question.

Furthermore, there seem to be no implications with regard to the third ground for appeal to the SFT, according to which an award may be annulled "*if the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims*" (Article 190 para. 2 (c) PILA). It should be noted that the assessment of the principle *ne ultra/ infra petita* is made based on the requests for relief of the parties but is not extended to their legal arguments. This means that, the Panel has the possibility to make a different qualification to the facts of the case and rely on legal arguments even if there were not raised by

the parties.<sup>21</sup> Therefore, a CAS Panel is obliged to render a decision within the claims submitted to it and is not allowed to go beyond them (*ne ultra petita*) or below them (*ne infra petita*), irrespective of the Panel's right to refuse evidence under specific conditions based on Article R57 para. 3.

The same applies to the last ground for appeal to the SFT, and, in particular, the procedural public policy: this ground for appeal includes procedural guarantees like the right to a fair procedure, the principle of *res judicata*, the independence of experts appointed by the tribunal etc.<sup>22</sup> It is however not a violation of procedural public policy if the CAS Panel wrongly evaluated the evidence, it wrongly established the facts or it failed to apply a procedural provision, unless such provision guarantees the fairness of the proceedings.<sup>23</sup> Although it could be possible, in theory, to invoke a violation of procedural public policy if the panel denied evidence by application of Article R57 para. 3 CAS Code and thus deprived the parties from a fair trial and a full power of review (Article 6 ECHR and Article 29 Swiss Constitution), it would be extremely difficult to establish such violation based exclusively on Article R57 para. 3 CAS Code.

The fourth ground of appeal to the SFT is given "*if the equality of the parties or their right to be heard in an adversarial proceeding was not respected.*" As regards the parties' right to be heard, it must be noted that the CAS Panel is basically free to render its decision based on the principle of *iura novit curia*, i.e. irrespective of the arguments adduced by the parties, with the sole exception of the "*effet de surprise*" as it was described by the SFT in one of its judgments.<sup>24</sup> On the other side, if the Panel refuses newly submitted evidence without

justifying its decision to do so, such refusal would potentially constitute a violation of the party's right to be heard (to the extent that it could be prone to influence the outcome of the case) and would thus be inadmissible under Article 190 para. 2 (d) PILA.

#### IV. Article R57 para. 3 CAS Code and Article 317 Swiss CCP

Article 317 of the Swiss Code on Civil Procedure rules the admission of new facts and new evidence in appeal. Accordingly, they are only admissible provided they are: "*a) invoked without delay; and b) it was not possible, despite reasonable diligence, to invoke them in the proceedings before the court of first instance. 2) an amendment of the claim is only admissible provided that: a) the conditions pursuant to article 227 para. 1 are fulfilled; and b) in addition the amendment is based on new facts and means of evidence.*" While the rationale seems to be similar in both Article 317 CCP and Article R57 para. 3 CAS Code,<sup>25</sup> the two provisions are not comparable and one should not take Article 317 CCP in order to interpret Article R57 para. 3 CAS Code.

Already from the wording, it becomes clear that Article R57 para. 3 CAS Code is formulated in a different way than Article 317 CCP. While, in the former case, the Panel "*(...) has discretion to exclude evidence presented by the parties if (...)*", the latter leaves the judge with no discretion ("*new facts and new evidence are only admissible provided that...*") but to dismiss new evidence if the cumulative conditions enumerated in the provision are not fulfilled.

It is further clear that the CAS Code refers to arbitral proceedings, whereas the appeal proceedings foreseen under Article 308 ff.

<sup>21</sup> ATF 4A\_220/2007 at 7.2. See also Poudret/Besson, para. 807, p. 745.

<sup>22</sup> See 4P.143/2001, at 3a; 4P.98/2005 at 5.1; 4P.99/2000 at 3b. See further references in Von Segesser/Schramm, Swiss PILA, at Art. 190 n. 13 f., p. 960, in: Mistelis L. (ed.), Concise International Arbitration, Kluwer Law International, The Hague, 2010.

<sup>23</sup> Idem, p. 961.

<sup>24</sup> See the judgment of the SFT, 4A\_400/2008, judgment of 9 February 2009.

<sup>25</sup> i.e. economy of procedure, rendering parties responsible for evidence presented before the previous instance and assuming the consequences in cases where the parties act in a negligent (or abusive) way and fail to submit all existing evidence at the previous instance.

CCP are appeal proceedings before state courts.

Under the scheme of the CCP, it is evident that the party submitting new evidence bears the burden of proving that the conditions are fulfilled. However, how is the situation regulated under the scheme provided from the CAS Code?

Unlike Article 317 CC, Article R57 para. 3 refers merely to evidence (and therefore not the amendment of the claim nor the amendment of facts). The two cumulative conditions that the party invoking new evidence must fulfil is that such party must submit new evidence without delay and show that it was not possible to submit such evidence at the previous instance. The wording of the conditions of Article 317 CCP is similar to the one of Article R57 para. 3 CAS Code, yet one should not use Article 317 CCP in order to interpret Article R57 para. 3 CAS Code. This is so to the extent that the admission of new evidence under Article R57 CAS Code is the rule and the application of Article R57 para. 3 CAS Code the exception to this rule. What is more, the full review by the CAS Panel should only be limited (through the application of Article R57 para. 3 CAS Code) in exceptional circumstances of abusive or inappropriate conduct by the parties submitting new evidence.

#### V. CAS case law with respect to Article R57 para. 3 CAS Code

CAS 2013/A/3286-3294 was the first case in which a CAS Panel made use of its discretion to refuse evidence based on Article R57 para. 3 CAS Code.<sup>26</sup> The Sole Arbitrator referred to Article 317 CCP and applied it by analogy in order to define the procedure to follow for the evaluation of new evidence submitted by the parties and also in order to establish who bears the burden of proving the conditions

enumerated in article R57 para. 3.<sup>27</sup> The Sole Arbitrator considered that the burden of proof lied with the Appellant,<sup>28</sup> who had to explain why the evidence of the alleged payments was not submitted at the earlier hearings. The Sole Arbitrator made use of his discretion provided by Article R57 para. 3 CAS Code and dismissed the appellant's justification that the documents in question were not available at the time of the earlier hearings due to a pending tax inquiry because the appellant failed to specify why it was not possible to submit these documents during the previous proceedings.

In this case, the Sole Arbitrator noted that even if such evidence was admissible, they would have not been accepted in order to sustain the appeal.<sup>29</sup> In case, however, that the evidence refused was essential to substantiate the appeal, a refusal would have endangered the appellant's right to be heard.

#### VI. Concluding remarks: is there an inconsistency between the *de novo* review of Article R57 and the newly inserted provision of Article R57 para. 3?

The previous pages show that the full power of review is a well-established principle of the CAS appeal procedure: the full power of review is not only desirable but also necessary for a number of reasons, to the extent that the previous instance is not an independent arbitral tribunal but the internal body of a sports federation. The newly inserted third paragraph of Article R57 CAS Code offers CAS Panels the discretion to deny evidence, under specific circumstances.

Although the exact conditions for the use of Article R57 para. 3 CAS Code are not explicitly stipulated in the text of the CAS Code, the new limitations in the admission of new evidence should be interpreted in such a

<sup>26</sup> CAS 2013/A/3286-3294, SC FC Sportul Studentesc SA v. RFF & O. Omensian, award of 7 March 2014.

<sup>27</sup> See CAS 2013/A/3286-3294, (fn. 26 above), para. 66.

<sup>28</sup> As provided by Romanian Law on Social Dialogue No 62/2011.

<sup>29</sup> See CAS 2013/A/3286-3294 (fn. 26 above), para. 71.

way as not to circumvent the core principle of the Panel's full power of review.

It has been submitted that a further condition for the application of the new provision should be that the decision of the previous instance was rendered by an independent tribunal (and thus not the internal instances of a sports federations). However, this would limit excessively the scope of the provision, to the extent as to render its application *de facto* impossible.

Another solution would consist in that the CAS Panels reserve the application of this provision to exceptional circumstances and as a safeguard in order to avoid abusive or otherwise unacceptable conduct by one of the parties: the control of good faith should therefore be the key element prior to the application of Article R57 para. 3, and in this way the award will not risk violating Article 190 para. 2 (d) PILA. At a procedural level, and to the extent that the admission of new evidence before CAS (under Article R57 CAS Code) is the rule and the third paragraph of Article R57 is the exception to such rule, Article 317 CCP (and the burden of proof) does not seem to apply by analogy as to the conditions for its application. It would be preferable for CAS Panels to accept all evidence submitted by default, and in case of objections raised by the other party, it would be up to this party to establish that such evidence "*was available to them or could reasonably have been discovered by them before the challenged decision was rendered*".

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## Jurisprudence majeure\* Leading Cases

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

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

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**Arbitration CAS 2012/A/2844**  
**Gussev Vitali v. C.S. Fotbal Club Astra & RPFL**

7 June 2013\*

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**Football; Termination of a contract of employment; Reduction of salary as a disciplinary sanction imposed from a club on a player; Justification of a salary reduction as a disciplinary sanction imposed on a player; Termination of a contract with sporting just cause; Breach of contract with or without just cause; Compensation for breach of contract in the absence of a mechanism in the agreement; Calculation of interest in case of default;**

**Panel**

Mr Hendrik W. Kesler (Netherlands), Sole Arbitrator

**Facts**

This appeal was brought by Gussev Vitali (the “Player” or the “Appellant”), a football player from Estonia against S.C. Fotbal Club Astra (the “Club” or the “Respondent”), a football club from Giurgiu, Romania, currently playing in the First League Championship of the Romanian Professional Football League (the “RPFL”).

On 23 February 2010 the Club and the Player signed an employment agreement valid until 30 June 2013 (the “Agreement”). On 6 July 2010 a surgical intervention on the Player took place at the Orto Sport Medical Clinic in Bucharest, Romania. In agreement with the Club the Player went back to Estonia for recovery. This period ended on 28 January 2011.

On April 2011 the Player took part in the Club’s trainings of the First Respondent and at

the end of May he was on the bench during the matches against Unirea and Otelul Galati, teams of the first Professional League of Romania (the “League”). The League season 2010-2011 ended on 22 May 2011.

On June 2011, when the trainings for the new season started, the Player took part in the training session. However, before leaving for the training camp, the Club decided that the Player had to stay in Ploiesti and to train with the 3rd League Team.

On 1 June 2011 the parties opened proceedings before the legal bodies of the RFF and/or RPFL. The Club brought forward at first instance, two claims against the Appellant: one before the Romanian Professional Football League Disciplinary Committee (the “RPFL DC”) and another before the RPFL Dispute Resolution Chamber (the “RPFL DRC”).

The Club’s Decision to initially sanction the Player and to reduce his salary by 25 % was ratified by the RPFL DC. The RPFL DRC subsequently dismissed a counterclaim submitted by the Player and upheld the Club’s claim, declaring the termination of the Agreement with just cause (the “RPFL DRC Decision”). The Player appealed against the RPFL DC Decision and the RPFL DRC Decision, respectively on 21 and 28 December 2011 before the RPFL Appeal Committee (the “RPFL AC”). On its turn the Club also appealed against the RPFL DRC Decision (the RPFL AC Decisions nr. 79 and nr. 80 are the “Challenged Decisions”).

The RPFL AC issued the Challenged Decision nr. 79, upholding the Club’s appeal against the DRC of the PFL and dismissing the appeal lodged by the Player, compelling the Club to the payment of 3.699 EUR to the Player as outstanding financial rights and declaring that the contractual relations between the parties

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\* We draw your attention to the fact that the facts and the legal findings of this award have been summarized.

terminated starting with 26.10.2011. Furthermore, the RPFL AC rendered the Challenged Decision nr. 80 and dismissed the Player's appeal against the RPFL DC Decision, as unfounded.

On 28 June 2012 the Appellant filed a Statement of Appeal before the Court of Arbitration for Sport (the "CAS") against the Challenged Decisions.

A hearing was held on 4 February 2013 in Lausanne (the "Hearing").

### Reasons

1. The Sole Arbitrator found that, in line with CAS case law, it is not justifiable that a player who is recovering from injury in another country and then acts as substitute player during games can still be sanctioned with a 25% reduction of his salaries, due to an alleged sporting non-performance/low performance. Such a sanction is not acceptable and shall be considered unreasonable and not in line with the FIFA and CAS jurisprudence on disciplinary sanctions on players in case of sporting non-performance. In this regard, the principle of contractual stability must be respected by clubs and it shall not be dependent on the performance of a player. Therefore, the sanction on the Player for the 2010-2011 season was considered unreasonable and not in line with the FIFA and CAS jurisprudence on disciplinary sanctions on players in case of sporting non-performance.
2. According to the Sole Arbitrator, a player's low performance does not constitute a valid reason to terminate unilaterally an employment contract. In this respect, the lack of objective criteria when establishing a player's possible low performance and, hence, for the sake of the legal security cannot be endorsed and specially does not constitute a just cause to terminate an employment contract. This understanding is substantiated not only by the FIFA DRC jurisprudence, but specially the CAS case law.
3. The fact that a player's salary is considered as one of the highest in his Club is irrelevant for a subsequent disciplinary decision, since both parties drew up the agreement by free will and the Club knew that they had an expensive Player under contract. It is further irrelevant the mere fact that the Player did not play in the current championship.
4. It is well established jurisprudence of the CAS that the performance of players cannot be the reason for disciplinary sanctions unless misbehaviour of the player is proven. A report prepared by an employee of a club as the basis for a disciplinary sanction must of course meet very strict requirements regarding the circumstances and facts about any misconduct of a player. The Costel Lazar Report does not meet these requirements, so it cannot serve the purpose of disciplinary sanctions, particularly if one considers the period – one month at the maximum- the report refers to.
5. As a general rule, in case of a termination with just cause, there is no compensation due and in case the termination was without just cause compensation is due that can however be adjusted according to the specific circumstances on a case by case basis. It is well-established jurisprudence of the CAS that only a player can raise the grounds of sporting just cause to terminate an employment agreement, but even though he must provide substantial evidence that the following four requirements have been complied with: (i) that the player is an established professional; (ii) that he has played in less than 10% of the official

- matches in which his club was involved in the sporting season in question; (iii) the player's personal circumstances; and (iv) that he terminates his employment contract during the 15 days following the final official match in the season of the club with which he was registered.
6. According to CAS jurisprudence, it can be mentioned that the obligation to pay salaries towards players in a proper and timely manner has been long protected under the FIFA RSTP. The non-payment or late payment of remuneration by an employer does in principle - and particularly if repeated as in the present case - constitute "just cause" for termination of the contract. This is because the employer's payment obligation is his main obligation towards the employee. If, therefore, he fails to meet this obligation, the employee can, as a rule, no longer be expected to continue to be bound by the contract in future. Whether the employee falls into financial difficulty by reason of the late or non-payment, is irrelevant. The only relevant criteria are whether the breach of obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost.
  7. The Sole Arbitrator further referred to the jurisprudence of the Swiss Federal Tribunal, according to which various criteria play a determining role for the calculation of the compensation for a breach of contract if the agreement signed between the parties does not provide a mechanism for calculating the compensation for a breach of contract: the nature and duration of the contract, the gravity of the fault and the contractual violation, the economic situation of the parties as well as the potential independency between the parties.
  8. If there is no contractually agreed interest rate in case of default, according to Art. 104 of the Swiss Code of Obligations a 5% interest rate can be lawfully added to the original monetary obligation, starting from the notification of the decisions of the decision appealed to the CAS.

### Decision

The Sole Arbitrator partially upheld the statement of appeal filed on 28 June 2012 by Mr. Gussev Vitali, set aside the Decisions nr. 79 and 80 of 29 March 2012 and ordered the Club to pay to the Player the amount of EUR 90,000 with interest at 5% per annum as from 26 June 2012.

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**Arbitration CAS 2012/A/2852**  
**S.C.S Fotbal Club CFR 1907 Cluj S.A. &**  
**Manuel Ferreira de Sousa Ricardo &**  
**Mario Jorge Quintas Felgueiras v.**  
**Romanian Football Federation (FRF)**  
28 June 2013\*

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**Football; Rule of a National Association regarding players trained at national level (“home-grown” players); Interpretation of an arbitration clause; Application of the principle of free movement of workers to professional players; Nationality clauses; Compatibility of a rule with EU law;**

**Panel**

Mr Chris Georghiadis (Cyprus), President  
Mr Bernard Hanotiau (Belgium)  
Mr Fabio Iudica (Italy)

**Facts**

The appeal is brought by the Portuguese players Manuel Ferreira De Sousa Ricardo and Mario Jorge Quintas Felgueiras (hereinafter “the Players”), as well as the Romanian Liga 1 club S.C.S. Fotbal Club CFR 1907 Cluj S.A. (hereinafter also referred to as “the Club” or, together with the Players, the “Appellants”) against the decision of the Executive Committee of the Romanian Football Federation (hereinafter “FRF”) to increase the minimum number of “*players trained at national level*” who must be registered on the referee’s report of each official match. According to the applicable regulations (as translated into English by the Appellants), “*Players that are trained nationally means players that, irrespective of their citizenship, have been registered to and have participated in competitions for a club in Romania for*

*a minimum of 3 years (consecutive or not) between the ages of 15 and 21. The 3 year stage is adequately reduced for players under 18*”. The Appellants claim that the said decision is in breach of the principle of the freedom of movement for workers as laid down in European Union (hereinafter “EU”) and Romanian laws and regulations.

During the last two football seasons, the Club signed employment contracts with thirteen players, who are not of Romanian nationality but have the European citizenship (hereinafter “Community players”). At the present time, twenty-one non-Romanian players are registered with the Club. Among them, sixteen are Community players.

The 2011 edition of the FRF Regulations on the organisation of the football activity (“Regulament de organizare a activitatii fotbalistice” – hereinafter “ROAF”) provides, so far as material, as follows (as translated into English by the Appellants): “*The teams have the right to register a maximum of 18 on the match sheet, out of which seven are substitutes*” (Article 46.5), and “*(...) a Liga 1 and women’s football teams have the right to use a maximum of 5 non-EU players at the same time on the pitch and have the obligation to register on the match sheet a minimum of 5 players that are trained nationally for each official match. (...) Players that are trained nationally means players that, irrespective of their citizenship, have been registered to and have participated in competitions for a club in Romania for a minimum of 3 years (consecutive or not) between the ages of 15 and 21. The 3 year stage is adequately reduced for players under 18*” (Article 46.7.1).

On 18 June 2012, the FRF Executive Committee decided to amend several provisions of the ROAF, including its article 46.7.1, which reads as follows in its present

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\* We draw your attention to the fact that the facts and the legal findings of this award have been summarized.

form: “a) for the 2012/2013 and 2013/2014 competition years, have the right to use a 5 extra-community players concurrently on the field and have the obligation to register in the referee’s report of each official match, a minimum of 5 players trained at national level; b) for the 2014/2015 competition year, have the right to use a 3 extra-community players concurrently on the field and have the obligation to register in the referee’s report of each official match a minimum of 6 players trained at national level; c) starting with the 2015/2016 competition year, have the right to use a 2 extra-community players concurrently on the field and have the obligation to register in the referee’s report of each official match, a minimum of 8 players trained at national level”. The FRF published the decision of its Executive Committee on its website on 18 June 2012 (hereinafter the “Challenged Decision”).

On 9 July 2012, the Appellants filed a joint statement of appeal with the Court of Arbitration for Sport (hereinafter “CAS”). On 27 July 2012, within the granted time extension, the Appellants lodged their appeal brief.

On 27 August 2012 and within the granted time extension, the FRF filed its answer.

A hearing was held on 8 January 2013 at the CAS premises in Lausanne, Switzerland. The Appellants were represented by their attorneys, the FRF was not present or represented.

### Reasons

1. In their statement of appeal and in their appeal brief, the Appellants submitted that the present dispute was subject to the jurisdiction of the CAS, based on the terms of article 34.9 of the FRF Statutes:

*“Decisions of the Executive Committee that are contrary to the law or to the provisions comprised in the statutes and regulations of [FRF] may be challenged*

*before courts of law by any members who did not participate in the meeting of the Executive Committee or who voted against and asked that this is recorded on the records of proceedings of the meeting in accordance to legal provisions in force.*

*Any dispute regarding the Decisions of the Executive Committee will be submitted first of all, mandatorily, to an arbitration procedure before the Court of Arbitration for Sport”.*

In its answer, the FRF alleged that only the “members of the Executive Committee” and not any “members” of the FRF were able to avail themselves of this provision.

The Panel held that, according to the Swiss Federal Tribunal, arbitration clause must be interpreted according to the general rules of interpretation of contract. The statements of the parties are to be interpreted as they could and should be understood on the basis of their wording and the context as well as under the overall circumstances. In particular, the arbitration clause must be interpreted on the basis of the principle of good faith. The requirements of good faith tend to give the preference to a more objective approach. The emphasis is not so much on what a party may have meant but on how a reasonable man would have understood his declaration.

In view of these principles of interpretation, the Panel had no difficulties to come to the conclusion The structure as well as the content of article 34.9, which is divided into two paragraphs, indicates that the rule maker’s intention was to differentiate between the regime applicable to the situation referred to in paragraph 1 and the one applicable to the situation referred to in paragraph 2. In other

words, the two paragraphs do not have the same object and are not mutually interdependent as otherwise, the broad terms of article 34.9 par. 2 would make article 34.9 par. 1 meaningless. Hence, the two paragraphs should be read alone. Under such circumstances, the fact that only members of the Executive Committee can make use of article 34.9 par. 1 of the FRF Statutes is of no relevance with regard to the actual standing to bring a dispute before the CAS based on the terms of article 34.9 par. 2 of the FRF Statutes.

The text of article 34.9 par. 2 of the FRF Statutes is unequivocal and, in the absence of any argument to the contrary, the Panel sees no reason why it should not be given its plain and ordinary meaning. The terms used in this provision (“*first of all*” + “*mandatorily*”) suggest strongly that the FRF Statutes are setting up the CAS as the first instance for ruling on “*any*” dispute brought against a decision of the Executive Committee. The fact that “*any*” dispute must (“*mandatorily*”) be resolved through arbitration “*first of all*” implies that CAS has jurisdiction to rule on disputes raised by any interested party, whether it is a member of the Executive Committee or not.

In brief, the members of the Panel unanimously agree that article 34.9 par. 2 of the FRF Statutes must be seen as a *lex specialis* which takes precedence over the general and possibly conflicting provisions laid down elsewhere, in particular in article 58 of the FRF Statutes. Although it is quite strange that article 34.9 provides that the decisions of the Executive Committee shall be appealed before the ordinary courts by the EC Members and before the CAS by any member of the FRF, the Panel finds that, with the exception of the situation

expressly provided for under article 34.9 par. 1, the CAS has the exclusive jurisdiction to hear disputes (regarding decisions of the Executive Committee) submitted before it by any member of the FRF. There is no room for any other interpretation.

2. The main issue to be resolved by the Panel was whether the Challenged Decision was compatible with the principle of freedom of movement as provided by EU and Romanian laws. The FRF had suggested that it enjoys autonomy to self regulate football and, consequently, the extent of the applicability to its players of the principle of free movement for workers. The Panel found that the EU Court of Justice had long established that professional football players are workers who have a personal right not to be subject to discriminatory or restrictive rules which prevents them from leaving their country to pursue gainful employment in other Member States. Although sporting federations still hold regulatory authority to determine regulations’ substantive principles concerning player movement rights, they too are subject to and must respect EU law and principles. In view of these findings, the submissions of the FRF regarding its autonomy as a governing body could not be opposed to the Appellants, which were entitled to rely on the provisions and principles stemming from EU law and to bring their case before the CAS for non-compliance with obligations referred to therein.
3. With regard to, in particular, home-grown players’ rules and nationality discrimination, the Panel recalled that the EU Court of Justice had held that

rules laid down by sporting associations, under which football clubs may field only a limited number of professional players who are nationals of other Member States, constituted an obstacle to freedom of movement for workers, prohibited by EU law. However, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players had to be accepted as legitimate. It was therefore left to the self-regulatory autonomy of the sporting associations to elaborate rules or practices at club level that are compatible with the requirements of EU law. Both the FIFA and the UEFA had made use of this opportunity to amend their respective regulations, however with different results. While the FIFA “6+5” rule – according to which each club must, at the beginning of the match, field at least 6 players who are eligible to play for the national team of the country where the club is located – had been rejected by the EU Commission and the EU Parliament as it was considered to be based on direct discrimination on the grounds of nationality, the UEFA “home-grown players” rule had received support by both institutions.

In the case at hand, the FRF was submitting that the Challenged Decision did nothing more than to implement at national level the concept of “home-grown players” developed in the UEFA regulations. The Panel acknowledged that the FRF home-grown players’ rule seemed not to be directly discriminatory as it did not by its terms impose a restriction on the employment of non-nationals. Instead, employment opportunities for non-nationals – when compared with the employment opportunities for nationals – might be

indirectly reduced because the training requirements were more likely to be fulfilled by nationals than non-nationals. For the Panel, however, by comparison with the FIFA “6 + 5” rule and the UEFA “home-grown players” rule, the FRF rule required a club to actually field a requisite number of locally trained/eligible players while the UEFA rule merely required that these locally trained players be retained in the club’s playing squad. With the substitutes, the number of locally trained players under the FRF rule could even exceed the number of eligible players under the FIFA rule. Likewise, the opportunity for EU players to be fielded might be reduced if non-EU players were registered in the match sheet. Therefore, the Panel came to the conclusion that the FRF rule went far beyond the various limits set by the UEFA home-grown players’ rule. Under such circumstances, the FRF could not reasonably contend that the Challenged Decision did nothing more than implement at national level the concept developed by the UEFA.

4. The last question was then to address whether there were sufficient grounds to objectively justify the FRF rule. The Panel recalled that the assessment whether a certain sporting rule was compatible with EU law required a case-by-case analysis of the circumstances of each individual situation. The burden of demonstrating that its rule is acceptable obviously fell on the sporting associations which elaborated it, which had to establish that its rule was either expressly provided for in EU law or met objective justifications. But even so, application of this rule had to be such as to ensure achievement of the aim in question and not go beyond what was

necessary for that purpose. Finally, there had to be no other measures available which could be less discriminating.

For the Panel, considering how hesitant and cautious the EU Commission was about the UEFA home-grown players' rule and in view of its reservations, any measure going above and further would have needed a particularly convincing objective justification. *In casu*, the FRF had confined itself to extremely general considerations and in particular it had failed to give any justification as to why the Challenged Decision had to be considered as proportionate and as a suitable means, which did not go beyond what was necessary, even though it exceeded UEFA home-grown players' rule. Under such circumstances, there were no grounds to consider that the discrimination resulting from the Challenged Decision was compatible with articles 18 and 45 TFEU, with the various provisions of the Regulation (EU) No 492/2011 as well as with article 5 of the Romanian labour law.

### **Decision**

On these grounds, the Panel upheld the joint appeal filed by S.C.S. Fotbal Club CFR 1907 Cluj S.A., Manuel Ferreira De Sousa Ricardo and Mario Jorge Quintas Felgueiras, set aside the decision of the FRF Executive Committee so far as it related to article 46.7.1 of the ROAF and annulled article 46.7.1 of the ROAF.

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Arbitration CAS 2012/A/2874  
Grzegorz Rasiak v. AEL Limassol  
31 May 2013\*

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**Football; Termination of the employment contract without just cause; Testimony of a party or a representative of a party; Scope of the appeal proceedings; Specificity of sport regarding the obligation to mitigate the damage;**

**Panel**

Mr Efraim Barak (Israel), President  
Mr Mark Hovell (England)  
Mr Chris Georghiades (Cyprus)

**Facts**

On 20 August 2010, the Polish international Grzegorz Rasiak and the Club AEL Limassol signed an employment contract for a period of two football seasons, *i.e.* until 31 May 2012. The Player was entitled to receive net as salary the total amount of EUR 150,000.00 in 10 monthly instalments of EUR 15,000.00 for each season. On 21 August 2010, the parties signed a supplementary agreement for the same period of time. The Player was entitled to receive net as salary the total amount of EUR 125,000.00 in 10 monthly instalments of EUR 12,500.00 for each season. In addition to the salary, he was also entitled to receive various benefits and bonuses for sports achievements. Both agreements (the “Employment Contracts”) contained clauses according to which “*the [Club] has the right and shall pay all the [Player’s] emoluments in the manner specified herein with a grace period of 90 (ninety) days*” and “*The [Club] shall be obliged to deduct*

*and pay on behalf of the [Player] his income Tax Obligation and Social Insurance Contributions*”.

On 20 April 2011, the Club terminated the Employment Contracts with immediate effect and a fine of EUR 3,000.00 was imposed on the Player, allegedly “*(...) because between 20-31/03/2011 though he was asked repeatedly by the Committee of the Club to visit the offices and sign some necessary and very important papers according to UEFA’s demands, he refused repeatedly to do so, without any excuse*”. Furthermore, the Club stated that “*he answered in unprofessionally and inappropriate way to his Coach and to the person of the Committee that asked from him repeatedly to visit the offices of the Club*”. On 2 May 2011, the Player notified the Club of his disagreement with the termination by the Club. On 6 May 2011, the representatives of the Player informed the Club that the Player was committed to continue performance of the Employment Contracts. On 22 June and 4 July 2011, the representatives of the Player requested the Club to inform the Player of the schedule of preparations for the following season and insisted on performance of the duties under the Employment Contracts. The communications contained a warning to the Club that if it did not adhere to the obligations under the Employment Contracts, such behaviour would be assessed as a unilateral termination of contract without just cause. This correspondence remained unanswered by the Club.

On 21 July 2011, the Player lodged a claim against the Club in front of FIFA, maintaining that the Club terminated the Employment Contracts without just cause. On 24 November 2011, the FIFA DRC issued a preliminary decision in the dispute between the parties, stating that: “*prima facie, it appears to be plausible to consider that the termination of the*

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\* We draw your attention to the fact that the facts and the legal findings of this award have been summarized.

[Employment Contracts] *between the [Player] and the [Club] occurred without just cause*". On 25 November 2011, upon receiving the approval of FIFA for the registration, assumingly due to the content of the preliminary decision of the FIFA DRC, the Player and the Polish club of Jagiellonia Bialystok entered into an employment contract valid as of the date of signing until 30 June 2013. The employment contract determined, *inter alia*, that the Player would be entitled to a monthly salary of PLN 28,500.00 net for the 2011/2012 season and of PLN 36,000.00 net for the 2012/2013 season. On 1 March 2012, the FIFA DRC rendered its final decision (the "Appealed Decision") in which it partially accepted the claim of the Player and ordered the Club to pay to the Player outstanding remuneration in the amount of EUR 61,000.00 net and compensation for breach of contract amounting to EUR 145,000.00.

On 30 July 2012, the Player filed a statement of appeal with the CAS and on 9 August 2012, filed its appeal brief. The Appellant challenged the Appealed Decision of the FIFA DRC, requesting that the calculation of the compensation for breach of contract be calculated in accordance with the principles of Article 17 of the FIFA Regulations on the Status and Transfer of Players (RSTP), and additionally Swiss law. On 7 September 2012, the Respondent filed its answer, whereby it requested the CAS to reject the Appellant's Appeal and to decide that the unilateral termination of the Employment Contracts was with just cause. On 22 February 2013, the Respondent informed that Mr Michalis Kafkalias, General Manager of the Club, would not be attending the hearing but would be available to be heard by teleconference. On 25 February 2013, the Appellant objected to the Respondent's intention to hear Mr Michalis Kafkalias, as Mr Kafkalias had not been named as a witness for Respondent in the written

submissions as required by Article R55 of the CAS Code.

A hearing was held on 27 February 2013 in Lausanne, Switzerland.

### Reasons

1. During the FIFA proceedings, the Club argued that the FIFA DRC was not competent to deal with the present case, as the Club allegedly had lodged a claim against the Player in front of the Limassol District Court regarding the termination of the Employment Contracts and compensation, before the FIFA proceedings commenced. The Club also argued that it had just cause to unilaterally terminate the Employment Contracts with the Player. As FIFA found itself competent to deal with this dispute and decided that the Club had no just cause to prematurely unilaterally terminate the Employment Contracts with the Player and since the Club did not file an independent appeal with CAS against the Appealed Decision, the findings and decisions of the FIFA DRC regarding these two issues are therefore final and binding and cannot be discussed in the present appeal proceedings.
2. After deliberating about the parties' comments on its preliminary understanding that Mr Kafkalias was not a witness in the sense of Article R55 of the CAS Code, but a party as he was the General Manager of the Club at the time the contractual relationship between the parties was terminated, the Panel decided to allow the testimony of Mr Kafkalias. The Panel found that Article R55 of the CAS Code specifically refers only to witnesses and experts and not to parties and thus makes a clear distinction

between them. Consequently, a party or a representative of a party is, strictly speaking, not required to provide a statement of its/his expected testimony. However, the testimony of a party in any case may not exceed the scope of the written submissions and has to be restricted to what has been stated before, as stipulated in Article R56 of the CAS Code.

3. At the outset of the hearing, the Panel drew the attention of the parties to the scope of the appeal proceedings. The Panel informed the parties that it understood from the file that the Player's requests for relief in front of CAS are wider than his requests for relief in front of the FIFA DRC. The Player argued that the claim in front of FIFA was filed in July 2011 and that this claim had to be lodged in order for the Player to be able to be registered with a new club. At that time the Player, obviously, could not see into the future, it was hard to predict that the Club would win the Cypriot championship in the 2011/2012 season. On the other hand, the Club sustained that the Player does not have the right to claim for more compensation than he claimed before the FIFA DRC.

After considering the arguments of the parties, the Panel found that in reviewing a case in full, a panel cannot go beyond the scope of the previous litigation. It is limited to the issues arising from the challenged decision. Although it is true that claims maintained in a statement of appeal may be amended in an appeal brief, such amended claims may however not go beyond the scope and the amount of the previous litigation that resulted in the appealed decision. Maintaining any other opinion will not only be against the basic principles of the scope of an appeal, but will blur the clear distinction

that should be strictly kept between appeal arbitrations and ordinary arbitrations when such an ordinary arbitration clause exists.

Nevertheless, in an appeal in which the case is heard *de novo* one exception to this basic principle may exist when a party in the previous proceedings claimed amounts that he was entitled to receive from the other party in the framework of contractual or other relations, however such entitlement in full, or part of it, is conditional upon the actual materialization of a certain clear and undisputed condition (such as, in a football case, winning the championship or the Cup etc.) and the condition was indeed fulfilled while the previous proceedings were pending and the fulfilment of the condition itself (as opposed to the entitlement to receive the payment because of the materialization of the condition) is not disputed. This is even more so when in the previous proceedings a lump sum amount is claimed in respect of compensation for the termination of the agreement without just cause. In such cases, this amount, that was conditional upon the materialization of a condition, may be considered within the compensation for the termination of the contract when the materialization of the condition was not disputed by the other party.

In view of the above, the Panel found that a CAS panel is in principle limited to the scope of the previous litigation. Therefore, new claims advanced in appeal, hitherto not claimed in the previous litigation, are in principle inadmissible. However, claims that could, for legitimate reasons, not have been advanced in the previous litigation, but were likely to have been claimed in the absence of such legitimate reasons at that time, do fall under the *de novo*

competence of CAS panels and should hence be considered as admissible.

4. The Player was of the opinion that, in case of unilateral breach of contract without just cause by a club, the player is entitled to receive all the amounts which would have been payable if the contract would have been fulfilled. The Panel adhered to the Player's position in that the effects of the principle of *pacta sunt servanda* do not cease upon a party unilaterally terminating a contract. However, it was not convinced that this should lead to the conclusion that no distinction between the salaries outstanding at the time of the breach and the amounts payable thereafter should be made. On the contrary, it confirmed the distinction made by the FIFA DRC and found that when the termination of a contract without just cause is established, the remuneration that should have been paid until the termination date is due and should be paid, unless specific circumstances arise. However, and unless the parties have agreed on a legitimate liquidated compensation, when calculating the compensation for the breach of contract this compensation must compensate for the damage caused by the breach. This calculation, even in the case of labour relations, will mainly consider the residual amounts of the salaries for the original period of the contract and may be affected by other facts and circumstances. Therefore, for the Panel, the above-mentioned distinction is indeed important.
5. As regards the calculation of compensation in accordance with Article 17 RSTP, the Panel found that the legal framework set out in case CAS 2008/A/1519-1520 and the principle of

positive interest were applicable in the present case. Therefore, it decided to assess the Player's objective damages one by one, before applying its discretion in adjusting the total amount pursuant to the "specificity of sport".

The Panel found that the criterion of specificity of sport shall be used by a panel to verify that the solution reached is just and fair not only under a strict civil (or common) law point of view, but also taking into due consideration the specific nature and needs of the football world (and of parties being stakeholders in such world) and reaching therefore a decision which can be recognised as being an appropriate evaluation of the interests at stake, and does so fit in the landscape of international football. For the Panel, the principle that a party suffering from a breach of contract has a general obligation to mitigate his damages goes two ways. On the one hand, the mitigated amount shall be deducted from the amount used as the basis to calculate the compensation due. However, on the other hand, the fact that the party suffering from the breach was able to mitigate his damages is a fact that should be considered to the benefit of the party suffering from the breach in light of the "specificity of sport".

In the present case, the Panel found that there were indeed several aggravating circumstances in the termination of the Employment Contracts without just cause by the Club. The Panel noted that the Employment Contracts were terminated during the protected period, that the breach occurred in the middle of the season, and that the breach had indirect consequences for the Player's family. It also took into account the general difficulty of players to find a new club if they are involved in a dispute regarding a unilateral breach of contract,

the fact that the Player's Agent had come to Cyprus to try and find an amicable solution with the Club, that during the hearing the General Manager of Club admitted that "*the Club unilaterally terminated too many employment contracts with players of the Club at the end of the 2010/2011 season*", and that the Club in fact dragged the Player into filing a claim with FIFA by terminating the Employment Contracts without just cause.

compensation equal to three months' salary, *i.e.* EUR 82,500.00 (3 x EUR 27,500.00).

### Decision

As regards outstanding payments at the time of the breach, the Panel found that the Player was entitled to (i) outstanding salaries in the amount of EUR 70,833.33, (ii) outstanding bonuses in the amount of EUR 8,500.00 and outstanding benefits (housing allowance) in the amount of EUR 2,500.00, therefore totaling EUR 81,833.33.

Summing up all the individual claims of the Player, the Panel found that the Player had substantiated the following objective damages due to the unilateral termination of the Employment Contracts without just cause by the Club and had to be compensated as follows: (i) the loss of salaries under the remaining term of the Employment Contracts (EUR 273,615.69), (ii) points bonuses over the 2011/2012 season (EUR 8,500.00) and (iii) bonus for winning the Cypriot championship in the 2011/2012 season (EUR 100,000.00). Hence, the Panel found that the Club, in principle, had to reimburse to the Player an additional amount of compensation of EUR 382,115.69 for the damages incurred by him due to the breach of the Employment Contracts by the Club.

In light of the above-mentioned aggravating circumstances and pursuant to the "specificity of sport", the Panel deemed it appropriate to award the Player an additional amount of

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**Arbitration CAS 2012/A/2912**  
**Koji Murofushi & Japanese Olympic**  
**Committee (JOC) v. International**  
**Olympic Committee (IOC)**  
11 June 2013\*

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**Athletics; Election relating to the IOC Athletes' Commission; Withdrawal of a candidate by the IOC Executive Board; De novo hearing; Legal standards applicable to an administrative decision taken by a sporting body; Breach of the Rules of Conduct Applicable to Campaigns for Election to the IOC Athlete's Commission (RoC); Breach attributed to the athlete; Proportionality of the sanction;\***

**Panel**

Prof. Ulrich Haas (Germany), President  
Mr Jeffrey G. Benz (USA)  
Mr Hans Nater (Switzerland)

**Facts**

On 19 May 2011, the IOC (the Respondent) sent a letter to all NOCs informing them - *inter alia* - of the election relating to the IOC Athletes' Commission to be held during the XXX Olympiad, London 2012. According thereto the Election would be held in accordance with paragraph 1 of the Bye-law to Rule 21 of the Olympic Charter (the "OC"). In the letter, the IOC also made reference to the "Regulations relating to the IOC Athletes' Commission" and their Annexes (the "Regulations"). In accordance with Article 3.4.4 of the Regulations, the campaigning for the Election is subject to the "Rules of Conduct Applicable to Campaigns for Election

to the IOC Athletes' Commission" (the "RoC").

On 31 August 2011 the National Olympic Committee for Japan (JOC) nominated Mr Murofushi as its candidate to stand in the Election. Pursuant to Article 3.4.2.b. of the Regulations, Mr Murofushi, as well as the President of the JOC and the Chairperson of the JOC's Athletes Commission, signed a copy of the RoC, which was attached to the Candidature Proposal Form transmitted by the JOC to the IOC, thereby recognizing and accepting the application of said rules.

After several incidents whereby the Athlete made use of Voting Instructions, distributed Phone Wipe and used an iPad in the Dining Hall to promote his candidature, on 11 August 2012, the IOC Executive Board decided to withdraw Mr. Murofushi's candidature for the Commission.

On 3 September 2012, Koji Murofushi and the JOC (the Appellants) filed their Statement of Appeal with the Court of Arbitration for Sports (CAS) to challenge the IOC Executive Board decision.

A hearing was held on 10 and 11 April 2013 at the Château de Bèthusy, Lausanne, Switzerland.

**Reasons**

1. The Appellants submitted that a Panel cannot heal procedural mistakes of the first instance by claiming to act *de novo* and at the same interfere with the decision of the previous instance only where the measure of the sanction imposed by a disciplinary body in the exercise of its discretion allowed by the

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\* We draw your attention to the fact that the facts and the legal findings of this award have been summarized.

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relevant rules is “evidently and grossly disproportionate”. However, the Panel considered that it can modify a prior decision - based on the first sentence of Art. R57 of the Code – if it finds that the latter is “erroneous”. The Panel was comforted in its view by the jurisprudence. The right to a *de novo* review, and the *de novo* review undertaken by a CAS Panel, pursuant to Art. R57 of the CAS Code thus cures any issues arising from any perceived prior procedural due process lapses.

2. As regards the nature of the decision taken by the IOC Executive Board to withdraw the athlete’s candidature, the Panel found that it should be qualified a disciplinary decision as the IOC has based its disciplinary measure on sec. 6 lit. c RoC which provides for sanctions. According to this provision the candidature can be “withdrawn” under certain conditions. Logically, a withdrawal of the candidature is only possible where the addressee of this measure is still a “candidate”. It follows from sec. 3.4.3 of the Regulations relating to the IOC Athletes’ Commission that the “election process” is only terminated once the results of the voting are announced. Where the withdrawal of a candidature by the IOC Executive Board (EB) takes place before the election process is terminated, the Athlete is still a “candidate”.
3. Contrary to the Appellants’ allegation, the Panel found that the Executive Board was not prevented from looking at all three incidents when issuing its sanction i.e. the presence of voting instructions, the distribution of the Phone Wipes and the fact that the athlete was allegedly campaigning in the Dining Area. Recalling that Swiss law does not

attribute *res judicata* effects to administrative decisions by organs of sports associations which necessarily lack the adversarial nature of a legal procedure and decision by a judicial body, the Panel rejected this argument. Furthermore, the Panel held that the prohibition of double jeopardy did not prevent the Executive Board from taking the incident related to the Voting Instructions into account in making its decision since no sanction was issued but rather an order to stop further distribution of the Voting Instructions enacted by an IOC official. The Panel considered that the distribution of the Voting Instructions constituted a breach of the RoC as they were not solely meant to explain the voting process to the Japanese athletes, but were also intended to promote the Athlete’s candidature. The Phone Wipe constituted a gift within the meaning of the RoC, thus, a breach of the RoC. The Panel also underlined that the RoC makes it clear that “*no form of promotion may be undertaken*” in the restricted areas. The related broad interpretation of the term “promotion” finds support in the wording of the RoC as well as in CAS jurisprudence. Campaigning is any act with the help of which a person is trying to attract attention from the voters. The rule, thus, makes it clear that not only the inducement to vote for a particular candidate, but also the promotion of the election process in the dining area as such constitutes “promotion of the candidature”.

4. According to the Appellants, the RoC do not contain a specific rule according to which a breach committed by a NOC can be attributed to a candidate. However, the Panel found that the purpose of the Candidacy Agreement

was to cover the entire election process from the time of the acceptance of the candidature by the IOC until the publishing of the election results. The details of the election process were therefore a kind of “work in progress”. Consequently, the contents of the Candidacy Agreement should be interpreted not only in light of the RoC, but also in light of the information letters issued by the IOC and the discussions held at the (information) meetings for the candidates the purpose of which was to provide the latter (as well as the NOCs) with additional information, clarifications and instructions concerning the election process. In this respect, the letters made rather clear that the promotion of a candidate by a NOC constituted a breach of the RoC attributable to the candidate that may lead to the disqualification of the candidate. The Panel considered that there is no room to apply the principle of *contra proferentem* when interpreting the contents of the Candidacy Agreement. Thus, the Athlete could not only be made accountable for breaches committed by him, but also for breaches committed by his NOC.

5. Contrary to the Athlete’s submissions, the Panel was not convinced on a balance of probabilities that the Athlete was led to believe that his behaviour related to the distribution of the Phone Wipes and his activities were in

conformity with the RoC. The Panel found that the Athlete couldn’t assign the blame for his breach of the rules to the IOC. The Athlete was responsible for a series of breaches. One of them must be qualified as a serious breach i.e. the distribution of the Voting Instructions. Furthermore, the Athlete committed another (less serious) breach after having been warned and advised that he had to comply with the rules of conduct contained in the RoC i.e. the distribution of the Phone Wipes and the campaigning in the dining hall. In view of all of the above, the sanction issued by the EB – the withdrawal of the candidate- is proportionate and, thus “correct”.

### Decision

The Panel observed that the Executive Board based its Decision to withdraw the Appellant’s candidature on the presence of the Voting Instruction, the distribution of the Phone Wipes and on the fact that the Athlete allegedly was “campaigning” in the Dining Area on 7 August 2012. The Panel considered that the Athlete was responsible for a series of breaches of the RoC. The Panel found that the sanction issued by the EB – the withdrawal of the candidate- was proportionate and, thus “correct”. Consequently, the Panel dismissed the appeal and confirmed the decision taken by the Executive Board of the International Olympic Committee on 11 August 2012.

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**Arbitration CAS 2012/A/2919**  
**FC Seoul v. Newcastle Jets FC**  
24 September 2013\*

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**Football; CAS jurisdiction; Interruption of a limitation period; Training compensation; Standing to be sued;**

**Panel**

Mr Efraim Barak (Israel), Sole arbitrator

**Facts**

On 28 February 2003 Mr Jin Hyung Song, a player of Korean nationality was registered as a professional with FC Seoul (the “Appellant”), a football club registered with the Korea Football Association.

On 1 February 2008, the Korean Football Association issued the International Transfer Certificate (ITC) of the player in favor of Newcastle Jets (the “Respondent”), a football club registered with the Football Federation of Australia.

On 19 November 2008, the Appellant requested from the Respondent training compensation for the player. On 18 June 2009, the Respondent undertook that the training compensation amount will be paid no later than 18 December 2009.

On 30 March 2010, the Appellant filed a claim with FIFA in the absence of payment made by the Respondent.

On 26 April 2012, the FIFA DRC declared the Appellant’s claim inadmissible as being time-barred.

On 6 September 2012, the Appellant filed a statement of appeal with the Court of Arbitration for Sports (“CAS”). The Sole

Arbitrator requested the assistance of the Football Federation Australian on the issue of ownership of clubs in Australia following the Respondent’s argument that as the new owner of Newcastle Jets, it was not liable for the amounts owed by the old owner of Newcastle Jets which was the party before FIFA.

A Hearing was held on 12 August 2013 at the CAS Shanghai Alternative Hearing Centre.

**Reasons**

1. The Respondent, presenting itself as the New Club, objected to the jurisdiction of CAS, because in its opinion the Appellant should have filed a claim against the Old Club instead of against the New Club. However, the Panel considered that in the absence of any proof to the contrary, it must be assumed that the Appellant in good faith lodged an appeal against “Newcastle Jets FC” without any further specification, as this was the only name which appeared on the letterhead of the Respondent in its correspondence with the Appellant in respect of the matter at stake. The Panel held that the jurisdiction of CAS derived from the fact that an appeal was lodged against a final decision passed by one of FIFA’s legal bodies against the entity which was a party to the proceedings at FIFA. However, the standing to be sued

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\* We draw your attention to the fact that the facts and the legal findings of this award have been summarized.

of the Respondent should be adjudicated together with the merits of the case.

2. Whereas on the one hand FC Seoul argued, with reference to article 135(1) of the Swiss Code of Obligations, that the acknowledgement of Newcastle Jets of its debt towards FC Seoul is a ground for interruption of the two-year prescription and that consequently, a new limitation period commenced as of the date of the interruption pursuant to article 137 of the Swiss Civil Code, on the other hand Newcastle Jets alleged that there are no grounds to rely on Swiss law. The Panel considered that in principle, subsidiary applicable Swiss law does not supersede or supplant all aspects of the regulations of FIFA. With respect to the limitation period of two years set out in article 25(5) of the FIFA Regulation, there is no provision providing for the consequences of a possible amicable agreement between parties to postpone the due date for payment of certain amounts. There is also no provision providing for the possible interruption of the prescription period or a provision specifically determining that the limitation period of two years can under no circumstances be interrupted. The Panel held that in this regards, where the FIFA Regulations contain a *lacuna*, or at least an ambiguity, in the spirit of good relations that should be encouraged in the world of sport, it must be possible for a limitation period to be interrupted in case the parties have mutually agreed on a new payment schedule, especially if the debtor asked for it and the creditor in *bona fide* relies on such new payment schedule.
3. Based on the evidence on file, the entitlement of the Appellant to receive training compensation in respect of the

transfer of the Player is not disputed, nor is the amount of training compensation and the agreed date on which, at the latest, this amount should have been paid by Newcastle Jets FC, plus interest in a yearly rate of 5%.

4. The Respondent objected to its standing to be sued under the operation and management of the new licensee. The Sole Arbitrator understood this objection of Newcastle Jets to amount to an allegation that there was a lack of standing to be sued for the New Club. In this respect, the Panel found that although acknowledging the CAS panel discretion in ruling *de novo*, in view of CAS jurisprudence, it was appropriate to respect FIFA's autonomy in connection with the standing to be sued issue, especially because the case deserved to be examined and decided first by the worldwide governing body of football. Therefore, the issue of standing to be sued and the liability of Newcastle Jets, under the management and operation of the new licensee, towards FC Seoul, has been referred back to the FIFA DRC to decide.

### Decision

The appeal is partially upheld. The claim filed by the Appellant with the FIFA DRC on 30 March 2010 is admissible. The FIFA DRC decision is set aside and the case is remitted back to FIFA to decide whether the Respondent, under the new licence, has standing to be sued. The Appellant is entitled to receive as training compensation USD 200'000 which enforcement will remain pending and subject to the rendering of a decision by FIFA with respect to the issues of the standing to be sued.

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**Arbitration CAS 2012/A/2985**  
**Racing Club v. Genoa Cricket and**  
**Football Club S.p.A.**  
2 September 2013\*

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**Football; Management agreement entered into between a bankrupt club and a company constituted under the Argentinean law; Lis pendens principle; Nature of the relationship between the club and the company: contract of agency; Direct representation of the club by the company; Club's right arising from the transfer agreement entered into between the company and a third club;**

**Panel**

Mr Pedro Tomás Marqués (Spain), President  
Mr Hernán Jorge Ferrari (Argentina)  
Mr Hendrik Willem Kesler (Netherlands)

**Facts**

In March 2000 and in view of the alarming number of football clubs experiencing financial difficulties, the Asociación del Fútbol Argentino ("AFA") approved a "Rescue Plan" establishing a partnership between Argentinean clubs in fragile economic conditions and private legal entities. On 13 July 1998, the Argentinean football club Racing Club Asociación Civil (the "Appellant") was declared bankrupt. In August 2000, the competent public authority approved a reorganisation plan and put the Appellant under administration. In this context, the company Blanquiceleste SA Association ("Blanquiceleste") was constituted with the aim of carrying out the Appellant's

football related activities and a "Management Agreement" was entered into between the Appellant and Blanquiceleste.

On 13 January 2004, Blanquiceleste signed a transfer agreement with the Italian football club Genoa Cricket and Football Club S.p.A. (the Respondent) for the transfer of the Argentinean Player Diego Milito. On 31 October 2007, Blanquiceleste initiated proceedings with FIFA to order the Respondent to pay in its favour EUR 1,250,000, representing 25% of EUR 5,000,000 paid by the Spanish club Zaragoza for the transfer of the Argentinean Player Diego Milito.

On 3 June 2008, the Management Agreement was terminated by a court ruling. Later in June 2008, Blanquiceleste was declared bankrupt.

On 13 October 2009, the Appellant informed FIFA that Blanquiceleste was no longer its administrator and therefore, it argued that it should legitimately be entitled to take Blanquiceleste's place as claimant in the proceedings initiated before FIFA. The Single Judge of the FIFA Player's Status Committee decided to reject the claim of the Appellant "*since the latter was not a party to the said [Transfer Agreement] and that, therefore, there is no contractual basis for its claim to succeed*".

On 16 November 2012, the Appellant filed its statement of appeal with the Court of Arbitration for Sport ("CAS").

A hearing was held on 19 June 2013 at the CAS premises in Lausanne, Switzerland.

**Reasons**

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\* We draw your attention to the fact that the facts and the legal findings of this award have been summarized.

1. The Respondent claimed that the company managing the football related activities of the Appellant (Blanquiceleste) and the Appellant brought to Argentinean courts numerous claims against each other as regards their contractual relationship. It contended that the proceedings initiated before the Argentinean Courts produced an effect of *lis pendens* on the present arbitration as there is a possible conflict between the two proceedings and there is a risk of contradictory judgments. However, as the dispute before the CAS is between the Appellant and the Respondent and not between the Appellant and the company managing the football related activities of the Appellant, the Panel found that there is no identity as to the parties involved in the alleged disputes brought before the Argentinean courts and the parties to the present arbitration. Under these circumstances, the Panel held that the *lis pendens* principle did not apply.
2. As regards the nature of the relationship between the club and the company managing the football related activities of the Appellant, pursuant to the Argentinean law, the Appellant, represented by the appointed "Fiduciary Body", entered into a Management Agreement with a company constituted with the aim of carrying out the Appellant's related football activities. The Management Agreement was entered into within the framework of the Appellant's bankruptcy proceedings, governed by the Argentinean law. Under these circumstances, contrary to the Respondent allegation, it is not reasonable to conclude that the company was acting in its own name and on its own behalf when performing its contractual duties. The Panel therefore found that the company should be considered as an agent, i.e. a legally independent commercial intermediary, which undertakes to conduct certain business or provide certain services in accordance with the terms of the contract.
3. The Panel agreed with the Appellant's argument according to which the Transfer Agreement was signed on its behalf by Blanquiceleste. In this respect, according to Article 32 of the Swiss Code of Obligations, and to the jurisprudence of the Swiss Federal Tribunal, direct representation exists where an agent acts in the name and on behalf of the principal. If the agent acts within the scope of his authority, his acts bind the principal and the third party directly, but not himself. Based on the facts and circumstances surrounding the signature of the Transfer Agreement, the Panel found that the requirements of direct representation were met: Blanquiceleste was authorised to act on behalf of the Appellant and it signed the Transfer Agreement with the Respondent in its capacity as the Appellant's manager and administrator, which was clearly disclosed to the Respondent. Furthermore, the Respondent could not ignore that only a club and not a private company can transfer the Player's federative rights and the proportion of economic rights it eventually holds and it "*must have inferred the agency relationship from the circumstances*" (see article 32 par. 2 CO).
4. As it has been established that the company was acting in the name and on behalf of the Appellant when it entered into the Transfer Agreement, the rights and obligations arising there from accrue directly to the Appellant. In this respect,

the Respondent received EUR 5,000,000 for the final transfer of the Player to Zaragoza. On the basis of the Transfer Agreement, the Respondent must pay to its contracting partner 25 % of such amount, which equals EUR 1,250,000. In the absence of a specific contractual clause related to the late payment of the debt arising out of the Transfer Agreement, the legal interest due pursuant to Article 104 of the CO are applicable. 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.

### Decision

The Panel found that the requirements of direct representation were met. As a consequence, the Panel considered that the rights and obligations arising from the Transfer Agreement accrued directly to the Appellant. Furthermore, pursuant to Article 104 of the CO an interest at the rate of 5 % per annum was due. Consequently, the appeal filed by Racing Club Asociación Civil against the decision issued by the Single Judge of the FIFA Players' Status Committee on 24 April 2012 was upheld whereas the decision issued by the Single Judge of the FIFA Players' Status Committee on 24 April 2012 was set aside.

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**Arbitration CAS 2013/A/3047**  
**FC Zenit St. Petersburg v. Russian**  
**Football Union (RFU)**  
7 October 2013\*

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**Football; Disciplinary sanctions for improper conduct of supporters; Objective scope of the arbitration agreement; Request to issue a sanction against a third party; Standard of proof; Liability of a club for the behaviour of its supporters; Interpretation of a provision; Security obligations and strict liability**

**Panel**

Mr Patrick Lafranchi (Switzerland), President  
Mr José Juan Pinto (Spain)  
Prof. Ulrich Haas (Germany)

**Facts**

This appeal is brought by FC Zenit St. Petersburg (hereinafter referred to as “the Appellant” or “FC Zenit”), against a decision of the Appeals Committee of the All-Russian Public Organization Russian Football Union (hereinafter also referred to as “the Appeals Committee”) dated 7 December 2012 (hereinafter also referred to as “the Appealed Decision”) imposing in particular various sanctions to FC Zenit following alleged violations by the FC Zenit’s fans of the RFU regulations in the context of a football match against the FC Dynamo Moscow (hereinafter referred to as “FC Dynamo”).

On 17 November 2012, FC Zenit played a match against FC Dynamo at Khimki Arena in Moscow (hereinafter also referred to as “the Stadium”). The Khimki Arena is the stadium

where FC Dynamo plays its home matches in the Russian Football Premier League. For years, Sector B of the stands of the Khimki Arena (hereinafter referred to as “Sector B”) is allocated to the fans of the visiting team. Sector B has a capacity of approximately 2’600 people. In the course of the preparation of the match, issues arose regarding the allocation of tickets to the visiting team (FC Zenit) by the home team (FC Dynamo).

In the 37th minute of the match, a pyrotechnic device hit the goalkeeper of FC Dynamo, Anton Shunin, who was playing, at that time, in front of Sector B. The pyrotechnic device hit the leg of Mr Shunin and exploded right in front of him, causing a cornea burn of both eyes. Subsequently, Mr Shunin was not able to continue the match and needed medical treatment. Following these events, the match’s referee, Mr Nikolaev, decided to abandon the match.

On 22 November 2012, the RFU’s Control and Disciplinary Committee (hereinafter referred to as the “RFU CDC”) rendered a decision against the Appellant. The RFU CDC sanctioned the Appellant with (i) a defeat 0-3, two next home matches behind closed doors in a competition under auspices of RFU and fine of 500’000 roubles for interference by persons, other than players or officials of the Club, in the match; (ii) a fine of 100’000 roubles for chants of obscenities by the Club fans at the stadium during the match; and (iii) a fine of 500’000 roubles for throwing pyrotechnics by spectators and hitting a player with a pyrotechnics. By the same decision, the RFU CDC sanctioned FC Dynamo with (i) a fine of 80’000 roubles for chants of obscenities by the Club fans at the stadium; and (ii) with a fine of 500’000 roubles and one next home match behind closed doors in a competition under auspices of RFU for failing to provide

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for the public order and security at the stadium, which led to disorderly conduct by spectators and grave consequences.

On 7 December 2012, the Appeals Committee upheld the decision of the RFU CDC.

On 28 December 2012, the Appellant filed an appeal with CAS against the decision issued by the RFU Appeals Committee on 7 December 2012 (hereinafter referred to as “the Appealed Decision”). On 15 January 2013, the Appellant filed its Appeal Brief.

On 21 February 2013, the Respondent filed its Answer.

On 30 April 2013, the Appellant filed a letter dated 1 April 2013 from the Head Department of the Russian Ministry of Interior for Moscow stating that the criminal investigation that had been carried out about the match had established that “[d]uring the course of the match, at 16:37 an unidentified person, [...] who was located at a spectators’ tribune threw a burning firecracker (flare) towards the Dynamo goalkeeper Mr. Shunin [...]”. The Appellant further stated that “[t]herefore, the criminal investigation hasn’t established neither the author’s identity nor specified the tribune from which the firecracker was thr[own]”.

On 2 May 2013, the Respondent commented on the Appellant’s letter dated 30 April 2013 and stressed in particular that the Appellant did not quote all the relevant part of the letter, in particular the following: “*The search of B sector of the Arena-Khimki stadium showed the following: writings on the northern wall of the sector (Only Peter, only victory), remains of pyrotechnic devices and damage to the protecting net*”. The Respondent provided another letter from Head Department of the Russian Ministry of Interior for Moscow, dated 19 April 2013, in which it is confirmed that during the investigation it was established that the pyrotechnic device was thrown from sector B.

A hearing was held on 9 May 2013 in Lausanne, Switzerland.

On 14 May 2013, the Panel issued a “partial” operative part of the award.

### Reasons

1. The Respondent contested CAS jurisdiction regarding some of the Appellant’s prayers for relief. The Panel found that the intention of the parties determines the objective scope of an arbitration clause. In cases of doubt about the actual intention of the parties, it is presumed that a competent arbitral tribunal should judge about all pending disputes between the parties. In other words, an arbitration clause has to be interpreted widely once its validity is established. This interpretation results from the principle of procedural efficiency.
2. The Appellant had directed various claims against the RFU with the aim of sanctioning FC Dynamo Moscow, although the latter club had not been named as a party in these proceedings. The Panel found that whether or not the Appellant was entitled to request from the RFU/the Panel to issue a sanction against FC Dynamo Moscow was not an issue of jurisdiction, but a question relating to the principle of standing to sue or to be sued, which is a matter of substantive law. *In casu*, the applicable rules did not contain any provision granting the Appellant a right to claim from RFU/the Panel to sanction a third party, such as FC Dynamo Moscow. According to the Panel, even if there had been such a right (according to the applicable substantive rules), the Panel would have been barred from deciding

upon such a claim, since the latter would have had to be directed not only against the RFU, but also against FC Dynamo Moscow. Insofar RFU and FC Dynamo Moscow form a mandatory passive joinder of parties. Since Appellant had filed its claims solely against the RFU, the latter had no standing to be sued. Thus, the claims directed towards FC Dynamo Moscow had to be dismissed.

3. The Panel agreed with the well established CAS jurisprudence according to which the standard of proof to be applied with regard to disciplinary proceedings is the “comfortable satisfaction” of the Panel.
4. As regards the relevant provisions in the present case, the Panel found that they contained a very important principle in football, which is the principle of liability of a club for the behavior of its supporters. This principle fulfils a preventive and deterrent function. Its purpose is not to punish the club itself, which may have nothing to feel guilty about, but to pass the responsibility on the club for its supporters’ faulty behavior.
5. The main point in the argumentation of the Appellant was that the allocation of tickets for Sector B of the stadium, usually reserved for the visiting team’s supporters, had not been done in accordance with the applicable regulations as it did not file a written request for allocation. Out of this fact the Appellant derived the conclusion that none of the supporters in the Khimki Arena could be considered as its supporters. In consequence the Appellant did not deem itself liable for the conduct of any of the supporters present at match day in the Khimki

Arena, in particular for the throwing of the pyrotechnical device from Sector B. The Panel however found that it could not be disputed that the Appellant posed a request for ticket allocation of the relevant match, due to the fact that the parties agreed of how to allocate tickets to the Appellant’s supporters, and that the agreement covered the entire ticket distribution on the match at the Khimki Arena. The Panel further held that in view of the pieces of evidence such as the pre-match protocol, the Delegate report, the witness statements, the videos and the photos, it considered as established that all supporters of Sector B were supporters of the Appellant. Moreover, as the Appellant had not been able to rebut the relevant statement of the Delegate report that the pyrotechnical device was thrown from Sector B, the Panel also considered as established that the relevant pyrotechnical device that hit FC Dynamo’s goalkeeper Shunin and led to the abandonment of the match had been thrown from Stand B.

6. According to the Appellant, FC Dynamo had failed in all its security obligations and therefore the liability for the supporters’ behaviour could not be shifted to the Appellant. Recalling constant CAS jurisprudence, the Panel however found that security obligations of a home club and strict liability of a club for its supporters’ behavior were two different elements which could lead to different sanctions. The fact that the home club had failed to fulfill some of its order and security obligations, for which it had been sanctioned, did not prevent the application of the strict liability principle of the visitor’s club for its supporters’ behavior.

### **Decision**

The Panel considered that the sanctions imposed on the Appellant by the RFU CDC, and confirmed in the Appealed Decision, were compliant with Article 102 and 114 RFU DR. Furthermore, as the Appellant had not made any subsidiary argument(s) with regard to the

sanctions to be applied, the Panel confirmed the sanctions set forth in the Appealed Decision.

In light of the above, the Panel dismissed the appeal filed by the Appellant against the decision issued by the Appeals Committee of the Russian Football Union on 7 December 2012 in its entirety.

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**Arbitration CAS 2012/A/3055**  
**Riis Cycling A/S v. the Licence**  
**Commission of the UCI**  
11 October 2013\*

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**Cycling; Doping; Erga omnes effect of a CAS award with regard to the practice of a rule of a federation; Categories of measures imposed by sports associations according to CAS case law; Meaning and nature of the Neutralisation Rule; The Neutralisation Rule as a sanction; Compliance of the Neutralisation Rule with the WADC**

**Panel**

Prof. Ulrich Haas (Germany), President

Mr Michele Bernasconi (Switzerland)

Mr. Georg Von Segesser (Switzerland)

**Facts**

The dispute in the case at hand is related to an appeal filed by Riis Cycling A/S (“Appellant” or “Riis”), a Danish company that owns a professional cycling team currently named Team Saxo-Tinkoff, against the Licence Commission (“LC”) of the International Cycling Union (UCI) whose task it is to issue licences for the participation in the major international cycling competitions.

In 2004, the UCI created a system under which the teams of professional riders need to obtain a licence or a registration to compete at international and national level. More specifically as to the international level, the UCI Cycling Regulations Part 2 Road Races (the “Regulations”) currently provide for a licence (the “WorldTour Licence”: Articles 2.15.001 to 2.15.267 of the Regulations) to take part in the UCI World Tour events, which

include the major international competitions (such as the *Tour de France*, the *Giro d’Italia*, etc.), and a registration (the “Professional Continental registration”: Articles 2.16.001 to 2.16.054) to participate in the Professional Continental circuit (comprising races of the various continental calendars). In order to obtain a WorldTour Licence or a Professional Continental registration, teams need to satisfy sporting, ethical, financial and administrative criteria (Article 2.15.011). The continued fulfillment of the same criteria is verified every year, as teams holding a WorldTour Licence or a Professional Continental registration have to register again for the following season. The UCI WorldTour and WorldTour Licences are regulated in Chapter XV in Part II of the Regulations.

The sporting criterion is one of the four categories based on which the LC awards UCI WorldTour Licences. The sporting criterion of a team is calculated on the basis of Article 2.15.011a. This provision makes reference to a “*point scale approved by the UCI Professional Cycling Council*” (the “PCC”). On 17 March 2011, at the meeting of the PCC in Milan, the point scale used to measure the 2012 sporting value was approved and a proposal for a so-called Neutralisation Rule with respect to the sporting value of riders returning from a two-year ban for doping violations was presented. The PCC postponed the decision on the Neutralisation Rule until a legal analysis of the measure was completed.

At the seminar for teams in Brussels in April 2011, participants were informed that there could be a modification of the 2012 sporting criteria, should the Neutralisation Rule be adopted. The rule was ratified by the UCI Management Committee the day after the PCC

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\* We draw your attention to the fact that the facts and the legal findings of this award have been summarized.

decided to adopt the rule at a meeting of the PCC in June 2011. In a letter dated 29 June 2011, the UCI informed the teams of the above modification and advised them that the modification was “*effective immediately*”.

On 3 August 2010, the Appellant engaged the cyclist Mr Alberto Contador for a period of two years, beginning on 1 January 2011. On 12 August 2011, the Appellant applied for a WorldTour Licence for the year 2012. Said licence was granted on 18 November 2011 by the LC. On 6 February 2012, the CAS imposed a two-year period of ineligibility on Mr Alberto Contador, ending on 5 August 2012. In addition, Mr Alberto Contador was disqualified from all competitions he participated in as from 25 January 2011. On 14 August 2012, Riis applied for a WorldTour licence for the Team Saxo-Tinkoff beginning in January 2013. Among the documents considered by the LC was the “*UCI Team Evaluation Report 2013*” in accordance with Article 2.15.017 para. 3 of the Regulations. The report notes the team’s position in the sporting hierarchy on 21 October 2012 as 20<sup>th</sup>, which required further assessment. The detailed report includes a comparison of the riders’ performances in 2011 and 2012, an analysis of which riders accounted for what percentage of the earned points and an analysis of the points earned.

On 21 November 2012, the hearing regarding the application for a UCI WorldTour Licence took place with both the Team Saxo-Tinkoff and the UCI being represented. In a letter of 10 December 2012, the LC informed the Team Saxo-Tinkoff that a licence had been granted for two years. In a following letter sent by fax on 21 December 2012 (but dated 7 December 2012), the LC briefly explained its reasons for granting the licence. It noted in particular that the team had followed its recommendations by changing its recruitment strategy so that the team was not solely based on one leader.

On 9 January 2013, the Appellant filed a “Petition” with the Court of Arbitration for Sport (“CAS”). The “Petition” contained the Statement of Appeal as well as the Appeal Brief. In a Preliminary Award on Jurisdiction and Admissibility dated 17 June 2013, the Panel decided to retain jurisdiction to adjudicate on the merits of the appeal submitted by the Appellant and dismissed the Respondent’s objections with respect to jurisdiction and admissibility.

### Reasons

1. According to the Panel, the review of LC decisions provided for in the Regulations is modelled after Article 75 CC, according to which, in the event a decision other than a resolution of the General Assembly is appealed the person appealing the decision of an association must be adversely affected in order to have standing to sue. There are not any adverse effects of the LC decision regarding the use of the Neutralisation Rule and the reasons resulting in a ranking of 20<sup>th</sup> in the sports evaluation. This would have been possible if the disputed ranking had been between 16 and 20 and the “correct” ranking between 1-15 and the Appellant would have automatically fulfilled the sporting criterion. Since, however, the difference is between the 19<sup>th</sup> place instead of the 20<sup>th</sup>, the Appellant does not seem to have suffered any harm and has no standing to appeal with respect to its request to set aside in the decision of the LC the reasons which resulted in the Appellant having been ranked 19<sup>th</sup>.
2. The Panel further held that, as concluded in the Preliminary Award on

jurisdiction, the Appellant has sufficient legal interest to request declaratory relief to the effect that the Respondent is not allowed to apply the Neutralisation Rule to the Appellant. Furthermore, the Appellant is already adversely affected by the legal uncertainties pertaining to the validity of the Neutralisation Rule. As a WorldTour licence holder, the Appellant has entered into a contractual relationship with the Respondent. In the case at hand, the uncertainty relates to the validity of the Neutralisation Rule with respect to a violation that took place before the introduction of the Neutralisation Rule.

3. In view of the very broad scope of this provision and Article R57 of the Code which entrusts the Panel with full review powers, there is no valid reason why a declaratory award on the legality of the application of a provision in the Regulations to the Appellant and thus, on a preliminary question regarding the legality of the decision under appeal should not be within the authority of the CAS. Therefore, by granting the CAS such extensive review powers, the Code and the Regulations (by way of reference) implicitly accept the possibility that a decision rendered with regard to the practice of the LC of using the Neutralisation Rule may, and almost certainly will, have consequences *erga omnes* that go beyond the dispute *inter partes* upon which it is based.
4. The Panel further referred to CAS case law, according to which three categories of measures imposed by sport associations have been distinguished. The first category is

disqualification. It consists in the forfeiture of results, medals, points and prizes of an athlete (Article 10.1 WADC). The second type of sanction is of a disciplinary nature, including the imposition of a period of ineligibility on an athlete (e.g. in Article 10.2 WADC). The third type of measure is administrative in nature and concerns the conditions of participation in a competition or event. This can be in the form of qualification rules which establish the conditions under which an athlete is allowed to participate. The differentiation between these different types of measures must be performed not on a formal, but on a substantive basis. If, therefore, an eligibility rule is tied to an athlete's prior wrongful behaviour, the non-admission of the athlete concerned to an event or competition amounts to and must be treated as a disciplinary action against this athlete.

5. To the Panel's view, the Neutralisation Rule stipulates that the points, placings or wins of a rider who has been sanctioned for a violation of the UCI's Anti-Doping Rules with at least a two-year period of ineligibility will not be considered for two years beginning the day after the suspension ends. The Neutralisation Rule is considered to be a sanction for various reasons: it is automatically triggered by a doping offence sanctioned by at least a two-year period of ineligibility and Riders have no possibility to appeal. The effect of the Neutralisation Rule is disciplinary and has a punitive effect on both teams and riders. The stated aim of creating homogeneous teams which do not rely on one strong rider can be achieved in a more proportionate, effective and balanced manner than

double sanctioning doping violations. Therefore, the effect of the Neutralisation Rule is similar to a boycott, that it is clearly a sanctioning device directed against the athlete and that it impacts the team's freedom to contract and choose the riders it wants.

6. The Neutralisation Rule further sanctions the same misconduct as the WADC. It is clearly disciplinary in nature and purpose. The effect of the Neutralisation Rule primarily concerns riders who have been sanctioned for a doping violation under the WADC. That it is directed at teams does not alter the disciplinary effects on riders — essentially extending their doping sanction by another two years. This kind of additional disciplinary sanction

for misconduct already sanctioned is not provided for in Article 10 WADC and represents, in view of the Panel, a “*substantive change*” to the sanctions in the WADC. Therefore, the Neutralisation Rule does not comply with UCI's obligations under the WADC.

### **Decision**

The Panel dismissed the requests to set aside the argument of the Licence Commission in its reasons from 21 December 2012 that the team is ranked 20th in the sports evaluation and granted the second request of the Appellant to declare that the Neutralisation Rule should not be applied.

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**Arbitration CAS 2013/A/3067**

**Málaga CF SAD v. Union des Associations Européennes de Football (UEFA)**

11 June 2013 (full award with grounds of 8 October 2013)\*

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**Football; UEFA Financial Fair Play Regulations; Overdue payable; Law governing the existence of an obligation and the due date of the obligation; Definition of an overdue payable according to the UEFA Financial Fair Play Regulations; Agreement to extend the deadline for payment according to the FIFA Financial Fair Play Regulations**

**Panel**

Prof. Ulrich Haas (Germany), President

Mr José Juan Pintó (Spain)

Prof. Massimo Coccia (Italy)

**Facts**

The present dispute is between Málaga Club de Fútbol SAD ("Málaga", the "Club" or the "Appellant"), a Spanish football club affiliated with the Real Federación Española de Fútbol ("RFEF"), playing, at the time of the filing of the appeal discussed in the present proceedings, in the "UEFA Champions' League", and UEFA (the "Respondent"), the governing body of European football, dealing with all matters relating thereto and exercising regulatory, supervisory and disciplinary functions over national federations, clubs, officials and players affiliated to the UEFA or participating in its competitions.

In accordance with the provisions in Articles 65 and 66 of the UEFA Club Licensing and Financial Fair Play Regulations, edition 2012, in force at the time of the facts discussed in these proceedings (the "CL&FFPR" or the "Regulations"), Málaga submitted to the RFEF its financial declaration stating that as of 30 June

2012 it had overdue payables of EUR 3,845,000 towards other football clubs and of EUR 5,575,000 towards social and/or tax authorities. Thus, the overall amount of overdue payables declared by Málaga in its financial statement was EUR 9,420,000. Accordingly, this financial statement by Málaga was forwarded by the RFEF to the UEFA on 16 July 2012. On 3 August 2012, upon examination of the documentation submitted to it, the Investigatory Chamber of the UEFA Club Financial Control Body (the "Investigatory Chamber") found that Málaga was in breach of the indicator 4 as defined in Article 62, par. 3, of the CL&FFPR and decided to request an independent auditing firm (the "AF") to carry out a compliance audit" for the verification of the accuracy of the declarations submitted by Málaga.

On 27 August 2012, the AF issued its report (the "First Report"), confirming the existence of overdue payables on 30 June 2012 as communicated by Málaga and indicating that an additional amount of EUR 4,599,000, which had been considered by Málaga as deferred by the tax authorities, had actually to be considered as an overdue payable due to the lack of a written agreement signed by the tax authorities to extend the deadline for payment.

On 5 November 2012, the AF issued its report (the "Second Report"), where it found, inter alia, that an amount of EUR 8,450,000 had to be considered as "overdue", because of lack of written agreement between Málaga and the tax authorities, and that the amount of EUR 4,668,000 had to be considered as deferred, because the tax authorities had required the payment of that amount by 20 November 2012, *i.e.* after the reporting date of 30 September 2012. On 8 November 2012, the Investigatory Chamber, finding that Málaga had overdue payables of EUR 14,019,000 as of 30 June 2012 and EUR 8,450,000 as of 30 September 2012, decided to refer the Club to the Adjudicatory Chamber of the UEFA Club Financial Control

\* We draw your attention to the fact that the facts and the legal findings of this award have been summarized.

Body (the "Adjudicatory Chamber") in accordance with Article 12, par. 1, lit. b) of the Procedural Rules governing the UEFA Club Financial Control Body.

On 12 December 2012, a hearing was held before the Adjudicatory Chamber at the headquarters of the UEFA in Nyon. On 21 December 2012, the Adjudicatory Chamber rendered its decision on the case (the "Appealed Decision"), imposing *inter alia* a fine € 300,000 on Malaga CF, an exclusion from participating in the next UEFA club competition for which it would otherwise qualify on its results or standing in the next four seasons. The further exclusion provided for in the decision, namely a further exclusion from the next UEFA club competition for which it would otherwise qualify was lifted because the Appellant could prove, by 31 March 2013, that it was in compliance with Articles 65 and 66 of the CL&FFP Regulations so that as at that date it had no overdue payables towards football clubs as a result of transfer activities or towards employees and/or social/tax authorities.

On 4 January 2013, Málaga received from the Spanish tax authorities a document, dated 3 January 2013, which stated that –in view of the payments effectuated by Málaga –the request for deferral of outstanding amounts had been granted. Consequently, the Club had to pay the remaining amounts in two installments, *i.e.* EUR 1,362,568.52 by 20 January 2013, and EUR 3,869,185.06 by 5 February 2013. By 5 February 2013, Málaga had paid the outstanding amounts provided for in the deferral plan agreed with Spanish tax authorities.

On 24 January 2013, Málaga filed a Statement of Appeal against the Appealed Decision with the CAS Court Office. A hearing took place in Lausanne on 4 June 2013. In its Appeal Brief, Málaga primarily requested the Panel to annul the UEFA decision and decide that it should not be sanctioned.

### Reasons

1. The Panel held that, in principle, the law governing the existence of an obligation also governs the due date of the latter. It is beyond dispute that whether or not Málaga owed a debt towards the Spanish tax authorities within the meaning of the CL&FFP is a question that is governed by Spanish law. It is not a mandatory requirement that both questions (existence of an obligation and due date) be governed by the same law. In light of the freedom of association, the latter may provide in its rules and regulations that a different set of rules apply to both questions. This is all the more true if the association – as is the case here – has set out to create a level playing field in international club competitions. The idea to define in a uniform manner – and independently of where a club is domiciled – the term "overdue" is, thus, not arbitrary, but instead perfectly in line with the principle of freedom of association.
2. According to the Panel, there needs to be a uniform definition of what constitutes an overdue payable. The various legal systems differ as to what consequences follow from the fact that a debt is "overdue". If the term "overdue" were not defined in the CL&FFP, it would be difficult to know to what consequences the term "overdue" used in the CL&FFP refers. That the CL&FFP is designed to uniformly and autonomously define the term "overdue" clearly follows from the CL&FFP. There is no room for the application of the *contra proferentem* rule here. Thus, Spanish law does not apply within the definition at UEFA level of the expression "overdue payables".
3. It follows from the Regulations that the term "overdue" is a defined term that must be interpreted autonomously, *i.e.* without reference to a national law. Therefore, recourse to a national law in

the context of the CL&FFPR is legitimate only (i) if necessary for the application of the CL&FFPR and (ii) where recourse to national laws does not undermine the very purpose of the CL&FFPR. Neither prerequisite is fulfilled in the case at hand and, thus, only the CL&FFPR are applicable to the question whether or not the outstanding payables were overdue.

4. The Panel interpreted Nr. 2 lit. b of Annex VIII of the Regulations and concluded that it does follow from its wording that the agreement to extend the deadline for payment must necessarily be found in a single document signed by both parties. Instead, what is intended by the rule is that the declaration of the creditor to accept the extension of the deadline for payment must be in writing. In order to comply with the said rule, it suffices that a request by the debtor to extend the deadline (be it orally or in written form) is accepted by the creditor in written form. The provision makes two things very clear. First, an extension of the deadline for payment is only accepted if there is a clear expression of will of the creditor in this respect. This is in particular made clear by the note in brackets according to which “keeping still” or not enforcing a claim cannot be qualified as a tacit consent by the creditor to extend the deadlines for payments. Secondly, the provision requires that the relevant expression of the creditor’s will must be in writing.
5. To the Panel’s view, the prerequisites of Nr. 2 lit. b of Annex VIII of the Regulations would have been fulfilled if the Appellant had made a request for deferral of payment that had been accepted in writing by the Spanish tax authorities. However, lacking any decision of the Spanish tax authorities and, thus, a clear expression of will to

extend the deadlines of payment, the prerequisites of Nr. 2 lit. b of Annex VIII of the Regulation cannot be deemed to be fulfilled. Some national laws provide for a concept of “tacit approval” in case a private subject files a request with a public authority and the latter remains inactive. However, even if one were to assume that there was a tacit approval by the Spanish tax authorities in relation to the postponement of the deadline for payment, the conditions of Nr. 2 lit. b of Annex VIII of the Regulations would not be fulfilled. The latter expressly require that the consent given by the creditor be in writing. It is true that a conditional (written) consent was given by the Spanish tax authorities after 30 September 2012. This, however, is immaterial in the case at hand, since Nr. 2 of Annex VIII of the Regulations provides that the debtor must prove by the relevant reporting date (*i.e.* by 30 September 2012) that the conditions for deferred payments are fulfilled, which was not the case here.

6. The Panel concluded that the situation at hand does not differ from a case in which a debtor requests from a private creditor (*e.g.* another club, banks or other creditor) the postponement of deadlines for payment. In such case, the debtor has no compelling powers to force the creditor to take a decision in relation to his request. This is no case of force majeure. The debt payer has at least some kind of influence to receive a timely answer to its request. This influence consists in filing the deferral request as early as possible. The earlier the request is filed the sooner the tax authorities will decide upon the request for deferral. In the case at hand the request has been made — practically — at the latest moment possible before the reporting date of 30 June 2012. If, therefore, no “answer” was received from the tax authorities before 30

September 2012, not solely the tax authorities are to be blamed.

### **Decision**

The Panel dismissed the appeal and confirmed the decision issued by the Adjudicatory Chamber and the sanción imposed on Málaga CF SAD.

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**Arbitration CAS 2013/A/3099**

**Beşiktaş Jimnastik Kulübü Derneği v. Allen Iverson**

30 August 2013\*

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**Basketball; CAS jurisdiction (no); Article 186 of the Swiss PILA and CAS proceedings; Conditions for CAS jurisdiction according to Article R47 of the CAS Code; Optional wording of an arbitration clause to be inserted in a contract;**

**Panel**

Mr. Mark Hovell (United Kingdom)

Prof. Martin Schimke (Germany)

Prof. Lucio Colantuoni (Italy)

**Facts**

Beşiktaş Jimnastik Kulübü Derneği (“Appellant” or the “Club”), is a Turkish professional basketball club. Mr Allen Iverson (“Respondent” or the “Player”) is an American professional basketball player. On 30 May 2009, the Fédération Internationale de Basketball (“FIBA”) Arbitral Tribunal (“FAT”) Arbitration Rules (2009 edition) came into force and on 1 May 2010, the FAT Arbitration Rules (2010 edition) came into force. On 3 September 2010, the FIBA Internal Regulations 2010 were approved by the FIBA Central Board. On 7 September 2010, the FIBA General Statutes 2010 came into force, under which the FAT was renamed the Basketball Arbitral Tribunal (“BAT”).

The parties entered into an employment contract for the 2010-2011 season on 29 October 2010 (“Contract”). In December 2010, the Respondent complained of pain in his right leg, and in January 2011 the parties agreed that the Respondent would need to undergo surgery and that it would be preferable if it were

undertaken in the U.S.A. On 31 January 2011, the Appellant’s lawyer sent a letter to the Respondent’s agent stating that the Appellant had not received any information regarding the Respondent’s medical treatment.

On 1 March 2011, in light of the medical situation of the Respondent, the Appellant notified the Respondent’s agent that it deemed the Respondent’s condition to pre-date his entry medical examination by the Appellant and to be unrelated to sports. The Appellant therefore announced that the Contract and all payments stemming there from were being suspended until the medical board of the Appellant determined the Respondent fit to play again with the Appellant’s team.

On 16 and 22 March 2011, the Respondent contested the Appellant’s position and requested the payment of USD 410,000, i.e. the suspended amount of payments due under the Contract.

On 23 March 2011, the Appellant responded and stated that it was refusing to pay the Respondent.

On 1 April 2011, the BAT Arbitration Rules (2011 edition) came into force. The Respondent filed a request for arbitration with the BAT (which body had assumed all responsibilities of the FAT) on 15 September 2011 in order to claim his outstanding contractually-stipulated salary as the Appellant had not made the contractual payments to him.

By an award dated 30 January 2013 (“Decision”), the BAT condemned the Appellant to pay to the Respondent an amount of USD 210,000 as contractual damages, plus interest at 5% per annum on such amount from 1 March 2011 onwards. The Appellant was further condemned to pay to the Respondent an amount of EUR 11,995.02 as reimbursement of

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\* We draw your attention to the fact that the facts and the legal findings of this award have been summarized.

50% of the latter's arbitration costs and of 50% of the non-reimbursable fee he paid to the BAT.

On 21 February 2013, the Appellant filed a statement of appeal with the CAS. The Panel determined that there was no need to hold a hearing to adjudicate the issue of jurisdiction, and on 17 June 2013, the CAS Court Office informed the parties that the Respondent's comments of 26 April 2013 were accepted into the CAS file and that both parties had the opportunity to provide final submissions on jurisdiction and, in particular, upon the applicable edition of the FAT Arbitral Rules.

### Reasons

1. As Switzerland is the seat of the arbitration and all parties involved are non-Swiss entities or persons, the provisions of the Swiss Private International Law Act ("PILA") apply pursuant to its Article 176, paragraph 1. According to Article 186 of the PILA, the CAS has the power to decide on its own jurisdiction. According to Swiss legal scholars, this provision is the embodiment of the 'Kompetenz-Kompetenz' principle which is also regarded as a corollary to the principle of the autonomy of the arbitration agreement. Article 186 of the PILA has been held to be applicable in CAS proceedings as well.
2. Article R47 of the CAS Code is the relevant provision regarding jurisdiction of CAS. This Article requires three separate criteria in order for the CAS to have jurisdiction over a claim, namely: a) a decision of a federation, association or sports-related body, b) an express grant of jurisdiction either through the statutes or regulations of that sports-related body or a specific arbitration agreement concluded by the parties, and c) the exhaustion by the Appellant of all legal remedies available to him prior to the appeal.

3. Neither party claims that the parties entered into a specific arbitration agreement. Whilst the Appellant makes reference to the FAT Arbitration Rules (2009 edition) which include optional wording to be inserted into arbitration clauses in playing contracts that provides an appeal to the CAS, that wording was not inserted in the Contract. Therefore, the parties disagree over whether or not the relevant statutes or regulations of FAT provide for a right of appeal of such a decision to the CAS.

4. The Appellant has submitted that at the time of the Contract the FIBA Arbitration Rules (2009 edition) were in force, however the Panel have determined that this was not the case. The Panel determined that the FIBA Arbitration Rules (2010 edition) were in force at the time the Contract was entered into and noted that these do not provide for an appeal to be made to the CAS, as had been provided for in the 2009 version. Further, the FIBA Internal Regulations were also in force at the time that the parties entered into the Contract and these regulations clearly provide that awards of the BAT (or FAT) shall be final and binding upon communication to the parties. Finally, the FIBA General Statutes (which came into effect on 7 September 2010) also clearly provide that awards of the BAT (or FAT) are final and binding upon communication to the parties.

### Decision

The Panel concluded that there was no right of appeal to the CAS in the present case. It therefore dismissed the appeal for lack of jurisdiction and held that the BAT Award was final and binding.

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**Sentences du TAS JO 2014**  
**CAS Awards OG 2014**

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**CAS Ad hoc Division (O.G. Sochi)  
2014/01**

**Daniela Bauer v. Australian Olympic  
Committee (AOC) & Austrian Ski  
Federation (ASF)**

4 February 2014

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**Ski/halfpipe freestyle ski; Winter  
Olympic Games; Selection to the 2014  
Austrian team; Quota allocation in  
women's halfpipe;**

**Panel**

Mr Patrick Lafranchi (Switzerland), President  
Judge Robert Decary (Canada)  
Prof. Matthew Mitten (USA)

**Facts**

In October 2013, the Australian Olympic Committee (AOC) made a public announcement on its website indicating that all quota places allocated to Austria would be accepted. However, the NOC of Austria declined to allocate one available spot for freestyle. On 20, 21 and 22 January 2014 however, Mr. Christian Rijavec, the person responsible for the Freestyle department of the Austrian Ski Federation (ASF), indicated to Daniela Bauer (the Applicant) by email that she should be able to participate in the Olympic Games if Austria obtained a quota place and in view of the fact that Ms. Elizabeth Gram, another Austrian halfpipe freestyle skier, was injured. Daniela Bauer was provided with a travel schedule and a pre-Olympic training program. On 25 January 2014, the FIS published the final list of the Olympic Games female participants in Freestyle Skiing. Daniela Bauer was not listed therein. On the occasion of a telephone conversation on 26 January 2014, the Applicant was informed by the ASF Sporting Director, that the AOC had declined to use the quota place for female halfpipe freestyle. On 27 January 2014, the Applicant was informed by Mr. Christian Rijavec by email that she had not been recommended by the

ASF on the “*basis of sporting estimates*”. An application was received at 8 am on 2 February 2014 with the CAS ad hoc Division. A hearing was held on 3 February 2014 at the CAS ad hoc Division’s offices at the Ayvazovsky Hotel, 1 Morskoy Boulevard, Adler District, 354340 Russia.

The Applicant challenges the ASF’s failure to recommend her to the AOC as a participant in the Women’s Freestyle Halfpipe discipline and the AOC’s failure to nominate her for the quota place reallocated to Austria. The Respondents submitted that the AOC has the exclusive authority under Rule 27 of the OC to decide which athletes shall take part in the Olympic Games and that the performance and results of the Applicant were not sufficient enough to allow her to reach a positive result at the Olympics.

**Reasons**

1. The CAS Panel reminded that according to Rule 27.7.2 and 44 of the Olympic Charter, at national level, a national Olympic committee (NOC) has the exclusive right to send competitors to the Olympic Games upon the recommendations for entries given by national federations and in compliance with the Olympic Charter. According to Rule 44.4 of the Olympic Charter “*NOCs must investigate the validity of the entries proposed by the national federations and ensure that no one has been excluded for racial, religious or political reasons or by reason of other forms of discrimination*”. In addition, Rule 44.5 of the Olympic Charter, provides that only those competitors adequately prepared for high level international competition shall be sent to the Olympic Games.
2. The Panel found that Email and verbal representations made to the Applicant by the person responsible for the Freestyle department of the Austrian Ski Federation may have created an expectation that the Australian Ski

Federation would recommend to the Australian Olympic Committee that she would be nominated for a quota allocation in women's halfpipe had she met the FIS minimum qualification standards and finished in the top 17 in a World Cup event. However, the person responsible for the freestyle department of the Australian Ski Federation did not have any authority on behalf of the Australian Ski Federation to guarantee or promise that this would occur. Moreover, the person responsible for the Freestyle department of the ASF was not authorized to make any representations, promises, or guarantees regarding whether the Australian Olympic Committee would nominate her if she satisfied these standards.

3. The FIS allocation quotas establish a maximum number of participants for an event and the means for filling these spots, but they do not establish any requirement that its National Federations must follow in making recommendations to their respective NOCs regarding quota allocation nominations.
4. The Panel considered based on the submitted evidence, that the ASF did not exercise its discretion in an arbitrary, unfair, or unreasonable manner because it had a legitimate sports performance justification for not recommending that the AOC nominate the Applicant for an allocation quota in women's halfpipe.

### **Decision**

The application filed by the Applicant against the Respondents is dismissed and their decisions are hereby confirmed.

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**CAS Ad hoc Division (O.G. Sochi)**

2014/02

**Clyde Getty v. International Ski Federation (FIS)**

5 February 2015

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**Ski; Olympic Winter Games; Eligibility to compete in the Freestyle Aerials; Requirements under the Freestyle Skiing Qualification System;**

**Panel**

Prof. Luigi Fumagalli (Italy), President

Prof. Gary Roberts (USA)

Ms Alexandra Brillantova (Russia)

**Facts**

Clyde Getty, born in 1961, competes in the Aerials discipline and participated *inter alia* in the Olympic Winter Games in 2002 and 2006. He claimed that he was eligible to be entered in the 2014 Olympic Winter Games following a decision of the FIS to allocate a quota place to the NOC of Argentina (COA). The FIS replied that the quota place was erroneously attributed to the COA on 24 January 2014 and was withdrawn on the same day, considering that no Argentinean athlete was eligible to participate in the Aerials. An application was received at 15:15 on 2 February 2014 with the CAS *ad hoc* Division. A hearing was held on 4 February 2014 at the CAS *ad hoc* Division's offices at the Ayvazovsky Hotel, 1 Morskoy Boulevard, Adler District, 354340 Russia.

In his application, Mr Getty requested a declaration concerning his eligibility to compete in the Freestyle Aerials of the XXII Olympic Winter Games whereas the FIS requested the Panel to reject the Applicant's appeal and to hold that he is not eligible to compete in the Freestyle Aerial of the XXII Olympic Winter Games. A hearing was held on 4 February 2014 at the CAS *ad hoc* Division's offices at the Ayvazovsky Hotel, 1 Morskoy Boulevard, Adler District, 354340 Russia.

**Reasons**

Under the Freestyle Skiing Qualification System (FSQS), for an athlete to be entered into the Sochi OWG, at least two conditions have to be concurrently satisfied, subject to any additional condition contained in domestic qualification rules:

- i. the athlete needs to be eligible in accordance with Clause 3.1: for the discipline of Aerials, competitors need to have placed in the top 30 in a FIS World Cup event or in the Aerials FIS Freestyle Skiing World Championships and have a minimum of 80 FIS points in the Aerials on the Olympic FIS Points List;
- ii. the athlete's NOC has been allocated a quota place, in accordance with Clause 3.2 or Clause 3.3.

The Panel found that it cannot be derived arguments from an alleged violation by FIS of an obligation to enter into the Aerials event of the Sochi OWG 25 athletes. In fact, the number of 25 is expressly defined by the Freestyle Skiing Qualification System to be the maximum, and this implies that a lower number of actual competitors was possible.

In the same way, and in light of the foregoing, there is no obvious ambiguity calling for the application of the *contra proferentem* rule of interpretation in the Freestyle Skiing Qualification System.

The clear wording of the provisions of the Freestyle Skiing Qualification System, in particular clauses 3.1 and 3.1, does not allow any interpretation which would make Clyde Getty eligible to be entered in the 2014 Olympic Winter Games by the COA, as he did not reach the minimum FIS points requirement at the end of the qualification period. It follows that the FIS was not estopped from denying Clyde Getty a quota place to be entered into the Sochi Olympic Winter Games.

## **Decision**

The application is rejected.

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CAS Ad hoc Division (O.G. Sochi)

2014/03

**Maria Belen Simari Birkner v. Comité Olímpico Argentino (COA) & Federación Argentina de Ski y Andinismo (FASA)**

13 February 2014

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**Ski; Qualification for the Sochi Olympic Winter Games; Selection for the Argentinean national team; CAS ad hoc division jurisdiction; Proof of the discriminatory character of the National Olympic Committee for Argentina's decision;**

#### Panel

Judge Annabelle Bennett (Australia),  
President

Prof. Brigitte Stern (France)

Mr David Wei Wu (China)

#### Facts

The qualification process for participation in the Sochi Olympic Games started in July 2012 and ended on 19 January 2014. By letter dated 20 January 2014, the Argentinean Ski Federation (FASA) conveyed its decision, that Maria Belen Simari Birkner (the Applicant) was not selected for the Argentinean National Team for participation in the Sochi Olympic Games.

An Application was received at 4.25 pm on 11 February 2014 by the CAS *ad hoc* Division. A hearing was held on 12 February 2014 at the CAS ad hoc Division's offices at the Ayzovskiy Hotel, 1 Morskoy Boulevard, Adler District, Russia.

The Applicant sought an order that the Argentinean NOC enters Maria Belen Simari Birkner in the Sochi Olympic Winter Games to compete in the Alpine Skiing events. The Applicant primarily alleged discrimination on the basis of her family affiliation, a form of discrimination prohibited by and incompatible with the Olympic Charter, Fundamental Principles of Olympism, Rule 6

and Rule 44.4 of the Olympic Charter. The Applicant also alleged the existence of the jurisdiction of the Panel whereas the Respondents contested the existence of any basis of jurisdiction of the Panel.

#### Reasons

1. The Panel found that the conditions for the existence of jurisdiction *rationae personae* are fulfilled as the Applicant is an athlete to which Article 1 of the CAS ad hoc Rules gives the right to apply to CAS. Likely, the conditions for the existence of jurisdiction *ratione materiae* of the *ad hoc* Division provided for in Article 61 of the Olympic Charter (OC) are also fulfilled, as there can be no issue that the Request for Arbitration, which relates to qualification for the Sochi Olympic Games, deals with a “dispute arising on the occasion of, or in connection with, the Olympic Games”. Moreover, the jurisdiction *ratione voluntatis* is also satisfied as the Respondents submitted to the jurisdiction of the *ad hoc* Division under Rule 61 of the OC. The Applicant did not sign the Entry Form by which the jurisdiction of the *ad hoc* Division is accepted, but has clearly consented to jurisdiction by filing the Request for Arbitration. There is no review mechanism provided for in the FASA Statutes for reviewing decisions concerning athlete selection for competitions. Accordingly, the Applicant is not barred from bringing a claim to the *ad hoc* Division on the basis that she has not exhausted internal remedies. Pursuant to Article 1 § 1 of the CAS *ad hoc* Rules, the dispute, in order to enter into the jurisdiction *ratione temporis* of the Panel, should have arisen 10 days before the Opening Ceremony. It is accepted that the date when a dispute arises is in general the date of the decision with which the Applicant disagrees. Such a date can arise later, in some cases, if, for example, the decision is not self-explanatory and requires some

explanation in order for the Parties to know with certainty that they are in disagreement. However, general distress, which the Applicant says she has suffered, does not of itself delay the date on which the dispute arises. The dispute arose as soon as the Applicant was notified of her non-selection – with which she was in total disagreement without any need to receive explanations on the reasons for the Decision . Therefore, the date when the dispute arose was well before the 10 days before the Opening Ceremony, with the consequence that the Panel has no jurisdiction to entertain the case.

- 2 Even though a finding of lack of jurisdiction has been made, the athlete's claims on the merits would have failed as the Applicant has not established that the COA decision was discriminatory. The allegations related to bias against the athlete's family have not been demonstrated. In this regard, a discretion based on "*the evolution and projection in the future*" is not arbitrary, unfair or unreasonable.

### **Decision**

The *ad hoc* Division of the Court of Arbitration for Sport has no jurisdiction to deal with the Application filed by Ms Maria Belen Simari Birkner on 11 February 2014.

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**CAS Ad hoc Division (O.G. Sochi)**

2014/04-05

**Alpine Canada Alpin (ACA), Canadian Olympic Committee (COC) & Olympic Committee of Slovenia (SOC) v. International Ski Federation (FIS) & International Olympic Committee (IOC)**

23 February 2014

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**Ski cross; Winter Olympic Games; Violation of the International Freestyle Skiing Competition Rules (ski suits); Failure to file a timely protest;**

**Panel**

Prof. Luigi Fumagalli (Italy), President

Mr Patrick Lafranchi (Switzerland)

Prof. Matthew Mitten (USA)

**Facts**

At 9:47 pm of 20 February 2014, the Olympic Committee of Slovenia filed with the International Ski Federation a protest about the suits used by the French Competitors during the Big Final of the men's ski cross competition of the Sochi Olympic Winter Games.

At 10:33 pm of 20 February 2014, the Alpine Canada Alpin and the Canadian Olympic Committee sent to the FIS a letter containing their official appeal submission relating to a violation of rule 4511.4 of the FIS International Freestyle Skiing Competition Rules (ICR) regarding ski suits for use in the Olympic Mens Ski Cross competition by the French competitors racing February 20, 2014.

The FIS Jury decided that the protests could not be entertained because they had not been filed on time after the race.

On 22 February 2014 the CAS *ad hoc* Division received two applications: one was made by both the Alpine Canada Alpin and the Canadian Olympic Committee and the other one by the Olympic Committee of Slovenia.

The Co-President of the CAS *ad hoc* Division decided that the two applications should be heard and decided together by the Panel of arbitrators. A hearing was held on 22 February 2014 at the CAS *ad hoc* Division's Offices at the Ayvazovsky Hotel, 1 Morskoy Boulevard, Adler District, 354340 Russia.

The Applicants requested disqualification pursuant to Article 3056.3 ICR of all three of the French Competitors (Jean Frederic Chapuis, Arnaud Bovolenta and Jonathan Midol) who won the gold, silver, and bronze medals respectively during the 20 February 2014 men's Ski Cross Big Final competition. They also sought an order requiring Respondents to correct the final standings in this Competition in accordance with Article 3056 ICR. The Applicants asserted that the Jury improperly determined that their Protests were untimely because they were not made within 15 minutes of posting of the official competition results as required by Article 3050.3.3 ICR and failed to determine the merits of their claim that the three French Competitors violated Article 4511.4 ICR by using a prohibited method, and Rule 222.1 ICR by using equipment that does not conform to FIS regulations. The Respondents asked that the Applicants' application be denied because their respective protests were not filed in a timely manner pursuant to Article 3050.3.3 ICR and because the two FIS equipment controls determined that the three French Competitors' suits (including the pants) complied with FIS equipment rules.

**Merits**

The Panel found that the Applicants did not comply with the explicit requirement of Articles 3050.1 and 3050.3 ICR that “[n]o Protest shall be considered by the Jury unless” a written protest is made “to a [FIS] Jury member within 15 minutes of completion of the last competition run of that phase of competition”. In this respect, Article 3050.1 ICR explicitly requires only the “reason for the protest”, not substantiated evidence or proof that a violation of FIS rules occurred during the

competition. Therefore, contrary to the Applicant's submissions, the 15 minute deadline for an appeal is not unreasonable under the circumstances and its strict enforcement would not preclude proper application and enforcement of Article 4511.4 ICR. In this context, Rule 40 of the Olympic Charter requiring that competitors, coaches, and other team officials "*must respect the spirit of fair play*" would not be violated. Therefore, the Panel held that the Applicants' delay of more than six hours in filing a written Protest was not justified in the circumstances of the case: the Applicants became aware of the possibility that the three French Competitors may have violated the ICR at the time the Big Final of the Competition was run. No valid excuse that would justify the consideration of their claims had been offered. Holding the contrary would contravene the natural expectation of athletes, sports governing bodies, spectators, and the public that competition results are final unless promptly and properly protested within a reasonable amount of time after the competition ends.

### **Decision**

The applications filed by the Applicants are to be dismissed.

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**Jugements du Tribunal Fédéral\***  
**Judgements of the Federal Tribunal**

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\* Relatifs à la jurisprudence du TAS  
Related to CAS jurisprudence

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**Arrêt du Tribunal fédéral 4A\_274/2012  
du 19 septembre 2012  
Fédération X. \_\_\_\_\_ (recourante) c.  
European Chess Union (ECU) (intimée)\***

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*Recours en matière civile contre la sentence rendue le  
22 mars 2012 par le Tribunal Arbitral du Sport  
(TAS)*

**Extrait des faits**

L'European Chess Union (ci-après: l'ECU) est une association de droit suisse qui a son siège à Hünenberg, dans le canton de Zoug. Elle a notamment pour tâche de gérer les différents tournois d'échecs organisés en Europe et a édicté, pour ce faire, une réglementation intitulée European Chess Union Tournament Rules 2010 (ci-après: le Règlement).

A une exception près, les compétitions de l'ECU ont lieu une fois par an. L'organisation de chaque tournoi est attribuée par le comité de l'ECU à une fédération nationale européenne sur la base d'un appel d'offres et selon des modalités fixées dans le Règlement. Le 30 avril 2011, l'ECU a procédé à un appel d'offres en vue de l'organisation des tournois 2013. Dans le délai imparti, la Fédération X. \_\_\_\_\_ a annoncé, notamment, les candidatures de A. \_\_\_\_\_ pour le European Youth Championship (ci-après: l'EYC) et de B. \_\_\_\_\_ pour l'European Senior Team Championship (ci-après: l'ESTC). D'autres fédérations nationales, au nombre de quatre, respectivement trois, ont présenté des candidats à l'organisation de ces deux tournois. Sur la base du rapport dressé par l'inspecteur C. \_\_\_\_\_, le comité de l'ECU, siégeant les 13 et 14 septembre 2011, a attribué l'organisation de l'EYC à la

Fédération d'échec du Monténégro (ville de Budva).

Le 10 octobre 2011, la Fédération X. \_\_\_\_\_ a interjeté appel, auprès du Tribunal Arbitral du Sport (TAS), contre la décision du comité de l'ECU. Elle a conclu, en substance, en plus de l'annulation de cette décision, à ce que l'organisation de l'EYC et de l'ESTC lui soit attribuée. Dans son mémoire d'appel, la Fédération X. \_\_\_\_\_ a requis la nomination d'un expert indépendant qui serait chargé d'évaluer les candidatures déposées pour l'EYC et l'ESTC selon les critères fixés dans le Règlement afin de déterminer si l'évaluation faite par l'inspecteur C. \_\_\_\_\_ était défendable. Dans ce but, elle a soumis au TAS les noms de trois organisateurs professionnels de tournois d'échecs susceptible d'effectuer ce travail.

Une Formation de trois membres a été constituée et les parties en ont été informées le 14 novembre 2011. Par fax du 6 décembre 2011, une conseillère du TAS a communiqué aux conseils des parties l'information suivante: *"The parties are advised that having considered the Appellant's request for the appointment of an expert report and evaluation by an independent organiser, the Panel determines that no grounds have been put forward or established which justify the appointment of such an expert by the Panel. However, the parties are reminded that they are free to nominate such experts and witness they deem necessary, pursuant to the provisions of Articles R44.2, R51 and R55 of the CAS Code."*

Le 22 décembre 2011, le TAS a convoqué les parties à une audience fixée au 3 février 2012, en leur rappelant qu'elles devaient y amener les témoins ou experts éventuels annoncés dans leurs écritures. En réponse à cette lettre, la Fédération X. \_\_\_\_\_ a indiqué les noms et adresses des quatre témoins dont elle

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\* Le jugement rendu par le Tribunal Fédéral a été résumé. L'intégralité du jugement est disponible sur le site web du Tribunal Fédéral [www.bger.ch](http://www.bger.ch).

requérait l'audition. Le 27 janvier 2012, le TAS a rendu une ordonnance de procédure qui confirmait, sous chiffre 9, les termes de sa lettre du 22 décembre 2011. Les parties ont contresigné cette ordonnance. A l'audience du 3 février 2012, la Fédération X. \_\_\_\_\_ a comparu avec ses quatre témoins, mais sans aucun expert. A l'issue de l'audience, les parties ont exprimé leur satisfaction quant au déroulement de celle-ci et n'ont formulé aucune remarque ou objection touchant la procédure. Par sentence du 22 mars 2012, la Formation a rejeté l'appel dans la mesure où il était recevable. Le 14 mai 2012, la Fédération X. \_\_\_\_\_ a formé un recours en matière civile au Tribunal fédéral en vue d'obtenir l'annulation de ladite sentence.

### Extrait des considérants

#### **1. Dans un premier moyen, la recourante reproche au TAS d'avoir violé son droit d'être entendue, au sens de l'art. 190 al. 2 let. d LDIP, en refusant de mettre en œuvre l'expertise requise par elle.**

Sans doute la recourante critique-t-elle à juste titre deux arguments avancés par le TAS dans sa réponse au recours. Le premier a trait au pouvoir, qualifié de "discrétaire", dont la Formation jouirait, en vertu de l'art. R44.3 du Code de l'arbitrage en matière de sport (ci-après: le Code), pour décider de commettre un expert, par opposition à une obligation qui lui serait faite de nommer un expert chaque fois qu'une partie le demande (réponse, n. 11). Il va sans dire que, si le TAS pouvait écarter ad libitum une requête, présentée en temps utile et dans les formes idoines, tendant à l'administration d'une expertise propre à prouver un fait pertinent et contesté, le droit d'être entendu de la partie requérante, garanti par les art. 182 al. 3 et 190 al. 2 let. d LDIP, s'en trouverait violé, quand bien même pareil pouvoir découlerait d'une interprétation correcte de la règle de procédure précitée.

Le second argument consiste dans l'assimilation que le TAS paraît vouloir faire

entre une expertise judiciaire ordonnée par lui sur la base de l'art. R44.3 du Code, applicable à la procédure d'appel en vertu du renvoi de l'art. R57 du Code, et l'expertise privée, prévue à l'art. R.44.2 du Code, applicable par l'effet du même renvoi, qui consiste pour une partie à amener son ou ses experts à l'audience d'instruction orale (réponse n. 10). Contre une telle assimilation, la recourante fait valoir, avec raison, que les règles régissant ces deux types d'expertise sont très différentes et, surtout, que la force probante d'une expertise privée n'est pas comparable à celle d'une expertise judiciaire.

Ce nonobstant, le grief examiné ne saurait être admis. En effet, si elle s'estimait victime d'une violation de son droit d'être entendue, la recourante aurait dû relancer la Formation pendente lite et, singulièrement, lorsque celle-ci lui avait fait part, le 6 décembre 2011, de ce qu'elle ne voyait aucun motif susceptible de justifier la désignation d'un expert. Elle aurait dû s'opposer alors à la clôture de la procédure arbitrale en attirant l'attention des arbitres sur le fait qu'ils n'avaient pas ordonné l'expertise judiciaire requise et que semblable expertise ne pouvait pas être remplacée par la déposition d'un expert amené par elle à l'audience d'instruction à venir. Au lieu de quoi, la recourante n'a soulevé aucune objection ni formulé une quelconque remarque à ce propos entre la date précitée et celle de ladite audience (3 février 2012). Elle a même contresigné l'ordonnance de procédure du 27 janvier 2012 qui ne disait mot de l'expertise judiciaire requise. Enfin, elle n'a pas non plus émis de réserve à ce sujet au cours de l'audience du 3 février 2012. Il n'importe, à cet égard, qu'il n'existe pas de recours immédiat contre une décision incidente par laquelle le TAS refuse de désigner un expert, comme le souligne la recourante. La jurisprudence fédérale précitée n'en exige pas moins, sous peine de forclusion, que la partie intéressée attire l'attention de la Formation sur ce qu'elle considère être un vice de procédure et manifeste ainsi clairement son opposition à ce mode de faire dans l'espoir

que son intervention amènera peut-être les arbitres à changer d'avis et à revenir sur la décision contestée qu'ils ont prise antérieurement. La recourante a préféré attendre de connaître l'issue du litige pour se plaindre, alors seulement, après avoir constaté qu'elle lui était défavorable, de la violation de son droit à la preuve, ce qui n'est pas admissible.

**2. En second lieu, la recourante se plaint de la composition irrégulière du tribunal arbitral (art. 190 al. 2 let. a LDIP), subsidiairement de l'incompatibilité de la sentence avec l'ordre public procédural (art. 190 al. 2 let. e LDIP), du fait que le refus de mettre en œuvre l'expertise requise par elle, qui lui a été notifié par le fax du 6 décembre 2011 précité, n'émanerait sans doute pas de la Formation, à l'en croire, mais, selon toute vraisemblance, du seul Greffe du TAS.**

En argumentant ainsi, la recourante n'émet que des suppositions quant à l'auteur de l'ordonnance du 6 décembre 2011, lesquelles suppositions ne sauraient prévaloir contre le texte de cette ordonnance où il est question d'une décision prise par la Formation ("the Panel determines..."). Au demeurant, à supposer que la recourante dise vrai, elle n'en devrait pas moins se laisser opposer le fait qu'ayant pris connaissance du refus d'administrer l'expertise litigieuse, quel qu'en fût l'auteur, elle n'a pas fait le nécessaire pour tenter d'obtenir une décision inverse de la part de la Formation, initiative qu'elle aurait dû être d'autant plus encline à prendre qu'un tel refus, selon ses dires, pouvait lui avoir été signifié à l'insu des arbitres. Une éventuelle admission du second grief ne lui serait donc d'aucun secours.

Par ces motifs, le Tribunal fédéral rejette le recours.

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**Judgment of the Swiss Federal Tribunal  
4A\_620/2012 of May 29, 2013**

**X. S.A.D. (appellant) v. FIFA  
(respondent)\***

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*Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of 20 August 2012*

**Extract of the facts**

X.\_\_\_\_\_ S.A.D. (The Appellant) seated in K.\_\_\_\_\_ (Spain), operates a football team in the highest Spanish football league. It is a member of the Spanish Football Federation, Real Federación Española de Fútbol (RFEF). The Fédération Internationale de Football Association (FIFA; the Respondent) is an association under Swiss law (Art. 60 ff. ZGB2), seated in Zürich. On July 18, 2004, the Appellant entered into an agreement with the Uruguayan Football Club Y.\_\_\_\_\_ as to the transfer of a player.

In a decision of August 10, 2010, the FIFA Players' Status Committee ordered, inter alia, the Appellant to pay the transfer compensation of EUR 959'596 to Y.\_\_\_\_\_. On October 10, 2011, Y.\_\_\_\_\_ informed the Respondent that the Appellant had not fulfilled its claimant obligations according to the decision of the FIFA Players' Status Committee and the matter was subsequently referred to the FIFA Disciplinary Committee. On October 31, 2011, the FIFA Disciplinary Committee opened disciplinary proceedings against the Appellant.

In a decision of November 30, 2012, the FIFA Disciplinary Committee held that the Appellant was at fault for failing to comply with the decision of the FIFA Players' Status Committee and had therefore violated Article

64 of the FIFA 2011 Disciplinary Code. The FIFA Disciplinary Committee ordered the Appellant to pay a fine to the Respondent in the amount of CHF 30'000 and demanded that the Appellant comply within 30 days with the payment obligation contained in the decision of the FIFA Players' Status Committee.

On February 3, 2012, the Appellant appealed the decision of the FIFA Disciplinary Committee to the Court of Arbitration for Sport (CAS). On March 7, 2012, the Respondent appointed Margarita Echeverria as arbitrator. By letter of March 8, 2012, the CAS invited the Appellant to state its position as to the March 7, 2012, submission of the Respondent. In a letter of May 7, 2012, the CAS informed the parties that Mrs. Echeverria had accepted her appointment and made the following disclosure: *"I am an external consultant of FIFA in America regarding statutes governance and management of the federations"*.

In the same letter of May 7, 2012, the CAS advised the parties, with reference to Article R34 of the CAS Code, that they could challenge Mrs. Echeverria within seven days from becoming aware of the ground for challenge, should they have any objections to her appointment. In a letter of May 22, 2012, the CAS informed the parties that the three-member Panel was constituted with Mrs. Echeverria as party-appointed arbitrator for the Respondent.

In a submission of May 28, 2012, the Appellant challenged the appointment of Mrs. Echeverria on the basis of the disclosure that she is an external consultant of the Respondent in America. In a letter of June 6, 2012, the Respondent advised the CAS that there were no valid reasons to challenge the

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\* The decision of the Federal Tribunal has been summarised. The original decision is in German. The

entirety of the text is available on the website of the Federal Tribunal [www.bger.ch](http://www.bger.ch).

appointment of Mrs. Echeverria and that the Appellant had submitted no argument that could question the independence and impartiality of Mrs. Echeverria. In a letter of June 7, 2012, Mrs. Echeverria advised the CAS that she considered herself independent and impartial. In a decision of July 3, 2012, the Board of International Council of Arbitration for Sport (ICAS) rejected the challenge with the following reasons:

*“a) Article R34 of the CAS Code provides that [a]n arbitrator may be challenged if the circumstances give rise to legitimate doubts over his independence. The challenge shall be brought within 7 days after the ground for the challenge has become known.”*

*b) Ms. Margarita Echeverria disclosed the information related to her impartiality and independence to the Parties on May 7, 2012.*

*c) The Appellant raised its objection to Ms. Margarita Echeverria’s nomination on May 28, 2012. This was 21 days after the grounds for challenging had become known to the Parties.*

*d) The Appellant’s challenge was hence filed out of the time limit set in Article R34 of the CAS Code and was inadmissible.”*

Thereafter, Mrs Echeverria was part of the Panel. In a decision of August 20, 2012, the CAS rejected the Appellant’s appeal and confirmed the decision of the FIFA Disciplinary Committee of November 30, 2011. In a civil law appeal of October 17, 2012 to the Federal Tribunal, the Appellant requested principally the annulment of the award CAS 2012/A/2730 for irregular constitution of the arbitral tribunal and, alternatively, that the arbitral award CAS 2012/A/2730 be annulled and the matter be sent back to the CAS.

### **Extract of the legal considerations**

**1. The Appellant argues that the Arbitral Tribunal was composed in violation of the rules (Art. 190(2)(a) PILA). According to the Appellant, the consulting activity of Mrs. Echeverria for the Respondent raises justified doubt as to her independence (Art. 180(1)(c) PILA).**

According to the case law of the Federal Tribunal, objections to the composition of the arbitral tribunal must be raised at the earliest possible time. The party wishing to challenge an arbitrator must therefore raise the ground for challenge as soon as it becomes aware of it. This rule derives from the general principle of good faith and it was incorporated into R34 of the CAS Code as well as in many other arbitration rules and it applies to the grounds for challenge that a party was actually aware of, as well as to those which it should have been aware of by exercising proper attention. The argument that the arbitral tribunal was irregularly composed is forfeited when it is not immediately raised.

The parties may determine the challenge procedure themselves. When the parties resort to a private body – as they did here – to decide the challenge, they may not appeal its decision directly to the Federal Tribunal, but possible grievances according to Art. 190(2)(a) PILA may be raised in an appeal against the arbitral award within the meaning of Art. 190 PILA . The system of appointment of a CAS Panel is regulated in R40.2 and R40.3 of the CAS Code. There is a distinction there between the appointment (German “Benennung,” French “nomination”) and the confirmation (German “Bestätigung,” French “confirmation”) of an arbitrator. While the parties are basically competent for the appointment – and the arbitrators as to the Chairman – the “confirmation” is done by the CAS as an arbitral institution. It is only with the “confirmation” of the arbitrators that the Panel is constituted (R40.3(1) first sentence, CAS Code). The confirmation may only take place when the CAS is satisfied that the arbitrators appointed are independent (R33(1) of the CAS Code) and that they meet the other requirements of R33(2) of the CAS Code (R40.3(1), second sentence, CAS Code).

According to R34(2) of the CAS Code, the grounds for challenge must be presented to

the Board of the International Council of Arbitration for Sport (ICAS). This body or the Council itself decides the matter after hearing all parties to the proceedings. According to R34(1), the grounds for challenge must be raised within seven days from becoming aware of it. In the case at hand, the ICAS board reached the conclusion that the Appellant challenged Mrs. Echeverria only 21 days after becoming aware of the possible grounds for challenge and therefore too late.

The Appellant's argument that the challenge was raised in a timely manner because the time limit of seven days begins with the confirmation of the appointment by the CAS is not convincing. The grounds for challenge that a party becomes aware of must be raised immediately, not only against fully appointed arbitrators but also against potential arbitrators proposed by the parties or by an appointing authority. As the Respondent rightly points out in its rejoinder this is exactly the case here, as the CAS stated the following in the May 7, 2012, letter sent to the parties: *"Furthermore, please find enclosed the 'Arbitrator's Acceptance and Statement of Independence' filed by the arbitrator Mrs. Margarita Echeverria, arbitrator nominated by the Respondent. You will note that Mrs. Echeverria has accepted her nomination in the Panel but wishes to disclose the following information: 'I am an external consultant of FIFA in America regarding statutes governance and management of the federations'. In the event that the parties have an objection to the appointment of Mrs. Echeverria, they may request her challenge within a deadline of seven days after the grounds for the challenge has become known, in accordance with the requirements set at Article R34 of the Code of Sports-related Arbitration."*

According to the general principle of good faith, the Appellant had to assume that this letter would cause the time limit to start. In any case, the Appellant cannot deduce the contrary from the rule R40.3(1), second sentence, of the CAS Code, whereby the confirmation of a party-appointed arbitrator takes place when the former has ensured his

independence. The CAS was entitled to conclude from the Appellant's silence that it agreed or to consider the corresponding exceptions forfeited due to contradictory behavior. The Appellant is therefore barred from raising the grievance of improper constitution of the Arbitral Tribunal before the Federal Tribunal (Art. 190(2)(a) PILA).

**2. The Appellant further argues a violation of its right to be heard by the Arbitral Tribunal (Art. 190(2)(d) PILA) because its request that two documents from the FIFA Players' Status Committee be produced was rejected.**

The Appellant contradicts itself by arguing a violation of the right to be heard in the Federal Tribunal after expressly confirming at the end of the arbitral hearing of July 9, 2012, that with regard to its right to be heard, it had no objections as to the manner the proceedings had been conducted. The assertion in the appeal to the Federal Tribunal that the Appellant "obviously" did not intend to withdraw the previously expressed objections when it made this statement to the Arbitral Tribunal, does not change this at all, as it is only a self-serving argument. The Arbitral Tribunal was entitled to assume, on the basis of the Appellant's statement without reservation that it had no objections, that the Appellant no longer had any objections, specifically with regard to the rejected request to include the two documents from the proceedings in the FIFA Players' Status Committee. The Appellant has therefore forfeited the right to make this argument based on Art. 190(2) d PILA in the Federal Tribunal.

The appeal must therefore be rejected.

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**Arrêt du Tribunal fédéral 4A\_682/2012  
du 20 juin 2013**

**Egyptian Football Association  
(recourante) c. Al-Masry Sporting Club  
(intimé)\***

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*Recours en matière civile contre la sentence rendue le  
2 octobre 2012 par le Tribunal Arbitral du Sport  
(TAS)*

**Extrait des faits**

Le 1er février 2012, la ville de Port-Saïd, en Egypte, a été le théâtre de heurts sanglants à l'issue d'un match de football du championnat national de première division opposant l'équipe locale, Al-Masry Sporting Club (ci-après: Al-Masry), à une formation du Caire, Al-Ahly Sporting Club (ci-après: Al-Ahly). Après le coup de sifflet final, de nombreux supporters d'Al-Masry ont envahi la pelouse où ils ont été rejoints par des supporters de l'équipe visiteuse. Des affrontements violents ont alors éclaté entre les deux groupes de supporters, faisant 74 morts et des centaines de blessés. Le 21 mars 2012, la Fédération égyptienne de football (ci-après: l'EFA, selon son acronyme anglais) a prononcé des sanctions à l'encontre des deux clubs. Al-Masry s'est vu interdire de disputer des matchs dans le stade de Port-Saïd pendant une durée de trois ans et sa première équipe a été exclue de toute compétition pour les saisons 2011/2012 et 2012/2013. Quant au club cairote, il a été condamné à jouer quatre matchs officiels à huis clos. Saisie par Al-Masry, la Commission d'appel de l'EFA (ci-après: la Commission d'appel), statuant le 24 avril 2012, a aggravé les sanctions prononcées en première instance contre ce club. Elle lui a interdit de participer à tout événement sportif organisé

par l'EFA durant la saison 2012/2013; l'a relégué en deuxième division pour la saison

2013/2014, en excluant la présence de ses supporters pour les rencontres disputées tant à domicile que sur terrain adverse; a décidé qu'il ne pourrait pas organiser de match dans le stade de Port-Saïd pendant une durée de quatre ans; enfin, l'a obligé à disputer les quatre prochaines rencontres l'opposant à Al-Ahly sur un terrain neutre, distant d'au moins 200 kilomètres du Caire et de Port-Saïd.

Le 17 mai 2012, Al-Masry a interjeté appel auprès du Tribunal Arbitral du Sport (TAS) contre la décision du 24 avril 2012. Par sentence du 2 octobre 2012, la Formation de trois membres, constituée pour statuer sur cet appel, a partiellement admis celui-ci. En conséquence, elle a obligé le club de Port-Saïd à jouer à huis clos l'ensemble de ses matchs à domicile pendant une saison complète. Le 16 novembre 2012, l'EFA (ci-après: la recourante) a formé un recours en matière civile et demande au Tribunal fédéral d'annuler la sentence du 2 octobre 2012 et de constater que le TAS n'était pas compétent pour rendre cette sentence.

**Extraits des considérants:**

**1. Dans un premier moyen, la recourante, invoquant l'art. 190 al. 2 let. b LDIP, soutient que le Tribunal arbitral s'est déclaré à tort compétent pour connaître de la demande qui lui était soumise. A l'en croire, l'intimé n'aurait pas épuisé les voies de recours internes qu'elle a instituées en faveur de ses affiliés.**

En vertu de l'art. R47 al. 1 du Code de l'arbitrage en matière de sport (le Code), la

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\* Le jugement rendu par le Tribunal Fédéral a été résumé. L'intégralité du jugement est disponible sur le site web du Tribunal Fédéral [www.bger.ch](http://www.bger.ch).

compétence du TAS peut découler, notamment, d'une convention d'arbitrage spécifique conclue par les parties. Etant un contrat, la convention d'arbitrage vient à chef lorsque les parties ont manifesté, réciproquement et de manière concordante, leur volonté de recourir à l'arbitrage. Dans sa réponse, l'intimé déduit de la correspondance échangée par les parties au mois de mai 2012 que celles-ci ont conclu une convention d'arbitrage spécifique fondant la compétence du TAS pour statuer sur l'appel dirigé contre la décision de la Commission d'appel du 24 avril 2012. L'argument tombe à faux. Outre que cette hypothèse a été écartée par la Formation elle-même, il paraît artificiel d'interpréter les demandes de renseignements formulées par l'intimé et les réponses apportées par la recourante comme l'expression consciente de la volonté concordante de ces deux parties de soumettre le cas au TAS sans égard à ce que prévoient les dispositions pertinentes des statuts et règlements de la recourante, autrement dit de traiter cet échange de correspondance à l'égal d'un compromis arbitral. Il s'est agi là, bien plutôt, d'une simple clarification de la situation juridique quant à la voie de droit permettant d'attaquer une décision de la Commission d'appel.

Aux termes de l'art. 186 al. 2 LDIP, l'exception d'incompétence doit être soulevée préalablement à toute défense sur le fond. C'est un cas d'application du principe de la bonne foi, ancré à l'art. 2 al. 1 CC, qui régit l'ensemble des domaines du droit, y compris l'arbitrage. En l'espèce, la recourante n'a pas déposé de réponse dans le délai qui lui avait été imparti pour ce faire. Elle prétend, certes, avoir soulevé l'exception d'incompétence du TAS antérieurement, à savoir dès qu'elle eut été informée de l'introduction de la procédure d'appel. Dirait-elle vrai, il faudrait alors admettre qu'elle a valablement excipé de l'incompétence de cette juridiction arbitrale, fût-ce de manière prématurée au regard de l'art. R55 al. 1 du Code. Cette condition n'est toutefois pas remplie. En effet, malgré qu'en ait la recourante, la lettre du 28 mai 2012

qu'elle a envoyée au Greffe du TAS ne manifeste en rien la volonté de son auteur de soulever une exception d'incompétence. Le passage précité de cette missive, noyé dans le corps d'un texte se bornant à relater les étapes de la procédure consécutive à la tragédie du 1er février 2012, ne constitue qu'un élément de cette narration, sans aucune prise de position ni objection au sujet de la compétence du TAS. Du reste, loin de soulever une exception de ce chef, la recourante a confirmé, deux jours plus tard, à l'intimé que la voie de l'appel au TAS était bien celle qu'il lui fallait emprunter pour contester la décision de la Commission d'appel, étant donné le caractère facultatif de la procédure spécifique de l'art. 21bis du Règlement de recours. Sans doute la recourante n'a-t-elle pas déposé de réponse par la suite, si bien que la Formation a poursuivi la procédure arbitrale en son absence, comme l'art. R55 al. 2 du Code le lui permettait. S'agissant d'une procédure par défaut, les arbitres ont d'ailleurs précisé qu'il leur incombait d'examiner d'office la question de leur compétence, en conformité avec les principes susmentionnés. Cependant, la Formation a admis sa compétence sur le vu du courrier, que le directeur exécutif de la recourante avait adressé à l'intimé en date du 30 mai 2012. La recourante le lui reproche. Il n'est pas certain qu'elle y soit recevable, tant il est vrai que l'on ne peut guère, sauf à violer les règles de la bonne foi, conforter son adverse partie dans sa décision d'en appeler au TAS pour venir ensuite lui dénier le droit de saisir cette juridiction arbitrale. Quoi qu'il en soit, pour les motifs indiqués ci-après, la recourante conteste en vain la compétence du TAS.

Il est constant que l'intimé a déposé sa déclaration d'appel auprès du TAS le 17 mai 2012, après avoir saisi la Commission d'appel, en date du 3 mai 2012, d'une demande au sens de l'art. 21bis du Règlement de recours et s'être vu confirmer, le 8 mai 2012, par le directeur exécutif de la recourante, en réponse à sa demande du même jour, que c'était effectivement la voie à suivre pour

entreprendre la décision de la Commission d'appel du 24 avril 2012. Cet enchaînement de circonstances tendrait à démontrer que cette partie était initialement dans l'incertitude quant au moyen de droit à utiliser pour attaquer ladite décision; qu'elle a fait usage, dans un premier temps, de la voie de recours assortie du délai le plus court (i.e. celle de l'art. 21bis du Règlement de recours, à exercer dans les dix jours), afin de sauvegarder ses droits; qu'elle s'est ensuite renseignée auprès de la recourante pour savoir si cette voie de droit était la bonne; qu'il lui a été répondu que la décision attaquée était une décision finale au niveau de la Fédération égyptienne de football, susceptible d'être déférée au TAS; qu'elle a agi en conséquence par la saisine de celui-ci. Par ailleurs, l'intimé a bel et bien retiré sa demande au sens de l'art. 21bis du Règlement de recours, alors que la cause était pendante devant le TAS. Il l'a fait dans sa lettre du 29 mai 2012 à l'intention de la recourante. Certes, un tel retrait ne serait pas efficace s'il avait pour objet une voie de droit visée par l'art. R47 al. 1 du Code, car il équivaldrait, dans ce cas, à une manœuvre destinée à contourner la règle de l'épuisement préalable des voies de droit internes qu'énonce cette disposition. Semblable hypothèse ne se vérifie, toutefois, pas en l'espèce.

L'obligation d'épuisement des instances préalables, prévue à l'art. R47 al. 1 du Code, ne vise que l'instance interne dont la fédération sportive concernée prescrit la mise en œuvre avant toute saisine du TAS, à l'exclusion de celle à qui la partie recourante a le choix de déférer ou non la décision qui ne la satisfait pas. De surcroît, il n'est guère envisageable d'admettre que pareille obligation puisse également porter sur un moyen de droit extraordinaire et incomplet, telle la révision. Or, à supposer qu'une partie doive exercer un moyen de droit extraordinaire et incomplet avant de pouvoir saisir le TAS, l'appel ne pourrait plus avoir pour objet que la décision rendue sur ce moyen de droit. La partie appelante ne pourrait se plaindre que d'une mauvaise

application des faits et du droit que l'instance de recours interne de la fédération sportive en cause aurait faite dans les limites de sa cognition restreinte. En revanche, elle ne serait plus en mesure de déférer la décision initiale au TAS, étant donné que le délai d'appel de 21 jours (art. R49 du Code) serait déjà échu de longue date. Il faut s'en tenir au principe général, qu'exprimait dans un autre contexte l'art. 54 al. 1 de la loi fédérale d'organisation judiciaire du 16 décembre 1943 (OJ) abrogée par l'art. 131 al. 1 LTF, voulant que le délai de recours ne puisse pas être prolongé par l'emploi d'un moyen de droit extraordinaire. En l'occurrence, les statuts de la recourante prévoient expressément que les décisions prises par la Commission d'appel sont finales, qu'elles ne peuvent pas être annulées à l'intérieur de la fédération égyptienne de football et qu'elles doivent être attaquées devant le TAS.

L'art. 21bis du Règlement de recours édicté par la recourante accorde, quant à lui, à chaque partie la possibilité de demander, dans les dix jours, une "réévaluation" de la décision prise par la Commission d'appel si cette décision a été influencée par un "acte de tricherie" de la partie adverse ou si la partie requérante découvre après coup des documents concluants qu'elle n'avait pas pu invoquer dans la procédure de recours et dont la Commission d'appel ignorait l'existence au moment de rendre sa décision. Il n'apparaît pas que les normes de rang supérieur (les statuts de la recourante) feraient de la demande prévue dans la disposition précitée de rang inférieur (le Règlement de recours) une voie de droit à épuiser impérativement avant de saisir le TAS. De surcroît, le moyen de droit réservé par l'art. 21bis du Règlement de recours présente toutes les caractéristiques de la révision classique (recours extraordinaire, aux ouvertures limitées, n'ayant ni effet suspensif ni effet dévolutif). Partant, sur le vu des principes sus-indiqués, il n'y a pas lieu de le ranger dans les voies de droit à l'épuisement préalable desquelles l'art. R47 al. 1 du Code subordonne la recevabilité de l'appel au TAS.

Cela étant, le grief tiré de l'incompétence du TAS tombe à faux, si tant est qu'il soit recevable.

**2. La recourante reproche, par ailleurs, au TAS d'avoir statué *ultra petita* en imposant à l'intimé une sanction (l'interdiction d'admettre la présence de spectateurs pour l'ensemble des matchs disputés à domicile pendant une saison complète) plus sévère que la sanction la plus dure (l'obligation de disputer un maximum de six rencontres en territoire neutre et sans spectateurs) à laquelle le club de Port-Saïd avait consenti dans ses conclusions subsidiaires.**

Dans sa réponse, le TAS met en doute l'existence d'un intérêt de la recourante à soulever pareil grief. On serait enclin à lui donner raison. Il faut bien voir, en effet, qu'en formulant ce grief, la recourante, non seulement se plaint d'une décision censée ne toucher que son adverse partie, mais, qui plus est, remet en cause une sanction se rapprochant davantage, par sa sévérité, de celle que sa Commission d'appel avait prononcé que de celle à laquelle le club sanctionné avait déclaré consentir dans le pire des cas. En d'autres termes, par le biais de l'argument procédural qu'elle invoque, la recourante reproche indirectement au TAS d'avoir prononcé une sanction trop sévère à l'encontre de l'intimé, alors que ladite sanction était sensiblement moins sévère que celle qu'elle avait elle-même infligée au club incriminé par le truchement de sa Commission d'appel. Il n'est pas certain que le principe de la bonne foi y trouve son compte. Quoi qu'il en soit, le grief examiné ne saurait prospérer.

Le reproche que la recourante adresse au TAS, sur la base de l'art. 190 al. 2 let. c, est dénué de tout fondement. En effet, la Formation était saisie de conclusions de l'intimé allant de l'absence complète de toute sanction à l'obligation de jouer six matchs à huis clos en terrain neutre. La recourante, qui n'a pas participé à la procédure arbitrale, n'a

pas laissé entendre, ni formellement ni implicitement, qu'elle s'accommoderait d'une telle sanction, bien que cette dernière se situât en deçà de celles que sa Commission d'appel avait imposées au club appelant. Dès lors, en infligeant à ce club une peine plus sévère que la peine maximale figurant dans ses conclusions alternatives, mais moins lourde que celles prononcées en première instance, la Formation n'a admis que partiellement l'appel, n'est pas sortie des limites assignées à son pouvoir décisionnel et, partant, n'a en aucun cas statué *ultra petita*.

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**Informations diverses**  
**Miscellaneous**

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