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Table des matières/Table of Contents

Editorial.....	4
Articles et commentaires / Articles and Commentaries	6
La protection des joueurs mineurs au sens de l'art. 19 RSTJ Juan Pedro Barroso	7
The FIFA arbitration clauses under scrutiny of the Belgian Judge: The Seraing case Stéphanie De Dycker	23
Jurisprudence majeure / Leading Cases	33
CAS 2017/A/4977 Smouha SC v. Ismaily SC & Aziz Abdul & Club Asante Kotoko FC & Fédération Internationale de Football Association (FIFA) 4 February 2019	34
CAS 2017/A/5003 Jérôme Valcke v. Fédération Internationale de Football Association (FIFA) 27 July 2018	42
CAS 2017/A/5045 Maria Farnosova v. International Association of Athletics Federations (IAAF) & All Russia Athletics Federation (ARAF) 27 July 2018	57
CAS 2017/A/5299 Olympique Lyonnais v. Union des Associations Européennes de Football (UEFA) 10 August 2018	66
CAS 2017/A/5359 Persepolis Football Club v. Rizespor Futbol Yatirimlari 29 May 2018	72
CAS 2017/A/5369 World Anti-Doping Agency (WADA) v. South African Institute for Drug-Free Sport (SAIDS) & Gordon Gilbert 21 June 2018	77
TAS 2017/A/5382 Jules Accorsi c. Fédération Internationale de Football (FIFA) & Fédération Centrafricaine de Football (RCA) 15 août 2018	83
CAS 2017/A/5459 Isidoros Kouvelos v. International Committee of the Mediterranean Games (ICMG) 6 November 2018 (operative part of 11 May 2018)	92
CAS 2018/A/5733 Koninklijke Racing Club Genk (KRC Genk) v. Manchester United Football Club 15 November 2018	100
CAS 2018/A/5745	

Pan-American Team Handball Federation (PATHF) v. International Handball Federation (IHF) 26 October 2018 (operative part of 13 September 2018)	104
CAS 2018/A/5800 Samir Arab v. Union Européenne de Football Association (UEFA) 14 November 2018 (operative part of 16 August 2018)	111
Jugements du Tribunal fédéral / Judgements of the Federal Tribunal.....	121
Judgment of the Federal Tribunal 4A_424/2017 23 October 2017 X (Appellant) v. World Anti-Doping Agency (WADA) and World Squash Federation (WSF) (Respondents).....	122
Judgment of the Federal Tribunal 4A_426/2017 17 April 2018 L. (Appellant) v. International Federation of Football Association (FIFA) Respondent.....	125
Arrêt du Tribunal Fédéral 4A_560/2018 16 novembre 2018 Fédération Internationale de Football Association (FIFA) (recourante) c. José Paolo Guerrero Gonzales et Agence Mondiale Antidopage (AMA) (intimés)	130
Judgment of the Federal Tribunal 4A_382/2018 15 January 2019 International Olympic Committee (IOC) (Appellant) v. X (Respondent)	133
Arrêt du Tribunal Fédéral 4A_556/2019 5 mars 2019 Jose Marcio da Costa c. Salem Alwan Jawad et Fédération Internationale de Football Association (FIFA)	139
Informations diverses / Miscellaneous.....	147
Publications récentes relatives au TAS/Recent publications related to CAS	148

Editorial

Mid-year news include the start-up of the permanent CAS Anti-Doping Division (ADD) as of 1 January 2019 whose role is to manage first-instance procedures relating to anti-doping matters. The new list of arbitrators specialized in anti-doping regulations (the CAS ADD list) is separated from the CAS general list of arbitrators in order to avoid that the same arbitrators be eligible in first-instance and in appeal. However, the CAS ADD arbitrators will remain eligible to rule on cases submitted to the CAS Ordinary Division (sole instance).

The ICAS is satisfied that CAS makes every effort to ensure that the proceedings of the new Anti-Doping Division are lighter and quicker in order to make the system work in the long run. Earlier this year, the CAS ADD registered its first procedures, all filed by the IOC. Two procedures have been already completed, in less than seven weeks from the filing of the request for arbitration until the final decision. A third procedure has been initiated in June 2019 and is ongoing.

The first International Federation to delegate its first-instance authority to the CAS ADD was the International Triathlon Union (ITU) in March 2019. The International Ski Federation (ISF) and the World Archery Federation (WA) signed the official declaration recognizing the CAS ADD procedure during SportAccord on the Gold Coast, Australia on 7 May 2019. Since then, the International Luge Federation (FIL) has also recognized the jurisdiction of the CAS ADD and further IFs are in the process of utilising the services of the CAS ADD.

A propos ICAS, the elections took place on 28 May 2019 with the following result for the current 4-year cycle (2019-2022):

- John Coates (Australia) was re-elected as ICAS/CAS President;
- Michael Lenard (USA) was re-elected as ICAS Vice-President;

- Tjasa Andréa-Prosenec (Slovenia) was re-elected as ICAS Vice-President;
- Corinne Schmidhauser (Switzerland) was re-elected as President of the CAS Appeals Division;
- Elisabeth Steiner (Austria), former judge of the European Court of Human Rights was elected as Deputy President of the Appeals Division;
- Carole Malinvaud (France) was re-elected as President of the CAS Ordinary Division;
- Giulio Napolitano (Italy), professor of Administrative Law and Comparative Administrative Law at the Roma Tre University was elected as Deputy President of the Ordinary Division;
- Ivo Eusebio (Switzerland), former judge of the Swiss Federal tribunal, was elected as President of the CAS Anti-Doping Division;
- David W. Rivkin (USA), specialist in international dispute resolution, past President of the International Bar Association (IBA) and former CAS arbitrator, has been appointed as Deputy President of the Anti-Doping Division.

The appointed Division Presidents will be involved in the following commissions formed by the ICAS at the beginning of this year:

Challenge Commission (new; chaired by Justice Ellen Gracie Northfleet, former President of the Supreme Court in Brazil, 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.

Membership Commission (renewed; chaired by Swiss Federal Judge Yves Rüedi and composed of Ms Tricia Smith (Canada), Olympian in rowing, IOC Member and President Canadian NOC, 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.

All Presidents and Deputy Presidents of the CAS Divisions and of the new ICAS Commissions have been chosen from outside the entities of the Olympic Movement and are independent. The ICAS has a total of 20 Members, 11 men and 9 women.

At the end of 2021, the CAS will move from the Château de Béthusy to the Palais de Beaulieu, still in Lausanne. In July this year, the renovation of the Palais de Beaulieu will begin. The future CAS headquarters will be four times bigger than the current one and will be able to accommodate three hearing rooms and an auditorium. In October this year, the CAS ADD will be located in temporary offices at Avenue de Rhodanie, in the South of Lausanne, and will move to Beaulieu later, where this Division will have a dedicated floor.

Regarding the “leading cases” selected for this issue, while they mostly remain football-related (7 cases out of 11), two relevant doping cases have also been included.

In the field of football, the case 5299 Olympic Lyonnais v. UEFA deals with the sanctions applicable to a club for improper conduct of supporters/spectators. In 5382 Jules Accorsi c. Fédération Centrafricaine de Football, the panel analyses the standing to sue of the party appealing a FIFA disciplinary decision against one of its affiliated association. The case 5800 Samir Arab v. UEFA contemplates a player’s infringement of UEFA Disciplinary Rules regarding match fixing. In Persepolis Football Club v. Rizespor Futbol Yatirimlari, the panel examines the consequences of the failure to summon FIFA in a sporting sanction dispute whereas in Genk v. Manchester United, the application of the exception of article 6 para. 3 Annex 4 RSTP is dealt with in relation to training compensation. In 4977 Smouha SC v. Ismailiy SC, Aziz Abdul, Club Asante Kotoko & FIFA, a player’s termination of contract without just cause and joint liability

of the new club is analysed. Finally, the 5003 Jérôme Valecke v. FIFA case addresses several interesting issues related to the violation of the FIFA Code of Ethics by a FIFA official.

Turning to doping, the case 5369 WADA v. SAIDS and Gordon Gilbert involving the use of testosterone addresses the issue of the duty to establish the route of ingestion of the prohibited substance in order to establish lack of intent whereas in Maria Farnosova v. IAAF and ARAF, the panel interestingly deals with the different aspects of an athlete’s ABP and notably analyses the admissibility of the means of evidence.

Outside football and doping, the case 5459 Isidoros Kouvelos v. International Committee of the Mediterranean Games analyses a procedural aspect of the appeal namely the admissibility of the appeal in light of the *dies a quo* and the notion of decision. Lastly, in 5745 Pan American Team Handball Federation v. IHF, a governance issue is dealt with regarding the powers of a general assembly.

In addition to the interesting article written by Stéphanie De Dycker entitled “The FIFA arbitration clauses under scrutiny of the Belgian Judge: The Seraing case”, we are pleased to publish an article overviewing the CAS jurisprudence related to the protection of minors players according to article 19 RSTP written by Juan Pedro Barroso.

As usual, summaries of the most recent judgements rendered by the Swiss Federal Tribunal in connection with CAS decisions have been enclosed in this Bulletin.

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

Matthieu REEB
CAS Secretary General

Articles et commentaires
Articles and Commentaries



La protection des joueurs mineurs au sens de l'art. 19 RSTJ

Juan Pedro Barroso*

- I. Le principe: généralités et notions
 - II. Les exceptions prévues au principe (art. 19 al. 2 let. a à c RSTJ)
 - A. Le déplacement familial pour des “raisons étrangères au football”
 - B. La jurisprudence du TAS
 - C. L'exception “UE/EEE” (art. 19 al. 2 let. b RSTJ)
 - D. TAS 2012/A/2862 et CAS 2016/A/4903: le critère subjectif de la nationalité
 - E. L'exception de la distance (art. 19 al. 2 let. c RSTJ)
 - III. Les exceptions “non prévues” et évolution au sein de la FIFA
 - IV. Critique du système et conclusion
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I. Le principe: généralités et notions

Afin de prévenir les situations d'abus auxquelles ont fait face de nombreux joueurs mineurs par le passé¹, l'art. 19 al. 1 du Règlement du Statut et du Transfert des Joueurs de la FIFA (ci-après: RSTJ) pose comme règle de principe l'interdiction des transferts internationaux pour les joueurs n'ayant pas atteint l'âge de 18 ans. Face aux diverses préoccupations à l'origine de cette disposition, la FIFA met en avant la nécessité de fournir un environnement stable pour la formation et l'éducation des joueurs mineurs². Au nom de la protection de ces derniers et à de rares exceptions près, il a ainsi semblé nécessaire à la FIFA d'interdire toute forme de migration liée au football pour les joueurs mineurs. La notion de “transfert international”, au sens de l'art. 19 RSTJ, englobe deux scénarios possibles:

- le transfert d'un joueur mineur de son club d'origine affilié à une association membre de la FIFA, vers un club de transfert affilié à une autre association nationale membre de la FIFA;

- le “premier enregistrement auprès d'un club de tout joueur dont la nationalité est différente de celle du pays dans lequel il demande à être enregistré pour la première fois et qui n'a pas vécu de façon continue pendant au moins les derniers cinq ans dans le pays en question” (art. 19 al. 3 RSTJ).

A première vue, le système posé par l'art. 19 RSTJ ne donne pas d'importance au fait de savoir si les parents du mineur consentent au transfert ou si les clubs impliqués dans l'opération s'accordent tous deux sur celle-ci³.

Selon des définitions adoptées par la FIFA dans la partie introductive du RSTJ, est considéré joueur mineur celui qui n'a “pas encore atteint l'âge de 18 ans”. L'article 19 al. 1 RSTJ reprend dès lors cette définition en instaurant le principe d'interdiction de transfert international d'un joueur lorsque celui-ci n'a pas atteint l'âge de 18 ans. Comme le soulignent certains auteurs, le fait que cette notion soit fixée dans un règlement fédératif privé suscite certaines questions du point de vue du conflit, de la coordination ou de l'adéquation de ce texte aux normes d'ordre public de divers Etats qui prévoient la majorité, respectivement la minorité, à un

* Le présent article est issu du travail de Master présenté par Juan Pedro Barroso à l'université de droit de Lausanne.

¹ A ce sujet, Commission européenne, *Study on sports agents in the European Union*, p. 121-122,

<http://ec.europa.eu/assets/eac/sport/library/studies/study-sports-agents-in-eu.pdf>

² Commentaire RSTJ, p. 59.

³ CAÑIZARES EVA, *La discutible protección del deportista menor de edad en las transferencias internacionales*.

seuil plus ou moins élevé⁴. Ce constat découle en particulier de l'obligation de transposition imposée aux associations nationales⁵, sans modification, de diverses dispositions contraignantes telles que l'art. 19 RSTJ⁶.

La sentence CAS 2008/A/1485 Midtjylland c. FIFA apporte plusieurs réponses relatives au statut du joueur visé par l'art. 19 RSTJ. Selon le raisonnement adopté par la Formation dans cette affaire, rien n'indique que cette disposition vise uniquement les joueurs professionnels, ou les joueurs amateurs. Il serait d'ailleurs contraire à l'objectif recherché par le RSTJ de retenir une telle solution. En effet, selon la Formation, l'application de l'art. 19 RSTJ aux seuls joueurs professionnels aurait pour conséquence de laisser les joueurs amateurs seuls face aux risques d'abus et de mauvais traitements. Par ailleurs, les statuts "professionnel" et "amateur" au sens du RSTJ ne doivent pas être confondus avec le statut de "travailleur" ou "étudiant"⁷ qui n'est pas spécifique au RSTJ ou à l'activité de football.

II. Les exceptions prévues au principe (art. 19 al. 2 let. a à c RSTJ)

A. Le déplacement familial pour des "raisons étrangères au football"

En vertu de l'art. 19 al. 2 let. a RSTJ, le transfert international d'un joueur mineur est autorisé si les parents du joueur s'installent dans le pays du nouveau club pour des raisons étrangères au football.

Du point de vue de l'objectif poursuivi par la FIFA, il apparaît premièrement que cette exception entretient des liens certains avec le regroupement familial, situation largement

garantie en Europe en faveur des enfants qui suivent le parcours international de leurs parents⁸. C'est donc en considération de la nouvelle vie que décident d'entreprendre les parents du joueur mineur que la FIFA envisage de permettre une éventuelle formation sportive au mineur dans son nouvel Etat de résidence.

Dans la pratique, nous verrons que cette disposition a donné lieu à certains abus au détriment de l'efficacité recherchée, en raison notamment d'une formulation jugée peu précise par certains auteurs⁹.

1. La notion de "parents"

Aux termes des précisions apportées dans le Commentaire relatif au RSTJ, (ci-après: Commentaire RSTJ), la FIFA pose le principe d'une interprétation stricte du terme "parents" et souligne l'insuffisance du lien qu'entretiendrait un joueur mineur avec un proche parent avec lequel il résiderait dans le pays du club de transfert, pour admettre l'exception susmentionnée¹⁰.

A première vue, cette solution peut sembler restrictive. En effet, il découlerait de cette interprétation qu'un mineur sous tutelle ou réfugié, arrivé dans un nouvel Etat sans ses parents biologiques ne devrait pas bénéficier de cette exception. Cette solution pourrait dès lors se révéler trop exclusive.

2. Les "raisons étrangères au football"

Le Commentaire RSTJ précise que les associations sont uniquement autorisées à enregistrer des joueurs mineurs qui font le déplacement avec leurs parents, pour autant que le déménagement ne soit pas lui-même lié au transfert de leur enfant dans un club de

⁴ CRESPO PÉREZ J. / FREGA NAVIA R., *Nuevos comentarios al reglamento FIFA con análisis de Jurisprudencia de la DRC y del TAS*, Madrid 2015, p.255.

⁵ voir CRESPO PÉREZ J. / FREGA NAVIA R., *op. cit. note de bas de page 4*, p. 300-302.

⁶ Art. 1 al. 1 et art. 3 RSTJ.

⁷ Voir CAS 2008/A/1485 Midtjylland c. FIFA, par. 17.

⁸ CRESPO PÉREZ J. / FREGA NAVIA R., *op.cit. note de bas de page 4*, p.258.

⁹ CRESPO PÉREZ J. / FREGA NAVIA R. qualifient par exemple la formulation de cette exception d'insuffisante.

¹⁰ Commentaire RSTJ, p. 58.

football¹¹. Ici aussi, ces précisions ne semblent pas prendre en compte un nombre important de questions récurrentes en pratique et laissent même entrevoir des moyens de contourner le système de protection imposé par la FIFA.

Partant d'une interprétation stricte et littérale, telle que prônée par la FIFA, on ne pourrait premièrement pas accepter le transfert international d'enfants de parents eux-mêmes actifs dans le domaine du football professionnel. L'application de cette exception devrait dès lors être écartée pour l'enregistrement, dans un nouvel Etat, d'enfants de joueurs de football, d'entraîneurs, de préparateurs physiques et même d'agents de joueurs qui migreraient à l'étranger pour des raisons liées à leur métier, lui-même en relation avec le football¹².

Du point de vue téléologique, une telle situation serait peu adaptée. En ce sens, la lettre ne concorde pas avec l'esprit de la disposition qui voudrait que l'absence de relation avec le football soit exigée exclusivement en rapport avec la carrière sportive du joueur mineur et non avec celle des parents¹³.

Concernant la question de la preuve des raisons étrangères au football, les procédures devant la Commission du Statut et du Transfert des Joueurs font l'objet d'un règlement de procédure spécifique (ci-après: le Règlement de procédure)¹⁴ prévoyant que le fardeau de la preuve incombe à la partie qui invoque un droit découlant d'un fait qu'elle allègue (art. 12 al. 3). Il revient donc à celui qui entend demander l'application de l'exception de l'art. 19 al. 2. let. a RSTJ de prouver que le déménagement de la famille

s'est fait pour des raisons étrangères au football. Le TAS ajoute dans la sentence CAS 2013/A/3140 A v. Club Atlético de Madrid SAD & RFEF & FIFA qu'il revient au joueur de démontrer que le football n'est pas l'une des raisons ayant motivé le déménagement dans le pays où se trouve le nouveau club¹⁵.

Selon l'interprétation de la FIFA, la volonté réelle des parents joue un rôle déterminant et il n'est pas nécessaire que l'objectif principal des parents soit l'activité footballistique de leur enfant pour que l'exception de l'art. 19 al. 2 let. a RSTJ soit écartée¹⁶. Il est suffisant que le déménagement se soit produit pour des raisons participant également à l'activité footballistique du mineur pour que l'exception ne soit pas retenue. Ainsi, le fait que l'activité footballistique d'un joueur soit un élément accessoire et non principal de la volonté de ses parents de s'établir dans un nouveau pays suffit au TAS pour rejeter une demande d'enregistrement au sens de l'art. 19 al. 2 let. a RSTJ¹⁷. Toutefois, le TAS précise que tout rapport entre le déménagement des parents du joueur dans le pays du nouveau club et la pratique du football par leur enfant dans ledit club "*ne saurait être rédbibitoire*"¹⁸. En d'autres termes, si l'une des raisons valables du déménagement des parents est liée d'une manière ou d'une autre au football, le TAS doit évaluer le poids de la raison liée au football, à savoir le "facteur football" et son impact sur la décision finale de déménagement¹⁹.

Selon le TAS, la protection recherchée par cette disposition vise essentiellement deux cas distincts:

- celui où le joueur mineur serait victime d'un déracinement social, culturel,

¹¹ Commentaire RSTJ, p. 58.

¹² CRESPO PÉREZ J./ FREGA NAVIA R., *op.cit. note de bas de page 4*, p. 258.

¹³ *Ibid.*

¹⁴ Règles régissant les Procédures de la Commission du Statut des Joueurs et de la Chambre de Résolution des Litiges.

¹⁵ CAS 2013/A/3140 - A v. Club Atlético de Madrid SAD & RFEF v. FIFA, par. 8.26.

¹⁶ TAS 2012/A/2787 Villareal c. FIFA du 5 avril 2013, par. 82.

¹⁷ TAS 2011/A/2494 FC Girondins de Bordeaux c. FIFA, par. 62.

¹⁸ TAS 2011/A/2494 FC Girondins de Bordeaux c. FIFA par. 62-64.

¹⁹ CAS 2015/A/4312, CAS 2013/A/3140.

économique et/ou éducatif, voire d'une exploitation à des fins sportives et commerciales de son potentiel footballistique au détriment de son bien-être et de son développement personnel;

- celui où le déménagement des parents, étranger à la pratique du football, empêcherait sans raison valable le joueur mineur de continuer à exercer ce sport dans son nouveau pays de destination. Cette hypothèse signifie qu'un joueur mineur doit pouvoir s'établir à l'étranger avec sa famille sans être pénalisé dans son développement sportif, mais ceci pour autant que ce déménagement ne soit pas précisément motivé par sa pratique du football. L'intention dans le but recherché par les parents est donc déterminante²⁰.

Enfin, en ce qui concerne le degré de la preuve, le TAS approuve une approche stricte en requérant un degré de preuve élevé. L'exception de l'article 19 al. 2 let. a RSTJ ne peut être retenue que si ses conditions sont établies "*au-delà du doute raisonnable*"²¹.

B. La jurisprudence du TAS

Comme évoqué précédemment, cette exception a fait l'objet de diverses utilisations frauduleuses et de montages entre les parents du joueur mineur et le club de transfert afin d'obtenir l'approbation nécessaire au transfert international ou au premier enregistrement du joueur mineur. Une analyse de diverses décisions du TAS en la matière permettra de préciser les contours de cette exception.

1. CAS 2005/A/955 et CAS 2017/A/5244:
l'importance de la chronologie de la survenance des choix

L'ordre de survenance des choix dans le processus de déplacement familial (en

particulier le choix des parents de déménager pour des raisons non liées au football et celui du joueur mineur de s'engager dans un nouveau club) est un facteur récurrent pris en compte par le TAS dans les sentences relatives à cette exception.

L'affaire CAS 2005/A/955 Acuña & Cádiz v. FIFA concerne un joueur de nationalité paraguayenne ayant quitté son pays natal avec son frère et sa mère pour l'Espagne alors qu'il était âgé de 16 ans²². Trois jours seulement après leur arrivée en Espagne, le club de transfert et le joueur signèrent un contrat professionnel pour une durée de plus de 6 ans.

Dans cette affaire, la Formation a estimé que la décision du joueur d'intégrer le club de transfert en Espagne avait été prise en amont, soit avant le déplacement familial et que celui-ci était dès lors directement lié au contrat signé entre le joueur et le club de transfert²³. Ce constat chronologique a permis au TAS de déduire que le déplacement n'était pas totalement lié à des raisons étrangères au football.

Dans une affaire plus récente (CAS 2017/A/5244 O. & Associação Juvenil Escola de Futebol Hernâni Gonçalves v. FIFA), le TAS a adopté une approche similaire en s'intéressant principalement à la chronologie des événements ayant conduit une mère norvégienne, actrice impliquée dans l'organisation de projets de théâtre avec des groupes sociaux défavorisés, et son fils, au Portugal, où le mineur intégra le club de F.c. Porto. Les arguments de la mère du mineur, à savoir que l'emploi qui lui était proposé au Portugal correspondait à ses intérêts en tant qu'artiste, qu'il s'agissait d'une opportunité d'emploi irrésistible et surtout qu'il s'agissait de la seule raison ayant motivé sa décision de s'installer au Portugal, n'ont

²⁰ CAS 2015/A/4312 John Kenneth Hilton v. FIFA, CAS 2013/A/3140 A v. Club Atlético de Madrid SAD & RFEF v. FIFA, par. 62-64.

²¹ CAS 2017/A/5244 O. & Associação Juvenil Escola de Futebol Hernâni Gonçalves v. FIFA.

²² CAS 2005/A/955 Acuña and Cadiz v. FIFA and PFA par. 2.5.

²³ CAS 2005/A/955 Acuña and Cadiz v. FIFA and PFA, par. 7.3.1.

pas suffi à convaincre l'Arbitre unique en charge de cette affaire²⁴.

L'arbitre unique a considéré que la chronologie des événements constituait un critère objectif permettant d'établir si la décision de la mère de déménager au Portugal était motivée par des raisons purement professionnelles ou si elle l'était, dans une certaine mesure, par les possibilités offertes à son fils dans ce pays, en particulier par la possibilité d'intégrer le F.c. Porto. Il est apparu que la mère du Joueur s'était d'abord intéressée à son fils, en vue de le faire intégrer un club prestigieux, le Porto F.c., avant de trouver un emploi à plein temps au Portugal. Ce n'est d'ailleurs qu'à partir du moment où le F.c. Porto a démontré un réel intérêt pour le joueur (le joueur avait eu l'occasion non seulement de s'entraîner avec le F.c. Porto à plusieurs reprises, mais aussi de participer à des tournois avec l'équipe du club, à une époque où il résidait encore en Norvège) que sa mère a organisé sa vie en conséquence pour s'installer définitivement au Portugal²⁵. Ainsi, il a été jugé très probable que la carrière footballistique du mineur ait joué un rôle important dans la décision de la mère de s'installer au Portugal en 2015, alors que les premiers contacts avec le club avaient été établis en 2013²⁶.

2. Sentence CAS 2011/A/2354: le degré de parenté

Cette sentence concerne un joueur mineur d'origine bosniaque qui s'est déplacé à l'âge de 15 ans à Francfort, en Allemagne, pour suivre dès le mois d'octobre 2009 un programme de formation de trois ans destiné à le préparer à la profession de "gestionnaire

d'aéroport avec des compétences en allemand", afin de postuler à un poste à l'Aéroport de Sarajevo ultérieurement²⁷. Les parents du mineur restaient en Serbie et avaient convenu avec la tante de leur enfant domiciliée en Allemagne que ce dernier demeurerait chez celle-ci.

Au cours de l'année 2010, le joueur s'inscrit dans le club allemand OFL Kickers Offenbach. L'association allemande de football demanda alors l'approbation requise à la FIFA par l'intermédiaire du système de Transfer Matching System (TMS)²⁸, sur la base de l'exception de l'art. 19 al. 2 let. a RSTJ.

La solution retenue par le TAS, qui confirme le rejet de la FIFA, est intéressante eu égard au degré de parenté qui semble être exigé pour admettre l'application de cette exception. Bien qu'elle confirme l'interprétation stricte requise par la FIFA du terme "parents"²⁹, la Formation laisse entrevoir une solution plus large en admettant, au moins théoriquement, que ce terme puisse couvrir des situations plus larges que celle des parents naturels³⁰. Toutefois, dans le cas d'espèce, le degré de parenté liant un mineur à sa tante n'a pas permis de justifier l'application de l'exception de l'article 19 al. 2 let. a RSTJ³¹.

3. TAS 2011/A/2494: l'intérêt professionnel des parents au déplacement

Les faits concernent ici un joueur mineur de nationalités italienne et argentine, qui quitta en 2011 son pays natal, l'Argentine, où il était domicilié avec sa famille, afin de s'établir dans la région de Bordeaux, en France. Très vite,

mineur (19 par. 3 RSTJ) ou du transfert international d'un joueur mineur (19 al. 2 RSTJ) s'effectue via le système TMS.

²⁹ Commentaire RSTJ, p. 58.

³⁰ CAS 2011/A/2354 E. v. FIFA, par. 18.

³¹ Dans le cas d'espèce, le lien de parenté entre le joueur et la tante ne suffit pas et ce, malgré que les raisons du déplacement de cette même tante n'aient aucun lien avec le joueur mineur ou son éventuel carrière sportive.

²⁴ CAS2017/A/5244 O. & Associação Juvenil Escola de Futebol Hernâni Gonçalves v. FIFA, par. 54 ss.

²⁵ CAS2017/A/5244 O. & Associação Juvenil Escola de Futebol Hernâni Gonçalves v. FIFA, par. 61.

²⁶ *Ibid.* par. 63.

²⁷ CAS 2011/A/2354 E. v. FIFA, partie des faits.

²⁸ Le système TMS est un système d'information en ligne ayant pour principal objectif de simplifier les procédures de transferts internationaux de joueurs. En vertu de l'art. 1 de l'annexe II RSTJ, la procédure d'approbation du premier enregistrement d'un joueur

le mineur intégra le club des Girondins de Bordeaux F.c. (ci-après: FCGB) dans l'une de ses équipes "jeunes". Avant le déplacement, le joueur avait évolué au sein d'un projet de formation et de recrutement de jeunes joueurs argentins susceptibles de rejoindre le FCGB. Il existait en effet une coopération entre ce programme et le club français. Quatre joueurs avaient d'ailleurs déjà fait l'objet d'un recrutement en France dans le cadre de cette coopération³².

Par une analyse objective des éléments factuels de la cause, la Formation est arrivée à la conclusion que le déplacement de la famille n'était pas motivé par des raisons étrangères au football. La Formation a notamment pris en compte l'existence d'une passerelle active entre le club d'origine et le FCGB dont l'objectif est de permettre aux clubs français de découvrir de jeunes talents argentins ainsi que l'intérêt manifesté depuis plusieurs années par le FCGB à l'égard du jeune joueur. Ont également motivé la décision, l'intérêt du joueur de suivre un plan de carrière lui permettant d'accéder au plus haut niveau du football et l'absence chez les parents de motivations professionnelles les poussant à déménager.

Cette affaire a aussi permis de préciser la notion de motivations professionnelles qui pousseraient les parents à se déplacer. A ce titre, le TAS a considéré que la notion de "*raisons étrangères au football*" fait, dans une large mesure, allusion à l'installation dans un pays étranger de personnes jouissant d'une formation spécifique – parfois hautement qualifiées – dont l'évolution de la carrière professionnelle implique une prise de fonction à l'étranger³³.

Ainsi, le fait que les parents d'un joueur mineur jouissent d'une formation ou de diplômes qu'ils ne puissent faire valoir dans l'Etat d'accueil semble militer en défaveur d'un intérêt professionnel (donc étranger au football) au déménagement de la famille³⁴. Ce dernier argument peut paraître discutable si l'on tient compte du fait que les situations où des parents font le déplacement vers un nouveau pays en ayant déjà les compétences requises en vue d'une prise de fonction programmée semblent être minoritaires en pratique.

4. TAS 2012/A/2787: absence de délai formel entre le moment du déplacement et celui de la demande de transfert

Ce cas concerne le transfert d'un joueur polonais âgé de 12 ans au moment de son déménagement avec sa famille à Villareal, en Espagne. Alors que le déplacement eut lieu au début du mois de juillet 2011, les premiers contacts intervinrent en août 2011 entre les parents et le club de Villareal F.c. en vue de l'inscription de l'enfant dans les équipes "jeunes" du club³⁵. Le 7 novembre de la même année, le père conclut un contrat à durée déterminée de 7 mois en qualité d'ouvrier. Le même jour, le Villareal F.c. fit une demande auprès de la RFEF³⁶ en vue de l'inscription du joueur dans les équipes "jeunes" du club³⁷.

Le 24 novembre 2011, la RFEF, pour le compte de Villareal F.c., introduisit sur TMS une demande d'approbation de transfert international en invoquant l'exception de l'art. 19 al. 2 let. a RSTJ. Au vu des circonstances, la demande fut refusée par le Juge Unique de la Sous-commission qui opéra une interprétation stricte tant du

³² TAS 2011/A/2494 FC Girondins de Bordeaux c. FIFA, par. 1-10.

³³ TAS 2011/A/2494 FC Girondins de Bordeaux c. FIFA, par. 72.

³⁴ *In casu*, le père du joueur jouissait d'une formation technique et d'un diplôme de professeur de sport en Argentine qu'il ne pouvait faire valoir en France. Le fait qu'il doive, pour subvenir à ses obligations

d'entretien, accepter un emploi ne requérant pas une telle formation a suffi à la Formation pour écarter l'éventuel intérêt financier au déménagement de la famille (par. 72.e).

³⁵ CAS 2012/A/2787 Villareal c. FIFA du 5 avril 2013, par. 6.

³⁶ Real Federación Española de Fútbol.

³⁷ CAS 2012/A/2787 Villareal c. FIFA, par. 8.

principe que des exceptions de l'art. 19 RSTJ³⁸.

Ce qui attire particulièrement l'attention est le fait que le délai de quatre mois entre l'installation des parents en Espagne et la demande d'enregistrement du Joueur, jugé trop court par la FIFA et avancé à l'appui de sa décision, puisse laisser croire en l'existence d'une exigence supplémentaire non-écrite³⁹. A cet égard, le club intimé a laissé entendre que la motivation de cette décision pouvait paraître arbitraire et contraire à toute sécurité juridique⁴⁰. Toutefois, la Formation a rejeté cet argument au motif que ledit délai de quatre mois n'était qu'un "*élément factuel parmi d'autres lui ayant permis d'analyser la situation*"⁴¹. Ainsi, d'autres éléments auraient certainement suffi à douter des raisons ayant motivé le déplacement de la famille et à justifier l'exclusion de cette exception⁴². La solution retenue par le TAS permet au moins de retenir qu'un tel délai ne doit pas être considéré comme une condition supplémentaire de l'art. 19 al. 2 let. a RSTJ.

5. CAS 2012/A/2839: extension de la notion de parenté et prise en compte des chances de développement dans le pays d'accueil⁴³

Les faits concernent un joueur d'origine uruguayenne. Dans les premières années de sa vie, la mère biologique de l'enfant décéda. Le père de l'enfant se remaria avec une femme de nationalité argentine et tous deux résidèrent avec l'enfant dans une petite localité uruguayenne, non loin de Buenos Aires, en Argentine. Lorsque le joueur eut 15 ans, la famille se déplaça en Argentine au

motif que la belle-mère du joueur avait l'occasion de travailler dans une entreprise familiale et que les enfants (le joueur ainsi que ses demi-frères) pouvaient y obtenir une meilleure éducation scolaire. Quatre mois après son arrivée, le joueur mineur fit ses preuves avec le club Boca Juniors où il fut accepté.

Le TAS est arrivé à la conclusion qu'au vu des circonstances, il fallait assimiler la belle-mère de l'enfant à un parent biologique. Le TAS a tenu compte du fait que la mère biologique de l'enfant était décédée et que l'enfant mineur résidait avec sa belle-mère depuis le remariage du père⁴⁴.

Cette décision constitue à certains égards l'aboutissement de ce que laissait entendre le TAS dans la sentence CAS 2011/A/2354 E. v. FIFA, précédemment exposée. Ainsi, lorsqu'il est objectivement impossible pour l'enfant d'effectuer le déplacement avec ses parents biologiques (par exemple en cas de décès, de disparition et peut-être même de séparation des parents), il devrait être envisageable de palier à cette absence de parent par la présence d'une personne substituée voire même d'une autre entité détentrice de l'autorité parentale sur l'enfant. Une telle exception ne devrait cependant être acceptée que pour autant que la personne avec qui réside le mineur se soit réellement substituée au parent biologique⁴⁵.

La Formation a également souligné que le déplacement de la famille s'est fait pour des motifs d'ordre social, éducatif et

³⁸ CAS 2012/A/2787 Villareal c. FIFA, par. 9-11.

³⁹ CAS 2012/A/2787 Villareal c. FIFA, par.13.

⁴⁰ CAS 2012/A/2787 Villareal c. FIFA, par. 77-78.

⁴¹ CAS 2012/A/2787 Villareal c. FIFA, par. 113.

⁴² CAS 2012/A/2787 Villareal c. FIFA, par. 86: notamment les articles de presse dont la FIFA fait mention dans sa réponse présentant le joueur comme "doté d'un talent extraordinaire" et faisant état des déclarations du père du joueur indiquant que si les exigences d'une carrière de footballeur pour son fils amenaient à ce que la famille déménage, la famille déménagerait.

⁴³ Cette sentence à laquelle il est fait référence n'est pas publiée car les parties ont convenu de la garder confidentielle. Toutefois, cette dernière étant d'un certain intérêt, elle sera exposée sur la base de la présentation qu'en font CRESPO PÉREZ J./ FREGA NAVIA R. *op. cit.* note de bas de page 4, p. 265.

⁴⁴ CRESPO PÉREZ J./ FREGA NAVIA R. *op.cit.*, p 265.

⁴⁵ A joué un rôle important le fait que l'enfant habite depuis le remariage de son père avec sa belle-mère, cette dernière ayant dès ce moment joué un véritable rôle de mère.

économique⁴⁶. Ces considérations vont à l'encontre du raisonnement critiqué précédemment dans la sentence TAS 2011/A/2494 FC Girondins de Bordeaux c. FIFA. Il peut donc être déduit de ce qui précède que l'absence d'opportunités sociales, éducatives et économiques de la ville d'origine, en comparaison avec la ville de destination, puisse jouer un rôle déterminant dans l'application de l'exception en cause, pour autant bien sûr que ces raisons motivent principalement le déplacement familial.

6. CAS 2013/A/3140: prise en compte de la situation économique, culturelle et sociale de la famille

Dans cette affaire, le joueur mineur concerné est citoyen américain. Sa famille décida de se déplacer en Espagne en juillet 2012 alors que le joueur était âgé de 13 ans. Il pratiqua d'abord le football dans l'équipe de sa nouvelle école puis entreprit avec succès un test physique auprès de l'académie de l'Atlético Madrid. La RFEF demanda ensuite à la Sous-commission du Statut du Joueur (ci-après: la Sous-commission)⁴⁷, sur demande de l'Atlético de Madrid, l'approbation de l'enregistrement du joueur en application de l'exception de l'art. 19 al. 2 let. a RSTJ.

Préalablement à la décision de la Sous-commission, une déclaration du joueur était parue sur le site de son école faisant état du fait qu'il avait déménagé en Espagne "*car il avait été accepté dans le club de football appelé Atlético de Madrid*"⁴⁸. S'est ensuivi le rejet de la demande d'enregistrement du joueur auprès de l'Atlético en raison de "*l'activité professionnelle du père et le court délai entre le*

processus d'inscription du joueur par le club, la résidence familiale du joueur en Espagne et le test d'aptitude du joueur, en particulier la catégorie du club". Pour ces motifs, le fait que le déménagement ait eu lieu pour des raisons étrangères au football a été mis en doute.

En appel, le TAS a souligné la nécessité d'une application "*stricte, rigoureuse et consciencieuse*" des règles posées par la FIFA⁴⁹. Ainsi, la Formation a affirmé le caractère exhaustif de la liste d'exceptions de l'art. 19 al. 2 RSTJ, allant ainsi, de manière surprenante, à l'encontre de sentences précédentes en la matière⁵⁰. Rappelant son pouvoir de statuer *de novo* consacré par l'article R57 du Code TAS, la Formation a considéré que l'exception de l'article 19 al. 2 let. a RSTJ trouvait application en l'espèce.

A l'appui de la solution retenue, il a notamment été tenu compte de la nature "*multiculturelle et plurilingue*" de la famille du joueur, permettant d'expliquer la probabilité d'un déménagement en Espagne. La Formation a considéré en effet que le fait que la mère du joueur soit d'origine colombienne permettait de "*facilement comprendre que la famille voulait s'immerger dans un environnement hispanique, à la fois pour des raisons de culture et de langue*"⁵¹. En outre, les moyens financiers de la famille du joueur ont permis de démontrer l'indépendance pécuniaire de la famille par rapport à l'évolution professionnelle du joueur mineur⁵². A ce titre, compte tenu du fait que le père, à l'époque du litige, était toujours membre du conseil d'administration de la société qu'il avait fondée et revendue pour une somme importante, la Formation a conclu que ce

⁴⁶ CRESPO PÉREZ J./ FREGA NAVIA R., *op.cit. note de bas de page 4*, p 265.

⁴⁷ La Sous-commission du Statut du Joueur est un organe rattaché à la Commission du Statut du Joueur, instituée par l'art. 19 al 4 RSTJ. Elle a été introduite suite au constat du non-respect de plusieurs obligations relatives à la protection des joueurs mineurs, initialement à charge des associations nationales. Elle est composée du président et du vice-président de la Commission du Statut du Joueur ainsi que de neuf autres membres. Enfin, sa compétence s'étend également à l'approbation préalable de chaque

transfert international et de chaque premier enregistrement de joueur.

⁴⁸ CAS 2013/A/3140 A v. Club Atlético de Madrid SAD & RFEF & FIFA, par. 2.20.

⁴⁹ CAS 2013/A/3140 A v. Club Atlético de Madrid SAD & RFEF & FIFA, par. 8.23.

⁵⁰ CAS 2008/A/1485 Midtjylland c. FIFA ; CAS 2012/A/2787 Villareal c. FIFA.

⁵¹ CAS 2013/A/3140 A v. Club Atlético de Madrid SAD & RFEF & FIFA, par. 8.31.

⁵² *Ibid.*

dernier était libre d'effectuer cette activité depuis n'importe quel lieu dans le monde, écartant de cette façon toute relation avec l'éventuelle carrière sportive de l'enfant⁵³. Enfin, le fait que le projet de déménagement en Espagne ait débuté avant même qu'un quelconque lien entre le joueur mineur et l'Atlético Madrid puisse être établi a également été pris en compte. Par ces motifs, la Formation a admis la requête du joueur et ordonné l'enregistrement de ce dernier.

Selon BASSO A., le contenu de cette sentence démontre l'importance d'une analyse détaillée des faits et de leur ordonnancement dans le temps afin d'établir la raison réelle du déménagement de la famille d'un joueur mineur dans un nouveau pays⁵⁴. L'analyse en question est donc à opérer au cas par cas. Le seul principe commun que l'on puisse tirer des différentes sentences rendues est que les exceptions de l'art. 19 al. 2 RSTJ sont à retenir dans des situations vraiment exceptionnelles⁵⁵.

Bien que la solution retenue soit en accord avec l'objectif recherché, certains auteurs ont critiqué le raisonnement de la Formation dans cette affaire⁵⁶. Le fait que la demande d'enregistrement ait été faite seulement 6 semaines après le déplacement du joueur en Espagne, que le joueur ait débuté dans un club lié contractuellement à l'Atlético Madrid ou encore la propre déclaration du jeune joueur sur le site internet de son école ont été avancés comme autant d'éléments allant à l'encontre de la solution retenue.⁵⁷

Sous réserve des éléments de fait propres à chaque cas d'espèce, le déménagement d'une famille financièrement aisée dont le train de

vie ne dépendrait pas de la carrière sportive du mineur et qui serait motivé par des raisons culturelles ou linguistiques, devrait pouvoir bénéficier de l'exception prévue à l'article 19 al.2 let a.⁵⁸.

7. TAS 2015/A/4178: de la lettre à l'esprit de la norme

Cette décision concerne un joueur mineur amateur de nationalité canadienne. En 2013, âgé de 14 ans, le joueur quittait le Canada avec sa grand-mère, afin de s'établir en Belgique. Peu avant le déménagement, la garde de l'enfant avait été confiée par acte notarié à ses grands-parents domiciliés en Belgique. L'acte notarié en question prévoyait la garde de l'enfant jusqu'en août 2017, "*date du retour définitif de l'enfant à la résidence de ses tuteurs légaux*".

Peu après l'établissement de l'enfant en Belgique, une convention écrite dans laquelle la grand-mère de l'enfant déclarait vouloir devenir sa tutrice fut entérinée par décision de justice. Cette convention visait à "*offrir au jeune une prise en charge dans le milieu familial élargi pour qu'il puisse progresser dans la pratique du football dans le cadre d'études qui n'existent pas au Canada*"⁵⁹. Saisi d'une demande d'approbation de transfert international basée sur l'exception de l'art. 19 al. 2 let. a RSTJ, le Juge Unique de la Sous-commission rejeta ladite demande au motif "*que le Joueur s'était rendu en Belgique sans être accompagné de ses parents et uniquement avec ses grands-parents à qui les parents du Joueur avaient confié la garde*"⁶⁰.

Suite à ce refus, la mère du joueur quitta le Canada en 2015 pour s'établir en Belgique afin de recouvrer la nationalité belge⁶¹. Le

⁵³ *Ibid.*

⁵⁴ BASSO A., *FIFA transfer regulations: lessons from CAS cases involving Spanish football clubs concerning minors*, p.26-29.

⁵⁵ *Ibid.*

⁵⁶ CRESPO PÉREZ J./ FREGA NAVIA R., *op.cit. note de bas de page 4*, p. 267.

⁵⁷ CAS 2013/A/3140 A v. Club Atlético de Madrid SAD & RFEF & FIFA, par. 8.30.

⁵⁸ CRESPO PÉREZ J./ FREGA NAVIA R *note de bas de page 4*, p. 269.

⁵⁹ TAS 2015/A/4178 Zohran Ludovic Bassong & RSC Anderlecht c. FIFA, par. 1-6.

⁶⁰ TAS 2015/A/4178 Zohran Ludovic Bassong & RSC Anderlecht c. FIFA, par. 7-9.

⁶¹ Comme exposé par le TAS, selon les dispositions du droit belge en vigueur depuis 2013, seules les personnes ayant leur résidence principale en Belgique depuis au moins douze mois sur base d'un séjour légal ininterrompu peuvent demander le recouvrement de la nationalité belge, par. 11.

père du joueur, directeur dans le secteur bancaire, demeura au Canada.

Une nouvelle demande d'approbation de transfert international fut introduite par l'association belge de football, toujours basée sur l'exception de l'art. 19 al. 2 let. a RSTJ. Sur la base d'une interprétation stricte des dispositions du RSTJ, la demande fut à nouveau refusée au motif qu'il ne pouvait être établi sans aucun doute que la mère du joueur avait déménagé pour des raisons totalement étrangères au football, la mère du joueur ayant notamment déclaré par écrit que son déménagement était orienté par l'objectif *"de se conformer à l'exigence de la FIFA que son fils soit accompagné d'au moins un de ses parents directs pour obtenir l'autorisation du transfert international"*⁶².

En appel, la Formation du TAS a procédé à une interprétation objective du RSTJ pour déterminer si l'installation de la mère du joueur en Belgique était due à des raisons étrangères au football. En reprenant les événements factuels pertinents et leur chronologie respective, et sur la base d'une interprétation stricte, la Formation a considéré que l'exception ne pouvait pas être appliquée⁶³.

Le TAS a cependant considéré que la liste d'exceptions de l'article 19 al. 2 RSTJ n'était pas exhaustive et que d'autres exceptions particulières pouvaient justifier le déménagement du joueur⁶⁴.

Sur ce point, la Formation a rappelé la *ratio legis* de la norme déjà établie lors d'une décision précédente non-publiée⁶⁵: en raison des divers abus commis par les clubs qui poursuivaient leurs seuls intérêts financiers et

afin de protéger les intérêts du joueur mineur, la FIFA a mis en place cette disposition *"dont l'application constante et systématique est, en quelque sorte, destinée à corriger ces situations de danger potentiel pour les joueurs mineurs"*⁶⁶.

Par ce raisonnement, le TAS a pris une nouvelle direction, s'écartant cette fois d'une interprétation littérale de la norme. Au vu des circonstances du cas d'espèce, la Formation a pris acte du fait que les risques dont se prévaut la FIFA étaient inexistant *in casu* et que la situation économique des parents tendait à exclure le risque d'une exploitation commerciale. La Formation s'est ainsi rattachée à l'intérêt supérieur du mineur sans s'estimer *"limitée par le catalogue d'exceptions prévues à l'art. 19 al. 2 RSTJ"*. Dans ce contexte, la Formation a déclaré *"que le bien-être et le développement personnel du joueur militent en faveur de l'approbation de la demande de transfert"*, ce qui justifiait ici de faire une exception au principe fixé à l'art. 19 al. 1 RSTJ⁶⁷.

Ce raisonnement témoigne d'une évolution marquante dans l'interprétation opérée par le TAS du système imposé par la FIFA. En effet, la priorité est donnée à l'intérêt supérieur du mineur au détriment d'une lecture stricte de la norme pour mettre le joueur au bénéfice d'une exception non-prévue par l'art. 19 al. 2 RSTJ.

C. L'exception "UE/EEE" (art. 19 al. 2 let. b RSTJ)

En vertu de l'art. 19 al. 2 litt. b RSTJ, le transfert qui a lieu à l'intérieur de l'Union européenne ou au sein de l'Espace économique européen et qui concerne des joueurs âgés de 16 à 18 ans est autorisé pour

⁶² TAS 2015/A/4178 Zohran Ludovic Bassong & RSC Anderlecht c. FIFA, par. 17.

⁶³ *Ibid.*, par. 77: le fait que la mère du joueur fasse le déplacement plus d'un an après celui de son fils a notamment joué un rôle décisif, sans qu'il n'y ait besoin d'analyser profondément les raisons ayant motivé le déplacement de la mère.

⁶⁴ Elle se base ainsi sur les déclarations de la FIFA portées dans une note de synthèse produite par la FIFA sur demande des appelants, témoignant du

caractère non-exhaustif de la liste d'exceptions, contrairement à ce qu'elle soutenait dans sa réponse d'appel.

⁶⁵ CAS 2007/A/1403 Real Club Racing de Santander, SAD, c. Club Estudiantes de la Plata, non-publié mais repris pas le TAS.

⁶⁶ TAS 2015/A/4178 Zohran Ludovic Bassong & RSC Anderlecht c. FIFA, par. 84.

⁶⁷ TAS 2015/A/4178 Zohran Ludovic Bassong & RSC Anderlecht c. FIFA, par. 84 à 88.

autant que le nouveau club respecte diverses obligations à l'égard du joueur. Ces dernières ont trait à l'octroi d'une éducation et/ou formation footballistiques et à la prise en compte d'une alternative dans le cas où le joueur ne parvienne pas à remplir les attentes sportives du nouveau club.

De prime abord, il est intéressant de constater que les obligations imposées au nouveau club ne sont pas uniquement liées à la formation sportive et à l'éducation du joueur mineur, mais envisagent, par des mesures concrètes, la possibilité que le mineur ne réussisse pas sa carrière footballistique, ce qui reste la règle dans la triste majorité des cas. Ces garanties sont réjouissantes car elles prennent en compte l'intérêt supérieur du mineur⁶⁸. Toutefois, ce texte laisse entrevoir une certaine forme de discrimination.

Dans le Commentaire RSTJ, la FIFA indique que cette exception résulte de l'engagement entre l'UE et FIFA/UEFA, passé en mars 2001, qui permet à l'art. 19 RSTJ de ne pas entrer en conflit avec la libre-circulation des travailleurs au sein de l'UE et de l'EEE⁶⁹. Le Commentaire RSTJ précise encore que les ressortissants d'autres pays liés à l'UE par un accord bilatéral prévoyant la libre circulation des travailleurs sont au bénéfice des mêmes conditions que les joueurs européens⁷⁰.

Ainsi, un joueur âgé de 16 à 18 ans peut se déplacer seul sur le territoire de l'UE / EEE, d'un Etat-membre à un autre, à la condition que le club de transfert garantisse la formation sportive et l'éducation académique du joueur transféré. Le club doit par ailleurs offrir au joueur mineur une formation professionnelle pour le cas où il mette fin à son engagement avec ce dernier. Le respect

de ces obligations par le club est sous la surveillance de l'association à laquelle est affilié le club au moment et après la demande d'inscription du joueur mineur. Cet examen doit par ailleurs être effectué pour chaque nouvelle demande d'enregistrement. En cas de non-respect des obligations énoncées, l'association se doit de refuser l'enregistrement du joueur. Le non-respect de ces obligations par le club à l'égard d'un mineur après l'approbation d'une demande d'enregistrement est sanctionné par des mesures disciplinaires⁷¹.

Enfin, il convient de préciser qu'il n'est fait aucune référence à la nationalité du joueur, critère à priori non pertinent dans le cadre de cette disposition.

1. La discrimination réglementaire de la FIFA

Il convient à présent de s'intéresser aux éléments discriminatoires qui affectent cette disposition⁷². Pour certains, il est incompréhensible d'admettre cette exception tant qu'elle se focalise uniquement sur un espace régional déterminé, excluant ainsi les Etats non concernés par cette exception⁷³.

Il ressort du texte réglementaire que le critère déterminant choisi par la FIFA n'est pas celui de la nationalité du mineur, critère subjectif, mais celui d'un territoire défini, critère objectif. Ainsi, cette disposition ne concerne que les clubs (tant le club d'origine que le club de transfert ou celui du premier enregistrement) dont le siège se trouve au sein de l'UE ou de l'EEE. Par conséquent, le fait que le joueur soit préalablement enregistré dans un club situé à l'intérieur de l'espace UE/EEE est à priori une condition

⁶⁸ CRESPO PÉREZ J./ FREGA NAVIA R., *op.cit. note de bas de page 4*, p.270, y voient la possibilité d'ajouter l'obligation pour le nouveau club d'autoriser le joueur à retourner deux fois par année au lieu de résidence de ses parents ; des obligations quant à la nutrition du sportif ou encore des obligations d'assurer médicalement le jeune joueur. Une telle solution viserait à ce que le club vienne à se substituer aux parents en garantissant ainsi une protection complète.

⁶⁹ http://europa.eu/rapid/press-release_IP-01-314_en.htm

⁷⁰ Commentaire RSTJ, p. 59.

⁷¹ Commentaire RSTJ, p. 59.

⁷² PALAZO IVÁN, «Discriminación de la FIFA e incoherencia del TAS».

⁷³ CRESPO PÉREZ J./ FREGA NAVIA R., *op.cit. note de bas de page 4*, p. 270.

sine qua non à l'admission de cette exception⁷⁴, alors que le fait que le joueur ait la nationalité de l'un des Etats membres UE/EEE semble sans importance⁷⁵.

De toute évidence, la principale motivation de la FIFA était de garantir le respect d'une norme communautaire. Ce n'est qu'ensuite que la FIFA a assorti la norme d'obligations supplémentaires à charge du nouveau club afin de protéger l'intérêt supérieur du mineur. Ainsi, le respect des normes communautaires est au premier plan et la protection des joueurs mineurs, au second plan. Compte tenu de l'objectif recherché, il est difficile de comprendre ce qui justifie que des joueurs âgés de 16-18 ans inscrits dans des clubs en dehors du champ géographique européen, ne puissent pas bénéficier de cette exception⁷⁶.

Cela paraît d'autant plus surprenant que cette disposition découle d'un accord visant à respecter la libre circulation des travailleurs européens, qui dépend dans une large mesure de la titularité d'un passeport UE⁷⁷.

D. TAS 2012/A/2862 et CAS 2016/A/4903: le critère subjectif de la nationalité

L'affaire TAS 2012/A/2862 F.c. Girondins de Bordeaux c. FIFA a déjà été commentée plus haut et concerne les mêmes intéressés ayant fait l'objet d'un refus d'approbation de transfert basé sur l'exception de l'art. 19 al. 2 let. a RSTJ, confirmé par le TAS. Quelques mois après cet échec, le club français et le joueur ont conclu une convention de formation comportant un volet sportif et un volet scolaire⁷⁸. Il est à relever que le joueur était alors âgé de 16 ans. Une nouvelle demande d'approbation de transfert

international fut introduite par la fédération française de football dans le système TMS, sur la base de l'exception de l'art. 19 al. 2 let. b RSTJ⁷⁹.

Cette nouvelle demande a été rejetée au motif que l'affaire concernait *“le transfert international d'un ressortissant d'un Etat européen d'une association qui ne se trouve pas sur le territoire de l'UE ou de l'EEE vers un Etat membre de l'UE, dont il n'a pas la nationalité”* et *“qu'un tel transfert ne correspond pas à la lecture stricte de l'exception en question”*.

Malgré ce refus, la FIFA a souligné le respect des obligations supplémentaires imposées au club dans le cadre de cette exception⁸⁰. Le message de la FIFA est clair: la priorité doit être donnée à un *“critère objectif de territorialité, sans prise en compte de critère de personnalité”*⁸¹. *In casu*, peu importe que le joueur ait la nationalité d'un Etat-membre de l'UE, seul est pertinent le fait que ce dernier soit venu d'Argentine.

Devant le TAS, s'est ouvert un véritable débat légal sur la question de l'interprétation de l'art. 19 al. 2 let. b RSTJ pour déterminer lequel des deux critères précités devait prévaloir. Le TAS a dans un premier temps procédé à une interprétation *“objective”* des dispositions réglementaires de la FIFA⁸². La nationalité du joueur est donc parue non pertinente, *“seule la question du territoire dans lequel se déroule le transfert international devant être examinée”*⁸³.

Toutefois, au cours de sa plaidoirie introductive, l'un des conseils de l'appelant s'est référé à un document interne de la FIFA contenant de nombreuses références à des décisions de la Sous-commission et traitant

⁷⁴ TAS 2012/A/2862 F.c. Girondins de Bordeaux c. FIFA, par. 9.

⁷⁵ PALAZO IVÁN, “Discriminación de la FIFA e incoherencia del TAS»

⁷⁶ CRESPO PÉREZ J./ FREGA NAVIA R., *op.cit. note de bas de page 4*, p.272.

⁷⁷ Voir art. 45 TFUE.

⁷⁸ TAS 2012/A/2862 F.c. Girondins de Bordeaux c. FIFA, par. 15.

⁷⁹ TAS 2012/A/2862 F.c. Girondins de Bordeaux c. FIFA, par. 18.

⁸⁰ Art. 19 al. 2b) let. i, ii, et iii RSTJ.

⁸¹ TAS 2012/A/2862 F.c. Girondins de Bordeaux c. FIFA, par. 19.

⁸² PERRIN/CHAPUIS, *Droit de l'association*, 3^e ed., art 63 cc.

⁸³ TAS 2012/A/2862 F.c. Girondins de Bordeaux c. FIFA, par. 92.

spécifiquement de la problématique du transfert international des joueurs mineurs. On y constate la contradiction entre l'interprétation restrictive de la norme prônée par la FIFA et le contenu de "sa" note interne indiquant qu'il "n'existe pas de jurisprudence établie pour les demandes concernant des citoyens de l'UE cherchant à être transférés depuis l'extérieur de l'UE/EEE vers un club de l'UE/EEE. La Sous-commission a pris des décisions différentes indiquant deux interprétations divergentes"⁸⁴. Dans la pratique et dans la majorité des cas, c'est d'ailleurs le critère de la nationalité du mineur et non celui de la territorialité qui est appliqué par la FIFA.

Après avoir à nouveau souligné le caractère non-exhaustif de la liste de l'art. 19 al. 2 RSTJ⁸⁵ en se référant à sa jurisprudence antérieure⁸⁶, à l'intention présumée de la FIFA telle qu'elle ressort de sa note interne et à la pratique de la FIFA consacrant, dans la majorité des cas, la prévalence du critère de nationalité, le TAS est arrivé à la conclusion qu'il "existe une exception non-écrite dans le Règlement autorisant le joueur disposant de la nationalité de l'un des pays membres l'UE/EEE à bénéficier de l'exception figurant à l'art. 19 al. 2 let. b RSTJ, à la condition que son nouveau club garantisse son éducation scolaire et sa formation sportive"⁸⁷. L'approbation fut donc acceptée et la question semble avoir été tranchée.

A noter que cette décision marque une évolution car elle va dans le sens contraire d'une affaire précédente⁸⁸ dans laquelle le TAS a suivi la lettre de l'article 19 al. 2 let. b et n'a à aucun moment tenu compte de la double nationalité argentine et italienne du joueur concerné⁸⁹.

⁸⁴ TAS 2012/A/2862 F.c. Girondins de Bordeaux c. FIFA, par. 45.

⁸⁵ TAS 2012/A/2862 F.c. Girondins de Bordeaux c. FIFA, par. 96.

⁸⁶ CAS 2008/A/1485 Midjylland c. FIFA.

⁸⁷ TAS 2012/A/2862 F.c. Girondins de Bordeaux c. FIFA, par. 98.

⁸⁸ CAS 2009/A/1810 & 1811 SV Wilhelmshaven v. Club Atlético Excursionistas & Club Atlético River Plate.

Bien que les circonstances dans lesquelles la note interne a été produite sont discutables, on ne saurait s'opposer à la solution finale adoptée par le TAS qui a le mérite de réduire l'effet discriminatoire exposé précédemment.

Dans la cause CAS 2016/A/4903 Club Atlético Vélez Sarsfield v. The Football Association Ltd., Manchester City FC & FIFA, le TAS a abouti au même résultat, en partant cette fois d'une interprétation historique et comparative de l'art. 19 al. 2 let. b RSTJ avec l'art. 45 par. 3 let. b du Traité sur le fonctionnement de l'Union européenne (TFUE), disposition qui établit le principe de la libre circulation des travailleurs au sein de l'UE. A cet égard, le TAS a relevé d'abord que la disposition de droit communautaire a joué un rôle important dans la genèse de l'art. 19 al. 2 let. b RSTJ et son application dans la pratique⁹⁰. Considérant par ailleurs que cette disposition est formulée de façon similaire à celle de l'article 19 al. 2 let. b RSTJ, et qu'elle a toujours été interprétée comme s'appliquant également aux travailleurs possédant un passeport UE domiciliés dans un pays hors UE/EEE, mais disposés à se rendre dans un pays UE/EEE, le TAS a reconnu de ce fait une justification juridique suffisante à l'interprétation de l'article 19 al. 2 let. b RSTJ comme étant également applicable aux transferts de joueurs avec un passeport UE de clubs basés dans des pays hors UE/EEE vers des clubs basés dans des pays UE/EEE⁹¹.

E. L'exception de la distance (art. 19 al. 2 let. c RSTJ)

Selon l'art. 19 al. 2 let. c RSTJ "si le joueur vit tout au plus à 50 km d'une frontière nationale et si le club auprès duquel le joueur souhaite être enregistré

⁸⁹ PALAZZO, PALAZTO IVÁN, "Discriminación de la FIFA e incoherencia del TAS».

⁹⁰ CAS 2016/A/4903 Club Atlético Vélez Sarsfield v. The Football Association Ltd., Manchester City FC & FIFA, par. 92.

⁹¹ CAS 2016/A/4903 Club Atlético Vélez Sarsfield v. The Football Association Ltd., Manchester City FC & FIFA par. 93 – 99.

dans l'association voisine se trouve à une distance de 50 km maximum de la frontière. La distance maximale entre le domicile du joueur et le club doit être de 100 km. Dans ce cas, le joueur doit continuer à habiter chez ses parents et les deux associations concernées doivent donner leur accord exprès”.

Le Commentaire RSTJ fait expressément référence aux transferts transfrontaliers et met en avant les circonstances particulières existant dans certaines régions favorisant des échanges réguliers entre pays limitrophes⁹². Dans la mesure où cette situation est aussi susceptible de concerner les sportifs, il a été jugé nécessaire de rendre le principe plus flexible en permettant à un joueur mineur qui vit près d'une frontière nationale de s'inscrire dans un club appartenant à l'association nationale voisine.

Le point de rattachement avec la protection des mineurs réside sans doute dans le fait que l'enfant doit rester vivre chez lui, ce qui ne devrait pas altérer dans une grande mesure sa situation initiale et, évidemment, son développement personnel⁹³. L'explication que donne la FIFA à cette exception dans le Commentaire RSTJ laisse cependant ouvertes plusieurs questions:

- est-ce que la distance maximale de 100 km imposée par la FIFA se rapporte à une distance dite “à vol d'oiseau” ou s'agit-il au contraire d'une distance effective ?;
- qu'est-ce qu'exige la FIFA en demandant à ce que le joueur continue à résider chez lui ? Qu'en serait-il si le joueur devait passer plusieurs nuits dans l'académie et non chez ses parents ?;
- qu'en est-il de la situation où le joueur habite à une distance quelque peu supérieure à 50 km de la frontière, par

exemple 55 km, et que le nouveau club est situé à moins de 50 km de l'autre côté de la frontière, disons 40 km⁹⁴ ? La distance totale serait alors inférieure à 100 km.

A l'heure actuelle, cette disposition n'a pas donné lieu à discussion devant le TAS de sorte qu'il n'est, pour l'heure, pas envisageable d'approfondir sérieusement cette question.

III. Les exceptions “non prévues” et évolution au sein de la FIFA

Cette section relève d'une importance cruciale pour l'évolution de la protection des mineurs selon que l'on retienne une interprétation stricte de l'art. 19 RSTJ, ou une interprétation en considération de l'intérêt supérieur du joueur mineur.

Parmi les éléments analysés dans la sentence CAS 2008/A/1495 FC Midtjylland A/S v. FIFA⁹⁵, il y a lieu de mentionner la question relative au caractère exhaustif de la liste de l'art. 19 al. 2 RSTJ. Après avoir constaté qu'aucune des exceptions de l'art. 19 al. 2 RSTJ n'était applicable aux joueurs concernés, la Formation a, sur la base de certaines considérations présentées par la FIFA dans son mémoire de réponse, proposé une nouvelle interprétation de l'application de la disposition. En effet, si d'un côté la Commission du Statut du Joueur prône une exhaustivité et une interprétation stricte des exceptions prévues à l'art. 19 al. 2 RSTJ, cette dernière a admis (dans sa propre décision portée ensuite devant le TAS dans l'affaire CAS 2008/A/1495 FC Midtjylland A/S v. FIFA) que deux exceptions non écrites existaient en faveur des étudiants exclusivement⁹⁶. Bien que ces exceptions ne se soient pas réalisées dans le cas d'espèce⁹⁷, cette sentence a le mérite de souligner que la

⁹² Commentaire FIFA, page 60.

⁹³ CRESPO PÉREZ J./ FREGA NAVIA R., *op. cit. note de bas de page 4*, p.276.

⁹⁴ *Ibid.*, p.275.

⁹⁵ CAS 2008/A/1495 FC Midtjylland A/S v. FIFA, par. 10.

⁹⁶ CAS 2008/A/1495 FC Midtjylland A/S v. FIFA, par. 20.

⁹⁷ CAS 2008/A/1495 FC Midtjylland A/S v. FIFA, par. 22: notamment du fait qu'il soit clairement établi que le but de l'accord de coopération vise à permettre à des joueurs du club nigérian de continuer leur “carrière sportive au du club”.

FIFA admet elle-même que la liste des exceptions de l'art. 19 al. 2 RSTJ n'est pas exhaustive. La Formation a par ailleurs ajouté que la disposition a été construite afin de permettre d'autres exceptions, ici relatives à la situation des étudiants⁹⁸.

Comme le relève le TAS dans la sentence TAS 2015/A/4178 Zohran Ludovic Bassong & RSC Anderlecht c. FIFA, le texte de l'art. 19 RSTJ ne permet pas à lui seul de répondre à la question de l'exhaustivité des exceptions posées par ledit article⁹⁹. En effet, bien qu'un principe et trois exceptions à ce principe soient mentionnées, le RSTJ ne fait aucune mention de l'éventuelle exhaustivité de ces dernières¹⁰⁰.

C'est notamment par une note de synthèse produite dans cette procédure par la FIFA, sur demande des appelants, qu'il a été précisé que *“si un club estime que des circonstances très particulières, qui ne répondent à aucune des exceptions prévues dans le RSTJ, justifient l'enregistrement d'un joueur mineur, l'association du club concerné peut, au nom de son affilié, soumettre une demande officielle par écrit à la Sous-commission pour qu'elle considère le cas spécifique et rende une décision formelle”*¹⁰¹. La FIFA a encore ajouté que l'appréciation de ce type de demande se fait *“au cas par cas”* et qu'il n'est pas possible de spécifier davantage d'éléments nécessaires à l'acceptation d'une exception autre que celle prévue par l'art. 19 al. 2 RSTJ¹⁰².

Il faudra attendre 2017 pour que la FIFA émette à l'attention de ses associations membres un communiqué présentant un *“Guide concernant les demandes d'approbation pour*

*les joueurs mineurs”*¹⁰³ et la procédure administrative de demande de premier enregistrement et de transfert international de mineurs¹⁰⁴. Ce document fait état de certaines exceptions, non-prévues par l'art. 19 al. 2 RSTJ, mais visiblement acceptées par la jurisprudence interne de la Sous-commission. Bien que la question de la force contraignante de ce guide par rapport au RSTJ¹⁰⁵ se pose, on ne peut que se réjouir du fait que la FIFA ait admis certaines exceptions non-prévues tenant compte de l'intérêt supérieur du joueur mineur¹⁰⁶. On mentionnera à cet égard, en particulier, les exceptions suivantes:

- **l'exception du joueur réfugié non accompagné:** *“le joueur mineur déménageant dans un autre pays sans ses parents pour des raisons humanitaires et qui ne peut envisager de retourner dans son pays d'origine car sa vie ou sa liberté y serai(en)t menacée(s) en raison de sa race, sa religion, sa nationalité, son appartenance à un groupe social particulier ou de ses opinions politiques”*¹⁰⁷;
- **l'exception du joueur participant à un échange étudiant:** le transfert est autorisé si *“l'éducation académique et/ou scolaire du joueur mineur était manifestement la raison principale de son déménagement à l'échelle internationale sans ses parents et la durée maximale de l'enregistrement du joueur mineur pour le club concerné n'excède pas une durée d'un an, sous réserve que le joueur mineur retourne immédiatement dans son pays d'origine à la fin du*

⁹⁸ CAS 2008/A/1495 FC Midtjylland A/S v. FIFA par. 21.

⁹⁹ TAS 2015/A/4178 Zohran Ludovic Bassong & RSC Anderlecht c. FIFA.

¹⁰⁰ Voir art. 19 al. 1 et 2 RSTJ.

¹⁰¹ TAS 2015/A/4178 Zohran Ludovic Bassong & RSC Anderlecht c. FIFA, par. 82.

¹⁰² TAS 2015/A/4178 Zohran Ludovic Bassong & RSC Anderlecht c. FIFA, par. 82.

¹⁰³ <https://resources.fifa.com/mm/document/affederation/footballgovernance/02/93/07/06/protectiondesmineurs->

[guideconcernantlesdemandes%E2%80%99approbationpourlesjoueursmineurs_french.pdf](https://resources.fifa.com/mm/document/affederation/footballgovernance/02/86/35/28/protectiondesmineurs%E2%80%9393%C2%ABguideconcernantlesdemandes%E2%80%99approbationpourlesjoueursmineurs_french.pdf)

¹⁰⁴ http://resources.fifa.com/mm/document/affederation/footballgovernance/02/86/35/28/protectiondesmineurs%E2%80%9393%C2%ABguideconcernantlesdemandes%E2%80%99approbationpourlesjoueursmineurs%C2%BB_french.pdf

¹⁰⁵ *Ibid.*: il est notamment mentionné dans ce règlement qu'il n'est pas forcément contraignant mais qu'il s'agit plus de “guidelines” pour le CSJ.

¹⁰⁶ *Ibid.*, p.1-2.

¹⁰⁷ Guide concernant les demandes d'approbation pour les joueurs mineurs, p. 11.

*programme académique en question ou qu'il ait 18 ans avant la fin dudit programme*¹⁰⁸.

IV. Critique du système et conclusion

A certains égards, le manque de publicité des décisions prises par la FIFA peut être considéré comme un frein au bon développement de l'art. 19 RSTJ¹⁰⁹. Dans ce contexte, la solution adoptée par le TAS pour la publication de ses sentences rendues en appel pourrait se révéler intéressante. En effet, la procédure d'appel devant le TAS n'est en principe pas confidentielle. Ainsi, la sentence fait l'objet d'une publication sauf accord contraire des parties.¹¹⁰

Cette solution permettrait de garantir une égalité de traitement entre les clubs et les joueurs, et encouragerait la FIFA à adopter une ligne de conduite cohérente, tenant compte de ses précédents, notamment en évitant, lors de la procédure d'appel devant le TAS, la production de notes internes faisant état d'interprétations différentes au sein même de l'organe décisionnel compétent de la FIFA. Avec la solution proposée, les acteurs concernés auraient évidemment toujours la possibilité de s'opposer à la publication de la décision en cause.

De plus, une telle manière de procéder permettrait aux clubs ayant recours à de tels transferts de connaître la ligne de conduite adoptée par la FIFA, d'en avoir pleinement conscience *a priori* et ainsi d'éviter de prendre des risques en entreprenant des démarches qui se verraient ensuite balayées par l'instance décisionnelle de la FIFA.

Sur le volet interprétatif, il n'est pas question de critiquer les bonnes intentions qui ont poussé la FIFA à adopter une lecture stricte de la disposition en cause. Toutefois, le droit et le football doivent pouvoir s'adapter à de nouvelles circonstances. Il semble donc nécessaire, d'adopter une interprétation plus proche de l'esprit et de l'objectif recherché

que de la lettre de la disposition. Un bon exemple est l'admission comme exception non-écrite du premier enregistrement de joueurs mineurs réfugiés, non-accompagnés de leurs parents. En effet, la disposition a été introduite à un moment où il était difficile de concevoir l'ampleur que prendrait la crise migratoire survenue en Europe ces dernières années. Le football étant un moyen d'intégration inestimable, on ne peut que féliciter le TAS d'avoir fait un pas en ce sens, en affirmant à plusieurs reprises la non-exhaustivité de la liste d'exceptions de l'art. 19 al. 2 RSTJ.

Du point de vue réglementaire, il peut paraître surprenant de voir la FIFA s'octroyer la compétence d'interdire à des parents, prêts à de grands sacrifices pour soutenir leur enfant, de se déplacer dans un nouveau pays pour des raisons liées aux chances de carrière de leur enfant¹¹¹. En ce sens, la suppression de la mention "*raisons étrangères au football*" pourrait se révéler plus proche de l'intérêt supérieur de l'enfant

Enfin, si l'art. 19 al. 2 let. b RSTJ ne contenait pas la discrimination exposée plus haut, cette disposition pourrait certainement s'ériger en un principe efficace et conforme à l'intérêt supérieur du mineur. Dans cette optique, le contrôle du respect des obligations devrait revenir entièrement à la FIFA, sans délégation aux associations nationales. Certes, un tel système demanderait le déploiement de moyens considérables sur les plans économique et structurel. Toutefois, cela permettrait sans doute d'uniformiser les pratiques nationales, évitant ainsi que certaines associations ferment les yeux sur des situations contraires à l'objectif recherché au niveau international.

¹⁰⁸ *Ibid.*, p. 12.

¹⁰⁹ Art. 15 al. 1 du Règlement de procédure.

¹¹⁰ R59 par. 7 Code TAS.

¹¹¹ CRESPO PÉREZ J./ FREGA NAVIA R., *op. cit.*, p. 308.

The FIFA arbitration clauses under scrutiny of the Belgian Judge: The Seraing case

Stéphanie De Dycker*

- I. Introduction
 - II. The background of the Seraing Case
 - III. The decision of the Brussels Court of Appeal on the validity of the FIFA arbitration clauses
 - IV. An analysis of the decision of the Brussels Court of Appeal
 - A. Missed Opportunity for International Arbitration
 - B. Missed Opportunity for Sports Arbitration
 - IV. The limited scope of the decision of the Brussels Court of Appeal
 - V. Conclusion
-

I. Introduction

When FIFA arbitration clauses are challenged before domestic judicial courts, they are evaluated in the context of domestic law on arbitration. As a result, they may be interpreted and lead to different consequences depending on the interpretation of domestic law on arbitration by each domestic judicial court. An illustration hereof could recently be observed in Belgium. On 29 August 2018, the Brussels Court of Appeal (hereinafter referred to as “BCA” or the “Court”) decided that FIFA arbitration clauses were invalid according to Belgian arbitration law¹. This occurred in the context of the Seraing case, a well-known judicial battle in the world of sports law.

Several commentators and headlines in various media presented the decision of the Court as ‘the beginning of the end’ for the

Court of Arbitration for Sport (hereinafter referred to as “CAS”)². Some of them even referred to a new *Bosman* case³ or to the possibility to challenge the validity of various arbitral awards rendered on the basis of invalid arbitration clauses⁴.

The present paper intends to demonstrate that the situation is quite different. After a presentation of the background of the case (I) and the findings of the BCA (II), it is submitted that the decision of the Court is regretful since it had sufficient legal grounds to come to a different result more favourable to international arbitration in general and to sports arbitration in particular (III). However, the fact that it did not seize this opportunity to advance international arbitration and sports arbitration appears less dramatic considering that the scope of the decision of the Court is limited in several aspects (IV).

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¹ Court of Appeal, Brussels (18th Ch. fr.), 29 August 2018, 2016/AR/2048, available (in French) at: <http://www.iusport.es/resoluciones-judiciales/SENTENCIA-CORTE-APELACION-BRUSELAS-TAS-2018-anonimizada.pdf> (29.04.2019).

² For instance, see: <https://plus.lesoir.be/176064/article/2018-09-01/le-rfc-seraing-met-une-premiere-claque-la-fifa>; https://www.lemonde.fr/football/article/2018/08/31/football-le-recours-au-tas-qu-impose-la-fifa-est-illegal-selon-la-cour-d-appel-de-bruxelles_5348695_1616938.html; https://www.rtb.be/sport/football/detail_les-clauses-fifa-concernant-le-recours-au-tribunal-arbitral-du-sport-sont-illegales?id=10007518; https://en.as.com/en/2018/09/05/football/1536164687_519265.html?id_externo_rsoc=comp_tw (29.04.2019).

[illegal-selon-la-cour-d-appel-de-bruxelles_5348695_1616938.html](https://www.rtb.be/sport/football/detail_les-clauses-fifa-concernant-le-recours-au-tribunal-arbitral-du-sport-sont-illegales?id=10007518); https://www.rtb.be/sport/football/detail_les-clauses-fifa-concernant-le-recours-au-tribunal-arbitral-du-sport-sont-illegales?id=10007518; https://en.as.com/en/2018/09/05/football/1536164687_519265.html?id_externo_rsoc=comp_tw (29.04.2019).

³ For instance, see: https://www.rtb.be/sport/football/detail_les-clauses-fifa-concernant-le-ecours-au-tribunal-arbitral-du-sport-sont-illegales?id=10007518. (29.04.2019).

⁴ For instance, see: <http://www.rfc-seraing.be/la-cour-dappel-de-bruxelles-a-tranche/> (29.04.2019).

II. The background of the Seraing Case

The Royal Football Club Seraing United (hereafter “RFC Seraing” or the “Club”) is a football club registered with the Royal Belgian Football Association (*Union Royale Belge des Sociétés de Football Association ASBL/Koninklijke Belgische Voetbalbond (KBVB)*), hereinafter referred to as “URBSFA”) and with its seat in Seraing, in the southern part of Belgium. In 2016-2017, RFC Seraing evolved in the Belgian First Amateur Division, which is the third highest division of the Belgian football league system. Doyen Sports Investments Limited (hereinafter referred to as “Doyen”) is an investment company incorporated under Maltese law and active in the field of sports.

On 30 January 2015, RFC Seraing and Doyen concluded a “Third party ownership” contract (hereinafter referred to as “TPO”) called “Cooperation Agreement”, providing *inter alia* that the Club would transfer the economic rights of three players in exchange for the payment by Doyen of EUR. 300.000, after which Doyen would own 30% of the financial value of the federative rights on these three players, allowing it to benefit from future transfers of these players during their contract with RFC Seraing. However, considering it was necessary to limit the influence from external stakeholders – i.e. third-party investors – on the world of football, FIFA had decided, already in December 2014, to ban TPO contracts under a new article 18ter of its Regulations on the Status and Transfer of Players (hereinafter referred to as “RSTP”).

The RFC Seraing *Saga* is essentially twofold. The first part of the saga unfolded in Switzerland and is the result of the disciplinary sanctions imposed upon Seraing by the Disciplinary Committee of FIFA on 4 September 2015 for violation of TPO provisions of the FIFA RSTP. The FIFA Appeal Committee confirmed such decision

on 7 January 2016. Seraing appealed that decision before the CAS. In its award of 9 March 2017⁵, the CAS Panel confirmed the legality of articles 18bis and 18ter of the RSTP, but decided to reduce the sanction imposed upon Seraing because it was the first case on the matter of prohibition of TPO. The RFC Seraing and Doyen appealed the CAS award before the Swiss Federal Tribunal (hereinafter referred to as “SFT”), invoking essentially the incorrect constitution of the arbitral tribunal as well as the violation of their right to be heard and, on the merits, the violation of substantive public policy for endorsing FIFA’s ban on TPO and imposing manifestly disproportionate sanctions. In its arrest of 20 February 2018⁶, the SFT dismissed the appeal on all claims. The judgement of the SFT put an end to the judicial proceedings of the RFC Seraing in Switzerland. However, this did not mean the end of Seraing and Doyen’s judicial battle against FIFA’s TPO ban.

Indeed, the second part of the Seraing-Saga unfolds in Belgium. In parallel to the proceedings before sports judicial organs, RFC Seraing and Doyen started in 2015 several proceedings before judicial courts in Belgium, in order to challenge FIFA’s ban on TPO agreements and the consequences of FIFA’s sanction upon the Club, whether on the merits or for urgent proceedings. Among these proceedings, RFC Seraing and Doyen summoned FIFA, UEFA and URBSFA on 3 April 2015 before the Brussels Commercial Court requesting it to refer five questions to the Court of Justice of the European Union regarding the validity of articles 18bis and 18ter of the RSTP with European Union Law. In its judgment dated 17 November 2016, the Brussels Commercial Court found that it lacked jurisdiction to decide upon the matter. RFC Seraing and Doyen appealed that decision before the BCA. In a first interlocutory judgment dated 11 January 2018, the BCA invited the parties to develop their legal position on whether, considering

⁵ CAS 2016/A/4490, *RFC Seraing v. Fédération Internationale de Football Association (FIFA)*, award 9 March 2017.

⁶ SFT 20 Feb 2018, 4A_260/2017, 36 ASA Bull 406 (2018), ATF 144 III 120.

their wording in broad terms⁷, the arbitration clauses referred to by the respondents constitute valid arbitration clauses under articles 1681 and 1682 of the Belgian Judicial Code (hereinafter referred to as “BJC”). After hearing the parties’ positions on this matter, the BCA rendered a second interlocutory judgement on 29 August 2018, in which it confirmed its jurisdiction to decide upon the dispute.

III. The decision of the Brussels Court of Appeal on the validity of the FIFA arbitration clauses

While the decision of the BCA covers several issues, the present paper focuses merely on the jurisdictional issue, and specifically, on the Court’s analysis and response to the *exceptio arbitri* raised by the respondents, namely the FIFA, UEFA and URBSFA.

In line with the pyramidal institutional structure of sports dispute settlement, the concerned arbitration agreement is included in statutory provisions of the FIFA, the UEFA and the URBSFA as well as in the commitment of the RFC Seraing, in its statutes⁸, to respect the statutes and other decisions of the same FIFA, UEFA and URBSFA. Articles 66 (1) and 68(1) and (2) of the FIFA Statutes⁹ provide that “*FIFA recognises the (...) CAS (...) to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents*” and that “*confederations,*

member associations and leagues shall agree to recognise CAS as an independent judicial authority and to ensure that their members, affiliated players and officials comply with the decisions passed by CAS” and finally that “*(r)ecourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations*”.¹⁰

The Court’s analysis of such *exceptio arbitri* is based on Belgian arbitration law, specifically on the first paragraph of article 1682 of the BJC¹¹. The latter commends a judicial court to declare itself without jurisdiction unless the arbitration clause is invalid or has ceased to exist. Based on this provision, the BCA was thus empowered to fully review (i) whether there is a valid arbitration agreement and (ii) whether the dispute between the parties falls within the scope of such arbitration agreement. In the present case, the BCA came to the conclusion that the arbitration clause contained in the FIFA Statutes is not valid in accordance with Belgian Law. Consequently, it did not examine the second question as to whether the dispute at stake falls within the scope of the arbitration clause.

When assessing the validity of the arbitration agreement, the BCA – pursuant to article 1681 of the BJC – examined whether in the case at hand there was an agreement by the parties to submit to arbitration all or certain disputes, which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not¹². Interestingly, the Court did not

⁷ The decision of the Brussels Court of Appeal states, in its paragraph 2: “(...) *au vu de la généralité de ses termes* (...)”.

⁸ Art. 37 Statutes of RFC Seraing.

⁹ Currently article 57 (1) of the FIFA Statutes and article 59 (1) and (2) of the FIFA Statutes.

¹⁰ See also article 61 of the UEFA Statutes and Article 104 of the URBSFA Statutes. These statutory provisions of the UEFA Statutes and of the URBSFA Statutes are similar to that of the FIFA Statutes, which makes the issue relevant for these sports organizations as much as for the FIFA.

¹¹ The French version of article 1682 BJC states as follows: “§ 1er. *Le juge saisi d'un différend faisant l'objet d'une convention d'arbitrage se déclare sans juridiction à la demande d'une partie, à moins qu'en ce qui concerne ce différend la convention ne soit pas valable ou n'ait pris fin. A peine*

d'irrecevabilité, l'exception doit être proposée avant toutes autres exceptions et moyens de défense. (...)”. The Dutch version of article 1682 BJC states as follows: “§ 1. *De rechter bij wie een geding aanhangig is gemaakt waarop een arbitrageovereenkomst betrekking heeft, verklaart zich, op verzoek van een partij, zonder rechtsmacht, tenzij de overeenkomst ten aanzien van dat geschil niet geldig is of geëindigd is. Op straffe van niet-ontvankelijkheid, moet de exceptie voor elke andere exceptie of verweer worden voorgedragen. (...)*”

¹² The French version of Article 1681 BJC states as follows: “*Une convention d'arbitrage est une convention par laquelle les parties soumettent à l'arbitrage tous les différends ou certains des différends qui sont nés ou pourraient naître entre elles au sujet d'un rapport de droit déterminé, contractuel ou non contractuel*”. The Dutch version of article 1681 BJC states as follows: “*Een arbitrageovereenkomst is een*

consider the question of the *consent* given to arbitration, which is normally a common issue when it comes to determining the validity of the arbitration agreement in professional sports¹³. The BCA took a different route. Indeed, after having requested the parties to develop their legal position as to the broad wording of the FIFA arbitration clauses, the Court focused on the issue of whether the parties had agreed to submit to arbitration disputes *in respect of a defined legal relationship* i.e. the issue of specificity of the arbitration agreement.

The BCA started its legal reasoning by stating that article 1681 BJC, which provides for such specificity requirement of the arbitration agreement, finds its origin in article 1 of the European Convention providing Uniform Law on Arbitration dated 20 January 1966¹⁴. The latter in turn stems from article II (1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958¹⁵.

Although the specific requirement that an arbitration agreement refers to a defined legal relationship has barely led to discussion in practice, this does not – and could not, in the Court’s view – mean that such requirement would no longer be applicable. Such requirement would therefore not be met in a hypothesis where parties were to agree to submit to arbitration *any and all* existing or future disputes on *all* topics.

The Court expressly acknowledged the fact that Sports Arbitration has recently evolved in a globalized and closed mechanism of

dispute settlement and that all implications of such system have not yet been explored. In the Court’s opinion, however, the “defined legal relationship” requirement relates to (i) the fundamental right of access to justice¹⁶, (ii) the respect for the agreement of the parties, in that they are not obliged to arbitrate disputes they did not agree on and (iii) avoiding that parties with strong bargaining power impose their will on weaker parties.

In casu, the Court found that the intention of the drafters behind the statutory arbitration clauses at stake is to submit to arbitration before CAS *any and all* disputes between the designated parties. As a result, the Court decided that the concerned arbitration agreement is too broad and therefore invalid in accordance with Belgian law. Consequently, the Court dismissed the *exceptio arbitri* and upheld its jurisdiction to decide on the merits of the case.

In doing so, the Court rejected a series of arguments raised by the Respondents.

First, the Court disagreed with FIFA’s argument that the arbitration agreement covers characterized disputes in as much as it applies to disputes arising from the activities of the FIFA in the framework of (i) its statutory purpose and (ii) of the legal relationship it has with the persons mentioned under article 68 paragraph 1 of its Statutes. In the Court’s view, an arbitration agreement cannot validly cover *any and all* relationships between two defined individuals. Neither can this validly be the

overeenkomst waarin de partijen alle geschillen of sommige geschillen die tussen hen gerezen zijn of zouden kunnen rijzen met betrekking tot een bepaalde, al dan niet contractuele, rechtsverhouding aan arbitrage voorleggen”.

¹³ S. Besson, *Chronique de jurisprudence arbitrale en matière sportive*, *Revue de l'arbitrage*, 2018 (3), 656-659; See, for instance, the Pechstein case : Judgment of German *Bundesgerichtshof* of 7 June 2016, *Deutsche Eisschnellauf-Gemeinschaft (DESG) and International Skating Union (ISU) v. Claudia Pechstein*, KZR 6/ ; *Rev. Arb.* 2016 908, *chron. M. Maisonneuve* ; U. Haas , “*The German Federal Court on Theacherous Ice – A final point in the Pechstein case*” in: *New Developments in International Commercial Arbitration 2016*, Zurich, Schulthess, 2016,

pp. 216-295. A recourse is still pending before the German Constitutional Court (*Bundesverfassungsgericht*).

¹⁴ European Convention providing Uniform Law on Arbitration, Strasbourg, 20 January 1966, 56 *European Treaty Series*.

¹⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, UNTS, Vol I, 330, 4739, 3.

¹⁶ As mentioned by the BCA in its decision, the fundamental right of access to justice is guaranteed by Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 47 of the Charter of Fundamental Rights of the European Union.

case with respect to disputes between two legal entities. The limitation to a legal entity's activities, as provided in its statutes merely, does not allow, in the Court's view, for a sufficient characterization of the disputes to be submitted to arbitration. FIFA is a legal entity among others and there should not be a specific treatment in the present case.

Second, the Court dismissed the argument made by FIFA and UEFA according to which the requirement of specificity of the arbitration clause shall be interpreted extensively, in line with the principle "*favor arbitrandum*". The Court indeed stressed that this principle does not allow minimizing the requirement of specificity of the arbitration clause, as expressly stated in article 1681 of the BJC.

Third, the Court was not convinced by the fact that the CAS can only decide upon "sports disputes" as provided under article S1 of the CAS Code. In the Court's opinion, this limitation is not provided in the arbitration agreement and can furthermore be amended by a decision of the International Council of Arbitration for Sport.

Fourth, contrary to what UEFA had argued, the Court found that article 67 of the FIFA Statutes, which limits CAS jurisdiction, rather confirms the general character of the arbitration clause encompassed in article 66 and 68 of the FIFA Statutes.

Fifth, the Court differentiated between the object of the arbitration agreement and the source of it. For the Court, the commitment by the Club to comply with the statutes and other regulations of the FIFA, UEFA and URBSFA is merely the source of its

agreement to arbitration; it does not define the scope of this arbitration agreement.

Finally, the Court refused to draw an analogy with the arbitration clauses contained in the statutes of commercial companies, which are equally broad. The Court highlighted that the present dispute is specific in the sense that it relates to the relationship between a sports organization and one of its *indirect* members. Arbitration clauses contained in statutory provisions of commercial companies however cover all disputes between the company and its shareholders, which are *direct* – rather than indirect – members.

IV. An analysis of the decision of the Brussels Court of Appeal

The decision of the BCA¹⁷ appears at first surprising – to say the least. Indeed, the "defined legal relationship" requirement has seldom been tested before courts and tribunals and, in practice, very broad arbitration clauses as well as arbitration clauses with no express limits have been accepted and enforced before national courts of many countries¹⁸. Even in Belgium, there seems to be no case law confirming the position of the Court on this issue.

After careful consideration of the decision and the arguments rejected by the Court, the decision appears regretful for several reasons. Indeed, it is submitted that the Court had enough elements to adopt an interpretation of the specificity requirement of the arbitration agreement that would have been more favourable to international arbitration in general on the one hand, and to sports arbitration on the other hand. It is indeed telling that the Court expressly acknowledged the emergence of a system of globalised

¹⁷ A final review of the legal reasoning held by the Brussels Court of Appeal before the Court of Cassation – the Belgian Supreme Court – appears yet no formally excluded. Indeed, pursuant to article 1073 of the BJC, recourse before the Court of Cassation is in principle possible during a period of three months following notice of the decision of the Court of Appeal by a bailiff ("*signification/betekening*"), a formality that is complied upon discretion of the winning party. If

introduced, such recourse would be limited, pursuant to article 147 of the Belgian Constitution, to the revision of the law, and not of the facts.

¹⁸ Several examples of courts' decisions, which have upheld arbitration clauses that contain no express reference to the disputes they cover, are cited with respect to several jurisdictions in: G. Born, *International Commercial Arbitration*, Vol. I, 2014, pp. 294-295 and pp. 768-769.

dispute settlement mechanism in sports, the implications of which have not been explored at the time being¹⁹. One may indeed regret that the BCA did not take the opportunity of this case to draw some concrete consequences from this acknowledgement, specifically as to the validity of the arbitration agreement. In this sense, the decision of the BCA in the Seraing case represents a missed opportunity for International Arbitration in general (A), as well as for Sports Arbitration in particular (B).

A Missed Opportunity for International Arbitration

As a preliminary remark, it appears relevant to recall that the BCA did not decide on the principle of the consent to arbitration. One may indeed argue that the issue of the consent of the Club to the arbitration agreement was not considered as problematic in the present case. Nor did the Court decide on the issue of arbitrability, understood in its most common meaning, i.e. the quality that applies to a field, an issue or a dispute, to be submitted to the jurisdictional power of arbitrators.²⁰ Rather, the BCA decided that an arbitration agreement cannot be valid under Belgian law when its scope *ratione materiae* is too broad. In doing so, the Court decided not only on the issue of the conditions of *existence* of an arbitration agreement, but at the same time also on the issue of the *scope* of such

arbitration agreement²¹. Yet, courts and tribunals in Belgium have, already for some time now, considered arbitration as an alternative means of dispute resolution, qualifying it even as usual, rather than an exceptional means of resolution of disputes²². As a result, arbitral tribunals and national courts tend to abandon the rule according to which arbitration clauses are to be interpreted restrictively, to the benefit of an approach that favors arbitration, designated under the term *favor arbitrandum*. Based on such approach, it is now widely accepted that once the parties' consent to arbitration is accepted, such arbitration agreement should apply to a maximum of disputes arising from the contract into play, so as to give full effect to the parties' will to arbitrate.²³

Such development is far from being specific to Belgium. Rather, the principle of *favor arbitrandum* has been observed in various jurisdictions and on several aspects of the arbitration proceedings.²⁴ For example, in Switzerland, with respect to the specificity requirement of arbitration agreement, most commentators consider that such requirement is satisfied if the relevant legal relationship is identifiable from the wording of the arbitration agreement.²⁵

In this context, the decision of the BCA as to the specificity requirement of the arbitration agreement is regrettable. The disputes

¹⁹ Court of Appeal, Brussels (18th Ch. fr.), 29 August 2018, 2016/AR/2048, para. 13.

²⁰ The original French version states : “la qualité qui s’applique à une matière, à une question ou un litige, d’être soumis au pouvoir juridictionnel des arbitres” : See : T. Clay, *Les principes fondamentaux de l’arbitrage*, Bruxelles, Bruylant, 2012, p. 19-22 ; P. Level, “L’arbitrabilité”, *Rev. arb.* 1992, p. 213, n° 1. Conversely, in US arbitration law, one commonly has a broad understanding of the concept of arbitrability. See also on this: B. Hanotiau, “L’arbitrabilité et la *favor arbitrandum* : un réexamen”, *J.D.I.*, 1994, pp. 901, at 3.

²¹ J.-F. Poudret, S. Besson, *Comparative law of international arbitration*, 2007, pp. 265-266.

²² For instance, see arbitral award of 24 June 1997: “*Si pareil principe [l’interprétation restrictive des clauses d’arbitrage] a bien été affirmé dans le passé, il n’est plus de mise de nos jours où l’arbitrage est devenu un mode alternatif courant de solution des litiges dans la vie des affaires, particulièrement sur le plan international. En droit belge, depuis*

la loi du 4 juillet 1972, les dispositions gouvernant l’arbitrage sont inscrites dans le Code judiciaire, ce qui démontre bien le caractère non exceptionnel de cette procédure, reconnue au même titre que la procédure devant les tribunaux ordinaires” in : award 24 June 2007, *J.T.*, 1999, p. 192; voir aussi : G. Keutgen, G.-A. Dal, *L’arbitrage en droit belge et international*, tome 1, 2015, pp. 202-203, n°187.

²³ G. Keutgen, G.-A. Dal, *L’arbitrage en droit belge et international*, tome 1, 2015, p. 203, n°188.

²⁴ Clay, T., *Les principes fondamentaux de l’arbitrage*, Bruxelles, Bruylant, 2012, p. 19-22 ; voir aussi en ce qui concerne l’arbitrabilité : “On voit [...] de plus en plus la *favor arbitrandum* dominer la détermination de l’arbitrabilité du litige” ; “Le principe de la *favor arbitrandum* [...] doit guider le juge en cas de doute sur l’arbitrabilité du litige” in : B. Hanotiau, “L’arbitrabilité et la *favor arbitrandum* : un réexamen”, *J.D.I.*, 1994, pp. 899-966, at 16 and 35.

²⁵ See: B. Berger, F. Kellerhals, *International and domestic arbitration in Switzerland*, 2015, p. 97, para. 299-300.

covered by the FIFA arbitration clauses may indeed only arise, *de facto* and *de jure*, from the activities of the FIFA, as limited by its statutory purpose, and from its relationship with other parties designated in the arbitration clause, which are all intrinsically related to sport. As a result, even if they were not expressly defined, the disputes covered by the FIFA arbitration clauses were at least identifiable based on the arbitration agreement and the therein-designated parties.

Moreover, the decision of the BCA appears all the more regretful that Belgium considers itself as a jurisdiction that is favourable to arbitration. That is at least the declared objective of its recent fundamental reform that was implemented by the Law of 24 June 2013 amending the Sixth Part of the Judicial Code regarding Arbitration²⁶. As stated in the *Travaux Préparatoires*, the objective of the legislator with this reform is to provide Belgium with a progressive legislation in the field of arbitration and to present itself as an open jurisdiction in the field of arbitration, in particular international arbitration.²⁷ Obviously, with this reform, the aim of the Belgian Legislator was to present the Kingdom of Belgium as an attractive seat for international arbitration but also, more generally, to adopt a legislation that is open to arbitration, including when the arbitration has its seat abroad. Hence, the interpretation adopted by the BCA appears to run against the current as set by the Legislator in its reform of 2013.

B. Missed Opportunity for Sports Arbitration

It appears that the Brussels Court of Appeal not only missed an opportunity for

International Arbitration in general, but also, and in particular, for Sports Arbitration.

In the past ten years, attention was brought to the CAS as a global – yet private – dispute settlement mechanism for sports, in particular before national and international courts and tribunals. Despite the vigorous attacks against it, the CAS emerged from these judicial battles somehow – although perfectible in several aspects – reinforced in its role and its specificity as World Court for Sport as well as in its capacity to fulfil this role adequately. This is the case with respect to the *Pechstein* case for instance, where the German Federal Tribunal – the German Supreme Court – emphasized, in its decision of 7 June 2016, that the CAS is a genuine, impartial and independent arbitration tribunal and that such sports jurisdiction is necessary for the uniformity in sport. A few weeks after the decision of the BCA, the European Court of Human Rights issued its decision on the *Pechstein and Mutu* matters²⁸. It acknowledged the CAS as a *sui generis* judicial body, with great powers and great responsibilities, especially under article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) and recognized the specificity of sports arbitration as follows:

“(…) 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

²⁶ Loi du 24 juin 2013 modifiant la sixième partie du Code Judiciaire relative à l’arbitrage, *M.B.*, 28.06.2018, p. 41263.

²⁷ The original French version states : “*En intégrant dans le Code judiciaire la majeure partie de la loi uniforme et en en reprenant souvent le libellé, la Belgique entend se présenter comme un pays ouvert à l’arbitrage et singulièrement à l’arbitrage international et comme un pays disposant d’une législation progressiste en matière d’arbitrage*”, in: *Travaux Préparatoires, Loi du 24 juin 2013 modifiant la sixième partie*

du Code Judiciaire relative à l’arbitrage, 53/K/2743-001, available at : <http://www.lachambre.be/FLWB/PDF/53/2743/53K2743001.pdf> (29.04.2019).

²⁸ European Court of Human Rights, *Mutu & Pechstein v. Switzerland*, Judgment of 2 October 2018, available (in French) at: [https://hudoc.echr.coe.int/eng#{"itemid":\["001-186434"\]}\]\]](https://hudoc.echr.coe.int/eng#{) (29.04.2019).

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".²⁹

The SFT also has a long-standing case law on sports arbitration and the legality of the CAS in particular. The SFT acknowledged that the consensual nature of sport arbitration must be reviewed with "benevolence" with a view to enhancing speedy disposition of disputes by specialized arbitral tribunals presenting sufficient guarantees of independence and impartiality, such as the CAS³⁰. Furthermore, already in the *Lazutina* case of 2003³¹, the SFT decided that the CAS was sufficiently independent from the International Olympic Committee as well as from all the parties calling on its services and its decisions, and that its awards are comparable to state court decisions. After the *Lazutina* case, the SFT confirmed its position at several occasions.³² In its judgement of 20 February 2018, which it rendered in the present *Seraing* case, the SFT again confirmed the legality of the CAS as an arbitral institution as well as its independence, from FIFA this time³³.

The BCA acknowledged the emergence of a globalised dispute settlement mechanism in sports but missed an opportunity to draw concrete consequences from the specificity of such dispute resolution mechanism. As mentioned above, it did underline the specificity of sports arbitration when, examining the analogy with compromissory clauses contained in statutory provisions of commercial companies, it highlighted the fact

that statutory compromissory clauses in sports arbitration are designed to bind indirect members, and not only direct members, like it is the case with respect to compromissory clauses encompassed in statutory provisions of commercial companies. If it did highlight the specificity of sport arbitration with respect to this argument - albeit rejecting it - it appears regretful that it did not take this argument into account to characterize the disputes covered by the FIFA arbitration clauses as, *de facto* and *de jure*, disputes *relating to sports*.

IV. The limited scope of the decision of the Brussels Court of Appeal

Even if, as mentioned above, the decision of the BCA can be considered as a missed opportunity in two respects, it is submitted that the fact that it did not seize this chance is far from dramatic for the world of sports arbitration. It appears indeed important to specify the scope of the decision of the BCA.

First, *ratione materiae*, the findings of the BCA only concern the ordinary proceedings before the CAS and not its appeals proceedings. Hence, the BCA did not make any finding on statutory clauses, which provide for the recourse before CAS against decisions rendered by judicial bodies of sports organisations. Therefore, even broadly worded statutory arbitration clauses of sports organisations, which provide for appeals procedure before CAS, fall outside of the scope of the BCA decision³⁴. Yet, the vast majority of the disputes that come before the CAS are appeals procedures based on appeals arbitration clauses³⁵.

²⁹ European Court of Human Rights, *Mutu & Pechstein v. Switzerland*, Judgment of 2 October 2018, para. 98 available (in French) at: [https://hudoc.echr.coe.int/eng#{"itemid":\["001-186434"\]}](https://hudoc.echr.coe.int/eng#{) (29.04.2019).

³⁰ See: ATF 133 III 235 at 4.3.2.3.

³¹ 129 III 445 at 3.3.4.

³² See: BGE 4P.149/2003, 4P.172/2006, 4A_548/2009, 4A_612/2009, 4A_640/2010, 4A_246/2011, 4A_428/2011 and 4A_102/2016, BGE 4A_600/2016.

³³ SFT 20 February 2018, 4A_260/2017, 36 ASA Bull 406 (2018), ATF 144 III 120.

³⁴ This is for instance the case of article 58 of the FIFA Statutes, which provides as follows: "*Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question*".

³⁵ See Statistics published on the website of the CAS, available at: <https://www.tas->

Second, *ratione personae*, the decision rendered by the BCA concerns the relationship between the FIFA and one of its indirect members, as opposed to direct members. Indeed, the BCA recalled that the dispute at stake opposed the FIFA, the UEFA, and the URBSFA to a football club, which is not a direct member neither of FIFA nor UEFA. As a result, the decision of the BCA shall have no impact on disputes regarding the relationship between a sports organisation on the one hand, and direct members of such sports organisation, on the other hand.

Third, the scope of the decisions rendered by the BCA is limited *ratione territoriae*. Obviously, decision of the BCA is binding upon the parties to that procedure only. In addition, it has only an impact with respect to Belgian Law since it is based on specific provisions of the BJC. In theory at least, the decision has no impact outside the Belgian law context. Indeed, the decision was rendered pursuant to Belgian law, as interpreted by a Belgian judge. In addition, as stated by the SFT with respect to the decision of the BCA before its issuance, in conformity with the principle of sovereignty, an opinion expressed by a superior court of a Member State of the European Union has no more weight than that of the Swiss Supreme judicial authority, which clearly indicates that it shall not consider modifying its position following the decision of the BCA³⁶.

Linked to the issue of the limited effect *ratione territoriae* of the decision of the BCA is the hypothetical question of the influence of such decision on CAS panels and on other national courts, outside the territory of the Kingdom of Belgium. With respect to CAS arbitration, CAS panels will continue, pursuant to the principle of *Kompetenz-Kompetenz*, to be the only ones entitled to rule on their jurisdiction based on the factual and legal circumstances of the case. Moreover, as the seat of CAS arbitration is in Switzerland, CAS panels will

apply Swiss arbitration law. In that sense, the influential power of the decision of the BCA appears limited. Although it is very delicate to determine which approach to a specific situation a specific judge in a specific jurisdiction would follow, the potential influential power of the decision of the BCA on other national courts appears rather limited too. First, based on the negative effect of the *Kompetenz-Kompetenz* principle, domestic courts in several other jurisdictions are only empowered to operate a *prima facie* examination of the validity of the arbitration agreement. Yet, such limited review of the issue of validity of the arbitration agreement would unlikely lead a domestic court to find that the specificity requirement of the arbitration clause is not met in a specific case. Second, as already mentioned, in most jurisdictions, the specificity requirement of the arbitration clause is not considered as problematic in case law and interpreted based on the *favor arbitrandum* principle.

V. Conclusion

Far from being ‘the beginning of the end’ for the CAS, the decision of the BCA rather appears to have a limited impact. Indeed, the Court’s decision concerns Belgian law only and is obviously binding only for the parties to the procedure. In addition, the Court’s decision is relevant only with respect to statutory compromissory clauses of sports organisations, which concern *ordinary* arbitration rather than *appeals* arbitration proceedings. Finally, it only concerns disputes with *indirect* members of such sports organisation.

The influential power of the decision of the BCA on other courts and arbitral panels appears limited too. Based on the principle of *Kompetenz-Kompetenz*, CAS panels review their jurisdiction independently in each case. In addition, based on the negative effect of the *Kompetenz-Kompetenz* principle, national courts

cas.org/fileadmin/user_upload/CAS_statistics_2016_.pdf (29.04.2019).

³⁶ SFT 20 Feb 2018, 4A_260/2017, 36 ASA Bull 406 (2018), ATF 144 III 120., par. 3.4.1. This judgment was

rendered in the same Seraing case in the framework of an appeal against the CAS award of 9 March 2017 (see above, section I).

often do not have the opportunity to review as carefully as the BCA the issue of the validity of the arbitration agreement. In addition, case law in most jurisdictions do not consider the specificity requirement of the arbitration clause as problematic and interpret it based on the *favor arbitrandum* principle.

Nevertheless, the decision of the BCA appears regretful since it did not take into account the *favor arbitrandum* principle nor the

specificity of the sports worldwide dispute settlement system, which was recognized less than two months later by the European Court of Human Rights. Paradoxically, the decision of the BCA has at least the merit of highlighting the importance of a strong dispute settlement system in sports at the worldwide level, in view of preventing fragmentation and ensuring legal certainty to all its stakeholders in *any and all* of their disputes.

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 2017/A/4977

Smouha SC v. Ismaily SC & Aziz Abdul & Club Asante Kotoko FC & Fédération Internationale de Football Association (FIFA)

4 February 2019

Football; Joint and several liability to pay compensation for termination of contract without just cause; Independence of joint defendants; The legality of mechanism of joint and several liability established by Art. 17(2) FIFA RSTP; The disapplication of the mechanism of joint and several liability set forth by art. 17(2) FIFA RSTP

Panel

Mr Manfred Nan (the Netherlands),
President

Prof. Petros Mavroidis (Greece)

Mr Mark Hovell (United Kingdom)

Facts

Smouha SC (the “Appellant” or “Smouha”) is a football club registered with the Egyptian Football Association (the “EFA”).

Ismaily SC (the “First Respondent” or “Ismaily”) is a football club also registered with the EFA.

Mr Aziz Abdul (the “Second Respondent” or the “Player”) is a Ghanaian professional football player.

Club Asante Kotoko FC (the “Third Respondent” or “Asante Kotoko”) is a football club registered with the Ghana Football Association (the “GFA”).

The *Fédération Internationale de Football Association* (the “Fourth Respondent” or “FIFA”) is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the world governing body of international football. It exercises

regulatory, supervisory and disciplinary functions over national associations, clubs, officials and football players worldwide.

On 31 December 2012, the Player and Asante Kotoko entered into an employment contract for a period of three years, valid as from the date of signing until 30 December 2015.

On 17 July 2014, Ismaily presented a written offer to Asante Kotoko to acquire the services of the Player for an amount of USD 100,000 as well as “20% from the next transfer”, which offer was accepted. Also on 17 July 2014, the Player signed a document named “*Formal Offer for: Abdul Aziz Yusif*” (the “Formal Offer”) sent to him by Ismaily, according to which the Player was offered an employment contract for a period of five sporting seasons for a total remuneration of USD 570,000. On 20 July 2014, Ismaily informed Asante Kotoko that it would pay the amount of USD 100,000 “*once the player passes the medical test scheduled once he reaches Egypt as we are preparing his papers to enter the country nowadays*”.

On 1 August 2014, Asante Kotoko informed Smouha that its management had accepted their “*offer of ABDUL AZIZ YUSIF for a transfer fee of USD 100,000 (one hundred thousand dollars) and 20% as onward transfer*”.

On 2 August 2014, Ismaily informed Asante Kotoko that the Player had received the visa to enter Egypt, confirming its interest in the Player and stating that “*the money transfer once the player passes his medical check*”.

On 11 August 2014, Smouha paid the transfer fee of USD 100,000 to Asante Kotoko. On an unknown date, Smouha and the Player concluded an employment contract for a period of three years for a total remuneration of USD 973,230.

On 28 July 2015, Ismaily lodged a claim against the Player for breach of contract with

the FIFA Dispute Resolution Chamber (the “FIFA DRC”). Ismaily also called Smouha and Asante Kotoko as respondents, arguing that they induced the Player to breach his employment contract with Ismaily. Ismaily claimed an amount of USD 615,000 (USD 570,000 corresponding to the value of the formal offer and USD 45,000 for the specificity of sport) from the Player and requested that Smouha and Asante Kotoko were to be held jointly and severally liable.

On 13 October 2016, the FIFA DRC rendered its decision (the “Appealed Decision”), with [*inter alia*] the following operative part:

1. *The claim of [Ismaily] against [the Player] and [Smouha] is partially accepted.*
2. *The claim of [Ismaily] against [Asante Kotoko] is rejected.*
3. *[The Player] is ordered to pay to [Ismaily] within 30 days as from the date of notification of this decision, compensation for breach of contract in the amount of USD 615,000 plus 5% interest p.a. on said amount as from 28 July 2015 until the date of effective payment.*
4. *[Smouha] is jointly and severally liable for the payment of the aforementioned compensation.*
- (...)
7. *A restriction of four months on his eligibility to play (...) is imposed on [the Player].”*

As to the question of the alleged breach of contract without just cause by the Player, “*the Chamber was eager to highlight that based on the parties’ respective statements and the documentation available on file, it was undisputed that [the Player] never joined [Ismaily] in order to offer his services to the latter in accordance with the relevant employment contract. Also, it is undisputed that, in August 2015, [the Player] signed an employment contract with [Smouha] covering partially the same period of time as the employment contract the [Player] signed with [Ismaily]. By acting as such, the Chamber concurred that [the Player] had acted in breach of the employment contract concluded with [Ismaily] and is*

therefore to be held liable for breaching the contract without just cause”.

After having established that the Player’s breach took place within the “protected period” as defined in item 7 of the “Definitions” section of the FIFA Regulations on the Status and Transfer of Players (the “FIFA RSTP”), the FIFA DRC turned its attention to the question of the consequences of such breach:

“In doing so, the Dispute Resolution Chamber established that, in accordance with art. 17 par. 1 of the Regulations, [the Player] is liable to pay compensation to [Ismaily]. Furthermore, in accordance with the unambiguous contents of article 17 par. 2 of the Regulations, the Chamber established that [the Player’s] new club, i.e. [Smouha], shall be jointly and severally liable for the payment of compensation. In this respect, the Chamber was eager to point out that the joint liability of [the Player’s] new club is independent from the question as to whether the new club has induced the contractual breach. This conclusion is in line with the well-established jurisprudence of the Chamber and has been repeatedly confirmed by the CAS”.

“In continuation, the Chamber focused on the issue of inducement by [Smouha] and held that, considering the small time frame between the signature of the Formal Offer by [the Player] and the signature of the contract between [the Player] and [Smouha] as well as the fact that the Formal Offer was never executed, it could not be reasonably expected from [Smouha] to have been aware that [the Player] had signed another contract, i.e. the Formal Offer, covering the same period. In view of the above, the Chamber decided that the issue of inducement as regard [Smouha] is not to be further considered”.

On 31 January 2017, Smouha lodged a Statement of Appeal. On 10 February 2017, Smouha filed its Appeal Brief. Smouha challenged the Appealed Decision, submitting the following requests for relief:

1. *State that the FIFA Dispute Resolution Chamber has wrongly interpreted the legal*

situation currently existing in the case at stake as regards their particular situation.

2. *As a consequence of the above, declare that the decision taken by the FIFA [DRC] of FIFA on 13 October 2016 as regards Smouha SC (point 4 of the decision) is purely and simply cancelled and that Smouha SC are consequently relieved of any obligations whatsoever with respect to the case under review.*

On 8 March 2017, the CAS Court Office informed the parties that another appeal had been filed against the Appealed Decision by the Player. The parties were therefore requested to indicate whether they would agree to consolidate the present procedure with *CAS 2017/A/5019 Abdul Aziz Yusuf v. Ismaily SC*. On 9 and 13 March 2017 respectively, Smouha and FIFA indicated to agree with the consolidation, whereas Ismaily objected. On 14 March 2017, the CAS Court Office informed the parties that in light of Ismaily's objection, and in accordance with Article R52 para. 4 of the CAS Code, the issue of the consolidation would be submitted to the President of the CAS Appeals Arbitration Division, or her Deputy. On 4 July 2017, the CAS Court Office informed the parties that, given the similarities between the present case and the procedure *CAS 2017/A/5019*, the Division President decided to submit the present procedure to a Panel composed of three arbitrators. The procedure *CAS 2017/A/5019* would be referred to a sole arbitrator, who would also act as President in the present case.

On 21 November 2017, FIFA provided the Panel with a translation into English of the decision with reference SFT 4A_32/2016 and dated 20 December 2016.

On 26 June 2018, the CAS Court Office provided the parties with the arbitral award issued in the proceedings with the reference *CAS 2017/A/5019*, in which the sole arbitrator overturned the Appealed Decision and determined that the Player was not liable

to pay compensation for breach of contract to Ismaily. The parties were invited to comment on the potential impact and/or consequences of such award for the present procedure.

On 2 July 2018, Ismaily provided its comments in respect of the CAS Court Office letter dated 26 June 2018. With reference to jurisprudence of the Swiss Federal Tribunal (the "SFT"), Ismaily submitted that a joint and several debtor not involved in the proceedings cannot invoke a judgment which has rejected the claim of the creditor against another joint and several debtor. If the judgment becomes final against one of the joint and several debtors, the SFT must treat it "*as a separate judgment*" in the assessment of the claim against the other debtor.

On 3 July 2018, FIFA provided its comments in respect of the CAS Court Office letter dated 26 June 2018. FIFA emphasised that the present matter solely pertains to the issue of the joint liability for the payment of compensation for breach of contract imposed on Smouha, which is specifically set out in Smouha's Appeal Brief. FIFA indicated that, "*from a strictly procedural and legal point of view, the award rendered in the matter CAS 2017/A/5019 Abdul Aziz Yusuf v. Ismaily SC should not have any influence on the award which is yet to be rendered in the present proceedings*". At the same time, FIFA however indicated that, "[o]bviously, to try to defend that the joint liability for the payment of compensation for breach of contract imposed on [Smouha] by the DRC should be maintained where the player does not have to pay the same compensation, appears pointless and we come to the conclusion that point 4. of the relevant decision of the DRC has become obsolete".

On 4 July 2018, the Player provided his comments in respect of the CAS Court Office letter dated 26 June 2018. The Player principally objected to the conclusion reached in *CAS 2017/A/5019* that he was not held to pay compensation to Ismaily, but

that still sporting sanctions were imposed on him.

On 7 August 2018, Smouha provided its comments in respect of the CAS Court Office letter dated 26 June 2018. Smouha argued that *“the point of the same decision against which [Smouha] had appealed in the case CAS 2017/A/4977, namely point 4, may obviously not be upheld since a party (Smouha SC, who, we repeat had furthermore clearly been found by FIFA as not being guilty of having induced the player to any incorrect behavior) may not held be jointly and severally liable for a payment of which the cause has ceased to exist by a Court decision and that is not due any more by the party who had been ordered to pay the amount in question”*.

Reasons

1. Independence of joint defendants

Faced with such situation, one would in principle be inclined to say that since the Player is no longer held liable to pay compensation to Ismaily, Smouha should neither be held (jointly and severally) liable, particularly because it was determined by the FIFA DRC that the latter was not at fault itself, but was only declared jointly and severally liable because Article 17(2) FIFA RSTP provides for such automatic joint liability.

Being cognisant of certain jurisprudence of the SFT on the formal separation between joint debtors/creditors, the Panel deemed it important to have the views of the parties in this respect, to assess whether the CAS Award issued in the matter referenced *CAS 2017/A/5019* could have any impact on the present appeals arbitration proceedings. After taking note of the parties' positions in this respect, the Panel finds that the outcome of the proceedings in *CAS 2017/A/5019* can play no role in the present proceedings, even if this would lead to contradicting outcomes.

According to the jurisprudence of the Swiss Federal Tribunal, defendants lodging separate appeals against a first instance decision remain independent from each other: *“The joint defendants remain independent from each other. The behavior of one of them, and in particular his withdrawal, failure to appear or appeal, is without influence upon the legal position of the others (judgment 4P.226/2002 of January 21, 2003 at 2.1; (...)). As to the judgment to be issued, it may be different as to one of the joint defendants or the other (...). The independence of joint defendants will continue before the appeal body: a joint defendant may independently appeal the decision affecting him regardless of another's renouncing his right to appeal the same decision; similarly, he will not have to worry about the appeals of the other joint defendants being maintained if he intends to withdraw his own (...). Among other consequences, this means that the res judicata effect of the judgment concerning joint defendants must be examined separately for each joint defendant in connection with the opponent of the joint defendants because there are as many res judicata effects as couples of claimant/defendant (...).”*

As such, although both the Player and Smouha challenged the Appealed Decision by lodging an appeal before CAS, the appeals shall be dealt with separately. The Panel is therefore to render a decision on the basis of Smouha's requests for relief, regardless of the outcome of the arbitration in *CAS 2017/A/5019* and the fact that this may potentially lead to contradictory decisions. In its requests for relief, Smouha requests the Panel to decide as follows:

- “1. State that the FIFA Dispute Resolution Chamber has wrongly interpreted the legal situation currently existing in the case at stake as regards their particular situation.*
- 2. As a consequence of the above, declare that the decision taken by the FIFA Dispute Resolution Chamber of FIFA on 13 October 2016 as regards Smouha SC (point 4 of the*

decision) is purely and simply cancelled and that Smouha SC are consequently relieved of any obligations whatsoever with respect to the case under review”.

By formulating its requests for relief in this way, Smouha prevented the Panel from assessing whether the Player was liable to pay damages to Ismaily, as it accepted the Player’s liability as a matter of fact, while it only challenged its own joint and several liability as a matter of law.

2. The legality of mechanism of joint and several liability established by Art. 17(2) FIFA RSTP

Having reached the above conclusion as to the scope of the present appeal arbitration proceedings, the Panel will assess the principal issue raised by Smouha, *i.e.* whether, on the basis of Article 17(2) FIFA RSTP, it can be held jointly and severally liable for the Player’s debt towards Ismaily. Article 17(2) FIFA RSTP determines the following: *“Entitlement to compensation cannot be assigned to a third party. If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties”.*

The Panel observes that the question whether such joint liability is permissible, even if any fault is absent, has been extensively addressed in the decision of the Swiss Federal Tribunal that was translated into English by FIFA upon request of the Panel: *“Art. 17 par. 2 RSTP establishes a joint liability with regard to the payment of compensation for breach of contract without just cause between the professional player and his new club. This provision establishes a passive joint liability between the author of the contractual violation and the one who has profited from said violation, irrespective of any involvement on the part of the latter in the contractual breach. Within the external relations between creditor and*

debtors, this regulatory provision, which, besides, has been applied for a long time, is self-sufficient, so that it is not necessary, at this stage, to apply Swiss law subsidiarily in accordance with art. 58 of the Code of Sports-related Arbitration combined with art. 66 par. 2 of the FIFA Statutes in their version as applied in casu. The interpretation, in itself, of art. 17 par. 2 RSTP, which the Panel made is not subjected to examination by this Court. The very rule of passive joint liability, which FIFA has created to the benefit of the former club and at the expense of the new club has certainly not remained uncontested [...] and has indeed been set aside in a case where the former club had parted ways with a player who had not honoured its contractual obligations [...]; however, it does not necessarily violate any fundamental principle of substantive law to the extent that it would no longer be compatible with the juridical order and the system of decisive values. To argue otherwise would be difficult, besides, as Swiss law knows roughly similar rules, as the Respondents have pointed out in their respective briefs. Therefore, nothing would command an immediate intervention of the Federal Tribunal in a field which, first and foremost, has to do with sports politics and where the competent bodies of world football are better equipped than itself to intervene efficiently, in a calm manner.

The alleged excessive nature of the joint liability imposed on the new club is equally not proven. First of all, the new club cannot ignore its liability for the acts of a third party and the consequences that it might incur on its financial situation; this should lead the latter to do all in its power in order to escape from such joint liability. For instance, it should enquire by all means about the legal situation of the player it wishes to contract with, without relying blindly on the statements of the latter. Equally, it should, if necessary, conclude an employment contract upon the suspensive condition that would allow it to clarify the situation. Secondly, the joint debt is individualized as it corresponds to the compensation, calculated on the basis of the criteria listed in art. 17 par. 1 RSTP, which the player who terminated the employment contract without just cause will have to pay to his

former club. It will, furthermore, be determined if the parties to the contract in question, as it is often the case, used the possibility mentioned in art. 17 par. 2 RSTP to stipulate the amount of compensation that the player would have to pay. Finally, the new club should be in a position to defend itself against the former club's allegations by putting forward the reasons for which the joint liability should not be applicable due, for instance, to the fact that the player had a valid reason justifying the premature termination of the employment contract (cf. award 4A_304/2013 quoted hereinbefore point. 3). Moreover, once condemned to pay, the new club should be able, under certain conditions, to turn against the other joint debtor, i.e. the player at fault" (SFT 4A_32/2016, consid. 4.3).

Having carefully considered the reasoning of the SFT in this decision, the Panel finds that there are some distinguishing features with the matter at hand.

3. The disapplication of the mechanism of joint and several liability set forth by art. 17(2) FIFA RSTP

From FIFA's Answer it appears that the purpose of Article 17(2) FIFA RSTP is i) that the party suffering from the breach obtains an additional guarantee that it will be paid; and ii) to relieve the financial and sportive burden placed on the player so as not to hinder his football career. During the hearing, when asked by one member of the Panel to comment on the thesis that there are only three areas where joint liability could be applied (based on a contract (Article 1-40 SCO); based on tort (Article 41-61 SCO); and based on unjust enrichment (Article 62-67 SCO)), FIFA answered that the provision may be based on unjust enrichment. Therefore, iii) unjust enrichment will also be taken into account as a possible justification for Article 17(2) FIFA RSTP. In CAS jurisprudence and legal doctrine other reasons have been advanced: iv) ensuring contractual stability in combination with

unjust enrichment (CAS 2013/A/3365 & CAS 2013/A/3366 A.S. (the "Mutu case"), para. 159 of the abstract published on the CAS website); and v) avoiding evidentiary difficulties in establishing the joint liability (cf. CAS Bulletin 2018/1, p. 60, with further reference to CAS 2013/A/3149, para. 99).

The Panel agrees with the reasoning of the SFT in 4A_32/2016 that the automatic joint liability as set out in Article 17(2) FIFA RSTP is not illegal *per se* and that, in principle, in light of the justifications put forward above, it serves a legitimate purpose. The Panel also finds that a fault of the acquiring club is not necessarily required in order for the automatic joint liability to be applied. However, the Panel finds that, in order to validly apply Article 17(2) FIFA RSTP in a specific case, at least one of the justifications for the application of the concept of automatic joint liability in general should indeed be present. After analysing the reasons advanced by FIFA in the matter at hand and the reasons advanced in legal doctrine, the Panel finds that such justification is not present in the matter at hand.

First of all, Smouha paid a transfer fee to Asante Kotoko of USD 100,000 and promised an additional payment of 20% of any transfer fee received in case the Player would subsequently be transferred by Smouha to a third club. As mentioned by the SFT in the decision set out above (SFT 4A_32/2016), Article 17(2) FIFA RSTP appears to be intended to establish "*a passive joint liability between the author of the contractual violation and the one who has profited from said violation*" (emphasis added). The Panel does not disagree with this interpretation, but deems it essential to point out that Smouha did not "profit" from the alleged contractual violation of the Player because it paid a transfer fee in the amount of USD 100,000. As such, unlike a situation where the acquiring club

would not have to pay a transfer fee after a breach of contract by the player, but would be able to transfer the player for a transfer fee in the future, there is no such “unjust enrichment” of Smouha here.

Following the reasoning of the SFT in 4A_32/2016, FIFA argued in its Answer that Smouha can demand a contribution from the Player at a later stage. This is however also not the case for Smouha, because the Player is not held liable anymore due to the award issued in *CAS 2017/A/5019*. Insofar the outcome of *CAS 2017/A/5019* cannot be taken into account in the present appeal arbitration proceedings, the Panel finds that, applying such legal fiction, it can at least not be said with certainty that Smouha can demand a contribution from the Player at a later stage.

Insofar Article 17(2) FIFA RSTP is aimed at “*avoiding any debate and difficulties of proof regarding the possible involvement of the new club in the player’s decision to terminate his former contract*” (cf. CAS Bulletin 2018/1, p. 60, with further reference to CAS 2013/A/3149, para. 99), there is no such difficulty in the present case. The FIFA DRC explicitly confirmed in the Appealed Decision that “*it could not be reasonably expected from [Smouha] to have been aware that [the Player] had signed another contract, i.e. the Formal Offer, covering the same period*”. This goes further than leaving the possible involvement of Smouha in doubt, as it explicitly exonerates Smouha from any wrongdoing.

Finally, although not specifically argued by Smouha, the Panel considers it doubtful whether Ismaily incurred any damages and finds it difficult to follow the reasoning of the FIFA DRC in the Appealed Decision with respect to the compensation awarded. It is generally accepted that the compensation to be awarded for breach of contract is to be based on the principle of

“positive interest” (CAS 2017/A/5111, para. 137 of the abstract published on the CAS website, with further references to CAS 2008/A/1519-1520, nos. 85 *et seq.*; CAS 2005/A/801, no. 66; CAS 2006/A/1061, no. 15; CAS 2006/A/1062, no. 22; and CAS 2014/A/3527, no. 78). The situation in the matter at hand is however that Ismaily never paid a transfer fee for the Player and saved itself the financial burden of having to pay the Player a salary of USD 570,000. Although the Panel is willing to concede that Ismaily may have incurred certain expenses in the process of acquiring the Player and that they would have benefitted from his sporting performance, such damages are however not quantified or proven by Ismaily, as a consequences of which the Panel fails to see the damages incurred by the latter.

Acknowledging that the majority of the jurisprudence of the FIFA DRC and CAS have consistently applied the automatic joint liability principle enshrined in Article 17(2) FIFA RSTP also to acquiring clubs that acted without fault, the Panel wishes to emphasise that it does not disagree with such jurisprudence, but that it finds that the circumstances in the present matter are truly exceptional and therefore justify another outcome. The Panel also feels itself comforted in its conclusion by the fact that, be it for different reasons, two other exceptions to the automatic application of Article 17(2) FIFA RSTP have already been established (cf. *CAS 2013/A/3365* & *CAS 2013/A/3366* and *CAS 2015/A/4094*).

In this respect, the Panel wishes to add that it adheres with the reasoning of the CAS panel in the Mutu case that “[t]he prospect of having to pay a high compensation may actually serve as a broader deterrent for players willing to put an end to their employment contracts than if a New Club were to be found jointly and severally liable” and therefore finds that the

preservation of the legitimate objective of preserving contractual stability is not jeopardized by the Panel's disapplication of Article 17(2) FIFA RSTP in the present matter.

In light of the exceptional circumstances set out above, and regardless of the Panel's view that Article 17(2) FIFA RSTP is not *per se* invalid as such, the Panel finds that in the present case Smouha cannot be held (jointly and severally) liable to pay compensation for breach of contract to Ismaily.

Decision

The appeal filed on 31 January 2017 by Smouha SC against the decision issued on 13 October 2016 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is upheld. The items 1 and 4 of the decision issued on 13 October 2016 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* are annulled. All other and further motions or prayers for relief are dismissed.

CAS 2017/A/5003

Jérôme Valcke v. Fédération Internationale de Football Association (FIFA)

27 July 2018

Football; Violation of the FIFA Code of Ethics (FCE) by a FIFA official; Version of the law applicable regarding intertemporal issues in the context of disciplinary matters; FIFA authority to impose disciplinary sanction under the applicable law; Relationship between Swiss labour law and association law regarding the authority of FIFA to impose disciplinary sanctions; No violation of Swiss Ordre Public; Satisfaction of predictability requirement regarding sanction provided by the FCE and FDC; No violation of principle of ‘Ne bis in idem’; Burden and standard of proof under Articles 51 and 52 FCE; Violation of conflict of interest regulations (Article 19 FCE); No violation of Articles 15 and 13, paras. 1-3 FCE (lex specialis derogat generali); Prerequisites for applicability of customary law within associations; Applicability of International treaties on human rights in arbitration proceedings; Privilege against self-incrimination; Privilege against self-incrimination and duty of cooperation in sports disciplinary proceedings; Duty to cooperate (Article 41 FCE)

Panel

Mr Massimo Coccia (Italy), President

The Hon Michael Beloff, QC (United Kingdom)

Prof. Ulrich Haas (Germany)

Facts

Mr. Jérôme Valcke (the “Appellant”) is the former FIFA Secretary General. Mr. Valcke was appointed by the FIFA Executive Committee to serve as “General Secretary”

on 27 June 2007, following which he signed an employment contract on 2 July 2007. On 17 September 2015, the FIFA Emergency Committee suspended Mr. Valcke from his duties as FIFA Secretary General and put him on leave. On 11 January 2016, FIFA terminated the Appellant’s employment agreement with immediate effect.

The Fédération Internationale de Football Association (the “Respondent” or “FIFA”) is the international governing body of football at worldwide level, headquartered in Zurich, Switzerland.

This appeal is brought by Mr. Valcke against a decision of the FIFA Appeal Committee (the “Appeal Committee”) taken on 24 June 2016 (the “Appealed Decision”) which (i) partially confirmed the decision of the Adjudicatory Chamber of the FIFA Ethics Committee (the “Adjudicatory Chamber”) taken on 10 February 2016, (ii) held that Mr. Valcke violated Articles 13 (“General Rules of Conduct”), 15 (“Loyalty”), 16 (“Confidentiality”), 18 (“Duty of disclosure, cooperation and reporting”), 19 (“Conflicts of interest”), 20 (“Offering and accepting gifts and other benefits”) and 41 (“Obligation of the parties to collaborate”) of the FIFA Code of Ethics (2012 edition), and (iii) sanctioned Mr. Valcke with a ban of 10 years from taking part in any football-related activity at national and international level from 8 October 2015 and with a fine of CHF 100,000.

In 2009 and 2010, Mr. Benny Alon of JB Sports Marketing AG (“JB”) threatened FIFA with a multimillion dollar lawsuit, claiming to have knowledge of ticket irregularities in connection with the 2006 FIFA World Cup. Mr. Alon demanded that FIFA should enter into an agreement by which FIFA would sell JB Sports Marketing thousands of tickets to multiple editions of the FIFA World Cup in exchange for Mr. Alon’s silence about the alleged wrongdoings.

On 29 April 2009, following instructions of then FIFA President, Mr. Joseph Blatter, JB and FIFA entered into an agreement under which FIFA agreed to sell to JB 8,750 Category 1 tickets for each of the FIFA World Cup editions of 2014, 2018 and 2022 at their regular face value (the “JB Agreement”).

During the negotiation of the JB Agreement, FIFA refused to sign a side letter drafted and proposed by JB which stated that “*JB Sports Marketing will have the rights to purchase from FIFA a limited number of Cat 1 tickets for the FIFA World Cup in 2010, 14, 18 and under certain conditions 2022 and resell to clients/ buyers*”. FIFA also refused to amend Clause 9 of the JB Agreement to include the line “*however selling the ticket inventory does not constitute a breach of this agreement*”.

The JB Agreement stipulated *inter alia*:

- “*Upon request by FIFA ... JB will provide 60 FIFA guests with an invitation for a golf tournament organized and paid by JB and taking place in years 2010, 2014, 2018 and 2022. The Parties agree and acknowledge that FIFA is neither obliged to attend such golf tournaments with FIFA management nor to invite guests to attend such tournament*” (Clause 1.5);
- “*JB shall fully comply with, and cause any and all entities and individuals to whom it allocates tickets, including its representatives, staff, or guests to fully comply with this Agreement, in particular the following terms and conditions, regulations and codes which will be enforced by FIFA for all contractual editions of the FIFA World CupTM: a. the General Ticket Terms and Conditions for the use of tickets in its applicable form; b. the Sales Regulations for tickets in its applicable form ...*” (Clause 5.1);
- “*The tickets will be printed with the name ‘FIFA’ or any other neutral designation and if possible without price indication, but mentioning the Category ‘Cat. 1’*” (Clause 5.3);
- “*JB shall liaise directly and exclusively with the FIFA Secretary General’s office*” (Clause 6.1);

- “*JB undertakes to comply with all applicable national and international provisions ...*” (Clause 6.9); and
- “*JB, its professional advisors, its bodies, its members, its employees, its agents and any other individuals involved on behalf of JB agrees not to make any statements about FIFA, its bodies, employees and agents*” (Clause 7.2).

On 27 July 2010, in anticipation of the 2014 FIFA World Cup, the Brazilian Parliament enacted a law to impose civil and criminal sanctions for the unauthorized sale of FIFA World Cup tickets, including the resale of tickets at prices above face value (“Brazilian Fan Statute”).

On 6 March 2011, Mr. Jack Warner, the then President of the Caribbean Football Union (“CFU”), sent an email to Mr. Valcke, referring to several requests he had already made in the past to grant to the CFU the purchase for the Caribbean region of the media rights for the 2018 and 2022 FIFA World Cups. Mr. Warner again repeated his request. The CFU, in the FIFA upcoming presidential election of 1 June 2011, would vote using a “*block vote system*”, meaning that the 25 national federations forming that union would all vote the same and, in that way, would have a significant impact on any voting matters.

On 7 March 2011, Mr. Valcke replied to Mr. Warner’s email and indicated that despite having received other offers for the media rights of the 2018 and 2022 FIFA World Cup (including one offer for USD 4 million), he would “*gift*” them to Mr. Warner for USD 1 million.

On 19 March 2011, Mr. Valcke emailed the FIFA TV Division about media rights negotiations for Thailand with Mr. Worawi Makudi, then FIFA Executive Committee member and President of the Football Association of Thailand. Mr. Valcke suggested that FIFA refrain from selling

media rights at a discount to Thailand since Mr. Worawi was a supporter of Mr. Mohamed Bin Hammam in the FIFA election for presidency.

Ultimately, in relation to the Caribbean region, FIFA did not award the media rights for the 2018 and 2022 editions of the FIFA World Cup to the CFU. Instead, on 5 December 2014, FIFA awarded those rights to DirectTV Latin America LLC for a total fee of USD 20 million.

Between summer 2012 and July 2015, on four separate occasions, Mr. Valcke, accompanied by one or several members of his family, travelled by private jet to or from business meetings, on some occasion deviating his route for private reasons. According to KPMG, by using the private jet instead of a commercial flight, on each occasion FIFA incurred additional costs, which were never deducted from Mr. Valcke's salary.

On 5 March 2013, following several emails by Mr. Alon to Mr. Valcke informing the latter that JB was reselling tickets and requesting approval of the resale, Mr. Valcke replied "*You can go ahead*".

In the beginning of April 2013, upon request by Mr. Alon, Mr. Valcke eventually agreed to adjust the contractually agreed allocation of tickets, by changing the ticket inventory to JB's benefit. While Mr. Alon claimed before the Swiss criminal prosecutor that Mr. Valcke agreed to a 50 percent kickback on the profits of the ticket resales for the 12 matches awarded, Mr. Valcke admits having received such an offer but is adamant that he never accepted it.

On 3 April 2013, Mr. Valcke and Mr. Alon exchanged emails about meeting in Zurich on that day for Mr. Alon to hand over certain "*documents*" to Mr. Valcke. Whereas Messrs. Valcke and Alon did not meet on 3 April 2013, in an email of later that same day to Mr. Valcke's private Gmail account, Mr. Alon

sent Mr. Valcke a photograph of a suitcase and told him that he would provide the "*document*" whenever requested.

On 23 April 2013, Mr. Alon sent an email to Mr. Valcke's private Gmail account with subject header "*pension fund*", listing the prices obtained by JB for the resale of Confederation Cup tickets, all of which covered by the JB contract. Mr. Alon further requested Mr. Valcke to "*Please send us the invoice for the CC*".

On 16 July 2013, by email to Mr. Valcke's private Gmail account, Mr. Alon (i) complained about Mr. Valcke's request to suspend sales of FIFA World Cup tickets and (ii) updated Mr. Valcke with details on the FIFA World Cup tickets sold up to that date by JB for which it had received a 50 percent non-refundable payment. On 17 July 2013, Mr. Valcke replied from his private Gmail account and told Mr. Alon that he could continue selling tickets.

On 26 November 2013, the company Match Hospitality AG ("MH"), FIFA's exclusive partner for hospitality packages sent a formal letter to FIFA (i) complaining about Mr. Alon reselling tickets with authorization from FIFA, (ii) stressing that reselling tickets above face value contravened FIFA regulations and Brazilian law, (iii) indicating that selling as part of hospitality packages would breach the exclusivity agreement between FIFA and MH, and (iv) presenting as the only viable solution that Mr. Alon be designated as a MH sales agent.

Also around the same time, Mr. Alon requested Mr. Valcke to provide 2,282 additional tickets to secure a deal with a "*Rossi Group*" from Brazil. According to Mr. Alon's testimony before the Swiss criminal prosecutor, Mr. Valcke agreed, by a handshake, without written agreement, to this additional resale and increased JB's inventory from 8,750 to 11,032 tickets.

In December 2013, Mr. Alon and Mr. Valcke exchanged several emails by which Mr. Valcke expressed the necessity of restructuring of the relationship between FIFA and JB (*i.e.* termination of the JB Agreement and entering into a new agreement between JB and MH under the auspices of FIFA, whereby JB would become a sales agent of MH). Mr. Alon insisted to maintain the JB Agreement.

On 18 December 2013, despite JB's insistence for the JB Agreement to remain in force, FIFA delivered a letter to JB bearing Mr. Valcke's signature (Mr. Valcke alleges that FIFA's legal team prepared this letter and used his electronic signature in his absence) in which Mr. Valcke purportedly first requested that Mr. Alon avoid making future communications to his private email account, thanked JB for confirming that it was "close" to entering into an agreement with MH that would enable JB to act as a sales agent of MH, expressing surprise that in the past, JB had resold tickets and explained *inter alia* that (i) according to the previous JB Agreement, JB did not have the right to resell or transfer tickets to third parties without FIFA's prior written consent (which it never gave or would be in the position to give), (ii) JB would only be able to resell tickets if it became a sales agent of MH, and (iii) any resale of tickets would be a breach of the JB Agreement, the FIFA General Terms and Conditions, and the Brazilian Fan Statute.

On 20 December 2013, JB and FIFA terminated the JB Agreement. JB and MH also entered into a non-exclusive agency agreement, approved by Mr. Valcke on behalf of FIFA, which appointed JB as a sales agent of MH, thereby allowing JB to sell to its original customers by providing hospitality packets in compliance with FIFA's ticketing policy and under MH's pricing structure (the "JB-MH Agency Agreement").

Further on the same day, JB and Mr. Byrom (the CEO of MH, acting in his personal

capacity) agreed to sign a Side Letter to the JB-MH Agency Agreement, under which Mr. Byrom *inter alia* committed to pay USD 8.3 million to JB (the "Side Letter"). According to a FIFA internal memo of 22 September 2014, FIFA had made an oral commitment to reimburse Mr. Byrom for this amount.

On 22 September 2014, Mr. Kattner, FIFA's then Director of Finance, issued a memorandum to the then Chairman of the FIFA Finance Committee, summarizing the relationship between FIFA and JB, requesting approval for a reimbursement payment to Mr. Byrom in the amount of USD 8.3 million.

On 28 October 2014, after the approval of the FIFA Finance Committee, Mr. Valcke and Mr. Byrom agreed that FIFA would reimburse the full amount Mr. Byrom had committed to pay JB in the Side Letter in order to compensate JB for termination of the JB Agreement based on the profit JB expected to earn if it had been allowed to continue selling its entire ticket inventory under that agreement.

On 10 March 2015, the Office of the Attorney General of Switzerland ("Swiss OAG" or "Swiss Prosecutors") opened criminal proceedings on suspicion of criminal mismanagement and of money laundering in connection with the awarding of the FIFA World Cups of 2018 and 2022. On 27 May 2017, the Swiss OAG seized data and documents at FIFA's headquarters and six high-ranking FIFA officials were arrested and detained in Zurich pending extradition at the request of the U.S. Attorney's Office for the Eastern District of New York, which suspected them of having received millions of US dollars in bribes. The U.S. Department of Justice and the U.S. Attorney's Office for the Eastern District of New York were investigating, among other things, payments FIFA made to the CFU and CONCACAF totalling USD 10 million in relation to the 2010 FIFA World Cup.

On 2 June 2015, FIFA's external counsel sent a letter to all FIFA employees, including Mr. Valcke, in connection with the Swiss and U.S. investigations against FIFA. All employees were requested to preserve all information and documents stored in any form from 1 January 2002 and to refrain from amending, destroying or in any way altering any relevant document (the "Document Preservation Notice").

On 18 September 2015, upon the opening of disciplinary proceedings against Mr. Valcke for possible violations of several rules of the FIFA Code of Ethics ("FCE"), the FIFA Investigatory Chamber requested Mr. Valcke to make himself available for an interview with the chief of investigation on 21 September 2015 in Zurich.

Between 20 and 29 September 2015, Mr. Valcke's counsel, referring to Article 39 of the 2012 FCE, repeatedly requested access to the investigation files before the interview and to postpone the interview until Mr. Valcke had had the opportunity to review the evidence and files. Mr. Valcke's counsel added that *"in light of the pending U.S. and Swiss investigations, it is particularly important that Mr. Valcke be provided access to all FIFA emails and documents related to the matter being investigated, and that he be afforded all the rights remedies and fairness to which he is entitled"*. Within the same period of time, the FIFA Investigatory Chamber rejected Mr. Valcke's request to have access to the investigation files before the interview took place explaining that under Article 39 FCE, in exceptional circumstances (such as when confidential matters need to be safeguarded) the right to be heard could be restricted. The Investigatory Chamber underlined that: *"... noting your reference to the apparent ongoing investigation conducted by the Swiss Attorney General, you are hereby reminded that any ordinary proceedings ongoing at national level are independent from the activities of the investigatory chamber of the FIFA Ethics Committee ..."*

On 28 September 2015, the Investigatory Chamber warned Mr. Valcke for his failure to comply with prior requests to attend an interview and provide certain documentary evidence. It reminded Mr. Valcke yet again of his duty to cooperate under Article 41 FCE and that his continued failure to cooperate could result in sanctions imposed under the respective rule of the FCE. The same day, by separate letter, the Investigatory Chamber also requested Mr. Valcke to provide, by 29 September 2015 the documentary evidence it requested on 22 September 2015.

On 7 October 2015, the Adjudicatory Chamber of the FIFA Ethics Committee (hereinafter the "Adjudicatory Chamber") provisionally banned Mr. Valcke from taking part in any football-related activity at national and international level for a maximum duration of 90 days. The Adjudicatory Chamber issued the grounds of its decision on 8 October 2015. The provisional ban was confirmed on 24 November 2015 and then extended for a period of 45 days on 5 January 2016.

On 14 October 2015, in the absence of a reply by Mr. Valcke regarding whether he had, and would continue to obey with the Document Preservation Notice, FIFA's lawyers instructed a forensic expert to conduct an examination of Mr. Valcke's work laptop.

On 11 December 2015, the forensic expert issued a report concluding that Mr. Valcke, downloaded and attempted to use a data destruction tool, a software used to securely erase files and folders beyond forensic recoverability. However, the program apparently failed to install because the user had restricted permissions on the laptop. The forensic expert also identified that between 24 September and 11 October 2015 (the day before Mr. Valcke handed over his work laptop to FIFA) the user deleted a total of 1,034 files or folders using the built in Recycle Bin feature, having selectively chosen the deleted documents. The selected documents

were moved in bulk to the Recycle Bin within minutes of each other and then permanently deleted en masse. According to Mr. Valcke, the deleted files were private files, except for two which were FIFA-related and which he deleted unintentionally as they were inadvertently filed in his private folders.

On 10 February 2016, the Adjudicatory Chamber issued its final decision against Mr. Valcke. It sanctioned Mr. Valcke with a ban of twelve years from taking part in any football-related activity at national and international level from 8 October 2015 and a fine in the amount of CHF 100,000 for having infringed Articles 13 (“General rules of conduct”), 15 (“Loyalty”), 16 (“Confidentiality”), 18 (“Duty of disclosure, cooperation and reporting”), 19 (“Conflicts of interest”), 20 (“Offering and accepting gifts and other benefits”) and 41 (“Obligation of the parties to collaborate”) of the FCE.

On 24 June 2016, following Mr. Valcke’s appeal against the Adjudicatory Chamber’s decision, the Appeal Committee issued its decision (the “Appealed Decision”). The Appealed Decision partially confirmed the Adjudicatory Chamber’s decision and reduced the sanction to a ban of ten years, while maintaining the fine at CHF 100,000.

On 23 February 2017, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the “CAS Code”), Mr. Valcke filed a Statement of Appeal with the Court of Arbitration for Sport (the “CAS”) challenging the Appealed Decision.

Reasons

1. Version of the law applicable regarding intertemporal issues in the context of disciplinary matters

Having discussed and affirmed its jurisdiction over the matter at hand as well as the admissibility of the Appeal, the Panel turned to the Parties’ disagreement

regarding the application of the legal concept of *lex mitior*, specifically the question of which version of the FCE applies to the issue of whether the Appellant, by means of his email to Mr. Warner of 7 March 2011 (offering the CFU media rights for the 2018 and 2022 FIFA World Cups in exchange for USD 1 million) offered an improper benefit to Mr. Warner and the CFU.

The Appellant argues that the previous version of the FCE, the 2009 edition, must apply, because the email at the basis of the alleged ethical infringement was sent on 7 March 2011, before the FCE 2012 came into force. The Appellant further denies having made an offer or even an attempt to offer (claiming that, at most, he “expressed an intent”); that in any case, Article 10 FCE (2009 edition) only prohibited the “giving” and not “offering” or “attempt to offer” of gifts.

The Respondent points to Article 3 FCE (“Applicability in time”) (2012 edition), stipulating that the FCE “shall apply to conduct whenever it occurred including before the passing of the rules contained in this Code except that no individual shall be sanctioned for breach of this Code on account of an act or omission which would not have contravened the Code applicable at the time it was committed nor subjected to a sanction greater than the maximum sanction applicable at the time the conduct occurred ...”, to support its position that the 2012 edition applies. The Respondent further argued that the Appellant violated Article 20 FCE (2012 edition) by offering an improper benefit to the CFU. In the Respondent’s view the offer to the CFU of the media rights for the FIFA World Cups of 2018 and 2022 at the price of USD 1 million constituted an offer of a gift, amongst others as the requested price was far below market price, and the Appellant was well aware of that.

The Panel first of all clarified that according to well-established CAS jurisprudence, intertemporal issues in the context of disciplinary matters are governed by the general principle *tempus regit actum* or principle of non-retroactivity, which holds that (i) any determination of what constitutes a sanctionable rule violation and what sanctions can be imposed in consequence must be determined in accordance with the law in effect at the time of the allegedly sanctionable conduct, (ii) new rules and regulations do not apply retrospectively to facts having occurred before their entry into force, (iii) any procedural rule – on the contrary – applies immediately upon its entry into force and governs any subsequent procedural act, even in proceedings related to facts occurred beforehand, and (iv) any new substantive rule in force at the time of the proceedings does not apply to conduct occurred prior to the entry into force of that rule unless the principle of *lex mitior* makes it necessary.

Furthermore, and with regards to Article 3 FCE (2012 edition), the Panel, referring to previous CAS jurisprudence, held that even if the starting point of Article 3 FCE departs from the traditional *lex mitior* principle – by reversing it so that the new substantive rule applies automatically unless the old rule is more favourable to the accused – the respective approach is equivalent to the traditional principle of *lex mitior*.

Pursuant to the above approach, and given that the Appellant’s conduct under scrutiny occurred before the entry into force of the 2012 FCE, the Panel found that it had to compare the texts of Article 10 FCE (2009 edition) and Article 20 FCE (2012 edition), under the aspect of the principle of *lex mitior*. The Panel determined that while the two sets of rules differ in their language, both of them

equally prohibit the offering and the actual delivery of gifts, thereby embracing acts which are the mirror image of each other *vis-a-vis* gifts, *i.e.* giving or accepting, without either of them being more favourable in this context. Moreover, “giving” in the 2009 edition must include “offering” since the vice lies in the offer, and whether or not an offer is accepted depends solely upon the reaction of the intended recipient – a matter which is not within the control of the offeror.

The Panel, therefore, concluded that nothing turns in this case on the general principle of *tempus regit actum*, being the offer of an improper benefit by the Appellant to the CFU caught under either rule; the Appealed Decision, according to which Mr. Valcke had been found to have violated Article 20, para. 1 FCE for offering the CFU media rights for the 2018 and 2022 FIFA World Cups in exchange for only USD 1 million, a fee far below the market price, was found to be correct in this regard. The Panel also agreed with the Appeal Committee that the fact that FIFA did not ultimately award the media rights to the CFU is irrelevant, as Mr. Valcke offering the rights below market value was sufficient to constitute an infringement under Article 10 FCE (2009 edition).

2. FIFA authority to impose disciplinary sanction under the applicable law

The Panel then turned to the Parties’ disagreement with respect to whether and to what extent the mandatory provisions of Swiss law apply to a sanction imposed by a sport governing body pursuant to Swiss association law, and if so, whether the sanction of a ban from partaking in activities of that sport governing body violates that mandatory law. This as the Appellant challenges FIFA’s authority to impose a ban or a fine on him, based on the argument that such sanction

contravenes mandatory provisions of Swiss employment law. FIFA, conversely, argues that given that the ban is purely related to association law and directed at the Appellant as an organ of FIFA, employment law is irrelevant.

In order to decide the question, the Panel started by examining the applicable legal framework. It held that by submitting their dispute to the CAS, the Parties had agreed on the conflict of law rule contained in Article R58 of the CAS Code, according to which the dispute must be decided – primarily – according to the “applicable regulations”, *i.e.* the rules and regulations of the sporting entity that has issued the decision that forms the matter in dispute. Accordingly, the dispute must be decided – primarily – according to the rules and regulations of FIFA. Further that the rule applicable in this regard, Article 58 para. 2 FIFA Statutes, when stipulating that “CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”, by using the terms “primarily” and “additionally” provides for a hierarchical relationship between the “FIFA regulations” and “Swiss law” - a relationship that has been understood in constant CAS jurisprudence as implying that the “additionally” applicable Swiss law is merely intended to clarify that the FIFA regulations are based on a normatively shaped basis, deriving from Swiss law, and that any matter not covered by FIFA regulations must be decided in accordance with Swiss law. Consequently, the purpose of the reference to Swiss law in Article 58 para. 2 is to ensure the uniform interpretation of the standards of the football industry worldwide. Swiss law does govern, *e.g.*, the interpretive methods with regard to FIFA rules as well as the question of who bears the burden of proof for particular issues, since this legal question – in the absence of any explicit provision – is equally subject to Swiss law under Article 58 para. 2 FIFA Statutes.

The wording (“primarily”, “additionally”) referred to in Article 58 para. 2 FIFA Statutes clearly indicates that, in principle, the FIFA regulations always take precedence over Swiss law. Based on the above the Panel concluded that FIFA’s authority to impose disciplinary sanctions cannot be limited by mandatory Swiss law.

3. Relationship between Swiss labour law and association law regarding the authority of FIFA to impose disciplinary sanctions

In follow up, the Panel clarified that while the present arbitration does not deal with an employment-related dispute, but rather with sanctions issued by a sport governing body based on association law, it had to be determined, on a subsidiary basis, whether and to what extent Swiss employment law comes into play in such a dispute. Notwithstanding that a dispute is an arbitrable non-labour related dispute, certain provisions of labour law may, at least in principle, apply. More specifically, it had to be decided whether, as argued by the Appellant, Swiss employment law is applicable to the present case to the extent that it precludes the Respondent from imposing a ban on the Appellant from partaking in any football-related activity for a set period of time.

The Appellant argued in this context that whereas he was both an ordinary FIFA employee and, by virtue of his employment contract only, a FIFA official, his status as an employee and official were inseparable and therefore FIFA had to respect the mandatory provisions of Swiss employment law in their employment relationship and in sanctioning him. FIFA took the position that while disciplinary proceedings based on the employment relationship are limited by the mandatory rules of labour law, disciplinary proceedings under association law are only limited by the mandatory law of association, personality

rights and public policy. Given that FIFA's ban is purely related to association law and directed at the Appellant as an organ of FIFA, employment law is irrelevant.

The Panel acknowledged that the Appellant was in a situation of "role splitting" in the sense that, in his capacity as the FIFA Secretary General, he had two separate legal statuses or roles: on the one hand, he was an official (and even an organ) of FIFA on the basis of the association rules; on the other hand, he was a FIFA employee by virtue of an employment agreement under private law. The Panel however held that these two legal relationships, even if interrelated, are separate and independent of each other as bears on their inception, effects and termination. That as a result of the Appellant's dual legal status, his status as an official or organ of FIFA has been governed by Swiss association law, while his status as an employee of FIFA has been governed by Swiss employment law. Consequently, both the Appellant and the Respondent, symmetrically, possessed rights and obligations *vis-à-vis* each other under two different sets of rules: (i) the FIFA Statutes and various FIFA regulations, including the FCE, in relation to the Appellant's status as an organ or official of FIFA, and (ii) the employment contract and Swiss labour law, in relation to the Appellant's status as an employee and the Respondent's status as an employer.

The Panel further acknowledged that Swiss sport governing bodies such as FIFA – as associations incorporated under Swiss private law pursuant to Article 60 *et seq.* Swiss Civil Code ("CC") – have a legitimate interest in and are entitled to control and supervise the conduct of their organs and officials by implementing *inter alia* specific ethical standards of conduct in their rules. They are also entitled to

sanction persons bound by their ethical rules, irrespective of whether those persons are also employed by them. With regards to the question whether and to what extent Swiss employment law is applicable to sanctions issued by a sport governing body based on association law (as opposed to an employment-related dispute), the Panel reminded that it has been held that while the autonomy of the association to impose sanctions under association law is not absolute, that power is not necessarily limited by the mandatory provisions of Swiss employment law. In principle, employment law could (only) come into play in instances where the association law was used by an association to circumvent the specific protection mechanisms of labour law. However, in the present case, there was no evidence to indicate such an attempt at circumvention, as FIFA had simply applied the FCE and imposed a ban in response to what it deemed to be serious unethical behaviour, as it had in other recent disciplinary proceedings against prominent members of the FIFA Executive Committee and even the former FIFA President.

4. No violation of Swiss Ordre Public

In the following, the Panel turned to the Appellant's claim that, in light of the Matuzalem ruling (BGE 138 III 322), the Appellant's ban is contrary to substantive Swiss public policy and, more specifically, to Article 27 para. 2 CC on personality rights. The Panel found – as also acknowledged by the Respondent - that the autonomy of associations incorporated under Swiss private law (such as FIFA) to impose sanctions under association law is indeed limited by Swiss public policy ("*ordre public*"), and in particular by the fundamental rules protecting personality rights under Article 27 *et seq.* CC and competition law. The Panel, referring to the jurisprudence of the Swiss Federal Tribunal, developed that *e.g.*

a ban of a football player from any football-related activity imposed due to the non-payment of a debt pursuant to Article 64 FIFA Disciplinary Code (“FDC”) is incompatible with substantive Swiss public policy because it prevents the player from exercising his profession as a footballer and from earning the money necessary to discharge his debt, thereby restricting his personality right to economic freedom enshrined in Article 27 para. 2 CC. However, in cases where (as in the present case) the ban imposed derives directly from a breach of the association’s primary regulations (here: FCE), and where the ban does not deprive the individual concerned of the material possibility of paying his debts, *e.g.* as the ban does not extend to private or public activities outside of organized football, so that the individual concerned is free to exercise his profession (*e.g.* as a businessman or manager in any company worldwide), the personality rights under Article 27 para. 2 CC are not restricted. The Panel thus concluded that the Appellant’s personality rights under Article 27 para. 2 CC were not restricted.

5. Satisfaction of predictability requirement regarding sanction provided by the FCE and FDC

Still in the context of the sanctions imposed, the Panel examined the Appellant’s argument that the sanctions imposed on him by FIFA violated mandatory provisions of Swiss employment law, because the fine lacked an adequate contractual basis, as the relevant FIFA provisions do not satisfy the requirements of predetermination and limitation established under Swiss law and are inconsistent with the principle of *nulla poena sine lege certa*. Analysing the specific regulations concerning sanctions applicable in the case at hand, the Panel noted that pursuant to Article 5, para. 1 FCE, the FIFA Ethics Committee may

pronounce the sanctions provided in the FCE, the FIFA Disciplinary Code and the FIFA Statutes. As a result, the FIFA Ethics Committee was entitled to apply the sanctions listed in Article 6 FCE, Article 10 *et seq.* FDC and Article 65 of the FIFA Statutes. It noted that none of these rules provide specific sanctions for each and every ethical offense, but rather provide a range of sanctions that may be imposed on a natural person, including *e.g.* a warning, a reprimand, a fine, a ban from dressing rooms and/or the substitutes’ bench, a ban on entering a stadium, a ban on taking part in any football-related activity and social work. With regard to the fine, Article 15 FDC stipulates that it “*shall not be less than CHF 300, or in the case of a competition subject to an age limit not less than CHF 200, and not more than CHF 1,000,000*”.

To start with the Panel acknowledged that according to the principle of legal certainty, the offences and sanctions of sports organizations must be predictable to the extent that those subject to them must be able to understand their meaning and the circumstances in which they apply; at the same time the Panel acknowledged that sport governing bodies must have a certain discretion to impose sanctions they deem appropriate for the offense committed under the particular circumstances and context of that case; that therefore, it is unnecessary and impractical for *e.g.* the FCE to list the specific sanction for each and every ethical offense, or to limit very narrowly the amount of a possible fine. The Panel further underlined that in applying sanctions the sport governing body is not free to ignore the principle of proportionality, but must impose a sanction that is proportionate to the offence and must also take into account the sanctions – if themselves proportionate – imposed on others for similar offences. The Panel, finding that in

light of the above, Article 6 FCE and Article 15 FDC are sufficiently “determinable” and thus satisfy the predictability test, dismissed the Appellant’s arguments in this regard.

Furthermore, given that FIFA’s ban is purely related to association law and directed at the Appellant as an organ of FIFA, employment law is irrelevant.

6. No violation of principle “*ne bis in idem*”

As regards the Appellant’s challenge of FIFA’s authority to impose a ban or a fine on him on the ground that by imposing the ban and fine and at the same time terminating his employment contract, FIFA violated the principle of *ne bis in idem*, the Panel found to start with that while there may be a certain factual overlap in the scope of activities of the FIFA body in charge of overseeing employment-related matters and the FIFA Ethics Committee, from a legal angle, those activities were wholly separated as each body applies a different set of rules and pursues its own functions with its own remedies. Accordingly, whereas if *e.g.* an individual is dismissed by FIFA, this is related to his status as an employee and his contractual relationship with FIFA, while any sanctions imposed on the same individual in the course of disciplinary proceedings for violations *e.g.* of the ethical rules are based on the individual’s status as an official of FIFA. With this in mind, the Panel held that the principle of *ne bis in idem* is inapplicable to the present case since the Appellant’s dismissal from his job related to his status as an employee and his contractual relationship with FIFA, whereas the sanctions imposed in the disciplinary proceedings were based on his status as an official (and even an organ) of FIFA and on violations of the ethical rules. The Panel also dismissed the Appellant’s related argument that the termination of the employment

relationship and the disciplinary sanction derive from the same Appellant’s conduct. It underlined that all legal systems experience situations where the same facts provide separate and parallel consequences under different sets of rules. *E.g.*, the same individual conduct can result in an obligation to pay compensatory damages and the imposition of a criminal sanction: both legal consequences can smoothly coexist.

7. Burden and standard of proof under Articles 51 and 52 FCE

Turning thereupon to the merits of the case, the Panel started by recalling that pursuant to Article 52 FCE (2012 edition) FIFA bears the burden of proving the Appellant’s violations. Furthermore, while from the wording of Article 51 FCE (2012 edition) (“*[t]he members of the Ethics Committee shall judge and decide on the basis of their personal conviction*”) it followed that a party has discharged its burden of proof in case the FIFA Ethics Committee is personally convinced that a fact has been established, the characterization of “*personal conviction*” had been considered problematic as an effective standard of proof. The relative lacuna in the FIFA rules has led several CAS panels dealing with disciplinary cases involving FIFA officials to apply the flexible standard of proof of “*comfortable satisfaction*”, *i.e.* requiring less than the standard of “*beyond a reasonable doubt*” but more than the standard of “*balance of probabilities*”, while bearing in mind the seriousness of the allegations made. The Panel decided that it will thus apply such standard of proof in conjunction with the criterion of personal conviction as provided by Article 51 FCE (2012 edition).

8. Violation of conflict of interest regulations

In the following the Panel examined the specific violations allegedly committed by

the Appellant, starting with the alleged violation of Article 19 FCE resulting from the Appellant's involvement in the resale of FIFA World Cup Tickets.

The Panel noted that according to FIFA, the Appellant violated Article 19 FCE because in the course of 2013, (i) he helped one of his acquaintances, Mr. Alon, gain an advantage by authorizing JB to resell tickets in contravention of the JB Agreement and unilaterally altering JB's ticket inventory to the benefit of that company, thereby putting himself in a position of conflict of interest and (ii) he personally gained a personal advantage by accepting (or at least not refusing) an upfront payment of USD 500,000 and a 50 percent share on the expected profits from JB's resale of tickets to at least 12 games of the 2014 FIFA World Cup.

The Appellant denied having committed violations of the FCE in relation to his dealings with Mr. Alon and JB, claiming to start with that Mr. Alon was not an "acquaintance"; that nothing about his involvement in the sale of FIFA World Cup tickets was improper; to the contrary, he acted appropriately and in the interests of FIFA in his dealings with Mr. Alon, using his best efforts to protect FIFA from legal, financial and reputational damage.

As regards the question whether the Appellant and Mr. Alon were "*acquaintances*", the Panel held that absent a definition of "acquaintance" in the FCE, it had to turn to its common meaning in the English language (CAS 2007/A/1377, at para. 19 *et seq.*), from which it resulted that the bar to become an acquaintance is set low. Considering that the Appellant and Mr. Alon knew each other for some time (according to the Appellant's testimony since 2009), interacted on a first-name basis, made personal references in their communications, and used private email

accounts to communicate, the Panel determined that this clearly surpasses the threshold of an acquaintance. The Panel further summarized that it had to determine whether the Appellant, in contravention of Article 19, para. 2 FCE, placed himself in a situation of conflict of interest, or in the appearance thereof. More specifically, it had to assess (i) whether the Appellant had or appeared to have any private or personal interests in JB's resale of FIFA World Cup tickets, which includes the gaining any possible advantages for himself or acquaintances, and (ii) whether those interests detracted him from the ability to perform his duties with integrity in an independent and purposeful manner.

The Panel found being personally convinced, to its comfortable satisfaction that Mr. Alon gained an advantage at the hands of the Appellant by profiting from the resale of the FIFA World Cup Tickets, which the Appellant had authorized in violation of the JB Agreement. Notwithstanding the clear prohibition in the JB Agreement to resell tickets on a stand-alone basis and the fact that FIFA never explicitly nor implicitly granted JB the right to resell tickets on a stand-alone basis, the Appellant authorized Mr. Alon and JB to do so. Furthermore, the Appellant unilaterally and without FIFA's knowledge and/or backing agreed to adjust the allocation of tickets under the JB Agreement to allow JB to maximize its profits by: (i) at the request of Mr. Alon, extending the terms of the JB Agreement to grant JB 1,200 Category 1 tickets to Brazil's matches until the semi-finals and 200 Category 1 tickets to the final, and (ii) increasing JB's ticket inventory size under the JB Agreement by 2,282 tickets. The Panel is personally convinced to its comfortable satisfaction that, based on the aforementioned, the Appellant helped Mr. Alon and JB gain an advantage and thus had private and personal interests

involved in the matter within the meaning of Article 19, para. 2 FCE.

In addition to the advantages Mr. Alon and JB gained, also the Appellant gained a personal advantage by accepting from JB a 50 percent kickback on the profit JB would make on the tickets from the 12 games of the 2014 FIFA World Cup as reallocated by the Appellant. In fact, the 50 percent kickback was referred to by the Appellant as “documents” and “pension fund” in his correspondence with Mr. Alon. The Panel is further persuaded that the private or personal interests involved (*i.e.* the advantages gained for himself and his acquaintance Mr. Alon) detracted the Appellant from his ability to perform his duties with integrity in an independent and purposeful manner. Specifically, the Appellant did not act in FIFA’s interests in his dealings with Mr. Alon subsequent to the signing of the JB Agreement and before its restructuring, when he provided an advantage to Mr. Alon by authorizing JB to resell tickets on a stand-alone basis in contravention of the JB Agreement and unilaterally extending the terms and ticket inventory size of that agreement, and at the same time provided himself such an advantage by accepting a 50 percent kickback on sales of tickets awarded to JB. Consequently, the Panel finds that the Appellant created a massive conflict of interest and, thus, very seriously violated Article 19, para. 2 FCE.

9. No violation of Articles 15 and 13, paras. 1-3 FCE (*lex specialis derogat generali*)

The Appellant further argued that pursuant to the principle of *lex specialis derogat legi generali*, he cannot be sanctioned under Articles 13 and 15 FCE in relation to his dealings with Mr. Alon and JB, as the Appeal Committee based said alleged infringements on same exact facts used to sanction him under the more specific Articles 19, 18 and 41 FCE. Conversely,

FIFA argued that the Appellant, by putting his and his acquaintance’s interests before those of FIFA, additionally violated Articles 13 and 15 FCE, respectively, for acting disloyally and failing to show commitment to an ethical attitude and awareness of his duties and concomitant obligations and responsibilities. In FIFA’s opinion, the principle of *lex specialis* does not apply and the same facts can constitute a violation of both Articles 19 FCE and Articles 13 and 15 FCE; the only limitation is double jeopardy, meaning that FIFA cannot impose two sanctions for the same facts, which is not the case, as the Appealed Decision did not impose any sanction for the violations of Articles 13 and 15 FCE. The Panel determined that in the context of disciplinary regulations it is in abstract possible that one act at the same time breaches more than one rule and is therefore sanctioned under all those rules. However, where a specific provision entirely covers the incriminated conduct, the accused may not be sanctioned again for that same conduct under a more general provision. Accordingly, and given that Articles 13 and 15 FCE are written in general terms and that the obligations of loyalty and ethical conduct set forth therein are by definition violated if a conduct falls foul of Article 19 FCE, such conduct cannot be held as also being in violation of Articles 13 and 15 FCE.

10. Prerequisites for applicability of customary law within associations

Having then found that the Appellant breached FIFA’s travel regulations as well as Article 13, paras. 1 to 4 FCE (not however Articles 5 and 19 FCE as alleged by FIFA) with regards to four trips by using a private jet without an admissible business rationale, having multiple persons accompany him, and not integrally reimbursing FIFA for the additional costs it incurred for the

Appellant's incorrect use of a private jet and having additional accompanying persons, the Panel turned to the Appellant's argument that he did not breach the FIFA travel regulations since his acts were consistent with common practice deriving in part from Mr. Blatter's "leadership style". The Panel held that while Swiss doctrine and jurisprudence as well as CAS jurisprudence recognize the potential relevance of customary law within an association, under Swiss association law, customary law can only represent a valid set of rules of an association provided that (i) the applicable regulations contain a loophole which may be supplemented by customary law, (ii) there is a constantly and consistently applied practice of the association (*inveterata consuetudo*), and (iii) the members are convinced that such practice is legally mandatory or necessary (*opinio juris sive necessitatis*). However, the Appellant has failed to establish any of the three cumulative conditions to prove the existence of a customary rule in FIFA.

11. Applicability of International treaties on human rights in arbitration proceedings

The Appellant admits that he refused to agree to an interview with the Investigatory Chamber. Nevertheless, he does not believe that this was, as submitted by FIFA, a violation of his duty to cooperate under Article 18, para. 2 and Article 41, paras. 1-2 FCE because he was entitled under the European Convention on Human Rights ("ECHR") to exercise his right against self-incrimination before the Investigatory Chamber, given the ongoing investigations by the U.S. and Swiss criminal prosecution authorities. In this context, to start with the Panel addressed the question of the applicability of the ECHR to the present case. The Panel underlined that CAS panels, in accordance with the jurisprudence of the Swiss Federal Tribunal, had held that given that International treaties on human rights

(such as *e.g.* the ECHR) are meant to protect the individuals' fundamental rights *vis-à-vis* governmental/public authorities, in principle, they are inapplicable *per se* in disciplinary matters carried out by sports governing bodies, due to the fact that sports governing bodies (such as FIFA) are legally characterized as purely private entities and the sanctions imposed by them are based purely on private (Swiss association) law. However, some guarantees afforded by Article 6.1 ECHR in relation to civil law proceedings are indirectly applicable even before an arbitral tribunal as parties to an arbitration have to be guaranteed a fair proceeding within a reasonable time by an independent and impartial arbitral tribunal. That accordingly, these procedural principles form part of the Swiss procedural public policy.

12. Privilege against self-incrimination

Analysing more specifically the privilege against self-incrimination as invoked by the Appellant in the context of his refusal to agree to an interview with the Investigatory Chamber, the Panel developed that the privilege against self-incrimination is the result of a balance of interest and, thus, must be assessed in light of the respective procedural and factual framework. Furthermore, although the privilege against self-incrimination is not explicitly included in Article 6 ECHR, it has been recognized as an implied right under Article 6 ECHR by the European Court of Human Rights in various judgments on the fairness of criminal trials.

13. Privilege against self-incrimination and duty of cooperation in sports disciplinary proceedings

The Panel thereupon evaluated whether the privilege against self-incrimination, despite the fact that the guarantees

recognized in a criminal trial are inapplicable *per se* in disciplinary proceedings before CAS, may still be *indirectly* applicable, even more so in light of the fact that elements of the privilege against self-incrimination may also be found in civil matters. The Panel developed that on the one hand it had to be taken into account that sports governing bodies have the right – protected by the autonomy of associations – to establish – within limits – certain rules of conduct that deviate from normally applicable rules of conduct in ordinary society. That on the other hand it had to be taken into account that an individual/official – differently from criminal law – voluntarily submits to the rules and regulations of a sport governing body such as FIFA, and that, unlike public authorities, sports governing bodies have limited investigative powers. Accordingly, in principle compulsory cooperation for fact-finding is permissible and establishing and applying respective rules is, in principle, essential to maintaining the image and integrity of sports. The Panel concluded that in its view, in the context of sport, the privilege against self-incrimination may not be easily invoked in a disciplinary proceeding. At the same time the Panel however acknowledged that the balancing of the interests involved may tip in favour of the privilege against self-incrimination in case a parallel criminal proceeding is pending and where there is a clear and imminent danger that the privilege against self-incrimination would be circumvented, *e.g.* if a sports organisation would be (mis-)used by public authorities to collect information they would be otherwise unable to obtain, *i.e.* by the sports organisation passing on the information obtained to the public authorities which have opened proceedings against the same individual in the same matter. However, the Appellant had not substantiated any claim regarding

such a risk (even more, there is no evidence before the Panel confirming that a criminal investigation against the Appellant had been initiated at the time) and therefore the Appellant's non-cooperation, *i.e.* his non-appearance in the disciplinary investigation is not justified.

14. Duty to cooperate

Finally, the Panel examined the Appellant's claim that while at all times, he had been willing to cooperate with the Investigatory Chamber, FIFA had to grant him prior access to the investigation file before attending any in-person interview. Referring to Article 41 FCE, the Panel held that parties in proceedings in front of the FIFA Investigatory Chamber and the Adjudicatory Chamber of the Ethics Committee are required to collaborate in establishing the facts of a case, in particular by complying with requests for information from the Ethics Committee and an order to appear in person. That moreover, the duty to cooperate by interviewing with the Investigatory Chamber is unconditional, and that in particular acceptance to be interviewed may not be conditioned on receiving prior access to the investigation file. This is especially true considering that whereas under the FCE, while a party in ethics proceedings has the right to access the files, the FCE – in line with the rules governing the criminal proceedings of several countries which adhere to due process principles – does not require that such access be granted prior to the first interview. The Panel rejected the Appellant's position.

Decision

The Panel therefore dismissed the appeal by the Appellant against the FIFA Appeal Committee's decision dated 24 June 2016.

CAS 2017/A/5045

Maria Farnosova v. International Association of Athletics Federations (IAAF) & All Russia Athletics Federation (ARAF)

27 July 2018

Athletics; Doping (ABP); Version of the regulations applicable; Burden and standard of proof regarding the ADRV; Admissibility of evidence regarding the ADRV; Requirements to establish an anti-doping rule violation by means of an ABP; Burden of proof and “Beweisnotstand” in ABP cases; Admissibility and reliability of the intelligence provided; Determination of the appropriate period of ineligibility

Panel

Prof. Ulrich Haas (Germany), President
Mr Michele Bernasconi (Switzerland)
Mr Romano Subiotto QC (United Kingdom)

Facts

Ms Maria Farnosova (the “Athlete” or “Appellant”) is a professional international middle-distance runner, specialising in 800m, based in Moscow, Russia.

The International Association of Athletics Federations (“IAAF” or the “First Respondent”) is the international governing body of the athletics federations worldwide, headquartered in Monaco.

The All Russia Athletics Federation (“ARAF” or “Second Respondent”) is the national athletics federation and governing body of Russia, headquartered in Moscow, Russia. (as of 26 November 2015 suspended) and a member of IAAF.

The IAAF Athlete Biological Passport Programme (ABP) is based on a longitudinal monitoring of an athlete and is designed to be

an “indirect” method of doping detection. It focuses on the effect of prohibited substances and methods on the athlete’s haematological values rather than the identification of a specific substance or method in the athlete’s sample.

The ABP, in principle, follows a two-step process:

- In a first step, the athlete’s blood values are inserted into the “Adaptive Model”, which is a mathematical model designed to identify unusual or abnormal longitudinal results from athletes. It calculates the probability of a longitudinal profile of Marker values assuming that the athlete has a normal physiological condition. It identifies atypical values or profiles that warrant further attention. Atypical values correspond – according to the WADA ABP Operating Guidelines – to outliers out of the 99% range.
- In a second step, the data that has been flagged by the Adaptive Model must be interpreted by experts, in particular in light of the information provided by the athlete. The mere fact that an outlier exists is, thus, by itself no proof of doping. Instead, the data must be examined and evaluated to determine whether other (i.e. natural) causes might explain the data obtained.

The Athlete has been in the Registered Testing Pool of the IAAF at all material times (15 August 2009 to 22 March 2015). The IAAF collected 28 blood samples from the Athlete in the context of the ABP. All samples were then analysed by a WADA-accredited laboratory.

Based on the Adaptive Model, the Athlete’s ABP profile was flagged as abnormal at a specificity of 99% with respect to five samples: Sample 7 (upper limit for OFF-score), Sample 8 (lower limit for OFF-score, upper limit for reticulocyte%), and Sample 25-27 (all: lower limit for OFF-score, upper limit for reticulocyte%).

On 14 July 2015, the ABP-Expert Panel (constituted of Dr Schumacher, Prof. D’Onofrio, and Prof. Audran) issued a joint opinion (the “First ABP-Expert Report”) in which it concluded with regard to the Athlete’s ABP as follows:

*“We therefore conclude that it is highly likely that a Prohibited Substance or Prohibited Method has been used and that it is unlikely that the passport is the result of any other cause. It is our unanimous opinion that considering the information available at this stage and in the absence of an appropriate physiological explanation, the likelihood of the abnormality being due to **blood manipulation**, namely the artificial increase of red cell mass using an erythropoietic stimulant and/or **blood transfusion** is high.*

On the contrary, the likelihood of a medical condition causing the supraphysiologically increased red cell mass visible in this sample is low. Analytical shortcomings are also highly unlikely to have caused the suspicious pattern in the profile. Environmental factors such as altitude exposure are also improbable to have had a significant effect, as based on the available documentation, the athlete never sojourned at altitudes sufficient to trigger haematological changes such as observed in the relevant samples”.

More specifically, with regard to Sample 7 and Sample 8 the ABP-Expert Panel stated:

*“The sequence of samples 7 and 8, where the athlete displays an OFF score of 121 in August 2011 (IAAF World Championships Daegu, sample 7) and more normal values in winter (sample 8). **Such constellation illustrates a supraphysiological red cell mass (high haemoglobin) with downregulated erythropoiesis (low reticulocytes) in the lead up to a major competition. It is typically observed after the use and discontinuation of an erythropoietic stimulant or the application of a blood transfusion.***

In addition to this specific abnormality, there is also a clear, consistent pattern of high haemoglobin values paired with low reticulocyte% during summer (= the competitive season), which is against physiological

regulation (1,2) and points towards a repetitive supraphysiological increase in red cell mass with subsequently suppressed erythropoiesis”.

With regard to Samples 25, 26, and 27, the ABP-Expert Panel further observed as follows:

“Samples 25-27 with an obvious reticulocyte increase with low haemoglobin concentration. In the mentioned samples, the athlete displays the lowest haemoglobin paired with the highest reticulocytes of the profile.

Such constellation is typically observed after blood loss, where haemoglobin concentration is low and the body increases its erythropoietic activity to counterbalance the loss, thus the increased reticulocytes.

*The athlete was apparently 19-20 weeks pregnant when sample 27 was obtained. Pregnancy usually causes a drop in haemoglobin concentration due to plasma volume expansion and (possibly) an increase in reticulocytes to accommodate the blood volume for the unborn child (3–5). The timeline of haematological changes in relation to the state of the pregnancy is well defined in the scientific literature, and matches the profile of the athlete. Therefore, the constellation visible in the last part of the profile can be explained by a **pregnancy**”.*

Ms Stepanova, an elite-level Russian athlete, specialising in 800m was sanctioned with a two-year period of ineligibility in connection with abnormalities of her ABP. Ms Stepanova secretly audio- and video-recorded two meetings, one with Mr Kazarin (the Athlete’s and Ms Stepanova’s coach) and one with the Athlete and the Athlete’s husband.

On 10 November 2014, Ms Stepanova met Mr Kazarin and secretly audio- and video-recorded the meeting. In the recorded conversation, Mr Kazarin admits to administering Prohibited Substances to athletes, including EPO, human growth hormone (HGH), *oxandrolone*, and *primabolan*. Furthermore, the video shows that Mr Kazarin provides Ms Stepanova with a selection of pills (i.e. 15 pills of *oxandrolone*) and syringes. He instructs Ms Stepanova in

the video to take these pills from 12 November to 27 November 2014. He further reassures her that despite taking the pills she will be able to pass the doping control scheduled for 10 January 2015.

On 19 November 2014, Ms Stepanova visited the Athlete at her home. The Athlete's husband also participated in the conversation, which was again secretly audio- and video-recorded by Ms Stepanova. In her conversation with Ms Stepanova, the Athlete mainly admitted that the Federation was protecting the athletes. With respect to the testosterone admission, the Athlete stated that she used testosterone on one occasion, which resulted in an increase of her testosterone levels. The Athlete also showed detailed knowledge about the washout periods of *parabolan*, *oxandrolone*, and *turinabol* "turik". The Athlete, the Athlete's husband (Mr Farnosov), and Ms Stepanova also discussed the use and the dosage of *EPO*.

Ms Stepanova handed over the two (secret) recordings to a German journalist who then produced a documentary alleging wide-spread doping in Russian athletics. This documentary was broadcasted on 3 December 2014 on the German TV channel "ARD".

Following this documentary, WADA established an Independent Commission on 16 December 2014 to investigate these allegations of wide-spread and institutionalised doping in Russia.

On 9 November 2015, the Independent Commission issued its Report ("WADA IC First Report"), confirming consistent and wide-spread use of performance enhancing drugs amongst Russian athletes.

With regard to the Athlete, the IC First Report finds as follows:

"In November 2014, Yuliya Stepanova secretly recorded a conversation between herself and Russian Olympic Gold Medalist Mariya Savinova [i.e.

Maria Savinova Farnosova]. In the recording, Savinova discussed her use of prohibitive substances and how positive drug tests are covered up in Russia.

(...)

In conclusion, the secret recordings show that Ms. Savinova-Farsonova [sic] has an in-depth knowledge of doping regimes, dosages, physiological effects of doping and new PEDs. WADA laboratory experts reviewed Ms. Savinova-Farsonova's [sic] ABP profiles, which reflected that her steroid passport was normal. Conversely, her haematological passport was considered as "likely doping" by two of the three WADA laboratory experts who reviewed her ABP profiles. WADA laboratory experts specifically pointed to Ms. Savinova-Farsonova's [sic] doping test taken during the 2011 World Championships, which they termed as very suspicious.

Based on Ms. Savinova-Farsonova's [sic] statements and her demonstration of in-depth knowledge of doping in the ARD secret tape recordings, IC investigators believe she has breached Code article 2.2 'Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method.' This finding is further reinforced by Mr. Melnikov's (whistleblower and coach) statement that they 'pumped so much into her.' Therefore Mariya Savinova-Farsonova [sic] is the subject of an IC sanction package that has been submitted to WADA, who forwarded it to the IAAF. The IAAF informed ARAF on 08 August 2015".

On 7 August 2015, the IAAF charged the Athlete with violating IAAF Rule 32.2 (b) (Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method) based on Ms Stepanova's declaration. The First IAAF Charge letter further advised the Athlete that "*in accordance with Rule 37.10 [of the IAAF Rules] the IAAF has initiated an investigation into a further ground of potential anti-doping rule violation ... pursuant to the Athlete Biological Passport programme*".

On 30 September 2015, RUSADA forwarded a statement (including annexes) of the Athlete to the IAAF. In the letter, the Athlete provided – *inter alia* – the following

explanations for the abnormalities in her ABP: the use from the junior age of vitamins and minerals during the training process and of natural products and herbs during competitions seasons, and products dispensed in the national team (actovegin in tablets, folic acid, vitamin B12, iron supplements), acupuncture and different practices to improve physical and mental state. As an experiment one year before the Olympics she used an altitude tent. The Athlete also explained that she has polycystic ovarian syndrome resulting in certain problems: unstable menstrual cycle, complications during pregnancy, increased blood testosterone and DHT.

On 14 November 2015, the ABP-Expert Panel issued a second opinion (the “Second ABP-Expert Report”), confirming its previous evaluation that the abnormalities in the Athlete’s ABP were likely to have resulted from blood manipulation and unlikely to be the result of a normal physiological or pathological condition.

On 18 November 2015, the IAAF forwarded the Second ABP-Expert Report to the Athlete. Furthermore, the letter advised the Athlete that she was now being charged with a further violation of IAAF Rule 32.2 (b) based on the abnormal ABP and that the IAAF sought to ban the Athlete for four years based on IAAF Rule 40.6 (“Pre-2015 IAAF Rules”) (the “Second IAAF Charge Letter”).

On 3 February 2016, the IAAF informed the Athlete (i) that ARAF’s membership had been suspended, (ii) that it took over the responsibility for coordinating the disciplinary proceedings, and (iii) that her case would be referred to the Court of Arbitration for Sport (CAS).

On 4 March 2016, the First Respondent filed a Request for Arbitration with the CAS. The case was referred to a Sole Arbitrator.

On 10 February 2017, the Sole Arbitrator

rendered his decision (the “Appealed Decision”), sanctioning the Athlete with the maximum four-year period of ineligibility.

On 27 March 2017, the Athlete filed a Statement of Appeal against the Appealed Decision with the CAS in accordance with Article R47 et seq. of the Code of Sports-related Arbitration (the “Code”). A hearing took place in Lausanne on 4 December 2017.

Reasons

1. Version of the regulations applicable

According to Art. R58 of the Code, the Arbitral Tribunal decides the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association, or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Court deems appropriate. In the latter case the Court shall give reasons for its decision.

In the case at hand, the “applicable regulations” within the meaning of Art. R58 of the Code are the rules and regulations of the IAAF. This principle is also reflected in IAAF Rule 42.22 (2012-2013) (which is identical to IAAF Rule 42.23 (2016)), which states – inter alia – as follows:

The “rules of law chosen by the parties” within the meaning of Art. R58 of the Code that apply subsidiarily are the laws of Monaco. This follows from IAAF Rule 42.23 (2012-2013) (reflected in IAAF Rule 42.24 (2016)).

Therefore, the Panel will apply primarily the IAAF’s Rules and Regulations. With regard to procedural questions the IAAF Rules (2016), i.e. the rules at the time when

the appeal was filed, are applicable. With respect to the substantive issues the Panel will apply the rules and regulations in force at the relevant time, i.e. the IAAF Rules (2012-2013).

It also follows from the above that the IAAF regulations must be interpreted and applied in light of Monegasque law, which applies subsidiarily.

2. Burden and standard of proof regarding the ADRV

While the burden of proof is – according to Swiss law – a question of substantive law, the standard of proof is a question of procedural law. In the case at hand, the Parties have agreed on the applicability of the IAAF Rules that contain a specific provision with respect to the standard of proof. This provision is identical in the IAAF Rules (2012-2013) and the IAAF Rules (2016) and reads as follows:

*“1. The IAAF, the Member or other prosecuting authority shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the IAAF, the Member or other prosecuting authority has established an anti-doping rule violation to the **comfortable satisfaction of the relevant hearing panel**, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.*

*2. Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a **balance of probability**, except as provided in Rules 40.4 (Specified Substances) and 40.6 (aggravating circumstances) where the Athlete must satisfy a higher burden of proof”.*

It follows from the above that the burden of proving whether the Athlete has

committed an ADRV in the form of IAAF Rule 32.2 (2012-2013) rests upon the IAAF. In order to succeed with its request, i.e. to uphold the first-instance decision of the CAS, the IAAF must convince this Panel *“to the **comfortable satisfaction ...**, bearing in mind the seriousness of the allegation which is made”* that the Athlete committed the ADRV. It clearly follows from the applicable provision that the applicable standard of proof is flexible. The threshold that the IAAF must meet is higher depending on the seriousness of the allegation.

3. Admissibility of evidence

The question of the admissibility of evidence is a matter of procedural law. Hence, Art. 182(1) PILA is the starting point for determining the applicable standards. Again, the Parties have agreed in the present matter on the applicability of the IAAF Rules. As a result, the IAAF Rules (2016) apply, which provide as follows in IAAF Rule 33.3 (2016):

“3. Facts related to anti-doping rule violations may be established by any reliable means, including but not limited to admissions, evidence of third Persons, witness statements, experts reports, documentary evidence, conclusions drawn from longitudinal profiling such as the Athlete Biological Passport and other analytical information. ...”

4. Requirements to establish an anti-doping rule violation by means of an ABP

IAAF Rule 33.3 (2016) provides that an ADRV *“may be established by any reliable means”*. All experts heard at the hearing agreed that the ABP is, in principle, reliable in general terms, provided the two-step approach is duly applied, i.e. that abnormal results are interpreted and set into context. The Panel concurs with this view and refers to the numerous CAS decisions that have qualified the ABP as

reliable evidence (CAS 2015/A/4006, para. 103; CAS 2016/O/4481, para. 133; CAS 2016/O/4464, para. 148; CAS 2010/A/2174, para. 9.8; CAS 2010/A/2176; CAS 2010/A/2235). Furthermore, IAAF Rule 33.3 (2016) explicitly names the “*the Athlete Biological Passport*” as an example of a reliable means of evidence.

5. Burden of proof and “Beweisnotstand” in ABP cases

In view of the Panel, the IAAF experts have convincingly explained that the abnormal values of Sample 7 and Sample 8 cannot be explained by common causes namely by frequent long-distance flights, altitude training, use of Hypoxic tent, ingestion of nutritional supplements, food poisoning, genetic disposition and the alleged polycystic ovarian syndrome.

The Panel underlines that in the context of an ABP, the anti-doping organization is confronted with an “*état de nécessité en matière de preuve*” or “Beweisnotstand” since by its very nature the alleged facts i.e. doping, cannot be proven by direct means. In order to discharge its burden of proof, the anti-doping organization must show – in principle – that not only the doping scenario is plausible, but that all potential explanations other than doping – have to be excluded. Such proof of “negative facts”, however, is impossible. In this respect, the Swiss Federal Tribunal makes it clear that difficulties in proving “negative facts” result in a duty of cooperation of the contesting party who must cooperate in the investigation and clarification of the facts of the case. Thus, in ABP cases, the athlete must submit in detail alternative (natural) scenarios to explain the blood values such as altitude training, food poisoning etc. However, the above difficulties do not lead to a re-allocation of the risk if a specific fact cannot be established. Instead, this risk

will always remain with the party having the burden of proof *e.g.* IAAF in this case. Furthermore, the Swiss Federal Tribunal states that, in assessing and determining whether a specific fact can be established, the court must take into account whether the contesting party has fulfilled its obligations of cooperation. In the context of ABP cases, it is a matter of debate whether the IAAF or any other anti-doping organization, must do anything in addition to rebutting the alternative “natural” scenarios) submitted by the athlete. There appears to be a thread of CAS jurisprudence according to which an anti-doping organization is required to establish – in addition to the testing results – a “doping scenario”. This CAS jurisprudence may be understood to mean that even if all scenarios other than doping can be excluded on a balance of probability, this does not suffice for the Panel to be comfortably satisfied that the athlete committed blood manipulation. Instead, the use of a prohibited substance or method must – in addition – be a plausible and likely explanation of the values obtained for the Panel to positively assume that the athlete has doped. Such assessment must be made based on all evidence before the Panel. Specifically, a significant correlation between the sporting calendar of the athlete and the variances observed in his/her blood values which cannot be explained by common cause should be considered a plausible and likely explanation of blood manipulation by the athlete.

In this context, the IAAF submits that the doping scenario is a plausible and likely explanation based on the following facts:

- blood manipulation is manifest in endurance sport and in Russian athletics;
- there are correlations between the sporting calendar and the variances of the blood values of the Athlete;

- there are seasonal variations of the blood values of the Athlete that are incompatible with the variances observed within the reference population;
- the recordings of Ms Stepanova indicate that the Athlete was likely to have used blood doping;
- the Athlete's coach (Mr. Kazarin) is known for administrating doping substances.

In addition to natural doping scenarios submitted by the athlete i.e. frequent long distance flights, altitude training, use of hypoxic tent, ingestion of nutritional supplement, food poisoning and genetic disposition, the Appellant contests these submissions by the IAAF and submits in particular that the doping scenario is neither plausible nor can it be ascertained with a sufficient degree of certainty because:

- the Athlete's haemoglobin values never exceeded the limits of the Adaptive Model; and
- the mean haemoglobin concentrations varied only a little from winter to summer

The Panel finds that all evidence on file points in the direction that blood manipulation by the Athlete is the only remaining and – when assessed individually – also the only plausible and likely explanation for the Athlete's abnormal blood values. Blood manipulation is common in endurance sport. Contrary to what the Appellant submits there is a significant correlation between the sporting calendar of the Athlete and the variances observed in her blood values. This results from a comparison of the in-competition with the out-of-competition testing results. These variances observed support the doping

scenario, i.e. that the Athlete submitted to blood manipulation in preparation for the competitions. Further evidence that the variances have no “natural” cause is the fact that the seasonal variances between winter and summer observed in the Athlete's values are opposite from what one would normally expect when looking at the reference population. In addition, the intelligence provided by Ms Stepanova, which will be analysed in more detail below, clearly shows that the Athlete was embedded, moved and acted in a doping infested environment (husband and coach) that had in-depth knowledge of the effects of blood doping and the detection mechanisms of the ABP. The Appellant's argument that the haemoglobin values always stayed within the normal reference range does not contradict the above finding. Haemoglobin is only one of the parameters that is measured in the context of the ABP. The fact that the haemoglobin value stays within the normal range does not off-set the abnormality of the other values observed in Samples 7 and 8. Finally, also the values obtained for Sample 6 (discussed above) support the doping scenario when interpreted in light of the findings for Samples 7 and 8. As a result, and based on all the evidence available to this Panel, it is convinced with the required degree of proof that a doping scenario is the only possible cause of the Athlete's abnormal blood values.

With regard to the Athlete's ABP (Sample 7 and Sample 8) the Panel finds that the Athlete engaged in blood doping/manipulation.

6. Admissibility and reliability of the intelligence provided

Before this Panel – unlike before the first-instance proceedings – the Athlete has not contested the admissibility of the recordings. For the sake of good order, the

Panel would like to state that the recordings are admissible evidence and refers insofar to the grounds exposed in the first-instance proceedings to which it fully adheres.

The Panel furthermore finds that the recordings and transcripts are reliable in general terms. There is no disagreement that the recordings are genuine, i.e. that the conversation took place, that the Athlete, her husband and Ms Stepanova participated in the conversation and that the conversation was recorded by Ms Stepanova. The Panel, nevertheless, bases its findings on the recordings provided by the First Respondent as these recordings have already been used in other CAS proceedings, in which they were translated by an independent translator appointed by the CAS. This translation – at least for the relevant parts – is congruent with the translation provided by the First Respondent.

It follows from the information and intelligence provided by Ms Stepanova that the Athlete regularly used prohibited substances over a long period of time.

7. Determination of the appropriate period of ineligibility

Based on the reliable evidence before it, there can be no doubt that the Athlete acted intentionally when using the prohibited substances. Furthermore, the Panel acknowledges that the doping case at hand is indeed very severe. Not only has the Athlete ingested different prohibited substances on multiple occasions, but was also engaged in a sophisticated doping scheme, supported – *inter alia* – by her coach, Mr Kazarin (see CAS 2016/A/4480). Those facts are aggravating circumstances justifying the imposition of a period of ineligibility greater than the standard sanction (cf. IAAF Rule 40.6 (2012 – 2013). Her

persistent doping practice has caused serious damage not only to all other athletes, who were deprived of their medals, but also to the reputation of athletics in general. Bearing in mind all aggravating circumstances and in view of the lack of any mitigating circumstances submitted by the Appellant, the Panel must confirm the period of ineligibility of four years.

The principle of proportionality is part of the *ordre public* and must be observed by this Panel independently of the Parties' prayers of relief and submissions. In the case at hand the Panel observes that the Athlete is sanctioned in the case at hand with:

- a period of ineligibility of four (4) years and
- a disqualification of all competitive results from 26 July 2010 to 26 August 2013.

The combined effects of such sanction are severe, considering that its effective length is close to seven years and that the ADRV in question is a "first violation". However, it must also be kept in mind that disqualification and ineligibility serve different purposes. Disqualification is intended to reinstall a level playing field, i.e. to neutralize the illegal advantage obtained by an athlete in competition over his or her competitor. The period of ineligibility, in contrast, serves as a deterrent for the athlete concerned and for all other potential offenders. Thus, disqualification and period of ineligibility cannot be simply added together when assessing the overall proportionality of the sanction. The more competitions have been distorted, the longer the period of disqualification must be in order to prevent that harm is being done to the (undoped) competitors.

In the case at hand, the Panel finds that the

overall effects of the sanction are still proportionate considering the specificities of the case. The Athlete has distorted multiple high-level competitions, damaged numerous other athletes and has breached the applicable rules on many occasions using multiple different substances and did so in full knowledge of the circumstances. The overall integrity of athletics has suffered heavily from the Athlete's behaviour. Such behaviour, thus, warrants a serious sanction. Therefore, the Panel finds that in light of the specific circumstances of this case the boundaries of public policy are not trespassed, even

though technically speaking this is a first ADRV.

Decision

The Appeal filed by Maria Farnosova on 27 March 2017 against the International Association of Athletics Federations and the All Russia Athletics Federation concerning the decision issued by the Court of Arbitration of Sport dated 10 February 2017 is dismissed. The decision issued by the Court of Arbitration for Sport dated 10 February 2017 is upheld.

CAS 2017/A/5299

Olympique Lyonnais v. Union des Associations Européennes de Football (UEFA)

10 August 2018

Football; Disciplinary sanctions against a club for improper conduct of supporters/spectators; Applicable standard of CAS power of review in disciplinary matters; Provocation as mitigating factor; Best efforts to implement security measures as mitigating factor; No past record of hooliganism as mitigating factor; Proportionality of the sanction and deferral for a probationary period

Panel

Prof. Ulrich Haas (Germany), President

Mr Hamid Gharavi (France)

Mr Manfred Nan (The Netherlands)

Facts

On 13 April 2017, the UEFA Europa League 2016/2017 Quarter-final match between Olympique Lyonnais (“OL” or “the Appellant”) and Beşiktaş JK (“BJK”) took place at the Parc Olympique Lyonnais stadium (“Parc OL”).

OL had reserved tickets for the (official) supporters of BJK in sectors n° 428 to 431 (Level 4) of the Parc OL. A total number of 2,766 tickets were sold by BJK. With regard to the ticket sales for all other sectors, OL’s season ticket holders had priority and could buy tickets first. After the deadline for such priority sales elapsed, OL opened the sale of tickets to the public, but on French territory only. (Direct) Purchases from outside France, in particular from Turkey and Germany were blocked. Around 15,000 (unofficial) supporters of BJK were able to obtain tickets for the Match, a great part of them did so with the help of Turkish residents in France. The

(unofficial) BJK supporters who obtained their tickets *via* public sale were located in almost all areas of the stadium. The total number of spectators at the Match was 55,452.

On 22 March 2017, the Préfecture du Rhône (police forces responsible for *inter alia* the city of Lyon and its suburbs – “the Préfecture”) instructed OL to place all unofficial BJK supporters in the upper level of the south stands and in the surrounding sectors of the official BJK supporters, i.e. around sector n° 430, including sectors n° 424 to 429.

On the day of the Match, the supporters of both teams started to arrive at the Parc OL at around 18h30. While the OL supporters gathered in a small square located next to the tramway terminus, the BJK supporters gathered at the tramway terminus. At 18h46, BJK supporters began attacking OL supporters by throwing pyrotechnics onto OL supporters over the fence separating the tramway terminus and the square.

At 19h45, fearing a general confrontation between BJK and OL supporters (both groups separated by only a few meters), the Préfecture decided to use tear gas in order to disperse the crowd. The tear gas grenades were thrown by the police forces only a few meters away from the spectators’ body search point. The tear gas affected the sight and breathing of the security stewards responsible for the body searches. The stewards had to cover their faces with their clothes to protect themselves from the tear gas. This caused several minutes of chaos during which security measures were hindered, allowing supporters to force their way into the stadium without being searched.

In the south stand of the stadium, the lower level were occupied by OL supporters seated in sectors n° 016 to 020 and the upper level (on both sides of sectors n° 428 to 431) were occupied by BJK supporters. At 20h50 OL supporters in the lower tier of the South stand

began to self-evacuate onto the pitch to escape pyrotechnics being thrown down onto them by the unofficial Besiktas supporters in sector 427 above them. Parallel to the invasion of the pitch by OL supporters, another group of OL supporters moved from their sectors behind the goal (sectors n° 018 to 019) and attempted to find a stairway to the upper sectors occupied by the Turkish supporters (sectors n° 424 to 426). However, no such access exists inside the Parc OL. The OL supporters then took on the Turkish supporters seated in the sectors n° 124 to 125 and a fight broke out between OL and BJK supporters. In addition, supporters of OL blocked staircases in the south stand (sectors 16, 17, 18, 19 and 20) and in the North stand (sectors 1, 2, 3, 4, 5, 101, 102, 103, 104, 105 and 106) during the Match.

At 21h40, as the teams lined up in the tunnel, OL supporters in the North stand raised a giant tifo/banner. As the banner was raised, dark smoke emerged from under it before being covered by the banner. At 21h50, red and blue smoke devices were ignited in the North stand by OL supporters. At 21h51, the Match started with a delay of approximately 46 minutes after the initially scheduled kick-off because of the crowd disturbances.

Each time OL scored a goal in the match that finally ended in 2-1, supporters of OL crossed the fence of the North stand and celebrated between the fence and the LED boarding. One supporter of OL from the North stand ran onto the pitch, but was immediately stopped by stewards and taken into police custody. At 22h36, grey smoke devices were ignited in the North stand by OL supporters. At 22h46 and 22h47, supporters of OL celebrated the victory on the pitch. The match officials and BJK's players had already returned to the dressing rooms. At 22h56, a blue smoke device was ignited in the North stand by OL. At 23h31, one firework was thrown on to the pitch by OL supporters, landed in the back area.

On 14 April 2017, the Control Ethics and Disciplinary Body of the UEFA (the "CEDB") sent a notice to OL announcing the opening of a disciplinary procedure in relation to the Match. On 19 April 2017, the CEDB issued the operative part of its decision regarding the Match, which reads as follows:

"1. To exclude Olympique Lyonnaise from participating in the next UEFA club competition for which it will otherwise qualify. This exclusion is deferred for a probationary period of two (2) years; 2. To fine Olympique Lyonnaise € 100'000; 3. [...]"

On 11 May 2017, the CEDB notified the grounds of its decision. When determining the appropriate sanction, the CEDB stated as follows:

"Regarding the crowd disturbances, the Control, Ethics and Disciplinary Body identified and took into account the following: (i) the seriousness of the offences and the extreme violence committed against other spectators, in particular also women and children, [...]; (ii) the poor image given of UEFA competitions, UEFA itself and football in an overall. Regarding the setting off of fireworks, the insufficient organization and the blocking of stairways, the pitch invasion and the improper conduct of the team, the Control, Ethics and Disciplinary Body took into account the following circumstances: (i) the multiplicity of the offences committed; (ii) the club's previous record, noting that the club has already been punished in respect of all of the abovementioned violations of the UEFA Disciplinary Regulations; and (iii) the seriousness of the offences committed. In view of the above, the Control, Ethics and Disciplinary was of the opinion that a very harsh sanction needs to be imposed on the club. [...]. Bearing in mind this despicable behaviour by its supporters and the lack of organization which led up to these events, the Control, Ethics and Disciplinary Body on the one hand formed the belief that Lyon should not be allowed to participate in the UEFA competitions and should be excluded. On the other hand, the Control, Ethics and Disciplinary Body also took into account the positive attitude shown by the club as well as acknowledging the positive previous record of the club pertaining to crowd disturbances, the Control, Ethics and Disciplinary

Body therefore decided to exclude Olympique Lyonnais from participating in the next UEFA club competition for which it will otherwise qualify, while however deferring this exclusion for a probationary period of two (2) years to give the club a final and strong warning, as well as an incentive to work the obvious organizational problems as well as the problems with its hooligan supporters. [...]”.

On 22 May 2017, OL submitted an appeal against the CEDB decision to the UEFA Appeals Body.

On 13 July 2017, the UEFA Appeals Body issued the operative part of its decision (“the Appealed Decision”), which confirmed the CEDB decision of 19 April 2017. On 16 August 2017, the UEFA Appeals Body notified the grounds of the Appealed Decision. It noted that the CEDB neither abused nor exceeded its broad powers of discretion when imposing the sanctions and that the measures imposed by the CEDB complied with the principles of legality and proportionality. For the UEFA Appeals Body, particular importance was rightly attached to the following factors by the CEDB: “(i) *the multiplicity of offences; (ii) the seriousness of the offences, in particular the crowd disturbances and violent behaviour of the Club’s supporters which threatened the health and safety of all those present at the Match (both inside and outside the stadium), and also severely tarnished the image of the competition; (iii) the Club’s previous record for most of the relevant offences, something which points to an endemic problem of misconduct amongst the Club’s supporters and habitual deficiencies in match organisation at the Club; and (iv) the fact that the Club neglected to make proper security preparations for the Match (for example, proper and effective segregation and body searching), even though it had been made aware of the large number of visiting Club supporters who would be attending and could therefore reasonably be expected to have foreseen issues of the type that occurred*”.

On 28 August 2017, the Appellant filed an appeal with the CAS against the Appealed

Decision. A hearing took place in Lausanne, Switzerland on 6 February 2018.

Reasons

1. Applicable standard of CAS power of review in disciplinary matters

For the Panel, the core of the dispute between the parties was about the proportionality of the Appealed Decision. For OL, the sanction imposed on it was “*manifestly grossly disproportionate*” and for the UEFA, in contrast, the sanction issued against OL was rather lenient and in any event proportionate.

Turning first to the applicable standard of review, the Panel found that although CAS panels had frequently stated that “[t]he measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rule can be reviewed only when the sanction is evidently and grossly disproportionate to the offence”, such general statements should be read (and applied) with care. First, because such restriction was developed in Swiss law of associations to protect the autonomy of associations from excessive state interference. However, no state interference was at stake where a private institution (CAS) was mandated by private parties to resolve a dispute between them. Furthermore, whether and to what extent a federation was bound by the principle of proportionality or the principle of equal treatment when exercising its disciplinary powers was a question of law and, according to Swiss law, no limited review applied to questions of law. Moreover, the UEFA Appeals Body had full power to revise the first instance decision and there were no reasons of good administration of justice why CAS’s mandate would be more restrictive than the UEFA Appeals Body’s powers of review. Finally, the constant jurisprudence of the CAS according to which procedural flaws committed by the

judicial organs of a federation “*fade to the periphery*” in appeals proceedings before the CAS would have to be revised, if CAS were prevented from exercising its full mandate in disciplinary proceedings, i.e. to review the facts and the law of the case.

In conclusion, the Panel found that in disputes involving disciplinary sanctions, the CAS powers to review the facts and the law of the case were neither excluded nor limited. Although a CAS panel would not easily ‘tinker’ with a well-reasoned sanction, *i.e.* to substitute a sanction of 17 or 19 months’ suspension for one of 18, the fact that it might not lightly interfere with such a decision, did not mean that there was in principle any inhibition on its power to do so.

2. Provocation as mitigating factor

The Appellant was submitting that the violence of its own supporters had been provoked by the BJK fans and a direct consequence thereof. Consequently, the extreme violence displayed by the BJK fans had to be taken into account as a mitigating circumstance.

The Panel concurred with the jurisprudence of either the judicial instances of UEFA and the CAS that was reluctant to consider provocation as a mitigating factor. According to the Panel, violence displayed by one side could not, as a matter of principle, justify or mitigate further violence displayed by the other side. The behaviour of BJK fans, therefore, could not justify the aggressions displayed by (a group of) OL fans and could not be qualified as a mitigating circumstance. Moreover, the Panel also observed that the group of violent OL supporters were all dressed alike (as if wearing a “uniform”) and appeared to be acting in a very organized (pre-planned) manner, thereby contradicting the Appellant’s submission that the group of

OL supporters only reacted to a provocation.

3. Best efforts to implement security measures as mitigating factor

OL also submitted that it had done its best to handle the whole situation and that this should be taken into account as a mitigating factor.

The Panel found that the efforts (i.e. security measures) taken and implemented by a club could not serve as a ground for excuse or exculpation, but might however be taken into account in the determination of the proportionality of the sanction. According to the Panel however, the threshold was not to be set too low, considering that the duty to ensure compliance with the various security obligations was a standard duty of any home team. Consequently, the fact that a club had done its best to handle the situation could constitute a mitigating factor only in exceptional circumstances.

4. No past record of hooliganism as mitigating factor

For the Appellant, the fact that it had no record for (violent) hooliganism and/or crowd disturbances was also to be taken into account.

The Panel acknowledged that it could not establish any other incident of violent hooliganism of OL in the recent past, and that as such, OL appeared not to have a structural problem with violent hooliganism among its fans. Consequently, the Panel found that the CEDB and the UEFA Appeals Body were right in qualifying OL’s (non-)record with regard to (violent) hooliganism / crowd disturbances as a mitigating factor.

5. Proportionality of the sanction and deferral for a probationary period

After assessing whether the mitigating factors had correctly been established, the question remained whether the sanction issued was proportionate. The Panel recalled that the principle of proportionality encompassed three aspects. According thereto the measure had to be appropriate, necessary and demonstrate a reasonable balance between the objective pursued and the means used to achieve it (proportionality in its narrow sense).

Looking first at whether the disciplinary sanction was appropriate and necessary, the Panel explained that disciplinary measures served different purposes. On the one hand, a sanction had to help to undo harm that had been inflicted by the offender. On the other hand and more importantly, a disciplinary sanction had to prevent re-offending by the offender. Consequently, harsher sanctions were warranted in case of serious infringements, structural non-compliance with the various obligations and in case of recidivism.

In the instant case, there was no doubt for the Panel that the incidents at the Match had been very serious, as the extreme violence in the stands had affected innocent bystanders, spectators, women and children. The harm inflicted on innocent fans, but also to UEFA had been considerable and warranted a harsh sanction in order to prevent such events from reoccurring. For the Panel, the incidents could not be adequately punished (solely) with a fine or with a match behind closed doors (in addition to a fine). The latter would not only have sanctioned OL, but also the visiting club. In addition, such sanctions, in these circumstances, would have been insufficient to fulfil the objective of eradicating such reckless fan behaviour and to reach the people actually

responsible for the offenses committed. Thus, the decision to exclude OL from participating in the next UEFA club competition for which it will otherwise qualify deferred for a probationary period of two years (together with a fine of EUR 100,000) was, in principle, both appropriate and necessary to achieve its purpose in light of the circumstances of this case.

Assessing next whether the sanction was reasonably balanced, the Panel found that the judicial organs of UEFA had correctly taken into account that the circumstances of the Match were exceptional and that OL was not a recidivist when it came to violent hooliganism, but a first-time offender. An unconditional or immediate exclusion from UEFA competitions under the given circumstances would have been too harsh of a sanction, incompatible with the principle of proportionality.

The question, however, was to what extent the “*harshest sanction possible*” had been softened by suspending it for a probationary period of 2 years. The Panel held that a literal interpretation of Article 20 para. 3 of the UEFA Disciplinary Regulations (DR) stating that if a further offence is committed during the probationary period, the competent disciplinary body, as a rule, orders that the original disciplinary measure be enforced, appeared to indicate that any kind of further offence committed during the probationary period would revive the original disciplinary sanction. Such interpretation, however, would have been in contrast with the very purpose of the sanction which was – *inter alia* – to undo the harm inflicted and prevent the re-occurrence of certain violations, i.e. to incentivise the club to comply with its obligations and to influence its fans’ behaviour. Consequently, in order to make sense, Article 20 para. 3 DR – in particular in light of the principle of strict liability

enshrined in Article 8 DR – had to be construed narrowly and the threshold not set too low, which also followed from a comparison with other cases. Indeed, when looking at the jurisprudence of CAS and the judicial organs of UEFA as a whole, the exclusion from UEFA competition appeared to be kind of an *ultima ratio* only imposed on clubs that had displayed severe and constant recidivism with respect to violent hooliganism.

Wondering how to ensure that its proportionality considerations would be observed, the Panel stated that it could specify in its decision under what future circumstances it would consider it to be proportionate that the execution of the exclusion from the UEFA competitions would be triggered. However, it deemed itself barred from pursuing this path by CAS jurisprudence as in the case CAS 2013/A/3139 the CAS panel had decided that it was not for it to decide under what conditions the suspension of the sanction could be revoked in the future but for the

legal bodies allocated with such future legal proceedings, as the imposition of the suspended sanction may depend on the specific circumstances of the future case. In light of this jurisprudence and in consideration of the lack of legal certainty with respect to Article 20 para. 3 DR, the majority of the Panel felt that it had to ensure proportionality by other means, *i.e.* by reducing the original probationary period of two years to 15 months and thereby limiting the period of uncertainty.

Decision

As a result, the Panel partially granted the appeal filed by Olympique Lyonnais. The decision of the UEFA Appeals Body ordering Olympique Lyonnais to pay a fine of EUR 100,000 was upheld, whereas its decision to exclude Olympique Lyonnais from participating in the next UEFA club competition suspended for a probationary period of two years was amended, the probationary period being reduced to 15 months.

CAS 2017/A/5359

Persepolis Football Club v. Rizespor

Futbol Yatirimlari

29 May 2018

Football; Failure to summon FIFA in the arbitration; Power to impose sporting sanctions; Standing to be sued; FIFA as necessary respondent to sporting sanctions appeals; Intervention by FIFA in sporting sanctions dispute; Consequences of failure to summon FIFA in sporting sanction dispute

Panel

Mr Rui Botica Santos (Portugal), President

Mr Dominique Kocholl (Austria)

Mr Michele Bernasconi (Switzerland)

Facts

Persepolis Football Club (“Appellant” or “Persepolis”) is an Iranian football club and a member of the Football Federation Islamic Republic of Iran. The latter is a member of the Fédération Internationale de Football Association (“FIFA”).

Rizespor Futbol Yatirimlari (“Respondent” or “Rizespor”) is a Turkish football club and a member of the Turkish Football Federation. The latter is also a member of FIFA.

On an undisclosed date, the Respondent entered into a contract (“Rizespor Employment Contract”) with the Iranian Player M. (“Player”) valid from 19 July 2016 to 31 May 2018. The Player is purported to have signed the Rizespor Employment Contract as a free player, after his employment contract with his immediate former club - the Appellant - had expired on 13 May 2016.

On 19 July 2016, the Respondent wrote to the

Player’s immediate former club - the Appellant -, requesting it to facilitate the Player’s International Transfer Certificate (“ITC”).

By letter dated 18 July 2016, delivered to the Respondent on 22 July 2016, the Player informed the Respondent that due to the political instability in Turkey, he had changed his mind and signed a two-year contract with the Appellant (“Persepolis Employment Contract”) with effect from 19 July 2016.

On 22 July 2016, the Respondent rejected the Player’s purported termination of the Rizespor Employment Contract and ordered him to report to training within 2 days.

On 23 July 2016, the Appellant informed the Respondent that it had indeed signed an employment contract with the Player, *i.e.* the Persepolis Employment Contract.

On 1 September 2016, the Respondent instituted proceedings before the FIFA DRC against the Player for unjustified termination of contract and also enjoined the Appellant for having allegedly induced the said termination. The Respondent sought EUR 2,000,000 in compensation and also asked for sporting sanctions to be imposed on the Player and the Appellant.

On 31 August 2017, the FIFA DRC rendered its decision (the “Appealed Decision”), partially accepting the Respondent’s claim. The FIFA DRC found that the Player had not adduced evidence of any contact or correspondence with Rizespor regarding his security concerns, and to have terminated the Rizespor Employment Contract without just cause. The FIFA DRC was also of the view that the *coup d’etat* in Turkey was overturned on 15 July 2016 and that Turkey had returned to political stability by the time the Player terminated the Rizespor Employment Contract. The FIFA DRC decided that the

Player had to pay to Rizespor compensation for breach of contract in the amount of EUR 789,500, and imposed a four months restriction on the Player's eligibility to play in official matches. The FIFA DRC further found Persepolis to be jointly and severally liable in accordance with Article 17.2 FIFA Regulations on the Status and Transfer of Players ("RSTP"). It also considered that the Appellant had failed to provide any specific or plausible explanation as to its possible non-involvement in the Player's decision to unilaterally terminate the Rizespor Employment Contract and consequently applied Article 17.4 RSTP, *i.e.* banned the Appellant from registering any new players, either nationally or internationally for the next two consecutive registration periods. Any further claims lodged by the Claimant were rejected.

On 22 September 2017, the grounds of the Appealed Decision were communicated to Persepolis.

On 11 October 2017, Persepolis filed a Statement of Appeal against the Appealed Decision with the CAS in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "Code").

On 17 October 2017, the CAS Court Office informed FIFA of Persepolis' appeal and invited FIFA, pursuant to Article R41.3 of the Code, to state whether it intended to participate in the proceedings.

On 1 November 2017, FIFA informed the CAS Court Office that it renounced its right to take part in the proceedings. It however emphasized that only FIFA had standing to be sued with regard to the issue of the imposition of sporting sanctions and that, given the Appellant's failure to name FIFA as a party in these proceedings, such issue was "outside the scope of the Panel's review".

On 2 November 2017, the Appellant asked the CAS Court Office to order FIFA to "intervene" in these proceedings.

On 3 November 2017, the CAS Court Office drew the Appellant's attention to "*the fact that it is for the Appellant to name all respondents against which the appeal is directed, within the time limit stipulated in Article R49 of the Code of Sports-related Arbitration (the "Code"), and no intervention of any party in the proceedings may be ordered by the CAS pursuant to Article R41.3 of the Code*".

On 22 November 2017, the Appellant filed its Appeal Brief together with the documents and evidence it intended to rely on.

Despite having been invited, the Respondent did not file its Answer to the Appeal Brief. Nevertheless, it sent several correspondences to the CAS Court Office submitting that through the Settlement Agreement, the Parties had "(...) settle[ed] matters in respect to both the compensation and the sports sanction (...) in (...) good faith". It consequently requested these appeal proceedings "(...) be evaluated and decided in light of our such statement".

On 14 December 2017, the Parties entered into an agreement ("Settlement Agreement") through which they sought to settle the orders made in the Appealed Decision and agreed as follows:

- a) The Appellant shall within 30 days pay the Respondent EUR 50,000 to offset the legal costs and expenses incurred by the latter during the FIFA DRC proceedings; and
- b) The Respondent confirmed that it no longer had, and would not raise any claim for compensation against the Appellant as regards the EUR 789,500 ordered by the FIFA DRC.

On 23 February 2018, the Respondent informed the CAS Court Office that the

Parties had settled their differences regarding the EUR 789,500 compensation ordered by the FIFA DRC and consequently requested that the appeal “(...) *be evaluated and decided in light of our such statement*”.

On 26 March 2018, the Appellant informed the CAS Court Office of the Parties’ Settlement Agreement and asked for it to be construed to imply that the Appellant did not induce the Player to terminate the Rizespor Employment Contract.

On 23 April 2018, a hearing was held in Lausanne, Switzerland.

Reasons

1. Power to impose sporting sanctions

The Panel, having first of all clarified that the Appellant’s key cause of action in these proceedings is to set aside or reduce the sporting sanctions imposed on it under Article 17.4 RSTP, thereupon emphasised that the power to impose disciplinary sanctions because of a violation of the FIFA Regulations is at the sole discretion of FIFA, *e.g.* another football club, such as the Respondent, lacks such disciplinary power. Indeed, it is FIFA that has a *de facto* personal obligation and interest as a sports governing body to ensure that its affiliates fully comply with its regulations and with any disciplinary sanctions imposed by its bodies.

2. Standing to be sued

In follow up of this question, the Panel observed that whereas in essence, the Appellant seeks relief from FIFA, the body which imposed the said sanctions, the Appellant had not filed an appeal against FIFA and had only named Rizespor as a respondent. This raises the question whether Rizespor has standing to be sued

(*i.e. légitimation passive*). The Panel elaborated further that in the context of the standing to be sued the question is whether, in view of an appellant’s prayers for relief, the appellant has named the right respondent. According to Swiss and CAS case law the question of standing to sue and standing to be sued are questions touching on the substance, as opposed to the admissibility of a claim. Consequently, the lack of quality to sue leads to the dismissal of the claim as unfounded. Similarly, if a respondent lacks standing to be sued, the claim shall also be rejected. A party has standing to be sued if it is personally obliged by the “disputed right” at stake or has a *de facto* interest in the outcome of an appeal. The Panel found that the “disputed right at stake” in the present case was whether the Appellant ought to be relieved from the sporting sanctions. Lastly, the criteria for awarding legal standing to be sued should not differ depending on whether the dispute is vertical (*i.e.* between FIFA and one of its (indirect) members) or horizontal (*i.e.* only between indirect FIFA members).

3. FIFA as necessary respondent to sporting sanctions appeals

The Panel thereupon turned to the question as to who is the proper respondent in the present case, *i.e.* in an appeal against sporting sanctions. It elaborated that FIFA disciplinary proceedings, like basically all disciplinary proceedings of a sport association, are primarily meant to protect an essential interest of FIFA and FIFA’s (direct and indirect) members, *i.e.* the full compliance with the rules of the association and with the decisions rendered by FIFA’s decision-making bodies and/or by CAS. The Panel concluded that as a consequence, in an appeal against a decision of FIFA, by means of which disciplinary sanctions have been imposed on a party, only FIFA has

standing to be sued, but not the (previously) opposing party, *i.e.* here Rizespor. That in other words, appeals against sporting sanctions must be directed against FIFA as the party having standing to be sued.

4. Intervention by FIFA in sporting sanctions dispute

Thereupon the Panel examined the Appellant's argument that by sending its letter dated 1 November 2017, addressing the question as to whether FIFA had standing to be sued, FIFA had intervened in the proceedings at hand and should therefore be considered as a party, in accordance with Article R41.3 of the Code.

The Panel, underlining that it is standard CAS procedure to ask FIFA to state whether it would like to participate as a party in appeals against decisions rendered by FIFA's judicial bodies, held that in circumstances where FIFA, upon question at the beginning of CAS appeals proceedings against a decision rendered by FIFA's judicial bodies, renounced its right to participate as a party in the proceedings, FIFA cannot be seen to have accepted to sit as a party merely because it had also stated its position as regards the question of standing to be sued. The Panel stressed that FIFA's role would turn into that of a respondent if the Appellant would have named FIFA as a respondent, or if FIFA had gone a step further by requesting the intervention (which it did not, as it expressly renounced to its right to intervene) and if the other parties had then agreed thereto. Summing up, the Panel therefore rejected the Appellant's assertion that FIFA became a party through its letter dated 1 November 2017.

5. Consequences of failure to summon FIFA in sporting sanction dispute

Lastly, the Panel held that the consequence of an appeal that is not filed against FIFA on matters questioning the validity of disciplinary sanctions imposed by FIFA itself is that the appeal cannot be upheld, but has to be dismissed. Specifically, the Panel found that the failure of not summoning FIFA as respondent in proceedings where sporting sanctions imposed by FIFA are appealed, may not be remedied by way of a settlement agreement in which the parties to the dispute acknowledge that the basis for the sporting sanctions, *e.g.* that a football club induced a Player to terminate his former employment contract, is moot. Put differently, while a football club can agree with another club to settle a certain financial dispute existing between the two clubs, it has no power to decide whether or not a disciplinary sanction shall be maintained or adjusted. The Panel therefore rejected the Appellant's prayer to have the Settlement Agreement considered in addressing the question of disciplinary sanctions as the Parties could not settle those. To this end the Panel underlined that in case it were to vary or set aside the disciplinary sanctions on the basis of the settlement agreement despite FIFA's non participation in the proceedings it would be overlooking the Respondent's lack of standing to be sued.

In conclusion the Panel determined that the present appeal regarding the disciplinary sanctions imposed by FIFA on the Appellant had to be dismissed on account of FIFA's absence as respondent. The Respondent lacks standing to be sued and the Appellant has to bear the consequences of its failure to name FIFA as a respondent in the present appeal proceedings.

Decision

As a result, the Panel concluded that the appeal had to be dismissed and the decision issued by the sub-committee of the FIFA Dispute Resolution Chamber on 31 August 2017 is confirmed.

CAS 2017/A/5369

**World Anti-Doping Agency (WADA) v.
South African Institute for Drug-Free Sport
(SAIDS) & Gordon Gilbert**

21 June 2018

Cycling (mountain bike); Doping (testosterone); Naming as respondent of the national anti-doping organization; Article R56 of the CAS Code and right to be heard; Duty to establish route of ingestion in order to establish lack of intent; Proof of lack of intent; Disqualification of results unless fairness requires otherwise

Panel

Prof. Luigi Fumagalli (Italy), Sole Arbitrator

Facts

The South African Institute for Drug-Free Sport (“SAIDS” or “the First Respondent”) is a public entity, with seat in Cape Town, South Africa. SAIDS has *inter alia* statutory drug-testing powers and the authority to conduct and enforce anti-doping programmes nationally according to the SAIDS Anti-Doping Rules (the “ADR”) adopted to implement SAIDS’ responsibilities under the World Anti-Doping Code (WADC).

Mr Gordon Gilbert (the “Athlete” or the “Second Respondent”) is a South African professional cyclist and former professional football player born on 10 December 1982. The Athlete is registered with Cycling South Africa (“CSA”), member of the South African Sports Confederation and Olympic Committee (“SASCOC”). The Athlete was a brand ambassador for Biogen, an international company, which produces various vitamin and food supplements, at mountain bike events.

On 12-14 May 2016, the Athlete competed in

the Sani2c race (the “Race”), a multi-day mountain bike competition event taking place in South Africa. The Race was under jurisdiction of CSA and, as such, was subject to the rules of CSA, the SASCOC and SAIDS.

On 13 May 2016, the second day of the Race, the Athlete underwent an in-competition doping control. In the doping control form (the “DCF”), the Athlete declared that, in the seven days preceding the sample collection, he had used, among others, the following products: “*DripDrop, PeptoPro, Enduren, Panado*”.

The sample was analysed by the Doha Laboratory, Qatar (the “Doha Laboratory”), which reported the presence of prohibited substances in the A sample. As the Doha Laboratory was not accredited to conduct specific analyses, namely the IRMS analysis, the sample was sent to the WADA accredited anti-doping laboratory in Rome, Italy (the “Rome Laboratory”).

On 17 January 2017, the Rome Laboratory reported an adverse analytical finding (the “AAF”) for the presence in the Athlete’s A sample of exogenous Testosterone, *i.e.* of an Exogenous Anabolic Androgenic Steroid, a substance prohibited in- and out-of-competition under S1.1.b of the list of prohibited substances and methods published by WADA for 2016 (the “Prohibited List”).

On 2 March 2017, the Athlete was notified by SAIDS of the AAF and of his provisional suspension from the participation in any sport. Furthermore, in the same notification, the Athlete was informed of his rights to request the analysis of the B sample.

The Athlete addressed SAIDS to have various supplements analysed. More in detail, the Athlete submitted bottles of Biogen Testoforte (lot numbers 126359, 126360 and 103997) to

SAIDS to be sent for analysis. On such basis, SAIDS forwarded to the South African Doping Control Laboratory in Bloemfontein (the “Bloemfontein Laboratory” or “SADoCoL”) the samples of the supplements submitted by the Athlete. On 26 May 2017, the Bloemfontein Laboratory analysed such samples and reported the presence of 4-Androstene-3, 17-dione in them.

On 31 May 2017, the Athlete was formally charged with an anti-doping rule violation pursuant to Article 2.1 of the ADR on the basis of the AAF.

On 28 June 2017, a first hearing in front of the Independent Doping Hearing Panel (“IDHP”) was held in Johannesburg. The hearing was then adjourned to allow the Athlete to collect the witness evidence he intended to rely upon. On 7 August 2017, a second hearing in front of IDHP was held.

On 30 August 2017, IDHP issued a decision (the “Decision”) finding as follows: “... the Athlete be declared ineligible for a period of six (6) months. The period of ineligibility commenced on 2 March 2017 and ended on 1 September 2017”. In support of such conclusion, the IDHP stated the following:

- “30. ... the Panel considered all relevant evidence in assessing whether the violation was intentional and finds that the anti-doping rule violation was not intentional, as contemplated in article 10.2.1.1. of the Rules. ...
33. The Athlete explained that he was sponsored by Biogen, an international company which produce various vitamin and supplements products. ...
34. The Athlete testified that he suffered from irritability and anxiety, hair loss and low testosterone count. For this reason, Brandon Fairweather, a personal friend of the Athlete and a representative of Biogen, advised the Athlete to use Biogen Testoforte. ...

39. After the adverse analytical finding, the Athlete sought to have his supplements analysed to determine whether any of his supplements contained any substance that could account for the adverse analytical finding. With the intervention of SAIDS, the supplements were submitted to the Doping Control Laboratory in Bloemfontein for analysis. This revealed that the Biogen Testoforte samples (Lot numbers 126360, 126359 and 103997) which was submitted for analysis, contained 4-Androstene-3, 17-dione. The presence of 4-Androstene-3, 17-dione in the supplements is consistent with the analytical finding that the urine sample of the Respondent revealed the presence of Testosterone and one of its diols. ...

42. Since the Athlete established that the adverse analytical finding resulted from the contaminated product and that he acted with No Significant Fault or Negligence ..., the applicable range for the period of Ineligibility would be reduced to a range of two (2) years to a reprimand. ...

51. This Panel ... reiterates that each case must be determined on its own facts. The Panel recognizes that the Athlete did take a number of significant steps to minimize any risk associated with the taking of supplements. ...

53. The concern of this Panel is that the Athlete in this case put far too much trust in the recommendation of someone who lacked any professional qualifications. He did not query whether Brandon Fairweather had any experience, let alone qualifications as a pharmacologist or nutritionist. While the Panel accepts that it would be unreasonable to expect an athlete to go to the lengths of having each batch of a supplement tested before use, there are other less onerous steps that could be taken, such as making a direct inquiry to the manufacturer and seeking a written guarantee that the product is free of any substances on the WADA Prohibited List. The Athlete further failed to seek advice from SAIDS.

54. The Panel expected the Athlete to produce corroborating evidence sufficient to demonstrate that he did sought medical advice before taking the

supplement. ...

55. *To this end, the matter was postponed to give the Athlete the opportunity to present the required corroborating evidence. The Athlete unfortunately failed to call any witnesses ...*

56. *The Athlete only submitted a report prepared by Dr PE Van der Walt of the Clinpath Laboratory and a report by Dr Paul Theron. The Panel found these reports to be unreliable and the conclusions arrived at were not substantiated.*

57. *The Panel finds that the Athlete has therefore not presented the corroboration required to support his submissions”.*

On 12 September 2017, the Decision was notified to WADA, CSA and the Union Cycliste Internationale (the “UCI”).

On 23 October 2017, WADA filed with the CAS an appeal against the Decision. The statement of appeal named SAIDS and the Athlete as respondents.

Reasons

1. Naming as respondent of the national anti-doping organization

Before addressing the merits of the appeal, the Sole Arbitrator had to deal with some issues of preliminary nature. The first one concerned the position of SAIDS in this arbitration. SAIDS, in its written submissions, had requested to be removed from the CAS proceedings, because the Decision had been rendered by an independent tribunal and SAIDS did not have any interest in the dispute before CAS.

The Sole Arbitrator noted, however, that the Decision had been rendered, even though by an independent tribunal, in a case for which SAIDS had the result management responsibility under Article 7.1 of the ADR and was in charge of the

hearing pursuant to Article 8 of the ADR. Therefore, the Decision could be considered as a ruling for which SAIDS had the responsibility. As a consequence, SAIDS had properly been named as a respondent by WADA, which sought the annulment of the Decision, and therefore could not be removed from the proceedings.

2. Article R56 of the CAS Code and right to be heard

The second issue concerned the request of the Second Respondent to be allowed to conduct some evidentiary proceedings, including a pharmacokinetic study. The Sole Arbitrator recalled that Article R56 of the CAS Code introduced a fundamental rule, intended to serve the purpose of concentration and rapidity in CAS proceedings: the parties were not be authorized *inter alia* to specify further evidence after the submission of the appeal brief and of the answer. Article R56 allowed however a deviation from the rule: further evidence, after the submission of the appeal brief and of the answer, could be specified if the parties agreed or the President of the Panel gave an authorization “*on the basis of exceptional circumstances*”. The possibility to give an authorization, absent the parties’ agreement, represented an exception to the general prohibition, and as such was of strict interpretation. In addition, it left no room for an ordinary disregard based on a simple claim that otherwise the parties’ right to be heard would be infringed.

In the case of the Athlete, the Sole Arbitrator remarked that the Second Respondent (and his then attorney) had been reminded that any determination under Article R56 of the Code required a showing of exceptional circumstances, based on evidence of the circumstances

which had prevented the Second Respondent from introducing the evidence in the proceedings together with its answer, but that no such evidence had been produced. Therefore, the evidentiary proceedings requested by the Second Respondent could not be allowed.

3. Duty to establish route of ingestion in order to establish lack of intent

The IDHP had held in its Decision that the anti-doping rule violation was not intentional, and that the Athlete was entitled to a fault-related reduction, because the AAF was caused by a contaminated product and the degree of fault was minimal: it had therefore imposed a reprimand and no period of ineligibility. This conclusion was challenged before CAS by WADA, which submitted that the Athlete had not proved that the anti-doping rule violation was not intentional. As a result, the sanction should have been a suspension for 4 years.

The first question that the Sole Arbitrator had therefore to examine was whether the violation could be considered to be intentional. In that context, a question was whether an athlete, in order to establish absence of intent (within the meaning of Article 10.2.3 of the ADR), had to positively establish the “route of ingestion” of the prohibited substance. For the Sole Arbitrator, the establishment of the source of the prohibited substance in an athlete’s sample was not mandated in order to prove an absence of intent. Indeed, the provisions of the ADR concerning “intent” did not refer to any need to establish source, in direct contrast to Article 10.5, combined with the definitions of “No Fault or Negligence” and “No Significant Fault or Negligence”, which expressly and specifically required to establish source. Although the Sole Arbitrator admitted that

it could be *de facto* difficult for an athlete to establish lack of intent to commit an anti-doping rule violation demonstrated by presence of a prohibited substance in his/her sample if s/he could not even establish the source of such substance, he was ready to admit that a CAS panel could be persuaded by an athlete’s assertion of lack of intent, where it was sufficiently supported by all the circumstances and context of his/her case.

This, however, did not mean that the athlete could simply plead his/her lack of intent without giving any convincing explanations to prove, by a balance of probability, that s/he did not engage in a conduct which s/he knew constituted an anti-doping rule violation or knew that there was a significant risk that said conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. The athlete, even though not bound to prove the source of the prohibited substance, had to show, on the basis of the objective circumstances of the anti-doping rule violation and his/her behaviour, that specific circumstances existed disproving his/her intent to dope. S/he could not merely speculate as to the possible existence of a number of conceivable explanations for the adverse analytical finding (AAF) and then further speculate as to which appeared the most likely of those possibilities to conclude that such possibility excluded intent. A protestation of innocence, the lack of sporting incentive to dope, or mere speculation by an athlete as to what may have happened did not satisfy the required standard of proof (balance of probability) and the mere allegation of a possible occurrence of a fact could not amount to a demonstration that that fact had actually occurred: unverified hypotheses were not sufficient. Instead, an athlete had a stringent requirement to offer persuasive evidence

that the explanation s/he offered for an AAF was more likely than not to be correct, by providing specific, objective and persuasive evidence of his/her submissions.

Looking first at whether, in this specific case, the Athlete had established the “route of ingestion” of the prohibited substance, the Sole Arbitrator found that it had not been established that 5 contaminants leading to an AAF for Testosterone were detected in the contaminated product used by the Athlete. Indeed, based on the scientific evidence on file, or referred to by the Parties, the only relevant precursor of Testosterone found was 4-Androstene-3,17-dione (Androstenedione). Such circumstance had the following effects: (i) the calculation of the amount of prohibited substance (Androstenedione) ingested daily by the Athlete lead to 9.0 mcg (=9,000 ng), based on the maximum amounts of Androstenedione found in the tablets of Testoforte, multiplied by the standard daily dose of that product; and (ii) there was no “interaction” with other “unquantified” precursor, which could have amplified the effects of the daily intake of 9.0 mcg of Androstenedione. It had also not been established that the daily intake of 9.0 mcg of Androstenedione, even over a prolonged period of time, would produce an alteration in the IRMS of the magnitude shown in the Athlete’s case. On the other hand, WADA had positively established the case that the alteration in the Athlete’s steroid profile and the positive IRMS result was compatible with either the use of a pharmacological dose of Androstenedione or with the administration or co-administration of another endogenous anabolic androgenic steroid like Testosterone. In conclusion, the Second Respondent had not established, by balance of probability, that the ingestion of the contaminated product Testoforte was at the origin of the AAF.

4. Proof of lack of intent

In light of this finding, the next question was whether the Athlete had offered sufficient evidence to support his assertion of lack of intent. For the Sole Arbitrator, for the reasons already explained, no persuasive evidence had been adduced that the explanation offered by the Athlete for his AAF was more likely than not to be correct: it was simply not more likely that the AAF was caused by the prolonged intake of 9.0 mcg of Androstenedione, than by the intake of a larger dose of Testosterone or one of its precursors. At the same time, the Sole Arbitrator could not base his decision on speculative guess uncorroborated by sufficient evidence: a protestation of innocence or a clean career were not sufficient elements to prove lack of intent. The conclusion was that the Second Respondent had not proved that the anti-doping rule violation for which he was responsible was not intentional. As a result, as the Athlete had failed to prove lack of intent, a sanction of ineligibility for 4 years was necessarily to be imposed in accordance with Article 10.2.1 of the ADR.

5. Disqualification of results unless fairness requires otherwise

The sample collection had taken place on 13 May 2016, more than a year before the first hearing before the IDHP (on 28 June 2017), and nearly six months had passed between the date of provisional suspension (2 March 2017) and the date the sanction had finally (but retroactively) been imposed. As these facts were not attributable to the Athlete, the Sole Arbitrator found it justified, in accordance with Article 10.11.2 of the ADR, to set 2 March 2017, i.e. the same date indicated in the Decision, corresponding to the date of provisional

suspension, as the starting date for the start of the ineligibility. With regard to disqualification of results, Article 10.8 of the ADR mandated the disqualification of all the Athlete's results in the period between (but including) 13 May 2016 and the date (2 March 2017) from which the Athlete was declared ineligible to compete by this award. The Sole Arbitrator found that no reason based on the "fairness" exception allowed by Article 10.8 of the ADR was engaged to depart from such conclusion with respect to an athlete found responsible for an intentional anti-doping rule violation.

Decision

As a result, the Sole Arbitrator upheld the appeal filed by the World Anti-Doping Agency and set aside the decision rendered on 30 August 2017 by the IDHP. It declared Gordon Gilbert ineligible for a period of four years from 2 March 2017 and disqualified all competitive results obtained between 13 May 2016, including the results of 13 May 2016, and 2 March 2017, with all of the resulting consequences, including forfeiture of any medals, points and prizes.

TAS 2017/A/5382

Jules Accorsi c. Fédération Internationale de Football (FIFA) & Fédération Centrafricaine de Football (RCA)

15 août 2018

Football; Litige disciplinaire; Droit applicable; Contrôle *ex officio* de la qualité/de l'intérêt à agir d'un demandeur contre une décision disciplinaire d'une association; Solidarité entre débiteurs; Légalité du système disciplinaire de la FIFA; Limites à l'intervention de l'autorité de surveillance en matières pénale et disciplinaire; Violation de l'ordre public suisse

Formation

Prof. Petros Mavroidis (Grèce), Président

Prof. Gérard Simon (France)

Me Patrick Lafranchi (Suisse)

Faits

M. Jules Accorsi, né le 27 juin 1937, est un entraîneur de Football de nationalité française.

La Fédération Internationale de Football Association ("FIFA") est l'instance dirigeante du football au niveau mondial. Elle est constituée en association au sens des articles 60 et suivants du Code civil suisse et a son siège à Zurich en Suisse.

La Fédération Centrafricaine de Football ("RCA") est une association regroupant les clubs de football de la République centrafricaine et organisant les compétitions nationales et les matchs internationaux de la sélection de la République centrafricaine. Elle a son siège à Bangui, République Centrafricaine, et est affiliée à la FIFA depuis 1964.

Par contrat du 30 juillet 2010, M. Accorsi a été engagé par la RCA en qualité de sélectionneur de l'équipe nationale. Le 19 juin 2012, M. Accorsi a dénoncé le contrat de travail le liant à la RCA en raison des retards répétés dans le paiement de ses salaires. M. Accorsi a saisi la FIFA afin d'obtenir le paiement de ses arriérés de salaires ainsi que la réparation du dommage causé par la RCA. Par décision du 21 janvier 2013, notifié le 8 février 2013, le Juge unique de la Commission du Statut du Joueur de la FIFA a [*inter alia*] prononcé ce qui suit:

- "1. La demande du demandeur, Jules Accorsi, est partiellement acceptée.*
- 2. Le défendeur, la Fédération Centrafricaine de Football, doit payer au demandeur, Jules Accorsi, les montants suivants:*
 - a. EUR 120,000 à titre de salaires impayés;*
 - b. EUR 30,000 à titre de compensation pour rupture du contrat;*
 - c. EUR 1,128 à titre de remboursement pour un billet d'avion Bangui-Bastia".*

La décision précitée est entrée en force. Le 25 février 2013, M. Accorsi a mis la RCA en demeure de lui verser les montants alloués par le Juge unique de la Commission du Statut du Joueur de la FIFA. En l'absence de toute réaction de la RCA, M. Accorsi a interpellé la FIFA pour lui demander de transmettre le dossier sans délai à sa Commission de Discipline.

Le 26 mars et le 11 avril 2013, la FIFA a invité en vain la RCA à s'acquitter de sa dette envers M. Accorsi, lequel a réclamé les 12 avril, 21 mai, 24 juin, 19 juillet, 2 octobre et 10 octobre 2013 que la Commission de Discipline de la FIFA se saisisse du contentieux l'opposant à la RCA. Le 14 octobre 2013, les Parties ont été informées du fait que la Commission de Discipline de la FIFA avait été saisie.

Le 9 septembre 2014, la Commission de Discipline de la FIFA a rendu une décision intimant à la RCA de payer l'intégralité de sa dette envers M. Accorsi dans les 120 jours, faute de quoi M. Accorsi *“pourra exiger par écrit auprès du secrétariat de la Commission de Discipline de la FIFA que la Fédération Centrafricaine de Football soit condamnée au paiement d'une amende de CHF 15,000 et que le cas soit resoumis à la Commission de Discipline de la FIFA afin que des sanctions plus sévères soient imposées à la débitrice, telle que l'exclusion d'une compétition de la FIFA”* (la “Première Décision Disciplinaire”). Le 6 octobre 2014, le dispositif de la Première Décision Disciplinaire a été communiqué à M. Accorsi. Le 20 octobre 2014, la décision – apparemment non motivée – a été notifiée à la RCA.

Le 18 février 2015 et faute de paiement de la part de la RCA, M. Accorsi a demandé à la FIFA de poursuivre la procédure disciplinaire à l'encontre de son débiteur. Le 19 juin 2015, la Commission de Discipline de la FIFA a rendu une nouvelle décision frappant la RCA d'une amende de CHF 7,500 et la sommant de payer l'intégralité de sa dette envers M. Accorsi dans les 60 jours, faute de quoi M. Accorsi *“pourra exiger par écrit auprès du secrétariat de la Commission de Discipline de la FIFA que la Fédération Centrafricaine de Football soit exclue de la compétition préliminaire pour la Coupe du Monde de la FIFA, Russie 2018™”* (la “Seconde Décision Disciplinaire”). Le 6 juillet 2015, le dispositif de la Seconde Décision Disciplinaire a été communiqué à M. Accorsi. Le 14 juillet 2015, la décision – apparemment non motivée – a été notifiée à la RCA.

Le 25 septembre 2015, M. Accorsi a confirmé à la FIFA n'avoir toujours pas été payé par la RCA, dont il a demandé “[l'] *exclusion de la compétition préliminaire de la coupe du monde de la FIFA 2018 dont le premier match doit avoir lieu le 8 octobre prochain contre Madagascar*”. En dépit de la Seconde Décision Disciplinaire et de la requête

formulée par M. Accorsi le 25 septembre 2015, la RCA a participé à la compétition préliminaire pour la Coupe du Monde de la FIFA, Russie 2018™.

Le 5 novembre 2015, M. Accorsi a confirmé à la FIFA avoir reçu l'équivalent de la somme de EUR 43,786.53, réduisant ainsi sa créance à EUR 128,386.05. Le 24 novembre 2015, la FIFA a pris note du fait que la RCA n'avait pas acquitté entièrement sa dette envers M. Accorsi et, dans ce contexte, a informé les Parties que *“l'affaire sera resoumise à la Commission de Discipline de la FIFA lors de sa prochaine séance le 15 décembre 2015 aux fins de prononcer des sanctions additionnelles”*.

Le 15 décembre 2015, la Commission de Discipline de la FIFA a rendu une nouvelle décision frappant la RCA d'une amende de CHF 7,500 et la sommant de payer l'intégralité de sa dette envers M. Accorsi dans les 60 jours, faute de quoi M. Accorsi *“pourra exiger par écrit auprès du secrétariat de la Commission de Discipline de la FIFA à ce que soit prononcée l'exclusion de la Fédération Centrafricaine de Football de la compétition préliminaire de la Coupe du Monde de la FIFA, Qatar 2022™”* (la “Troisième Décision Disciplinaire”). Le 2 février 2016, le dispositif de la Troisième Décision Disciplinaire a été communiqué à M. Accorsi. Le 12 février 2016, la décision – apparemment non motivée – a été notifiée à la RCA.

Le 20 mai 2016, M. Accorsi a confirmé à la FIFA que la RCA ne lui avait toujours pas versé le solde de sa créance et expliqué ces manquements par le fait que les sanctions disciplinaires prononcées à l'encontre la RCA n'étaient pas dissuasives. D'une part, la RCA ne s'étant jamais qualifiée pour la coupe du monde, son exclusion à un tel événement était donc sans grande conséquence. D'autre part, sachant que la prochaine coupe du monde aurait lieu en 2022, la sanction tendant à priver la RCA de participer à cette manifestation

aboutissait en réalité à lui octroyer un nouveau délai de grâce.

Dans ce contexte, M. Accorsi a demandé à la FIFA *“l’exécution immédiate de [la sanction prononcée dans le cadre de la Troisième Décision Disciplinaire], mais surtout, en l’absence de paiement effectué dans le délai annoncé, le prononcé par la Commission de Discipline de l’exclusion de la Fédération Centrafricaine de Football de la CAN 2019 (seule sanction sportive dissuasive)”*. Le 21 juillet 2016, la FIFA a répondu à M. Accorsi qu’en sa qualité de créancier, son droit dans la procédure disciplinaire se limitait à exiger *“par écrit à ce que soit prononcée l’exclusion de la Fédération Centrafricaine de Football de la compétition préliminaire de la Coupe du Monde de la FIFA, Qatar 2022™”*, ce qu’il a fait par courrier du 25 juillet 2016.

Le 1^{er} septembre 2016, M. Accorsi a demandé à la FIFA de lui confirmer que la sanction prononcée à l’encontre de la RCA avait été bel et bien exécutée. A une date indéterminée, M. Accorsi et la RCA ont négocié un protocole d’accord visant au paiement échelonné par la RCA de sa dette. Le 11 août 2017, M. Accorsi a informé la FIFA que la RCA s’était dérobée, une fois de plus, à ses engagements en ne respectant pas le plan de paiement négocié. M. Accorsi a alors demandé à la FIFA *“que la procédure disciplinaire soit poursuivie, et ce compris le prononcé de sanctions d’interdiction de faire appel à un sélectionneur/entraîneur national étranger et l’exclusion de la CAN 2019 dès réception du présent courrier”*.

Le 18 août 2017, la FIFA a informé la RCA que faute de paiement de sa dette envers M. Accorsi avant le 1^{er} septembre 2017, l’affaire serait portée devant sa Commission de Discipline. Le 23 août 2017, le Ministre de la promotion de la jeunesse, du développement des sports et du service civique de la République Centrafricaine a accusé réception du dernier envoi de la FIFA et confirmé la

volonté de son gouvernement de payer sous 90 jours la totalité des sommes dues à M. Accorsi. Le 24 août 2017, la RCA s’est référée au courrier du gouvernement de la République Centrafricaine et a reconnu sa dette envers M. Accorsi. Par la même occasion, elle a demandé à la FIFA un sursis de 60 jours pour effectuer le paiement de la créance de M. Accorsi. La FIFA a alors adressé plusieurs courriers à la RCA, attirant son attention sur le fait que a) la créance de M. Accorsi reposait sur la décision rendue le 21 janvier 2013 par le Juge unique de la Commission du Statut du Joueur de la FIFA, b) que cette décision était entrée en force, c) que la FIFA ne pouvait donc pas accorder de délai de paiement, d) que seul M. Accorsi en avait la prérogative et e) que par conséquent l’affaire resterait à l’ordre du jour de la prochaine séance de la Commission de Discipline de la FIFA. Le 4 septembre 2017, M. Accorsi a informé la FIFA que la RCA ne s’était toujours pas acquittée de sa dette et demandé la poursuite de la procédure disciplinaire.

Le 29 septembre 2017, la Commission de Discipline de la FIFA a rendu *[inter alia]* la décision suivante (“Décision Litigieuse”):

- “1. La Fédération Centrafricaine de Football persiste à ne pas respecter la décision rendue par le juge unique de la Commission du Statut du Joueur le 21 janvier 2013, et, par conséquent, continue de violer l’art. 64 du Code disciplinaire de la FIFA.
2. Le Fédération Centrafricaine de Football dispose d’un dernier délai de grâce de 30 jours à compter de la notification de la décision pour s’acquitter de sa dette auprès du créancier, M. Jules Accorsi, conformément à la décision du juge unique de la Commission du Statut du Joueur le 21 janvier 2013.
3. En cas de non-paiement de la totalité de la somme restante à payer au créancier dans le délai précité, le créancier pourra exiger par écrit auprès du secrétariat de la Commission de Discipline de la FIFA à ce que soit prononcée l’exclusion de la

Fédération Centrafricaine de Football de la compétition préliminaire de la Coupe du Monde de la FIFA, Qatar 2022™. Une fois que le créancier aura fait cette requête, la Fédération Centrafricaine de Football sera automatiquement exclue de la compétition préliminaire de la Coupe du Monde de la FIFA, Qatar 2022™.

Dans la Décision Litigieuse, la Commission de Discipline de la FIFA a relevé qu'elle avait été saisie de la même cause pour la quatrième fois et qu'en dépit du délai de grâce de 60 jours accordé dans la Troisième Décision Disciplinaire, la RCA s'était limitée à verser à M. Accorsi EUR 43,786 le 20 octobre 2015. Selon la Commission de Discipline de la FIFA, la RCA s'est rendue coupable d'une violation de l'article 64 du Code disciplinaire de la FIFA (CDF) ainsi que de l'article 14 al. 1 lit. a) des Statuts de la FIFA. *“Au vu de toutes les circonstances du cas d'espèce, (...) la Commission estime qu'une amende n'est pas préconisé [sic]”*. De même et sans de plus amples explications, elle a considéré justifié d'accorder un délai de grâce de 30 jours pour permettre à la RCA de s'acquitter de sa dette. La Décision Litigieuse a été communiquée à M. Accorsi le 9 octobre 2017 et à la RCA le 17 octobre 2017.

Le 30 octobre 2017, M. Accorsi a déposé une déclaration d'appel auprès du Tribunal Arbitral du Sport (“TAS”) contre la Décision Litigieuse avec pour conséquence que la procédure disciplinaire initiée devant la FIFA a été suspendue jusqu'à droit connu sur le présent arbitrage. Le 18 décembre 2017, M. Accorsi a déposé son mémoire d'appel.

Le 23 janvier 2018, le Greffe du TAS a accusé réception de la réponse déposée le 22 janvier 2018 par la FIFA et observé que la RCA n'avait pas procédé dans le délai qui lui avait été imparti. Le 26 janvier 2018, le Greffe du TAS a accusé réception de la réponse de la RCA datée du 18 janvier 2018 mais envoyée par courrier le 23 janvier 2018. Malgré sa tardiveté,

cette écriture a été considérée comme recevable au vu de l'accord de M. Accorsi et de la FIFA. Le 26 février 2018, la RCA a produit un mémoire additionnel, lequel a été écarté par la Formation arbitrale en raison de sa tardiveté. A la fin de l'audience du TAS, les Parties ont toutefois demandé à la Formation arbitrale de suspendre la procédure jusqu'au 16 avril 2018, afin de tenter une nouvelle conciliation. Le 22 mai 2018, la Formation arbitrale a donné un ultime délai supplémentaire de 15 jours à la RCA pour présenter à M. Accorsi une offre transactionnelle. Le 8 juin 2018, le Greffe du TAS a pris note du fait que la RCA n'avait pas fait de proposition et confirmé aux Parties que la procédure reprenait son cours.

Considérants

1. Droit applicable

Le siège du TAS se trouvant en Suisse et le litige revêtant un caractère international, les dispositions du chapitre 12 relatif à l'arbitrage international de la Loi fédérale sur le droit international privé (“LDIP”) sont applicables en vertu de son article 176 al. 1 LDIP. Au chapitre 12 de la LDIP, le droit applicable au fond est régi par l'article 187 al. 1 LDIP qui prévoit que le *“tribunal arbitral statue selon les règles de droit choisies par les parties ou, à défaut de choix, selon les règles de droit avec lesquelles la cause présente les liens les plus étroits”*.

Une élection de droit tacite et indirecte par renvoi au règlement d'une institution d'arbitrage est admise (KARRER in Basler Kommentar zum Internationalen Privatrecht, Bâle 1996, N 92 et 96 ad art. 187 LDIP; POUURET/BESSON, Droit comparé de l'arbitrage international, Zurich 2002, N 683 p. 613 et les références citées; CAS 2004/A/574; TAS 2016/A/4468, consid. 54). En outre, au sens de l'article 187 al. 1 LDIP, peuvent être choisies par les

parties non seulement une loi nationale, mais encore des “règles de droit” affranchies de toute loi étatique (LALIVE/POUDRET/REYMOND, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne 1989, pp. 399-400; TAS 2016/A/4468, consid. 55), comme les règles et règlements des fédérations internationales sportives.

En l'espèce, l'objet de la présente procédure est la Décision Litigieuse. La Formation arbitrale relève par ailleurs qu'à teneur de l'article 57 al. 2 des Statuts de la FIFA (Edition avril 2016), “[l]e TAS applique en premier lieu les divers règlements de la FIFA ainsi que le droit suisse à titre supplétif”. Par conséquent, la Formation arbitrale appliquera en premier lieu les règlements, directives et circulaires de la FIFA ainsi que le droit suisse à titre supplétif.

2. Contrôle ex officio de la qualité/de l'intérêt à agir d'un demandeur contre une décision disciplinaire d'une association

La Décision Litigieuse a été rendue le 29 septembre 2017 par la Commission de Discipline de la FIFA et est dirigée à l'encontre de la RCA, qui est sommée de s'acquitter de sa dette envers M. Accorsi. En cas de défaut de la part de la RCA, la Décision Litigieuse donne toutefois la possibilité à M. Accorsi “[d']exiger par écrit auprès du secrétariat de la Commission de Discipline de la FIFA à ce que soit prononcée l'exclusion de la Fédération Centrafricaine de Football de la compétition préliminaire de la Coupe du Monde de la FIFA, Qatar 2022™”.

Dans ce contexte et avant toute chose, se pose la question de savoir si M. Accorsi a la légitimation active lui conférant le droit de contester la Décision Litigieuse devant le TAS. En effet, la sanction prononcée par la Commission de Discipline de la FIFA

frappe exclusivement la RCA. A cet égard, il y a lieu de noter que la Décision Litigieuse est basée sur l'article 64 CDF. Selon le Tribunal fédéral suisse, une peine disciplinaire prononcée par une association tombe sous le coup de l'article 75 du Code Civil suisse (“CC”) (Arrêt du Tribunal fédéral du 20 février 2018, 4A_260/2017, consid. 1.2.2). Cela est particulièrement vrai dans le cas d'espèce où la Décision Litigieuse vise manifestement à régler une question liée aux relations que la FIFA entretient avec un de ses membres qui ne respecte pas les décisions prises par ses organes (Arrêt du Tribunal fédéral du 20 février 2018, 4A_260/2017, consid. 5.1 et Arrêt du 29 juin 2017, 4A_600/2016 consid. 3.2.2).

A titre liminaire, il y a lieu de souligner que la question de l'intérêt à agir contre une décision d'une association est une question de droit qui doit être examinée d'office (ATF 132 III 503 consid. 3.1 et références citées). Cet examen *ex officio* est d'autant plus justifié que l'article 75 CC est de droit impératif (Arrêt du Tribunal fédéral du 29 juin 2017, 4A_600/2016 consid. 3.2.1) et que sa mise en œuvre (dont fait partie la qualité pour agir) doit être spontanément analysée par la Formation arbitrale.

L'action fondée sur l'article 75 CC vise l'annulation des décisions de l'association qui violent la loi ou les statuts. Cette action est purement cassatoire (Arrêt du Tribunal fédéral du 29 mai 2009, 5A_153/2009 consid. 2.1). Il est toutefois admis que, par souci d'économie de procédure, le juge peut réduire les sanctions contestées devant lui. De même, lorsque le litige est destiné à être tranché par un tribunal arbitral, les statuts ou les parties peuvent confier à ce dernier la mission de modifier la décision entreprise (FOËX B., in Pichonnaz/Foëx, *Commentaire romand*, Helbling &

Lichtenhahn, Bâle, 2010; *ad.* Art. 75, par. 33, p. 542). L'action de l'article 75 CC a pour objet les décisions de l'association. Elle ne vise pas uniquement les décisions de l'assemblée générale, organe suprême de l'association, mais également celles qu'un organe inférieur prend dans les limites de ses compétences (ATF 118 II 12; consid. 3 a). Il peut en particulier s'agir de sanctions prises contre un membre (ATF 119 II 271; Arrêt du Tribunal fédéral du 29 mai 2009, 5A_153/2009 consid. 2.1).

En principe, seuls les membres de l'association ont qualité pour agir en annulation d'une décision de l'association. Toutefois et en présence d'associations faitières, les membres indirects peuvent également avoir la légitimation active (BOHNET F., Actions civiles, conditions et conclusions, Helbing Lichtenhahn, Bâle 2014, *ad.* art. 75 CC, N14, p. 108). En particulier, le membre indirect doit pouvoir faire examiner par le juge les sanctions (peines statutaires) qui lui ont été infligées. Dans le cas des sanctions, cette protection juridique doit être accordée même à la personne qui n'est pas membre de l'association, si elle s'est soumise à la réglementation établie par cette dernière, par exemple lorsque pareille démarche est une condition à remplir pour pouvoir participer à une manifestation organisée par l'association. Là encore, la décision attaquée doit être susceptible d'un contrôle juridique libre et indépendant (ATF 119 II 271, consid. 3 b).

Enfin et selon la jurisprudence, la qualité pour agir n'est pas seulement reconnue à celui qui n'a pas adhéré à la décision, encore faut-il que ce dernier ait un intérêt à l'action. Cet intérêt doit "*être compris de manière large*" (ATF 132 III 503, consid. 3.1). C'est ainsi notamment que celui qui n'est pas directement affecté par la décision, peut

valablement l'attaquer, s'il devait s'avérer qu'elle était contraire au droit ou aux statuts (LA ROCHEFOUCAULD E., Standing to sue, a procedural issue before the CAS, A short analysis of the standing to sue issue in light of the jurisprudence of the CAS, Bulletin TAS, 1/2011; p. 14). En l'espèce, doit donc être examiné si M. Accorsi a un intérêt propre à attaquer la Décision Litigieuse ou si cette dernière pourrait être contraire aux statuts de la FIFA ou, de manière plus large, au droit. Pour justifier d'un intérêt personnel, M. Accorsi doit établir un rapport spécial suffisamment étroit avec l'objet du litige et démontrer que l'annulation de la décision attaquée ou sa modification lui procure un avantage concret. Dans ses conclusions, M. Accorsi a demandé que la sanction prévue par la Décision Litigieuse soit réformée à de nombreux égards.

M. Accorsi a pris une conclusion en constatation de la mauvaise foi et du manque d'impartialité de la FIFA. Selon la jurisprudence, l'action en constatation de droit est ouverte si la partie demanderesse a un intérêt important et digne de protection à la constatation immédiate de la situation de droit; il n'est pas nécessaire que cet intérêt soit de nature juridique, il peut s'agir d'un pur intérêt de fait; la condition est remplie notamment lorsque les relations juridiques entre les parties sont incertaines et que cette incertitude peut être levée par la constatation judiciaire. L'intérêt pratique à une constatation de droit fait normalement défaut pour le titulaire du droit lorsque celui-ci dispose d'une action en exécution, en interdiction ou d'une action formatrice, immédiatement ouverte, qui lui permettrait d'obtenir directement le respect de son droit ou l'exécution de l'obligation (ATF 123 III 49 consid. 1a). Dans ce sens, l'action en constatation de droit est subsidiaire par rapport à une action condamnatoire ou une

action formatrice (cf. ATF 119 II 368 consid. 2a p. 370; ATF 135 III 378 consid. 2.2). En l'espèce, il est indéniable que le recours de M. Accorsi est dirigé contre la Décision Litigieuse, laquelle a pour sujet la RCA. Le fait de demander dans le cadre d'un appel au TAS, la constatation de la mauvaise foi et le manque d'impartialité de la FIFA est déplacé. Par ailleurs, M. Accorsi n'explique pas quel droit il entend faire découler de cette action en constatation ni l'intérêt pratique qui en résulte pour lui. S'il avait des prétentions à faire valoir contre la FIFA, il devrait procéder par le biais d'une action formatrice, dans le cadre de laquelle il pourrait faire valoir ses griefs à l'encontre de la FIFA et non par le biais d'un appel d'une décision prononcée contre un tiers (la RCA).

M. Accorsi a pris des conclusions de nature financière: a) qu'il soit rappelé que la RCA est redevable d'un certain montant envers M. Accorsi, b) que la FIFA soit reconnue débitrice solidaire de cette dette, c) que cette dette soit acquittée au moyen des versements que la FIFA verse annuellement à ses membres, d) que la RCA et la FIFA soient condamnées solidairement entre elles à lui verser EUR 50,000 au titre de réparation pour tort moral et autres frais. Il est incontesté que la décision rendue le 21 janvier 2013 par le Juge unique de la Commission du Statut du Joueur de la FIFA est entrée en force. Dans cette décision, seule la RCA est désignée en qualité de débiteur de M. Accorsi. De jurisprudence constante, la Commission de Discipline de la FIFA doit limiter son examen à la question de savoir si la RCA s'est acquittée de sa dette. Il ne lui appartient pas de se prononcer sur le bien-fondé de cette dernière. Le pouvoir d'examen du TAS est limité dans la même mesure (CAS 2016/A/4595 et références citées). Il résulte que les conclusions prises par M.

Accorsi et mises en évidence au paragraphe précédent, doivent être écartées.

M. Accorsi a pris des conclusions de nature disciplinaire: que la RCA soit a) exclue de la compétition préliminaire de la Coupe du Monde 2022 et, en cas de défaut de paiement persistant, b) que la RCA soit successivement interdite d'enregistrer un sélectionneur étranger, c) qu'elle soit exclue de la Coupe d'Afrique des Nations 2018, d) de toutes les compétitions de football, e) qu'elle soit suspendue *"en qualité de membre de la FIFA"* jusqu'au paiement de sa dette. L'exclusion de la RCA de la compétition préliminaire de la Coupe du Monde 2022 est déjà prévue par la Décision Litigieuse et la Coupe d'Afrique des Nations 2018 a pris fin le 4 février 2018. Les conclusions de M. Accorsi relatives à ces deux compétitions ne justifient pas de son intérêt pour annuler la Décision Litigieuse. Par ailleurs, l'interdiction d'enregistrer un sélectionneur étranger est une sanction qui n'est pas prévue par le CDF.

L'article 64 CDF, sur lequel est fondée la Décision Litigieuse, prévoit la possibilité d'imposer une amende et *"s'il s'agit d'une association, elle sera mise en garde et menacée de se voir imposée d'autres mesures disciplinaires en cas de non-paiement ou de non-respect de la décision dans le dernier délai de grâce. L'exclusion d'une compétition de la FIFA peut aussi être prononcée"*. Il résulte de cette disposition – qui est une *lex specialis* par rapport à l'article 12 CDF – qu'en cas de non-respect par la RCA de la décision du Juge unique de la Commission du Statut du Joueur de la FIFA, la Commission de Discipline de la FIFA peut prononcer une amende ou l'exclusion *"d'une compétition de la FIFA"* (soulignement ajouté). L'exclusion de toutes les compétitions de football, quel que soit l'organisateur n'est donc pas prévue par le CDF. La conclusion de M. Accorsi y

relative ne peut être retenue. Il en va de même pour la suspension de la qualité de membre FIFA de la RCA. A cet égard, il y a lieu de relever que seul le Congrès de la FIFA a la qualité de prononcer l'admission, la suspension et l'exclusion des associations membres et il ne peut le faire que sur recommandation du Conseil de la FIFA (Article 10 des Statuts de la FIFA). La Commission de Discipline n'a donc pas la compétence d'adopter la mesure demandée par M. Accorsi.

Il résulte de ce qui précède que parmi toutes les conclusions prises par M. Accorsi, seule celle liée à l'exclusion de la RCA de la compétition préliminaire de la Coupe du Monde 2022 peut être retenue. Dès lors que cette sanction est déjà prévue par la Décision Litigieuse, M. Accorsi n'a aucun intérêt digne de protection à ce que cette dernière soit annulée.

3. Solidarité entre débiteurs

Par surabondance et en ce qui concerne la solidarité de la FIFA, il y a lieu de relever qu'en l'absence de déclaration expresse, la solidarité n'existe que dans les cas prévus par la loi (Article 143 al. 2 du Code des Obligations suisse). M. Accorsi n'a pas indiqué quelle base légale pourrait justifier la solidarité de la FIFA. En outre, il n'a absolument pas établi la légitimité et l'existence de ses prétentions financières autres que celles adjugées par le Juge unique de la Commission du Statut du Joueur de la FIFA. Ces dernières doivent être écartées sans autre considération, faute pour M. Accorsi d'avoir apporté la preuve liées aux faits générateurs des droits, qu'il invoque (Article 8 CC).

4. Légalité du système disciplinaire de la FIFA

Le Tribunal fédéral a expressément reconnu la légalité du système disciplinaire de la FIFA (Arrêt du Tribunal fédéral du 5 janvier 2007, 4P.240/2006). Il a d'ailleurs été appelé à intervenir régulièrement dans des litiges de nature disciplinaire impliquant la FIFA sans remettre en cause le système en question (Arrêt du 20 février 2018, 4A_260/2017). Plus spécifiquement et en ce qui concerne le système disciplinaire mis en place par la FIFA, le Tribunal fédéral a confirmé que ce dernier ne vise pas à se substituer à l'exécution forcée ressortant de la compétence exclusive de l'Etat mais à sanctionner - sur le plan purement associatif - le membre qui violerait ses obligations et mettrait ainsi en péril le respect des buts statutaires de l'association (cf. 4P.240/2006, consid. 4.2). La Formation arbitrale ne peut donc que rejeter le grief de M. Accorsi selon lequel le régime de sanctions mis en place par la FIFA viole le droit suisse.

5. Limites à l'intervention de l'autorité de surveillance en matières pénale et disciplinaire

En ce qui concerne la sanction en tant que telle prononcée par la Commission de Discipline, il convient de garder à l'esprit que, en droit pénal, le juge dispose d'un large pouvoir lorsqu'il fixe la peine à infliger à un accusé reconnu coupable d'une infraction. L'autorité de surveillance ne doit intervenir que si la peine a été fixée en dehors du cadre légal, si elle est exagérément sévère ou clémente au point de constituer un abus du pouvoir d'appréciation ou si des éléments d'appréciation importants n'ont pas été pris en compte. En matière de sanctions disciplinaires infligées à des sportifs, le Tribunal fédéral n'intervient à l'égard des décisions rendues en vertu d'un pouvoir d'appréciation que si elles aboutissent à un résultat manifestement injuste ou à une

iniquité choquante (Arrêt du Tribunal fédéral du 29 juin 2017, 4A_600/2016 consid. 3.7.2; Arrêt du 22 juin 2015, 5A_805/2014, consid. 5.2 et les références). En l'espèce, il y a lieu d'observer que la sanction prise par la Commission de Discipline ne vise pas M. Accorsi puisqu'elle est prononcée exclusivement à l'égard de la RCA. A ce titre, il est douteux qu'il ait la qualité de contester la quotité de cette sanction, qui a d'ailleurs été acceptée par la RCA, puisque cette dernière n'a pas interjeté appel contre la Décision Litigieuse.

6. Violation de l'ordre public suisse

M. Accorsi se plaint du fait que la FIFA n'a pas statué dans un délai raisonnable et "*a donc mené une procédure arbitraire enfreignant l'ordre public*". Une décision est incompatible avec l'ordre public si elle méconnaît les valeurs essentielles et largement reconnues qui, selon les conceptions prévalant en Suisse, devraient constituer le fondement de tout ordre juridique. C'est le résultat auquel aboutit la décision qui doit être incompatible avec l'ordre public (Arrêt du Tribunal fédéral du 20 février 2018, 4A_260/2017, consid. 5.1). En l'occurrence, seule est litigieuse la Décision prise par la Commission de Discipline en date du 29 septembre 2017. Elle est l'aboutissement de la demande formée par M. Accorsi en date du 11 août 2017 qui avait alors prié la FIFA de poursuivre la procédure disciplinaire à l'encontre de la RCA, laquelle avait violé l'accord amiable conclu à une date indéterminée. Entre le moment de la requête de M. Accorsi et la date à laquelle la Décision Litigieuse a été prise, un peu plus d'un mois s'est écoulé. Dans ce contexte, la Formation arbitrale ne voit pas en quoi l'ordre public a pu être violé. Plus particulièrement, M. Accorsi ne met pas en avant la norme juridique qui aurait été appliquée de manière arbitraire, ni

ne démontre que celle-ci lui confère un droit ou tend à la protection de ses intérêts.

Décision

En conclusion, la Formation arbitrale retient que M. Accorsi n'a pas su démontrer son intérêt légitime à ce que la décision attaquée soit annulée ou modifiée ni expliquer en quoi cette dernière viole les statuts de la FIFA ou le droit suisse. Il n'a ainsi aucun intérêt pratique actuel à l'admission de son appel et doit ainsi se voir dénier la qualité pour agir. L'appel déposé le 30 octobre 2017 par M. Jules Accorsi à l'encontre de la décision du 29 septembre 2017 de la Commission de Discipline de la FIFA est rejeté. La décision du 29 septembre 2017 de la Commission de Discipline de la FIFA est confirmée.

CAS 2017/A/5459

Isidoros Kouvelos v. International Committee of the Mediterranean Games (ICMG)

6 November 2018 (operative part of 11 May 2018)

Mediterranean Games; Election of a candidate to a top position in a sport organisation; Admissibility of the appeal in light of the dies a quo and the notion of decision; CAS jurisdiction subjected to the existence of a decision; Interpretation of a provision regarding the majority requisites for the election of candidates

Panel

Mr Ivaylo Dermendjiev (Bulgaria), President
Mr Efraim Barak (Israel)
Mr Lino Farrugia Sacco (Malta)

Facts

Mr. Isidoros Kouvelos (the “Appellant”) is a member of the Hellenic Olympic Committee representing the Hellenic Equestrian Federation and holds the position of President of the International Olympic Academy since 2009. The Appellant was also elected and served as the Secretary General of the International Committee of the Mediterranean Games for two consecutive four-year terms from 2009 until 2017.

The International Committee of the Mediterranean Games (“ICMG” or the “Respondent” or the “Committee”) is an international non-governmental and non-profit organisation duly organized in the form of an association governed by the legislation of Greece where it is located. The Respondent consists of 25 National Olympic Committees of the Mediterranean States. Its main objective is the organization of the Mediterranean

Games (the “Games”) as well as the promotion of sports in general among the member States.

According to Rule XI of the ICMG Charter, the Committee is administered by the ICMG Executive Committee (“EC”) elected by the ICMG General Assembly (“GA”) for a four-year term of office. The EC is comprised of:

- A President, who presides over all activities of the ICMG and is its permanent representative;
- A first Vice-President who replaces the President on his request in case of impediment;
- A second Vice-President who replaces the President on his request in case of impediment of the President or the first Vice-President;
- A Secretary General entrusted with the implementation of the decisions adopted by the ICMG EC and is responsible for the management of the ICMG under the President’s authority;
- A Treasurer who is responsible for finances, accounting and the execution of the budget with all related obligations of any kind;
- Seven members.

All members of the EC, including the Secretary General, are elected by the GA by secret ballot for a four-year term of office starting from the day following the closing ceremony of the Games and ending on the day of the closing ceremony of the next Games except under exceptional circumstances. The members of the ICMG EC are re-eligible, on their own proposal or on the proposal of their respective National Olympic Committee.

The election of the members of the ICMG EC, namely the President, the first Vice-President, the second Vice-President, the Secretary General, the Treasurer and the additional

seven EC Members is conducted through a two-round voting system that is governed by the ICMG Charter rules as follows:

“BYE-LAW TO RULE XI

Preamble

1. Only the votes of the ICMG members present at the GA will be taken into consideration.

2. During the submission of applications, the candidate should expressly indicate the post for which he applies. Each candidate may only apply for one post.

Elections

1. For the election to the posts of President, 1st Vice-President, 2nd Vice-President, Secretary General and Treasurer of the ICMG, the candidate who has obtained an absolute majority in the first ballot is elected.

If no candidate for any of these posts has obtained an absolute majority and if there are at least three candidates in the first round, a second ballot will be taken in which the candidate who has obtained the smallest number of votes in the first ballot may not participate.

If there are only two candidates left, a new ballot is taken. In the absence of an absolute majority, a final vote will be held and the candidate who has obtained the highest number of votes is elected.

When there is only one candidate for a post, he must obtain an absolute majority in the first ballot. Should he fail to obtain an absolute majority, a second ballot will be taken for which absolute majority is not required”.

Nonetheless, from a historical perspective, the above cited provision from the ICMG Charter was not strictly complied with during GA meetings on which elections for members of the ICMG EC took place.

As evident from the Minutes of the GA meeting held in Pescara, Italy on 24 June 2009, the elections for the post of some of the EC

members where there was only one candidate were held through “applauds” and “cheers”.

Similarly, during the ICMG GA meeting held on 19 June 2013 in Mersin, Turkey, the posts for EC members where there was only one candidate were elected by “applause” as demonstrated by the GA meeting Minutes.

Upon the expiration of the second consecutive four-year term of the Appellant as Secretary General, the next elections were to take place during the ICMG GA meeting in Tarragona, Spain on 13 October 2017. The Appellant was the sole candidate for the 2017 elections for the post of the ICMG Secretary General.

On 12 October 2017, the day before the GA meeting, the ICMG EC held a meeting on which it was expressly decided that the elections for the new four-year term of the EC members will be conducted in strict compliance with the rules of the ICMG Charter, hence, a secret ballot will be carried out regardless of the number of candidates for each respective post.

In accordance with the foregoing decision, ballot papers were prepared for the 2017 ICMG Secretary General elections. These ballots were bilingual, with sections for the first and second round each containing a ticking box where each voter can indicate whether she/he votes “OUI/YES” or “NON/NO”. It should be noted that the ballot papers for the election of other members of the ICMG EC, such as the second Vice-President and the 7 additional EC members were different than the ballot paper for the Secretary General election and did not contain YES and NO boxes. Rather, they contained a single box for indication whether the respective voter votes in favour of the respective candidate.

As planned, the voting for the post of the ICMG Secretary General took place during the

GA meeting on 13 October 2017 in Tarragona, Spain. During the first round, the Appellant was not able to achieve the required absolute majority with 23 votes received in favour, 36 against and 17 blanks. As a result, a second voting round was held where the Appellant was also not able to achieve a majority – 26 votes in received favour, 43 against and 7 blank votes.

However, during the voting a dispute arose as to the interpretation of Bye-law to Rule XI of the ICMG Charter in its part which stipulates that in the event that a candidate fails to obtain an absolute majority, a second ballot shall be taken for which absolute majority is not required. As the dispute was not resolved, it was agreed that the Appellant would not be officially declared elected for the position of Secretary General and that the dispute should be referred to the Court of Arbitration for Sport (the “CAS”).

After the GA meeting, the Appellant submitted a legal opinion to the ICMG President requesting that the decision of the GA is reconsidered and his election is confirmed on the basis of the correct interpretation of the provision of By-law to Rule XI of the ICMG Charter.

On 5 December 2017 and after receipt of the above-mentioned legal opinion, the ICMG President sent a letter to the Appellant (the “Second Appealed Decision”) which in its pertinent parts provided that:

“...[a]fter having examined all the relative documents presented to us regarding your case as well as the documents submitted by you directly, EB members having unanimously concluded that the best way forward is for you to appeal to CAS following the decision of the General Assembly and as clearly stated in the Minutes”.

On 11 December 2017, the Appellant filed its statement of appeal in accordance with Articles

R47 and R48 of the Code of Sports-related Arbitration (the “Code”).

On 6 March 2018, the Respondent filed its answer to the appeal including, *inter alia*, an exception of inadmissibility of the appeal against the Decision of 13 October 2017, of lack of jurisdiction to examine the letter of 5 December 2017 and of estoppel.

On 2 April 2018, the Appellant filed his observations on the exception of inadmissibility, lack of jurisdiction and estoppel.

On 18 April 2018, in view of the Parties’ positions, the Panel decided to issue an award based on the Parties’ written submissions and invited the Parties to submit their final written observations allowing them to develop their arguments and submit legal materials but were not allowed to submit new arguments or new means of evidence. The Panel further advised that it would do its utmost to issue the operative of its decision by 4 May 2018 (i.e., before the start of the 2017 Games) but could not exclude that more time could be needed.

Reasons

1. Admissibility of the appeal in light of the dies a quo and the notion of decision

Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

The admissibility of the appeal is contested by the Respondent on the account of late filing. The Respondent argues that the

twenty-one-day term should be counted as from the date of the General Assembly meeting whereupon the First Appealed Decision was adopted. This is due to the fact that the Appellant was present at the meeting and therefore acquired knowledge of the decision “on the spot”. Thus, the deadline for submission of claim before CAS commenced on 13 October 2017. As the statement of appeal was filed on 11 December 2017, the term under Article R49 of the Code had already expired and the appeal is inadmissible.

The Appellant, on the other hand, submits that the term under Article R49 of the Code should be counted as from the date on which the Minutes from the General Assembly meeting were sent to him via email on 20 November 2017. Therefore, the appeal is not time-barred and should be declared admissible.

Furthermore, the Appellant alleges that the letter sent to him by the ICMG President Mr. Amar Addadi on 5 December 2017 (that is the Second Appealed Decision) constitutes a second appealable decision the time limit to which was also not time-barred.

Prior to examining the legal issue at hand, the Panel wishes to note that failure to comply with the time-limit period under Article R49 of the Code results in the loss of the Appellant’s substantive claim. As recognized in CAS 2013/A/3135 (par. 27 of the award), the inadmissibility, if the appeal is not lodged in time, is automatic and the party’s reaction or non-reaction cannot change such consequence: the expiration of the deadline has a preclusive effect and this effect cannot be abrogated by the Panel as it does not have the discretion to extend the term.

The Panel should also be extremely mindful of the fact that the time limit under Article R49 of the Code is the only one that is strict and cannot be modified according to Article R32.2 of the Code: “*Upon application on justified grounds, either the President of the Panel or, if he has not yet been appointed, the President of the relevant Division, may extend the time limits provided in these Procedural Rules, with the exception of the time limit for the filing of the statement of appeal, if the circumstances so warrant*”. (Emphasis added). As stated in CAS 2006/A/1168: “R32 contains an important exception to any such discretion. Neither the President of the relevant Division nor the President of this Panel has any discretion to extend the time limit for the filing of the Statement of Appeal”.

Having in mind the foregoing, the correct resolution of the admissibility concern *in casu* boils down to the issue of the starting point of the calculation of the twenty-one-day time limit period for appeal (*dies a quo*) and whether the Panel should adopt the view of the Appellant that the period started as from the receipt of the Minutes of the GA, or that of the Respondent, that the period started immediately after the decision was adopted on the meeting of the GA and thus the Appellant acquired knowledge of this decision.

As a preliminary matter, essential importance needs to be attached to the determination of the law that needs to be applied to the question of calculation of the time limit under Article R49 of the Code (such determination being without prejudice to the law applicable to the merits). Swiss law should be applied in this regard as *lex loci arbitri* (A. Rigozzi, E. Hasler and M. Noth, “Sports arbitration under the CAS rules”, Chapter 5 in M. Arroyo (ed.) *Arbitration in Switzerland: the practitioner’s guide*, Kluwer (2013) pp. 885–

1083, 1002 and the CAS jurisprudence cited there, namely: CAS 2002/A/403, CAS 2002/A/408, CAS 2010/A/2315, CAS 2010/A/2401). This is because the relevant time limit in the absence of anything to the contrary in the statutes and regulations of the respective federation is the 21 days period specified in the CAS Code (A. Rigozzi, E. Hasler and M. Noth, “Sports arbitration under the CAS rules”, Chapter 5 in M. Arroyo (ed.) *Arbitration in Switzerland: the practitioner’s guide*, Kluwer (2013) pp. 885–1083, 1002 and the CAS jurisprudence cited there, namely: CAS 2002/A/403, CAS 2002/A/408, CAS 2010/A/2315, CAS 2010/A/2401). Unlike the case with other sports associations, the ICMG Charter is silent as to if the time limit to appeal starts to run from communication or notification of the decision or if a decision within the meaning of Article R47 of the Code must be written. In order to establish whether the appeal is filed within the prescribed time-limit, the Panel should analyze two issues: (i) which acts form the decision that is appealed and (ii) what is the meaning of the “receipt of the decision” which will set out the specific *dies a quo*. In analysing the issue of admissibility, it is first necessary to consider what is a “decision” for the purposes of Article R47 of the Code. According to the CAS jurisprudence, a “decision” within the meaning of Article R49 of the Code should be construed to mean the complete and final decision, including the reasons for it (CAS 2007/A/1355). In short, (i) what constitutes a decision is a question of substance not form; (ii) a decision must be intended to affect and affect the legal rights of a person, usually, if not always, the addressee and (iii) a decision is to be distinguished from the mere provision of information. Further under Swiss law, the *lex fori*, “*The authority notify its decision to the parties in writing*” (article 34.1 of the Federal

Law on Administrative Procedure). The Panel, therefore, needs to closely observe the relevant contents of the said Minutes in order to reach an accurate conclusion on this issue.

One possible interpretation regarding the *dies a quo* may be that the deadline to appeal has not yet started as long as the decision reached during the GA meeting, by way of the minutes, has not been formally notified. As to the question of receipt of the decision, the CAS Code is silent with regard to the meaning of “receipt” in Article R49. Hence, as pointed out by scholars referring to Swiss law, a decision is deemed to have been received (or as the case may be, notified) at the time when it came into the so-called “sphere of control of its addressee” (A. Rigozzi, E. Hasler and M. Noth, *opp. cit.*, at 1003 citing BGE 118 II 42 para. 3b.; U. Haas, *opp. cit.*, at 11). Furthermore, Article 75 of the Swiss Civil Code determines the obtaining of knowledge as the relevant criterion to determine *dies a quo* with regard to decision of organisation. This solution is further confirmed by CAS jurisprudence. In the context of a decision of a supreme organ of an association passed via voting during a live meeting where the Appellant was present, a formal application of the interpretation would necessarily lead to the conclusion that the starting point for the calculation of the time-limit under Article R49 of the Code with regard to the Appellant’s statement of appeal started to run as from the date of the GA meeting. However, the Panel is of the view that the particular circumstances of the case at hand may be taken into consideration. Thus, a letter of the President of the association sent to the Appellant nearly two months after the GA containing an offer to arbitrate which is valid under the CAS Code and the applicable Swiss law and which was accepted by the Appellant through the

submission of its statement of appeal may render the analysis with regard to the *dies a quo* calculation non-conclusive. Furthermore, in line with the jurisprudence of the Swiss federal Tribunal (judgement 4A_246/2011; judgement 4A_460/2010 of April 18, 2011 at 3.2.2; 4A_548/2009 of January 20, 2010 at 4.1; 4A_460/2008 of January 9, 2009 at 602 with references), it is to the benefit of both parties to the dispute as well as of promotion of the quick and specialized resolution of sport cases by well-versed bodies such as CAS to decide borderline cases as this one *in favorem arbitrandum*. Based on the foregoing reasons, the appeal should be considered timely lodged and therefore admissible.

2. CAS jurisdiction subjected to the existence of a decision

Article R47 of the Code provides as follows: *An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.*

The jurisdiction of the CAS principally derives from Rule VII.4 of the ICMG Charter which provides the following:

“The decisions of the ICMG are taken in conformity with the provisions of the ICMG Charter. Any dispute relating to their application or interpretation must be submitted to the Court of Arbitration of Sport (CAS). The decisions of the CAS are final”.

CAS jurisdiction is also based on the ICMG President’s letter of 5 December 2017.

CAS has jurisdiction with regard a decision i.e. a ruling capable of affecting the addressee of the decision rights. This impact should be examined on a case by case basis. Such impact may be a question of fact as well as a question of law and by definition should imply the occurrence of a change relating to the addressee’s rights and/or interests. In this respect, CAS has obviously jurisdiction with regard the decision of the GA of an association passed on the GA meeting not to declare a candidate elected at a top position in the association (the First Appealed Decision). However, CAS has no jurisdiction with regard a letter issued by the President of the association representing an offer to arbitrate since no negative changes occurred as a result of it towards the addressee and it does not amount to a decision under the association’s rules (the Second Appealed Decision).

3. Interpretation of a provision regarding the majority requisites for the election of candidates

The dispute between the Parties primarily revolves around the correct interpretation of the ICMG Charter, and specifically By-law to Rule XI which in its relevant parts reads:

“When there is only one candidate for a post, he must obtain an absolute majority in the first ballot. Should he fail to obtain an absolute majority, a second ballot will be taken for which absolute majority is not required”.

According to the Appellant, during the second round vote where there is only one candidate for the post, no majority at all is needed and the candidate may be elected when there are any numbers of votes in his favour.

Conversely, the Respondent disagrees with the analysis put forward in the appeal brief that any number of votes cast in favour of a sole candidate during the second round of elections would suffice for that candidate to be elected. The respective rule in the Charter states that an absolute majority is not required but this cannot amount to considering that any numbers of votes would be enough. If this was the rationale behind this rule, there would be no need of having second round of votes.

Additionally, the Respondent believes that the ICMG GA decision not to elect the Appellant for the position of Secretary General is justified by policy considerations and democratic reasons of not electing someone that is not accepted by most of the electorate as the ICMG is an international organisation entrusted with a role in public interest to play through the promotion of sport and Olympism for the benefit of the public at large which cannot be ignored.

According to CAS jurisprudence, statutes and regulations of an association shall be interpreted and construed according to the principles applicable to statutory interpretation rather than those applicable to contractual interpretation. The interpretation of the statutes and rules of a sport association has to be rather objective and always start with the wording of the rule which falls to be interpreted i.e. emphasis shall be put on literal and systematic interpretation. The adjudicating body will have to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax. In its search, the adjudicating body will have further to identify the intentions (objectively construed) of the association which drafted the rule, and such body may also take account of any relevant historical background which illuminates its

derivation, as well as the entirely regulatory context in which the particular rule is located. Following the aforementioned methods of interpretation, a provision regarding the elections majority requisites which is not entirely clear, i.e. according to which no absolute majority is required during the second ballot of elections for the position of Secretary General where there is a sole candidate failing to obtain absolute majority during the first round, shall not be interpreted to mean that no majority at all is required. The respective candidate would still have to obtain higher number of positive votes than negative ones in order to be successfully elected. It would be against the democratic representativeness and the public purpose of the international association to elect someone that is not accepted by most of the electorate. The purpose of the rule, is to ensure efficient and timely election but at the same time appointment of a candidate who is acceptable by the majority of the members.

The Panel thus determines that the provision of Bye-law to Rule XII of the ICMG Charter, according to which no absolute majority is required during the second ballot of elections for the position of Secretary General where there is a sole candidate failing to obtain absolute majority during the first round, shall not be interpreted to mean that no majority at all is required. In the Panel's view, the respective candidate would still have to obtain higher number of positive votes than negative ones in order to be successfully elected.

Insofar in elections for a position with a single candidate a majority is indeed needed also in the second round, the correct voting procedure would require that the ballot papers contain a "YES" and "NO" box in order to calculate the votes and decide if the majority was reached or not. .

Based on the foregoing, the Panel finds no reasons to find the GA decision invalid which is therefore upheld.

Decison

The Court of Arbitration has no jurisdiction to review the ICMG President letter dated 5 December 2017.

The appeal filed by Isidoros Kouvelos on 11 December 2017 against the decision of the General Assembly of the ICMG rendered on 13 October 2017 and relating to the election of the Secretary General is admissible.

The appeal filed by Isidoros Kouvelos on 11 December 2017 against the decision of the General Assembly of the ICMG rendered on 13 October 2017 and relating to the election of the Secretary General is dismissed.

CAS 2018/A/5733

Koninklijke Racing Club Genk (KRC Genk) v. Manchester United Football Club
15 November 2018

Football; Training compensation; Offer of a contract under Art. 6 para. 3 Annexe 4 RSTP and compatibility with Belgian law; Exception to the exception to the general principle of training compensation; Obligation of clubs to justify that they are entitled to training compensation

Panel

Prof. Luigi Fumagalli (Italy), President
Mr Frans de Weger (the Netherlands)
Prof. Ulrich Haas (Germany)

Facts

Koninklijke Racing Club Genk (“Genk”) is a football club member of the Royal Belgian Football Association (“Union Royale Belge des Sociétés de Football-Association” - “URBSFA”), and a category II club, under the terms of the applicable FIFA Regulations on the Status and Transfer of Players (the “RSTP”).

Manchester United Football Club (“MU”) is a category I club under the terms of the applicable RSTP.

Mr Indy Boonen, born on 4 January 1999 (the “Player”), is a football player of Belgian nationality, who started to train with Genk on 18 May 2006.

According to the passport issued by the URBSFA, the Player was registered as an amateur with Genk from 1 July 2010 until 30 June 2014; *i.e.* from season 2010/2011 until season 2013/2014 (four seasons). During his time with Genk, the Player’s performances

were assessed and transcribed in unsigned forms. In April 2014, the Player, who was at the time 15, informed Genk of his decision to deregister from the club. The circumstances around the Player’s “*deregistration*” are disputed:

- At the hearing before the Court of Arbitration for Sport (“CAS”), Mr Roland Breugelmans, Youth Director of Genk, explained that, in April 2014, Genk informed in writing the Player’s family that it intended to keep the Player for the next season but not his brother, Seppe, who was also trained by the club at the time. The Player’s father urged Genk to keep his two sons and, in view of the club’s inflexible position, decided to deregister both, the Player and his brother.
- MU submitted a written statement (dated 26 July 2017), whereby the Player’s father affirmed the following: “(...) *I am informed by MU’s lawyers that Genk are seeking to argue that Indy was clearly part of their future plans and would have been offered a contract if Genk had been legally able to do; I do not agree with this. (...) I am told Genk have tried to justify their interest in keeping Indy by reference to Indy’s playing record with Genk and the national team. As I recall, whilst Indy did play regularly for Genk’s youth teams, he played less in his final season (2013/14) due to an injury. Also, Indy did not play in a competitive match for the national team whilst he was with Genk. In any event for the reasons explained above, these statistics do not tell the full story*”.

On 1 August 2015, the Player signed a two-year scholarship agreement with MU.

On 24 August 2015, the Single Judge of the Players’ Status Committee authorised the transfer of the Player, who was still a minor, from Belgium to England, where he was registered as a professional with MU as of 4 September 2015.

On 20 October 2015, Genk sent a letter to MU

claiming the payment of a training compensation of EUR 300'000 following its registration of the Player in September 2015. On 4 November 2015, MU asked Genk to provide “details / evidence to demonstrate that [it] has retained the right to claim Training Compensation in respect of the Player in accordance with Article 6 (3) of Annex 4 to the [RSTP]”. On 20 November 2015, Genk answered the following: “Despite [its] clear intentions and interest [...] in retaining the services of its talented player Indy Boonen for the future, the club was unable to offer a contract to him, due to mandatory national law. In particular, according to mandatory Belgian laws specific to sport, a football player cannot enter into an employment agreement before the age of 16 or before he has finalized his fulltime scholar obligations”.

On 17 February 2016, MU argued that Genk was not entitled to claim training compensation simply because it was unable to offer a contract to the Player due to mandatory national laws. According to MU, the training compensation was conditional upon Genk showing that it had a *bona fide* and genuine interest in retaining the Player for the future.

On 5 May 2017, Genk requested FIFA to order MU to pay in its favour an amount of EUR 300,000 plus 5% interest *p.a.* as of 30 days after the Player’s registration with the English club. On 30 November 2017, the sub-committee of the FIFA Dispute Resolution Chamber adopted a decision (the “Appealed Decision”) in which it accepted that, by reason of its national law, Genk was not in a position to offer a contract to the Player. Under these circumstances, it held that it was Genk’s duty to provide sufficient evidence that it had a genuine and *bona fide* interest in keeping the Player in its team and that it showed a proactive attitude to clearly manifest that it intended to count on the Player for the future. In light of these considerations, the sub-committee of the FIFA Dispute Resolution Chamber examined the documentation submitted by Genk and

“highlighted that, although the player was registered with [Genk] until 30 June 2014, his last evaluation dates back to 21 December 2013. Equally, the sub-committee deemed that the comments outlined in the player’s evaluations do not constitute conclusive evidence demonstrating that [Genk] had a genuine and bona fide interest in keeping the player in its team beyond the 2013-2014 season. Likewise, the sub-committee underscored that [Genk] had not provided documentation demonstrating the player’s role in [its] team for the future or that it had communicated such future plans to the player and/or his parents. Consequently, the sub-committee concurred that [Genk] had not demonstrated a proactive attitude vis-à-vis the player, so as to clearly manifest that it intended to count on the player for the future”. As a result, the sub-committee of the FIFA Dispute Resolution Chamber concluded that Genk had not provided sufficient and conclusive evidence justifying that it was entitled to receive training compensation. Hence, it held that Genk failed to comply with the prerequisites of Article 6 para. 3 of Annexe 4 RSTP and rejected its claim.

On 9 May 2018, Genk filed a Statement of Appeal against the Appealed Decision with the CAS in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the “Code”).

Reasons

1. Offer of a contract under Art. 6 para. 3 Annexe 4 RSTP and compatibility with Belgian law

Genk had argued that, in view of the specificity of its national legislation, Article 6 para. 3 of Annexe 4 RSTP was not applicable to Belgian clubs, which are not in a position to “offer the player a contract”, without being exposed to criminal charges. As a consequence and according to Genk, Belgian clubs were automatically entitled to training compensation, whenever one of

their players, who is under the age 16, moved to another association inside the territory of the EU/EEA.

The Panel held that, although it was undisputed that, pursuant to Belgian laws, it was impossible for Genk to enter into an employment contract with a minor under the age of 16 without facing criminal prosecution, it could not agree that there was some kind of “Belgian exception”, releasing Belgian clubs from the requirements set forth under Article 6 para. 3 of Annexe 4 RSTP. For the Panel, the very starting point of the Appellant’s line of argumentation, i.e. that Belgian law forbade any kind of employment offers below the age of 16, did not appear very convincing, as Belgian law only prohibited the execution of an employment contract with a minor below the age of 16. The purpose of the provision was clear, i.e. to protect youngsters and to ensure that they finish education first before entering onto the labour market. Nothing in the rules pointed into the direction that an employer was prevented to make a (binding) offer to the minor, e.g. to employ him/her – subject to his/her or his/her representative’s consent – once s/he would have turned 16.

2. Exception to the exception to the general principle of training compensation

The Panel also found that Article 6 para. 3 of Annexe 4 RSTP did not require a club to offer a professional contract to all its young amateur players for fear of losing all right to training compensation. Such an obligation would have been too costly for the clubs and would have contravened the spirit and purpose of the FIFA transfer rules, which are set out in order to grant to clubs the necessary financial and sportive incentives to invest in training and education of young players. Even if the player had not been

offered a contract, the training club was entitled to training compensation provided that it could “*justify that it is entitled to such compensation*”. Therefore, even without offering a professional contract, clubs had an opportunity to protect their investment on young players.

3. Obligation of clubs to justify that they are entitled to training compensation

Hence, according to Article 6 para. 3 of Annexe 4 RSTP, a club could claim training compensation provided that one of these two alternative requirements was met: it had offered the player a professional contract (“First Alternative”) or it could otherwise justify that it was entitled to training compensation (“Second Alternative”). The fact that Belgian clubs were prohibited from offering the player a contract because of their national legislation (i.e. they could not meet the requirements of the First Alternative), did not exempt them from the obligation to prove that the Second Alternative was triggered; i.e. that they “*can justify that [they are] entitled to such compensation*”. In order to be entitled to a training compensation, the club had to demonstrate (absent any offer) that it had a “*genuine and bona fide interest in retaining the services of the player*” by taking a proactive attitude vis-à-vis the player so as to clearly show that it still counted on him/her for the future season(s).

Assessing whether Genk had proven in these proceedings that it was entitled to training compensation albeit not offering a contract to the Player, the Panel found that the evidence provided by Genk did not ascertain its real intention of keeping the Player in its team. In particular, it did not support that Genk had adopted a proactive attitude vis-à-vis the Player so as to clearly show a *bona fide* and genuine interest in

retaining him for the future. Above all, Genk had not demonstrated that, when the Player had announced that he was leaving the club, it had taken all the necessary measures to persuade him to stay. There was not any evidence that Genk had sought to make any contact with the Player or his father after the end of the 2013/2014 season, even though the Player had not registered with MU until the beginning of September 2015. Genk had not even submitted internal notes or reports suggesting that it was disappointed by the Player's departure or that his deregistration was considered as a big loss for the club. Likewise, there was no letter from Genk to the Player asking him to reconsider his decision of leaving the club. There was not even any witness statement from any director or official of Genk to support its assertions of interest in the Player. At the hearing before the CAS and for the first time, Mr Roland Breugelmans had confirmed that, in April 2014, he had had a heated discussion with the Player's father, who wanted both of his sons to remain with Genk. Given the club's refusal to keep Seppe Boonen, the Player's father had decided to deregister both of his sons, which - the Panel had the impression - did not seem to have affected Mr Breugelmans, who apparently had done nothing more than simply acknowledge the decision of the Player's father. At least, he had not asserted otherwise before the Panel.

The Panel was thus of the opinion that Genk had not shown persuasive evidence of a *bona fide* and genuine interest in retaining the Player on its team for the 2014/2015 season. As a consequence, the Panel held that Genk had not justified that it was entitled to training compensation.

Decision

As a result, the Panel concluded that the appeal had to be dismissed and the decision issued by the sub-committee of the FIFA Dispute Resolution Chamber on 30 November 2017 confirmed.

CAS 2018/A/5745

Pan-American Team Handball Federation (PATHF) v. International Handball Federation (IHF)

26 October 2018 (operative part of 13 September 2018)

Handball; Governance; Discretion of Panel to exclude evidence under Article R57.3 CAS Code; “Proper notice” in the meaning of Article 67(3) Swiss Civil Code; Consequences of defect convening notice/agenda; Prerequisites for voting on amended agenda item/motion; New motions under Article 12.3.9 IHF Statutes; Delegation by general assembly of its competences; Nullity of resolutions; No reallocation by CAS of costs of previous instances

Panel

Prof. Martin Schimke (Germany), President
Mr Diego Ferrari (Argentina)
Mr Pierre Müller (Switzerland)

Facts

The Pan-American Team Handball Federation (the “Appellant” or the “PATHF”) is the continental confederation responsible for governing the sport of handball in Pan-America and is affiliated to the International Handball Federation. The PATHF has its registered office in Buenos Aires, Argentina.

The International Handball Federation (the “Respondent” or the “IHF”) is the international sports federation responsible for governing the sport of handball worldwide. The IHF has its registered office in Basel, Switzerland.

The present proceedings relate to the legality of a motion (the “Motion”) presented by the

IHF President to divide the PATHF into two confederations, namely a “*North America and the Caribbean Handball Confederation*” and a “*South and Central America Handball Confederation*”, the amendment of this Motion shortly before the IHF Congress, and the decision issued by the IHF Congress ensuing from this amended motion.

On 9 June 2017, in preparation for the IHF Congress to be held in Antalya, Turkey, on 11 November 2017, the IHF President submitted the Motion to the IHF Head Office.

On 18 July 2017, the IHF invited the PATHF to the IHF Council Meeting to be held on 18 August 2017 in Tbilisi, Georgia (the “Tbilisi Council Meeting”). While the Parties disagree as to the content of the invitation, the Panel accepted that a “Motion from the IHF President” was duly announced.

On 18 August 2017, during the Tbilisi Council Meeting, the Motion was presented by the IHF President. The Council voted in favour of the Motion and decided for the Motion to be submitted to the Ordinary IHF Congress to be held in Antalya, Turkey on 11 and 12 November 2017.

On 18 September 2017, the Tbilisi Council Meeting Minutes were sent to all IHF Member Federations and Confederations, amongst others setting out the justification for the Motion.

On 29 September 2017, the IHF sent the IHF Congress Agenda, included the point: “12.1 Motion from the IHF President”, to, *inter alia*, the IHF Member Federations and Confederations.

On 11 October 2017, a working document regarding the Motion was distributed to the delegates. This working document explained that Article 10.2.2 of the IHF Statutes would

be amended by splitting the PATHF into two confederations.

On 9 November 2017, during the IHF Council Meeting in Antalya, Turkey (the “Antalya Council Meeting”), the IHF Council agreed with the IHF President’s proposal to ask the IHF Congress to authorise the IHF Council to evaluate and take a decision on the Motion related to the Pan-American continent (the “amended motion”). The Antalya Council Meeting Minutes reflect that the following discussions took place in respect of the amended motion:

On 11 November 2017, on the occasion of the IHF Congress, the IHF Congress, by a purported two-thirds majority (the minutes reflect the following votes: Yes: 102; No: 26; Abstain: 24) that is disputed by the PATHF, decided to “*delegate its authority to the IHF Council to discuss, evaluate and take a decision on the motion regarding the IHF Statutes related to the Pan-American continent and consequently on the relevant IHF Statutes changes*” (the “Congress Decision”). After presenting the content and purpose of the amended motion, the IHF President proceeded immediately with the voting. No discussion took place on such amended motion prior to the vote. In particular, the PATHF President was only given the floor after the vote. He requested a vote by secret ballot, which was neither addressed by the IHF President, nor submitted for approval or disapproval by the Congress members.

The IHF Congress Minutes reflect that the following discussions took place in respect of the Motion:

“Mr Brihault informed the Congress that one election-related Statutes motion had been submitted to the Congress and gave the floor to President Moustafa who addressed the Congress delegates, stating that the presentation of the motion related to the Pan-American continent would take a long time, therefore he will

explain the main concept of the motion. In addition, he referred to the meeting of the Pan-American Team Handball Federation in the evening prior to the Congress, during which he made a detailed presentation of the motion.

President Moustafa informed the Congress that the motion concerned had been presented to the IHF Council in its meeting in Tbilisi, Georgia on 18 August 2017, stating that the Council (with four abstentions) was in favour of the content of the motion and agreed to submit the motion to the Congress as per Article 13.3, point 11 of the IHF Statutes.

[...]

President Moustafa informed the Congress that the IHF Council decided in its meeting in Antalya, Turkey on 9 November 2017 to ask the Congress to authorise the Council to discuss, evaluate and take a decision on the motion regarding the IHF Statutes related to the Pan-American continent.

President Moustafa then asked the Congress delegates if they agree on authorising the IHF Council to discuss, evaluate and take a decision on the motion regarding the IHF Statutes related to the Pan-American continent and consequently on the relevant IHF Statutes changes.

The delegates cast their votes by raising their voting cards. The election officer and tellers counted the following votes (counting of votes was repeated to guarantee the correct result of the voting): Yes: 102; No: 26; Abstain: 24.

President Moustafa thanked the Congress delegates for authorising the IHF Council to discuss, evaluate and take a decision on the motion regarding the IHF Statutes related to the Pan-American continent and consequently on the relevant IHF Statutes changes.

President Moustafa gave the floor to Mr Mario Moccia, President of Pan-American Team Handball Federation, who stated that he abstained from voting when the motion concerned was presented to the IHF Council meeting in Tbilisi, Georgia on 18 August 2017. He also referred to the autonomy of the Continental Confederations according to Article 12.3, point 10 of the IHF Statutes, stressing that a continent’s specific issue shall be decided by the continent concerned. Referring to the voting procedure, he remarked that the voting on changes to the IHF

Statutes should be by secret ballot to ensure that delegates can express themselves freely. He asked President Moustafa to reconsider the motion, adding that the Pan-American continent is united and wants to stay united.

President Moustafa informed the Congress that all details related to the motion concerned, including the IHF future plan in Pan-America, will be sent to the IHF Member Federations to give them the possibility to have the full picture of the disadvantages of the current system and the benefits of the new system, which proves that the IHF is working in the best interest of handball”.

On 7 December 2017, the PATHF filed an appeal with the IHF Arbitration Commission, requesting it to declare the Congress Decision null and void.

On 9 January 2018, the IHF President wrote to the IHF Member Federations and Continental Confederations to provide them with details related to the Motion concerned.

On 14 January 2018, the IHF Council met in Zagreb, Croatia (the “Zagreb Council Meeting”). Having first agreed to suspend the PATHF according to Article 10.2.3.2 IHF Statutes for an alleged violation by the PATHF of the IHF Statutes, the IHF Council then agreed “to divide the continent of Pan-America into two”, i.e. the North America and the Caribbean Handball Confederation (“North”) and the South and Central America Handball Confederation (“South”) (the “Zagreb Council Decision”).

On 9 February 2018, the IHF President informed the IHF Member Federations and Confederations that the statutory amendments in relation to the division of the PATHF into two confederations would be effective and in force from 11 February 2018.

On 13 February 2018, the PATHF was provided with the minutes of the Zagreb Council Meeting.

On 14 February 2018, the IHF Arbitration Commission issued its decision, following the appeal filed by the PATHF on 7 December 2017 against the Congress Decision. The IHF Arbitration Commission rejected the PATHF’s appeal.

On 6 March 2018, the PATHF filed an appeal with the IHF Arbitration Tribunal against the IHF Arbitration Commission’s decision dismissing the PATHF’s appeal against the Congress Decision.

On 14 March 2018, the PATHF filed a new appeal with the IHF Arbitration Commission, this time against the Zagreb Council Decision.

On 1 May 2018, the IHF Arbitration Tribunal rendered its decision (the “Appealed Decision”) regarding the appeal filed by the PATHF on 6 March 2018 against the Decision of the IHF Arbitration Commission dated 14 February 2018. The IHF Arbitration Tribunal dismissed the PATHF’s appeal.

On 4 May 2018, the grounds of the Appealed Decision were communicated to the PATHF.

On 14 May 2018, the IHF Arbitration Commission issued its decision on the appeal filed by the PATHF on 14 March 2018 against the Zagreb Council Decision, rejecting the PATHF’s appeal.

On 15 May 2018, the PATHF lodged an appeal with CAS against the Appealed Decision, pursuant to Article R48 of the CAS Code of Sports-related Arbitration (the “Code”) The PATHF designated its Statement of Appeal as its Appeal Brief, pursuant to Article R51 Code.

On 28 August 2018, a hearing was held in Lausanne, Switzerland.

Reasons

1. Discretion of Panel to exclude evidence under Article R57.3 CAS Code

Having to start with confirmed its jurisdiction over the case as well as the admissibility of the appeal, the Panel continued by examining the objection brought forward during the hearing by the PATHF regarding the admissibility of the IHF's exhibit R-1 (*i.e.* the letter dated 9 June 2017, by means of which the IHF President submitted his Motion to divide the PATHF into two confederations to the IHF Head Office), and PATHF's request for the respective document to be excluded from the file on the basis of Article R57.3 of the Code, on the grounds that it had been available to the IHF, but was never submitted until the present proceedings before CAS.

The Panel held that it was clear from the language of Article R57.3 of the Code that while a CAS Panel may exclude evidence presented by the parties which had been available to them or could reasonably have been discovered by them before the challenged decision was rendered, it is not bound to do so. Indeed, the practice of CAS with respect to the application of this rule is restrictive, *i.e.* exclusion of evidence should be the exception rather than the rule, and should generally be applied only in "*exceptional circumstances of abusive or inappropriate conduct by the parties submitting new evidence*". Provided the other party(ies) is/are granted the opportunity to address the new evidence, such an approach is in keeping with CAS' *de novo* power of review under Article R57 of the Code, and with the parties' right to be heard. Based on the above, the Panel found that the PATHF had not established that exhibit R-1 as filed together with the IHF Answer was filed in an abusive or inappropriate way, but rather

that its filing in the present proceedings was in keeping with the *de novo* power of review of CAS as set out in Article R57 of the Code. Accordingly, the Panel, in line with the IHF's request to dismiss the PATHF's objection, decided to dismiss the PATHF's request to exclude exhibit R-1 from the case file.

2. "Proper notice" in the meaning of Article 67(3) Swiss Civil Code

Thereupon the Panel turned to the Appellant's allegation that the Motion had not been presented to the IHF Member Federations prior to the IHF Congress and that the IHF Statutes would not allow voting on any item without proper notice. That the IHF Statutes rather require that any motion submitted by the IHF Council shall be submitted to the IHF Head Office five months before the IHF Congress, that such motion must be included in the Congress Agenda, which shall be published 6 weeks prior to the IHF Congress and that motions submitted past such 5-month deadline or during the IHF Congress shall require a 2/3 majority "to be heard", namely to be submitted to the discussion and decision by the Congress delegates. According to the Appellant, the Appealed Decision has therefore been taken in violation of the IHF Statutes and Swiss law and shall thus be considered as null and void and annulled.

The Panel first found, as had been submitted by the Respondent, that the Motion complied with the relevant formal prerequisites as set out in Article 12 IHF Statutes, to the extent that the IHF President had submitted his Motion to the IHF Head Office on 9 June 2017 (*i.e.* more than 5 months prior to the IHF Congress), the Motion was included in the IHF Congress Agenda as distributed to the

delegates on 29 September 2017 (*i.e.* more than 6 weeks prior to the IHF Congress), and a working document explaining the content of the Motion was distributed to the delegates on 11 October 2017 (*i.e.* more than one month prior to the IHF Congress). However, the Panel also stressed that a notice alone is not sufficient, but that rather, pursuant to Article 67(3) SCC, a “*proper notice*” must be given, which does not only comprise formal aspects but also material aspects. According to the Swiss Federal Tribunal, as a general rule, it is necessary that the items on which the general assembly is requested to rule are placed on the agenda and duly announced. Whether or not this requirement is fulfilled is decided in each case/situation, based on the specific circumstances: an item is duly placed on the agenda when, on the basis of the agenda and the statutes, the members know on which points it will be necessary to deliberate and, if necessary, to take a decision.

3. Consequences of defect convening notice/agenda; Prerequisites for voting on amended agenda item/motion

In follow up, the Panel further held that in case a convening notice does not include a full agenda, or where the description of a subject on the agenda is imprecise, unclear or misleading, there is a defect that could lead to the annulment of the underlying decisions. Whether or not the decision should be set aside depends, however, on the assessment of the concept of defect and the gravity of the violation. It is therefore essential to determine whether or not the alleged defect could have an influence on the decision.

The above in mind, the Panel continued by assessing whether “proper notice” was given to the IHF Congress in the specific circumstances. It held that insofar as the

only reference to the Motion in the IHF Congress Agenda was “Motion from the IHF President”, without indication of the content of the Motion, in principle this was not sufficient for the members to know on which issue they would have to deliberate on and, if necessary, to decide. Furthermore, the Panel found that also the working document, distributed to the members on 11 October 2017, did not enable the members to know on which issue they would have to deliberate on and decide. The Panel underscored that although the working document explained the Motion to split the PATHF into two confederations, it did not at all reflect the motion finally presented and voted on during the IHF Congress (*i.e.* to delegate the IHF Congress’ authority to the IHF Council to “*discuss, evaluate and take a decision on the motion regarding the IHF Statutes related to the Pan-American continent*”). In the Panel’s view, this was a fundamentally different motion - indeed, the Motion - announced in the IHF Congress Agenda on 29 September 2017 and explained in the working document distributed on 11 October 2017 - was finally not voted on during the IHF Congress, *i.e.* the IHF Congress did not decide whether or not to split the PATHF.

4. Prerequisites for voting on amended agenda item/motion

The Panel underlined that in case an initial motion – duly included as item on the agenda of a general assembly (*i.e.* here the motion by the IHF President to split a continental confederation into two confederations) is later on changed into a fundamentally different motion finally presented and voted on during the general assembly (*i.e.* to delegate the IHF Congress’ authority to the IHF Council to “*discuss, evaluate and take a decision on the motion regarding the IHF Statutes related to the Pan-American*

continent”), proper notice of the content of the amended motion had to be officially communicated prior to the vote to the delegates asked to vote on the amended motion, allowing the delegates to prepare themselves to deliberate and vote on the amended motion, and potentially discuss the motion within their respective National Federations. As regards the amended motion in the case at hand, the Panel found that it was first presented to the IHF Congress delegates during the IHF Congress itself and that furthermore, the IHF Congress delegates were not given the opportunity to consider the content of the amended motion or the implications that would arise from accepting it. Consequently, the Panel concluded that no proper notice was given for the motion that was ultimately presented during the IHF Congress resulting in the IHF Congress Decision.

5. New motions under Article 12.3.9 IHF Statutes

Furthermore, the Panel highlighted that while under Article 12.3.9 IHF Statutes, it is possible to submit new motions even during the IHF Congress, such motions may not concern amendments to the IHF Statutes. However, the amended motion, *i.e.* the motion to delegate the IHF Congress’ authority to “*discuss, evaluate and take a decision on the motion regarding the IHF Statutes related to the Pan-American continent and consequently on the relevant IHF Statutes changes*” to the IHF Council, could possibly result in amendments to the IHF Statutes, *i.e.* it was a vote of major importance, as also confirmed by the fact that a two-thirds majority was required for approval.

6. Delegation by general assembly of its competences

Thereupon the Panel turned to the question whether it was possible for the IHF Congress to delegate its power to amend the IHF Statutes to the IHF Council. The Panel acknowledged that some of the competences of a general assembly – *i.e.* an association’s supreme organ – can be delegated to other organs, while others cannot. Referring to Swiss legal doctrine in this regard, the Panel found the respective approach in determining when a general assembly is permitted to delegate its power to amend statutes to another body to be quite restrictive. That however, even the scholars whose interpretations appeared to be the least restrictive were of the view that in order to delegate competences, a statutory basis is required, without which the general assembly would ultimately have to decide on a modification of the statutes adopted by another body. The Panel further developed that even following the least restrictive interpretation approach, the prerequisites for the IHF Congress Decision to delegate its authority to the IHF Council to “*discuss, evaluate and take a decision on the motion regarding the IHF Statutes related to the Pan-American continent and consequently on the relevant IHF statutory amendments*” were clearly not complied with as there was neither a provision in the IHF Statutes providing for such delegation, nor was there a reservation made to possibly appeal the IHF Council decision to amend the IHF Statutes to the IHF Congress. Consequently, the Panel found that in the circumstances of the present case, the IHF Congress was clearly not entitled to delegate its authority to the IHF Council to “*discuss, evaluate and take a decision on the motion regarding the IHF Statutes related to the Pan-American continent and consequently on the relevant IHF statutory amendments*”.

7. Nullity of resolutions

In the next step the Panel addressed the question whether the IHF Congress Decision was null and void or otherwise avoidable. To start with the Panel observed that a resolution of a general assembly is null and void if it is afflicted with a severe deficiency. Or, put differently, nullity is given in cases where a resolution suffers from manifest defects, whether those be procedural or substantive. Whether a decision is challengeable or null and void must, in each case, be dealt with based on the specific circumstances of each individual case; in case it is not possible to determine with sufficient clarity whether a decision is challengeable or null and void it is commonly acknowledged that it is challengeable for reasons of legal certainty.

The Panel determined that the irregularities that occurred in the process leading up to the IHF Congress Decision were of such a severity that the threshold of null and void is reached. To the Panel, this was particularly so for three reasons: first, because there was no legal basis in the IHF Statutes for the IHF Congress to delegate its authority to amend the IHF Statutes to the IHF Council and because the IHF Congress was not provided with an opportunity to review or ratify the IHF Council's decision in this respect afterwards. Second, the motion presented by the IHF President at the IHF Congress was completely new for the IHF Congress delegates; no prior official information in respect of this new motion to delegate powers to the IHF Council had been provided; no proper notice was given in the IHF Congress Agenda, nor in the working documents distributed later. Third, the IHF Congress delegates were not provided with the opportunity to discuss the amended motion before it was put to the vote; while, in the Panel's opinion, the outcome of the vote might well have been different had the

delegates been granted the floor. Consequently, in light of the severe deficiencies in the process leading to the IHF Congress Decision, the Panel found that the only appropriate decision in this respect was to declare the IHF Congress Decision null and void. Given the above conclusion, the Panel annulled the Appealed Decision issued by the IHF Arbitration Tribunal on 1 May 2018.

8. No reallocation by CAS of costs of previous instances

Finally, the Panel addressed the PATHF's request for the IHF to reimburse the costs it incurred in the proceedings in front of the IHF Arbitration Commission and the IHF Arbitration Tribunal. The Panel, underlining that according to consistent CAS jurisprudence, it is not for the CAS to reallocate the costs of the proceedings before the previous instances, dismissed the request. It further clarified that therefore, and notwithstanding the conclusion that the IHF Congress Decision is null and void, the PATHF's appeal could not be entirely upheld.

Decision

As a result, the Panel concluded that the appeal had to be partially upheld and the decision issued by the Arbitration Tribunal of the International Handball Federation annulled. The Panel further declared the decision of the Congress of the International Handball Federation of 11 November 2017 to delegate its authority to the Council of the International Handball Federation to discuss, evaluate and take a decision on the motion regarding the IHF Statutes related to the Pan-American continent and consequently on the relevant IHF Statutes changes null and void.

CAS 2018/A/5800

Samir Arab v. Union Européenne de Football Association (UEFA)

14 November 2018 (operative part of 16 August 2018)

Football; Match-fixing; Restriction of power of review of sanctions limited to evident and gross disproportionate sanctions; Conditions for a reduction of an appellant's sanction based on substantial assistance; Procedural concept of *res iudicata*; Passive match-fixers' global conduct

Panel

Prof. Martin Schimke (Germany), President

Mr Manfred Nan (the Netherlands)

Prof. Denis Oswald (Switzerland)

Facts

Mr Samir Arab (the “Appellant” or the “Player”) is a professional football player of Maltese nationality and former player of the Maltese U-21 national team that participated in the UEFA European U-21 Championship 2017.

The *Union Européenne de Football Association* (the “Respondent” or “UEFA”) is an association under Swiss law and has its registered office in Nyon, Switzerland. UEFA is the governing body of football at European level. It exercises regulatory, supervisory and disciplinary functions over national federations, clubs, officials and players in Europe.

It is common ground between the parties that it appears from information provided by the Maltese police authorities, the Maltese criminal court, the UEFA Ethics and Disciplinary Inspector (the “EDI”), the proceedings before the UEFA Control, Ethics and Disciplinary

Body (the “UEFA CEDB”) and the UEFA Appeals Body, that the match-fixing plot under scrutiny was masterminded by Mr Ronnie Mackay, who is banned for life by the Malta Football Association (the “MFA”) for match-fixing back in 2012, and Mr Seyble Zammit, a 21-year old former football player who knows many of the players who are under scrutiny. Mr Mackay was approached by an Asian investor, and, in turn, convinced Mr Zammit to approach the players in order to make the fix happen. Mr Mackay was convicted and sentenced to two years in prison in respect of the present match-fixing plot by a Maltese first instance criminal court in August 2016. Mr Zammit was also convicted but was not sanctioned because he cooperated with the authorities.

On 7 or 8 March 2016, Mr Zammit contacted Mr Emanuel Briffa, another player of the Maltese U-21 national team, Mr Cesare and the Player and they all met at the Café Jubilee in Valetta, Malta, on or around 9 March 2016, where Mr Zammit proposed that they fix [the match against the Montenegro U-21 team, (“Match 1”)] Match 1. The Player maintained that he refused the offer. On or around 14 March 2016, Mr Briffa and the Player met Mr Zammit again at Café Jubilee. Also present at this meeting were Mr Mackay and a “*mysterious Asian investor named Fred*”. Again, an offer of EUR 3,000 was made to Mr Briffa and the Player to have a half-time score of 0:1 and a final score of 0:3. The Player maintained that he refused the offer.

On 23 March 2016, Match 1 between the Maltese U-21 national team and the Montenegro U-21 national team within the UEFA European U-21 Championship 2017 took place, ending with a score of 0:1 in favour of Montenegro. The UEFA Betting Fraud Detection System (“BFDS”) escalated the match, and it was reported that there was strong pre-match betting for Malta to lose

Match 1. However, the BFDS report suggested that there was no evidence that this match was actually manipulated for betting purposes, while stating that the possibility that it was targeted cannot be ruled out absolutely.

According to information provided by Mr Franz Tabone, Maltese UEFA integrity officer, the A-team manager of the Malta team contacted him in the morning of the day of Match 1. The manager informed him that he saw suspicious persons having coffee at the bar of the U-21 team in Floriana. Mr Tabone alerted the U-21 team manager Mr Jesmond Abela and informed the police officer Mr Scicluna, who is responsible for investigating match-fixing cases within Malta and is the contact person for the MFA. Following an investigation conducted jointly by the MFA and Mr Tabone, the latter reported that, during Match 1, persons were seen directly at the match stadium, who were strongly believed to be part of a gang engaged in match-fixing practices. Namely, Mr Ronnie Mackay was one of those persons. Mr Tabone also reported that he was informed by the father of the national U-21 player Mr Llywelyn Cremona, Mr Anton Cremona, that his son was approached by match-fixers.

On 26 March 2016, the U-21 Maltese national team player Mr Joseph Mbong informed the team manager that he had received a message on Whatsapp, containing an offer to fix the match against the national U-21 team of Czech Republic at the occasion of the UEFA European U-21 Championship 2017 (“Match 2”). This message had been sent from the cell phone number of Mr Zammit. On 27 March 2016, the MFA informed the police that Match 1 might have been targeted for manipulation, as well as upcoming Match 2 to be played on 29 March 2016. On 29 March 2016, Match 2 was played and ended with a score of 0:7 in favour of Czech Republic.

On 13 April 2016, the Player provided a witness statement to the Maltese police against Mr Mackay and Mr Zammit and he finally also testified in court against Mr Mackay.

On 23 January 2017, the EDI opened investigations in relation to Match 1 and 2. Eight persons were investigated, including the Player. On 7 February 2017, six players of the Maltese U-21 national team and Mr Tabone were questioned by the EDI. The Player was not among them. On 29 May 2017, the EDI submitted her report to the UEFA CEDB and requested disciplinary proceedings to be opened against eight players, including the Player. The charge against the Player was “*acting in a manner that was likely to exert an unlawful or undue influence on at least one UEFA match with a view of gaining an advantage for themselves and third parties*” in violation of Article 12(2)(a) UEFA Disciplinary Regulations (the “UEFA DR”). The EDI requested the UEFA CEDB to impose a life ban on any football-related activity on the Player, or, alternatively, to “*impose appropriate disciplinary sanctions on each of the persons involved depending on their role and involvement into the attempted match-fixing*”. On 29 May 2017, the UEFA CEDB opened disciplinary proceedings against the Player. On 15 June 2017, the Player submitted his defence, denying a violation of Article 12(2)(a) UEFA DR. On 14 December 2017, the UEFA CEDB rendered its decision (the “UEFA CEDB Decision”), whereby the UEFA CEDB found that the Player was not guilty of a violation of Article 12(2)(a) UEFA DR, but was found guilty of a violation of Article 12(2)(d) UEFA DR (a failure to “*immediately and voluntarily inform 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*”). The UEFA CEDB Decision contains the following operative part:

“The player Samir Arab is banned on all football-related activities until 31 December 2019”.

On 17 February 2018, the Player announced his intention to lodge an appeal against the UEFA CEDB Decision. On 19 February 2018, the Player filed the grounds of his appeal, requesting the UEFA Appeals Body to revoke the UEFA CEDB Decision and to impose a more equitable and just punishment for the violation of Article 12(2)(d) UEFA DR. On 9 April 2018, the UEFA Appeals Body rendered its decision (the “Appealed Decision”), whereby it rejected the Player’s request for a reduction of the sanction for a violation of Article 12(2)(d) UEFA DR, reasoning that the Player had violated Article 12(2)(a) UEFA DR and that the sanction imposed was actually too lenient and that “the sanction should have gone beyond what was imposed against the player for not reporting the approach”. The Appealed Decision [*inter alia*] contains the following operative part:

“1. The appeal lodged by Mr. Samir Arab is rejected. Consequently, the UEFA Control, Ethics and Disciplinary Body’s decision of 14 December 2017 is upheld”.

On 25 June 2018, the Player filed a Statement of Appeal challenging the Appealed Decision.

Reasons

1. Restriction of power of review of sanctions limited to evident and gross disproportionate sanctions

Given that the Player clarified at the hearing that he no longer requested the ban imposed on him to be entirely annulled, the sole issue to be determined by the Panel is whether the UEFA CEDB Decision issued on 14 December 2017, by means of which the Player was “banned on all football-related activities until 31 December 2019”, and as confirmed by means of the Appealed Decision, is to be reduced. It is established CAS jurisprudence that a sanction imposed

by a disciplinary body in the exercise of the discretion allowed by the relevant rule should be reviewed only when the sanction is evidently and grossly disproportionate to the offence. In this respect, the Panel fully adheres to the reasoning of the CAS panel in CAS 2011/A/2645 (para. 44 of the abstract published on the CAS website):

*“[T]his CAS Panel, even though it has full power of review of the disputed facts and law in the exercise of its jurisdiction, accepts the dictum in the award of 21 May 2010, CAS 2009/A/1870, [...] (§ 125), under which “the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence (see TAS 2004/A/547, [...], §§ 66, 124; CAS 2004/A/690, [...], § 86; CAS 2005/A/830, [...], § 10.26; CAS 2005/C/976 & 986, [...], § 143; 2006/A/1175, [...], § 90; CAS 2007/A/1217, [...], § 12.4)”. Far from excluding, or limiting, the power of a CAS panel to review the facts and the law involved in the dispute heard (pursuant to Article R57 of the Code), such indication only means that a CAS panel “would not easily ‘tinker’ with a well-reasoned sanction, i.e. to substitute a sanction of 17 or 19 months’ suspension for one of 18” (award of 10 November 2011, CAS 2011/A/2518, [...], § 10.7, with reference to CAS 2010/A/2283, [...], § 14.36). Therefore, a panel “would naturally (...) pay respect to a fully reasoned and well-evidenced decision (...) in pursuit of a legitimate and explicit policy” (*ibid.*)”.*

2. Conditions for a reduction of an appellant’s sanction based on substantial assistance

Insofar as the Player maintains that he provided “substantial assistance” in the way it is defined in the World Anti-Doping Code, even if the Player’s analogy in this respect were to be followed, the Panel notes that also there substantial assistance only

exceptionally leads to an acquittal (Article 10.6.1.2 World Anti-Doping Code (edition 2015)), but more often only results in a reduction of the sanction otherwise imposed [...] (Article 10.6.1.1 World Anti-Doping Code (edition 2015)). As to the significance of the assistance provided by the Player, the Panel finds that the Player did what could be expected of him. The evidence provided by the Player was crucial in convicting Mr Mackay and Mr Zammit as he was the only witness before the Maltese criminal court that was not being prosecuted himself, leading the Maltese Police Inspector to say that the Player's testimony was convincing and important in sentencing Mr Mackay and Mr Zammit, and the Maltese Criminal Court to rule that "*Samir Arab is a very important witness in this case who removes all doubt that might arise with regards to the credibility of the principal witness Seyble Zammit. He ties the evidence against the accused, says that Ronnie Mackay came with the Asian individual and the offer was made by both Ronnie Mackay and Seyble Zammit*" (cf. p. 40 of the judgement). The Panel however does not find that the Player's assistance reached the threshold of "substantial assistance" as defined in the World Anti-Doping Code because that would have required the Player to do the following:

"(1) fully disclose in a signed written statement all information he or she possesses in relation to anti-doping rule violations, and (2) fully cooperate with the investigation and adjudication of any case related to that information, including, for example, presenting testimony at a hearing if requested to do so by an Anti-Doping Organization or hearing panel. Further, the information provided must be credible and must comprise an important part of any case which is initiated or, if no case is initiated must have provided a sufficient basis on which a case could have been brought" (Appendix 1 to the World Anti-Doping Code (edition 2015)).

The Player, however, limited his assistance to answering questions from the judge and police officer Mr Scicluna, without spontaneously providing insight into his full knowledge of the circumstances at stake. Indeed, the concept of substantial assistance requires one to go beyond mere cooperation with the authorities, but to come clean and provide all information known. The Player for instance certainly had knowledge about the involvement of his teammates as the in-person meeting that took place on or around 9 March 2016 was attended also by Mr Briffa and Mr Cesare and the second in-person meeting that took place on or around 14 March 2016 was attended by Mr Briffa, but he failed to mention this before the Maltese authorities. Although the Player was in his right to limit himself to answering the questions posed to him by the authorities, the Panel finds that the Player should have done more in order to benefit from providing "substantial assistance". Indeed, also in accordance with the definition of "substantial assistance" set out in the World Anti-Doping Code, he was required to "*fully disclose (...) all information he or she possesses*". The Panel is therefore satisfied that the assistance provided by the Player to the Maltese courts should be taken into account as a mitigating factor, but that the assistance provided was not so significant or substantial that it should lead to an annulment of the ban.

3. Procedural concept of *res indicata*

The Player was initially also accused by the EDI of having committed a violation of Article 12(2)(a) UEFA DR ("*who acts 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*"), but the UEFA CEDB concluded that the Player was not guilty of such infringement. Given that the

Player lodged an appeal against this decision with the UEFA Appeals Body, but the EDI did not, the Player submits that it was an *ultra petita* ruling of the UEFA Appeals Body to consider that it was “*satisfied with the conclusion that [the Player] accepted at a first instance the bribe*”, that “*at least at the beginning, [the Player] accepted the bribe. The fact that the [Player] refused the offer afterwards doesn’t change the fact that by accepting at a first instance he already violated Article 12 (a) DR*” and that “*it is the Appeal Body’s strong conviction that the involvement of [the Player] in the match fixing activities prior to Match 1 corresponded also to a violation of Article 12(a) DR*”, while ultimately concluding that “[i]t follows that the sanction to be imposed against the player should have gone beyond what was imposed against the player for not reporting the approach”.

The Player submits that, since the UEFA CEDB Decision was not appealed by the EDI, the UEFA CEDB’s ruling on Article 12(2)(a) UEFA DR became final and binding, as a consequence of which the UEFA Appeals Body’s conclusion violates the principle of *res iudicata*. By concluding that the Player violated Article 12(2)(a) UEFA DR, the UEFA Appeals Body did not seriously analyse the Player’s request to have his sanction for a violation of Article 12(2)(d) UEFA DR reduced. Because the analysis on the reduction of the sanction was contaminated by the unfounded and unwarranted conclusion that the Player had violated Article 12(2)(a) UEFA DR, the Player argues that the Appealed Decision constituted a clear *ultra petita* ruling.

UEFA maintains that the UEFA Appeals Body expressly declined to evaluate the disciplinary consequences of a potential breach of Article 12(2)(a) UEFA DR, in light of the limitations imposed by the principles of *non reformatio in peius* and *non ultra petita*, which prevented it from

imposing a harsher sanction on the Player. Most significantly, the UEFA Appeals Body only evaluated the proportionality of the sanction in consideration of a breach of Article 12(2)(d) UEFA DR, without taking into consideration a possible violation of Article 12(2)(a) UEFA DR. As stated in the Appealed Decision, “*it is noted that the CEDB imposed a sanction against the player strictly for not reporting (Article 12(2)(d) DR), and not for acting in a manner likely to exert an unlawful or undue influence on the course and/or result of a match (Article 12(2)(a) DR). Consequently, it is therefore this approach that is mainly under the scope of the Appeals Body evaluation*”.

The Panel observes that, contrary to the allegation of UEFA, the Appealed Decision does not exclusively consider the violation of Article 12(2)(d) UEFA DR, as reference is made to the fact that “*it is therefore this approach that is **mainly** under the scope of the Appeals Body evaluation*” (emphasis added), thus leaving room for other circumstances, such as an alleged violation of Article 12(2)(a) UEFA DR, to be taken into account. The Panel indeed does not consider it appropriate that the UEFA Appeals Body may have taken an alleged violation of Article 12(2)(a) UEFA DR into account in reaching the conclusion that a two year ban was appropriate, as the Player was no longer accused of having violated Article 12(2)(a) UEFA DR and was not put in a position to defend himself against such allegation, as he was under the legitimate understanding that this issue was closed after he learned that the EDI did not file an appeal against the UEFA CEDB Decision.

This is however not a violation of the principles of *non ultra petita* or *non reformatio in peius*. Indeed, as argued by UEFA, the principle of *non ultra petita* does not extend to arguments advanced, but is limited to a comparison between the decision and the

requests for relief (the *petita*) put forward. Given that the UEFA CEDB imposed a ban on the Player until 31 December 2019 and because only the Player lodged an appeal against this decision, pursuant to the principle of *reformatio in peius*, the UEFA Appeals Body could not increase the sanction, but only reduce it. The UEFA Appeals Body was therefore within its rights to dismiss the Player's appeal and confirm the outcome of the UEFA CEDB Decision, even if the reasons invoked to reach such a conclusion were influenced by an illegitimate finding that the Player also violated Article 12(2)(a) UEFA DR.

This, however, does amount to a violation of the principle of *res indicata* because the findings of the UEFA Appeals Body on the merits superseded the findings on the merits of the UEFA CEDB in considering that the Player had also violated Article 12(2)(a) UEFA DR. The mere fact that the Player, in his appeal against the UEFA CEDB Decision, requested the UEFA Appeals Body in his requests for relief to “[c]onfirm the decision of the CEDB in regard to appellant as finding appellant not guilty of a violation of Art 12 (2) (a) DR” does not make this any different, as UEFA should have filed an independent appeal against the UEFA CEDB Decision if it wanted the Player to be tried for a violation of such provision. The Panel feels comforted in this respect by the reasoning of another CAS panel (CAS 2013/A/3256, para. 138-140 of the abstract published on the CAS website):

“The Panel observes that the procedural concept of res indicata is defined in Swiss law. (OBERHAMMER / NAEGELI, in OBERHAMMER / DOMEJ / HAAS (Ed), Commentary on Swiss Civil Procedure, 2nd ed. 2014, Art. 236, no. 39 et seq.) According thereto res indicata has two elements:

- 1) *the so-called “Spermwirkung” (prohibition to deal with the matter = ne bis in idem). The consequence of this effect is that if a matter (with res indicata) is brought again before the judge, the latter is not even allowed to look at it, but must dismiss the matter (insofar) as inadmissible. It is for this reason – e.g. – that article 59(2) of the Swiss Federal Code of Civil Procedure (hereinafter: the “CCP”) provides that a claim must be rejected as inadmissible, if the matter falls under res indicata.*
- 2) *the so-called “Bindungswirkung” (binding effect of the decision). According thereto, the judge in a second procedure is bound to the outcome of the matter decided in res indicata. The binding effect is only of interest, if the judge asked second has to deal with a preliminary question that has been decided finally by the first judge.*

The Panel finds that although the UEFA Appeals Body did not increase the sanction imposed by the UEFA CDB, the findings on the merits of the UEFA Appeals Body surpassed the findings on the merits of the UEFA CDB. Although this is strictly speaking not prohibited by the UEFA DR (2012), the Panel finds that this is a violation of the principle of res indicata. The discretion of the UEFA Appeals Body to re-examine the case from both a factual and a legal perspective (comparable to the de novo competence of CAS pursuant to Article R57 of the CAS Code) neither allows the UEFA Appeals Body to change the matter in dispute, nor is any justification given by UEFA on the basis of which an exception should be made in the present case.

Hence, the Panel finds that the Appellant could rely on the findings of the UEFA CDB, i.e. it could not reasonably be expected from the Appellant to defend itself against general accusations in respect of matches that were not individually assessed by the UEFA CDB. By discussing and specifically establishing that five matches had been influenced, the UEFA CDB limited the scope of the proceedings to these five matches. If five cases of match-fixing are the basis of the UEFA CDB Decision, UEFA cannot, without appealing the

decision of the UEFA CDB, introduce other cases at the appeal stage before the UEFA Appeals Body. A general confirmation of the UEFA CDB stating that this list of five matches is not exhaustive is of no avail in this respect, also taking into account the Appellant's denial of all factual allegations.

*The Panel thus adheres to the Appellant's position and finds that the scope of the proceedings is limited to the findings of the UEFA CDB on the five matches and that the UEFA Appeals Body was prevented from assessing any additional matches by the "Sperrwirkung" attached to the principle of *res iudicata*".*

Notwithstanding this violation of the "Sperrwirkung" attached to *res iudicata*, the Panel finds that this should not lead to an annulment of the Appealed Decision, but rather that the Panel shall focus its attention on the proportionality of the sanction imposed for violating Article 12(2)(d) UEFA DR and that an alleged violation of Article 12(2)(a) UEFA DR plays no role in this respect.

4. Passive match-fixers' global conduct

The Player submits that his failure to report was justified by i) the absence of proper education; ii) the absence of dissemination of information; iii) the absence of a reliable and secure reporting tool that would guarantee the Player's safety and would protect his identity; and iv) the Player's fear of repercussions if he reported the match-fixing approach. The Panel agrees with the Player that the issues mentioned are important and fall under the responsibility of sports governing bodies, as is also reflected in Article 6 and 7 of the Council of Europe Convention on the Manipulation of Sports Competitions, to which reference is made in Article 2.3 of the Memorandum of Understanding concluded between UEFA and the Council of Europe. The

Panel however does not agree with the Player that UEFA failed to comply with its duties in this respect. Indeed, it is not disputed by the Player that he received an instruction from the MFA Integrity Manager around November 2014 (*i.e.* about a year and three months before the match-fixing approach), but he argues that such instruction did not even last 5 minutes and should therefore not be regarded as proper education. The Panel finds that it is established that the Player was educated about match-fixing and that at least one other player from his team (Mr Mbong) had understood the instruction and reported the approach to his team manager. When asked at the hearing whether the integrity officer had told him how to report, the Player testified that he was not really told how to do this, but at the same time that he was instructed to go to his coach or to the integrity officer. The Panel finds that the Player had therefore at least understood the crucial part of the message, *i.e.* report the approach to the coach or integrity officer, but nevertheless failed to comply with it.

In any event, the Panel finds it difficult to reconcile the Player's arguments that, on the one hand, he was not aware of a duty to report, but on the other hand, that he did not comply with his duty to report the approach because he was afraid of repercussions. One cannot blow hot and cold at the same time: either the Player was aware of his duty to report or not and the Player's reliance on the argument of fear suggests that he was aware of this duty. The Panel finds that sports governing bodies have a certain duty to make reporting easy and secure, especially related to match-fixing issues. The Panel acknowledges and emphasises the importance of a proper reporting tool, such as the UEFA Integrity App. Such tool should not only be made available, but football players from around

the world should also be instructed on how to use it. However, the Panel finds it crucial in this respect that the Player did not prove that he showed any interest or willingness to report the match-fixing approach and that the reason why he ultimately failed to do so was that his safety was at risk or that his identity would not be protected. Indeed, had the Player shown that he explored the possibility of reporting the match-fixing approach to his coach, to his team manager, to the integrity officer, to the police, or otherwise, but that he subsequently decided not to proceed in view of the fact that insufficient guarantees as to his safety and/or anonymity were provided, the Panel would have been open to considering the Player's argument. However, in the absence of such evidence, the Panel finds that there is nothing on file indicating that the Player was genuinely prepared to report the match-fixing approach, which renders it impossible for the Panel to distinguish the Player's argument from a situation where a player makes up such argument retrospectively in an attempt to justify a violation of a duty to report.

Indeed, the Panel finds that the Player would have complied with his duty to report if he had reported the match-fixing approach anonymously. That is to say, even if the Player had failed to provide further details such as the names of people involved in the match-fixing approach, the Player could not have been found guilty of violating Article 12(2)(d) UEFA DR, as such provision cannot be stretched beyond its wording. Said Article for instance does not require someone to provide a minimum amount of information, let alone to come forward against gambling syndicates, mafia and other forms of organised crime (as suggested by the Player), but only to report the match-fixing approach. It should, however, be noted, that a failure to provide

further information may arguably be a reason for UEFA to sanction under Article 12(2)(e) UEFA DR, as this provision emphasises the duty to report behaviour, which necessarily requires one to provide certain details and therefore goes beyond the mere reporting of an approach. UEFA also appears to distinguish between "*those who breach their duty to report approaches (Art. 12(2)(d) DR) or their knowledge of a possible match-fixing plot (Art. 12(2)(e) DR)*". The latter provision is however not in play here.

Finally, the Player's arguments relating to his fear of criminals, stemming from his childhood experiences, which included threats from criminals due to problems encountered by his father concerning the latter's drug and alcohol addiction, are regrettable. These experiences, however, do not exempt the Player from his duty to report match-fixing approaches to the authorities in the absence of convincing evidence in this regard. The Panel finds that no such convincing evidence was provided. Indeed, the Player testified that he was not afraid of Mr Zammit, while it is undisputed that the first match-fixing approach was made by Mr Zammit alone in a meeting further attended by Mr Briffa and Mr Cesare. The Player did not submit that he feared any of these persons, but that he was mainly afraid of Mr Mackay because he was a convicted criminal. The Player also testified that during the first meeting he did not yet know that Mr Mackay was involved in the match-fixing scheme, as Mr Mackay only attended the second meeting. Therefore, importantly, the Player's fear of Mr Mackay does not justify why he did not report the first match-fixing approach during the five-day period until he met Mr Mackay during the second meeting. Finally, the Panel notes that the Player did not submit that he had received threats from anyone involved in the match-fixing

scheme following his refusal to take part therein, so that his fear was in any event only a general one, and not based on any specific threats or warnings. Consequently, the Panel finds that the Player did not put forward any evidence that justified his failure to report.

Importantly, the Panel agrees with UEFA that it is an important aspect and an aggravating circumstance that the Player was approached twice for match-fixing. This indeed sets aside the Player's case from players that were only approached once and this makes the Player's violation more severe. Indeed the Player did the opposite to what he should have done after being approached for the first time. Instead of immediately reporting this approach to the authorities, the Player, after having had about five days to think about what to do, chose to meet Mr Zammit again, knowing that the purpose of this meeting was to discuss a possible collaboration to fix football matches. Although the Panel notes that, for instance, the CAS panel in CAS 2014/A/3467 held that the athlete concerned "*deliberately proceeded to engage in what he knew full well to be a violation of the 2010 Program on at least two counts*" (CAS 2014/A/3467, para. 122 of the abstract published on the CAS website), the Panel finds that not too much emphasis should be placed on the two counts of failing to report in the matter at hand, as it is not so much the number of approaches that are informative for the severity of the Player's violation but the conduct of the Player as a whole, as is indeed submitted by the Player. In this respect, the Panel finds the second meeting important because it shows that the Player did exactly the opposite of what he should have done after being approached with an offer to engage in match-fixing: he did not report the approach, but he attended a second meeting with the fixer.

Consequently, the Panel finds that it is indeed an aggravating circumstance that the Player met with Mr Zammit for a second time, knowing full well that the purpose of the second meeting would be a proposal to engage in a match-fixing scheme.

Insofar as the Player submits that "*in the end of the day the best way to protect the integrity of the game is to say no to match-fixing*" and that "[t]his is exactly what the player did and he should get credit for it", the Panel finds that these statements must be rejected. Rather than just saying no to the match-fixers, the Player was also obliged to show that he said no to the approach by reporting it to the authorities. He failed to do so and therefore left the possibility open that the match-fixing scheme would be executed. By doing so, he did nothing to protect his teammates from getting in trouble or even danger, nor to prevent the match-fixers from possibly approaching further persons. The mere fact that he came forward when the match-fixing scheme already unravelled deserves some credit, but the fact remains that the Player was far too late in doing so, also considering that under Article 12(2)(d) UEFA DR requires the reporting to be done immediately.

Based on the foregoing, and after having taken into due consideration the regulations applicable, the evidence produced and all arguments submitted, the Panel does not consider a two-year ban to be evidently and grossly disproportionate. Although the outcome remains the same, maybe it gives some comfort to the Player that the Panel finds that the reasoning of the UEFA CEDB was more appropriate to justify this conclusion than the reasoning of the UEFA Appeals Body and of UEFA in the present proceedings before CAS, insofar as the latter held that the sanction imposed by the UEFA CEDB was lenient. The Panel finds

that the two-year ban is not lenient, but that it is justifiable to reflect the severity of the violation committed by the Player taking into account all specific circumstances of this matter.

Decision

The appeal filed by Mr Samir Arab on 25 June 2018 against the decision issued on 9 April 2018 by the Appeals Body of the *Union Européenne de Football Association* is dismissed. The decision issued on 9 April 2018 by the Appeals Body of the *Union Européenne de Football Association* is confirmed.

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_424/2017

23 October 2017

X (Appellant) v. World Anti-Doping Agency (WADA) and World Squash Federation (WSF) (Respondents)

Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of 27 June 2017¹

Extract of the facts

On October 2, 2016, X, a professional squash player of [nationality omitted], concluded an agreement entitled “Agreement” with the World Squash Federation (WSF), according to which he admitted having violated the anti-doping rules and accepted, to this end, a one-year suspension as of February 7, 2016, as well as the annulment of all of his results at the 2016 South-Asian Games.

On December 23, 2016, the World Anti-Doping Agency (WADA) filed a statement of appeal with the Court of Arbitration for Sport (CAS) in order to contest the Agreement. The CAS rendered an award on June 27, 2017. Its operative part upheld WADA’s appeal (n.1), annulled the sanction stipulated in the Agreement of October 2, 2016 (n. 2), imposed a four-year suspension on X starting on February 29, 2016 (n. 3), invalidated all the results obtained by the athlete at the South-Asian Games of Guwahati, India in February 2016 (n. 4), as well as all other results obtained by the athlete since February 7, 2016, a sanction that included, among others, the withdrawal of all medals, points, and prizes won (n.5), it ruled on the costs and expenses of the arbitral procedure (nn.6 and 7) and rejected all other requests and submissions (n. 8).

In summary, the CAS Panel found that X had committed a violation of Art. 2.1 of the Anti-Doping Rules of the WSF (hereafter: the Rules), that he could not establish the non-intentional character of such violation, and that he should therefore be suspended for a duration of four years according to Art. 10.2.1 of the Rules, as the conditions for a reduction of the length of the sanction in accordance with Art. 10.6.3 were not met.

On August 28, 2017, X (hereafter: the Appellant) filed a civil law appeal in which he requested the Federal Tribunal annul the award in question and to render a new decision “*taking into consideration the reduction [of the sanction] to two years following the prompt admission of Mr. X pursuant to Art. 10.6.3 of the Anti-Doping Rules of the World Squash Federation*”. In the alternative, the Appellant requested the case be remitted to the CAS in order for it to rule by taking into account the facts ignored in violation of the right to be heard. The Respondents and the CAS, which produced the file of the case, were not invited to file an answer.

Extract of the legal considerations

In his first argument, the Appellant alleges a violation of his right to be heard.

The right to be heard as guaranteed by Art. 182(3) and 190(2)(d) PILA does not differ in principle from what is established by constitutional law. Thus, it was held that, in the field of arbitration, each party has the right to

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.

state its views on the essential facts for judgment, to submit its legal arguments, to introduce evidence on pertinent facts, and to participate in the hearings of the arbitral tribunal. On the other hand, the right to be heard does not include the right to state one's case orally. By the same token, it does not require an international arbitral award to be reasoned. However, case law has also inferred a minimal duty for the arbitral tribunal to examine and handle the pertinent issues. This duty is breached when, due to an oversight or misunderstanding, the arbitral tribunal does not take into consideration some statements, arguments, evidence, and offers of evidence submitted by one of the parties and important to the decision to be issued (ATF 142 III 360 at 4.1.1 and the case law cited).

It is for the party alleging such a violation to establish, in its appeal against the award, how the arbitrators' oversight prevented it from being heard on an important issue. It must establish, on the one hand, that the arbitral tribunal did not examine some of the elements of fact, evidence or law that were regularly raised in its submissions and, on the other hand, that these elements were such that they affect the outcome of the case. Such demonstration is to be made based on the reasons set out in the award under appeal.

The Appellant alleges that the Panel failed to examine whether the conditions for a reduction of the suspension to a minimum of two years, as provided for in Art. 10.6.3 of the Rules, were met in the present case. According to the French translation, provided by the Appellant, said provision, cited in English in the text of the award under appeal, provides as follows [*sic*]:

*10.6.3 Prompt Admission of an Anti-Doping Rule Violation after being Confronted with a Violation Sanctionable under Article 10.2.1 or Article 10.3.1
“An Athlete or other Person potentially subject to a four (4) year sanction under Article 10.2.1 or 10.3.1*

(for evading or refusing Sample Collection or Tampering with Sample Collection), by promptly admitting the asserted anti-doping rule violation after being confronted by the W/SF, and also upon the approval and at the discretion of both WADA and the W/SF, may receive a reduction in the period of Ineligibility down to a minimum of two (2) years, depending on the seriousness of the violation and the Athlete or other Person's degree of Fault.

By referring to the provision above, the Appellant, who admits not being able to invoke the one or the other specific grounds for annulment or reduction of the suspension period as provided for in Art. 10.4 and 10.5 of the Rules (the first condition for its application implicitly derives from the systematics of Art. 10 of the Rules), contends that he immediately admitted (“*prompt admission*,”² according to the English version of Art. 10.6.3) the infraction of the Rules of which he was accused (second condition for the application of this provision).

Regarding the third condition for the application of the aforementioned provision, that is the discretionary consent that must be given by WADA and by the W/SF, the Appellant holds that the W/SF clearly approved the application of Art. 10.6.3 of the Rules in the specific case and also pointed out that he asked for WADA's approval in his answer of March 6, 2017. Invoking Art. 13.1.1 of the Rules, which grants the appeal instance the full power of review, the Appellant contends that the Panel did not deal with or even examine the question of whether he had promptly admitted the anti-doping violation, on which the reduction of his four-year suspension depended under Art. 10.6.3 of the Rules, and all this because the Panel considered, against all the evidence, that the W/SF had not given its approval for such a reduction. According to the Appellant, this was a violation of his right to be heard.

As it is presented, the plea of violation of such a guarantee cannot be upheld.

² In English in the original text.

It must be concluded, first, that the Panel dedicated an entire chapter, entitled “3, Prompt Admission?”, to the examination of the conditions for the application of Art. 10.6.3 of the Rules. The Appellant’s plea that the Panel entirely ignored this question is therefore dismissed. It further must be recalled that the application of the aforementioned provision requires, among other conditions, that WADA, like the WSF, gives its discretionary consent for its application in a given case. The Appellant also noted this himself on page 7 of his submission. He rightly does not pretend that the three conditions of Art. 10.6.3 of the Rules are not cumulative. However, in para. 85 of the Award, the Panel found that WADA refused to give its consent as to the application of this provision in the particular case. This finding, that binds the Federal Tribunal (Judgment 4A_668/2016 of July 25, 2017, at 2.2 and case law cited therein), results in the inapplicability of Art. 10.6.3 of the Rules in the case at hand, something the Panel unambiguously highlighted in the same paragraph of the Award (“*That refusal is fatal to the Athlete’s attempt to rely on that provision.*”).³ Therefore, the Panel cannot be held liable for a violation of the Appellant’s right to be heard for leaving unanswered the question, which forms the basis of one of the two other, cumulative conditions required for the application of the aforementioned provision: whether the Appellant had promptly admitted having committed the violation of the anti-doping rules that he was accused of.

In a second plea, based on Art. 190(2)(c) PILA, the Appellant alleges that the Panel omitted to address one of the claims.

According to Art. 190(2)(c), second sentence, an award may be challenged when the arbitral tribunal fails to examine one of the claims submitted to it. Failure to do so entails a formal denial of justice. By the phrase “*chefs de la demande*” (“*Rechtsbegehren*,” “*determinate conclusioni*,” “*claims*”),⁴ what is meant is all requests and

submissions of the parties. What is referred to here is an incomplete award, that is, a case in which the arbitral tribunal failed to decide on one of the claims filed by the parties. This complaint does not support the contention that the arbitral tribunal failed to decide a question important for the outcome of the case (ATF 128 III 234 at 4a p. 242 and case law cited; *see also* Judgment 4A_173/2016 of June 20, 2016, at 3.2).

The Appellant refers to conclusion No. 3 of his answer of March 6, 2017, in which he requested, in the alternative, the reduction of the suspension period based on Art. 10.6.3 of the Rules. According to him, the Panel did not examine in the Award, nor reject in its operative part, the question of his prompt admission of the violation of the anti-doping Rules and the reduction of the duration of the suspension, in application of the aforementioned provision, to which the WSF had consented. In his view, it is not pertinent that the Panel rejected all the other requests and submissions in n. 8 of the operative part of the Award.

The appeal must be dismissed in this respect. Indeed, if we compare n. 8 and n. 3 of the operative part, which changed the suspension period from one year to four years, to the reasons of the award, particularly those that can be found in the part examined on the previous paragraph of this judgment, it is clear that the Panel rejected the Appellant’s alternative submission in his answer to the appeal [to the CAS] and it was not limited to formulating a conclusion only in order to “cover itself,” to repeat the expression used by an author cited by the Appellant (Andreas Bucher, in *Commentaire romand, Loi sur le droit international privé - Convention de Lugano*, 2011, n°81 ad art. 190 LDIP).

Decision

The appeal is rejected.

³ In English in the original text.

⁴ In English in the original text.

Judgment of the Federal Tribunal 4A_426/2017

17 April 2018

L. (Appellant) v. International Federation of Football Association (FIFA), Respondent

Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of 26 June 2017¹

Extract of the facts

The International Federation of Football Associations (FIFA), an association under Swiss law with its registered office in Zurich, is the governing body of football worldwide. In its capacity as organizer of the next FIFA World Cup, whose finals will take place in Russia from June 14 to July 15, 2018 (hereinafter: the World Cup), it issued a Regulation on the FIFA World Cup Russia 2018, which entered into force in March 2015 (hereinafter: the Regulation).

The Organizing Committee of the World Cup (hereinafter: the Organizing Committee), appointed by the FIFA Executive Committee, is responsible for the organization of this competition (Article 3.1 of the Regulations). Its decisions are final and without appeal under Art. 3.4 of the Regulations. The World Cup takes place in two phases: the preliminary competition and the final competition. The first phase, which has been completed, has allowed, in particular, the designation of five national teams of the African Football Confederation (CAF) who will play in the final phase of the World Cup in Russia with twenty-seven other teams divided into eight groups of four teams by means of a draw which was made on December 1, 2017. Cameroon participated in the third round of the play-off phase, from October 2016 to November 2017. During this

period, they faced, in round-robin matches, three other African teams similarly placed in Group B - Algeria, Zambia and Nigeria - in six successive matches played on October 9, 2016, November 12, 2016, September 1, 2017, September 4, 2017, October 7, 2017, and November 11, 2017. At the end of this preliminary competition, the Cameroon team placed third in the group, with seven points, thus ranking behind the Nigeria (thirteen points) and Zambia (eight points) but ahead of Algeria (four points). Therefore, only the Nigerian team was admitted to the circle of five CAF teams who qualified for the final competition. L. (hereinafter: the Club) is a Cameroonian football club affiliated with the Cameroonian Federation of Football (hereinafter: FECAFOOT). The present case, which divides the Club and FIFA, is in the much broader context of the difficulties that FECAFOOT has been experiencing since 2013 and which are at the root of many disputes.

By letter of September 12, 2016, addressed to the President of the Organizing Committee, the Club requested the postponement of the Algeria-Cameroon match of October 9, 2016 and all other upcoming matches of the third round of group B “*until legality is restored within our association*”. According to it, as FECAFOOT was not validly represented by the so-called Mr. N., all acts conducted by that person on behalf of the association were invalid, in particular the designation of Cameroon’s national team A, which raised fears that the team competing in the match against Algeria was not “representative” of FECAFOOT. Responding to this letter by letter

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of September 20, 2016, the Secretary General of FIFA told the Club that this case seemed to be of an exclusively internal character not falling under the competence of the FIFA bodies, so that it could not intervene in this case. She added that “FIFA’s policy is to communicate only through its member associations”.

On October 6, 2016, the Club filed a statement of appeal with the Court of Arbitration for Sport (CAS). On October 21st, it filed its appeal brief, requesting, in essence, the annulment of the FIFA decision of September 20, 2016, and the rescheduling of the Algeria-Cameroon match of October 9, 2016, and all the other matches Cameroon was scheduled in and set to be played by a non-representative FECAFOOT team, including the Cameroon-Zambia match of November 12, 2016, to allow the participation of a representative team of FECAFOOT in these matches. The President of the CAS Appeals Division appointed a judge from Canton Vaud as a sole arbitrator (hereinafter: the Arbitrator), who decided to render a separate award on the admissibility of the appeal, challenged by FIFA, and a preliminary question on the merits. The parties then exchanged written submissions on these preliminary issues before being called to a hearing held on May 17, 2017. By judgment of June 26, 2017, the Arbitrator dismissed the plea of lack of jurisdiction *ratione personae* raised by FIFA. On the other hand, admitting the objection of lack of jurisdiction *ratione materiae* raised by the same party, he found that he was not competent to hear the appeal filed by the Club and thus terminated the procedure. In summary, the Arbitrator held, on the first point, that there was no basis for declaring that Mr. N. lost his power to represent the Club as President within the framework of the appeal proceedings and, on the second point, that Art. 3.4 of the Rules, properly interpreted, constituted a *lex specialis* to the more general provisions of the FIFA Statutes (hereinafter: the Statutes) and had to exclude an appeal to the CAS from decisions of the Organizing Committee. It resulted in the inadmissibility of the appeal, which made it unnecessary to proceed to the examination of the legal interests and standing.

On August 25, 2017, the Club (hereinafter: the Appellant) lodged a civil law appeal to the Federal Tribunal requesting the annulment of the award of June 26, 2017, the finding of jurisdiction *ratione materiae* of the CAS and the referral of the case to the arbitral tribunal to make a new award within the considerations of the forthcoming federal judgment. Qualifying the challenged award as an interim decision within the meaning of Art. 190(3) PILA, the Club accused the arbitrator of having wrongly declared himself incompetent (Art. 190(2)(b) PILA and ATF 140 III 477), also alleging a violation of public policy of Art. 190(2)(e) PILA in this context.

Extract of the legal considerations

According to Art. 76(1)(b) LTF the appellant must in particular have an interest worthy of protection in the annulment of the decision under appeal. A legally protected interest consists in the practical use that admitting the appeal would have for the appellant, by preventing it from undergoing some damage of an economic, ideal, substantive or other nature that would be caused by the decision under appeal (ATF 137 II 40 at 2.3 p. 43). The interest must be present, that is, it must exist not only at the time the appeal is made but also when the decision is issued (ATF 137 1296 at 4.2 p.299; ATF 137 11 40 at 2.1 p.41). The Federal Tribunal finds the matter incapable of appeal when the legally protected interest is lacking at the time the appeal is made. However, if the interest disappears during the proceedings, the appeal becomes moot (ATF 137 I 23 at 1.3.1 p. 24 if. and the cases quoted). The requirement of a present interest is exceptionally derogated when the dispute on which the decision under appeal is based may arise again at a later time under identical or analogous circumstances, when its nature makes it impossible to adjudicate it before it loses its relevance, and when, as a matter of principle, there is a sufficiently important public interest in the resolution of the issue in dispute (ATF 137 I 23 at 1.3.1 p. 25; ATF 136 II 101 at 1.1 p.103; ATF 1351 79 at 1.1 p.81).

Whatever the Appellant supports, the explanations provided under Chapter 1(c) of its

appeal (p. 3 and 4) fail to support the contention that he had an interest worthy of protection (within the meaning of the case law recalled above) in the annulment of the award under appeal at the time he filed its appeal (August 25, 2017). In any event, such an interest, even if it had been established, has clearly disappeared since then.

The Appellant, in filing its appeal, alleges it was particularly affected by the award of June 26, 2017, to the extent that the declaration of lack of jurisdiction *ratione materiae* of the CAS prevented it “from ruling on the merits of the case, in particular, on the annulment of the decision of FIFA dated September 20, 2016, in relation to the problem of non-representativity of the Cameroon national team for the 2018 World Cup in Russia.” According to the Appellant, this issue was crucial as, at the time of filing the appeal, several qualification matches remained to be played in the context of the third round of the World Cup and it was still possible, if necessary, to replay the matches that had already been played.

It must be noted from the outset that the interest alleged by the Appellant rests exclusively on the assumption that the national team of Cameroon that participated in the preliminary phase of the World was not “representative”. This is based on the simple fact that its players had been designated, at least indirectly, by a national federation — FECAFOOT — which has at its head a representative (the President M.), who was not validly elected. Indeed, if Cameroon had advanced a representative team that would have started the third qualifying round and had been serious contenders for qualification for the World Cup final competition, the Appellant would not have had the interest required to request the annulment of an arbitral award in which the CAS had refused to enter into an appeal aimed at rescheduling games played and to play with this team in this context. However, this assumption (i.e. the non-representativity of the national team line-up during the competition preliminary ruling) is merely an assumption in support of which the Appellant has not put forward any concrete evidence, and the existence of some causal link between the (correct or not) way in which leaders

of a national federation are appointed and the representativeness of the team constituted by this federation to represent their country at the World Cup is not evident. Apart from the lack of interest that the President of FECAFOOT, legitimate or not, would have had to deprive the national selection of its best players, even if it means accommodating a predictable elimination of this team at a discount, the Appellant did not demonstrate, or even allege, that one or another player who otherwise would have been a pillar of the team was voluntarily removed from national selection. It does not further specify how, in his view, players should be selected so that Cameroon’s national A-team could be fit to be called “representative”.

The Appellant argues next that the erroneous interpretation of the Statutes and Rules by the arbitrator seriously prejudices it, as “it explains the decisions of the Organizing Committee of the 2018 World Cup could not be the subject of an appeal to the CAS”. Moreover, the Appellant, who, as a football club, is not a member of FIFA (see Art. 11(1) of the By Laws), does not explain how it would nevertheless have an interest worthy of protection to challenge decisions taken by a part of that association — the Organizing Committee, which constitutes a permanent Committee of FIFA (Art. 39(1)(d) and Art. 43 of the Statutes) — and intended for its members, i.e. national associations, with certain exceptions (Art. 11(1), (5) and (6) of the Statutes). Therefore, it goes without saying that it cannot argue any interest worthy of protection against annulment of an award where the Arbitrator did not enter into the merits of the appeal of a decision by which FIFA had informed the Appellant, in accordance with its case law, that it could not intervene in this matter, while reminding it that it is its policy to communicate only through the member association to which the applicant club is affiliated.

The Appellant argues, however, that there was a significant financial interest *in casu*, expecting that opposing teams participating in the elimination phase may require the disqualification of the national team of Cameroon on the grounds that it was formed by FECAFOOT, unduly

represented by Mr. N ,which would have the effect of depriving it of significant sums allocated to the federations as well as to the clubs directly on the occasion of the organization of the World Cup. The Appellant does not demonstrate, nor even claim, that its opponents in Group B for the third round required the disqualification of the Cameroon national team. Also the financial risk invoked in connection with such a request is purely hypothetical, such that it cannot be held that there is an interest worthy of protection before the Federal Tribunal.

In these circumstances, it must be concluded that the action is inadmissible. Indeed, the Appellant has not successfully demonstrated that at the time of filing its appeal it was particularly touched by the decision and had an interest worthy of protection in its annulment (Article 76(1)(b) LTF).

If it was not already inadmissible at the time, *quod non*, the present action would have become irrelevant since then.

It is indeed clear that the third round of the preliminary competition for Group B ended on November 11, 2017, with the last match of this group (Zambia-Cameroon), and that assured the qualification of Nigeria for the final competition. In these circumstances, we cannot determine a current interest that the Appellant could still have to admit its requests. Aside from putting forward an alleged financial interest, the existence of which would lie entirely on its own statements, the Appellant explains that four games could still be subject to rescheduling, so that twelve points could be awarded for the games and that would completely boost Cameroon's chances of qualifying for the finals of World Cup starting June 14, 2018.

In theory and from a strictly chronological point of view, the Appellant's suggestion would be possible so long as the final competition of the World Cup had not already started. However, if one looks at it more closely and considers the actual situation, it is pure idealism. In order to implement it, on the assumption that the present appeal is allowed, the

CAS must reinstate the case, examine the question of the interest and standing of the appellant club, and then the merits which would undoubtedly take some time. It would then be required to reopen the entire elimination phase as it concerns Cameroon, which would require replaying Group B third-round games that had been played over a period of more than one year. Moreover, the Appellant does not indicate why only four of the six matches of this group should be replayed, nor does it explain how the other three teams, especially the one qualified for the final game, would consider such a solution, resulting from difficulties only of interest to the FECAFOOT. It is not realistic to imagine for a moment that we can postpone, even for a relatively short period of time, a final competition for which a complicated draw was completed on December 1, 2017, which concerns thirty-two national teams that are impatient to play against each other for a period of a month fixed long in advance taking into account a busy international calendar, teams that furthermore having planned their training in this regard. It is still without counting the requirements related to the organization of such an event, whether it is temporary contribution of human resources and infrastructure necessary for its good operation, not to mention the media coverage of a competition of global importance and huge advertising benefits. There is therefore no need to spend any more time in order to exclude the solution recommended by the Appellant. It follows that, if it had not been held inadmissible, the appeal submitted for the consideration of this Tribunal, should in any case be declared moot, as there is no current interest on the part of the Appellant to be admitted.

In its rejoinder, the Appellant claims to have alleged in a very detailed way the particular circumstances of the case in dispute which should enable the Federal Tribunal to exceptionally hear the matter, in derogation of the current interest requirement. However, nothing as submitted confirms the allegations challenged by the Appellant. In particular, the Appellant does not cite any part of its appeal

where it clearly invoked this exception and indicated how these conditions would be met in its opinion. No doubt it seeks to repair this omission in its rejoinder, but it does so in vain in view of the case law on this issue (Judgment 4A_450/2017 of March 12, 2018, at 2.2).

Decision

The appeal is inadmissible.

Arrêt du Tribunal fédéral 4A_560/2018

16 novembre 2018

Fédération Internationale de Football Association (FIFA) (recourante) c. José Paolo Guerrero Gonzales et Agence Mondiale Antidopage (AMA) (intimés)

Recours en matière civile contre la sentence rendue le 30 juillet 2018 par le Tribunal Arbitral du Sport (TAS) (CAS 2018/A/5571)

Extrait des faits

Par décision du 7 décembre 2017, la Commission de discipline de la Fédération Internationale de Football Association (ci-après: la FIFA) a suspendu le joueur de football professionnel péruvien José Paolo Guerrero Gonzales (ci-après: le footballeur), reconnu coupable d'une violation de l'art. 6 du Règlement antidopage de la FIFA, pour une durée d'une année, dont à déduire la période de suspension provisoire déjà subie depuis le 3 novembre 2017.

Le 20 décembre 2017, la Commission de recours de la FIFA, admettant partiellement l'appel interjeté par le footballeur, a réduit la période de suspension à six mois, sous déduction de la période de suspension provisoire déjà écoulée.

En date des 26 février et 9 mars 2018, le footballeur et l'Agence Mondiale Antidopage (ci-après: l'AMA) ont interjeté appel contre cette décision.

Par sentence motivée du 30 juillet 2018, une Formation de trois membres du Tribunal Arbitral du Sport (TAS), rejetant l'appel du footballeur et admettant partiellement celui de l'AMA, a fixé la durée de la suspension à quatorze mois à partir de la notification de la sentence, dont à déduire la période de suspension provisoire déjà subie.

Le 25 mai 2018, le footballeur a déposé un recours en matière civile au Tribunal fédéral contre ladite sentence (cause 4A_318/2018). L'affaire est toujours pendante.

La FIFA (ci-après: la recourante) en a fait de même, par mémoire du 17 octobre 2018 (cause 4A_560/2018).

Le footballeur, l'AMA et le TAS n'ont pas été invités à déposer une réponse.

Extrait des considérants

Selon l'art. 76 al. 1 LTF, applicable à l'arbitrage tant interne qu'international en vertu de l'art. 77 al. 2 LTF a contrario, a qualité pour former un recours en matière civile quiconque a pris part à la procédure devant l'autorité précédente ou a été privé de la possibilité de le faire (let. a), pour autant qu'il soit particulièrement touché par la décision attaquée et ait un intérêt digne de protection à son annulation ou sa modification (let. b). Si la qualité pour recourir n'est pas évidente, il incombe au recourant de démontrer que les conditions en sont remplies et, pour ce faire, de fournir toutes les données nécessaires (arrêt 5A_439/2009 du 14 septembre 2009 consid. 1.2.3; BERNARD CORBOZ, in Commentaire de la LTF, 2e éd. 2014, n° 6a ad art. 76 LTF). La qualité pour recourir se détermine exclusivement selon l'art. 76 LTF (arrêt cité, consid.

1.2.2, lequel se réfère à l'ATF 126 I 43 consid. la p. 44).

Conformément à l'art. 76 al. 1 let. b LTF, le recourant doit notamment avoir un intérêt digne de protection à l'annulation de la décision attaquée. L'intérêt digne de protection consiste dans l'utilité pratique que l'admission du recours apporterait à son auteur, en lui évitant de subir un préjudice de nature économique, idéale, matérielle ou autre que la décision entreprise lui occasionnerait (ATF 137 II 40 consid. 2.3. p. 43). L'intérêt doit être actuel (arrêt 4A_426/2017 du 17 avril 2018 consid. 3.1 et les arrêts cités). Au demeurant, le recourant doit avoir un intérêt personnel à recourir. Selon l'adage "nul ne plaide par procureur", il n'est en principe pas admis d'agir en justice en faisant valoir non pas son intérêt, mais l'intérêt d'autrui (CORBOZ, op. cit., n° 22 ad art. 76 LTF).

La FIFA a pris part formellement, en qualité de défenderesse, à la procédure devant le TAS. Elle remplit donc la condition posée à l'art. 76 al. 1 let. a LTF.

L'art. 75 al. 3, 1er par., du Règlement confère certes à la FIFA le droit d'interjeter devant le TAS des appels relatifs à des joueurs de niveau international. Toutefois, cette faculté ne préjuge pas la qualité de cette association pour former un recours en matière civile contre la sentence du TAS attaquée, puisqu'il s'agit là d'une question à trancher au regard du seul art. 76 LTF.

La recourante indique qu'elle soulève les griefs tirés de l'arbitraire, voire de la contrariété à l'ordre public, et de la violation de son droit d'être entendue. Cette simple énumération des griefs qu'elle entend formuler à l'encontre de la sentence ne permet nullement à la Cour de céans de vérifier en quoi la FIFA aurait un intérêt

personnel, actuel et digne de protection à s'en prendre à la décision attaquée.

Il en va de même de l'affirmation de la FIFA selon laquelle l'ensemble de ses conclusions ont été rejetées par le TAS. Lesdites conclusions ne tendaient du reste qu'au rejet des appels formés par le footballeur et par l'AMA, ainsi qu'à la confirmation de la décision prise le 20 décembre 2017 par la Commission de recours de la FIFA ou, sinon, de celle rendue le 7 décembre 2017 par la Commission de discipline de la FIFA. La Formation du TAS ne les a pas admises, elle qui, après avoir rejeté l'appel du footballeur et admis partiellement celui de l'AMA, a fait passer la durée de la suspension de six à quatorze mois et a modifié la décision du 20 décembre 2017 dans cette mesure. Devant le TAS, la FIFA a ainsi joué, *mutatis mutandis*, le même rôle que celui qui est dévolu d'ordinaire, dans une procédure cantonale, à un tribunal de première instance dont le jugement est soumis à la juridiction d'appel compétente. Il va sans dire que ce tribunal, pas plus que la collectivité publique dont il dépend, ne saurait se prévaloir de l'art. 76 al. 1 let. b LTF pour contester devant le Tribunal fédéral la décision d'appel au seul motif qu'elle a modifié le dispositif de son jugement. Rien ne justifie d'en décider autrement en ce qui concerne la FIFA, en l'espèce du moins. Cette association ne démontre pas, de surcroît, en quoi le fait que le footballeur a été davantage puni que ce qu'elle estimait justifié lui causerait, à elle, un préjudice d'une quelconque nature.

Dans l'ordonnance rendue le 27 septembre 2018 en l'affaire connexe 4A_318/2018, Guerrero c. FIFA et AMA, la présidente de la Ire Cour de droit civil, statuant sur une requête d'effet suspensif du footballeur, a souligné que, dans ses observations du 18

septembre 2018 au sujet de ladite requête, la FIFA avait fait part de son intention d'interjeter un recours séparé — intention qu'elle a mise à exécution depuis lors —, tout en déclarant considérer avec une certaine bienveillance les arguments développés par le footballeur dans une partie de sa requête. Elle a d'ailleurs évoqué en passant la question de la qualité pour recourir de la FIFA sans pousser plus avant l'examen de celle-ci. Il appert de ces remarques que la FIFA entendait soutenir, par son propre recours à venir, l'un ou l'autre des arguments avancés par le footballeur dans son propre recours. Or, pareille intention, correspondant peu ou prou au fait de plaider pour autrui, n'était guère compatible avec l'allégation, par ladite association, de l'existence d'un intérêt *personnel* lui conférant la qualité pour agir devant le Tribunal fédéral.

Le recours est irrecevable.

Au demeurant, dans les susdites observations du 18 septembre 2018, la recourante a clairement indiqué, en ces termes, quel était le but poursuivi par elle, via le recours distinct qu'elle s'apprêtait à déposer(p. 3, let. D.b):

“La FIFA entend d'ailleurs interjeter un recours séparé en son propre nom car la motivation de la Sentence attaquée soulève une question fondamentale du point de vue du principe de la proportionnalité sur laquelle il est dans l'intérêt général d'obtenir l'avis du Tribunal fédéral, même sous l'angle restreint de l'arbitraire ou de l'ordre public”.

Il va sans dire que le seul désir, fût-il compréhensible, d'obtenir du Tribunal fédéral une réponse à une question juridique qualifiée par elle de fondamentale n'est pas propre à conférer à la FIFA la qualité pour recourir au sens de l'art. 76 al. 1 let b LTF.

Decision

Judgement of the Federal Tribunal 4A_382/2018

15 January 2019

International Olympic Committee (IOC) (Appellant) v. X (Respondent)

Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of 23 April 2018¹

Extract of the facts

The International Olympic Committee (IOC) is an international non-governmental and non-profit organization, established as an association under Swiss law with its headquarters in Lausanne. The Olympic Charter gives it the mission to lead the Olympic Movement, including the organization of the Summer and Winter Olympic Games (OG).

From 7 to 23 February 2014, the Russian city of Sochi hosted the Winter Olympics (hereinafter: the Sochi Games). The athletes from the organizing country won 33 medals, which allowed Russia to finish first in the medal table, despite having only reached eleventh place at the previous Winter Olympics in Vancouver (Canada) in 2010.

X is a Russian cross-country skier who participated in the Sochi Games. He won the medal [type omitted] in [category omitted] free individual and the medal [type omitted] in the [category omitted] relay with the Russian team.

On February 13, 21, and 23, 2014, the Russian skier was subjected to three anti-doping tests, all of which were revealed to be negative, just like the controls carried out on other Russian athletes involved in the arbitration procedure, which will be discussed later.

On December 3, 2014, a German TV channel broadcasted a documentary concerning the alleged existence of a secret, extensive, and institutional doping program within the Russian Athletics Federation, after which the World Anti-Doping Agency (WADA) appointed a three-member independent commission to investigate this allegation. In its report of November 9, 2015, the Independent Commission confirmed that widespread cheating had been organized by members of the entourage of athletes, officials, and athletes themselves in order to increase the chances of success of individual athletes and teams of the organizing country through the use of substances and methods that fell within the anti-doping regulations.

In 2015, Dr. A, former director of the Moscow Anti-Doping Laboratory and the person in charge in Sochi during the Winter Olympics, left Russia and made a series of statements that were widely published and that revealed the existence of a sophisticated doping plan before, during, and after the Sochi Olympics. Also, on May 19, 2016, WADA instructed Professor Richard H. McLaren to conduct an independent inquiry into Dr. A's allegations. In his first report, dated July 16th 2016, Prof. McLaren came to the conclusion that the Moscow Laboratory was operating, for the protection of doped Russian athletes, as part of a highly reliable, state-driven system, which the report called the "Disappearing Positive Methodology"; that the Sochi Laboratory had used a unique system of exchange of samples, by which clean urine could be exchanged, on the

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.

day of the control, with the samples containing banned substances in order to allow doped Russian athletes to participate in the 2014 Winter Olympics. The second report of Prof. McLaren, dated December 9, 2016, contained detailed explanations on the implementation of an unprecedented doping program at the Sochi Games. According to its author, there had been a meticulously orchestrated conspiracy, with the complicity of the officials within the Ministry of Sport, the Russian National Team Sport Readiness Center (CSP), the staff of the Moscow-based Sochi Laboratory, the Russian Anti-Doping Agency (RUSADA), the Olympic organization, the athletes, and the Federal Secret Service (FSB).

In December 2016, the IOC instituted a Disciplinary Commission of three members which was charged with investigating potential anti-doping rule violations committed by Russian individual athletes at the Sochi Games. One of the targeted persons was X who was informed by the IOC, on December 22, 2016, of the initiation of a disciplinary procedure against him. On the same day, the International Ski Federation (FIS) suspended the Russian athlete on a provisional basis. In appeal by the person concerned, the Court of Arbitration for Sport (CAS), ruling on August 31, 2017, said that the provisional suspension of the person concerned should be terminated, if necessary, on October 31 of that year, at the latest.

On November 1, 2017, after hearing the case, the Disciplinary Commission pronounced its decision Finding X guilty of violating the IOC Anti-Doping Rules at the Sochi Olympics.

The full decision was issued on November 27, 2017. The Disciplinary Commission came to the conclusion, from the evidence available, that it was more than comfortably satisfied that a sample swapping program had indeed been put in place and carried out at the Sochi Games. For the Disciplinary Commission, it was inconceivable that the Russian athletes had not been involved in this program, which, like a fine Swiss watch, could not have functioned in the

absence of one of its many cogs. In its opinion, X was no exception to the rule for various reasons. Therefore, he was to be found guilty of violating Articles 2.2, 2.5, and 2.8 of the World Anti-Doping Code (WADC), 2009 version, and to impose the aforementioned sanctions.

By a reasoned Award of April 23, 2018, following the issuance of the operative part of February 1, 2018, the CAS admitted the appeal of X, annulled the decision rendered on November 1, 2017 by the Disciplinary Commission against the Russian skier and restored the individual results obtained by him on the occasion of the Sochi Olympics 2014 with all the consequences both for himself and for the relay team in [name of category omitted].

Once the preliminary questions were answered, the Panel started to examine the merits of the appeal (Award, paras. 688-865). In its opinion, the relevant provisions in this respect were Articles 2.2, 2.5, 2.8 and 3.1 of the WADA Code and, additionally, the 2014 WADA Prohibited List. *First*, the IOC had the burden to establish the existence of the relevant anti-doping rule violation, to the comfortable satisfaction of the Panel; *second*, the hearing authority would consider all the decisive circumstances of the case, while the absence of direct proof would not necessarily mean proof of innocence, but could also imply that a grave, reprehensible act was effectively disguised; furthermore, as the IOC did not constitute a national or international office responsible to apply the law and its investigatory powers were limited compared to those of a state or international organ, the Panel should consider these facts while assessing the evidence provided, to the extent that it would be possible to admit that the IOC established, to its satisfaction, the existence of an anti-doping rule violation notwithstanding the impossibility to reach a similar conclusion on the sole basis of a direct proof; however, and at the same time, considering the seriousness of accusations against the athlete, the IOC should provide a particularly cogent proof as to the deliberate participation of the athlete in the alleged violation; it would not be sufficient to simply

establish the existence of a general doping scheme to the comfortable satisfaction of the Panel; it should also be necessary to sufficiently prove, in each individual case, that the athlete concerned had deliberately adopted a concrete behaviour that constituted a specific and identifiable violation of an anti-doping rule; *third*, in order to verify whether the IOC had provided the proof to the required standard, the Panel would take into consideration any admissible and reliable means of proof provided by the IOC; supposing that the evidence provided had the same weight, it would then apply the rules on the burden of proof.

After examining the issue of proof, the Panel indicated the method that it would use for the examination of the disputed issues. It emphasized, *first*, that Article R57 of the Code allows it to review the facts and the law with full power of review (*de novo*), and that it would be able to take into account the evidence presented to it, without limiting itself to the evidence that existed on the date of the decision of the Disciplinary Commission. It therefore insisted that its findings were based on a different and broader basis than the findings on which the outcome of the Disciplinary Commission was based. The Panel noted, *secondly*, that insofar as the appellant's dispute was concerned, it would not have to draw definitive conclusions as to the general existence, purpose, nature and extent of a doping or cover-up scheme used at the Sochi Olympics as such, but rather only to the extent necessary for the consideration of the specific issues related to the Russian athlete. *Third*, it explained that it was not possible for it to conclude that the existence of a general doping and cover-up scheme would imply obligatorily and *ipso facto* the commission by the athlete of the alleged anti-doping rule violations by the IOC. It would rather need to ensure that the totality of the evidence at its disposal would allow it to conclude, to its comfortable satisfaction, that the athlete personally committed specific acts or omissions that form the elements of each of the disputed anti-doping rule violations.

The Panel then examined, in detail, the various anti-doping rule violations invoked by the IOC against the athlete. At the end of this analysis, based on all available evidence, it concluded that the IOC did not bring sufficient evidence, as it was incumbent on it, of a violation of one or other of these rules by the athlete. It concluded with these clarifications, which are reproduced here in the original language of the Award:

867. In reaching these conclusions, the Panel wishes to underscore what it has not decided in this appeal. The Panel has not made a ruling on whether or not Sochi Games existed and how it worked even though it was in place and worked. Moreover, the Panel did not consider it possible to conclude that the existence of a general doping and cover-up scheme, even if established, would inexorably lead to a conclusion Athlete committed the ADRVs alleged by the IOC.

868. What the Panel, in the appeal of an individual athlete against the finding of various ADRVs, did decide is simply this: for all the reasons outlined in this award, the evidence presented before the Panel does not justify the conclusion to the comfortable satisfaction of the Panel that the Athlete, through acts or omissions, individually committed any of the alleged ADRVs.

On June 27, 2018, the IOC (hereinafter: the Appellant) lodged a civil law appeal to the Federal Tribunal for the violation of its right to be heard in adversarial proceedings (Article 190(2)(d) PILA), with a view to obtaining the annulment of the Award.

Extract of the legal considerations

In a single plea, the Appellant, denouncing a violation of his right to be heard, alleges that the CAS, on the one hand, failed to fulfil its minimum duty to consider and deal with the relevant issues and, on the other hand, based its Award on unforeseeable grounds.

The right to be heard, as guaranteed by Articles 182(3) and 190(2)(d) PILA, does not require an international arbitral award to be reasoned. However, the case law has inferred a minimum duty of the arbitral tribunal to consider and deal

with the relevant issues. This duty is violated when, inadvertently or by misunderstanding, the arbitral tribunal does not consider the allegations, arguments, evidence and offers of evidence presented by one of the parties that are important for the award to be rendered. In its appeal against the award, it is incumbent upon the so-called aggrieved party to demonstrate which oversight of the arbitrators prevented it from being heard on an important issue. It is up to this party to establish, on the one hand, that the arbitral tribunal did not examine some factual, legal or evidentiary elements that it had consistently put forward in support of its conclusions and, secondly, that those elements were likely to affect the outcome of the dispute (ATF 142 III 360 at 4.1.1 and 4.1.3).

In Switzerland, the right to be heard relates mainly to the findings of fact. The right of the parties to be questioned on legal issues is only limited recognized. Generally, according to the adage *jura novit curia*, state or arbitral courts freely assess the legal significance of the facts and they may also rule on the basis of rules of law other than those invoked by the parties. Accordingly, provided that the arbitration agreement does not restrict the mission of the arbitral tribunal to solely the legal grounds raised by the parties, the latter do not need to be heard specifically on the scope of the rules of law. Exceptionally, it is appropriate to challenge them where the judge or arbitral tribunal is considering basing its decision on a standard or a legal consideration that was not invoked during the procedure and the relevance of which could not have been foreseen by the parties (ATF 130 III 35 at 5 and references). Moreover, knowing what is unpredictable is a question of appreciation. The Federal Tribunal is therefore restrictive in the application of this rule for this reason and because it is appropriate to have regard to the peculiarities of this type of procedure by avoiding that the argument of surprise is used to obtain a material review of the award by the appeal authority (Judgment 4A_716/2016 of January 26, 2017 at 3.1). The Federal Tribunal also recalled this conclusion, a few years ago, by refusing to extend that case-law to the

establishment of the facts (Judgment 4A_538/2012 of January 17, 2013 at 5.1, confirmed by the judgments 4A_214/2013 of August 5, 2013 at 4.3.1 and 4A_305/2013 of October 2, 2013 at 4).

Moreover, the Federal Tribunal has only rarely admitted the argument of “surprise” (ATF 130 III 35 at 6.2, Judgment 4A_400/2008 of February 9, 2009 at 3.2). In the vast majority of cases, it has rejected said argument (judgments 4A_716/2016 of January 26, 2017 at 3.2, 4A_136/2016 of November 3, 2016 at 5.2, 4A_322/2015 of June 27, 2016 at 4.4, 4A_324/2014 of October 16, 2014 at 4.3; 4A_544/2013 of May 26, 2014 at 3.2.2, 4A_305/2013 of October 2, 2013 at 4, 4A_214/2013 of August 5, 2013 at 4.3.1, 4A_407/2012 of February 20, 2013 at 5.3; 4A_538/2012, *supra*, at 5.1; 4A_46/2011 of May 16, 2011 at 5.1.3, 4A_254/2010 of August 3, 2010 at 3.3, 4A_240/2009 of December 16, 2009 at 3 and 4R105/2006 of August 4, 2006 at 7.2, last paragraph). It is however true that the long-standing restraint of the Federal Tribunal towards this argument had practically no deterrent effect on the persons filing appeals in international arbitration (Judgment 4A_525/2017 of August 9, 2018 at 3.1 *in fine*).

The Appellant alleges that the Award violated its right to be heard due to the fact that it failed to examine its principal argument, formulated as follows (Award, para. 200, Appeal, para. 45):

[T]he IOC [...] invites the Panel to first, come to a conclusion on the existence of a doping and cover-up scheme, and, secondly, draw conclusions with respect to the general involvement of the athletes.

In connection with this, appellant emphasizes that the case in question does not result from a traditional violation of the anti-doping rules, characterized by the presence of a prohibited substance in the athlete’s sample but, rather, by the implementation of an institutionalized doping program, within the framework of a conspiracy initiated by the State which

organized the Sochi Olympics for the benefit of athletes with this nationality, in order to cover-up any trace of doping in athletes who however used substances prohibited by WADA. It undoubtedly concedes that the Russian appellants, before the Panel, had argued that it was necessary to demonstrate their individual guilt. However, in its opinion, these same appellants allegedly had not disputed the relevance of the existence of the Russian doping program, even though the debate focused on the question of proof of the execution of such a program. A similar opinion was shared by the Panel, but the latter, even though it admitted that it had more evidence that the Disciplinary Commission, considered that it was not its task to decide on the existence of the Russian doping program as such, but only to determine if any individual athlete was involved. Accordingly, it had not taken into account various elements of proof such as the excessively high salt content or the presence of mixed DNA in urine samples of some of the Russian appellants, simply because the Appellant had failed to establish that the samples of X were affected by such anomalies. In so doing, the Panel, having assessed the evidence of the respondent's involvement in organized cheating, purely and simply ignored the Appellant's main argument, according to which the Panel should have considered the very nature of an institutional system of doping whose purpose was precisely to cover up the doped athletes.

Still according to the Appellant, the manner in which the Panel proceeded would also fall under the notion of 'surprise', as the respondent himself did not contest the relevance of a Russian doping program but instead tried to demonstrate that the existence of such program was not established. The effect of surprise of the Appellant was even more striking in retrospect as the Panel clarified, particularly in para. 867 of its Award, that there was significant evidence of the existence of the Russian doping program, whose existence it refused to affirm.

According to the Appellant, the Panel deprived the right to be heard of any substance by refusing

to deal with the question of the existence of a Russian doping scheme and prohibiting itself from drawing the necessary conclusions as to the proof of the involvement of individual athletes in the illicit scheme.

Finally, the Appellant refers to a subsidiary argument according to which the Panel clarified, on the violation of the anti-doping rule on the use of a prohibited substance, that, even if the presence of a Russian doping scheme were established, it would still not be convinced of the involvement of the appellant in the violation of said rule. Referring to the Judgment 4A_730/2012 of April 29, 2013 at 3.3.2, the Appellant qualifies such subsidiary argument as a "standard clause" that is unfit to exclude a violation of the right to be heard.

It is obvious, by reading the argumentation that has just been recounted in a slightly summarized way — argumentation which is also unclear and essentially appellatory in nature — that the Appellant in reality tries, under the guise of a violation of its right to be heard, to question how the Panel assessed the evidence in the arbitration file and to make the Federal Tribunal return the case to the Panel so that the latter can confirm the existence of a Russian doping scheme in order to reach the conclusion that the respondent was involved in such a scheme. It goes without saying that such an attempt is doomed to fail.

It appears from the rest, in view of the findings formulated in paras. 867-868 of the Award, that the Appellant makes in its appeal an extremely brief summary of the nuanced considerations that the Panel showed what, in its eyes, was the way to understand the relationship between the institutionalized doping scheme seemingly put in place for the Sochi Games and the possible individual guilt of Russian athletes who had been sanctioned in first instance for being involved in this scheme. It should not be forgotten in this regard that the Disciplinary Commission — which, it is worth noting, was set up by the Appellant — had taken care to specify that it would not apply a system of collective sanctions

against all Russian athletes who participated in the Sochi Games, but rather would examine each case individually, in order to punish only those athletes whose personal involvement could be established as in violation of the applicable anti-doping rules. The Panel held a similar reasoning with regard to the exclusion of collective sanctions. However, it then deviated somewhat from the reasoning held by the Disciplinary Commission in the sense that, contrary to the latter, it did not find that it was necessary to establish from the existence, supposedly proven, of a generalized doping and cover-up scheme that such individual athlete had committed the alleged anti-doping rule violation. However, knowing whether individual responsibility can be inferred from the finding of the existence of an illicit scheme, operated on a large scale, is a point of law which is beyond the Federal Tribunal's control when it rules on an appeal in international arbitration. This means that the Appellant cannot complain to the Tribunal of the choice made by the Panel between the two alternatives, by refusing to infer the respondent's guilt from the mere existence — even if proven — of a doping scheme within the context of a competition in which the athlete had participated under the colors of the organizing country.

That being said, it is in no way demonstrated and does not appear to be that the Panel violated, by inadvertence or misunderstanding, the Appellant's right to have its allegations, arguments, evidence and offers of evidence relevant to the Award heard in accordance with the applicable rules of procedure.

For the rest, the Appellant fails to bring good arguments as to the effect of surprise. We can hardly imagine an organization of this importance, which was part of a procedure that hit the headlines, and two sports-arbitration specialists, can still be surprised in any way in a litigation whose considerable stakes could not be disregarded. Finally, the alternative reasoning held by the Panel has nothing to do with what the Federal Tribunal has characterized as the "stereotypical formula" in Judgment 4A_730/2012, quoted by the Appellant, where

the Panel simply stated that it took into account all the facts, legal arguments and evidence submitted by the parties, but would only refer to arguments and evidence necessary to explain its reasoning.

Decision

In such circumstances, the appeal can but only be dismissed.

Arrêt du Tribunal fédéral 4A_556/2019

5 mars 2019

Jose Marcio da Costa c. Salem Alwan Jawad et Fédération Internationale de Football Association (FIFA)

Recours en matière civile contre le “Termination Order” prononcé le 10 septembre 2018 par le Président suppléant de la Chambre d’appel du Tribunal Arbitral du Sport (TAS)

Extrait des faits

Jose Marcio da Costa (ci-après: le footballeur ou le recourant) est un footballeur professionnel brésilien, domicilié en Turquie.

Salem Alwan Jawad (ci-après: l’agent ou l’intimé n° 1) est un agent de joueurs de nationalité portugaise.

La Fédération Internationale de Football Association (ci-après: la FIFA ou l’intimée n° 2), association de droit suisse ayant son siège à Zurich, est l’instance dirigeante du football au niveau mondial.

Par décision du 30 juin 2015, le Juge unique de la Commission du Statut du Joueur de la FIFA, considérant que le footballeur avait violé le contrat de représentation conclu avec son agent, a condamné le premier à verser au second, dans un délai de trente jours, la somme de 400’000 USD, avec intérêts à 4% l’an dès le 25 septembre 2013.

Contre cette décision, le footballeur a interjeté appel, le 31 mars 2016, auprès du Tribunal Arbitral du Sport (TAS).

Par sentence du 31 janvier 2017, le TAS a rejeté l’appel et confirmé la décision attaquée.

Le 17 octobre 2017 l’agent a informé la Commission de discipline de la FIFA (ci-

après: la Commission de discipline) que le footballeur ne lui avait pas encore versé les 400’000 USD, intérêts en sus. Il a renouvelé cette démarche en date des 16 et 17 janvier 2018.

La Commission de discipline a ouvert, le 18 janvier 2018, une procédure disciplinaire à l’encontre du footballeur au motif qu’il ne s’était pas acquitté de sa dette à l’égard de l’agent, alors même que la sentence précitée du TAS était entrée en force.

Par décision du 1er mars 2018, la Commission de discipline a infligé au footballeur une amende de 20’000 fr. et lui a imparté un délai de grâce de 90 jours pour honorer sa dette à l’égard de son agent sous peine de se voir imposer automatiquement une suspension d’une année de toute activité relative au football, sur simple requête du créancier. Elle a en outre réservé la possibilité de prononcer de nouvelles mesures disciplinaires, sur demande écrite du créancier, dans l’hypothèse où le footballeur ne s’acquitterait pas du montant dû avant l’échéance de la période de suspension.

En bref, la Commission de discipline a considéré, au regard de l’ensemble des circonstances, et notamment de la situation économique du footballeur, que celui-ci disposait des ressources financières suffisantes pour s’acquitter de sa dette, ce qu’il s’était pourtant abstenu de faire. Partant, le footballeur avait violé l’art. 64 du Code disciplinaire de la FIFA.

Le 10 juillet 2018, le footballeur a déposé une déclaration d'appel auprès du TAS, dans laquelle il sollicitait l'octroi d'une prolongation de quinze jours du délai pour déposer son mémoire d'appel.

Le 10 août 2018, le TAS a avisé les parties que le délai pour déposer le mémoire d'appel avait expiré le 2 août 2018. Il leur a indiqué que si le Greffe avait certes reçu un exemplaire du mémoire d'appel par télécopie, en revanche aucune version originale dudit mémoire ne lui était parvenue par courrier en temps utile. De ce fait, il a fixé un délai de trois jours à l'appelant pour démontrer qu'il avait effectivement envoyé le mémoire d'appel par courrier dans le délai échéant le 2 août 2018, faute de quoi l'appel serait considéré comme retiré, conformément à l'art. R51 du Code de l'arbitrage en matière de sport (dans sa version de 2017; ci-après: le Code).

Par fax du 16 août 2018, le conseil de l'appelant a confirmé n'avoir pas adressé le mémoire d'appel par courrier, en raison d'une erreur commise par son secrétariat. Il précisait toutefois l'avoir transmis le 31 juillet 2018 par télécopie.

Le 17 août 2018, le TAS a invité les parties à indiquer, dans les trois jours, si elles admettaient la requête de l'appelant tendant à la poursuite de la procédure arbitrale. Il soulignait qu'à défaut d'accord, application serait faite de l'art. R51 du Code.

Dans le délai imparti, les deux intimés ont demandé au TAS de mettre un terme à la procédure arbitrale.

Par décision du 10 septembre 2018, intitulée "*Termination Order*", le Président suppléant de la Chambre d'appel du TAS (ci-après: le Président), considérant que l'appel était réputé retiré en vertu des art.

R31 et R51 du Code, a clos la procédure arbitrale.

Le 15 octobre 2018, le footballeur a formé un recours en matière civile devant le Tribunal fédéral aux fins d'obtenir l'annulation de la décision rendue le 10 septembre 2018.

Extrait des considérants

Le recours en matière civile visé par l'art. 77 al. 1 let. a LTF en liaison avec les art. 190 à 192 LDIP n'est recevable qu'à l'encontre d'une sentence, qui peut être finale (lorsqu'elle met un terme à l'instance arbitrale pour un motif de fond ou de procédure), partielle, voire préjudicielle ou incidente. En revanche, une simple ordonnance de procédure pouvant être modifiée ou rapportée en cours d'instance n'est pas susceptible de recours. Est déterminant le contenu de la décision, et non pas sa dénomination (ATF 143 Ill 462 consid. 2.1).

En l'occurrence, la décision attaquée (*Termination Order*) n'est pas une simple ordonnance de procédure susceptible d'être modifiée ou rapportée en cours d'instance. En effet, le TAS ne se contente pas d'y fixer la suite de la procédure, mais, constatant que le mémoire d'appel n'a pas été adressé par courrier dans le délai pour ce faire, en tire la conséquence prévue par l'art. R51 du Code, soit la fiction irréfragable du retrait de l'appel. Son prononcé s'apparente ainsi à une décision d'irrecevabilité qui clôt l'affaire pour un motif tiré des règles de la procédure. Qu'il émane du Président suppléant de la Chambre d'appel plutôt que d'une Formation arbitrale, laquelle n'était du reste pas encore constituée, n'empêche pas qu'il s'agit bien d'une décision susceptible de recours au Tribunal fédéral (arrêt 4A_692/2016 du 20 avril 2017 consid. 2.3).

Le requérant, qui a pris part à la procédure devant le TAS, est particulièrement touché par la décision attaquée, car celle-ci entraîne le refus de donner suite à son appel. Il a ainsi un intérêt personnel, actuel et digne de protection à l'annulation de cette décision, ce qui lui confère la qualité pour recourir (art. 76 al. 1 LTF).

En vertu de l'art. 100 al. 1 LTF, le recours contre une décision doit être déposé devant le Tribunal fédéral dans les trente jours qui suivent la notification de l'expédition complète. Selon la jurisprudence, la notification par fax ou par courrier électronique d'une sentence du TAS ne fait pas courir le délai de l'art. 100 al. 1 LTF (arrêts 4A_600/2016 du 29 juin 2017 consid. 1.3; 4A_392/2010 du 12 janvier 2011 consid. 2.3.2). En l'espèce, la décision originale a été notifiée aux parties sous plis du 12 septembre 2018. Le requérant l'a reçue le lendemain.

En déposant son mémoire le 15 octobre 2018, il a donc respecté le délai légal dans lequel il devait saisir le Tribunal fédéral, le 13 octobre 2018 étant un samedi (art. 45 al. 1 LTF).

Pour le surplus, le requérant invoque des griefs figurant dans la liste exhaustive de l'art. 190 al. 2 LDIP.

Il convient dès lors d'entrer en matière.

Invoquant l'art. 190 al. 2 let. d LDIP, le requérant dénonce, dans un premier moyen, une violation de son droit d'être entendu. Il reproche au Président de n'avoir pas examiné les arguments qu'il avait soulevés dans son fax du 16 août 2018.

Le droit d'être entendu, tel qu'il est garanti par les art. 182 al. 3 et 190 al. 2 let. d LDIP, n'exige pas qu'une sentence

arbitrale internationale soit motivée (ATF 142 III 360 consid. 4.1.1). Ce principe s'applique aussi, sinon a fortiori, à une ordonnance de procédure ayant pour simple but de constater que la cause pendante a pris fin *ipso jure* et qu'il y a lieu de la rayer du rôle (arrêt 4A_692/2016, précité, consid. 5.2). Sans doute, pour cette décision de procédure comme pour une sentence au fond, faut-il que celui qui la rend ait traité tous les arguments pertinents avancés par les parties. Point n'est, toutefois, besoin qu'il le fasse nécessairement de manière expresse ni qu'il y consacre de longs développements, du moins lorsque la sanction attachée au non-respect d'une règle de procédure ne laisse guère de marge d'appréciation à celui qui doit la prononcer (arrêt 4A_692/2016, précité, consid. 5.2).

Il incombe à la partie soi-disant lésée de démontrer, dans son recours dirigé contre la sentence, en quoi une inadvertance des arbitres l'a empêchée de se faire entendre sur un point important. C'est à elle d'établir, d'une part, que le tribunal arbitral n'a pas examiné certains des éléments de fait, de preuve ou de droit qu'elle avait régulièrement avancés à l'appui de ses conclusions et, d'autre part, que ces éléments étaient de nature à influencer sur le sort du litige. Pareille démonstration se fera sur le vu des motifs énoncés dans la sentence attaquée (ATF 142 III 360 consid. 4.1.3 et l'arrêt cité). Si la sentence passe totalement sous silence des éléments apparemment importants pour la solution du litige, c'est aux arbitres ou à la partie intimée qu'il appartient de justifier semblable omission dans leurs observations sur le recours. Il leur incombe de démontrer que, contrairement aux affirmations du requérant, les éléments omis n'étaient pas pertinents pour résoudre le cas concret ou, s'ils l'étaient, qu'ils ont été réfutés implicitement par le tribunal arbitral. Cependant, les arbitres n'ont pas

l'obligation de discuter tous les arguments invoqués par les parties, de sorte qu'il ne peut leur être reproché, au titre de la violation du droit d'être entendu en procédure contradictoire, de n'avoir pas réfuté, même implicitement, un moyen objectivement dénué de toute pertinence (ATF 133 III 235 consid. 5.2; arrêt 4A_692/2016, précité, consid. 5.2).

Le Code énonce notamment ce qui suit, dans sa version entrée en vigueur le 1^{er} janvier 2017:

Art. R31 Notifications et communications al. 3:

“La requête d'arbitrage, la déclaration d'appel et tout autre mémoire écrit, imprimé ou sauvegardé sur support numérique, doivent être déposés par courrier au Greffe du TAS par les parties en autant d'exemplaires qu'il y a d'autres parties et d'arbitres, plus un exemplaire pour le TAS, faute de quoi le TAS ne procède pas. S'ils sont transmis par avance par télécopie ou par courrier électronique à l'adresse électronique officielle du TAS [...], le dépôt est valable dès réception de la télécopie ou du courrier électronique par le Greffe du TAS mais à condition que le mémoire et ses copies soient également déposés par courrier le premier jour ouvrable suivant l'expiration du délai applicable, comme mentionné ci-dessus”. [passage souligné par le Tribunal fédéral]

Art. R51 Motivation de l'appel al. 1:

“Dans les dix jours suivant l'expiration du délai d'appel, la partie appelante soumet au Greffe du TAS un mémoire contenant une description des faits et des moyens de droit fondant l'appel, accompagné de toutes les pièces et offres de preuves qu'elle entend invoquer. (...) L'appel est réputé avoir été retiré si la partie appelante ne se conforme pas à ce délai”. [passage souligné par le Tribunal fédéral]

Le recourant expose que, dans son fax du 16 août 2018 par lequel il sollicitait la continuation de la procédure tout en reconnaissant avoir omis d'envoyer en

temps utile son mémoire d'appel par voie postale, il a soulevé les points suivants: le fait que le mémoire d'appel n'a pas été transmis par voie postale au TAS en raison d'une erreur commise par le secrétariat de son conseil; qu'il a adressé son mémoire d'appel par fax du 31 juillet 2018; que les règles procédurales sont édictées pour garantir l'égalité entre les parties, la prévisibilité de la procédure et la cohérence du système juridique; que la procédure arbitrale est moins formaliste qu'une procédure étatique ordinaire; qu'il n'a bénéficié d'aucun avantage sur le plan procédural; que les intimés n'ont subi aucun préjudice lié à l'absence de dépôt du mémoire d'appel sous forme papier; que la sanction découlant de l'art. R51 du Code serait particulièrement préjudiciable pour lui, qui approche de la fin de sa carrière, vu le risque de suspension de toute activité footballistique auquel il s'expose; que le TAS ferait preuve de formalisme excessif en appliquant strictement l'art. R51 du Code. A en croire le recourant, ces moyens seraient susceptibles d'influencer l'issue du litige. Partant, le Président aurait dû les examiner, ce qu'il s'est pourtant abstenu de faire.

Avant de rendre son ordonnance de clôture, le Président a donné au recourant l'occasion de se déterminer sur le point de savoir s'il avait effectivement envoyé le mémoire d'appel par courrier dans le délai échéant le 2 août 2018. Le recourant a reconnu qu'il ne l'avait pas fait. Il a néanmoins requis la continuation de la procédure, en émettant des considérations formulées en des termes tout à fait généraux. A la lecture de la décision attaquée, force est de reconnaître que le Président n'a pas traité expressément les différents arguments avancés par le recourant. Il convient d'ailleurs de relever que la motivation juridique de la décision attaquée est pour

le moins laconique. Cela étant, dans son *Termination Order*, le Président a expressément fait référence au fax du 16 août 2018 que lui avait adressé le recourant. Il faut dès lors admettre, avec l'intimée n° 2, que le TAS a tenu compte des moyens qui y étaient soulevés mais les a écartés implicitement. A cet égard, il y a lieu de rappeler que le tribunal arbitral n'est pas tenu de traiter de manière expresse les arguments invoqués par une partie lorsque, comme c'est le cas en l'occurrence, la sanction attachée au non-respect d'une règle de procédure ne laisse guère de marge de manœuvre à celui qui doit la prononcer (cf. arrêt 4A_692/2016, précité, consid. 5.2).

Au demeurant, à supposer que le Président n'ait pas écarté implicitement les arguments invoqués par le recourant, l'on devrait de toute manière nier l'existence d'une violation du droit d'être entendu car les moyens soulevés par le recourant n'étaient pas susceptibles d'influencer l'issue du litige.

Premièrement, on ne discerne pas en quoi l'erreur commise par le secrétariat du mandataire du recourant justifierait de ne pas appliquer l'art. R51 du Code.

Deuxièmement, il n'est pas contesté que le mémoire d'appel a été adressé au TAS par fax en temps utile. En revanche, le recourant n'a pas envoyé la version originale dudit mémoire par voie postale, alors que l'art. R31 al. 3 du Code l'exige pourtant. Dans ces conditions, force est d'admettre que le seul fait pour le recourant d'avoir transmis son mémoire d'appel par télécopie dans le respect du délai n'a aucune incidence sur le sort de la présente cause.

Troisièmement, les considérations tout à fait générales émises par le recourant concernant la nature des règles procédurales, le caractère prétendument

moins formaliste de la procédure arbitrale ou encore le fait qu'il n'a pas été avantagé procéduralement et que les intimés n'ont subi aucun préjudice lié à la nature du support utilisé pour le dépôt du mémoire d'appel ne sont pas pertinents, étant donné le libellé clair de l'art. R31 al. 3 du Code. Quoi qu'en dise le recourant, les formes procédurales sont nécessaires à la mise en œuvre des voies de droit pour assurer le déroulement de la procédure conformément au principe de l'égalité de traitement (cf. arrêts 4A_238/2018 du 12 septembre 2018 consid. 5.3; 4A_690/2016 du 9 février 2017 consid. 4.2).

Quatrièmement, le fait que la sanction prévue par l'art. R51 du Code puisse avoir des conséquences préjudiciables pour le recourant au regard des circonstances du cas d'espèce ne permet nullement d'écarter l'application de cette disposition.

Cinquièmement enfin, le moyen pris d'un formalisme excessif est également mal fondé, comme on le démontrera ci-après.

Il s'ensuit le rejet du grief tiré de la violation du droit d'être entendu.

Dans un deuxième moyen, le recourant soutient que la décision rendue le 1er mars 2018 par la Commission de discipline serait nulle, car elle contreviendrait gravement à l'ordre public matériel.

A en croire l'intéressé, la sanction prononcée contre lui, alors qu'il ne dispose pas des ressources nécessaires au règlement de sa dette à l'égard de l'intimé n° 1, serait contraire à l'art. 27 al. 2 CC, puisqu'elle limiterait sa liberté économique de façon choquante et inadmissible. En refusant de constater d'office cette nullité et d'entrer en matière, le TAS aurait ainsi commis un

déni de justice et, partant, violé l'ordre public formel, voire l'art. 190 al. 2 let. c LDIP.

La jurisprudence n'a pas exclu que, dans des cas exceptionnels, une sentence arbitrale puisse être considérée comme nulle, notamment lorsqu'il n'existe manifestement aucune convention d'arbitrage et qu'aucune procédure arbitrale n'a eu lieu (ATF 130 III 125 consid. 3.1). Il convient cependant d'user de retenue dans l'admission de motifs de nullité absolue, qui doivent être examinés en tout temps et d'office, car le litige tranché définitivement par l'arbitrage ne doit en principe pas être remis en question (arrêt 4P267/1994 du 21 juin 1995 consid. 3a). Il appartient à celui qui entend contester une sentence viciée d'articuler ses griefs dans le cadre d'un recours formé contre la sentence, et non pas d'attendre d'être poursuivi pour invoquer, alors seulement, la nullité de la décision à exécuter. Une sentence ne sera tenue pour nulle en raison de son contenu que dans des cas exceptionnels (arrêts 4A_407/2017 du 20 novembre 2017 consid. 2.2.2.1; 4P.267/1994, précité, consid. 3a). La sentence qui viole l'ordre public n'est, en principe, pas entachée de nullité absolue, mais seulement attaquable, à moins qu'elle ne porte atteinte à des intérêts publics prépondérants (ATF 120 11 155 consid. 6b).

En l'occurrence, force est de relever que le recourant n'a jamais soutenu devant le TAS que la décision attaquée devant lui aurait été frappée de nullité. On cherche en effet en vain, dans le dossier produit par le TAS, ne serait-ce qu'une ébauche d'une telle démonstration. Invoquer un tel moyen, uniquement au stade du recours devant le Tribunal fédéral, soulève dès lors certaines interrogations au regard des règles de la bonne foi. Il n'est pas interdit de penser que le recourant cherche en réalité, par ce biais, à remédier à

l'inobservation du délai pour déposer son mémoire d'appel devant le TAS, et à obtenir ainsi de la Cour de céans qu'elle procède, en lieu et place de la juridiction arbitrale spécialisée, à un contrôle matériel de la décision rendue par la Commission de discipline. Quoi qu'il en soit, le recourant se contente de soutenir que la décision rendue par celle-ci mettrait en péril son avenir économique et heurterait l'ordre public matériel. Il ne prétend cependant pas que ladite décision porterait atteinte à des intérêts publics prépondérants. Il ne démontre pas davantage l'existence d'un vice d'une gravité telle qu'il justifierait de considérer la décision comme nulle.

Il appert des remarques précédentes que le grief doit être écarté.

Dans un ultime moyen, le recourant reproche au Président d'avoir fait preuve de formalisme excessif à son égard en appliquant mécaniquement les art. R31 et R51 du Code, violant ainsi l'art. 190 al. 2 let. e LDIP en tant qu'il commande le respect de l'ordre public procédural.

Il y a violation de l'ordre public procédural lorsque des principes fondamentaux et généralement reconnus ont été violés, ce qui conduit à une contradiction insupportable avec le sentiment de la justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un Etat de droit (ATF 132 III 389 consid. 2.2.1). Cette garantie est subsidiaire: elle ne peut être invoquée que si aucun des moyens prévus à l'art. 190 al. 2 let. a-d LDIP n'entre en ligne de compte. Il s'agit d'une norme de précaution pour les vices de procédure auxquels le législateur n'aurait pas songé en adoptant les autres lettres de l'art. 190 al. 2 LDIP (ATF 138 III 270 consid. 2.3). Une sentence non motivée ne heurte pas

l'ordre public (ATF 130 III 125 consid. 2.2).

Dans un arrêt rendu en 2017, le Tribunal fédéral s'est demandé dans quelle mesure le formalisme excessif pouvait être assimilé à une violation de l'ordre public au sens de l'art. 190 al. 2 let. e LDIP et, singulièrement, de l'ordre public procédural. Il a évoqué la possibilité de ne prendre en considération, sous l'angle de la contrariété à l'ordre public, que les violations caractérisées de l'interdiction du formalisme excessif, sans toutefois pousser plus avant l'examen de cette question dès lors que dans le cas concret, le TAS n'avait nullement fait preuve de formalisme excessif (arrêt 4A_692/2016, précité, consid. 6.1).

La même conclusion s'impose ici, pour les motifs exposés ci-dessous.

Selon la jurisprudence relative à l'art. 29 al. 1 Cst., il y a excès de formalisme lorsque des règles de procédure sont conçues ou appliquées avec une rigueur que ne justifie aucun intérêt digne de protection, au point que la procédure devient une fin en soi et empêche ou complique de manière insoutenable l'application du droit (ATF 142 110 consid. 2.4.2; 132 I 249 consid. 5 p. 253).

Le Tribunal fédéral a déjà eu l'occasion de préciser que le TAS ne faisait pas montre d'un formalisme excessif en sanctionnant par une irrecevabilité le vice de forme que constituait l'envoi d'une déclaration d'appel par simple télécopie (arrêt 4A_690/2016, précité, consid. 4.2). Il l'a encore rappelé tout récemment, dans un arrêt rendu en 2018, en soulignant que, si l'art. R31 al. 3 du Code permet de déposer par avance une déclaration d'appel par télécopie, la validité de ce dépôt est toutefois subordonnée à la condition que l'écriture soit aussi transmise par courrier le premier jour ouvrable suivant l'expiration

du délai applicable. En d'autres termes, on ne saurait reléguer l'exigence du dépôt d'une déclaration d'appel par courrier au rang de simple formalité administrative (arrêt 4A_238/2018, précité, consid. 5.6).

Appliqués aux circonstances du cas concret, ces principes permettent d'écarter le reproche de formalisme excessif formulé par le recourant.

Ce dernier a en effet reconnu s'être contenté de transmettre son mémoire d'appel par simple télécopie, sans le déposer également par courrier le premier jour ouvrable suivant l'échéance du délai applicable, ce qui, au regard de l'art. R31 al. 3 du Code et de la jurisprudence susmentionnée, suffit à sceller le sort du présent recours. C'est le lieu de rappeler en outre que le recourant avait été expressément rendu attentif à la nécessité d'adresser son mémoire d'appel par courrier, ainsi que le démontre le passage mis en exergue par le TAS dans son courrier électronique du 20 juillet 2018. Quoi qu'en dise le recourant, la transmission du mémoire d'appel par courrier ne constitue pas une simple formalité, mais bel et bien une condition de validité du dépôt de cette écriture.

On ne saurait suivre le recourant lorsqu'il affirme que la jurisprudence mentionnée ci-dessus, relative à la transmission par télécopie d'une déclaration d'appel, ne serait pas transposable à l'envoi du mémoire d'appel. Rien ne justifie en effet de soumettre ces deux actes à deux régimes juridiques distincts, puisque l'art. R31 al. 3 du Code vise, selon son texte, non seulement la déclaration d'appel mais aussi "tout autre mémoire écrit". En outre, le mémoire d'appel revêt une importance toute particulière dans le cadre de la procédure devant le TAS, puisque l'appel est réputé avoir été retiré si le mémoire d'appel n'est pas transmis dans les dix jours suivant l'expiration du

délai d'appel (art. R51 du Code). La jurisprudence rendue par la Cour de céans concernant l'envoi de la déclaration d'appel par télécopie vaut ainsi *mutatis mutandis* pour la transmission du mémoire d'appel par simple fax.

Par ailleurs, la référence faite par l'intéressé à l'ATF 142 I 10 est dénuée de pertinence. Dans cette affaire pénale, le Tribunal fédéral a considéré que lorsqu'un mémoire d'appel n'est pas signé valablement par une partie ou son représentant, le tribunal doit lui impartir un délai raisonnable pour réparer le vice. Cette jurisprudence n'est manifestement pas applicable en l'espèce, puisque le recourant n'a pas omis de signer son mémoire d'appel, mais n'a en réalité pas observé le délai pour déposer ledit mémoire dans les formes prescrites par le Code. En d'autres termes, le mémoire d'appel n'était pas affecté d'un quelconque vice; il n'a simplement pas été déposé en temps utile, raison pour laquelle le Président a clos la procédure arbitrale par un prononcé s'apparentant à une décision d'irrecevabilité. Dans la mesure où il n'existait en l'occurrence aucun vice réparable, c'est à bon droit que le Président n'a pas imparti de bref délai supplémentaire au recourant.

Le recourant fait également fausse route lorsqu'il affirme qu'aucun intérêt digne de protection ne justifiait d'appliquer strictement en l'espèce les règles procédurales, dès lors que la poursuite de la procédure n'aurait pas mis en péril les intérêts des parties ni nui à la sécurité du droit. En raisonnant ainsi, il perd de vue que les formes procédurales sont nécessaires à la mise en œuvre des voies de droit, pour assurer le déroulement de la procédure conformément au principe de l'égalité de traitement et pour garantir l'application du droit matériel. Un strict respect des règles relatives aux délais de recours s'impose pour des motifs d'égalité

de traitement et de sécurité du droit (arrêts 4A_238/2018, précité, consid. 5.3; arrêt 4A_692/2016, précité, consid. 6.2). En décider autrement dans le cas d'une procédure arbitrale particulière reviendrait à oublier que la partie intimée est en droit d'attendre du tribunal arbitral qu'il applique et respecte les dispositions de son propre règlement (arrêts 4A_692/2016, précité, consid. 6.2; 4A_600/2008, précité, consid. 5.2.2). Il n'est dès lors pas envisageable de sanctionner plus ou moins sévèrement le non-respect d'un délai — au lieu de déclarer toujours le recours irrecevable — suivant le degré de gravité de l'atteinte que la décision susceptible de recours porte à la partie qui n'a pas recouru en temps utile contre cette décision (arrêt 4A_384/2017 du 4 octobre 2017 consid. 4.2.3).

Le moyen pris d'une violation de l'ordre public procédural se révèle ainsi infondé.

Décision

Le recours est rejeté dans la mesure où il est recevable.

Informations diverses
Miscellaneous



Publications récentes relatives au TAS/Recent publications related to CAS

- Belhaouci D., Comment penser le “Global Sports Law”? Les Cahiers de droit de sport, n° 49, 2018 p. 9
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- De Castro Moreira Sordi P., Nilmar case update: Considerations from the CAS on the uses and purpose of the TMS proceedings, Football Legal No 10, December 2018, p.171
- Dos Santos C., European Court of Human Rights Rules upon Sports-Related Decision: Switzerland Condemned. ASA Bulletin, Volume 37, No. 1, 2019, p. 117
- Gradev G., Chipeva M. & Vasilev R., Sidelining a player for two weeks is just cause for the termination of contract, Football Legal No 10, December 2018, p.175
- Kharitonchuk A., CAS decision FC Dynamo Kyiv v. FFU – Standing to be sued, Football Legal No 10, December 2018, p.173
- Kleiner J. & Etter C. , Recent Jurisprudence of the Swiss Federal Tribunal : Various Aspects of the Right to be heard, Football Legal No 10, December 2018, p.165
- Krechetov E., Dispute between Slaven Bilic and FC Lokomotiv – Act 2, Football Legal No 10, December 2018, p.177
- Marmayou J.-M., L’effet négatif du principe compétence-compétence au service de l’autonomie du système TAS, Cass. 1^e civ., 11 octobre 2017, n°16-24590, Les Cahiers de droit de sport, n° 49, 2018 p.115
- Orth J. F., Claudia Pechstein: Im Westen wenig Neues!, Spurt 6/2018, p. 233
- Rigozzi A. & Quinn B., The Guerrero Doping Saga: Proportionality Questioned, Football Legal No 10, December 2018, p.94
- Soublière J., Fighting Doping in Football with Integrity within the confines of the World Anti-Doping Code, Football Legal No 10, December 2018, p.82
- Torchetti P., The case of Harold Mayne-Nicholls: A Relentless Pursuit, Football Legal No 10, December 2018, p.145
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- Vandellos Alamilla J. F., Excepio non adimpleti contractus in Football Labor Disputes, Football Legal No 10, December 2018, p.37
- Verly. M., TAS: une hégémonie contestée, Article/commentaire Cour d’appel de Bruxelles, 11 janv. Et 29 août 2018, n° 2016/AR/2048, Doyen Sports Investments, RFC Seraing et autres c/ FIFA et autres, Jurisport n°197, mai 2019, p. 33

- Appellationshof Brüssel, FIFA-Schiedsklauseln in Belgien ungültig (Fall “Seraing”), Spurt 3/2019, p. 263
- Bundesgericht, I. Zivilrechtliche Abteilung, 4A_432/2017, Urteil vom 22. Januar 2018, A. gegen B., Bundesrichterin Kiss, Präsidentin, Bundesrichterinnen Klett, Hohl, Gerichtsschreiber Leeman, ASA Bulletin, Volume 37, No. 1, 2019, p. 189
- CAS: 10-Jahres-Sperre wegen Verstößen gegen das FIFA-Ethikreglement (Fall “Jérôme Valcke”) (m. Anm. Hofmann), Spurt 3/2019, p. 127
- EGMR Unabhängigkeit und Unparteilichkeit des CAS (Fälle Mutu and Pechstein) (m. Anm. Hülskötter), Spurt 3/2019, p. 253

