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Editorial

2018, an Olympic year, was a big year for the CAS. To begin with it registered a significant number of cases (609, equalling the record of 2016) and also set up four ad hoc Divisions. The first ad hoc Division was implemented for the Olympic Winter Games in PyeongChang, Korea. The PyeongChang Games were also closely connected with the end of the CAS procedures involving 39 Russian athletes (appeals against sanctions imposed by the IOC, post-Sochi 2014), managed by CAS within less than 2 months. The 39 reasoned awards will be published in the CAS database in January 2019. The first of these reasoned awards (Legkov v/ IOC) was recently upheld by the Swiss Federal Tribunal (ATF 4A_382/2018).

Thereafter, ad hoc divisions were established on the occasion of the Commonwealth Games in the Gold Coast, Australia, of the Asian Games in Jakarta, Indonesia, and of the FIFA World Cup in Russia. Importantly, further to the successful experience of the CAS Anti-Doping Division (CAS ADD) at the 2016 Olympic Games in Rio, a new CAS ADD was established in PyeongChang for the second time alongside the "classic" CAS Ad Hoc Division (AHD). But in 2018, ICAS amended the regulations of the CAS ADD in order to include the Winter International Federations in the CAS ADD procedure during the PyeongChang Olympic Games, the objective being the reduction of the number of internal procedures related to the same facts and to the same athletes, with a double degree of jurisdiction guaranteed.

One of the highlights of 2018 was obviously the decision of the European Court of Human Rights (ECHR) in the cases Mutu and Pechstein v. Switzerland. The original decision in French is included in this issue together with an explanatory note in English released by the Court. Like the Swiss Federal Tribunal in 2003 and the German Federal Tribunal in 2016, the ECHR recognized that the CAS was an independent arbitration court within the meaning of article 6§1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Importantly, the ECHR emphasized the fact that, by analogy to State courts, it was not possible to establish a lack of independence or impartiality of the CAS based on its funding system. Furthermore, the ECHR confirmed that the system of a mandatory list of arbitrators did not violate Article 6§1 of the Convention.

Finally, the ECHR noted that the principle of a right to a public hearing in judicial procedures was also applicable to non-State courts ruling on disciplinary and/or ethics matters. In the case of Claudia Pechstein, CAS should have allowed a public hearing to take place considering that the athlete had requested one and that there was no particular reason to deny it. The ICAS has acknowledged such decision and has already amended Article R57 of the Code of Sports-related Arbitration accordingly.

A propos ICAS, as a reminder, 7 new ICAS members have been appointed for the current 4-year cycle (2019-2022):

- Mr Antonio Arimany (Spain), lawyer, Secretary General International Triathlon Union (ITU)
- Prof. Enrique Arnaldo Alcubilla (Spain), Professor of law at the Rey Juan Carlos University in Madrid
- Prof. Giulio Napolitano (Italy), Attorney at law
- Mr Mikael Rentsch (Switzerland/Sweden), Legal Director Fédération Equestre Internationale (FEI)
- Judge Patrick Robinson (Jamaica), Judge at the International Court of Justice in The Hague
- Mr Yves Rüedi (Switzerland), Judge at the Swiss Federal Tribunal (Criminal Division).

- Dr Elisabeth Steiner (Austria), Attorney at law, former judge at the European Court of Human Rights

The elections for the ICAS Board Members and for the Division Presidents will take place in May 2019.

In application of the recommendation of the Olympic Summit in 2017 and 2018, a new CAS Division started to operate as of 1 January 2019: the permanent CAS Anti-Doping Division which will manage first-instance procedures relating to anti-doping matters. Such creation implies the establishment of a new list of arbitrators (the CAS ADD list) in order to avoid that the same arbitrators be eligible in first-instance and in appeal.

Furthermore, ICAS has decided to create new commissions in order to reduce the burden on the ICAS Board and to further strengthen the independence and governance of CAS:

- Challenge Commission (new; chaired by Justice Ellen Gracie Northfleet and composed of the 3 Division Presidents and the 3 Deputy Presidents, less the President and Deputy of the Division concerned by the specific procedure for challenge), which will handle the petitions for challenge raised against CAS arbitrators.
- Legal Aid Commission (renewed; composed of the ICAS President and of the four ICAS members nominated as athletes' representatives), which shall rule on requests for legal aid filed by physical persons who do not have the financial means to proceed before the CAS.
- Membership Commission (renewed; chaired by Federal Judge Yves Rüedi and composed of Ms Tricia Smith and the three Division Presidents), which shall review the lists of CAS arbitrators and mediators, as well as the candidatures of potential new CAS members.

Another key decision, this time issued by the Swiss Federal Tribunal (SFT), in the case RFC Seraing v/ FIFA (4A_260/2017 X. v. FIFA on 20 February 2018) has also been included in this issue. The opinion rendered by the SFT is of major interest and strengthens the *Lazutina* judgment that was rendered by the SFT 15 years ago (ATF 129 III 445). The SFT judgment concentrates on the "legality" of CAS as an arbitral tribunal but also on its independence from FIFA. The judgment rendered by the SFT confirms the independence of CAS, both structurally and financially, in particular with regard to FIFA. It also referred to the *Pechstein* judgment of the German *Bundesgerichtshof* of 7 June 2016 which confirmed that CAS is a genuine, independent, and impartial arbitral tribunal.

Regarding the "leading cases" selected for this issue, while they mostly remain football-related (8 cases out of 12), some relevant doping cases have also been included.

In the area of football and in particular in the context of match-fixing, the case 5324 Fédération Burkinabé de Football v. FIFA, South African Football Association, Fédération Sénégalaise de Football & Federaçao Caboverdiana de Futebal analyses the validity of a FIFA decision ordering the replay of a fixed match whereas the case 5500 Lao Toyota Football Club v. Asian Football Confederation (AFC) contemplates the eligibility of a club involved in match-fixing activities to participate in AFC competitions. For its part, the case 4903 Club Atlético Vélez Sarsfield v. Manchester City FC & FIFA interprets Article 19.2 (b) of the FIFA Regulations for the Status and Transfer of Players (RSTP) related to the transfer of minors in light of CAS jurisprudence and European law. The cases Olympiques des Alpes SA v. Genoa Cricket & Football Club and FK Sarajevo v. KUG Westerlo deal respectively with the entitlement to training compensation of clubs having registered a player on a loan basis and the waiver of right to training compensation. Interestingly, the case 5272 KF Skënderbeu v. the Albanian

Football Association analyses the scope of discretion for a federation's decision making bodies to act as a legislator in disciplinary matters. Finally, in 5374 Jaroslaw Kolakowski v. Daniel Quintana Sosa, a player's agent contractual entitlement to a commission is examined.

Turning to doping, the case 4772 Diego Dominguez v. Fédération Internationale Automobile relates to a denial of a retroactive Therapeutic Use Exemption (TUE) whereas in 5282 WADA v. IIHF & Filip Lestan CAS deals with the conditions of reduction of a sanction in case of prompt admission of anti-doping rule violation. In 5114 Elizabeth Juliano owner of Horizon et al. v. Fédération Equestre Internationale, the validity of a provisional suspension of a horse by reason of an adverse analytical finding is confirmed. Lastly, the case Nesta Carter v. IOC analyses the scope of the IOC's policy regarding the re-analysis of a sample within the limitation period.

In addition to an article entitled "Recreational drugs and doping: the issue of cocaine", prepared by Carlos Schneider, FIFA Head of Ethics for the Secretariat of the Investigatory Chamber, we are pleased to publish in this issue an article on match fixing entitled "Match-fixing and the evolution of CAS Jurisprudence" co-written by Giulo Palermo and Bryce Williams attorneys at law, which analyses the latest regulatory and jurisprudential developments in this area.

This edition of the Bulletin was finalized with a slight delay in order to include the confirmation that the ICAS is now the owner of the south wing of the Palais de Beaulieu in Lausanne, which will be the future headquarters of the CAS. The renovation and transformation work will start in May 2019 and will last approximately 2 years.

We hope you enjoy reading this new edition of the CAS Bulletin.

Matthieu REEB
CAS Secretary General

Articles et commentaires
Articles and Commentaries

Match-fixing and the evolution of CAS Jurisprudence

Giulio Palermo & Bryce Williams*

I. Introduction

1. The jurisprudence of the Court of Arbitration for Sport (CAS) on match-fixing has a relatively short history, with the first major international match-fixing case decided in 2010.[1] Over the more than twenty match-fixing related cases which have followed, CAS Panels have developed a comparatively harmonious approach to common legal issues arising from match-fixing, subject to the applicable regulations or the circumstances of a given case.

2. As noted by the CAS Panel in *Köllerer*, *"consistency across different associations may be desirable*… [but] *CAS neither has the function nor the authority to harmonize regulations by imposing a uniform standard of proof, where, as in the current case, an association decides to apply a different, specific standard in its regulations"*.[2] Further, CAS Panels have in some cases relied upon existing jurisprudence developed in respect of other sports integrity issues by analogy, notably, the regime applicable to doping.[3]

* Giulio Palermo is an arbitration specialist qualified in Switzerland, Italy and Spain. He is a partner at the Geneva office of Archipel, a dispute resolution boutique with offices in Geneva and Paris. The article is co-authored with Bryce Williams, LL.M. (MIDS) (Hons); LL.B. (Syd) (Hons); B.Int.S. (Syd).

[1] CAS 2009/A/1920 *FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA* (***Pobeda***), award of 15 April 2010. *Pobeda* had been preceded by a number of earlier decisions, including TAS 98/185 *Royal Sporting Club Anderlecht / UEFA* (***RSC Anderlecht***), award of 22 July 1998 and CAS 2008/A/1583 *Sport Lisboa e Benfica Futebol SAD v. UEFA & FC Porto Futebol SAD* / CAS 2008/A/1584 *Vitória Sport Clube de Guimarães v. UEFA & FC Porto Futebol SAD* (***FC Porto***), award of 15 July 2008. It was also preceded by the UEFA Emergency Panel's decision in respect of *AC Milan* in 2006. For more on the development of UEFA's approach to match-fixing, including these early cases, see E. Garcia Silvero, *The match-fixing eligibility criteria in UEFA competitions: an overview of CAS case law*, (CAS Bulletin 2018/1).

[2] CAS 2011/A/2490, *Daniel Köllerer v. Association of Tennis Professionals (ATP), Women's Tennis Association (WTF), International Tennis Federation (ITF) & Grand Slam Committee* (***Köllerer***), award of 23 March 2012, para. 29.

[3] For example, in *Pobeda* (CAS 2009/A/1920), the Panel stated that it was *"of the opinion that cases of match fixing should be dealt in line with the CAS constant jurisprudence on disciplinary doping cases"* (in respect of the standard of proof). In CAS 2013/A/3256 *Fenerbahçe Spor Kulübü v. Union des Associations Européennes de Football (UEFA)* (***Fenerbahçe***), award of 11 April 2014, the Panel observed the *"spectrum of sanctions* [in match-fixing cases]…*is comparable to a certain extent to the*

3. Building upon the rich existing literature on match-fixing in CAS jurisprudence,[4] this article reviews the legal issues which have arisen in the context of match-fixing cases and assesses their development over time, including by reference to the parallel evolution of sports regulations and international legal instruments. To that end, this article analyses the material and personal scope of match-fixing conduct subject to regulation (Section B); the process of proving match-fixing, including the burden and standard of proof (Section C); as well as the scope of review of sanctions for match-fixing conduct when it has been established (Section D).[5]

II. Defining 'Match-fixing'

4. The improper manipulation of sport, or match-fixing, has emerged as one of the *"major threats facing contemporary sport"*[6] and as the *"worst offence possible under the* [applicable rules]*"*, which *"undermines the sport as a whole"*.[7] In undermining the authenticity and uncertainty of results, it attacks all members of the professional sporting community – the clean competitors who are denied the right to compete fairly, the spectators and fans who engage with the game, and the clubs and federations, whose economic viability are dependent on those spectators and fans.[8] Indeed, professional sport *"can only continue to be successful if it is run according to the highest standards of conduct and integrity, both on and off the field"*.[9]

5. Moreover, the manipulation of sports competitions is also a relatively uncontrolled and therefore extremely **attractive business for criminal organizations**. In this respect, a very recent landmark investigation on sports integrity observed that:
"law enforcement agencies are also now appearing to realise that they should be more active in prosecuting match-fixing as a method of addressing organised crime or money laundering, since match-fixing is considered by such criminal organisations to be a more attractive and lower-risk investment when compared to other criminal enterprises that are more severely sanctioned".[10]

6. The scourge of match-fixing is not limited to a specific region or sport. To date, CAS Panels have rendered decisions in respect of match-fixing in, inter alia, football (by far, the most frequent sport represented at CAS level), tennis, cricket and even bridge.[11] Nevertheless, the nature of some sports renders them more vulnerable to match-fixing than others. For example, as the Panel in Köllerer noted, tennis is "extremely vulnerable to corruption as a match-fixer only needs to corrupt one player (rather than

spectrum of sanctions in doping cases…this Panel is prepared to find some guidance in the elaborate regime on doping sanctions" (at para. 574). More recently, in CAS 2016/A/4650 *Klubi Sportiv Skënderbeu v. Union Européenne de Football Association (UEFA)* (***Skënderbeu***), award of 21 November 2016, para. 82, the Panel noted *"the similarities between the procedures followed in respect of the* [UEFA Betting Fraud Detection System] *and the athlete blood passport (the "ABP") in doping matters"*. However, In CAS 2014/A/3625 *Sivasspor Kulübü v. Union of European Football Association (UEFA)* (***Sivasspor***), award of 3 November 2014, the Appellant argued for the extension of the doping analogy to the strict liability of clubs for the conduct of their players (para. 63), a position rejected by UEFA, the Respondent (paras. 98 -100). The Panel did not need to expressly decide the point.

[4] *Ex multis*, Emilio Garcia Silvero's considered review of administrative / eligibility measures from the UEFA perspective (CAS Bulletin 2018/1) and Efraim Barak and Dennis Koolaard's reflection on the *Pobeda* case and its aftermath (CAS Bulletin 2014/1).

[5] Nevertheless, this article does not deal with legal issues which, although they may arise in the match-fixing context, arise in a similar fashion in other contexts – for example, the necessity and/or scope of third party participation in appeal proceedings when the third party's rights are affected by a decision.

[6] European Commission Expert Group on Match Fixing, *State of Play on the fight against match fixing* (2016).

[7] *Köllerer* (CAS 2011/A/2490), para. 63.

[8] See the discussion in CAS 98/200 *AEK Athens and SK Slavia Prague / Union of European Football Associations (UEFA)* (***AEK***), award of 20 August 1999, paras. 22-27.

[9] *AEK* (CAS 98/200), para. 23.

[10] The Independent Review of Integrity in Tennis, Chapter V Protection of Integrity by Punishment of Breaches, para. 161

[11] In respect of the latter, see CAS 2016/A/4783 *Fulvio Fantoni & Claudio Nunes v. European Bridge League (EBL)* (***Fantoni***), award of 10 January 2018.

a full team)".[12] Moreover, "integrity problems in tennis are greatest where prize money relative to costs, prospects of advancement, public interest and attention, and financial resources of tournaments are lowest".[13]

7. The manipulation of sport, in the form of 'match-fixing', takes many forms. The Panel in Fenerbahçe identified two main categories:[14]

a. *"Classic"* match-fixing, where participants aim to influence the outcome of matches for their own benefit (as in the *Fenerbahçe* case itself, where the club was accused of *"having influenced the outcome of numerous matches … in order to win the Turkish Super Lig in the 2010/2011 season"*);[15] and

b. *"Modern"* match-fixing, where third parties profit on betting markets from:

   i. the occurrence of particular events during the competition (*i.e.* spot fixing), as in *Asif*[16] and *Butt*,[17] where 'no-balls' were to be bowled during specified overs, or

   ii. the outcome of matches, typically where the involved party underperforms (as in *Pakruojo*,[18] where high-value bets were placed on Pakruojo losing against weaker teams by a certain number of goals).

   The latter has appeared most frequently at the CAS level.

A. Definition ratione materiae

8. Despite recurrent fact patterns, a common legal definition of 'match-fixing' has eluded the grasp of national criminal law and sporting federations. The Convention on the Manipulation of Sports Competitions (Macolin Convention), designed with the aim of *"further develop*[ing] *a common European and global framework"* defines *"manipulation of sports competitions"* as: *"an intentional arrangement, act or omission aimed at an improper alteration of the result or the course of a sports competition in order to remove all or part of the unpredictable nature of the aforementioned sports competition with a view to obtaining an undue advantage for oneself or for others"*.[19] Article 15 of the Convention obliges contracting parties to criminally sanction manipulation *"when it involves either coercive, corrupt or fraudulent practices"*.

9. The Macolin Convention also provides greater definition to prohibited conduct related to the manipulation of sport. Article 7 of the Convention encourages sports organisations and competition organisers to: (i) prohibit competition stakeholders from betting on sports competitions in which they are involved; (ii) prohibit competition stakeholders from misusing inside information; and (iii) require competition stakeholders to report any suspicious activity immediately.

10. At the national level, different definitions and approaches have been developed. As the Panel in *Asif* noted,[20] Mr. Asif had been charged (in national criminal proceedings, separate to his alleged disciplinary breaches) with contraventions of the *Prevention of Corruption Act 1906 (UK)* (since replaced by the *Bribery Act 2010 (UK)*) which has a broad, general scope,[21] and section 42 of the

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[12] *Köllerer* (CAS 2011/A/2490), para. 66.
[13] The Independent Review of Integrity in Tennis, *Interim Report*, para. 11.
[14] *Fenerbahçe* (CAS 2013/A/3256), paras. 125 -129.
[15] *Fenerbahçe* (CAS 2013/A/3256), para. 128.
[16] CAS 2011/A/2362 *Mohammad Asif v. International Cricket Council (ICC)* (***Asif***), award of 17 April 2013.
[17] CAS 2011/A/2364 *Salman Butt v. International Cricket Council (ICC)* (***Butt***), award of 17 April 2013.
[18] CAS 2015/A/4351 *Vsl Pakruojo FK, Darius Jankauskas, Arnas Mikaitis, Sigitas Olberkis, Valdas Pocevicius, Alfredas Skroblas, Donatas Strockis, Diogo Gouveia Miranda, C.H. Alexandru, Taras Michailiuk v. Lithuanian Football Federation* (***Pakruojo***), award of 13 July 2016.
[19] Council of Europe Convention on the Manipulation of Sports Competitions, CETS 215, 2014, ("***Macolin Convention***"), Article 3(4).
[20] *Asif* (CAS 2011/A/2362), paras. 21-23.
[21] Section 1 of the *Prevention of Corruption Act 1906 (UK)* provides, *inter alia*, that, *"*[i]*f any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any*

Gambling Act 2005 (UK), which addresses cheating in the gambling context specifically.[22]

11. Federations have also adopted different language to define the scope of their 'match-fixing' or manipulation provisions. The current form of the provisions most frequently considered by CAS, the UEFA Disciplinary Regulations (2017), proscribes *"damage* [to] *the integrity of matches and competitions"*, including:

"a. [acting] *in a manner that is likely to exert an unlawful or undue influence on the course and/or result of a match or competition with a view to gaining an advantage for himself or a third party;*

b. [participating] *directly or indirectly in betting or similar activities relating to competition matches or who has a direct or indirect financial interest in such activities;*

c. [using or providing] *others with information which is not publicly available, which is obtained through his position in football, and damages or could damage the integrity of a match or competition;*

d. …not immediately and voluntarily [informing] *UEFA if approached in connection with activities aimed at influencing in an unlawful or undue manner the course and/or result of a match or competition;*

e. …not immediately and voluntarily [reporting] *to UEFA any behaviour he is aware of that may fall within the scope of this article".*[23]

Likewise, the Tennis Anti-Corruption Program (2018)[24] proscribes, *inter alia*:

"d. … directly or indirectly, [contriving] *or* [attempting] *to contrive the outcome or any other aspect of any Event.*

[…]

f. … directly or indirectly, [soliciting] *or* [accepting] *any money, benefit or Consideration with the intention of negatively influencing a Player's best efforts in any Event".*[25]

11. Clearly there are certain core elements common to criminal, disciplinary and administrative definitions – intent, direct or indirect involvement, conduct that is (circularly) 'improper' or 'unlawful', the object of the conduct being the result or an aspect of the competition, and the concept of obtaining an 'advantage' or 'benefit'.

13. As the jurisprudence of CAS Panels has clarified, there are certain elements which are not required to make out 'match-fixing' (under the respective regulations) – in *Asif* and *Butt*, the CAS Panels clarified that a financial benefit was *not* required under the International Cricket Council Code to establish 'match-fixing', and as such, a lack of proof of such a benefit was not a critical flaw.[26] The Panels in *Köllerer* and *Savic* further clarified that an attempt at match-fixing did not have to be successful in order to attract liability under the relevant regulations.[27]

14. Of course, with a slightly amorphous definition, specific sets of fact patterns have emerged which have tested, and demonstrated, the adaptability of the concept. In *Eskişehirspor*, bonuses had been offered by a third club for Eskişehirspor players to beat a rival club – as such, it was unusual in that a third club was involved, and that the benefits were offered to *play well* (presumably, what Eskişehirspor was interested in doing in any event).[28] Nonetheless, the Panel found a breach of the administrative provisions given it was *"an*

person in relation to his principal's affairs or business, … he shall be guilty of a misdemeanour".

[22] Section 42 of the *Gambling Act 2005 (UK)* provides, *inter alia*, that "[a] *person commits an offence if he - (a)cheats at gambling, or (b)does anything for the purpose of enabling or assisting another person to cheat at gambling".*

[23] UEFA Disciplinary Regulations (***UEFA DR***), Edition 2017, Article 12.

[24] Tennis Integrity Unit, Tennis Anti-Corruption Program (*"**TACP**"*), 2018, Section D, Article 1, letter *d.*

[25] TACP, Section D, Article 1, letter *f.*

[26] *Asif* (CAS 2011/A/2362), para. 64; *Butt* (CAS 2011/A/2364), para. 75.

[27] *Köllerer* (CAS 2011/A/2490), para. 62; CAS 2011/A/2621 *David Savic v Professional Tennis Integrity Officers (**Savic**)*, award of 5 September 2012, para. 9.1.

[28] CAS 2014/A/3628 *Eskişehirspor Kulübü v. Union of European Football Association (UEFA) (**Eskişehirspor**),* award of 2 September 2014.

activity clearly aimed at influencing the outcome of a match", and noted that third party bonuses jeopardise the integrity of competitions more broadly, including by changing their incentive structures.[29]

15. These cases have also fostered the development of the definitions themselves. In *N&V*,[30] it was established that players had been approached as part of a match-fixing scheme, but it was not established that they had actually manipulated the match. They had not reported the approach. The Panel found a violation of the UEFA Disciplinary Regulations, which at that point did not contain the above-mentioned paragraphs (concerning the obligation to inform / report), rather a general obligation to act in accordance with the principles of *"loyalty, integrity and sportsmanship"*. The Panel found a breach of these principles, implying from these principles *"a duty of the players to fully cooperate with the sporting authorities in their effort to prevent manipulation of matches"*.[31] An express obligation to inform and report was added immediately after the decision (in June 2011, following the decision in *N&V* in May 2011).[32] As a consequence, most sporting federations have adopted **reporting obligations** in their integrity rules.

16. In response to the potentially harsh impact of the Panel's conclusion in *N&V* that *"the fear of possible reactions by the criminal gang is no excuse under* the [Disciplinary Regulations] *for a player's failure to report an illicit approach"*, the Tennis Anti-Corruption Program (2018) introduced a defence against disciplinary charge for lack of reporting where the approached person has an honest and reasonable belief that there was a significant threat to their life or safety, of that of any member of their family.[33]

B. Statutory Regulations

17. Temporality (*i.e. nullum crimen, nulla poena sine praevia lege poenali*) has played a significant role in the development of CAS' case law, and the statutory basis for disciplinary and administrative measures for match-fixing. As this basis has evolved rapidly, CAS Panels have resorted to *"the applicable substantive rules by reference to the principle "tempus regit actum": in order to determine whether an act constitutes a disciplinary infringement, the Panel applies the law in force at the time the act was committed"*,[34] with the exception that later regulations may be applicable if they are more favourable to the athlete.[35]

18. This follows from the principle of legality – as the Panel noted in *Fenerbahçe*, *"there must be a sufficiently clear legal basis for a disciplinary measure to be imposed… Legal certainty requires, inter alia, that the applicable provision…is sufficiently clear as to its material and territorial scope of application"*.[36]

19. Nevertheless, in the early phases of statutory development, CAS Panels were willing to extract obligations from general principles (as in *N&V* described above, and in *Pobeda* where though *"[n]o provision in the UEFA 2004 Statutes and 2004 [Disciplinary Regulations] refers specifically to "match fixing"… [it] touches at the very essence of the principle of loyalty, integrity and sportsmanship"*,[37] and was thus a breach of the Disciplinary Regulations).

20. The structure of match-fixing regulation has since significantly evolved. Most notably,

[29] *Eskişehirspor* (CAS 2014/A/3628), paras. 113-120.
[30] CAS 2010/A/2266, *N. & V. v. UEFA (**N&V**)*, award of 5 May 2011.
[31] *N&V* (CAS 2010/A/2266), para. 24.
[32] Amongst other significant amendments to the 2008 UEFA DR, see Articles 5bis (2)(d) and (e) of UEFA Disciplinary Regulations, Edition 2011.
[33] TACP, Section D, Article 3.
[34] *Pakruojo* (CAS 2015/A/4351), para. 73, cited with approval in CAS 2017/A/4947 *Ion Viorel v. Romanian Football Federation (**Viorel**)*, award of 6 October 2017, para. 124.
[35] As in *Viorel* (CAS 2017/A/4947), where the amendments to the Romanian Football Federation Regulations removed the potential for a person to be declared *"persona non grata"* as a sanction (at para. 126).
[36] *Fenerbahçe* (CAS 2013/A/3256), paras. 190, 192.
[37] *Pobeda* (CAS 2009/A/1920), para. 19.

federations have introduced a two-stage process, incorporating eligibility/administrative measures, in addition to potential disciplinary measures.[38] For instance, the UEFA first introduced the two-stage process in 2007 by amending Article 50 of its Statute. In the first stage, the administrative measures render clubs ineligible for competitions for one season, due to their involvement in match-fixing. In the second stage *"a concrete and specific breach of the regulation is required"*[39] to justify the application of disciplinary proceedings which may result in the suspension from European competitions without a maximum duration.

21. For instance, Article 4.02 of the 2018 UEFA Europa League Regulations provides:

"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, i.e. 27 April 2007, in any activity aimed at arranging or influencing the outcome of a match at national or international level, UEFA will 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 of preventing that club from participating in a UEFA club competition".

22. As noted in *Eskişehirspor*,[40] the scope of these eligibility/administrative measures are *"very broad"* by virtue of the connecting factors used (applicable to a *club* being *indirectly involved* in any activity *"aimed at"* influencing the outcome of a match at the *national or international* level). As the Panel in *Besiktas* noted (and approved in *Eskişehirspor)*, *"*[even an] *activity which might look at first sight licit, might breach Article 2.08 UELR* [an earlier version of Article 4.02]*, considering all of the circumstances of a case, if this activity might have an influence on the outcome of a particular match".*[41]

23. The categorisation of these measures has provoked some debate in the jurisprudence. In *Fenerbahçe*, the first Panel to address the difference between administrative and disciplinary measures observed that *"irrespective of the wording used* ["administrative measure"]*, proceedings initiated by UEFA on the basis of article 2.05 of the UCLR* [an equivalent provision] *are disciplinary in nature, because the subject matter in such proceedings is the imposition of a sanction"*,[42] but also noted *"the administrative measure is not the final sanction, but only a preliminary minimum sanction intended to protect the integrity of the competition".*[43]

24. Conversely, the Panel in *Besiktas* considered that the administrative measures were *"not of a sanctionatory nature".*[44] In *Sivasspor*,[45] the Panel noted the clear distinctions between the two kinds of measures, including:

a. the conduct to which each measure attaches - disciplinary measures requiring "an active role in the match-fixing activity… contrary to the potential passive and indirect role envisaged in the administrative measures… it is clear that to act… is different than to be involved (to be implicated in or associated with something)";

b. the entities to which the measures are directed (to clubs (for administrative

[38] This evolution (with respect to UEFA's regulations) has been detailed in E. Garcia Silvero, *The match-fixing eligibility criteria in UEFA competitions: an overview of CAS case law*, CAS Bulletin 2018/1.
[39] *Skënderbeu* (CAS 2016/A/4650), para. 1.
[40] *Eskişehirspor* (CAS 2014/A/3628), paras. 111-112.
[41] CAS 2013/A/3258 *Besiktas Jimnastik Kulübü v. UEFA* (***Besiktas***), award of 23 January 2014, para. 139; *Eskişehirspor* (CAS 2014/A/3628), para. 113.
[42] *Fenerbahçe* (CAS 2013/A/3256), para. 162.
[43] *Fenerbahçe* (CAS 2013/A/3256), para. 166.
[44] *Besiktas* (CAS 2013/A/3258), para. 127.
[45] *Sivasspor* (CAS 2014/A/3625), paras. 124-125.

measures), and to everyone inclusive of clubs (for disciplinary measures)); and

c. the applicable time limits.

25. The Panels in *Eskişehirspor* (chaired by the same arbitrator),[46] and *Phnom Penh* (addressing a similar provision in the Asian Football Confederation regulations),[47] agreed, as did the Panel in *Skënderbeu*, the latter noting that while administrative measures had punitive elements, *"such hybrid nature does not take away that a distinction between an initial administrative measure, followed by a subsequent disciplinary procedure is perfectly feasible"*.[48]

26. A number of consequences flow from this distinction, as the Panel in *Sivasspor* suggested, it is *"not a trivial semantic question"*[49]*:*

a. issues of *res judicata* and *ne bis in idem* do not arise as between administrative and disciplinary measures proceedings, given the different object of proceedings (*i.e.* proving *involvement* in match fixing for the former and *responsibility* for match-fixing for the latter);

b. the substance of the *Disciplinary* Regulations does not apply to administrative measures, including provisions concerning the strict liability of clubs for their players and officials.[50] Instead, the standard of *"involvement"* for administrative measures is ascertained by reference to the broader regulatory framework and to the underlying national law;[51]

c. the degree of 'culpability' or fault of the club is not relevant (per *Eskişehirspor*) for administrative measures;[52] and

d. the administrative measure is not subject to deferral or a probationary period (*Eskişehirspor*).[53]

27. Despite the breadth of the UEFA provisions, other federations have extended their reach even further to *"presumed match-fixing"*. Article 44 of the Lithuanian Football Federation's Disciplinary Code (considered in *Pakruojo*) provides, in part:

"In the case when there are sufficient data to confirm match-fixing, the Participant of the Match, the behaviour of whom during the Match (as shown by the analysis of the Match) allows presuming that such a Participant could have committed [match-fixing]*, shall be sanctioned with Match suspension (disqualification)".*

28. Nevertheless, there are limits to this extension – while the presumption of match-fixing was legitimate in the context of the administrative measures in *Pakruojo*,[54] application of such presumptions in the disciplinary context was not acceptable to the Panel in *Skënderbeu II* –

"…sanctions based on suspicion, may be possible in the context of provisional measures, or, as referred to by the CAS panel in [*Pakruojo*]*, as an*

[46] *Eskişehirspor* (CAS 2014/A/3628), paras. 102-106.

[47] CAS 2016/A/4642 *Phnom Penh Crown Football Club v. Asian Football Confederation (**Phnom Penh***), award of 6 December 2016, para. 77.

[48] *Skënderbeu* (CAS 2016/A/4650), para. 48.

[49] *Sivasspor* (CAS 2014/A/3625), para. 117.

[50] *Sivasspor* (CAS 2014/A/3625), para. 128; *Eskişehirspor* (CAS 2014/A/3628), para. 134.

[51] Nevertheless, given the broad scope of the provision (extending to 'indirect involvement'), the lack of strict liability provisions may not be critical in practice (see *Sivasspor* (CAS 2014/A/3625), paras. 146 -149; *Eskişehirspor* (CAS 2014/A/3628), paras. 134 - 137).

[52] *Eskişehirspor* (CAS 2014/A/3628), at para. 136, where the Panel found that *"to declare a club ineligible under this article, it is irrelevant whether the latter had any degree of culpability in connection with the prohibited activities…* [the criminal law principle of "nulla poena sine culpa"] *does not apply to every measure taken by an association, especially when this measure is not of a disciplinary nature but of an administrative one".*

[53] *Eskişehirspor* (CAS 2014/A/3628), at para. 141, where the Panel observed that, *"taking into account that the measure under art. 2.08 of the UEL Regulations is not a sanction and does not have a disciplinary nature, art. 11 of the UEFA DR cannot be applied and the ineligibility measure is to be applied automatically. As a consequence, the Panel considers that (i) it is not possible to annul the administrative measure on the basis that the Appellant bears no fault or negligence and (ii) the one-year ineligibility period cannot be subject to a probationary period".*

[54] *Pakruojo* (CAS 2015/A/4351), paras. 87-88.

"administrative" measure or an admissibility requirement for taking part in a competition in order to protect the integrity of such competition, but not for the imposition of a definite disciplinary measure…"[55]

29. These new provisions at the national federation level have been introduced at least partly in response to the growing intervention of international and regional federations in national contexts. For example, in 2013, UEFA added the following *"failure to prosecute"* provision to Article 23 of its Disciplinary Regulations (now Article 29): *"The Control and Disciplinary Body also has jurisdiction in the event of a UEFA member association and/or its members failing to prosecute, or prosecuting in an inappropriate manner, a serious violation of the UEFA statutory objectives".*

30. Nonetheless, some national federations have moved in the other direction – the Turkish Football Federation, in response to the sheer number of clubs implicated in the 2010/2011 Süper Lig fixing, limited the sanction of relegation (to a lower league) to circumstances where the impugned party had *"effectively influenc[ed]"* the match (and removed the sanction from parties that had only *"attempt[ed] to influence"* matches).[56]

31. Further, UEFA's (and other federations') intervention remains at their discretion. Others aggrieved by match-fixing, including 'clean' competitors, have limited power to trigger intervention from the federation, such as in the case of *Trabzonspor*, where the 'clean' runner-up in the 2010/2011 Turkish Süper Lig unsuccessfully sought the title given the original title holder (Fenerbahçe) had been implicated in match-fixing.[57]

32. As noted above, the proliferation of controls (and civil and criminal proceedings) has produced new issues at the CAS phase:

a. what is the *res judicata* effect of findings in respect of the same conduct, but at a different level (national/international),[58] and/or at a different phase (administrative/disciplinary)?

b. what is the *res judicata* effect of findings in respect of different parties involved in the same conduct (*e.g.* two clubs that have fixed a match)?[59]

c. what is the impact of criminal convictions (or findings of innocence) on disciplinary proceedings? What is the effect of an appeal against conviction?

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[55] CAS 2017/A/5272 *KF Skënderbeu v. the Albanian Football Association (**Skënderbeu II**)*, award of 13 April 2018, para. 70.

[56] *Eskişehirspor* (CAS 2014/A/3628), para. 61.

[57] CAS 2015/A/4343 *Trabzonspor v. TFF, UEFA and Fenerbahçe* (***Trabzonspor***), award of 27 March 2017.

[58] In CAS 2013/A/3297 *Public Joint-Stock Company "Football Club Metalist" v. Union des Associations Européennes de Football (UEFA) & PAOK FC (**FC Metalist**)*, award of 29 November 2013, findings at the national level (which had been confirmed by CAS, but subject to an appeal to the Swiss Federal Tribunal) had been relied upon by UEFA in its administrative proceedings, which decision was appealed to CAS.
In *Fenerbahçe* (CAS 2013/A/3256), the Panel considered a disciplinary measure imposed by UEFA after an acquittal at the national level – *"The disciplinary proceedings of the TFF PFDC were based on the internal regulations of the TFF and a possible sanction would only have had national consequences. Disciplinary proceedings initiated by UEFA on the basis of article 2.06 of the UCLR are based on the internal regulations of UEFA and a possible sanction deriving from such proceedings only has European consequences. As such, the "circles" of rights and duties are not identical… the Panel finds that the scope and nature of the suspensions sought in the different disciplinary proceedings was different and as such no violation of the ne bis in idem principle occurred".* (at para. 167).
In *Skënderbeu II* (CAS 2017/A/5272), considered disciplinary action taken by the national federation, after administrative action had been taken by UEFA (considered in *Skënderbeu* (CAS 2016/A/4650)).
In *Trabzonspor* (CAS 2015/A/4343), no issue of *res judicata* or *ne bis in idem* was found to have arisen given the object of the previous proceedings was to sanction Fenerbahçe at the UEFA, not national level.

[59] In *Sivasspor* (CAS 2014/A/3625) the Panel came to different conclusions to the Panel in *Fenerbahçe* (CAS 2013/A/3256) as to whether match-fixing allegations had been made out in respect of the same conduct, noting, *"the conclusions reached by the CAS* [in Fenerbahçe] *with regard to this First Front (which the Panel notes that were related to Fenerbahçe's officials, but not to Sivasspor's officials or players), even though have been taken into account by this Panel, they do not bound it to reach the same conclusions, being hence the Panel free to reach its own conclusions in accordance with the evidence submitted by the parties".* (para. 138(db)).

33. Ultimately, the wide scope of UEFA's discretion with respect to existing findings in administrative proceedings[60] (and by extension, a CAS Panel's discretion when making the decision *de novo*), and CAS Panels' strict approach to *res judicata/ne bis in idem* has meant related decisions have had an evidentiary, rather than jurisdictional, impact.

C. Definition ratione personae

34. CAS Panels have considered measures imposed against almost all participants in sporting competitions – players (for example, in *de la Rica*),[61] coaches (*Viorel*),[62] other club officials (*Pobeda*),[63] referees (*Lamptey*),[64] and clubs (*Besiktas*).[65]

35. The question of the liability of a club for the actions of its players, coaches and officials has arisen frequently in CAS jurisprudence. As noted by the Panel in *Fenerbahçe*, *"[a] legal entity can only be held liable for match-fixing through actions of persons representing or acting on behalf of the legal entity, i.e. its officials"*.[66] **Strict liability** provisions have made it difficult for claims that individuals have acted on a *"frolic of their own"* to succeed – in *Pobeda*, the Panel noted that *"*[t]*he mere fact that the president of Pobeda is found guilty of fixing matches is…sufficient to also sanction the Club as such"*.[67] Even where strict liability provisions are not directly applicable (as in administrative proceedings), the broad scope of *"indirect involvement"* incorporated into the definition of impugned conduct produces a similar effect in practice.[68]

36. Clubs can be held liable even in the absence of findings of individual liability – in *Fenerbahçe*, the club's argument, that the suspension of proceedings against individuals precluded action against the club, was rejected – it was *"not a prerequisite under the UEFA DR that individuals are sanctioned before or at the same time the club is sanctioned"*.[69] Further, it was not necessary to identify the specific official who had engaged in the fixing,[70] or the specific player(s) on the other team who had accepted the offer.[71]

37. The importance of sanctioning clubs was highlighted by the Panel in *Pobeda* – *"Only reactions inside the clubs can prevent that games are manipulated, and only strong sanctions against the clubs will set the necessary signal to the officials and the players that the direct or indirect support of match fixing activities are not tolerated but can lead to severe consequences for the entire club and not only for the leading actors of the plot…* [s]*uch sanctions should not only prevent individuals from manipulating games, but also encourage the other members of the club to take action when they become aware of such manipulations"*.[72]

38. Nevertheless, there are rare exceptions to the rule – in *Phnom Penh*,[73] four coaches conspired to reduce the performance of the club, in order to have the head coach fired. Under the applicable regulations (which did not contain a strict liability provision), while the actions of the relevant officials *"did"* meet the definition of 'match-fixing', these actions were *"not attributable to the Appellant club at all"* as *"*[t]*heir actions were motivated and aimed at furthering their own interests in a corrupt manner and not the interests of the Appellant club. The Appellant*

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[60] *"UEFA can rely on, but is not bound by, a decision of a national or international sporting body, arbitral tribunal or state court"*, for example, under Article 4.02 of the UEFA Champions League Regulations (2017/2018 Season).
[61] CAS 2014/A/3467 *Guillermo Olaso de la Rica v. Tennis Integrity Unit (TIU)* (***de la Rica***), award of 30 September 2014.
[62] *Viorel* (CAS 2017/A/4947).
[63] *Pobeda* (CAS 2009/A/1920).
[64] CAS 2017/A/5173 *Joseph Odartei Lamptey v. FIFA* (***Lamptey***), award of 4 December 2017.
[65] *Besiktas* (CAS 2013/A/3258).
[66] *Fenerbahçe* (CAS 2013/A/3256), para. 300.
[67] *Pobeda* (CAS 2009/A/1920), para. 63.
[68] See, for example, *Eskişehirspor* (CAS 2014/A/3628), paras. 131-139.
[69] *Fenerbahçe* (CAS 2013/A/3256), para. 245.
[70] *Fenerbahçe* (CAS 2013/A/3256), the Panel noted that it had *"no doubt and is comfortably satisfied that at least one of Fenerbahçe's officials attempted to fix the match"* (at para. 430).
[71] *"The Panel does not deem it necessary for it to be proven by UEFA which players of Ankaragücü accepted the offer to fix the match; the Panel finds that there is sufficient evidence against the officials of Fenerbahçe that a match-fixing offer was made"*. (at para. 481).
[72] *Pobeda* (CAS 2009/A/1920), para. 69.
[73] *Phnom Penh* (CAS 2016/A/4642).

was the actual or intended victim of their nefarious activity".[74] The Panel applied principles of agency (applicable in the absence of strict liability provisions) to conclude that the actions of the coaches *"could not be treated in law as the actions of the Appellant [club]"*.[75]

39. A very recent landmark investigation on integrity in tennis recommended that: (i) **vicarious liability** should be imposed *"on a player for an offence committed by [a member of his entourage] if the Player knew or should reasonably have known, but did not report, that* [a member of his entourage] *might commit that offence"*; and joint and several liability should be imposed *"on a Player for fines and other financial penalties incurred by* [a member of his entourage] *"*.[76]

40. In light of the above, liability has been, and can be, extended to actors that have not been directly involved in match-fixing on the basis of their statutory, disciplinary or contractual duties. Those bases can therefore limit the application of the general principle of personal liability (*i.e. nullum crimen, nulla poena sine culpa*).

III. Proving Match-fixing

41. Common evidentiary issues have arisen from the nature of match-fixing and its regulation. As those engaged in match-fixing *"will seek to use evasive means to ensure that they leave no trail of their wrongdoing"*,[77] issues associated with the evidence relied upon to establish an offence, and the sufficiency of that evidence, arise in nearly every case at the CAS level.

42. Given the limited investigative powers of sports governing bodies,[78] detecting and proving match-fixing demands a sustained level of deep cooperation between all concerned actors (*i.e.* on the one hand, the national and international sports federations and, on the other hand, the police, judicial authorities and the betting industry). International initiatives, like those under the auspices of the Council of Europe (in particular, the Macolin Convention) are critical in this regard but have been so far underpowered and underutilised. Fortunately, the probable upcoming entry into force of the Macolin Convention[79] will accelerate and boost the possibility for all concerned actors to effectively share - through the so called *"national platforms"*[80] - sensitive information and coordinate their respective actions to prevent and fight match-fixing.[81]

A. Burden of Proof

43. It has been settled that the burden of establishing a match-fixing offence lies with the regulatory body as the party alleging the existence of relevant facts (per *Pobeda*,[82]

[74] *Phnom Penh* (CAS 2016/A/4642), para. 91.
[75] *Phnom Penh* (CAS 2016/A/4642), para. 98.
[76] The Independent Review of Integrity in Tennis, Chapter XIV "Recommendations", pp. 60-61.
[77] CAS 2010/A/2172, *Mr. Oleg Oriekhov v. UEFA* (***O***), award of 18 January 2011, para. 21, cited with approval in *N&V* (CAS 2010/A/2266), para. 18; CAS 2013/A/3062 *Kevin Sammut v. UEFA* (***Sammut***), award of 28 May 2014, para. 93; *Fenerbahçe* (CAS 2013/A/3256), para. 279; *Besiktas* (CAS 2013/A/3258), para. 174; *Sivasspor* (CAS 2014/A/3625), para. 136; *Eskişehirspor* (CAS 2014/A/3628), para. 127.
[78] CAS 2011/A/2425, *Ahongalu Fusimalohi v. Fédération Internationale de Football Association (FIFA)* (***Fusimalohi***), award of 8 March 2012, para. 107(v).
[79] Unofficial sources sustain that at least two states are close to ratification.
[80] M. Henzelin, G. Palermo and T. Mayr, *Why 'national platforms are the cornerstone in the fight against match-fixing in sport: the Macolin Convention*, LawInSport, 18 June 2018: *"Macolin Convention establishes national platforms whose functions are to: serve as information hubs by collecting, analysing and disseminating or transferring relevant information to the necessary sports regulatory bodies or public authorities; coordinate efforts in the fight against manipulation of sports competitions; and cooperate with all relevant bodies and organisations at national and international levels, including the national platforms of other States"*. Moreover, the Macolin Convention is also a key legal instrument in extradition in absence of other instrument of transnational judicial cooperation.
[81] M. Henzelin, G. Palermo and T. Mayr, *Why 'national platforms are the cornerstone in the fight against match-fixing in sport: the Macolin Convention*, LawInSport, 18 June 2018: "[National platforms] *are not abstract forums but rather seek to bring each stakeholder to the table to effectively prevent, detect, investigate and sanction all forms of manipulation of any type of sports competition"*.
[82] *Pobeda* (CAS 2009/A/1920), para. 25.

Fantoni,[83] *N&V,*[84] *Sammut,*[85] *Besiktas,*[86] *Sivasspor,*[87] *Eskişehirspor*,[88] and others).

44. Nevertheless, in practice, given the nature of the offence (and the lack of direct evidence in most cases noted above), once convincing circumstantial evidence has been provided by the sports federation, an accused party is expected to provide contrary evidence, or a legitimate explanation for the evidence adduced.

45. This expectation is even more acute in the context of *"presumed"* offences, as in *Pakruojo*. In that case, the Panel observed that the relevant rules *"allow the player to offer contrary evidence, disproving the commission of the infringement of presumed manipulation. Therefore, they cannot be said to provide for a sanction on the basis of a mere suspicion: evidence has to be offered by the [federation] to ground the finding of an infringement; and evidence can be brought by the accused player to contradict the [federation's] submissions"*.[89]

46. Once liability is confirmed by the Panel, the appellant bears the burden of proof where it has alleged disproportionality of the sanction imposed at first instance (see *FC Metalist*).[90]

B. Standard of Proof

47. CAS jurisprudence has repeatedly dismissed "the application of the standard of proof of beyond any reasonable doubt … 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".[91]

48. The standard of proof to be applied by CAS Panels, in the absence of a specific provision in the applicable regulations, is that of "comfortable satisfaction". The "comfortable satisfaction" standard has been explained as a "flexible" standard, or in the words of the Sivasspor Panel, "kind of [a] sliding scale",[92] i.e. "greater than a mere balance of probability but less than proof beyond reasonable doubt bearing in mind the seriousness of the allegation which is being made".[93]

49. This conclusion appears relatively well settled, though the reasoning through which this conclusion has been reached has varied. Some CAS Panels have relied upon analogies to doping cases, given the common elements between the two – conduct which by its nature is concealed, but which is also extremely important to eradicate.

50. In some cases, CAS Panels have assumed (or the parties have agreed) the baseline civil standard of proof to be the "balance of probabilities", with the seriousness of the allegation and the severity of the potential penalties justifying an elevated standard of proof (to "comfortable satisfaction"). In contrast, other CAS Panels have found the baseline civil standard to be proof "beyond reasonable doubt", with a reduction in the burden (to "comfortable satisfaction") justified given the federation's lack of access to direct evidence,[94] or the lack of investigatory powers associated with a criminal investigation.[95]

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[83] *Fantoni* (CAS 2016/A/4783), para. 45.
[84] *N&V* (CAS 2010/A/2266), para. 17.
[85] *Sammut* (CAS 2013/A/3062), para. 95.
[86] *Besiktas* (CAS 2013/A/3258), paras. 112-115.
[87] *Sivasspor* (CAS 2014/A/3625), para. 130.
[88] *Eskişehirspor* (CAS 2014/A/3628), para. 121.
[89] *Pakruojo* (CAS 2015/A/4351), para. 89.
[90] *FC Metalist* (CAS 2013/A/3297), paras. 8.30-8.34.
[91] E. Barak, D. Koolaard, *Match-fixing. The aftermath of Pobeda – what have the past four years brought us?*, in CAS Bulletin 2014, pages 5-24. See also decision by the Swiss Federal Supreme Court 5P.83/1999 of 31 March 1999, paragraph 3.d.
[92] *Sivasspor* (CAS 2014/A/3625), para. 132.
[93] *Fenerbahçe* (CAS 2013/A/3256), para. 277.
[94] *Fenerbahçe* (CAS 2013/A/3256), para. 281.
[95] Nevertheless, in *Besiktas* (CAS 2013/A/3258), the Panel was of the view that the availability of evidence from a criminal investigation did not justify departure from the 'comfortable satisfaction' standard (see paras. 123-125).

51. Specific provisions in the regulations can reinforce or modify this approach (which itself is dependent on the underlying national law applicable):

a. The administrative provisions in the UEFA Europa League Regulations entrench the 'comfortable satisfaction' standard.[96]

b. In contrast, the Association of Tennis Professionals (ATP) regulations provide for a *"preponderance of the evidence"* standard (equivalent to balance of probabilities). In *Köllerer*, the Panel found that there was *"no universal (minimum) standard of proof for match-fixing offences"* and that the lower standard prescribed in the ATP regulations *"would [not] violate any rules of national and/or international public policy"*.[97] Such a standard did not *"unreasonably favour the ATP",* and did not mean that *"the ATP could arbitrarily remove players that they do not like on their tour for corruption offences",* as Köllerer had argued.[98]

52. In any event, in practice, CAS Panels have often noted their satisfaction to a greater degree than the standard they consider to be applicable – in *Savic* (where the *"preponderance of the evidence"* standard applied), the Panel noted it was *"comfortably satisfied"* that the allegations had been established.[99] In *O*, the Panel applied the *"comfortable satisfaction"* standard but nevertheless noted that proof *"beyond reasonable doubt"* had been established.[100]

53. Critically, however, sufficient evidence needs to be adduced to meet this standard of proof in respect of *each* party impugned. *N&V* serves as a rare example of a successful appeal at the CAS level, where the evidence before the Panel established match-fixing in respect of one party (V), but not the other (N). The Panel found that *"the elements offered by UEFA (the two ambiguous references to the jersey number of N.) are not sufficient to establish to its comfortable satisfaction that there were contacts between N. and the members of a criminal group involved in match fixing and betting fraud"*.[101] The obvious exception to this principle is where liability attaches by the operation of law, as with the strict liability of clubs for their players and officials.

C. Evidentiary Issues

54. Given the seriousness of an allegation of match-fixing, CAS Panels have needed to have a *"high degree of confidence in the quality of the evidence",* as suggested in *Köllerer*.[102] Nevertheless, the concealed nature of the relevant conduct means that direct evidence is rare, and where it exists, it is often in 'code' (as the Panel in *Besiktas* observed – *"people involved in match-fixing will avoid using direct words in this* [*regard*]*"*) and/or has been procured in a covert fashion.[103]

55. Such difficulty led certain CAS Panels to consider that the standard of admissibility of evidence in Swiss criminal or civil courts is not applicable (*FC Metalist*,[104] *Sivasspor*,[105] *Eskişehirspor*[106]). For instance, CAS Panels must not automatically reject inappropriately obtained evidence, unless the admission of that evidence infringes public policy. This conclusion was firstly reached by the CAS Panel in *Valverde*,[107] where the Panel admitted the use of illegitimately collected evidence, where there was an overriding public interest.[108] The point was further stressed in

[96] *Sivasspor* (CAS 2014/A/3625), paras. 131-133.
[97] *Köllerer* (CAS 2011/A/2490), paras. 29-30.
[98] *Köllerer* (CAS 2011/A/2490), para. 34.
[99] *Savic* (CAS 2011/A/2621), para. 8.31.
[100] *O* (CAS 2010/A/2172), para. 37.
[101] *N&V* (CAS 2010/A/2266), para. 39.
[102] *Köllerer* (CAS 2011/A/2490), para. 40.
[103] *Besiktas* (CAS 2013/A/3258), para. 174.
[104] *FC Metalist* (CAS 2013/A/3297), paras. 8.9-8.13.
[105] *Sivasspor* (CAS 2014/A/3625), para. 142
[106] *Eskişehirspor* (CAS 2014/A/3628), para. 130.
[107] CAS 2007/A/1396 & 1402, *World Anti-Doping Agency (WADA) and Union Cycliste Internationale (UCI) v. Alejandro Valverde & Real Federación Española de Ciclismo (RFEC)* (***Valverde***), award of 31 May 2010.
[108] *Valverde* (CAS 2007/A/1396 & 1402), para. 60c *"such evidence can be used, even if it was collected with violation of certain human rights, if there is an overriding public interest at stake. In the case at hand, the internationally accepted fight against doping is a public interest, which would outweigh a posible violation of Mr Valverde's personal rights"*.

the 2010 *Adamu* case,[109] where the importance of the honesty of top football officials was deemed fundamental in the fight against corruption in sports, and justified the use of evidence of private conversations for disciplinary purposes (even if such use infringed Mr. Adamu's personality rights).[110] Likewise, in the recent *Bazdyreva* award, the Panel confirmed the suitability of the *"balancing test"* between the private interest of the complainants and the public interest in discerning the truth, when confronted with illegally obtained evidence.[111]

56. This balancing test has also been endorsed by the Swiss Federal Tribunal,[112] which ruled on this question in the context of the appeal of the CAS award in the *FC Metalist* case. The Tribunal concluded that reliance by an arbitral tribunal on illegally obtained evidence did not violate procedural public policy where it was critical to establishing the truth.[113]

57. In *Fusimalohi*,[114] a corruption, rather than a match-fixing case, the CAS Panel held that, by accepting the FIFA regulations, the parties had accepted the rules applicable to the admissibility of evidence. In that regard, Article 96 of the FIFA Disciplinary Code provided that *"any type of proof may be produced"*[115] with the exception of *"proof that violates human dignity"*.[116] The CAS Panel considered that the concept of *"human dignity"* was equivalent to Article 28 of the Swiss Civil Code, which protects the personality from illegal infringements. The Panel concluded that, whilst the evidence was obtained by intruding into Fusimalohi's private life, the admissibility of such evidence could be justified on the basis of an overriding public interest in the exposure of illegal or unethical conduct.[117] It further found that admitting such evidence did not entail the violation of public policy, given the seriousness of the allegations made, the necessity of discovering the truth, exposing and sanctioning any wrongdoing, and holding wrongdoers accountable. The growing concern about corrupt practices in all major sports and the limited investigative powers of sports governing bodies were also considered by the Panel.[118]

58. Particular kinds of evidence have been regularly adduced in match-fixing cases, each of which have raised specific issues:

a. *Evidence from parallel criminal investigations / proceedings* – A large number of CAS cases have emerged from disciplinary or administrative proceedings taken in parallel with criminal proceedings (in particular, criminal proceedings in Bochum, Germany, and in Turkey). In *N&V*,[119] the Panel found evidence from such proceedings *"meaningful"* given the evidence was *"not rendered with the present dispute in mind"*. In that case, transcripts of phone taps were *"particularly incriminating"*, and phone tap transcripts have continued to be used frequently at both first instance and CAS-level.

b. *Judgments / Decisions from parallel criminal proceedings* – Panels have "[felt] comforted" in their conclusions by convictions in parallel proceedings. As the Fenerbahçe Panel noted, "[w]hile a criminal

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[109] CAS 2011/A/2426, *Amos Adamu v. FIFA (**Adamu**)*, award of 24 February 2012.
[110] *Adamu* (CAS 2011/A/2426), paras. 75, 78, 102-107.
[111] CAS 2016/O/4488, *International Association of Athletics Federations (IAAF) v. All-Russia Arthletics Federation (ARAF) & Anastasiya Bazdyreva* (***Bazdyreva***), award of 23 December 2016, paras. 78-94.
[112] L. Beffa, O. Ducrey, *Review of the 2014 Case Law of the Swiss Federal Tribunal concerning Sports Arbitration,* in Causa Sport: die Sport-Zeitschrift für nationales und internationales Recht sowie für Wirtschaft Issue 2, 2015, pp. 122-123.
[113] In the Swiss Federal Tribunal's review of the *FC Metalist* award (4A_362/2013), the Tribunal observed that *"the interests at hand must instead be balanced; they are, on the one hand, the interest in finding the truth and, on the other hand, the interest in protecting the legal protection infringed upon by the gathering of the evidence"* (3.2.2). See also Swiss Federal Tribunal Decision 4A_448/2013.
[114] *Fusimalohi* (CAS 2011/A/2425).
[115] Article 96(1), of the FIFA Disciplinary Code.
[116] Article 96(2) of the FIFA Disciplinary Code.
[117] *Fusimalohi* (CAS 2011/A/2425), para. 105.
[118] *Fusimalohi* (CAS 2011/A/2425), para. 107.
[119] *N&V* (CAS 2010/A/2266), paras. 20, 34.

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".[120] The Besiktas Panel likewise considered parallel convictions "an evidentiary indicator of the correctness of the challenged decision of the UEFA Appeals Body".[121]

Complications arise when these decisions are the subject of an appeal. The Panel in *Eskişehirspor* examined the scope of the appeal in detail, concluding that the appeal did not undermine the factual findings in the original decision (which then could provide comfort to the Panel).[122]

c. *Phone / Skype records* – Panels have admitted and considered these records to the extent the 'chain of custody' of the relevant phone or computer is intact (*de la Rica*).[123] Panels have generally accepted the recognition / identification of individuals by voice (*Köllerer,*[124] *Savic*[125]) in response to suggestions that impugned individuals were being 'impersonated'.

d. *Anonymous witness statements* – Given the potential involvement of criminal organisations in match-fixing, informants may be unwilling to provide statements in support of the case, at least not where they are identified to the impugned party. The CAS Panel in *Pobeda* considered the issues with witness statements given anonymously, finding that the statements were admissible but only subject to strict conditions – the witnesses being cross-examined through a translator in a separate secure location, and the Panel having undertaken checks to verify the identity of the witness.[126]

e. *Betting analysis* – There are two main categories of indicators which may be combined to prove a betting fraud: quantitative and qualitative evidence. The former category includes mathematical models and algorithmic analysis, which indicate if the betting patterns of a selected match presents a significant deviation from the *"calculated odds"* (or statistical forecasting model) predicted by the bookmakers.[127] This quantitative analysis works as a first-stage screen, producing an alert in case the betting behaviour has no logical explanation. The unusual matches subsequently undergo a second, qualitative, screening by analysts, which is aimed at eliminating *"false positives"* and *"assuring high specificity when cases are finally classified as positives"*.[128] In this second stage, unusual betting patterns will be considered against all external information, including pre-match unpredicted movements (like the news of the absence of a player due to an injury) or on-field actions, in order to verify if the betting behaviour may be explained by events that were not included in the mathematical models. If the publicly available information does not justify the betting pattern, the match is *hot-listed* and submitted to further investigations by a team of experts experienced in betting fraud analysis.[129] To conclude the escalation process, the agreement from at least three experts is required for the match to be qualified as suspicious. Only suspicious matches will be reported to the relevant regulator and sporting authority,

[120] *Fenerbahçe* (CAS 2013/A/3256), para. 544.
[121] *Besiktas* (CAS 2013/A/3258), para. 205.
[122] *Eskişehirspor* (CAS 2014/A/3628), para. 130.
[123] *de la Rica* (CAS 2014/A/3467), para. 89.
[124] *Köllerer* (CAS 2011/A/2490), para. 57.
[125] *Savic* (CAS 2011/A/2621), paras. 8.18-8.20, 8.30.
[126] *Pobeda* (CAS 2009/A/1920), paras. 13-16.
[127] In its submission before the CAS for the *Skënderbeu* (CAS 2016/A/4650) case, UEFA explained that *"The calculated odds are a mathematical representation of the true probability of an occurrence without the external effect of money and opinion. In effect, they show what should be happening to the odds instead of what is actually happening"*, at para. 81.
[128] D. Forrest, I.G. McHale, *An Evaluation of Sportradar's Fraud Detection System*, University of Liverpool, 2015, p. 12.
[129] D. Forrest, I.G. McHale, *An Evaluation of Sportradar's Fraud Detection System*, University of Liverpool, 2015, p. 47-48.

namely the UEFA's disciplinary bodies in case of European football competitions.

Perhaps the most controversial development on the evidentiary front is the increasing reliance of Panels on suspicious betting patterns, in particular on the UEFA's Betting Fraud Detection System (BFDS[130]) reports. The latter has operated since July 2009 and as noted above combines a quantitative analysis of irregularities in betting behaviour with qualitative analysis of match performance and other considerations. The evidentiary value of the BFDS was discussed by the CAS Panels in *Skënderbeu*,[131] *Pakruojo,*[132] *Viorel*,[133] and *Lamptey*.[134] As the Panel in *Skënderbeu* noted, the use of the BFDS is similar in many ways to the athletes' blood passports (ABP) used in the context of doping, *"both rely initially on analytical data which is subsequently interpreted by experts/analysts before conclusions are drawn"*.[135] The ABP, which is operating since 2009 as a part of WADA (World Anti-Doping Agency) anti-doping program, also consists of a preliminary analytical test[136] aimed at highlighting unusual conditions via chemical markers, and a subsequent expert judgment of the suspicious profiles.[137] In case of questionable passports, the APMU (Athlete Passport Management Unit) will open an infringement proceeding of the Anti-Doping Code.[138]

f. *Other circumstantial evidence* – Analysis of sporting performance (*i.e.* the anomalous conduct of the sports actors) is the most typical circumstantial evidence. It is indeed often included in BFDS reports and used by CAS Panels to support causal/factual chains.[139]

In *Pakruojo*[140] and *Skënderbeu,*[141] CAS Panels have also considered the conduct of the betting operators (*i.e.* the removal from betting of matches involving a club, either generally or during a specific match) as circumstantial evidence of match-fixing. In the latter case, the CAS Panel considered it *"important that a prominent Asian bookmaker removed live markets before the end of the game"*.[142]
Other elements such as the club's financial problems and internal accusations of match-fixing from individuals not involved in the fix (in *Pobeda*),[143] or the potential financial benefit from match-fixing, in *Besiktas*,[144] were used in support of the Panels' respective findings.

IV. Sanctioning Match-fixing

59. The proportionality of sanctions imposed by a federation is often one of the most important elements at stake in match-fixing cases given the serious consequences on the appellant's right to compete, as well as his or her financial situation.

A. Purpose of sanctions

60. As noted by the CAS Panel in *Pobeda*, one of the first major international match-fixing cases at the CAS level, heavy sanctions play an important deterrent, as well as punitive

[130] The BFDS is operational since July 2009 by virtue of UEFA's partnership with Sportradar and ESSA. It monitors about 32'000 European matches each year with the aim of *"highlight*[ing] *irregular betting movements, both pre-match and in-game (live), in the core betting markets by monitoring major European and Asian bookmakers"*.
[131] *Skënderbeu* (CAS 2016/A/4650), paras. 66-106.
[132] *Pakruojo* (CAS 2015/A/4351), para. 92.
[133] *Viorel* (CAS 2017/A/4947).
[134] *Lamptey* (CAS 2017/A/5173), paras. 81-84.
[135] *Skënderbeu* (CAS 2016/A/4650), para. 82.
[136] Composed by an haematological module and a steroidal module, aimed at stressing blood and urine variables which are incoherent with a fixed standard.
[137] WADA, Athlete Biological Passport Operating Guidelines, version 6.1, 2018.
[138] World Anti-Doping Code, Article 2.2.
[139] *Skënderbeu* (CAS 2016/A/4650), paras. 96-105; *Pakruojo* (CAS 2015/A/4351), paras. 92(i), 97.
[140] *Pakruojo* (CAS 2015/A/4351), para. 55(ii).
[141] *Skënderbeu* (CAS 2016/A/4650), para. 87.
[142] *Skënderbeu* (CAS 2016/A/4650), para. 99.
[143] *Pobeda* (CAS 2009/A/1920), paras. 35-36, 50.
[144] *Besiktas* (CAS 2013/A/3258), para. 154. However, in *Sivasspor* (CAS 2014/A/3625), the Panel noted that *"in order to declare a club ineligible under art. 2.08 of the UEL Regulations, it is irrelevant whether the Club itself, as a sporting institution, had any economic or sporting benefit or not"*. at para. 147.

function.[145] Administrative measures, which as noted above are not generally considered of a *"sanctionatory"* nature, also have a preventive and deterrent impact.

B. Review of sanctions imposed

61. According to Article R57 CAS Code, the Panel "may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance".[146] Nonetheless, CAS tribunals repeatedly proved deferential to federations' expertise and authority, limiting their review to sanctions that are "evidently and grossly disproportionate to the offence" in the words of the N&V and de la Rica Panels,[147] or "obviously or self-evidently unreasonable or perverse" in the language of the Butt Panel.[148] This restrictive approach was confirmed in Viorel, where the Panel also noted the wide measure of autonomy given to federations to regulate their own affairs.[149] Given this standard, changes to sanctions imposed are indeed rare.

62. Nevertheless, the wording of Article R57 CAS code allows for a wider power of scrutiny by granting the tribunal *"full power to review the facts and the law"*.[150] Accordingly, in the recent *AC Milan* award[151] the Panel refused *"self-restraint when reviewing the facts and law of the case"*[152] opting instead for a fresh and full re-hearing of the UEFA CFCB (Club Financial Control Body) decision. In doing so, the CAS Panel recalled a position already presented in the *Bucci* award[153] and adopted in a number of consequent awards involving the All Russia Athletic Federation.[154]

63. The cases above illustrate the coexistence of different approaches with regards to the depth of scrutiny that CAS Panels may give to the imposition of sanctions at first instance. As a result, the relevant standard is not yet fixed.[155]

C. Substantive considerations

64. The severity of the impact of match-fixing on the perception of sport is a common refrain. In *O*, the CAS Panel observed that match-fixing causes *"great and widely publicized damage to the image of UEFA and of football in general"*, and that it was *"a growing concern, indeed a cancer, in many major sports, football included, and must be eradicated"*.[156]

65. The severity of the impact legitimises and justifies severe sanctions – such sanctions are appropriate when considered against *"the specific interest the sanctioning sport governing body wishes to pursue"* (namely the integrity of their competitions). For individuals, life bans are the most common sanction. As the Panel in *Pobeda* noted, "[m]*atch fixing is one of the worst possible infringements of the integrity of sports. Therefore, the Panel finds that a life ban from any football related activities against [the President] is an adequate sanction and not disproportionate"*.[157] The

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[145] *Pobeda* (CAS 2009/A/1920), para. 69.
[146] CAS Code of Procedural Rules, Article R57.
[147] *N&V* (CAS 2010/A/2266), para. 43 ; *de la Rica* (CAS 2014/A/3467), para. 121.
[148] *Butt* (CAS 2011/A/2364), paras. 55-56.
[149] *Viorel* (CAS 2017/A/4947), paras. 106, 110.
[150] CAS Code of Procedural Rules, Article R57.
[151] CAS 2018/A/5808, *Associazione Calcio Milan S.p.A. v. UEFA* (***AC Milan***), award of 1 October 2018.
[152] *AC Milan* (CAS 2018/A/5808), para. 77(c).
[153] CAS 2010/A/2283, *P. Bucci v. FEI*, award of 23 June 2011, at para. 14.36 the Panel noted that *"it would not easily "tinker" with a well-reasoned sanction, i.e. to substitute a sanction of 17 or 19 months' suspension for one of 18. It would naturally (as did the Panel in question) pay respect to a fully reasoned and well-evidenced decision of such a Tribunal in pursuit of a legitimate and explicit policy. However, the fact that it might not lightly interfere with such a Tribunal's decision, would not mean that there is in principle any inhibition on its power to do so"*.
[154] CAS 2008/A/1718 to CAS 2008/A/1724, *IAAF v. All Russia Athletic Federation & Daiya Pishchalnikova*, award of 18 November 2009, at para. 166 the Panel noted that *"[n]ot only can the Panel review the facts and the law contained in the Decisions, but it can as well replace those Decisions if the Panel finds that the facts were not correctly assessed or the law was not properly applied leading to an "erroneous" decision. The procedure before CAS is indeed a de novo appeal procedure, which means that if the appeal is admissible, the whole case is transferred to CAS for a complete rehearing with full devolution power in favor of CAS"*.
[155] D. Mavromati, *Deconstructing the CAS Award 2018/A/5808 (AC Milan v. UEFA) – The Devil is in the (Procedural) Details*, SportLegis, 2018.
[156] *O* (CAS 2010/A/2172), paras. 45, 50.
[157] *Pobeda* (CAS 2009/A/1920), para. 68.

Panels in *Köllerer* and *Lamptey* agreed, the former observing that *"any sanctions shorter than a lifetime ban would not have the deterrent effect that is required to make players aware that it is simply not worth the risk"*.[158] Nevertheless, financial penalties in addition to life bans were held to be disproportionate in *Köllerer* and *Savic*.[159]

66. Obviously a 'life ban' is not appropriate for impugned clubs. Some Panels have taken sanctions against clubs in the doping context as an appropriate guide – in *Fenerbahçe*, the Panel observed that in doping cases, there were a spectrum of sanctions between zero and eight years (of exclusion from competitions), with a 'standard' offence sanctioned with a two-year ban from competition.[160]

67. A number of considerations, in addition to the severity of the impact of match-fixing, have been taken into account by CAS Panels – in *Sammut*, the player's involvement in the *actual implementation* of the fix, rather than facilitating the fix by conveying messages, had not been established, which justified a reduced sanction of a ten-year ban (rather than a life ban).[161] That being said, other CAS Panels have clarified that the depth of the evidence supporting a match-fixing finding is exclusively relevant in order to establish liability and not relevant in relation to the assessment of sanctions. In *Asif*, the CAS Panel declined to adjust the penalty imposed, given that Mr Asif had already benefited of a reduction in parallel criminal proceedings. The CAS Panel noted that the criminal judge imposed a more lenient prison term precisely because the ban imposed by the sporting federations was *"considerable punishment for a man in Mr Asif's position"* and, therefore, there was no reason why Mr Asif should have *"such benefit twice"*.[162]

V. Conclusion

68. Appeals to the CAS against match-fixing findings are rarely successful by nature for several reasons. First, sports federations tend to pursue only very solid cases.[163] An unsuccessful prosecution could reinforce the damage caused to the reputation of a sporting code. Thus, and if possible, sports federations might prefer to prevent breaches of integrity when they are able to disrupt in advance the manipulation of sports competitions. Secondly, given the process of *de novo* review, procedural flaws at first instance are often resolved by the CAS Panels. Thirdly, CAS panels have also limited discretion to adjust sanctions (*i.e.* the most important elements at stake in match-fixing cases), given that generally life bans are commonplace for individuals and are considered proportionate by previous case law.

69. Although relatively fruitless for appellants, CAS jurisprudence has, and continues to, undoubtedly boost the development of statutory, disciplinary and administrative legal measures by sports federations and public entities in their fight against the manipulation of sport competitions. New technologies will continue to shape the way matches are fixed, how match-fixing is detected, and how CAS Panels resolve the match-fixing allegations before them. CAS jurisprudence will therefore continue to: (i) be an ongoing source of case study for sports prosecutors, law enforcements and betting operators; (ii) inspire the recasting of the sports regulations

[158] *Köllerer* (CAS 2011/A/2490), para. 66 ; *Lamptey* (CAS 2017/A/5173), paras. 93-94.

[159] *Köllerer* (CAS 2011/A/2490), paras. 70-73; *Savic* (CAS 2011/A/2621), paras. 8.36-8.38. This caution is probably caused by the 2012 landmark decision in *Matuzalem* (4A_558/2011 of 27 March 2012) paragraphs 4.3.1-4.3.5. In this case, the Swiss Federal Supreme Court annulled an international arbitral award for a breach of substantive public policy because the financial penalties decided by the arbitral tribunal were considered disproportionate and violated the athlete's right to *"economic freedom"*.

[160] *Fenerbahçe* (CAS 2013/A/3256), para. 574.

[161] *Sammut* (CAS 2013/A/3062), paras. 179-180.

[162] *Asif* (CAS 2011/A/2362), para. 71.

[163] For example, KS Skënderbeu had been implicated in more than 50 suspicious matches at the national and international levels, *Skënderbeu* (CAS 2016/A/4650), para. 66.

and of national and international legislations; and (iii) have a pivotal role in protecting the sport integrity by punishing disciplinary violations.

Recreational drugs in sport: the issue of cocaine

Carlos Schneider*

I. Introduction: the banning of recreational drugs

It is common to connect doping exclusively with performance-enhancing substances. It has become natural to relate news regarding doping cases with cheaters, those who use a doping substance to place themselves in a better position than their contenders. And this aspect is completely relevant for the analysis of the issue at hand.

This initial association is more emotional than rational. However, it is true that there is a widespread public concern regarding doping as one of the worst sporting crimes.[1] Some authors even consider it to be more serious than match-fixing.[2]

It goes without saying that both doping and match-fixing are completely unacceptable behaviours, but it is still interesting to analyse the reasons why the public reacts so emotionally to cases of doping, whereas their reaction to other forms of cheating, such as committing a foul or handling the ball, is not as negative or strong.[3] This indeed explains why substances normally used for recreational purposes are banned and it is commonly accepted that their use is persecuted by anti-doping organisations.

In this regard, article 4.3.1 of the current World Anti-Doping Code states that "[a] *substance or method shall be considered for inclusion on the Prohibited List if WADA* [World Anti-Doping Agency]*, in its sole discretion, determines that the substance or method meets any two of the following three criteria:*

4.3.1 Medical or other scientific evidence, pharmacological effect or experience that the substance or method, alone or in combination with other substances or methods, has the potential to enhance or enhances sport performance;

4.3.2 Medical or other scientific evidence, pharmacological effect or experience that the Use of

*Dr Carlos Schneider is FIFA Head of Disciplinary and of the Secretariat of the Ethics Investigatory Chamber and wishes to thank Emilio Garcia, FIFA Legal Chief Officer, for his guidance, support and assistance in drafting this article.

[1] WADDINGTON I., VEST- CHRISTIANSEN A. & GLEAVES J., Recreational Drug Use and Sport: Time for WADA to rethink. Performance Enhancement & Health, 41-47.

[2] SPARRE K., (2011). New study claims doping is bigger threat to sport than match fixing, play the game. *http://www.playthegame.org/news/news-articles/2011/new-study-claims-doping-is-bigger-threat-to-sport-than-match-fixing/*.

[3] WADDINGTON I., VEST- CHRISTIANSEN A. & GLEAVES J., op. cit. fn. 2.

the substance or method represents an actual or potential health risk to the Athlete;

4.3.3 WADA's determination that the Use of the substance or method violates the spirit of sport described in the introduction to the Code".[4]

It is interesting to note that the only condition of the three cited above that is not subject to a scientific analysis is the one relating to the violation of the spirit of sport. For instance, it is possible to scientifically establish how a substance has performance-enhancing effects or constitutes an actual or potential risk to health, but the notion of the "spirit of sport" is vague. It has a sort of "catch-all" quality.[5]

Turning to the historical background of anti-doping organisations banning recreational drugs in sport, it was not until the mid-90s that the use of recreational drugs was considered to be doping.

Decades before, in the late 60s, the fight against doping was significantly intensified. Sports organisations banned substances mainly following two objectives, i.e. the protection of health and maintaining a fair competition.[6] Admittedly with inconsistencies, these two grounds for acting against the use of substances have persisted throughout decades. Anti-doping organisations refrained from acting against recreational drugs until drug abuse became a social concern in the 90s. Until then, the International Olympic Committee (IOC) Medical Commission[7] had some tolerance towards the use of recreational drugs, such as cannabis. In this context, here is a remarkable statement made by Professor Arnold Beckett, one of its leading members: *"If we started looking at the social aspect of drug-taking then we would not be doing our job".*[8]

However, something changed in the 90s and has persisted until today among anti-doping organisations, which is reflected in their regulations. The inclusion of marijuana in the list of prohibited substances acted as the triggering moment to ban recreational drugs. It opened the door to the monitoring of non-sporting lifestyles.[9] This shift in position of the IOC inevitably resulted in the listing of recreational drugs on WADA's Prohibited List.

This change in mindset evidently also needed legal support, i.e. legal grounds to ban these substances. As mentioned above, in the past, the criteria to prohibit substances was based on their impact on sport performance and the health risks connected to these products. However, the enhancing effects were not so evident regarding recreational drugs or, at least, in terms of the health risk criteria, not so different from other "legal drugs", such as alcohol and tobacco. Therefore, it is interesting to note that new criteria was established to ban certain substances, including some recreational drugs: for the so-called "spirit of sport".

Regarding recreational drugs, the sports authorities took on the same arguments as public authorities[10]. This approach based on the social concern about the increasing number of findings of social drugs in sport. Sport being a role model for youngsters served as a showcase for the public authorities to implement their programmes and attack the use of recreational drugs. However, the question remains as to whether this should be the goal of sports organisations.

But what is the spirit of sport? It may be *"the celebration of human spirit, body and mind"*,

[4] WADA Code, 2015 edition.

[5] WADDINGTON I., VEST- CHRISTIANSEN A. & GLEAVES J., op. cit. fn. 1.

[6] WADDINGTON I., a. (2009). *An introduction to drugs in sport: Addicted to winning?* London.

[7] FRIDMAN S., S. (2007 2 (1)). Should athletes be tested for recreational drugs? Three sporting federations kick around the proverbial footbal. *Australian and New Zealand Sports Law Journal*, 59 et seq.

[8] Times, 14 September 1988.

[9] WADDINGTON I., VEST- CHRISTIANSEN A. & GLEAVES J., op. cit. fn. 1.

[10] Sports Council (1996). Report on the sports council's doping control service, 1995-96, London: Sports Council.

including concepts such as ethical behaviour, fair play, loyalty, sportsmanship, excellence, dedication, respect of the rules and opponents, etc.[11] Still, the above concepts are abstract and depend on the social mindset at a specific moment. Furthermore, the argument that everything that is illegal is against the spirit of sport cannot be applied across the board for all recreational drugs. This is the case of marijuana, which, in some countries is not illegal and is even used for therapeutic purposes.[12]

It is therefore problematic to police personal lifestyle and social activities, which may be unrelated to sport performance.[13] This is also conflictive if the argument is that recreational drugs are a health risk, when you consider that other drugs, such as alcohol and tobacco are permitted. More specifically, alcohol and tobacco present astonishing figures of mortality and can have serious consequences, such as alcoholism and cancer.[14] This is the reason why some authors consider that WADA and the anti-doping world in general lost an opportunity to develop their approach on recreational drugs.[15]

Admittedly, the new WADA Code is more flexible and opens the door for more opportunities to those athletes who used recreational drugs in a context unrelated with sport and without the intention to cheat.

Finally, there has been criticism that these substances are included in the WADA Prohibited List without solid grounds. Cocaine is considered an in-competition prohibited substance subject to a potential four-year suspension,[16] while, narcotics, e.g. morphine (contained in heroine) are "specified substances" and subject to sanctions ranging from a warning to a two-year suspension.[17] The attitude towards recreational drugs based on the argument that they are a potential health risk or go against the spirit of sport makes, to some extent, no sense at all.

Consequently, the solution here is not black or white. To ban behaviour going against the spirit of sport is today, *per se*, reasonable, legitimate and completely necessary. Sport acts as a role model and, even though unwanted by the sports authorities, it also affects the development of societies and sets the tone for social needs and expectations. However, even though banning drugs seems reasonable, the legal grounds need to be thoroughly examined in order for the ban to gain consistency throughout the years. Using the spirit of sport as a basis seems, in principle, not enough when careers are at stake. It is a "catch-all" notion that is constantly evolving to the detriment of athletes whose only mistake may have been to live in the wrong period.

Bearing the above in mind, the current work will analyse the attitude of sports authorities and CAS (Court of Arbitration for Sport) specifically towards cocaine.

As a preliminary remark though, it must be stated that to ban cocaine definitely meets the criteria established in article 4.3 of the WADA Code. There is no doubt that the use of this substance is absolutely against the spirit of sport, insofar as it is widely perceived as a substance connected to drug trafficking, criminal organisations, addiction, and negative side effects on the human body. It has been widely proven by the scientific world that cocaine presents clear health risks.[18] However, some academics also point

[11] FRIDMAN S., op. cit. fn. 7.
[12] WADDINGTON I., VEST- CHRISTIANSEN A. & GLEAVES J., op. cit. fn. 1.
[13] WADDINGTON I., VEST- CHRISTIANSEN A. & GLEAVES J., op. cit. fn. 1.
[14] MATTHEWS – KING A., (11 May 2018). Alcohol and tobacco by far the worst drugs for human health, global review finds. *Independent*.
[15] WADDINGTON I., VEST- CHRISTIANSEN A. & GLEAVES J., op. cit. fn. 1.
[16] WADA 2018 Prohibited List under class S6.
[17] WADA 2018 Prohibited List under class S7.
[18] AVOIS L., ROBINSON N. S. & MANGIN, P. a. (2006). Central nervous system stimulants and sport practice. *British Journal of Sports Medicine, Jul; 40(Suppl 1)*, i16–i20.

to some potential enhancing effects possibly connected to this substance.[19]

II. Recreational drugs and doping: the issue of cocaine

A. What is cocaine?

First and foremost, there are several definitions for cocaine.

Merriam Webster defines cocaine *as "a bitter crystalline alkaloid $C_{17}H_{21}NO_4$ obtained from coca leaves that is used especially in the form of its hydrochloride medically as a topical anaesthetic and illicitly for its euphoric effects and that may result in a compulsive psychological need".*[20] Oxford defines it as *"an addictive drug derived from coca or prepared synthetically, used as an illegal stimulant and sometimes medicinally as a local anaesthetic".*[21]

With respect to its effects, it appears that cocaine is a strong CNS stimulant and is probably the most addictive agent known. Its recreational use is widespread, and it is highly addictive with its effect mediated through dopamine release.[22]

In terms of sport, there is an ongoing debate regarding the possible (negative or positive) effects of this drug on the sport performance of athletes. In this regard, cocaine acts as a reuptake inhibitor of a neurotransmitter serotonin, norepinephrine and dopamine causing strong short-term stimulation. Resulting effects are, for example, an increased heart rate or improved stamina and self-confidence, which can potentially enhance physical performance. It seems to be unclear but not relevant, if the trade-off between performance enhancement and negative effects (addiction, rise in tolerance, aggression) can be specifically beneficial in a particular sport.[23]

More precisely, regarding the possible effects of cocaine on the human body, some authors consider that, while cocaine is a strong central nervous system stimulant,[24] it does not really enhance sport performance.[25] It may in some circumstances hinder, rather than help, a player's performance if taken shortly before the game.[26]

The discussion on the possible effects of cocaine on sport performance remains open as some deem that it has the potential to improve oxygen supply, enhance mental awareness and create a feeling of invincibility.[27]

Regarding health consequences, Avois et al. associate a number of dramatic fatalities with coronary occlusions that have occurred in athletes misusing cocaine, usually those who have been exercising intensely following drug administration. Many sportspeople who misuse cocaine complain of negative central effects, such as perceptual misjudgements and time disorientation that sometimes reduce their athletic performance. Furthermore, cocaine addicts frequently turn to other drugs to ease the comedown when no more cocaine is available. When used together, these drugs and cocaine can prove even more deadly than when used alone. Some fatalities have also occurred when cocaine misuse has been mixed with alcohol or anabolic steroids. The joint misuse of alcohol and cocaine is extremely cardiotoxic. These practices increase the risk of sudden death by cardiac arrest or seizures followed by respiratory arrest.[28]

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[19] ER, E. (2008;7). Stimulants in sports. *Curr Sports Med Rep.* , 244–245.

[20] Merriam Webster: www.merriam-webster.com/dictionary/cocaine.

[21] Oxford Dictionary: https://en.oxforddictionaries.com/definition/cocaine.

[22] AVOIS L., ROBINSON N. S. & MANGIN, P. op. cit. fn 18.

[23] ER, E. (2008;7). Stimulants in sports. *Curr Sports Med Rep.* , op. cit. fn. 19.

[24] AVOIS L., ROBINSON N. S. & MANGIN, P. op. cit. fn. 18.

[25] Ibid.

[26] LAWSON A., (2006). Cocaine no help, says expert. *The Sun Herald*, 114.

[27] FRIDMAN S., op. cit. fn. 7.

[28] AVOIS L., ROBINSON N. S. & MANGIN, P. op. cit. fn. 18.

As mentioned above, the case of cocaine, under recreational drugs, is a special one, mainly because it is widely accepted as having serious negative effects on the athlete's health, deriving mainly from its addictive effects. Cocaine has been at the origin of a high number of deaths, the end of professional careers and personal relationships.

Referring back to WADA's criteria, the use of cocaine definitely goes against the spirit of sport, understood as the model for a healthy and positive attitude to life. It constitutes an evident potential health risk for athletes. In this sense, WADA's decision to ban this substance is well-founded.

B. WADA's attitude towards cocaine

For the purposes of this study, from a legal perspective, what really matters is the definition given by the WADA Code to cocaine. In this regard, cocaine is classified as a stimulant and appears in the WADA 2018 Prohibited List under class S6, being prohibited in-competition only. It is important to note that both the presence of cocaine and/or its metabolites (benzoylecgonine and methylecgonine) in urine can be classified as a severe doping offence. Cocaine is a non-threshold substance, meaning that any concentration of it found in the analysis equates to a positive result for an anti-doping rule violation.

Although WADA's approach is correct in banning this substance, mainly for its pernicious effects, and, to some extent, its closeness to other stimulants like amphetamines, how WADA approaches the use of this substance is not totally convincing.

Interestingly, WADA allows the use of cocaine out-of-competition, banning it only for in-competition use or if it appears in doping results. But at the same time, WADA attaches to it the worst possible sanctions, four years suspension, classifying it as a non-specified substance rather than a specified one.

This compared to WADA's approach to the use of other well-known recreational drugs is remarkable. For instance, and as mentioned above, this is the case of cannabis and narcotics, listed as specified substances, meaning that their use would imply lower sanctions and even potentially a full reduction of the period of ineligibility.[29]

C. CAS jurisprudence on recreational drugs

This analysis of CAS's attitude towards cocaine will consist of two parts. First, a brief legal analysis needs to be carried out on the way this arbitration tribunal applied the former WADA Code of 2009. It will explain the situation giving rise to WADA's current approach. Second, CAS's current approach will be analysed, with reference to its history, as well as outlining athletes' prospects following an adverse analytical result for cocaine.

1. CAS jurisprudence on cocaine under the 2009 edition of the WADA Code

It is noted that DUVAL already performed an interesting legal analysis of CAS case law dealing with doping matters on cocaine base on the WADA Code Edition 2009.[30] Therefore, the current review will only address the main conclusions of this author and develop those aspects still controversial in the current situation.

First and foremost, in case of an adverse finding for cocaine, the athlete only has one possibility to obtain the *"elimination or reduction of the period of ineligibility"*: the escape clause provided by article 10.5 of the 2009 edition of the WADA Code. To this end, under article 10.5.1, an athlete must establish *"that*

[29] CAS 2016/A/4416, paras 71-73.

[30] DUVAL A., (2014) Doping and the the Court of Arbitration for sport « I dont like the drugs, but the drugs like me » . *T.M.C. Asser Instituut.*

he or she bears No Fault or Negligence". However, as cocaine is a prohibited substance, *"the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated"*. Furthermore, article 10.5.2 provides that *"*[i]*f an Athlete ... establishes in an individual case that he or she bears No Significant Fault or Negligence, then the otherwise applicable period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable"*. Finally, as cocaine is a prohibited substance, *"the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced"*.[31]

Thus, the key to getting a reduction, or removal, of an ineligibility period due to a positive cocaine doping test, is to demonstrate a low (or no) degree of fault or negligence in the chain of events leading up to its intake. In fact, a lot depends on the understanding by CAS of the notions of "no fault or negligence" and of "no significant fault or negligence". As we will see, CAS has adopted a very strict interpretation of those notions, rendering it almost impossible for an athlete to escape the two-year ban.[32]

To give you an overview, the most relevant cases dealt with by CAS on cocaine demonstrate that the different CAS panels have had a strict attitude towards these matters – as Duval claims the *"Ice-Cold CAS"*.[33] In this regard, CAS has steadily imposed the maximum sanction contemplated in the WADA Code Edition 2009 of a two-year ban. This was the case when an athlete was not able to prove how the substance entered the body[34] when there were no truly exceptional circumstances,[35] when an athlete willingly ingested drugs,[36] voluntarily decided to put himself in an uncertain situation,[37] accepted the risk[38] and, also, when there was not enough evidence to demonstrate an alleged dependency syndrome.[39]

Only in exceptional, *"very atypical factual circumstances"*,[40] did CAS amend the original sanction, as well as in situations where the alleged facts were quite extraordinary, e.g. dramatic mismanagement and careless habits of an anti-doping laboratory,[41] the athlete was a victim of an assault which led to the ingestion of cocaine[42] and/or the athlete kissed a person in a bar and thereby accidently and entirely unintentionally got contaminated.[43]

The above considerations are useful for understanding CAS's approach to the recent cases dealing with cocaine, even under the current WADA Code. CAS's strict attitude has persisted. However, the case law also shows a change in trend, at least to the extent of reducing sanctions, whereby the athlete may have more room to defend himself, although always subject to a sanction.

2. CAS jurisprudence on cocaine under the 2015 edition of the WADA Code

a. Introductory remarks: the applicable legal framework

As a general approach, Article 10.2 of the WADA Code provides that the period of ineligibility for an anti-doping rule violation is four years. As an exception, a two-year ban is imposed if the athlete or other person can establish that the anti-doping rule violation was not intentional, the anti-doping rule violation involves a specified substance and the anti-doping organisation cannot establish that the anti-doping rule violation was intentional.

[31] DUVAL A., op. cit. fn. 30.
[32] DUVAL A., op. cit. fn. 30.
[33] DUVAL A., op. cit. fn. 30.
[34] Ibid.
[35] CAS 2006/A/1130.
[36] CAS 2007/A/1384.
[37] CAS 2008/A/1516.
[38] CAS 2009/A/2012.
[39] CAS 2011/A/2307.
[40] DUVAL A., op. cit. fn. 30.
[41] CAS 2013/A/3170.
[42] CAS 2007/A/1312.
[43] CAS 2009/A/1926 and 1930.

The above is also subject to a potential reduction or suspension of the period of ineligibility for no fault or negligence (article 10.4), no significant fault or negligence (article 10.5), or for other reasons, e.g. substantial assistance in discovering or establishing an anti-doping rule violation (article 10.6).

Bearing the above in mind, the proposed exercise now is to fit into this scheme the analysis of cocaine carried out recently by CAS.

The aim of this review is to explain the standard procedure undertaken by CAS in cases of cocaine. Having looked into this procedure, it appears that CAS hasn't always been consistent in its own approaches, and, in some cases, has failed to follow the appropriate order in evaluating them (intention and fault).

b. The intention to cheat: the time of ingestion is crucial

ba. The meaning of in-competition prohibited substances

It is interesting that the first assessment of a doping case that needs to be done is regarding the range of the potential sanction. As mentioned above, the length of the standard sanction depends on the existence of an intention to cheat by the athlete. Consequently, the lack of an intention means that the sanction will range between a one- and two-year ban for prohibited non-specified substances, or, in cases of specified substances, between a warning and a two-year ban.

According to article 10.2.3 of the WADA Code, *"the term "intentional" is meant to identify those athletes who cheat. The term, therefore requires that the athlete or other person engaged in a conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk"*. Further to that the WADA Code contemplates that *"An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the 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"* (emphasis added)[44]

For the sake of clarity, the lack of intent is demonstrated by an athlete who can establish that he took the prohibited in-competition substance out of competition and in a context unrelated to sport. But, it doesn't follow that the same logic applies conversely, because this is not expressly mentioned by any anti-doping rule. It is sustained that the fact that the athlete took the recreational drug prohibited in-competition within the in-competition period does not demonstrate *ipso facto* that he had the intention to cheat. In this regard, the athlete could still demonstrate that he took it in a context unrelated to sport, as is generally the case with recreational drugs. Obviously, how the substance entered the body is relevant, but it is only another element. It becomes decisive only afterwards in connection with the level of fault and not a prerequisite to establish the intention to cheat.

Referring back to the case of cocaine, the analysis of the existence of an intention to cheat will provide two possible outcomes. First, where this intention exists, the sanction given will be a four-year ban. Second, the lack of intention to cheat will result in a sanction ranging between a one- and two-year ban, never below this level, unless the athlete can prove *No Fault or Negligence*, in which case the otherwise applicable sanction can be annulled.

Again, for in-competition prohibited substances like cocaine, the athlete can demonstrate an absence of intention by

[44] Article 10.2.3 of the WADA Code.

establishing that the intake was done out-of-competition, i.e. before a certain period, in a context unrelated to sport, i.e. before a certain period.

In football, for instance, depending on the competition, this period is normally 24 hours prior to and after the match[45]. The substance also needs to have been ingested in a context not related to sport.

More specifically, the WADA Code establishes that unless provided for otherwise in the rules of an international federation or the governing body of the event in question, "in-competition" means the period commencing twelve hours before a competition in which the athlete is scheduled to participate until the end of that competition and the sample collection process related to the competition.[46]

In the case of cocaine, the anti-doping rule violation applies when an in-competition doping control detects this substance or its metabolites in the sample of an athlete. Roughly saying, the use of cocaine is permitted only outside the in-competition period, which is confusing if the aim of banning the use of this substance is to protect the spirit of sport and the health of athletes.[47]

Bearing the above in mind, the evaluation of the intention to cheat in cases of cocaine follows the same path. If it is demonstrated that the athlete took the substance before the in-competition period, there is no intention to cheat. Consequently, the maximum sanction will be a two-year ban.

bb. The metabolism process of cocaine as a key element

For the above reasons, demonstrating the moment the cocaine entered the body of the athlete is completely relevant. For this purpose the question as how this substance acts in the human body, i.e. chemical modification and its half-life (i.e. the time taken for the concentration of the drug in the body to reduce to one half of that at the start of the time interval), also becomes crucial.

Illustrating is the brilliant evaluation made by CAS over this matter in CAS 2017/A/5144. Firstly, it conveyed that cocaine is very rapidly chemically modified, i.e. it is metabolised quickly producing a number of metabolites (like methylecgonine and benzoylecgonine (BCE)). Secondly, it pointed to the fact that cocaine has a short half-life because the body excretes the drug very fast. In particular, according to the expert report submitted by Professor Cowan's during the arbitral proceedings, again in CAS 2017/A/5144, the documented half-lives of cocaine, methylecgonine and benzoylecgonine are 2.4-3 hours, 5.2-6 hours and 5.9-6.2 hours, respectively.[48]

Here CAS based on the expert statements established that, due to the metabolism process described above, when analysing a sample for cocaine, normally the metabolite benzoylecgonine has high urine concentration. It is important to note that the presence of the parent substance (cocaine: COC) in this concentration in the athlete's urine clearly points to an exposure to the drug shortly before sample-taking. As a general rule, if you have a higher concentration of cocaine than its metabolites in a urine sample, the consumption must have been recent. Furthermore, methylecgonine has a relatively high urine concentration, but normally much lower than that of benzoylecgonine.[49]

Consequently, the presence of cocaine in its original composition (COC) indicates a recent intake of the substance, whereas in its absence, the presence of its metabolites may

[45] See UEFA Anti-Doping Regulations, Edition 2018: Definition In-competition.
[46] Appendix 1 of the WADA Code.
[47] For example, in CAS2016/A/4416, the athlete had tested positive out-of-competition competition on other occasions, without it having any impact on his sporting situation.
[48] CAS 2017/A/5144, par. 99.
[49] CAS 2017/A/5144, par. 100.

indicate an intake beyond the in-competition period.

It is important to stress here again that in the case of recreational drugs, the sole presence or demonstration that the athlete took the substance within the in-competition period is not enough to demonstrate that he had the intention to cheat and is subject to a four-year ban. As said, the athlete could still demonstrate that the intake was made in a context unrelated to sport and have the otherwise applicable sanction reduced.[50], However, the above-mentioned CAS award CAS 2017/A/5144, missed the opportunity to clarify this extent and centred the discussion on a different element to impede the reduction of the sanction, i.e. how the substance entered the body.

bc. CAS recent approach: a brilliant explanation for the process of cocaine, an unfortunate analysis regarding intention and a satisfactory outcome

As exposed above CAS 2017/A/5144 brilliantly explained in detail the chemical modification of cocaine and its half-life within a human body. This in the context of establishing the time of ingestion. However, the legal analysis continued in the sense that the athlete was not able to demonstrate how the substance had entered his body. Consequently, it seems that CAS decided, on a balance of probabilities, that given that the athlete was not able to demonstrate how the substance had entered his system, that the consumption was intentional and that, ultimately, he bore fault or negligence, or that these were significant and there were therefore no grounds to eliminate or reduce the four-year ban.[51]

However, this approach, even accepting the fact that the possible outcome should have been the same for the athlete, is not correctly construed. Under the scheme that follows the evaluation of the elements of a doping substance, the question whether the athlete is able to demonstrate how the substance entered his body is expressly mentioned in connection with the assessment of fault and negligence and significant fault or negligence, in other words, when the panel has already decided on the intention to cheat, not before.

As mentioned before, there is nothing in Article 10.2.3. WADA Code expressly sustaining the existence of intention if the athlete does not establish that he took the substance out of competition in a context unrelated to sport.

Admittedly, the question of how the substance entered the body is an important element to establish the intention of the athlete or the context in which the substance had been taken. In this regard, CAS jurisprudence shows many examples in which this has been decisive to impose the maximum sanction[52]. But none of them, until CAS 2017/A/5144, dealt with a recreational drug, known mainly for its use for recreational purposes.

In the above-mentioned CAS award, the Panel decided based on the expert reports and on the circumstances of the case that the athlete had taken the drug shortly before the doping control, admittedly within the in-competition period[53]. Summarily, CAS decided that the mere fact that the athlete was unable to prove how the substance had entered his body, combined with an intake shortly before the doping control, proves the athlete's guilt and provides grounds for the imposition of the maximum sanction.

It appears that CAS implicitly strictly applied the WADA Code (article 10.2.3) and FIFA ADR (article 19). It implicitly considered that the athlete knew that his taking the drug constituted an anti-doping rule violation or that there was a significant risk that the conduct might constitute or result in an anti-

[50] Article 10.2.3 of the WADA Code.
[51] CAS 2017/A/5144, par. 110.
[52] CAS 2016/A/4626, CAS 2016/A/4563 and CAS 2016/A/4377.
[53] CAS 2017/A/5144 at paras 107 to 110.

doping rule violation, and manifestly disregarded that risk[54].

But, again, this was not explicitly stated by CAS 2017/A/5144. Admittedly, it considered that the athlete could not demonstrate that he had unintentionally committed the anti-doping rule violation, that he, in addition, failed to demonstrate that he had consumed cocaine in a recreational social/context, and, strikingly, that he was unable to demonstrate that he bore no significant fault. However, the examination here was only to determine whether the player had had the intention to cheat. All this, as admitted by CAS itself, related to a known recreational drug, normally used for exactly that, i.e. recreational purposes, and likely unrelated to sport.

In this author's opinion, CAS missed the opportunity to disconnect the assessment over the intention to cheat of the athlete[55] and the demonstration of how the substance entered the athletes body, the latter included in the analysis of the player's fault[56].

Admittedly, the question as to how the substance entered the athlete body is in direct connection with his intent to cheat, but the lack of establishment of the origin of the prohibited substance cannot automatically result in a finding that the athlete intended to cheat. Again, in the case of recreational drugs, the athlete may demonstrate that the intake was unrelated to sport to prove the absence of intention to cheat. It appears therefore controversial to apply the same strict approach of CAS for other prohibited substances in cases of recreational drug use, whose the purpose is, precisely, recreation and not to enhance sport performance. Summarily, an adequate assessment seems to be necessary for recreational drugs, because the departing idea of the intake is implicitly a recreational use.

The above consideration against CAS approach finds its support in CAS 2015/A/4200 also dealing with cocaine. Here, CAS deems that "cheating" is a key element of "intent". Specifically it states that *"*[b]*y using a Prohibited Substance, an athlete wishes to obtain an advantage in comparison to other athletes. The athlete's will is directed to achieve this advantage not only based on the own physical and/or psychical abilities as an athlete, but on additionally taking the Prohibited Substance; the will of an athlete using a Prohibited Substance, which is prohibited only in competition, out of competition in a context unrelated to sport performance is not directed to achieve such unfair competitive advantage and, thus, according to Article 10.2.3 FINA DC[57] does not mean 'cheating'. In such case, there is no 'intent' to be found"*.[58]

As said, it appears that CAS 2017/A/5144 conversely applied the consequence of Article 10.2.3 WADA Code understanding that an in-competition ingestion of an in-competition prohibited substance demonstrates the intent of the athlete instead of separating and explaining the connection between the intention to cheat of the athlete and his inability to prove how the substance entered his body.

Notwithstanding the above considerations, the above-mentioned case, i.e CAS 2017/A/5144, interestingly presented sufficient elements to support the same conclusion it rendered, including here as well absence of the source of the substance, such as the high concentrations of intact cocaine and both its metabolites and the likelihood that the intake took place shortly before the match, increasing the chances that the intake had a direct relation with the match.

Finally, and even agreeing with the final outcome of the CAS award, in this author's opinion this case also creates some feelings with regard to those situations of athletes presenting lower levels of concentration of cocaine or only its metabolites, who were not

[54]Article 10.2.3 of the WADA Code.
[55] Article 10.2.3 of the WADA Code.
[56] Article 10.3 of the WADA Code.
[57] Practically identical to Article 10.2.3 of the WADA Code.
[58] CAS 2015/A/4200, par. 7.4.

able to demonstrate how the substance had entered the body. There might be a risk, still hypothetical, that following the above approach by CAS, these concentrations would not have an impact on the case merely because the athlete could not demonstrate how the substance had entered his or her body. In other words, this would mean that the athlete's chances rely decisively on his or her capacity to convince a panel how the cocaine had entered his/her body, even in situations where it is scientifically shown that the intake was done outside the in-competition period. Admittedly, this goes beyond the analysis of the referenced CAS award and is based merely on a hypothesis, but the idea seeding the approach of CAS points at this direction, which is definitely worrisome.

Again, it is understood that CAS didn't face the above situation, which remains uncertain. However, as a matter of fairness, such an hypothetical approach would hinder the possibility of athletes to reduce the potential sanction, precisely in a situation dealing with a substance ingested for "recreational purposes" without evident sport performance-enhancing effects.

c. No fault or negligence

For the purposes of this review, the notion of "no fault" is conceived as established in the WADA Code as *"any breach of duty or any lack of care appropriate to a particular situation"*.[59] Further it means that *"*[f]*actors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk"*.[60]

Further, this notion implies that *"*[i]*n assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2 [of the WADA Code]"*.

Finally, WADA Codes establishes that *"The Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system"*.[61]

Except in the rare cases of contamination or inadvertent ingestion of cocaine, it is commonly accepted by CAS that the presence of cocaine in the athlete's body is due to the existence of fault or negligence of the latter. In other words, the athlete did not take utmost caution. Consequently, the critical element here is the *"utmost caution"* demanded from the athletes, and only in exceptional circumstances can a departure from this be accepted.[62]

In this regard, CAS has steadily and consistently established that this notion of *"utmost caution"* is incompatible with an athlete that deliberately ingests a substance that he knows is prohibited in-competition. The care due by an athlete refers to the availability of this plea *"only in exceptional circumstances"*, an approach confirmed in CAS 2017/A/5015 and CAS 2017/A/5110: *"a finding of No Fault applies only in truly exceptional cases. In order to have acted with No Fault,* [the Athlete] *must have*

[59] WADA Code, Appendix 1 on the definition of Fault.
[60] Ibid.
[61] WADA Code, Appendix 1 on the definition of No Fault or Negligence.
[62] CAS 2016/A/4416, par. 63.

exercised the 'utmost caution' in avoiding doping. As noted in CAS 2011/A/2518, the Athlete's fault is measured against the fundamental duty which he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance"'.[63]

With respect to doping concerning cocaine, it is interesting that CAS's most recent jurisprudence sort of assumes that an athlete has not exercised "utmost caution". This is illustrated in the fact that fault and negligence tend to be assessed together with the potential significant fault or negligence of the athlete, i.e. without separating the analysis in different chapters. Implicitly, CAS accepts that the presence of this recognisable and illicit drug sustains the existence of fault or negligence of the latter.

CAS will only implement a specific analysis of this issue if the athlete strongly contests this fact, thereby obliging it do so. Here again, CAS continues with its "ice-cold" attitude towards the assessment of this substance,[64] at least when examining the fault and negligence of the athlete. It is at this point that the examination of how the substances entered the body is relevant in order to decide whether a sanction is needed as it will define the level of possible fault of the athlete, i.e. the significant fault.

d. The existence of significant fault or negligence

There is a general consensus on how to define and approach the different levels of fault of an athlete.

First, the WADA Code defines significant fault or negligence as *"*[t]*he Athlete or other Person's establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system"*.[65]

Also useful for this purpose is the well-known jurisprudence based on the *Cilic* case. The Panel in this case noted that *"*[t]*he breadth of sanction is from 0 – 24 months. As Article 10.4* [of the WADA Code] *says, the decisive criterion based on which the period of ineligibility shall be determined within the applicable range of sanctions is fault"*. CAS has commonly supported the following degrees of fault contained in the *Cilic* case: significant degree of or considerable fault, normal degree of fault and light degree of fault.[66]

Following this same line and *"*[i]*n order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete in light of his personal capacities"*.[67]

Consequently, *"*[t]*he Panel suggests that the objective element should be foremost in determining into which of the three relevant categories a particular case falls"*.[68] It follows in that *"*[t]*he subjective element can then be used to move a particular athlete up or down within that category"*.[69] Finally, CAS assumes that *"*[o]*f course, in exceptional cases, it may be that the subjective elements are so significant that they move a particular athlete not only to the extremity of a particular category, but also into a different category altogether"*.[70]

Referring back to the cases of cocaine, it appears that the test of no significant fault or negligence is more flexible, but not too much.

da. Objective element

[63] CAS 2018/A/5546.
[64] DUVAL A., op. cit. fn. 30.
[65] CAS 2013/A/3327, par. 69. (WADA Code, Appendix 1)
[66] CAS 2013/A/3327, par. 69.
[67] CAS 2013/A/3327, par. 71.
[68] CAS 2013/A/3327, par. 72.
[69] CAS 2013/A/3327, par. 73.
[70] CAS 2013/A/3327, par. 74.

Again, the *Cilic* case makes some interesting assessments as regards the analysis of the objective element. It considers that *"*[a]*t the outset, it is important to recognise that, in theory, almost all anti-doping rule violations relating to the taking of a product containing a prohibited substance could be prevented"*.[71]

However, an athlete cannot be reasonably expected to follow all of the steps foreseen in *Cilic* in every and all circumstances, particularly in cases of recreational drug use. Instead, these steps can only be regarded as reasonable in certain circumstances. Specifically for substances prohibited in-competition only, CAS considers that two types of cases must be distinguished:

First, where the prohibited substance is taken by the athlete in-competition: in such a case, the full standard of care described above should equally apply.

Second, where the prohibited substance is taken by the athlete out-of-competition (but the athlete tests positive in-competition): *"Here, the situation is different. The difference in the scenario … where the prohibited substance is taken out-of-competition is that the taking of the substance itself does not constitute doping or illicit behaviour. The violation (for which the athlete is at fault) is not the ingestion of the substance, but the participation in competition while the substance itself (or its metabolites) is still in the athlete's body. The illicit behaviour, thus, lies in the fact that the athlete returned to competition too early, or at least earlier than when the substance he had taken out of competition had cleared his system for drug testing purposes in competition"*.[72]

In cases of cocaine, CAS has constantly confirmed that the traditional ways of ingestion cocaine present a high degree of fault, i.e. smoking, snorting or injecting. In this regard, CAS tends to accept that the fault is either significant or normal and the range of sanctions must be between 18 and 24 months, depending, evidently, on the subjective elements.

Beyond the traditional ways of ingestion, CAS is not inflexible, but it is true that the alternative needs to be credible. To blame a family member or another person for one's own mistakes is risky with an uncertain, and, usually, negative outcome. This is so, because, if the athlete is not able to demonstrate how the substance entered his or her body, he or she does not qualify for the examination of no significant fault, i.e. no reduction of the sanction is possible. However, if the theory is credible, the consequences can be very positive.[73]

Even where the standard of proof is the balance of probabilities, the athletes need to substantiate their arguments. It becomes the most important aspect of the case. The case law shows that CAS is reluctant to accept alternatives to the most common ways of ingestion. Therefore, the exercise of convincing CAS on this exact aspect becomes relevant and completely necessary.

Lately, athletes have opted for an interesting approach in order to reduce the above range. In short, they seek to apply the same conditions to cocaine as those applicable to cannabis, i.e. to establish no significant fault by clearly demonstrating that the context of such consumption was unrelated to sport performance, which would result in the subsequent reduction of the sanction. And this only based on the fact that they could clearly demonstrate that the use of this substance was done in a context unrelated to sport. This indeed is the policy for cannabis as provided for in the WADA Code,[74] which has already raised some legal concerns.

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[71] CAS 2013/A/3327 at par. 74.
[72] CAS 2013/A/3327 at par. 75.
[73] CAS 2018/A/5546.
[74] WADA Code, Appendix 1 Definitions: No significant Fault or Negligence: "Comment to No Significant Fault or Negligence: 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".

This approach, as explained by CAS, is based, firstly on the legislative history of the WADA Code, as cited by CAS in some awards.[75] *"In an initial version of the WADC (version 2.0) both drugs (Cannabinoids and Cocaine) were being treated together as 'Substances of Abuse' making it clear that recreational drug use merits 'special treatment'. The (draft) provision dealing with 'Substances of Abuse' (that provided a sanction in the range of a reprimand up to one year) was criticized by stakeholders in the revision process, in particular because it suggested rehabilitation at the expense of the athlete. Stakeholders feared that requiring an athlete to foot the bill for a rehabilitation program would result in discriminatory treatment among athletes with different financial means. Thus, the original concept of 'Substances of Abuse' was dropped in the final version of the WADC with the consequence that the general provisions on fault-related reductions would apply to recreational drug use. It is to be noted that the final draft of the WADC, which was circulated prior to the World Anti-Doping Conference in Johannesburg, did not contain any special provision relating to recreational drug use. In particular, the final draft of the WADC did not contain today's comment (in the definition section) relating to Cannabinoids"*.[76]

Further, CAS sustained that *"the problem related to recreational drug use was only tabled once again a couple of days prior to the World Anti-Doping Conference by some stakeholders. The latter felt that, under the general rules relating to fault-related reductions, recreational drug users would end up under the new WADC with much harsher sanctions than under the WADC 2009, which was not in line with the overall concept and purpose of the revision process to provide for more flexibility for 'non-cheaters'. It appeared, thus, that a solution had to be found quickly. Initially, a broad and cohesive concept dealing with recreational drug use was contemplated in the context of fault-related reductions of the periods of ineligibility (see HAAS, in BERNASCONI (ed.) Arbitrating Disputes in a Modern Sports World, 2016, p. 54 seq.). However, in view of the fact that there was no further consultation window available to get any feedback from stakeholders at this late stage, it was decided to keep changes to the final version of the text to a minimum. Thus, a comment was inserted in the definition of NSF dealing with the most relevant recreational drug use in practice, i.e. the use of Cannabinoids"*.[77]

Consequently, CAS has held that *"it appears from the legislative history that the comment in the definition section related to NSF does preclude this Panel to apply the carve out for Cannabinoids by analogy also to the recreational use of Cocaine"*.[78]

Second, this same panel also deemed that *"a systematic interpretation of the rules speaks in favour of treating both 'substances of abuse' similarly when it comes to assessing the athlete's level of fault in relation to their consumption. Finally, the application of the comment to NSF by analogy to Cocaine also helps to avoid inconsistencies with Art. 19 (3) FIFA ADR (Art. 10(2)(3) WADC). The article provides that the recreational use of a drug (that is only prohibited in-competition) does not constitute 'intentional doping' when being used in a context unrelated to sport performance. If this, however, is the case it would be contradictory to prevent the same athlete from recourse to the concept of NSF (enshrined in the ADR / WADC) by pointing to his alleged intentional consumption of the drug"*.[79]

However, this argument of treating both substances in the same manner has not been consistent in CAS jurisprudence and has even been reasonably contested by this arbitral tribunal. It certainly helped in the case cited above, CAS 2016/A/4416 (*Fernández* case), but did not in another recent case, CAS 2017/A/5078, making reference indeed to the *Fernández* case.

In substance, CAS rightfully stated that the fact that cocaine may be assimilated under

[75] CAS 2016/A/4416 at paras 71 citing RIGOZZI/VIRET/WISNOSKY, *Does the World Anti-Doping Code Revision Live up to its Promises?*, Jusletter 11 November 2013, no. 140 et seq.

[76] CAS 2016/A/4416, par. 71.

[77] CAS 2016/A/4416, par. 72.

[78] CAS 2016/A/4416, par. 72 citing RIGOZZI/HAAS/WISNOSKY/VIRET, *Breaking Down the Process for Determining a Basic Sanction under the 2015 World Anti-Doping Code*, Int. Sports Law J (2015) 15:3,27: "… *the panel might consider applying by analogy the special assessment for cannabinoids included in the Comment to the definition of No Significant Fault or Negligence in Appendix 1 of the 2015 Code, in situations that appear consistent with its underlying rationale*".

[79] CAS 2016/A/4416 at par. 73.

some respects to Cannabinoids does not imply that in every single case a reduction of the sanction is warranted: as indicated in the same *Fernández* award, in fact, an individual evaluation of the relevant objective and subjective elements is to be conducted.[80]

There are certainly arguments in favour of CAS's latest position. The analogy must not be accepted for two main reasons. First, cocaine is a non-specified substance, whereas cannabis is a specified one. It is, therefore, subject to different limitations. Second, in cases of cocaine, the argument referring to a use of the drug in an unrelated context to sport already provides for establishing the lack of intention to cheat and thereby reduces the potential range of possible sanctions for in-competition prohibited substances. To accept this argument again would lead to an automatic double reduction, one based on the lack of the intention to cheat, and, another, for the lack of significant fault. It would mean that the athlete would benefit from two consequent reductions in one sole strike.

db. Subjective element

CAS constant practice points to the fact that, "[w]*hilst each case will turn on its own facts, the following examples of matters which can be taken into account in determining the level of subjective fault can be found in CAS jurisprudence (cf. also LA ROCHEFOUCAULD E., CAS Jurisprudence related to the elimination or reduction of the period of ineligibility for specific substances, CAS Bulletin 2/2013, p. 18, 24 et seq.): a. [a]n athlete's youth and/or inexperience* (see CAS 2011/A/2493, para 42 et seq; CAS 2010/A/2107, para. 9.35 et seq.)*; b.* [l]*anguage or environmental problems encountered by the athlete* (see CAS 2012/A/2924, para 62)*; c.* [t]*he extent of anti-doping education received by the athlete (or the extent of anti-doping education which was reasonably accessible by the athlete)* (see CAS 2012/A/2822, paras 8.21, 8.23)*; d.* [a]*ny other 'personal impairments'".*[81]

In cases involving cocaine, unlike for the objective element, CAS has shown some flexibility towards athletes and their personal situation with regard to the subjective element.

For instance, even though in the CAS 2015/A/4200 case, the Panel did not accept the athlete's arguments concerning his level of fault, it made some important comments on the evaluation of the existence of psychological impairments as a possible mitigating factor in determining the degree of fault. The athlete in this case alleged that the intake of cocaine was due to the fact that he was suffering from depression caused by the sudden death of his father and the bad results of his club. The panel deemed that the appellant could not provide sufficient evidence to prove that he was suffering from the disease or sufficient reasons to explain why he had not consulted a physician or a psychologist. Instead, he relied on himself and arguably his family for diagnosing a depression and for finally successfully overcoming such state without professional help. In this regard, the panel deemed that since the appellant could not present reliable expert evidence to the panel that he suffered from an illness that would have excluded or reduced his ability of cognizance, there had clearly been significant fault or significant negligence of the athlete.[82]

The lessons learnt by this CAS award are twofold. First, depression may be a valid argument to reduce the level of fault. Second, this allegation needs to be supported by sufficient evidence, such as that the player

[80] CAS 2017/A/5078 at par. 90.

[81] CAS 2013/A/3327, par. 76 lists a number of examples, such as an athlete who has taken a certain product over a long period of time without incident, that person may not apply the objective standard of care which would be required or that he would apply if taking the product for the first time (see CAS 2011/A/2515, par. 73), an athlete who has previously checked the product's ingredients, an athlete who is suffering from a high degree of stress (CAS 2012/A/2756, par. 8.45 et seq.), and an athlete whose level of awareness has been reduced by a careless but understandable mistake (CAS 2012/A/2756, par. 8.37).

[82] CAS 2015/A/4200, par. 7.8.

had consulted a physician or a psychologist during the period of time that he had ingested cocaine.

Furthermore, CAS 2016/A/4416 also recognised as an adequate mitigating factor the possible negative environment in which the player may have been placed at the time he took cocaine. *"Furthermore, it appears to the Panel that the Player's life in May-June 2015 was rather chaotic. His father, who apparently had a bad influence on him, had moved in his house with his entourage. Thereupon the Player's wife moved out and left the Player taking their daughter with her. The Player stated that at that time a lot of people were hanging out at his place and that a lot of alcohol was consumed. It appears to the Panel that the Player had lost control over his private life".* [83] Consequently, the panel found that, considering the player's reduced ability to exert control over and steer his private life, his subjective level of negligence was lower.[84]

CAS had the same approach in CAS 2017/A/5078, where the player had allegedly sustained an addiction to cocaine due to his problems with gambling and his private life: his family had returned to their home country without him. The panel, here again, noted that the player's capacity had not been impaired by any addiction, or by a state of depression (which is a severe clinical condition and not simply a state of mood), which had not been medically certified or treated. The intervention of a mental coach, indeed, as evidenced at the hearing, had had a different purpose, and did not concern any addiction or depression.

In summary, CAS is flexible in that it is open to accepting various types of arguments, such as mental and physical impairments, the external influence of the athlete's context, or his or her negative private life. By the same token though, it applies a strict approach and relies on external sources of evidence rather than on the athletes' own self-assessment or that of their families. CAS is strict in demanding sufficient proof to certify any psychological or mental impairment.

III. Conclusions

As mentioned at the beginning, there is a general and public concern towards doping as a one of the worst sporting crimes. The question about doping in connection with recreational drugs and the reasons to ban such drugs is still under discussion within the scientific and the sporting world. It is illustrating that the main criterion used to explain the ban of these substances, i.e. a violation of the spirit of sport, is the only one not subject to a scientific analysis. However, it is still possible to combine this criterion with the other two conditions contained in the WADA Code, i.e. the potential or actual sport-enhancing effects or health risk for the athlete. But the main issue of banning recreational drugs is confronted with the challenge of policing personal lifestyle and social activities, in which the use of such drugs may be unrelated to sport, have no enhancing effects and not be a potential health risk (or at least no more than tobacco or alcohol).

As stated above, the solution here is not black or white. It is insisted that banning conducts going against the spirit of sport is necessary due to the exposure of athletes as role models to youngsters and even adults. To some extent it is submitted that it affects the development of societies and serves as a catalyst of social needs and expectations. However, the legal rationale of banning these substances needs still to be discussed in the sense of gaining consistency and the due respect to the private life of athletes.

In the case of cocaine, it is undisputed that its use definitely goes against the spirit of sport, as well as constituting an evident potential health risk for athletes. But this only means that the use of this substance must be banned, and not the manner or the categorization of the latter, i.e. defined it as a

[83] CAS 2016/A/4416, par. 76.

[84] CAS 2016/A/4416, par. 79.

prohibited non-specified substance or prohibited specified substance.

The discussion with cocaine also pivots around the idea that its recreational use is generally accepted and fits badly with the notion of "intention to cheat" contemplated in the WADA Code for those who "cheat". It is reminded that it is a substance prohibited only in competition, meaning that its intake out of competition is allowed, but it should no longer be present in the athlete's samples taken in-competition. In this respect, if it is demonstrated that cocaine was used out-of-competition it is admitted that there is no intention to cheat.

The assessment of the intention to cheat is quite interesting in cases of cocaine, because the concentration of this substance or its metabolites in the doping results is completely relevant to establish whether its intake occurred in or out of competition. In general terms, and as exposed above, the presence of pure cocaine (COC) should speak for a recent intake of the substance, whereas the presence of only its metabolites, could be explained by an intake beyond the in-competition period.

Interestingly, it seems that on one occasion CAS[85] may have implicitly disregarded the above approach. This seems to have been the case, to the extent that the presence of pure cocaine and a possible intake close to the sporting event, combined with the athlete's inability to demonstrate how the substance entered his body, resulted in the maximum sanction being confirmed. Admittedly, the outcome of CAS appears to have been correct, but seemingly its evaluation of the intention to cheat was not or at least the due separation between the latter and the level of fault of the athlete was not duly assessed. In contrast to the referenced CAS case, it appears that this approach would not serve in situations in which athletes would have either low levels of pure cocaine or only metabolites of the drug in their samples, and they were still not able to demonstrate how the substance entered their body. This because the concentration would scientifically demonstrate that the ingestion was made outside the competition period, the intake being considered as being without any intention to cheat.

Also with regard to the fault of the athlete, the assessment is interesting as it follows CAS' previous "Ice-Cold" position before the entry into force of the new WADA Code edition 2015. However, it seems that CAS is also moving towards having some flexibility as to the existence of significant fault or negligence, accepting well-founded and almost certified alternatives to the traditional ingestion of cocaine, or allowing personal impairments to be considered as mitigating factors.

All in all, the evaluation of doping cases deriving for the presence or the use of cocaine has interesting elements and opens important debates, even over the *ratio legis* of WADA's approach to banning certain substances and not others. This, in combination with the common recreational use of these substances, opens further questions about the intention to cheat of athletes using, for instance cocaine, and it also connects them to the addictive effects of the drug and the personal impairments accompanying or causing its ingestion, circumstances almost only being present in such cases. The manner to solve the possible obstacles and to gain consistency from the sporting authorities and CAS on how to approach substances of the kind is and will be relevant as long as all stakeholders are able to legally define and encapsulate the meaning of spirit of sport, potential health risk and sport-enhancing effects to ban any substance.

[85] CAS 2017/A/5144.

Jurisprudence majeure*
Leading Cases

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

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

CAS 2016/A/4772
Diego Dominguez v. Fédération Internationale de l'Automobile (FIA)
12 January 2018

Automobile; Doping (amphetamine) (denial of retroactive TUE); Applicability of the FIA ADR to the athlete participating in a FIA International Sporting Code event; Scope of CAS authority to review TUEC decisions under FIA ADR regarding fairness assessment; Invalidity of the federation decision for lack of reasons regarding "fairness criteria"

Panel
Mr Ken Lalo (Israel), President
Mr Rui Botica Santos (Portugal)
Mr Hans Nater (Switzerland)

Facts

This appeal is brought by Mr Diego Hugo Dominguez Stroessner (the "Appellant") against the decision of the Therapeutic Use Exemption Committee ("TUEC") of the Fédération Internationale de l'Automobile ("FIA"), dated 5 April 2016 (the "Challenged Decision"), which refused to grant the Appellant a retroactive Therapeutic Use Exemption ("TUE") for the use of lisdexamphetamine (50 mg once daily) and dextroamphetamine sulphate (10 mg three times daily) starting from 17 March 2015. These products contain amphetamine, a prohibited substance, which was discovered along with its metabolite, p-OH amphetamine, in a sample taken at an in-competition doping control during the Ralli Santa Cruz de la Sierra, Bolivia (the "Santa Cruz Rally", being part of FIA Confederación Deportiva Automovilística Sudamericana Rally Championship ("CODASUR"), subjecting the Appellant to proceedings for an anti-doping rule violation ("ADRV"), which are still pending but are not the subject of this appeal.

The Appellant is a Paraguayan businessman and competitor in rally competitions in South America.

The FIA is the international governing body for motorsport. The FIA is a French association constituted under and governed by the Loi du 1er juillet 1901, with its legal seat in Paris.

On 17 March 2015, the Appellant filed with his national association, Touring y Automovil Club Paraguayo ("TACPy"), a request for a renewal of a license to compete in driving rally competitions. As part of such process the Appellant completed the standard medical history form specifying that he suffered from Attention Deficit Hyperactivity Disorder ("ADHD") for which he was taking vyvanse and he attached to such form a letter from his doctor, Dr David Gross, confirming that the Appellant had ADHD and was treated with daily doses of vyvanse and dextroamphetamine sulphate ("Dr Gross' Letter"). TACPy granted the Appellant a license to compete.

On 28 August 2015, during the Santa Cruz Rally, the Appellant underwent an in-competition doping control test and provided a urine sample to the FIA. The Appellant advised the Doping Control Officer of his condition and provided a copy of Dr Gross' Letter.

On 11 September 2015, the World Anti-Doping Agency (WADA) accredited laboratory in Bogota, Colombia, reported that a prohibited substance, amphetamine, and its metabolite, p-OH amphetamine, had been found in that sample. The FIA checked the file and determined that the Appellant did not have a TUE permitting the use of amphetamine.

On 5 October 2015, the FIA sent the Appellant a notice of charge for the commission of an ADRV under Article 2.1 of the FIA Anti-Doping Regulation ("FIA ADR"), for the substance amphetamine (and its metabolite p-OH amphetamine), which is prohibited under Category S6 of the WADA 2015 Prohibited List.

On 4 February 2016, following notification of the ADRV, the Appellant applied for a retroactive TUE.

On 10 February 2016, the ADRV proceedings against the Appellant were suspended following resolution of the retroactive TUE issue.

On 2 March 2016, the Appellant applied for a prospective TUE.

On 24 March 2016, the Appellant's application for a prospective TUE was granted for a period of one (1) year.

On 1 April 2016, following a hearing, the provisional suspension of the Appellant imposed following the alleged ADRV was lifted.

On 5 April 2016, the TUEC issued the Challenged Decision rejecting the Appellant's application for a retroactive TUE and informing him that the FIA was *"unable to grant a retroactive TUE in this case, since the members do not consider that the explanations provided fulfil the criteria to grant a retroactive TUE on the basis of fairness"*.

On 13 April 2016, the Appellant requested WADA to review the FIA's refusal to grant the retroactive TUE.

On 6 May 2016, Mr Andrew Slack, Ph.D., a Medical Manager at WADA wrote to the FIA's TUE department an email which in its pertinent part states:

"(…)

Based on our understanding of the facts, it is WADA's opinion that ISTUE 4.3(d), if not also 4.3(c), criteria are met in Mr. Dominguez's case and justify the grant of a retroactive TUE. Nevertheless, we recognize that there may be extenuating circumstances or considerations of which we are unaware. Would you be kind enough to elaborate on the TUEC's rationale for rejecting Mr. Dominguez's retroactive TUE pursuant to ISTUE 4.3(d)?"

On 25 July 2016, the FIA answered WADA on behalf of its TUEC that the Appellant was not a low level athlete, that he was made aware of the TUE process by Dr Gross before participation at the Santa Cruz Rally, that this is *"not a lack of knowledge but a lack of consideration for motor sport rules"*, that amphetamine is a widely known doping substance, that this is *"[a] legal story rather than a medical story"* and that the Appellant did not deserve to be granted a retroactive TUE based on the fairness criterion.

On 10 August 2016, WADA advised the Appellant that it declined to conduct a formal review of the TUE application, in view of the absence of any agreement between the FIA and WADA regarding the application of the fairness criterion to the Appellant.

On 31 August 2016, the Appellant filed his statement of appeal at the Court of Arbitration for Sport (the "CAS") against the FIA in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code") challenging the Challenged Decision.

Reasons

The following provisions of the FIA ADR, which are based on the WADC, are material to this appeal:

FIA ADR 4.5 *("Therapeutic Use Exemptions ("TUEs")")* provides in its pertinent part:

"4.4 WADA's International Standards For reasons of harmonisation, WADA publishes International Standards for various technical and

operational aspects of anti-doping. These International Standards constitute an integral part of the Regulations and it is obligatory to respect them. They (…) comprise: - the Prohibited List; - the International Standard for Therapeutic Use Exemptions; - (…)

4.5.1 Athletes with a documented medical condition requiring the Use of a Prohibited Substance or a Prohibited Method must first obtain a TUE. (…).

The Appellant made an application for disclosure of 11 January 2017 based on its argument that the disclosed documents failed to constitute the reasoned decision which the TUEC was required to issue.

On 16 January 2017, the FIA responded to the Appellant's request for documents stating that the FIA complied with the requests for disclosure. The FIA confirmed that there were no minutes of meetings in relation to the TUEC's decision and that other than the email exchange with WADA which was already disclosed *"there are no further formal documents elaborating on the FIA TUEC's reasons for denying the Appellant a retroactive TUE on the basis of fairness"*.

On 20 January 2017, based on the FIA reply, the CAS advised the parties that the Panel denied the Appellant's request for further disclosures.

1. Applicability of the FIA ADR to the athlete participating in the Santa Cruz Rally?

   The Appellant contended that he was not bound by the FIA regulations, including the FIA ADR, at the time of the anti-doping control at the Santa Cruz Rally. The Appellant claimed that he never explicitly or tacitly accepted the FIA regulations and consented to be subject to them, as required for example in CAS 2010/A/2268 *I. v. FIA*. In this respect, the Appellant argued that he did not have an international licence and was not an international level athlete and that he did not sign any form which contained any reference to the FIA ADR. The Appellant further highlighted that participation at a prize giving ceremony for winners of events on the FIA International Sporting Calendar was not an indication that the person attending was an international level athlete. Therefore, the Appellant argued that, similar to other national competitors in his country, he was not under any obligation to apply for a TUE in accordance with the provisions of the FIA ADR, and that, even if he had been under such an obligation, he was denied an opportunity to correctly apply for a TUE in accordance with the FIA ADR.

   The FIA accepted that its rules were binding only on those who agree to them, but argued that such agreement may be either express (e.g., in an entry form or application for accreditation signed by the athlete) or tacit, and that consent might be implied objectively from the athlete's conduct, without any requirement of a signed document.

   The Panel agreed that tacit agreement suffices as is made clear by authors dealing with the subject and other CAS awards (Sullivan, The World Anti-Doping Code and Contract Law, in 'Doping in Sport and the Law' (Bloomsbury 2016), p.68; Haas / Martens, Sportrecht – Eine Einführung in die Praxis, Schulthess Zurich 2011, p.72; CAS 2016/A/4697 *Dorofeyeva v International Tennis Federation*, paras. 84-86). Such tacit consent, stemming, for example, from the mere participation in international events, suffices to bind these sportsmen and sportswomen by the regulations of the specific sport. The Panel agreed with the FIA that CAS jurisprudence was clear that all those participating in organised sport were deemed to know that, in order to ensure a level playing-field for all, there were strict anti-doping rules that should

be complied with, and they were deemed to be bound by those rules whether or not they had ever explicitly signed up to them, or even read them *(Roberts v FIBA*, Swiss Federal Tribunal decision number 4P 230/2000, 2001 ASA Bull 523, 7 February 2001, p.4; CAS 2009/A/910, *Telecom Egypt Club v EFA*, para. 9; CAS 2007/A/1284 *WADA v FECNA & Prieto*, para. 47; CAS 2011/A/2675, *Overvliet v IWF*, para. 7.26; CAS 2011/A/2398 *WADA v WTC & Marr*). In particular, an athlete who competes at the international level of a sport cannot claim ignorance of the applicable anti-doping rules (CAS 2010/A/2268 *I. v FIA*, para. 93; CAS 2012/A/2959 *WADA v Nilforushan and FEI*, paras. 8.17–8.18; CAS 2012/A/2822 *Qerimaj v International Weightlifting Federation*, para. 8.21(2)).

The Santa Cruz Rally is one of five CODASUR regional championships staged across the South American continent in five different countries. The CODASUR is an International Rally Championship sanctioned by the FIA that has been registered on the FIA International Sporting Calendar since 2011. The Panel accepted that it was, therefore, governed by the FIA International Sporting Code, including the FIA ADR. The Panel was of the view that tacit or implied acceptance of the rules sufficed and that participation in the CODASUR events clearly meant that the Appellant submitted to the FIA regulations including its FIA ADR. The Panel was of the opinion that in this specific case the Appellant was also aware of those rules even if he did not give much attention to the details of the correct formalities regarding the application for and receipt of a TUE.

2. Scope of CAS authority to review TUEC's decisions under Article 4.5.4.1 (d) FIA ADR

The FIA argued that the comment to ISTUE Article 4.3(d) precluded an appeal against the FIA's assessment of fairness.

The Panel agreed with the FIA that there was no conflict between the general right of appeal under Article 4.5.7 FIA ADR (Article 4.4.7 WADC) and the comment under Article 4.3(d) ISTUE which states that: *"[i]f WADA and/or the Anti-Doping Organization do not agree to the application of Article 4.3(d), that may not be challenged either as a defense to proceedings for an anti-doping rule violation, or by way of appeal, or otherwise"*. Such comment simply limits the right on appeal to replace the TUEC's fairness assessment with that of CAS. It is allowed to provide a discretion to the association and courts should not lightly exercise their power of review over the association's decisions made in the exercise of such discretion, especially in cases in which sports governing bodies have special expertise and experience in relation to their respective sport. While the Panel accepted that CAS could not replace its assessment of fairness with that of the TUEC, it was nevertheless of the opinion that appeals might still be permitted on the ground that the decision was arbitrary, grossly disproportionate, irrational or perverse or otherwise outside of the margin of discretion, or taken in bad faith or without the due process rights provided to the athlete.

3. Invalidity of the federation's decision for lack of reasons regarding "fairness criteria"

The Appellant mainly argued that the Challenged Decision was not valid or was null and void because: it failed to contain any reasons.

The Challenged Decision rejected the Appellant's application for a retroactive TUE, stating that the FIA was *"unable to grant a retroactive TUE in this case, since the*

members do not consider that the explanations provided fulfil the criteria to grant a retroactive TUE on the basis of fairness". In essence the TUEC repeated in its decision the exact wording of Article 4.5.4.1(d) FIA ADR and gave no further explanation for the rejection of the TUE application. The Panel determined that merely stating that *"fairness criteria"* was not met, did not provide *"an explanation of the reason(s) for the denial"* of the TUE application as required under Article 6.8.b ISTUE incorporated to the case herein through Article 4.5.5 FIA ADR. This is an explicit rule on point. The literal meaning of the word *"explanation"* is a reason or justification, a statement or account that makes something clear. A repetition of the rule which states that a retroactive TUE should be granted when *"fairness requires the grant of a retroactive TUE"* and merely stating that *"fairness criteria"* was not met could not be considered *"an explanation of the reason(s) for the denial"*.

An athlete has a legitimate expectation to understand the rationale of a decision which is a legal ruling affecting his status and which may impact claims of ADRV and possible defences as well as the athlete's handling of such ADRV case. The decision might be challenged on appeal as shown in this award, albeit to a limited degree, and, therefore, the FIA's argument that the Challenged Decision was not subject to review and there was no reason to provide a reasoned decision was not acceptable. The later communication with WADA did not remedy the Challenged Decision. Both the Appellant and WADA were entitled to have a reasoned decision which would have allowed them to properly review and assess their respective positions immediately following the issuance of such a decision. This may even be more relevant in the present case in which WADA itself seems to have questioned the TUEC's decision.

Even if the Panel were to accept that it was within the FIA's discretion to deny the retroactive TUE, the FIA's decision should still be annulled for violating the Appellant's personality rights since he had a legitimate expectation to understand the rationale of the decision and this should be respected. This is a fundamental right which may outweigh the argument that there has not been any misuse of discretion by the FIA.

The Panel held that the FIA could not assume that the TUEC would take the same substantive decision if the matter was brought before it again considering that the TUEC's decision would have to be a reasoned one. The TUEC is an independent body of the FIA and its discretion cannot and should not be assumed by the FIA. Furthermore, the mere process of formulating the reasons for the decision may result in a different decision. Even if it were the same decision, its reasoning may have an impact on the proceedings relating to the ADRV.

Decision

The Panel thus decided to set aside the Challenged Decision and required the TUEC to issue a new decision in relation to the Appellant's application for a retroactive TUE dated 4 February 2016 which should be a reasoned decision.

CAS 2016/A/4903
Club Atlético Vélez Sarsfield v. The Football Association Ltd., Manchester City FC & Fédération Internationale de Football Association (FIFA)
16 April 2018

Football; Transfer of minor players; Request for intervention of a party involved in the first instance proceedings but that did not appeal the decision; Procedural violations that can be cured by de novo proceedings; Interpretation of the statutes and regulations of a sport association; Right to move and reside freely within the territory of a Member State of the EU; Distortion of the transfer market

Panel
Mr Efraim Barak (Israel), President;
Prof. Gustavo Albano Abreu (Argentina);
Prof. Ulrich Haas (Germany)

Facts

Club Atlético Vélez Sarsfield (the "Appellant" or "Vélez Sarsfield") is a football club with its registered office in Buenos Aires, Argentina, and affiliated to the Asociación del Fútbol Argentino (Argentine Football Association – "AFA"), the governing body of football at domestic level in Argentina. AFA is no party to the present dispute, but is nonetheless granted limited rights as an *amicus curiae*.

Manchester City FC (the "Second Respondent" or "City") is a football club with its registered office in Manchester, United Kingdom. Manchester City is registered with the Football Association Ltd. (the "First Respondent" or the "FA"), which is the governing body of football at domestic level in the United Kingdom. The FA is affiliated to the Fédération Internationale de Football Association (the "Third Respondent" or "FIFA").

On 1 October 2010, B. (the "Player") a football player of Argentinian nationality born in 2000, was registered with Vélez Sarsfield when he was 11 years of age. During his registration with Vélez Sarsfield, he was called up to represent AFA's national youth teams.

On 22 June 2016, shortly before the Player's 16th birthday, Manchester City sent an email to inform Vélez Sarsfield that the Player and his parents had taken the decision to join City next July and to offer some bonuses for the future trajectory the Player could develop.

On 23 June 2016, Vélez Sarsfield rejected Manchester City's offer.

On 27 June 2016, the Player obtained an Italian passport, besides his Argentinian passport.

On 11 July 2016, the day the Player turned 16, he entered into an employment contract with Manchester City, valid as from the date of signing until 10 July 2018.

On 2 August 2016, the FA introduced through FIFA's Transfer Matching System ("TMS") a request for approval by the Sub-Committee of the FIFA Players' Status Committee (the "Sub-Committee") for the international transfer of the Player to Manchester City. The FA's request was based on the exception stipulated in Article 19(2)(b) of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP"): *"The transfer takes place within the territory of the European Union (EU) or the European Economic Area (EEA) and the player is aged between 16 and 18".*

On 24 August 2016, the Single Judge of the Sub-Committee rendered his decision (the "Appealed Decision"), with the following operative part: *"The application of the* [FA] *on*

behalf of its affiliated club Manchester City for the approval prior to the request of the International Transfer Certificate of the minor player B. (Italia) is accepted".

On 12 December 2016, Vélez Sarsfield lodged a Statement of Appeal, pursuant to Article R48 of the CAS Code of Sports-related Arbitration (edition 2016) (the "CAS Code").

On 3 July 2017, a hearing was held in Lausanne, Switzerland.

Reasons

1. AFA had filed a request for intervention in this proceedings. The Panel decided to reject it, mainly because AFA had failed to lodge an independent appeal with the CAS, while it was a party in the proceedings leading to the Appealed Decision. For the Panel, admitting AFA as a party to the proceedings before the CAS would *de facto* have led to a circumvention of the strict deadline of 21 days to challenge the Appealed Decision and might have set a dangerous precedent in which a direct party to a dispute before a first instance failed to comply with the CAS Code and did not submit an appeal on time, but rather would have been permitted to *"enter through the back door"* and join the proceedings if its request for intervention as a party would have been upheld, while filed only after the expiry of the time limit to appeal.

   Notwithstanding the rejection of AFA's request to intervene, the Panel was of the view that the participation of AFA in the proceedings, without allocating it any procedural rights as a party, could facilitate the Panel in resolving the matter since under Article 19(4) FIFA RSTP the national association is the formal party to the application for approval of an international transfer of a minor, and as AFA had been directly involved in the proceedings before the Single Judge of the Sub-Committee of FIFA. The Panel therefore allowed AFA to file a written submission limited to legal arguments and allocated it a restricted time limit to plead during the hearing.

2. The Panel dismissed Vélez Sarsfield's argument that the Single Judge of the Sub-Committee had committed a manifest violation of its right to defence and the guarantee of due process. The Panel held that neither the mere fact that the Single Judge of the Sub-Committee had decided not to hold a hearing, nor FIFA's argument in the present proceedings that Vélez Sarsfield did not have standing to challenge the Appealed Decision, nor FIFA's failure to take disciplinary action against Manchester City for an alleged breach of the FIFA Disciplinary Code did constitute a violation of any procedural rights.

   In any event, the Panel found that even if any procedural deficiencies had occurred throughout the proceedings before the Single Judge of the Sub-Committee, such deficiencies could have been and were cured in the present proceedings before CAS. The Panel indeed recalled that amongst the procedural violations in a first instance decision that could be cured by a *de novo* CAS proceeding was the right to be heard. Infringements on the parties' right to be heard could generally be cured when the procedurally flawed decision was 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 in the first instance and in front of which the right to be heard had been properly exercised.

3. Whereas Vélez Sarsfield submitted that Article 19(2)(b) FIFA RSTP was only applicable in case of transfers from one club based in an EU/EEA country to

another, the FA and Manchester City submitted that, regardless of the plain and clear wording of the rule, the nationality of the football player concerned was decisive, *i.e.* Article 19(2)(b) FIFA RSTP was also applicable to transfers from a club based in a non-EU/EEA country to a club based in an EU/EEA country if the player concerned was an EU citizen. The latter view had also prevailed in the Appealed Decision.

The Panel found that the Single Judge of the Sub-Committee of the FIFA PSC, following the interpretation given to the rule in TAS 2012/A/2862 and in order to maintain stability in the transfer system, had interpreted the provision as expected from a lower instance which is supposed to apply the CAS jurisprudence on a similar matter. Indeed, the plain wording might reasonably and without considering other rules of interpretation have led one to think that the exception could only be invoked in case of a transfer taking place from a club based in one EU/EEA country to another. For the Panel however, such interpretation disregarded the "legislative environment" and the surrounding circumstances of the legislation process that had led to the inclusion of this rule in the FIFA RSTP following the discussions with the European Commission.

For the Panel, it was uncontroversial the provision establishing the principle of "free movement of workers" within the EU (Article 45(3)(b) of the Treaty on the Functioning of the European Union, "TFEU") had played an important role in the genesis of Article 19(2)(b) FIFA RSTP and its application in practice. Article 45(3)(b) contained similar wording as Article 19(2)(b) FIFA RSTP, but this wording had consistently been interpreted as applying also to workers possessing an EU passport domiciled in non-EU/EEA countries, but willing to move to an EU/EEA country. As Article 20(2)(a) TFEU and Directive 2004/38/EC had introduced EU citizenship as the basic status for nationals of the Member States when they exercise their right to move and reside freely on EU territory, free movement of workers did not only contemplate a right to move freely within EU territory for EU citizens, but also to reside freely on EU territory. Therefore, a provision in the FIFA RSTP preventing football players with an EU passport that are registered with clubs based in non-EU/EEA countries from transferring to clubs based in EU/EEA countries, while permitting football players with an EU passport that are registered with clubs based in EU/EEA countries from transferring to clubs based in other EU/EEA countries would clearly have constituted a violation of the principle of free movement of workers, particularly because no justification for such diversified approach was given.

As such, and in order to prevent inconsistencies between different rights of EU/EEA citizens deriving merely from their residence, the Panel found sufficient legal justification to the interpretation of Article 19(2)(b) FIFA RSTP as being also applicable to transfers of players with an EU passport from clubs based in non-EU/EEA countries to clubs based in EU/EEA countries.

4. While adopting such interpretation, the Panel however noticed that such interpretation was indeed likely in certain circumstances to lead to unequal treatment between EU/EEA and non EU/EEA Players and Clubs. The Panel also noted that it saw no reason, nor had FIFA or any other party involved in the arbitration been able to present one, to justify why clubs based in EU/EEA countries deserved preferential treatment over club based in other parts of the world. Nonetheless, the consequence was

not that Article 19(2)(b) FIFA RSTP was invalid, because this would negatively affect players holding the EU/EEA citizenship that can legitimately rely on this exception, but that the territorial scope of the provision should no longer be restricted to transfers *"within the territory of the European Union (EU) or European Economic Area (EEA)"*.

5. The last issue for the Panel was to decide whether to establish already in this case that Article 19(2)(b) FIFA RSTP should be applicable to all transfers worldwide, as long as the material requirements set out in Article 19(2)(b)(i)-(iv) FIFA RSTP are complied with. Considering the implications of such decision, the Panel found that the matter should be dealt with first by FIFA, which was expected to duly consider the findings of this award in order to determine whether to amend the regulations, or to adopt a different interpretation of the rule through circular letters, or otherwise, which was of course its prerogative.

Decision

As a result, the Panel held that the Single Judge of the Sub-Committee had correctly approved the Player's registration with Manchester City and that FIFA was expected to duly consider the findings of this award to determine whether to amend the regulations, or to adopt a different interpretation of the rule through circular letters, or otherwise.

CAS 2017/A/4984
Nesta Carter v. International Olympic Committee (IOC)
31 May 2018

Athletics (4x100m relay); Re-analysis of a sample within the limitation period revealing an ADRV; Violation constituted by the presence of methylhexaneamine (MHA) in the athlete's sample; Scope of authority of the accredited laboratory to re-test the athlete's sample; Scope of the IOC's policy related to the re-analysis program; Absence of prejudice suffered by the athlete due to delay; Absence of breach of the principle of legal certainty

Panel
Mr Ken Lalo (Israel), President
Prof. Philippe Sands QC (United Kingdom)
Prof. Massimo Coccia (Italy)

Facts

Nesta Carter is a Jamaican athlete born in 1985 who specializes in the 100m race.

The IOC is the international non-governmental organization leading the Olympic Movement under the authority of which the Olympic Games are held. The IOC has its seat in Lausanne, Switzerland.

On 22 August 2008, Nesta Carter participated in the 4x100m relay final at the Beijing Olympics with Michael Frater, Usain Bolt and Asafa Powell. The team won the gold medal. At the end of the race, the athlete provided a urine sample which was analysed by the Beijing laboratory and found negative.

On 14 October 2008, a total of 4,072 A & B samples, including the Athlete's samples, were couriered from the Beijing Laboratory to the Lausanne Laboratory.

Nearly eight years later, following Dr Richard Budgett's letter of 24 March 2016 to the Lausanne Laboratory Director, the athlete's samples were re-tested by the Lausanne Doping Analysis Laboratory - LAD, a WADA-accredited laboratory. Dr Budgett is the IOC Medical and Scientific Director. In his letter to the LAD he indicated the substances to be re-analyzed. The Athlete was subsequently charged with an anti-doping rule violation ("ADRV"), namely "presence of a Prohibited Substance" pursuant to Article 2.1 of the IOC Anti-Doping Rules applicable to the 2008 Beijing Games ("IOC ADR") and/or "use of a Prohibited Substance" pursuant to Article 2.2 of the IOC ADR.

Nesta Carter's A and B samples revealed the presence of methylhexaneamine (MHA). The athlete refused the unfavourable analytical result so that the IOC Disciplinary Commission was seized.

On 25 January 2017, the Disciplinary Commission (DC) issued the contested decision confirming that the athlete had committed an anti-doping rule violation in accordance with the IOC RAD.

On 15 February 2017, the Athlete filed his statement of appeal at the Court of Arbitration for Sport (the "CAS") against the IOC, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code") challenging the Appealed Decision.

Reasons

1. Positive Finding of MHA

To start with, the Panel underlined that the Athlete participated at the Beijing Games. Similarly to all other participants, the Athlete

expressly accepted the rules applicable to this event by signing the applicable entry form. The entry form included a specific agreement to comply with the event rules and, as part thereof, specifically with the IOC ADR. The entry form also included a confirmation that the Athlete had full knowledge of the corresponding provisions.

Article 6.5 of the IOC ADR provides that *"the ownership of the samples is vested in the IOC for the eight years. During this period the IOC shall have the right to re-analyse samples (taken during the Period of the Olympic Games). Any anti-doping rule violation discovered as a result thereof shall be dealt with in accordance with these Rules"*.

The IOC exercised the possibility of the re-analysis of the Athlete's sample within the applicable deadline of eight (8) years in the context of a global process of re-analysis of the samples collected at the Beijing Games. The analysis of the Athlete's sample was performed at the Lausanne Laboratory in the exact same way and process as all other samples. It established the presence of MHA.

The WADA 2008 Prohibited List included *"all stimulants"* as substances prohibited in competition at section S6, including the stimulants identified at that section *"and other substances with a similar chemical structure or similar biological effect(s)"*. MHA was not specifically listed in section S6 of the 2008 Prohibited List. Yet the WADA Prohibited List is not a closed list and does not provide an exhaustive enumeration, but establishes the principle that all stimulants are prohibited. While not mentioned by name during 2008, MHA was nevertheless covered under class S6 Stimulants, as a substance with a similar chemical structure or similar biological effect(s) to an expressly listed stimulant (tuaminoheptane), and it was therefore already prohibited as a stimulant.

The validity of the results of the analysis of the Athlete's sample was unchallenged. They thus established the presence of MHA, a prohibited substance, in the Athlete's sample and, therefore, an ADRV within the meaning of Article 2.1 IOC ADR.

2. Scope of authority of the accredited laboratory to re-test the athlete's sample

The Athlete argued that one of his fundamental rights was breached in that his sample was tested by the Lausanne Laboratory outside the scope and specific instructions of the IOC. The Lausanne Laboratory tested for products which it was not requested to test since it was only authorized to test the Athlete's sample for the substances specified in Dr Budgett's Letter (MHA was not included), used a test which was neither specifically designed for nor primarily placed to detect the products which the IOC requested it to test for. The Athlete further contended that an athlete's right for his sample not to be tested in the absence of lawful authorisation by the IOC is even more fundamental than the right to attend the opening and analysis of the B sample, and the consequence of not respecting that right should be the same for both; namely, that the results of the A sample analysis should be disregarded.

The Panel first held that Article 6.5 of the IOC ADR provides a broad and discretionary power to the IOC to test for any and all prohibited substances at any time within the statute of limitation period which, in relation to samples from the Beijing Games, stood at eight years. Article 6.5 of the IOC ADR does not limit the types of tests to be conducted on samples within the "statute of limitation" period. According to article 6.5 of the IOC ADR what truly counts is not whether a substance is detected or not in a specific analysis performed at a given time in a given laboratory but whether it is present or not. The

Athlete knew or could have known that, as a participant at the Beijing Games, his samples could be retested at any time during the following eight years, and under any applicable method for any substance. He had no grounds to rely on a communication between the IOC and the Lausanne Laboratory which was not addressed to nor known by him (Dr Budget's letter). Moreover, the IOC was not limited by its own instruction letter and was not setting limits to its own possibility to extend the re-analysis as it would deem fit. In any event, the subsequent IOC's ratification of the Lausanne Laboratory's procedure superseded for all purposes its own prior instructions.

According to Article 5.2.4.2.1 of the ISL 2016, the Lausanne Laboratory had to apply a *"fit for purpose"* method capable of detecting the prohibited substances. The "Dilute and Shoot" method used is a screening method regularly used by the Lausanne Laboratory since 2011. It uses little urine, a very relevant aspect in the context of re-analysis, and does not require urine preparation. It allows to detect the substances covered with adequate sensitivity. The "Dilute and Shoot" method thus fully satisfies the ISL requirements and was adequate.

The tests conducted by the Lausanne Laboratory were not made due to a specific bias towards the athlete, or with bad faith or ill intentions. On the contrary, it was made in a way in which the Lausanne Laboratory usually acts, under a normal methodology applied by it and designed to analyse a large number of samples in an economical and effective way.

3. Scope of the IOC's policy related to the re-analysis program

The Athlete claimed that the scope of re-analysis of samples was restricted by the "policy" of the IOC on the detection of substances which could not have been detected at the time of the initial analysis. Since MHA was technically detectable at the time of the initial analysis by the WADA-accredited laboratory in Beijing, it could not be a substance legitimately detected in a later re-analysis.

All participants at the Olympic Games have the fundamental duty not to use any prohibited substance and to ensure that no prohibited substance is effectively present in their systems and in their samples. If they fail to do so, they will not be entirely safe until the expiration of the statute of limitation, which was eight (8) years during the relevant period to this case. This is an absolute duty and is not linked with the detectability of the substance. Therefore, a failure to discover the substance during an earlier period (a negative test), or by one laboratory, is not a guarantee against a later finding of an ADRV, provided it is within the period of limitation, also considering the well-known possibility of so-called "false negatives".

Moreover, a new analysis performed during the limitation period is not limited by the analysis already performed. The initial analysis does not act as a *"re-analysis threshold"*. The rules do not exclude from the scope of the re-analysis prohibited substances which the first anti-doping laboratory could have effectively or theoretically discovered given the then existing state of science. In any event, the re-analysis program is meant to protect the integrity of the competition results and the interests of athletes who participated without any prohibited substance and not the interests of athletes who were initially not detected for any reason and are later and within the statute of limitation period found to have competed with a prohibited substance in their bodily systems.

4. Absence of prejudice suffered by the athlete due to delay

The Athlete argued that he was prejudiced by a delay of years in retesting his sample only months before the expiry of the period of limitation.

The WADA Code 2004 provides for a limitation period of eight years between the date of an alleged violation and an action being commenced. The rules do not form an obligation on the IOC to perform re-analysis at all, or to do so as early as possible, when any new testing method becomes available. Therefore, the argument of the athlete regarding the alleged prejudice suffered due to "delay" cannot be accepted. In this respect, the difficulties to gather evidence including of the possible source of the MHA are inherent to an application of a long statute of limitation period. Indeed, the appealed decision rested on the sole finding of an objective ADRV based on the presence of a prohibited substance in the athlete's sample and was strictly limited to the consequences related to the Olympic Games. Issues linked with fault or negligence, whether significant or not, were not relevant and other than the disqualification from the race, with all it entails, sanctions such as ineligibility or disqualification from other events were not at stake. Thus there was no merit in the athlete's argument regarding an alleged prejudice suffered due to "delay".

5. Absence of breach of the principle of legal certainty

The Athlete finally argued that there would be a fundamental unfairness to be sanctioned for the presence of a substance that he did not know, and could not reasonably have known, was a prohibited substance at the time. A charge against him should therefore be dismissed based on the principle of a lack of legal certainty.

The Panel reminded that MHA was already prohibited under the WADA 2008 Prohibited List as a stimulant having a similar structure and effects as one of the listed stimulants (tuaminoheptane). This had been confirmed by CAS jurisprudence (CAS 2009/A/1805). The Athlete was required to ensure that no stimulants were present in his bodily systems, named or unnamed. This was the legal framework which was set in order to ensure a more equal playing field to sporting competitors. It was a legal framework of which he was aware.

Therefore no dismissal of a claim against the athlete should apply based on the principle of a lack of legal certainty.

Decision

The Panel dismissed the appeal filed on 15 February 2017 by Mr Nesta Carter against the decision of the Disciplinary Commission of the International Olympic Committee dated 25 January 2017 and upheld the the decision of the Disciplinary Commission of the International Olympic Committee in the matter of Nesta Carter dated 25 January 2017 is upheld.

CAS 2017/A/5090
Olympique des Alpes SA v. Genoa Cricket & Football Club
14 March 2018

Football; Compensation for training; Admissibility of newly presented arguments and evidence; Principle of entitlement to training compensation of clubs having registered one player on a loan basis; Analysis of the question of the completion of one player's training period

Panel
Mr Manfred Nan (The Netherlands), President
Mr Daniele Moro (Switzerland)
The Hon. Michael Beloff QC (United Kingdom)

Facts

This is an appeal brought by Olympique des Alpes SA (the "Appellant" or "Sion") against the decision of the Single Judge of the Sub-Committee of the FIFA Dispute Resolution Chamber (the "FIFA DRC Single Judge") dated 7 February 2017 (the "Appealed Decision"), in which decision Sion is ordered to pay training compensation to Genoa Cricket & Football Club (the "Respondent" or "Genoa") in the amount of EUR 55,000 plus 5% interest.

Sion is a football club with its registered office in Martigny-Croix, Switzerland. Sion is registered with the Swiss Football Association (the "SFA"), which in turn is affiliated to the *Fédération Internationale de Football Association* ("FIFA").

Genoa is a football club with its registered office in Genoa, Italy. Genoa is registered with the Italian Football Federation (the "FIGC"), which in turn is also affiliated to FIFA.

According to the international player passports, Mr M (the "Player"), a Senegalese football player born on 3 April 1993, was *inter alia* registered with the following clubs, as follows:

- FC Krasnodar: as a professional as from 31 August 2012 until 10 July 2013;
- Genoa: as a professional on loan as from 6 August 2013 until 22 July 2014;
- FC Krasnodar: as a professional as from 29 July 2014 until 1 September 2014;
- Sion: as a professional as from 5 September 2014.

On 21 September 2016, Genoa lodged a claim against Sion via FIFA's Transfer Matching System ("TMS") with FIFA, claiming training compensation in an amount of EUR 57,205, plus interest accruing as of 2 October 2014, arising from the transfer of the Player from FC Krasnodar to Sion. In spite of having been invited to do so, Sion did not respond to Genoa's claim. On 7 February 2017, the Appealed Decision was rendered, with, *inter alia*, the following operative part:

"1. The claim of [Genoa] is partially accepted.

*2. [Sion] has to pay to [Genoa], **within 30 days** as from the date of notification of this decision, the amount of EUR 55,000 plus 5% interest p.a. on said amount as of 3 October 2014 until the date of effective payment".*

On 10 April 2017, Sion lodged a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (2017 edition) (the "CAS Code"). On 20 April 2017, Sion filed its Appeal Brief in accordance with Article R51 of the CAS Code. In its Appeal Brief, Sion requested three documents to be produced and challenged the

Appealed Decision, submitting the following requests for relief:

"1. To cancel the decision of the Single Judge of the sub-committee of the Dispute Resolution Chamber".

"2. To find that FC Sion has no debt towards Genoa CFC in relation to the training compensation of [M]".

On 11 July 2017, Genoa filed its Answer. In this submission, Genoa objected to the admissibility of several documents submitted by Sion on the basis of Article R57 para. 3 of the CAS Code. Genoa's Answer contained a statement of facts, legal arguments, and the following requests for relief:

"a. REJECTING the Appellant's requests in their entirety;

b. CONFIRMING the FIFA Decision";

On 3 August 2017, the CAS Court Office, on behalf of the Panel, invited Sion to respond to Genoa's objection to the admissibility of certain exhibits. Furthermore, as to Sion's request for certain documents to be produced, Sion was invited to provide evidence that it made unsuccessful efforts to obtain the requested documents from third parties and explain on what legal basis Sion considered the Panel to have authority to do so. On 10 August 2017, further to the Panel's invitation, Sion clarified its position regarding the application of Article R57 para. 3 of the CAS Code and the Panel's authority to request documents from third parties.

On 29 September 2017, the CAS Court Office, on behalf of the Panel, requested FIFA to provide it with the documents/information, to the extent available to FIFA (notably through FIFA TMS). On 13 November 2017, FIFA provided the CAS Court Office with the requested documents and information, but requested that such documents be provided to the Panel only (and thus not to the parties) for the purpose of this particular arbitration.

On 15 November 2017, Sion objected to FIFA's request to keep the documents provided confidential, whereas Genoa indicated that it would accept any decision of the Panel in relation to the confidentiality of such documentation.

On 20 November 2017, the CAS Court Office informed the parties that they would be provided with an opportunity to examine the documents at the outset of the hearing, but that they should not keep any copies thereof.

Reasons

1. Admissibility of Sion's newly presented arguments and evidence

   Article R57 para. 3 of the CAS Code provides as follows – as relevant: *"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".*

   First of all, the Panel observed that Article R57 para. 3 of the CAS Code refers to evidence, not arguments. Moreover Article R57 para. 3 of the CAS Code simply provides that CAS panels have the *"discretion to exclude evidence presented by the parties if".* Therefore, there is no limitation at all to the scope of a CAS panel's review with respect to legal arguments and submissions. The Panel therefore admitted Sion's arguments and submissions, adding that Sion's argument that the Player had already ended his training period was not to be qualified as an unexpected argument in matters involving a claim for training compensation and itself fell within the boundaries of the requests for relief of the dispute before the FIFA DRC Single Judge.

Secondly, as to the request to exclude newly presented evidence, the Panel found that after the amendment of Article R57 of the CAS Code in March 2013, the basis of *de novo* review was still, in essence, the foundation of the CAS appeals system and the standard of review should not be undermined by an overly restrictive interpretation of Article R57 para. 3 of the CAS Code. This has also been the view in CAS jurisprudence (CAS 2014/A/3486, as mentioned in CAS Bulletin 2015/1, p. 67). As such, the Panel also considered that the discretion to exclude evidence should be exercised with caution, for example, in situations where a party acted in bad faith or may have engaged in abusive procedural behaviour, or in any other circumstances where the Panel might, in its discretion, consider it either unfair or inappropriate to admit new evidence (See MAVROMATI/REEB, in *The Code of the Court of Arbitration for Sport – Commentary, cases and material*, page 520, para. 46). In this respect, no evidence was provided by Genoa that Sion acted in bad faith or engaged in any abusive procedural behaviour. On the contrary, Genoa explicitly accepted that it classified Sion's behaviour as negligent, not deliberate. The Panel found that Sion did not act with the diligence required, as it should have discovered Genoa's claim by checking FIFA TMS not only regularly but also thoroughly, and by failing to do so violated Article 2 para .1 of Annexe 6 to the FIFA RSTP. Pursuant to Article 2 para. 2 of Annexe 6 to the FIFA RSTP, such omission could lead to *"any procedural disadvantages"* in the FIFA proceedings and even to sanctions pursuant to Article 9 para. 4 FIFA RSTP, but not necessarily to the exclusion of evidence in appeals proceedings at CAS pursuant to Article R57 para. 3 of the CAS Code. Negligence is not the same as bad faith.

The Panel found that – by admitting Sion's legal arguments and this new evidence to the file – it did not go beyond the claims submitted to it within the meaning of Article 190(2)(c) of Switzerland's Private International Law Act or beyond the scope of the previous litigation as argued by Genoa. As such, the Panel saw no reason not to admit the legal arguments and the newly submitted evidence to the case file.

2. Principle of entitlement to training compensation of clubs having registered one player on a loan basis

The relevant provisions regarding training compensation are set out in article 20 FIFA RSTP and articles 1, 2 and 3 of Annex 4 to the FIFA RSTP.

It is common ground between the parties that the Player was on loan to Genoa during the 2013/2014 sporting season, which is the season of his 21st birthday, and that the subsequent transfer of the Player from Krasnodar to Sion occurred in the sporting season of his 22nd birthday. As such, in the Panel's view the entire period of time the Player was registered with Genoa should be taken into account in accordance with Article 2 para. 1 of the FIFA RSTP.

The Panel next addressed Article 3 para. 1 of Annex 4 to the FIFA RSTP which provides that for any subsequent transfer, training compensation will only be owed to the "former" club of the Player for the time he has effectively been trained by that club. In this respect, the Panel fully concurred with the following reasoning set out by another CAS panel in CAS 2015/A/4335:

"Article 3 para. 1 of Annexe 4 to the RSTP states that for any subsequent transfer training compensation will only be owed to the "former club" of the Player for the time that he has effectively been

trained by that club. The key term here is "effectively". This term was introduced because the framers of the FIFA RSTP wanted to compensate training clubs for services rendered, and thus, provide them with the incentive to continue training players. It follows that clubs cannot and should not be compensated for training that has taken place elsewhere. It is thus, evident that this provision exclusively refers to the segment of time (a) during which the Player was contractually bound to the "former club", and (b) which is immediately preceding the segment of time for which he is registered with the new club (See CAS 2007/A/1320 – 1321; para. 46 et seq.)".

"It is now well established that the loan of a player to another club does not interrupt the continuing training period of the player. Assume for example that, as per the terminology adopted above, Club 1 loans out a player to Club 2. It then sells the player to Club 3. In this case, Club 1 should be compensated only for the time that it provided training to the player itself, and not for the time that the player was being effectively trained by Club 2. For that time, that is time of training with Club 2, it is Club 2 that has the right to be compensated in terms of being paid a training compensation by Club 3. As a consequence, the club, which transferred the player on a loan basis to another club, is entitled to training compensation for the period of time during which it effectively trained the player, however excluding the period of time of the loans to the other club (CAS 2014/A/3710 and reference; CAS 2013/A/3119).

In CAS 2013/A/3119, the CAS Panel found that this conclusion (…) "is consistent with the actual rationale of the training compensation system, which is to encourage the recruitment and training of young players. To hold that the loan of a player would interrupt the training period, could, in the opinion of the Panel, deter training clubs from loaning players. (…) [I]f the making of such loan would entail the consequence that the training club would thereby waive its entitlement to training compensation, the training club might decide not to loan the player to another club merely in order to secure its entitlement to training compensation. In such situation, the player would be deprived from the very training considered to be the most suitable for him. The Panel would regard such a situation as undesirable, and endorses the view of the FIFA DRC insofar it argued that any other interpretation of the FIFA Regulations would potentially deprive young players of the opportunity to gain practical experience in official matches for another club in order to develop his footballing skills in a positive way" (CAS 2015/A/4335, para. 55-58 of the abstract published on the CAS website – emphasis added by the Panel).

The Panel found that the two above-mentioned precedents exhaustively dealt with the issue at hand in an entirely convincing way, and therefore did not deem it necessary to do other than adopt their reasoning thereto. Consequently, the Panel found that Genoa was – in principle – entitled to receive training compensation from Sion in respect of the Player.

3. Analysis of the question of the completion of one player's training period

According to Article 1 para. 1 of Annex 4 to the FIFA RSTP, *"*[a] *player's training and education takes place between the ages of 12 and 23. Training compensation shall be payable, as a general rule, up to the age of 23 for training incurred up to the age of 21, unless it is evident that a player has already terminated his training period before the age of 21. In the latter case, training compensation shall be payable until the end of the season in which the player reaches the age of 23, but the calculation of the amount payable shall be based on the years between the age of 12 and the age when it is established that the player actually completed his training".*

The Panel found that the burden of proof to demonstrate that the training of the Player actually ended before the Player's 21st birthday lied with Sion. The Panel found

FIFA circular letter no. 801 to be persuasive for this purpose. This circular letter provides, *inter alia*, as follows: *"The Committee was asked to determine what triggers the end of a player's training and/or education. It maintained that it is a question of proof, which is at the burden of the club that is claiming this fact. A player who regularly performs for the club's "A" team could be considered as having accomplished his training period. This may certainly signal that the formation of a player has been completed but there may be other indications hereto. The decision on this will have to be taken on a case-by-case basis. This principle will also apply to apprentice professionals or players under a scholarship agreement".*

According to certain CAS jurisprudence a player that regularly plays in the "A" team of a club is to be deemed as having completed his training (CAS 2003/O/527, CAS 2006/A/1029). However, according to other CAS jurisprudence, even though regular performance for a club's "A" team can signify the end of a player's training, this does not necessarily constitute the only and decisive factor for the completion of a player's training. As a matter of fact, a player of a moderate football team could be required to play on a regular basis although his training is not finished, judged by the standards of a better ranked team. Similar differences can exist between one national championship and another, as regards the importance of the regularity of a player's match appearances.

There are in this context further factors that are generally taken into consideration such as the player's value at a club, reflected in the salary a player is paid, in the loan fee that is achieved for his services or in the value of the player's transfer, the player's public notoriety at national and international level, his position at the club if established as a regular or even holding the captaincy, the level of games, his regular inclusion in the national team and so forth (CAS 2006/A/1029, p. 20 *et seq.*; CAS 2008/A/1705, para. 9.4). The Panel subscribed to this more nuanced view, which is also endorsed by another CAS panel in CAS 2014/A/3486: *"The mere fact that a player regularly plays in the "A" team of his club is not decisive, since following such an approach would be inconsistent with the case-by-case analysis contemplated in FIFA circular letter no. 801. In this respect, the number of games played in the "A" team of a club is only one factor (albeit an important one) to be taken into account when assessing whether a player has completed his training period. The Panel finds that, in any event, the level of the relevant league is one of the factors that should also be taken into account, since it is much harder for a player to reach the "A" team of a club in a top league in comparison to reaching the "A" team of a club in a less developed league".*

The Panel noted that Sion did not dispute that the Player was on loan with Genoa as from 6 August 2013 until 22 July 2014, but referred to the Player's written statement dated 20 April 2017, in which he stated that Genoa *"has never trained me and that I have been directly included into the first team. There, I have played the majority of the games",* suggesting that the Player was never effectively trained by Genoa.

Insofar Sion suggested that a player is by definition not being trained if he formed part of the first team, the Panel should reject such reasoning. The mere fact that a player is part of the first team – either as a substitute or as a regular starter – does not *per se* entail that he is no longer being trained for the purposes of training compensation.

Since the Player confirmed that he played the majority of the matches during that season, which implies that he was not injured during that season, and that it is to be presumed that he joined the usual

training sessions during that season in the absence of any evidence to the contrary, the Panel found that the Player was being trained by Genoa. The Panel noted additionally that during the 2013/2014 sporting season at Genoa, the Player only played 6 full matches out of 39 matches in the "*Serie A*" and the "*Coppa Italia*", and Genoa did not use the option for his definitive transfer.

The Panel was aware of the opinion of the CAS Panels in CAS 2006/A/1029 and CAS 2011/A/2682 to the effect that there is a difference between the "training" and the "development" of a player. In this regard, the panel in CAS 2006/A/1029 stated that *"*[t]*he training period is ruled and limited by FIFA with specific regulations and Circular Letters while the development of a player is not. The aim and the spirit of FIFA Regulations is to regulate the training and not the development of the Player. Therefore what needs to be established is the point of termination of the training period and not the extent of the subsequent development of Y. as a professional football player".* Although the Panel was prepared to accept that a distinction could be made between the "training" of a player in the sense of the FIFA RSTP and the "development" of a player in the sense that a football player does not stop learning and might still improve as a football player after the end of his training period, the Panel found that the Player had not completed his training period while playing for Genoa. Therefore any distinction between the training and development of the Player was not relevant to the present appeal.

As a result, the Panel concluded that Sion has not demonstrated that the Player had completed his training period during the 2013/2014 season while playing for Genoa on loan, or *a fortiori* before.

Noting that Sion did not dispute the calculation of the training compensation as such and the amount of training compensation to be paid as stipulated by the FIFA DRC Single Judge, the Panel found that Genoa was entitled to receive training compensation from Sion for the training of the Player in a total amount of EUR 55,000 plus interest, at a rate of 5% *per annum* on said amount as of 3 October 2014 until the date of effective payment.

Decision

The appeal filed on 10 April 2017 by Olympique des Alpes SA against the decision issued on 7 February 2017 by the Single Judge of the Sub-Committee of the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is dismissed. The decision issued on 7 February 2017 by the Single Judge of the Sub-Committee of the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is confirmed.

CAS 2017/A/5114
Elizabeth Juliano, Owner of Horizon; Maryanna Haymon, Owner of Don Principe; Adrienne Lyle and Kaitlin Blythe v. Fédération Equestre Internationale (FEI)
19 March 2018

Equestrian; Doping (horse) (Ractopamine); Admissibility of new evidence; Validity of the mandatory provisional suspension of the horse by reason of the Adverse Analytical Finding (AAF); Validity and proportionality of the duration of the provisional suspension; Absence of condition to lift the provisional suspension

Panel
The Hon. Michael Beloff QC (United Kingdom), President
Prof. Massimo Coccia (Italy)
Prof. Cameron Myler (USA)

Facts

Elizabeth B. Juliano, Owner of Horizon; Maryanna Haymon, Owner of Don Principe; Adrienne Lyle, Rider and Person Responsible for Horizon and Kaitlin Blythe, Rider and Person Responsible for Don Principe (all together the "Appellants") filed an appeal with the Court of Arbitration for Sport ("CAS") from the Preliminary Decision of the Fédération Equestre Internationale ("FEI or Respondent") Tribunal of 2 May 2017 (the "Appealed Decision") maintaining the Provisional Suspension of Horizon and Don Principe (the "Horses").

The FEI is the world governing body for equestrian sports. It is a Swiss private association whose headquarters are in Lausanne.

Until the incidents which gave rise to the Provisional Suspension neither the Owner nor Rider has ever been charged with violating the FEI's Equine Anti-Doping Rules (the "EAD Rules") or any other rule of the equestrian sport, nor have either of the Horses ever been involved in any such violation.

From 8 February to 12 February 2017, the Horses participated in the Adequan Global Dressage Festival, an FEI-sanctioned event held in the United States of America.

On 10 February 2017, Horizon provided blood plasma and urine samples as part of routine drug-testing procedures.

On 12 February 2017, Don Principe also provided blood plasma and urine samples as part of routine drug-testing procedures.

On 7 March 2017, the laboratory analysis report of the Horses' urine samples revealed the presence of Ractopamine, a substance that is banned by the FEI, in both Horses, so constituting an Adverse Analytical Finding (the "AAF").

On 5 April 2017, the FEI provisionally suspended the Riders indefinitely and provisionally suspended the Horses for a two-month period until 4 June 2017.

Both the Horses' daily dietary regimen had for several months included a horse supplement "Soothing Pink", produced by Cargill, a major manufacturer of horse feed and supplements. The label for Soothing Pink, which listed its ingredients, contained no reference to Ractopamine.

Upon learning of the positive test results, the Owners contacted Cargill to inquire whether the presence of Ractopamine could have arisen

from the Horses ingesting contaminated feed or supplements manufactured by that firm.

On 26 April 2017, Cargill issued a report (the "Cargill Report") that concluded on the basis of its investigation that the "Soothing Pink" product consumed by the Horses was the source of the Ractopamine.

On 27 April 2017, blood and urine samples were taken from the Horses to determine whether their systems still contained any quantity of Ractopamine.

On 28 April 2017, laboratory tests of those samples indicated that no trace of Ractopamine was then present in either Horse's system.

On 26 April 2017, upon receiving the Cargill Report, the Appellants requested a Preliminary Hearing with the FEI in accordance with Article 7.4.3 of the EAD Rules, asking that the Provisional Suspensions of the Persons Responsible and of the Horses be lifted immediately.

On 27 April 2017, the FEI advised the Appellants, that the Provisional Suspensions of the Persons Responsible only would be lifted-not those of the Horses.

Accordingly, promptly after the Preliminary Hearing – but before the issuance of the FEI's written Preliminary Decision – Mr. Silver, counsel for the Appellant emailed the FEI Tribunal requesting a hearing on the matter of the Horses' Provisional Suspensions.

On 28 April 2017, the FEI Tribunal issued its first written Preliminary Decision regarding the Provisional Suspensions of the Horses and the Persons Responsible. It decided to lift the Persons' Responsible Provisional Suspensions. The FEI Tribunal concluded, however, that no reasons existed for lifting the Horses' Provisional Suspensions because *"Provisional Suspensions of horses are imposed for welfare reasons and to guarantee a level playing field"* and *"[no evidence had been adduced"* to show that those purposes *"would not be affected by a lifting of the Provisional Suspensions of the Horses"*. It noted that in cases in which a horse has been provisionally suspended for an alleged Article 2.1 violation, *"it is the FEI's established policy for, inter alia, the reason set out above that, a Provisional Suspension of two (2) months is imposed,"* regardless of how the banned substances entered the horse's system or whether the person responsible bore any fault for the banned-substance violation. As a result, the FEI Tribunal maintained the Horses' Provisional Suspensions.

On 1 May 2017, a second Preliminary Hearing was held.

On 2 May 2017, the FEI Tribunal issued a second Preliminary Decision, confirming its refusal to lift the Horses' Provisional Suspensions on the ground.

On 2 May 2017, the Appellants filed with CAS an application for provisional measures under Article R37 of the Code of Sports-related Arbitration (the "Code"), requesting CAS immediately to lift the Horses' Provisional Suspensions pending the final resolution of this appeal.

On 8 May 2017, the President of the CAS Appeals Arbitration Division granted the Appellants' application for provisional measures and lifted the Horses' Provisional Suspensions (the "CAS Stay").

The Appellants' main submissions may be summarized as follows:

- There was a range of factors which, certainly if evaluated collectively, amounted to "exceptional circumstances" within the meaning of Article.7.4.4(iii) of the EAD

Rules, so justifying the lifting of the provisional suspension thereunder.

- In any event, there was no evidence of any fault or negligence in the Appellants so justifying a lifting of the provisional suspension under Article 7.4.4(ii) of the EAD Rules.
- The Two-Month Policy relied on by the FEI was not properly authorized and was not contained in and was indeed inconsistent with the EAD Rules.

The Respondent's main submissions may be summarized as follows:

- The power of the FEI to impose Provisional Suspensions on the Horses derives directly from the EAD Rules.
- The imposition of a Provisional Suspension on the Horses can be both challenged and lifted, provided the requirements set out in Article 7.4.4(i) or 7.4.4(iii) of the EAD Rules are satisfied.
- The Appellants did not meet the relevant requirements at the Preliminary Hearings phase to warrant lifting of the provisional suspensions of the Horses and had still failed to meet these requirements in the current proceedings before the CAS.
- Imposing Provisional Suspensions on horses in Banned Substance cases is legal, justified and proportional and is fundamental to protect the welfare of the horse and to ensure a level playing field.

Reasons

The EAD Rules, effective from 1 January 2016, provide so far as material as follows:

7.4 Provisional Suspensions

7.4.1 The FEI shall provisionally suspend a Person Responsible, member of the Support Personnel, and/or the Person Responsible's Horse prior to the opportunity for a full hearing based on: (a) an admission that an EAD Rule violation has taken place (for the avoidance of doubt, an admission by any Person can only be used to provisionally suspend that Person); or (b) all of the following elements: (i) an Adverse Analytical Finding for a Banned Substance that is not a Specified Substance from the A Sample or A and B Samples; (ii) the review described in Article 7.1.2 above; and (iii) the Notification described in Article 7.1.4 above.

7.4.4 The Provisional Suspension shall be maintained unless the Person requesting the lifting of the Provisional Suspension establishes to the comfortable satisfaction of the FEI Tribunal that:

(i) the allegation that an EAD Rule violation has been committed has no reasonable prospect of being upheld, e.g., because of a material defect in the evidence on which the allegation is based; or

(ii) the Person can demonstrate that the evidence will show that he bears No Fault or No Negligence for the EAD Rule violation that is alleged to have been committed, so that any period of Ineligibility that might otherwise be imposed for such offence is likely to be completely eliminated by application of Article 10.4 below or that 10.5 applies and the Person can demonstrate that the evidence will show that he bears No Significant Fault or Negligence and that he has already been provisionally suspended for a period of time that warrants the lifting of the Provisional Suspension pending a final Decision of the FEI Tribunal; or

(iii) exceptional circumstances exist that make it clearly unfair, taking into account all of the circumstances of the case, to impose a Provisional Suspension prior to the final hearing of the FEI Tribunal. This ground is to be construed narrowly, and applied only in truly exceptional circumstances. For example, the fact that the Provisional Suspension would prevent the Person or Horse competing in a particular Competition or Event shall not qualify as exceptional circumstances for these purposes.

1. To start with, the Panel first held that since it is conducting a *de novo* hearing pursuant to Article R57 of the Code, it will decide the appeal on the evidence before it, whether or

not the same evidence was available either to the FEI Tribunal or at the date of the CAS Stay, subject only to its rejection of any fresh evidence under the discretion vested in it under paragraph 3 of the same Article. It declined to reject the FEI's fresh evidence, which was important to an understanding of the Two-Month Policy and its application to the Appellants' cases and whose previous omission could not be ascribed to any lack of good faith or tactical manoeuvre on the Respondent's part (being the test consistently applied by CAS panels to exclude evidence under the third paragraph of Article R57 of the Code). Moreover, the Appellants have been given and taken full opportunity to respond to it. For the same reason, the Panel was not required to comment on the force of the allegations made by the Appellants of the deficiencies of the Respondent's previous evidence (or, indeed, of any development of their defence to the Appellants' challenge). As is ordinarily, if not universally, the position on an appeal to the CAS, the parties and the Panel started with a clean slate.

Turning to the substance of the appeal, the Panel considered appropriate to discuss the interpretation of the relevant parts of the EAD Rules before proceeding to consideration of whether and, if so, how the Two-Month Policy could be accommodated within them, and concurrently, how both rules and policy should be applied to the facts of this case (as found by the Panel).

2. The Panel considered that under Article 7.4.1 of the 2016 Equine Anti-Doping Rules (the "EAD Rules"), the imposition of a mandatory provisional suspension on the horses by reason of the Adverse Analytical Finding (AAF) was not only enabled but mandated for a banned substance that was not a Specified Substance from the A Sample or A and B Samples.

3. The Panel further found that an indication of the length of any such provisional suspension was not prescribed under Article 7.4.1 EAD Rules or any other Article of the EAD Rules. Accordingly, as a matter of principle, the FEI had the discretion to choose any length as long as it pursued a legitimate aim and the duration of the suspension was proportionate. The Panel accepted the Respondent's argument that an off the peg (one size fits all) rather than a bespoke solution was required because of the range of equine sports, the variety of substances prohibited in them, the permutations of their administration and the differences in their potential impact. The means to promote the legitimate aims described – a minimum blanket two-month suspension – were in its view proportionate. All anti-doping regulations seek to ensure a level playing field, that is to say (materially) one on which a participant (human or horse) gains no unfair advantage from prohibited substances, as well as to protect their health. Horses, unlike humans, cannot themselves take care to avoid the ingestion of prohibited substances. The welfare and health argument had a proper and particular resonance in their case. In this regard, the means to promote the legitimate aims described, namely a minimum blanket two-month suspension were proportionate, even if in consequence there were cases where it could be shown that in the particular circumstances any residual effect of the substances, whose initial presence in the horse's system was of course a *sine qua non* of such suspension, had disappeared at some time before the end of that period. Furthermore the Panel noted that, (i) the period was notably short; (ii) the evidence was compelling that the "Two-Month Policy", devised by experts carefully and

continually (since many years) and considered by the governing organs of the FEI, had a consensus of approval in the equine sports community since several years; (iii) it was in the nature of Provisional Suspensions that persons (or in this case animals) were temporarily, but irreversibly, rendered unable to compete in circumstances where it might subsequently be shown (usually after a full hearing) that the substantive case against them had and has no merit; (iv) Provisional Suspensions are not decisive of guilt – they have a necessarily preliminary character; and (v) the Two-Month Policy was not impregnable. Therefore, the Two-Month Policy should be considered proportionate.

4. What is more, the Panel stressed that the Two-Month Policy was not itself absolute. Article 7.4.4 of the EAD Rules allows for any provisional suspensions to be lifted in three distinct situations of whose existence the FEI Tribunal is *"comfortably satisfied"*.

   The first possibility provided for in Article 7.4.4(i) is that the allegation of an EAD Rules violation *"has no reasonable prospect of being upheld"*. This ground was unavailable to the Appellants since the positive test results had not been challenged.

   The second possibility provided for in Article 7.4.4(ii) is that the evidence is likely to show an absence of fault or negligence so that any period of ineligibility is likely to be completely eliminated under Article 10.4. The Panel did not accept that this provision, while literally applicable to horses as well as to persons responsible, could sensibly bear that meaning. The behaviour of horses cannot engage consideration of whether there has been or is on their part fault or not. By contrast, Persons Responsible can be with or without fault, depending on the circumstances. However, the crucial point is that the absence of fault on their part cannot itself always mean that the welfare of the horse would not be compromised by allowing it to return to competition before the expiry of the minimum two-month period. The Panel considered that the intention of the FEI was that Article 7.4.4(ii) provided a basis for lifting of a suspension of Persons Responsible, not of horses.

   The third possibility is provided for in Article 7.4.4(iii) *"exceptional circumstances"*. This ground is to be construed narrowly, and applied only in truly exceptional circumstances. In this respect, the fact that the horses might have been able to participate in an important championship is, consonantly with the World Anti-Doping Code, specifically ruled out as a situation which triggers this exception. Likewise, the concept of exceptional circumstances cannot be extended as a ground for lifting a provisional suspension in the case of a horse whose AAF is not itself challenged and where there would be no adverse effect on the horses' welfare or unfair competitive advantage if it were allowed to compete within the two-month period. Such position is at odds with the policy itself whose uniformity of application is a key feature.

Decision

The appeal should therefore be dismissed both for the general and the particular reasons set out above.

CAS 2017/A/5205
FC Koper v. Football Association of Slovenia (NZS)
6 March 2018

Football; Denial of club license to participate in the domestic professional football competitions; Scope of the appeal and standing to be sued; Admissibility of new evidence; Discretion of the licensing authority

Panel
Ms Svenja Geissmar (United Kingdom), President
Mr Rui Botica Santos (Portugal)
Mr Dominik Kocholl (Austria)

Facts

On 1 February 2017, following a proposal submitted by FC Koper (the "Appellant" or the "Club") on 3 November 2016, the District Court in Koper, Slovenia, issued a decision to initiate the proceedings of compulsory settlement against the Club. Also on 1 February 2017, the District Court in Koper published a notice to all the creditors to declare their claims to the Club.

The Football Association of Slovenia (the "Respondent" or the "NZS") is the national governing body of football in Slovenia. The NZS has a dual licensing system in place and is therefore responsible for the issuance of licenses to Slovenian clubs that are to participate in the domestic professional football competitions and to Slovenian clubs that are to enter into UEFA competitions.

On 31 March 2017, the Club, in accordance with the NZS' Club Licensing Regulations (the "NZS CLR"), filed an application for a license to participate in UEFA competitions as well as in the Slovenian first division (the "1.SNL") for the competitive season of 2017/2018. According to the Club, and as part of this application, it filed an independent audit report dated 31 March 2017.

According to the Club, on 21 April 2017, the Club concluded a contract with the Municipality of Koper, pursuant to which funds in an amount of EUR 350,000 were allocated to the Club.

On 27 and 28 April 2017, the two biggest creditors of the Club were said to have deferred the Club's payment obligations (of EUR 2,120,000 and EUR 936,380.47 respectively) until 31 May 2018 and, according to the Club, statements confirming these commitments were delivered to the NZS.

On 3 May 2017, the NZS Committee for Club Licensing (the "NZS CCL") denied (the "First Instance Decision") the granting of a license to participate in UEFA competitions as well as in the Slovenian first division for the competitive season of 2017/2018.

On 15 May 2017, the Club challenged the First Instance Decision before the NZS Appellate Licensing Committee (the "NZS ALC").

On 23 May 2017, the Club concluded a contract with a company, pursuant to which the company purchased the Club's claim in an amount of EUR 500,000 against a debtor originating from a sponsorship contract.

On 29 May 2017, the Club's creditors were submitted by the Club to have voted in favour of a compulsory settlement agreement for the Club's debts towards several creditors.

On 29 May 2017, the Club filed with the NZS ALC both the contract concluded with the company on 23 May 2017 and a statement of the administrator confirming that *"we can*

reasonably conclude that the legally required majority of creditors voted IN FAVOUR of the compulsory settlement".

On 1 June 2017, the NZS ALC rejected the appeal of the Club (the "Appealed Decision").

According to the Club, on 1 and 2 June 2017, the Club submitted the documents confirming the deferral of debts by the Club's two main creditors again.

On 5 June 2017, given the rejection of the license by the NZS ALC and due to the fact that allegedly several crucial documents were not taken into account at the moment of rendering the decision, the Club filed before the NZS a *"Proposal for Revision against the decision of the NZS Committee for Club Licensing"*.

On 19 June 2017, the NZS CCL rejected the aforesaid request.

On 20 June 2017, the NZS Executive Board adopted a resolution, following the proposal communicated by the NZS Secretary General on 19 June 2017 and pursuant to Article 27 of the NZS Articles of Association, determining the 10 participants for the 1.SNL in the 2017/2018 sporting season.

On 23 June 2017, the Club filed a Statement of Appeal with CAS in accordance with Article R48 of the Code of Sports-related Arbitration (2017 edition) (the "CAS Code").

On 3 July 2017, the Club filed an urgent Request for Provisional Measures, requesting the President of the CAS Appeals Arbitration Division to *"admit the present request for provisional and conservatory measures and grants the stay of the execution of the decision notified to the Club on 2 June 2017 by the NZS Appellate Licensing Committee"*.

On 14 July 2017, the President of the Appeals Arbitration Division dismissed the request for a stay filed by FC Koper.

On 11 October 2017, a hearing was held in Lausanne, Switzerland. During the hearing the Club presented two new documents that it requested to be admitted into to the case file. The first document is a decision issued by the district court of Koper on 28 August 2017, pronouncing the compulsory settlement of the Club. The second document is a decision issued by the Slovenian Supreme Court, ruling that the appeal filed by the Republic of Slovenia (one of the Club's creditors) against the approval of the compulsory settlement pronounced on 28 August 2017 was partially granted. The NZS did not explicitly object to the admissibility of these documents, but argued that such documents could not lead to any hindsight bias, as the Panel needs to assess the case based on the evidence available before the NZS committees at the relevant time. The Panel decided to admit the two documents and their translations into English to the case file.

Reasons

1. The Club's primary request for relief was solely aimed at obtaining a license for participation in the 1.SNL, but did not comprise a request to be reinstated in such competition if it were to be granted a license.

   The Panel found that if a club's primary request for relief is solely aimed at obtaining a license for participation in the first domestic professional football league, but doesn't comprise a request to be reinstated in such competition, the scope of the appeal is limited to whether or not the authority granting the license should have issued it to the club. According to the Panel, if the Club would have desired to be reinstated in the

1.SNL it should also have challenged the decision of the NZS Executive Board whereby the participants of the 2017/2018 sporting season of the 1.SNL were determined. Regarding the granting of the license however, the absence of the club that could potentially be replaced in the competition by the club requesting the license did not prevent the CAS from potentially ruling that the club should be granted a license, for the issuance of such license was a matter between the club requesting it and the authority granting it, i.e. the NZS.

2. Before examining whether the Club complied with the criteria to be granted a license to participate in the 2017/2018 sporting season of the 1.SNL, the first task of the Panel was to assess which documents were (i) at the disposal of the NZS CCL and the NZS ALC when these committees rendered their decisions and (ii) filed before the end of the deadline of each of those procedural stages, and (iii) which documents were presented only in the present proceedings before CAS. For the Panel, this first step was of crucial importance, because the licensing procedure is conducted under a specific timetable and important deadlines for the clubs, *i.e.* the decision on whether or not a license is to be issued should normally be taken before the commencement of the competition concerned and the ultimate deadlines which are required to be the same for all the clubs.

   The Panel recalled that pursuant to Article R57 of the CAS Code, new evidence could in principle be submitted for the first time in the proceedings before CAS. However, pursuant to Article R57.3 of the CAS Code, CAS Panels also have the *"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"*. The Panel nevertheless found that it was not even necessary to determine whether any newly presented evidence by the Club in the present proceedings before CAS was to be excluded on the basis of Article R57.3 of the CAS Code, as previous CAS jurisprudence had already determined that, regarding exclusion of evidence, the scope of review provided in specifically applicable regulations was to be considered as *lex specialis* which superseded the general procedural provision of Article 57 para. 3 of the CAS Code.

   Applying these findings to the instant case, the Panel held that the NZS CLR – which was thus to be considered as a *lex specialis* of the CAS Code – was sufficiently clear in stating that no new evidence could be presented if it had not been presented in the proceedings before the NZS ALC by 15 May 2017. In the opinion of the Panel, such prohibition to file new evidence served a legitimate purpose in the context of a licensing system, because allowing a party to file new evidence for the first time before CAS would have undermined the authority of the domestic licensing bodies and created unequal treatment of the clubs, while at the same time putting the desired certainty of knowing which clubs will participate in the relevant domestic competitions some time before the start of such competition at risk.

3. According to the applicable provision of the NZS CLR, the judgment to be made by the NZS CCL and the NZS ALC was whether it could be established that the Club may or may not have been able to continue as a going concern until the end of the 2017/2018 sporting season. The Panel held that the word "may" used in the provision provided considerable leeway to the NZS CCL and the NZS ALC in deciding whether or not to issue the license. No absolute

certainty was required that the Club would be able to continue as a going concern until the end of the season in order to be granted a license, but any reasonable doubts in this respect should be taken away.

Based on the documents available to them at the time of their decisions, both the NZS CCL and the NZS ALC had decided to deny a license to the Club because they had serious doubts as to whether the Club would be able to continue as a going concern until at least the end of the 2017/2018 sporting season. The Panel recalled that if considerable leeway is granted by the applicable regulations to the licensing authority in deciding whether or not to issue a license, the task of a CAS panel is limited to reviewing whether or not such authority made correct use of its discretion and could reasonably come to the conclusion that it reached. *In casu*, the decision to refuse the license was justified based on those documents and the fact that the other documentary evidence that could potentially have increased the likelihood of the Club being able to compete in the 2017/2018 sporting season was not made available before the relevant deadlines was the fault of the Club only.

Decision

As a result, the Panel concluded that the NZS did not lack standing to be sued alone, that the newly presented evidence could not have been taken into account in assessing whether the Club should be granted a license to partake in the 2017/2018 sporting season of the 1.SNL and that the NZS ALC had legitimately refused to issue a license to the Club to partake in the 2017/2018 sporting season of the 1.SNL.

CAS 2017/A/5272
KF Skënderbeu v. Albanian Football Association (AFA)
13 April 2018

Football; Validity of the establishment of a new practice by a federation in respect of match-fixing; De novo hearing; Legal framework of a new practice with respect to match-fixing; Scope of discretion for a federation's decision-making bodies to act as a legislator in disciplinary matters; Absence of validity of the establishment of a new practice with respect to match-fixing lacking legal certainty

Panel
Prof. Ulrich Haas (Germany), President
Mr Frans de Weger (The Netherlands)
Mr André Brantjes (The Netherlands)

Facts

KF Skënderbeu (the "Appellant" or the "Club") is a professional football club with its registered headquarters in Korça, Albania. The Club is registered with the Albanian Football Association.

The Albanian Football Association (the "Respondent" or "AFA") is the national governing body of football in Albania. AFA is affiliated to the *Union Européenne de Football Association* ("UEFA") and the *Fédération Internationale de Football Association* ("FIFA").

Since 2010, the UEFA Betting Fraud Detection System (the "BFDS") has identified more than 50 matches involving the Club where the results were allegedly manipulated for betting purposes.

On 1 June 2016, UEFA's Appeals Body rendered a decision against the Club, with, *inter alia*, the following operative part:

"The [Club] *is not eligible to play the UEFA Champions League 2016/2017".*

On 26 July 2016, following an appeal lodged against this decision by the Club, the Court of Arbitration for Sport ("CAS") issued an arbitral award (CAS 2016/A/4650), with, *inter alia*, the following operative part:

"1. The appeal filed by [the Club] *on 14 June 2016 against the decision issued on 1 June 2016 by the Appeals Body of* [UEFA] *is dismissed.*

2. The decision issued on 1 June 2016 by the Appeals Body of [UEFA] is confirmed. […]"

On 23 June 2017, the AFA Ethics Committee, issued a decision (the "Appealed Decision"), with the following operative part:

"Pursuant to Article 17, 18 and further of the Code of Ethics and Articles 16, 68/2, 134 and further of the Code of Sport Discipline

DECIDED:

1. *To plead guilty* [the Club] *for conspiring to influence match results contrary to sports ethics for the 2015/2016 season;*
2. *To remove the "Champion" title to* [the Club] *for the 2015/2016 season;*
3. *To sanction* [the Club] *with a fine of ALL 2,000,000.00 (two million Albanian Lek);*
4. *To sanction* [the Club] *with the reduction of 12 (twelve) points from the classification for the 2016/2017 season;*
5. *This decision may be opposed pursuant to Article 18 of the Code of Ethics".*

The AFA Ethics Committee then presented a summary of the BFDS reports in respect six matches.

On 4 August 2017, the Club filed a Statement of Appeal, pursuant to Article R48 of the CAS Code of Sports-related Arbitration (the "CAS Code") with CAS.

On 14 August 2017, the Club filed its Appeal Brief, pursuant to Article R51 of the CAS Code.

On 7 September 2017, AFA filed its Answer, pursuant to Article R55 of the CAS Code, requesting CAS to decide as follows:

"[…] [T]*he decision of the Ethics Committee of the Albanian Football Association should be upheld and the appeal filed by Klubi Sportiv Skënderbeu should be dismissed".*

On 15 January 2018, the CAS Court Office, on behalf of the Panel invited AFA to submit the precise text of "the new norm" or "new practice" that had been formulated by the AFA Ethics Committee in order to combat match-fixing and that was applied to the Club, and to clarify whether this new rule/practice was communicated to the clubs.

Reasons

1. De novo hearing

   The Club maintained that several procedural violations took place in the proceedings before the AFA Ethics Committee and that the Appealed Decision was rendered in complete violation of the Club's right for a fair trial and the right to defend itself.

   AFA maintained that it is consistent CAS jurisprudence that such procedural flaws, if any, could be cured in the proceedings before CAS due to its *de novo* power of review.

   The Panel observed that the *de novo* power of CAS panels and the curing effect thereof has been interpreted consistently in CAS jurisprudence:

   "The issue of the powers of the appeal panel has also been considered time and time again by CAS appeal arbitration tribunals when considering allegations of a denial of natural justice in the making of the original decision. An equally well accepted view has been taken that as it is a completely fresh hearing of the dispute between the parties, any allegation of denial of natural justice or any defect or procedural error ("even in violation of the principle of due process") which may have occurred at first instance, whether within the sporting body or by the Ordinary Division CAS panel, will be "cure" by the arbitration proceedings before the appeal panel and the appeal panel is therefore not required to consider any such allegations (see for example CAS 98/211, at para. [8]). […]" (CAS 2008/A/1575, para. 32 of the abstract published on the CAS website).

   The Panel found that, should there had been any procedural flaws in the proceedings before the AFA Ethics Committee in the proceedings leading to the Appealed Decision, such potential flaws were in any event repaired in the present proceedings because the Panel found, and the parties confirmed at the end of the hearing, that their right to be heard had been fully respected in the present appeal arbitration proceedings. In light of the foregoing, the Panel was of the opinion that the Club's submission based on several procedural violations that took place in the proceedings before the AFA Ethics Committee should be dismissed.

2. Legal framework of the new practice enacted by the AFA Ethics Committee

   Article 68 AFA Disciplinary Code (headed: *"Game fixing"*):

"1. Anyone who conspires to influence the result of a game contrary to sports ethics shall be punished by a suspension for a period of 6 (six) months, as well as a fine of ALL 1,500,000 (one million five hundred thousand Albanian Lek) up to ALL 3,000,000 (three million Albanian Lek). As with the confirmation of serious cases or cases of cooperation in an organized manner, offenders shall be punished with the permanent exclusion from the football activities.

2. In the case of confirming the participation of a player or official in influencing the result of the game in accordance with paragraph 1 of this article, a legal entity, association or club where the player or officer concerned pertains shall be punished with a fine of ALL 2,000,000 (two million Albanian Lek). In case of identifying serious cases or cases of cooperation in an organized manner, the legal entity, association or club concerned shall be punished with removal of 12 (twelve) points, exclusion from championship or competition or relegation to a lower category".

Article 134 AFA Disciplinary Code (headed: *"Scope of the Code, deficiencies and precedents"*):

"[…]

2. If there is any deficiency in this code, the legal authorities shall take decision pursuant to the precedents previously created and in lack of precedents, pursuant to the rules that they would formulate for the said issues the same as they would be legislators".

It remained undisputed between the parties, and it was in fact explicitly stated in the Appealed Decision that *"*[i]*n the analysis of all the factors, the Committee failed to prove the direct or indirect involvement of a player or official of* [the Club] *in influencing the result of a game against the sport ethics".*

As such, there was no doubt that Article 68(2) AFA Disciplinary Code was not directly applicable in the matter at hand, since this provision requires a confirmation of *"the participation of a player or official in influencing the result of the game in accordance with paragraph 1 of this article"*. Only if such prerequisite was complied with could a *"legal entity, association or club"* be sanctioned, which was, however, not the case.

In the absence of a legal basis in the AFA regulations to sanction the Club under such circumstances, the AFA Ethics Committee resorted to Article 134 AFA Disciplinary Code.

The Panel noted that a provision such as Article 134 AFA Disciplinary Code was not an unknown concept in domestic laws and regulations and was therefore not invalid *per se*.

Article 1(2) and (3) of the Swiss Civil Code (the "SCC") for example determine as follows:

"2. In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator.

3. In doing so, the court shall follow established doctrine and case law".

Indeed Article 1 SCC establishes a well-known principle in private law. According thereto, it is a given that statutory law is of a fragmentary nature. Article 1 SCC prevents a judge to hide behind this fragmentary nature of statutory law and to refuse to issue a decision where the legislator has (involuntarily omitted) to rule on the matter. Instead, in such circumstances a judge must – in application of a specific methodology – adjudicate the

dispute by developing the law (just like a legislator). Thus, Article 1(2) and (3) SCC only apply to the field of civil or private law and, in addition, where the legislator involuntarily failed to regulate the matter.

Article 134 AFA Disciplinary Code grants the competent authority the discretion to act like a legislator in disciplinary matters. Whether this can be accepted appears questionable. A lot has been written on the legal nature of disciplinary proceedings. This Panel found that the legal nature of such proceedings was distinct in nature. Evidence of this could be found in the jurisprudence of CAS whereby certain (but by far not all) principles of criminal law were applied to disciplinary proceedings by analogy (e.g. *lex mitior*). Likewise, the Panel found that the principles of *nullum crimen, nulla poena sine lege scripta et certa* were also applicable by analogy to disciplinary proceedings. According to this principles, no sanction might be imposed unless there was an express provision describing in sufficient clarity and specificity, not only the misconduct but also the applicable sanction. In order to encourage the stakeholders not to engage in certain unwanted activity by threatening to sanction them, there must be clarity on what constitutes misconduct. Furthermore, equal treatment of all members is only possible if there is legal certainty with respect to the contents of the rule. While acknowledging the applicability of the above criminal principle in general terms, this Panel wished to emphasize that not the same high criminal law standards with respect to legal certainty ("Bestimmtheitsgrundsatz") apply to disciplinary proceedings. In the view of the Panel it suffices that the misconduct covered by the respective rule and the sanction applicable to such misconduct be determinable by interpretation. Thus, there remained a scope of applicability for Article 134 AFA Disciplinary Code. However, in the view of the Panel, the margin to act like a legislator in disciplinary proceeding was rather small.

3. Scope of discretion of the AFA Ethics Committee to act as a legislator in disciplinary matters

In its letter dated 18 January 2018, AFA informed the Panel as follows in respect of its new practice:

"With regard to the "text of the new norm", the position of [AFA] *is that the responsibility of a club involved in match fixing should not be dependent solely on the personal responsibility of a player or club official. Accordingly, the "new norm" is that it is not necessary to find a specific player or official guilty in order to sanction a club if the panel is comfortably satisfied that the club is guilty of match fixing based on the reputable evidence such as those contained in the BFDS Reports.*

Based on the above, the Chairman of the Ethics Committee proposed that amendments with that purpose are made to a revised edition of the disciplinary code which will then be communicated to the clubs in the normal fashion".

The Panel observed that this interpretation was formulated in a negative way, i.e. it stated what was <u>not required</u> for a football club to be convicted for an offence related to match-fixing. Importantly, AFA however did not explain what <u>was required</u> for a football club to be convicted for an offence related to match-fixing.

In any event, insofar the new practice applied by the AFA Ethics Committee entailed that a football club could be sanctioned for the mere reason that suspicions were raised in respect of being indirectly involved in match-fixing, without any concrete substantiation as to why the club acted in a culpable way and without any

evidence that its officials or players were involved in match-fixing, the Panel found that such new practice was not permissible.

Such practice, i.e. sanctions based on suspicion, might be possible in the context of provisional measures, or, as referred to by the CAS panel in CAS 2016/A/4650, as an "administrative" measure or an admissibility requirement for taking part in a competition in order to protect the integrity of such competition, but not for the imposition of a definite disciplinary measure.

4. Absence of validity of the establishment of a new practice with respect to match-fixing lacking legal certainty

In view of the Panel's conclusion that it was not clear what constituted the new practice of the AFA Ethics Committee and the fact that this new practice was not communicated to the Club, the Panel found that the Club could not be sanctioned based on such new practice. There should be legal certainty and the entities/persons subject to the AFA Code of Ethics and the AFA Disciplinary Code should know what the practice was. This was all the more true considering the serious detrimental effects of the sanction in question.

Finally, the Panel wished to make clear that the reason for upholding the Club's appeal was not based on the lack of admissibility or reliability of the BFDS reports as evidence in cases of match-fixing. Even less could this decision be qualified as a departure from the jurisprudence established by previous CAS panels. To the contrary, this Panel found that the BFDS reports, generally speaking, were a valuable tool in the detection and subsequent sanctioning of match-fixing violations. However, just like any other evidence, also BFDS report did not exempt a panel from carefully evaluating the evidence. In this case the Panel did not need to take this step, since AFA lacked already a proper legal basis for imposing a sanction.

Decision

The Panel found that the sanctions imposed on the Club by the AFA Ethics Committee in the Appealed Decision should be set aside. The appeal filed by KF Skënderbeu on 4 August 2017 against the decision issued on 23 June 2017 by the Ethics Committee of the Albanian Football Association was upheld.

CAS 2017/A/5277
FK Sarajevo v. KVC Westerlo
16 April 2018

Football; Waiver of training compensation; Training compensation objective; Waiver of rights; Mandatory prohibition of waiver of rights following from statutory mandatory provisions; Clear and unequivocal language of waiver; Waiver limited to person entitled to the right; Validity of waiver of training compensation not requiring contractual agreement; Proof of waiver of training compensation

Panel
Mr Ivaylo Dermendjiev (Bulgaria), President
Mr Frans de Weger (The Netherlands)
Mr Manfred Nan (The Netherlands)

Facts

Fudbalski Klub Sarajevo (hereinafter the "Appellant") is a professional football club having its seat in Sarajevo, Bosnia and Herzegovina. The Appellant is affiliated to the Football Federation of Bosnia and Herzegovina ("FFBH"). FFBH is affiliated to the Fédération Internationale de Football Association ("FIFA").

KoninklijkeVoetbalClubWesterlo (hereinafter the "Respondent") is a professional football club having its seat in Westerlo, Belgium. The Respondent is affiliated to the Royal Belgian Football Federation ("RBFF"). RBFF is also a member of FIFA.

The present dispute is related to the right of the Appellant to receive training compensation for the player F. (the "Player"). The Player is a national of Bosnia and Herzegovina, born in May 1995 and, according to the Player's player passport, he was registered with the Appellant from 3 April 2010 until 19 January 2015 as a professional player.

The contract between the Appellant and the Player expired on 1 January 2015. Between 12 and 15 January 2015, the Player was on trial with the Respondent.

On 19 January 2015, the Appellant issued a letter to the Player, singed by its General manager, Mr Dino Selimovic. The letter, in its relevant part, reads as follows:

"With the authorization of the President of FK Sarajevo, and in the name of FK Sarajevo, general manager of FK Sarajevo hereby

C O N F I R M S

the following conditions to be valid for the transfer of the player [F.] (Nat: BiH), DOB: [xx].05.1995. to the new football club from FK Sarajevo.

With this document FK Sarajevo confirms that:

- the new club of the player [F.] agrees to pay 10% of the total nett transfer fee, should the player be transferred or loaned from new club to the third (next) club; and

- the new club of the player [F.], should the player return back to FK Sarajevo, will not request any compensation or transfer fee or any other funds from FK Sarajevo;

then FK Sarajevo will not ask for training compensation from the new club. […].

On 31 January 2015, the Player signed a professional employment contract with the Respondent.

On 2 February 2015, the Respondent received a statement from Sport Club Betaclub Sarajevo (the Player was registered with Betaclub Sarajevo as an amateur from 23 August 2006 until 17 November 2009) declaring that it would not claim training compensation for the Player.

On 3 February 2015, the Appellant confirmed

to the Player that the contract between it and the Player expired on 1 January 2015 and that the said parties had no other signed contracts.

On 10 February 2015, the Player was registered with the Respondent and remained registered with it until 1 March 2016 when the employment contract was terminated by mutual consent and the Player joined a Slovakian club, without a transfer fee being paid to the Respondent.

After the termination of the employment contract between the Player and the Respondent, the Appellant sought payment of training compensation from the Respondent in the amount of EUR 279,166.67, which was rejected by the Respondent.

On 20 June 2016, the Appellant wrote to the Player advising him that its letter of 19 January 2015 had no longer any legal effect as from the date of his movement from the Respondent to another club.

On 19 July 2016, the Appellant filed a petition with the FIFA DRC requesting to be awarded with training compensation due by the Respondent for the subsequent professional registration of the Player in the amount of EUR 279,166.67, plus 5% interest per annum as of 19 February 2015.

In its decision of 9 February 2017 (the "DRC Decision"), the grounds of which were notified to the parties on 21 July 2017, the DRC rejected the Appellant's claim on the grounds that the Appellant, by means of the confirmation letter signed by its General Manager, had clearly and unmistakably waived its right to receive training compensation for the Player. Furthermore, the Respondent, before registering the Player, upon request of a confirmation from the previous clubs of the Player that no training compensation would be due, had received the Appellant's confirmation letter, a waiver for training compensation from Betaclub, as well as the confirmation by the Appellant regarding the expiry of its employment contract with the Appellant.

On 9 August 2017, the Appellant submitted a Statement of Appeal against the DRC Decision to the Court of Arbitration for Sport ("CAS").

On 21 August 2017, the Appellant filed its appeal brief in accordance with Article R51 of the CAS Code.

Reasons

1. To start with, and addressing one of the two main decisive questions in the case at hand, *i.e.* whether in general, the Appellant was entitled to receive training compensation under Article 20 Regulations on the Status and Transfer of Players (RSTP), read together with Articles 1 and 2 of Annex 4 of the RSTP, the Panel noted that the relevant rules of the RSTP foresee a system whereby a player's training club shall be compensated by the player's new club for the entire period the training club effectively trained the player between the ages of 12 and 21, subject to the factual question of whether the player's training has in fact been completed earlier. The Panel underlined that the FIFA training compensation system ensures that training clubs are adequately rewarded for the efforts they invest in training their young players, and that they are also sufficiently compensated for the costs incurred in training young players in relation to the savings of the new club. The concept is aimed at maintaining the competitive balance between clubs, allowing them to continue training and developing players in the knowledge that they will be adequately compensated for their efforts. Training compensation therefore plays an important role in the development of young players

and in maintaining the stability and integrity of the sport. Having analyzed the facts, the applicable regulations as well as the parties' positions, the Panel concluded that the Appellant would in principle be entitled to training compensation for the Player after he had left the Appellant in the beginning of 2015, unless it was established that the Appellant had waived its right.

2. Thereupon the Panel turned to the second decisive question, *i.e.* the main argument brought forward by the Respondent against the payment of training compensation, specifically that the Appellant had waived its right to training compensation. In this context the Appellant contends that the confirmation letter of 19 January 2015 was only addressed to the Player as a courtesy to him in order to facilitate a possible transfer of the Player to a club abroad.

   Accordingly, at the outset of its analysis whether the Appellant had validly waived its right to training compensation, the Panel acknowledged that it is common for various sets of laws, including Swiss law, that in general, rights may be waived voluntarily. This is however not the case where (i) the waiver is contrary to law, public policy or good morals and requires that (ii) the person making the waiver has the capacity/authority to do so; (iii) the waiver is made clearly; and (iv) the person has the right he is renouncing.

3. Analysing further the validity of the Appellant's waiver, the Panel observed that the RSTP do not expressly foresee the waiver by a training club of its entitlement to training compensation. Given however that under Swiss law, waivers of rights are valid unless explicitly prohibited by mandatory provisions, and given that a waiver of the right of training compensation is not expressly prohibited either by the RSTP or by Swiss law, the Panel held that it must be assumed that it is permissible under those sets of law. The Panel clarified in this context that it had neither been referred to any allegations or indications whatsoever that the waiver of the right to training compensation contradicts public policy or good morals. Therefore, the Panel found that the waiver of right to training compensation does not violate law or contravene public policy and good morals.

4. The Panel, having next held that the statement of 19 January 2015 had been made by a person that had the authority and capacity to execute and deliver the statement and to assume the obligations hereunder, then addressed the further requirements applicable to waivers. In this context the Panel highlighted that a waiver meant that the party essentially loses any possibility to claim the respective right, and that given this serious legal consequence, the validity of a conventional waiver under Swiss law had to be subject to a clearly and unequivocally phrased declaration by the party concerned, reflecting its intention to renounce its right. Thus, implied waivers could not be recognized. The Panel further developed that, as also affirmed by the jurisprudence of the FIFA Dispute Resolution Chamber and CAS, insofar as training compensation was a right stipulated in the RSTP, the existence of a waiver of this right could only be assumed in case it was unmistakable that the renouncing club had indeed intended to waive its right to training compensation under the applicable regulations. Applying the above principles to the case at hand, and considering the particular wording of the Appellant's statement of 19 January 2015, the Panel – contrary to the Appellant's assertion that the statement was drafted in a very general wording - came to the conclusion that the statement in question was not a blanket

waiver of any rights related to the Player. To the contrary, it constituted an express waiver defining the exact nature and scope of the rights waived by the Appellant. Hence the waiver was explicit (albeit under some conditions), specifically relating to training compensation, and the Appellant's intent was abundantly clear.

5. The Panel further underlined that as a general rule, only the party entitled to a right, *i.e.* only the club entitled to training compensation can waive this right. Therefore, neither the Player nor an agent could be obliged towards a third club waiving the training compensation that pertains to the training club. The Panel, recalling that it had already been established that the Appellant was in principle entitled to training compensation, highlighted that in its view it was also important in the present case that the waiver was articulated by the Appellant itself. In conclusion the Panel declared being satisfied that the Appellant's statement of 19 January 2015 complied with the general requirements for the validity of waivers.

6. In the next step the Panel turned to the specific objections raised by the Appellant against its letter of 19 January 2015 being classified as a waiver of training compensation, specifically the argument that insofar as the document was only signed by the Appellant, but not by the Respondent, it was a mere declaration by the Appellant given to the Player as a courtesy. Put differently, given the Respondent had neither signed the document nor accepted it, no waiver had been agreed between the Parties, with the consequence that the Appellant's letter did not constitute a valid waiver of training compensation.

   The Panel held that there is no requirement *e.g.* that the waiver of training compensation be recorded in a bilateral agreement between the former and the new club or that the latter subsequently confirms the waiver, be it that the latter at least has to implicitly accept the condition precedent set out in the waiver. Accordingly, whereas ideally, a waiver to training compensation should form part of an agreement between the respective clubs, it is not necessary for the waiver to be contractual in order to be valid. Noting in particular that in the case at hand, no transfer agreement had been concluded and no contractual link between the clubs existed, the Panel found that the waiver does not need to be either outlined in a separate agreement or be subsequently confirmed by the new club. Rather, on this basis, a waiver of the right to receive training compensation does not require written consent of the club benefitting from the waiver. Additionally, the Panel underlined that, as is well established in Swiss contract law, a waiver of rights does not need to take a particular form, even if requirements of form must be observed when entering into an agreement or complying with a related provision. The Panel underlined that this is even more so in cases of unilateral waivers that are not made in a contractual context.

7. Lastly, referring again to the rationale of training compensation *i.e.* the general objective to support grassroots football and to improve football talent by rewarding clubs for work in training young players, the Panel underlined that an allegation that a club had waived its right to training compensation must be supported by conclusive evidence. Apart from an agreement between the new and the old club, an existing unilateral written statement from the club entitled to receive training compensation could equally qualify as such compelling evidence.

Decision

The Panel therefore dismissed the appeal by the Appellant and confirmed the decision rendered by the FIFA Dispute Resolution Chamber on 9 February 2017.

CAS 2017/A/5282
WADA v. International Ice Hockey Federation (IIHF) & F.
9 April 2018

Ice hockey; Doping (Dehydrochlormethyltestosterone metabolites); Intent and burden of proof for absence of intent; Reduction of sanction in case of prompt admission of anti-doping rule violation, Article 10.6.3 WADC; Purpose of Article 10.6.3 WADC; No obligation to admit intent; Prompt admission under Article 10.6.3 WADC in Article 2.1 WADC cases; Backdating of starting date of period of ineligibility

Panel
Prof. Luigi Fumagalli (Italy), President
The Hon Michael Beloff QC (United Kingdom)
Prof. Ulrich Haas (Germany)

Facts

The World Anti-Doping Agency (hereinafter "WADA" or the "Appellant") is a Swiss private law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada.

The International Ice Hockey Federation (hereinafter "IIHF" or the "First Respondent") is the governing body of international ice hockey and inline hockey. It has its seat in Zurich, Switzerland.

F. (hereinafter the "Player" or "Second Respondent") is a Slovak ice hockey player born in November 1997. The Player is registered with the Slovak Ice Hockey Federation (the "SIHF"), which in turn is affiliated to the IIHF.

The appeal concerns a decision of the IIHF dated 22 June 2017, imposing on F. what WADA contends to be an inadequate period of ineligibility. The questions posed by this appeal concern the question whether F. committed his anti-doping rule violation intentionally and the possibility to reduce the otherwise applicable period of ineligibility based on prompt admission of the asserted anti-doping rule violation after being confronted with it.

On 2 January 2017, during the IIHF World Junior Championship in Canada, the Player underwent a doping control in Montreal, Canada. In the doping control form, the Player declared having used, in the 72 hours preceding the sample collection, the products "Vit. C - E. Magnesium, Stilnox".

On 22 February 2017, the Player was notified of an adverse analytical finding (the "AAF") for the presence in his A sample of "Dehydrochlormethyltestosterone metabolites", *i.e.* of an Exogenous Anabolic Androgenic Steroid (AAS), a non-specified substance prohibited in- and out-of-competition under class S1.a of the 2017 WADA List of prohibited substances and methods.

On 3 March 2017, the Player waived the right to the B sample analysis, declared to agree that he had ingested "a wrong product" and further explained as follows:

"After the missed NHL draft pick", he *"felt some pressure from the people around me, like I am not good enough, I should better go to school instead of playing hockey, and I wanted to show them that I am good and work on it during the summer. In the summer I was gaining up with Syntha 6 and Sitek Jumbo. Then I got in contact with some "specialists" of bodybuilding, and they told me about a product, which the doctors use for rehabilitation after injuries, Turinabol. I was not thinking much about it, and definitely not about*

consequences; I was not checking the product out, I was just thinking that if that is for rehabilitation after injuries, it must be a legal product. This was my big mistake. I was taking those pills together with the products Syntha 6 and Sitek Jumbo for a while. This was the mistake of my life and it was just stupid. There was never any thinking about doing something illegal or get any advantage, I just did not think at all about what I am doing in that moment.

I hope that I will get another chance after this and I will work hard and be smarter in the future. I know that I am responsible for what I eat and drink myself".

As a result of the AAF, disciplinary proceedings were opened by the IIHF against the Player. On 18 May 2017, upon request by the IIHF Disciplinary Board (the "IIHF DB"), the Player clarified amongst others that the *"specialists"* mentioned in his email of 3 March 2017 *"… were just regular guys going to the gym I attended that Summer. I admired their abilities and shape and asked about some recommendations to reach similar results and to improve my own abilities. They told me Turinabol was a substance used for rehabilitation purposes, prescribed also by medical doctors. Due to my eagerness to reach better results I did not inquire more about the substance. Now I am aware this was the worst decision in my life and I feel really sorry about this".*

On 22 June 2017, the IIHF DB issued a decision (the "Decision") by which it imposed on the Player a period of ineligibility of 1 year and 6 months, starting on 15 March 2017.

In a nutshell, the IIHF DB found that as the Player had sufficiently explained that he did not know that the ingestion of the substance will constitute an anti-doping rule violation or that there was a significant risk that the ingestion of the substance would constitute an anti-doping rule violation, he had not acted intentionally. Whereas the Player, considering amongst others his young age, did not bear Significant Fault or Negligence, the influence of the bodybuilders and the whole milieu at the gym gave reason to assess a minor degree of Fault that justified to reduce the otherwise applicable period of ineligibility of two years to a period of one and a half years. As regards the starting date of the period of ineligibility the IIHF DB noted that the IIHF had not, as it should have, imposed a Provisional Suspension on the Player, which otherwise would have been credited to the sanction imposed by the Panel. Given that this fault could not be blamed on the Player, his period of ineligibility was backdated under Article 10.11.1 WADA Anti-Doping Code ("WADC").

On 29 June 2017, the Decision of the IIFH DB was notified to WADA and transmitted by the IIHF to the SIHF for communication to the Player.

On 9 August 2017, the Appellant submitted a Statement of Appeal against the Decision to the Court of Arbitration for Sport ("CAS"), requesting the Panel to find that the anti-doping rule violation was "intentional" and therefore to impose a sanction of four years of ineligibility on the Player pursuant to Article 7.2.1 of the DC.

On 21 August 2017, the Appellant filed its appeal brief in accordance with Article R51 CAS Code.

Reasons

1. At the outset of its review the Panel clarified that insofar as in the present case, the commission by the Player of the ADRV under Article 2.1 IIHF Doping Control Regulations (the "DCR") itself is undisputed, the main issue to be examined relates to the measure of the sanction to be imposed for such violation. The Panel took note that the suspension of four years foreseen under Article 7.2.1 IIHF

Disciplinary Code (the "DC") for the violation committed by the Athlete can be replaced with a suspension of two years provided the violation was not intentional (Article 7.2.2 DC). Indeed, WADA is challenging the finding of the IIHF DB that the Player had proven that the anti-doping rule violation was not intentional, and requests the Panel to impose a sanction of four years of ineligibility pursuant to Article 7.2.1 DC. The IIHF, for its part requests the Panel to dismiss the appeal and to confirm the Decision.

The Panel developed that under the DC as well as under the equivalent WADC the term *"intentional"* requires *"that the Athlete … engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk"*. Furthermore, under Article 10.2.1.1 WADC, in cases of a positive finding for the presence of a specified substance prohibited in- and out-of-competition, as in the present case, the athlete's intent is presumed and it is the athlete's burden to prove, by a balance of probability, that he or she did not act intentionally, *i.e.* that he or she did not engage in a conduct which he or she knew constituted an anti-doping rule violation, or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. The Panel held that according to his own declarations, the Player, based on advice of some bodybuilders he had met in the gym and whose *"abilities and shape"* he admired, had ingested the product containing the prohibited substance as he wanted to reach similar results and to improve his own abilities. Also based on information provided by the bodybuilders that the product was used for rehabilitation purposes he had thought that it was safe. For a period of several months, without any medical or therapeutic justification and without ever having consulted a doctor or having made any Internet search about the product, the Player had expressly and purposefully engaged in a way to improve his physical attributes and performance. In conclusion, contrary to the finding in the Decision, the Panel found that the Player had failed to establish that he did not engage in a conduct which he knew constituted an anti-doping rule violation, or which he knew that there was a significant risk that his conduct might constitute or result in an anti-doping rule violation, and that he did not manifestly disregard that risk. In conclusion, the Player had not established, by a balance of probability, non-intentional use of a prohibited substance.

2. Turning to the sanction for the rule violation, the Panel underlined that as the Player had not established that the rule violation was not intentional, there was no room for a fault-related reduction under Articles 7.4 and 7.5 DC. However a reduction of the four year period of suspension would potentially be available provided the conditions unrelated to fault, *i.e.* prompt admission of the rule violation under Article 10.6.3 WADC (referred to by Article 7.6(c) DC) are met. Article 10.6.3 WADC provides for a possible reduction of the sanction of four years potentially applicable for violations sanctionable under Article 10.2.1 WADC (*i.e.*, for violations under Article. 2.1 (Presence), Article 2.2 (Use), and Article 2.6 (Possession) – all of a Prohibited Substance), or under Article 10.3.1 WADC (i.e., for violations under Article 2.3 (Evading, Refusing or Failing to Submit to Sample Collection) and under Article 2.5 (Tampering)). To benefit from a potential reduction the athlete is not only required to have admitted the asserted anti-

doping rule violation promptly after being confronted with it; he or she further needs the approval of WADA and the Anti-Doping Organization with results management responsibility. However, even in such circumstances, any reduction (if any) is dependent on the discretion of those two bodies, the key word in Article 10.6.3 WADC being "may" and not "must", and depends on the severity of the violation and the athlete's degree of fault.

3. As regards the purpose of Article 10.6.3 WADC, the Panel considered that it is aimed at avoiding (or decreasing) the time and costs involved in a contested dispute and its procedural consequences. By means of the reduction foreseen by Article 10.6.3 WADC, the WADC intended to give a benefit to the athlete who, promptly admitting the anti-doping rule violation, in some way "simplifies" the disciplinary proceedings. Addressing WADA's argument that Article 10.6.3 WADC is intended to be applied before the onset of the disciplinary proceedings, in order to avoid or at least curtail them and that an athlete could not have all of his arguments in mitigation of sanction being heard by a tribunal and, at the very end of the disciplinary process, in the event his or her arguments were rejected, for Article 10.6.3 WADC to be applied on a subsidiary basis, the Panel decided that in the case at hand, the application of Article 10.6.3 WADC was not foreclosed by the late stage of these proceedings at which it was raised. This because after his prompt admission, the Player did not advance at any stage any other such justification or plea as amounting to a retraction of or withdrawal from such admission; furthermore, the issue of the application of Article 10.6.3 WADC only arose before CAS because WADA brought an appeal arguing that the Player could be subject to a four-year sanction for an intentional violation. The Player could not be blamed for the duration of the proceedings or the fact that they were neither avoided nor curtailed.

4. Thereupon the Panel turned to the question as to whether, as submitted by WADA but contested by the IIHF, in order to obtain any reduction for prompt admission, the Player had to also admit having committed the anti-doping rule violation admitted by him with intent. The Panel concluded that Article 10.6.3 WADC did not require anywhere that an athlete admits intent in order to become potentially eligible for a reduction of the four year sanction. In the Panel's view this was due to the fact that on its face, Article 10.6.3 WADC requires the admission of the anti-doping rule violation, and not the acceptance of its consequences. Furthermore, and also contrary to WADA's submission, Article 10.6.3 WADC does neither require that the athlete him- or herself prays in aid its application. The relevant disciplinary tribunal or CAS Panel can consider its applicability to the case before it of its own motion.

5. In the next step the Panel examined whether the Player's admission of the rule violation fulfilled the requirements of Article 10.6.3 WADC. Analysing Article 10.6.3 WADC the Panel started by ascertaining that the group of violations for which Article 10.6.3 WADC applies is not "homogenous": while for all violations the burden to establish their commission lies with the Anti-Doping Organization, the violation under Article 2.1 WADC is simply and sufficiently established by an adverse analytical finding, the accuracy of which is to be presumed unless rebutted in the limited way envisaged by Article 3.2.2 WADC; an admission by the Athlete is therefore not necessary to prove such anti-doping rule violation. In contrast, for other

violations, *e.g.* evading, refusing or failing to submit to sample collection (Article 2.3), tampering or attempted tampering with any part of doping control (Article 2.5), more complex evidence can be required in order to satisfy the burden of proof borne by the anti-doping organization. In such context, admission of the athlete can constitute an important element to reach the conclusion that an anti-doping rule violation has been committed. The Panel considered that a prompt admission of a violation under Article 2.1 (whether by way of the simple acknowledgment of the adverse analytical finding or voluntary waiver of the B sample analysis), while – as in all cases – a necessary precondition of bringing into play of Article 10.6.3 WADC, does not appear to be sufficient for an athlete to obtain any benefits. This because it conceded nothing that is not already vouched for by the adverse analytical finding. In the Panel's view, in order to obtain any benefits under Article 10.6.3 WADC an athlete charged under Article 2.1 WADC had to do "more" than merely admit the presence in his/her body of a prohibited substance. In defining the nature of the "positive" behaviour required, the Panel concluded that to allow for the meaningful application of all elements of Article 10.6.3 to an Article 2.1 WADC violation, an athlete must describe the factual background of the anti-doping rule violation both fully and truthfully, and not merely accept the accuracy of the adverse analytical finding. In the Panel's opinion only this enhanced admission would enable the adjudicative body to determine whether the athlete would potentially be subject to a sanction of four years for an intentional violation. As regards the potential application of Article 10.6.3 WADC to the present case, the Panel held that at no time the Player had disputed the AAF and that his behaviour amounted to a prompt and enhanced admission of the asserted anti-doping rule violation after being confronted with it by the IIHF. In particular as, having been notified of the AAF on 22 February 2017, on 3 March 2017 the Player waived the B sample analysis, agreed that he had ingested *"a wrong product"*, took responsibility for *"what I eat and drink"*, admitted his lack of care and explained the factual circumstances in which he took the product containing the prohibited substance. The Panel underlined that the very circumstances described by the Player had been acknowledged and assumed by WADA as the factual basis for its conclusion that the Player committed an (at least indirectly) intentional violation.

In conclusion, the Panel found the Player to be eligible for a reduction, subject to the approval of WADA and the IIHF. The Panel, acknowledging that WADA, if contrary to its primary submission Article 10.6.3 WADC was engaged at all, would allow for a reduction in a range between three and six months, and the IIHF between six and nine months, determined a reduction in the measure of six months to be proportionate to the seriousness of the Player's violation and his degree of fault. Accordingly, it imposed a suspension for three years and six months on the Player.

6. Lastly the Panel took note that whereas the Decision had been issued on 22 June 2017, the ineligibility period had been set to start on 15 March 2017. The Panel agreed with IIHF BD's reasons for starting the ineligibility period at an earlier date than the date of the Decision, specifically that the IIHF had not, as it should have, imposed a provisional suspension on the Player under Article 10.1 of the DCR, and that otherwise any period of provisional suspension would have been credited to the sanction imposed on the Player. The failure of the IIHF to impose a provisional suspension had to be

considered as implying a delay, not attributable to the Player, in the application of a sanction, justifying a backdating of its starting date.

Decision

The Panel therefore partially upheld the appeal by the Appellant, overturned the decision rendered by the IIHF DB and declared F. ineligible for a period of three years and six months, backdated to 15 March 2017.

CAS 2017/A/5324
Fédération Burkinabé de Football v. Fédération Internationale de Football Association (FIFA), South African Football Association, Fédération Sénégalaise de Football & Federaçao Caboverdiana de Futebal
31 October 2018

Football; Decision ordering the replay of a match; Decision "final and binding" according to Art. 3 para. 3 FIFA World Cup Regulations (WC Regulations); Principles of interpretation of articles of associations; Validity of Art. 3 para. 3 WC Regulations; Scope of Art. 3 para. 3 WC Regulations; Compliance of a decision to replay a match with the WC Regulations and CAS jurisdiction

Panel
Prof. Martin Schimke (Germany), President
Mr Hendrik Willem Kesler (The Netherlands)
Mr Jean-Philippe Rochat (Switzerland)

Facts

The FIFA World Cup is an event embodied in the FIFA Statutes (Article 1 of the Regulations for the 2018 FIFA World Cup Russia; "the WC Regulations")[1]. The FIFA Council has appointed the Organising Committee for FIFA Competitions ("Organising Committee") to organise the competition (Article 1 para. 6 and Article 3 para. 1 of the WC Regulations). The Organising Committee is responsible for organising the FIFA World Cup in accordance with the FIFA Statutes and the FIFA Governance Regulations (Article 3 para. 1 of the WC Regulations). The decisions taken by the Organising Committee and/or its bureau/subcommittee are final and binding and not subject to appeal (Articles 3 para. 3 and 20 para. 1 of the WC Regulations).

The format of the preliminary competition to the World Cup could vary depending on the continental Confederation. With respect to the Confédération Africaine de Football ("CAF"), the competing teams had to go through two first preliminary stages in order to bring the number of representative teams down to 20. These remaining teams were divided into five groups of four teams to play home-and-away round-robin matches (the "Third Preliminary Stage"). The winners of each group qualified for the 2018 FIFA World Cup.

The representative teams of Senegal, Burkina Faso, Cape Verde and South Africa were in the same group (Group D) of the Third Preliminary Stage. The matches were played between 8 October 2016 and 14 November 2017.

On 12 November 2016, the second round of the Third Preliminary Stage took place in South Africa, where the representative team of South Africa played against the representative team of Senegal (the "Match"). Mr Joseph Odartei Lamptey ("Mr Lamptey"), of Ghanaian nationality, was the referee. The representative team of South Africa won on the score of 2 - 1. It opened the score by converting a penalty into a goal at minute 43 of the Match. It scored again two minutes later. Finally, the representative team of Senegal scored the final goal of the Match at minute 75.

According to the official match report, Mr Lamptey awarded the penalty for a non-existent handball. In addition and according to the betting monitoring company Sportradar Integrity Services, there was *"a clear and*

[1] There are two editions of the WC Regulations. One version is dated September 2016, (the "Old Version") and the other version is dated February 2018, (the "New Version"). The Panel relies on the New Version in its Award unless indicated otherwise.

overwhelming evidence that the course or result of this match was unduly influenced. The betting evidence ultimately indicated that bettors held prior knowledge of at least three goals being scored in total". Likewise, Early Warning System Gmbh provided FIFA with an alert that it detected irregular betting patterns during the Match.

The FIFA Disciplinary Committee eventually initiated disciplinary proceedings against Mr Lamptey and, on 15 March 2017, issued a decision whereby it found Mr Lamptey guilty of having unlawfully influenced the Match results and, therefore, of breaching Article 69 para. 1 of the FIFA Disciplinary Code. As a consequence, Mr Lamptey was *"banned from taking part in any kind of activity at national and international level (administrative, sports or any other) for life"*. On 27 April 2017, the FIFA Appeal Committee upheld the decision of the first instance. Mr Lamptey filed an appeal with CAS. On 2 August 2017, CAS issued the operative part of its award, whereby it dismissed the appeal filed by Mr Lamptey and confirmed the decision of the FIFA Appeal Committee (CAS 2017/A/5173).

On 6 September 2017, FIFA notified both the South African Football Federation and the Fédération Sénégalaise de Football that the Bureau for the FIFA World Cup™ Qualifiers (the "FIFA Bureau") had taken the following decision (the "Appealed Decision"):

"1. The first-leg match South Africa vs Senegal shall be replayed.

2. The result of the match of 12 November 2016 shall be cancelled for all purposes.

[…]".

The Fédération Burkinabé de Football (also the "Appellant") as well as the South African Football Association filed a petition before the Court of Arbitration for Sport ("CAS") for a stay of the execution of the decision. Both requests were dismissed by CAS on 17 October and 6 November 2017, respectively.

On 8 September 2017, the Appellant wrote to FIFA to contest the authority of the FIFA Bureau to decide the replay of a match. In addition, it submitted that the regulatory requirements for a match to be replayed were not met. The Appellant concluded that the Appealed Decision was illegal, arbitrary and to be annulled. On 10 September 2017, FIFA answered to the various allegations of the Appellant, which maintained its position and brought up further arguments in another letter, sent on 12 September 2017 to FIFA.

On 14 September 2017, the Organising Committee *"confirmed the decision of the Bureau for the FIFA World Cup™ Qualifiers, which had ordered a replay of the qualification match between South Africa and Senegal held on 12 November 2016. This confirmation came after the* [CAS] *upheld the lifetime ban on match referee Joseph Lamptey for match manipulation, the ruling imposed by the FIFA Disciplinary and Appeal Committee. The match will be replayed during the November 2017 international window, with the exact date to be confirmed in due course"* (the "14 September 2017 Decision").

On 18 September 2017, the Appellant lodged with CAS an appeal against the Appealed Decision. Via facsimile dated 27 September 2017 but received on 28 September 2017, the Appellant informed the CAS Court Office that its appeal was actually lodged not only against FIFA but also against the South African Football Association, the Fédération Sénégalaise de Football and the Federação Caboverdiana de Futebol.

On 5 October 2017, the South African Football Association lodged with CAS an appeal against the 14 September 2017 Decision. The case was recorded under CAS 2017/A/5356 South African Football Association v. FIFA, Fédération Burkinabé de

Football, Fédération Sénégalaise de Football & Federação Caboverdiana de Futebol ("CAS 2017/A/5356").

The Parties either expressly or tacitly (Federação Caboverdiana de Futebol) agreed to submit the present procedure to the same Panel as in the proceedings CAS 2017/A/5356.

On 10 November 2017, the Match was replayed and the representative team of Senegal won on the score of 2 - 0.

On 14 December 2017 and considering the outcome of the Third Preliminary Stage in Group D, the Appellant requested to be authorised to amend its requests for relief and to file a second brief. The South African Football Association filed a similar petition on 18 December 2017. These requests were eventually granted with the express or tacit consent (Federação Caboverdiana de Futebol) of the other Parties.

On 16 and 21 February 2018 and in reply to the request of the CAS Court Office, all the Parties (with the exception of Federação Caboverdiana de Futebol, which remained silent) confirmed their preference for the matter to be decided solely on the basis of their written submissions.

Reasons

1. FIFA and the Fédération Sénégalaise de Football had submitted that, in view of the clear wording of Article 3 para. 3 of the WC Regulations, which provides that *"[t]he decisions taken by the FIFA Organising Committee and/or its bureau/subcommittee are final and binding and not subject to appeal",* CAS had no jurisdiction in the present matter. They had put forward that this provision was a *lex specialis*, which applied to any decision taken by the Organising Committee, within the scope of its competence. The Appellant and the South African Football Association had claimed, on their side, that CAS had jurisdiction to decide on the present dispute. According to them, the scope of Articles 57 and 58 of the FIFA Statutes concerning CAS jurisdiction could not be modified by hierarchically inferior regulations (the WC Regulations). In other words, the decisions which could not be appealed before CAS were exhaustively enumerated in Article 58 para. 3 of the FIFA Statutes.

   The Panel started by addressing the question of the exact scope of Article 3 para. 3 of the WC Regulations. It found that according to the wording of this provision, the decisions taken by the Organising Committee not only were *"final and binding and not subject to appeal"* in the sense that they could not be dealt with through legal internal channels anymore, but also, read together with Article 14 para. 3 of the WC Regulations, which states that *"[t[he participating member associations, players and officials acknowledge and accept that, once all internal channels have been exhausted at FIFA, their sole recourse shall be to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, unless excluded or the decision is declared as final and binding and not subject to appeal"*, were not subject to an appeal before CAS.

   The issues to be resolved therefore were i) whether the list of exceptions to the jurisdiction of CAS provided under Article 58 para. 3 of the FIFA Statutes was exhaustive and ii) whether it could be completed by the WC Regulations.

2. For the Panel, it resulted from the fact that there was no unified view in the literature and the jurisprudence on how articles of

association should be interpreted in Switzerland, that there was not one method of interpretation that prevailed over the others, when statutes of a private legal entity were at stake. When called upon to interpret articles of associations, a CAS panel had therefore to adopt a pragmatic approach and follow a plurality of methods, without assigning any priority to the various means of interpretation. The situation had be assessed on a case-by-case basis and the interests at stake had to be balanced in respect of the principle of proportionality.

3. Bearing in mind the above and the fact that it is the responsibility of the Organising Committee to organize the FIFA World Cup, the Panel found that it made sense to allow this body to make the necessary final decisions to meet its numerous obligations sometime in a very short notice. FIFA Statutes were not meant to deal with issues relating to the organisation of the FIFA World Cup. These aspects needed to be resolved through specific regulations, which, as such, had to be seen as a *lex specialis*.

   For the Panel, there was no contradiction between Article 3 para. 3 of the WC Regulations and the FIFA Statutes. If an appeal could be lodged against each decision taken by the Organizing Committee within the frame of the organisation of the FIFA World Cup, it could seriously impede the competition and would thereby be in direct conflict with one of the main goals of FIFA; *i.e.* the organisation of its own international competitions (Article 2 (b) of the FIFA Statutes).

   In addition, the Panel observed that Article 3 para. 3 of the WC Regulations was not new. A similar (when not identical) provision could be found in the 2006, 2010 and 2014 WC Regulations. Under these circumstances, it was unconvincing that a rule that had not changed over the last 10 years and that had been applied systematically and continuously in the last 4 FIFA World Cups, could be considered as null and void, just because it was implemented without an express legal basis in the FIFA Statutes. Given the fact that Article 3 para. 3 of the WC Regulations was part of FIFA's current and constant practice and had been in force for many years and had never been put into question by FIFA's supreme and legislative body (the Congress), it seemed reasonable to the Panel to submit that such a provision could be considered as having been ratified by it.

   As an intermediary conclusion, the Panel therefore found that Article 3 para. 3 of the WC Regulations was not incompatible with Article 58 of the FIFA Statutes.

4. This said, it was obvious for the Panel that it could only be that *"[the] decisions taken by the FIFA Organising Committee and/or its bureau/subcommittee are final and binding and not subject to appeal"* insofar that they were reasonable, not arbitrary and taken with respect to the fundamental rights of the parties concerned. Likewise, Article 3 para. 3 of the WC Regulations could not empower the Organising Committee with the absolute discretion to take just any measure regardless of whether it was within its area of its responsibility. Would the Organizing Committee make an ill-founded decision, a possibility of recourse to a higher judicial body had to be provided. Moreover, if the Organizing Committee was to take a decision which went beyond its prerogatives, it would not fall under the WC Regulations, which would therefore simply not be applicable. This would be particularly true for Article 3 para. 3 of the WC Regulations.

5. The Panel then recalled that in the present case, it had been established in the CAS 2017/A/5173 award that the outcome of the Match had been influenced *"in a manner contrary to sporting ethics"* by wrongful decisions taken by Mr Lamptey and, consequently, its result may have affected the proper functioning of the entire competition as well as the image of FIFA. It was therefore reasonable to say that it was the duty of the Organising Committee to manage the situation. In addition, the decision to replay a fixed match did not seem to be arbitrary, to go beyond the scope of the WC Regulations or to be unfair. On the contrary, to keep a manipulated result would have given an unmerited advantage to the team that had benefited from it and would obviously have been incompatible with fair play. Moreover, the Appealed Decision and the 14 September 2017 Decision did not appear to have had a negative and disproportionate impact on the interests of the Appellant and of the South African Football Association, as in view of the final standings of Group D at the end of the Third Preliminary Stage, their representative team would in any event not have qualified for the final phase of the 2018 FIFA World Cup.

Decision

As a result, the Panel found that the decision to replay the Match was compliant with the WC Regulations, not arbitrary or unreasonable. Article 3 para. 3 of the WC Regulations was therefore fully applicable and, as a consequence, CAS had to decline jurisdiction.

Note

The Panel held the same reasoning and came to the same conclusion in the case CAS 2017/A/5356 South African Football Association v. FIFA, Fédération Burkinabé de Football, Fédération Sénégalaise de Football & Federação Caboverdiana de Futebol.

CAS 2017/A/5374
Jaroslaw Kolakowski v. Daniel Quintana Sosa
10 April 2018

Football; Contractual dispute; Applicable law; Player's agent contractual entitlement to a commission; Calculation of a commission due to a player's agent; Interest payable on a debt

Panel
Mr Mark Hovell (United Kingdom), President
Mr Fabio Iudica (Italy)
Mr João Nogueira da Rocha (Portugal)

Facts

Mr Jaroslaw Kolakowski (the "Agent" or the "Appellant") is a football agent/intermediary of Polish nationality, domiciled in Warsaw, Poland, and licensed by the Polish Football Federation (the "PFF").

Mr Daniel Quintana Sosa (the "Player" or the "Respondent") is a Spanish citizen and professional football player, born in Las Palmas, Spain on 8 March 1987.

On 2 October 2013, the Agent and the Player concluded a representation contract (the "Representation Contract") containing the following material terms:

"1) Term of the contract

This agreement is a fixed term contract, it will take effect on 02.10.2013 and will terminate on 01.10.2015. (…).

2) Remuneration

The Agent is entitled to receive a commission in amount of 10% of the total amount of the player's contracts, which are signed with clubs, during the term of this Agreement - until 01.10.2015.

3) Exclusivity

The Parties agree that on the power of this agreement, the player's agent receives exclusive rights to negotiate and represent the player in any transfer activities regarding all CLUBS WORLDWIDE. The player is forbidden to sign a contract with any club, using the representation or help of any 3rd Parties or himself alone. In such case the Player will be obliged to pay the agent, within 14 days from the signing of the contract, a penalty in amount of 15% from the total amount of the signed contract.

4) Regulations

Polish law and regulations of The Polish FA, including the regulations of FIFA and UEFA are valid and govern this agreement. The parties agree to adhere to the statutes, regulations, directives and decisions of the competent bodies of FIFA, the confederations and the relevant associations, as well as public law provisions governing job placement and other laws applicable in the territory of the association, as well as international law and applicable treaties".

On 29 September 2014, the Player signed an employment contract with Saudi Arabian club Al Ahli SC ("Al Ahli Employment Contract"). It is undisputed between the parties that the Agent was not involved in the Player's signing. The Al Ahli Employment Contract was valid from 28 September 2014 until 30 June 2017, and the Player was to be paid a total remuneration of EUR 550,000 for the season 2014/15, EUR 650,000 for the season 2015/16 and EUR 750,000 for the season 2016/17.

On 1 February 2015, the Al Ahli Employment Contract was prematurely terminated. Accordingly, the Al Ahli Employment Contract was only valid for 4 months and the Player was only remunerated for that period. On 9 February 2015, the Agent filed a claim at the FIFA Players' Status Committee ("PSC") against the Player, alleging that the Player breached the Representation Contract by signing the Al Ahli Employment Contract without his knowledge or involvement. The

Agent requested the amount of EUR 225,000 as penalty under clause 3 of the Representation Contract, along with interest at 5% *p.a.* from 13 October 2014. On 8 May 2017, the Single Judge of the FIFA PSC ("Single Judge") rendered his decision *inter alia* as follows (the "Appealed Decision"):

"1. The claim of the Claimant, Jaroslaw Kolakowski, is partially accepted.

2. The Respondent, Daniel Quintana Sosa, has to pay to the Claimant, Jaroslaw Kolakowski, ***within 30 days*** *as from the date of notification of this decision, the outstanding amount of EUR 34,375".*

On 24 October 2017, in accordance with Article R47 of the Code of Sports-related Arbitration (the "CAS Code Edition 2017"), the Agent filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") challenging the Appealed Decision and *inter alia* requesting the following prayers for relief:

"The appellant requests the CAS to sentence the Respondent Daniel Quintana Sosa to:

1) Pay the Appellant Jaroslaw Kolakowski the outstanding amount pursued before the FIFA's Players' Status Committee i.e. set aside the amount adjudicated by the Single Judge of the FIFA's Players' Status Committee, the amount of 190.625 EUR along with the interest on the principal amount of 225.000 EURO in the rate of 5% per annum on that amount due since 13-10-2014".

On 11 December 2017, the Player filed his Answer and made the following request for relief:

"Terms in which the Appeal presented should be rejected and the contested decision [be upheld] in full".

Reasons

1. Applicable law

Article 187(1) of the Swiss Private International Law Act ("PILA") provides - *inter alia* - that *"the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such a choice, according to the law with which the action is most closely connected"*. This provision establishes a regime concerning the applicable law that is specific to arbitration and different from the principles instituted by the general conflict-of-law rules of the PILA[1].

According to the legal doctrine, the choice of law made by the parties can be tacit and/or indirect, by reference to the rules of an arbitral institution. As a matter of principle, in agreeing to arbitrate a dispute according to the CAS Code, the parties submit to the conflict-of-law rules contained therein, in particular to Art. R58 of the CAS Code[2]. Whether such indirect choice of law could be accepted here, appeared questionable, since art. 4 of the Representation Contract contains a direct choice-of-law clause in favour of Polish law, FIFA's and UEFA's Regulations.

According to the predominant view in the legal literature, an indirect choice of law is - in principle - always superseded by a direct choice of law[3]. However, this Panel found that this principle should not apply here. The reason why the predominant view in the legal literature holds is that, generally speaking, the rules of the arbitral institutions do not wish to limit the parties'

[1] CAS 2014/A/3850, at para. 48.

[2] See for example CAS 2014/A/3850 at para. 49; CAS 2008/A/1705 at para. 9; CAS 2008/A/1639 at para. 21.

[3] See BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd edition, Bern 2015, No. 1393; KAUFMANN-KOHLER/RIGOZZI, Arbitrage International, 2nd edition, Bern 2010, No. 618; see also BSK-IPRG-KARRER, 3rd edition, Basel 2013, Art. 187 No. 123.

autonomy in any respect[4]. This, however, is not true in the context of appeals arbitration procedures before the CAS. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS, the *"Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision"*.

It follows from this provision that the "applicable regulations", *i.e.* the statutes and regulations of the sports organisation that issued the Appealed Decision (here: FIFA) were applicable to the dispute irrespective of what law the parties had agreed upon. In the Panel's view the parties could not derogate from this provision if they wanted their dispute to be decided by the CAS and, indeed, the parties did not derogate in the case at hand, as FIFA's Regulations were 1 of the 3 direct choices made. To conclude, therefore, this Panel found that Article R58 of the CAS Code took precedence over the conflicting aspects of the direct choice-of-law clause contained in the Representation Contract and that, thus, the FIFA rules and regulations applied primarily.

The Panel observed that Article 57(2) of the FIFA Statutes (2016 edition) stipulates: *"The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law"*. The above provision makes it clear that the FIFA rules and regulations have been drafted against the backdrop of a certain legal framework, *i.e.* Swiss law. Thus and in summary, the Panel should apply the various rules and regulations of FIFA and whenever issues of interpretation arose with respect to the FIFA rules and regulations, the Panel would resort to Swiss law.

The Panel further noted that pursuant to the submissions of the parties, the only area in which Polish law differed to Swiss law in any of the issues applicable in this dispute was the rate of interest on unpaid debts (which is higher in Polish law than in Swiss law). However, the Agent explicitly stated in his written submissions that the interest rate under Swiss law should be applicable here, not the rate under Polish law. Accordingly, in practical terms Swiss law was applicable subsidiarily on all the relevant issues in this dispute.

2. Player's agent contractual entitlement to a commission

Based on clause 3 of the Representation Contract, the Agent submitted that he was still entitled to 15% of the total value of the Al Ahli Employment Contract, even though he did not act for the Player in concluding the contract. Conversely, the Player argued that said clause was null and void *"according to the regulations of FIFA and UEFA and according to Polish law and the Regulations of the Polish FA"*.

The Panel noted that it was common to see representation contracts which are exclusive, such that players could not use another agent in a deal whilst under contract with them. However, it was also not uncommon to see an agent work on a potential transfer or new employment contract for a player during the term of a

[4] BSK-IPRG-KARRER, 3rd edition, Basel 2013, Art. 187 No. 123

representation contract, but ultimately got 'cut out' of the deal by the player who decided to then act for himself at the last minute when signing for a new club and/or signing a new employment contract. Accordingly, it was not unusual to see clauses in representation contracts where an agent was paid commission irrespective of whether he acted on a deal or not.

The panel in CAS 2013/A/3104 stated: *"Although the Bureau of the Player's Status Committee had held in August 1998 that the Player's Agent's activities must be causal to the conclusion of employment contract and that, as a general rule (emphasis added), if an employment contract was signed without the involvement of a particular player's agent, the player concerned did not owe any commission to the agent, this rule is not without exception. Thus, it is clearly recognized that an agent is entitled to claim a commission, even when he has not been actively involved in a transfer, if a clause to this effect is explicitly and unequivocally stipulated in the Representation Agreement. The Panel agrees with the Respondent that a clause of this effect is explicitly and unequivocally stipulated (…) in the (…) Agreement".*

In the above case however, the agent was entitled to the same commission (*i.e.* 10%) regardless of whether he acted in a transaction or not. Here, the Panel considered that clause 3 of the Representation Contract went much further than an ordinary exclusivity clause as; (a) it forbade the Player from acting for himself; and (b) it entitled the Agent to a penalty rate of commission of 15% if the Player acted for himself - as opposed to 10% which the Agent would ordinarily have been entitled to.

On balance, the Panel concluded that clause 3 of the Representation Contract should be interpreted down to what the industry norm would be. The Player should always be entitled to act for himself on a transfer or employment contract and forbidding him from doing so would be a violation of his rights. Agents could be appointed exclusively vis-à-vis another agent, but no player should be forced to use an agent or restrained from concluding their own deal, subject only to a financial penalty should they chose to ultimately represent themselves. Further, the Panel concluded that there was a deterrent effect in clause 3 of the Representation Contract which was to discourage the Player from negotiating/signing a contract without the Agent's involvement. The parties agreed on this clause and pursuant to the principle of *pacta sunt servanda*, subject to the below it is not unreasonable for the Agent to be entitled to a penalty commission rate of 15%. The Panel concluded that the applicable rate of commission was 15%.

3. Calculation of a commission due to a player's agent

The Panel noted that contrary to what the Single Judge concluded in the Appealed Decision, the active term of the contract was in fact only 4 months and 2 days, which suggested that the Player only earned EUR 183,333 (*i.e.* 4/12 x EUR 550,000) of income from Al Ahli. The Panel determined to use this figure when calculating the amount of damages to be awarded to the Agent. Also, considering that the Player earned EUR 183,333 of income under the Al Ahli Employment Contract, the Panel noted that the amount being claimed by the Agent as damages (*i.e.* EUR 225,000) amounted to 123% of the total income earned by the Player whilst he played for Al Ahli.

The Panel turned to Article 18(1) of the Swiss Code of Obligations ("Swiss CO"),

which states as follows: *"When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement"*.

The Panel acknowledged that the parties freely agreed to clauses 2 and 3 of the Representation Contract, but also considered pursuant to the above cited provisions of the Swiss CO that it should take into account all the circumstances relevant to this particular matter as well as the intentions of the parties when entering into their agreement. Having considered the arguments from both parties, on balance, the Panel concluded that it would be nonsensical, and even perverse, for a football player to lose money from working because he had to pay commission to an agent. If the Panel were to award the Agent damages of EUR 225,000 in these circumstances, the Player would have, in effect, paid the Agent EUR 41,667 for the right to have played for Al Ahli for free for four months. This is all the more absurd given that the Agent did not even act for the Player in concluding the Al Ahli Employment Contract. The Panel considered that having to pay his entire earnings (and more) from a contract with a club to an agent irrespective of whether that said agent negotiated his deal or not, could not have been the intention of the parties when entering into the Representation Contract.

In the Panel's experience, most agents are rewarded for their efforts by a commission payment calculated by reference to a percentage of what the player is paid by his club. Not what he might be paid. A player may be transferred, he may settle his contract with a club, he may be injured and have to retire before the end of his contract with the club or he may be such a success, that the club and the player tear up his first contract and he's awarded an improved contract. There are so many unknowns in football. As such, the standard arrangement between a player and his agent is that the player (or sometimes the club on his behalf) pays the agent a percentage of his earnings from the contract of employment that he has with the club, that the agent negotiated on his behalf, for the entire time that the contract of employment runs for. The Panel saw no evidence that the parties here intended to move from the standard practice in football.

Accordingly, the Panel agreed with the Single Judge and concluded that clauses 2 and 3 of the Representation Contract should be interpreted to award the Agent commission based on the income *actually* earned by the Player under any employment contract. In the present circumstances, pursuant to Article 18(1) of the Swiss CO, the Panel concluded that the amount of commission that the Agent was entitled to should be reduced to EUR 27,500 (*i.e.* 15% of EUR 183,333). However, the Panel noted that this amount (EUR 27,500) was in fact lower than the amount of damages granted to the Agent in the Appealed Decision (EUR 34,375). The Panel also acknowledged that the Player did not appeal the Appealed Decision and accordingly, the Panel was unable to award an amount lower than that granted to the Agent in the Appealed Decision, as that would violate the principle of *ultra petita*. Accordingly, the amount of damages (subject to interest) to be awarded to the Agent was EUR 34,375.

4. Interest payable on a debt

In the Appealed Decision, the Single Judge determined that interest would not be applicable on any award of damages to the

Agent, as *"interest cannot run over the penalty for lack of contractual basis"*.

The Agent disputed this ruling and argued that under Swiss law, interest should be payable on the amount of commission awarded as damages. The Agent submitted that, the rate of 5% *per annum* should be applicable in the present matter pursuant to Articles 73(1) and 104(1) of the Swiss CO.

The Panel disagreed with the conclusion of the Single Judge and accepted the Agent's arguments. The Panel noted that it was widely accepted under Swiss law that 5% interest was applicable on unpaid debts. In relation to the principal amount on which interest should be calculated, the Panel acknowledged that whilst it concluded that the Agent was only entitled to EUR 27,500 of damages, the amount of damages ultimately awarded in this Award is EUR 34,375.

Accordingly, the Panel concluded that it had the autonomy to determine the issue of interest in the manner it deemed most appropriate - *i.e.* it was not bound by the Appealed Decision or restricted by the prayers for relief submitted (or not submitted) by the Player. In the present circumstances, the Panel determined that the amount of interest that the Agent would have been entitled to was 5% *per annum* on the part of the commission awarded above that he *should* have been paid by the Player, *i.e.* EUR 27,500.

Decision

For the reasons stated above, the Panel conclude that the Agent should be awarded the following total damages: EUR 34,375 of commission and interest of 5% *p.a.* on the amount of EUR 27,500 as from 13 October 2014 until the effective date of payment.

CAS 2018/A/5500
Lao Toyota Football Club v. Asian Football Confederation (AFC)
12 June 2018 (operative part of 17 January 2018)

Football; Ineligibility of a club involved in match-fixing activities to participate in AFC competitions; *Res iudicata* principle; *Ne bis in idem* principle; Exceptions to the *ne bis in idem* principle

Panel
Mr Marco Balmelli (Switzerland), President
Prof. Massimo Coccia (Italy)
Mr Mark Hovell (United Kingdom)

Facts

Lao Toyota Football Club (hereinafter referred to as the "Appellant") is a professional football club from Laos competing in the Lao Premier League. The Appellant is affiliated to the Lao Football Federation (the "LFF"), which in turn is affiliated to the Asian Football Confederation and the Fédération Internationale de Football Association (the "FIFA").

The Asian Football Confederation (hereinafter also referred to as "the Respondent" or the "AFC") is the governing body of Asian football and has its registered headquarters in Kuala Lumpur, Malaysia.

In February 2017, the Appellant was involved in a disciplinary procedure regarding allegations of match-fixing during the AFC Cup Seasons 2015 and 2016. Several former players of the Appellant were judged guilty for match-fixing and banned for life. The AFC Disciplinary and Ethics Committee ("AFC DC" or "DC") however dismissed all the accusations towards the Appellant without reservations in a decision dated 15 February 2017 ("AFC DC decision"). The Appellant won the national Laotian football championship by the end of 2017 season and therefore qualified for the playoff-round of the AFC Cup 2018.

On 13 December 2017, the AFC Entry Control Body ("AFC ECB" or "ECB") decided (the "Appealed Decision" or "ECB decision") that the Appellant was ineligible to participate in the AFC Cup 2018 due to an involvement in match-fixing according to art. 12.8. of the Entry Manual for AFC Club Competitions 2017-2020 ("Entry Manual").

On 22 December 2017, the Appellant filed its Statement of Appeal/Appeal Brief in accordance with art. R47, R48 and R51 the Code of Sports-related Arbitration (the "CAS Code") with the Court of Arbitration for Sport (the "CAS").

On 10 January 2018, the Respondent filed its Answer, pursuant to art. R55 of the CAS Code.

The Appellant's position in these arbitration proceedings can be summarised as follows:

a) The AFC DC fully discharged the Appellant which is why there is no space for a contradictory decision by the ECB.

b) The fight against match-fixing is indeed an important task, some basic legal principles should however never be violated. In denying the Appellant to participate in the AFC Cup 2018, a clear violation of the *ne bis in idem* principle is given.

c) A two-stage process by the Federation, as a valid exception to the principle acknowledged by CAS (cf. CAS 2013/A/3256), is not visible at all. For these conditions to be met, there would have to be an *"administrative measure"* followed by a *"disciplinary measure"*. The order in the present case however is the

other way round and therefore resulting in an approach not protected by CAS.

d) The Appellant therefore concludes that he should be allowed to participate in the AFC Cup 2018.

The Respondent's main submissions on the other hand can be summarised as follows:

a) The Appellant was declared ineligible to participate in the 2018 AFC Cup due to a violation of art. 12.8. of the Entry Manual. According to this article, a club can be prevented from participating if it has been directly and/or indirectly involved in arranging or influencing the outcome of a match.

b) The AFC follows a zero tolerance-policy with regard to match-fixing and also confirmed this approach in various judgments. The integrity and reputation of its competitions are key factors of this policy. The Respondent also builds his arguments on CAS cases regarding UEFA which knows a similar rule in its legal framework.

c) The two decisions have different objects, the DC Decision relating to a much more narrowly worded article than the one pertinent for the AFC ECB. The first requires an active role by the offender while the latter only requires an involvement.

d) The extensive amount of evidence collected in the disciplinary procedure clearly proves an involvement of the Appellant.

e) The ECB has discretionary power to decide on these cases and therefore denied the eligibility of the Appellant.

The AFC DC which issued the first decision in this matter may pronounce sanctions described in the AFC Statutes and the Disciplinary and Ethics Code. According to the AFC Statutes (art. 60) and the Disciplinary and Ethics Code (art. 22), the AFC DC amongst other things also has the power to impose an exclusion from a future competition. The Appealed Decision was treated under the possibility of the violation of art. 66 of the Disciplinary and Ethics Code ("Unlawfully influencing Match results").

The Appealed Decision was issued by the AFC ECB, another judicial body of the AFC and independent from the AFC DC. The AFC ECB has jurisdiction to determine the eligibility of clubs to participate in AFC club competitions, *inter alia* where the AFC or a Club alleges that a Club has been directly or indirectly involved in match-manipulation (cf. art. 4.1.1 of the ECB Procedural Rules). It applied the Entry Manual as the pertinent framework in the first place. The rules for the procedure itself before the AFC ECB were the ECB Procedural Rules.

It is on the grounds of art. 12.8. of the Entry Manual that the Appellant was prevented to enter the 2018 AFC Cup. Article 12.8. of the Entry Manual reads as follows: *"If, on the basis of all the factual circumstances and information available to the AFC, the AFC concludes to its comfortable satisfaction that a club has been directly and/or indirectly involved, since the entry into force of Article 73.6 of the AFC Statutes on 8 June 2010 (or its future equivalents), in any activity aimed at arranging or influencing the outcome of a match at national or international level, such club shall be declared ineligible to participate in AFC Competitions. Such ineligibility is effective for only one (1) football season".*

Besides, art. 73.6 of the AFC statutes contains the following: *"The admission to an AFC competition of a Member Association or Club directly or indirectly involved in any activity aimed at arranging or influencing the outcome of a match at national or international level can be refused with immediate effect, without prejudice to any possible disciplinary measures".*

The relevant question needs to be if the procedure in the present case was carried out according to the basic principles of law and standing CAS jurisprudence.

Reasons

1. *Res iudicata* principle

The procedural concept of *res iudicata* has two elements: 1) the so-called *"Sperrwirkung"* (prohibition to deal with the matter = *ne bis in idem*), the consequence of this effect being that if a matter (with *res iudicata*) is brought again before the judge, the latter is not even allowed to look at it, but must dismiss the matter (insofar) as inadmissible; and 2) the so-called *"Bindungswirkung"* (binding effect of the decision), according to which the judge in a second procedure is bound to the outcome of the matter decided in *res iudicata* (cf. CAS 2013/A/3256). It is mainly the first concept which is pertinent in this case.

2. *Ne bis in idem* principle

The basic legal principle of *ne bis in idem* generally states that one cannot be judged for the same charges again after a legitimate judgement in the first place. For this principle to be fulfilled three requirements need to be given: an identity of the parties, of the facts and of the object (cf. also CAS 2007/A/1396 & 1402). The principle of *ne bis in idem* is also known as "double jeopardy" in common law countries.

CAS has put it clearly in previous decisions where it was in a position to define the *ne bis in idem* principle in football law: Sports disciplinary bodies cannot try a person or an entity again for an offence in relation to which that person or entity has been acquitted already by a final decision of another body based on the same regulatory framework (cf. CAS 2013/A/3256).

3. Exceptions to the *ne bis in idem* principle

There are however two exceptions established in the cited case CAS 2013/A/3256. The first one relates to different levels of the competent authorities – a first decision on the basis of national regulatory framework can still be looked at differently by an international authority.

The second exception concerns the so-called "two-stage process". If the nature of the suspensions sought in the two proceedings was different, the first one being a minimum administrative measure – which, in fact, could be compared to an interim measure – and the second one being a final disciplinary measure. In such a situation, another judgement in the second procedure is in general possible.

The parties agreed that the parties and the facts of the two cases (by the AFC ECB and the DC) were the same, but differed on the identity of the object. They agreed however also on the qualification of the DC decision as a decision in a disciplinary procedure and the ECB decision as a decision in an administrative procedure. The parties in the end drew different conclusions as to the further qualification though.

The Appellant explicitly made reference to the case CAS 2013/A/3256 to set out that this was the order to be followed. The case at hand however was laid out exactly the opposite way: the Appellant was dismissed without reservation in a disciplinary procedure which resulted in a final and binding decision, after which a matter had to be deemed a *res iudicata*. Only about 10 months later, the ECB decision concerning the ineligibility for the AFC Cup followed.

This was a clear violation of the two-stage process according to the Appellant, as the provided order was not respected.

The Respondent on the other hand made reference to its rules, outlining the independence of the different AFC bodies. Due to the different bodies resulting in a difference of the objects and its independence of each other, the question of *ne bis in idem* was not relevant in the present matter. The ECB safeguarded the integrity of the competition by applying the pertinent criteria on who can enter a competition or not ("integrity admission process"). Such a procedure is in general also protected by CAS (CAS 2014/A/3625, para. 123).

The Panel found that the wording of art. 12.8. of the Entry Manual is clear. It is the AFC that decides – no distinction is made regarding the respective bodies, it just says the AFC. In the majority of the Panel's opinion, a club that has been absolutely dismissed of all charges in a disciplinary procedure can in such a case not be charged again later by the very same federation on the same facts, even if it had been another body of said federation. This is all based *"on the same regulatory framework"*, as it was described in the case CAS 2013/A/3256. Article 73.6 of the AFC Statutes heads in the same direction, stating in the end that an eligibility decision due to match-fixing goes *"without prejudice to any possible disciplinary measures"* and therefore has no influence on the disciplinary measure. The order in the AFC regulations, even if this provision was already enacted in 2010, is exactly the same as the one outlined in the case CAS 2013/A/3256. Article 73.6 of the AFC Statutes in addition also states that right to participate in a competition can be refused with *"immediate effect"*. This provision gives a clear hint as to the intended order as well.

The interpretation of these rules also let the Panel assume that the disciplinary measure was a final and also binding decision. There might additionally be an administrative measure which normally comes automatically and before a possible disciplinary procedure for which a case usually is treated more thoroughly. If an *"automatic suspension"*, as it was called by the Respondent itself, was to be pronounced, there was no point in issuing such a decision only ten months after the disciplinary sanction, even if a club only qualified at a later stage. Various possibilities still existed like pronouncing an automatic exclusion in case of a qualification in the following years or at least a reservation in the DC decision. Generally said, an automatic suspension should follow within the frame of the disciplinary procedure at the latest.

In the majority of the Panel's view, an identity of the objects was also given here, especially where looking at the fact that the DC could have pronounced an ineligibility for the AFC Cup as well (art. 60 AFC Statutes). Even if there was an autonomy between the AFC Committees and the AFC ECB, it was still the AFC on both ends that decided. A violation of the *ne bis in idem* principle had been established according to the majority of the Panel. The question remained if this violation could be healed.

As already lined out, the two-stage process, as a possible exception, was applied the wrong way round. The ECB with competence for administrative eligibility decisions should not be able to amend a DC decision (however wrong it might be). The order of the two procedures (disciplinary and administrative) might exceptionally be also the other way round in certain cases, but definitely not without any reservation or hint at all to a possible eligibility issue

arising. No such reservation was made in the case at hand though.

There was a further difference to the already mentioned case CAS 2013/A/3256 where a distinction was not only made between the order of the decisions but it needed to be added that the first, administrative measure was rendered by the national federation based on its regulations (TFF in that case) and the second, disciplinary one by the continental federation based on its regulations (UEFA). There was not only a distinction in the object regarding the nature of the decision but additionally also regarding the scope of the consequences or rather the issuing federation and the framework. A discharge by the continental federation as the issuer of the second decision never took place.

The case at hand had a different structure, with both regulations being issued by the AFC. There was no mention of another possible procedure arising and such a possibility was never made clear to the Appellant at any point during the Disciplinary Procedure or in the respective decision. The Appellant could count on not being charged again (cf. also CAS OG 02/001).

The Respondent further stressed that by signing the *"Participating Team Agreement"*, the Appellant explicitly accepted the Entry Manual and confirmed to comply with it. The Appellant therefore had to be aware of art. 12.8. of the Entry Manual and should have been aware of a threatening ineligibility decision. Yet in the case at hand, the Appellant could not be aware of such a threat as the DC decision explicitly dismissed all the charges concerning an involvement in match-fixing. The Appellant confirmed its compliance with the Entry Manual as it had justified reason to believe that art. 12.8. of the Entry Manual would not apply to them due to the previous acquittal.

Decision

The Panel found that the Appeal should be upheld and the Appellant be deemed eligible to participate in the 2018 AFC Cup.

Jugement de la Cour Européenne des Droits de l'Homme
Judgement of the European Court of Human Rights

Affaire Mutu et Pechstein c. Suisse

Jugement de la Cour Européenne des Droits de l'Homme
Troisième section
Affaire Mutu et Pechstein c. Suisse
(Requêtes nos 40575/10 et 67474/10)
Arrêt Strasbourg 2 octobre 2018

Cet arrêt deviendra définitif dans les conditions définies à l'article 44 § 2 de la Convention. Il peut subir des retouches de forme.

Procédure

En droit

En l'affaire Mutu et Pechstein c. Suisse,
La Cour européenne des droits de l'homme (troisième section), siégeant en une chambre composée de:
Helena Jäderblom, présidente,
Branko Lubarda,
Luis López Guerra,
Helen Keller,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides, juges,
et de Fatoş Aracı, greffière adjointe de section,

Après en avoir délibéré en chambre du conseil le 6 décembre 2016 ainsi que les 20 février et 28 août 2018,

Rend l'arrêt que voici, adopté à cette date:

Procédure

1. À l'origine de l'affaire se trouvent deux requêtes (no 40575/10 et no 67474/10) dirigées contre la Confédération suisse et dont, respectivement, un ressortissant roumain, M. Adrian Mutu ("le requérant"), et une ressortissante allemande, Mme Claudia Pechstein ("la requérante"), ont saisi la Cour, respectivement, le 13 juillet 2010 et le 11 novembre 2010, en vertu de l'article 34 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales ("la Convention").

2. Le requérant a été représenté par Me M. Hissel, avocat à Eupen (Belgique), et la requérante par Me S. Bergmann, avocat à Berlin. Le gouvernement suisse ("le Gouvernement") a été représenté par son agent, M. F. Schürmann, et par son agent suppléant, M. A. Scheidegger, de l'Office fédéral de la justice.

3. Le requérant alléguait principalement une violation de l'article 6 § 1 de la Convention.

4. La requérante se plaignait de violations de l'article 6 §§ 1 et 2 de la Convention.

5. Les requêtes ont été communiquées au Gouvernement le 12 février 2013.

6. Le 23 mai 2013, le club de football Chelsea Football Club Limited ("le club Chelsea" ou "le tiers intervenant") s'est vu accorder l'autorisation d'intervenir dans la procédure écrite (article 36 § 2 de la Convention et article 44 § 3 du règlement de la Cour) dans le cadre de la requête no 40575/10.

7. Le gouvernement roumain et le gouvernement allemand, qui ont reçu communication de la requête no 40575/10 et de la requête no 67474/10 respectivement (article 36 § 1 de la Convention et article 44 § 1 a) du règlement de la Cour), n'ont pas souhaité exercer leur droit d'intervenir dans la procédure.

8. Le 6 décembre 2016, la Cour a décidé de joindre les deux requêtes en application de l'article 42 § 1 de son règlement.

En fait

I. LES CIRCONSTANCES DES CAS D'ESPECE

A. Les faits relatifs à la requête no 40575/10

9. Le 11 août 2003, le requérant, joueur de football professionnel, conclut avec le club Chelsea un contrat de travail – régi par le droit anglais –, dont l'échéance était fixée au 30 juin 2008. Le lendemain, il fut transféré du club italien AC Parma au club Chelsea en échange d'une somme de 22 500 000 livres sterling (GBP) – soit environ 26 343 000 euros (EUR). Le contrat prévoyait que le requérant recevrait un salaire annuel brut de 2 350 000 GBP (soit environ 2 751 000 EUR), ainsi qu'une "prime à la signature" de 330 000 GBP (soit environ 386 000 EUR) payable en cinq fois.

10. Le 1er octobre 2004, l'Association anglaise de football procéda à un contrôle antidopage ciblé, qui révéla la présence de cocaïne dans l'échantillon prélevé sur le

requérant. Le 28 octobre 2004, le club Chelsea mit fin au contrat du requérant avec effet immédiat. Une mesure de suspension fut prononcée à l'encontre de celui-ci.

11. Une fois la période de suspension échue, le requérant retourna en Italie, où il rejoua au niveau professionnel dès le printemps 2005. Par la suite, il fut successivement au service des clubs Juventus FC, ACF Fiorentina et AC Cesena. Il fut à nouveau suspendu en 2010 pour une période de six mois, pour dopage. Il évolua ensuite dans le championnat français de première division, au sein du club corse d'Ajaccio.

12. Le 26 janvier 2005, le requérant et le club Chelsea décidèrent de soumettre à la commission de recours de la Première Ligue anglaise ("la FAPLAC"), un organe affilié à la Fédération Internationale de Football Association ("la FIFA"), la question de savoir s'il y avait eu rupture unilatérale du contrat par le requérant "sans juste motif" au sens de l'article 21 du règlement de la FIFA concernant le statut et le transfert des joueurs ("le règlement de 2001"). Le requérant n'était pas obligé d'accepter un arbitrage eu égard à la possibilité offerte par l'article 42 du règlement de 2001 à tout joueur de football de porter un litige l'opposant à son club devant un tribunal étatique.

13. Par une décision du 20 avril 2005, la FAPLAC répondit par l'affirmative à cette question.

14. Saisi d'un appel du requérant, le Tribunal arbitral du sport ("le TAS"), compétent pour connaître des recours contre les décisions de la FAPLAC et présidé par un avocat allemand, Me D. R. M., confirma cette décision par une sentence du 15 décembre 2005. La formation arbitrale interpréta les termes "unilateral breach" de l'article 21 du règlement de 2001, et parvint à la conclusion qu'ils visaient la rupture d'un contrat de travail et non pas sa résiliation. Le requérant ne contesta pas cette sentence.
Le 11 mai 2006, le club Chelsea saisit la Chambre de règlement des litiges ("la CRL") de la FIFA d'une demande de dommages intérêts fondée sur la rupture unilatérale du contrat par le requérant. La CRL se déclara d'abord incompétente. Saisi par le club Chelsea, le TAS lui renvoya la cause le 21 mai 2007 afin qu'elle se prononçât sur le fond. Par une décision du 7 mai 2008, la CRL condamna le requérant à verser au club Chelsea la somme de 17 173 990 EUR. La CRL prit pour base la part non amortie des frais payés par le club Chelsea pour le transfert du requérant, en application du droit anglais, par le jeu de l'article 22 du règlement de 2001.

15. Le 2 septembre 2008, le requérant interjeta appel devant le TAS, concluant à sa libération totale du paiement de dommages-intérêts. Il choisit Me J.-J. B., un avocat français, comme arbitre. Le 22 septembre 2008, s'appuyant sur l'article R34 du code de l'arbitrage en matière de sport ("le code de l'arbitrage"), il requit la récusation de l'arbitre choisi par le club Chelsea, Me D. R. M, qui avait présidé la formation du TAS ayant émis la sentence du 15 décembre 2005. Par une décision du 13 janvier 2009, le Conseil international de l'arbitrage en matière de sport ("le CIAS") rejeta cette requête. Le 14 janvier 2009, le TAS informa les parties que la formation arbitrale serait constituée de Me J.-J. B., de Me D. R. M. et du professeur L. F., avocat à Milan, qui en assurerait la présidence. Par une sentence du 31 juillet 2009, le TAS rejeta l'appel du requérant. Il jugea que la seule question encore litigieuse, à savoir la question du montant des dommages intérêts, avait été tranchée par la CRL en conformité avec l'article 22 du règlement de 2001 et le droit anglais.

16. Le 14 septembre 2009, le requérant déposa un recours devant le Tribunal fédéral suisse ("le Tribunal fédéral"), concluant à l'annulation de cette sentence au motif que le TAS n'avait pas présenté des garanties suffisantes d'indépendance et d'impartialité. Selon lui, les arbitres L. F. et D. R. M. n'auraient pas dû siéger en son sein. En ce qui concernait le premier, le requérant s'appuyait sur un courriel anonyme selon lequel le

cabinet d'avocats dans lequel il était associé représentait les intérêts du propriétaire du club Chelsea. En ce qui concernait le second, le requérant indiquait qu'il avait déjà siégé au sein de la formation ayant rendu la première sentence arbitrale, en date du 15 décembre 2005. Le requérant soutenait également que la sentence était contraire à l'ordre public matériel, à l'interdiction du travail forcé et à son droit au respect de sa vie privée.

17. Par un arrêt du 10 juin 2010 (4A_458/2009), le Tribunal fédéral débouta le requérant, principalement au motif que la formation arbitrale pouvait selon lui être considérée comme "indépendante et impartiale". Il rejeta ceux des autres moyens du requérant qu'il avait déclarés recevables. Le Tribunal fédéral se prononça notamment en ces termes:

"3.1 Un tribunal arbitral doit, à l'instar d'un tribunal étatique, présenter des garanties suffisantes d'indépendance et d'impartialité (ATF 125 I 389 consid. 4a ; 119 II 271 consid. 3b et les arrêts cités). Le non-respect de cette règle conduit à une composition irrégulière relevant de la disposition précitée (ATF 118 II 359 consid. 3b). Pour dire si un tribunal arbitral présente de telles garanties, il faut se référer aux principes constitutionnels développés au sujet des tribunaux étatiques (ATF 125 I 389 consid. 4a ; 118 II 359 consid. 3c p. 361). Il convient, toutefois, de tenir compte des spécificités de l'arbitrage, et singulièrement de l'arbitrage international, lors de l'examen des circonstances du cas concret (ATF 129 III 445 consid. 3.3.3 p. 454). A cet égard, l'arbitrage en matière de sport institué par le TAS présente des particularités qui ont déjà été mises en évidence par ailleurs (ATF 129 III 445 consid. 4.2.2.2), telle la liste fermée d'arbitres, et dont on ne saurait faire abstraction, même si elles ne justifient pas en soi de se montrer moins exigeant en matière d'arbitrage sportif qu'en matière d'arbitrage commercial.

(...)

3.2.1 Le recourant soutient que, le 1er septembre 2009, son conseil anglais a reçu un courrier électronique anonyme l'informant, en substance, que le cabinet d'avocats milanais dans lequel le Professeur [L. F.] travaille représentait les intérêts de [R. A.], important homme d'affaires russe qui contrôle l'intimé, circonstance que le président de la Formation avait omis de révéler dans sa déclaration d'indépendance.

Le 13 octobre 2009, [L. F.] a produit une déclaration écrite détaillée, annexée à la réponse du TAS, dans laquelle il conteste vigoureusement les allégations du recourant tirées de ce courrier électronique anonyme. Ladite déclaration a été communiquée au recourant, lequel n'a pas jugé utile d'en réfuter le contenu puisqu'il s'est abstenu de déposer un mémoire de réplique.

3.2.2 Comme le recourant soutient avoir découvert le motif de révision à réception du courrier électronique du 1er septembre 2009, soit avant l'expiration du délai de recours, c'est à bon droit qu'il l'a invoqué dans le cadre du présent recours, au titre de la composition irrégulière du tribunal arbitral (art. 190 al. 2 let. a LDIP), et non pas par la voie d'une demande de révision (arrêt 4A_234/2008 du 14 août 2008 consid. 2.1).

Cela étant, le recourant concède lui-même, dans son mémoire (n. 58 et 62), qu'il n'a pas les moyens de vérifier l'exactitude des informations qui lui ont été communiquées de manière anonyme et que les faits mentionnés dans le courrier électronique en question ne constitueraient un motif de récusation que s'ils étaient avérés. Or, force est d'admettre, sur la base de la déclaration écrite circonstanciée du Professeur [F.], laissée intacte par le recourant, que cette dernière condition n'est pas réalisée. Le président de la Formation y réfute, en effet, point par point, toutes les allégations visant à contester son indépendance par rapport à l'intimé. Comme il n'est pas contredit, sa présence au sein de la Formation ayant rendu la sentence attaquée n'apparaît nullement irrégulière, de sorte que le recourant n'a pas lieu de s'en plaindre a posteriori.

3.3.1 Le recourant conteste également l'indépendance de l'arbitre [D.-R. M.], choisi par l'intimé, au motif que cet arbitre avait déjà présidé la Formation ayant rendu la première sentence, favorable au club anglais, dans le litige divisant les parties. A cet égard, le recourant se réfère aux lignes directrices sur les conflits d'intérêts dans l'arbitrage international, édictées par l'International Bar Association (IBA Guidelines on Conflicts of Interest in International Arbitration approuvées le 22 mai 2004, "http://www.ibanet.org/publications/Publications_home.cfm" ; ci après: les lignes directrices ; à leur

sujet, cf. l'arrêt 4A_506/2007 du 20 mars 2008 consid. 3.3.2.2 et les auteurs cités). Selon lui, la circonstance alléguée relèverait du chiffre 2.1.2 de ces lignes directrices, qui vise le cas où l'arbitre a été précédemment impliqué dans l'affaire ("the arbitrator has previous involvment in the case"), circonstance rangée dans la liste dite rouge relative ("waivable red list") qui appréhende les situations dans lesquelles l'arbitre est tenu de se récuser, sauf consentement exprès des parties (ch. 2 de la Partie II des lignes directrices). De l'avis du recourant, ladite circonstance pourrait également relever du chiffre 3.1.5 de la liste orange (situations intermédiaires devant être révélées, mais ne justifiant pas nécessairement une récusation), lequel s'applique à l'arbitre qui participe, ou a participé durant les trois dernières années, en qualité d'arbitre, à une autre procédure arbitrale relative à une affaire connexe impliquant l'une des parties ou une entité affiliée à l'une des parties ("the arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on related issue involving one of the parties or an affiliate of one of the parties"). La désignation de [D.-R. M.] en qualité d'arbitre par l'intimé constituerait, aux dires du recourant, une marque d'appréciation de la partie qui a obtenu gain de cause dans la première affaire opposant les mêmes parties (recours, n. 75 i.f.).

(...)

3.3.3.1 Quoi qu'en dise le recourant, il n'est déjà pas sûr que les deux règles des lignes directrices invoquées par lui trouvent à s'appliquer en l'espèce.

La première d'entre elles suppose que l'arbitre a été précédemment impliqué dans l'affaire (ch. 2.1.2) ; sous-entendu la même affaire, à en juger par le titre de la rubrique où figure cette règle ("2.1. Relationship of the arbitrator to the dispute"). De ce point de vue, et à s'en tenir à un critère purement formel, la présente affaire se distingue de celle qui a donné lieu à la première sentence, datée du 15 décembre 2005. Preuve en est le fait que les deux causes ont été enregistrées sous des numéros d'ordre différents par le greffe du TAS (CAS 2005/A/876 pour l'une, CAS 2008/A/1644 pour l'autre). Une troisième cause a d'ailleurs été ouverte et liquidée dans l'intervalle par une sentence du 21 mai 2007 émanant de trois autres arbitres (CAS 2006/A/1192).

Quant à la seconde règle, prise elle aussi à la lettre, elle traite du cas où l'arbitre agit – ou a agi durant les trois dernières années – en qualité d'arbitre dans une autre procédure arbitrale concernant l'une des parties (ou une entité affiliée à l'une des parties) et non pas les deux, comme c'est ici le cas. Au demeurant, comme cette règle a été placée dans la liste orange, sa violation ne justifie pas la récusation automatique de l'arbitre visé par elle.

Cela étant, il ne faut pas surestimer le poids de ces arguments de nature formelle. Il sied, en effet, de ne point oublier que les lignes directrices, si elles constituent certes un instrument de travail précieux, n'ont pas pour autant valeur de loi. Dès lors, les circonstances du cas concret, tout comme la jurisprudence du Tribunal fédéral en la matière, resteront toujours décisives pour trancher la question du conflit d'intérêts (arrêt 4A_506/2007, précité, ibid.).

3.3.3.2 Le fait qu'un magistrat a déjà agi dans une cause peut éveiller un soupçon de partialité. Le cumul des fonctions n'est alors admissible que si le magistrat, en participant à des décisions antérieures relatives à la même affaire, n'a pas déjà pris position au sujet de certaines questions de manière telle qu'il ne semble plus à l'avenir exempt de préjugés et que, par conséquent, le sort du procès paraît déjà scellé. Pour en juger, il faut tenir compte des faits, des particularités procédurales ainsi que des questions concrètes soulevées au cours des différents stades de la procédure (ATF 126 I 168 consid. 2 et les arrêts cités). Il n'en va pas autrement dans le domaine de l'arbitrage. Le comportement d'un arbitre au cours de l'instance arbitrale peut également jeter le doute sur son indépendance et son impartialité. Cependant, le Tribunal fédéral se montre exigeant dans l'appréciation du risque de prévention. Ainsi, il est de jurisprudence que les mesures de procédure, justes ou fausses, ne sont pas, comme telles, de nature à fonder un soupçon objectif de prévention à l'égard de l'arbitre qui les a prises (ATF 111 Ia 259 consid. 3b/aa p. 264 et les références). Cette remarque s'applique aussi à l'arbitre qui a pris une part active à une sentence partielle, fût-elle erronée (ATF 113 LA 407 consid. 2a p. 409 i.f.).

En l'occurrence, la mission confiée à la Formation du TAS ayant rendu la première sentence arbitrale sous la présidence de l'arbitre [D.-R. M.] était nettement circonscrite. En effet, devant cette instance d'appel, le recourant ne contestait déjà plus avoir commis une violation grave de ses obligations contractuelles en consommant de la cocaïne. Il soutenait, en revanche,

que, dans la mesure où l'initiative de résilier le contrat de travail pour ce motif avait été prise par l'intimé, on ne pouvait pas lui imputer une "rupture unilatérale du contrat sans juste motif ou juste cause sportive", au sens de l'art. 21 du Règlement 2001, ni, partant, le condamner à dédommager son ex-employeur. La tâche des arbitres consistait donc uniquement à interpréter les termes "unilateral breach", figurant dans la version anglaise de l'art. 21 du Règlement 2001. La Formation a tranché cette question de principe en ce sens que ladite expression visait la rupture d'un contrat de travail et non pas sa résiliation. Elle a, par ailleurs, réfuté un second argument par lequel le recourant souhaitait qu'une différence fût faite entre le joueur qui abandonne son club sans juste motif et celui qui commet une violation grave de ses obligations contractuelles.

En se prononçant de cette manière, la Formation a certes rendu une sentence favorable à l'intimé, puisqu'elle a écarté une objection dirimante de la partie à qui celui-ci entendait réclamer des dommages-intérêts. Toutefois, hormis le fait que le recourant n'a jamais contesté cette première sentence, et sauf à faire un procès d'intention à l'arbitre [M.], il n'est pas possible d'admettre objectivement qu'en tranchant les deux questions susmentionnées, essentiellement théoriques, l'arbitre ait adopté un comportement propre à faire douter de son impartialité et à accréditer l'idée qu'il avait d'ores et déjà pris fait et cause pour l'intimé. De surcroît, il ne ressort pas de la sentence du 15 décembre 2005 que la Formation y aurait préjugé d'une quelconque manière la question du montant de l'indemnité due par le recourant. Il convient de souligner, en outre, que l'on a affaire ici à une série de trois sentences rendues dans la même cause, matériellement parlant, et qui auraient pu l'être, le cas échéant, par une seule Formation, les deux premières revêtant un caractère préjudiciel par rapport à la troisième, c'est-à-dire la sentence finale formant l'objet du présent recours. Or, sauf circonstances exceptionnelles, il n'est en principe pas admissible de contester a posteriori la régularité de la composition du tribunal arbitral qui a rendu la sentence finale au seul motif que ses membres ont déjà statué dans la même cause en participant au prononcé de sentences préjudicielles ou partielles. Le permettre reviendrait à signer l'arrêt de mort de telles sentences, dont l'utilité n'est pourtant plus à démontrer. Pareilles circonstances, le recourant n'en invoque point. Par conséquent, les doutes qu'il émet rétrospectivement au sujet de l'indépendance et de l'impartialité de l'arbitre [M.] ne sont pas justifiés.

3.4 D'où il suit que le grief tiré de la violation de l'art. 190 al. 2 let. a LDIP tombe à faux tant à l'égard du président [F.] qu'envers l'arbitre [M.]"

B. Les faits relatifs à la requête no 67474/10

18. La requérante est une patineuse de vitesse professionnelle, et elle appartient à la Deutsche Eisschnelllauf-Gemeinschaft ("la DESG"), qui est elle-même membre de l'International Skating Union ("l'ISU"), la fédération internationale de patinage, dont le siège est à Lausanne.

19. Le 6 février 2009, l'ensemble des athlètes inscrits aux championnats du monde de patinage de vitesse devant avoir lieu les 7 et 8 février 2009 à Hamar, en Norvège, parmi lesquels la requérante, furent soumis à des tests antidopage. Le 18 février 2009, la requérante subit un nouveau test. Après examen du profil sanguin de la requérante, l'ISU introduisit une plainte devant sa commission disciplinaire. Une audience fut tenue à Berne les 29 et 30 juin 2009. Par une décision du 1er juillet 2009, ladite commission prononça la suspension de la requérante pour une période de deux ans avec effet rétroactif à compter du 9 février 2009.

20. Le 21 juillet 2009, la requérante et la DESG firent appel de cette décision devant le TAS. Le 17 août 2009, celui-ci leur fit connaître la composition de la formation arbitrale. Aucun commentaire ne fut formulé à ce sujet durant la procédure devant le TAS. L'audience eut lieu à Lausanne les 22 et 23 octobre 2009. Malgré la demande de publicité de l'audience formulée par la requérante, celle-ci se tint à huis clos. Douze experts désignés par les parties furent entendus. Celles-ci purent les interroger librement.

21. Les 23 et 24 novembre 2009, la requérante demanda la réouverture de la procédure. Le 25 novembre 2009, le TAS

rejeta cette demande et confirma la suspension de deux ans.

22. Le 7 décembre 2009, la requérante déposa un recours devant le Tribunal fédéral, concluant à l'annulation de la sentence du TAS. Elle soutenait que le TAS ne constituait pas un tribunal "indépendant et impartial" en raison du mode de nomination des arbitres, que son président n'avait pas été impartial car il avait auparavant fait part de sa "ligne dure" contre le dopage et que son secrétaire général avait modifié la décision arbitrale a posteriori. Elle reprochait en outre au TAS de ne pas avoir tenu d'audience publique. Elle se plaignait également d'une violation de son droit d'être entendue et invoquait différents moyens relatifs à l'ordre public.

23. Par un arrêt du 10 février 2010, le Tribunal fédéral rejeta le recours de la requérante. La haute juridiction s'exprima notamment en ces termes:
[traduction du Greffe]

"3.1.2 Lorsqu'un tribunal arbitral présente un défaut d'indépendance ou d'impartialité, il s'agit d'un cas de composition irrégulière au sens de l'article 190 al. 2 let. a de la LDIP. En vertu du principe de la bonne foi, le droit d'invoquer le moyen se périme cependant si la partie ne le fait pas valoir immédiatement (ATF 129 III 445, consid. 3.1, p. 449 et autres références).

La recourante a saisi elle-même le TAS et a signé l'ordre de procédure du 29 septembre 2009 sans soulever de grief quant à son indépendance ou son impartialité. Dans ces circonstances, attendre d'avoir interjeté appel devant le Tribunal fédéral pour soulever pour la première fois la question de l'impartialité de la formation arbitrale est incompatible avec le principe de la bonne foi. En conséquence, le grief tiré du défaut d'indépendance du tribunal arbitral doit être écarté.

3.1.3 Par ailleurs, contrairement à ce que soutient la recourante, le TAS doit être vu comme un véritable tribunal arbitral. De surcroît, selon la jurisprudence du Tribunal fédéral, il jouit d'une indépendance suffisante par rapport au CIO [le Comité international olympique] pour que les sentences qu'il rend, y compris dans les causes intéressant cet organisme, puissent être considérées comme de véritables jugements, assimilables à ceux d'un tribunal étatique (ATF 129 III 445, consid. 3, pp. 448 et suiv. et autres références).

Indépendamment du fait que les allégations factuelles de la recourante ne reposent pas sur les faits établis dans la sentence attaquée (art. 105 al. 1 LTF), ses arguments de caractère général ne font pas naître de doutes raisonnables quant à l'indépendance du TAS, si bien que le grief tiré du défaut d'indépendance du TAS serait en tout état de cause considéré comme non fondé.

3.2 En deuxième lieu, la recourante se plaint de la prétendue partialité de F., le président de la formation arbitrale. Celui-ci aurait, en octobre 2007, dit adopter "une ligne dure en matière de dopage" à l'un des représentants légaux actuels de la recourante qui souhaitait qu'il fût nommé arbitre dans une affaire impliquant un sportif qu'il représentait. La recourante en déduit qu'avec la nomination de F. par G., ancien membre du Comité national olympique, président d'une fédération sportive internationale et membre de la Commission sport et droit du CIO, la décision était prise d'avance.

Ce grief est infondé. L'accusation selon laquelle le président de la formation arbitrale aurait, dans un autre contexte, affirmé adopter une "ligne dure" dans les affaires de dopage est trop vague et trop générale pour faire naître un doute raisonnable quant à l'indépendance de F., a fortiori en l'absence de lien direct avec ledit contexte (comp. ATF 133 I 89, consid. 33, p. 92 ; ATF. 105 Ia 157, consid. 6a, p. 163).

Les griefs tirés de la partialité du président de la formation arbitrale et de la composition irrégulière de celle-ci en raison d'une prétendue influence du CIO sont sans fondement.

3.3 L'autre grief soulevé par la recourante, selon lequel le CIO et les fédérations sportives internationales auraient influencé la décision par l'intermédiaire du secrétaire général du TAS, lequel aurait rectifié a posteriori la décision attaquée, est pure spéculation et ne repose pas sur des faits établis. Ainsi, la recourante elle-même indique ne pas savoir si le secrétaire général a ou non fait usage de la possibilité de procéder à des "rectifications" de la sentence.

En outre, elle ne soulève pas un grief au sens de l'article 190 al. 2 let. a de la LDIP lorsqu'elle fait valoir que, selon l'article R59 du code du TAS, la

décision doit être communiquée au secrétaire général du TAS, lequel peut "procéder à des rectifications de pure forme" et "attirer l'attention de la formation [arbitrale] sur des questions de principe fondamentales". Contrairement à ce qui est allégué dans le recours, cette démarche ne remet pas en cause le fait que la sentence a été rendue par le TAS et par lui seul. Rien ne montre que celui-ci ait subi une influence illégitime de nature à faire douter de son indépendance.

Le grief tiré du défaut d'indépendance et de la composition irrégulière de la formation arbitrale (art. 190 al. 2 let.a LDIP) est donc infondé et les demandes liées à ce grief doivent en conséquence être rejetées.

4. La recourante allègue par ailleurs une violation du droit à une audience publique.

4.1 C'est à tort qu'elle invoque à cet égard l'article 6 § 1 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, l'article 30 § 3 de la Constitution fédérale et l'article 14 § 1 du Pacte international relatif aux droits civils et politiques puisque, selon la jurisprudence du Tribunal fédéral, ces dispositions ne s'appliquent pas aux procédures d'arbitrage volontaire (comp. arrêts 4P.105/2006 du 4 août 2006, consid. 7.3 ; 4P.64/2001 du 11 juin 2001, consid. 2d/aa, non publié in ATF 127 III 429). Il n'est donc pas possible de déduire des dispositions précitées l'existence d'un droit à une audience publique dans le cadre d'une procédure d'arbitrage.

Le TAS n'a aucunement méconnu le droit de la recourante à une audience publique en rejetant, en application de l'article R57 du code du TAS, qui dispose que l'audience n'est publique qu'en cas d'accord des parties, la demande qu'elle avait formulée pour que son agent fût autorisé à assister à l'audience. L'intéressée ne démontre pas dans quelle mesure le droit à être entendue (art. 190 al. 2 let. d LDIP) et la question de l'ordre public (art. 190 al. 2 let. e LDIP) devraient avoir pour effet d'imposer la tenue d'une audience publique dans le cadre de procédures arbitrales alors que ces audiences se tiennent normalement à huis clos.

Indépendamment de la question de l'existence ou non de ce droit, étant donné la place éminente qu'occupe le TAS dans le secteur sportif, il serait souhaitable [wünschenswert], pour renforcer la confiance en l'équité et en l'indépendance de ses sentences, qu'une audience publique puisse être tenue si l'athlète en fait la demande.

4.2 Alors que la procédure devant le TAS comporte un libre examen des éléments factuels et juridiques, le pouvoir d'examen du Tribunal fédéral quant aux sentences arbitrales est extrêmement restreint. Ainsi, la présente espèce se prête à une décision sur pièces ; la tenue de débats publics (art. 57 LTF), souhaitée par la recourante, n'est pas indiquée.

L'obligation de tenir des débats publics, qui peut être exceptionnellement imposée par un droit supérieur au droit national – par exemple en cas de requête en vertu de l'article 120 al. 1 let. c. de la LTF ou lorsque le tribunal entend statuer lui-même sur le fond (comp. art. 107 al. 2 LTF) en se fondant sur ses propres constatations factuelles (comp. HEIMGARTNER/WIPRÄCHTIGER, in Basler Kommentar, Bundesgerichtsgesetz, 2008, nos 9 et suiv. sur l'art. 57 LTF ; JEAN-MAURICE FRÉSARD in Commentaire de la LTF, 2009, no 8 et suiv. sur l'art. 57 LTF), ne s'applique pas dans le cadre des procédures arbitrales selon l'article 77 de la LTF.

Il y a donc lieu de rejeter la demande de tenue de débats publics devant le Tribunal fédéral".

24. Après avoir été déboutée par le Tribunal fédéral et avoir saisi la Cour de sa requête, la requérante engagea également une procédure à l'encontre de l'ISU devant les juridictions allemandes.
Dans un premier temps, elle obtint gain de cause devant la cour d'appel de Munich, qui, dans un arrêt du 15 janvier 2015, jugea les sentences du TAS inapplicables en Allemagne. Selon cette juridiction, si l'on pouvait considérer que des athlètes acceptaient de se soumettre volontairement à la juridiction d'un tribunal arbitral, cela ne pouvait pas valoir dans le cas du TAS en raison du poids prépondérant des fédérations sportives dans sa composition. Selon la juridiction bavaroise, ce déséquilibre était accepté par les sportifs uniquement parce que, dans le cas contraire, ils ne pourraient pas participer aux compétitions professionnelles. Pour elle, il s'agissait par conséquent d'un "abus de position dominante".

25. Cet arrêt fut cassé par la Cour fédérale de justice allemande le 7 juin 2016. Selon cette haute juridiction, s'il était vrai que l'ISU exerçait un monopole au sens du droit de la concurrence allemand, les athlètes acceptaient néanmoins librement de souscrire la clause d'arbitrage prévoyant la juridiction du TAS et cette pratique ne constituait donc pas un abus de position dominante.

C. Le fonctionnement de l'arbitrage sportif international

26. Le TAS a officiellement été créé le 30 juin 1984, date de l'entrée en vigueur de ses statuts, dans le but de résoudre les litiges relatifs au sport. Son siège a été fixé à Lausanne. Institution d'arbitrage autonome sur le plan de l'organisation, mais sans personnalité juridique, il était composé à l'origine de soixante membres, désignés à raison d'un quart chacun par le Comité international olympique ("le CIO"), les fédérations internationales ("les FI"), les comités nationaux olympiques ("les CNO") et le président du CIO. Les frais de fonctionnement du TAS étaient supportés par le CIO, compétent pour modifier les statuts de ce tribunal (pour plus de détails, voir l'arrêt du Tribunal fédéral ATF 119 II 271, consid. 3b).

27. Dans un arrêt rendu en 1993, le Tribunal fédéral a formulé des réserves quant à l'indépendance du TAS par rapport au CIO, en raison des liens organiques et économiques existant entre les deux institutions. Selon lui, il était souhaitable que l'on assurât une indépendance accrue du TAS à l'égard du CIO (ATF 119 II 271, consid. 3b). Cet arrêt a entraîné une importante réforme du TAS.

28. Les principales nouveautés ont consisté en la création à Paris, le 22 juin 1994, du CIAS et dans la rédaction du code de l'arbitrage, entré en vigueur le 22 novembre 1994.

29. Fondation de droit privé soumise au droit suisse, le CIAS, dont le siège est à Lausanne, est composé de vingt membres juristes de haut niveau. Les membres du CIAS sont désignés pour une période renouvelable de quatre ans.

30. Le CIAS a notamment pour mission de sauvegarder l'indépendance du TAS et les droits des parties. Exerçant diverses fonctions, il lui incombe, en particulier, d'adopter et de modifier le code de l'arbitrage, d'administrer et de financer le TAS, d'établir la liste des arbitres du TAS pouvant être choisis par les parties, de statuer en matière de récusation et de révocation des arbitres et de nommer le secrétaire général du TAS.

31. Le TAS établit des formations qui sont chargées de trancher les litiges survenant dans le domaine du sport. Il est composé de deux chambres, à savoir la chambre arbitrale ordinaire et la chambre arbitrale d'appel. La première s'occupe des litiges soumis au TAS en qualité d'instance unique (exécution de contrats, responsabilité civile, etc.), tandis que la seconde connaît des recours dirigés contre des décisions disciplinaires prises en dernière instance par des organismes sportifs, tels que les fédérations (par exemple, suspension d'un athlète pour cause de dopage, de brutalités sur un terrain ou d'injures envers un arbitre de jeu).

1. Les règles relatives à la nomination des membres du CIAS, en vigueur à l'époque des faits

32. À l'époque des faits, les vingt membres du CIAS étaient nommés en vertu de l'article S4 du code de l'arbitrage, rédigé en *ces termes:*

"a. quatre membres sont désignés par les Fédérations Internationales (FI), à savoir trois par les FI olympiques d'été (ASOIF) et un par les FI olympiques d'hiver (AIWF), choisis en leur sein ou en dehors ;

b. quatre membres sont désignés par l'Association des Comités Nationaux Olympiques (ACNO), choisis en son sein ou en dehors ;

c. quatre membres sont désignés par le Comité International Olympique (CIO), choisis en son sein ou en dehors ;

d. quatre membres sont désignés par les douze membres du CIAS figurant ci-dessus, après des consultations appropriées, en vue de sauvegarder les intérêts des athlètes ;

e. quatre membres sont désignés par les seize membres du CIAS figurant ci-dessus et choisis parmi des personnalités indépendantes des organismes désignant les autres membres du CIAS".

2. Les règles relatives à la nomination des arbitres du TAS, en vigueur à l'époque des faits

33. Les arbitres du TAS devaient être au nombre de cent cinquante au moins et ils n'étaient pas affectés à une chambre en particulier. La liste des arbitres du TAS était composée en vertu de l'article S14 du code de l'arbitrage, rédigé en ces termes:

"En constituant la liste des arbitres du TAS, le CIAS devra faire appel à des personnalités ayant une formation juridique complète, une compétence reconnue en matière de droit du sport et/ou d'arbitrage international, une bonne connaissance du sport en général et la maîtrise d'au moins une des langues de travail du TAS, dont les noms et qualifications sont portés à l'attention du CIAS, notamment par le CIO, les FI et les CNO. En outre, le CIAS devra respecter, en principe, la répartition suivante:

• 1/5e des arbitres sélectionnés parmi les personnes proposées par le CIO, choisies en son sein ou en dehors;

• 1/5e des arbitres sélectionnés parmi les personnes proposées par les FI, choisies en leur sein ou en dehors;

• 1/5e des arbitres sélectionnés parmi les personnes proposées par les CNO, choisies en leur sein ou en dehors ;

• 1/5e des arbitres choisis, après des consultations appropriées, en vue de sauvegarder les intérêts des athlètes ;

• 1/5e des arbitres choisis parmi des personnes indépendantes des organismes chargés de proposer des arbitres conformément au présent article".

34. Seuls les arbitres figurant sur la liste ainsi constituée qui y restaient inscrits pendant une période renouvelable de quatre ans (article S13 du code de l'arbitrage) pouvaient siéger dans une formation arbitrale (articles R33, R38 et R39 du code de l'arbitrage).

35. Selon l'article R54 du code de l'arbitrage, le président de la formation arbitrale était désigné par le président de la chambre arbitrale d'appel du TAS après consultation des arbitres nommés par les parties.

36. Lorsqu'ils étaient appelés à siéger, les arbitres devaient signer une déclaration solennelle d'indépendance (article S18 du code de l'arbitrage). Au demeurant, tout arbitre avait l'obligation de révéler immédiatement toute circonstance susceptible de compromettre son indépendance à l'égard des parties ou de l'une d'elles (article R33 du code de l'arbitrage). Il pouvait d'ailleurs être récusé lorsque les circonstances permettaient de douter légitimement de son indépendance. La récusation, qui était de la compétence exclusive du CIAS, devait être requise sans délai dès la connaissance de la cause de récusation (article R34 du code de l'arbitrage). Tout arbitre pouvait être révoqué par le CIAS s'il refusait ou s'il était empêché d'exercer ses fonctions, ou bien s'il ne remplissait pas ses fonctions conformément au code de l'arbitrage. Le CIAS pouvait exercer cette fonction par l'intermédiaire de son Bureau rendant une "décision sommairement motivée" (article R35 du code de l'arbitrage). Lorsque la formation arbitrale était composée de trois arbitres, à défaut de convention, chaque partie désignait son arbitre et le président de la formation était choisi par les deux arbitres ou, à défaut d'entente, nommé par le président de la chambre (article R40.2 du code de l'arbitrage). Les arbitres désignés par les parties ou par d'autres arbitres n'étaient réputés nommés qu'après confirmation par le président de la chambre. Une fois la formation constituée, le dossier était transmis

aux arbitres pour instruction de la cause et prononcé de la sentence par ceux-ci.

37. Composé au départ de soixante membres, le TAS comptait à l'époque des faits près de trois cents arbitres.

3. Les modifications ultérieures aux règles relatives à la nomination des arbitres du TAS

38. Le 1er janvier 2012, l'article S14 du code de l'arbitrage a été modifié par la suppression des règles relatives à la nomination des arbitres par cinquièmes. Il se lit de la manière suivante en sa nouvelle formulation, telle que figurant actuellement sur le site Internet du TAS (http://www.tas-cas.org/fileadmin/user_upload/code_fr_010112_avec_modifs.pdf):

"En constituant la liste des arbitres du TAS, le CIAS devra faire appel à des personnalités ayant une formation juridique complète, une compétence reconnue en matière de droit du sport et/ou d'arbitrage international, une bonne connaissance du sport en général et la maîtrise d'au moins une des langues de travail du TAS, dont les noms et qualifications sont portés à l'attention du CIAS, notamment par le CIO, les FI et les CNO. ~~En outre, le CIAS devra respecter, en principe, la répartition suivante:~~

~~• 1/5e des arbitres sélectionnés parmi les personnes proposées par le CIO, choisies en son sein ou en dehors;~~

~~• 1/5e des arbitres sélectionnés parmi les personnes proposées par les FI, choisies en leur sein ou en dehors;~~

~~• 1/5e des arbitres sélectionnés parmi les personnes proposées par les CNO, choisies en leur sein ou en dehors ;~~

~~• 1/5e des arbitres choisis, après des consultations appropriées, en vue de sauvegarder les intérêts des athlètes ;~~

~~• 1/5e des arbitres choisis parmi des personnes indépendantes des organismes chargés de proposer des arbitres conformément au présent article".~~

39. En ses dispositions pertinentes en l'espèce, le code de l'arbitrage, en vigueur au 1er janvier 2017, se lit ainsi:

"S6 Le CIAS exerce les fonctions suivantes:

(...)

3. Il désigne les arbitres constituant la liste des arbitres du TAS et les médiateurs(rices) constituant la liste des médiateurs du TAS ; il peut également les retirer de ces listes (...)

S14 En constituant la liste des arbitres du TAS, le CIAS devra faire appel à des personnalités ayant une formation juridique appropriée, une compétence reconnue en matière de droit du sport et/ou d'arbitrage international, une bonne connaissance du sport en général et la maîtrise d'au moins une des langues de travail du TAS, dont les noms et qualifications sont portés à l'attention du CIAS, notamment par le CIO, les FI, les CNO, ainsi que par les commissions d'athlètes du CIO, des FI et des CNO. Le CIAS peut identifier les arbitres ayant une spécialisation particulière pour traiter certains types de litiges.

En constituant la liste des médiateurs(-rices) du TAS, le CIAS veille à nommer des personnalités ayant de l'expérience dans le domaine de la médiation et une bonne connaissance du sport en général.

S15 Le CIAS publie les listes des arbitres et des médiateurs(-rices) du TAS, ainsi que toute modification ultérieure de ces listes.

S16 Lors de la désignation des arbitres et des médiateurs(-rices), le CIAS prend en considération la représentation continentale et les différentes cultures juridiques".

II. LE DROIT INTERNE PERTINENT

1. La loi fédérale sur le droit international privé du 18 décembre 1987

40. Les dispositions pertinentes en l'espèce de la loi fédérale sur le droit international privé du 18 décembre 1987 ("la LDIP") sont ainsi libellées:

Chapitre 12 Arbitrage international

Art. 176

"1 Les dispositions du présent chapitre s'appliquent à tout arbitrage si le siège du tribunal arbitral se trouve en Suisse et si au moins l'une des parties

n'avait, au moment de la conclusion de la convention d'arbitrage, ni son domicile, ni sa résidence habituelle en Suisse.

2 Les dispositions du présent chapitre ne s'appliquent pas lorsque les parties ont exclu par écrit son application et qu'elles sont convenues d'appliquer exclusivement les règles de la procédure cantonale en matière d'arbitrage.

3 Les parties en cause ou l'institution d'arbitrage désignée par elles ou, à défaut, les arbitres déterminent le siège du tribunal arbitral".

Article 190

"1 La sentence est définitive dès sa communication.

2 Elle ne peut être attaquée que:

a. lorsque l'arbitre unique a été irrégulièrement désigné ou le tribunal arbitral irrégulièrement composé;

b. lorsque le tribunal arbitral s'est déclaré à tort compétent ou incompétent ;

c. lorsque le tribunal arbitral a statué au-delà des demandes dont il était saisi ou lorsqu'il a omis de se prononcer sur un des chefs de la demande ;

d. lorsque l'égalité des parties ou leur droit d'être entendues en procédure contradictoire n'a pas été respecté ;

e. lorsque la sentence est incompatible avec l'ordre public.

3 En cas de décision incidente, seul le recours pour les motifs prévus à l'al. 2, let. a et b, est ouvert ; le délai court dès la communication de la décision".

Article 191

"Le recours n'est ouvert que devant le Tribunal fédéral. La procédure est régie par l'article 77 de la loi du 17 juin 2005 sur le Tribunal fédéral".

Art. 192

"1 Si deux parties n'ont ni domicile, ni résidence habituelle, ni établissement en Suisse, elles peuvent, par une déclaration expresse dans la convention d'arbitrage ou un accord écrit ultérieur, exclure tout recours contre les sentences du tribunal arbitral; elles peuvent aussi n'exclure le recours que pour l'un ou l'autre des motifs énumérés à l'art. 190, al. 2.

2 Lorsque les parties ont exclu tout recours contre les sentences et que celles-ci doivent être exécutées en Suisse, la convention de New York du 10 juin 1958 pour la reconnaissance et l'exécution des sentences arbitrales étrangères s'applique par analogie".

2. La loi sur le Tribunal fédéral du 17 juin 2005, dans sa version en vigueur à l'époque des faits

41. Les dispositions pertinentes en l'espèce de la loi sur le Tribunal fédéral du 17 juin 2005 ("la LTF"), dans sa version en vigueur à l'époque des faits, étaient ainsi libellées:

Art. 57 Débats

"Le président de la cour peut ordonner des débats".

Art. 58 Délibération

"1 Le Tribunal fédéral délibère en audience:

a. si le président de la cour l'ordonne ou si un juge le demande;

b. s'il n'y a pas unanimité.

2 Dans les autres cas, le Tribunal fédéral statue par voie de circulation".

Art. 59 Publicité

"1 Les éventuels débats ainsi que les délibérations et votes en audience ont lieu en séance publique.

2 Le Tribunal fédéral peut ordonner le huis clos total ou partiel si la sécurité, l'ordre public ou les bonnes mœurs sont menacés, ou si l'intérêt d'une personne en cause le justifie.

3 Le Tribunal fédéral met le dispositif des arrêts qui n'ont pas été prononcés lors d'une séance publique à la disposition du public pendant 30 jours à compter de la notification".

Art. 61 Force de chose jugée

"Les arrêts du Tribunal fédéral acquièrent force de chose jugée le jour où ils sont prononcés".

Art. 77 Arbitrage international

"1 Le recours en matière civile est recevable contre les décisions de tribunaux arbitraux aux conditions prévues par les art. 190 à 192 de la loi fédérale du 18 décembre 1987 sur le droit international privé.

2 Sont inapplicables dans ces cas les art. 48, al. 3, 93, al. 1, let. b, 95 à 98, 103, al. 2, 105, al. 2, et 106, al. 1, ainsi que l'art. 107, al. 2, dans la mesure où cette dernière disposition permet au Tribunal fédéral de statuer sur le fond de l'affaire.

3 Le Tribunal fédéral n'examine que les griefs qui ont été invoqués et motivés par le recourant".

Art. 122 Violation de la Convention européenne des droits de l'homme

"La révision d'un arrêt du Tribunal fédéral pour violation de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales du 4 novembre 1950 (CEDH) peut être demandée aux conditions suivantes:

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

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

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

3. La jurisprudence pertinente du Tribunal fédéral

42. S'agissant de la question de savoir si un athlète professionnel devait être considéré comme "contraint" de se soumettre à une juridiction arbitrale, dans une affaire concernant un joueur de tennis professionnel, le Tribunal fédéral s'est prononcé en ces termes par un arrêt du 22 mars 2007, publié au Recueil officiel (ATF 133 III 235):

"4.3.2.2 (...) Le sport de compétition se caractérise par une structure très hiérarchisée, aussi bien au niveau international qu'au niveau national. Etablies sur un axe vertical, les relations entre les athlètes et les organisations qui s'occupent des diverses disciplines sportives se distinguent en cela des relations horizontales que nouent les parties à un rapport contractuel (ATF 129 III 445 consid. 3.3.3.2 p. 461). Cette différence structurelle entre les deux types de relations n'est pas sans influence sur le processus volitif conduisant à la formation de tout accord. En principe, lorsque deux parties traitent sur un pied d'égalité, chacune d'elles exprime sa volonté sans être assujettie au bon vouloir de l'autre. Il en va généralement ainsi dans le cadre des relations commerciales internationales. La situation est bien différente dans le domaine du sport. Si l'on excepte le cas – assez théorique – où un athlète renommé, du fait de sa notoriété, serait en mesure de dicter ses conditions à la fédération internationale régissant le sport qu'il pratique, l'expérience enseigne que, la plupart du temps, un sportif n'aura pas les coudées franches à l'égard de sa fédération et qu'il devra se plier, bon gré mal gré, aux desiderata de celle-ci. Ainsi l'athlète qui souhaite participer à une compétition organisée sous le contrôle d'une fédération sportive dont la réglementation prévoit le recours à l'arbitrage n'aura-t-il d'autre choix que d'accepter la clause arbitrale, notamment en adhérant aux statuts de la fédération sportive en question dans lesquels ladite clause a été insérée, à plus forte raison s'il s'agit d'un sportif professionnel. Il sera confronté au dilemme suivant: consentir à l'arbitrage ou pratiquer son sport en dilettante (...). Mis dans l'alternative de se soumettre à une juridiction arbitrale ou de pratiquer son sport "dans son jardin" (...) en regardant les compétitions "à la télévision" (...), l'athlète qui souhaite affronter de véritables concurrents ou qui doit le faire parce que c'est là son unique source de revenus (prix en argent ou en nature, recettes publicitaires, etc.) sera contraint, dans les faits, d'opter, nolens volens, pour le premier terme de cette alternative.

Par identité de motifs, il est évident que la renonciation à recourir contre une sentence à venir, lorsqu'elle émane d'un athlète, ne sera généralement pas le fait d'une volonté librement exprimée. L'accord qui résultera de la concordance entre la volonté ainsi manifestée et celle exprimée par l'organisation sportive intéressée s'en trouvera, dès lors, affecté ab ovo en raison du consentement obligatoire donné par l'une des parties. Or, en acceptant d'avance de se soumettre à toute sentence future, le sportif, comme on l'a vu, se prive d'emblée du droit de faire sanctionner ultérieurement la violation de principes fondamentaux et de garanties procédurales essentielles que pourrait commettre le tribunal arbitral appelé à se prononcer sur son cas. En outre, s'agissant d'une mesure disciplinaire prononcée à son encontre, telle la

suspension, qui ne nécessite pas la mise en œuvre d'une procédure d'exequatur, il n'aura pas la possibilité de formuler ses griefs de ce chef devant le juge de l'exécution forcée. Partant, eu égard à son importance, la renonciation au recours ne doit, en principe, pas pouvoir être opposée à l'athlète, même lorsqu'elle satisfait aux exigences formelles fixées à l'art. 192 al. 1 LDIP (...). Cette conclusion s'impose avec d'autant plus de force que le refus d'entrer en matière sur le recours d'un athlète qui n'a eu d'autre choix que d'accepter la renonciation au recours pour être admis à participer aux compétitions apparaît également sujet à caution au regard de l'art. 6 par. 1 CEDH (...)".

43. Un an plus tard, le Tribunal fédéral s'est prononcé comme suit dans une affaire concernant un organisateur de matchs de football (arrêt du 20 mars 2008, 4A_506/2007):

"3.2 (...) C'est le lieu d'observer que l'on a affaire ici, contrairement à ce qui est le cas pour la grande majorité des affaires du TAS soumises au Tribunal fédéral, à un litige relevant de la procédure d'arbitrage ordinaire, au sens des art. R38 ss du Code, et non de la procédure arbitrale d'appel consécutive à la contestation d'une décision prise par un organe d'une fédération sportive ayant accepté la juridiction du TAS (cf. art. R47 ss du Code). En cela, le différend soumis au TAS, relativement à l'exécution du contrat international en cause, revêtait toutes les caractéristiques de ceux qui font l'objet d'un arbitrage commercial ordinaire, n'était le contexte sportif dans lequel il s'inscrivait. Ce différend mettait aux prises des parties placées sur un pied d'égalité, qui avaient choisi de le faire trancher par la voie arbitrale et qui n'ignoraient rien des enjeux financiers qu'il comportait ; leur situation était bien différente, sous cet angle, de celle du simple sportif professionnel opposé à une puissante fédération internationale (cf. ATF 133 III 235 consid. 4.3.2.2)".

44. En ce qui concerne l'indépendance du TAS, notamment en raison du mécanisme de nomination des arbitres, dans un arrêt du 27 mai 2003 publié au Recueil officiel (ATF 129 III 445), le Tribunal fédéral s'est prononcé comme suit:

"3.3.3.2 (...) Tel qu'il a été aménagé depuis la réforme de 1994, le système de la liste d'arbitres satisfait aujourd'hui aux exigences constitutionnelles d'indépendance et d'impartialité applicables aux tribunaux arbitraux. Les arbitres figurant sur la liste sont au nombre de 150 au moins et le TAS en compte environ 200 à l'heure actuelle. La possibilité de choix offerte aux parties est ainsi bien réelle, quoi qu'en disent les recourantes, même si l'on tient compte de la nationalité, de la langue et de la discipline sportive pratiquée par l'athlète qui saisit le TAS. (...)

*Force est, en outre, de souligner que le TAS, lorsqu'il fonctionne comme instance d'appel extérieure aux fédérations internationales, n'est pas comparable à un tribunal arbitral permanent d'une association, chargé de régler en dernier ressort des différends internes. Revoyant les faits et le droit avec plein pouvoir d'examen et disposant d'une entière liberté pour rendre une nouvelle décision en lieu et place de l'instance qui a statué préalablement (*REEB, *Revue, ibid.), il s'apparente davantage à une autorité judiciaire indépendante des parties. A son égard, le système de la liste d'arbitres ne soulève dès lors pas les mêmes objections que celles qu'il rencontre lorsqu'il est utilisé par les tribunaux arbitraux créés par des associations. Au demeurant, il n'est pas certain que le système dit de la liste ouverte - il offre aux parties (ou à l'une d'elles) la possibilité de choisir un arbitre en dehors de la liste, contrairement au système de la liste fermée appliqué par le TAS (cf. CLAY, op. cit., n. 478 p. 400) -, qui a les faveurs de certains auteurs (voir not.: BADDELEY, op. cit., p. 274; STEPHAN NETZLE, Das Internationale Sport-Schiedsgericht in Lausanne. Zusammensetzung, Zuständigkeit und Verfahren, in Sportgerichtsbarkeit, in* Recht und Sport, *vol. 22, p. 9 ss, 12), constitue la panacée. Au contraire, sous l'angle de l'efficacité du tribunal arbitral, ce système comporte le risque qu'il y ait, au sein du tribunal un ou plusieurs arbitres non spécialisés et enclins à agir comme s'ils étaient les avocats des parties qui les ont désignés (cf., à ce sujet: SCHILLIG, op. cit., p. 160)".*

III. LES TEXTES INTERNATIONAUX

Le règlement d'arbitrage de la Cour internationale d'arbitrage

45. La disposition pertinente en l'espèce du règlement d'arbitrage de la Cour internationale d'arbitrage ("le règlement de l'ICC") peut se lire ainsi:

Article 12

"(...)

4 Lorsque les parties sont convenues que le litige sera résolu par trois arbitres, chacune des parties, respectivement dans la Demande et dans la Réponse, désigne un arbitre pour confirmation. Si l'une des parties s'en abstient, la nomination est faite par la Cour [internationale d'arbitrage].

5 Lorsque le litige est soumis à trois arbitres, le troisième arbitre, qui assume la présidence du tribunal arbitral, est nommé par la Cour [internationale d'arbitrage], à moins que les parties ne soient convenues d'une autre procédure (...)"

IV. LE DROIT ET LA PRATIQUE PERTINENTS DE L'UNION EUROPEENNE

46. Vers la fin des années 1990, à la suite de plusieurs plaintes, la Commission européenne a ouvert une enquête approfondie sur les règles de la FIFA concernant les transferts internationaux de footballeurs. Cette enquête a conduit à l'envoi d'une communication de griefs à la FIFA le 14 décembre 1998. À la suite de cette communication et des échanges avec la Commission européenne, la FIFA a accepté de modifier sa réglementation en prévoyant notamment que, en cas de litige concernant sa mise en œuvre, les joueurs pouvaient recourir à un arbitrage volontaire ou saisir les juridictions nationales. La Commission européenne a estimé que les nouvelles règles répondaient à ses préoccupations et a mis un terme à la procédure.

47. Par ailleurs, par une décision publiée le 8 décembre 2017, à la suite d'une plainte déposée par deux patineurs professionnels, la Commission européenne a conclu que les règles de l'ISU prévoyant des sanctions sévères contre les athlètes qui participent à des épreuves de patinage de vitesse non reconnues par l'UIP sont contraires aux règles de l'UE en matière de pratiques anticoncurrentielles. Elle a par conséquent donné à l'ISU trois mois pour modifier ces règles.

V. LA REGLEMENTATION PERTINENTE DE LA FIFA

1. Le règlement de 2001

48. En ses dispositions pertinentes en l'espèce, le règlement de 2001 se lit ainsi:
Article 21

"1 a) Dans le cas de contrats signés jusqu'au 28e anniversaire du joueur: en cas de rupture unilatérale de contrat sans juste motif ou juste cause sportive au cours des 3 premières années, des sanctions sportives seront appliquées et une indemnité devra être payée.

b) Dans le cas de contrats signés après le 28e anniversaire, les mêmes principes s'appliquent mais seulement au cours des 2 premières années.

c) Dans les cas visés aux deux paragraphes qui précèdent, toute rupture unilatérale de contrat sans juste motif est interdite au cours d'une saison.

2 a) Toute rupture unilatérale de contrat sans juste motif ou sans juste cause sportive après les 2 ou 3 premières années n'entraînera pas l'application de sanctions. Des sanctions sportives pourront toutefois être applicables à l'encontre de clubs et/ou d'agents de joueurs occasionnant une rupture de contrat. Une indemnité devra être payée.

b) Une rupture de contrat comme définie dans le paragraphe ci-dessus est interdite au cours de la saison.

c) Des mesures disciplinaires pourront être appliquées par la Chambre de Règlement des Litiges en l'absence de préavis dans les 15 jours suivant le dernier match officiel de la saison nationale du club auprès duquel le joueur était enregistré".

Article 22

"Sans préjudice des dispositions relatives à l'indemnité de formation fixée à l'article 13 et suivants, et si rien n'est spécifiquement prévu par le contrat, l'indemnité pour rupture de contrat par le joueur ou le club devra être calculée conformément au droit national, aux spécificités du sport et en tenant compte de tout critère objectif inhérent au cas, tel:

1) Rémunération et autres bénéfices dans le contrat en cours et/ou dans le nouveau contrat

2) Durée de la période restante du contrat en cours (jusqu'à cinq ans maximum)

3) Montant de tous les frais payés par l'ancien club amortis au prorata sur le nombre d'années du contrat

4) Si la rupture intervient pendant les "périodes protégées", définies sous 21.1".

(...)"

Article 42

"Sans préjudice des droits de tout joueur ou de tout club de demander réparation devant une cour civile dans des litiges opposant clubs et joueurs, il convient d'établir un système arbitral et de règlement des litiges constitué des éléments suivants (...)"

2. Le code disciplinaire de la FIFA

49. La disposition pertinente en l'espèce du code disciplinaire de la FIFA peut se lire ainsi:
Article 64

"1. Quiconque ne paie pas ou pas entièrement une somme d'argent à un autre (joueur, entraîneur ou club par ex.) ou à la FIFA, alors qu'il y a été condamné par un organe, une commission ou une instance de la FIFA ou par une décision consécutive du TAS en appel (décision financière) ou quiconque ne respecte pas une autre décision (non financière) d'un organe, d'une commission ou d'une instance de la FIFA ou du TAS en appel (décision consécutive):

a) sera sanctionné d'une amende pour ne pas avoir respecté la décision ;

b) recevra des autorités juridictionnelles de la FIFA un dernier délai de grâce pour s'acquitter de sa dette ou pour respecter la décision (non financière) ;

(...)

4. Une interdiction d'exercer de toute activité relative au football peut par ailleurs être prononcée contre toute personne physique".

VI. LA REGLEMENTATION PERTINENTE DE L'ISU

50. Les dispositions pertinentes en l'espèce du règlement de l'ISU, telles qu'elles étaient rédigées à l'époque des faits, se lisaient ainsi:

IV. Organes judiciaires

Article 24

"1. Commission disciplinaire

La commission disciplinaire (CD) de l'ISU est un organe indépendant élu par le congrès. Elle agit en tant qu'autorité de première instance qui procède à des auditions et statue sur toutes les accusations qui lui sont adressées par toute autorité de l'ISU ou toute partie à l'ISU et qui sont portées contre un patineur, un officiel, un titulaire de poste ou tout autre participant aux activités de l'ISU (l'auteur présumé) qui se trouve accusé d'une infraction d'ordre disciplinaire ou éthique (l'infraction).

(...)"

V. Arbitrage

Article 25

Tribunal arbitral du sport (TAS) – Arbitrage des appels

"1. Appels

Les appels contre les décisions de la CD, et contre celles du conseil lorsqu'ils sont autorisés par une disposition expresse de la présente Constitution, peuvent être introduits auprès de la chambre arbitrale d'appel du Tribunal arbitral du sport (TAS), à Lausanne (Suisse).

2. Compétence du TAS

Le TAS est habilité à examiner les appels et à statuer dans les cas suivants:

a) les appels contre toute décision de la CD, ou du président de la CD dans le cas décrit à l'article 24, paragraphe 8.e) ;

b) les appels contre les décisions du conseil imposant une pénalité à un membre ou sa suspension ;

c) les appels contre toute décision du conseil prononçant l'inéligibilité d'un patineur, d'un officiel, d'un titulaire de poste ou de tout autre participant aux activités de l'ISU ;

d) les appels contre toute décision du conseil instruisant en qualité d'organe disciplinaire une plainte contre un membre de la CD.

(...)"

Article 26

Tribunal arbitral du sport (TAS) – Arbitrage ordinaire

"1. Compétence du TAS

Tous les membres, leurs membres individuels et toutes les autres personnes revendiquant une qualité pour agir en tant que participants actuels ou futurs à l'ISU ou aux compétitions, championnats, congrès ou autres activités de l'ISU, ainsi que l'ISU elle-même, acceptent de se soumettre à l'arbitrage exécutoire rendu selon les règles de la chambre arbitrale ordinaire du Tribunal arbitral du sport (TAS), à Lausanne (Suisse), qui est la seule juridiction compétente en la matière et constitue l'unique mode de règlement de toutes les réclamations et de tous les litiges qui ne sont pas régis par les termes des articles 24 et 25 ci-dessus, à savoir:

a) les réclamations pour dommages, les réclamations financières ainsi que toutes les autres réclamations qui pourraient sinon donner lieu à des poursuites devant un tribunal civil: (1) contre l'ISU ou tout titulaire de poste de l'ISU, officiel de l'ISU, agent ou salarié agissant au nom de l'ISU ; et (2) émanant de l'ISU contre toute partie ayant ou revendiquant une qualité pour agir au sein de l'ISU, telle qu'identifiée ci dessus dans le présent article ;

b) les requêtes au titre de l'article 75 du code civil suisse.

(...)" [traduction du greffe]

EN DROIT

51. Invoquant l'article 6 § 1 de la Convention, le requérant soutient que la formation arbitrale ayant rendu la sentence du 31 juillet 2009 ne peut être considérée comme indépendante et impartiale.

52. Invoquant également l'article 6 § 1 de la Convention, la requérante estime quant à elle que la commission disciplinaire de l'ISU et le TAS ne peuvent être considérés comme des tribunaux indépendants. La requérante se plaint par ailleurs de n'avoir bénéficié d'une audience publique ni devant la commission disciplinaire de l'ISU, ni devant le TAS, ni devant le Tribunal fédéral. Toujours sur le terrain de l'article 6 § 1 de la Convention, la requérante soutient que son droit à un procès équitable n'a pas été respecté aux motifs que le droit suisse ne prévoit aucune instance compétente pour réexaminer l'établissement des faits après le TAS et que le Tribunal fédéral n'a qu'un pouvoir d'examen très limité. Enfin, invoquant l'article 6 § 2 de la Convention, la requérante estime que la procédure devant le TAS est contraire au principe de la présomption d'innocence.

53. Maîtresse de la qualification juridique des faits (Radomilja et autres c. Croatie [GC], nos 37685/10 et 22768/12, §§ 113-115, 20 mars 2018), la Cour estime plus approprié d'examiner l'ensemble de ces griefs sous le seul angle de l'article 6 § 1 de la Convention, ainsi libellé en ses passages pertinents en l'espèce:

"Toute personne a droit à ce que sa cause soit entendue (...) publiquement (...) par un tribunal indépendant et impartial (...) qui décidera, soit des contestations sur ses droits et obligations de caractère civil, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle. Le jugement doit être rendu publiquement, mais l'accès de la salle d'audience peut être interdit à la presse et au public pendant la totalité ou une partie du procès dans l'intérêt de la moralité, de l'ordre public ou de la sécurité nationale dans une société démocratique, lorsque les intérêts des mineurs ou la protection de la vie privée des parties au procès l'exigent, ou dans la mesure jugée strictement nécessaire par le tribunal, lorsque dans des circonstances spéciales la publicité serait de nature à porter atteinte aux intérêts de la justice".

I. SUR LA VIOLATION ALLEGUEE DE L'ARTICLE 6 § 1 DE LA CONVENTION EN RAISON D'UN MANQUE D'INDEPENDANCE ET D'IMPARTIALITE DU TAS

A. Sur la recevabilité

1. Sur l'applicabilité de l'article 6 § 1 de la Convention

a) Les thèses des parties

54. Le Gouvernement considère que l'article 6 de la Convention ne s'applique pas aux procédures devant le TAS. Il indique toutefois que, par le biais du contrôle effectué par le Tribunal fédéral en vertu de la loi suisse, le TAS se voit amené dans les faits à mettre en œuvre "certains principes procéduraux" correspondant à "certaines garanties essentielles de l'article 6 § 1 de la Convention", en s'inspirant de la jurisprudence de la Cour. Il s'agit donc, selon le Gouvernement qui reprend les termes du Tribunal fédéral, d'une application "indirecte" des garanties de l'article 6 § 1 aux procédures devant le TAS.

55. Les parties et le tiers intervenant formulent un certain nombre d'arguments concernant le caractère volontaire ou forcé de l'acceptation par les requérants de la juridiction du TAS. La Cour estime que ces arguments ne relèvent pas de la question de l'applicabilité de l'article 6 § 1, et elle les examinera lorsqu'elle sera amenée à déterminer si l'acceptation de la juridiction du TAS par les requérants valait renonciation aux garanties prévues par cette disposition (paragraphes 77 à 123 ci-dessous).

b) L'appréciation de la Cour

56. La Cour rappelle que l'article 6 § 1 de la Convention ne vaut que pour l'examen des "contestations sur [des] droits et obligations de caractère civil" et du "bien-fondé de toute accusation en matière pénale" (Le Compte, Van Leuven et De Meyere c. Belgique, 23 juin 1981, § 41, série A no 43).

57. En ce qui concerne la requête no 40575/10, la Cour note que le requérant se plaint de la sentence arbitrale du 31 juillet 2009, qui l'a condamné à verser des dommages-intérêts au club Chelsea. Les droits en question sont ici clairement de nature patrimoniale et ils résultent d'une relation contractuelle entre personnes privées. Ils sont donc des droits "à caractère civil" au sens de l'article 6 de la Convention.

58. En ce qui concerne la requête no 67474/10, la Cour observe que c'est la sentence du 25 novembre 2009, confirmant la suspension de la requérante pour deux ans, qui est en cause. Ici aussi, s'agissant d'une procédure disciplinaire menée devant des organes corporatifs et dans le cadre de laquelle le droit de pratiquer une profession se trouve en jeu, le caractère "civil" des droits en question ne fait pas de doute (voir, mutatis mutandis, ibidem, § 48).

59. L'article 6 § 1 de la Convention est par conséquent applicable ratione materiae aux litiges objet de la présente affaire, auxquels les requérants étaient parties devant le TAS.

2. Sur la compétence ratione personae de la Cour

a) Les thèses des parties

60. Dans les deux causes, le Gouvernement considère que la responsabilité de la Suisse ne peut être engagée en raison d'un manquement de la part du TAS à moins que "le Tribunal fédéral [n'ait] omis de corriger un tel manquement dans le cadre de ses compétences". Il ajoute que le TAS "repose sur une organisation et des normes entièrement indépendantes de l'État".

61. Les requérants et le tiers intervenant ne se sont pas prononcés sur cette question.

b) L'appréciation de la Cour

62. Le Gouvernement ne soulève pas explicitement une exception d'irrecevabilité ratione personae mais considère toutefois que la responsabilité de la Suisse ne peut être engagée en raison d'un manquement de la part du TAS à moins que "le Tribunal fédéral [n'ait] omis de corriger un tel manquement dans le cadre de ses compétences".

63. La Cour rappelle que, même si l'État défendeur n'a pas soulevé d'objections quant à sa compétence ratione personae, cette question appelle un examen d'office (voir, mutatis mutandis, Sejdić et Finci c. Bosnie

Herzégovine [GC], nos 27996/06 et 34836/06, § 27, CEDH 2009).

64. Par ailleurs, elle rappelle que si les autorités d'un État contractant approuvent, formellement ou tacitement, les actes des particuliers violant dans le chef d'autres particuliers soumis à sa juridiction les droits garantis par la Convention, la responsabilité dudit État peut se trouver engagée au regard de la Convention (voir, mutatis mutandis, Ilaşcu et autres c. Moldova et Russie [GC], no 48787/99, § 318, CEDH 2004 VII, et Solomou et autres c. Turquie, no 36832/97, § 46, 24 juin 2008).

65. En l'occurrence, la Cour observe que les griefs soulevés devant elle portent essentiellement, dans les deux cas d'espèce, sur la composition du TAS et sur les procédures suivies devant cette instance. Or le TAS n'est ni un tribunal étatique ni une autre institution de droit public suisse, mais une entité émanant du CIAS, c'est-à-dire d'une fondation de droit privé (paragraphe 29 ci-dessus).

66. Cela étant, la Cour note que, dans des circonstances limitativement énumérées, notamment en ce qui concerne la régularité de la composition de la formation arbitrale, la loi suisse prévoit la compétence du Tribunal fédéral pour connaître de la validité des sentences du TAS (articles 190 et 191 de la LDIP). En outre, dans les présentes causes, cette haute juridiction a rejeté les recours des requérants donnant, de ce fait, force de chose jugée aux sentences arbitrales en question dans l'ordre juridique suisse.

67. Les actes ou omissions litigieuses sont donc susceptibles d'engager la responsabilité de l'État défendeur en vertu de la Convention (voir, mutatis mutandis, Nada c. Suisse [GC], no 10593/08, § 120-122, CEDH 2012). Il s'ensuit également que la Cour est compétente ratione personae pour connaître des griefs des requérants quant aux actes et omissions du TAS validés par le Tribunal fédéral.

3. Sur le non-épuisement des voies de recours internes par la requérante

68. Le Gouvernement considère que le grief de la requérante tiré d'un manque d'indépendance et d'impartialité du TAS devrait être déclaré irrecevable pour non-épuisement des voies de recours internes au motif que la requérante n'avait pas soulevé ce grief devant le TAS et que le Tribunal fédéral n'était par conséquent pas entré en matière.

69. La requérante ne se prononce pas sur cette exception d'irrecevabilité.

70. La Cour rappelle que le mécanisme de sauvegarde instauré par la Convention revêt, et c'est primordial, un caractère subsidiaire par rapport aux systèmes nationaux de garantie des droits de l'homme. La Cour a la charge de surveiller le respect par les États contractants de leurs obligations découlant de la Convention. Elle ne doit pas se substituer aux États contractants, auxquels il incombe de veiller à ce que les droits et libertés fondamentaux consacrés par la Convention soient respectés et protégés au niveau interne. La règle de l'épuisement des recours internes se fonde sur l'hypothèse, reflétée dans l'article 13 de la Convention, avec lequel elle présente d'étroites affinités, que l'ordre interne offre un recours effectif quant à la violation alléguée. Elle est donc une partie indispensable du fonctionnement de ce mécanisme de protection (Vučković et autres c. Serbie [GC], no 17153/11, § 69, 25 mars 2014).

71. La Cour rappelle ensuite que les États n'ont pas à répondre de leurs actes devant un organisme international avant d'avoir eu la possibilité de redresser la situation dans leur ordre juridique interne. Les personnes désireuses de se prévaloir de la compétence de contrôle de la Cour relativement à des griefs dirigés contre un État ont donc l'obligation d'utiliser auparavant les recours qu'offre le système juridique de celui-ci. La Cour ne saurait trop souligner qu'elle n'est pas une juridiction de première instance ; elle n'a pas la capacité, et il ne sied pas à sa

fonction de juridiction internationale, de se prononcer sur un grand nombre d'affaires qui supposent d'établir les faits de base ou de calculer une compensation financière deux tâches qui, par principe et dans un souci d'effectivité, incombent aux juridictions internes (ibidem, § 70).

72. La Cour rappelle également que l'article 35 § 1 impose aussi de soulever devant l'organe interne adéquat, au moins en substance (Gäfgen c. Allemagne [GC], no 22978/05, §§ 144 et 146, CEDH 2010, et Fressoz et Roire c. France [GC], no 29183/95, § 37, CEDH 1999 I) et dans les formes et délais prescrits par le droit interne, les griefs que l'on entend formuler par la suite devant la Cour. Cet article commande en outre l'emploi des moyens de procédure propres à empêcher une violation de la Convention. Une requête ne satisfaisant pas à ces exigences doit en principe être déclarée irrecevable pour non-épuisement des voies de recours internes (Vučković et autres, précité, § 72).

73. En l'occurrence, la Cour note que la requérante a soulevé le grief tiré d'un manque d'indépendance et d'impartialité du TAS dans son recours formé le 7 décembre 2009 devant le Tribunal fédéral et que la haute juridiction, dans son arrêt du 10 février 2010, a rejeté ce grief comme étant irrecevable au motif que l'intéressée ne l'avait pas soulevé à temps devant le TAS (paragraphe 23 ci-dessus).

74. À cet égard, la Cour rappelle que les voies de recours internes n'ont pas été épuisées lorsqu'un appel n'est pas admis à cause d'une erreur procédurale émanant du requérant (Gäfgen, précité, § 143). Or, dans le présent cas d'espèce, dans la mesure où le Tribunal fédéral, après avoir exposé les motifs d'irrecevabilité, s'est quand même prononcé, fût-ce brièvement, sur l'indépendance et l'impartialité du TAS aux points 3.1.3 à 3.3 de son arrêt (paragraphe 23 ci dessus), la Cour considère que ce grief ne peut être rejeté pour non-épuisement des voies de recours internes (Verein gegen Tierfabriken Schweiz (VgT) c. Suisse (no 2) [GC], no 32772/02, §§ 43 et 45, CEDH 2009).

75. Par conséquent, l'exception d'irrecevabilité du Gouvernement doit être écartée.

4. Conclusion sur la recevabilité

76. Constatant que ces griefs ne sont pas manifestement mal fondés au sens de l'article 35 § 3 a) de la Convention et qu'ils ne se heurtent à aucun autre motif d'irrecevabilité, la Cour les déclare recevables.

B. Sur le fond

1. Sur la validité de l'acceptation de l'arbitrage par les requérants

a) Les thèses des parties et les observations du tiers intervenant

i. Les thèses du Gouvernement communes aux deux requêtes

77. Se référant à la jurisprudence de la Cour, le Gouvernement indique que le droit à un tribunal garanti par l'article 6 § 1 de la Convention n'est pas absolu. En particulier, le Gouvernement dit qu'une personne peut renoncer à l'exercice de certains droits garantis par la Convention au profit d'un arbitrage, lorsqu'il s'agit de trancher une contestation portant sur ses droits et obligations à caractère civil, à condition qu'une telle renonciation soit libre, licite et sans équivoque. Il ajoute que la renonciation ne doit pas être faite sous l'effet de la contrainte et que l'arbitrage ne doit pas avoir été imposé par la loi.

78. En ce qui concerne le cas spécifique du TAS, le Gouvernement considère que le recours à l'arbitrage ne répond pas seulement à l'intérêt des organisations sportives mais également à celui des athlètes, membres de ces organisations, dont ils pourraient par ailleurs influencer les statuts. Selon lui, il est important que les différends sportifs, notamment ceux comportant une dimension

internationale, puissent être soumis à une juridiction spécialisée qui soit à même de statuer de manière rapide, économique et, si nécessaire, confidentielle, dans le respect des garanties procédurales énumérées à l'article 190 alinéa 2 de la LDIP. Eu égard à la dimension des manifestations sportives internationales, il ne serait pas concevable que la question de l'arbitrage soit négociée individuellement avec chacun des participants à de telles manifestations. Le Gouvernement précise que ces manifestations sont organisées dans différents pays par des organisations ayant leur siège dans des États différents et qu'elles sont souvent ouvertes à des athlètes du monde entier. À ses yeux, s'il n'était possible de parvenir valablement à aucune solution uniforme pour résoudre les litiges résultant de ces manifestations, cela poserait de graves problèmes à tous les acteurs concernés et porterait gravement atteinte à la sécurité juridique.

79. Enfin, le Gouvernement argue que le TAS pourrait être tenté de déplacer son siège dans un pays non membre du Conseil de l'Europe et de soustraire ainsi entièrement les affaires en question à l'examen de la Cour.

ii. Requête no 40575/10

α) Les thèses des parties

80. Le Gouvernement indique que le requérant ne remet pas en cause la procédure arbitrale de manière générale et ne prétend pas avoir été contraint de recourir à la procédure arbitrale, et, par conséquent, il en conclut que l'intéressé doit être considéré comme ayant volontairement renoncé à certaines des garanties prévues par l'article 6 de la Convention. Au surplus, le Gouvernement estime que le requérant avait accepté dans son contrat de travail de se soumettre au règlement de 2001. Or, à ses yeux, ce règlement ne comportait pas un recours obligatoire à l'arbitrage puisque, en son article 42, il prévoyait que le système arbitral devait être établi "sans préjudice des droits de tout joueur ou de tout club de demander réparation devant une cour civile (...)". Le Gouvernement soutient donc que, par le jeu de cette disposition, le requérant aurait pu, dès le début, attaquer la décision du club Chelsea de mettre fin à son contrat devant un tribunal anglais.

81. De son côté, le requérant, citant à l'appui de ses thèses certaines analyses de doctrine, soutient que les contrats de travail des joueurs de football professionnels doivent s'analyser en des contrats d'adhésion car les joueurs ne disposeraient pas de la force de négociation contractuelle nécessaire pour imposer aux clubs et aux fédérations de retirer les clauses d'arbitrage. Il allègue, d'une part, que tous les joueurs du club Chelsea étaient obligés d'accepter la clause d'arbitrage dans leur contrat et, d'autre part, que ce genre de pratique est courant dans le monde du football professionnel.
Sa souscription de la clause d'arbitrage n'aurait par conséquent pas été un choix librement consenti et aurait relevé d'une pratique systématique dans le monde du football. Pour les mêmes raisons, la possibilité pour un joueur de football de porter un litige l'opposant à son club devant un tribunal étatique sur la base de l'article 42 du règlement de 2001, mentionnée par le Gouvernement, ne serait qu'apparente.

β) Les observations du tiers intervenant

82. À l'instar du Gouvernement, le tiers intervenant soutient que le requérant a librement choisi de se soumettre à un arbitrage, en acceptant, le 26 janvier 2005, la juridiction de la FAPLAC et, par conséquent, celle du TAS. Le requérant aurait dès lors renoncé volontairement aux garanties prévues par la Convention, conformément à la jurisprudence de la Cour.
Le tiers intervenant cite à ce titre l'affaire Suovaniemi et autres c. Finlande ((déc.), no 31737/96, 23 février 1999), considérant que, dans cette affaire, la Cour avait admis qu'une personne pouvait valablement renoncer au droit à ce que sa cause fût entendue par un tribunal arbitral impartial dès lors que la loi nationale prévoyait une protection suffisante.

83. Le tiers intervenant indique lui aussi que le règlement de 2001 n'imposait pas l'arbitrage eu égard à la possibilité offerte par son article 42 à tout joueur de football de porter un litige l'opposant à son club devant un tribunal étatique.

iii. Requête no 67474/10

84. Le Gouvernement expose que la requérante avait signé une déclaration par laquelle elle acceptait expressément l'application du règlement de l'ISU établissant l'autorité de la commission disciplinaire de cette fédération, ainsi que celle du TAS en tant qu'instance de recours. À ses yeux, c'est donc de manière délibérée, en signant un document explicite, que la requérante a adhéré à la convention d'arbitrage.

85. Le Gouvernement ajoute que, s'il est vrai que la réglementation applicable obligeait la requérante à accepter la convention d'arbitrage afin de permettre à celle-ci de participer aux compétitions organisées par l'ISU, l'intéressée n'a pas contesté cette obligation au moment de signer sa déclaration. Il indique aussi qu'elle ne s'est pas non plus adressée à un tribunal étatique pour contester l'imposition d'une clause d'arbitrage comme condition à sa participation à une compétition sportive, et ce alors qu'elle en aurait eu la faculté. De même, il estime que, en tant qu'athlète ayant participé à de nombreuses compétitions internationales, elle aurait également pu mettre en avant sa renommée pour tenter de s'opposer à la convention d'arbitrage.

86. Le Gouvernement soutient en outre qu'une inégalité entre les parties, résultant de leurs qualités respectives de participante à une compétition sportive et d'organisatrice de cette même compétition, ne peut avoir pour effet d'invalider une convention d'arbitrage. Admettre le contraire remettrait en question toutes les clauses arbitrales et l'ensemble du droit contractuel.

87. Le Gouvernement en déduit que la convention d'arbitrage acceptée par la requérante ne peut être considérée comme ayant été conclue sous la contrainte. À cet égard, il estime que, même si le Tribunal fédéral, dans sa jurisprudence relative à l'arbitrage sportif (arrêt du 22 mars 2007, ATF 133 III 235 ; paragraphe 42 ci-dessus), considère que les sportifs professionnels n'ont d'autre choix que d'accepter les clauses arbitrales imposées par les fédérations, cela ne pose problème que lorsque les décisions d'arbitrage ne sont pas susceptibles de recours.

88. Se référant à la jurisprudence de la Cour, la requérante indique, quant à elle, que, s'il est vrai qu'une personne peut renoncer à l'exercice de certains droits garantis par la Convention en faveur d'un arbitrage, lorsque le recours à l'arbitrage n'est pas librement consenti, les garanties prévues par l'article 6 § 1 de la Convention trouvent à s'appliquer.

89. La requérante soutient que les fédérations sportives profitent de la position de monopole qui serait la leur pour obliger les sportifs de haut niveau à accepter le recours à l'arbitrage du TAS, faute de quoi ceux-ci ne seraient pas autorisés à participer aux compétitions, notamment olympiques. Elle dit que la possibilité, évoquée par le Gouvernement, de refuser la clause d'arbitrage et de recourir devant un tribunal étatique est illusoire. Elle ajoute que, à supposer même qu'un tribunal étatique se prononce sur la question dans un délai compatible avec la participation aux manifestations sportives concernées, sa décision n'aurait de force que dans l'État en question, et ce alors que, d'après elle, les compétitions internationales se déroulent dans une multitude d'États.

90. La requérante avance que même le Tribunal fédéral, dans sa jurisprudence relative à l'arbitrage sportif, considère que les sportifs professionnels n'ont d'autre choix que d'accepter la clause arbitrale. Elle cite, à titre d'exemple, l'arrêt du 22 mars 2007 (ATF 133 III 235 ; paragraphe 42 ci-dessus).

91. La requérante, qui dit avoir souscrit la clause d'arbitrage sous la contrainte, estime par conséquent que les garanties prévues par l'article 6 § 1 de la Convention sont applicables dans leur totalité à la procédure la concernant menée devant le TAS.

b) L'appréciation de la Cour

i. Principes généraux

92. La Cour rappelle que l'article 6 § 1 de la Convention garantit à toute personne le droit à ce qu'un tribunal connaisse de toute contestation relative à ses droits et obligations de caractère civil. Il consacre de la sorte le "droit à un tribunal", dont le droit d'accès, à savoir le droit de saisir le tribunal en matière civile, ne constitue qu'un aspect (Paroisse gréco-catholique Lupeni et autres c. Roumanie [GC], no 76943/11, § 84, 29 novembre 2016 et Golder c. Royaume-Uni, 21 février 1975, § 36, série A no 18).

93. Le droit d'accès aux tribunaux, reconnu par l'article 6 § 1, n'est pourtant pas absolu: il se prête à des limitations implicitement admises, car il commande de par sa nature même une réglementation par l'État. Les États contractants jouissent en la matière d'une certaine marge d'appréciation. Il appartient pourtant à la Cour de statuer en dernier ressort sur le respect des exigences de la Convention ; elle doit se convaincre que les limitations mises en œuvre ne restreignent pas l'accès offert à l'individu d'une manière ou à un point tels que le droit s'en trouve atteint dans sa substance même. En outre, pareille limitation ne se concilie avec l'article 6 § 1 que si elle tend à un but légitime et s'il existe un rapport raisonnable de proportionnalité entre les moyens employés et le but visé (Paroisse gréco catholique Lupeni et autres, précité, § 89, Eiffage S.A. et autres c. Suisse (déc.), no 1742/05, 15 septembre 2009, Osman c. Royaume Uni, 28 octobre 1998, § 147, Recueil 1998 VIII, et Waite et Kennedy c. Allemagne [GC], no 26083/94, § 59, CEDH 1999 I).

94. Ce droit d'accès à un tribunal n'implique pas nécessairement le droit de pouvoir saisir une juridiction de type classique, intégrée aux structures judiciaires ordinaires du pays ; ainsi, un organe chargé de trancher un nombre restreint de litiges déterminés peut s'analyser en un tribunal à condition d'offrir les garanties voulues (Lithgow et autres c. Royaume-Uni, 8 juillet 1986, § 201, série A no 102). L'article 6 ne s'oppose donc pas à ce que des tribunaux arbitraux soient créés afin de juger certains différends de nature patrimoniale opposant des particuliers (Suda c. République tchèque, no 1643/06, § 48, 28 octobre 2010). Présentant pour les intéressés comme pour l'administration de la justice des avantages indéniables, les clauses contractuelles d'arbitrage ne se heurtent pas, en principe, à la Convention (Tabbane c. Suisse (déc.), no 41069/12, § 25, 1er mars 2016).

95. En outre, il convient de distinguer entre arbitrage volontaire et arbitrage forcé. S'agissant d'un arbitrage forcé, en ce sens que l'arbitrage est imposé par la loi, les parties n'ont aucune possibilité de soustraire leur litige à la décision d'un tribunal arbitral. Celui-ci doit offrir les garanties prévues par l'article 6 § 1 de la Convention (Suda, précité, § 49).

96. En revanche, lorsqu'il s'agit d'un arbitrage volontaire consenti librement, il ne se pose guère de problème sur le terrain de l'article 6. En effet, les parties à un litige sont libres de soustraire aux juridictions ordinaires certains différends pouvant naître de l'exécution d'un contrat. En souscrivant une clause d'arbitrage, les parties renoncent volontairement à certains droits garantis par la Convention. Une telle renonciation ne se heurte pas à la Convention pour autant qu'elle est libre, licite et sans équivoque (Eiffage S.A. et autres, décision précitée, Suda, précité, § 48, R. c. Suisse, no 10881/84, décision de la Commission du 4 mars 1987, Décisions et rapports (DR) no 51, Suovaniemi et autres, décision précitée, Transportes Fluviais do Sado S.A. c. Portugal (déc.), no 35943/02, 16 décembre 2003, et

Tabbane, décision précitée, § 27). De plus, pour entrer en ligne de compte sous l'angle de la Convention, la renonciation à certains droits protégés par celle-ci doit s'entourer d'un minimum de garanties correspondant à sa gravité (Pfeifer et Plankl c. Autriche, 25 février 1992, § 37, série A no 227, et Tabbane, décision précitée, § 27).

ii. Application de ces principes aux cas d'espèce

α) Les considérations communes aux deux requêtes

97. À titre liminaire, la Cour rappelle avoir déjà relevé que la LDIP reflétait un choix de politique législative qui répondait au souhait du législateur suisse d'augmenter l'attractivité et l'efficacité de l'arbitrage international en Suisse (Tabbane, décision précitée, § 33) et que la mise en valeur de la place arbitrale suisse pouvait constituer un but légitime (ibidem, § 36).

98. En ce qui concerne le cas spécifique de l'arbitrage sportif, elle considère qu'il y a un intérêt certain à ce que les différends qui naissent dans le cadre du sport professionnel, notamment ceux qui comportent une dimension internationale, puissent être soumis à une juridiction spécialisée qui soit à même de statuer de manière rapide et économique. En effet, les manifestations sportives internationales de haut niveau sont organisées dans différents pays par des organisations ayant leur siège dans des États différents, et elles sont souvent ouvertes à des athlètes du monde entier. Le recours à un tribunal arbitral international unique et spécialisé facilite une certaine uniformité procédurale et renforce la sécurité juridique. Cela est d'autant plus vrai lorsque les sentences de ce tribunal peuvent faire l'objet de recours devant la juridiction suprême d'un seul pays, en l'occurrence le Tribunal fédéral suisse, qui statue par voie définitive.
Sur ce point, la Cour rejoint donc le Gouvernement et reconnaît qu'un mécanisme non étatique de règlement des conflits en première et/ou deuxième instance, avec une possibilité de recours, bien que limitée, devant un tribunal étatique, en dernière instance, pourrait constituer une solution appropriée en ce domaine.

99. En revanche, en ce qui concerne le risque, évoqué par le Gouvernement, que le TAS puisse être tenté de déplacer son siège dans un pays non membre du Conseil de l'Europe afin de soustraire entièrement le contentieux porté devant lui à l'examen de la Cour (paragraphe 79 ci dessus), il n'appartient pas à cette dernière de se prononcer in abstracto sur une telle éventualité. Si une telle hypothèse devait se réaliser, il appartiendrait à la Cour de statuer, au cas par cas, lors de l'examen de requêtes introduites devant elle à la suite du prononcé par les juridictions des États parties à la Convention de décisions donnant force exécutoire aux sentences du TAS dans les ordres juridiques respectifs de ces États.

100. En l'occurrence, la question qui se pose à la Cour est celle de savoir si, dans les deux cas d'espèce, en acceptant la juridiction du TAS, les requérants ont renoncé au bénéfice des garanties prévues par l'article 6 § 1 de la Convention, qu'ils invoquent dans leurs requêtes respectives. Dans le cas du requérant, il s'agit de l'indépendance et de l'impartialité de deux des arbitres composant la formation arbitrale ayant rendu la sentence du 31 juillet 2009. Dans le cas de la requérante, il s'agit de l'indépendance et de l'impartialité structurelle du TAS en raison du mode de nomination des arbitres.

101. Cette question présuppose que l'acceptation de la juridiction du TAS ait valu renonciation implicite à l'application de tout ou partie des garanties prévues par l'article 6 § 1 de la Convention normalement applicables aux litiges portés devant les tribunaux étatiques. Or le Gouvernement soutient que c'est par le jeu de principes généraux d'ordre procédural reconnus par le Tribunal fédéral que l'article 6 trouve à s'appliquer "indirectement" aux procédures devant le TAS (paragraphe 54 ci-dessus).

102. Par conséquent, au moment de choisir d'accepter ou non la juridiction du TAS, et à supposer même qu'ils aient eu recours à des conseils éclairés, les requérants pouvaient au mieux espérer qu'en acceptant la juridiction du TAS ils auraient bénéficié d'une application "indirecte" de l'article 6 § 1. Une telle hypothèse laissait par ailleurs ouverte la question de leurs droits respectifs à un recours individuel devant la Cour, au cas où le TAS et/ou le Tribunal fédéral, dans leur application "indirecte" de l'article 6 § 1, auraient fait une mauvaise interprétation des principes dégagés par la jurisprudence de la Cour.

103. La Cour part donc du principe que, dans les deux cas d'espèce, l'acceptation de la clause d'arbitrage pouvait valoir renonciation à tout ou partie des garanties prévues par l'article 6 § 1. Elle doit donc déterminer si cette acceptation relevait d'un choix "libre, licite et sans équivoque" au sens de sa jurisprudence. Pour y parvenir, la Cour juge utile de comparer les causes objet de la présente affaire à des affaires d'arbitrage commercial sur lesquelles elle s'est déjà prononcée.

104. Dans l'affaire Tabbane (déc.), précitée, le requérant était un homme d'affaires tunisien qui entretenait des relations commerciales avec la société Colgate. La Cour a considéré qu'en concluant un compromis d'arbitrage le requérant avait expressément et librement renoncé à la possibilité de soumettre les litiges potentiels à un tribunal ordinaire, qui lui aurait offert l'ensemble des garanties de l'article 6 de la Convention. Il n'existait par ailleurs aucune indication quant au fait que le requérant avait agi sous la contrainte en signant la convention d'arbitrage, et l'intéressé ne le prétendait pas.

105. Dans l'affaire Eiffage S.A. et autres (déc.), précitée, les requérantes, qui s'étaient constituées en un groupement d'entreprises de génie civil, se plaignaient d'une clause d'arbitrage contenue dans un contrat qu'elles avaient conclu avec l'Organisation européenne pour la recherche nucléaire ("le CERN") après avoir répondu à un appel d'offres. La Cour a considéré que les requérantes avaient librement décidé de conclure un contrat avec le CERN et d'en accepter les conditions générales, lesquelles prévoyaient l'arbitrage comme voie exclusive de règlement des différends.

106. Dans l'affaire Transportes Fluviais do Sado S.A. (déc.), précitée, la requérante était une société anonyme ayant conclu un contrat de concession avec une administration publique. La Cour a relevé que c'était la requérante elle-même qui, en accord avec l'administration concédante, avait décidé de soustraire aux juridictions ordinaires certains différends pouvant naître de l'exécution du contrat de concession. La Cour a d'ailleurs remarqué que de telles clauses d'arbitrage étaient courantes s'agissant de ce type de contrat.

107. La Cour souligne que, dans ces trois affaires, les requérants – un homme d'affaires et des sociétés commerciales – étaient libres d'établir ou non des relations commerciales avec les partenaires de leur choix sans que cela affectât leur liberté et leur capacité de mener, avec d'autres partenaires, des projets relevant de leurs domaines d'activité respectifs. Par exemple, il est difficile de croire que l'entreprise Eiffage, qui est très active dans le secteur des travaux publics mais également dans celui du logement résidentiel privé, soit obligée d'accepter des clauses d'arbitrage pour pouvoir exister en tant qu'entreprise de construction. Pour une entreprise de ce type, la renonciation à un ou plusieurs marchés publics comportant une clause d'arbitrage pourrait avoir des répercussions en termes de chiffre d'affaires mais probablement pas en termes de capacité à vivre de son activité de construction.

108. Dans les présentes causes, les requérants sont deux sportifs de haut niveau qui gagnent leur vie en pratiquant leurs disciplines respectives dans les circuits professionnels. Leurs situations respectives ne sont pas

comparables à celles qui viennent d'être décrites.

La Cour va les examiner séparément en commençant par la situation de la requérante.

β) Requête no 67474/10

109. La Cour rappelle tout d'abord que la réglementation applicable de l'ISU prévoyait la juridiction obligatoire du TAS pour les litiges résultant, comme dans le cas d'espèce, d'une procédure disciplinaire (paragraphe 50 ci dessus).

110. Elle relève ensuite que le Gouvernement ne conteste pas que la réglementation applicable obligeait la requérante à accepter la convention d'arbitrage afin que celle-ci pût participer aux compétitions organisées par l'ISU (paragraphe 85 ci-dessus).

111. Elle rappelle d'ailleurs que le Tribunal fédéral lui-même a admis dans sa jurisprudence relative au TAS que "l'athlète qui souhaite participer à une compétition organisée sous le contrôle d'une fédération sportive dont la réglementation prévoit le recours à l'arbitrage [n'aura] d'autre choix que d'accepter la clause arbitrale, notamment en adhérant aux statuts de la fédération sportive en question dans lesquels ladite clause a été insérée, à plus forte raison s'il s'agit d'un sportif professionnel. Il sera confronté au dilemme suivant: consentir à l'arbitrage ou pratiquer son sport en dilettante" (paragraphe 42 ci-dessus).

112. La Cour note également que la Commission européenne soupçonne l'ISU d'exercer une sorte de monopole sur l'organisation des compétitions de patinage de vitesse (paragraphe 47 ci-dessus).

113. En l'occurrence, la Cour considère que le choix qui s'offrait à la requérante n'était pas de participer à une compétition plutôt qu'à une autre, en fonction de son acceptation ou sa non-acceptation d'une clause d'arbitrage. En effet, contrairement au choix offert aux requérants des affaires Tabbane, Eiffage S.A. et autres, et Transportes Fluviais do Sado S.A. (décisions précitées) – qui avaient eu la possibilité de conclure un contrat avec un partenaire commercial plutôt qu'avec un autre –, le seul choix offert à la requérante était soit d'accepter la clause d'arbitrage et de pouvoir gagner sa vie en pratiquant sa discipline au niveau professionnel, soit de ne pas l'accepter et de devoir renoncer complètement à gagner sa vie en pratiquant sa discipline à un tel niveau.

114. Eu égard à la restriction que la non-acceptation de la clause d'arbitrage aurait apportée à la vie professionnelle de la requérante, l'on ne peut pas affirmer que cette dernière a accepté cette clause de manière libre et non équivoque.

115. La Cour en conclut que, bien qu'elle n'ait pas été imposée par la loi mais par la réglementation de l'ISU, l'acceptation de la juridiction du TAS par la requérante doit s'analyser comme un arbitrage "forcé" au sens de sa jurisprudence (voir, a contrario, Tabbane, décision précitée, § 29). Cet arbitrage devait par conséquent offrir les garanties de l'article 6 § 1 de la Convention (paragraphe 95 ci-dessus).

γ) Requête no 40575/10

116. En ce qui concerne le requérant, la Cour note que, si l'article 42 du règlement de 2001, auquel le requérant était tenu de se soumettre pour pouvoir évoluer dans un club de football professionnel, prévoyait bien le recours à l'arbitrage, le système permettant un tel recours devait être établi "sans préjudice des droits de tout joueur ou de tout club de demander réparation devant une cour civile dans des litiges opposant clubs et joueurs" (voir la partie "La réglementation pertinente de la FIFA").
La situation du requérant est par conséquent différente de celle de la requérante, dans la mesure où la réglementation applicable de la fédération sportive concernée n'imposait pas l'arbitrage mais laissait le mode de règlement des litiges à la liberté contractuelle des clubs et des joueurs.

117. Or le requérant soutient que, en raison de l'existence d'une disparité quant au pouvoir de négociation contractuelle entre lui-même et le club Chelsea, et entre les joueurs et les clubs de football en général, son acceptation de la clause d'arbitrage n'était pas réellement libre. Il allègue, d'une part, que tous les joueurs du club Chelsea étaient obligés d'accepter la clause d'arbitrage dans leur contrat et, d'autre part, que ce genre de pratique est courant dans le monde du football professionnel, les joueurs n'ayant à ses dires pas une force de négociation suffisante pour s'y opposer.

118. Par ailleurs, le requérant estime que, pour les mêmes raisons, la possibilité pour un joueur de football de porter un litige l'opposant à son club devant un tribunal étatique sur la base de l'article 42 du règlement de 2001, évoquée par le Gouvernement, n'est qu'apparente (paragraphe 81 ci dessus).

119. La Cour peut accepter qu'un grand club de football, disposant de moyens financiers considérables, puisse disposer d'un pouvoir de négociation plus important qu'un simple joueur, fût-il de grande renommée. Cela étant, non seulement le requérant n'apporte pas la preuve que tous les joueurs du club Chelsea avaient été obligés d'accepter la clause d'arbitrage, mais il n'apporte pas non plus la preuve que d'autres clubs de football professionnel, disposant peut-être de moyens financiers plus modestes, auraient refusé de l'embaucher sur la base d'un contrat prévoyant le recours à une juridiction ordinaire. Au surplus, il n'apporte pas la preuve de son impossibilité à se prévaloir de l'article 42 du règlement de 2001, qui lui permettait de porter son litige devant un tribunal étatique.

120. Contrairement à la requérante, le requérant n'a donc pas démontré que le seul choix qui s'offrait à lui consistait à accepter la clause d'arbitrage et pouvoir gagner sa vie en pratiquant sa discipline au niveau professionnel, ou ne pas l'accepter et renoncer complètement à gagner sa vie en pratiquant sa discipline à un tel niveau. La Cour considère donc que l'on ne peut, dans le cas d'espèce, parler d'un arbitrage "forcé" (Tabbane, décision précitée, § 29).

121. Reste à savoir si le choix du requérant était "sans équivoque", c'est-à-dire si, en optant, même librement, pour la juridiction du TAS au lieu de celle d'un tribunal étatique, le requérant avait renoncé en toute connaissance de cause au droit à ce que son litige avec le club Chelsea fût tranché par un tribunal indépendant et impartial. À cet égard, la Cour rappelle que, dans sa décision Suovaniemi et autres (précitée), elle a considéré que le choix des requérants de se soumettre à un arbitrage était non seulement volontaire, car ils avaient librement accepté la convention d'arbitrage, mais également "sans équivoque", puisqu'ils n'avaient pas récusé, au cours de la procédure arbitrale, l'arbitre dont ils contestaient l'indépendance et l'impartialité.

122. En l'occurrence, la Cour note que, le 22 septembre 2008, s'appuyant sur l'article R34 du code de l'arbitrage, le requérant avait requis la récusation de l'arbitre choisi par le club Chelsea, Me D. R. M., dont il contestait l'indépendance et l'impartialité (paragraphe 15 ci-dessus). Par conséquent, à la différence de ce qui a été jugé dans l'affaire Suovaniemi et autres (déc.), précitée, l'on ne peut pas considérer que, en acceptant la clause d'arbitrage dans son contrat et en choisissant de porter l'affaire devant le TAS – et non devant un tribunal étatique, comme il y était autorisé par l'article 42 du règlement de 2001 –, le requérant avait renoncé "sans équivoque" à contester l'indépendance et l'impartialité du TAS lors d'un éventuel litige l'opposant au club Chelsea.

123. Par conséquent, dans le cas du requérant aussi, la procédure d'arbitrage devait offrir les garanties de l'article 6 § 1 de la Convention (paragraphe 95 ci-dessus).

2. Sur l'indépendance et l'impartialité du TAS

a) Les thèses des parties et les observations du tiers intervenant

i. Requête no 67474/10

α) La thèse de la requérante

124. La requérante soutient que le TAS n'est ni indépendant ni impartial. Elle indique que, selon le droit procédural applicable au TAS, les deux parties à un litige peuvent chacune nommer un arbitre de leur choix, mais qu'elles n'ont aucune influence sur la nomination du troisième arbitre chargé de présider la formation arbitrale, et que le président de la formation arbitrale est nommé par le greffe du TAS, et notamment par son secrétaire général. Elle indique aussi que le TAS est financé par les fédérations sportives et que, par conséquent, ce système de nomination implique que les arbitres désignés par le greffe du TAS sont enclins à favoriser les fédérations. La requérante soutient d'ailleurs que le président de la formation arbitrale ayant statué sur sa cause avait un préjugé contre les athlètes accusés de dopage car il avait auparavant toujours refusé d'être nommé en tant qu'arbitre par un athlète accusé de dopage, préférant toujours représenter les fédérations.

125. La requérante dit ensuite que les arbitres doivent être choisis parmi ceux présents sur la liste élaborée par le CIAS, dont la grande majorité des membres serait nommée par les fédérations. Elle estime que la composition de cette liste ne garantit donc pas une représentation équilibrée des intérêts des athlètes par rapport à ceux des fédérations. Elle estime en outre que l'obligation pour les parties de choisir leur arbitre respectif sur cette liste montre que le TAS ne constitue pas un véritable tribunal arbitral, puisque, selon elle, les parties à un arbitrage classique peuvent choisir leurs arbitres librement.

126. Par ailleurs, la requérante indique que, d'après l'article R59 du code de l'arbitrage, la sentence arbitrale est soumise avant son prononcé au secrétaire général du TAS et que celui-ci pourra lui apporter des corrections de forme mais aussi attirer l'attention de la formation arbitrale sur des questions de principe, tout en n'ayant pas siégé en tant qu'arbitre (paragraphe 23 ci dessus). Elle en déduit que cela illustre de manière supplémentaire le manque d'indépendance et d'impartialité du TAS – allégué par elle – eu égard à la nomination du secrétaire général du TAS par le CIAS et à la prétendue domination de ce dernier par les fédérations. Pour ce qui est de son cas particulier, la requérante se dit convaincue que le secrétaire général du TAS a exercé une influence réelle sur la sentence arbitrale, puisque le prononcé de la sentence aurait été plusieurs fois retardé par rapport aux dates annoncées.

β) La thèse du Gouvernement

127. Le Gouvernement conteste la position de la requérante sur la nomination du président de la formation arbitrale. Il indique que, selon l'article R54 du code de l'arbitrage, le président de la formation arbitrale est désigné par le président de la chambre arbitrale d'appel du TAS après consultation des arbitres nommés par les parties. Selon lui, le secrétaire général du TAS ne joue aucun rôle à cet égard, même si la lettre informant les parties de ladite nomination est signée par un membre du greffe du TAS.
Le Gouvernement ajoute que, dans la pratique, si les parties s'accordent sur le nom du président de la formation arbitrale, le président de la chambre arbitrale d'appel suit généralement leur choix.
128. En ce qui concerne l'indépendance et l'impartialité du président de la formation arbitrale ayant statué sur la cause de la requérante, qui, d'après celle-ci, a refusé de siéger en tant qu'arbitre dans des cas similaires et nourrit ainsi des préjugés contre les athlètes accusés de dopage, le Gouvernement indique que l'intéressée n'a pas demandé la récusation de cet arbitre, alors qu'elle en aurait eu la faculté en vertu de l'article R34 du code de l'arbitrage. Il indique en outre que, devant le Tribunal fédéral, la requérante a avancé un autre argument tenant à des déclarations précédentes que cet arbitre

aurait faites quant à son adoption d'une "ligne dure" contre le dopage.

129. En ce qui concerne le choix des arbitres à partir de la liste du TAS, le Gouvernement reconnaît que cette liste est obligatoire pour les parties. Cela étant, il considère, d'une part, que cette liste évolue régulièrement et, d'autre part, que le fait que les arbitres sont choisis par le CIAS n'implique pas que ceux-ci soient favorables aux fédérations, puisque le CIAS serait lui-même composé de manière équilibrée. Le Gouvernement ajoute que les biographies des membres du CIAS montrent que ceux-ci proviennent aussi bien du monde sportif, que du monde judiciaire, que du monde de l'arbitrage international.

130. Quant au mode de financement du TAS, qui, selon la requérante, est un autre élément de la dépendance de celui-ci envers les fédérations, le Gouvernement indique qu'environ 60 % du budget du CIAS sont versés par "les différentes entités du Mouvement olympique", les 40 % restants étant versés par les utilisateurs du TAS par le biais des frais d'arbitrage. Il précise que la contribution versée par le Mouvement olympique a pour but de permettre à tous les athlètes désireux de contester une décision en matière disciplinaire de bénéficier de la gratuité des services du TAS et de son greffe, ce qui aurait d'ailleurs été le cas de la requérante.
Le Gouvernement indique également que les juridictions étatiques sont toujours financées par les États et que la Cour elle-même est financée par les États membres du Conseil de l'Europe. Selon lui, l'on ne peut en déduire un manque d'impartialité dans les litiges impliquant ces États.

131. En ce qui concerne le rôle du secrétaire général du TAS, le Gouvernement expose que, selon les dispositions des articles R46 et R59 du code de l'arbitrage, avant le prononcé de la sentence arbitrale, le secrétaire général du TAS a en effet la possibilité de proposer des rectifications de forme et d'attirer l'attention de la formation arbitrale sur des questions de principe fondamentales, notamment lorsque la sentence modifie la jurisprudence du TAS. Toutefois, les membres de la formation arbitrale resteraient libres de choisir de prendre en considération ou non les observations du secrétaire général. Il s'agirait d'une pratique courante dans le monde de l'arbitrage, attestée par l'article 31 du règlement de l'ICC.
Par ailleurs, selon le Gouvernement, les allégations de la requérante quant à la prétendue influence du secrétaire général du TAS sur la sentence la concernant ne sont pas étayées et le retard de trois jours dans le prononcé de la sentence, dont l'intéressée se plaint, était dû à une demande de prolongation de délai formée par la formation arbitrale elle-même.

ii. Requête no 40575/10

α) Les thèses des parties

132. Le Gouvernement indique d'emblée que, dans sa requête, le requérant s'est contenté d'un renvoi à son recours en matière civile devant le Tribunal fédéral du 14 septembre 2009, sans prendre position sur une éventuelle violation de l'article 6 § 1 de la Convention ni remettre en cause les conclusions du Tribunal fédéral.

133. Le Gouvernement indique ensuite que l'article 190 de la LDIP, tel qu'interprété par le Tribunal fédéral (ATF 118 II 359 consid. 3b), comprend le non-respect de la règle voulant qu'un tribunal arbitral présente des garanties suffisantes d'indépendance et d'impartialité. Il se réfère en outre à la jurisprudence du Tribunal fédéral selon laquelle le TAS constitue un véritable tribunal arbitral qui respecte les garanties nécessaires d'indépendance et d'impartialité et dont les sentences sont assimilables aux jugements d'un tribunal étatique (par exemple, ATF 129 III 445, consid. 3.3.4), et il précise que cette jurisprudence a été réaffirmée par le Tribunal fédéral dans son arrêt du 10 juin 2010 portant rejet du recours du requérant. De même, il dit que l'ordre public procédural énoncé à l'article 190 alinéa 2 lettre a) de la LDIP garantit aux parties le droit à un jugement

indépendant sur les conclusions et l'exposé des faits soumis au tribunal d'une manière conforme à la procédure applicable. Il ajoute qu'il y a violation de l'ordre public procédural *"lorsque des principes fondamentaux et largement reconnus ont été violés, ce qui conduit à une contradiction insupportable avec le sentiment de justice, de telle sorte que la contradiction apparaît incompatible avec les valeurs reconnues dans un État de droit"*. Le Gouvernement assure que l'exigence d'indépendance et d'impartialité d'un tribunal fait partie des principes fondamentaux ressortissant de la conception suisse du droit procédural, visés par l'article 27 alinéa 2 lettre b) de la LDIP.

134. En ce qui concerne le président de la formation du TAS ayant rendu la sentence du 31 juillet 2009, qui, selon le requérant, était associé dans un cabinet d'avocats représentant les intérêts du propriétaire du club Chelsea, le Gouvernement fait observer que le requérant lui-même se dit dans l'incapacité d'apporter la preuve de cette circonstance, par ailleurs réfutée point par point par l'intéressé, et il considère que c'est donc à juste titre que le Tribunal fédéral n'a pas suivi le requérant sur ce point.

135. En ce qui concerne Me D. R. M., le Gouvernement se réfère aux conclusions du Tribunal fédéral (paragraphe 17 ci-dessus) selon lesquelles la circonstance que le président de la formation arbitrale ayant rendu la sentence du 31 juillet 2009 avait déjà siégé dans la formation ayant rendu la sentence du 15 décembre 2005 n'était pas de nature à faire naître des doutes quant à l'appréciation objective de son indépendance et de son impartialité, étant donné la mission circonscrite confiée à la formation ayant rendu la première sentence et le fait que l'on était en présence d'une "série de trois sentences rendues dans la même cause", "les deux premières revêtant un caractère préjudiciel par rapport à la troisième".

136. Pour sa part, le requérant renvoie aux arguments développés dans son recours devant le Tribunal fédéral (paragraphe 16 ci-dessus).

β) Les observations du tiers intervenant

137. Le tiers intervenant soutient que le système mis en place par la loi suisse, par le biais du contrôle exercé par le Tribunal fédéral, garantit une protection suffisante quant à l'indépendance et l'impartialité des formations du TAS.
Au surplus, le tiers intervenant, suivant le Tribunal fédéral, considère: d'une part, que l'arbitre D. R. M. n'avait à aucun moment de la procédure donné de signes de partialité ; d'autre part, que les trois sentences arbitrales devaient être considérées comme faisant partie de la même cause, qui aurait pu être entendue par une formation unique, et que, par conséquent, il était légitime qu'un même arbitre ait pu faire partie de deux des formations les ayant rendues ; et, enfin, que les allégations du requérant quant à l'indépendance et l'impartialité de l'arbitre L. F. n'étaient pas étayées.

b) L'appréciation de la Cour

i. Principes généraux

138. La Cour rappelle qu'en vertu de l'article 6 § 1, un "tribunal" doit toujours être "établi par la loi". Cette expression reflète le principe de l'Etat de droit, inhérent à tout le système de la Convention et de ses protocoles. En effet, un organe n'ayant pas été établi conformément à la volonté du législateur, serait nécessairement dépourvu de la légitimité requise dans une société démocratique pour entendre la cause des particuliers. L'expression "établi par la loi" concerne non seulement la base légale de l'existence même du tribunal, mais encore la composition du siège dans chaque affaire (Lavents c. Lettonie, no 58442/00, § 114, 28 novembre 2002). La "loi" visée par cette disposition est donc non seulement la législation relative à l'établissement et à la compétence des organes judiciaires, mais également toute autre disposition du droit interne dont le non-respect rend irrégulière la participation d'un ou de plusieurs juges à l'examen de l'affaire.

139. Par ailleurs, la Cour rappelle qu'une autorité qui ne figure pas parmi les juridictions d'un État peut, aux fins de l'article 6 § 1, s'analyser néanmoins en un "tribunal" au sens matériel du terme (Sramek c. Autriche, no 8790/79, § 36, 22 octobre 1984). Un "tribunal" se caractérise au sens matériel par son rôle juridictionnel: trancher, sur la base de normes de droit, avec plénitude de juridiction et à l'issue d'une procédure organisée, toute question relevant de sa compétence (ibidem, et Chypre c. Turquie [GC], no 25781/94, § 233, CEDH 2001 IV). La compétence de décider est inhérente à la notion même de "tribunal". La procédure devant un "tribunal" doit assurer "la solution juridictionnelle du litige" voulue par l'article 6 § 1 (Benthem c. Pays-Bas, 23 octobre 1985, § 40, série A no 97). Aux fins de l'article 6 § 1, un tribunal ne doit pas nécessairement être une juridiction de type classique, intégrée aux structures judiciaires ordinaires. Il peut avoir été institué pour connaître de questions relevant d'un domaine particulier dont il est possible de débattre de manière adéquate en dehors du système judiciaire ordinaire (Rolf Gustafson c. Suède, 1er juillet 1997, § 45, Recueil 1997 IV). En outre, seul mérite l'appellation de "tribunal" au sens de l'article 6 § 1 un organe jouissant de la plénitude de juridiction et répondant à une série d'exigences telles que l'indépendance à l'égard de l'exécutif comme des parties en cause (Beaumartin c. France, 24 novembre 1994, § 38, série A no 296 B, et Di Giovanni c. Italie, no 51160/06, § 52, 9 juillet 2013).

140. Pour établir si un tribunal peut passer pour "indépendant" aux fins de l'article 6 § 1, il faut prendre en compte, notamment, le mode de désignation et la durée du mandat de ses membres, l'existence d'une protection contre les pressions extérieures et le point de savoir s'il y a ou non apparence d'indépendance (Findlay c. Royaume-Uni, 25 février 1997, § 73, Recueil 1997-I, et Brudnicka et autres c. Pologne, no 54723/00, § 38, CEDH 2005-II).

141. L'impartialité se définit d'ordinaire par l'absence de préjugé ou de parti pris. Selon la jurisprudence constante de la Cour, aux fins de l'article 6 § 1, l'impartialité doit s'apprécier selon une démarche subjective, en tenant compte de la conviction personnelle et du comportement de tel juge, c'est-à-dire du point de savoir si celui-ci a fait preuve de parti pris ou préjugé personnel en telle occasion, et aussi selon une démarche objective consistant à déterminer si le tribunal offrait, notamment à travers sa composition, des garanties suffisantes pour exclure tout doute légitime quant à son impartialité (voir, entre autres, Fey c. Autriche, 24 février 1993, §§ 27 28 et 30, série A no 255-A, et Wettstein c. Suisse, no 33958/96, § 42, CEDH 2000-XII).

142. La frontière entre l'impartialité subjective et l'impartialité objective n'est cependant pas hermétique car non seulement la conduite même d'un juge peut, du point de vue d'un observateur extérieur, entraîner des doutes objectivement justifiés quant à son impartialité (démarche objective) mais elle peut également toucher à la question de sa conviction personnelle (démarche subjective) (Kyprianou c. Chypre [GC], no 73797/01, § 119, CEDH 2005-XIII). Ainsi, dans des cas où il peut être difficile de fournir des preuves permettant de réfuter la présomption d'impartialité subjective du juge, la condition d'impartialité objective fournit une garantie importante de plus (Pullar c. Royaume-Uni, 10 juin 1996, § 32, Recueil 1996-III).

143. En la matière, même les apparences peuvent revêtir de l'importance ou, comme le dit un adage anglais, "justice must not only be done, it must also be seen to be done" (il faut non seulement que justice soit faite, mais aussi qu'elle le soit au vu et au su de tous). Il y va de la confiance que les tribunaux d'une société démocratique se doivent d'inspirer aux justiciables (Oleksandr Volkov c. Ukraine, no 21722/11, § 106, CEDH 2013, et Morice c. France [GC], no 29369/10, § 78, CEDH 2015).

144. Enfin, les concepts d'indépendance et d'impartialité objective sont étroitement liés

et, selon les circonstances, peuvent appeler un examen conjoint (Sacilor-Lormines c. France, no 65411/01, § 62, CEDH 2006-XIII).

ii. Application de ces principes aux cas d'espèce

145. Comme la Cour l'a rappelé plus haut (paragraphes 91-94 ci dessus), l'article 6 de la Convention ne s'oppose pas à ce que des tribunaux arbitraux soient créés afin de juger certains différends de nature patrimoniale opposant des particuliers (Suda, précité, § 48), les clauses contractuelles d'arbitrage présentant pour les intéressés comme pour l'administration de la justice des avantages indéniables (Tabbane, décision précitée, § 25). Les parties à un litige peuvent renoncer à certains droits garantis par l'article 6 § 1 pour autant que cette renonciation est libre, licite et sans équivoque. Dans le cas contraire, le tribunal arbitral doit offrir les garanties prévues par l'article 6 § 1 de la Convention (Suda, précité, § 49).

146. La Cour admet qu'en matière d'arbitrage commercial et d'arbitrage sportif consenti de manière libre, licite et non équivoque les notions d'indépendance et d'impartialité pourraient être interprétées avec souplesse, dans la mesure où l'essence même du système arbitral repose sur la nomination des instances décisionnelles, ou du moins d'une partie d'entre elles, par les parties au litige.

147. Or, dans la présente affaire, la Cour a conclu que la renonciation aux droits garantis par l'article 6 § 1 de la part de la requérante n'avait pas été libre et "sans équivoque" (paragraphe 114 ci-dessus), que la renonciation de la part du requérant n'avait pas été "sans équivoque" (paragraphe 122 ci-dessus) et que, par conséquent, les procédures d'arbitrage qui concernaient les intéressés devaient offrir l'ensemble des garanties de l'article 6 § 1.

148. La Cour doit donc rechercher si le TAS pouvait passer pour un tribunal "indépendant et impartial, établi par la loi" au sens de cette disposition et des principes énoncés aux paragraphes 138 à 144 ci-dessus, au moment où il a statué sur les causes respectives des requérants.

149. Elle relève, à cet égard, que, même si le TAS était l'émanation d'une fondation de droit privé (voir, cependant, Suda, précité, § 53), il bénéficiait de la plénitude de juridiction pour connaître, sur la base de normes de droit et à l'issue d'une procédure organisée, toute question de fait et de droit qui était soumise dans le cadre des litiges dont il était saisi (Chypre, précité, § 233, et Sramek, précité, § 36). Ses sentences apportaient une solution de type juridictionnel à ces litiges et pouvaient faire l'objet d'un recours devant le Tribunal fédéral dans les circonstances limitativement énumérées aux articles 190 à 192 de la LDIP.
Par ailleurs, le Tribunal fédéral, dans sa jurisprudence constante, considérait les sentences rendues par le TAS comme de "véritables jugements, assimilables à ceux d'un tribunal étatique" (paragraphe 23 ci dessus).
Au moment de statuer sur les causes respectives des requérants, par le jeu combiné de la LDIP et de la jurisprudence du Tribunal fédéral, le TAS avait donc les apparences d'un "tribunal établi par la loi" au sens de l'article 6 § 1. Ce qui n'est d'ailleurs pas contesté explicitement par les requérants. Reste à savoir s'il pouvait passer pour "indépendant" et "impartial" au sens de la même disposition.

α) Requête no 67474/10

150. La requérante soutient en premier lieu que le président de la formation arbitrale ayant statué sur sa cause avait auparavant toujours refusé d'être nommé en tant qu'arbitre par un athlète accusé de dopage, préférant toujours représenter les fédérations sportives. Elle en déduit un préjugé de cet arbitre à l'encontre des athlètes accusés de dopage et donc un manque d'impartialité.
La Cour note que, devant le Tribunal fédéral, la requérante avait utilisé un autre argument pour tenter de démontrer le manque

d'impartialité du président de la chambre arbitrale. Elle avait soutenu que, par le passé, celui-ci avait représenté la "ligne dure" de la lutte contre le dopage (paragraphe 23 ci dessus).
Quoi qu'il en soit, comme le Tribunal fédéral, la Cour n'aperçoit aucun élément factuel susceptible de mettre en doute l'indépendance ou l'impartialité de l'arbitre en question. Les allégations de la requérante en ce sens sont trop vagues et hypothétiques et doivent par conséquent être rejetées.

151. En ce qui concerne le financement du TAS par les instances sportives, comme le Gouvernement (paragraphe 130 ci-dessus), la Cour relève que les juridictions étatiques sont toujours financées par le budget de l'État et considère qu'on ne peut pas déduire de cette circonstance un manque d'indépendance et d'impartialité de ces juridictions dans les litiges opposant des justiciables à l'État. Par analogie, on ne saurait déduire un manque d'indépendance et d'impartialité du TAS en raison exclusivement de son mode de financement.

152. La Cour prend également note de la position de la requérante, qui soutient que le TAS ne peut être considéré comme un tribunal indépendant et impartial en raison d'un problème structurel tenant à un déséquilibre entre les fédérations et les athlètes dans le mécanisme de nomination des arbitres.

153. La Cour rappelle qu'à l'époque des faits, en vertu de l'article S14 du code de l'arbitrage, la liste des arbitres du TAS était établie par le CIAS et devait être composée de la manière suivante: pour trois cinquièmes, d'arbitres sélectionnés parmi les personnes proposées par le CIO, les FI et les CNO, choisis en leur sein ou en dehors ; pour un cinquième, d'arbitres choisis par le CIAS "après des consultations appropriées, en vue de sauvegarder les intérêts des athlètes" ; et, pour un cinquième, d'arbitres choisis, toujours par le CIAS, parmi des "personnes indépendantes" des organismes susmentionnés (paragraphe 33 ci-dessus). Le CIAS n'était donc tenu de choisir qu'un cinquième d'arbitres parmi des personnalités indépendantes des instances sportives susceptibles de s'opposer aux athlètes dans le cadre de litiges portés devant le TAS. La Cour note d'ailleurs que ce mécanisme de nomination par cinquièmes a été supprimé en 2012 et remplacé par une formulation plus générale (paragraphe 38 ci-dessus).

154. En outre, la Cour relève que même la nomination du cinquième d'arbitres indépendants à l'égard des instances sportives se faisait à la discrétion du CIAS. Or le CIAS était lui-même composé en totalité par des personnalités issues de ces instances (paragraphe 32 ci-dessus), ce qui révèle l'existence d'un certain lien entre le CIAS et des organisations susceptibles de s'opposer aux athlètes lors d'éventuels litiges portés devant le TAS, notamment d'ordre disciplinaire.

155. De surcroît, d'une part, les arbitres étaient nommés pour un mandat de quatre ans renouvelable, sans limitation du nombre de mandats, et d'autre part, le CIAS avait le pouvoir de révoquer, par une décision "sommairement motivée" sur la base de l'article R35 du code de l'arbitrage, tout arbitre refusant ou étant empêché d'exercer ses fonctions, ou bien ne remplissant pas ses fonctions conformément aux dispositions du même code (voir, a contrario et mutatis mutandis, Di Giovanni, précité, § 57, et Luka c. Roumanie, no 34197/02, § 44, 21 juillet 2009).

156. En l'espèce, la formation arbitrale ayant statué sur le litige opposant la requérante à l'ISU était composée de trois arbitres, tous choisis à partir de la liste établie par le CIAS, selon les modalités qui viennent d'être décrites, et soumis au pouvoir de révocation de ce dernier. Même la faculté laissée à la requérante de nommer l'arbitre de son choix était limitée par l'obligation de recourir à cette liste (articles R33, R38 et R39 du code de l'arbitrage), de sorte que la requérante ne disposait pas d'une totale liberté de choix – alors que pareille liberté est la règle, par

exemple, en matière d'arbitrage commercial, en vertu de l'article 12 du règlement de l'ICC.

157. Cela étant, la Cour note que la liste des arbitres établie par le CIAS comportait, à l'époque des faits, quelques 300 arbitres (paragraphe 37 ci dessus). Or la requérante n'a pas présenté d'éléments factuels permettant de douter en général de l'indépendance et de l'impartialité de ces arbitres. Même en ce qui concerne la formation arbitrale ayant statué sur sa cause, la requérante n'a contesté in concreto qu'un seul arbitre, en l'occurrence le président de la formation arbitrale, sans par ailleurs étayer ses allégations (paragraphe 150 ci-dessus).
Si la Cour est prête à reconnaitre que les organisations susceptibles de s'opposer aux athlètes dans le cadre de litiges portés devant le TAS exerçaient une réelle influence dans le mécanisme de nomination des arbitres en vigueur à l'époque des faits, elle ne peut pas conclure que, du seul fait de cette influence, la liste des arbitres était composée, ne serait-ce qu'en majorité, d'arbitres ne pouvant pas passer pour indépendants et impartiaux, à titre individuel, objectivement ou subjectivement, vis-à-vis de ces organisations.
La Cour ne voit donc pas de motifs suffisants pour s'écarter de la jurisprudence constante du Tribunal fédéral, selon laquelle le système de la liste d'arbitres satisfait aux exigences constitutionnelles d'indépendance et d'impartialité applicables aux tribunaux arbitraux et le TAS, lorsqu'il fonctionne comme instance d'appel extérieure aux fédérations internationales, s'apparente à une autorité judiciaire indépendante des parties (paragraphe 44 ci-dessus).

158. Pour ce qui est du pouvoir du secrétaire général du TAS d'apporter des modifications de forme à la sentence arbitrale et d'attirer l'attention de la formation arbitrale, après les délibérations, sur des questions de principe, qui, selon la requérante, constituerait une illustration de plus du manque d'indépendance et d'impartialité du TAS vis-à-vis des instances sportives, la Cour note que la requérante n'a pas apporté la preuve que la sentence du 25 novembre 2009 ait été modifiée par l'intervention du secrétaire général du TAS, a fortiori dans un sens qui lui aurait été défavorable.
La Cour n'aperçoit donc aucune raison de s'écarter des conclusions du Tribunal fédéral qui, dans son arrêt du 10 février 2010, a jugé ces allégations comme une pure spéculation ne reposant sur aucun fait établi (paragraphe 23 ci-dessus).

159. Au vu de ce qui précède, la Cour conclut qu'il y n'y a pas eu violation de l'article 6 § 1 de la Convention en raison d'un prétendu manque d'indépendance et d'impartialité du TAS.

β) Requête no 40575/10

160. La Cour observe que la situation du requérant est différente de celle de la requérante. D'une part, le requérant a librement choisi de recourir au TAS plutôt qu'à un tribunal étatique, alors que, contrairement à la requérante, il en avait la possibilité (paragraphes 116 à 123 ci-dessus). D'autre part, il ne se plaint pas d'un manque d'indépendance et d'impartialité du TAS en raison d'un problème structurel tenant au mécanisme de nomination des arbitres. Il se plaint uniquement d'un manque d'indépendance et d'impartialité, à titre individuel, de deux arbitres ayant composé la formation arbitrale qui a rendu la sentence du 31 juillet 2009.

En ce qui concerne l'indépendance et l'impartialité de l'arbitre D. R. M.

161. La question qui se pose est celle de savoir si le fait que Me D. R. M. avait déjà siégé dans la formation ayant rendu la sentence du 15 décembre 2005 a pu légitimement donner à craindre de la part de celui-ci un parti pris quant à la sentence rendue le 31 juillet 2009.

162. Pour se prononcer sur l'existence d'une raison légitime de douter de l'impartialité de cet arbitre, le point essentiel est de savoir si les questions que celui-ci avait traitées dans la

sentence du 31 juillet 2009 étaient analogues à celles sur lesquelles il avait eu à statuer dans la sentence du 15 décembre 2005 (voir, mutatis mutandis, Morel c. France, no 34130/96, § 47, CEDH 2000 VI). Pour qu'un préjugé ait pu se créer, il faut, d'une part, que l'arbitre mis en cause ait eu successivement à connaître de faits identiques et, d'autre part, qu'il ait eu à répondre à la même question ou, du moins, que l'écart entre les questions qu'il a eu à trancher ait été infime (voir, mutatis mutandis, Liga Portuguesa de Futebol Profissional c. Portugal, no 4687/11, § 69, 17 mai 2016).

163. La Cour note que la question tranchée par la première sentence arbitrale était celle de l'interprétation des termes "unilateral breach" de l'article 21 du règlement de 2001, et que celle tranchée par la sentence du 31 juillet 2009 était en revanche liée à la correcte application de l'article 22 du règlement de 2001 par la CRL dans sa décision du 7 mai 2008 relative aux dommages-intérêts que le requérant devait verser au club Chelsea.

164. Par conséquent, comme le Tribunal fédéral l'a, à juste titre, relevé, bien que les faits générateurs de la cause soient les mêmes, les questions juridiques tranchées par les deux formations arbitrales sont à l'évidence nettement distinctes, la première portant sur la responsabilité contractuelle du requérant, la deuxième sur le quantum des dommages-intérêts devant être versés à la partie lésée.

165. Dès lors, la Cour estime qu'il n'y a pas eu violation de l'article 6 § 1 de la Convention en raison d'un défaut d'impartialité de l'arbitre D. R. M.

En ce qui concerne l'indépendance et l'impartialité de l'arbitre L. F.

166. Selon le requérant, l'arbitre L. F. était associé dans un cabinet d'avocats représentant les intérêts du propriétaire du club Chelsea et il ne pouvait donc pas passer pour indépendant et impartial envers ce club.

167. La Cour note que, par un arrêt longuement motivé et ne révélant aucune trace d'arbitraire, le Tribunal fédéral a conclu que le requérant n'avait pas apporté la preuve de ses allégations. Le requérant l'a d'ailleurs reconnu lui-même devant cette haute juridiction, et il ne soutient pas le contraire devant la Cour.

168. La Cour n'aperçoit donc aucune raison sérieuse de substituer son propre avis à celui du Tribunal fédéral sur ce point et conclut qu'il n'y a pas eu violation de l'article 6 § 1 de la Convention en raison d'un défaut d'impartialité de l'arbitre L. F.

II. SUR LA VIOLATION ALLEGUEE DE L'ARTICLE 6 § 1 DE LA CONVENTION EN RAISON DE L'ABSENCE D'AUDIENCE PUBLIQUE

169. La requérante se plaint de n'avoir bénéficié d'une audience publique ni devant la commission disciplinaire de l'ISU, ni devant le TAS, ni devant le Tribunal fédéral, malgré ses demandes explicites en ce sens. Elle indique que l'exigence de publicité des débats est l'une des garanties prévues par l'article 6 § 1 de la Convention, que les États peuvent déroger à celle-ci uniquement dans les conditions expressément énumérées par cette disposition et que, en l'occurrence, pareilles conditions n'étaient pas réunies.

A. Sur l'absence d'audience publique devant le TAS

1. Sur la recevabilité

170. La Cour rappelle ses conclusions quant à sa compétence ratione personae (paragraphe 67 ci-dessus).

171. Constatant par ailleurs que cette partie de la requête no 67474/10 n'est pas manifestement mal fondée au sens de l'article 35 § 3 a) de la Convention et qu'elle ne se heurte à aucun autre motif d'irrecevabilité, elle la déclare par conséquent recevable.

2. Sur le fond

172. À titre liminaire, la Cour rappelle sa conclusion quant au caractère forcé de l'arbitrage auquel la requérante était partie (paragraphe 115 ci dessus).

a) Les thèses des parties

173. La requérante expose que, pour statuer sur sa cause, le TAS a tenu deux jours d'audiences et qu'au cours de celles-ci de nombreux experts ont été entendus sur des questions scientifiques complexes. Elle soutient à cet égard que les thèses des experts cités par elle ont été rejetées de manière non objective et sur un ton moqueur, et que cela n'aurait pas le cas si le TAS avait autorisé la présence du public.

174. Le Gouvernement estime, sans autres précisions, que, l'article 6 § 1 n'étant pas directement applicable aux procédures devant le TAS, ce dernier ne pouvait être tenu de statuer sur la base d'une audience publique.

b) L'appréciation de la Cour

i. Principes généraux

175. La Cour rappelle que la publicité de la procédure judiciaire constitue un principe fondamental consacré par l'article 6 § 1 de la Convention. Cette publicité protège les justiciables contre une justice secrète échappant au contrôle du public et constitue ainsi l'un des moyens qui contribuent à la préservation de la confiance dans les tribunaux. Par la transparence qu'elle donne à l'administration de la justice, elle aide à atteindre le but de l'article 6 § 1: le procès équitable, dont la garantie compte parmi les principes fondamentaux de toute société démocratique (Diennet c. France, 26 septembre 1995, § 33, série A no 325-A, B. et P. c. Royaume-Uni, nos 36337/97 et 35974/97, § 36, CEDH 2001-III, Olujić c. Croatie, no 22330/05, § 70, 5 février 2009, Martinie c. France [GC], no 58675/00, § 39, CEDH 2006-VI, et Nikolova et Vandova c. Bulgarie, no 20688/04, § 67, 17 décembre 2013).

176. L'article 6 § 1 ne fait cependant pas obstacle à ce que les juridictions décident, au vu des particularités de la cause soumise à leur examen, de déroger à ce principe: aux termes mêmes de cette disposition, "(...) l'accès de la salle d'audience peut être interdit à la presse et au public pendant la totalité ou une partie du procès dans l'intérêt de la moralité, de l'ordre public ou de la sécurité nationale dans une société démocratique, lorsque les intérêts des mineurs ou la protection de la vie privée des parties au procès l'exigent, ou dans la mesure jugée strictement nécessaire par le tribunal, lorsque dans des circonstances spéciales la publicité serait de nature à porter atteinte aux intérêts de la justice" ; le huis clos, qu'il soit total ou partiel, doit alors être strictement commandé par les circonstances de l'affaire (Diennet, § 34, Martinie, § 40, Olujić, § 71, et Nikolova et Vandova, § 68, précités).

177. L'article 6 n'exige pas nécessairement la tenue d'une audience dans toutes les procédures. Cela est notamment le cas pour les affaires ne soulevant pas de question de crédibilité ou ne suscitant pas de controverse sur les faits qui auraient requis une audience, et pour lesquelles les tribunaux peuvent se prononcer de manière équitable et raisonnable sur la base des conclusions présentées par les parties et d'autres pièces (voir, par exemple, Döry c. Suède, no 28394/95, § 37, 12 novembre 2002, Pursiheimo c. Finlande (déc.), no 57795/00, 25 novembre 2003, et Şahin Karakoç c. Turquie, no 19462/04, § 36, 29 avril 2008). Partant, la Cour ne saurait conclure, même dans l'hypothèse d'une juridiction investie de la plénitude de juridiction, que l'article 6 implique toujours le droit à une audience publique, indépendamment de la nature des questions à trancher. D'autres considérations, dont le droit à un jugement dans un délai raisonnable et la nécessité en découlant d'un traitement rapide des affaires inscrites au rôle, entrent en ligne de compte pour déterminer si des débats publics sont

nécessaires (Varela Assalino c. Portugal (déc.), no 64336/01, 25 avril 2002). La Cour a ainsi déjà considéré que des procédures consacrées exclusivement à des points de droit ou hautement techniques pouvaient remplir les conditions de l'article 6 même en l'absence de débats publics (Jurisic et Collegium Mehrerau c. Autriche, no 62539/00, § 65, 27 juillet 2006, et Mehmet Emin Şimşek c. Turquie, no 5488/05, §§ 30 31, 28 février 2012).

ii. Application de ces principes au cas d'espèce

178. La Cour rappelle que, dans son arrêt du 10 février 2010, le Tribunal fédéral s'est limité à juger que la requérante ne pouvait pas invoquer un quelconque droit à une audience publique devant le TAS, tiré de l'article 6 § 1 de la Convention, car cette disposition n'était pas applicable aux procédures d'arbitrage volontaire. Le Tribunal fédéral a toutefois souligné que, compte tenu de l'importance du TAS en matière de sport, la tenue d'une telle audience aurait été "souhaitable" (paragraphe 23 ci dessus).

179. La Cour rappelle en outre que les principes relatifs à la publicité des audiences en matière civile, tels qu'ils ont été décrits ci-dessus, valent non seulement pour les tribunaux ordinaires mais également pour les juridictions ordinales statuant en matière disciplinaire ou déontologique (Gautrin et autres c. France, 20 mai 1998, § 43, Recueil 1998 III).

180. Cela étant, la Cour a déjà jugé que ni la lettre ni l'esprit de l'article 6 § 1 n'empêchaient une personne de renoncer de son plein gré, de manière expresse ou tacite, à l'exercice du droit à la publicité des débats (Håkansson et Sturesson c. Suède, 21 février 1990, § 66, série A no 171-A).

181. Or cela n'est pas le cas en l'occurrence. D'une part, comme la Cour l'a reconnu plus haut, il s'agit d'un arbitrage forcé. D'autre part, il n'est pas contesté que la requérante avait expressément demandé la tenue d'une audience publique et que celle-ci lui a été refusée sans qu'aucune des conditions énumérées à l'article 6 § 1 fût remplie.

182. La Cour considère que les questions débattues dans le cadre de la procédure litigieuse – qui étaient relatives au point de savoir si c'était à juste titre que la requérante avait été sanctionnée pour dopage, et pour la résolution desquelles le TAS a été amené à entendre de nombreux experts – nécessitaient la tenue d'une audience sous le contrôle du public. En effet, la Cour observe qu'il y avait une controverse sur les faits et que la sanction infligée à la requérante avait un caractère infamant, étant susceptible de porter préjudice à son honorabilité professionnelle et à son crédit (voir, mutatis mutandis, Grande Stevens et autres c. Italie, nos 18640/10, 18647/10, 18663/10, 18668/10 et 18698/10, § 122, 4 mars 2014). D'ailleurs, malgré sa conclusion quelque peu formaliste, le Tribunal fédéral lui-même, dans son arrêt du 10 février 2010, a expressément reconnu au travers d'un obiter dictum qu'une audience publique devant le TAS aurait été souhaitable.

183. Compte tenu de ce qui précède, la Cour conclut qu'il y a eu violation de l'article 6 § 1 de la Convention à raison de la non-publicité des débats devant le TAS.

184. Cette conclusion la dispense d'examiner le grief de la requérante quant à l'absence d'audience devant la commission disciplinaire de l'ISU, dont le TAS était l'organe de recours disposant de la plénitude de juridiction (paragraphe 169 ci-dessus).

B. Sur l'absence d'audience publique devant le Tribunal fédéral

185. La Cour rappelle que des procédures consacrées exclusivement à des points de droit ou hautement techniques peuvent remplir les conditions de l'article 6 de la Convention même en l'absence de débats publics (Jurisic et Collegium Mehrerau, précité, § 65, et Mehmet Emin Şimşek, précité, §§ 30-31).

186. En l'occurrence, elle note que, dans son arrêt du 10 février 2010, le Tribunal fédéral a rejeté la demande de tenue d'une audience publique formulée par la requérante en rappelant que, d'après la LTF, les audiences publiques n'étaient tenues que dans des cas exceptionnels ou lorsque lui même entendait statuer sur le fond de l'affaire qui lui était soumise "en se fondant sur ses propres constatations factuelles".

187. Dans le cas d'espèce, l'objet du litige devant le Tribunal fédéral portait uniquement sur les garanties procédurales applicables au TAS. Il s'agissait donc de questions juridiques hautement techniques qui ne comportaient aucun examen de faits éventuellement susceptible d'exiger la tenue d'une audience publique. La Cour est convaincue que ce type de litige peut être valablement résolu sans le recours à une audience publique (voir, mutatis mutandis, Döry, précité, § 37, et Schuler-Zgraggen c. Suisse, 24 juin 1993, § 58, série A no 263).

188. Il s'ensuit que ce grief doit être rejeté pour défaut manifeste de fondement, en application de l'article 35 §§ 3 et 4 de la Convention.

III. SUR LES AUTRES VIOLATIONS ALLEGUEES

189. Invoquant les articles 4 § 1 et 8 de la Convention et l'article 1 du Protocole no 1 à la Convention, le requérant se plaint de la somme qu'il a été condamné à verser au club Chelsea.

190. Compte tenu de l'ensemble des éléments dont elle dispose, et pour autant que les griefs du requérant tirés des articles 4 § 1 et 8 de la Convention relèvent de sa compétence, la Cour estime que ces griefs ne révèlent aucune apparence de violation des droits et libertés énoncés dans la Convention ou ses Protocoles. Dès lors, ces griefs doivent être déclarés irrecevables, en application de l'article 35 §§ 3 et 4 de la Convention.

191. Par ailleurs, la Cour relève que la Suisse n'a pas ratifié le Protocole no 1 à la Convention. Il s'ensuit que cette partie de la requête no 40575/10 est incompatible ratione personae (Ocelot S.A. c. Suisse (déc.), no 20873/92, 25 mai 1997) et qu'elle doit également être rejetée, en application de l'article 35 §§ 3 et 4 de la Convention.

IV. SUR L'APPLICATION DE L'ARTICLE 41 DE LA CONVENTION

192. Aux termes de l'article 41 de la Convention, "Si la Cour déclare qu'il y a eu violation de la Convention ou de ses Protocoles, et si le droit interne de la Haute Partie contractante ne permet d'effacer qu'imparfaitement les conséquences de cette violation, la Cour accorde à la partie lésée, s'il y a lieu, une satisfaction équitable".

A. Dommage

193. Au titre de la satisfaction équitable, la requérante réclame la somme de 3 584 126,09 euros (EUR), assortie d'intérêts, pour dommage matériel et la somme de 400 000 EUR pour dommage moral. Pour la ventilation du montant du préjudice matériel, elle renvoie aux conclusions qu'elle avait déposées dans le cadre de la procédure civile engagée contre l'ISU devant les juridictions allemandes.
Dans ses observations, que la Cour a reçues avant la fin de la procédure devant les juridictions allemandes (paragraphes 24 et 25 ci-dessus), le Gouvernement indique que, au moment de la présentation des observations de la requérante, la procédure devant lesdites juridictions était encore pendante. Il considère que la référence à cette procédure ne constitue pas une demande de satisfaction équitable au sens de la Convention et qu'il convient par conséquent de la rejeter.

194. En ce qui concerne le préjudice matériel, la Cour n'aperçoit aucun lien de causalité entre la violation constatée et le dommage matériel allégué par la requérante (Gajtani c. Suisse, no 43730/07, § 125, 9 septembre 2014). En effet, rien ne permet de dire que, si

la sentence arbitrale avait été prononcée par un tribunal arbitral ayant statué en audience publique, les conclusions de ce tribunal arbitral auraient été favorables à la requérante.

195. En ce qui concerne le préjudice moral, statuant en équité, la Cour considère qu'il y a lieu d'octroyer 8 000 EUR à la requérante, pour les deux violations constatées dans le chef de celle-ci.

B. Frais et dépens

196. La requérante n'a pas formulé de demande spécifique à ce titre.

Par ces motifs, la cour

1. Déclare, à l'unanimité, les requêtes recevables quant aux griefs tirés d'un manque d'indépendance et d'impartialité du TAS ainsi que de l'absence d'une audience publique devant le TAS, et irrecevables pour le surplus;

2. Dit, par cinq voix contre deux, qu'il n'y a pas eu violation de l'article 6 § 1 de la Convention quant aux griefs des requérants tirés de l'indépendance et l'impartialité du TAS ;

3. Dit, à l'unanimité, qu'il y a eu violation de l'article 6 § 1 de la Convention dans le chef de la requérante à raison de l'absence d'une audience publique devant le TAS ;

4. Dit, par cinq voix contre deux,

a) que l'État défendeur doit verser à la requérante, dans les trois mois à compter du jour où l'arrêt sera devenu définitif conformément à l'article 44 § 2 de la Convention, 8 000 EUR (huit mille euros), à convertir dans la monnaie de l'État défendeur, au taux applicable à la date du règlement, plus tout montant pouvant être dû à titre d'impôt, pour dommage moral ;

b) qu'à compter de l'expiration dudit délai et jusqu'au versement, ce montant sera à majorer d'un intérêt simple à un taux égal à celui de la facilité de prêt marginal de la Banque centrale européenne applicable pendant cette période, augmenté de trois points de pourcentage ;

5. Rejette, par cinq voix contre deux, la demande de satisfaction équitable pour le surplus.

Fait en français, puis communiqué par écrit le 2 octobre 2018, en application de l'article 77 §§ 2 et 3 du règlement de la Cour.

Fatoş Aracı	Helena Jäderblom
Greffière adjointe	Présidente

H.J.
F.A

Mutu and Pechstein v. Switzerland - 40575/10 and 67474/10
Judgment 2.10.2018 [Section III]
Article 6
Disciplinary proceedings
Article 6-1
Civil rights and obligations
Impartial tribunal
Independent tribunal
Method of appointing arbitrators to the Court of Arbitration for Sport: Article 6 § 1 applicable; no violation

Facts – In the first application, the applicant was a professional footballer who had been ordered to pay a very high sum to his club for a unilateral breach of contract. The applicant in the second application was a speed skater on whom sanctions had been imposed for doping. These two applications raised questions concerning the fairness of the procedures before the Court of Arbitration for Sport (CAS).

Law – Article 6 § 1

(a) Applicability – The first applicant complained about the arbitration decision ordering him to pay damages to Chelsea Football Club. The rights in question were clearly of a pecuniary nature and resulted from a contractual relationship between private persons. They were therefore "civil" rights for the purposes of Article 6.
In the second application, it was the decision upholding the applicant's two-year suspension that was in dispute. Given that they concerned disciplinary proceedings conducted before corporate bodies in which the right to practise a profession was at stake, the "civil" aspect of the rights in question was not in doubt.

Conclusion: Article 6 § 1 applicable.

(b) Jurisdiction ratione personae – The complaints essentially concerned the composition of the CAS and the procedures followed before that body. However, the CAS was neither a State court nor another institution of Swiss public law, but an entity set up under the auspices of the International Council of Arbitration for Sport (ICAS), that is, a private-law foundation.

That being said, in certain enumerated circumstances, particularly with regard to the lawfulness of the composition of the arbitration panel, Swiss law provided that the Federal Supreme Court had jurisdiction to determine the validity of the decisions issued by the CAS. In addition, in the cases in question, the Federal Supreme Court had dismissed the applicants' appeals, thus attributing res iudicata effect in the Swiss legal order to the arbitration awards in question.

The contested acts and omissions were thus capable of engaging the respondent State's responsibility under the Convention. The Court had jurisdiction ratione personae to examine the applicants' complaints concerning acts or omissions by the CAS that had been validated by the Federal Supreme Court.

Conclusion: compatibility ratione personae.

(c) Merits

i. The validity of the applicants' agreement to arbitration

(α) Situation of the second applicant (application no. 67474/10) – The applicable rules of the International Skating Union (ISU) provided for the CAS's compulsory jurisdiction in disputes arising from disciplinary proceedings. The second applicant was obliged to accept the arbitration agreement in order to be able to take part in competitions organised by the ISU and to earn her living. In view of the restriction that a refusal to accept the arbitration clause would have entailed for the

second applicant's professional life, she had not accepted this clause freely and in a non-equivocal manner.

Although it had not been imposed by law but by the ISU's rules, the second applicant's acceptance of the CAS's jurisdiction had to be regarded as "compulsory" arbitration. In consequence, this arbitration process was required to provide the guarantees of Article 6 § 1 of the Convention.

(β) Situation of the first applicant (application no. 40575/10) – The applicable rules of the relevant sporting federation did not impose arbitration, but left the mode of resolving disputes to the contractual freedom of the clubs and players. There was no question of "compulsory" arbitration.

However, the first applicant had requested the withdrawal of the arbitrator chosen by Chelsea Football Club, and had challenged his independence and impartiality. It followed that the first applicant had not waived "in an unequivocal manner" his right to challenge the CAS's independence and impartiality in any dispute between him and Chelsea Football Club. Thus, the arbitration procedure had to provide the guarantees of Article 6 § 1 of the Convention.

ii. The independence and impartiality of the CAS – Although the CAS derived its authority from a private-law foundation, it enjoyed full jurisdiction in determining, on the basis of rules of law and after proceedings conducted in a prescribed manner, all issues of fact and law submitted to it in the context of the disputes brought before it. Its decisions provided a judicial-type solution to these disputes, and an appeal lay against them with the Federal Supreme Court. Furthermore, the Federal Supreme Court considered the award decisions issued by the CAS as "genuine judgments, comparable to those of a State court". When ruling on the applicants' respective cases, through the combined effect of the Federal Act on Private International Law and the case-law of the Federal Supreme Court, the CAS thus had the appearance of a "tribunal established by law" within the meaning of Article 6 § 1.

(α) With regard to the second applicant (application no. 67474/10) – At the relevant time, the list of CAS arbitrators was drawn up by ICAS. It was composed as follows: three-fifths of its members were selected from individuals proposed by the International Olympic Committee, the international federations and the national Olympic committees, chosen from their membership or outside it; one-fifth of the members were chosen by ICAS "after appropriate consultations, in order to protect the interests of athletes", and one-fifth were chosen from persons who were "independent" vis-à-vis the above-mentioned sporting bodies.

ICAS was required to choose only a fifth of the arbitrators from individuals who had no relationship with the sporting bodies which were likely to challenge athletes in the context of disputes brought before the CAS. In addition, the appointments were made at ICAS's discretion. However, ICAS was itself entirely composed of individuals who had come from those sporting bodies, which indicated the existence of a certain link between ICAS and the organisations likely to challenge athletes in potential disputes brought before the CAS, particularly those of a disciplinary nature.

Furthermore, the arbitrators were appointed for a renewable four-year term, with no limitation on the number of terms; equally, ICAS had the power to remove, by a decision "with summary reasoning", any arbitrator who refused or was prevented from exercising his or her functions, or who did not fulfil his or her duties in accordance with the provisions of the Arbitration Code.

In the present case, the arbitration panel which had ruled on the dispute between the second applicant and the ISU was made up of three arbitrators, all selected from the list drawn up by ICAS and subject to ICAS's power to remove them. Even the option, available to the second applicant, of selecting

an arbitrator of her own choice was limited by the obligation to use this list, so that the second applicant did not enjoy a totally free choice.

That being noted, at the relevant time the list of arbitrators prepared by ICAS contained some 300 arbitrators. However, the second applicant had not advanced any factual elements which cast doubt on the independence and impartiality, in general, of these arbitrators and of the arbitration panel which ruled on her case.

While the Court was prepared to acknowledge that the organisations likely to challenge athletes in the context of disputes before the CAS exerted a genuine influence in the selection mechanism in force at the relevant time, it could not conclude, on the sole basis of this influence, that the list of arbitrators had been composed, if only as a majority, of persons who could not be regarded as objectively or subjectively independent and impartial on an individual basis vis-à-vis those organisations.

There were not therefore sufficient grounds for departing from the Federal Supreme Court's consistent case-law to the effect that the system based on a list of arbitrators met the constitutional requirements of independence and impartiality applicable to the arbitration courts and that the CAS, when functioning as an external appeal body to the international federations, had the appearance of a judicial authority which was independent of the parties.

Conclusion: no violation (five votes to two).

(β)Concerning the first applicant (application no. 40575/10) – The first applicant complained that two of the arbitrators on the arbitration panel which issued a decision in his case had, on an individual basis, been lacking in independence and impartiality. With regard to the first arbitrator, although the facts giving rise to the case were the same, the legal issues decided by the two arbitration panels on which the arbitrator in question had sat were obviously quite different. With regard to the second arbitrator, the Federal Supreme Court had concluded in a lengthily reasoned judgment which contained no hint of arbitrariness that the first applicant had failed to substantiate his allegations.

Conclusion: no violation (five votes to two).

The Court also concluded, unanimously, that there had been a violation of Article 6 § 1 in respect of the second applicant on account of the failure to hold a public hearing before the CAS.

Article 41: EUR 8,000 to the second applicant in respect of non-pecuniary damage; second applicant's claim in respect of pecuniary damage rejected.

(See also Osmo Suovaniemi and Others v. Finland (dec.), 31737/96, 23 February 1999; Transportes Fluviais do Sado S.A. v. Portugal (dec.), 35943/02, 16 December 2003, Information Note 59; Eiffage S.A. and Others v. Switzerland (dec.), 1742/05, 15 September 2009; Suda v. the Czech Republic, 1643/06, 28 October 2010, Information Note 134; Tabbane v. Switzerland (dec.), 41069/12, 1 March 2016, Information Note 194; and National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France, 48151/11 and 77769/13, 18 January 2018, Information Note 214)

Jugements du Tribunal fédéral*
Judgements of the Federal Tribunal

* Résumés de jugements du Tribunal Fédéral suisse relatifs à la jurisprudence du TAS
Summaries of some Judgements of the Swiss Federal Tribunal related to CAS jurisprudence

Judgment of the Federal Tribunal 4A_260/2017
20 February 2018
X, (Appellant) v. International Federation of Association Football (Respondent)

Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of 9 March 2017[1]

Extract of the facts

The International Federation of Football Associations (officially, the Fédération Internationale de Football Association or FIFA), an association under Swiss law registered in Zurich, is the world's governing body for football. It has enacted, amongst other things, the Regulations on the Status and Transfer of Players (RSTP). One of the aims of these Regulations is limiting the influence of outside actors and to prevent third parties from acquiring ownership of the players' economic rights.

Normally, the ownership of the federal rights arising from the player's mandatory registration with a national association and the ownership of economic rights concerning said player *(e.g.* the transfer fee) are inseparable. However, for several years now, certain countries of South America and Europe (Spain and Portugal in particular) have introduced a practice that has disconnected these two categories of rights. This practice is called *third-party ownership of economic rights of football players* or better known under its English name — Third-Party Ownership (TPO) — and consists in having a professional football club selling, totally or partially, his economic rights over a player to a third-party investor, so that this investor may benefit from any potential capital gain that the club will make upon the future transfer of the player. In return, the investor provides financial assistance to the club to allow it to resolve cash flow problems or helping it acquire a player, among other objectives. In this case, a club that is interested in a player but is unable to pay the transfer fee required by the player's current employer, calls upon an investor who will provide the necessary funds for the payment of all or part of the transfer fee. In exchange, the investor obtains a profit-sharing on the indemnity that the club will get in case of subsequent transfer of the player.

Aware of the problem, in 2008 FIFA adopted Art. 18bis RSTP, that reads as follows:

1. *No club shall enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams.*
2. *The FIFA Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in this article.*

Then in 2012, FIFA introduced a new Art. 18ter to the RSTP forbidding as of 1 May 2015 the TPO practices:

1. *No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation.*
2. *The interdiction as per paragraph 1 comes into force on 1 May 2015.*
3. *Agreements covered by paragraph 1 which predate 1 May 2015 may continue to be in place until their contractual expiration. However, their duration may not be extended.*

[1] The original of the judgment is in French (www.bger.ch).
For the full English translations & introductory notes on the Federal Tribunal judgments in both sports- and commercial arbitration cases, you can visit the website www.swissarbitrationdecisions.com (operated jointly by Dr. Charles Poncet and Dr. Despina Mavromati) as a service to the international arbitration community.

4. *The validity of any agreement covered by paragraph 1 signed between one January 2015 and 30 April 2015 may not have a contractual duration of more than 1 year beyond the effective date.*
5. *By the end of April 2015, all existing agreements covered by paragraph 1 need to be recorded within the Transfer Matching System (TMS). All clubs that have signed such agreements are required to upload them in their entirety, including possible annexes or amendments, in TMS, specifying the details of the third party concerned, the full name of the player as well as the duration of the agreement.*
6. *The FIFA Disciplinary Committee may impose disciplinary measures on clubs or players that do not observe the obligations set out in this article.*

Within the meaning of the RSTP, the "third party" is a party other than the two clubs which transfer a player from one club to another, or any club to which the player has been registered.

On 30 January 2015, X (hereafter: X. or the Club), a third division football club registered with the Royal Belgian Football Association (RBFA), and W. Limited (hereafter: W.), an investment company under [name of country redacted] law that called itself *"the world leader in 'Third-Party Ownership',"* signed a TPO contract. Titled *"Cooperation Agreement"* , the contract provided that the Club would transfer to W. 30% of its economic rights associated with three designated players against payment by W. of EUR 300'000, in three parts, with the last coming due in February 2016. The contract was due to expire on 1 July 2018, with the possibility of extension reserved. On 7 July 2015, the same parties signed a second contract of the same type according to which X. sold to W. 25% of the economic rights of a Portuguese player for EUR 50'000. The Club also signed a contract with that player, who was a free agent. These various contracts were forwarded to the FIFA department that administers the Transfer Matching System (TMS).

On 2 July 2015, the Secretariat of the FIFA Disciplinary Commission, via the RBFA, opened a disciplinary proceeding against X. for violation of Art. 18bis and 18ter of the RSTP related to the Cooperation Agreement. On 21 July 2015, it extended the scope of this proceeding after being informed of the existence of a second agreement.

The FIFA Disciplinary Commission rendered a decision on 4 September 2015. It found the Club liable for violation of Art. 18bis and 18ter RSTP and prohibited the latter from registering players, at the national and international level, for four transfer periods following the notification of its decision, and also imposed a CHF 150'000 fine.

With a decision rendered on 7 January 2016, the FIFA Appeal Committee dismissed the appeal filed by the Club and confirmed the first-instance decision.

On 9 March 2016, X. filed an appeal with the Court of Arbitration for Sport (CAS). The arbitral proceedings were conducted in French by a Panel of three arbitrators.

On 9 March 2017, the Panel rendered its final award. Partially allowing the appeal, it amended the challenged decision in that the prohibition on X. to register players at national and international level, was reduced to three full and consecutive registration periods following the notification of the arbitral award. For the rest, the decision of the FIFA's Appeals Commission was confirmed.

On 15 May 2017, X. (hereafter: the Appellant) filed a civil law appeal before the Swiss Federal Tribunal requesting the annulment of the award dated 9 March 2017. It also requested that the appeal be granted a suspensive effect. In short, the Appellant argued that the CAS could not be regarded as a genuine arbitral tribunal and also that the conduct adopted by the President of the Panel towards its lawyers during the hearing of 17 October 2016, infringed its right to be heard. On the merits, the Appellant contended that the Panel rendered an award incompatible with substantive public policy by endorsing FIFA's total ban on TPO and imposing sanctions that were manifestly disproportionate.

In its reply of 27 June 2017, FIFA (hereafter: the Respondent) requested the inadmissibility and, alternatively, the dismissal of the appeal.

On the same day, the CAS, represented by its Secretary-General, produced the case file and filed its observations requesting the dismissal of the appeal.

Extract of the legal considerations

In its first ground of appeal, based on Art. 192(2)(a) PILA, the Appellant submits that the challenged award was rendered by an irregularly composed arbitral tribunal.

This statement is based on several grounds that can be summarized as follows.

The Appellant has argued in length during the arbitration proceedings, the CAS does not constitute a genuine arbitral tribunal within the meaning of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (RS 0.277.12), and the obligation to have recourse to CAS arbitration is all the more illegal as it is imposed by the statutes of an organization (FIFA) described by law-enforcement authorities as *"mafia-like"*.

In a decision of 12 November 2010, the Brussels Court of Appeal, ruling in interim proceedings, indicated that the CAS may not be a genuine arbitral tribunal, but rather an appellate body of the sports federation that rendered the challenged disciplinary sanction.

Moreover, the Respondent's own counsel also expressed his doubts as to the nature of this arbitral institution in an article devoted to the contentious issue in which he highlighted, among other criticisms, the considerable influence of sports organizations in the appointment of members of the International Council of Arbitration for Sport (ICAS)[2] and the limited effectiveness of the process of challenging CAS arbitrators (Antonio Rigozzi, *L'importance du droit suisse de l'arbitrage dans la resolution des litiges sportifs internationaux,* in Revue de droit Suisse [RSJ/ZSR] 2013 I p. 301 fp.

Following the above criticisms by the state court and the aforementioned author, the Appellant invites the Federal Tribunal to review its case law on the matter. In its opinion, as the Respondent was only bound by the jurisdiction of the CAS after the judgment of 27 May 2003 (ATF 129 III 445; hereafter: the *Lazutina* judgment), which had confined itself to examining the links existing between that arbitral tribunal and the IOC, FIFA's relationship with the CAS has never really been put to the test of the Federal Tribunal to date.

In summary, the Appellant challenges CAS independence vis a vis FIFA.

The Appellant summarizes its argumentation in the form of the following statement, with elements borrowed from 'football language':

"In sum, how could [the Appellant] *consider for a single moment that its right to a fair trial has been respected when, having had a CAS arbitration imposed upon it by FIFA's statutes and by those of its Belgian member federation, after the other side had done everything to prevent or delay as far as possible the legal issue filed by X. before the Belgian state courts, and after having done everything it could to speed up the disciplinary procedure? When FIFA plays the "arbitral" match at home, before an arbitral institution — the CAS — to which it is a major contributor and is one of the most recurrent "clients", before a panel appointed by a member of the "sporting establishment" and composed of other members of such establishment, and — for good measure — whose draft decision is "re-read" by the Secretary General of the CAS, X. finds it hard to believe that it can be as sensitive to the interests* [of the Appellant] *as it is to those of the "sporting movement" that keeps it alive?"*

[2] Article S2 Code of Sports-related Arbitration and Mediation Rules: "The purpose of ICAS is to facilitate the resolution of sports-related disputes through arbitration or mediation and to safeguard the independence of CAS and the rights of the parties. It is also responsible for the administration and financing of CAS".

In the leading *Lazutina* decision of 27 May 2003, the Federal Tribunal, after having examined this question in depth, concluded that the CAS is sufficiently independent of the IOC, as well as of all the parties calling upon its services, so that the decisions it renders can be considered as real awards, comparable to state court judgments (ATF 129 III 445, at 3.3.4). The unpublished recital 2.1 of said judgment on the relation between the International Equestrian Federation (FEI), on the one hand, and the CAS in its original organizational structure of 30 June 1984, on the other hand, already stated that it is *"clear that the contested decisions have the status of awards since they were rendered in cases opposing the Appellant to the FIS* [International Skiing Federation]*"*. This recital refers to a previous decision of 15 March 1993 concerning the relations between the International Equestrian Federation (FEI), on the one hand, and the CAS in its original organization of 30 June 1984, on the other hand (ATF 119 II 271, *Gundel* judgment). From an independence point of view, the Federal Tribunal has therefore always found that the links established by the International Summer Olympic Federations *(in casu,* the FEI) or the International Winter Olympic Federations *(in casu,* the FIS) with the CAS less problematic than those between this arbitral tribunal and the IOC. Therefore, prima facie, there is no reason why this should not be the case today.

Since then, this case law has been confirmed on numerous occasions in cases where one or the other of the existing IFs appeared as parties (cf. e.g. 4P.149/2003 of 31 October 2003 at 1.1, 4P.172/2006 of 22 March 2007 [ATF 133 III 235] at 4.3.2.3, c of 20 January 2010, at 4.1 [with FIFA as a party], 4A_612/2009 of 10 February 2010, at 3.1.3, 4A_640/2010 of 18 April 2011, at 3.2.2 [with FIFA as a party], 4A_246/2011 of 7 November 2011 [ATF 138 III 29] at 2.22, 4A_428/2011 of 13 February 2012, at 3.2.3 and 4A_102/2016 of 27 September 2016, at 3.2.3). It was last upheld in the judgment 4A_600/2016 of 29 June 2017, between *Michel Platini* and FIFA, in an appeal seeking the annulment of disciplinary sanctions endorsed by the FIFA Appeal Committee and subsequently reduced by the CAS.

The Federal Tribunal's analysis was recently confirmed by the German *Bundesgerichtshof*[3] in its judgment of 7 June 2016, in the case of Claudia Pechstein, a German skater sanctioned by CAS for doping, against the International Skating Union. Surprisingly, the Appellant completely disregards the aforementioned judgment, even though the academic writing has extensively commented on it.

In the aforesaid judgment of 7 June 2016, the German *Bundesgerichtshof* examined in detail the independence of the CAS in order to establish whether the German courts had jurisdiction to rule on a claim for damages brought by the German athlete Claudia Pechstein against the International Skating Union (ISU). Acknowledging the defendant's objection, it concurred with the Swiss Federal Tribunal that the CAS is a genuine, independent, and impartial arbitral tribunal (n. 23: *"Der CAS ist ein «echtes» Schiedsgericht im Sinne der Zivilprozessordnung und nicht lediglich ein Verbandsgericht"*[4]*;* n. 25: *"Der CAS stellt eine solche unabhängige und neutrale Instanz dar."*[5]*).*

It goes without saying that the judgment relied upon by the Appellant, which the Brussels Court of Appeal rendered some six years earlier at the end of an interlocutory procedure in which the Court merely *mentioned* the possibility that the CAS might not constitute a genuine arbitral tribunal, is not comparable with the German judgment in which the question of the CAS' independence was examined in detail.

In any event, whether or not it confirms the *Lazutina* judgment, and in accordance with the principle of sovereign nations, an opinion expressed by the superior court of an EU member state has no more weight than that of the supreme judicial authority of the country in which the case in dispute is pending, namely Switzerland.

Therefore, the Federal Tribunal has no reason to depart from well-established case law. Only

[3] In German in the original text.

[4] In German in the original text.

[5] In German in the original text.

compelling reasons could allow the Court to distinguish FIFA from the other IFs with respect to its independence from the CAS. However, this Court did not find sufficiently strong arguments in the Appellant's brief to justify treating FIFA as a distinct case from that point of view. Undoubtedly, the Federal Tribunal is not unaware of the criticisms on the CAS by some in academia (cf., among others, Axel Brunk, *Der Sportier und die institutionnelle Sportschiedsgerichtsbarkeit,* 2015, p. 237 ff., 262 ff., 275 if, 305 ff. et 343 ff; Piermarco Zen-Ruffinen, *La nécessaire réforme du Tribunal Arbitral du Sport,* in Citius, Altius, Fortius, Mélanges en l'honneur de Denis Oswald, 2012, p. 483 ff., passim). In the *Lazutina* judgment (ATF 129 Ill 445, at 3.3.3.3, p. 463), the Court itself described the arbitral tribunal as a *"perfectible institution"*. However, apart from the improvements that were made to the institution, as rightly stressed by its Secretary General in his Answer, and from the fact that it does not seem viable, in many respects, to replace it with another mechanism for dealing with sports disputes, unless athletes and other interested parties are referred to a State court with all the disadvantages that this entails, the Federal Tribunal, as the judicial authority called upon to rule on appeals in international arbitration matters, does not have the mission to reform this institution itself, nor to recast its governing regulations but must only ensure that it reaches the independence level required to be comparable to a State court. This is certainly the case, despite the Appellant's contentions, given the convincing explanations provided by the Respondent and the CAS in their replies to the Appeal. It suffices to merely add the following observations.

Regarding the structural independence of the CAS in relation to the IFs in general and FIFA in particular, the Appellant essentially limits itself to reproducing, verbatim, a long part from the aforementioned academic article published by the Respondent's counsel. However, the latter clearly demonstrates, in paras. 65 to 76 of its Answer, that the situation has changed significantly since then. For example, the President of the CAS Appeals Division, who appoints the sole arbitrator or the president of the panel (Art. R54 of the CAS Code), is no longer the IOC Vice-President (as was the case at the time of publication of this article) but a former athlete designated by the ICAS for this purpose. Moreover, and contrary to what previously occurred, as a result of an amendment to Art. S14 of the CAS Code, the ICAS is no longer required to have a quota of arbitrators selected from among the persons proposed by the sports organizations (1/5th each for the IOC, the IFs and the NOCs). The latter no longer have a privileged status as, like their athletes' commissions, they can only propose to ICAS the names and qualifications of arbitrators likely to appear on the *ad hoc* list, which must include at least 150 names (Art. S13 para. 2 of the CAS Code) and actually includes more than 370 at present, which correspond to arbitrators from 87 different countries (Matthieu Reeb, *The Court of Arbitration for Sport [CAS] in 2017,* in "Justice-Justiz-Giustiza" 2017/14 n. 1). Moreover, even if, when the Federal Tribunal rendered the *Lazutina* judgment, the ICAS President, who is also the President of the CAS pursuant to Art.59 of the CAS Code, was elected by the ICAS from among its members *"on the proposal of the IOC"*, that role is now elected after consultation with the IOC, the ASOIF, the AIOWF and ANOC (Art. S6.2 of the CAS Code) and any member of the ICAS may apply for the presidency of this body (Art. S8.3 of the CAS Code). It is therefore reasonable to state, as the Respondent does, that the analysis of the relations between the CAS and the IOC, which the Federal Tribunal carried out in the Lazutina decision, applies *a fortiori* to FIFA.

Regarding the financial independence of the CAS from FIFA, it must be noted that the CHF 1'500'000 paid annually by FIFA as a contribution to the CAS' general costs represents less than 10% of the institution's budget (CHF 16'000'000), which is less than the percentage suggested by Piermarco Zen-Ruffinen *(op. cit.,* pp. 500 et seq.) and remains well below the CHF 7'500'000 paid by the Olympic movement as a whole for the same title. It is equally difficult to see to whom else the CAS could turn in order to collect the necessary funds for its general expenses if not to the sports organizations using its services. It is further not conceivable that athletes and sports organizations could be charged with a contribution equal to the full financing of this institution, unless the former are harmed and denied access to CAS. Moreover, the situation of sportspersons is not comparable to

that of the parties to an *ad hoc* commercial arbitration, who are required to pay all the costs of the arbitral tribunal on an equal footing. As for the desire of CAS arbitrators and employees to seek to preserve their advantages by doing everything in their power not to lose a "big client" such as FIFA, this entails a state of mind that is not in line with the qualities that can be expected of persons working at a tribunal, even a private tribunal. Nonetheless, the Appellant has not provided any evidence to that effect. Nor has it attempted to demonstrate, by statistical analysis or otherwise, that there is a propensity on the part of the CAS to agree with FIFA when it is a party to a CAS arbitration procedure.

The system of "scrutiny of the award"[6] established by Art. R59 para. 2 of the CAS Code (cf. Kaufmann-Kohler/Rigozzi, *International Arbitration, Law and Practice in Switzerland,* 2015, n. 7.157 ff, spec. 7.161) does not only happen in the CAS, as it also occurs in ICC proceedings. The Federal Tribunal has found nothing wrong with it, as scrutiny of the award does not question the decision-making power of the arbitrators acting within the scope of a Panel (Judgment 4A_612/2009, cited above). Moreover, this opinion is shared by the German *Bundesgerichtshof* (cf. judgment cited).

The two examples drawn by the Appellant from the Panel's and the President's conduct in this case have nothing to do with the matter of the CAS's independence as an institution. The Appellant raises a specific grievance from the first example, which will be examined later. Regarding the second, through which the Appellant invokes the repeated refusals to suspend the proceedings until the rendering of the decision in the pending proceedings before the European courts on the legality of the TPO prohibition, it should be noted that, unless particularly serious or repeated errors which would constitute a manifest violation of its obligations, procedural errors or a materially incorrect decision are not sufficient to establish an appearance of prejudice of an arbitral tribunal (Judgment 4A_606/2013 of September 2, 2014, at 5.3 and the precedents cited).

This exception is not relevant in this case. Indeed, the reasons stated by the Panel in paras. 79 to 82 of its Award appear to be at least plausible.

In these circumstances, the Appellant's claim based on Art. 190(2)(a) PILA is unfounded.

In its second claim, the Appellant alleges a violation of its right to be heard resulting from certain statements made by the President of the Panel during the hearing of 17 October 2016.

In principle, the right to be heard, as guaranteed by Art. 182(3) and 190(2)(d) of PILA, is not different from the right enshrined in constitutional law. Thus, in arbitration, each party has the right to state its opinion as to the essential facts of the case, to present its legal arguments, to submit evidence on relevant facts, and to participate in the arbitral tribunal's proceedings. However, the right to be heard does not include the right to an oral hearing. Nor does it require that an international arbitral award be reasoned. However, the case law has inferred a minimal duty of the arbitral tribunal to examine and address the relevant issues. This obligation is breached when, inadvertently or due to a misunderstanding, the arbitral tribunal fails to take into consideration allegations, arguments, or evidence presented by one of the parties and important for the award (ATF 142 III 360, at 4.1.1 and the judgments cited). The party that considers that there has been a violation of its right to be heard — or another procedural defect — must immediately raise this in the arbitration proceedings, otherwise it will be considered time-barred. Indeed, it is contrary to the principle of good faith to argue a procedural irregularity only at the time of the appeal against an arbitral award, when the irregularity could have been raised during the course of the proceedings (Judgment 4A_150/2012 of 12 July 2012, at 4.1). Similarly, the party intending to challenge an arbitrator must raise the ground for challenge as soon as it becomes aware of it (Judgment 4A_110/2012 of 9 October 2012, at 2.1.2). Art. 180(2) PILA is the basis for this jurisprudential principle which Art. R34(1) of the CAS Code materializes by stipulating that a

[6] In English in the original text.

challenge must be brought within seven days after the cause of the challenge is known.

To support its claim, the Appellant cites, as follows, a verbal exchange that took place during the aforementioned hearing between one of its counsel and the President of the Panel:

Lawyer: *[...] W. leads the debate, starts talking about the issue of legality. (...)*

W.*, unlike FIFA, has had no proceedings brought against it so far, let alone for slanderous reasons. On the other hand, FIFA (and this is always the problem), the people in front of us are obviously charming, perfectly respectable people, but we tend to forget that FIFA is FIFA, which is currently under examination before...*

President: *Oh no, look, I don't want to get into this debate, otherwise...!*

Lawyer: *it is extremely relevant, it is not a debate, it is a fact.*

President: *All right, then, we're all leaving! Let's just say everybody's rotten and get out of here, that's it! [...]*

Due to the statements made by the President of the Panel, the Appellant claims that it was prevented from explaining that the TPO prohibition, allegedly introduced in the name of morality, had in fact been adopted by a FIFA Executive Committee, of which at least half of the members are currently being prosecuted in the United States of America pursuant to an anti-mafia law. It sees the direct result of the method of appointment of the President of the Panel by the President of the CAS Appeals Division in what it considers an *"attitude of prejudice"*, demonstrated by this exchange, the effects of which would be particularly sensitive when a party tries to restrict the regulatory flexibility of a federation.

The Appellant then asserts, directly attacking the President of the Panel, that A. demonstrated by his aforementioned statement that he *"is part of the same sports establishment as FIFA"* and is both *"judge and party"*.

The Appellant confuses grievances based on the violation of the right to be heard (Art. 190(2)(d) PILA) and those based on the irregular composition of the arbitral tribunal (Art. 190(2)(a) PILA). However, in the heading as well as in the development of its grounds, only the first of these two objections is addressed. Accordingly, this Court cannot rule on the second ground (Art. 77(3) LTF). Regardless, the Appellant is estopped from invoking either of these two grounds for not having immediately intervened after having heard the President's statements.

In addition, the President of the Panel, by virtue of his position, should direct the arguments, ensure that they are concise, and invite the parties to focus on the subject of the dispute (Art. R44.2.2 of the CAS Code by reference to Art. R57.1 [now: para. 3] of the latter). This is what he did by preventing the hearing of 17 October 2016, from becoming a trial of FIFA and, in particular, the morality of certain members of its Executive Committee.

It is therefore by no means established that the Panel, by the conduct of its President, has in any way violated the right of the Appellant to be heard. Moreover, the latter is not convincing when it equates A. to FIFA without good reason, by relying on their alleged common membership to the same sporting establishment, and thus disqualifies him as judge and party in any proceedings in which that association is involved.

In any event, the Appellant does not explain how his argument concerning the morality of certain members of the FIFA Executive Committee, which it was allegedly prevented from developing by the President of the Panel, is relevant in the present case. It probably tried to remedy this lack of reasoning in its reply (p. 3, item 100), but it was not entitled to do so because of the aforementioned case-law. Therefore, the ground of the breach of the right to be heard, if it has not been barred by estoppel, can only be rejected as unfounded.

Finally, the Appellant submits that the challenged award is incompatible in many respects with substantive public

policy pursuant to Art. 190(2)(e) PILA and the relevant case-law.

An award is incompatible with public policy if it disregards the essential and widely recognized values which, according to the prevailing view in Switzerland, should constitute the basis of any legal order (ATF 132 III 389, at 2.2.3). An award is contrary to substantive public policy when it is in breach of fundamental principles of substantive law to such an extent that it can no longer be reconciled with the decisive legal order and value system: these principles include, in particular, contractual fidelity, respect for the rules of good faith, prohibition of abuse of law, prohibition of discriminatory or confiscatory measures, and protection of persons lacking civil capacity.

As the adverb *"in particular"* stresses, unambiguously, that the list of examples drawn up by the Federal Tribunal to describe the content of substantive public policy is not exhaustive, despite its constant presence in the case law relating to Art. 190(2)(e) PILA.

In the *Tensacciai* judgment of March 8, 2006, the Federal Tribunal, after examining the question, came to the conclusion that the provisions of any competition law are not part of the fundamental values (ATF 132 III 389, at 3).

In the present case, the Appellant, despite claiming the opposite, seeks, in a few lines, to question said case law. In its opinion, due to an undeniable worldwide generalization of the most essential competition rules, it would be reasonable to assume that while competition law as a whole is not unconditionally part of public policy pursuant to Art. 190(2)(e)PILA, on the other hand, competition law, and in particular the EU and Swiss competition law, is part of it insofar as it sanctions the most serious unconstitutional conduct, such as restrictions by object or abuses of a dominant position aimed at excluding all "third parties" from a given market ("boycott") in order to reserve it for a few elected representatives, in the case at hand, the clubs doing so (creation of a monopoly or an oligopoly).

There is no need here to examine the merits of this statement on its own, or re-examine the challenged case law. Indeed, even if it were necessary to follow the Appellant's arguments and soften the case law, the plea alleging a violation of substantive public policy for serious breaches of competition law and the similar plea based on a failure to respect the right to the free movement of capital (and related rights) should nevertheless be rejected. It must be noted that, as its reasoning, the Appellant refers to a long scholarly article written by a French author (Jean-Michel Marmayou), published in 2016, with the title *"Lex Sportiva and Investments: Prohibition of Third-Party Player Ownership"* [7] but the version produced as Annex 2 to its appeal is entitled: *"TPO: for or against the "appropriation" of the workforce?"*[8] In a fundamentally appellatory criticism, it quotes parts of this article, or more often than not, simply refers other parts of it to the Court to read without giving consideration to the reasons given by the Panel in the Award relating to the competition law and the free movement of capital. In the Appellant's opinion, it is sufficient to *"compare the very serious analysis made by Mr. Marmayou in his above-mentioned article with the ersatz (sic) examination of competition law contained in the challenged award."* However, by arguing in such a way, the Appellant seriously disregards the federal case law on the grounds of appeal of an arbitral award, which requires the Appellant to discuss the reasons in the contested award and to indicate precisely how the Appellant considers that the award has disregarded the law.

Consequently, the appeal is not admissible on these grounds.

The Appellant argues that the challenged award is also in breach of public policy by putting something that is — according to the Federal Tribunal itself — an entirely lawful activity, "out of business". It is unclear which element of the aforementioned definition of substantive public

[7] Title in French in the original text: *"Lex sportiva et investissements: interdiction du Third Party Player Ownership."*

[8] Title in French in the original text: *"TPO: pour ou contre «l'appropriation» de la force de travail?"*

policy the Appellant links the Panel's approach, due to a lack of precision on this issue.

The Appellant's considerable reliance on the Tribunal Federal Judgment 4A_116/2016 of 13 December 2016 cannot, however, convincingly demonstrate the precedential value of that judgment, which concerned different parties. The circumstances of the two cases were not identical[9].

As for the additional statements made by the Appellant, which are essentially of an appellatory nature, it is not possible to link them to the criticism based on the aforementioned federal judgment. Indeed, the Appellant discusses the *"margin of autonomy of the associations"* with regard to the elements of the European law approach that it raised before the Brussels Court of Appeal; the conditions which must be fulfilled regarding an *"exception to the principle of free movement"*; as well as the case law of the Federal Tribunal on European public policy. However, the supposed relationship between the discussed matters and the considerations issued by the Court in 4A_116/2016 does not emerge from its appeal.

Consequently, the complaint based on a violation of substantive public policy must be dismissed insofar is it rests on an alleged *carte blanche* given by the Federal Tribunal to the use of a TPO system.

The Appellant further argues that, according to a generally accepted — though questionable — view, the clubs are the indirect members of the IFs. As a result, there is a contractual relationship between the Respondent and itself, which it argues prohibits the Appellant from undertaking any TPO activity with any "third party". In its view, such a contract would constitute a breach of public policy, as Art. 27(2) CC prohibits excessive contractual restrictions on the economic freedom of the parties. In this case, however, the FIFA regulations at issue suppress the freedom of football clubs throughout the world to make certain types of investment.

According to the case law, the violation of Art. 27(2) CC is not automatically against substantive public policy as defined above; there also needs to be a clear and severe violation of this fundamental right. Under Art. 27(2) CC, however, a contractual restriction of economic freedom is considered excessive only if a party is placed at the mercy of its contractual counterpart's arbitrariness, if it suppresses his economic freedom, or if it restricts him in such a way that the basis of his economic existence is jeopardized (Judgment 4A_312/2017 of 27 November 2017, at 3.1 and the precedent cited therein).

The conditions established by this case law are not fulfilled in the present case. By prohibiting TPOs, FIFA is restricting the economic freedom of the clubs, but is not suppressing it. Clubs remain free to pursue investments, as long as they do not secure them by assigning the economic rights of the players to third-party investors. The Appellant acknowledges that the suppressed freedom concerns only *"certain types of investment"*. Moreover, if this violation of Art. 27(2) CC was so detrimental to the economic freedom of clubs, one must ask how professional clubs established in countries that have already prohibited the establishment of TPOs — such as France and England — still find the funds necessary for their operation, which they are widely known to have.

Consequently, this ground is unfounded.

As a final ground, the Appellant argues that "the punishment is highly disproportionate, to such an extent as to violate public policy."

9 According to the Appellant, in this award, endorsed by the Federal Tribunal, the CAS validated the legality of contracts of the type TPO. Consequently, FIFA, which is required by a clause in its Statutes to comply with CAS case law, would violate this obligation by banning TPOs.
This is not the case. The award rendered by a CAS panel is intended only to settle a specific dispute. The one to which the appellant refers did not concern the dispute at issue here, but opposed other parties. In addition, it did not address the compliance of the TPOs with Art. 18bis and 18ter RSTP, nor the legality of the TPOs with respect to the standards invoked by the appellant. It is therefore not a relevant example for the resolution of the dispute (See 4A_116/2016 at lit. B.b.b.d).

As submitted, this final ground is not admissible. Indeed, the Appellant has obviously confused the Federal Tribunal ruling on an appeal in international arbitration with a court of appeal authorized to freely examine the extent of the sanction imposed by a lower criminal court and to consider, for this purpose, all relevant factual circumstances. Moreover, by disregarding all of the rules governing the procedure for appeals in civil matters concerning international arbitration (see above), it alleges facts that do not correspond to a statement made by the Panel in the challenged award — in particular, concerning the effective impact of the sanction on the first team and on the young players — without raising any of the admissible exceptions that would allow it to question the factual situation set out therein, and does not discuss the reasons given by the arbitrators to justify the contested sanctions and hopelessly attempts to supplement its argument in its Reply.

Decision

The appeal must therefore be dismissed to the extent that it is admissible.

Informations diverses
Miscellanous

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