



Bulletin TAS CAS Bulletin

2022/02



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT

Bulletin TAS
CAS Bulletin
Boletín del TAS
2022/2

Table des matières/Table of Contents/Indice de Contenidos

Editorial.....	4
Articles et commentaires / Articles and Commentaries / Artículos y comentarios.....	6
Protecting Human Rights, Competitive Equity, and Sports Integrity in Binary Athletic Competition in a Nonbinary World Matthew J. Mitten & Kristina Frkovic	7
Swiss law of association and its particularities Denis Oswald.....	27
The Court of Arbitration for Sport's approach to the complexities of art. 15 of the FIFA Disciplinary Code Carlos Schneider & Molly Strachan	44
Jurisprudence majeure / Leading Cases / Casos importantes	66
CAS 2019/A/6669 Sayed Ali Reza Aghazada v. FIFA 28 April 2022.....	67
CAS 2020/A/6922 Tiago Carpes de Bail v. FIFA 13 June 2022.....	77
CAS 2020/A/7359 Football Club Noah v. Football Club Kairat 25 April 2022.....	83
CAS 2020/A/7523 Vladimir Leshonok v. Football Club Irtysh & Football Union of Russia 16 May 2022	88
CAS 2021/A/7636 SønderjyskE Fodbold A/S v. FIFA & Dabo Babes Football Club 27 June 2022.....	94
CAS 2021/A/7701 Joao Teixeira v. National Anti-Doping Agency of Ukraine 6 April 2022.....	99
CAS 2021/A/7858 Association Omnisport Centre Mbérie Sportif v. Union Sportive Tataouine 7 June 2022.....	103
CAS 2021/A/7859 NK Zaprešić v. Serder Serderov & FIFA 11 April 2022.....	107
CAS 2021/A/7983 Brianna McNeal v. World Athletics and CAS 2021/A/8059 WA v. Brianna McNeal 9 June 2022 (operative part of 2 July 2021)	113
CAS 2021/A/8075	

Football Association of Albania & Nedim Bajrami v. FIFA & Swiss Football Association	119
13 June 2022 (operative part of 30 August 2021)	
CAS 2021/A/8221	
Kayserispor KD v. Robert Prosinecki	
21 April 2022.....	124
CAS 2021/A/8225	
Emilian Hulubei v. Romanian Football Federation	
11 April 2022.....	127
CAS 2021/A/8296	
World Anti-Doping Agency v. FIFA & Vladimir Obukhov	
16 June 2022.....	131
Jugements du Tribunal fédéral / Judgements of the Federal Tribunal / Sentencias del Tribunal federal	136
4A_520/2021	
4 mars 2022	
A. c. Fédération Internationale de Football Association	137
4A_106/2022	
5 mai 2022	
A. c. B.....	147
4A_140/2022	
22 août 2022	
A., c. B., C, Fédération Internationale de Football Association	150
Informations diverses / Miscellaneous / Información miscelánea.....	160
Publications récentes relatives au TAS/Recent publications related to CAS/Publicaciones recientes relacionadas con el CAS.....	161

Editorial

The year 2022 was probably the most transformative in the history of ICAS/CAS since the International Council of Arbitration for Sport (ICAS) was constituted in 1994. The move to new offices, owned by ICAS, the significant increase of the CAS caseload, in particular in relation to football matters, and the reform of ICAS with its composition increasing from 20 to 22 members constitute major changes which will pave the way of the future evolution of the institution. The CAS procedural rules have been also amended on the basis of the recent experience and practice of the tribunal. As a consequence, the Code of Sports-related Arbitration has been amended with respect to both the ICAS Statutes (the Statutes) and the Procedural Rules (the Procedural Rules). The amendments entered into force on 1 November 2022. They are published on the CAS website.

The most significant change is related to the composition of ICAS (Article S4 of the ICAS Statutes). Indeed, in view of the significant increase of the number of arbitrations related to football conducted by the CAS, ICAS has decided to create a “4th pillar” representing the football sector within the Council by allocating four seats to the football stakeholders (the other pillars being the International Olympic Committee (IOC), the International Federations (under their umbrella associations ASOIF and AIOWF) and the *Association of National Olympic Committees* (ANOC), all contributors to the ICAS funding). As a consequence, of the additional ICAS members appointed, one will represent the football leagues and one will represent the football clubs. Furthermore, one seat among the ICAS “athletes’ group” remains reserved for football, more particularly for one representative of the football players, to be recommended after consultation with the International Federation of Professional Footballers (FIFPro).

Furthermore, with respect to the Legal Aid system that helps athletes without sufficient financial means to access to CAS arbitration, Article S6 para. 9 has been amended to reflect that, in 2023, the ICAS will manage two separate legal aid funds: the existing one (general fund) and a new Football Legal Aid Fund (FLAF) dedicated to football matters. This change reflects the need to separate legal aid requests submitted in football-related disputes from legal aid requests submitted in relation to other sports as the FLAF will be exclusively financed by FIFA while the classic legal aid fund will continue to be financed by the Olympic Movement as a whole.

With respect to the Procedural Rules, adjustments have been made to several articles that govern CAS arbitrations in order to tighten up the existing language, to bring them into line with current practice and jurisprudence, and to enhance the efficiency of the CAS services. The main changes concern articles R56, R59 and R64.4 of the CAS Code.

Article R56 mentions the principle of a management conference prior to the hearing. It is not an obligation to hold it but it will be an obligation to ask the parties if they want it. As a matter of principle, it is recommended to hold such a management conference in complex procedures.

At Article R59, a time limit of maximum four months between the closing of the evidentiary proceedings and the notification of the final arbitral award has been implemented.

The revised Article R64.4 specifies that the assessment of arbitration costs at the end of the procedures will have to be more detailed.

On the occasion of its last meeting on 2 December 2022, the ICAS appointed Ms Elisabeth Steiner (Austria) as Vice-President,

in replacement of Ms Tjasa Andrée-Prosenč. Ms Steiner is an attorney at law in Vienna and a former judge at the European Court of Human Rights. At the same meeting, the ICAS decided to increase the size of its Board with the addition of a 3rd Vice-President (who will be elected in 2023).

We are pleased to publish in this issue three articles in English, namely, Protecting Human Rights, Competitive Equity, and Sports Integrity in Binary Athletic Competition in a Nonbinary World co-written by Matt Mitten, CAS Arbitrator & Kristina Frkovic, Research Assistant, Marquette University Law School; Swiss law of association and its particularities, written by Denis Oswald, CAS arbitrator and; The Court of Arbitration for Sport's approach to the complexities of art. 15 of the FIFA Disciplinary Code, co-written by Carlos Schneider, FIFA Director of Judicial Bodies and Molly Strachan, FIFA Legal Counsel.

As usual, because the vast majority of CAS cases are football-related, this new issue of

the Bulletin includes a majority of selected "leading cases" related to football, specifically twelve football cases, two of which are linked to doping and one athletics' doping cases.

Finally, summaries of the most recent judgements rendered in French by the Swiss Federal Tribunal in connection with CAS decisions have been enclosed in this Bulletin. Of particular interest is the decision 4A 542_2021 which addresses the issue of the validity of a sanction allegedly disproportionate which would therefore be contrary to public policy and which would infringe an athlete's personality rights.

I wish you a pleasant reading of this new edition of the CAS Bulletin and wish you a Happy Festive Season.

Matthieu Reeb
CAS Director General

Articles et commentaires
Articles and Commentaries
Artículos y comentarios



Protecting Human Rights, Competitive Equity, and Sports Integrity in Binary Athletic Competition in a Nonbinary World

Matthew J. Mitten & Kristina Frkovic*

- I. Introduction
 - II. Historical IOC Athlete Eligibility Guidelines for Female Olympic and International Sports Competition, IF Rules, and CAS Jurisprudence
 - III. 2021 IOC Framework and Its Recommended Role in Future CAS Adjudications of the Legality of IF Athlete Eligibility Rules for Women's Sports Competitions and Events
 - IV. U.S. Legal Process for Resolving Disputes Regarding Athlete Eligibility Rules for Female Olympic Sports and Judicial Precedent Regarding Non-Olympic Sports
 - V. 2022 NCAA Sport-specific Transgender Student-Athlete Participation Policy
 - VI. Conclusion
-

Abstract

This article describes the history and evolution of the International Olympic Committee (IOC) guidelines and International Federation (IF) rules regarding the eligibility of female athletes with sex variations and transgender female athletes to participate in sport at the international and Olympic level. In doing so, this article discusses the *Chand* and *Semenya* Court of Arbitration for Sport (CAS) decisions, which demonstrate a balancing of human rights and competitive equity in sport. This article discusses the 2021 "IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations" and recommends that a combination of the IOC Framework and tripartite *Chand/Semenya* CAS legal framework should be used moving forward, as it appropriately balances an athlete's human

rights with preserving the competitive equity of sport. Lastly, this article discusses eligibility rules for female athletes with sex variations and transgender female athletes from a U.S. perspective, including how they are used in Olympic sports, professional sports, college sports, and high school sports¹.

Key words: gender, transgender, sport, Olympics, CAS, IOC, human rights, competitive equity

I. Introduction

This article initially describes the history and evolution of the International Olympic Committee (IOC) guidelines and International Federation (IF) rules regarding the eligibility of female athletes with sex variations (e.g., hyperandrogenism and other differences of sex development) and transgender female athletes

* Matthew J. Mitten is Professor of Law and Executive Director, National Sports Law Institute, Marquette University Law School; Arbitrator, Court of Arbitration for Sport

Kristina Frkovic is a third Year Law Student, Research Assistant, Marquette University Law School (Class of May 2022)

This article has been already published in the Journal *Pandektis* Vol. 14 ½ 2022

¹ The authors express their gratitude to Lauren Gary Rice (Exercise Scientist) and Laurel Montag, Third Year Law Student, Research Assistant, Marquette University Law School (Class of May 2022) for their insightful comments regarding a draft of this article.

to participate in Olympic and international women's sports competitions and events, as well as their rationales. In doing so, it reviews the *Chand* and *Semenya* Court of Arbitration for Sport (CAS) jurisprudence, establishing and applying the legal framework for balancing these athletes' human rights with the rights of other female athletes to competitive equity, along with the rights of the IOC and IFs to protect competitive integrity in elite-level international women's sport.

Next, this article considers the "IOC Framework On Fairness, Inclusion and Non-Discrimination On the Basis Of Gender Identity and Sex Variations" (November 2021) and determines that the IOC Framework appropriately balances the foregoing rights as well as recommends some modifications to the *Chand/Semenya* legal framework for future CAS adjudications of legal challenges to IF athlete eligibility rules for women's sports competitions and events.

The article then describes the contractual obligation of a U.S. National Governing Body (NGB) to comply with its IF's athlete eligibility rules for female sports, the federal law protecting Olympic sport athletes from sex discrimination, and the legal process for resolving disputes regarding athlete eligibility rules for female Olympic sports. It also reviews U.S. judicial precedent regarding the exclusion of transgender female athletes from professional and non-Olympic sports. It notes that, consistent with the 2021 IOC Framework, the National Collegiate Athletic Association (NCAA) recently adopted a new sport-specific transgender student-athlete participation policy for each of its 21 women's intercollegiate sports, which incorporates the corresponding U.S. NGB athlete eligibility rules for that sport. Because of its consistency with U.S. judicial precedent, the authors suggest that American sports arbitrators and courts should apply the *Chand/Semenya* legal framework (with their proposed modifications) when resolving future disputes regarding the

eligibility of female transgender athletes (e.g., University of Pennsylvania swimmer Lia Thomas) or female athletes with sex variations to participate in domestic female sports competitions and events.

II. Historical IOC Athlete Eligibility Guidelines for Female Olympic and International Sports Competition, IF Rules, and CAS Jurisprudence

The IOC and IFs are private sport governing bodies with global monolithic and plenary power to determine athletic eligibility requirements for Olympic and international sports, subject to compliance with applicable national laws (generally Swiss law because the IOC and most IFs are headquartered in Lausanne, Switzerland) and transnational laws (e.g., European Union Law, particularly the Treaty of Rome's competition and freedom to provide services provisions; European Convention on Human Rights).

An IF's statutes, including its athlete eligibility rules, must comply with the Olympic Charter for the sport(s) under the IF's governance to be part of the Olympic Games or Olympic Winter Games. Subject to this requirement, Rule 25 of the Olympic Charter (2020) provides that each IF have the independence and autonomy to govern its sport. Rule 26 (1.1) and (1.5) states that an IF's role includes establishing and enforcing "in accordance with the Olympic spirit, the rules concerning the practice of their respective sports and to ensure their application" as well as "responsibility for the control and direction of their sports at the Olympic Games".

The Olympic Charter (2020) expressly provides that the "practice of sport is a human right" without discrimination based on "sex," "sexual orientation," or "birth or other

status”.² This is not an absolute right because an athlete’s participation in Olympic and international sports is conditioned upon “fair play” as well as compliance with other Olympic Charter requirements.³ For example, Rule 43 of the Olympic Charter requires athletes to comply with the World Anti-doping Code (WADC)⁴ and the Olympic Movement Code on the Prevention of Manipulation of Competitions (CPMC),⁵ which collectively protect competitive equity and sport integrity.

Binary Male or Female Athletic Competition

Despite the Olympic Charter’s foregoing anti-discrimination provisions, the IOC and IFs historically have generally conducted binary male or female only Olympic or international athletic competitions⁶:

- (a) Athletics competition events are, for reasons of fairness, divided into events for male and female athletes.
- (b) Female athletes participate in female but not male events. Likewise, male athletes participate in male but not female events.
- (c) There is a substantial difference in athletic performance between elite males and elite female athletes. Male athletes are, on average, faster and more powerful than female athletes.

- (d) The division according to the sex of the athlete is therefore appropriate and is for the benefit of female athletes and their ability to engage in meaningful competition by competing on a level playing field.⁷

Ethics and legal experts, as well as athletes, recognize and accept the paramount importance of maintaining competitive equity and sport integrity in binary elite-level athletic competition. Dr. Thomas Murray, president emeritus of the Hastings Center (an independent, interdisciplinary bioethics research institute), states: “[T]he essence of competitive sport is that a contest is ‘fair and meaningful’ in the sense that ‘its outcome is uncertain and will be determined by factors that are prized and valued by the sport (e.g., talent and dedication) and not by other factors.’”⁸ “[I]t is inevitable that lines must be drawn to ensure fair and meaningful play,” and “a sport and its stakeholders have the right to draw lines to ensure that their competitions emphasise such values and make them the determinant of success”.⁹

Professor Doriane Lambelet Coleman, Duke Law School, explains:

[T]he division of competitive athletics into male and female categories reflects the widely held view that women are entitled to

² Fundamental Principles of Olympism 4 and 6, *Olympic Charter*, INTERNATIONAL OLYMPIC COMMITTEE, July 17, 2020, at 11 available at [EN-Olympic-Charter.pdf](#).

³ International Olympic Committee (2020). *Olympic Charter*, pp. 11.

⁴ The WADC’s (2021) purposes include to protect athletes’ “fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide”. “Anti-doping programs seek to maintain the integrity of sport in terms of respect for rules, other competitors, fair competition, a level playing field, and the value of clean sport to the world”.

⁵ Article 2.2 of the CPMC (2016) defines the “[m]anipulation of sports competitions” as “[a]n intentional arrangement, act or omission aimed at an improper alteration of the result or the course of a sports competition in order to remove all or part of the unpredictable nature of the sports competition with a

view to obtaining an undue Benefit for oneself or others.” INTERNATIONAL OLYMPIC COMMITTEE, *Olympic Movement Code on the Prevention of Manipulation of Competitions* (2018) at 16 available at [Code-Prevention-Manipulation-Competitions.pdf \(olympic.org\)](#)

⁶ A notable recent exception is the 4 x 100 metres mixed female and male medley swimming relay during the 2020/2021 Tokyo Olympic Games. <https://apnews.com/article/2020-tokyo-olympics-swimming-sports-36788bf9189349adbd1549de68f7e265>

⁷ *Chand v. Athletics Federation of India & International Association of Athletic Federations* (2015) 24 July CAS 2014/A/3759, at para. 35.

⁸ *Id.*, para 275.

⁹ *Id.*, paras 276 and 277.

parity with men in the distribution of sporting opportunities. This commitment to equality facilitates female empowerment and has numerous consequential benefits for both individual women and society at large. [I]t is well understood that if there were not a separate category for girls and women based on inherent differences between the sexes, the best athletes would always be boys and men. The commitment to female equality in competitive sport is therefore a profoundly important, but also fragile, commitment.¹⁰

Paula Radcliffe, an elite level female long distance runner, notes, “the overriding need for athletes to feel that they are competing on an equal footing and that competition is fair and meaningful” with the consequent need for sport rules and athlete eligibility requirements “designed to ensure success is determined solely by talent and dedication, and not by ‘unfair’ advantage”.¹¹ “If men and women competed in one category . . . competition would not be fair and meaningful because the men would always outperform women”.¹²

The biological basis for binary female and male only sports competitions is that males generally have a higher naturally occurring post-puberty level of testosterone, which provides males with outcome-determinative physical advantages vis-à-vis females in elite-level athletic competition:

It is accepted by all parties that circulating testosterone has an effect from puberty, in increasing bone and muscle size and strength and the levels of haemoglobin in the blood. After puberty, the male testes produce (on average) 7 mg of testosterone per day, while the female testosterone production level stays at about 0.25 mg per day. The normal female range of serum testosterone . . . produced

mainly in the ovaries and adrenal glands, is 0.06 to 1.68 nmol/L. The normal male range of serum testosterone concentration, produced mainly in the testes, is 7.7 to 29.4 nmol/L.

Testosterone may not be the only factor that results in an increase in lean body mass, higher levels of haemoglobin and increased sporting ability, but the expert evidence explains that it is the primary factor.

Based on our collective expertise and experience, [42] specialists in the sports science and sports medicine communities consider the following to be indisputable scientific facts:

1. The main physical attributes that contribute to elite level athletic performance are:
 - power generation . . .
 - aerobic power . . .
 - body composition . . .
 - fuel utilization . . . and;
 - economy of motion.
2. Biological males and biological females are materially different with respect to these attributes.
3. The primary reason for these sex differences in the physical attributes that contribute to elite (>99th percentile) athletic performance is exposure in gonadal males with functional androgen receptors to much higher levels of testosterone during growth and development (puberty), and throughout the athletic career. . . .
4. Therefore, the primary driver of the sex difference in elite athletic performance is exposure in biological males to much higher levels of testosterone during growth, development, and throughout the athletic career.¹³

¹⁰ *Semenya v IAAF & Athletics South Africa v. IAAF* (2019) 30 April CAS 2018/O/5794 and 2018/O/5798, at para 391.

¹¹ Id, para 335.

¹² Id, para 336.

¹³ *Semenya CAS award*, paras 489 and 491.

Neither the IOC nor any IFs have established eligibility guidelines or rules that exclude male athletes with superior genetic traits or inherent physical characteristics that provide a natural competitive advantage from participation in any male sports or athletics. For example, there is no upper limit on an athlete's natural testosterone levels for eligibility to participate in male sports (although increasing one's testosterone level exogenously by taking prohibited substances violates the WADC). Athletes who transition from female to male generally have been permitted to compete in male Olympic and international sports competitions without any restriction other than self or legal verification of their male identity.

Historically, athlete eligibility requirements (for particular female athletes having a "male" appearance or physique) to participate in female Olympic or other international sports competitions initially included visual inspection of an athlete's genitalia to ensure no visible external male gonads or genetic testing to establish that the athlete did not have a male (i.e., Y) chromosome.¹⁴ In contrast to the more liberal eligibility requirements for athletes to participate in male sports competitions, historically there have been additional requirements (or recommendations) that athletes who transition from male to female must (or should) satisfy, as well as the promulgation of IF rules establishing a generally applicable maximum limit on a athlete's natural testosterone levels for eligibility to participate in female sports competitions or events.

2003 Stockholm Consensus

The "Statement of the Stockholm Consensus on Sex Reassignment in Sports (2003)," which

¹⁴ James L. Rupert (2011), "Genitals to Genes: The History and Biology of Gender Verification in the Olympics", in: Canadian Bulletin of Medical History, Volume 28:2, p.348.

was developed by a seven-person ad hoc committee of medical experts convened by the IOC Medical Commission, recommended that athletes undergoing post-puberty sex reassignment from male to female be eligible to participate in female sports competitions only if surgical anatomical changes have been completed, including external genitalia changes and gonadectomy (eligibility should begin no sooner than two years thereafter); legal recognition of female sex; and verified hormonal therapy appropriate for the female sex for a "sufficient length of time to minimise gender-related advantages in sport competitions".

Chand v. IAAF

In April 2011, to maintain competitive balance in international women's athletics events, the International Association of Athletic Federations (IAAF), the IF for the sport of athletics, adopted Hyperandrogenism Regulations effectively creating a rebuttable presumption that a female athlete is eligible to participate in international competitions only if she has "androgen levels below the normal range" of male total testosterone levels, defined as ≥ 10 nmol/L testosterone. In other words, the athlete's naturally occurring total serum testosterone levels must be less than 10 nmol/L to participate in any IAAF international women's track and field events unless she proves her body is resistant to androgens and therefore her naturally elevated testosterone levels in the normal male range do not provide her with any competitive advantage or an IAAF-appointed Expert Medical Panel, after a three-stage medical assessment process, recommends conditions under which the athlete may participate in women's events that are accepted by the IAAF Medical Manager.¹⁵

¹⁵ Chand award, paras 41-62.

In *Chand*, Dutee Chand, a female Indian 200 and 400 metre sprinter, challenged the validity of the IAAF's Hyperandrogenism Regulations after she was provisionally suspended from participating in any athletics events ostensibly because medical testing determined her hyperandrogenism. A CAS panel of arbitrators established a tripartite shifting burdens of proof legal framework for determining the validity of IF rules that discriminate based on sex or gender by restricting the eligibility of female athletes with high levels of naturally occurring testosterone to participate in international competitive athletics events. It determined that the athlete initially must prove the regulations are prima facie discriminatory contrary to "a higher ranking rule or otherwise" (e.g., the IOC Charter, the IAAF constitution, or the laws of Monaco, where the IAAF is domiciled) by a balance of probabilities.¹⁶ If she does so, then the IAAF must prove its regulations "are necessary, reasonable and proportionate for the purposes of establishing a level playing field for female athletes"¹⁷ by a balance of probabilities. Without any clear reasons, the panel rejected the athlete's contention that the IAAF must prove the Hyperandrogenism Regulations are justified to its comfortable satisfaction. It concluded that the IAAF's establishing of the regulations "pursuant to its stated objectives . . . alone does not support a justification [for] discrimination".¹⁸ If the IAAF does so, the "burden shifts back to the [a]thlete to disprove

the bases of that justification" by a balance of probabilities.¹⁹

At the outset, the CAS panel noted it is undisputed that Dutee Chand is a "woman" assumed to have "an endogenous [i.e., natural] level of testosterone greater than 10 nmol/L although the actual level has not been established" who "has not undergone the three-stage medical assessment process including a physical examination provided for in the Hyperandrogenism Regulations".²⁰

The Preface to the Hyperandrogenism Regulations provides context and explains their purpose: "Since 1928, competition in Athletics has been strictly divided into male and female classifications and females have competed in Athletics in a separate category designed to recognize their specific physical aptitude and performance. The difference in athletic performance between males and females is known to be predominantly due to higher levels of androgenic hormones in males resulting in increased strength and muscle development".²¹ The Explanatory Notes state that the IAAF's role "is first and foremost to guarantee the fairness and integrity of [its] competitions" and that the "Regulations stipulate that no female with [hyperandrogenism] shall be eligible to compete in a women's competition if she has functional androgen levels [testosterone] that are in the male range".²²

¹⁶ Id, paras 443 and 449.

¹⁷ Id, para 450.

¹⁸ Id, para 444.

¹⁹ Id, paras 445 and 447.

²⁰ Id, para 36.

²¹ Id, para 43.

²² Id, para 67. Regarding whether naturally elevated levels of testosterone in the normal male range provide female athletes with an unfair competitive advantage in elite women's athlete competition, the IAAF submitted the following evidence: Joanna Harper, a medical physicist who competed in male distance running events for more than 30 years before transitioning to a transgender female who not competes in the female

category, testified that transgender women experience "extreme and rapid" changes in speed after reducing their testosterone levels, after transgender surgery the body produces less endogenous testosterone, which accords with "reduced athletic ability"; and that "the best way to achieve a level playing field for female athletes is 'to require all woman athletes to be hormonally similar.'" Id, paras 326-333. Ms. Radcliffe, an elite female long distance runner, testified she would have "genuine concerns about fairness" about competing against females with testosterone levels in the male range, which "make the competition unequal in a way greater than simple natural talent and dedication. Id, paras 334-338. Professor Maria Jose Martinez Patino, a

The panel determined that the athlete met her burden of proving the hyperandrogenism regulations are prima facie discriminatory by requiring “female athletes to undergo testing for levels of endogenous testosterone when male athletes do not,” as well as by placing “restrictions on the eligibility of certain female athletes to compete on the basis of a natural physical characteristic (namely the amount of testosterone that their bodies produce naturally)”²³.

Given the record evidence, the panel concluded that the IAAF did not prove, by a balance of probabilities, that the Hyperandrogenism Regulations “are necessary and proportionate to pursue the legitimate objective of regulating eligibility to compete in female athletics to ensure fairness in athletic competition,”²⁴ because they only “exclude female athletes that are shown to have a competitive advantage of the same order as that of a male athlete,”²⁵ and that “competition against hyperandrogenic females to whom the existing Regulations apply is unfair due to superior sport performance caused by high levels of testosterone”²⁶.

Because the necessary data is not currently available and additional evidence regarding “the quantitative relationship between androgen levels in hyperandrogenic females and increased athletic performance” is required before the IAAF can satisfy its foregoing burden of proof,²⁷ the CAS panel suspended the IAAF’s implementation of the Hyperandrogenism Regulations for two years

from the 24 July 2015 date of its award. It stated that the regulations would be declared void if the IAAF does not submit such evidence (“in particular, the actual degree of athletic performance advantage sustained by hyperandrogenic female athletes as compared to non-hyperandrogenic female athletes by reason of their high levels of testosterone”²⁸) within the two-year time period.

2015 IOC Consensus Statement

In November 2015, twenty medical and legal experts participated in an IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism, which resulted in publication of a three-page document with the same title (November 2015 IOC Consensus Statement).²⁹ Noting “a growing recognition of the importance of autonomy of gender identity in society,” since the 2003 Statement of the Stockholm Consensus on Sex Reassignment in Sports, it provided transgender guidelines “to be taken into account by sports organisations [e.g., IFs] when determining eligibility to compete in male and female competition”. In a significant departure from the Stockholm Consensus, it stated that requiring surgical anatomical changes as a condition of a transgender athlete’s participation “is not necessary to preserve fair competition and may be inconsistent with developing legislation and notions of human rights”.

The following guidelines were provided: Athletes transitioning from female to male are eligible to compete in male sports without any

former elite-level female athlete, Spanish national athletics coach, and IOC Medical Commission independent expert, testified that the Hyperandrogenism Regulations “ensure equality in sport by enabling female athletes to compete on a level playing field in conditions that are fair and equal”. Id, para 322.

²³ Id, para 448.

²⁴ Id, para 536.

²⁵ Id, para 531.

²⁶ Id, para 537.

²⁷ Id, paras 531 and 532.

²⁸ Id, at 112.

²⁹

https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf

restrictions; Athletes transitioning from male to female are eligible to compete in female sports if her declared gender identity is female and her total serum testosterone level has been below 10 nmol/L for at least 12 months prior to her first female sport competition and remains below this maximum level throughout the period she participates in female sports (which will be monitored by testing and result in a 12-month suspension for non-compliance); Regarding the participation of female transgender athletes, it states that the “overriding sporting objective is and remains the guarantee of fair competition”.

Regarding hyperandrogenism in female athletes, in response to the *Chand* CAS award, the Consensus Statement recommended that participation eligibility rules should protect “women in sport” and promote fair competition; the IAAF “is encouraged to revert to CAS with arguments and evidence to support the reinstatement of its hyperandrogenism rules (i.e., to be eligible to participate in women’s athletics events, an endogenous total serum testosterone level below 10 nmol/L unless the individual female athlete is androgen insensitive/resistant); and “[t]o avoid discrimination, if not eligible for female competition[,] the athlete should be eligible to compete in male competition”.

Semenya v. IAAF

In March 2018, the IAAF informed the *Chand* CAS Panel of its intention to replace its Hyperandrogenism Regulations with new Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) (DSD Regulations), which would become effective on 1 November 2018. Thereafter, the *Chand* arbitration proceeding was terminated.

The Introduction to the DSD Regulations states the IAAF’s recognition that, while biological sex is usually aligned with the conventional male and female binary, “some individuals have congenital conditions that cause atypical development of their chromosomal, gonadal, and/or anatomic sex (known as differences of sex development, or DSDs, and sometimes referred to as ‘intersex’)” resulting in “some national legal systems now recognis[ing] legal sexes other than simply male and female”.³⁰ It notes the existence of “a broad medical and scientific consensus . . . that high levels of testosterone circulating in athletes with certain DSDs can significantly enhance their athletic performance”.³¹ Therefore the regulations, which exist “solely to ensure fair and meaningful competition within the female classification, for the broad class of female athletes,” allow trans athletes to compete in the female events currently “most clearly affected” by their participation only if they meet certain eligibility conditions.³²

Pursuant to the DSD Regulations, a “Relevant Athlete” who has one of six DSDs with a circulating testosterone level of ≥ 5 nmol/L and sufficient androgen sensitivity for her levels of testosterone “to have a material androgenizing effect”³³ is eligible to participate in “Restricted Events” (i.e., 400m, 800m, and 1500m races; 400m hurdles races; and all other track events between 400m and 1 mile) in the female classification at international competitions *only* if she satisfies three conditions: 1) is legally recognized as a female or intersex; 2) reduces her circulating testosterone level to < 5 nmol/L for a continuous period of at least six months; and 3) stays below this maximum level of testosterone “for so long as she wishes to maintain eligibility” to participate in these events. The DSD Regulations do not require any surgical intervention to reduce or maintain

³⁰ Semenya award, para 426.

³¹ *Ibid.*

³² *Ibid.*

³³ *Id.*, paras 431, 433, and 434.

her testosterone level. A “Relevant Athlete” who does not satisfy these eligibility criteria may compete in the female classification in all track and field events that are not international competitions, in the male classification in any events in all competitions, and in any intersex track and field competitions.³⁴

Regulation 1.2 states that the DSD Regulations “operate globally” and “are to be interpreted and applied not by reference to national or local laws, but rather as an independent and autonomous text”.³⁵ Regulation 5.2 requires that resolution of any disputes between an athlete or her National Federation (NF) is subject to the exclusive jurisdiction of the CAS,³⁶ and Regulation 3.18(d) prohibits the athlete from bringing proceedings in any court or other legal forum.³⁷

In June 2018, South African middle-distance runner Caster Semenya (who won the gold medal in the women’s 800 metres event at the 2012 and 2016 Olympic Games) and Athletics South Africa (ASA) filed requests for arbitration challenging the DSD Regulations that were consolidated into a single CAS arbitration proceeding, *Semenya v IAAF & Athletics South Africa v. IAAF*. They sought a declaration that the DSD Regulations are invalid because they discriminate on the basis of birth (i.e., natural biological traits), sex, and gender and are not a necessary, reasonable, and proportionate means of maintaining competition among female athletes in the “Restricted Events”. More specifically, they argued that it is not necessary to discriminate based on DSD to have fair competition in those women’s international track events because “from a scientific perspective there is no sensible basis for distinguishing between DSD and other genetic variations and

mutations that improve athletic performance”³⁸ and no empirical data proves that women with a natural testosterone level ≥ 5 nmol/L have a greater athlete performance advantage than women below this threshold.

In response, while stating its commitment to “the principle of equal treatment and non-discrimination,”³⁹ the IAAF asserted that the DSD Regulations do not discriminate because they treat like individuals alike (i.e., biologically male athletes who are legally recognized or identify as males or females) in determining their eligibility to participate in the “Restricted Events”. The IAAF also contended that even if the regulations are found to be discriminatory based on gender or sex, different eligibility requirements for biologically male athletes identifying as females are necessary, reasonable, and proportionate to its legitimate objective of protecting the right of biologically female athletes to fair competition in the “Restricted Events”.

The CAS Panel observed that the following facts and issues are undisputed: Ms. Semenya is a woman, who was determined to be a female at birth, has always identified as a female, is legally recognized as a woman, and has always run in IAAF events in the female category.⁴⁰ It is necessary to divide international elite competitive athletics into separate female and male categories and to have “a protected class of female athletes”⁴¹ as well as that “any rules regulating who may participate in the female category must be rational, objective and fair”.⁴²

It recognized that this case “involves incompatible, competing, rights” and that “[i]t is not possible to give effect to, or endorse, one set of rights without restricting the other set of rights:”

³⁴ Id, para 436. Many NGBs (i.e., National Federations) adopt and follow their respective IF athlete eligibility rules for national competitions.

³⁵ Id, para 427.

³⁶ Id, para 450.

³⁷ Id, para 448.

³⁸ Id, para 52.

³⁹ Id, para 293.

⁴⁰ Id, para 454.

⁴¹ Id, para 461.

⁴² Id, para 462.

[O]n one hand is the right of every athlete to compete in sport, to have their legal sex and gender identity respected, and to be free from any form of discrimination. On the other hand, is the right of female athletes, who are relevantly biologically disadvantaged vis-à-vis male athletes, to be able to compete against other female athletes and not against male athletes and to achieve the benefits of athletic success, such as positions on the podium and consequential commercial advantages”.⁴³

Applying the *Chand* legal standard to the parties’ evidence and arguments in this case, the *Semenya* Panel initially determined that Claimants proved that the DSD Regulations discriminate based on sex because they impose eligibility conditions only on athletes legally recognized as female or intersex, but not on legally recognized male athletes. The regulations also discriminate based on birth because of their application to “a subset of the female/intersex population” based on their “innate biological characteristics”.⁴⁴ It, therefore, rejected the IAAF’s assertion that the DSD Regulations do not discriminate because all “biologically male” athletes (whether legally male or female) are treated the same for purposes of their eligibility to participate in “Restricted Events”.

The Panel then considered whether the IAAF satisfied its burden of proving by a balance of probability that the DSD Regulations (specifically their application to legally recognized females with a 46 XY DSD, particularly 5-ARD⁴⁵) are necessary, reasonable, and proportionate to ensure “fair competition in the female category of elite

competitive athletics,” an undisputed “legitimate objective”.⁴⁶

Ms. Semenya asserted that *Chand* requires that the DSD Regulations be “necessary to exclude women athletes with DSD from the female category” because of “an advantage comparable to that of male athletes,” which is negated by the following evidence: her fastest time in the 800 metres has been beaten by almost 3,000 men and her times are consistently 9-14% slower than men’s performances in this event; and her average 1.03% faster time than the second place finisher in the women’s 800 metres “is not a statistical outlier in comparison to other track events during the same time.”⁴⁷

The Panel rejected her contention by interpreting *Chand* more broadly:

[T]he necessity of the DSD Regulations turns on the question identified in *Chand*, namely whether the degree of the performance advantage that Relevant Athletes enjoy by virtue of their elevated testosterone levels is so significant as to require the imposition of restrictions on their eligibility to compete against other female athletes who do not enjoy that testosterone-based advantage.⁴⁸

In reaching this conclusion, the Panel majority effectively rejected expert testimony on her behalf by Adjunct Professor Ross Tucker, University of Capetown, that, “what constitutes an ‘unfair advantage’ is ‘to a large degree philosophical’” and suggesting that “insurmountable advantage” provided by naturally occurring conditions is the appropriate standard for excluding female

⁴³ Id, para 460.

⁴⁴ Id, para 547.

⁴⁵ “Individuals with 5-ARD have what is commonly identified as the male chromosomal sex (XY and not XX), male gonads (testes not ovaries) and levels of circulating testosterone in the male range (7.7-29.4

nmol/L), which are significantly higher than the female range (0.06-1.68 nmol/L)”. Id, para 497.

⁴⁶ Id, para 556.

⁴⁷ Id, para 568.

⁴⁸ Id, para 569.

athletes from participation in elite level women's sports competition.⁴⁹

On the other hand, the Panel accepted Ms. Semenya's assertion that "the criterion for reasonableness is whether the restrictions imposed by the DSD Regulations are rationally connected to their objective of ensuring fair competition for female athletes in elite athletics".⁵⁰

A majority of the Panel found that "a preponderance of the evidence is that female athletes with 5-ARD and other 46 XY DSD have high levels of circulating testosterone in the male range and that this does result in a significantly enhanced sport performance ability, which 'translates in practice to a significant performance advantage' in the "Restricted Events".⁵¹ The majority found that the totality of the scientific evidence "provides adequate support for the IAAF's claim that female athletes with a 46 XY DSD enjoy a significant performance advantage over other female athletes, which is of such magnitude as to be capable of subverting fair competition in the female category".⁵² The majority found that the 5 nmol/L upper limit of endogenous testosterone in the DSD Regulations (a 50% reduction from the Hyperandrogenism Regulations' 10 nmol/L maximum) "was not arbitrary" because this level is significantly higher than the normal testosterone range of 0.06-1.68 nmol/L for XX females. Female athletes with a level of testosterone above 5 nmol/L are either male-to-female transgender, or have a 46 XY DSD and are not taking testosterone-suppressing medication, unless they are taking exogenous testosterone or have a testosterone-secreting tumor in their adrenal glands or ovaries.⁵³ Based on these findings, the majority concluded that the DSD Regulations

are necessary and reasonable to achieve this legitimate objective.⁵⁴

The Panel majority also determined that the DSD Regulations' requirements that a 46 XY DSD athlete be medically assessed for androgen sensitivity (with the benefit of any doubt being resolved in the athlete's favor) and to take oral contraceptives to lower her testosterone level below 5 nmol/L (which would be effective and not result in side effects different from those experienced by XX women who take them) are not "disproportionate" means of preserving fair competition in the Restricted Events.⁵⁵

On 25 September 2020, in *Caster Semenya & ASAF v. IAAF (2019)*, the Swiss Federal Tribunal (SFT) rejected Semenya and the ASA's joint request for the court to vacate the CAS Panel majority's upholding of the DSD Regulations on the grounds it "violate[s] essential and widely recognized public policy values, including the prohibition against discrimination, the right to physical integrity, the right to economic freedom and respect for human dignity". The SFT recognized that natural characteristics can distort the fairness of competitions and confirmed that "it is above all up to the sports federations to determine to what extent a particular physical advantage is likely to distort competition and, if necessary, to introduce legally admissible eligibility rules to remedy this state of affairs". Its ruling prevented Semenya from participating in the women's 800-metres race at the Tokyo Olympic Games because she refused to take medication to reduce her natural testosterone level below 5 nmol/L.

On 18 February 2021, Ms. Semenya filed a proceeding with the European Court of

⁴⁹ Id, paras 272-277.

⁵⁰ Id, para 583.

⁵¹ Id, paras 535 and 536.

⁵² Id, para 53.

⁵³ Id, paras 610-611.

⁵⁴ Id, paras 583 and 584.

⁵⁵ Id, paras 599 and 604.

Human Rights⁵⁶ alleging that the DSD Regulations violate several provisions of the European Convention on Human Rights, including Articles 3 (prohibition of inhuman or degrading treatment), 8 (right to respect for private life), and Article 14 (prohibition of discrimination), which is pending.

III. 2021 IOC Framework and Its Recommended Role in Future CAS Adjudications of the Legality of IF Athlete Eligibility Rules for Women's Sports Competitions and Events

In November 2021, the IOC published its "IOC Framework On Fairness, Inclusion and Non-Discrimination On the Basis Of Gender Identity and Sex Variations" (IOC Framework)⁵⁷, which establishes ten principles that IFs and other sports organizations should consider "in establishing and implementing eligibility rules for high-level organised competition" and "ensuring safe and fair competition [for] inclusion and non-discrimination on the basis of gender identity and sex variations".⁵⁸ It was developed after extensive consultation with athletes; IFs and other sports organizations; and human rights, legal, and medical experts. The IOC Framework replaces the IOC's 2015 Consensus Statement.

In comparison to the 2015 IOC Consensus Statement, the IOC Framework is considerably more liberal in its support of inclusive participation by athletes with sex variations and/or transgender status (e.g., Laurel Hubbard, a transgender female, participated in the Tokyo Olympic Games as a member of

New Zealand's women's weightlifting team), while explicitly recognizing the need to ensure "a level playing field, where no athlete has an unfair and disproportionate advantage over the rest".⁵⁹ Sex variations and/or transgender status cannot be deemed or presumed to provide "an unfair or disproportionate competitive advantage".⁶⁰ Any restricted (i.e., exclusionary) athlete eligibility criteria must be based on "robust and peer reviewed research" demonstrating that participation in the specific sport, discipline or event provides "a consistent, unfair, disproportionate competitive advantage in performance".⁶¹ If eligibility criteria based on this principle prevents an athlete from competing in it, the athlete "should be allowed to participate in other disciplines and events for which [he or she] are eligible in the same gender category".⁶²

Unlike the 2015 IOC Consensus Statement, the IOC Framework does not recommend any maximum testosterone thresholds for eligibility to participate in any elite level women's sports or establish any specific objective medical or scientific criteria for determining whether an athlete's participation should be permitted or prohibited. Nor does the IOC Framework require or prohibit IF consideration of a female athlete's individual medical or physical characteristics in determining her eligibility to participate in women's sports competition or particular events.

Consistent with Rule 25 of the Olympic Charter, the IOC Framework recognizes that "it must be in the remit of each sport and its governing body to determine how an athlete

⁵⁶ Semenya v. Switzerland, (application no. 10934/21), which was communicated to the Government of Switzerland on 17 May 2021 for its submission of observations after the non-contentious phase of the case. See [Notification of the application Semenya v. Switzerland \(1\).pdf](#).

⁵⁷

<https://stillmed.olympics.com/media/Documents/News/2021/11/IOC-Framework-Fairness-Inclusion->

Non-discrimination-2021.pdf?_ga=2.113955331.583514125.1647147885-1085195548.1646427317

⁵⁸ Id, p.2 ("Principles").

⁵⁹ Id, p.1 ("Introduction"); Id, p.3 ("Fairness").

⁶⁰ Id, p.4 ("No Presumption of Advantage").

⁶¹ Id, p.4 ("Evidence-Based Approach").

⁶² Ibid.

may be at a disproportionate advantage against their peers, taking into consideration the nature of each sport”. It states that sport governing body eligibility rules for women’s competition categories should provide confidence that no athlete “has an unfair and disproportionate competitive advantage (namely an advantage gained by altering one’s body or one that disproportionately exceeds other advantages that exist at elite-level competition)”.⁶³ By recommending that athlete eligibility criteria should “reflect any relevant ethical, human rights, legal, scientific, and medical developments in this area” and “include the affected stakeholder’s feedback on their application,”⁶⁴ the IOC Framework’s approach is more comprehensive than the 2015 IOC Consensus Statement, which recommended a ≤ 10 nmol/L maximum testosterone level for transgender females and supported it as the eligibility criterion for female athletes with hyperandrogenism who are androgen-sensitive to participate in elite women’s sports.

The IOC Framework explicitly recommends CAS arbitration as the legal forum in which an athlete should be permitted to contest IF or other sports organization eligibility rules and decisions excluding them from a sports competition or event based on sex variations, physical appearance, and/or transgender status.⁶⁵ It does not explicitly reference or approve the *Chand/Semenya* CAS jurisprudence or either panel’s application of it to the particular eligibility requirements that female athletes must satisfy to participate in women’s sport competitions or events. On the other hand, the IOC Framework’s principles implicitly support the general legal framework these arbitration awards establish and apply in resolving such disputes. Read together, these principles acknowledge that when eligibility criteria regulate participation in women’s and

men’s categories of sport competition, “respect for internationally recognised human rights” (e.g., “inclusion and non-discrimination”) requires that athletes “not be excluded solely on the basis of their transgender identity or sex variations” without medical or scientific evidence of a resulting “unfair or disproportionate competitive advantage” (i.e., “an advantage gained by altering one’s body or one that disproportionately exceeds other advantages that exist at elite-level competition”).

The IOC Framework is consistent with the *Semenya* CAS Panel’s determination that IF eligibility conditions or requirements applicable only to athletes legally recognized as female or intersex (but not to legally recognized male athletes) discriminate based on sex and birth because of an athlete’s “innate biological characteristics”. It recommends that athletes not be excluded from participating based on sex variations, physical appearance, and/or transgender status without “robust and peer-reviewed” medical or scientific evidence that their participation in the particular sport or event would provide “a consistent, unfair, disproportionate competitive advantage”. This recommendation also is consistent with the *Chand/Semenya* CAS jurisprudence requiring an IF to prove that a challenged eligibility rule is “necessary, reasonable, and proportionate” to its legitimate objective of protecting the right of biologically female athletes to fair competition in specific sports events.

The January 2022 “Joint Position Statement of the International Federation of Sports Medicine and European Federation of Sports Medicine Associations on the IOC Framework On Fairness, Inclusion and Non-Discrimination On the Basis Of Gender Identity and Sex Variations”⁶⁶ expresses

⁶³ Id, p.3 (“Fairness”).

⁶⁴ Id, p.6 (“Periodic Review”).

⁶⁵ Id, p.5.

⁶⁶ Fabio Pigozzi, Xavier Bigard, et al. (2021), “Joint position statement of the International Federation of Sports Medicine (FIMS) and European Federation of Sports Medicine Associations (EFSMA) on the IOC

concerns that IF adoption of the IOC Framework's principles will result in unfair competition in women's sports. It notes that the scientific, biological or medical aspects necessary to ensure fair competition in women's elite sport are not considered, which is contrary to the 2015 IOC Consensus, the scientific evidence, and the subsequent assessment of numerous sports medicine associations/commissions. The IOC Framework states there should be "no presumption of advantage" because of an athlete's sex variations or transgender status, which the Joint Position Statement interprets as meaning "due to high concentrations of testosterone in the male range of 9.2-31.8 nmol/L".

According to the Joint Position Statement, "there is little doubt that high testosterone concentrations, either endogenous or exogenous, confer a baseline advantage for athletes in certain sports" and "to uphold the integrity and fairness of sport that these baseline advantages of testosterone must be recognized and mitigated, as has been called for previously". It also points out that most IFs lack the necessary resources or expertise to ensure compliance with the IOC Framework's principle that athlete eligibility restrictions should be "based on robust and peer-reviewed research that demonstrates a consistent, unfair, disproportionate competitive advantage in performance," which could result in athlete "self-identification that all but equates to no eligibility rules". In other words, if athletes have "a free choice to compete in any gender classification, sport would lose its integrity and near-universal support".

The Joint Position Statement recognizes the primacy of ensuring fair competition in elite-level international women's sport competition, as does the IOC Framework. Although the

framework on fairness, inclusion and non-discrimination based on gender identity and sex variations", in: BMJ Open Sport & Exercise Medicine.

IOC Framework does not recommend a maximum level of testosterone for female athletes with sex variations or transgender status for eligibility to participate in women's sports, it does not prohibit or state that such a requirement is disfavored. Rather, it recommends an "evidence-based approach" requiring such a restriction to be "based on robust and peer-reviewed research," which currently exists according to the Joint Position Statement.

The IOC Framework recognizes that each IF should determine whether and how a female athlete may have an unfair competitive advantage, which is consistent with the Olympic Charter's provision that each IF have the independence and autonomy to govern its sport. Moreover, the *Semenya* CAS Panel majority ruling permits an IF to adopt athlete eligibility rules more restrictive than the then-current IOC guidelines (e.g., it upheld the IAAF DSD Regulations' ≤ 5 nmol/L maximum testosterone level, which is significantly lower than the IAAF Hyperandrogenism Regulations ≤ 10 nmol/L maximum testosterone level supported by the 2015 IOC Consensus). Therefore, the Joint Position Statement's concerns, while legitimate, may be unfounded based on close analysis of the IOC Framework's foregoing principle and existing CAS jurisprudence.

Recommendations

Based on the IOC Framework's principles for balancing the inherently conflicting rights of all athletes to compete in sport without discrimination based on their individual legal sex and gender identity; rights of female athletes who are biologically disadvantaged vis-à-vis female athletes with male levels of natural testosterone to competitive equity; and rights of the IOC and IFs to protect competitive

<https://bmjopensem.bmj.com/content/bmjosem/8/1/e001273.full.pdf>

integrity in elite-level international women's sport, the authors have the following recommendations.

In determining whether a challenged IF athlete eligibility rule is “necessary, reasonable, and proportionate” to its legitimate objective of protecting the right of biologically female athletes to fair competition in elite-level international sports events, the appropriate question should be whether a female athlete's transgender identity or sex variations provide her with “an unfair and disproportionate competitive advantage (namely an advantage gained by altering one's body or one that disproportionately exceeds other advantages that exist at elite-level competition)”. To provide an affirmative answer to this question, an IF should prove the particular athlete has “a significant performance advantage over other female athletes, which is of such magnitude as to be capable of subverting fair competition in the female category,” which is essentially the same as the standard established by the *Semenya* Panel majority. But the IF would not be required to prove the athlete has “a competitive advantage of the same order as that of a male athlete” (the apparent *Chand* standard) or an “insurmountable advantage” provided by naturally occurring conditions (as one of Ms. Semanya's experts suggested).

Because of its worldwide monolithic authority to govern the sport, the IF should be required to prove the foregoing requirement to the CAS panel's comfortable satisfaction (i.e., “greater than a mere balance of probability but less than proof beyond a reasonable doubt”), which is the same legal standard established by the WADC for proving that an athlete has committed an anti-doping rule violation (ADRV).⁶⁷ The *Chand* CAS Panel provided no reasoned explanation for rejecting the athlete's requested comfortable satisfaction standard and instead adopting the lower balance of probability evidentiary burden of proof that

the IAAF was required to satisfy (as did the *Semenya* CAS Panel). If an IF's eligibility rules preclude or restrict participation in women's sports competition because of a female athlete's naturally occurring testosterone level because of one of more DSDs, the IF's burden of proving her exclusion is “necessary, reasonable, and proportionate” to protect fair competition in elite-level women's international sports events should be the same as required to establish an ADRV for the presence of exogenous testosterone in her system. The IOC Framework's general principles for ensuring inclusion, non-discrimination, and fair competition in women's sport are the same regarding IF eligibility rules for female transgender athletes or female athletes with sex variations. Therefore, to provide consistent legal treatment of both categories of female athletes, the IF should be required to prove to the CAS Panel's comfortable satisfaction that the exclusion or restricted participation of transgender female athletes generally is “necessary, reasonable, and proportionate” to ensure fair competition in elite-level international sports events because such athletes have “a significant performance advantage over other female athletes, which is of such magnitude as to be capable of subverting fair competition in the female category”.

In summary, the three-part *Chand/Semenya* legal framework for determining the validity of IF eligibility rules for female athletes based on their sex variations or transgender status should be modified as italicized : 1) the athlete has the burden of proving by a balance of probability that the eligibility rule discriminates against female athletes based on sex, sexual orientation, or birth (no proposed change); 2) if she does so, the IF must prove *to the comfortable satisfaction of the CAS panel* that its eligibility rule is “necessary, reasonable, and proportionate” to its legitimate objective of

⁶⁷ WADC, Article 3.1.

protecting the right of biologically female athletes to fair competition in the particular elite-level international sports competition or event because female transgender identity/status or sex variations generally provide “*an unfair and disproportionate competitive advantage (namely an advantage gained by altering one’s body or one that disproportionately exceeds other advantages that exist at elite-level competition)*,”⁶⁸ and 3) if it does so, the athlete has the burden of proving by a balance of probability that *application of the eligibility rule or its restriction(s) to exclude her from participating in particular elite-level international women’s sports or events is not necessary to further the IF’s objectives.*

IV. U.S. Legal Process for Resolving Disputes Regarding Athlete Eligibility Rules for Female Olympic Sports and Judicial Precedent Regarding Non-Olympic Sports

Olympic Sports

In the U.S., there is no general human or legal right to participate in sports at any level of competition. The USOPC and U.S. NGBs for Olympic and international sports must comply with the athlete eligibility requirements established by the Olympic Charter and IOC rules as well as CAS awards interpreting and applying them. Each NGB has a contractual obligation to adhere to its IF’s athlete eligibility requirements for elite-level international sport competitions, which the USOPC also must effectively follow when entering Team USA athletes in the Olympic Games, Olympic Winter Games, and other international multi-sport competitions (e.g., Pan American Games). The USOPC and its recognized NGBs also must comply with the Ted Stevens Olympic and Amateur Sports Act (ASA),⁶⁹ a federal law expressly requiring each NGB to provide all athletes with an equal opportunity

to participate in sport without discrimination based on “sex”⁷⁰ and imposing an affirmative legal duty to encourage and support athletic participation opportunities for women.⁷⁰ The ASA requires each NGB’s athlete eligibility criteria for Olympic and international sports competition not to be “more restrictive than” those of the IF for its sport.⁷¹

The ASA requires the USOPC to establish a procedure for “swift and equitable resolution” of disputes regarding the opportunity of an athlete to participate in the Olympics and other international athletic competitions such as the Pan-American Games and world championships for the various sports.⁷² Section 9 of the USOPC’s Bylaws prohibits an NGB from denying an otherwise qualified athlete the opportunity to participate in these elite-level competitions and provides an aggrieved athlete with the right to submit a dispute with her or his NGB to domestic arbitration, which currently is conducted before a sole arbitrator in accordance with the Commercial Rules of the American Arbitration Association (AAA). Because there presently is no Section 9 jurisprudence regarding the validity of eligibility rules restricting female athletes with sex variations or transgender female athletes from participating in elite-level international women’s sports competitions or their application to individual female athletes, it is likely that a AAA arbitrator would follow and apply the *Chand/Semenya* CAS legal framework in resolving a U.S. athlete’s dispute with her NGB.

Although an NGB has plenary domestic authority to govern the participation of U.S. athletes in Olympic and other international athletic competition in a sport, it has no authority to govern other levels of competition such as intercollegiate and professional sports, which are autonomously and separately

⁶⁸ 36 U.S.C. §220051, et seq.

⁶⁹ 36 U.S.C. §220522(a)(8).

⁷⁰ 36 U.S.C. §220524(6).

⁷¹ 36 U.S.C. §220522(a)(14).

⁷² 36 U.S.C. §220509(a).

governed by other U.S. sports associations or leagues. The ASA's prohibition against sex discrimination is inapplicable to intercollegiate and professional sports governing bodies, which must comply with other applicable national and state laws prohibiting discrimination against college and professional athletes based on sex or sexual orientation. Unless proven to be necessary to maintain the sport's competitive balance (or to protect other athletes' health and safety), U.S. courts have ruled that applicable federal or state human rights laws prohibit an American sport governing body from establishing or enforcing athlete eligibility requirements that discriminate based on sex, gender, or sexual orientation, which includes categorically prohibiting transgender female athletes from participating in female-only sports or requiring them to satisfy unreasonable requirements as a condition of participation.

Professional Sports

In *Richards v United States Tennis Association* (USTA) (1977) 400 N.Y.S.2d 267, a New York state court enjoined the USTA from requiring a transgender female athlete, Dr. Renee Richards, to submit to a sex-chromatin test used by the IOC to confirm she is a "normal female," as a condition of being allowed to qualify and/or participate in the United States Open Tennis Tournament as a woman. After undergoing a sex change operation to become a female, she subsequently entered nine women's tennis tournaments, winning two tournaments and finishing as runner-up in three others. As the justification for requiring her to submit to a sex-chromatin test, the USTA asserted "there is a competitive advantage for a male who has undergone 'sex-change' surgery as a result of physical training and development as a male" and "the Olympic sex determination procedures, are a reasonable way to assure fairness and equality of competition when dealing with numerous competitors from around the world". Determining that the "only justification for

using a sex determination test in athletic competition is to prevent fraud, i.e., men masquerading as women, competing against women," the court found no evidence that requiring her to take this test (which created an irrebuttable presumption of one's sex based on their chromosomes) is necessary to maintain the competitive integrity of women's tennis. Based on expert testimony that she is a female, "her muscle development, weight, height and physique fit within the female norm," and will have no unfair advantage competing against other women, the court ruled that requiring her to pass the sex-chromatin test to participate in the women's U.S. Open "is grossly unfair, discriminatory and inequitable, and violative of her rights" under New York's Human Rights Law.

High School Sports

Even for non-elite levels of athletic competition (e.g., high school sports or youth sports), U.S. courts have ruled that exclusion of all transgender female athletes from female sports must be proven to be necessary to maintain the integrity of female athletic competition. In *Hecox v Little* (2020) 479 F. Supp. 3d 930, a federal district court ruled that Idaho's Fairness in Women's Sports Act violates the federal constitution. This state law categorically prohibited transgender females from participating in female interscholastic sports competition in Idaho as well as provided a process for challenging a female athlete's sex and a private cause of action against a school by any student deprived of an athletic opportunity or harmed because of a transgender female's participation on a female-only team. The court ruled that this law violates the federal Constitution's Equal Protection Clause (EPC) because it constitutes illegal sex discrimination based on gender identity and does not substantially further any important government objectives (e.g., promoting sex equality; providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities; and providing female athletes

with opportunities to earn college scholarships and other accolades). For the same reasons, in *B. P. J. v West Virginia State Board of Education* (2021) WL 3081883, a federal court preliminarily enjoined the state school board from enforcing the “Save Women’s Sports Bill,” a West Virginia statute effectively prohibiting transgender female students from participating in any female college or high school sports offered by state public schools because the 11-year old sixth-grade girl plaintiff will likely succeed in proving this statute as applied to her violates the EPC and Title IX (a federal law prohibiting sex discrimination by educational institutions receiving federal funds).

Collectively, the *Richards*, *Hecox*, and *B. P. J* judicial precedent requires a U.S. sport governing body for professional or high school sports to prove that its eligibility rule or individualized application to a particular athlete that discriminates against female athletes based on their sex or sexual orientation is reasonably necessary to maintain competitive balance in female sports competition. These cases are consistent with the U.S. Supreme Court’s 2001 landmark ruling that the federal disability discrimination laws, specifically the Americans With Disabilities Act (ADA),⁷³ require a sport’s governing body (including those that regulate professional sports at the highest level of competition) to make reasonable accommodations to provide a physically impaired athlete with an opportunity to compete in the subject sport. Because DSD substantially limits the major life activity of reproduction, it probably is a “physical impairment” and athletes with DSD are protected by the federal disability discrimination laws.

⁷³ 42 U.S.C. §§ 12101 et seq. The ADA is patterned after the Rehabilitation Act of 1973, 29 U.S.C. §701 et seq., which applies to educational institutions that receive federal funds (which virtually all U.S. private and public schools do), therefore, the athletic programs of elementary, middle, and high schools as well as colleges

In *PGA Tour, Inc. v. Martin* (2001) 532 U.S. 661, the Court held that the PGA violated the ADA by refusing to permit Casey Martin, a professional golfer with a circulatory disorder inhibiting his ability to walk, to use a golf cart while playing without any individualized evaluation of whether it would provide him with a competitive advantage over other golfers who walked the course. Rejecting the PGA’s allegation that “all the substantive rules for its ‘highest-level’ competitions [is] sacrosanct and cannot be waived under any circumstances,” the Court ruled that allowing Martin to use a cart would not fundamentally alter the nature of professional championship golf. It refused to presume that permitting Martin to use a cart would be “possibly ‘outcome-affecting,’” effectively requiring the PGA to make an “individualized inquiry” based on medical evidence and to prove that his use of it would provide a competitive advantage over other golfers walking the course.

V. 2022 NCAA Sport-specific Transgender Student-Athlete Participation Policy

On January 19, 2022, the NCAA Board of Governors adopted a new transgender student-athlete participation policy that permits, prohibits, or restricts their participation in intercollegiate sports in accordance with the corresponding U.S. NGB policy or rules for that sport, which is subject to ongoing review and recommendations by the NCAA Competitive Safeguards and Medical Aspects of Sports Committee to the NCAA Board of Governors consistent with the November 2021 IOC Framework.⁷⁴ NCAA President Mark Emmert stated: “Approximately 80% of U.S. Olympians are either current or former college athletes. This policy alignment provides

and universities must comply with federal disability discrimination law as well as applicable similar state laws.
⁷⁴ <https://www.ncaa.org/news/2022/1/19/media-center-board-of-governors-updates-transgender-participation-policy.aspx>.

consistency and further strengthens the relationship between college sports and the U.S. Olympics”.⁷⁵ It replaces the 2011 NCAA Inclusion of Transgender Student-Athletes Handbook,⁷⁶ which prohibited a transgender female student-athlete who is not taking gender transition hormone treatments from competing on a women’s intercollegiate team at any of the NCAA’s approximately 1,100 colleges or universities.

As a result of this new NCAA policy and effective immediately, transgender female athlete eligibility for each of the NCAA’s 21 women’s championship sports is to be determined by the NGB policy/rule for the particular sport. The NCAA effectively has delegated its authority to independently determine transgender female athlete eligibility (as well as presumably the eligibility of females with sex variations) to participate in intercollegiate sports. Therefore, in resolving disputes regarding the eligibility of these athletes to participate in NCAA intercollegiate sports competition, American sports arbitrators and/or courts may adopt and apply the *Chand/Semenya* CAS legal framework for Olympic and international sports, which generally is consistent with the *Richards*, *Hecox*, *B. P. J.*, and *Martin* jurisprudence.

VI. Conclusion

As long as there is only binary female and male athletic competition, legal disputes between athletes who are characterized as biologically male or female with natural sex variations, female athletes with natural testosterone levels within the normal female range, and sport governing bodies will continue to arise. As the *Semenya* CAS Panel aptly observed, these cases necessarily involve “incompatible, competing, rights”, and “[i]t is not possible to give effect

to, or endorse, one set of rights without restricting the other set of rights”. After careful consideration of these incompatible, competing rights (i.e., birth, individually determined gender or sex, participation in sport; competitive equity; and sports integrity) as well as CAS and U.S. jurisprudence, the authors conclude that the IOC Framework and the tripartite *Chand/Semenya* CAS legal framework (with some recommended modifications) appropriately balance these conflicting legitimate rights. Until there are additional categories of sports competition (e.g., among transgender female or intersex athletes), both provide principled and sound guidance to governing bodies for establishing athlete eligibility rules as well as sports arbitrators and courts in resolving future disputes regarding the legal validity or application of such rules to individual athletes at all levels of sports competition.

Bibliography

International Olympic Committee (2021), IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations, International Olympic Committee: Lausanne

International Olympic Committee (2020), Olympic Charter, International Olympic Committee: Lausanne

International Olympic Committee (2016), “Olympic Movement Code on the Prevention of the Manipulation of Competitions”, in: IOC Code of Ethics and other texts, pp. 7383

NCAA Office of Inclusion (2011), NCAA Inclusion of Transgender Student-Athletes, NCAA: Indianapolis

⁷⁵ Id.

⁷⁶https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC_TransgenderHandbook.pdf.

Fabio Pigozzi, Xavier Bigard, et al. (2021), “Joint position statement of the International Federation of Sports Medicine (FIMS) and European Federation of Sports Medicine Associations (EFSMA) on the IOC framework on fairness, inclusion and non-discrimination based on gender identity and sex variations”, in: BMJ Open Sport & Exercise Medicine

World Anti-Doping Agency (2021), World Anti-Doping Code, World Anti-Doping Agency: Montreal

Swiss law of association and its particularities

Denis Oswald*

- I. Introduction
 - II. Seat of the matter
 - III. The Association (art. 60 *et seq.* CC)
 - A. The Aim
 - B. The Organisation of the Association
 - C. The Resources of the Association
 - D. The General Assembly
 - E. The Agenda
 - F. The right to vote
 - G. The Calculation of the Majority
 - H. The Elections
 - I. The Residual Responsibilities
 - J. The direction
 - K. The Auditing Organ
 - L. The Other Organs
 - M. The Membership
 - N. Leaving the Association
 - O. The Members' rights
 - P. The Members' Obligations
 - Q. The Regulatory Power of Associations
 - R. The Jurisdictional Power of Associations
 - S. The Cessation of the Association
 - IV. The particularities of the Swiss law of association
-

I. Introduction

Almost all sports organisations, including the largest ones, are constituted in the legal form of an association, even if this does not prevent them from sometimes establishing, alongside the association, a separate entity in another form to support a specific activity. The IOC Television & Marketing Services SA is an example.

These organisations, when they are based in Switzerland, which is the case for the majority of them, must be organised in accordance with Swiss law. It also follows that, in the event of a dispute before CAS, Swiss law

applies pursuant to Art. 45 of the Code of Arbitration.

One of the strengths of the CAS is the diversity of arbitrators that the parties can choose from, but this diversity also leads to some arbitrators having to apply a law in which they have not been trained. This is particularly the case for Swiss association law, which has the particularity of being very liberal and flexibly regulated. This can lead to sometimes divergent interpretations or applications when the arbitrators involved are not well versed in this area. When talking about associations, it is worth mentioning at the outset, that this also includes federations. A federation is only a particular form of

* CAS Arbitrator, Professor Emeritus of the University of Neuchâtel, Director of the International Centre for Sports Studies (CIES), Participant in three Olympic Games in Rowing, (1968 - bronze medal, Diplomas 1972 & 1976), President World Rowing 1989-2014, IOC member since 1991.

association. It is an association whose members are themselves constituted as an association, i.e. an association of associations. As a result, the various rules relating to associations are applicable to federations, notably to all international sports federations based in Switzerland, despite their international character.

This presentation in such an article will naturally be summary, some will say basic, but it should still give the reader a good general idea of this institution. After that general presentation, we shall devote a few pages to some of the particularities specific to the Swiss law of association that CAS arbitrators may have to deal with. These particularities relate notably to the broad autonomy of associations in their organisation and the great protection their decisions enjoy before the courts. As you will see, this autonomy is the combined result of a legislator's will and the application to international arbitration of the federal law on private international law (PILA) which, by its liberal character, further strengthens this respect for decisions taken by associations.

It is why this article is particularly aimed at arbitrators working mainly in another law than Swiss law.

II. Seat of the matter

The association is governed by two groups of provisions: first, art. 52 et seq. of the Swiss Civil Code (CC) which are applicable to all moral persons and therefore also to associations. Then, there are specific provisions for each entity and these are, for the association, art. 60 to 79 CC.

Art. 52 et seq. CC are rarely at the centre of disputes that are submitted to CAS. We will therefore not set them out in detail here and limit ourselves to mentioning the main features of the most important ones. Nevertheless, we will come back to certain aspects as far as necessary in the presentation of the association itself.

A moral person is properly constituted and exists from the moment that “*it possesses the organs which the law and its statutes require for this purpose*” (art. 54 CC). At the same time, the moral person “*acquires legal personality, that is to say a distinct existence separate from that of its members*”. This also means that the moral person can “*acquire all types of rights and obligations which are not inherent to the human condition such as sex, gender and kinship*” (art. 53 CC).

The constitution and nomination of its various organs is a mandatory pre-requisite for a moral person to acquire legal personality (art. 54 CC). These organs assume a dual role: internally, they ensure the proper functioning of the moral person and externally they represent the moral person and allow it to express its will. They have the power to bind the association.

An association must also have a name and a seat. The seat of a moral person is the equivalent of a domicile for a natural person.

In order to be validly constituted, it is necessary that a moral person does not pursue an illicit aim or one which is contrary to “*good customs*”. The aim of a moral person must be defined by its Statutes.

The general part of the CC, namely art. 52 *et seq.*, does not contain any specific provisions with respect to the reasons for dissolution of a moral person. Such provisions are found in the regulations of each individual entity.

III. The Association (art. 60 et seq. CC)

We shall now consider in more detail the “*association*” as it constitutes, both in daily affairs and in the world of sport, the most widespread of the forms of legal person without a lucrative aim envisaged by the legislator.

Reflecting the unique position of the association in the Swiss legal system, the Federal Constitution has even devoted an article to guaranteeing freedom of association

which is thus a fundamental constitutional right. All natural persons, independent of their nationality, and all moral persons are entitled to freedom of association.

More specifically, Art. 23.2 of the Constitution confers the right on all those persons “to create associations, to join them or belong to them and to participate in the activities of the association”. This represents the positive aspect of the freedom of association.

In its negative aspect, the freedom of association protects the right to not be “obliged to join or belong to an association” (art. 23.3 of the Constitution) and to be able to leave or dissolve an association. The corollary of art. 23.3 of the Constitution is that there is no legal right to be part of a given association.

Having already mentioned the four elements dealt with expressly by the legislator in art. 52 et seq. CC and applicable to all moral persons (constitution, organisation, members and dissolution), we shall now examine the other specific provisions dedicated to the association and notably all those matters which concern the “legislative” and “judicial” powers of an association; this means that we will also expose the ability of an association to adopt rules and to sanction breaches of those regulations, which is the matter most often referred to CAS.

As mentioned above, apart from the general provisions of art. 52 et seq. CC, the association is regulated by a specific section of the CC containing only about 20 articles (art. 60 – 79 CC). This is not much for such an important and widely used subject and, moreover, not all provisions are mandatory. This reflects the Swiss legislator's desire to give associations as much freedom as possible in their organisation and to interfere as little as possible in their operations and decision-making. This freedom has been one of the major contributing factors in many international sports federations being established in Switzerland.

It is extremely easy to create an association in Switzerland, as you will see from the following presentation. All it takes is for two or three people to express their desire to organise themselves collectively in the form of an association in order to work towards a common goal. As soon as they have signed the corresponding statutes, the association exists and has legal personality. No further formalities are required, in particular no notarial deed, no state approval or registration. This also means that associations are completely private and detached from State power, even if they are naturally subject to mandatory law. For example, they do not have delegated powers from the State as is the case in countries such as France or Italy. This simplicity surprises people who create an association in Switzerland because they wonder how they will prove their existence, for example when they want to acquire a building. There are several ways of doing this, starting with the presentation of their statutes, but also with an address, letterhead, an announcement to the tax authorities and, above all, by carrying out the activity provided for in the statutes. There may also be a registration in the Register of Commerce (RC), which is not compulsory in all cases (see below). The IOC, for example, established in Switzerland since 1915, was not officially registered until it decided to register with the RC of Lausanne in 2010.

This situation does not prevent associations and, in particular, international sports federations from being fully recognised by the authorities and judicial bodies. The association even holds a central position in the Swiss legal system because of its freedom of constitution, organisation and functioning. We shall revert to this important element later.

The statutes constitute the fundamental charter of the association. In this sense, they might be compared with the constitution of a State. They define the essential elements of the association, namely its aims, organisation, its relations with its members and third parties, its resources, its name and its seat.

The use of the term “statutes” envisaged by the CC to refer to this fundamental document of the association is not however obligatory. Thus, many organisations use another terminology, for example the terms "constitution" or "charter" like the IOC.

In accordance with art. 61.1 CC, an association whose statutes have been adopted and which has constituted its direction (board) can be entered on the Commercial Register voluntarily, or because it meets one of the two conditions where the law provides for mandatory registration: The first concerns associations “*who, in order to achieve their aim, carry out a commercial activity*” (art. 61.2(1) CC). Only significant commercial activities are covered, and only if they do not serve solely to finance the ideal aim of the association (see below under “The aim” for more details). The second is when the association “*is subject to the obligation to have its accounts audited*” (art. 61.2(2) CC). In practice, few associations meet this second condition, as we shall see below.

One of the consequences of the entry on the Commercial Register is that the association becomes subject to bankruptcy regulations in the event of legal proceedings (art. 39.1(11) LP).

The circa twenty articles dedicated to the association can be divided into three categories of provisions: mandatory, “relative mandatory” and non-mandatory.

The mandatory provisions, as their name suggests, are mandatory for all associations. Associations cannot derogate from such provisions even if they are not specifically reproduced in their statutes. It is therefore necessary to distinguish these provisions from the so-called “obligatory” provisions; these latter provisions are those that must necessarily appear in the statutes (art. 60.2 CC), but, naturally, in forms that may vary according to the associations.

It is submitted that art. 65.3, 68, 70.2 and 75 CC are mandatory. They can be easily identified on reading the CC by the drafting of the legislator who states that these articles are “*provided for by law*”. Some others have an uncertain status, having been considered mandatory by some courts and not by others.

Other articles are “*relative mandatory*” in the sense that it is possible to derogate from them, but only if such derogation extends rather than limits the rights of the members.

Finally, the remaining provisions are non-mandatory: this means that associations are free to adopt other solutions than those suggested in the CC with respect to the relevant subject matter. If they don’t, these non-mandatory legal rules will automatically apply.

The law is silent as to the language in which the statutes should be drafted. Some international federations based in Switzerland do not have any of the Swiss national languages as official languages without this causing them any problems (for example, English and Spanish for baseball/softball).

As is already clear from the description above, but will also be confirmed in more detail in the remainder of this presentation, the organisational freedom granted by the legislator allows each association to shape its structure and functioning in its statutes. It can therefore be said that, in the final analysis, it is almost more the statutes rather than the legal provisions that determine the characteristics of each association. This also explains why associations under Swiss law can often be so different from each other and even more different from associations governed by foreign laws.

We will now describe what the association's statutes should contain.

The law prescribes the minimum content of the statutes. Art. 60.2 CC requires that the statutes contain provisions regarding the aim, resources and organisation of the association

(such provisions being called “obligatory”, but, again, with all the flexibility granted by the legislator regarding their content). Otherwise, the solution provided for in the law will be adopted in all cases where the statutes are silent.

A. The Aim

The law requires that every association has an aim which is clearly set out and is not illicit or contrary to good customs (art. 52.3 CC).

In practice, there is a distinction between the aim of an association in the strict sense and the aim in the wider sense. The former, which can be termed “*final*” or “*social*”, is the ultimate result which is intended to be produced by the common activity of the members. The latter can be defined as the means which are used in order to attain the aim (in the strict sense). This distinction is essential to allow important international federations, to have the aim of organising highly remunerative competitions, without risking the loss of their association status. The condition is that the money collected is used for an ideal goal such as the promotion and development of their sport. The IOC, for example, redistributes 90% of its income to its partners for the development of their sport and therefore still meets the definition of an association with an ideal goal.

B. The Resources of the Association

The specification of the resources of the association has the purpose of indicating the manner in which the funds, which are necessary for the attainment of the statutory aims, will be sourced.

Very often, membership fees constitute the primary source of revenues for associations, especially for those of a smaller size. For the larger associations, the membership levies only play a very limited role in this context. Television rights, merchandising, sponsorship and ticketing incomes constitute much more important revenue sources.

C. The Organisation of the Association

The law only requires from an association to have two organs: the general assembly (art. 64 to 68 CC) and the direction (board) (art. 69 CC). It flows from the legislative modifications of 1 January 2008 that certain associations must also have an auditing organ (art. 69b CC). Otherwise, the founding members are free to organise themselves as they please. The majority of associations have added further organs in addition to those which are required by the law; they do this in order to better conduct the various tasks that they have to accomplish.

The respective responsibilities of the organs have to be clearly defined in the statutes in order to avoid conflicts.

D. The General Assembly

It is worth clarifying at the outset that the use of the term “general assembly” is not mandatory. The IOC calls its general assembly the “Session”, the Swiss Ice Hockey League and Swiss Olympic Association use “Parliament” whereas the large majority of sports associations (including FINA, FIFA and FISA) use the term “Congress”.

According to the CC, “*the general assembly is the supreme authority of the association*” (art. 64.1 CC). In this respect, the general assembly can be compared to the parliament of a State where the most important decisions are taken. It is therefore essential that each member can participate in this assembly where the will of the association is formed and expressed. There are certain alternatives to a formal meeting for large associations. The first is a legal alternative because art. 66.2 CC provides that “*a proposal to which all the members have agreed to in writing is equivalent to a decision of the general assembly*”. The second alternative is that of the assembly of delegates (representing groups of members such as clubs or regional associations). This system is very often used by large federations.

In accordance with art. 64.2 CC, it is incumbent on the direction to convene the general assembly. However, the statutes can provide that another organ or representative of an organ (e.g. the President) has the authority to convene the general assembly. The members also have the inalienable right to demand the holding of a general assembly, most often an *'extraordinary'* assembly. The regularity with which general assemblies must be held is not stipulated by the CC. This question is left to the discretion of the association in its statutes. Smaller associations tend to organise an annual assembly whereas larger ones sometimes limit themselves to one every two years, or even every four years.

E. The Agenda

In contemplation of the general assembly, the direction sets the agenda, indicating the items which will be dealt with; certain items have to necessarily feature on the agenda according to the statutes.

Even though it is only mentioned once in the Code in art. 67.3, the agenda is an essential document because it also limits the decision-making power of the meeting. Indeed, unless the statutes provide otherwise, the assembly cannot decide on an object which is not on the agenda. The aim is to protect members from decisions taken by surprise.

F. The Right to Vote

As it will be explained in relation to members' rights, it is worth noting from the outset that the statutes of the association may determine that some members do not have voting rights and the other not necessarily equal voting rights.

According to art. 67.2 CC, *"decisions are taken on the majority of the votes of members present"*. The statutes can also confer a voting right on absent members. As such, the statutes can provide for voting by representation, such vote to be exercised by a representative (art. 32 *et seq* CC) or a proxy (art. 396.2 Code of Obligations (CO)). In the event that the

statutes are silent on this issue and there is not a particular custom of the association, representation is not possible.

Art. 66, 67 and 68 CC regulate the voting procedure, but only the last one of these articles is of a mandatory nature. This means that the law only regulates a small part of the voting procedure.

Very often, the statutes provide for a quorum of presence which is necessary for the general assembly to be able to debate matters and take decisions, but it is not mandatory.

G. The Calculation of the Majority

As far as the calculation of the majority is concerned, the fact that decisions are taken on the majority of the votes of the members present raises two issues which arise from the fact that, in the Swiss system, *"members present"* is not synonymous with *"voting members"*. In the first instance, it is necessary, for the purposes of calculating the majority, to deduct from the number of 'members present' the number of members present but without a vote. Even then, it has to be remembered that the calculation of the majority can be distorted by abstentions and invalid votes. In fact, these abstentions and invalid votes have the same effect on the calculation of the majority as negative votes because a majority of "yes votes" are necessary for a proposal to be adopted. However, a person who abstains does not intend to oppose the proposal; he/she simply does not want to express an opinion. The problems created by art. 67.2 CC have to be solved by statutory provisions, this being possible because art. 67 CC is a non-mandatory provision. For example, Rule 18.4, 2nd sentence of the Olympic Charter states: *Abstentions and blank or spoiled votes are not taken into consideration in the calculation of the required majority.*

H. The Elections

The electoral system for associations is relatively free. Generally, the elections are

governed by the principle of an absolute majority in the first round of votes. If no candidate is elected, a second round is necessary but it may take place on a relative majority. Another option is to eliminate the candidate who obtained the least amount of votes in each following round until a candidate acquires the requisite majority (relative or absolute).

I. The Residual Responsibilities

All of the responsibilities which the statutes do not attribute expressly to an organ (the so called residual responsibilities) are within the remit of the general assembly according to art. 65.1 *in fine* CC. Nevertheless, this provision is not mandatory. As a result, many associations have derogated from this article by assigning to the general assembly only those powers described as inalienable and leaving all others to the direction. This is a way to give more weight to the Direction and to restrict the powers of the General Assembly to the really essential objects. This possibility of distributing powers within the association is also a notable feature of Swiss law. As inalienable responsibilities, one can mention the ultimate supervision of the activity of the other organs and the revocation of such organs for just reasons in the event of serious defaults (art. 65.2/3 CC), the modification of the statutes, the [grant (or non-grant) of a release from liability] and the dissolution of the association.

J. The Direction

One can define the direction as being the executive organ of the association. Although the legislator only dedicated two articles to the direction (art. 68 and 69a CC), this organ remains essential.

Incidentally, it is useful to clarify that the organ imposed by art. 69 *et seq* CC can use a different nomenclature to direction. In practice, one comes across designations such as committee, executive committee, central committee, executive commission or executive council. This list is not exhaustive.

By virtue of art. 65.1 CC, it is incumbent on the general assembly to nominate the members of the direction. However, this article is non-mandatory. Therefore, the statutes can provide for the members of the direction to be nominated in a different way. Certain persons may for example become members of the direction *ex officio*; the Swiss members of the IOC are, for example, automatically integrated into the Executive Council of the Swiss Olympic Association by virtue of their membership of the CIO.

The eligibility conditions for a position within the executive organ are, in the main, determined by the statutes. In the event that the statutes are silent, the Swiss Federal Tribunal (SFT) has recognised that a person who is not a member of the association can be elected to the direction of such association. Furthermore, the law does not impose any conditions with respect to domicile or nationality for the members of the direction. The length of function, the conditions for re-election, the specific objectives, the manner of functioning of the direction and its power to represent the association are generally determined by the statutes. It can be noted that, in practice, the term of office is generally longer at the international level (as opposed to the national level).

Increasingly, associations are imposing age limits for leadership positions and other rules of good governance such as limits of terms.

The law provides that “*the direction has the right and the duty to manage and represent the association in conformity with the statutes*” (art. 69 CC). In addition to the continuing management of the association and the implementation of the decisions of the general assembly, the direction may have specific tasks conferred upon it by the statutes.

It is important to clarify the representational powers of the direction. When the statutes are silent on this matter, it is generally recognised that the president can bind the association. In practice however, the double

signature, (president with another member of the board) is becoming more and more frequent, at least for important commitments.

The liability of the members of the direction is not different from the general situation set out at art. 55 CC. By way of reminder, internal liability is distinguished from external liability.

K. The Auditing Organ

Since 1st January 2008, there has been a new provision (art. 69b CC) which subjects certain categories of association to the obligation to have their accounts audited. These associations have to provide for an auditing organ in their statutes. In accordance with the terms of art. 69b.1(1) – (3) CC, associations which exceed, within two successive accounting periods, two of the three following values are obliged to have their accounts audited by an external auditing organ: balance sheet value of 10m CHF, turnover of 20m CHF or 50 full time staff.

Associations which do not meet these criteria can organise the supervision of their management as they see fit (art. 69b.4 CC).

L. The Other Organs

We have already made clear that the law imposes, as a minimum, the existence of two organs: the general assembly and the direction. As just seen above, in certain circumstances, an auditing organ is also required. However, as indicated by art. 63 CC, associations are free to create organs and determine their functions and responsibilities, their methods of nomination and functioning, notably the procedure for adopting decisions, and the hierarchy between the various organs.

The majority of associations, in particular sports associations, have made use of this freedom. Specialised commissions assist the direction and the general assembly in taking a position in certain fields, notably in technical

areas. They have only an advisory function and cannot commit the association.

In order for a commission to be characterised as an “*organ*”, it has to have a decision-making power binding the association. If this is not the case, like most “*commissions*” it cannot be considered as such.

M. The Membership

The acquisition of the status of member of an association by a natural or moral person results from his/her participation in the foundation of the association or his subsequent joining of the same.

The legislator has not granted a right to be a part of an association. The conditions of membership often depend on the aims of the association. A classical music orchestra organised as an association will only admit members who play an instrument. Academic commentary and jurisprudence both recognise that, by virtue of the principle of freedom of association, associations have neither the obligation to justify a decision to refuse someone to membership nor to treat the candidates for membership in an equal fashion. However, jurisprudence has recognised that, in a certain number of situations, notably where an association has a monopoly position, there can be a limitation on the discretion of the association with respect to access to membership.

Indeed, in the prevailing pyramidal structure of sport, only one organisation is recognised at national, continental or world level. Such associations benefit therefore, in their area of “sovereignty” from a quasi-monopoly over the sporting discipline that they govern. The consequence of this monopoly is that athletes who are not part of the said structure are excluded and prevented from competing in competitions organised by the members of such structure. As these competitions are often the highest level of the discipline, one can speak of a kind of boycott when one of these entities refuses to accept a member who meets the conditions for admission. There

may be another form of boycott when such a federation prohibits its athletes from participating in a competition organised by a competing federation and threatens them to be excluded if they do.

It may also happen that the statutes of an association limit the number of its members. In the world of sport, this may be because of the size of its facilities, a limited number of instructors or the desire to avoid that the association does become too difficult or costly to manage. However, to be admissible, these restrictions must not be applied in a discriminatory manner.

The majority of commentators agree that the act of joining an association should be qualified as a bilateral contract.

N. Leaving the Association

Membership can cease in three ways: Firstly, when the member notifies the association of his/her decision to leave. Secondly, when a member is excluded from the association. Thirdly, when a member automatically loses his/her status as a member following his/her death, the dissolution of the association or the occurrence of a resolutive condition. One notes therefore that leaving an association may be voluntary or not; it may result from a decision of the member concerned or from a decision of the association or even from the occurrence of particular circumstances.

Besides the general exit clauses, the legislator also chose to dedicate a specific provision to exclusion (art. 72 CC). This is a situation that often gives rise to an appeal to the CAS. Indeed, art. 72, para. 1 CC states that *"the statutes may determine the grounds for expulsion of a member; they may also allow expulsion without stating the grounds"*. This is naturally one of the particularities of Swiss association law, which, once again, reflects the autonomy enjoyed by the association.

O. The Members' rights

a. The Right to Vote and the Equality of Votes

Art. 67 CC provides that *"all members have an equal voting right in the general assembly"*. However, this article is non-mandatory in nature. The association can derogate from it by conferring different voting rights on different categories of members, even allowing certain categories of members to be given no voting rights. This is an issue that is very often debated within international sports federations as to whether member federations should have a differentiated number of votes, depending on their size, their number of participants, the level of their national team or other such criteria. Some have made this choice and others not.

There are situations where the law provides for an automatic suspension of the right to vote. The situation set out in art. 68 CC is an example of this: *"Every member is, by law, deprived of his right to vote on any decision concerning a matter or a dispute (i.e. claim) when he, his spouse, parents or direct relatives are a party to such matter or dispute"*.

The right to participate in the General Assembly and thus in the taking of the most important decisions is one of the foundations of the association, as already mentioned. Access to the general assembly must be free of charge for members; it should also, in principle, be limited to the members.

It may be recalled that the drafting of an agenda and its communication to the members constitutes a legal obligation flowing from art. 67.3 CC.

b. The Patrimonial Rights

Patrimonial rights in the wider sense consist primarily in the rights of the members to benefit from the services provided by the association. These services vary according to the aims of the association. The services of the association often relate to a right of usage, especially in the sports domain (a tennis court, for example).

One can also talk about patrimonial rights in the narrower sense. This means the financial contributions which an association might make to its members, for example to support and develop their activities.

c. The Rights of Protection

So-called "*rights of protection*" are intended to guarantee the rights of members vis-à-vis the association, in particular by preventing the latter from infringing the law or its statutes.

As already mentioned, the right of exit entitles each member to leave the association according to the terms and conditions of the statutes. It is a fundamental right of protection guaranteed by the freedom of association of the Constitution.

Another one is the right to the maintenance of the social aim underpinned by art. 74 CC. This article provides that "*the transformation of the social aim cannot be imposed on any member*".

It is also important to underline here that the often mentioned freedom of organisation and functioning is not without limits and that the State reserves the right for itself to fulfil a certain supervisory function or, more particularly, to offer its assistance to members who claim that the association is abusing its rights by not respecting the law or its own statutes. Indeed, art. 75 CC authorises every member "*to judicially challenge any decision which he did not vote in favour of and which has violated either the applicable legal or statutory provisions, such challenge to be brought within the month following the member becoming aware of the decision*". For these purposes, it is accepted that a member who abstained and a member who was not present did not vote in favour of a decision.

Third parties cannot avail themselves of art. 75 CC against an association. They are obliged to act through the ordinary legal channels.

The decision which is challenged might be one rendered by the general assembly or any

other organ taking a final instance decision within its competence. This means that all the internal legal remedies must have been exhausted before. By legal provisions, one means all the norms contained within that part of the law dealing generally with the moral persons (art. 52 *et seq.* CC) and those, more specifically, dealing with associations (art. 60 *et seq.* CC). The rules concerning other legal forms, which are sometimes applied to associations by analogy, also enter into this category.

The text of art. 75 CC envisages that the member is authorised to "*judicially challenge*" the decisions of the association. Art. 75 CC does not specify that the challenge necessarily has to be brought before a State tribunal. Indeed, the drafting adopted by the legislator allows the parties to submit their dispute to an arbitral tribunal. It is this interpretation that has allowed most sports associations to stipulate that disputes concerning them should be dealt with exclusively by the CAS. The competent tribunal, State or arbitral, only has the power to set aside the challenged decision and not to modify it; an art. 75 CC action is one in annulment.

The deadline of one month to judicially challenge a decision which is illegal or contrary to the statutes is absolute and a failure to respect it must be noted *ex officio* by the court (i.e. regardless of a submission or application of the parties). A potentially voidable decision that is not attacked within one month subsists despite any shortcomings. This rule however only concerns voidable decisions as void decisions can be challenged at any time. An arbitrator is not necessarily aware of this distinction as it is not mentioned in the code but the result of jurisprudence. This distinction is obviously important but it is not always easy to make. A decision is voidable when it only violates the statutes, optional provisions of the law or regulations which, although imperative, only serve to protect the private interests of the members. A decision is void, in particular, when, due to a formal defect, it cannot be considered as a decision of the general

assembly or when it has been taken by a general assembly convened by an incompetent body (BGE 71 I 38). If void, the social decision is non-existent and the member may have it established at any time.

A particular problem for CAS arbitrators is the one-month time limit of Art. 75 and the 21 days of Art. R49 of the Arbitration Code, as well as the possibly shorter deadlines specifically set by some of federations. Indeed, art. R49 stipulates “*21 days in the absence of statutory or regulatory provisions of the association or federation concerned*”. Therefore, several situations may arise, in particular the filing of an appeal after the 21 days but before the expiry of the month provided for in Art. 75 CC, which some consider to be imperative or the filing of an appeal within the 21 days, and obviously within the month, but after the shorter period imposed by the federation concerned. Moreover, one can have parties who file an appeal beyond the month of art. 75 CC arguing that they are attacking a null and void decision, whereas the arbitration code does not know this notion of null decision. Our purpose is not to deal with this problem here but only to alert the arbitrators who read this article to its existence.

d. The Right to Request the Dissolution of the Association

Art. 78 CC provides that “*dissolution is declared by a judge on the demand of the competent authority or an interested party in circumstances where the aim of the association is illicit or contrary to good customs*”. The illicit nature of the aim of an association or the violation of good customs are further clarified by art. 19 and art. 20 CO. They can occur either initially or subsequently. In this case, the SFT has not adopted a literal interpretation of art. 52.3 CC which states that an association with an aim which is either illicit or contrary to good customs cannot acquire legal personality. Indeed, a literal reading of this provision would prevent a judge from declaring the sanction of dissolution and the allocation of the assets to a public corporation (art. 57.3 CC) since the association does not exist and never had

existed. In a decision on this principle concerning a limited company, the SFT deemed that a teleological (i.e. purposive) construction of this provision was necessary.

Aside from the statutory aims, an association can nonetheless pursue illegal, hidden aims which do not appear in the statutes. These aims might very well evolve in the course of the life of the association and continue in parallel with the initial aim (for example, a fan club that cultivates the practice of neo-Nazi songs). It is necessary that (i) such acts have a certain permanent quality or are at least regularly repeated over a long period and (ii) that the members are aware of them and at least implicitly approve them, so that one can speak of a hidden aim.

The competency to dissolve an association belongs to the civil judge of the location of the seat of the association.

If the aims of the association are no longer compliant, the members have the choice between invoking art. 78 CC if they want to dissolve the association, or art. 74 CC (protection of the social aim) if they would prefer it to survive but only if it is rendered compliant.

e. The Right to Equality of Treatment

The principle of equality of treatment of the members is a non-written rule. This right is not absolute because it does not prevent the association from creating various categories of members with different rights (including voting rights). However, the association does have to ensure the equality of treatment of all members who belong to the same category and who have the same qualifications and other characteristics.

f. The Respect of Basic Legal Principles

The provisions of the CC relating to associations are not the only mode of protection for members. In a more general sense, the rights of protection can be based on any principles of general law or other

branches of law. For instance, the member (the Constitution) such as the right to be heard as well as the right to a claim based on the liability of the organs of the association which is derived from art. 55.3 CC.

P. The Members' Obligations

The legislator devoted only one provision to the obligations of the members. This provision is art. 71 CC and it concerns membership fees. It provides that "*the members of the association can be obliged to pay membership fees if the statutes envisage this*". The drafting here is well-reasoned in the sense that it avoids the need to modify the statutes each time the level of the membership fees changes. As a general rule, it is incumbent on the general assembly to fix this amount (or on the board if this power has been transferred to it in the statutes).

The non-monetary obligations are not the object of any specific provisions in the law (although they may be dealt with by the statutes). However, the majority of these obligations are logically derived from the bond which unites the member to the association and from the social aim of the association. One can speak of an obligation of loyalty comprised of three elements: loyalty in the strict sense (adhering to the statutes and decisions), the obligation to participate (e.g. in the services of a club which imposes a minimum level of participation for certain activities) and the obligation to tolerate and to abstain.

Q. The Regulatory Power of Associations

The association naturally has the right to establish rules which regulate its functioning and the behaviour of its members.

The precise field within which this private regulatory power can be exercised is circumscribed on the one hand by State law (which only concedes a certain measure of autonomy) and by the association on the other, most notably in this latter case, when

the association determines its social aim. Indeed, the association can only regulate matters which are connected with its social aim. For a sporting association, disciplinary rules play an important role. They are mainly based on art. 72 CC, which allows for the exclusion of a member. Most associations have concluded that their organisational freedom under art. 63 CC also allows for less severe sanctions such as suspension or a financial penalty, this according to the principle "who can do more can do less".

As already mentioned, these rules of the association are not automatically or systematically subject to State control at a conceptual level. In theory, such rules are valid upon their adoption regardless of their conformity with state law or the validity of their adoption procedure. However, members who are affected by such rules are able to challenge them in certain circumstances at the time of their adoption or in the case of their specific application, such challenge being made pursuant to art. 75 CC. It has happened that courts have been required to declare as illegal certain norms of the association which have been applied for many years without previously being challenged (for example, transfer rules in football). The judicial instances, however, will not review any norm or decision of an association. Without going into detail, for many years the courts have distinguished between the rules of law and the rules of the game. They refrained from reviewing anything that was related to the rules of the game. Nowadays, judges only refrain from reviewing purely technical decisions, especially those made in the course of the game, for example those made by a referee. Thus, as soon as a decision may affect the personal rights and interests of a party, the judge's power of review is complete. It is therefore primarily the consequences of the decision which are important as opposed to the nature of the decision/sanction itself.

R. The Jurisdictional Power of Associations

The jurisdictional power of associations is the corollary of their regulatory power. It is actually logical that associations can establish judicial instances which supervise the correct application of the rules that the associations have issued.

The internal judicial instances of associations have to respect the fundamental principles of law, notably with respect to their constitution and procedures. This means in particular that these organs must be impartial and independent. As these bodies are constituted by the association itself, they hardly fulfil these requirements. It is why their decisions must always be subject to an external appeal body (either State or arbitral). In sport, this is precisely where CAS and its arbitrators are called upon to intervene. They do so in application of Art. 75 CC and within the limits of this provision. Some limits may also be imposed by supranational laws as well (in particular, European Law). For more details regarding art. 75 CC, see above under “Rights of protection”.

S. The Cessation of the Association

The legislator dedicated four provisions to the cessation of the association, notably art. 76 to 79 CC. The first three of these articles set out the various causes which can lead to the dissolution of the association. The fourth provision deals with the external consequences of the cessation of the association. We shall now examine each of the three causes of cessation, differentiating between a voluntary dissolution, a dissolution by law and a judicial dissolution.

a. Voluntary Dissolution

Art. 76 CC provides that “*an association can resolve to be dissolved at any time*”.

The law does not specify the reasons which might bring it to dissolve itself. Generally therefore, it is the association itself which provides in its statutes for the causes which might bring it to take such a decision. It is the general assembly which has the competence

for resolving the dissolution of the association.

b. The Dissolution by Operation of Law

There are a certain number of situations where the association cannot continue its activities and must be dissolved by law. These are situations where the authorities have to intervene because the association does not act. Art. 77 provides that “*an association is dissolved by law when it is insolvent or when the direction can no longer be constituted in accordance with the statutes*”. This provision would appear to be mandatory in nature.

c. Judicial Dissolution

Art. 78 CC provides that “*dissolution is declared by the judge on the request of a competent authority or an interested party when the aim of the association is illicit or contrary to good customs*”. According to the terms of the law, only the ordinary civil judge in the district of the association is competent to order dissolution.

The dissolution of the association brings its existence and its activities to an end; this, of course, has a number of consequences, notably those mentioned underneath at 20 d and 20 e.

d. Liquidation and the Allocation of Assets

All forms of dissolution (voluntary, by law and judicial) have the consequence that the association enters liquidation. Art. 58 CC provides that “*the assets of moral persons are liquidated in accordance with the rules applicable to cooperative societies*”. In practice, the association itself (meaning its direction) handles the liquidation of its assets.

The allocation of the wealth and assets of the association is governed primarily by the statutes which can freely determine to whom they should be allocated; for example, such allocation might be to a future or existing association with similar aims or to the federation to which the association belongs (within the sports world).

e. The Removal of the Entry on the Commercial Register

Art. 79 CC stipulates that “*if an association is entered on the commercial register, the dissolution must be declared either by the direction or by the judge to the official with responsibility for removing entries*”.

IV. The particularities of the Swiss law of association

This summary presentation of the association under Swiss law already highlights the ease with which an association can be set up and the freedom that founders enjoy in establishing the rules governing their association. On many points, they really can shape the form of their association as they wish and this is why, in order to fully understand the functioning of a specific association, CAS arbitrators must always take into account the choices made by the association concerned in its statutes on all aspects left to its discretion. It is why each association is different from the other and that what is valid for one is not necessarily valid for another.

In our general presentation, among the specificities that make associations subject to Swiss law different from associations governed by foreign laws, we noted, among others, the small number of legal provisions applicable, the fact that many of them are not mandatory, the possibility of determining voting and election procedures, of differentiating the number of votes of the various members, of deciding on the sharing of competences between the executive and the general assembly, of deciding on the rhythm of the general assemblies, of refusing the admission of a member or excluding one without giving reasons, and we could easily extend this list.

But, for CAS arbitrators, the most striking and sometimes also the most difficult feature to apply is the autonomy that associations enjoy in taking their decisions and the respect

that the courts accord them as if, exaggerating a little, associations had an autonomous life outside the legal system. It is from the perspective of the CAS appeal procedure that we will address these issues because that is where they arise.

In accordance with the will of the legislator, Swiss law confers a wide discretionary power on the associations' decision-making bodies, a much wider autonomy than for any other corporation under Swiss law. Judges and arbitrators restrain to review their decisions even if they do not fully share them. As stated by the Panel in CAS OG 22/11 (68): *In this regard, the Panel points out that in accordance with Swiss law and the well-established CAS case law, the discretionary power of the decision-making bodies of Swiss sports associations are broad. Such case law consistently allows for a wide exercise of such powers, which is to be restrained by the CAS only in extreme cases (i.e. illegality, arbitrariness or abusiveness).* The panel goes on saying at (69): *In the matter at hand, the Panel finds that the Appealed Decision was neither abusive nor arbitrary, nor does the Panel find that the IOC EB exceeded its power.*

In CAS 2020/A/7090, the arbitrators did not hesitate to use a very strong language to support the autonomy of an association's decision; “*Deference to and respect of the autonomy of sporting federations is of paramount importance in sports law. However, this principle is not absolute; it may yield when there are “exceptional circumstances”, such as arbitrariness, misuse of discretionary power, discrimination or breach of any relevant mandatory legal principle. The bar for determining these “exceptional circumstances” must however be set very high, lest it converts itself into a Trojan horse that subverts the principle itself. The arbitrariness, discrimination or breach must be blatant and manifest, and offend a basic sense of justice. The powers of a CAS panel do not extend to an evaluation of the legitimacy of the objectives or of the substantive value of a decision; therefore, however grievous to the particular interests of one party or drastic the decision may seem, if it does not seem manifestly or blatantly unreasonable, and, moreover, was taken pursuant to the appropriate procedures and by the pertinent organs of the federation, it cannot be annulled and must be upheld*”.

This discretion is recognised in the various areas where associations may have to take decisions. For example, in CAS 2020/A/7549 at (85), the same approach has been adopted regarding a decision to disaffiliate a member federation: *“This accords with CAS jurisprudence (generally applying Swiss law) which provides that, once the conditions for the exercise of a discretion by WKF [World Karate Federation] under the WKF Statutes are met, it is a matter for WKF to exercise that discretion subject only to review by the Panel in the event that the exercise of the discretion is unlawful in some way, for example because “it entails arbitrariness, a misuse of discretionary power, leads to discrimination or breaches any mandatory legal principle or if the decision entails a violation of [the federation’s] own statutes and rules”*: CAS 2018/A/5888 at (2000).

This approach may seem unusual to arbitrators who are not familiar with this feature and these arbitrators would often like to correct the decisions submitted to them because they do not fully agree with them although the decision at stake is not arbitrary nor illicit nor disproportionate. Thus, one finds in the CAS jurisprudence certain decisions that did not respect the discretionary power that the Swiss legislator has granted to the decision-making bodies of associations. Many of these concern sanctions imposed by the first instance where it is even more tempting than in other areas for arbitrators to review their level and adjust it according to their own assessment. However, arbitrators do not have this discretion, as is shown by many decisions, for example CAS 2019/A/6345. *A mere disagreement of CAS panels with the level of sanction(s) imposed does not suffice, in and of itself, to undo a decision of disciplinary nature. CAS panels must satisfy themselves that the sanction(s) are evidently and grossly disproportionate to the offence, before proceeding to rescind the sanction(s) imposed.*

In the same line, CAS 2018/A/6038: *The measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed by CAS panels only when the sanction is evidently and grossly disproportionate to the offence.*

In the case CAS 2019/A/6278, the panel clearly explained the reasons for the broad decision-making power left by the Swiss system to associations:

According to the principle of the association’s autonomy, under Swiss law, the right of associations to impose sanctions or disciplinary measures on clubs is not the exercise of a power delegated by the State, rather it is the expression of the freedom of associations and federations to regulate themselves. Indeed, when passing a decision, the association’s or federation’s disciplinary proceedings are meant to protect the essential objectives of the association or federation, such as taking all appropriate steps to prevent infringements of the Statutes, regulations or decisions of the association or federations.

Dealing with the same issue of the association’s autonomy, the panel in the case CAS 2018/A/5588, raised the sensitive question of the justification and admissibility of restrictions on the arbitrators' power of review of decisions, whereas, according to the Code of Sports-related Arbitration, they must conduct a *de novo* review of the cases. The arbitrators of that case clarified this apparent contradiction in the following way:

Notwithstanding a panel’s power to review a case de novo, the review and the power to amend a disciplinary decision of a judiciary body should only take place in cases in which such body has exceeded the margin of discretion accorded to it by the principle of association authority, i.e. only in cases in which said body must be held to have acted arbitrarily. This assumption is absent if a panel merely disagrees with a sanction. Only if a sanction must be considered as evidently and grossly disproportionate to the offence will a panel have the authority to amend or set aside a decision¹.

¹ See also CAS 2020/A/7016 para. 67: The Panel shall firstly refer in this respect to the CAS jurisprudence on the revision of disciplinary decisions, citing *ad exemplum* CAS 2019/A/6278 in which it is stated that “CAS may

amend a disciplinary decision of a FIFA judicial body only in cases in which it finds that the relevant FIFA judicial body exceed the margin of discretion accorded to it by the principle of association autonomy, i.e. only in cases in which the FIFA

In another case, CAS 2018/A/5977, the panel indicated that it would first rely on the expertise of the association and consider whether the challenged decision is admissible before examining its proportionality and reconsidering it in full detail. Actually, this suggests the approach that should be followed in all cases: *Whenever an association uses its discretion to impose a sanction, CAS will have regard to that association's expertise but, if having done so, the CAS panel considers nonetheless that the sanction is disproportionate, it must, given its de novo powers of review, be free to say so and apply the appropriate sanction.*

To conclude on this issue, we would like to point out the limits of the power of *de novo* review as expressed by Mavromati/Reeb: 12/p.508: *The full power of review has a dual meaning: first, CAS admits new prayers for relief and new evidence and hear new legal arguments, with some limitations that will be examined in more detail in the following pages (réf. to TAS 2008/A/1582). Second, the full power of review means that procedural flaws, which occurred during the proceedings of the previous instance, can be cured by the CAS panel. (...).* At 15, p. 508, they proceed with saying: *On the other side, the full power of review does not mean that CAS Panels will disregard the decision rendered by the previous instance without examining its well-founded. Notwithstanding the broad discretion offered by article R57, the appreciation made by the previous instance remains a decision rendered by a specialized instance of a federation and should be carefully examined (TAS 2005/A/958).*

It is important to note that this jurisprudence of respect for decisions rendered by associations existed for the ordinary courts in Switzerland before the creation of CAS in 1984. For a very long time, judges have examined the decisions of associations (sports or otherwise) with reservations. This was a way of taking into account the friendly nature of associations, the often very personal relationships between members and the disinterested and voluntary commitment

of those who run them. The latter, generally doing their best, even if sometimes not fully qualified, would have found it difficult to understand and accept such an intrusion of justice in their activities. This type of protection of the internal actions of the association has continued to the present day, although these original considerations no longer necessarily apply to large associations, especially large sports associations.

As mentioned at the beginning of this article, the respect enjoyed by the decisions of sports associations under Swiss law stems from the legislator's desire, to give associations a special status, but also from the fact that, in most sports cases, disputes are submitted to arbitration and that the law governing international arbitration in Switzerland (PILA) is very liberal. This liberality is explained by the fact that arbitration generally presupposes an agreement between the parties concerned and a common choice to avoid recourse to ordinary justice. In this respect, it may be noted that the avoidance of ordinary justice was precisely the objective of the then IOC President, Juan-Antonio Samaranch, when he had the idea of creating a court of arbitration for sport. He had been shocked by very inadequate decisions by judges who understood nothing about the philosophy and specificities of sport and he was convinced that ordinary justice was not suitable for settling most of the disputes that arise in sport. He therefore wanted to remove sports disputes from ordinary justice.

International arbitration can validly be applied as soon as a case involves a direct or indirect economic interest. This is the interpretation of Art. 177 I PILA which states: *any dispute involving property may be the subject-matter of an arbitration.*

The PILA is considered liberal mainly because two of its provisions grant decisive freedoms to the parties to determine, directly

judicial body concerned must be held to have acted arbitrarily. (cf. RIEMER H. M., Berner Kommentar, Art. 60-79 ZGB, no 230 on art.70 ZGB). This is, however, not the case if the Panel merely disagrees with a specific sanction, but only if the sanction

concerned is to be considered as evidently and grossly disproportionate to the offence" (CAS 2014/A/3562)

or by reference to arbitration rules, (...) the arbitral procedure and the applicable law (Art. 182 I and Art. 187 I). Art. 187 II even allows the parties to request that the arbitral tribunal decide *ex aequo et bono*. Ultimately, these provisions enable the parties to completely escape state law if they both so wish. This is why we have said that the great discretion enjoyed by associations under Swiss law results both from the legislator's desire to let them regulate themselves and from the fact that litigation involving international sports federations are most often settled through arbitration - a form of conflict resolution that also leaves them a lot of flexibility.

A final element must be noted on this point, also regulated by the PILA. Art. R59, al. 4 of the arbitration code which stipulates that the award shall be *final and binding upon the parties*, means that the parties in international arbitration may only file a motion to set aside the arbitral award before the SFT because CAS has its seat in Switzerland. Yet, the SFT may only examine five grounds in the awards rendered by CAS, the first four relating to the regularity of the procedure and the sixth one to the compatibility of the procedure with public policy (Art. 190 I PILA). For that reason, it is rare for CAS awards to be overturned by the SFT.

We hope that this presentation of the association under Swiss law, although brief, will help CAS arbitrators who have read it to get a better feel for the spirit and specificities of this institution with which they often have to deal in their arbitration activity.

The Court of Arbitration for Sport’s approach to the complexities of art. 15 of the FIFA Disciplinary Code

Carlos Schneider and Molly Strachan*

- I. Introduction
 - II. What is its purpose?
 - III. Origins and evolution
 - A. The increase of contractual disputes in football and the congruent lack of (an) appropriate mechanism(s) to ensure compliance with FIFA (and CAS) decisions
 - B. Development of the provision on failure to respect decisions
 - IV. Standing to invoke
 - A. Standing to sue
 - B. The point of examination of ‘the FIFA membership requirement’
 - V. Requirements for the implementation of art. 15 FDC
 - A. Standing to be sued
 - B. Insolvency proceedings
 - VI. Sporting Succession
 - VII. Diligence of creditors
 - VIII. Conclusion
-

I. Introduction

In accordance with the principle of association’s autonomy¹, the right of associations such as FIFA to impose sanctions or disciplinary measures is, rather than an expression of power delegated by the State, considered as an expression of the freedom possessed by associations and federations to regulate themselves². Indeed, and as shall be explored within this present article, FIFA disciplinary proceedings by intentional design, perform an indispensable and fundamental role with respect to the protection and safeguarding of the essential objectives of FIFA, art. 15 of the FIFA Disciplinary Code (FDC *or* the Code)

in particular, embodying what is arguably the paragon of disciplinary instruments when it comes to ensuring swift and effective financial justice for the football stakeholders³ – and one which has evolved sequentially, as will be demonstrated, with each iteration of the FDC.

Whilst at first-sight art. 15 FDC may appear *relatively* uncomplicated in substance and intrinsically straightforward in its intended function – *the deliverance of financial justice* – it is not without its more inconspicuous objectives, and in practice, the application of art. 15 FDC wrestles with a variety of legal points of contention, the complexities of which have been historically scrutinised and addressed by

* Carlos Schneider is FIFA Director of Judicial Bodies. Molly Strachan is FIFA Legal Counsel.

The authors wish to thank Dr Emilio Garcia, ICAS member and FIFA Legal Chief Officer, for his guidance, support and assistance in drafting this article.

¹ The existence of which has been confirmed by the Court of Arbitration for Sport (CAS) under Swiss Law – see CAS 2008/A/1583 and 1584.

² CAS 2020/A/6775 – par. 70.

³ Within this present article, ‘football stakeholders’ refers to the (in)direct members of FIFA; *i.e.* the FIFA member associations or a FIFA member association’s affiliated members *e.g.* leagues, clubs, officials, match officials, players, intermediaries and so forth.

the Court of Arbitration for Sport (CAS) - the independent court of arbitration as recognised by FIFA⁴⁵ - to create the nuanced—legal landscape of the present day.

This article intends to explore how the CAS has approached these sophisticated predicaments encountered in connection with the application of art. 15 FDC, the varying results and observations deriving from such examinations by the CAS, the ramifications of the foregoing when it comes to the perception of the Disciplinary Committee's championed enforcement system, and the effect(s) upon the disciplinary proceeding processes which concern potential infringement(s) of the aforementioned article.

II. What is its purpose?

To begin, in order to foster better understanding of the nuanced assessments of the CAS in connection with the application of art. 15 FDC, it is first necessary to understand the legislative/situational origins of the article, its historical evolution across the various editions of the FDC, what purpose(s) the article is intended to serve and the objective(s) it is designed to uphold.

As the global governing body of football, FIFA, in its position of international prominence, bears a responsibility and duty to exercise its powers in a manner that ensures that FIFA's principle objectives, as outlined within the FIFA Statutes, are both maintained and protected. Towards this end, art. 2 (c) of the FIFA Statutes (May 2021 edn.) provides that one such objective of FIFA is to draw up regulations and provisions governing the game

of football (and related matters) and to then subsequently ensure that the foregoing are enforced⁶. By natural continuation, art. 2 (d) FIFA Statutes successively enshrines FIFA's commitment to the maintenance of the foregoing principle, by denoting as one of its key objectives FIFA's undertaking to administer the appropriate steps to prevent any infringements of the Statutes, regulations or decisions of FIFA or of the Laws of the Game⁷.

In keeping with the above, and in order to achieve these aforementioned objectives, the FIFA Statutes also impose a statutory obligation upon the (in)direct members of FIFA to comply in full with the decisions passed by FIFA bodies⁸, as well as the decisions passed by the CAS as recognised by FIFA⁹. The FIFA Disciplinary Committee (the Committee), as one of FIFA's Independent Committees, fulfils a key role in this regard by ensuring that these decisions are respected by the FIFA members, and retains the competence to impose sanctions on said stakeholders in the event of non-compliance with a FIFA or CAS decision recognised by FIFA, pursuant - under the current 2019 edition of the Code - to art. 15 FDC.

More precisely, it is by virtue of the provisions of art. 15 FDC that the Committee is afforded the competence to impose sanctions upon non-compliant parties under FIFA's jurisdiction. In other words, when an entity (e.g. a club or an association) or an individual (e.g. a player or a coach) under FIFA's jurisdiction (*i.e.* an (in)direct member of FIFA) fails to respect a (non-)financial decision passed by a(n) (internal) FIFA body or

⁴ Art. 56 FIFA Statutes, May 2021 edn.

⁵ And being the court to which appeals against final decisions passed by FIFA's legal bodies may be addressed (*see FIFA Statutes, May 2021 edn. – Art. 57*).

⁶ Art. 2 (c) FIFA Statutes, May 2021 edn. – “*The objectives of FIFA are: (...) to draw up regulations and provisions governing the game of football and related matters and to ensure their enforcement*”.

⁷ Art. 2 (d) FIFA Statutes, May 2021 edn. – “*to control every type of association football by taking appropriate steps to prevent infringements of the Statutes, regulations or decisions of FIFA or of the Laws of the Game;*”.

⁸ Arts. 14, and 59 (1) FIFA Statutes, May 2021 edn.

⁹ Arts. 56 and 57 FIFA Statutes, May 2021 edn.

instance¹⁰ or by the CAS, in accordance with the provisions of art. 15 FDC, the FIFA Disciplinary Committee may impose sanctions upon the said defaulting party and, in order to achieve restitution, could be requested to intervene in order to demand such defaulting party to fulfil its obligations, subject to sanctions.

By way of illustration of the foregoing, take for example a defaulting club (non-compliant clubs comprising the vast majority of cases involving potential breaches of art. 15 FDC¹¹) which has failed to fulfil its financial obligations towards a creditor party in accordance with a final and binding FIFA or CAS decision. Pursuant to art. 15 FDC, upon the establishment of the said club's failure to comply with the final and binding decision rendered by FIFA or by the CAS, a final period of grace would be granted¹² within which to comply in full with the financial or non-financial decision not respected, and a fine imposed by way of sanction¹³. Following the expiry of this final grace period, and in the event of the pertinent club's continued failure to comply in full with its obligations *as per* the decision not-respected, a transfer ban¹⁴ would subsequently be automatically implemented against the club¹⁵, and would remain

implemented until such point that it should fulfil its outstanding obligations, in accordance with the FIFA or CAS decision¹⁶.

Therefore, in consideration of the statutory background and taking into account the method of application of art. 15 FDC as outlined above, the surface *raison d'être* of art. 15 FDC does not require any sort of exercise of lengthy contemplation to discern – the overarching and/or objective purpose of art. 15 FDC is, quite transparently, to induce timely compliance in defaulting parties ((in)direct members of FIFA) with the (non)financial decisions of FIFA and the CAS through the imposition of effective sanction(s), and in unison, to simultaneously provide for and maintain a swift and efficient disciplinary system by means of which (non)financial justice can be provided to those under FIFA's 'umbrella' – such disciplinary proceedings likewise being intended to protect the essential objectives of FIFA as contained within the FIFA Statutes¹⁷, as articulated *supra*.

Indeed, the foregoing sentiment has been expressed by FIFA on more than one occasion, for instance, the announcement of the FIFA

¹⁰ For example, a decision passed by the FIFA Dispute Resolution Chamber, the FIFA Disciplinary Committee, the FIFA Appeal Committee *and so forth*.

¹¹ Disciplinary and Ethics Report 2020/2021 - By way of illustration, between the sporting period 1 July 2020 – 30 June 2021, 83.8% percent of the cases decided by the Committee originated in a failure to respect a decision (717 cases), of which 96.1% involved a club as the defaulting party (689 cases).

¹² By the FIFA Disciplinary Committee.

¹³ Art. 15 (1)(a) and (b) FDC, 2019 edn – “1. *Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or a CAS decision (financial decision), or anyone who fails to comply with another final decision (non-financial decision) passed by a body, a committee or an instance of FIFA, or by CAS:*

a) will be fined for failing to comply with a decision in addition;
b) will be granted a final deadline of 30 days in which to pay the amount due or to comply with the non-financial decision”.

¹⁴ A transfer ban, in the context of disciplinary proceedings, is “a ban [against a club] *from registering any new players, either nationally or internationally*” implemented in the Transfer Matching System (TMS) by the Secretariat to the FIFA Disciplinary Committee.

¹⁵ Art. 15 (1)(c) FDC, 2019 edn – “*c) in the case of clubs, upon expiry of the aforementioned final deadline and in the event of persistent default or failure to comply in full with the decision within the period stipulated, a transfer ban will be pronounced until the complete amount due is paid or the non-financial decision is complied with (...).*”

¹⁶ In accordance with art. 15 (1)(c), in the event of “*persistent failure, repeated offences or serious infringements*” further sanctions in addition to the automatic transfer ban may be imposed such as a deduction of points or relegation to a lower division – acknowledging that what exactly comprises “*persistent failure*” remains to be defined by the FIFA Disciplinary Committee.

¹⁷ As confirmed by the CAS – see CAS 2020/A/6775 – par. 70.

Council's approval¹⁸ of the then 'new' 2019 edition of the Code on 11 July 2019 emphasised specifically FIFA's commitment to achieving financial justice by way of the reforms therein enacted with respect to art. 15 FDC¹⁹ (for further detail regarding these changes please see section C. *infra*), the "core of [the changes to the Code reflecting] FIFA's commitment to [enforcing] both financial and non-financial decisions"²⁰.

Nevertheless, whilst the primary purpose of art. 15 FDC in a more material sense – that is to say, as a literal provision included within the Code - is in itself known and manifest, a differentiation must be made between its conspicuous intent and its more subtle and discrete provision(s), the latter of which provide important legal context to the CAS's considerations when it comes to the legal issues faced in connection with the article's application. In this respect, an apt starting point from which better comprehension of the foregoing may be ascertained, is by means of an examination of both the origins and historical evolution of art. 15 FDC, the heritage and progressive development of such article between renditions of the Disciplinary Code illuminating its more underlying aim(s), which do not necessarily reveal themselves upon first glance – that is to say, art. 15 FDC's objectives of *ensuring compliance; protecting creditors and circumventing abuses*.

III. Origins and evolution

Looking back across the published editions of the FIFA Disciplinary Code and the respective corresponding articles to the 'modern-day' art. 15 FDC therein contained, whilst the traditional wording of the former has not undergone significant reformation over the

years, there are several notable 'leaps' between editions which have heralded the enactment of pivotal changes with regards to the regulations governing FIFA's disciplinary enforcement system – the so-called 'conceptual birth' and/or provenance of the article initially finding its derivation in the considerable surge in football litigation at the beginning of the 21st century²¹.

A. The increase of contractual disputes in football and the congruent lack of (an) appropriate mechanism(s) to ensure compliance with FIFA (and CAS) decisions²²

The initial *situational* origins of the 'art. 15 FDC sanctioning system' – to be differentiated from its legislative origins/framework as articulated *supra* - derive from the original absence of a concrete legislated mechanism within the FIFA regulations by means of which the decisions of a FIFA body, committee or instance could be enforced, or rather, non-compliance with the said FIFA decisions could be sanctioned. Indeed, prior to the 'sanctioning system's' introduction in its recognisable format within the 2002 edition of the Code, FIFA decisions, once issued, lacked a certain impetus and could often be seen to fall upon 'deaf-ears' in the sense that the pertinent debtor party often felt limited – or arguably negligible - pressure to comply with its obligations as ordered by FIFA, due to the lack of perceived consequences (*i.e.* the (lack-of) threat of disciplinary sanction(s)), thereby resulting in the relevant creditor party being left in a situation of comparative helplessness despite retaining a FIFA decision in its favour.

Consequently, and simultaneously owing to the aforementioned substantial increase in

¹⁸ The FIFA Council having approved the 2019 edition of the FIFA Disciplinary Code at its meeting in Paris, France, on 03 June 2019.

¹⁹ FIFA Circular n°1681, 11 July 2019.

²⁰ *Ibid.*

²¹ FIFA Circular n°1681, 11 July 2019.

²² El ARBITRAJE EN EL TAS: Procedimiento jurisprudencia y cuestiones prácticas más relevantes, WWAA, Aranzadi 2021, pages 318 *et seq*

contractual disputes in football over the last decade²³, there was ever-growing demand for a more competent and effective disciplinary system, which reflected the needs of the football stakeholders and ensured that non-compliant debtor parties were not permitted to continue with impunity. These ‘triggering conditions’ authoring the need for FIFA to address such matter, and to provide itself with a disciplinary tool which allowed the imposition of sanctions (*i.e.* consequences) upon non-compliant parties to the system.

B. Development of the provision on failure to respect decisions

Against such background, and in order to address the above-described lacuna, art. 70 FDC entitled *Payment of sums of money*’ - the then equivalent to the current art. 15 FDC – was introduced by FIFA under the 2002 edition of the Code, perpetuating in such form through the forthcoming 2004 and 2005 editions. Prior to the introduction of the 2006 edition of the FDC, under the 2002, 2004 and 2005 editions of the Code, art. 70 FDC only granted a route for the enforcement of financial decisions issued by FIFA’s own bodies or instances, with decisions issued by the CAS being excluded from the enforcement system²⁴. Indeed, it was not up until the coming into force of the 2006 edition of the Disciplinary Code that the earliest landmark changes were introduced to the article, the former’s enforcement capacity being expanded therein for the first time to

encompass the decisions of an arbitral tribunal external to FIFA, *i.e.* to CAS Arbitral Awards.

This amendment was particularly marked, as what it meant in practice, unprecedentedly, is that FIFA’s (in)direct members could rely on the FIFA Disciplinary Committee for the swift and efficient enforcement (through the sanctioning of/threat of sanction against non-compliant parties) of Arbitral Awards where previously no recourse to FIFA was available – such an amendment perpetuating through the following 2007, 2008 2009, 2011 and 2017 editions of the Code²⁵.

Nevertheless, notwithstanding such developments, there were several discernible criticisms of the ‘former’ approach under the FDC, which, again, were only accentuated by the substantial increase of football disputes over the last decade²⁶, which as aforementioned, acted as a driving factor towards a more competent system appropriate for handling growing demand. In particular, there were concerns that the imposition of a point deduction against a defaulting club was not always seen as pertinent and its impact limited especially in situations where a deductions of points would have no effect upon the club’s ranking at the end of the season²⁷, the potential imposition of a transfer ban, whilst not necessarily a heavier sanction than a point deduction *per se*²⁸, having been distinguished as the “*most effective instrument*”²⁹

²³ FIFA Circular n°1681.

²⁴ Art. 70 - *Payment of sums of money* - FDC, 2002, 2004 and 2005 edns. – “*Anyone who fails to pay another person (such as a player, a coach or a club) a sum of money in full, even though instructed to do so by a body of FIFA: (...)*”.

²⁵ Art. 64 – *Failure to respect decisions* - FDC, 2017 edn. - “*Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or a subsequent CAS appeal decision (financial decision), or anyone who fails to comply with another decision (nonfinancial decision) passed by a body, a committee or an instance of FIFA, or by CAS (subsequent appeal decision):(...)*”.

²⁶ FIFA Circular n°1681.

²⁷ CAS 2020/A/6755 - par. 96 - “*as past cases have demonstrated, point deductions and fines have proven not to be harsh enough to deter the [defaulting club] from repeatedly committing the same violations*”.

CAS 2019/A/6504 - par. 137 – “*(...) in light of the cases in which recently point deductions were imposed on the Appellant (see CAS 2018/A/6239, CAS 2019/A/6278 and CAS 2019/A/6287), it may appear that the prospect of such sanction did not put sufficient pressure on the Appellant to pay its debts*”.

²⁸ CAS 2019/A/6504 - par.136 – “*(...) neither a points deduction nor a transfer ban is per se a heavier sanction than the other*”.

²⁹ FIFA Circular n°1681.

both empirically and statistically³⁰ for the purpose of inducing compliance amongst defaulting clubs (which constitute the majority of cases when it comes to non-compliance with a FIFA/CAS decision).

Furthermore, one particular issue was the ‘exclusion’ of intermediaries from the enforcement system due to the changes introduced to the Regulations on the Status and Transfer of Players (RSTP) as from 1 April 2015 (which persisted through the sequential editions of the Regulations) by way of FIFA circular no. 1468, which meant that FIFA would “no longer be competent to hear disputes involving intermediaries” as the competence was shifted to Member Association(s).

In particular, due to the introduction of the then ‘new’ Regulations on Working with Intermediaries on 1 April 2015, art. 23 (2) of the RSTP removed the Players’ Status Committee’s jurisdiction to hear any contractual disputes involving intermediaries. As a result, in the interim prior to the introduction of the 2019 FDC, in line with the competencies of the Disciplinary Committee at that time, only FIFA Players’ Status Committee or Dispute Resolution Chamber decisions resulting from claims brought prior to 1 April 2015 or subsequent CAS appeal decisions, would permit a route for intermediaries to invoke the then equivalent article to art. 15 FDC for the potential implementation of disciplinary sanctions against their counterparts for failure to comply. Moreover, as a legal person intermediary (such as an intermediary company) could only be considered as an ‘intermediary’ under FIFA’s jurisdiction as from 01 April 2015 upon the introduction of the Regulations on Working with Intermediaries (and from which date, as

aforementioned, disputes involving intermediaries were no longer heard by FIFA), at such point there was simply no available route for a legal person intermediary to bring an enforceable decision before the Committee.

In addition to the above-mentioned factors, the complete lack of contemplation within the article of the concept of sporting succession³¹ despite FIFA’s existing policies and the consequential CAS jurisprudence on the matter (*for further detail in this regard please see section F. infra*) gave rise to a petition for redress and the implementation of a more efficient disciplinary system appropriate for tackling the rising demand whilst maintaining a competent and rigorous disciplinary process.

Therefore, in order to constitute a more comprehensive and systematic text for the football stakeholders, and in an effort to address the aforementioned issues, on 15 July 2019 the current edition of the FDC came into force, replacing the former 2017 edition. In this regard, the amendments to the FDC were not only structural, but also substantive, and contemplated three watershed changes:

- i) the ability to enforce ordinary CAS awards;
- ii) that transfer bans would be automatically imposed upon defaulting clubs until the point of payment in full of the outstanding amounts/complete compliance with the decision not-respected in the event of infringements of art. 15 FDC - with further sanctions, such as a deduction of points or relegation to a lower division, having the possibility to be additionally imposed in the event of “*persistent failure, repeated offences or serious infringements*”³², and lastly;

³⁰ Memo to the Chairman and Deputy Chairman of the FIFA Disciplinary Committee, 9 April 2019 (INTERNAL DOCUMENT)

³¹ CAS 2020/A/6831 - par. 93 - “*It becomes immediately obvious that this provision does not contemplate sporting succession at all (...)*”.

³² Prior to the introduction of the current art. 15 FDC 2019 edn., under art. 64 of the (former) FDC 2017 edn., the practice was that transfer bans imposed on defaulting clubs would only be implemented in certain cases, *in addition* to a point deduction for a certain number of registration periods, for up to a maximum of four (4)

iii) that the sporting successor of a non-compliant party shall also be considered a non-compliant party and therefore subject to the obligations under art. 15 FDC³³.

Each of these abovementioned amendments addressed a certain perceived deficiency of the former FDC, explicating the article's more subtle motivations than its previously mentioned manifest reflection of FIFA's commitment to achieving financial justice. The now indefinite and automatic transfer ban implemented against non-compliant clubs under art. 15 FDC was a welcome change for creditors seeking (financial) justice in the context of disciplinary proceedings (as aforementioned, past cases having demonstrated "*point deductions and fines have proven not to be harsh enough*"³⁴), such amendment seeking to ensure compliance amongst the football stakeholders by encouraging defaulting clubs to comply with decisions in a timely manner, such clubs no longer having 'access' to an alternative sanction than a transfer ban, as there is simply no provision for it under article 15 of the current FDC.

In continuation, the inclusion of CAS awards rendered in the context of ordinary arbitration proceedings into the enforcement system³⁵, and the codification of the concept that sporting entities, under specific conditions, will survive changes of legal entities, *i.e.* sporting succession, emphasised and actualised art. 15 FDC's pursuit of *creditor protection*. The former by providing recourse for intermediaries to (re)access the FIFA disciplinary system following their previous exclusion (*see supra.*), through the extended capacity of art. 15 FDC to the execution of ordinary CAS Awards, and

registration windows as from the first day of the next registration period following the expiry of the final period of grace, depending on the amount due to the creditor party in the case at hand.

³³ Art. 15 (4) FDC , 2019 edn. – "*The sporting successor of a non-compliant party shall also be considered a non-compliant party and thus subject to the obligations under this provision. Criteria to assess whether an entity is to be considered as the sporting successor*

the latter by offering greater security to the stability of contracts and greater strength of position and/or certainty for creditors when it comes to the enforcement of their claim by the emergence of a so-called 'second Debtor' (a concept which is explored in greater detail *infra.*) by way of established sporting succession.

In addition, the codification by the new FDC of the principal under art. 15 (4) FDC that the established sporting successor of a defaulting club shall be considered liable for the non-compliance with a FIFA or CAS decision of the original club, served to better avoid cases of abuse by way of a codified 'disciplinary tool' with which to combat the unfortunately increasingly common practice of defaulting clubs attempting to avoid their mandatory (financial) responsibilities towards their creditors by 'phoenix-birding' as a 'new' club³⁶ - a scenario against which the former FDC(s) provided minimal, if any, protection.

These above explicated objectives of *ensuring compliance; protecting creditors and circumventing abuses* contained within art. 15 FDC, in addition to its statutorily subscribed 'mission' of achieving (non)financial justice, *provide an important legal and contextual background to the considerations of the CAS* and are reflected, either expressly or in essence, when it comes to the CAS's approach to the predicaments encountered in connection with the application of art. 15 FDC. The underpinning objectives and history of the article proving important legal and contextual background against which the CAS can be seen to approach the legal complexities faced with regards to art. 15 FDC's application, and holding a discernible, if

of another entity are, among others, its headquarters, name, legal form, team colours, players, shareholders or stakeholders or ownership and the category of competition concerned?

³⁴ Ibid. 28.

³⁵ Provided the respective CAS procedure started after the entry into force of the Code - Art. 72 FDC, 2019 edn.

³⁶ FIFA Circular n°1681.

discrete, influence on the CAS's approach to the issues encountered.

IV. Standing to invoke

The above foundations for the examinations of this article having been established, it is now appropriate to turn to the first of the predicaments encountered in connection with the application of art. 15 FDC and which has been analysed by the CAS, the matter of *standing to invoke art. 15 FDC*.

A. Standing to sue

In truth, the question of *'Who can invoke art. 15 FDC?'* – or in other words, the issue of standing to sue under the application of art.15 FDC – is an intricate and complex matter that is still currently under CAS's scrutiny. In technical terms, the creditors of the respective decision not complied with, whilst retaining the right to be notified of the final-outcome of the relevant disciplinary proceedings under art. 15 (2) FDC and possessing an interest in the outcome of the given case³⁷, have no standing to sue, as the infringement of art. 15 FDC relates to the failure to respect a decision, which is an obligation solely directed to the debtor party (parties)³⁸.

Indeed, it has been established at CAS that disciplinary proceedings for failure to respect a decision are *"intended to protect primarily an essential interest of FIFA, i.e. the full compliance by the affiliates of the decisions rendered by its bodies. In other words, the core of the DC Decision (...) regards only the existence of a disciplinary infringement by [the debtor] and the power of FIFA to sanction it"*³⁹.

³⁷ CAS 2019/A/6287.

³⁸ CAS 2020/A/7183 – par. 92 – *"It is undisputed that the Player was not a party to the disciplinary procedure initiated against [the Club] for failing to comply with the decision of the DRC"*

CAS 2019/A/6287 - pars.114 and 115 – *"[The] Sole Arbitrator considers that, since the present proceedings concern disciplinary matter, [the creditor] has no legal interest (in the sense of CAS Code) with regard to the imposition of a disciplinary*

Remembering, that although CAS is not *"a body of FIFA"*, its awards are considered under the FIFA Statutes to have the same effect in this context as a decision issued by a body of FIFA⁴⁰.

This being said, it is worthy of note that the CAS has recently, in a number of very specific cases⁴¹, accepted and/or allowed a creditor to participate as a party in *proceedings before the CAS*, the foregoing being principally in circumstances whereby an assessment of the diligence of the creditor in claiming his credit is required. The diligence of the creditor in such context, being considered as a relevant factor for evaluation, and interdependent upon, establishing the debtor party's 'non-performance' (*for further detail in this regard please see section VII. infra*).

Furthermore, as an additional interposing remark, the CAS has likewise very recently clarified in CAS 2021/A/8308 - expressly without addressing the separate and often conflated issue of the *"existence of an Appellant's interest worth[y] of protection in the proceedings that led [to the relevant Committee's decision]"*⁴² - the associated matter of whether or not a creditor party may request the motivated decision (*i.e.* the grounds of a decision of the Committee) following the issuance of the terms/operative part in art. 15 FDC proceedings – such requests from creditors in FIFA's recent practices having been rejected pursuant to art. 51 (3) FDC on the basis that, in principle, the creditor is not considered as a party and therefore not entitled to request the motivated decision/grounds (such requests being reserved for parties to the proceedings).

sanction by FIFA on the Appellant ("principle of verticality"), as it merely involves the exercise of the statutory powers of FIFA towards a club affiliated to one of its members"

³⁹ CAS 2012/A/2981 – par. 48

⁴⁰ CAS 2005/A/957 – par. 26

⁴¹ CAS 2020/A/6713, par. 64; CAS 2020/A/6878, par. 100; CAS 2020/A/6900 & 6902, par. 121.

⁴² CAS 2021/A/8308 – par. 70

In this respect, within the aforementioned Award (which indeed arose from a creditor's appeal following FIFA's rejection of the former's request for the grounds of the applicable decision) the CAS established that pursuant to art. 15 (2) FDC⁴³, the pertinent creditor (*i.e.* the legal/natural person invoking art. 15 FDC) to the given case is indeed afforded the right to "*obtain from the [Committee] the grounds of the [Committee's] Decision*", **regardless** of whether or not the former can be considered as a 'party' to the proceedings⁴⁴.

More specifically, the Sole Arbitrator concluded that a literal interpretation of art. 15 (2) FDC directly indicates that the creditor "is (at least) a subject "affected" by the disciplinary decision (...) and has therefore "the right" to be notified of the final outcome of the proceedings⁴⁵", with the teleological interpretation in parallel (the Sole Arbitrator taking into account elements such as an analysis of art. 15 (2) FDC in its overall context within the Code) leading the Sole Arbitrator to conclude that "*the purpose of art. 15 (2) FDC cannot be limited to allowing the creditor to become acquainted with the operative part of the decision (...) while denying it access to the grounds (...)*⁴⁶" and, that "*linking the obligation to provide grounds solely to the status of party, and to the rights deriving from it (...) would be simplistic and omit their other functions*⁴⁷".

⁴³ Art. 15 (2) FDC , 2019 edn. – "*With regard to financial decisions passed by a body, a committee or an instance of FIFA, or CAS, disciplinary proceedings may only commence at the request of the creditor or any other affected party, who will have the right to be notified of the final outcome of the said disciplinary proceedings*".

⁴⁴ FIFA being ordered in CAS 2021/A/8308 as a result, to provide the appellant/creditor in with the grounds of the relevant decision passed by the Committee as it had requested.

⁴⁵ CAS 2021/A/8308 – par. 63

⁴⁶ CAS 2021/A/8308 – par. 66

⁴⁷ CAS 2021/A/8308 – par. 67 – see par. 66 for the 'purposes of motivated decisions/grounds' as acknowledged "*by the Swiss jurisprudence and legal writing*".

Nevertheless, taking into account the above and both considering the fact that the subject (a creditor's (lack of) status as 'party') is currently being reviewed and admitting, as expressed by Mr. Gustavo Abreu (CAS Arbitrator) during this year's FIFA Football Law Annual Review⁴⁸, that there is not yet a wealth of published CAS jurisprudence available on the topic - from what jurisprudence exists, the CAS is anyhow fairly well established when it comes to the necessary elements in order for an entity/person to have the requisite standing to invoke art. 15 FDC. The subject now being especially pertinent, given the latest amendment(s) to the Code and the inclusion thereby of ordinary CAS Awards into 'the disciplinary enforcement system'.

In this regard, the CAS has recognised a number of requirements for an entity/person to be able to invoke art. 15 FDC. To begin, as decided by the Panel in CAS 2016/A/4426 and confirmed in CAS 2020/A/7212 and CAS 2020/A/6884, entities/persons that are not members of FIFA cannot invoke Article 15 of the FIFA Disciplinary Code since they are not subjected to the various regulations of FIFA, as reinforced by the exhaustive list of those under the scope of personal application of the Code pursuant to art. 3 FDC. Therefore, an (in)direct membership to FIFA is considered as an imperative for an entity/person to have standing to invoke art. 15 FDC⁴⁹ - the entity/person being required to fall under the

⁴⁸ Mr. Gustavo Abreu, "*Understanding article 15 of the FIFA Disciplinary Code: FIFA and CAS jurisprudence*", In: FIFA Football Law Annual Review 2022, Buenos Aires, 11 March 2022.

⁴⁹ CAS 2020/A/6884 – par. 96

⁵⁰ Art. 15 FDC itself only providing a non-specific and exemplary list enumerating those who could benefit from disciplinary proceedings conducted by the Committee - "**Anyone** who fails to pay another person (**such as** a player, a coach or a club) or FIFA a sum of money (...)". In fact, the provision only imposes certain restrictions with respect to the 'kind of debt' (*i.e.* a debt based on the instruction of a FIFA body, committee or instance or a CAS decision) and the 'kind of debtor' (*i.e.* "**such as** a

jurisdiction of the FIFA Disciplinary Committee pursuant to art. 3 FDC.

In continuation, the CAS has likewise emphasised as a requirement that the entity/person invoking art. 15 FDC possesses an interest worthy of protection in the enforcement of the specific FIFA or CAS decision not complied with. Put succinctly by CAS, “(in)direct FIFA members can in principle not invoke [art. 15 FDC] in order to urge [the Committee] to enforce a decision against another member if it concerns a decision in which it does not have a direct and personal interest⁵¹”.

Therefore, deriving from such considerations of the CAS, a general rule emerges that the Committee, in principle, will be able to dismiss requests to enforce FIFA/CAS decisions under art. 15 FDC, should it be the case that such request arrives from an entity/person that is not considered as an (in)direct member of FIFA, and so not subject to – or recognised by – the regulations of FIFA. Following, should an (in)direct FIFA member attempt to urge the Committee to enforce a decision against another member in which it does not have a direct and personal interest, the request can likewise be dismissed due to lack of standing.

B. The point of examination of ‘the FIFA membership requirement’

Interestingly, whilst these above conditions for the invocation of art. 15 FDC are consistently agreed upon by the CAS, that is i) membership to FIFA and; ii) a direct and personal interest in the decision to be enforced, the CAS’ approach is nuanced, not with respect to the actual conditions for determining standing to invoke art. 15 FDC (which as mentioned the CAS Arbitrators generally agree on), but rather,

player, a coach or a club”), which as mentioned, is not exhaustive.

⁵¹ CAS 2020/A/6884 – par. 97

with regard to the FIFA membership requirement specifically, *the point at which this condition is to be examined – i.e. at what moment in time does the entity/person need to be considered as an (in)direct member of FIFA in order to have standing to invoke art. 15 FDC⁵²?*

On the one hand, in a vote of support towards art. 15 FDC’s objective of *creditor protection*, the majority of the Panel in CAS 2020/A/7212 considered that the decisive criteria in the matter of standing to invoke art. 15 FDC, was whether the creditor, *in casu* a former player, **had the right to bring a case before the FIFA judicial bodies** (*i.e.* was a member of FIFA at the time of the lodging of the claim) and concluded that in the affirmative, the player shall then also subsequently have “*the right to request enforcement of the decision passed notwithstanding his/ her status at the time of the request of enforcement⁵³*”, so regardless of the entity/person’s status at the time of the request for enforcement under art. 15 FDC before the Committee.

In this case, the CAS Panel reasoned that to conclude otherwise would mean that the creditor/player would be obliged to remain active “*not only during the proceedings before the FIFA DRC but also until he notices that a club does not comply with a final and binding decision of the FIFA DRC⁵⁴*” and so requests enforcement before the Committee, which could indeed occur years later should it be the case that the debtor party appeals the FIFA decision to the CAS and then the Swiss Federal Tribunal as dilatory measures. In this respect, the Panel emphasised that one of the objectives of disciplinary proceedings commenced on the basis of art. 15 FDC is to “**protect the creditors or any other affected party, notwithstanding**

⁵² and of course, providing that the entity/person meets the ‘direct and personal interest’ requirement established by CAS for art. 15 FDC’s invocation.

⁵³ CAS 2020/A/7212 – par. 85

⁵⁴ CAS 2020/A/7212 – par. 83

their status at the time of the request to the [Committee]”⁵⁵.

As such, on the basis of the foregoing, the CAS Panel concluded that as the creditor was considered as a player within the meaning of the 2019 FDC **at the time when the case was brought before the FIFA judicial bodies** – *i.e. at the moment of lodging the claim before the FIFA Dispute Resolution Chamber (DRC)*- his subsequent retirement did not preclude him from retaining the standing to invoke art. 15 FDC in order to request the enforcement of the final and binding FIFA DRC decision. The Panel concurring that the procedure of art. 15 FDC was to be considered as a natural continuation of the procedure before the FIFA bodies *“which can be considered as enforcement proceedings”⁵⁶.*

However, this being said, on the other hand there is an existing line of CAS jurisprudence which seems to place the point of examination of the ‘FIFA membership requirement’ differently. In CAS 2016/A/4426 the Panel emphasised that should the creditor, an Intermediary, not have been an (in)direct member of FIFA *at the moment of invoking art. 64* (the 2017 edn. FDC equivalent to art. 15 FDC 2019 edn.), *“the Intermediary’s request may have been dismissed straight away”⁵⁷.*

In continuation, the Sole Arbitrator in CAS 2020/A/6884, referring to the view of the Panel in CAS 2016/A/4426, stipulated that the *“standing of an entity in order to invoke art. 64 of the FIFA Disciplinary Code is (...) to be examined at the moment of lodging the claim, as it concerns a formal prerequisite for the validity of the claim”⁵⁸*, however continued to take note of the creditor’s – again an Intermediary – membership to FIFA *“at the moment she requested the FIFA DC to apply Article 64 of the FIFA Disciplinary Code (...)”⁵⁹* as evidence of the creditor’s *locus standi* – the

foregoing indicating that the moment of the examination of the ‘FIFA membership requirement’ took place upon the creditor’s respective request for enforcement proceedings under art. 15 of the Code.

Therefore, taking the above into account, it may seem at first sight that there is a different approach in the Court of Arbitration for Sport regarding the point of examination of the standing to invoke art. 15 FDC – *at the moment of lodging the claim before the FIFA bodies? Or, at the moment of lodging the request for enforcement proceedings under art. 15 FDC before the Committee?* One could reasonably argue that the former is in better alignment with the article’s intentions to impart financial justice, protect creditors and ensure compliance, due to its *inclusionary* rather than *exclusionary* nature. Further, as noted by the Panel in CAS 2020/A/7212, the latter could discernibly place unrealistic expectations upon creditors to remain ‘within the FIFA system’ purely to be able to request the enforcement of the amounts confirmed as due to them, which can take years in some cases should the debtor party appeal the FIFA decision to the CAS and so forth.

However, at the outset it should be noted that each case before the CAS shall be considered individually. The circumstances of one case and the other are neither equivalent nor completely comparable. In CAS 2016/A/4426 & CAS 2020/A/6884, the appellants - both intermediaries - were members of their respective national federations at the time they requested the FIFA Disciplinary Committee to enforce the FIFA decision with the consequence that the standing requirement was in any case fulfilled. To the contrary, in CAS 2020/A/7212, the creditor, a former player, was no longer a FIFA member at the time he requested the FIFA Disciplinary Committee to enforce the final and binding FIFA DRC

⁵⁵ CAS 2020/A/7212 – par. 84

⁵⁶ CAS 2020/A/7212 – par. 85

⁵⁷ CAS 2016/A/4426 – par. 88

⁵⁸ CAS 2020/A/6884 – par. 99

⁵⁹ CAS 2020/A/6884 – par. 101

decision. Yet, the Panel considered in that case that for the reasons expressed above, the decisive criteria in the matter of standing to invoke art. 15 FDC was that the player was a member of FIFA at the time of the lodging of the claim before the FIFA DRC. What may appear to be a different approach is actually due to different circumstances i.e. the quality of the appellants and their status at the moment of lodging the claim pursuant to art.15 FDC: (i) in CAS 2016/A/4426 & CAS 2020/A/6884 the appellants were intermediaries whose status is contingent on their registration (see below), whereas in CAS 2020/A/7212 the appellant was a former player - and (ii) in CAS 2016/A/4426 & CAS 2020/A/6884, the intermediaries were registered with their respective national federations at the time they requested the FIFA Disciplinary Committee to enforce the FIFA decisions whereas in CAS 2020/A/7212, the former player was retired. These different situations illustrate the need for the CAS to adopt an approach adapted to the circumstances of each individual case in order to both render a fair decision and comply with the purpose of the relevant rule.

In any event, the introduction of the enforcement of Ordinary CAS Awards under the 2019 FDC will most likely introduce some interesting (and welcome) developments in this area of jurisprudence.

Lastly, an interesting *obiter dictum* on the above 'rules' established by the CAS, is the unique

predicament it creates for intermediaries (both natural and legal persons), whose 'status' as an intermediary - and so (in)direct membership to FIFA and consequential standing to invoke art. 15 FDC in accordance with art. 3 FDC - appears, on the basis of the FIFA Regulations on Working with Intermediaries (**the Intermediary Regulations**), to be contingent on the fact that the natural or legal person is duly registered as an intermediary in accordance with the implemented registration system of the applicable Member Association – such registration being required for any form of so-called 'intermediary activity'.

More precisely, according to the Intermediary Regulations, an intermediary must be registered in the relevant registration system of the respective member association “*every time they are individually involved in a specific transaction*”⁶⁰ and “*each time any activity within the scope of article 1 paragraph 1 [of the Intermediary Regulations] takes place*”⁶¹. Indeed, it is a general principle under the Intermediary Regulations, that “*whenever an intermediary is involved in a transaction, he shall be registered pursuant to article 3*”⁶². In this regard, it is a requirement for the registration of intermediaries under art. 3 (2) that associations must require clubs and players who engage the services of an intermediary, to submit “[*at the least*]” the applicable Intermediary Declaration⁶³ as per Annexes I (“*Intermediary Declaration for natural persons*”) or II (“*Intermediary Declaration for legal persons*”) of the Intermediary Regulations⁶⁴ - it being by virtue

⁶⁰ Regulations on Working with Intermediaries art. 3 (1)

⁶¹ Regulations on Working with Intermediaries art. 3 (5)

⁶² Regulations on Working with Intermediaries art. 2 (3)

⁶³ Member Associations are considered to have complied with their obligations under art.4 paragraphs 1 to 3 (satisfaction of impeccable reputation and that the contracted intermediary has no contractual relationships that could lead to potential conflict(s) of interest) of the Intermediary Regulations “*Requisites for Registration*”, should they obtain a duly signed Intermediary Declaration as per Annexes I or II (art. 4 (4) Intermediary Regulations).

⁶⁴ In accordance with art. 3 (3) a player engaging the services of an intermediary within the scope of art. 1 (1a)

of the Intermediary Regulations, must submit to the association of the club with which he signed - his employment contract and “*at least*” the Intermediary Declaration alongside any other documentation required by the association. In the event of a renegotiation of an employment contract, a player engaging the services of an intermediary must also provide the association of his current club with the same documentation. The same applies to clubs engaging the services of an intermediary within the scope of art. 1 (b) of the Intermediary Regulations, who must submit the aforementioned documentation to the association of the club with which the player in question is to be registered. If the releasing club engaged the services of an intermediary, it must also

of signing the relevant declaration, that the legal or natural person agrees to subject his/her/itself to be bound by the FIFA Statutes and regulations in the context of their intermediary activities (in addition to the regulations of the confederation and association to which the person is contractually related.)

Therefore, on the basis of the above, it follows that in order to perform any sort of ‘intermediary activity’ and concurrently, to be considered as an intermediary within the scope of personal application of the Code pursuant to art. 3 FDC - and thereby an entity capable of invoking art. 15 FDC - the natural or legal person must be duly registered as an intermediary in accordance with the implemented registration system of the relevant Member Association at the point in which the ‘FIFA membership requirement’ is examined.

V. Requirements for the implementation of art. 15 FDC

Having examined the CAS’s approach to *standing to invoke art. 15 FDC*, it only seems logical to next analyse the CAS’s approach to the *requirements for the implementation of art. 15 FDC*. By way of introduction, in order for disciplinary proceedings to be opened and for the FIFA Disciplinary Committee to possess the ‘power to sanction’ a disciplinary infringement on the basis of art. 15 FDC (*i.e. non-compliance with a final and binding FIFA decision rendered by a FIFA Body, Committee or Instance or a CAS award (ordinary or in appeal*

submit a copy of the Intermediary Declaration to its relevant association.

⁶⁵ CAS 2019/A/6121 – para. 97.

⁶⁶ This approach was likewise reflected by the CAS Panel in CAS 2015/A/3959 “*the standing to sue or to be sued, in a civil proceeding forms part of the merits of the claim; it belongs to the subject (active or passive) of the claim invoked before the tribunal and the lack thereof results in the dismissal of the request and not its rejection as inadmissible*”.

procedure)), the person (legal or natural) the applicable final and binding FIFA or CAS decision is to be enforced against, must simultaneously have both standing to be sued *and* fall under the jurisdiction of the FIFA Disciplinary Committee pursuant to art. 3 FDC.

A. Standing to be sued

With regards to standing to be sued, *Locus standi* has been defined by the Swiss Federal Tribunal as follows: “*Standing to sue or to be sued in civil proceedings relates to the substantial basis of the claim; it is the (active or passive) subject of the claimed right that must have standing, as its absence causes the dismissal, and not the inadmissibility of the claim*” (Swiss Federal Decision of 29 April 2010, in the case

X. c. Y. SA, 4A_79/2010, extract published in: Semaine Judiciaire SJ 2010 I p. 459). Indeed, the traditional approach to the standing to be in court is that it is an attribute that the parties to a given process have, which reveals their connection to the subject of the dispute⁶⁵⁶ - standing to be sued referring to the proper party that has to defend the decision, *i.e.* the party against whom the appellant must direct its claim in order to be successful.⁶⁷

In line with the foregoing, existing CAS jurisprudence has established that an entity or individual has standing to be sued only if it is personally obliged by the claim brought by the appellant.⁶⁸ In other words, a party has standing to be sued only if said party has some stake in the dispute because something is sought

⁶⁷ Ulrich Haas, “*Standing to appeal and standing to be sued*”, In: Bernasconi, Michele; Rigozzi, Antonio. International Sport Arbitration, 6th CAS & SAV/FSA Conference Lausanne 2016. Bern: Editions Weblaw, 53-88. Page 54. See also CAS 2013/A/3140, par. 8.12.

⁶⁸ CAS 2013/A/3301, par. 93; CAS 2006/A/1206, par. 26; CAS 2008/A/1518; CAS 2017/A/5359 par. 62: - “*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 (...)*”

against it.⁶⁹ In this respect, it is pertinent to clarify that disciplinary proceedings under art. 15 FDC pertain to a vertical dispute between a member (who was sanctioned) and FIFA (who issued the sanctions)⁷⁰, whilst the FIFA/CAS decision to be enforced under art. 15 FDC concerns a horizontal dispute between two (or occasionally more) members of FIFA.

With regards to the first requirement for the implementation of art. 15 FDC, *standing to be sued*, such condition is fairly organic given that the outcome of any given disciplinary proceedings instigated for non-compliance with a FIFA/CAS decision against a defaulting party, would inevitably have a legal impact upon said defaulting party whom clearly has a stake in the proceedings, the action remaining with the defaulting party to alleviate its financial burden to the creditor party or however the case may be – it therefore following that the defaulting party has the standing to be sued in the context of the given art. 15 FDC case/disciplinary proceedings at hand.

With regards to the second requirement for the implementation of art. 15 FDC - that the prosecuted person must fall under the jurisdiction of the Committee pursuant art. 3 FDC - the condition is intuitive, given that in order to be subject to the Code and the

sanctions therein, the person subject to the disciplinary enforcement proceedings must fall under the Code's scope of personal application, for which art. 3 FDC thereby provides an exhaustive list. As a result, in theory, any person/entity that meets the aforementioned requirements may be subject to disciplinary proceedings and possible sanction under art. 15 FDC, should they fail to meet an obligation subscribed to them by way of a final and binding (non-)financial FIFA or CAS decision⁷¹.

B. Insolvency proceedings

This said, there are however, a number of existing circumstances that may 'block' or prevent art. 15 FDC's application (in some instances *temporarily*), even should it be the case that the above-mentioned conditions for art. 15 FDC's implementation are satisfied; the most notorious of which is that of insolvency proceedings. Indeed, pursuant to art. 55 FDC, should a party be under insolvency or bankruptcy proceedings in accordance with the respective procedures provided for by the relevant national law, the disciplinary proceedings against such party *may* be closed⁷².

So why is it the case that enforcement proceedings under art. 15 FDC may be closed when the debtor is undergoing insolvency proceedings or bankruptcy proceedings⁷³?

⁶⁹ CAS 2015/A/3999, 4000 – par. 73; CAS 2007/A/1329; CAS 2019/A/6233

⁷⁰ CAS 2018/A/5657

⁷¹ An interesting development in this area is the CAS's recent confirmation in CAS 2020/A/7251 of FIFA's approach that FIFA member associations are subject to two separate types of disciplinary proceedings against them pursuant to art. 15 FDC – i) Under art. 15 (1) FDC for failure to comply with a FIFA/CAS decision against the member association; and ii) Pursuant to art. 15 (1) **AND** art. 15 (3) FDC, for failure to comply with the implementation of a disciplinary sanction (such as a transfer ban), imposed by the FIFA Disciplinary Committee. Indeed, CAS 2020/A/7251 ruled that “*a member association of FIFA is obliged to implement the sanctions imposed by the FIFA*

Disciplinary Committee (...) in accordance with Article 15 (3) FDC in conjunction with [the Disciplinary decision]” (pars. 86-88) – the Hellenic Football Federation in such proceedings being found liable by the Panel for “*intentionally, or at least utterly negligently, violating Article 15 FDC*” (par. 98) due to its failure to implement a transfer ban against a defaulting club in accordance with the pertinent decision of the FIFA Disciplinary Committee. ⁷²Art. 55 (b) FDC, 2019 edn. – “*Proceedings may be closed when: a party is under insolvency or bankruptcy proceedings according to the respective procedures provided for by the relevant national law;*”

⁷³ CAS 2020/A/6900 & 6902 insinuates that the differentiation between insolvency and bankruptcy proceedings is a question of whether “*the term only refers to proceedings aiming at the liquidation of the estate or*

Well, the CAS has addressed this matter quite expressly and stated that given that “*the enforcement measure i.e. [the threatened disciplinary sanction] (...) is punitive in nature. The latter (...) [requiring] that the non-payment is in fact attributable to the person concerned. (...) [in] the face of (...) impossibility to freely dispose of the estate it would be contrary to public policy to sanction the debtor (or liquidator) for not complying with [the financial decision] (...) [therefore] no sanction can be imposed according to the FIFA Disciplinary Code (...)*”⁷⁴ - such finding of the CAS having its roots in previous CAS jurisprudence (see *CAS 2012/A/2750* – par. 121).

In other words, the CAS considers that it would be *contrary to public policy* to impose a sanction under art. 15 FDC against a debtor party under insolvency proceedings when, as a result, the insolvency debtor can no longer manage or dispose of his assets and is thereby bound by strict rules regarding the distribution of its estate (subject to criminal sanctions). Such a debtor would thereby face *a factual and legal impossibility* with regards to the fulfilment of its obligations *as per* the final and binding financial FIFA/CAS decision not complied with, and so cannot be considered to be at fault for the said non-compliance (and so subject to disciplinary sanction).

As a parenthetical remark, whilst the provisions of art. 55 FDC (as outlined *supra*, also see footnote 72.) with regards to

also to proceedings leading to the restructuring of the debtor (...)” (see par. 122) – however, whether the proceedings in question are bankruptcy or insolvency proceedings is somewhat immaterial (*i.e. whether the proceedings are aimed at the liquidation or restructuring of the debtor*) given that art. 55 FDC covers both concepts (bankruptcy and insolvency proceedings) and that the CAS has held that in any case the term ‘bankruptcy’ “**must extend to all collective enforcement proceedings (independently of their final goal) (...)** (cf. *CAS 2015/A/4162*; *CAS 2016/A/4593* & 4769; *CAS 2012/A/2754*). The latter [not differentiating] **between liquidation and restructuring proceedings**” (see par. 122) – so overall and the

bankruptcy/insolvency proceedings do not divulge by their wording much (if any) of FIFA’s incentives behind the inclusion of such article within the Code, FIFA can at least ostensibly be perceived to endorse and/or be shifting towards the aforementioned approach of the CAS. Art. 24 (3) of the latest renditions of the Regulations on the Status and Transfer of Players (RSTP) determining that where a party (such as a club) fails to pay another party within due time, despite being ordered to do so by the Football Tribunal (or indeed accepts/does not reject a FIFA proposal made pursuant to the Procedural Rules Governing the Football Tribunal), said party may be excluded from the consequences prescribed under art. 24 (2) RSTP⁷⁵, should it be the case that the Football Tribunal has been informed that “*the debtor club was subject to an insolvency-related event pursuant to the relevant national law and is legally unable to comply with an order*”⁷⁶ – the inclusion of such latter element demonstrating an apparent endorsement by FIFA of the above-outlined approach of the CAS in this respect.

With the foregoing in mind, it should be recalled that art. 55 FDC actually specifically provides that “*Proceedings may be closed when: a party is under insolvency or bankruptcy proceedings*”, which insinuates that the closure of the art. 15 FDC proceedings remains up to the discretion of the FIFA Disciplinary Committee and further, that there are exceptions to this ‘closure rule’ that exist. Indeed, the CAS has

foregoing considered, there is a rather broad notion of what can be considered as a bankruptcy or insolvency proceedings.

⁷⁴ CAS 2017/A/5054 – par. 87;

⁷⁵ Art. 24 (2) RSTP – “*Such consequences shall be the following:*
a) Against a club: a ban from registering any new players, either nationally or internationally, up until the due amounts are paid. The overall maximum duration of the registration ban shall be of up to three entire and consecutive registration periods (...)
b) Against a player: a restriction on playing in official matches up until the due amounts are paid. The overall maximum duration of the restriction shall be of up to six months on playing in official matches (...)”.

⁷⁶ Art. 24 (3) b RSTP October 2022 edition.

confirmed the foregoing in the context of one such scenario in particular, concerning the enforcement of claims under art. 15 FDC against the insolvency debtor which have arisen *after* the initiation of the pertinent insolvency proceedings – the former typically meaning under insolvency law that no restrictions will apply with regards to the debtor’s ability to dispose of its estate (such restrictions usually only applying to claims lodged *prior* to the opening of the insolvency proceedings).

In these circumstances, the Panel in CAS 2015/A/4162 held that where the debtor in question is not subject to (enforcement) restrictions with respect to the enforcement of the specific claim “*there is (...) no reason not to make the FIFA enforcement system available for obligations incumbent on the estate*” (par. 81), and resultantly, no need to close the relevant art. 15 FDC enforcement proceedings pursuant to art. 55 FDC, as/when the debtor does not face a factual/legal impossibility to comply with its obligations *as per* the relevant final and binding FIFA/CAS decision.

The above considerations of the CAS having been examined, as a matter of natural progression, the question which logically next presents itself is: *what happens once the insolvency or bankruptcy proceedings have closed and the debtor has survived/been restructured?* Concerning the former, it goes without saying that if the insolvency/bankruptcy proceedings have ended and the debtor has been dissolved, then the art. 15 FDC enforcement proceedings cannot be resumed, as the debtor no longer exists as a member of FIFA under the Committee’s jurisdiction. However, in circumstances whereby the debtor has survived the insolvency proceedings and/or been

restructured, as expressed by Mr. Ulrich Haas (CAS Arbitrator) during this year’s FIFA Football Law Annual Review (FLAR), the CAS has articulated its support that following the conclusion of the relevant insolvency proceedings, the enforcement proceedings under art. 15 FDC may be re-initiated/resumed⁷⁷ – a matter which Mr. Haas considered “*rather clear*”⁷⁸.

In those instances where the enforcement proceedings under art. 15 FDC are indeed resumed against the surviving debtor following previous closure under art. 55 FDC due to insolvency in normal circumstances, when there is a restructuring of a debtor party resulting from the insolvency proceedings; there will typically also be what is known in simple terms as ‘a creditor’s arrangement’, whereby the claims of creditor parties which were lodged prior to the initiation of the insolvency/bankruptcy proceedings are substantially reduced⁷⁹. With respect to the effects of an insolvency proceedings over the debtor’s estate or the impact that any such ‘creditor’s arrangement’ decided by a State Court may have on the original claim (*i.e.* the original amount(s) ordered to be paid to the respective creditor within the relevant final and binding FIFA/CAS decision), CAS jurisprudence has evolved over the years.

In CAS 2011/A/2646 of 30 April 2012, often referred to as ‘the Talca case’, although the bankruptcy proceedings had finalized - and it was therefore on the successor club to the insolvent club to pay and avoid the sanction, not being limited by any legal prohibition or restriction, the Panel expressed the opinion that “*(...) in most bankruptcy legal systems worldwide, (...) it is not unusual to see in the market of football that clubs which are declared bankrupt become, in*

the enforceability of the disciplinary measures after the insolvency proceedings have concluded”.

⁷⁸ Mr. Ulrich Haas, “*The sporting successor and insolvency in football*”, In: FIFA Football Law Annual Review 2022, Buenos Aires, 11 March 2022.

⁷⁹ Ibid.

⁷⁷ CAS 2012/A/2750 – par.155 “*(...) the [court order opening insolvency proceedings] does not order the RFEF to abstain from imposing any sanction permanently; the order is limited in time. In other words, the decision of the Zaragoza Commercial Court is without prejudice to*

accordance with the national laws ruling the bankruptcy proceedings, prevented from paying their debts in an immediate and entire manner. This situation is logically provoking undesired inequities in the referred market at international level, where clubs in bankruptcy enjoy the privileges of the bankruptcy proceedings while the other clubs are forced to honour their commitments in full and timely manner, all of them playing in the same competitions. Such inequity of treatment and opportunities is clearly against the essential principles of the so-called “lex sportiva”⁸⁰.

About four years later, in CAS 2015/A/4162 dated 3 February 2016, the Panel stressed that creditors must be protected from a misuse of insolvency proceedings (and the encroachment of creditors’ rights that follow such proceedings) by the debtor⁸¹.

In CAS 2020/A/6831 of 23 April 2021, the Panel offered that in order to determine what effect, if any, the creditor’s arrangement may have on the original claim, the law applicable to the merits of the case must be examined. In this regard, the Panel considered as a first ‘threshold’ question *“is the factual matter before it addressed in the relevant FIFA Regulations?”⁸²* and in continuation *“if the answer is yes, then the Panel would need to ask an additional question: i. Is FIFA law “complete”, and hence there is no need to have recourse to Swiss laws to fill the gaps; ii. Or, conversely, is FIFA law “incomplete”, and hence recourse to Swiss laws to fill the gaps becomes a necessity;⁸³”*. The Panel deemed that in the event that the latter case should apply, then *“Swiss law could lead the Panel to inquire into the law chosen by the Parties or if there is no such choice ‘to the rules of law that the Panel deems appropriate’ (assuming it is different from FIFA Regulations and Swiss law)⁸⁴”*. With the foregoing considerations in

mind, and having first considered both the FIFA Regulations and Swiss Law which did not provide any ‘answer’ with respect to as to how a creditor’s arrangement agreed by the applicable State Court may (or may not) impact the original claim in art. 15 FDC enforcement proceedings, the Panel therefore deemed it appropriate that *“as much as needed, the Panel may refer when relevant for the discussion on the merits of [the] case, to **the Bulgarian Law on bankruptcy**⁸⁵”*, ultimately concluding that *“it is **Bulgarian law that decides on the level of liability** (and the ensuing amount of debt of [the Club] to the [creditor]⁸⁶”*.

Essentially, what the CAS’s above approach concludes in short form, is that as neither the FIFA regulations nor Swiss Law addresses the potential effects (or lack thereof) of creditor’s arrangements upon the enforcement of original claims, the level/amount of the liabilities incurred by the debtor club are, in the opinion of the CAS⁸⁷, to be defined by the applicable national law of the country in which the debtor is domiciled *e.g.* by Bulgarian bankruptcy law. Applied in practice, what this effectively means is that where a creditor’s arrangement exists, the CAS⁸⁸ considers that the original claim in accordance with the FIFA/CAS decision cannot be enforced under art. 15 FDC, though it is however possible, in accordance with the applicable national law, to enforce the amount that was attributed to the relevant creditor under the pertinent creditor’s arrangement, pursuant to art. 15 FDC⁸⁹⁹⁰.

In CAS 2020/A/6900 & 6902, in response to the “Talca” case, the Sole Arbitrator held that insolvency proceedings usually do not accord privileges to a debtor, but rather substantially

⁸⁰ CAS 2011/A/2646 – par. 19

⁸¹ CAS 2015/A/4162 – par. 84

⁸² CAS 2020/A/6831 – par. 83

⁸³ CAS 2020/A/6831 – par. 84

⁸⁴ CAS 2020/A/6831 – par. 85

⁸⁵ CAS 2020/A/6831 – par. 89

⁸⁶ CAS 2020/A/6831 – par. 157

⁸⁷ Or rather, *the Panel* in CAS 2020/A/6831.

⁸⁸ Ibid.

⁸⁹ This approach being supported by CAS 2015/A/4162 – par. 83

⁹⁰ CAS 2020/A/6923 – par. 65 refers to national insolvency law regarding questions of essence related to the relations between the debtor and the creditor; See also CAS 2020/A/ 6941 – par.68.

interfere with the debtor's rights. Furthermore, the continuation of the operations will – in most cases – be under close supervision of the authority of administrators and the courts. The autonomy of the debtor is, thus, severely restricted in insolvency proceedings. Furthermore, the continuation of the operations – *e.g. via* a restructuring plan – requires that the latter is in the interest of the creditors and, thus, provides for an economically viable and sound reallocation of the debtor's resources. Insolvency proceedings consequently incentivize good governance which is also in the interest of the sporting community. In addition, it should not be forgotten that also the alternative to a continuation of the operations, *i.e.* the liquidation of a club has serious repercussions on the competitors⁹¹.

The view expressed in the former “Talca” case law concerning the ‘inequity of treatment’ of bankrupt clubs with regard to the essential principles of the *lex sportiva* does not seem to have been followed. Admittedly, it is easy to criticise the Talca case's statement as it is arguably a misjudgement, or as put by Mr. Haas during the FLAR, *a misrepresentation*⁹², to consider that insolvency proceedings afford some kind of advantage(s) to the insolvent debtor, which would no longer have control over its estate – the latter most likely largely being sold in the insolvency proceedings in order to benefit the creditors under the creditor's arrangement. In this sense, due regard being given to creditor's arrangements in accordance with the applicable national insolvency laws could even conceivably support art. 15 FDC's objective of *creditor protection*, the creditors under such arrangements being guaranteed ‘something rather than nothing’, when taking into account

that the debtor could in principle face an impossibility to comply should the original claim be enforced ‘as is’ (as opposed to enforcing under art. 15 FDC the amount(s) due in accordance with the pertinent creditor's arrangement).

VI. Sporting Succession

As has been expressed *supra*, the principal of sporting succession was codified by the new and current FDC under art. 15 (4) FDC, which establishes that the sporting successor of a non-compliant party shall also be considered as a non-compliant party and therefore subject to the obligations under art. 15 FDC. As far as cases of potential sporting succession are concerned, the first step is establishing indeed whether a club can actually be considered as the sporting successor of the original debtor club named under the FIFA/CAS decision to be enforced, and in the affirmative, where sporting succession can be established, pursuant to art. 15 (4) FDC the succeeding club can then be considered liable for the debts of the original club and consequently responsible for any non-compliance by the original debtor with a decision under the terms of art. 15 FDC.

With regards to the criteria for such determination, the CAS have clarified that the elements referred to under art. 15 (4) FDC as criteria for assessment of whether an entity is to be considered as the sporting successor of another entity⁹³ are not exhaustive (as clearly follows from the words “*among others*” therein) - additional elements other than those listed may be taken into consideration⁹⁴. In particular, the CAS jurisprudence is especially well-established in terms of criteria which may be used in order to determine whether ‘sporting succession’ has taken place, regardless of the

⁹¹ CAS 2020/A/6900 & 6922 – par. 141

⁹² Mr. Ulrich Haas, “*The sporting successor and insolvency in football*”, In: FIFA Football Law Annual Review 2022, Buenos Aires, 11 March 2022.

⁹³ Art. 15 (4) FDC, 2019 edn. – “(...) *Criteria to assess whether an entity is to be considered as the sporting successor of*

another entity are, among others, its headquarters, name, legal form, team colours, players, shareholders or stakeholders or ownership and the category of competition concerned”.

⁹⁴ CAS 2020/A/6884 – par. 138

legal form under which the clubs under consideration have operated (see, *inter alia*, CAS 2007/A/1355, CAS 2011/A/2614, CAS 2011/A/2646, CAS 2012/A/2778, CAS 2016/A/4550 and CAS 2016/A/4576). The identity of a club, according to the CAS, being constituted by elements such as its name, colours, fans, history, sporting achievements, shield, trophies, stadium, roster of players, historic figures and so forth, that allow it to distinguish itself from all the other clubs⁹⁵, the overall package of the elements, or the collective impression given, being decisive of whether or not there is sporting succession⁹⁶.

The above approach was confirmed in CAS 2020/A/7092, where it was again noted that the elements listed under art. 15 (4) FDC were a non-exhaustive list (par. 73 et seq.), and that whilst each element will be assessed individually as to whether it is indicative of sporting succession in the context of the overall analysis, all the criteria will then be assessed collectively in order to come to a conclusion as to whether sporting succession can be established (par. 75). Interestingly, in a more recent CAS decision (CAS 2020/A/7423), whilst the Panel again confirmed that the criteria under art. 15 (4) FDC is not a ‘closed-list’ but rather sets indicative criteria, the Panel did not “*consider itself to be bound by any prior decision of FIFA and CAS regarding what criteria shall be met in order to conclude that sporting succession exists*” and stated that it would only refer to and consider previous cases for reasons of predictability and stability, since it considered that the “*vast majority of CAS Awards that analyse the above-mentioned criteria in different ways, fail to create a robust and unified jurisprudence in this regard and leave*

⁹⁵ See CAS 2013/A/3425; CAS 2018/A/5618.

⁹⁶ *Ibid.* 91

⁹⁷ CAS 2020/A/7092 - par. 76 - “*The Panel finds that the concept of “sporting successor” is mainly implemented in order to avoid abuse*”.

⁹⁸ FIFA Circular n°1681 - “*FIFA will act against the sporting successor of a debtor, a practice that has unfortunately become more common in recent years as clubs attempt to avoid mandatory*

the analysis of said situation to be decided on a case-by-case basis (...)” (see par. 190 et seq.).

When it comes to sporting succession cases, the CAS has issued several awards attempting to define the purpose of art. 15 FDC’s ‘sporting succession provision’. The line of thought emerging from the jurisprudence (see CAS 2020/A/7092) that the concept of a ‘sporting successor’ is principally implemented in order to avoid cases of abuse⁹⁷ (see *supra* an objective of art. 15 FDC), a principle which was indeed indicated by FIFA itself within Circular n°1681⁹⁸.

This approach was developed in CAS 2020/A/7183 in which the Sole Arbitrator agreed with the findings in CAS 2020/A/7092 that the concept of sporting succession was mainly implemented in order to avoid abuses (par. 112), however emphasised that appearances (e.g. same colours, same logo etc. - which are purely objective or “*irrespective of good faith or bad faith*” as put by Mr. Haas during the FLAR⁹⁹) cannot be relied exclusively upon in order to reach the conclusion that the requirements for sporting succession have been met. The reasoning for this was that, given that the concept of sporting succession is implemented in disciplinary regulations (in context, under art. 15 FDC), it follows that when determining the disciplinary measure to be imposed the “*judging body must take into account the objective and subjective elements of the offence*”¹⁰⁰ in accordance with art. 24 FDC. To do otherwise, could potentially lead to the “*improbably result that any club that carries the same external [aspects as the Old Club such as same logo, same colours etc.] could possibly be considered as its sporting successor*”¹⁰¹ regardless of any actual

financial responsibilities towards other clubs, players, managers, etc..

⁹⁹ Mr. Ulrich Haas, “*The sporting successor and insolvency in football*”, In: FIFA Football Law Annual Review 2022, Buenos Aires, 11 March 2022.

¹⁰⁰ CAS 2020/A/7183 – par. 116

¹⁰¹ *Ibid.*

abuse, which requires the club to be at fault in some manner – *i.e.* the club must have ‘done something wrong’ in order to be ‘sanctioned’ with sporting succession under art. 15 FDC, such as breach a provision, commit a fraud and/or harm a protected interest by its actions.

This said, and despite the relatively clear approach of the CAS in the above-mentioned line of jurisprudence, it does ostensibly appear that the concept of sporting succession has in any case been applied even in cases in which no abuse appears to have taken place, purely based on objective appearances (irrespective of good faith). For example, in CAS 2020/A/7423, sporting succession was established based solely on objective external aspects (similar names, same logo, colours, uniform and social media), the Panel even noting in its considerations that there was “*no evidence on file that the New Club intended to circumvent the club’s financial obligations or to defraud the club’s creditor (...)*”¹⁰², which casts doubts over whether the purpose of art. 15 (4) is indeed really about preventing abuses, or perhaps more accurately, is indeed *limited to application* in cases of abuse *only* - such doubts only being strengthened by the recent confirmation in CAS 2020/A/7543, whereby the Sole Arbitrator directly and expressly pointed out that “*sporting succession does not necessarily derive from ‘shady practices’ to avoid due payments, or the existence of malicious intent (...)* *shady practices, or somewhat fraudulent practices by parties trying to avoid payments, do not constitute a condition sine qua non to conclude that sporting succession occurred (...)*”¹⁰³ or in other words, that “*sporting succession can exist even if such practices are absent*”¹⁰⁴.

As a result, against the above-established jurisprudential background, an ongoing discussion persists concerning ‘the real purpose of art. 15 (4) FDC’ in light of the

CAS’s evolving approach to this subject. By way of illustration, at the FLAR Mr. Ulrich Haas presented his considerations that the scope of application of the concept of sporting succession under art. 15 (4) FDC should be widened beyond cases of abuse, to also incorporate its interpretation as a provision that provides for creditor protection (again, see *supra*. an objective of art. 15 FDC), due to the fact that the provision can arguably be seen to compensate creditors from the disadvantages incurred when there is an ‘intransparent transfer of assets’ between the Old Club and the succeeding New Club.

Put differently, Mr. Haas contends that when an original debtor transfers assets to a third party, this may jeopardise the enforcement of the creditor’s claim under art. 15 FDC as it creates uncertainty for the creditor with regards to whether his or her claim can be enforced into the estate of the original debtor, thus weakening the creditor’s position. On this basis, Mr. Haas interprets art. 15 (4) FDC as providing compensation for this disadvantage imposed on creditors when a transfer of assets takes place, *i.e.* as a creditor protection provision, as by way of the establishment of sporting succession “*all of a sudden [the creditor has] two debtors in which [it] can rely*”¹⁰⁵, thereby remedying the detriment incurred.

The persisting discussion related to the real purpose of art. 15 (4) FDC seems to come to a conclusion with the new art. 25 par. 1 of the FIFA Regulations on the Status and Transfer of Players, October 2022 edition, entitled “Implementation of decisions and confirmation letters”. Indeed, this article provides “[T]he sporting successor of a debtor shall be considered the debtor and be subject to any decision or confirmation letter issued by the Football Tribunal. (...)”. The fact that this provision is included in the FIFA RSTP 2022 and not only in the FDC

¹⁰² CAS 2020/A/7423 - par. 201

¹⁰³ CAS 2020/A/7543 - par. 95 *et seq.*

¹⁰⁴ *Ibid.*

¹⁰⁵ Mr. Ulrich Haas, “*The sporting successor and insolvency in football*”, In: FIFA Football Law Annual Review 2022, Buenos Aires, 11 March 2022.

may be interpreted in the sense that the notion of abuse is not an essential condition to establish whether a sporting succession takes place. It will most definitely be interesting, especially so in light of recent developments, to see whether the CAS endorses this approach in the future.

VII. Diligence of creditors

In cases where sporting succession is established pursuant to art. 15(4) FDC, in the event that the original debtor club under the FIFA/CAS decision to be enforced underwent bankruptcy proceedings, the diligence of the creditor in claiming the relevant credit/registering his or her claim is a matter which shall be addressed by the Committee. The diligence of the creditor in this respect is important, as where the creditor can be determined to have acted with a lack of due diligence in this regard, this in principle, can lead to the claim being rejected – it being expected that the creditor takes part in the bankruptcy proceedings of the original club at the national level.

The above approach under art. 15 FDC disciplinary proceedings has been recognized by the CAS (see CAS 2011/A/2646; CAS 2019/A/6461; CAS 2020/A/6884), the creditor party being “*expected to be vigilant and to take prompt and appropriate legal action in order to assert his claims*¹⁰⁶”, with no disciplinary sanctions being imposed on a club as a result of sporting succession, should it be the case that the relevant creditor failed to claim his credit in the bankruptcy proceedings of the former club “*as there is a theoretical possibility he could have recovered his credit, instead of remaining passive*¹⁰⁷”.

¹⁰⁶ CAS 2020/A/6884 – par. 157

¹⁰⁷ Ibid.

¹⁰⁸ CAS 2020/A/6745 - “*In the case at stake, the Sole Arbitrator considers that we are **not in a situation of the negligence of the Player** contributing to the impossibility of*

An important factor established by the CAS for consideration when it comes to the diligence of the creditor, is whether it was reasonably possible for the creditor to have been aware of the bankruptcy proceedings of the original debtor club. In this context, the Sole Arbitrator held in CAS 2020/A/6884 that “*the [creditor] knew, or at the least should have known, about the bankruptcy proceedings*” (par. 159) and further that “*it would have required little from the [creditor] to register her claim in the bankruptcy proceedings in Bulgaria*” (par. 166). The Sole Arbitrator therefore concluding as a result, that the creditor had not acted with the required degree of due diligence in recovering her credit in the bankruptcy proceedings of the original debtor club, and so her claim must be dismissed.

By contrast, in cases where it can be established that it was not possible for the creditor party to have reasonably been aware of the bankruptcy proceedings of the original debtor, the CAS jurisprudence has confirmed that this may contribute towards the conclusion that the creditor may not have been negligent in its duty to act in a diligent way in situations in which bankruptcy proceedings have occurred (and so the claim would not be dismissed). Indeed, this was the case in CAS 2020/A/6745, where the Sole Arbitrator took into account that the creditor could not reasonably have been aware of the bankruptcy proceedings of the original debtor until well after disciplinary proceedings had started, as a contribution towards his conclusion of not being convinced that the relevant player/creditor lacked diligence in the collection of his credit¹⁰⁸.

However, and perhaps most significantly overall, it is important to note that as established in CAS 2020/A/6884, and following the approach of the Panel in the

receiving the amounts granted by the FIFA DRC Decision” (par. 89)

“*The Sole Arbitrator is **not convinced that the Player lacked diligence in the collection of his credit** (...)*” (par. 91)

Award CAS 2019/A/6461, the CAS has made clear that the assessment of the required degree of the creditor's diligence should be made on a case-by-case basis in view of the specific circumstances of the case. In other words, **there is no blanket rule that applies or test that has been established by the CAS**, when it comes to the necessary examination of whether a creditor has shown the required degree of diligence to recover the amounts he or she is owed, under the FIFA/CAS decision to be enforced pursuant to art. 15 FDC¹⁰⁹.

III. Conclusion

As demonstrated during the course of this article, art. 15 FDC is a complex and multi-faceted provision aimed not just at *the deliverance of financial justice* but also, in the spirit of *pro bono publico*, to ensure compliance amongst the football stakeholders (through the sanctioning of non-compliant parties), to protect the interests of creditor parties and to avoid circumstances of abuse.

The CAS's methods of approach to the complexities faced when it comes to art. 15 FDC's application consistently and continually embody these objectives, despite the dynamic and permanently evolving legal landscape in this area. Nevertheless, the sometimes evolving views of the CAS across the sophisticated predicaments encountered understandably drive a desire from the football stakeholders for further clarification and harmonization of approach, with the anticipated future developments in the CAS's assessments, being eagerly awaited.

¹⁰⁹ CAS 2020/A/6884 – par. 157 – “*There is no blanket rule as to whether or not a creditor has shown the required degree*

of diligence. This assessment should be made based on the specific circumstances of the case”.

Jurisprudence majeure*

Leading Cases

Casos importantes



* 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. Llamamos su atención sobre el hecho de que la siguiente jurisprudencia ha sido seleccionada y resumida por la Secretaría del TAS con el fin de poner de relieve las recientes cuestiones jurídicas que han surgido y que contribuyen al desarrollo de la jurisprudencia del TAS.

CAS 2019/A/6669

Sayed Ali Reza Aghazada v. FIFA

28 April 2022

Football; Disciplinary sanctions for failing to report sex crimes and to protect physical and mental integrity of players; Lex mitior and tempus regit actum; Hearing in person and translation during a hearing; Duty of good faith of a party to the arbitration; Testimony of anonymous witnesses; Conditions for the use of protected witnesses; Burden of proof and Beweisnotstand; Standard of proof; CAS power of review

Panel

Prof. Ulrich Haas (Germany), President

Mr Donald Rukare (Uganda)

The Hon. Michael Beloff QC (United Kingdom)

Facts

The dispute in these proceedings revolves around the decision rendered by the Adjudicatory Chamber of the FIFA Ethics Committee (“AC”). The decision of 8 October 2019 (“the Decision”) concerns alleged ethical misconduct of the Appellant, Mr Sayed Ali Reza Aghazada, who was the Secretary General of the Afghanistan Football Federation (“AFF”) from 2012 until 2019, related to sexual harassment, sexual abuse and rape committed by AFF officials. Among these officials was – *inter alia* – Mr Keramuddin Karim, the former President of the AFF. The AC imposed a ban on the Appellant prohibiting him from taking part in any kind of football-related activity at a national, regional and international level for a period of 5 years for failing to report the above said crimes and for failing to protect the physical and mental integrity of players. It further imposed a fine

on the Appellant in the amount of CHF 10,000.

On 23 November 2018, the representative of the Afghanistan Women’s National Football Team (“AWNFT”) sent an email to the general email address of the AFF (info@aff.org.af) and – addressed in CC – to Mr Aghazada ([...]@gmail.com). The email reads – in its pertinent parts – as follows: “Dear Mr. President Kramudin Karim, (...) You might remember that on 05th-Feb-2018 we informed you about mental abuse, sexual affairs and bad behaviour of two male representatives of Afghanistan Football Federation who were sent by you to our Jordan Football training camp. Our complaint and case were on the representatives Abdul Saboor Walizadeh who was introduced as an official delegate and representative of AFF and head of Women’s Football Committee, and Nader Alme who was sent as an assistant coach. We clearly remember you promised us that you will punish them and you will take strong actions against them. (...) After our investigations, we found out that Abdul Saboor Walizada got promotion as a head of the judicial and Nader Alme became the coach of U17 Men’s National Team. (...) Is this the way you want to protect our rights and our safety, by hiring the abuser?”.

On 29 November 2018, the sports brand Hummel terminated its sponsorship agreement with the AFF after becoming aware of the allegations of mental, physical and sexual abuse within the AFF. On 30 November 2018, a widespread media coverage reported “*severe mental, physical and equal right-abuse of the female players by male AFF officials*”. The reports also mentioned that the AFF released a statement in which it “*vigorously rejects the false accusations made with regard to the AFF’s women’s national team*”.

On the same date, the FIFA Investigatory Chamber of the FIFA Ethics Committee (“IC”) commenced investigations into the allegations of mental and physical abuse of members of the AWNFT. The IC informed

Mr Aghazada of the investigations and requested him to furnish all relevant information in the possession of the AFF in relation to the investigated matter to the IC by 7 December 2018.

On 2 December 2018, Mr Aghazada replied to the IC's letter of 30 November 2018 by stating that *"the AFF takes this matter extremely seriously and it does everything to prevent (and investigate) such extremely disturbing [sic] incidents and allegations"*.

On 5 December 2018, the Appellant in his capacity as Secretary General of the AFF sent the following letter in English and Dari language to Mr Walizada as well as to Mr Aleme, both accused of abuses of AFF female players: *"You may be aware that in the last days, the media have reported about sexual abuse and other mistreatment occurring within the AFF national teams. It was suggested that you may have been affected and the victim of such actions. Please find attached the relevant media reports and requests. As am [sic] employer, we want to do everything to support and protect you. If you would like to report anything in relation to these media reports, or if you have any knowledge of such incidents, please inform us immediately. If you do not feel comfortable to inform us, you may also provide such information to FIFA directly (legal@fifa.org). (...)"*.

On 9 December 2018, the then Attorney General of the Islamic Republic of Afghanistan ("Attorney General") provisionally suspended five officials of the AFF, including Mr Karim and Mr Aghazada. The Attorney General further imposed travel bans on all of the suspended officials.

On 12 December 2018, Mr Aghazada sent an email to the Secretary General of FIFA, Ms Fatma Samoura, informing her about the internal investigations initiated by the AFF and of the provisional suspension imposed on him by the Attorney General. He further indicated that the suspension should be considered an

act of unlawful governmental interference contrary to the FIFA Statutes. On the same date, the IC provisionally suspended Mr Karim for a period of 90 days.

On 17 December 2018, Mr Aghazada sent an email to the IC and Ms Samoura explaining that the internal investigations could not be conducted properly due to the suspensions imposed by the Attorney General. Accordingly, Mr Aghazada requested that the internal investigations of the AFF *"be stayed, until the situation with the government is clarified and at least, the General Secretary and the Vice-President are able to return to daily duties"*.

On 17 January 2019, after the deadline to provide the requested information had been extended by IC's email dated 24 December 2018, the AFF submitted its position on the alleged mental and physical abuse of female football players based on its internal investigations, in which it denied all such allegations.

On 8 June 2019, the AC sanctioned Mr Karim with a life ban on taking part in any football-related activity for the abuse of his position and the sexual abuse of various female players. The AC also imposed a fine of CHF 1,000,000 on him.

On 4 July 2019, the IC notified Mr Aghazada that formal investigations were being initiated against him for possible breaches of Articles 13, 15, 17, 23 and 25 of the 2018 edition of the FIFA Code of Ethics ("FCE"). The IC further requested Mr Aghazada to provide *"a written statement in relation to your awareness with respect to Mr Karim's conduct, in particular, if you were aware of the same please refer to any actions you may have taken in that respect"* by 17 July 2019.

On 16 July 2019, Mr Aghazada denied all alleged violations of the 2018 FCE stating, *inter alia*, that he *"has never been involved in such activity"*

[sexual abuse or assault of women] *directly or indirectly, and confirms that he has not been complicit in any such activity where it is alleged against Mr Karim, or any other person at the AFF*".

On 22 August 2019, the IC submitted its final report to the AC. The report "*finds Mr Aghazada guilty of having breached article 23 par 1 and 17 of the FCE 2018*".

On 23 August 2019, the AC informed Mr Aghazada that formal proceedings were being initiated against him before the AC based on the findings of the final report of the IC. On 8 October 2018 the AC issued its Decision whereby Mr Sayed Aghazada was (i) found guilty of an infringement of art. 17 (Duty to report) and art. 23 (Protection of physical and mental integrity) of the FIFA Code of Ethics, in relation to his awareness of and failure to report and prevent the sexual abuse committed by Mr Keramuudin Karim, former President of the Afghanistan Football Federation (AFF), against several female players in the period 2013 – 2018; (ii) banned from taking part in any kind of football-related activity at national and international level (administrative, sport or any other) for a period of 5 years, as of notification of the present decision, in accordance with article 7 lit. j) of the FIFA Code of Ethics in conjunction with art. 6 par. 2 lit. c) of the FIFA Disciplinary Code; and (iii) fined in the amount of CHF 10,000.

On 10 December 2019, the Decision with grounds was notified to Mr Aghazada. On 22 December 2019, the Appellant filed an appeal before the CAS against the Decision.

On 17 and 18 June 2021, after several postponements due to COVID-19 related travel restrictions, a hearing was held in this matter. The President of the Panel, the CAS counsel in charge of the case and the clerk attended the hearing in person whereas the other Members of the Panel, the parties and

their representatives, as well as the witnesses attended the hearing by video-conference.

The Panel heard evidence from three witnesses (i.e. Player C, Player D and Player A), who were called by the Respondent and heard by the Panel in a way so as to protect their identity. This was done via a translator/interpreter. The Parties and the Panel then had the opportunity to examine and cross-examine the witnesses. The testimony of the witnesses can be summarized - in essence - as follows: Player C played for the Afghan women national football team at the time of the relevant facts. In the year 2017, she was sexually harassed, hit in the face and elsewhere on her body and raped by the President of the AFF. The abuses took place on the premises of the AFF, i.e. in a secret room that could only be accessed through the office of the President of the AFF by fingerprint. Thereafter, the President of the AFF gave Player C 300 or 400 US dollars and advised her not to tell anybody about what had happened or about the secret room. Player C refused to take the money and was kicked out of the secret room through a side door that connected the secret room with the private parking space of the President of the AFF. She had blood, bruises and black spots on her face, neck and other parts of her body. She walked through to the main gate of the AFF compound and bumped into the Secretary General of the AFF, the Appellant. Player C turned to him for help and tried to explain what had happened to her, but instead of helping her, he was rough, and showed her no concern at all. He "*pulled his [business] card out of his pocket*" and told her: "*you can make money out of that and you can go wherever you want but I don't want to see you ever again in the federation*". According to Player C, the Appellant clearly knew what had happened to her, as he could see the state in which she was upon exiting the secret room where she had been sexually abused and beaten by the President of the AFF, Mr Karim. In addition, the Appellant's

office and Mr Karim's office were very close in the old offices, where the abuse took place; finally, Mr Karim and the Appellant have a "close relationship". According to Player C, "everybody at the AFF including the Appellant" knew about the widespread abuses committed on the female players of the AFF.

At the time of the relevant facts, Player D was a player of the Afghan women national football team. She was sexually assaulted twice by the President of the AFF, Mr Karim. Each time, the abuses took place in the old offices of the President of the AFF. Each time, she left the office of the President of the AFF in very bad conditions, i.e. shocked and crying, and many people could see her at that moment. In addition, according to Player D, it was impossible for the Appellant not to know about such abuses as his office in the old building was next to the President's office. Moreover, the Appellant and Mr Karim had a close relationship. Together with other players, Player D intended to make an official complaint in writing about these abuses. In order to do so they had to go through the Appellant. The Appellant however blocked the complaint, as was reported by the person in charge for filing the complaint. These events occurred between 2014 and 2016.

At the time of the relevant facts, i.e. while the Appellant was Secretary General of the AFF, Player A was a member of the Afghan women national football team. Player A reported that she was sexually harassed by the President of the AFF. Such abuse took place in the leisure room which is located on the upper floor of the new building of the AFF, above the new office of the President of the AFF. According to Player A, all women at the AFF knew about sexual abuses by AFF officials; it was impossible for the Appellant not to know about them. Player A also stated that she did not feel comfortable to report this fact earlier since she was under great stress until the

President of the AFF was sentenced; today she had more strength to enable her to testify about the Appellant.

The Panel also heard the testimony of the Appellant, whom both the Parties and the Panel had the opportunity to examine and cross-examine. The testimony of the Appellant can be summarized - essentially - as follows: He was Secretary General of the AFF from 2012 until 2019. He was elected to the position of Secretary General by the Executive Committee of the AFF upon proposal of the same Committee. At the time of his appointment as Secretary General, he was 22 years old. As Secretary General, he was in charge of international relations of the AFF as well as all financial matters and day to day business and administrative issues of the AFF. He was constantly liaising with the President of the AFF. For many issues he needed to ask for authorisation from the President of the AFF prior to taking action. From 2010 to 2015, he was working in the old offices of the AFF together with the other AFF employees. As from 2015, he moved to the new building of the AFF which is located in the same compound. He claims that the relationship with the President of the AFF, Mr Karim, was friendly and strictly professional. He was not aware of the abuses that were committed by the President of the AFF. He stated that he became aware of the alleged abuses against members of the National Women Football Team on 30 November 2018. While being on business trip, he read an email that had been sent on 23 November 2018 to his private email account from the Afghan Women National football team. At the same time, he also received a letter from the AFF sponsor, Hummel, cancelling the sponsorship contract with the AFF due to severe allegations of sexual harassments by AFF employees. Upon arrival in Kabul, he immediately started an internal investigation into these allegations. He also held a press conference shortly after the

incidents became public through media articles. At the press conference the Appellant dismissed the allegations of sexual abuses and explained that the women's team unleashed the media scandal after the AFF had decided to dismiss members from the AFF National Women Football Team who refused to wear the hijab in accordance with Islamic laws. He confirmed that he signed the letters from the AFF to Mr Abdul Saboor Walizada and Mr Mohammad Nader Aleme dated 5 December 2018, which were drafted according to his direction. Shortly thereafter, he was himself provisionally suspended.

Finally, the Panel also decided to hear Ms Andrea Sherpa-Zimmermann, CAS Counsel, who was present with the witnesses at a secret location. Ms Andrea Sherpa-Zimmermann was heard by the Panel *ex officio*. She reported that she was present throughout the testimony of the protected witnesses. She said that she was unable to comment on the quality of the translation provided by the translator, since she does not speak the relevant language. However, having assisted to the examination and cross-examination of the three witnesses in presence of the Interpreter, she confirmed that it was her firm impression that the Interpreter did not unduly interfere with the testimony of the protected witnesses. Furthermore, it was her firm impression that everything the witnesses said was translated into the microphone. There were no side discussions between the Interpreter and the witnesses. She further stated that she did not have the impression that there were language issues between the witnesses and the Interpreter. Everything ran very smoothly and professionally. She also explained that she had assisted to the examination of the same witnesses in the context of another CAS proceeding in which the same Interpreter was used. She did not feel that the Interpreter acted any differently in the present proceedings as compared with the previous proceedings.

Reasons

1. *Lex mitior* and *tempus regit actum*

The Parties were in dispute whether, in the light of the *lex mitior* principle, the Appeal had to be governed by the 2012 FCE or the 2018 FCE edition with respect to its substantive aspects. The Appellant submitted that the 2012 edition of the FCE, i.e. Article 18 (Duty of disclosure, cooperation and reporting) and Article 24 (Protection of physical and mental integrity), was to apply, because neither provision contained a minimum sanction which was more favourable to the Appellant. In addition, the wording of Article 24(1) of the 2012 FCE edition required a closer contact between the offender and offended than was evidenced by the facts of this case. The Respondent, submitted on the contrary, that the scope of liability had to be considered in order to determine the applicable edition of the FCE. A specific maximum sanction for a breach of the "Duty to report" (Article 17 of the 2018 FCE) and the "Protection of physical and mental integrity" (Article 23 of the 2018 FCE) was only provided for in the 2018 FCE edition. Furthermore, by reason of Article 11 of the 2018 FCE, it was more favourable for a person in the Appellant's position who had committed more than one offence, than the version in force at the time of such commission.

The Panel recalled that the principle of *lex mitior*, a concept originally deriving from criminal law, applied when a federation, associations or sports-related bodies amends its rules and regulations between the time of the asserted sports rule violation and the time of the decision taken by the relevant sports body in respect thereof. The principle of *tempus regit actum* was then softened by the *lex mitior* principle in a case where the new rules were more favourable to the accused. In such

circumstances the less severe “penalties” and “sanctions” would be applied retroactively. The principle of *lex mitior* served the purpose of sanctioning the person who had committed a violation reflecting the current opinion of the sports body that a milder sanction should apply to such violation than the one applicable at the time of its commission.

The Panel then held that the principle of *lex mitior* applied to the case at hand. The “sanctions” which could be imposed under the 2012 and 2018 edition in respect to the violations of the FCE allegedly committed by the Appellant differed inasmuch as only the 2018 edition of the FCE provided for a maximum ban on taking part in any football-related activity in case of a violation of the Duty to report under Article 17 of the 2018 FCE (two years) and in case of a violation of the Protection of physical and mental integrity under Article 23 of the 2018 FCE (five years). An Article which provided a cap for a sanction was automatically more favourable than one which did not. In addition, Article 11 of the 2018 FCE also limited for the first time the length of a sanction in case of multiple violations of the FCE, which was likewise equally in favour of the Appellant. The Panel also rejects the Appellant’s submissions regarding the application of Article 24(1) of the 2012 edition of the FCE. It recalled that the substance of the offence was to be assessed according to the law in force at the time it had been committed. In the eyes of the Panel, the Appellant was misconstruing the principle of *lex mitior* which applied only to the sanction for and not the substance of the offence. Therefore, the Panel found that the 2018 edition of the FCE was more favourable to the Appellant than the 2012 Edition and was thus applicable to the merits in this matter.

2. Hearing in person and translation during the hearing

The Appellant had requested the postponement of the hearing scheduled to take place on 17 and 18 June 2021, since, as a result of visa and travel restrictions in the context of the COVID pandemic, neither the Appellant nor his legal team would likely have been able to travel to Lausanne in Switzerland in time for the scheduled *in persona* hearing. The Panel however recalled that there was no right to an in person hearing (as distinct from one by video conference) either under Swiss law, the CAS Code or general principles of law.

The Appellant had also raised several issues relating to the Interpreter and his/her translation services during the examination and cross-examination of the protected witnesses. *Inter alia*, the Appellant had provided a series of examples of alleged mistranslations. The Panel noted that the purpose of a translation was not per se to translate each and every word that is pronounced by the witness, but rather to convey the meaning of what was said by such witness. In this particular case, the Interpreter had extensive qualifications and experience, and as a result was fit for purpose. Moreover, having reviewed the examples provided by the Appellant, the Panel found that the Interpreter had effectively conveyed the meaning of what had been said by the witnesses as required. The examples listed by the Appellant – in the view of the Panel – provided no grounds for any suspicion about the accuracy of the translation by the Interpreter.

3. Duty of good faith of a party to the arbitration

The Appellant was also contending that during the examination of Player C, a question was put to that witness in the absence of the Appellant’s legal team and that, as a result, the Appellant’s right to be heard in a safe and balanced manner had been compromised. The Panel first noted that it was unsure whether or not any of the members of the Appellant’s legal

team (who were logged on to the video platform at all times) were indeed absent from the virtual Hearing room when the question was put to Player C. But even if it had been the case that none of the three members of the Appellant's legal team were present, the President of the Panel had repeated the question to Player C when the Appellant and his legal team were certainly in the virtual Hearing room. The Panel further observed that the Appellant had not raised any complaint promptly but only after the hearing. It recalled that, if a party to an arbitration feels that its procedural rights have been infringed, it must, in exercise of its duty of good faith, act immediately to make an objection, *a fortiori* if such party is represented by several counsels. In acting against the principle of *venire contra factum proprium* the Appellant was barred from raising this complaint.

4. Testimony of anonymous witnesses

The Panel also had to deal with the question of whether a tribunal can rely on the testimony of an anonymous witness. It held that this issue was linked to the right to a fair trial guaranteed under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe (ECHR), notably the right for a person to examine or have examined witnesses testifying against him or her (Article 6 (3) ECHR) which as provided under Article 6 (1) ECHR applies not only to criminal procedures but also to civil procedures. The Panel was of the view that even though it was not bound directly by the provisions of the ECHR (cf. Art 1 ECHR), it should nevertheless take account of their content within the framework of procedural public policy. In addition, it was noteworthy that also Article 29 (2) of the Swiss Constitution guaranteed the same rights, in order to enable a person to check and, if need be, challenge facts alleged against him by a witness.

The Panel recalled that admitting anonymous testimony potentially infringed both, the right to be heard and the right to a fair trial, since the personal data and record of a witness were important elements of information to have at hand to test a witnesses' credibility. Furthermore, it was a right of each party to participate in the adducing of evidence and to be able to ask the witness questions. However, not all encroachments on the right to be heard and to the right to a fair trial amounted to a violation of those principles or of procedural public policy. The Panel referred to a decision (ATF 133 I 33) of the Swiss Federal Tribunal ("SFT") in which the latter had decided (in the context of criminal proceedings) that the admission of anonymous witness statements did not necessarily violate the right to a fair trial provided under Article 6 ECHR. According to the SFT, if the applicable procedural code provided for the possibility to prove facts by witness statements, it would have jeopardized the court's power to assess the witness statements if a party had been prevented, in principle, from ever relying upon such witness statements if anonymous. The SFT had stressed that the ECHR case law recognised the right of a party to use anonymous witness statements and to prevent the other party from cross-examining such witness if "*la sauvegarde d'intérêts dignes de protection*", notably the personal safety of the witness, required it. The Panel considered that this nuanced approach applied also to civil, including disciplinary, proceedings.

In the eyes of the Panel, the personality rights as well as the personal safety of a witness formed part of his/her interests worthy of protection. In the case at hand the Panel had no doubt that the danger for the witnesses and their relatives was not merely theoretical but actual. Furthermore, the Panel had equally no doubt that the measures ordered by it were

adequate and proportionate in relation to all interests concerned.

5. Conditions for the use of protected witnesses

The SFT had also held that the use of protected witnesses, although available, had to be subject to strict conditions. In particular the right to a fair trial had to be ensured through other means, namely a cross-examination through “*audiovisual protection*” and an in-depth verification of the identity and the reputation of the anonymous witness by the court. Pursuant to its own and the Strasbourg jurisprudence, the decision was not to be “*solely or to a decisive extent*” based on an anonymous witness statement.

The Panel was of the opinion that it had observed all of these precautions in these proceedings and, therefore, that the evidence of these protected witnesses was admissible. Furthermore, the Panel noted that also the Panel in CAS 2019/A/6388 had accorded the status of protected witnesses to the players in question in the proceedings against the former President of the AFF Mr Karim.

6. Burden of proof and *Beweisnotstand*

Turning to the question of the burden of proof, the Panel recalled that in a case, where a Tribunal has not reached the requisite degree of personal conviction that an alleged fact occurred the principle of burden of proof defines which party has to bear the consequences of such a state of non-conviction. Except where the arbitral agreement determines otherwise, the arbitral tribunal shall allocate the burden of proof in accordance with the rules of law governing the merits of the dispute, i.e. the *lex causae*. The *lex causae* in the matter at hand had been previously found to be primarily the various regulations of FIFA, most notably the FCE, and subsidiarily

Swiss law.

In application of the *lex causae*, the Panel held that pursuant to Article 49 of the FCE, “*the burden of proof regarding breaches of provisions of the Code rests on the Ethics Committee*”. However, it also recalled that, in accordance with Swiss law, each party had to bear the burden of proving the specific facts and allegations on which it relied. In a situation, where difficulties of proof arised (*Beweisnotstand*), a number of tools were at disposal in order to ease the – sometimes difficult – burden put on a party to prove certain facts. These tools ranged from a duty of the other party to cooperate in the process of fact finding, to a shifting of the burden of proof or to a reduction of the applicable standard of proof. The latter was the case, if – from an objective standpoint – a party had no access to direct evidence (but only to circumstantial evidence) in order to prove a specific fact. Hence, while the burden of proof remained on FIFA, the Appellant had in the circumstances of this case a duty to cooperate in the process of fact finding by the Panel, by bringing forward facts and evidence in support of his line of defence.

7. Standard of proof

The Panel then had to address the issue of the standard of proof. It recalled that the standard of proof was defined as the level of conviction that is necessary for a deciding body to conclude that a certain fact occurred. For the Panel, what law determines the standard of proof was debatable. However, given that the standard of proof was regulated for state court proceedings by Article 157 Swiss Code of Civil Procedure and was a matter closely related to the evaluation of the evidence, the better view was that the standard of proof should be classified as a question of procedure.

While the CAS Code itself did not specify a particular standard of proof, Article 48 of the

FCE – to which the Parties had submitted – provided that “[t]he members of the Ethics Committee shall judge and decide on the basis of their comfortable satisfaction”. Consequently, the Panel found that the standard of proof in the present matter was comfortable satisfaction, i.e. lower than the standard of “beyond a reasonable doubt” but higher than the standard of “balance of probabilities”, while bearing in mind the seriousness of the allegations made.

8. CAS power of review

The Panel held that whether or not the Appellant knew about the infringements within the meaning of Article 17 of the FCE providing that “Persons bound by this Code who become aware of any infringements of this Code shall inform, in writing, the secretariat and/ or chairperson of the investigatory chamber of the Ethics Committee directly”, was a fact that could not be established by direct evidence (to which only he was privy), but only by indirect or circumstantial evidence.

After having carefully reviewed the circumstantial evidence on file, the Panel found that 1) as is usually the case between the President and the Secretary general of an association, the working relationship between the President of the AFF and the Appellant was very close; 2) from a personal perspective, the Appellant and Mr Karim had a very intimate private relationship, and that the Appellant was part of Mr Karim’s inner personal entourage creating a bond of trust between them; 3) the Appellant held a leading management position within the AFF and that it was hard to imagine that given his position in such a small and hierarchical unit, he could have remained ignorant of any significant information pertinent to the organization and of happenings within it, therefore being particularly difficult for the President’s crimes to have been committed without others, and certainly the Appellant, knowing of them; 4) the offices of the President and the Appellant

were right next to each other, making it especially hard to believe that the crimes could have been committed by the President virtually on the Secretary General’s doorstep without the latter becoming aware of them; 5) the abuses committed on female football players were not isolated and individual incidents but rather, as had emerged from the testimony of the protected witnesses, occurred over a long period of time and were of a systemic nature, with the result that the Panel could not accept that the Appellant as the Secretary General of the AFF was not aware at all of this culture of abuse of female players taking place of such a period and in such proximity to him.

For the Panel, even if some of the above points looked at individually may have been insufficient to conclude with comfortable satisfaction that the Appellant knew of the sexual abuses committed against female players, collectively they constituted coherent pieces of a puzzle which came together to form a clear picture, namely that the Appellant knew what terrible circumstances were taking place within the AFF and who was responsible for them. Despite knowing about the atrocities suffered by the AFF female football players, the Appellant had not informed FIFA about these abuses nor taken any action as Secretary General to start an impartial investigation against Mr Karim and / or other AFF officials involved in these abuses. Accordingly, the Appellant had breached his duty to report as provided under Article 17 (1) of the FCE.

The Panel found that the Appellant had equally breached Article 23 of the FCE which provides that “Persons bound by this Code shall protect, respect and safeguard the integrity and personal dignity of others”. As previously stated, the Appellant knew about the crimes committed, he knew who the victims and who the perpetrators were. Despite this knowledge, the Appellant had failed to “protect, respect and safeguard the integrity and personal dignity of others”.

The Panel found the conduct of the Appellant particularly grave in relation to Player C. Instead of helping Player C, protecting her and investigating the matter the Appellant had roughly brushed her aside and had even further humiliated her by telling her that she could make money out of the incident. This was an expression of profound disregard for the needs of persons entrusted to his care, was deeply discriminatory and hurtful. Similarly, Player D had stated that a complaint had been presented to the Appellant by another player, with respect to Mr Karim's conduct and that the Appellant had prevented the complaint being filed. As a result, instead of protecting the alleged victims, the Appellant had chosen to protect the alleged perpetrator, thereby allowing Mr Karim to continue his abuses in secrecy. In the eyes of the Panel, such despicable attitude of the Appellant constituted a blunt violation of his obligation to protect, respect and safeguard the integrity of the AFF female football players embodied in Article 23 (1) of the FCE.

In assessing the consequences of the Appellant's violation of Articles 17 (1) and 23 (1) of the FCE, the Panel started with recalling that in disciplinary matters appealed to CAS, a panel would – where appropriate – demonstrate a certain degree of deference vis-à-vis the decision-making bodies, especially in the determination of the appropriate sanction. However, when a CAS panel concluded that the sanction imposed was disproportionate, it had to be free to say so and apply the appropriate sanction. This notwithstanding, it was bound by the matter in dispute and the requests filed by the Parties.

In the present matter, the AC had decided to impose upon the Appellant a monetary fine in the amount of CHF 10,000 as well as a ban from taking part in any football-related activity for a period of five years. Assessed in light of

the facts of this case, the Panel found this sanction clearly to be too lenient. Based on Article 11 of the FCE, a harsher sanction could properly have been imposed, but as stated above, the Panel deemed itself bound by the matter in dispute and the requests filed by the Parties. Notably in this context the Respondent had not sought an increase in the sanction imposed by the AC.

Decision

In light of the foregoing, the Panel held that the appeal had to be dismissed and the decision rendered by the Adjudicatory Chamber of the FIFA Ethics Committee on 8 October 2019 confirmed.

CAS 2020/A/6922

Tiago Carpes de Bail v. FIFA

13 June 2022

Football; Disciplinary dispute; Scope of (appeal) proceedings; Concept of standing/*locus standi*; Conditions for the recognition of a right to appeal of a non-addressee of a first instance decision; Creditors' standing to appeal in relation to FIFA Disciplinary Committee's decisions on sporting successions of debtors; FIFA's (lack of) standing to be sued as sole respondent in appeal proceedings against decisions of its Disciplinary Committee (DC) related to sporting succession of clubs

Panel

Mr Jan Raker (Germany), Sole Arbitrator

Facts

This appeal is brought by Mr Tiago Carpes de Bail (the "Player" or "Appellant") against the decision of the FIFA Disciplinary Committee (the "FIFA DC") of the FIFA (the "Respondent" or "FIFA") dated 7 November 2019 (the "Appealed Decision") in the disciplinary proceeding against Southend Futsal Club, England ("Southend"), regarding the dismissal of disciplinary sanctions on said Club.

On 1 August 2015, the Player signed a "Work Contract Professional Player" with the English futsal club Baku United F.C. Thereafter, Baku United F.C. informed the Player that the club would be closing down due to financial difficulties, which lead to the termination of the contract by the club. On 22 April 2016, the Player filed a claim against Baku United F.C. with the FIFA Dispute Resolution Chamber (the "FIFA DRC") for termination of the

contract without just cause. On 23 March 2017, the FIFA DRC rendered a decision (the "DRC Decision"), in which Baku United F.C. (London Baku United Futsal Club) was ordered to pay to the Player the amount of EUR 21,667 plus 5% *p.a.* interest as from 25 April 2016 and USD 5,000 as procedural costs. The DRC Decision remained unchallenged. As the amount awarded to the Player remained unpaid, the latter initiated disciplinary proceedings against Baku United F.C. at the FIFA DC, which rendered its decision on 7 November 2017.

On 11 January 2018, the Player informed FIFA that he had still not been paid and that the club was now named London City F.C.. Throughout the time between January 2018 and September 2019, the Player sent various communications to FIFA and made numerous phone calls to FIFA in order to obtain further information on the status of the matter. In such wake, the Player informed FIFA in March 2019 that the Club had changed its name again, this time to Southend Futsal Club. On 13 September 2019, FIFA informed the Player that it had initiated disciplinary proceedings against Southend as the prospective successor of Baku United F.C. for a potential failure to respect the DRC Decision. On 7 November 2019, the FIFA DC rendered the Appealed Decision, holding as follows:

"1. All charges against the club Southend Futsal Club are dismissed.

2. The disciplinary proceedings initiated against the club Southend Futsal Club are hereby closed".

The FIFA DC's considerations leading to the Appealed Decisions were expressed as follows:

23. [...] it cannot be established to his comfortable satisfaction that the new Club, Southend Futsal Club, is the legal and/or sporting successor of the original Debtor, Baku United FC (London Baku United Futsal Club).

24. [...] *since the new Club cannot be regarded as the sporting successor of the original Debtor, all charges against the new Club must be dismissed, as the new Club cannot be considered as a non-compliant party within the meaning of art. 64 of the 2017 FDC [...]*”.

The grounds of the Appealed Decision were communicated to the Player on 18 March 2020. On 6 April 2020, the Player filed a Statement of Appeal with the CAS in accordance with Article 58 of the FIFA Statutes and Articles R47 and R48 of the Code of Sports-related Arbitration (2019 edition) (the “CAS Code”). The Appellant’s submissions may be summarized as follows:

- The Appellant considers Southend Futsal Club to be the legal successor of Baku United FC. The Appellant submits that the club known as Baku United F.C. in the 2014/2015 season was known as London Baku United in the 2015/2016 season. In the 2016/2017 and 2017/2018 seasons, Baku United was replaced by London City Futsal Club. In the 2018/2019 season, London City Futsal Club’s place taken by Southend Futsal Club. For the 2019/2020 season, Southend Futsal Club changed its name to London Baku United Futsal Club.
- The Appellant acknowledges that he bears the burden of proof, but requests to take into account the specificity of his situation which requires him to operate with limited information, given the at best semi-professional state of futsal. The Appellant also duly informed FIFA about the various name changes which subsequently occurred. On the other side, the Appellant asserts, FIFA acted with a complete lack of assistance and transparency. Additionally, the Appellant contends that the proceedings at FIFA lasted for an unreasonable amount of time, due to FIFA allowing the English FA unreasonable extensions for its feedback to FIFA.
- Even though the DRC Decision only gave 30 days to Baku United to pay the amount,

FIFA failed to enforce its own decision for more than two years, which constitutes a gross transgression of the enforcement system of Article 64 of the 2017 edition of the FDC. FIFA should therefore be liable for the consequences of such failure.

The Respondent’s submissions, in essence, may be summarised as follows:

- The Respondent contends that on 27 March 2018, following a request from the Respondent, the English FA informed the Respondent that it was not aware of any relationship between the original debtor and London City FC. Throughout the years 2018 and 2019, the Respondent sent various further requests regarding the status of London City FC and Southend FC to the English FA. On 24 April 2019, the English FA finally replied to the Respondent, stating that Southend was affiliated to the English FA already since 2002 and that it was not known under any other name between 2002 and 2019. The FIFA DC accordingly rendered the Appealed Decision, denying a legal succession between the original debtor and Southend.
- The Respondent further argues that the Appellant never became a party to the disciplinary proceedings against the original debtor or Southend. Therefore, the Appellant lacks standing to appeal the Appealed Decision. This applies regardless of his right to file a complaint to FIFA or to be informed about the outcome of the proceedings. The Appellant does at most have an indirect interest in the outcome of the “enforcement proceedings”, whose purpose is not to ensure the settlement of the creditor’s claims, but to ensure compliance with a FIFA decision or CAS award. Furthermore, the result of such proceedings can at any time only be a sanction imposed on the debtor, but not the settlement of the creditor’s claims.

- Even more importantly, the Appellant failed to include Southend as a respondent in the current proceedings, even though the Appellant requests an award which would directly affect the legal interests of Southend. Due to the according lack of a passive “*litis consortium*”, FIFA also lacks standing to be sued in the Appeal. Furthermore, as Southend was not named as a Respondent in this matter and as Southend did not appeal the Appealed Decision by itself, the Appealed Decision has become final and binding in favour of Southend.
- The Respondent insists that FIFA acted diligently in favour of the Appellant, persistently trying to obtain the information required for the assessment of the Appellant’s requests, by sending no less than 9 letters and reminders to the English FA between January 2018 and January 2019. The Respondent refuses any liability for the possibly tardy responses from the English FA and maintains that, on the basis of such responses, the Appealed Decision is correct.

Reasons

1. Scope of (appeal proceedings)

The Sole Arbitrator notes that the Appellant’s request to be paid compensation was not a subject of the Appealed Decision. Rather, the Appellant bases his claim on the outcome of the Appealed Decision, for which he requests financial compensation from FIFA as the originator of such decision.

However, the nature of an appeal procedure against a decision is that the decision which is appealed is legally scrutinized by the appeal body, which then either confirms the appealed decision or upholds the appeal by either overturning it with a new decision or by referring it back to the original deciding body

for a new decision. The Appellant however requests a third option, which is the payment of damages in place of the revocation of the Appealed Decision. The Sole Arbitrator further notes that, within the procedure leading to the Appealed Decision, the subject matter was not a claim of the Appellant, but the question whether or not disciplinary sanctions should be imposed on another party, Southend. Therefore, the Sole Arbitrator concludes, that no payment to the Appellant, be it from Southend or FIFA, could ever result as a direct consequence from such proceedings. This cannot change within appeal proceedings. A request for the payment of a certain amount of money, which was not the subject matter of the Appealed Decision, can not be made with an appeal arbitration procedure of disciplinary nature, but would only be admissible in ordinary procedure. The Sole Arbitrator holds that the Appellant’s request to hold FIFA liable for his damages is outside the scope of the current appeal arbitration proceedings.

2. Concept of standing/*locus standi*

The concept of standing or *locus standi* describes the ability of a party to demonstrate to a court or an arbitral tribunal that it has a sufficient connection to and harm from the challenged decision to support its participation in the case. The basic purpose of the concept of standing is to determine the group of persons who are entitled to, in the present case, appeal the decision of an association.

3. Conditions for the recognition of a right to appeal of a non-addressee of a first instance decision

Standing to appeal a decision cannot be recognized with respect to any person remotely affected by a decision. Legal security and the effectiveness of the appeal process against a decision command that there should be strict

limits on the potential circle of persons who may be recognized to have standing to appeal, namely those persons having a special interest in the outcome of the case in a manner that clearly distinguishes them from other persons, including the general public.

4. Creditors' standing to appeal in relation to FIFA DC's decisions on sporting successions of debtors

The Sole Arbitrator notes that there is no provision in the FDC expressly stating that the victim of an alleged violation, like the creditor [of] a party failing to comply with a payment order issued by the DRC or CAS, would have the right to appeal a decision of the FIFA DC. Likewise, neither the FDC expressly offer such right to an entity who reports such failure to the FIFA DC and requests the initiation of disciplinary proceedings. The only mention of legal standing in the FDC is to be found in Article 58.1 of the 2019 edition of the FDC but the Sole Arbitrator notes that, in appeals against decisions of the FIFA DC which are brought to the Appeal Committee of FIFA, legal standing is restricted to parties to the proceedings before the FIFA DC. While this does constitute a guideline as to which level of proximity is regarded required by FIFA to constitute legal standing to appeal, the lack of an according provision in relation to appeals to CAS necessitates further scrutiny beyond the issue whether an Appellant was a party to the FIFA DC proceedings.

In CAS 2002/O/373, the CAS Panel held that a party must invoke a substantive right of its own or have an interest worthy of protection in order to be recognized standing to appeal. The concept of an *"interest worthy of protection"* was defined as encompassing the situation where *"the appellant is factually and directly affected by the litigious decision in a fashion that can be eliminated by its annulment and if the appellant did not have the opportunity to be heard in the first instance"*.

A narrow interpretation was also confirmed in CAS 2015/A/3874 in relation to Art. 62(2) of the UEFA Statutes, in which it was found that the appellant was not *"directly affected"* as the victim of racist and discriminatory chants during a match: *"the Appellant is also not directly affected as the "victim" of the racist and discriminatory chants, at least in the sense of the established case law. According to CAS 2008/A/1583 & 1584, this could only be envisaged if the UEFA rules provided a specific right for a victim to appeal, which they do not. Indeed Article 62 para. 2 of the UEFA Statutes links the "directly affected" requirement to the disciplinary decision and not to the conduct giving rise to the disciplinary proceedings"*.

With respect to the right to appeal of a non-addressee of a first instance decision, the CAS Panel held in CAS 2016/A/4903 that such a right must be admitted *"in very restricted cases. As a general rule, the appellant's interest must be concrete, legitimate, and personal. [...] the decision being challenged must affect the appellant directly, concretely, and with more intensity than others. Finally, the interest must exist not only at the time the appeal is filed but also at the time when the decision is issued. CAS jurisprudence found that in order to have standing to sue, the appellant must have an interest worthy of protection or a legitimate interest. This is found to exist if (i) the appellant is sufficiently affected by the appealed decision, and if (ii) a tangible interest of a financial or sporting nature is at stake. [...]. Sufficient interest is a broad, flexible concept free from undesirable rigidity and includes whether the appellant can demonstrate a sporting and financial interest"*.

The Sole Arbitrator understands that the Player has spent in vain numerous years trying to enforce the DRC Decision against Baku United F.C. and its alleged legal successors. In the case of the Player and Baku United F.C., this system proved to be insufficient for help, because Baku United F.C. was discontinued as a club and – possibly – succeeded by a variety of new clubs, continuing Baku United's legacy

without being willing to take responsibility for Baku United's debt. Despite it being acknowledged by previous FIFA DC jurisdiction and stipulated in Art. 15.4 of the 2019 edition of the FDC that new clubs can be held liable for the debts of former clubs, if they are to be considered as their sporting successors, the FIFA DC held that this was not the case for Southend in relation to the Player's claim. It is that substance which causes the grief which lead to the Player's appeal.

Appeals lodged by creditors in relation to disciplinary proceedings against debtors who failed to respect according FIFA decisions were dealt with differently by various CAS panels in the recent past: Some panels dealt with such appeals on the merits without bringing up the issue of standing to sue at all (CAS 2020/A/6745). In some cases, the standing to sue was confirmed (CAS 2020/A/6873) and in some it was explicitly rejected (CAS 2019/A/6287). The Sole Arbitrator acknowledges that indeed, the Appellant's legal position was not immediately and directly affected by the Appealed Decision. The disciplinary system created in the FDC is a system which is aimed at ensuring compliance of all direct and indirect FIFA members with the laws and regulations of FIFA and the decisions of FIFA's bodies. This system exclusively works on the basis of sanctions against offenders, but offers no single tool which a creditor could use to directly enforce a payment claim against his debtor. Such enforcement tools are restricted to the public authorities of the respective states.

However, it must also be noted that the Appellant does in fact have an own interest in the outcome of the Appealed Decision which distinguishes him from the wider public which is excluded by the concept of *locus standi*. The Sole Arbitrator must therefore consider whether such distinction is severe enough to

warrant a deviation from the general rule, that a direct interest must exist. The Sole Arbitrator agrees with the Panel in the case CAS 2016/A/4903 that, for such deviation to be justified and required, the Appellant must demonstrate to have a tangible interest of economic or sporting nature that sufficiently affects him.

As to the Appellant's interest which is affected by the Appealed Decision, the Appellant craves the payment of a salary amount which was promised to him, but never paid. The salary is the amount that employees rely on to be paid for the coverage of their living expenses and their entire livelihood. The settlement of the overdue amount is therefore of high personal importance to the Appellant.

While not having a direct effect, a different decision of the FIFA DC would have had a substantial indirect effect on the Appellant's situation. Had the FIFA DC imposed the usual disciplinary sanction on Southend, then the only means available to Southend in order to avoid or end a ban from registering players, a points deduction and/or a relegation would have been the payment of the overdue amount to the Appellant. Accordingly, an according decision by the FIFA DC would have been widely equivalent to a legal compulsion in favour of the Appellant. The Sole Arbitrator considers this to be a particularly strong indirect effect.

Finally, from a procedural point of view, the Appellant had only limited regular options to participate in the proceeding which led to the Appealed Decision. While the Respondent had to or chose to rely on the information received by one of its member associations, that showed little interest in a speedy solution of the matter, the Appellant was not formally part of the procedure and was therefore not formally able to provide evidence and arguments to the proceeding. If the Appellant did not have a

standing to sue for an appeal, he could at no point defend or promote the aforementioned substantial interests by proving factual statements and proof that speaks in his favour. He would depend entirely on the ability and willingness of others to gain and provide the necessary information.

In light of the aforementioned, the Sole Arbitrator holds that the Appellant's legal interest in the Appealed Decision is sufficiently high and direct to grant him a standing to appeal against it.

5. FIFA's (lack of) standing to be sued as sole respondent in appeal proceedings against decisions of its FIFA related to sporting succession of clubs

The FDC do not give any advice regarding the standing to be sued. The question of the standing to be sued is a question of the merits which means that in case it is denied, an appeal has to be dismissed (see MAVROMATI/REEB, The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials, R48, no. 65; CAS 2008/A/1639, no. 26; CAS 2007/A/1329 & 1330).

In CAS 2007/A/1329 & 1330, the Panel stated that *"Under Swiss law, [...], the defending party has standing to be sued (legitimation passive) if it is personally obliged by the "disputed right" at stake (see CAS 2006/A/1206). In other words, a party has standing to be sued and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it (cf. CAS 2006/A/1189; CAS 2006/A/1192)"*.

However, for the purpose of the present Appeal against the Appealed Decision, FIFA is not the only party from which something is sought. The Appellant's standing to sue derives from his personal and important interest to gain an amount of money from Southend. This interest is pursued by a request to FIFA to

impose sanctions on Southend and FIFA rejected to impose such sanctions on Southend. Southend would therefore also be immediately affected if the Appealed Decision was set aside, even if the case was only referred back to the FDC, because it would lose the acquitting effect of the Appealed Decision and be subject to the risk of being sanctioned and being held liable again. Just like the Appellant has a legitimate interest in being able to present and argue his case in this forum, Southend would have had a legitimate interest in defending its case. If the Sole Arbitrator decided to set aside the Appealed Decision, Southend would be directly affected, but without being granted a right to be heard and defend its position.

Accordingly, the Sole Arbitrator holds that for an appeal against a disciplinary decision of FIFA, with which the Appellant seeks to obtain a harsher sanction or to revert an acquittal, the Appellant must also name the party on which the sanction shall be imposed, as a Respondent in his appeal. In the present case therefore, the Sole Arbitrator holds that FIFA does not have standing to be sued as a sole Respondent. Consequently, the answer to the question whether or not Southend shall be considered the sporting successor of Baku United F.C. has become moot.

Decision

The appeal filed by Mr Tiago Carpes de Bail against the FIFA on 5 April 2020 with respect to the decision rendered by the FIFA Disciplinary Committee on 7 November 2019 is dismissed.

CAS 2020/A/7359

Football Club Noah v. Football Club Kairat

25 April 2022

Football; Training compensation; Entitlement to training compensation in case of transfer to a Category IV club; Discretion of the deciding body in the quantification of training compensation and duty to achieve a proportional result

Panel

Mrs Anna Bordiugova (Ukraine), Sole Arbitrator

Facts

On 18 April 2013, the football player X. (the “Player”), born [in] 1998, was registered as an amateur with the Football Academy of Football Club Kairat (the “Respondent” or “FC Kairat”), a professional football club with registered office in Almaty, Kazakhstan, competing in the Kazakh Premier League and affiliated to the Kazakhstan Football Federation (“KFF”). On 26 February 2016, during the season of his 18th birthday, the Player signed his first employment contract with the Respondent, valid until 1 March 2018. On 1 February 2017, the Respondent and the Player entered into a new employment contract, valid from the date of its signature until 30 November 2019, for a monthly salary of KZT [...] (the “Employment Contract”).

On 28 May 2018, the Player unilaterally terminated the Employment Contract with the Respondent, with effect from 30 June 2018, offering the payment of the compensation established by clause 6.7 of the Employment Contract, in the amount of KZT 1,190,000. On 29 May 2018, the Respondent sent a notification to the Player, stating that pursuant

to clauses 6.7 and 10.8 of the Employment Contract, to terminate the agreement he had to pay the Respondent a compensation in the minimum amount of USD 5,000,000. On 27 June 2018, the Player sent a second notice to the Respondent, reiterating the termination notice and offering again the payment of a compensation in the same amount, i.e. KZT 1,190,000.

On 2 July 2018, the Moldovan football club FC Saxan requested the Respondent to issue the Player’s non-TPO declaration, due to the signing of a contract with the Player. On 4 July 2018, the Respondent answered FC Saxan referring to the compensation clause included in clause 10.8 of the Employment Contract as well as to Article 17.4 of the FIFA Regulations on the Status and Transfer of Players (“FIFA RSTP”). On the same date, the Respondent filed a claim before the KFF Dispute Resolution Chamber (“KFF DRC”) requesting the imposition of sporting sanctions on the Player.

On 9 July 2018, the Respondent filed a claim before the FIFA Dispute Resolution Chamber (“FIFA DRC”) against FC Saxan, requesting the imposition of sporting sanctions on the latter for the alleged inducement of the Player to terminate the Employment Contract. On the same date, FC Saxan informed the Respondent by email that it was not aware of the existence of a valid contract between the Respondent and the Player and hence that it was not holding any negotiation with him.

On 24 July 2018, the KFF DRC issued a decision admitting the Respondent’s claim, imposing sporting sanctions on the Player.

On 27 August 2018, the Player entered into an employment agreement, valid until 1 June 2019, with Football Club Noah (the “Appellant” or “FC Noah”), an Armenian professional football club founded on 15 May

2017 with headquarters in Yerevan, competing in the Armenian Premier League and affiliated to the Football Federation of Armenia (“FFA”).

On 14 September 2018, the Single Judge of the FIFA PSC authorised the Appellant to provisionally register the Player.

On 17 January 2019, following some news published by the media regarding the transfer of the Player from the Appellant to the Russian football club FC Sochi, the Respondent sent a letter to the latter informing it about its intention to file legal actions against the Player and PFC Sochi due to an alleged bridge transfer of the Player, in order to claim a compensation of at least USD 5,000,000 in case no agreement was reached between them. PFC Sochi was requested to contact the Respondent within five days. This letter remained unanswered. On 23 February 2019, the Player was effectively transferred to PFC Sochi, where he was registered as a professional. On 29 April 2019, the Respondent sent a letter to PFC Sochi and to the Appellant requesting the payment of training compensation in the amount of EUR 864,538.34.

On 15 May 2019, the Respondent filed a claim before FIFA DRC against the Player, PFC Sochi and the Appellant, requesting the payment of a compensation in the amount of USD 5,000,000 plus 5% interest p.a., as from 1 July 2018 until the date of effective payment. The claim led to the opening of the FIFA file with Ref. nr. wit 19-01055 (the “Breach of Contract File”). On 12 February 2020, the FIFA DRC passed a decision in the Breach of Contract File partially accepting the claim of the Respondent and ordering the Player to pay the latter a compensation in the amount of KZT 1,260,000. On 15 April 2020, the FIFA DRC notified to the parties the grounds of the decision rendered in the Breach of Contract

File.

On 6 June 2019, the Respondent filed a claim before the FIFA DRC against the Appellant and PFC Sochi, requesting the payment of the Player’s training compensation in the amount of EUR 864,538.34. The claim was registered with Ref. nr. wit 19-01456 (the “Training Compensation File”). On 2 July 2020, the FIFA DRC rendered a decision partially accepting the claim of FC Kairat. FC Noah, was ordered to pay EUR 156,082 as training compensation plus 5% interest p.a. as from 15 October 2018 until the date of effective payment.

On 7 August 2020, the grounds of the decision were communicated by FIFA to the Parties and can be summarized as follows:

- Given that the Player was registered with FC Kairat before the end of the season of his 21st birthday (i.e. as an amateur from 18 April 2013 to 29 February 2016, and as a professional from 1 March 2016 to 30 June 2018) and that he was registered with FC Kairat as a professional before the end of the seasons of his 23rd birthday, FC Kairat should in principle be entitled to training compensation.

- Notwithstanding this, given that FC Noah was classified as a category IV club when registering the Player, in principle no training compensation was due to FC Kairat.

- In this regard, the FFA had classified FC Noah at the lowest category possible, despite it was competing in the highest professional division in Armenia. It would be against the spirit of Article 21 of the FIFA RSTP to allow a professional club that plays in the highest division of a country where more than one training category is available to benefit from young talents trained by other clubs outside its country without having to reward the clubs which have invested in training those young players. In light of the above, the category of FC Noah in the TMS (i.e. category IV) could

not be taken into consideration.

- There were two training categories in Armenia, and as per FIFA Circular 1249 “*All third-division clubs of member associations in category I and all second-division clubs in all other countries with professional football*” such as FC Noah, shall be classified as category III, not IV. As a result, FC Noah was a UEFA category III club (UEFA indicative amount of EUR 30,000 per year) in this particular case.

On 26 August 2020, the Appellant filed an appeal with the CAS against the decision of the FIFA DRC of 2 July 2020 (the “*Appealed Decision*”), directed against the Respondent.

On 16 March 2021, a hearing was held by videoconference.

Reasons

1. Entitlement to training compensation in case of transfer to a Category IV club

The Sole Arbitrator first addressed the question of whether training compensation was due in this particular case. As per FIFA Circular Letter no. 1627, of 9 May 2018, the FFA had been requested to allocate its affiliate clubs into two potential categories (III and IV). Considering the particularities of the Armenian professional football and considering the circumstances of the Appellant, the FFA had allocated the latter in Category IV. As a result, taking into account the Appellant’s categorization established by FFA, pursuant to Article 2.2 (ii) of Annexe 4 of the FIFA RSTP, in principle the Respondent would not have been entitled to any training compensation due to the hiring of the Player by the Appellant. Nevertheless, the Respondent was contesting the categorisation of the Appellant established by FFA, as it considered that given that the club competed in the highest professional division of Armenia, participated in UEFA

competitions (hence having youth teams and a youth development programme approved by UEFA) and had had a relevant sporting and economic growth, it should have been included in the highest possible Category (i.e. III).

The Sole Arbitrator did not share the Respondent’s opinion and considered that, even if one could disagree with the decision of the FFA to allocate the Appellant in Category IV, such decision was not arbitrary or biased. In this regard, the Sole Arbitrator considered that (i) the fact that the Appellant had been incorporated a little more than a year before such categorization, (ii) before the 2018/19 season it was competing in the Armenian First Division (2nd tier) and not in the Top division, (iii) the reason why the club was promoted from the First League to the Top League during the 2018/19 season was because in the previous season there were only 6 clubs participating in the Top League of Armenia and, ultimately, (iv) the fact that currently five of the nine clubs competing in the Top League are in category III and four in category IV, dispelled any concern regarding the reasons for such categorisation.

However, the Sole Arbitrator recalled that, in accordance with Article 5.4 of Annexe 4 of the FIFA RSTP, the categorisation that national federations made of its affiliated clubs was not binding for the FIFA DRC. In the present case, in the exercise of this discretion, the FIFA DRC had concluded that it would have been against the spirit of Article 21 of the FIFA RSTP to allow a professional club that played in the highest division of a country where more than one training category were available to benefit from young talents trained by other clubs outside of Armenia without having to reward the clubs which had invested in training those young players.

The Sole Arbitrator agreed with the FIFA DRC and considered that this situation would

not have been fair for the Respondent. Hence, fairness demanded that the Appellant paid to the latter a training compensation, despite being a Category IV club. However, this decision could not result in the imposition of a compensation disproportionate or unjust for the Appellant, considering the particularities of the case. The Sole Arbitrator was of the opinion that this was indeed what had happened in the present case. While concurring with the FIFA DRC on the fact that it would not be fair for the Respondent not to receive a compensation for the time and money it had spent in the training and education of the Player, especially taking into account that the Appellant was one of the top clubs of Armenia, the Sole Arbitrator could not endorse the quantification that the FIFA DRC had done of the training compensation (i.e. EUR 156,082) which, in her view, entailed an unjust result, clearly disproportionate to the particularities of the case, in the terms envisaged by Article 5.4 of Annexe 4 of the FIFA RSTP.

2. Discretion of the deciding body in the quantification of training compensation and duty to achieve a proportional result

The Sole Arbitrator then assessed what would be the correct amount of training compensation to be paid to the Respondent.

For the Sole Arbitrator, considering that when the Player had been hired the Appellant had just set in motion its youth training program, it seemed reasonable to believe that the amount that the club had been investing at that time in training players had been significantly lower than the EUR 30,000 corresponding to a Category III club, especially taking into account the average cost of life in Armenia. In this regard, the Appellant was sustaining, and the Sole Arbitrator accepted, that while in the 2017/2018 it had had no youth team, in 2018/2019 it had started investing in training

young players, at a total amount of EUR 3,500 per season (i.e. extremely lower than the EUR 30,000 per player). In line with this, considering the cost of life in Armenia and the average costs and expenses that a club had in this country, it seemed hard to believe that the Appellant would have had to spend EUR 156,082 in training the Player.

The Sole Arbitrator recalled that the assessment of the correct amount of training compensation also had to take into account that the Appellant had in good faith the legitimate expectation that the hiring of the Player would not trigger the payment of any training compensation, given that the Club was allocated in Category IV. In the eyes of the Sole Arbitrator, when the FIFA DRC, the Panel or the Sole Arbitrator exercised the discretionary power established by Article 5.4 of Annexe 4 of the FIFA RSTP, it had to balance the clubs' right to legal certainty and the consequences that a retroactive change in their categorization might have for them with the particularities and circumstances of the case at hand in order to assure that the amount of the training compensation was not only proportionate, but also fair for all the parties. For this purpose, the deciding body had to bear in mind that this discretionary power should be only exercised and the amount of the training compensation only be adjusted for reasons of material justice, in case the result of the quantification was clearly disproportionate to the circumstances at hand, either because it was too high or too low.

In this very particular case, the Sole Arbitrator considered that, given that there was no clear information regarding the training costs borne by the Appellant and that, ultimately, such costs would not be significant, it would be appropriate to take into account the real expenditures of the Respondent in the training of the Player to establish the correct amount of the training compensation, from the day of his

registration as an amateur (i.e. as of 18 April 2013) until the day of termination of the Employment Agreement with the Respondent (i.e. until 28 May 2018). This was precisely what the Appellant had proposed for the adjustment of the training compensation. For this purpose, the Sole Arbitrator took into account the uncontested financial data provided by the Respondent and only considered the direct costs incurred on running its Academy, not the indirect ones (i.e. an apportion of the costs corresponding to the secretariat, marketing department, gym area and its equipment, stadium, etc.), as she was of the opinion that such indirect costs existed regardless of the training of the young players and because it was impossible to estimate which part of these indirect expenses could be attributed to the training of young players.

As a result, the Sole Arbitrator found that the amount of the training compensation had to be adjusted to USD 44,569, plus the corresponding legal interest of 5% per annum as from 15 October 2018, which, taking into account that the average exchange rate between USD and EUR on that date (i.e. 15 October 2018) was 1 USD = 0.863483 EUR, corresponded to EUR 38,484.57.

Decision

The Sole Arbitrator partially upheld the appeal filed by Football Club Noah on 26 August 2020 against the decision of the FIFA Dispute Resolution chamber of 2 July 2020 and found that FC Noah had to pay EUR 38,484.57 as training compensation plus 5% interest p.a. as from 15 October 2018 until the date of effective payment.

CAS 2020/A/7523

Vladimir Leshonok v. Football Club Irtysh & Football Union of Russia (FUR)

16 May 2022

Football; Contractual dispute; Assessment of the validity of a buyout clause from the angle of its conformity to applicable regulations or norms; Assessment of the validity of a buyout clause from the angle of its conformity to the FUR's Regulations on the Status and Transfer of Players (FUR RSTP); Notion of excessive commitment of a party in the context of the contract at stake; Method of calculation of damages; Calculation of damages to be allocated to a player based on the parties' contract and the FUR RSTP

Panel

Mr Espen Auberg (Norway), Sole Arbitrator

Facts

Mr Vladimir Leshonok (the "Appellant" or the "Player") is a former professional football player of Russian nationality. Football Club Irtysh (the "First Respondent" or "the Club") is a professional football club, registered with the Football Union of Russia (the "FUR"), which in turn is affiliated with the Fédération Internationale de Football Association ("FIFA"). FUR (the "Second Respondent") is a nationwide governing football body in Russia, and is a FIFA member. The Appellant and the Respondents are hereinafter jointly referred to as the "Parties".

On 29 May 2020, the Parties signed [an] employment contract (hereinafter "the Employment Contract") concluded for the term from 1 February 2019 until 31 May 2021. Its termination is regulated in the

Employment Contract Clause 8, which *inter alia* read:

- 8.3. *Upon termination or early cancellation of the employment contract, all payments due for the Employee shall be granted by the Employer according to the requirements of the Labour Code of the RF and regulation norms of the FUR [...]. [...].*
- 8.5. *In the event of terminating the employment contract on the Employee's initiative (on his own volition) without just cause, the Employee shall be obliged to pay the Employer compensation in the amount of 20,000,000 (Twenty million) rubles. [...].*
- 8.7. *The Employer [the Club] is entitled to terminate the present Employment Contract early at its own initiative, notifying the Employee [the Player] about this fact in writing no later than 15 calendar days, however, the Employer is also obliged to make a payment in the amount of two fixed official salaries in favour the Employee on the day of dismissal, according to subclause 7.1 of clause 7 of this contract".*

Following the conclusion of the 2019/2020 season, the Club was promoted to the Russian Football National League, which is the second level of the Russian professional league. On 10 August 2020, the Club's president sent the Player a notification of early termination of the Employment Contract. The notification reads:

"With this termination notice of the employment contract, we inform You that the employment contract concluded with You dated February 1, 2019 No. 01/2019 will be terminated early within 15 calendar days from the date of signing this notice, based on the clause 8.7. of this employment contract. We also inform You that payments in the amount of two salaries will be made on the day of dismissal".

On 11 August 2020, the Player sent a request to the Club where he informed the club that

he considered the early unilateral termination of the Employment Contract to be [*inter alia*] unjustified. In the same request, the Player asked for [*inter alia*] an explanation with regards to the reasons and grounds for the early termination of the Employment Contract.

On 25 August 2020, fifteen days after the notification of the early termination of the Employment Contract, the Employment Contract was terminated. The same day, the Club paid the Player compensation in the amount of two fixed official monthly salaries, which amounted to RUB 250,000. Paragraph 1 of part 1 of Article 77 of the Labour Code of the Russian Federation “*agreement of the parties*” is specified in the order of dismissal as the basis for termination of the Employment Contract. No agreement on early termination of the Employment Contract was signed on the part of the Player who specified in the order of dismissal: “*I do not agree with the order, the dismissal was conducted unilaterally at the initiative of the employer, there is no agreement of the parties*”.

On 28 August 2020, the Player sent a letter to the Club where he upheld that the Employment Contract was terminated by the Club unilaterally without valid reasons and in the absence of the agreement between the parties. The Player demanded the Club to pay him RUB 1,056,946.43 within 10 calendar days as compensation for early termination of the Employment Contract, and informed that if the Club did not comply, the Player would be forced to apply to the FUR Dispute Resolution Chamber with demand to pay compensation and apply sports sanctions to the Club.

On 10 September 2020, the Player filed a claim against the Club before the FUR’s Dispute Resolution Chamber (the “FUR DRC”) and argued that Clause 8.7 of the

Employment Contract is illegal and invalid as it significantly violates the legal rights of the Player provided for by the Labour Code of the Russian Federation, as well as the core principle of stability of employment contracts stated by FIFA.

On 15 September 2020, the Club replied. The Club asked the FUR DRC to dismiss the claim, and sustained that Clause 8.7 of the Employment Contract is a valid buyout clause, which is in accordance with FUR RSTP, FIFA’s Regulations on the Status and Transfer of Players (the “FIFA RSTP”), Russian law and established jurisprudence of the Court of Arbitration for Sport (“CAS”). On 16 September 2020 the FUR DRC rendered the operative part of the award, dismissing the Player’s claim (the “Appealed Decision”). The operative part of the award reads:

“1. To dismiss the statement of the Professional Football player Leshonok Vladimir Olegovich in relation to the Alliance non-profit partnership ‘Football Club ‘Irtysb’, Omsk on the recovery of compensation for early termination of the Employment Contract in full [...]”.

The grounds of the decision were communicated to the Parties on 28 October 2020. On 18 November 2020, the Player filed a Statement of Appeal with CAS, pursuant to Article R47 of the Code of Sports-related Arbitration (2020 edition) (the “Code”), against the Appealed Decision.

Reasons

The Employment Contract between the Parties states that both are entitled to unilaterally terminate the contract, regardless of whether there is just cause for termination. In the event of such a unilateral termination on the Player’s initiative, Clause 8.5 of the Employment Contract states that the Player

shall be obliged to pay the Club a compensation in the amount of RUB 20,000,000. Similarly, if such a unilateral termination is initiated by the Club, Clause 8.7 of the Employment Contract states that the Club is obliged to pay the Player an amount corresponding to two fixed official monthly salaries, *i.e.* RUB 250,000. The Parties agree that the Employment Contract was terminated at the initiative of the Club, that the termination was not connected with any wrongful acts of the Player and that the Club invoked Clause 8.7 of the Employment Contract exclusively as grounds for its termination. The Parties disagree on whether the termination was lawful.

The termination clauses are often referred to as liquidated damages clauses, penalty clauses and buyout clauses. The Sole Arbitrator notes that Clause 8.7 of the Employment Contract is, in essence, a buyout clause which gives the Club the right to withdraw from the contract at any time subject to the payment of a predefined amount. The main issue to be resolved is whether the Club's termination, with reference to the buyout clause of Clause 8.7, is valid.

1. Assessment of the validity of a buyout clause from the angle of its conformity to applicable regulations or norms

As the parties did agree on the conditions in the Employment Contract, the Sole Arbitrator notes that a natural starting point in the consideration of the validity of the buyout clause is the principle of contractual freedom, *i.e.* that the parties are free to agree what they want. If conditions in the contract should be deemed void, such a decision must be based on restrictions in applicable regulations or norms with regards to the parties' autonomy.

2. Assessment of the validity of a buyout clause from the angle of its conformity to the FUR RSTP

The wording of the FUR RSTP and the FIFA RSTP suggest that the parties are free to agree on any amount of compensation in the employment contract. However, the principle of contractual freedom is not absolute. Validity of buyout clauses has been considered by CAS on numerous occasions, also in relation to the FUR RSTP. Based on the conclusions in the case CAS 2019/A/6514, it must be assumed that in order for a buyout clause to be valid and to comply with the FUR RSTP, three cumulative requirements must be met:

- The buyout clause shall be written in a clear and unequivocal manner.
- There shall be no evidence of coercion or duress in conclusion of the buyout clause.
- The buyout clause shall not demonstrate excessive commitment by one party that grants the other party undue control.

The Player claims that the buyout clause demonstrates excessive commitment from him as there is a gross imbalance between the amounts to be paid by the Parties when activating the buyout clauses that gives the Club undue control over the Player. Whilst the Club is obliged to pay the Player an amount corresponding to two fixed official monthly salaries, *i.e.* RUB 250,000, if the Club terminates the Contract, the Player is obliged to pay the Club RUB 20,000,000, *i.e.* 80 times more, if the Player terminates the contract.

3. Notion of excessive commitment of a party in the context of the contract at stake

Although excessive commitment must be considered on a case-to-case basis, CAS jurisprudence gives some guidance with regards to how excessive a commitment from

one of the parties must be before it should lead to the invalidity of a buyout clause or a liquidated damages clause. Based on CAS 2016/A/4826 and CAS 2015/A/3999 & 4000, it is clear that not any disparity between the amount of damages to which players and clubs are entitled according to the buyout clauses could lead to the invalidity of the clauses, and that a club's damages in case of a unilateral termination of an employment contract by a player could well be higher than the damage of a player in case of a unilateral termination by a club.

In CAS 2014/A/3707, the panel concluded that a buyout clause was invalid. Although the primary applicable law in that case was the FIFA RSTP, the main principles are applicable also for cases based on the FUR RSTP. The contract at issue entitled the club to terminate the contract subject to payment of remaining contractual amount for the season of termination, whilst the corresponding right for the player was subject to the player paying the club the remaining contract value in full. The CAS panel stated that such a regime *"leads to a system, which disproportionately favours the [club], which, in practice, can establish a long-term employment relationship with the Player and rescind it after one year only. With this method, the [club] can therefore refuse to keep the Player if the latter does not progress as expected but may retain him, should he confirm his sporting qualities and value. Such a system is clearly contrary to the general principles of contractual stability as well as of labour law as it gives the [club] undue control over the Player, without rewarding him in exchange"*.

In the case CAS 2019/A/6246, the CAS concluded that a liquidated damages clause was valid. In that case, the player was entitled to a compensation of RUB 225,000 and the corresponding compensation for the club in case of a termination by the player was RUB 2,500,000, *i.e.* about 11 times higher. The sole arbitrator in that case concluded that the

difference between the amounts was not of such a level that it should lead to the invalidity of liquidated damages clause.

In the abovementioned case CAS 2019/A/6514, the sole arbitrator stated that *"intervening with the parties' free will enshrined in a buyout clause should be confined to exceptional cases. This would, in principle, apply in the case of excessive disproportionality i.e., when one party makes an excessive commitment that disproportionately favours the other party of the buyout clause"*. Applying this principle to the case, the Sole Arbitrator concluded that a buyout clause which obliged the club to pay three monthly salaries was valid. The corresponding buyout clause for the player was three months salaries in addition to expenses.

The Sole Arbitrator thus notes that CAS' jurisprudence with regards to buyout and liquidated damages clauses based on the FUR RSTP to a large degree correspond to CAS jurisprudence based on the FIFA RSTP and Swiss law. CAS jurisprudence based on the FUR RSTP seem to give the parties a large degree of autonomy and freedom to agree on the terms of buyout or liquidated damages clauses and acknowledge that there can be disparity with regards to the predetermined damages in these clauses. However, the clauses can be deemed void if they are, *inter alia*, excessively disproportionate.

In the case at hand, with respect to the consideration of whether the buyout clause is excessively disproportionate, the Sole Arbitrator notes that the clause that entitles the Club to unilaterally terminate the contract in practice obliges the Club in such a case to pay RUB 250,000, whilst the corresponding amount in case the Player unilaterally terminates the contract is RUB 20,000,000, an amount that is 80 times higher.

4. Method of calculation of damages

The Sole Arbitrator agrees with the Club that the amount of damages incurred by players and clubs in case of unilateral breach of contract can differ and that, in general, the damages suffered by clubs following players' unilateral termination of contracts could well be higher than the damages suffered by players following clubs' unilateral termination of contracts. Damages should be calculated based on the principle of positive interest, under which compensation for breach must be aimed at reinstating the injured party to the position it would have been in, had the contract been fulfilled properly and to its end. A club's damages in such a case could include, *inter alia*, a transfer fee and an agent fee related to signing a replacement player, as well as medical insurance.

The Sole Arbitrator notes that the Player was 36 years old and that no transfer fee was paid when the Player signed a contract with the Club. At the time the Employment Contract was signed, the Club played in the third level in the Russian league and was later promoted to the second level of the Russian league. The damages the Club would suffer in case of the Player's unilateral termination of the Employment Contract, based on the principle of positive interest, would be limited to transfer and agent fees, if any, of a player that has a similar quality and age of the Player, in addition to other feasible costs. It must be assumed that the potential damages the club would suffer in case of the Player's unilateral termination of the Employment Contract would be rather limited, and in any case nowhere near the amount stipulated in the buyout clause, *i.e.* RUB 20,000,000.

Furthermore, the Sole Arbitrator notes that whilst the buyout clause that allows the Club to unilaterally terminate the Employment Contract requires the Club to pay a relatively

small fee, the buyout clause that allows the Player to unilaterally terminate the contract requires him to pay a fee that is so high compared to his wages that it would be practically impossible for him to unilaterally terminate the Employment Contract himself. Taken into consideration the Player's age, the level he plays football at and that no transfer fee was paid when he signed a contract with the Club, it is also highly unlikely that a new club would agree to pay the fee in connection with a transfer.

In view of the above, the Sole Arbitrator concludes that the Club's right to terminate the contract according to Clause 8.7 of the Employment Contract, seen in relation with the Player's right to terminate the contract in accordance with the Clause 8.5 of the Employment Contract, is considered as excessively disproportionate as it demonstrates excessive commitment by the Player and grants the Club undue control. As a consequence, the Club's termination of the Employment Contract with reference to its Clause 8.7 is deemed void.

5. Calculation of damages to be allocated to a player based on the parties' contract and the FUR RSTP

As the Club's unilateral termination in accordance with Clause 8.7 of the Employment Contract is deemed void, the consequences of the Club's unilateral termination shall be established in accordance with Clause 8.3 of the Employment Contract, with further reference to the FUR regulations. FUR RSTP Article 9 paragraph 2 states that compensation should be determined based on:

- "1) the remaining term of the employment contract with the former professional football club;*
- 2) salaries and other payments due to a professional football player / coach under an employment*

- contract with the old and new (if any) professional football clubs;*
- 3) *expenses incurred by a professional football player in transfer (movement) to the former and new (if any) professional football clubs;*
 - 4) *whether there was a termination of the employment contract for a protected period (for a professional football player);*
 - 5) *other objective criteria”.*

As the Player has not signed a contract with a new club following the termination of the Employment Contract with the Club, the compensation shall be calculated based in the remaining term of the Employment Contract. On the date of the termination, *i.e.* 25 August 2020, the remaining net value of the Player’s Employment Contract was RUB 931,883, corresponding to monthly wages of RUB 143,750 (RUB 125,000 with added 15% regional coefficient surcharge) for nine months and four days, deducted of the RUB 250,000 already paid by the Club as well as 13% personal income tax of the remaining amount. Against this background, the Sole Arbitrator finds that the Club shall pay compensation for breach of contract in the amount of RUB 931,883 to the Player. As interest on outstanding payment is not regulated in FUR RSTP, calculation of interest should be based on Article 236 of the Labour Code of the Russian Federation.

Decision

The appeal filed on 24 January 2020 by Vladimir Leshonok against the decision issued on 16 September 2020 by the Dispute Resolution Chamber of the Football Union of Russia is partially upheld. The decision issued on 16 September 2020 by the Dispute Resolution Chamber of the Football Union of Russia is set aside. Football Club Irtysh shall pay compensation for breach of contract to

Vladimir Leshonok in the amount of RUB 931,883 (nine hundred and thirty one thousand eight hundred and eighty three Russian Rubles), with interest as set out in Article 236 of the Labour Code of the Russian Federation. All other and further motions or requests for relief are dismissed.

CAS 2021/A/7636

SønderjyskE Fodbold A/S v. Fédération Internationale de Football Association (FIFA) & Dabo Babes Football Club

27 June 2022

Football; FIFA “proposal” regarding compensation for training (art. 13 FIFA Procedural Rules); CAS jurisdiction; Condition for a FIFA proposal to become final and binding and admissibility of the appeal; Applicable law; Scope of FIFA authority to issue a “proposal”; Notification of a decision; Consequences of FIFA’s failure to issue a complete proposal

Panel

Mr Jacopo Tognon (Italy), President

Mr Mark Andrew Hovell (United Kingdom)

Mr Lars Hilliger (Denmark)

Facts

SønderjyskE Fodbold A/S (the “Appellant” or the “Club” or “SønderjyskE”) is a Danish football club, affiliated to the Danish Football Federation, which in turn is affiliated to the *Fédération Internationale de Football Association* (“FIFA”).

The *Fédération Internationale de Football Association* (“FIFA” or the “First Respondent”) is the international governing body of football, based in Zurich, Switzerland.

Dabo Babes Football Club (the “Second Respondent” or “Dabo”) is an amateur club from Nigeria, affiliated to the Nigerian Football Federation (the “NFF”), which in turn is affiliated to FIFA.

On 4 January 2019, the Appellant and the Second Respondent entered into a transfer

agreement (the “Transfer Agreement”) for the definitive transfer of the player Nazifi Yahaya, according to which the Appellant agreed to pay to the Second Respondent the amounts as follows:

“1. SE pays a total transfer fee including training compensation of EUR 7,000 gross (VAT to be paid in Nigeria) to Dabo to be paid by release of TMS.

(...)

The Appellant and the Player signed an employment agreement valid from 5 January until 31 December 2019 according to which the Player was entitled to receive a monthly salary of DKK 21.500 gross as a remuneration for his professional services rendered in favour of the Appellant, plus bonuses (the “Employment Agreement”).

According to the Appellant, the Second Respondent was aware of the fact that the training compensation was included in the transfer fee.

However, the Second Respondent filed a claim before the FIFA Dispute Resolution Chamber (the “FIFA DRC”) requesting the distribution of the training compensation in connection with the transfer and registration of the Player.

On 23 November 2020, Dabo lodged a claim before the FIFA DRC, claiming EUR 186,500 and 5% interest *p.a.* as outstanding training compensation.

On 2 December 2020, the FIFA DRC Secretariat issued the following proposal (the “Proposal”) to SønderjyskE and Dabo:

“[...] in accordance with Article 13 of the Rules Governing the Procedures of the Players’ Status Committee and the Dispute Resolution Chamber, i.e. the Procedural Rules, and the FIFA Circular 1689, please find enclosed the proposal made by the FIFA secretariat in accordance with the above mentioned provision.

In sum, the proposed amount due by the respondent to the claimant is as follows:

EUR 243'287.67 as training compensation, plus 5% interest p.a. as of the due date

*In accordance with Article 13 of the Procedural Rules, it is informed that the parties have to either accept or reject the proposal **within the 15 days following this notification via TMS, i.e. until 17 December 2020.** In this regard, the Claimant is limited only to accept or reject the proposal, excluding hereby any possibility to amend its original claim.*

In case a proposal is accepted by all parties or the parties fail to provide an answer to the FIFA Player Status' Department within stipulated deadline, the proposal will become binding.

*In case of rejection by the respondent [i.e. SønderjyskE], the latter will have **five additional days, i.e. until 11 January 2021** to provide its position to the claim. Should the respondent wish to extend its deadline to file its position, it must request said extension before the expiration of the above mentioned date, in which case the deadline is automatically extended for **ten (10) additional days, i.e. until 21 January 2021** in accordance with Article 16 par. 11 of the Procedural Rules.*

Please also be informed that in case of rejection of the proposal by one of the parties, a formal decision on this matter will be taken by the Single Judge of the sub-committee of Dispute Resolution Chamber in due course.

Equally, we wish to point out that the relevant proposal will always be without prejudice to any formal decision which could be passed by the competent deciding body in the matter at a later stage in case the proposal is rejected by one of the parties". (emphasis in original)

On 16 December 2020, Dabo informed the FIFA DRC Secretariat that it accepted the Proposal.

SønderjyskE did not reply to the Proposal within the time limit granted therein.

On 18 December 2020, FIFA informed Dabo and SønderjyskE as follows (the "Appealed Decision"):

(...)

*[W]e would like to inform the parties involved that the proposal has become binding. Consequently, the Respondent, SønderjyskE, has to pay to the Claimant, Dabo Babes FC, within 30 days as from the date of this notification, if not done yet, the amount of **EUR 243'287.67, plus 5% interest p.a. as of the due date** until the date of effective payment.*

In the event that the aforementioned sum is not paid by the Respondent [SønderjyskE] within the stated time limit, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.

The Claimant [Dabo] is directed to inform the Respondent [SønderjyskE] immediately and directly of the account number to which the remittance is to be made and to notify the FIFA Dispute Resolution Chamber of every payment received". (emphasis in original)

On 8 January 2021, SønderjyskE filed an appeal against the Appealed Decision by submitting a Statement of Appeal before the Court of Arbitration for Sport (the "CAS") in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code").

Reasons

1. CAS Jurisdiction

The Appellant relied on Articles 57 and 58 of the FIFA Statutes as conferring jurisdiction on the CAS.

The First Respondent did not contest the jurisdiction of the CAS, whilst the Second Respondent disputed that the CAS had jurisdiction to hear the matter at hand. In particular, the Second Respondent contested the jurisdiction of CAS because: (i) the

Appealed Decision was not a decision of a federation (FIFA) but a decision of the parties and it was of a mere informative nature and, thus, it was not an appealable decision; (ii) the Appellant had not exhausted all legal remedies available at FIFA since it did not reject the Proposal.

The Panel considered that in light of the fact that the appealed decision i.e. a FIFA letter confirming the proposal issued by the FIFA DRC regarding the amounts in dispute relating to training compensation, produced legal effects towards the parties involved, it had to be considered as an appealable decision, pursuant to Article 58 para. 1 of the FIFA Statutes. Furthermore, considering that there were no further internal remedies available at FIFA since FIFA decided that the proposal became final and binding, CAS had jurisdiction to hear this case.

2. Condition for a FIFA proposal to become final and binding and admissibility of the appeal

The Appealed Decision was notified to the Appellant on 18 December 2020 and the Appellant filed its Statement of Appeal on 8 January 2021. Therefore, the 21-day deadline to file the appeal was met. However, the Respondents disputed the admissibility of the appeal arguing that in the absence of a clear objection made by the Appellant by the prescribed term, the Proposal submitted on 2 December 2020 had already entered into force and, thus, the Appealed Decision of 18 December 2020 could not be an appealable decision, being it of a merely informative nature. Therefore, in case SønderjyskE wanted to challenge the Proposal, it had to object to the Proposal within the granted time limit.

As a first step, the Panel recalled that the proposal regarding the amounts in dispute relating to training compensation issued by the

FIFA DRC in accordance with Article 13 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, i.e. the Procedural Rules, and the FIFA Circular 1689 (the Proposal), becomes final and binding only in case both parties accepted the Proposal or if none of the parties objected it within the stipulated term. In any case, the parties to which a proposal is addressed do not know whether the other party accepted or objected such proposal until proper confirmation is given by FIFA. Therefore, a proposal shall not be considered a final and binding decision. In this respect, pursuant to Article 13(3) FIFA Procedural Rules (2021 edition), only a "confirmation letter" from FIFA is a decision that definitely produces legal effects towards the parties involved.

As a result, an appeal filed by the appellant club within the deadline provided for by article R49 CAS Code against the appealed decision issued by the FIFA confirming the FIFA Proposal is admissible. Indeed, while a proposal is not binding until confirmed by FIFA, the appealed decision is not of a mere informative nature but is a final decision producing legal effects towards the parties involved. The consent of both the Appellant and the Second Respondent – even tacit – was required before the Proposal could become final; without this, a confirmation letter, such as the Appealed Decision, was required.

3. Applicable law

The Panel held that pursuant to Article 26 of the FIFA RSTP (2020 edition), disputes regarding training compensation "*shall be assessed according to the regulations that were in force when the contract at the centre of the dispute was signed, or when the disputed facts arose*". Disputes related to training compensation and solidarity mechanism are usually governed by Annex 6 of the FIFA RSTP. Pursuant to the principle of

lex specialis derogat legi generali (CAS 2017/A/5003, CAS 2015/A/4229, 2013/A/3274), Annex 6 of the FIFA RSTP prevails being it a more specific provision compared to the rules set forth by the FIFA Procedural Rules.

4. Scope of FIFA authority to issue a “proposal”

The Appellant alleged that FIFA was in breach of its duty to properly conduct a due diligence on the documents submitted and that the Proposal should not have been sent since it was not a case without complex factual and legal issues.

The first Respondent argued that according to Article 13 of the FIFA Procedural Rules, the FIFA administration could make a proposal in disputes relating to training compensation and solidarity mechanism; that following an initial assessment by the FIFA administration of the claim, no red flags were identified for a significant factual or legal complexity; that in any case, the FIFA administration has ample discretion in the assessment of the complexity of factual and legal issues, which is counterbalanced by the right of the parties to reject the relevant proposal and receive a reasoned decision.

The Panel agreed that as per the clear wording of Article 13 of the FIFA Procedural Rules and the FIFA Circular no. 1689, FIFA administration has in principle the authority to issue a proposal to the parties involved in disputes regarding training compensation with respect to the amounts owed, upon condition that (1) the dispute has no complex facts and legal issues or (2) in cases in which the FIFA DRC has a clear and established jurisprudence. The condition that the dispute concerns no complex factual or legal issues shall be ascertained on a *prima facie* basis. Furthermore, the FIFA administration shall establish, always

on a *prima facie* basis, whether all the regulatory requirements for being entitled to receive training compensation are met. In other words, according to the mechanism of article 13 of the FIFA Procedural Rules, (i) FIFA has in principle the authority to issue proposals, if either of the pre-requisites (1) and (2) are met; (ii) FIFA has ample discretion in making that assessment (CAS 2020/A/7252 & CAS 2020/A/7516) but it should not act arbitrarily and should carry out proper due diligence; (iii) failure by a party to respond to a proposal qualifies as acceptance; (iv) notification of a proposal via TMS is valid and permitted (CAS 2004/A/574); (v) the parties have the duty to regularly check the “Claims” tab in TMS. The occurrence of all the above requisites has to be verified on a case-by-case basis.

In this specific case, the Panel held that FIFA administration went beyond its margin of ample discretion in determining the complexity of the case and it did not appear to conduct sufficient due diligence or sufficient investigation prior to determining to issue the Proposal. The Panel was therefore of the opinion that this case should not have been qualified as “simple” and that pre-requisite was not engaged. As such the FIFA administration should not have issued the Proposal but referred the case to the FIFA DRC.

5. Notification of a decision

The Appellant argued it was not directly and properly notified since it was only notified via TMS.

The Respondents argued that it is proven that FIFA duly uploaded the Proposal and rendered it at the disposal of both the Appellant and the Second Respondent. Moreover, pursuant to the provisions of Annexes 3 and 6 of the FIFA RSTP, all stakeholders have a general duty and obligation to regularly access and check TMS.

The Panel recalled that as a basic rule, a decision or other legally relevant statement is considered as being notified to the relevant person whenever that person has the opportunity to obtain knowledge of its content irrespective of whether that person has actually obtained knowledge. Thus, the relevant point in time is when a person receives the decision and not when it obtains actual knowledge of its content.

In this respect, in case of failure of a party to respond to or reject a FIFA proposal notified by TMS within 15 days, such proposal is considered accepted, and the party is considered having waived the right to request a formal decision.

Thus, the Panel found that the failure of the Appellant club to reject the Proposal constituted a waiver of the right to request a formal decision. Furthermore, a club shall regularly check the “Claims” tab in TMS, failing which such club will bear the disadvantages deriving therefrom.

6. Consequences of FIFA’s failure to issue a complete/correct Proposal

In consideration of all the foregoing, the Panel found that the FIFA administration had exceeded its ample discretion in the evaluation of the complexity of the dispute. This was simply not a matter that should have been sent down the fast-track route. Therefore, pursuant to Article R57 of the CAS Code, the Panel annulled the Appealed Decision and referred the case back to FIFA.

In this respect, the Panel noted that Article R57 of the CAS Code allows CAS panels to issue a new decision or to annul the decision and refer the case back to the previous instance. In circumstances where there was no decision taken on the merits at the first instance, the

Panel determined that it should not render a decision on the merits of the case and substitute a FIFA decision which never considered the merits, rather it was more appropriate to return the case to FIFA (see *CAS 2012/A/2854; Mavromati/Reeb, op. cit., Article R57 N 20*). Indeed, the Panel found that the objectives of not depriving the parties of one level of adjudication and of allowing a unitary assessment of all the relevant aspects of the dispute should prevail over the advantages with respect to time and costs that a direct adjudication on the merits of the case by a CAS panel would imply.

Decision

In light of the foregoing, the Panel upheld the appeal filed by SønderjyskE Fodbold A/S on 8 January 2021 against the decision issued by FIFA on 18 December 2020 and referred back to FIFA for a formal decision on the merits said decision.

CAS 2021/A/7701

Joao Teixeira v. National Anti-Doping Agency of Ukraine

6 April 2022

Football; Doping (dorzolamide); General requirements of a prohibition and/or sanction provision in a federation's rules; Scope and purpose of the WADA prohibited list of substances; Legal basis for the WADA categories to impose disciplinary sanctions; Possibility to challenge a substance deemed to be "similar" to a prohibited substance in the prohibited list; Establishment of the presence of a prohibited substance in the athlete's sample; Sanction

Panel

Prof. Martin Schimke (Germany), Sole Arbitrator

Facts

Mr Joao Teixeira (hereinafter referred to as the "Player" or the "Appellant") is a professional football player from France. Since 30 August 2019 he is under contractual relationship with the Ukrainian Club Olexandria (the "Club").

The National Anti-Doping Centre of Ukraine (the "NADC" or the "Respondent") is the Ukrainian anti-doping agency approved by the World Anti-Doping Agency ("WADA") as a national anti-doping organization within the meaning of the WADA Code.

On 4 December 2019, the Appellant was subject to an anti-doping test performed by NADC. The analysis resulted in an Adverse Analytical Finding for the presence of dorzolamide.

On 30 January 2020, the Respondent notified the Appellant that dorzolamide had been found in his sample, so that he was guilty of violating article 2.1 of the NADC's anti-doping rules.

On 7 July 2020, NADC informed the Player of the concentration of dorzolamide found in the Player's sample (the concentration of dorzolamide was estimated at 5.1 ng/ml) and that the case was forwarded to the Disciplinary Anti-Doping Commission of the NADC ("NADC DAC").

On 18 January 2021, following the exchange of written submissions and an oral hearing on 12 January 2021, the NADC determined that the Player committed an anti-doping rule violation in accordance with Article 2.1 of the NADC Anti-Doping Rules ("NADC ADR") (the "Appealed Decision"), by stating the following:

"18. DAC NADC finds to its comfortable satisfaction that the commission of the ADRV under Article 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample (Dorzolamide) has been proven.

19. DAC NADC concluded that the Article 10.2.2 of the NADC ADR is applicable in this matter, and period of ineligibility of 2 (two) years should be applied to the Athlete, starting from 04 December 2019 until 03 December 2021.

(...)"

On 4 February 2021, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") in accordance with Article R47 et seq. of the CAS Code of Sports-related Arbitration (the "CAS Code") against the Appealed Decision.

Reasons

It is undisputed by the Parties that a WADA-accredited laboratory analysed the Player's A-

sample and detected the presence of dorzolamide in the amount of 5.1 ng/ml. The Player did not request the analysis of the B-sample.

The Respondent claimed that the Appellant committed a doping violation according to Article 2.1 of NADCU ADR, because dorzolamide is a prohibited substance according to S5 “Diuretics and Masking Agents” of the Prohibited List of the WADA-Code. Therefore, the Player should be sanctioned with a 2-year period of ineligibility. Conversely, the Player asserted that he did not commit an anti-doping violation, because the amount of the substance found was that small that it would not have any diuresis effect at all. Furthermore, he did not know how the substance entered his body, but he alleged that it was likely that it was a sabotage act committed against him by his Club.

In the Prohibited List (edition 2019) of the World-Anti Doping Code under “S5 DIURETICS AND MASKING AGENTS” the following is provided:

The following diuretics and masking agents are prohibited, as are other substances with a similar chemical structure or similar biological effect(s).

Including, but not limited to:

- *Desmopressin; probenecid; plasma expanders, e.g. intravenous administration of albumin, dextran, hydroxyethyl starch and mannitol.*
- *Acetazolamide; amiloride; bumetanide; canrenone; chlortalidone; etacrynic acid; furosemide; indapamide; metolazone; spironolactone; thiazides, e.g. bendroflumethiazide, chlorothiazide and hydrochlorothiazide; triameterene and vaptans, e.g. tolvaptan.*

Except:

- *Drospirenone; pamabrom; and ophthalmic use of carbonic anhydrase inhibitors (e.g. dorzolamide, brinzolamide);*

- *Local administration of felypressin in dental anaesthesia”.*

1. General requirements of a prohibition and/or sanction provision in a federation’s rules

At the outset, the Sole Arbitrator examined the general requirements of a prohibition and/or sanction provision. The Sole Arbitrator found comfort in CAS 2013/A/3324 & 3369 and CAS 2017/A/5006, where the Panel provided a useful summary of the relevant principles of interpretation established by the CAS case law. Thus, the different elements of the rules of a federation shall be clear and precise, in the event they are legally binding on athletes (CAS 2006/A/1164; CAS 2007/A/1377; CAS 2007/A/1437) whereas inconsistencies/ambiguities in the rules must be construed against the legislator as per the principle of “*contra proferentem*” (CAS OG 14/02; CAS 2017/A/5006; CAS 2013/A/3324 & 3369; CAS 94/129; CAS 2009/A/1752; CAS 2009/A/1753; CAS 2012/A/2747; CAS 2007/A/1437; CAS 2011/A/2612).

Furthermore, the Sole Arbitrator noted that when interpreting the rules, it is necessary to consider whether the spirit of the rule (in as much as it may differ from the strict letter) has been violated (CAS 2001/A/354 & 355; CAS 2007/A/1437; CAS OG 12/02). It follows that an athlete or an official or a club (or anyone bound by the rules), when reading the rules, must be able to clearly make the distinction between what is prohibited and what is not (CAS 2007/A/1437).

2. Legal basis for the WADA categories to impose disciplinary sanctions

As far as the above-mentioned concrete wording of S5 is concerned, the Sole Arbitrator recalled that the concept chosen there, namely

in addition to a list of named substances to include a catch all-clause sweeping up “*other substances with a similar chemical structure or similar biological effect(s)*” to one or more of the substances listed by name, is not new and unique. Rather, this catch-all provision also appears in the Prohibited List in relation to anabolic androgenic steroids (category S1.1), peptide hormones, growth factors, related substances, and mimetics (category S2), and stimulants (category S6b). Therefore, CAS jurisprudence has already dealt with the said concept in detail. In this respect, the Sole Arbitrator confirmed that the Prohibited List was not a closed list and the purpose of the wording and concept of S5 was to create “*the capacity to identify and sanction the use of substances not expressly listed as prohibited substances but nevertheless related to a prohibited substance by its pharmacological actions or chemical structure. [...] If that were not so, an athlete would be able, without risk, to use a drug that was only slightly different in make-up or formulation from the drug that appeared in the WADA Prohibited List, and so escape sanction*”. (*A. Lewis/J. Taylor, Sport: Law and Practice, 2021, Chapter C6 para. 6.56 to 6.60 with reference to CAS 2005/A/726*).

3. Legal basis for the WADA categories to impose disciplinary sanctions

In light of the above considerations including the general requirements of a valid legal basis, the Sole Arbitrator found that the wording of S5 and the other categories of the Prohibited List (edition 2019) of the World-Anti Doping Code were clear and specific enough and did not contravene the doctrines of legal certainty and foreseeability. This applied all the more to S5 in the present case because dorzolamide did not go entirely unmentioned in it. Rather, S5 explicitly provides that (only) the ophthalmic use of the substance dorzolamide is permitted. According to the principle *argumentum e contrario*, one could at least conclude from this that (the non-ophthalmic use) should therefore

be prohibited. The inclusion of an “exceptional” use of a substance would make no sense, if that substance were not generally prohibited. As a result, the Sole Arbitrator found that the Appealed Decision relied on a proper legal basis.

4. Possibility to challenge a substance deemed to be “similar” to a prohibited substance in the prohibited list

However, in the context of the above discussion on the wording and concept of S5 (and other categories), case law and literature also emphasise that similarity to a listed substance can be disputed by the athlete.

The Sole Arbitrator stressed that the inclusion of a substance on the List is made after a thorough evaluation by the so-called “List Committee”, a group of specialists in the field of doping substances representing all stakeholders in the fight against doping. It is thus justified to exempt a decision to put a substance on the List from challenge by the athletes. On the other hand, the classification of a substance as “similar” to one of the listed substances is made by the WADA administration without the benefit of the input from experts from all interested groups. To exclude any challenge of such a decision would give too much responsibility to WADA alone. Thus, the Panel considered that in contrast to a decision to include a particular substance on the Prohibited List, a WADA determination to treat a substance as “similar” to a listed substance can be challenged by athletes.

5. Establishment of the presence of a prohibited substance in the athlete’s sample

After having established that dorzolamide is a prohibited substance according to the WADA Prohibited List, the Sole Arbitrator turned to the question of whether there was a doping violation on the part of Appellant. First, the

exception of S5 is not applicable in the present case, because the Player did not assert that he used dorzolamide for an ophthalmic purpose. The Sole Arbitrator was not in a position to question or undermine the wording of the Prohibited List or WADA's Technical Letter that do not include a threshold value/reporting level, according to which a (small) quantity of dorzolamide in the urine sample would not cause an anti-doping rule violation regardless of the determinations of relevant experts as to whether or not this was likely to have had a diuretic effect, or any other effect related to doping or performance-enhancement (CAS 2018/A/5768). Thus, in the absence of proof that this was a topical ophthalmic administration, the Panel concluded that the presence of dorzolamide in the athlete's sample established an anti-doping violation as per Article 2.1 NADCU.

6. Sanction

The Sole Arbitrator noted that for the application of Article 10.5 or 10.6 NADC ADR (the elimination or reduction of the sanction respectively), the Player should establish, pursuant to Article 3.1. NADC ADR, that he bore no Fault or Negligence or no Significant Fault or Negligence. According to Article 3.1. NADC ADR the Player bears the burden by a balance of probability to persuade the Sole Arbitrator that the occurrence of a specified circumstance is more probable than its non-occurrence. Thus, the Player had to convince the Sole Arbitrator by the balance of probabilities establishing how the prohibited substance entered his body.

The only evidence submitted by the Player in this respect was his statement suspecting "the Club" of having committed a sabotage act against him. However, in the Sole Arbitrator's view, the general accusations against the Club were rather unsubstantiated assumptions and speculations. Even though, the Sole Arbitrator

could not exclude in its entirety that a sabotage act occurred, the Appellant did not provide any corroborating evidence according to Art 3.1 NADC ADR on how this substance entered his body. Corroborating evidence would have been necessary to determine if there was No Fault or Negligence or No Significant Fault or Negligence.

As a result, the requirements of Articles 10.4 and 10.5 NADC ADR were not fulfilled. In consequence, Article 10.2.2 NADC ADR had to be applied, meaning that a period of two (2) years Ineligibility should be imposed on the Appellant.

Decision

In light of the above considerations, the Sole Arbitrator dismissed the Appeal in its entirety and the Appealed Decision was upheld.

CAS 2021/A/7858

Association Omnisport Centre Mbérie Sportif v. Union Sportive Tataouine

7 June 2022

Football; Training compensation when a player re-registers as a professional after having been reinstated as an amateur; Interpretation of Article 3 para. 2 RSTP; Club entitled to training compensation

Panel

Mr Patrick Lafranchi (Switzerland), Sole Arbitrator

Facts

Association Omnisport Centre Mbérie Sportif (the “Appellant”) is a professional football club, affiliated to the Gabonese Football Federation (“FEGAFOOT”). The present dispute concerns a claim for training compensation for A. (the “Player”), born [in] 1996 in [...], Gabon. The Player is a professional football player currently registered with the Saudi football club Al-Adalah FC and playing for the national team of Gabon. The Appellant bases its claim on a player passport of the Player dated 23 June 2020 and issued by FEGAFOOT as well as a statement issued by FEGAFOOT dated 23 June 2020, confirming that the Player had been registered with the Appellant from 11 November 2008 until 4 January 2017 without interruption.

Union Sportive Tataouine is a professional football club (the “Respondent”), affiliated to the Tunisian Football Federation (“FTF”). The Respondent argues that no training compensation is owed as there were four different player passports issued by the FEGAFOOT, containing contradictory information as to the registration of the Player with the Appellant.

On 4 August 2020, the Appellant lodged a claim against the Respondent before the FIFA Dispute Resolution Chamber (the “FIFA DRC”), claiming training compensation in the amount of EUR 51,700 plus 5% interest p.a. as of the due date. On 1 February 2021, the FIFA DRC rejected the Appellant’s claim (the “Appealed Decision”). On 22 March 2021, the grounds of the Appealed Decision were communicated to the Parties.

In its decision, the FIFA DRC recalled that training compensation is payable by the new club of a player to the club(s) that have trained him between the age of 12 and 21 (unless it is evident that he has already terminated his training period before that) when the player is registered for the first time as professional and each time the player is transferred as professional between clubs affiliated to two different associations before the end of the season of his 23rd birthday (Article 20 FIFA Regulations on the Status and Transfer of Players (“FIFA RSTP”) in connection with Article 1 (1) and Article 2 (1) of Annexe 4 FIFA RSTP). With reference to Article 2 (2) Annexe 4 FIFA RSTP, the FIFA DRC held that no training compensation is due if a professional player reacquires amateur status on being transferred to a new club, but that training compensation is owed if a player is re-registered as a professional within 30 months of being reinstated as amateur (Article 3 (2) FIFA RSTP).

According to the FIFA DRC, it remained undisputed that the Player reacquired amateur status after having been registered with the Appellant as a professional and that he was re-registered with the Respondent as a professional. Thus, according to the FIFA DRC, the Appellant would, in principle, be entitled to receive training compensation for the new registration of the Player as a professional with the Respondent before the

end of his 23rd birthday season and within 30 months of the end of his previous professional contract.

However, the FIFA DRC pointed out that Article 20 FIFA RSTP foresees said training competition only (1) when a player is registered as a professional for the first time or (2) when a professional player is transferred between clubs affiliated to different associations. As none of those prerequisites set out above had been fulfilled in the present matter (neither was the Player registered for the first time as professional, nor was there a transfer between clubs affiliated to different associations when the Player registered with the Respondent), the claim of the Appellant was dismissed.

On 12 April 2021, the Appellant filed a Statement of Appeal with the CAS against the Appealed Decision. On 24 June 2021, the CAS Court Office informed the Parties that a Sole Arbitrator had been appointed to decide the case at hand. On 27 September 2021, the Parties were informed that the Sole Arbitrator deemed himself sufficiently well-informed to decide this case based solely on the Parties' written submissions, without the need to hold a hearing.

On 19 November 2021, the Lithuanian Football Federation sent a letter to the CAS Court Office confirming that the Player had amateur status when he was registered with FK Utenis from 9 August 2017 until 20 November 2017 and submitted the Player's football passport.

Reasons

1. Interpretation of Article 3 para. 2 RSTP

In the Appealed Decision, the FIFA DRC had stated that the Appellant would, in principle, have been entitled to training compensation as per Article 3 (2) FIFA RSTP. However, it had

pointed out that the FIFA RSTP foresaw the payment of training compensations only in case that a Player was either registered for the first time as a professional or was a professional Player transferred between clubs affiliated to different associations. Upon his registration with the Appellant, none of those two options had held true for the Player which was why the FIFA DRC had considered that the prerequisites of Article 3 (2) FIFA RSTP in combination with Article 20 FIFA RSTP had not been fulfilled. The Appellant had a different approach and considered the reference to Article 20 as being to the whole text of Article 20 FIFA RSTP and the whole training compensation scheme and not to the two training compensation triggers mentioned therein.

The Sole Arbitrator held that, contrary to the principle that no training compensation is due if a player reacquires amateur status, training compensation was due, if a player re-registered as a professional within 30 months of being reinstated as an amateur. Although Article 3 para. 2 of the FIFA RSTP stated that training compensation should be paid "*in accordance with article 20*" FIFA RSTP, this reference could not be read as a requirement that one of the two standard situations triggering the training compensation mechanism set out in Article 20 FIFA RSTP (first registration as a professional or transfer of a professional until the end of the season of his 23rd birthday) applied, in addition to the situation that made Article 3 para. 2 FIFA RSTP applicable in the first place. It was rather to be understood as a reference to the other issues addressed by Article 20 FIFA RSTP (payment is due whether the transfer takes place during or at the end of the player's contract, a further reference to other provisions regarding training compensation in Annexe 4 of the FIFA RSTP and that the principles of training compensation do not apply to women's football) and the training compensation system as such.

Yet, the Sole Arbitrator noted, it remained unclear what club was entitled to training compensation in this scenario.

The Sole Arbitrator recalled that Article 3 (2) FIFA RSTP, as an exception to the rule, was meant to apply in the scenario that a player re-registered as a professional within 30 months after being reinstated as an amateur. The club “benefitting” from this rule (thus, being entitled to training compensation) was the last club where the player had been registered as an amateur before being re-registered as a professional. This was comparable to a first registration as a professional as one of the scenarios set out in the ground rule of Article 20 FIFA RSTP, which – as per reference – should be observed when Article 3 (2) FIFA RSTP was applied. The club where the player had last been registered as a professional before reacquiring amateur status, on the other hand, was not entitled to training compensation. Except – and that seemed self-evident in light of the ratio of Article 3 (2) FIFA RSTP – if the club the player was transferred to reinstated the player as an amateur before re-registering the player as a professional, within the time limit of 30 months. In that scenario, and if all the other requirements were fulfilled, the club where the player had last been registered as a professional was obviously entitled to training compensation.

The Sole Arbitrator noted that this interpretation was in line with the intention and purpose of the training compensation system in general – that clubs that invested in training and educating young players were rewarded whenever a player that they trained became a professional (on being transferred). Also, potential abuse or attempts to circumvent the provisions regarding training compensation were prevented.

2. Club entitled to training compensation

Having set out all the above, the Sole Arbitrator then addressed the particularities of the case at hand.

He first noted that the Player had been registered as a professional with the Appellant for three seasons (season 2014/2015 to season 2016/2017), after having played for the latter as an amateur for six seasons. Notwithstanding the conflicting information in the different player’s passports, it was undisputed that the Player – after having left the Appellant – had been reinstated as an amateur with Red Star FC on 5 January 2017. The Player had then signed a professional contract with the Respondent on 20 September 2018, in the season of his 22nd birthday. Thus, undisputedly, he had been re-registered as a professional within 30 months after being reinstated as an amateur.

It was further undisputed that the Appellant was not the last club where the Player had been registered as an amateur, as the Player had undisputedly been registered as a professional with the Appellant before he had left the latter. Rather, the Parties had agreed that the last amateur club the Player had been registered with (notwithstanding the conflicting information in the player’s passports), had been Académie des Etoiles. From there, the Player had been transferred to the Respondent, where he had been re-registered as a professional.

Furthermore, none of the (conflicting) player’s passports on file had explicitly stated that the Player would have had reacquired his status as a professional by the latest in the calendar year of his 21st birthday: The player’s passports did either not mention anything in this regard or stated the contrary. Much more so, the Parties agreed that the Player had re-registered with the Respondent as a professional on 20 September 2018, thus after the calendar year of

his 21st birthday.

The Sole Arbitrator thus concluded that the prerequisites set out above were not fulfilled. The Sole Arbitrator therefore found that the Appellant could not claim training compensation from the Respondent, although for other reasons than suggested in the Appealed Decision.

Decision

As a consequence, the Sole Arbitrator dismissed the Appeal in its entirety and the Appealed Decision was upheld.

CAS 2021/A/7859

NK Zaprrešić v. Serder Serderov & Fédération Internationale de Football Association (FIFA)

11 April 2022

Football; Termination of employment agreement without just cause by club; Scope of CAS jurisdiction in case of appeals against decisions issued by internal bodies of FIFA; Competence of DRC Judge to decide on its own jurisdiction despite arbitration clause in favor of NDRC; Jurisdiction of FIFA for employment-related disputes; Burden of proof regarding independence of NDRCs; Composition of NDRCs according to Article 3 para. 1 FIFA NDRC Standard Regulations; Right to an “independent and impartial tribunal” under FIFA Circular No. 1010; Procedural rights of party that does not proceed in first instance proceeding

Panel

Mr Nicolas Cottier (Switzerland), Sole Arbitrator

Facts

On 14 January 2019, the Croatian club NK Inter Zaprrešić (the “Club” or the “Appellant”) and the Russian football player Serder Serderov (the “Player” or the “First Respondent”) signed an employment agreement (the “Agreement”), valid from that date until 15 June 2020. According to Article 9 of the Agreement, the Player’s monthly salary was fixed at EUR 6,000.

The English version of Article 16 g) of the Parties’ Agreement reads as follows:

“In case of dispute, the contractual parties establish the competence of the Croatian Football Federation’s Court of Arbitration. The Club and the Player are obliged not to settle possible disputes arising hereof in

front of regular courts. The Club and the Player are expressly obliged to completely adhere to all the provisions of the Croatian Football Federation’s regulations which regulate the work of the Croatian Football Federation’s Court of Arbitration, including the way of electing the arbiter or the arbitration council. The Club and the Player, pursuant to the provisions of the Law on Arbitration, have expressly agreed that the adjudication of the Croatian Football Federation’s Court of Arbitration may be challenged in front of the international Court of Arbitration for Sport (CAS) in Lausanne, Switzerland. An eventual successful challenge of the adjudication of the Croatian Football Federation’s Court of Arbitration does not affect the effectiveness of this adjudication”.

As of 1 January 2020, the Club stopped paying any salary to the Player.

On 15 March 2020, the Croatian 1. HNL was suspended until 5 June 2020 due to the COVID-19 pandemic and, upon respective request by the Club, the Player went back to Russia for the period of suspension of the championship.

Following this suspension and the consecutive extension of the football season, on 22 May 2020, the Player and the Club signed an addendum to the Agreement, extending its duration until 5 August 2020.

On 10 July 2020, the Player sent a notice of default to the Club, granting it a deadline of fifteen days to pay alleged overdue payables of EUR 36,000, namely the equivalent of six months of salaries, for the period from 1 January 2020 until 30 June 2020. The Player reserved his right to terminate the contract with just cause in case of absence of payment.

In response, on 14 July 2020, the Club sent a letter to the Player, by means of which it formally invited him to “*immediately but no later than 10 (ten) days from the receipt of this letter to come in Zaprrešić (Croatia) and continue to fulfil [his] contractual obligations*”. The Club indicated that in case of failure by the Player to comply it

would unilaterally terminate the Agreement and sue the Player for damages.

On 22 July 2020, referring to his notice of default of 10 July 2020, the Player replied that the Club was responsible for the fact that he had not been able to travel to Croatia earlier.

As the Player did not join the Club within the set deadline, the latter terminated the Agreement on 25 July 2020.

The Player did not find any new employment before the expiration period of the Agreement, namely 5 August 2020.

On 14 September 2020, the Player lodged a claim against the Club before the Judge of the FIFA Dispute Resolution Chamber (the “DRC Judge”). The Club did not proceed in front of the DRC Judge although it had been requested to do so by said judge and although it was participating to similar procedures before the FIFA DRC during the same period of time. In particular, the Club did not raise any objection to the jurisdiction of the DRC Judge.

In its decision of 13 January 2021 (the “Decision”), the DRC Judge found that the Club had lost interest in the Player’s services and had only summoned the Player to return to the Club after the Player had enquired about the payment of his salaries. In conclusion, the DRC Judge held that on 25 July 2020, the Club had terminated the Agreement without just cause and that it was undisputed that the Club itself was in breach of the Agreement at the time of termination, since the Player’s remuneration had not been paid since January 2020.

Specifically, and based on the version of August 2020 of the FIFA Regulations on the Status and Transfer of Players (the “RSTP”), the DRC Judge decided to partially accept the claim and ordered the Club to pay the Player outstanding remuneration in the amount of

EUR 36,000, payable in six instalments plus 5% interest *p.a.* until effective payment of the respective instalment as well as EUR 6,968 as compensation for breach of contract plus 5% interest *p.a.* as from 14 September 2020 and until effective payment.

On 25 March 2021, the grounds of the Decision were notified to the Player and the Club by the Fédération Internationale de Football Association (“FIFA” or the “Second Respondent”).

On 13 April 2021, the Appellant lodged a Statement of Appeal with the Court of Arbitration for Sport (the “CAS”) against the Player and FIFA with respect to the Decision, pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration (2020 edition) (the “Code”). Essentially, the Appellant argued that the DRC Judge had lacked jurisdiction to decide on the present case as the arbitration clause under Article 16 g) of the Agreement provides for the competence of the Court of Arbitration of the Croatian Football Federation (the “CFF Court of Arbitration” or the “CFF NDRC”), and that the latter fulfilled all requirements set by FIFA to qualify as independent National Dispute Resolution Chamber (“NDRC”).

Reasons

1. Scope of CAS jurisdiction in case of appeals against decisions issued by internal bodies of FIFA

To start with, and in light of the Appellant’s objection to the jurisdiction of the DRC Judge in the first instance proceedings, the Sole Arbitrator clarified that given that the present proceeding qualifies as CAS appeals arbitration proceeding - and specifically, appeals proceeding against a decision issued by an internal body of FIFA, namely the DRC Judge - unlike as in CAS ordinary arbitration proceedings, he does not only have to decide on the validity of the arbitration clause; that

rather, he also has to determine whether indeed the DRC Judge, based on the applicable FIFA Regulations, had jurisdiction to issue the decision appealed against, notwithstanding the arbitration clause in the Parties' Agreement in favour of a national arbitration tribunal, specifically the CFF Court of Arbitration.

2. Competence of DRC Judge to decide on his own jurisdiction despite arbitration clause in favor of NDRC

Starting his analysis of jurisdiction for the first instance proceedings, the Sole Arbitrator clarified that while the Parties' Agreement contained a clear and specific arbitration clause in favour of a national arbitration tribunal (here: the CFF Court of Arbitration), the DRC Judge - as an internal body of a Swiss association - was not part of the Parties' Agreement and therefore not bound by it; that therefore, and in light of the fact that the Player, despite the arbitration clause in favour of the CFF Court of Arbitration, had filed his claim against the Club before the DRC Judge, it was for the DRC Judge to decide on his competence for the case in question.

That specifically, given that both the Player and the Club were bound by the FIFA Regulations on the Status and Transfer of Players (RSTP) – the Club through membership and the Player by means of his registration with the national association, the latter being itself a member of FIFA - the question of competence had to be decided based on the RSTP. That furthermore, and in particular, the DRC Judge had to examine, with regard to the national arbitration tribunal designated by the Parties in their Agreement, whether the requirements of the guarantee of fair proceedings and respect of the principle of equal representation of players and clubs are fulfilled; in the affirmative, the DRC Judge would decline his own jurisdiction and refer the Parties to the national decision-making body initially

chosen by the Parties. If the relevant requirements have not been met, the DRC Judge would hold so and accept his own jurisdiction.

3. Jurisdiction of FIFA for employment-related disputes

Continuing his analysis of the jurisdiction of the DRC Judge, the Sole Arbitrator referred to Article 22 lit. b) of the RSTP, according to which FIFA is “automatically” competent to decide on employment-related disputes between a club and a player of an international dimension, unless the parties have opted in writing for the competence of an arbitration tribunal established at national level, and that arbitration tribunal is independent, guarantees fair proceedings and respects the principle of equal representations of players and clubs. Given that the Parties' Agreement was of employment-related nature and further given that it binds a Croatian Club to a Russian player and is therefore of international dimension, the Sole Arbitrator concluded that, in order to determine whether the DRC Judge had been competent to decide the present case at first instance, he had to examine whether the two cumulative conditions were met: a) the parties to the Agreement must have opted in writing for the competence of an arbitration tribunal established at national level and b) the chosen arbitration tribunal had to be independent, to guarantee fair proceedings and to respect the principle of equal representation of players and clubs.

To start with, the Sole Arbitrator found that the first condition, namely the contractual choice in writing of an arbitration tribunal (internal or external to the federation) is fulfilled in the present case, namely by means of Article 16 g) of the Parties' Agreement. In this context the Sole Arbitrator rejected the submissions of FIFA and the Player on the alleged lack of clarity and specificity of the

arbitration clause, underlining that in his view, the clause contained, in very clear wording, an arbitration clause in favor of the CFF Court of Arbitration.

The Sole Arbitrator further noted that neither the DRC Judge, at first instance, nor the Sole Arbitrator, at second instance, are bound by the option of national arbitral tribunal chosen by the Parties in the Agreement. That rather, given that the criterium of independence is a second and cumulative condition set by the RSTP in order to validly “opt out” of the jurisdiction of FIFA, both the DRC Judge and the Sole Arbitrator had to assess, based on the applicable FIFA Regulations and, if necessary, Swiss law (applicable as per Article 56 para. 2 of the 2021 FIFA Statutes), whether the independence condition is met.

4. Burden of proof regarding independence of NDRCs

Turning to the question of burden of proof that the national arbitration tribunal is independent as required by Article 22 lit. b) of the RSTP, the Sole Arbitrator held that according to CAS jurisprudence (CAS 2016/A/4846), and in accordance with Article 8 of the Swiss Civil Code, such burden rests on the party which claims such independence, in the present case the Appellant.

5. Composition of NDRCs according to Article 3 para. 1 FIFA NDRC Standard Regulations

Starting his analysis as to whether the CFF Court of Arbitration would qualify as independent national arbitral tribunal, the Sole Arbitrator underlined that the principles set under Article 22 lit. b) RSTP were further explained and outlined in FIFA Circular No. 1010 dated 20 December 2005 and the FIFA National Dispute Resolution Chamber (NDRC) Standard Regulations, the latter having entered into force on 1 January 2008

(the “FIFA NDRC Standard Regulations”).

Specifically, FIFA Circular No. 1010 outlines that the terms *‘independent’* and *‘duly constituted’* under Article 60 para. 3 (c) of the FIFA Statutes require that an arbitration tribunal meets the minimum (international) procedural standards as laid down in several laws and rules of procedure for arbitration tribunals, comprising, in the here relevant part, the *“Principle of parity when constituting the arbitral tribunal”* and the *“Right to an independent and impartial tribunal”*.

The Sole Arbitrator further noted that according to Article 3 para. 1 of the FIFA NDRC Standard Regulations, the chairman and a deputy chairman of a NDRC must be appointed by consensus between the player and club representatives.

Turning to the Procedural Rules of the CFF Court of Arbitration (the “CFF Procedural Rules”), the Sole Arbitrator noted that according to Article 5 para. 2 of such rules *“the President and the vice president of the Court of Arbitration shall be appointed by the Executive Committee of the CFF among arbitrators that have been proposed by the clubs and players’ representatives”*.

The Sole Arbitrator found that in light of the fact that essentially, it was the CFF Executive Committee which is in charge of the appointment of the President and the vice-president of the CFF Court of Arbitration, having the final word in electing both candidates, and given that, as argued by the First Respondent, both candidates had been proposed by the Clubs’ representatives, the President and the vice-president of the CFF Court of Arbitration are not *“chosen by consensus by the player and the club representatives”*. In this context the Sole Arbitrator further noted that out of the 17 members of the CFF Executive Committee, none represented the players, while six of them were senior officials of Croatian top clubs. In conclusion, the Sole

Arbitrator found that there is no guarantee that the principle of equal representation of players and clubs, expressly required under Article 22 lit. b) of the RSTP, is respected.

Based on the above, and further also referring to the CAS final decisions in the cases CAS 2014/A/3690 and CAS 2016/A/4846, the Sole Arbitrator concluded that due to the lack of consensus between players and clubs for the appointment of the chairman and the vice-chairman and the structural inequality between the clubs and the players in the composition of the CFF Executive Committee, *i.e.* the body in charge of the appointment of the President and the vice president of the CFF Court of Arbitration, the CFF Court of Arbitration is not an independent tribunal in compliance with Article 22 lit. b) of the RSTP, FIFA Circular No. 1010 and Article 3 para. 1 of the FIFA NDRC Standard Regulations.

6. Right to an “independent and impartial tribunal’ under FIFA Circular No. 1010

Continuing never-the-less his analysis as to whether the CFF Court of Arbitration would qualify as independent national arbitral tribunal, the Sole Arbitrator highlighted that according to FIFA Circular No. 1010, for a NDRC to meet the requirement of ‘independence’ and ‘duly constituted’, the arbitral tribunal has to meet certain minimum procedural standards, amongst others the ‘Right to an independent and impartial tribunal’. That FIFA Circular No. 1010 provides that in order to observe this right, the procedural rules of the respective arbitral tribunal need to foresee the option to reject an arbitrator as well as *“that the ensuing rejection and replacement procedure be regulated by agreement, rules of arbitration or state rules of procedure”*. The Sole Arbitrator held in this respect that while Article 9 of the CFF Procedural Rules mentions the President’s duty to decide on challenges, the CFF Procedural Rules do not mention as to how an arbitrator should be

replaced. Accordingly, the Sole Arbitrator held that the lack in the CFF Procedural Rules of a clearly established challenge mechanism, be it expressly or by clear reference to other sets of rules, constitutes another ground to exclude that the CFF Court of Arbitration meets the criteria set under Article 22 lit. b) RSTP, Circular No. 1010 and the FIFA NDRC Standard Regulations.

In conclusion, the Sole Arbitrator decided that given that he had already found the CFF Court of Arbitration to be non-compliant based on two separate grounds, namely the lack of consensus in the appointment of its chairman and vice-chairman and the lack of a clearly established rejection mechanism, the other issues raised by the Respondents against the CFF Court of Arbitration could be left open. However, and in response to the First Respondent’s criticism of the fee applied to the procedure before the CFF Court of Arbitration (Article 15 of the CFF Procedural Rules) – the Sole Arbitrator determined that this was in contradiction with the clear wording of Article 32 of the FIFA NDRC Standard Regulations, foreseeing the principle of gratuity of the proceedings.

In conclusion, the Sole Arbitrator found that the DRC Judge had been competent to decide, in the first instance, on the present employment-related dispute of international dimension.

7. Procedural rights of party that does not proceed in first instance proceeding

Finally, the Sole Arbitrator turned to the Second Respondent’s argument according to which the Appellant’s capacity to raise an objection to the jurisdiction of the FIFA DRC was restricted before CAS, given that the Appellant had failed to dispute FIFA’s jurisdiction before the FIFA DRC. In this context the Second Respondent argued that

the Appellant had been fully aware of the proceeding before the DRC Judge and that it had raised a jurisdiction objection in other, parallel proceedings which had taken place before the FIFA DRC. According to the Second Respondent, the Appellant, raising only at CAS level an objection to the jurisdiction of the DRC Judge related to the first instance proceedings, is acting in bad faith in the present proceedings.

The Sole Arbitrator, relying on jurisprudence of the Swiss Federal Tribunal (SFT) (ATF 120 II 155), held that a party which did not proceed during the first instance proceeding may still raise an objection to the jurisdiction of such instance in the context of appeal proceedings against the decision issued at first instance, unless the judge of first instance had issued an interim decision which had entered into force. At the same time the Sole Arbitrator however underlined that the right to contest the first instance's jurisdiction - while in principle also retained by the party which did not proceed before the first instance - is limited by the principle of good faith (ATF 120 II 155, p. 165). The Sole Arbitrator further determined that while the respective jurisprudence of the SFT refers to an "external" court of arbitration, it can also apply *mutatis mutandis* to the question of the possibility to raise an objection before CAS against the competence of an "internal" tribunal, such as the FIFA Tribunal, or, more specifically, the DRC Judge.

In order to support his finding that the limitations to raise an objection to the first instance judicial bodies apply to both "external" as well as "internal" tribunals, the Sole Arbitrator elaborated that the FIFA Regulations, notably the FIFA Statutes and the RSTP, set up a jurisdictional system with the purpose to solve disputes notably between clubs and players. The possibility to appeal to CAS ensures that such disputes be eventually adjudicated by an external arbitration court. The Sole Arbitrator further

elaborated that given that this jurisdictional system directly binds the national federations, given that they are members of FIFA, but also indirectly binds local clubs and players by way of reference, it was correct, at least with regards to the possibility to raise an objection on jurisdiction, to impose on the parties to proceedings before the FIFA Tribunal the same limits as the ones applicable to parties to an arbitration proceeding before an external tribunal.

Turning to the case at hand the Sole Arbitrator noted that while indeed, the Appellant did not contest having been fully aware of the first instance proceeding before the DRC Judge, it did not at all proceed in such proceedings, while at the same time it was raising an objection of lack of jurisdiction of the DRC Judge in at least one parallel first instance FIFA Tribunal proceeding.

The Sole Arbitrator further underlined that the Appellant did not provide any reasons as to why in the present case, it did not raise an objection to the jurisdiction of the DRC Judge, while it did do so in the context of other first instance FIFA Tribunal proceedings. The Sole Arbitrator concluded that given the absence of any legitimate explanation for such a contradictory procedural attitude, in view of the SFT jurisprudence, and of the particular circumstances of this case, the Appellant was not allowed to raise the objection to lack of DRC Judge jurisdiction before CAS.

Decision

The appeal filed by NK Inter Zaprëšić on 13 April 2021 by NK Inter Zaprëšić against Mr Serder Serderov and FIFA with respect to the decision issued on 13 January 2021 by the Dispute Resolution Chamber Judge of FIFA is rejected and said decision is confirmed.

CAS 2021/A/7983
Brianna McNeal v. World Athletics (WA)
&
CAS 2021/A/8059
WA v. Brianna McNeal
9 June 2022 (operative part of 2 July 2021)

Athletics (100 m hurdles); Doping (tampering with any part of the doping control); Applicable law and *lex mitior*; Assessment of the evidenc; Conduct to be considered tampering; Sanction for a tampering ADRV as a first offence and exceptional circumstances; Degree of fault; Applicable sanction to multiple violations; Application of the principle of proportionality

Panel

Mr Rui Botica Santos (Portugal), President
Ms Barbara Reeves (United States)
Prof. Ulrich Haas (Germany)

Facts

Brianna McNeal (the “Athlete”) is a 29-year-old internationally renowned athlete from the United States of America (“USA”) who competes in the 100 metres hurdles. The Athlete was in 2013 the World champion in the 100 meters hurdles and, among many other achievements, won the Olympic Gold medal at the 2016 Rio Olympic Games.

World Athletics (the “WA”), formerly known as the “International Association of Athletics Federations” (the “IAAF”), is the world governing body for track and field.

This case is essentially about a Tampering accusation made by WA against the Athlete which was decided, at first instance, by the WA Disciplinary Tribunal.

The Athlete failed to make herself available to be tested by a Doping Control Officer (DCO) on the morning of 12 January 2020, between 6:00 and 7:00 AM. When notified by the WA Athletics Integrity Unit (AIU) in order to provide an explanation for her Missed Test, the Athlete sent the “First Medical Note” to the AIU and alleged that she failed to wake up due to the unpredictable effects of the medication she took on the previous day for the first time, following a “surprise” medical procedure.

The AIU suspected that the First Medical Note had been altered and asked for further evidence from the Athlete, which she provided in the form of two additional medical notes (the Second and Third Medical Notes). Once again, the AIU did not deem such documents to be originals.

The Athlete then provided the Medical File when asked to do so by the AIU and, upon being called for an interview in August 2020, confessed that she had indeed changed the dates of the Medical Notes from 10 January 2020 (the real date) to 11 January 2020 (the false date).

On 13 January 2021, the AIU charged the Athlete with a Tampering violation under the provision of Article 2.5 2019 WA ADR/WADC and, on 21 April 2021, a decision was issued by the WA Disciplinary Tribunal imposing a 5-year period of Ineligibility on the Athlete due to a Tampering ADRV which was the Athlete’s second violation of anti-doping rules.

The present procedure is a consequence of the Appeal lodged by the Athlete on 21 May 2021 against the decision of the WA Disciplinary Tribunal and of the Cross-Appeal lodged by the WA also against that decision. Both appeals were consolidated into one single procedure to be simultaneously decided due to the commonalty of issues at stake.

Reasons

The Athlete essentially argued that she did not have any intent to subvert the Doping Control Process by changing the dates of the Medical Notes and, as such, she could not be considered as having committed a Tampering ADRV. The Athlete's willingness to hand over the complete and genuine Medical File demonstrated that she never intended to subvert the doping control process nor to prevent normal procedures from occurring. The Athlete argued that she did not want to disclose her abortion, but fully cooperated with the AIU; she asked for a handwritten note rather than a typed letter and simply did not believe the date to be correct. If this had been typed by the doctor, the Athlete would have obviously refrained from changing it.

On the other hand, WA concluded that the Athlete's explanations were unbelievable, that she remembered the date of the abortion procedure before engaging in the tampering conduct and that such conduct was illegitimate defence and unacceptable. WA thus considered that a tampering ADRV was committed, considering also that the intent requirement was present, since it found the Athlete intended to subvert the doping control process through the falsification of the Medical Note's dates. Therefore, WA argued that the Athlete should be punished with a harsher sanction than the one which was imposed on her by the WA Disciplinary Tribunal in first instance, namely by a 5-year period of Ineligibility due to a Tampering ADRV which was the Athlete's second violation of anti-doping rules.

1. Applicable law and *lex mitior*

In its fight against doping, WA follows the WA ADR and the rules applicable are those in effect at the time of the facts. Since the alleged

anti-doping violation i.e. alteration of the dates of three Medical Notes occurred on 13 February 2020 and on 14 March 2020, the regulations which in principle govern the dispute are those that were in force from 1 November 2019 and during the date of the facts (the "2019 WA ADR").

In the meantime, a new edition of the WA ADR was approved and implemented – which came into force from 1 January 2021 (the "2021 WA ADR"). The 2021 WA ADR reflects the promulgation of the new 2021 edition of the World Anti-Doping Code (the "2021 WADA Code").

The Panel found that an exception to the principle of application of the law at the time of the facts exist if the *lex mitior* doctrine applies. The principle of *lex mitior* occupies a central place in sports law. There is no discretion on the application of the *lex mitior* principle once it is found that the case appropriately falls within its scope (CAS 2015/A/4005 para. 115; and CAS 2020/A/6755 para. 51).

As the Athlete underlined during the proceedings before the WA Tribunal, the Panel concurred that the 2021 WA ADR rules were more favourable to the Athlete. In general, the *lex mitior* principle is relevant and applicable when and if the new rules - as it was the case of these proceedings – (i) provide for a reduced sanction; and/or (ii) redefine the disciplinary offense. The 2021 WA ADR that enshrines the *lex mitior* principle offers more favourable terms to athletes with respect to the imposition of sanctions for violations of Tampering offences. Equally, the new rules afford considerably greater flexibility in connection with the consequences to be drawn from a finding of multiple anti-doping rule violations, which was the case, since the Athlete had already committed another ADRV in 2019 and, if the ADRV disputed under these

procedures was confirmed, that would be the Athlete's second violation.

Therefore, it was the Panel's view that the 2021 WA ADR was more favourable to the Athlete and that she should benefit from all its provisions.

2. Burden of proof, standard of proof, Assessment of the evidence

Considering the disciplinary nature of Anti-Doping Rule Violation (ADRV) cases, the Panel shall determine first the burden of proof, the applicable standard of proof and the evaluation of the evidence presented to it in order to be able to proceed with the analysis of the merits of the dispute.

The Panel recalled that the burden of proof shall be ascertained in accordance with Rule 3.1 2021 WA ADR, which states that: "*The Integrity Unit or other Anti-Doping Organisation will have the burden of establishing that an anti-doping rule violation has occurred*". It was therefore for WA to demonstrate, to the comfortable satisfaction of the Panel, that the Athlete did indeed engage and commit an ADRV of Tampering (Rule 2.5 2021 WA ADR), which includes objective and subjective factors. CAS Jurisprudence is well acquainted with the "comfortable satisfaction" of the Panel standard of proof and the formula used in Article 3.1 2021 WA ADR ("*greater than a mere balance of probability but less than proof beyond reasonable doubt*") as it is similar to the jurisprudence's findings. In fact, it has been described as "*a kind of sliding scale, based on the allegations at stake: the more serious the allegation and its consequences, the higher certainty (level of proof) the Panel would require to be 'comfortable satisfied'*" (CAS 2014/A/3625, para. 132).

Nonetheless, the Panel held that the burden of proving that the Athlete's allegation that she was suffering from psychological or mental health issues during the period when the

Medical Note's dates were changed – the period surrounding the abortion - which in turn affected her judgement and reason, lied with the Athlete.

In this context, the assessment of the evidence contributes significantly to the decision-making. The Panel needed to have strong evidence that certain facts occurred in a given manner and the evidence also had to satisfy the Panel in the same sense. The relevant circumstances of the case assessed individually and/or combined, commonly known as the context, are major elements to reach this conclusion. The "evaluation of the evidence" concept refers to the judicial process of weighing/assessing the evidence on the record (*appréciation des preuves*). Under Swiss arbitration law, the deciding body is free in its evaluation of the evidence (*libre appréciation des preuves*). This principle is expressly recalled by Article 9(1) of the IBA Rules of Evidence, according to which "*the Arbitral Tribunal shall determine the (...) relevance, materiality and weight of evidence*" (Berger/Kellerhals, International Arbitration in Switzerland, 2nd Ed., London, 2010, para 1328).

3. Conduct to be considered tampering

(...)

2.5 Tampering or Attempted Tampering with any part of Doping Control by an Athlete or other Person"

Although Rule 2.5 2021 WA ADR does not itself define the meaning of the term "Tampering", this issue is resolved in Annex I of that regulation, which reads as follows:

"Tampering: *Intentional conduct that subverts the Doping Control process but that would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, offering or accepting a bribe to perform or fail to perform an act, preventing the collection of a Sample, affecting or*

making impossible the analysis of a Sample, falsifying documents submitted to an Anti-Doping Organisation or TUE committee or hearing panel, procuring false testimony from witnesses, committing any other fraudulent act upon the Anti-Doping Organisation or hearing body to affect Results Management or the imposition of Consequences, and any other similar intentional interference or Attempted interference with any aspect of Doping Control.

[Comment to Tampering: For example, this Rule would prohibit altering identification numbers on a Doping Control form during Testing, breaking the B bottle at the time of B Sample analysis, altering a Sample by the addition of a foreign substance, or intimidating or attempting to intimidate a potential witness or a witness who has provided testimony or information in the Doping Control process. Tampering includes misconduct that occurs during the Results Management process. See Rule 10.9.3(c). However, actions taken as part of a Person's legitimate defence to an anti-doping rule violation charge shall not be considered Tampering. Offensive conduct towards a Doping Control official or other Person involved in Doping Control that does not otherwise constitute Tampering shall be addressed in the disciplinary rules of sport organisations.]"

The Panel recalled that it is not necessary for a Doping Control Process to be actually subverted, in order for a tampering offence to exist. It suffices, for that purpose, that the conduct in question could, in theory, subvert the said process. The commission of a tampering offence always requires satisfactory proof that the offender intended to subvert the investigation, even if the latter was unaware that s/he was violating an anti-doping provision (CAS 2017/A/4937). In the specific context of the rules, intent does not need to be direct in the sense that subverting the doping control process was the sole and only driving motive behind the athlete's actions. Rather, it is sufficient for there to be intent that the athlete recognises the consequences of his or her actions and accepts that such consequences

have the potential to subvert the process. A violation of Rule 2.5 2021 WA ADR cannot be established merely by reference to the examples included in the rule. Therefore, a finding that the offence has actually been committed must include consideration of the subjective aspects of the case.

In this respect, the Panel found that the alteration of the dates of the Medical Notes could not only be considered to be falsification of a document, under Rules 2.5 and 5.7.9 2021 WA ADR, but also clearly amounted to conduct that tended to/was capable of subverting the Doping Control Process, as it was intended to favour and give added support to the explanation given by the Athlete for justifying her missed test. Furthermore, the Athlete had failed to prove the facts on which her defence was based, i.e. she had not comfortably convinced the Panel that the psychological effects of "the surprise" medical procedure, namely an abortion, had such an overwhelming effect on her that she was unable to comprehend the consequences of her acts, and was thus free of all liability in respect thereof.

4. Sanction for a tampering ADRV as a first offence and exceptional circumstances

"10.3.1 For violations of Rule 2.3 or Rule 2.5, the period of Ineligibility will be four (4) years except: (i) in the case of failing to submit to Sample collection, if the Athlete can establish that the commission of the anti-doping rule violation was not intentional, the period of Ineligibility will be two (2) years; (ii) in all other cases, if the Athlete or other Person can establish exceptional circumstances that justify a reduction of the period of Ineligibility, the period of Ineligibility will be in a range from two (2) years to four (4) years depending on the Athlete's or other Person's degree of Fault; or (iii) in a case involving a Protected Person or Recreational Athlete, the period of Ineligibility will be

in a range between a maximum of two (2) years and, at a minimum, a reprimand and no period of Ineligibility, depending on the Protected Person or Recreational Athlete's degree of Fault".

The Panel reminded that under Rule 10.3.1 2021 WA ADR, a reduction of the 4 years period of ineligibility applicable for a first tampering offence in a range from 2 years to 4 years was possible if the athlete could establish exceptional circumstances depending on the athlete's degree of fault. The specific meaning of "exceptional circumstances" is not defined in said rule. However, some examples of what can be considered to be "exceptional circumstances" are provided in the context of other rules. The Panel recalled that in principle, the interpretation of the expression "exceptional circumstances" must be restrictive so as only to include very unusual or abnormal situations.

In this respect, the Panel considered that the conduct of an athlete that without any doubt failed to prove that she did not intend to subvert the Doping Control Process, could nevertheless betray a certain level of psychological disturbance, which did not, however, alter the seriousness of her acts and the fact that she committed an ADRV. In this regard, psychological factors may amount to an abnormality that is "not within the bounds of normal conduct" and therefore to exceptional circumstances justifying that the penalty imposed on the athlete for the Tampering ADRV, when fixed on a first offence basis, vary according to the athlete's degree of fault.

The Panel therefore concluded that there were exceptional circumstances in this case i.e. psychological factors linked to an abortion, justifying that the penalty imposed on the Athlete for the Tampering ADRV, when fixed on a first offence basis, varied according to her degree of fault, within a range of from two to

four years of Ineligibility, in accordance with Rule 10.3.1 (ii) 2021 WA ADR.

5. Degree of fault

In order to determine, into which category of fault- significant, normal or light as established in CAS 2013/A/3335 - a particular case might fall, the Panel found that it was helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of her personal capacities. In this respect, the Panel considered that an athlete who acted, in objective terms, with a "significant degree of fault" could, due to the existence of exceptional circumstances closely linked to the subjective aspects of the case, have her degree of fault reduced from a "significant degree of fault" to a "normal degree of fault".

Under the circumstances of the case, the Panel concluded, notwithstanding the fact that it was unable to conclude that the Athlete had no intent to subvert the Doping Control Process, particularly because of her extreme lack of care, that it was nevertheless convinced that the traumatic experience through which the Athlete passed namely, an abortion, are exceptional circumstances that should be taken into consideration as a factor that shadowed her judgment, to a certain extent. The Panel accordingly also considered that the said exceptional circumstances were closely linked to the subjective aspects of the case, and that it was appropriate, because of the said aspects, to reduce the Athlete's degree of fault from a "significant degree of fault" to a "normal degree of fault".

6. Applicable sanction to multiple violations

The Panel already decided that the appropriate penalty for the Tampering ADRV committed by the Athlete, on a first offence basis, would be a 3-year Ineligibility period. Accordingly, and as the minimum level of the penalty to be imposed is the sum total of the period imposed for the Athlete's first ADRV (1 year) and the period of ineligibility that would be imposed on the Athlete for the second ADRV, on a first offence basis (3 years), the minimum period of Ineligibility that could be imposed is 4 years. The maximum limit is twice the period of Ineligibility that would be imposed on the Athlete for the second ADRV, on a first offence basis (3 years), namely 6 years.

It follows therefore, according to Rule 10.9.1 (a) (ii) of the 2021 WA ADR, that the appropriate penalty would be a period of Ineligibility of from 4 to 6 years. The specific penalty applicable should be fixed within this range, by reference to all the circumstances and the Athlete's degree of fault with regard to the second offence.

For this reason, and according to the formula in 2021 WA ADR, and having already considered that the Athlete's degree of fault, taking all the circumstances of the case into consideration, was such that her penalty could be reduced by one year, the Panel confirmed the said conclusion, which shall be applied in the final penalty. The Panel therefore considered that the application of the rules to this case required the imposition, on the Athlete, of a period of ineligibility of 5 years, for this ADRV, and therefore upheld the decision of the WA Disciplinary Tribunal.

7. Application of the principle of proportionality

In light of the above, the Panel considered that the 5-year period of Ineligibility sanction to be imposed on the Athlete might not be further reduced under the principle of proportionality,

since the elements of such principle had already been fully considered by the Panel and are a part of the 2021 WADC. When applying these regulations, only the most extreme and rare cases, where sanctions are clearly disproportionate and unfair, allow for an autonomous consideration of the principle of proportionality.

Decision

Therefore, the appeal filed by Ms Brianna McNeal was dismissed and the appeal filed by World Athletics against the decision of the World Athletics Disciplinary Tribunal was confirmed in full, with the following additional item:

“All competitive results obtained by Ms. Brianna McNeal between 13 February 2020 and 14 August 2020 shall be disqualified with all resulting consequences including forfeiture of any medals, titles, points, prize money and prizes”.

CAS 2021/A/8075

Football Association of Albania & Nedim Bajrami v. FIFA & Swiss Football Association

13 June 2022 (operative part of 30 August 2021)

Panel

Mr Francesco Macrì (Italy), President

Mr Julien Fouret (France)

Mr Mark Hovell (United Kingdom)

Football; Nationality; Principle set forth in the FIFA New Eligibility Rules/ Regulations Governing the Application of the FIFA Statutes; Acquisition of Albanian citizenship under Albanian law; Cumulative prerequisites of art. 9 para. 2 of the FIFA New Eligibility Rules regarding requests to change associations

Facts

The Football Association of Albania (the “First Appellant” or the “FAA”) is the football governing body in the Republic of Albania.

Nedim Bajrami (the “Second Appellant” or the “Player”) is a professional football player of both Swiss and Albanian nationality.

Fédération Internationale de Football Association (the “First Respondent” or “FIFA”) is the international governing body of football with its registered office in Zurich, Switzerland.

The Swiss Football Association (the “Second Respondent” or the “SFA”) is the football governing body in Switzerland.

Nedim Bajrami is a professional football player born on 28 February 1999 in Zurich, Switzerland, from Albanian parents. As

confirmed by the SFA, Mr Bajrami has appeared in 31 official matches for the Swiss national football team, none of which were at the so-called “A” level (*i.e.* with the senior Swiss national football team). Mr Bajrami played his first match for the Swiss U-15 national football team on 10 September 2013 and his last match for the Swiss U-21 national football team on 16 November 2020. He had never been called to represent the Albanian national football team in a friendly match or an official competition.

On 17 March 2021, the Ministry of Interior of Albania issued a declaratory statement under Articles 4(b) and 6 of Law 113/2020 of 29 July 2020 officially recognising Mr Bajrami’s Albanian descent, following which Mr Bajrami obtained an Albanian birth certificate on 19 March 2021 and an Albanian passport on 21 March 2021.

On 19 March 2021, the FAA submitted a (first) change of association request to the FIFA Players’ Status Committee (the “FIFA PSC”) concerning the Player (the “First Request”). On 23 March 2021, the first application was rejected by the Single Judge (the “SJ”) of the FIFA PSC (the “First Decision”).

On 21 May 2021, the FAA submitted a second change of association request to the FIFA PSC about Mr Bajrami (the “Second Request”), this time based on Article 9 para. 2 (a) of the FIFA New Eligibility Rules/ Regulations Governing the Application of the FIFA Statutes (the “Regulations”, the “RGAS” or the “New Eligibility Rules”). On 27 May 2021, the SJ of the FIFA PSC rejected the request of FAA for a change of association of Mr Nedim Bajrami. The grounds of this decision (the “Appealed Decision”) were notified to FAA on 4 June 2021.

On 23 June 2021, the Appellants filed a Statement of Appeal with the Court of

Arbitration for Sport (the “CAS”) in accordance with Article 58 of the FIFA Statutes and Articles R47 and R48 of the Code of Sports-related Arbitration (2020 edition) (the “CAS Code”) against the Respondents with respect to the Appealed Decision.

In summary, the Appellants argue that the Player never played at “A” level for the Swiss National Football team and that he held the Albanian nationality from birth. These two cumulative requisites matched the provision of Article 9 para. 2 (a) of the RGAS and the request for a change of association is worthy of upholding. The SJ of the FIFA PSC erred in stating that the Player had to fulfil “*further administrative requirements*” as substantial preconditions to obtain the Albanian nationality.

In summary, the First Respondent, argues that the prerequisites under Article 8 para. 1 (dh) and (e) of the Albanian Law 113/2020 on Citizenship are substantive. The Player had to undertake both before obtaining the requested nationality, thus incurring the prohibition of Article 5 para. 2 (a) of the Regulations. Besides, contrary to what is claimed by the Appellants, the statement from the General Secretary of the Albanian Ministry of Interior is clear and undisputable as it reports that the Albanian citizenship was granted to the Player only on 17 March 2021 by descentance. The wording of the Albanian Law 113/2020 on Citizenship clearly states that Albanian nationality can be automatically acquired only by birth (as provided by Articles 4 and 5) and not by descentance, as this is the case of the Player. Consequently, the Player did not hold Albanian nationality at his first official match with Switzerland and did not meet the second requirement of Article 9 para. 2 of the RGAS.

Reasons

1. Principle set forth in the FIFA New

Eligibility Rules/ Regulations Governing the Application of the FIFA Statutes

On 18 September 2020, FIFA modernized its Regulations Governing the Application of the FIFA Statutes (ed. 2020) (the “Regulations”, the “RGAS” or the “New Eligibility Rules”). The reform stands on the following core principles, as reported in the Commentary:

- *‘no nationality, no eligibility’. Eligibility must be based on an objective measurement (i.e. the nationality held by the player);*
- *equal treatment of all [Member Associations];*
- *the existence of a genuine link between the player and the [Member Association] they (intend to) represent;*
- *avoiding cases of excessive severity or hardship;*
- *prevention of abuse (i.e. ‘nationality shopping’); and*
- *protecting the sporting integrity of international competition”.*

These principles contain three essential elements: nationality as a precondition to play for a representative football team; the existence of a genuine link between the player and the association, and the intention to avoid that such rules can frustrate the legitimate expectation of a player to joining the chosen association; to prevent any abuse and to protect the integrity of competitions.

Regarding the first topic, Article 5 para. 1 (Principles) of the Regulations reads as follows:

“Any person holding a permanent nationality that is not dependent on residence in a certain country is eligible to play for the representative teams of the association of that country”; and Article 5 para. 2: “there is a distinction between holding a nationality and being eligible to obtain a nationality. A player holds a nationality if, through the operation of a national law, they have: a) automatically received a nationality (e.g. from birth) without being required to undertake any further administrative requirements (e.g. abandoning a

separate nationality); or b) acquired a nationality by undertaking a naturalisation process”.

FIFA’s Commentary explains as follows [in relation to the branch a) of Article 5 para. 2]:

“The first element requires that nationality be obtained ‘automatically’. This will generally occur when a player is born, subject to the relevant national law, in line with the principle of jus solis (nationality is linked to the place of birth) or jus sanguinis (nationality is linked to the nationality held by one or both parents) or a combination of both.

The second element requires that the automatic grant of nationality does not oblige the player to ‘undertake any further administrative requirements’”.

The Commentary clarifies that FIFA acknowledges that nationality by *jus sanguinis* or *ius soli* is “automatically” obtained and that the formalities necessary to get it are not to be considered “further administrative requirements”.

To sum up, FIFA rules recognise the primary importance of the player’s nationality to allow the applicant to play in the representative team of the relevant state. Such status will have to be in accordance with the rules of the relevant country to assess whether the applicant has already met this requirement (“*bold nationality*”) or has to go through a specific administrative procedure (“*being eligible to obtain nationality*”). Whether the player holds nationality due to childbirth, passports and other similar certificates to obtain citizenship must be considered formalities and cannot prevent the acquisition of sporting nationality.

2. Acquisition of Albanian citizenship under Albanian law

Law 113/2020 stresses the concept of citizenship as “*the stable legal bond*” that only can grant to an individual to exercise rights and the duty to comply with obligations in the

Albanian State. Notably, the Panel observes that Law 113/2020 provides two significant events to obtain Albanian citizenship by parenthood or kinship:

- Article 5 – Acquisition of citizenship by birth:

“Anyone born to at least one parent who is an Albanian citizen shall automatically acquire Albanian citizenship and shall be registered as an Albanian citizen. The entitlement to register as an Albanian citizen shall not expire after the person has reached 18 (eighteen) years of age”.

- Article 6 - Acquisition of citizenship by descent:

“1. A foreign citizen whose ancestors are of Albanian descent shall acquire Albanian citizenship, provided that a direct lineal kinship up to the third degree established between the applicant and their ancestor.

2. In such case, the citizen shall submit an application to acquire Albanian citizenship by descent and shall fulfil the requirements under Article 8(1)(db) and (ë) of this Law.

3. The documentation required to establish Albanian descent shall be defined in an instruction by the Minister”.

It remains understood that the Law at stake recognises the idea of nationality as that personal link and cultural heritage originated from birth between an individual and the country of the parents, the primary requirement for obtaining “*automatically*” citizenship. Such “*national*” bound is so essential that it entitles the applicant to be registered as an Albanian citizen even after 18 years of age.

3. Cumulative prerequisites of art. 9 para. 2 of the FIFA New Eligibility Rules regarding requests to change associations

Rules about participation in official matches are provided to determine the different situations in which the player can represent the relevant national team. According to Article 9 para. 1 of the Regulations, “a player may, only once, request to change the association for which he is eligible to play to the association of another country of which he holds the nationality”. Pursuant to Article 9 para. 2 (a) of the Regulations, the granting of such a request requires a demonstration that:

- i. The player has not been fielded at the “A” level for his current nationality; and
- ii. At the time of being fielded for his first match in official competition at the non-“A” level for his current association, the player “*already held*” the nationality of the association which he wishes to represent.

As provided by FIFA’s Regulations, these two prerequisites are cumulative.

The Panel turns now its attention to the FAA’s request for change of association of the Player dated 21 May 2021 and the grounds of the Appealed Decision.

Both Parties confirm that Mr Bajrami has appeared in 31 official matches for the Swiss national football team, none of which were at the so-called “A” level (*i.e.*, with the senior Swiss national football team). Mr Bajrami played his first match for the Swiss U-15 national football team on 10 September 2013 and his last match for the Swiss U-21 national football team on 16 November 2020.

It is not contested that Nedim Bajrami is a professional football player born on 28 February 1999 in Switzerland by Albanian parents, as proved by the birth certificate of the Office of Civil Registry, issued on 19 March 2021. In this regard, on 18 May 2021, the Ministry of Interior of the Republic of Albania

issued [a second] attestation [that reads]: “[...] we confirm that the citizen Nedim Bajrami, born on 28.02.1999, has attained the Albanian nationality pursuant to the Law 113/2020 ‘On Citizenship’. Moreover, we hereby clarify that the citizen Nedim Bajrami, according to the abovementioned Law, has the Albanian nationality since birth, a right benefited from the applicant’s request, or his parents in case of minors under the age of 18, as per legal procedures in force”. The Player obtained an Albanian passport on 21 March 2021.

The FAA’s Second Request, dated 21 May 2021, was filed based on Article 9 para. 2 (a) of the Regulations. In its Request, the FAA submitted that Mr Bajrami (i) had obtained the Albanian nationality by descentance and owned an Albanian birth certificate and passport; (ii) benefited from the Albanian nationality since birth, according to an official statement by the Ministry of Interior of Albania issued on 18 May 2021; and (iii) has not been fielded by the Swiss national team at “A” level competitions. Furthermore, by communication on 23 February 2021, the Player had previously confirmed his will to play for the representative team of the FAA and was aware that his decision had definitive nature.

It is undisputed that the Player has never represented Switzerland in a match during an official competition at “A” international level and, consequently, the first prerequisite was fulfilled. Besides, when the FAA filed the Second Request, the Player held Albanian nationality. Therefore, the Panel will focus on this legal discussion whether the Player “*already held*” the Albanian nationality on the date of his first appearance for the Swiss national U-15 football team or whether he had to undertake “*further administrative requirements*” to obtain such nationality.

The Panel notes that the Player’s parents were of Albanian nationality but, even though he

could have filed a request to obtain citizenship under Article 5 of Law 113/2020, the Player's request was filed according to Article 6, triggering the requirements under Article 8 para. 1 (dh) and (ë). The Appealed Decision stated that these two requirements were considered substantial preconditions to obtain Albanian nationality. Therefore, the SJ stated that "33. [...] *although entitled to obtain the Albanian nationality as from birth – due to Albanian descent, it remains that the Player did not hold it until he formally requested (and obtained) it in March 2021*" and "34. [...] *(the Player) did in fact not hold the nationality of Albania at the time he played his first match in an official competition for the ASF-SFV on 24 April 2014*".

The Panel finds that, despite the Law conditions under which the request to obtain citizenship was filed (Art. 5 or 6), the Player held Albanian nationality by birth since he was born by Albanian parents.

Firstly, as above outlined, Article 5 of the Regulations provides that nationality by birth, in line with the principle of *ius sanguinis*, is obtained automatically without undertaking "further administrative requirements". These requirements are considered substantial preconditions, and, if needed, the player is considered only eligible to obtain the relevant nationality. The Panel finds that "substantial preconditions" are needed to move from a previous legal *status* to the one related to the acquired nationality, namely what is stated in the FIFA's Commentary: "to abandon another nationality" or "substantial waiting period following childbirth". In these cases, the player is expected to undertake actions that will bring him into a new status due to his voluntary and conscious choice.

More to the point, the Albanian Ministry of Interior only considered that the Player was born by Albanian parents to grant him the requested citizenship, as clearly stated in the

official declaration issued on 18 May 2021. This is the reason why the Albanian authorities never asked for full documentary evidence under Article 8 para. 1 (dh) and (ë).

These findings also comply with the New Eligibility Rules' principles to avoid "excessive severity or hardship" in deciding nationality requests. The Player was born by Albanian parents; his mother tongue is Albanian; he was nourished in Albanian culture so much that he spontaneously decided to obtain such nationality as of definitive choice. To deny the Player's will would contradict the spirit of the rule and the very definition of nationality as outlined by FIFA, far from the undesirable "nationality shopping".

Decision

The appeal filed by the Football Association of Albania and Mr Nedim Bajrami on 23 June 2021 is upheld. The decision rendered by the Single Judge of the FIFA Players' Status Committee on 27 May 2021 is annulled. Mr Nedim Bajrami is an Albanian national and is eligible to represent Albania under Article 9 of the Rules Governing the Application of the FIFA Statutes. All other motions or prayers for relief are dismissed.

CAS 2021/A/8221

Kayserispor KD v. Robert Prosinecki

21 April 2022

Football; Employment-related dispute; Implicit choice of law; Contract modification as a result of change of circumstances; Entitlement to bonus due to non-relegation; Default interest rate under Swiss law

Panel

Prof. Ulrich Haas (Germany), Sole Arbitrator

Facts

Kayserispor Kulübü Derneği (the “Appellant” or “Club”) is a professional football club with its registered office in Kayseri, Turkey. The Club is a member of the Turkish Football Federation (“TFF”), which is in turn affiliated with the Fédération Internationale de Football Association (“FIFA”).

Roberto Prosinecki (the “Respondent” or “Coach”) was born on 12 January 1969 and is of Croatian nationality.

On 13 January 2020, the Club and the Coach signed an employment agreement (the “Employment Agreement”), valid until 31 May 2020, or any other date marking the end of the 2019/2020 Turkish football championship. Pursuant to this Agreement, the Coach was entitled to a total salary of EUR 325,000.00, as well as a bonus payment of EUR 250,000.00, subject to his team remaining in the top-tier Turkish Super League. Any future disputes arising between the Parties were to be resolved by FIFA bodies and the Court of Arbitration for Sport (CAS).

On 19 March 2020, the TFF announced that all football activities in Turkey would

immediately be suspended until further notice due to the COVID-19 pandemic.

Between 12 June 2020 and 26 July 2020, the remaining eight football matches of the Turkish football championship were played.

On 26 July 2020, the Club finished the Turkish Super League in the 17th place, synonymous with relegation to the second tier of the championship.

On 29 July 2020, the TFF announced that, due to the COVID-19 pandemic, no club would be relegated to a lower league for the 2019-2020 season in the top-tier Turkish Super League and that the latter would consist of 21 teams for the 2020-2021 season.

On 5 April 2021, the Coach lodged a claim with the FIFA Players’ Status Committee (FIFA PSC) against the Club for breach of the Employment Agreement. The Coach submitted that the Club failed to pay his salaries for the months of April and May 2020, and requested to receive additional remuneration for the months of June (in full) and July (in part), for a total amount of EUR 251,333.00. In addition, he claimed the payment of EUR 250,000.00, corresponding to the bonus provided for in case of non-relegation.

On 17 June 2021, the FIFA PSC rendered its decision (the “Appealed Decision”), by which it partially accepted the Coach’s claim. It found that the Club was liable to pay him outstanding salary (EUR 130,000.00) and bonus (EUR 250,000.00), plus 5% p.a. interest rate.

On 9 August 2021, the Club lodged an appeal against the Coach in relation to the Appealed Decision pursuant to Article R51 of the CAS Code of Sports-related Arbitration (the “CAS Code”).

Reasons

In the case of long-term contracts, the problem often arises that the external circumstances under which the contract was concluded change in the course of time. This problem became even more acute during the COVID-19 outbreak, which led to serious disruptions in the field of football.

The main dispute in these proceedings revolved around the Coach's entitlement to a bonus for non-relegation provided for in the Employment Agreement, whereas no team in the Turkish Super League had been relegated during the 2019-2020 season due to an administrative decision.

The Parties to the dispute had diametrically opposed views on this issue: the Appellant argued that such a clause was only meant to reward sporting merit in light of subjective methods of interpretation internationally, while the Respondent stated that it was operative regardless of the reasons for non-relegation.

For the remainder, the Parties concurred that the outstanding salary had been properly calculated by the FIFA PSC, but disagreed as to the applicable law and overall default interest rate.

This led the Sole Arbitrator to examine the issue of implicit choice of law, the conditions for contract modification as a result of change of circumstances (both generally and in the case at hand) and the relevant default interest rate.

1. Implicit choice of law

With regard to the applicable law, the Appellant maintained that this dispute should primarily be governed by Turkish law. In turn, the Respondent contended that the Parties agreed the dispute to be handled before FIFA

and CAS as appeal body and, thereby, implicitly referred to Swiss Law.

The Sole Arbitrator recalled that Article 187(1) of the Federal Act on Private International Law (PILA) enshrines the principle of party autonomy with respect to the applicable law. As a result, the parties are free to choose the law applicable to the merits of the dispute. Such choice of law may be made directly, by referring to a specific law, or indirectly, by referring to a "conflict-of-law" provision designating the applicable law to the merits. In addition, it is not required to take a particular form, and can be entered into either expressly or tacitly.

The Sole Arbitrator observed that the Employment Agreement contained an arbitration clause in favour of FIFA bodies and ultimately, CAS. He held that by doing so, the Parties had implicitly agreed that the arbitration proceedings would be governed by Article R58 of the CAS Code, which in turn led to the application of FIFA regulations and subsidiarily Swiss law, unless the application of Turkish law was deemed more appropriate.

2. Contract modification as a result of change of circumstances

While the Parties focused their argument on the relevant methods of contract interpretation, the Sole Arbitrator considered that the real question was whether and to what extent their common misconception of the future developments, in particular the consequences of the COVID-19 pandemic, had impacted the Employment Agreement.

The Sole Arbitrator underlined that, under Swiss law, contracts must be performed as agreed pursuant to the principle of *pacta sunt servanda*, regardless of whether the contract has become useless or burdensome for one of the parties. Exceptionally, though, a contract may

be modified by a judge or arbitrator if the circumstances have changed fundamentally. To this end, the change must have occurred after the conclusion of the contract, must not have been foreseeable or avoidable by the parties and must result in an obvious imbalance of the interests at stake. Finally, the risk associated with the changed circumstances must not have been assigned to one party by the contract or by law.

The Sole Arbitrator then applied these criteria to the case at hand, in order to definitively decide the issue of the Coach's entitlement to bonus due to his team's non-relegation.

3. Entitlement to bonus due to non-relegation

The Sole Arbitrator observed that the TFF's decision to renounce relegation for all teams at the end of the 2019/2020 season was a circumstance that occurred after the execution of the Employment Agreement and that was not foreseeable. It had the potential to disrupt the equivalence of the contract in that it created a significant windfall profit to the benefit of the Coach regardless of his sporting merit, and was not contractually rooted in the sphere of risk of the Appellant nor the Respondent.

The Sole Arbitrator concluded that the prerequisites for judicial adaptation were fulfilled, and that he could adjust the Employment Agreement to his discretion. In exercising his discretion, he endeavoured to consider the requirement of good faith and hypothetical will of the Parties. He decided to simply reduce the amount of the disputed clause to nothing, as it appeared to him that the Parties would simply not have entered into it had they contemplated the course of events that occurred.

4. Default interest rate under Swiss law

The Appellant challenged the application of Swiss law with regard to the default interest rate, which he considered excessive and inappropriate.

The Sole Arbitrator recalled that FIFA regulations, and more specifically the Regulations on the Status and Transfer of Players (RSTP), did not contain any provisions on the interest rate for outstanding salary claims. In line with his previous reasoning, he found that Swiss law shall apply subsidiarily, where the FIFA regulations contained a lacuna. He added that Swiss law was also the most appropriate law to deal with this matter, since the FIFA adjudicatory bodies constantly refer to the Swiss 5% default interest rate contained in article 73 of the Swiss Code of Obligations (CO) in their decisions.

Decision

In light of the foregoing, the Sole Arbitrator upheld the appeal. He retained that the decision issued by the FIFA PSC on 17 June 2021 should be annulled insofar as it awarded the Coach bonus payments under the Employment Agreement, and dismissed all further requests.

CAS 2021/A/8225

Emilian Hulubei v. Romanian Football Federation (RFF)

11 April 2022

Football; Validity of a decision of a federation’s executive committee; Standing to sue according to the RFF Statutes; Standing to be sued in general; Condition to grant declaratory relief; Standing to be sued alone as regards the formal validity of the federation’s decision; Standing to be sued alone as regards the substantial issues raised by the appellant

Panel

Mr Alexis Schoeb (Switzerland), Sole Arbitrator

Facts

Mr Emilian Hulubei (the “Appellant”) is the president of the football players’ union in Romania (“AFAN”) and, in that capacity, is a member of the Executive Committee of the Romanian Football Federation.

The Romanian Football Federation (the “Respondent” or the “RFF”) is the national governing body of football in Romania.

The “Brasov” case

The Romanian football club “CSM Corona Brasov” (“Corona Brasov”) was a public entity owned by the Brasov Municipality and played in the *Liga III* of the Romanian football league system.

At the end of the *Liga III* 2020/2021 season, Corona Brasov was promoted to play in the *Liga II* of the Romanian football league system.

On 25 June 2021, the Brasov Municipality agreed to transfer Corona Brasov’s right to participate in the *Liga II* to the football club “ACS FC Brasov” (“FC Brasov”), along with all the assets and liabilities of Corona Brasov.

The “Dacia” case

The Romanian football club “ACS Dacia Unirea Braila” (“ACS Dacia”) was a privately-owned football club playing in *Liga III* of the Romanian football league system which had entered into insolvency proceedings on 1 October 2018.

In March 2021, the Romanian football club “AFC 1919 Dacia Unirea Braila” (“1919 Dacia”) acquired the principal debts of ACS Dacia.

On 19 April 2021, the general assembly of the creditors of ACS Dacia approved a reorganisation plan under which, *inter alia*, ACS Dacia’s right to participate in RFF competitions was to be transferred to 1919 Dacia, along with its sporting record and the right to use its name and mark(s).

The Appealed Decisions

No action was filed against the favourable opinions of the RFF’s Legal Department in the “Brasov” and “Dacia” case regarding the above-mentioned transfer of rights and obligations, which were both submitted to the RFF’s Executive Committee for its approval pursuant to Article 4 par. 6 and 6.4 of the RFF’s Regulations for Organizing the Football Activity (“ROFA”).

During a meeting held on 19 July 2021 (the “Meeting”), the RFF’s Executive Committee passed the following decisions (the “Appealed Decisions”):

“The executive committee of the Romanian Football Federation,

[...]

- Approves with a majority of votes (one vote against) the concession of the right to participate in competition (2nd League) from CSM Corona Brasov to ACS Fotbal Club Brasov – Steagul Renaste. As a consequence, orders the affiliation ACS Fotbal Club Brasov – Steagul Renaste and the disaffiliation of CSM Corona Brasov.

[...]

- Approves with a majority of votes (one vote against) the concession of the right to participate in competition (3rd league) from ACS Dacia Unirea Braila to Asociatia Fotbal Club 1919 Dacia Unirea Braila. As a consequence, orders the affiliation Asociatia Fotbal Club 1919 Dacia Unirea Braila and the disaffiliation of ACS Dacia Unirea Braila”.

The Appellant was the only member of the RFF’s Executive Committee to vote against the approval of the applications filed by Corona Brasov and ACS Dacia.

On 9 August 2021, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the “CAS”) against the Respondent with respect to the Appealed Decisions.

Reasons

The present dispute concerns an appeal submitted against decisions issued by the Executive Committee of the RFF and revolves around the preliminary issues raised by the Respondent and, on substance, whether the Appealed Decisions comply with the statutes and regulations of the RFF.

While the Appellant claimed that the Appealed Decisions were null and void on the basis of alleged violations of procedural requirements and were made in breach of Article 70(2) of the RFF Statutes and Article 4(5) of the ROFA, the Respondent argued that the Appellant lacked a legal interest to lodge this appeal, objected that

the four clubs involved were not part of these proceedings although they were allegedly directly and legitimately interested and affected by this case and refuted any breach of the RFF regulations.

1. Standing to sue according to the RFF Statutes

The question of whether or not a party has standing to sue/appeal (or to be sued) is – according to the well-established CAS jurisprudence (see CAS 2020/A/7356; CAS 2020/A/6694; CAS 2016/A/4602; CAS 2013/A/3047; CAS 2008/A/1639) – an issue of substantive law.

The Sole Arbitrator thus noted, as the Panel did in the case CAS 2019/O/6383, that Article 48 para. 8 of the RFF Statutes expressly confers a right to appeal against a decision of the RFF Executive Committee to any of its members who voted against such decision and requested that his/her position be recorded in the minutes of the meeting.

In the present case, it is undisputed that the Appellant voted against the Appealed Decisions and requested that his position be recorded in the minutes of the RFF Executive Committee’s Meeting.

Consequently, the Sole Arbitrator concluded that the Appellant had the right to lodge this appeal and thus that the Respondent’s objection shall be rejected.

2. Standing to be sued in general

The Respondent is indeed the organisation (through one of its organs, the Executive Committee) that issued the Appealed Decisions and it is undisputed that it has standing to be sued in the present proceedings. However, the Respondent argued that the four clubs involved were not part of these

proceedings although they were legitimately interested and directly affected by this case. The Respondent thus objected that those four clubs should have been present in these proceedings in order to exercise their right of defence, because their sporting, financial and legal situation would be irreparably affected should the appeal be upheld.

The Appellant indicated that he directed his appeal solely against the Respondent alone because the Respondent namely, the Romanian Football Federation represents its members and, since no conclusions were taken against the clubs, there was no need to include them in the present proceedings.

The question at hand is therefore whether the Respondent had standing to be sued alone in the present proceedings. In other words, the question is whether the Appellant had to direct its Appeal also against the potentially affected four clubs, and, if so, what legal consequences follow from the Appellant's failure to do so.

On a general point of view, a sports federation such as the Respondent is deemed to be best suited to represent and defend the interests of its members in cases where a request for relief would have an indirect bearing on all its members (a similar reasoning was adopted in the case CAS 2016/A/4787).

However, this is not necessarily the case where a request for relief directly affects one or several specific members (CAS 2020/A/7061, para. 126). In this scenario, the appeal might also have to be directed against the potentially affected member(s) as co-respondent(s) alongside the sports federation from which the appealed decision emanates. This is indeed essential for an arbitral tribunal to ensure that the right to be heard of the member(s) concerned is respected (CAS 2019/A/6351).

Consequently, while noting that he would be in principle prevented from granting any request for relief that would directly affect the rights of an absent third party, the Sole Arbitrator deemed that he should deal with the Appellant's requests for relief in accordance with the above-mentioned test, *i.e.* in a manner which takes into account all the interests involved, the role assumed by the federation as well as the rights of defence and in particular the right to be heard of the directly affected parties.

3. Condition to grant declaratory relief

The Appellant sought to receive a declaratory award that would declare that the Appealed Decisions (a) were made in breach of the RFF Statutes and/or the ROFA and (b) were null and void.

In accordance with the CAS jurisprudence, declaratory reliefs can be granted only if the requesting party establishes a special legal interest to obtain such declaration (CAS 2009/A/1870, para. 132; CAS 2011/O/2574, para. 49; CAS 2011/A/2612, para. 48; CAS 2013/A/3272, para. 69).

Consequently, because the Appellant failed to show any further legal interest that he could have in the declarations sought under his prayers for relief (a) and (b), the Sole Arbitrator found such prayers inadmissible.

Secondly, the Sole Arbitrator noted that the Appellant requested “(c) *further or in the alternative, [to] set aside the Decisions*”.

The Sole Arbitrator noted that the Appellant's request for relief (c) rested on two distinct types of arguments. The first set of arguments raised by the Appellant strictly concerned the formal validity of the Appealed Decisions as RFF statutory provisions have been allegedly breached. The second set of arguments

concerned the application of the RFF regulations with respect to the RFF Executive Committee's approvals of the requests submitted by the clubs in the "Brasov" and "Dacia" cases. The different types of arguments raised by the Appellant imply a separate analysis of the question of who was best suited to defend the Appealed Decisions, especially considering the administrative nature of the present dispute.

4. Standing to be sued alone as regards the formal validity of the federation's decision

In substance, the Appellant alleged that the Appealed Decisions were null and void as a consequence of several procedural violations of the RFF Statutes.

The Sole Arbitrator considered that, despite the fact that third parties would be directly affected by the potential incorrect application of procedural rules by the Respondent, it seemed in principle, that the Respondent would be best suited to defend alone the application of its own procedural rules. For the sake of this specific issue, the Respondent might have standing to be sued alone in this procedure.

5. Standing to be sued alone as regards the substantial issues raised by the Appellant

The Appellant alleged that the Respondent breached several substantive rules when its Executive Committee decided to approve the "Brasov" and "Dacia" cases.

However, the Sole Arbitrator considered that the Respondent could not be best suited to defend alone the Appealed Decisions on the substantive issues raised by the Appellant and that the clubs concerned should have been part of the present proceedings in order to be able to defend their respective case. Indeed, a CAS panel is not in a position to decide whether the

appealed decision complied with a sports federations' substantive rules where the analysis of the compliance of the appealed decision with the sports federation's rules would require a concrete assessment of the applications submitted by the clubs directly affected by the outcome of the appeal as well as an analysis of the supporting documentation. Thus, the federation lacked standing to be sued alone in connection with such appealed decisions, and the appellant erred in filing his appeal only against the federation and not also against the clubs directly affected by the outcome of this appeal.

Decision

In light of the foregoing, the Sole Arbitrator decided to dismiss the appeal filed on 9 August 2021 by Mr Emilian Hulubei against the Appealed Decisions issued by the Executive Committee of the Romanian Football Federation on 19 July 2021 and to confirm the Appealed Decisions issued by the Executive Committee of the Romanian Football Federation on 19 July 2021.

CAS 2021/A/8296

**World Anti-Doping Agency (WADA) v.
Fédération Internationale de Football
Association (FIFA) & Vladimir Obukhov**

16 June 2022

Football; Doping (methandienone); Non-binding force of CAS precedents; Purpose and limits of the provision on substantial assistance; Conditions for finding substantial assistance; Consequences of a finding of substantial assistance and determination of the period of ineligibility to be suspended

Panel

Prof. Luigi Fumagalli (Italy), President

The Hon. Annabelle Bennett AC SC
(Australia)

Mr Manfred Nan (The Netherlands)

Facts

Mr Vladimir Obukhov (the “Player” or the “Second Respondent”) is a professional football player of Russian nationality born on 8 February 1992. At the time of the doping control, the Player was playing for Torpedo Moscow FC (“Torpedo” or the “Club”), a club affiliated to the Russian Football Union (“FUR”).

On 20 March 2013, the Player underwent an out-of-competition doping control in Novogork (Russia). The sample collected was identified by code No. 2783469. On 30 August 2013, the National Anti-Doping Laboratory – MSU of Moscow, reported in the Anti-Doping Administration Management System (“ADAMS”) a negative result for the sample under code No. 2783469.

On 11 March 2021, FIFA sent the Player, through the FUR, a “Notification regarding a

potential anti-doping rule violation” as follows: “your sample no. 2783469 was ... reported as a “negative” finding in ... ADAMS although having resulted in an adverse analytical finding (AAF) for the prohibited substance Methandienone (S1.1a, Exogenous Anabolic Androgenic Steroids (AAS)). There is compelling evidence that efforts were made to cover up this AAF by means of an “alternative disappearing positive methodology” (alternative DPM) and to get rid of traces regarding this cover up. ... The presence of the above-mentioned prohibited substance in your sample constitutes a breach of the FIFA Anti-Doping Regulations (“FIFA ADR”) and may result in you being charged with an anti-doping rule violation of art. 7 FIFA ADR As a consequence you may be sanctioned with a period of ineligibility to play of four years if you cannot establish that the ADRV was not intentional On receipt of this letter, you have the opportunity to admit the anti-doping rule violation and potentially benefit from a reduction of the otherwise applicable period of ineligibility, if the FIFA Disciplinary Committee decides that an anti-doping rule violation has been committed, and/or to provide substantial assistance in discovering or establishing other anti-doping rule violations as set out in article 24 par. 1 FIFA ADR. ...”.

On the same day, 11 March 2021, FIFA also notified another former player of Torpedo, Mr Ivan Knyazev, of a possible anti-doping rule violation relating to a sample collected on 28 May 2013, reported as negative by the Moscow Laboratory, although it had resulted in an adverse analytical finding for the prohibited substance Methandienone, *i.e.* the same substance as the one detected in the Player’s sample.

On 22 March 2021, the Player, in a letter to FIFA, admitted his anti-doping rule violation and expressed his intention to provide substantial assistance to FIFA. In that regard, the Player stated the following: “... *it is crucial to mention that the Player strongly believes that at the time of the events in question there was a sophisticated doping scheme at FC Torpedo Moscow, where the*

Player was employed at that time, which included the manipulations with the prohibited substances given to the football players by the team doctor and being covered by all the persons involved. In this context, please note that the Player is willing to provide Substantial Assistance to FIFA as he possesses information which can result in discovering or bringing forward an anti-doping rule violation by another Person, in particular the doctor of FC Torpedo Moscow. ...”.

On 24 March 2021, FIFA informed the Player that disciplinary proceedings had been opened against him, for the potential breach of Article 17 of the FIFA Disciplinary Code (“FDC”). Noting the Player’s willingness to provide substantial assistance, FIFA invited him to provide the relevant information mentioned in his communication (including corroborating evidence and documentation).

On 4 May 2021, the Player answered the FIFA invitation, requesting the FIFA Disciplinary Committee to reduce the otherwise applicable sanction and impose a six-month period of ineligibility for substantial assistance, on the basis of information regarding a doping scheme allegedly orchestrated within the club of FC Torpedo Moscow by the club’s doctor (the “4 May Declaration”). Attached to the 4 May Declaration, the Player submitted to FIFA written statements signed by three other former players of Torpedo.

On 10 May 2021, FIFA informed the Player that his case would be submitted to the Disciplinary Committee for consideration and decision on 27 May 2021.

On 17 May 2021, the Player transmitted to FIFA a letter of the same date from FUR, regarding the results of internal investigation that the latter had conducted at the request of the Player.

On 27 May 2021, the FIFA Disciplinary Committee decided that the Player had

provided complete and credible substantial assistance regarding his case and considered that an effective suspension of six months, as proposed by the Player, remained within the acceptable range in the light of the specific circumstances of this case in accordance with the applicable FIFA ADR. As a result, the Disciplinary Committee determined that both the Player and FIFA sign a cooperation agreement, to be thereafter validated by the FIFA Disciplinary Committee, to confirm that the conditions for providing complete and credible substantial assistance had been met and that an effective suspension of six months was within the reasonable range in this matter. On 2 June 2021, the Player agreed to sign the cooperation agreement and accepted the sanction of a six-month period of ineligibility.

On 4 June 2021, the Disciplinary Committee provisionally suspended the Player in order to avoid any irreparable harm that might be caused to him by any delay in the negotiation and conclusion of the cooperation agreement. On 11 June 2021, a cooperation agreement (the “Cooperation Agreement”) was signed between FIFA and the Player.

On 14 July 2021, the FIFA Disciplinary Committee issued a decision (the “Decision”) as follows:

- “1. Mr Obukhov is declared ineligible for a period of six months starting from 2 June 2021 until 2 December 2021.*
- 2. The Cooperation Agreement signed by Mr Obukhov and FIFA is hereby ratified by the Disciplinary Committee and its terms are incorporated into this decision”.*

On 20 August 2021, FIFA transmitted the Decision to WADA. On 8 September 2021, WADA filed a Statement of Appeal with the CAS to challenge the Decision. WADA requested the Decision to be set aside and that the Player be declared ineligible for two years.

On 9 November 2021, FIFA, in a letter to the Player, invited him to supplement the already provided information. On 26 November 2021, the Player provided to FIFA three written statements of former players of Torpedo.

A hearing was held on 17 March 2022 by video link.

Reasons

1. Non-binding force of CAS precedents

The first issue to be examined in this arbitration concerned the “cooperation” rendered by the Player and whether it qualified as Substantial Assistance under the mentioned regulations.

The Panel noted that the issues involved in the application of the provisions regarding Substantial Assistance had been the object of a number of CAS awards invoked by the Parties, even though to draw diverging conclusions. In any case, with respect to the force of CAS precedents, the Panel recalled that each case had to be decided on its own facts and, *“although consistency ... [was] a virtue, correctness remain[ed] a higher one”*.

2. Purpose and limits of the provision on substantial assistance

As a starting point, the Panel underlined that the existing mechanism was meant to be essential in the fight against doping. It was therefore important that the objective of Article 20 of the FIFA ADR, *i.e.* to encourage athletes, subject to the imposition of an ineligibility period, to come forward if they are aware of doping offences committed by other persons, was not undermined by an overly restrictive application of the provision. At the same time, however, it was important that “benefits” to athletes would not be applied too

lightly, without clear evidence of Substantial Assistance: the fight against doping was a serious matter, and only effective assistance in its pursuit could entitle an athlete to obtain a benefit with respect to the ineligibility period he/she had to serve for his/her anti-doping rule violation.

3. Conditions for finding substantial assistance

The Panel recalled that Article 20, read in conjunction with Definition No 54, of the FIFA ADR determined the conditions under which Substantial Assistance given by a player could be recognized: (i) the Substantial Assistance could be provided to FIFA, a national federation, an anti-doping organization, a criminal authority or a disciplinary body; (ii) the Substantial Assistance had to result either in FIFA, the national federation, or the anti-doping organization discovering or establishing an anti-doping rule violation by another person, or in the criminal authority or the disciplinary body discovering or establishing a criminal offence or a breach of professional rules by another person; (iii) the player providing the Substantial Assistance had to both fully disclose in a signed written statement all information he/she possessed in relation to anti-doping rule violations, and fully cooperate with the investigation and adjudication of any case related to that information; (iv) the information provided had to be credible; and (v) the information provided had to either comprise an important part of any case that was initiated, or, if no case was initiated, have provided a sufficient basis on which a case could have been brought.

Turning to the dispute at stake, the Panel noted that it concerned in fact the final element, mentioned above, that needed to be satisfied in order to establish that Substantial Assistance was given, *i.e.* whether *“the information provided ... comprise[d] an important part of any case that is*

initiated, or, if no case is initiated, ... have provided a sufficient basis on which a case could have been brought". The other points were not in issue. The Panel was of the opinion that, for this element to be satisfied, it was not necessary that the information given by the Player had in itself been a sufficient basis to secure a finding of an anti-doping rule violation. Under Article 20 of the FIFA ADR, Substantial Assistance could also have resulted in "discovering" an anti-doping rule violation – irrespective of its subsequent "establishment", for which additional elements (such as a hearing of the accused) may have been needed.

On this basis, the Panel remarked that the Player, as soon as he had been notified of his potential anti-doping rule violation, had rendered the 4 May Declaration, giving details of a practice of the Doctor and the treatment he had been made to undergo around the date on which he had provided the urine sample that tested positive. Such declaration was to be read together with the statements signed by four other individuals, provided by the Player together with the 4 May Declaration, as well as by the events with respect to another player of the Club, who had tested positive for the same substance as the Player. The very statements of the Doctor to the FUR, however self-exculpating, had indirectly confirmed the credibility of the Player's indications regarding the medical *routine* followed at the Club. In other words, the Player's declarations appeared to the Panel to offer "*a sufficient basis on which a case could have been brought*" against the Doctor: the fact that no case had eventually been brought by FUR or FIFA went beyond the Player's control and responsibility. For the Panel therefore, the cooperation given by the Player had amounted to Substantial Assistance under Article 20 of the FIFA ADR.

4. Consequences of a finding of Substantial Assistance and determination of the period of ineligibility to be suspended

For WADA, the Decision to "reduce" the period of ineligibility imposed on the Player for his anti-doping rule violation was wrong, firstly, as the FIFA ADR, in fact, only allowed FIFA to "suspend" a portion of the ineligibility period, subject to later reinstatement if the Player ceased to co-operate.

The Panel found the position of WADA to be correct. Indeed, Article 20 of the 2012 FIFA ADR clearly indicated that the FIFA Disciplinary Committee could "suspend" a portion of ineligibility imposed. In other words, the FIFA Disciplinary Committee, if it wished the Player to serve only 6 months of ineligibility, had to impose a sanction of 24 months, and suspend a portion of such period corresponding to 18 months. The Decision, to the extent it had directly imposed a reduced sanction, had to be corrected.

WADA contended that the Decision was also wrong, secondly, to the extent that it had applied the maximum possible "reduction" of 75% in respect of entirely speculative information, unsupported by concrete evidence and useless. According to WADA, the Player was not entitled to the maximum possible suspension, taking account of the criteria to be applied in the assessment of the measure of "suspension" to be granted.

The Panel recalled that the criteria to be considered in the determination of the extent to which the otherwise applicable period of ineligibility could be suspended were i) the seriousness of the anti-doping rule violation; and ii) the significance of the Substantial Assistance rendered, provided however that iii) no more than three-quarters of the otherwise applicable period of ineligibility could be suspended. In connection with the seriousness of the anti-doping rule violation, any performance-enhancing benefit which the person providing Substantial Assistance could

be likely to still enjoy had to be considered, while in the assessment of the importance of the Substantial Assistance, a) the number of individuals implicated, b) the status of those individuals in the sport, c) whether a scheme of trafficking under Article 2.7 or administration under Article 2.8 of the WADC had been involved, and d) whether the violation had involved a substance or method which was not readily detectible in testing, were to be taken into account. As a general matter, the earlier in the results management process the Substantial Assistance was provided, the greater the percentage of the otherwise applicable period of ineligibility could be suspended. The maximum suspension of the ineligibility period was only to be applied in very exceptional cases.

The Panel held that, considering the mentioned relevant factors, FIFA had clearly exceeded the discretion it had in the evaluation of the measure of the benefit to be given to the Player for the Substantial Assistance he had provided. In fact, FIFA had applied a “reduction” in the maximum measure allowed by the rules (i.e., for 18 months). The Panel, however, was of the opinion that the case of the Player was not “very exceptional” and did not warrant such “reduction”. Even though qualifying as a Substantial Assistance (because it had offered a sufficient basis to bring a charge against the Doctor, or at least to lead to additional investigation as to the practices at the Club), the information provided had not led to any anti-doping rule violation being imposed or charged, and therefore had proved to be of little significance.

As a result, the Panel, in the exercise of its *de novo* power of review of the facts and the law under Article R57 of the CAS Code, found that the period of ineligibility to be imposed on the Player should be suspended only in the measure of 12 months. Even though the Substantial Assistance had not lead to any

further proceedings, it concerned an anti-doping rule violation that had occurred 8 years before it had been rendered, it had promptly been given as soon as the Player had received a notification of his potential anti-doping rule violation, it concerned the practice of a doctor, i.e. of an individual having peculiar responsibilities within a football club, it exposed a potential violation that could involve a number of other players and individuals.

Decision

In light of the foregoing, the Panel found that the Decision had to be partially modified, so that the otherwise applicable ineligibility period of two years was suspended in a measure of 12 months.

Jugements du Tribunal fédéral*
Judgements of the Federal Tribunal
Sentencias del Tribunal federal



* 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
Resúmenes de algunas sentencias del Tribunal Federal Suizo relacionadas con la jurisprudencia del TAS

4A_520/2021

4 mars 2022

A. c. Fédération Internationale de Football Association (FIFA)

Recours en matière civile contre la sentence rendue le 31 août 2021 par le Tribunal Arbitral du Sport (CAS 2019/A/6344)

Extrait des Faits

A. est un ressortissant xxx, né le _____, domicilié à xxx. Il était le vice-président de la Confédération Brésilienne de Football entre 2012 et 2015, avant d'en assumer la présidence du 16 avril 2015 au 15 décembre 2017. Il était aussi membre de divers Comités de la Fédération Internationale de Football Association (FIFA) ainsi que du Comité exécutif de la Confederación Sudamericana de Fútbol (CONMEBOL), association regroupant les fédérations nationales de football sud-américaines.

La FIFA, association de droit suisse ayant son siège à Zurich, est la structure faîtière du football au niveau international. Elle dispose d'un pouvoir disciplinaire sur les fédérations nationales de football, les joueurs ou les officiels qui méconnaîtraient ses règles, en particulier son Code d'éthique (ci-après: CEF).

La présente affaire concerne la participation alléguée de A. à un système de corruption impliquant d'autres officiels des organisations actives dans le domaine du football portant sur la vente de droits relatifs à plusieurs compétitions de football, qui a été révélé à la suite d'une longue enquête menée par les autorités américaines. A la suite de ces investigations, plusieurs individus, dont A., ont été inculpés aux États-Unis d'Amérique de diverses infractions, notamment de racket, de blanchiment d'argent et d'escroquerie par le moyen des télécommunications (wire fraud

conspiracies). Ces événements sont connus sous le nom de "FIFA-Gate".

Le 23 novembre 2015, la Chambre d'instruction de la Commission d'éthique de la FIFA a ouvert une procédure disciplinaire contre A. en raison de la violation possible par celui-ci de diverses dispositions du CEF.

La Chambre de jugement a rendu sa décision en date du 25 avril 2018. Retenant que A. avait violé les art. 13, 15, 19, 20 et 21 CEF, elle lui a interdit, à vie, d'exercer toute activité en lien avec le football à un niveau national et international, tout en lui infligeant, de surcroît, une amende de 1'000'000 fr.

Par décision du 7 février 2019, la Commission de recours de la FIFA (ci-après: la Commission de recours), saisie par A, a confirmé intégralement la décision rendue par la Chambre de jugement.

Le 17 juin 2019, A. a interjeté appel auprès du Tribunal Arbitral du Sport (TAS) aux fins d'obtenir l'annulation de la décision précitée. Dans sa déclaration d'appel, il a désigné Martin Schimke en tant qu'arbitre.

Le 1er juillet 2019, la FIFA a choisi Massimo Coccia comme arbitre.

Le 24 juillet 2019, le TAS a avisé les parties que la Formation serait présidée par Mark Hovell et leur a transmis une déclaration d'indépendance, signée par ce dernier, indiquant ce qui suit:

"FIFA are a party in another case I have on - CAS 2019/A/6229. I am President of that Panel".

Le 24 décembre 2019, les parties ont été informées de la désignation en qualité de greffier de Tiran Gunawardena, avocat exerçant ses activités au sein de la même étude d'avocats que le président de la Formation.

La Formation a tenu une audience par visioconférence le 13 octobre 2020. Au cours de celle-ci, l'appelant a requis la production de déclarations d'indépendance actualisées de la part des arbitres concernant d'éventuelles nominations de ceux-ci dans d'autres affaires impliquant la FIFA.

Le 16 octobre 2020, le TAS a transmis aux parties un exemplaire des documents en question. Dans sa déclaration d'indépendance actualisée, l'arbitre Hovell a notamment précisé ce qui suit:

*"Prior cases involving FIFA:
Numerous, however the ongoing matters are:*

- CAS 2019/A/6344*
- CAS 2019/A/6463 & 6464*
- CAS 2019/A/6778, 6779, 6827, 6828, 6829, 6936, 6937, 6967 (Appointed by FIFA)*
- CAS 2020/A/6767*
- CAS 2020/A/7008 & 7009 (Appointed by FIFA)*
- CAS 2020/A/7026*
- CAS 2020/A/6943*
- CAS 2020/A/7092*
- CAS 2020/A/7297*
- CAS 2020/A/7255, 7387, 7383*

Separately, I am aware that a colleague at my law firm (...) recently advised FIFA on an entirely unrelated matter involving GDPR / data protection. For the avoidance of any doubt I was not involved in that matter in any way.

I do not believe this compromises my ability to be a completely impartial and independent arbitrator in this case, however I wished to bring this to the parties' attention in the interest of complete transparency".

Le 21 octobre 2020, l'appelant s'est adressé au TAS aux fins d'obtenir des informations complémentaires de la part de Mark Hovell et du greffier Gunawardena.

En date du 23 octobre 2020, l'appelant a déposé une demande de récusation visant Mark Hovell et Tiran Gunawardena.

Le 26 octobre 2020, le TAS a indiqué aux parties que la demande de récusation était prématurée, dans la mesure où Mark Hovell et Tiran Gunawardena n'avaient pas encore répondu à la demande de renseignements complémentaires formulée par l'intéressé. Une fois ces informations recueillies, l'appelant pourrait choisir de déposer de nouveau sa demande de récusation (re-file his Challenge Petition") s'il le souhaitait.

Le 27 octobre 2020, le TAS a transmis aux parties des informations complémentaires fournies par Mark Hovell ainsi que par Tiran Gunawardena.

Le 3 novembre 2020, l'appelant a déposé une nouvelle fois une demande de récusation visant les deux hommes précités.

Par décision du 10 mai 2021, la Commission de récusation du Conseil International de l'Arbitrage en matière de Sport (CIAS) a rejeté ladite demande.

Statuant par sentence du 31 août 2021, le TAS, admettant partiellement l'appel, a confirmé la décision de la Commission de recours quant aux infractions au CEF commises par A.. Il a cependant réduit à 20 ans la durée de l'interdiction d'activité liée au football prononcée à l'encontre du prénommé, tout en entérinant le montant de l'amende qui lui avait été infligée.

Le 6 octobre 2021, A. (ci-après: le recourant) a formé un recours en matière civile aux fins d'obtenir l'annulation de la sentence précitée. Il demande aussi au Tribunal fédéral de prononcer la récusation de l'arbitre Hovell et

du greffier Gunawardena. Invoquant l'art. 190 al. 2 let. a et d LDIP, l'intéressé se plaint d'une composition irrégulière du tribunal arbitral et reproche aux arbitres d'avoir enfreint son droit d'être entendu.

Au terme de sa réponse du 1er décembre 2021, la FIFA (ci-après: l'intimée) a conclu au rejet du recours dans la mesure de sa recevabilité.

Dans son écriture du 1er décembre 2021, le TAS a déposé des observations sur le recours. En annexe à son écriture, il a produit une déclaration écrite de l'arbitre Hovell, dans laquelle celui-ci se détermine sur les critiques formulées par le recourant.

Le recourant, dans sa réplique du 20 décembre 2021, et l'intimée, dans sa duplique du 4 janvier 2022, ont maintenu leurs conclusions respectives.

Extrait des considérants

(...)

5.

Dans un premier moyen, fondé sur l'art. 190 al. 2 let. a LDIP, le recourant se plaint d'une composition irrégulière de la Formation qui a rendu la sentence attaquée.

5.1.

5.1.1. Un arbitre doit, à l'instar d'un juge étatique, présenter des garanties suffisantes d'indépendance et d'impartialité. Le non-respect de cette règle conduit à une désignation irrégulière relevant de l'art. 190 al. 2 let. a LDIP en matière d'arbitrage international. Pour dire si un arbitre présente de telles garanties, il faut se référer aux principes constitutionnels développés au sujet des tribunaux étatiques, en ayant égard, toutefois, aux spécificités de l'arbitrage - surtout dans le domaine de l'arbitrage international - lors de l'examen des circonstances du cas concret (ATF 142 III

521 consid. 3.1.1; 136 III 605 consid. 3.2.1; arrêts 4A_318/2020 du 22 décembre 2020 consid. 7.1 non publié aux ATF 147 III 65; 4A_292/2019 du 16 octobre 2019 consid. 3.1; 4A_236/2017 du 24 novembre 2017 consid. 3.1.1).

5.1.2. La garantie d'un tribunal indépendant et impartial découlant de l'art. 30 al. 1 Cst. permet d'exiger la récusation d'un juge dont la situation ou le comportement est de nature à susciter des doutes quant à son impartialité. Elle vise à éviter que des circonstances extérieures à l'affaire puissent influencer le jugement en faveur ou au détriment d'une partie. Elle n'impose pas la récusation seulement lorsqu'une prévention effective du juge est établie, car une disposition relevant du for intérieur ne peut guère être prouvée; il suffit que les circonstances donnent l'apparence de la prévention et fassent redouter une activité partielle du magistrat. Cependant, seules les circonstances constatées objectivement doivent être prises en considération; les impressions purement individuelles d'une des parties au procès ne sont pas décisives (ATF 144 I 159 consid. 4.3; 142 III 521 consid. 3.1.1; 140 III 221 consid. 4.1 et les références citées; arrêt 4A_318/2020, précité, consid. 7.2 non publié aux ATF 147 III 65).

5.1.3. Pour vérifier l'indépendance de l'arbitre unique ou des membres d'une formation arbitrale, il est possible de se référer aux lignes directrices sur les conflits d'intérêts dans l'arbitrage international, édictées par l'International Bar Association (IBA Guidelines on Conflicts of Interest in International Arbitration, approuvées le 22 mai 2004 et révisées le 23 octobre 2014 [ci-après: les lignes directrices IBA]). Ces lignes directrices, que l'on pourrait comparer aux règles déontologiques servant à interpréter et à préciser les règles professionnelles (ATF 140 III 6 consid. 3.1; 136 III 296 consid. 2.1), n'ont bien sûr pas valeur de loi et ce sont toujours les circonstances du cas concret qui sont décisives; elles n'en constituent pas

moins un instrument de travail utile, susceptible de contribuer à l'harmonisation et à l'unification des standards appliqués dans le domaine de l'arbitrage international pour le règlement des conflits d'intérêts, lequel instrument ne devrait pas manquer d'avoir une influence sur la pratique des institutions d'arbitrage et des tribunaux (ATF 142 III 521 consid. 3.1.2). Les lignes directrices IBA énoncent des principes généraux. Elles contiennent aussi une énumération, sous forme de listes non exhaustives, de circonstances particulières: une liste rouge, divisée en deux parties (situations dans lesquelles il existe un doute légitime quant à l'indépendance et l'impartialité, les parties ne pouvant pas renoncer aux plus graves d'entre elles); une liste orange (situations intermédiaires qui doivent être révélées, mais ne justifient pas nécessairement une récusation); une liste verte (situations spécifiques n'engendrant objectivement pas de conflit d'intérêts et que les arbitres ne sont pas tenus de révéler). Il va sans dire que, nonobstant l'existence de semblables listes, les circonstances du cas concret resteront toujours décisives pour trancher la question du conflit d'intérêts (ATF 142 III 521 consid. 3.2.1 et les références citées).

5.1.4. La partie qui entend récuser un arbitre doit invoquer le motif de récusation aussitôt qu'elle en a connaissance. Cette règle jurisprudentielle vise aussi bien les motifs de récusation que la partie intéressée connaissait effectivement que ceux qu'elle aurait pu connaître en faisant preuve de l'attention voulue (ATF 129 III 445 consid. 4.2.2.1 et les références citées), étant précisé que choisir de rester dans l'ignorance peut être regardé, suivant les cas, comme une manoeuvre abusive comparable au fait de différer l'annonce d'une demande de récusation (ATF 136 III 605 consid. 3.2.2; arrêt 4A_318/2020, précité, consid. 6.1 non publié aux ATF 147 III 65). La règle en question constitue une application, au domaine de la procédure arbitrale, du principe de la bonne foi. En vertu de ce

principe, le droit d'invoquer le moyen tiré de la composition irrégulière du tribunal arbitral se périmé si la partie ne le fait pas valoir immédiatement, car celle-ci ne saurait le garder en réserve pour ne l'invoquer qu'en cas d'issue défavorable de la procédure arbitrale. Une demande de révision fondée sur la prétendue partialité d'un arbitre ne peut ainsi être envisagée qu'à l'égard d'un motif de récusation que le recourant ne pouvait pas découvrir durant la procédure arbitrale en faisant preuve de l'attention commandée par les circonstances (arrêt 4A_318/2020, précité, consid. 6.1 non publié aux ATF 147 III 65 et les références citées).

L'art. R34 al. 1 du Code vient concrétiser cette règle jurisprudentielle en prescrivant que la récusation doit être requise dans les sept jours suivant la connaissance de la cause de récusation (arrêt 4A_260/2017 du 20 février 2018 consid. 4.1 non publié aux ATF 144 III 120).

5.2.

5.2.1. Le recourant déplore le manque d'indépendance et d'impartialité de l'arbitre Hovell. Il lui reproche d'avoir enfreint volontairement et de manière répétée son devoir de révélation, en ne divulguant notamment pas une circonstance figurant dans la liste orange des lignes directrices IBA, à l'art. 3.1.3, à savoir le fait qu'il avait été nommé à deux reprises ou plus comme arbitre par l'intimée au cours des trois dernières années. Il est d'avis que le fait, pour l'arbitre, d'avoir été nommé à plusieurs reprises par l'intimée dans d'autres procédures constitue en soi une circonstance de nature à remettre en cause son indépendance et son impartialité. Le recourant fait en outre grief à l'arbitre Hovell et au greffier Gunawardena d'avoir dissimulé le fait que le cabinet d'avocats dans lequel ils exercent leurs activités avait conseillé l'intimée sur des questions ayant trait à la protection des données.

Pour étayer son moyen, le recourant relève que l'arbitre Hovell n'a révélé, dans sa première déclaration d'indépendance du 23 juillet 2019, qu'une seule affaire concernant l'intimée sans mentionner spontanément les autres procédures impliquant celle-ci dans lesquelles il avait été nommé arbitre. Dans sa deuxième déclaration d'indépendance, transmise aux parties le 16 octobre 2020, l'arbitre a fait état de dix procédures auxquelles l'intimée était partie. Le recourant observe que la liste des dossiers figurant dans cette déclaration d'indépendance faisait état de plusieurs procédures qui avaient été jointes et qui, comptabilisées individuellement, représentaient 21 affaires, dont 10 où l'arbitre concerné avait été désigné arbitre par l'intimée. Il souligne aussi que l'arbitre, dans sa troisième déclaration d'indépendance datée du 23 octobre 2020, a révélé l'existence de 16 autres procédures impliquant l'intimée (respectivement 19 en faisant abstraction des jonctions de causes), dans lesquelles il avait été nommé arbitre au cours des trois années précédant sa nomination en tant que président de la Formation dans la présente cause. Le recourant insiste sur le fait que l'arbitre mis en cause a fait état de 26 affaires (voire même de 40 en faisant abstraction des causes consolidées) auxquelles l'intimée était partie et où il siégeait en tant qu'arbitre. Il relève que l'arbitre, durant les trois années précédant sa désignation en tant que président de la Formation dans la présente espèce, a été nommé directement par l'intimée dans onze causes, qui ont ensuite été jointes en trois procédures distinctes.

5.2.2. L'intimée objecte, principalement, que le droit du recourant d'invoquer l'art. 190 al. 2 let. a LDIP est périmé. A cet égard, elle souligne que les avocats qui représentaient le recourant devant le TAS dans le cadre de la présente cause savaient, dès le 2 octobre 2020, que l'arbitre incriminé avait été désigné dans d'autres procédures impliquant l'intimée et que l'étude d'avocats dans lequel ce dernier exerce ses activités avait conseillé l'intimée en

matière de protection des données. Ces éléments mentionnés dans la deuxième déclaration d'indépendance du 16 octobre 2020 de l'arbitre mis en cause avaient en effet déjà été révélés le 2 octobre 2020 par celui-ci dans le cadre d'autres procédures arbitrales impliquant les conseils du recourant. La connaissance de telles circonstances par les mandataires de ce dernier devait ainsi être directement attribuée au représenté. Or, nonobstant le fait qu'ils avaient connaissance de ces éléments, les conseils du recourant ont attendu la fin de l'audience tenue le 13 octobre 2020, soit 11 jours plus tard, pour demander aux membres de la Formation de compléter leurs déclarations d'indépendance. L'intimée est dès lors d'avis que le recourant est forcé à demander la récusation de l'arbitre Hovell et du greffier Gunawardena puisqu'il n'a pas agi dans les sept jours suivant la connaissance des motifs de récusation ni respecté son devoir de curiosité.

A titre subsidiaire, l'intimée conteste que les raisons invoquées par le recourant suffisent à justifier la récusation de l'arbitre et du greffier mis en cause. Se référant au chiffre 5 de la partie II des lignes directrices IBA, intitulée "Application Pratique des Règles Générales", elle souligne qu'une demande de récusation fondée sur le fait qu'un arbitre n'a pas révélé certains éléments ne devrait pas donner lieu automatiquement à une récusation ultérieure de celui-ci, dès lors que le défaut de révélation ne peut pas, en soi, rendre un arbitre partial ou non indépendant, seuls les faits ou les circonstances que l'arbitre n'a pas divulgués étant susceptibles d'établir un éventuel défaut d'impartialité ou d'indépendance de sa part. Elle soutient par ailleurs que le fait pour l'arbitre Hovell d'avoir été nommé à diverses reprises par elle au cours des trois dernières années précédant sa désignation en tant que président de la Formation dans la présente cause ne saurait justifier sa récusation. A cet égard, l'intimée souligne que, selon la note explicative 5 relative à l'art. 3.1.3 des lignes directrices IBA, si, dans certains domaines particuliers tel l'arbitrage sportif, il est d'usage

pour les parties de nommer fréquemment le même arbitre dans des litiges différents, aucune révélation de ce fait n'est alors requise puisque toutes les parties à l'arbitrage devraient être familières avec cette pratique. Elle ajoute que le nombre de nominations de l'arbitre Hovell par ses soins au cours des trois dernières années est insignifiant lorsqu'on tient compte du fait qu'elle a pris part à plus de 400 procédures devant le TAS au cours de cette même période, ce qui implique qu'elle a nécessairement dû désigner à plusieurs reprises les mêmes arbitres au cours de ce laps de temps. Elle observe, par ailleurs, que les deux autres arbitres de la Formation ayant statué dans la présente cause, Martin Schimke et Massimo Coccia, ont été nommés par elle respectivement trois et six fois durant la même période, sans pour autant être en l'occurrence visés par une demande de récusation. Quant au fait que l'étude d'avocats dans lequel l'arbitre et le greffier mis en cause exercent leurs activités a prodigué des conseils en matière de protection des données à l'intimée, celle-ci juge cette circonstance non susceptible de remettre en cause leur indépendance et leur impartialité.

5.2.3. De son côté, le TAS s'emploie à démontrer le caractère infondé du moyen pris de la composition irrégulière du tribunal arbitral. Il insiste notamment sur le fait que l'intimée joue souvent le rôle dévolu à une autorité de première instance appelée à trancher divers litiges en matière de football et qu'elle est ainsi souvent atraite devant lui, aux côtés de l'intimé principal, par précaution, afin que la sentence arbitrale lui soit opposable. L'intimée ne participe généralement pas activement à de telles procédures et laisse souvent l'intimé principal désigner un arbitre de son choix. Le TAS précise que l'arbitre Hovell a été nommé arbitre dans diverses procédures impliquant l'intimée en qualité de "co-intimée passive" à l'appel. A son avis, ces affaires-là ne devraient pas être prises en considération dans le décompte des nominations selon l'art.

3.1.3 des lignes directrices IBA. Le TAS indique que l'arbitre mis en cause a été désigné à 13 reprises dans des procédures où l'intimée était l'intimée principale. Aucune de ces causes ne portait sur des faits de corruption. Le TAS rappelle en outre que l'arbitre Hovell n'a été nommé directement par l'intimée qu'à trois reprises au cours de la période 2018-2020. Se référant à la décision rendue le 10 mai 2021 par la Commission de récusation du CIAS, le TAS souligne enfin que celle-ci a retenu que les conseils du recourant connaissaient, depuis le 2 octobre 2020, l'existence d'un mandat confié par l'intimée au cabinet d'avocats dans lequel officie l'arbitre et que ceux-ci ne s'en sont pas plaints en temps utile dans la présente cause, sous prétexte d'un problème de confidentialité inexistant.

5.2.4. Pour sa part, l'arbitre rappelle que sa pratique - jugé erronée par la Commission de récusation - consistait à ne révéler que les affaires en cours impliquant l'une des parties au litige et indique avoir modifié sa pratique depuis lors. Il conteste cependant toute intention d'avoir voulu cacher délibérément et de manière répétée certaines informations aux parties. Il estime que le recourant est forclos à fonder sa demande de récusation sur les circonstances qui ont été révélées à ses avocats dans le cadre d'une procédure parallèle le 2 octobre 2020, dès lors que ceux-ci ont attendu plus de onze jours avant de requérir des explications complémentaires de sa part. S'agissant de la problématique afférente à ses nominations répétées, l'arbitre relève que, selon l'art. 3.1.3 des lignes directrices IBA, seules les affaires dans lesquelles un arbitre est nommé par une partie doivent être prises en considération. Or, l'arbitre Hovell souligne qu'il n'a été désigné directement par l'intimée que dans trois procédures (1. TAS 2018/A/5915; 2. TAS 2019/A/6778, 6779, 6827, 6828, 6829, 6936, 6937 et 6967; 3. TAS 2020/A/7008 et 7009), en tenant compte des jonctions de causes, durant la période visée par l'art. 3.1.3 des lignes directrices IBA. Il estime que rien

ne justifie de faire abstraction des jonctions de causes et de décomposer celles-ci séparément. Il précise que les affaires TAS 2019/A/6778, 6779, 6827, 6828, 6829, 6936, 6937 et 6967 portaient toutes sur le point de savoir si une équipe de football avait succédé à un club tombé en faillite et devait ainsi répondre des dettes contractées par celui-ci à l'égard des divers créanciers, raison pour laquelle les parties avaient décidé de joindre les causes afin qu'une seule formation arbitrale tranche l'intégralité du litige. L'autre affaire consolidée (TAS 2020/A/7008 et 7009) concernait un seul et même club de football lequel s'était vu infliger des amendes pour avoir prétendument commis deux infractions à une seule et même réglementation édictée par l'intimée, raison pour laquelle les deux causes avaient été jointes. L'arbitre souligne que si l'on devait suivre l'approche préconisée par le recourant consistant à comptabiliser séparément chaque nomination d'un arbitre, en faisant totalement abstraction des jonctions de causes, il ne faudrait pas longtemps pour que tous les arbitres figurant sur la liste des arbitres du TAS en matière de football dépassent le nombre visé par l'art. 3.1.3 des lignes directrices IBA.

5.2.5. Dans sa réplique, le recourant fait valoir que l'arbitre incriminé n'a qu'une pratique: celle de la dissimulation assumée. Ce dernier n'a, à son avis, pas agi par erreur mais a adopté un comportement clairement intentionnel consistant à passer sous silence de nombreuses affaires dans lesquelles il avait été " impliqué aux côtés de l'intimée ". Le recourant s'emploie ensuite à démontrer que la demande de récusation a bel et bien été formée à temps, raison pour laquelle la Commission de récusation du CIAS ne l'a du reste pas jugée irrecevable. Le recourant reproche ensuite à l'arbitre Hovell de n'avoir pas adopté une attitude transparente et d'avoir dissimulé de nombreuses procédures impliquant l'intimée dans lesquelles il avait siégé en tant qu'arbitre. Elle observe en outre que ce dernier n'a pas révélé, dans sa

première déclaration d'indépendance, l'existence d'une procédure arbitrale dans laquelle l'intimée l'avait choisi comme arbitre (TAS 2018/A/5915). Le recourant conteste en outre la position selon laquelle il n'existerait une obligation de révélation pesant sur l'arbitre que lorsque la partie l'ayant désigné joue un rôle " actif " dans la procédure arbitrale. Il estime, par ailleurs, que rien ne justifie de ne pas décomposer séparément les procédures ayant fait l'objet d'une jonction de causes. Il relève enfin que les tentatives de l'arbitre mis en cause de justifier son comportement en vertu de pratiques contradictoires et infondées dénotent une attitude partielle de sa part justifiant sa récusation.

5.3. Avant d'examiner la recevabilité et, le cas échéant, le mérite des critiques formulées par le recourant, il sied de rappeler que la Commission de récusation du CIAS a rejeté, par décision du 10 mai 2021, la demande de récusation de l'arbitre Hovell et du greffier Gunawardena formée par le recourant. Émanant d'un organisme privé, ladite décision, qui ne pouvait pas faire l'objet d'un recours direct au Tribunal fédéral, ne saurait lier ce dernier (ATF 138 III 270 consid. 2.2.1; arrêts 4A_404/2021 du 24 janvier 2022 consid. 5.1.2; 4A_287/2019 du 6 janvier 2020 consid. 5.2 et la référence citée). La Cour de céans peut donc revoir librement si les circonstances invoquées à l'appui de la demande de récusation sont de nature à fonder le grief de désignation irrégulière de la Formation du TAS comprenant l'arbitre et le greffier incriminés (ATF 128 III 330 consid. 2.2). Cela étant, le Tribunal fédéral examinera le moyen pris de la composition irrégulière de la Formation du TAS sur le vu des seuls faits constatés dans la décision prise par la Commission de récusation du CIAS au sujet de la demande de récusation (arrêt 4A_234/2010 du 29 octobre 2010 consid. 2.2 non publié aux ATF 136 II 605).

5.4. L'intimée soutient que le recourant serait, en l'occurrence, forclos à se plaindre

de la composition irrégulière du tribunal arbitral.

5.4.1. La jurisprudence impose aux parties un devoir de curiosité quant à l'existence d'éventuels motifs de récusation susceptibles d'affecter la composition du tribunal arbitral (ATF 147 III 65 consid. 6.5; 136 III 605 consid. 3.4.2). Une partie ne peut dès lors se contenter de la déclaration générale d'indépendance faite par chaque arbitre mais doit au contraire procéder à certaines investigations pour s'assurer que l'arbitre offre des garanties suffisantes d'indépendance et d'impartialité (ATF 147 III 65 consid. 6.5).

5.4.2. En l'espèce, il ressort de la décision rendue par la Commission de récusation du CIAS (n. 53-56) que le conseil qui représentait le recourant devant le TAS a eu connaissance, dès le 2 octobre 2020, du fait que l'arbitre incriminé avait été désigné dans d'autres procédures auxquelles était partie l'intimée et de la circonstance selon laquelle l'étude d'avocats dans lequel ce dernier exerce ses activités avait conseillé l'intimée en matière de protection des données, dès lors que ces informations avaient été divulguées par l'arbitre mis en cause dans le cadre d'autres procédures arbitrales impliquant le mandataire du recourant. Selon la jurisprudence, la connaissance de telles circonstances par le conseil du recourant est imputable à son mandant directement (arrêt 4A_110/2012 du 9 octobre 2012 consid. 2.2.2). Par conséquent, les règles de la bonne foi exigeaient du recourant, sinon qu'il sollicite la récusation de l'arbitre concerné dans le délai de sept jours fixé par l'art. R34 du Code après avoir pris connaissance de ces informations, à tout le moins, pour remplir son devoir de curiosité, qu'il demande formellement au TAS, dans le respect dudit délai, des précisions complémentaires au sujet des circonstances révélées par l'arbitre. En l'occurrence, il est établi que le recourant a attendu, sans raison valable, la fin de l'audience tenue le 13 octobre 2020, soit 11

jours plus tard, avant de demander aux membres de la Formation de compléter leurs déclarations d'indépendance. Dans ces conditions, il y a lieu d'admettre que l'intéressé est forclos à remettre en cause la régularité de la composition de la Formation dès lors que ce dernier n'a pas satisfait à son devoir de curiosité. Que la Commission de récusation du CIAS soit entrée en matière sur la demande de récusation qui lui était soumise n'y change rien, dans la mesure où le Tribunal fédéral n'est pas lié par une telle décision. Il suit de là que le grief soulevé par le recourant est frappé de forclusion.

5.5. A le supposer recevable, ce qui n'est pas le cas, le moyen considéré serait de toute manière infondé.

Le recourant fonde, dans une large mesure, son argumentation sur le fait que l'arbitre mis en cause n'a pas respecté son devoir de révélation. Il insiste sur l'obligation, ancrée à l'art. 179 al. 6 LDIP (dans sa version en vigueur depuis le 1er janvier 2021) et à l'art. R33 du Code, faite à l'arbitre de révéler sans retard l'existence des faits qui pourraient éveiller des doutes légitimes sur son indépendance ou son impartialité, ladite obligation perdurant jusqu'à la clôture de la procédure arbitrale. Contrairement à ce que semble sous-entendre le recourant, la violation du devoir de révélation ne saurait cependant constituer, à elle seule et en l'absence d'autres circonstances corroboratives, un motif de récusation, étant précisé qu'un arbitre n'est tenu de révéler que les éléments qui peuvent susciter des doutes légitimes quant à son impartialité (arrêt 4A_462/2021 du 7 février 2022 consid. 4.3.3). En l'occurrence, la Commission de récusation a critiqué, à bon droit, l'approche suivie par l'arbitre mis en cause consistant à ne révéler que les affaires en cours et à ne pas tenir régulièrement informées les parties chaque fois qu'il siège en tant qu'arbitre dans une nouvelle procédure impliquant l'une des parties au litige (n. 44). Cela étant, rien n'indique que

cette pratique, certes inappropriée et contraire aux exigences liées au devoir de révélation, était le fruit d'une volonté délibérée de l'intéressé de dissimuler certaines informations aux parties. Force est du reste de souligner que l'arbitre Hovell a fini par fournir, à la demande du recourant, toutes les précisions complémentaires requises par lui. Contrairement à ce qu'affirme le recourant, on ne saurait ainsi voir dans les erreurs et les imprécisions commises par l'arbitre en matière de révélation une forme de "dissimulation assumée".

Quoi qu'il en soit, les informations non révélées dans un premier temps par l'arbitre Hovell ne sauraient justifier sa récusation.

S'agissant de la problématique afférente aux nominations répétées dudit arbitre, il ressort des faits constatés par la Commission de récusation du CIAS - qui lie la Cour de céans (cf. consid 5.3) - que l'arbitre incriminé a siégé dans 26 procédures auxquelles était partie l'intimée au cours des trois années précédant sa désignation en qualité de Président de la Formation dans la présente cause (n. 68). Aussi est-ce en vain que le recourant fait état de 40 procédures car, ce faisant, il s'écarte de manière inadmissible des faits constatés par la Commission de récusation du CIAS. Au demeurant et contrairement à ce que tente de faire accroire le recourant, le nombre de procédures impliquant l'intimée dans lesquelles l'arbitre Hovell a siégé n'est pas décisif pour apprécier son indépendance et son impartialité. Seules les procédures dans lesquelles l'arbitre mis en cause a été désigné par l'intimée et non par une partie adverse ou par le TAS sont en effet des circonstances de nature à éveiller des doutes quant à son impartialité.

En l'occurrence, il ressort de la décision rendue par la Commission de récusation du CIAS que l'arbitre Hovell a été nommé à trois reprises par l'intimée directement (ou par l'une de ses co-intimées) au cours des trois

années précédant sa nomination par le TAS dans la présente cause, ce qui pourrait, à première vue, susciter certaines interrogations au regard de l'art. 3.1.3 des lignes directrices IBA. Cela étant, il ne faut pas perdre de vue que ce sont toujours les circonstances du cas concret qui sont décisives pour vérifier l'indépendance et l'impartialité d'un arbitre. A cet égard, il convient de rappeler que l'arbitrage en matière de sport institué par le TAS présente des particularités qui ont déjà été mises en évidence par ailleurs (ATF 129 III 445 consid. 4.2.2.2), telle la liste fermée d'arbitres. La note explicative 5 relative à l'art. 3.1.3 des lignes directrices IBA tient compte du reste de ces spécificités puisqu'elle mentionne qu'il peut être fait abstraction du critère formel relatif au nombre de nominations d'un arbitre dans certains domaines particuliers tel l'arbitrage sportif. En l'espèce, l'intimée a exposé, sans être véritablement contredite sur ce point par le recourant, qu'elle a pris part à plus de quatre cents procédures devant le TAS au cours des trois années précédant la nomination de l'arbitre Hovell dans la présente cause, ce qui signifie qu'elle a nécessairement dû désigner à plusieurs reprises les mêmes arbitres. Eu égard aux spécificités de l'arbitrage sportif, force est ainsi d'admettre que la désignation de l'arbitre Hovell par l'intimée, au cours de la période considérée, dans trois affaires ne présentant aucun lien avec la présente procédure, n'est, en l'absence d'autres circonstances corroboratives, pas de nature à éveiller des doutes légitimes quant à l'impartialité ou à l'indépendance dudit arbitre. Il sied au demeurant de relever que les désignations répétées d'un arbitre ne semblent pas gêner outre mesure le recourant, dès lors que l'intimée relève, sans être contredite par ce dernier, que l'arbitre qu'elle a choisi dans la présente affaire, Massimo Coccia, a déjà été nommé par elle à six reprises au cours des trois précédentes années.

Quant à l'autre motif de récusation invoqué par le recourant, il ressort de la décision rendue le 10 mai 2021 par la Commission de récusation du CIAS que le mandat unique confié par l'intimée au cabinet d'avocats dans lequel l'arbitre Hovell et le greffier Gunawardena exercent leurs activités était un cas isolé, qu'il n'avait aucun lien avec l'affaire jugée par le TAS, qu'il concernait un domaine totalement étranger au présent litige, que les deux hommes précités n'ont pas été les interlocuteurs de l'intimée sur ce mandat, et que le montant versé par l'intimée pour les services fournis ne représentait qu'une infime partie des honoraires perçus par l'étude d'avocats en question (n. 60). Le Tribunal fédéral ne discerne dès lors pas, à l'instar de la Commission de récusation du CAS, en quoi cette circonstance serait susceptible de remettre en cause l'indépendance et l'impartialité de l'arbitre Hovell et du greffier Gunawardena.

Pour le reste, il y a lieu de faire abstraction des critiques de type appellatoire fournies par le recourant, dans la mesure où l'intéressé assoit sa critique sur des faits s'écartant de ceux constatés dans la décision rendue par la Commission de récusation du CIAS ou semble vouloir étayer sa demande de récusation sur la base des explications fournies par l'arbitre Hovell dans sa prise de position jointe aux observations du TAS sur le recours. On ne saurait en effet voir dans la réfutation de l'arbitre des reproches qui lui sont faits une quelconque forme de parti pris à l'encontre du recourant.

Au vu de ce qui précède, le moyen considéré aurait de toute manière dû être rejeté s'il avait été jugé recevable.

(...)

Décision

Au vu de ce qui précède, le recours doit être rejeté dans la mesure de sa recevabilité.

4A_106/2022

5 mai 2022

A. c. B.

Recours en matière civile contre la sentence rendue le 28 janvier 2022 par le Tribunal Arbitral du Sport (CAS 2021/A/7833)

Extrait des faits

A.

A.a. A. _____ (ci-après: le cycliste) est un coureur cycliste professionnel de nationalité xxx.

B. _____ est l'association des fédérations nationales de cyclisme. Afin de lutter contre le dopage dans ce sport, elle a édicté un règlement antidopage (ci-après: RAD). Elle a, en outre, élaboré un programme, intitulé "Passport biologique de l'athlète" (ci-après: le passeport biologique), qui constitue une méthode indirecte de détection du dopage sanguin.

A.b. Un groupe de trois experts, désigné pour examiner le passeport biologique du prénommé, constitué de 22 échantillons sanguins prélevés entre le 3 août 2011 et le 4 novembre 2018, a conclu à l'usage très probable d'une substance ou d'une méthode prohibée, dans un rapport du 8 mai 2019, puis a confirmé sa première opinion le 8 septembre 2019 après avoir pris connaissance des explications fournies par l'intéressé et du rapport d'expertise produit par celui-ci.

Le cycliste a été suspendu provisoirement le 21 octobre 2019.

Le 19 mars 2020, B. _____ a ouvert une procédure disciplinaire à l'encontre du cycliste.

Par décision du 8 mars 2021, le Tribunal antidopage de B. _____ a notamment

retenu que le cycliste avait enfreint l'art. 2.2 RAD, l'a suspendu pour une durée de quatre ans à compter du 21 octobre 2019 et a annulé rétroactivement tous les résultats obtenus par lui dès le 28 juillet 2015.

B.

Le 6 avril 2021, le cycliste a interjeté appel contre cette décision auprès du Tribunal Arbitral du Sport (TAS).

Après avoir tenu une audience par vidéoconférence les 14 et 15 octobre 2021, la Formation du TAS, composée de trois arbitres, a rendu sa sentence finale le 28 janvier 2022, au terme de laquelle elle a rejeté l'appel et confirmé la décision attaquée.

C.

Le 2 mars 2022, le cycliste (ci-après: le recourant) a formé un recours en matière civile aux fins d'obtenir l'annulation de la sentence précitée.

B. _____ (ci-après: l'intimée) et le TAS n'ont pas été invités à répondre au recours.

Extrait des considérants

(...)

3.

3.1. Il convient d'examiner si le recours a été introduit en temps utile.

3.1.1. Conformément à l'art. 100 al. 1 LTF, le recours doit être déposé devant le Tribunal fédéral dans les trente jours qui suivent la notification de l'expédition complète.

Aux termes de l'art. 48 al. 1 LTF, les actes doivent être remis au plus tard le dernier jour du délai soit au Tribunal fédéral soit, à l'attention de ce dernier, à La Poste Suisse ou à une représentation diplomatique ou consulaire suisse. Le délai est sauvegardé si l'acte est remis le dernier jour du délai à minuit (ATF 142 V 389 consid. 2.2 et les références citées).

3.1.2. Un recours est présumé avoir été déposé à la date ressortant du sceau postal (ATF 142 V 389 consid. 2.2).

En cas de doute, la preuve du respect du délai doit être apportée par celui qui soutient avoir agi en temps utile au degré de la certitude et non simplement au degré de la vraisemblance prépondérante; elle résulte en général de preuves "préconstituées" (sceau postal, récépissé d'envoi recommandé ou encore accusé de réception en cas de dépôt pendant les heures de bureau); la date d'affranchissement postal ou le code à barres pour lettres, avec justificatif de distribution, imprimés au moyen d'une machine privée ne constituent en revanche pas la preuve de la remise de l'envoi à la poste. D'autres modes de preuves sont toutefois possibles, en particulier l'attestation de la date de l'envoi par un ou plusieurs témoins mentionnés sur l'enveloppe; la présence de signatures sur l'enveloppe n'est pas, en soi, un moyen de preuve du dépôt en temps utile, la preuve résidant dans le témoignage du ou des signataires; il incombe dès lors à l'intéressé d'offrir cette preuve dans un délai adapté aux circonstances, en indiquant l'identité et l'adresse du ou des témoins (arrêt 4A_216/2021 du 2 novembre 2021 consid. 2.2 et la référence citée).

3.1.3. En l'espèce, la sentence entreprise a été notifiée au recourant le 31 janvier 2022. Le délai de recours a expiré le 2 mars 2022 à minuit. Le sceau postal figurant sur l'enveloppe contenant le recours porte la date du 3 mars 2022. Le recours, expédié en courrier A et non sous pli recommandé

comme indiqué à tort dans le mémoire de l'intéressé, est ainsi présumé avoir été déposé tardivement. Cette présomption est toutefois réfragable. En l'occurrence, il appert qu'un témoin - dont l'identité a pu être vérifiée par le Tribunal fédéral - a attesté, au dos de l'enveloppe contenant le recours, que le pli avait été déposé le 2 mars 2022 avant minuit. Dans ces circonstances, il y a lieu d'admettre que l'acte de recours a été déposé en temps utile.

3.2. Pour le reste, qu'il s'agisse de l'objet du recours, de la qualité pour recourir ou encore des conclusions prises par le recourant, aucune de ces conditions de recevabilité ne fait problème en l'espèce. Rien ne s'oppose donc à l'entrée en matière. Demeure réservé l'examen de la recevabilité du grief invoqué par le recourant.

4.

(...)

4.3. Dans son mémoire de recours, l'intéressé indique qu'il s'était plaint, dans son mémoire d'appel soumis au TAS, de " nombreuses violations de certains règlements applicables et d'analyse des échantillons ". A cet égard, il expose avoir en particulier dénoncé la violation d'une règle de l'Annexe K du Standard international pour les contrôles et les enquêtes (ci-après: ISTI selon son acronyme anglais International Standard for Testing and Investigations) imposant aux agents de contrôle du dopage certaines obligations quant aux informations à consigner par écrit en cas de prélèvement effectué dans le cadre du programme du passeport biologique. Il fait grief à la Formation de n'avoir pas examiné son argument selon lequel la procédure n'avait pas été respectée en ce qui concerne le prélèvement des échantillons 3 et 11, raison pour laquelle ceux-ci auraient dû être exclus de son passeport biologique.

4.4. Force est d'emblée de relever que la motivation du grief laisse fortement à désirer, de sorte que l'on peut sérieusement douter de sa recevabilité. L'argumentation développée par le recourant, qui tient en quelques lignes, ne permet en effet nullement de discerner en quoi l'issue du litige eût pu être différente si la Formation avait pris en considération le moyen qu'elle aurait prétendument omis d'examiner. L'intéressé soutient certes que les échantillons 3 et 11 auraient dû être exclus. Cela étant, il n'ébauche pas la moindre démonstration visant à étayer son affirmation péremptoire. Au demeurant, la Cour de céans ne voit pas, faute de motivation suffisante de la part du recourant à cet égard, en quoi les prétendus vices procéduraux relatifs aux seuls échantillons 3 et 11 auraient pu avoir une quelconque incidence sur le résultat auquel a abouti la Formation, dès lors que le passeport biologique du recourant, abstraction faite des deux échantillons précités, comprenait encore vingt autres échantillons sanguins. En tout état de cause, après avoir examiné attentivement la sentence attaquée dans laquelle les arbitres se sont prononcés sur de nombreuses violations des règles de l'ISTI dénoncées par l'intéressé, le Tribunal fédéral estime que le grief considéré est infondé. Il renoncera à motiver plus avant cette conclusion tant il lui semble évident que le recourant, sous le couvert d'une violation de son droit d'être entendu, cherche, en réalité, à obtenir indirectement un examen par la Cour de céans du fond de la sentence attaquée. Il s'ensuit le rejet, dans la mesure de sa recevabilité, du grief tiré de la violation du droit d'être entendu.

5.

(...)

Décision

Au vu de ce qui précède, le recours est rejeté dans la mesure où il est recevable.

4A_140/2022

22 août 2022

A., c. B., C., Fédération Internationale de Football Association (FIFA)

Recours en matière civile contre la sentence rendue le 21 février 2022 par le Tribunal Arbitral du Sport (CAS 2020 A/7054)

Extrait des faits

A.

A.a. Le 14 septembre 2017, le footballeur professionnel portugais C._____ (ci-après: le joueur ou le footballeur) a conclu un contrat de travail arrivant à échéance le 30 juin 2022 avec le club de football B._____, membre de la Fédération Portugaise de Football (FPF), elle-même affiliée à la Fédération Internationale de Football Association (FIFA). Ledit contrat réglait la rémunération brute des services fournis par le joueur et prévoyait en outre le versement de divers bonus, dont le montant dépendait du nombre de rencontres disputées par l'intéressé. L'art. 8 du contrat de travail stipulait que le joueur pouvait mettre un terme aux relations contractuelles sans juste motif, moyennant notamment le versement d'un montant de 45'000'000 euros à son employeur. Une clause d'arbitrage, insérée à l'art. 10 dudit contrat, prévoyait que le Tribunal arbitral du sport portugais ("Tribunal Arbitral do Desporto"; ci-après: le TAD) serait seul compétent pour statuer sur tout différend opposant les parties.

A.b. Le 15 mai 2018, des individus supportant B._____ ont pénétré illégalement dans les installations de celui-ci et ont physiquement menacé et/ou attaqué certains employés et joueurs du club. Des tensions sont également apparues entre le président du club et certains joueurs; ce

dernier leur aurait notamment reproché d'être des enfants gâtés et vaniteux.

Le 14 juin 2018, le footballeur a résilié son contrat de travail, en invoquant l'existence d'un juste motif. Il se prévalait d'une rupture du lien de confiance à la suite de l'humiliation publique et du dénigrement dont il avait fait l'objet de la part du président du B._____ et se plaignait d'avoir été physiquement agressé, aux côtés de ses coéquipiers, par certains supporters violents lors des événements survenus le 15 mai 2018.

A.c. Le 1er août 2018, la Commission paritaire arbitrale, sise au Portugal, a validé la résiliation du contrat opérée par le joueur et a précisé que ce dernier pouvait offrir ses services à d'autres équipes de football.

Le 2 août 2018, le joueur a conclu un nouveau contrat de travail avec le club professionnel français A._____ échéant le 30 juin 2023, en vertu duquel il avait droit à un salaire mensuel de 10'000 euros ainsi qu'à un bonus de fidélité d'un montant avoisinant les 2'500'000 euros exigible le 5 juillet 2019.

A._____ a rentré ultérieurement dans le système de régulation des transferts ("Transfer Matching System") une instruction de transfert visant le joueur concerné. Fin août 2018, il a sollicité la remise du Certificat International de Transfert (*International Transfer Certificate*; ci-après: le CIT). Ledit document a été transmis le même jour par la FPF à la Fédération Française de Football (FFF), laquelle en a accusé réception le 4 septembre 2019. B._____ ne s'est pas opposé à la remise dudit document au A._____.

A.d. En juillet 2019, A._____ a transféré le joueur au club italien D._____ pour un montant d'environ 30'000'000 euros.

A.e. Auparavant, le joueur, se fondant sur l'art. 10 du contrat de travail, avait assigné B._____, en date du 17 août 2018, devant le TAD aux fins de faire constater qu'il avait résilié pour juste motif le contrat de travail qui le liait au défendeur et d'obtenir le paiement d'une compensation de 390'000 euros de sa part.

Le 14 septembre 2018, B._____ a conclu au rejet de la demande. A titre reconventionnel, il a réclamé le paiement d'un montant d'environ 45'000'000 euros pour résiliation du contrat sans juste cause.

Le 31 octobre 2018, B._____ a soulevé une exception d'incompétence du TAD et a sollicité la suspension de la procédure. A son avis, la Chambre de Résolution des Litiges de la FIFA (ci-après: la CRL) était exclusivement compétente pour trancher le différend divisant les parties.

Le 5 décembre 2018, le TAD a confirmé qu'il était compétent pour connaître du litige et a rejeté la demande de suspension de la cause, en précisant que B._____ avait, par son attitude, manifesté qu'il acceptait la compétence de l'autorité arbitrale saisie, puisqu'il n'avait contesté celle-ci que dans un second temps.

Le 18 mars 2019, le TAD a rendu sa décision. En bref, il a notamment retenu que le joueur avait été victime de harcèlement de la part de B._____, raison pour laquelle il avait droit au paiement d'une indemnité de 40'000 euros. L'attitude adoptée par le club vis-à-vis du joueur aurait en principe pu permettre à ce dernier de se départir du contrat pour juste motif. Toutefois, le comportement ultérieur du joueur, lequel n'avait pas mis fin immédiatement aux rapports de travail, démontrait que la relation contractuelle aurait

pu perdurer, de sorte qu'il y avait lieu de retenir que la résiliation du contrat avait en réalité été opérée sans juste cause. Aussi le joueur était-il contractuellement tenu d'indemniser son cocontractant. L'indemnité prévue par le contrat de travail, supérieure à 45'000'000 euros, devait toutefois être réduite à 16'500'000 euros car elle était manifestement excessive.

Le recours interjeté par le joueur à l'encontre de cette décision a été rejeté par la Cour d'appel de Lisbonne en janvier 2022.

A.f. De son côté, B._____, en date du 5 novembre 2018, a assigné le joueur et A._____ devant la CRL.

Le 23 janvier 2019, le joueur a fait valoir que la CRL était incompétente pour trancher le présent litige. A titre subsidiaire, il a soutenu que le contrat avait été résilié pour juste cause et a présenté une demande reconventionnelle en vue d'obtenir le paiement d'un montant total de 390'000 euros.

De son côté, A._____ a prétendu, principalement, que la demande était irrecevable et, subsidiairement, qu'elle devait être rejetée.

Statuant le 20 février 2020, la CRL a jugé que la demande était irrecevable pour cause de litispendance préexistante, vu la saisine préalable du TAD.

B.

Le 6 mai 2020, B._____ a appelé de la décision rendue par la CRL auprès du Tribunal Arbitral du Sport (TAS). En substance, il a conclu à ce que le joueur soit suspendu sportivement durant six mois. Il a également requis que A._____ fasse l'objet d'une sanction sportive lui interdisant de recruter de nouveaux joueurs pendant deux périodes de transfert. L'appelant a en outre conclu à ce que A._____ soit tenu solidairement, aux côtés du joueur, de lui verser la somme de 16'500'000 euros et de lui

payer, en tant que débiteur exclusif et sous sa seule responsabilité, un montant d'environ 28'790'000 euros.

En date des 22 et 23 juin 2021, la Formation désignée par le TAS, composée de trois arbitres, a tenu une audience.

Par sentence du 21 février 2022, la Formation, admettant partiellement l'appel interjeté par B._____, a annulé la décision querellée, a rejeté les demandes tendant à sanctionner sportivement le joueur ainsi que A._____ et a renvoyé la cause à la CRL afin que celle-ci statue sur la demande en dommages-intérêts formée par l'appelant à l'encontre de A._____ dans le sens des considérants émis par les arbitres. Les motifs qui étayaient cette sentence seront discutés plus loin dans la mesure utile à la compréhension des griefs dont celle-ci est la cible.

C.

Le 25 mars 2022, A._____ (ci-après: le recourant) a formé un recours en matière civile, assorti d'une requête d'effet suspensif, aux fins d'obtenir l'annulation de ladite sentence.

Au terme de sa réponse, B._____ (ci-après: le club intimé) a proposé le rejet tant du recours que de la demande d'effet suspensif.

Le footballeur (ci-après: le joueur intimé) a conclu au rejet du recours et de la demande d'effet suspensif dans la mesure de leur recevabilité.

La FIFA (ci-après: l'association intimée) a déclaré se rallier aux considérations émises par le recourant.

Le TAS a indiqué n'avoir aucune observation à formuler sur le recours.

Extrait des considérants

(...)

3.

Le Tribunal fédéral examine d'office et librement la recevabilité des recours qui lui sont soumis (ATF 138 III 46 consid. 1).

3.1. Qu'il s'agisse de la qualité pour recourir, du délai de recours ou encore des conclusions prises par le recourant, aucune de ces conditions de recevabilité ne fait problème en l'espèce.

3.2. Le recourant soutient que la décision attaquée est une sentence finale sur le fond (recours, n. 15). Pareille affirmation est toutefois erronée comme on va le voir.

3.2.1. 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. L'acte attaqué peut être une sentence finale, qui met un terme à l'instance arbitrale pour un motif de fond ou de procédure, une sentence partielle, qui porte sur une partie quantitativement limitée d'une prétention litigieuse ou sur l'une des diverses prétentions en cause ou encore qui met fin à la procédure à l'égard d'une partie des consorts (ATF 143 III 462 consid. 2.1; arrêt 4A_222/2015 du 28 janvier 2016 consid. 3.1.1), voire une sentence préjudicielle ou incidente, qui règle une ou plusieurs questions préalables de fond ou de procédure (sur ces notions, cf. l'ATF 130 III 755 consid. 1.2.1). En revanche, une simple ordonnance de procédure pouvant être modifiée ou rapportée en cours d'instance n'est pas susceptible de recours (ATF 143 III 462 consid. 2.1; 136 III 200 consid. 2.3.1; 136 III 597 consid. 4.2). Il en va de même d'une décision sur mesures provisionnelles visée par l'art. 183 LDIP (ATF 136 III 200 consid. 2.3 et les références citées).

Pour juger de la recevabilité du recours, ce qui est déterminant n'est pas la dénomination du prononcé entrepris, mais le contenu de

celui-ci (ATF 143 III 462 consid. 2.1; 142 III 284 consid. 1.1.1).

3.2.2. Aux termes de l'art. 186 al. 3 LDIP, le tribunal arbitral statue, en général, sur sa compétence par une décision incidente. Cette disposition exprime certes une règle, mais celle-ci ne présente aucun caractère impératif et absolu, son non-respect étant d'ailleurs dépourvu de sanction (arrêt 4A_222/2015, précité, consid. 3.1.2 et les références citées). Le tribunal arbitral y dérogera s'il estime que l'exception d'incompétence est trop liée aux faits de la cause pour être jugée séparément du fond (ATF 143 III 462 consid. 2.2; 121 III 495 consid. 6d).

Lorsqu'il écarte une exception d'incompétence, par une sentence séparée, il rend une décision incidente (art. 186 al. 3 LDIP), quel que soit le nom qu'il lui donne (ATF 143 III 462 consid. 2.2; arrêt 4A_414/2012 du 11 décembre 2012 consid. 1.1).

3.2.3. En l'occurrence, le TAS, après avoir admis sa compétence pour connaître du présent litige, a annulé la décision qui lui était soumise et a renvoyé la cause à la CRL pour qu'elle statue sur les prétentions en dommages-intérêts élevées par le club intimé à l'encontre du recourant. Ce faisant, il a sans doute clos la procédure d'appel pendante devant lui mais il n'a cependant pas rendu une sentence finale (ATF 140 III 520 consid. 2.2.2). La Formation a en effet chargé la CRL d'arrêter le montant de l'indemnisation due par le recourant une fois qu'elle aura offert aux parties la possibilité de faire valoir tous leurs moyens de preuve à cette fin (sentence, n. 234-236). La décision attaquée constitue ainsi une sentence incidente (ATF 140 III 520 consid. 2.2.2; arrêt 4P.298/2006 du 14 février 2007 consid. 4).

3.3. Selon l'art. 190 al. 3 LDIP, une décision incidente ne peut être attaquée que pour les motifs énoncés à l'art. 190 al. 2 let. a et b LDIP (ATF 130 III 76 consid. 4). Les griefs

visés à l'art. 190 al. 2 let. c à e LDIP peuvent aussi être soulevés contre les décisions incidentes au sens de l'art. 190 al. 3 LDIP, mais uniquement dans la mesure où ils se limitent strictement aux points concernant directement la composition ou la compétence du tribunal arbitral (ATF 143 III 462 consid. 2.2; 140 III 477 consid. 3.1; 140 III 520 consid. 2.2.3).

Dans son mémoire de recours, l'intéressé invoque le motif énoncé à l'art. 190 al. 2 let. b LDIP (incompétence du tribunal arbitral), lequel est recevable en vertu de l'art. 190 al. 3 LDIP. Sous des chiffres distincts de son écriture, il reproche, en outre, au TAS d'avoir enfreint son droit d'être entendu (art. 190 al. 2 let. d LDIP) et d'avoir rendu une sentence incompatible avec l'ordre public (art. 190 al. 2 let. e LDIP). Or, ces deux moyens sont soulevés, non pas dans le cadre de l'art. 190 al. 2 let. b LDIP, mais séparément, pour eux-mêmes. Dès lors, ils sont irrecevables. Dans ces conditions, la Cour de céans restreindra son examen au moyen fondé sur l'art. 190 al. 2 let. b LDIP. Le recours sera déclaré irrecevable pour le surplus.

(...)

5.

Dans son moyen pris de la violation de l'art. 190 al. 2 let. b LDIP, divisé en deux branches, le recourant reproche à la Formation d'avoir méconnu le principe de la litispendance et d'avoir admis, à tort, la compétence de la CRL et la sienne. Avant d'examiner les mérites des critiques soulevées par l'intéressé au soutien de ce moyen, il convient d'exposer les motifs qui sous-tendent la sentence attaquée. Pour faciliter la compréhension des considérations émises par les arbitres, il sied toutefois de reproduire le texte des dispositions réglementaires topiques édictées par la FIFA.

(...)

5.4.

5.4.1. Dans la première branche du moyen fondé sur l'art. 190 al. 2 let. b LDIP, le recourant reproche aux arbitres d'avoir méconnu les règles sur la litispendance dès lors qu'un litige similaire était déjà pendant devant le TAD lorsque la CRL a été saisie. Il soutient également que le non-respect du principe de litispendance constitue une violation de l'ordre public procédural au sens de l'art. 190 al. 2 let. e LDIP.

Pour étayer son moyen, l'intéressé fait valoir qu'il existait une identité d'objet entre les demandes soumises respectivement au TAD et à la CRL. Il fait grief à la Formation d'avoir considéré que l'application de l'art. 17 al. 2 RSTJ ne suppose pas que la CRL ait elle-même statué préalablement sur le litige divisant le footballeur d'avec son ancien club. Selon l'intéressé, il ne serait pas possible d'ouvrir une action séparée à l'encontre du nouveau club, à l'exclusion du joueur concerné. Il insiste sur le caractère subsidiaire de la responsabilité du nouveau club par rapport à celle, primaire, du joueur concerné. A son avis, une responsabilité solidaire et conjointe du nouveau club au sens de l'art. 17 al. 2 RSTJ entrerait en ligne de compte seulement lorsque la CRL a préalablement considéré qu'un footballeur a rompu son contrat de travail sans juste cause et l'a condamné, sur la base des règles du RSTJ, au versement d'une indemnité. En d'autres termes, ce n'est que dans la situation dans laquelle la même autorité juridictionnelle connaît, sur la base du même droit, des actions dirigées contre tous les débiteurs, qu'une responsabilité conjointe solidaire peut exister. En revanche, lorsqu'un tribunal différent examine la responsabilité d'un joueur sur la base d'autres règles de droit, la responsabilité du nouveau club déduite de l'art. 17 al. 2 RSTJ ne saurait entrer en ligne de compte. Ainsi, la CRL ne peut condamner un nouveau club en tant que débiteur solidairement responsable que si elle est elle-même compétente pour connaître du litige

principal entre le joueur et son ancien club et qu'elle reconnaît le footballeur responsable d'avoir rompu son contrat de travail sans juste cause. Or, en l'espèce, la CRL ne s'est jamais prononcée sur la résiliation du contrat de travail opérée par le joueur. Par ailleurs, elle ne sera en aucun cas compétente pour le faire vu la clause d'arbitrage, prévue par l'art. 10 du contrat de travail, attribuant une compétence exclusive au TAD pour trancher tout différend entre le joueur et le club intimé. Le recourant fait enfin valoir que la Formation, en niant l'existence d'un cas de litispendance, permet au club intimé de s'enrichir de manière illégitime, puisque ce dernier pourrait bénéficier de deux titres exécutoires indépendants - la sentence rendue par le TAD et la décision de la CRL - et risquerait dès lors d'être indemnisé deux fois.

5.4.2.

5.4.2.1. Saisi du grief d'incompétence, le Tribunal fédéral examine librement les questions de droit, y compris les questions préalables, qui déterminent la compétence ou l'incompétence du tribunal arbitral (ATF 134 III 565 consid. 3.1 et les références citées). En revanche, il ne revoit les constatations de fait que dans les limites usuelles, même lorsqu'il statue sur ce grief (arrêt 4A_682/2012 du 20 juin 2013 consid. 3.1 et 4.2).

5.4.2.2. Aux termes de l'art. 186 al. 1bis LDIP, le tribunal arbitral statue sur sa compétence sans égard à une action ayant le même objet déjà pendante entre les mêmes parties devant un autre tribunal étatique ou arbitral, sauf si des motifs sérieux commandent de suspendre la procédure.

Selon l'art. 64 al. 1 let. a du Code de procédure civile du 19 décembre 2008 (CPC; RS 272), la litispendance exclut que la même cause, opposant les mêmes parties, puisse être portée en justice devant une autre autorité.

La violation des règles sur la litispendance peut être invoquée dans le cadre de l'art. 190 al. 2 let. b LDIP (ATF 127 III 279 consid. 2a)

5.4.2.3. Selon la jurisprudence du Tribunal fédéral, il convient d'interpréter les statuts d'une association sportive majeure selon les règles d'interprétation de la loi (arrêts 4A_618/2020 du 2 juin 2021 consid. 5.4.3; 4A_462/2019 du 29 juillet 2020 consid. 7.2 et les références citées). Il sied d'en faire de même pour découvrir le sens de règles d'un niveau inférieur aux statuts édictées par une association sportive de cette importance (arrêts 4A_314/2017 du 28 mai 2018 consid. 2.3.1; 4A_490/2017 du 2 février 2018 consid. 3.3.2).

En l'occurrence, l'interprétation faite par la Formation porte sur des règles d'une association sportive d'un niveau inférieur aux statuts. Celles-ci ont été édictées par l'association intimée, laquelle est l'instance dirigeante du football au niveau mondial. Aussi y a-t-il lieu de les interpréter conformément aux méthodes d'interprétation des lois.

Toute interprétation débute par la lettre de la loi (interprétation littérale), mais celle-ci n'est pas déterminante: encore faut-il qu'elle restitue la véritable portée de la norme, qui découle également de sa relation avec d'autres dispositions légales et de son contexte (interprétation systématique), du but poursuivi, singulièrement de l'intérêt protégé (interprétation téléologique), ainsi que de la volonté du législateur telle qu'elle résulte notamment des travaux préparatoires (interprétation historique). Le juge s'écartera d'un texte légal clair dans la mesure où les autres méthodes d'interprétation précitées montrent que ce texte ne correspond pas en tous points au sens véritable de la disposition visée et conduit à des résultats que le législateur ne peut avoir voulu, qui heurtent le sentiment de la justice ou le principe de

l'égalité de traitement. En bref, le Tribunal fédéral ne privilégie aucune méthode d'interprétation et n'institue pas de hiérarchie, s'inspirant d'un pluralisme pragmatique pour rechercher le sens véritable de la norme (ATF 142 III 402 consid. 2.5.1 et les références citées).

5.4.3. Tel qu'il est présenté, le grief ne saurait prospérer. Force est d'emblée de relever que, sous le couvert d'une prétendue violation des règles sur la litispendance, le recourant cherche à entraîner la Cour de céans sur le terrain de l'application du droit matériel et à l'inciter à contrôler librement l'application faite par les arbitres de l'art. 17 al. 2 RSTJ. Une telle démarche est cependant vaine.

Pour que le moyen pris d'une violation des règles sur la litispendance puisse être admis, l'intéressé aurait dû démontrer que la procédure initiée au Portugal et celle ouverte devant la CRL opposaient les mêmes parties et que l'objet des deux litiges était identique. Or, le recourant n'effectue aucune démonstration en ce sens. Il est du reste établi que les parties aux deux procédures en question ne sont pas les mêmes. En outre, l'objet des deux litiges n'est pas similaire, puisque la procédure ouverte au Portugal vise à régler le différend entre le club intimé et le joueur intimé tandis que celle pendante devant la CRL concerne les prétentions élevées par le club intimé à l'encontre du recourant. Cela suffit à exclure toute situation de litispendance.

Pour le reste, on soulignera que le TAS, après avoir procédé à l'interprétation de l'art. 17 al. 2 RSTJ, a exposé, par le menu, les raisons pour lesquelles il estimait que ladite disposition ne permettait pas de retenir que la responsabilité du nouveau club présenterait un caractère accessoire par rapport à celle du joueur (sentence, n. 170 ss) et a indiqué pourquoi il n'était pas nécessaire que la CRL ait elle-même statué sur le point de savoir si le joueur concerné avait résilié son contrat de travail sans juste cause (sentence, n. 218 s.).

C'est le lieu de préciser que le Tribunal fédéral a déjà considéré que l'art. 17 al. 2 RSTJ, adopté et appliqué de longue date, établit une solidarité passive entre l'auteur de la violation contractuelle et celui qui en a tiré profit, indépendamment de toute implication de la part de ce dernier dans la rupture du contrat (arrêt 4A_32/2016 du 20 décembre 2016 consid. 4.3). La Cour de céans a aussi souligné que l'interprétation, en tant que telle, de l'art. 17 al. 2 RSTJ, à laquelle a procédé la Formation, échappe à l'examen du Tribunal fédéral (arrêt 4A_32/2016, précité, consid. 4.3). Il ne saurait en aller différemment ici dès lors que la nature exacte du régime de solidarité instauré par la disposition réglementaire n'a rien à voir avec la question ayant trait à l'éventuel non-respect des règles sur la litispendance.

En tout état de cause, la solution retenue par les arbitres apparaît non seulement juridiquement défendable au regard du texte de l'art. 17 al. 2 RSTJ mais également compatible avec les considérations émises dans l'arrêt paru aux ATF 140 III 520. Dans cette affaire, un club avait assigné conjointement un joueur et son nouveau club devant la CRL. Celle-ci avait condamné solidairement les défendeurs à payer au demandeur un certain montant conformément à l'art. 17 al. 2 RSTJ. Les défendeurs avaient tous deux formé un appel au TAS à l'encontre de cette décision. Peu après, le TAS a rendu une ordonnance de clôture par laquelle il a rayé l'une des causes du rôle, l'appel interjeté par le joueur étant réputé retiré, faute pour ce dernier d'avoir versé en temps utile la provision de frais requise. Tirant argument du retrait dudit appel, le demandeur a dénié au TAS toute compétence pour connaître de l'appel interjeté par le club, voire ne la lui a reconnue, à titre subsidiaire, que dans la mesure où l'appel portait sur le montant, et non sur le principe, de l'indemnité due solidairement par le joueur et le club défendeur. Examinant les conséquences sur le plan procédural du retrait de l'appel au regard du régime de la

responsabilité solidaire de l'art. 17 al. 2 RSTJ, le Tribunal fédéral a jugé que les codéfendeurs formaient une consorité matérielle simple passive. Il a relevé que la consorité simple laisse subsister la pluralité des causes et des parties. Les consorts simples restent dès lors indépendants les uns des autres. L'attitude de l'un d'entre eux est sans influence sur la situation juridique des autres. Quant à la décision à rendre, elle peut être différente d'un consort à l'autre. Cette indépendance entre les consorts simples persiste au niveau de l'instance de recours: un consort peut ainsi attaquer de manière indépendante la décision qui le concerne sans égard à la renonciation d'un autre consort à entreprendre cette même décision. Il s'ensuit, entre autres conséquences, que l'autorité de la chose jugée du jugement intéressant des consorts simples doit être examinée séparément pour chaque consort dans ses relations avec l'adversaire des consorts, car il y a autant de choses jugées que de couples demandeur/défendeur. Dans l'affaire en question, le Tribunal fédéral a abouti à la conclusion que, lorsque deux personnes qui formaient une consorité simple en première instance interjetent appel séparément et que l'une d'elles retire son appel par la suite, le tribunal arbitral d'appel qui rend une sentence annulant la décision attaquée à l'égard des deux consorts s'arrogé une compétence qu'il ne possédait plus (ATF 140 III 522 consid. 3.2.2).

Au vu de ce qui précède, le moyen pris d'une violation des règles sur la litispendance ne peut qu'être rejeté dans la mesure de sa recevabilité.

5.5.

5.5.1. Dans la seconde branche du moyen considéré, le recourant reproche à la Formation d'avoir admis sa compétence ainsi que celle de la CRL pour connaître de la présente affaire sur la base de l'art. 22 let. a RSTJ. Il soutient que l'interprétation faite par les arbitres de la disposition pertinente est

erronée et contraire à un passage figurant en p. 362 s. du Commentaire du RSTJ, édition 2021, publié par la FIFA (ci-après: le Commentaire RSTJ) où il est précisé ce qui suit:

(...) The DRC [CRL] view is even clearer where the player terminates the contractual relationship with their former club. In this situation, the DRC has concluded that there is no relationship between the contractual dispute and the ITC [CIT] request, and that FIFA is therefore not competent to deal with the relevant contractual dispute. To conclude, article 22 paragraph 1 (a) requires the contractual dispute between the player and their former club to be linked to an ITC request. Therefore, if an employment dispute with no international dimension arises between a player and a club (e.g. if both parties are, for instance, Brazilian), and the player only decides to transfer internationally to a club affiliated to a different member association *after* the original dispute arises, their proposed international transfer cannot be cited as the reason for the underlying contractual dispute. Hence, there is no international dimension to the original contractual dispute, and the relevant national decision-making authority is competent to deal with it”.

Se fondant notamment sur l’avis exprimé par l’ancien chef du Département du Statut du Joueur de la FIFA, E._____, le recourant souligne que le litige contractuel doit trouver sa source directement dans la demande de CIT afin que l’art. 22 let. a RSTJ puisse trouver application. Or, tel n’est pas le cas selon l’intéressé puisque le transfert international du joueur intimé n’a aucun lien avec le litige né plusieurs semaines auparavant entre le footballeur et son précédent employeur. En d’autres termes, la conclusion du contrat de travail entre le joueur intimé et le recourant le 2 août 2018 et la demande de CIT formée par ce dernier fin août 2018 ne sont pas les causes de la résiliation du précédent contrat de travail

opérée le 14 juin 2018 par le joueur. Se référant à une décision rendue par le TAS (TAS 2019/A/6621), l’intéressé fait valoir que l’art. 22 let. a RSTJ n’est applicable que lorsque le litige contractuel résulte du fait que le joueur a l’intention d’être transféré à l’étranger, c’est-à-dire dans les cas où il résilie son contrat de travail après avoir été incité à le faire par un club étranger ou parce qu’il a prévu d’évoluer pour un tel club et que celui-ci demande la délivrance du CIT. Il soutient qu’au moment de la résiliation par le joueur intimé de son précédent contrat de travail le 14 juin 2018, il n’y avait pas de litige concernant le CIT et que ces deux événements - la résiliation du contrat de travail et la demande de CIT - sont distincts l’un de l’autre. C’est donc à tort, selon lui, que la Formation a considéré que la période de dix semaines séparant ces deux épisodes était sans pertinence et qu’elle a estimé que la demande de CIT était la raison du présent litige. Partant, le recourant est d’avis que la Formation ne pouvait pas admettre sa compétence en vertu de l’art. 22 let. a RSTJ. Par ailleurs, il estime que l’art. 22 let. b RSTJ ne saurait trouver application en l’espèce vu l’art. 10 du contrat de travail attribuant une compétence exclusive au TAD pour connaître des litiges divisant le joueur intimé d’avec le club intimé. Dans ces conditions, il soutient que la Formation s’est déclarée à tort compétente pour connaître de la présente affaire.

5.6. L’interprétation faite par la Formation de l’art. 22 let. a RSTJ résiste aux critiques dont elle est la cible. En l’occurrence, la seule question à résoudre est celle de savoir si le TAS, et avant lui la CRL, étaient compétents pour statuer sur les prétentions élevées par le club intimé à l’encontre du recourant. L’intéressé soutient que le litige doit trouver sa source directement dans la demande de CIT pour que l’art. 22 let. a RSTJ puisse trouver application. Se fondant sur un passage extrait du Commentaire RSTJ, sur l’avis exprimé par E._____ et sur une sentence du TAS, il fait valoir que la CRL

n'est pas compétente selon l'art. 22 let. a RSTJ lorsqu'un joueur met fin à la relation contractuelle avec son ancien club sans avoir déjà l'intention, à ce moment-là, d'évoluer dans un club étranger et sans qu'on puisse établir une quelconque influence du nouveau club sur la résiliation dudit contrat. Semblable interprétation ne trouve cependant aucune assise dans le texte de ladite disposition. Selon le libellé de l'art. 22 let. a RSTJ, il suffit que la demande formée par une partie intéressée soit "en relation avec" la demande de CIT "notamment au sujet de son émission, de sanctions sportives ou d'indemnités pour rupture de contrat". Rien n'indique ainsi que la demande de CIT formée par le nouveau club doit être la cause directe du litige. Il ne ressort pas davantage du texte de l'art. 22 let. a RSTJ que le joueur concerné devrait être incité par le nouveau club à rompre son précédent contrat de travail ou qu'il devrait déjà avoir eu l'intention d'évoluer à l'étranger au moment où il a mis un terme aux rapports de travail pour que ladite disposition réglementaire puisse trouver application. Au demeurant, l'élucidation de telles questions épineuses soulèverait des difficultés pratiques et serait contraire à la sécurité du droit comme l'a observé de manière pertinente le TAS (sentence attaquée, n. 206). Ce dernier a considéré, de manière juridiquement défendable et compatible avec la lettre de l'art. 22 let. a RSTJ, que le litige opposant à l'origine le club intimé et le joueur intimé avait acquis une dimension internationale à la suite du transfert du footballeur au recourant et de la demande de CIT formée par ce dernier fin août 2018. Un autre passage extrait du Commentaire du RSTJ confirme du reste que, dans un tel cas, le fait qu'un club étranger soit impliqué dans un litige opposant un joueur et un autre club du même pays confère une dimension internationale au litige (p. 362). Le nouveau club étranger, membre d'une fédération nationale de football différente, ne saurait ainsi être attiré devant les autorités juridictionnelles d'une autre fédération nationale de football à

laquelle il n'appartient pas (Commentaire RSTJ, p. 362). Il n'apparaît ainsi pas illogique d'admettre que la CRL, soit une autorité juridictionnelle de l'association chapeautant le monde du football au niveau international, soit compétente pour connaître des litiges relatifs au statut contractuel d'un joueur divisant deux clubs appartenant à des fédérations de football nationales différentes. Cela apparaît d'autant plus justifié que le nouveau club s'expose potentiellement au prononcé de sanctions sportives à son encontre et au risque d'être condamné solidairement aux côtés du joueur à devoir payer un certain montant à l'ancien club pour rupture du contrat de travail sans juste cause en application de l'art. 17 RSTJ.

En l'occurrence, la Formation, après un examen détaillé de la chronologie des faits, a estimé que les conditions de l'art. 22 let. a RSTJ étaient remplies. En effet, la résiliation du contrat de travail opérée par le joueur intimé en date du 14 juin 2018 avait été suivie d'un transfert international de celui-ci et d'une demande de CIT de la part du recourant, ce qui avait donné lieu à un litige ultérieur entre les deux équipes de football concernées quant au point de savoir si le nouveau club devait indemniser l'ancien en application de l'art. 17 al. 2 RSTJ. Le TAS a en outre considéré que le laps de temps, relativement court, séparant la résiliation du contrat de travail et la demande de CIT, ne permettait pas de retenir qu'il s'agissait de deux événements distincts. Il a ainsi manifestement jugé que les prétentions élevées par le club intimé à l'encontre du recourant étaient en lien avec la demande de CIT concernant le joueur, ce qui conférait une dimension internationale au litige et, partant, attribuait la compétence pour trancher le différend à la CRL. Cette solution, juridiquement défendable, trouve du reste également un écho dans un autre passage tiré du Commentaire RSTJ (p. 361) prévoyant ce qui suit:

“Notwithstanding the above, article 22 paragraph 1 (a) somewhat extends FIFA jurisdiction and, in so doing, appears to contradict the general rule. Disputes between clubs and players in relation to the maintenance of contractual stability always fall within FIFA competence where they involve a request for an ITC and a claim by an interested party in relation to that ITC request. *The issuance of the ITC and the fact that the new club is affiliated to a different member association creates the international dimension.* Under such circumstances, FIFA becomes competent to deal with the relevant contractual dispute, regardless of whether there is a recognised independent arbitration tribunal in the country concerned” (passage mis en gras par la Cour de céans).

On relèvera, en outre, que la Formation a clairement exposé les raisons pour lesquelles elle ne se ralliait pas au raisonnement tenu par le TAS dans la sentence à laquelle se réfère le recourant dans son mémoire. Or, l'intéressé ne discute nullement l'argumentation juridique développée sur ce point par les arbitres.

Par surabondance et même à suivre la thèse du recourant selon laquelle un litige devrait trouver sa source directe dans la demande de CIT formée par le nouveau club pour que

l'art. 22 let. a RSTJ puisse trouver application, le sort du moyen examiné ne s'en trouverait pas modifié. Sous n. 210 de sa sentence, la Formation a en effet indiqué ce qui suit:

“Therefore, the Panel rules that the Player's international transfer to A._____ was the reason for the contractual dispute between B._____ and A._____ before the FIFA DRC”.

Sur la base des preuves à sa disposition et après avoir examiné de façon détaillée la chronologie des faits, le TAS a ainsi jugé que le transfert international du joueur était à l'origine du litige divisant les deux clubs. Ce faisant, le TAS a opéré une constatation de fait qui lie le Tribunal fédéral. L'intéressé n'invoque, du reste, aucune des exceptions susmentionnées qui lui permettraient de s'en prendre à cette constatation de fait de la Formation.

Il s'ensuit le rejet du moyen examiné.

(...)

Décision

Au vu de ce qui précède, le recours est rejeté dans la mesure où il est recevable.

Informations diverses
Miscellaneous
Información miscelánea



Publications récentes relatives au TAS/Recent publications related to CAS/Publicaciones recientes relacionadas con el CAS

- Auberg E., FIFA and UEFA's Suspension of Russian Teams from a Legal Perspective, *Football Legal*, # 17 – June 2022, p.171
- Aumeran X., Guerre en Ukraine, Football: premières contestations des sanctions devant le TAS, *La Revue Juridique et Economique du Sport*, n° 231, juin 2022, p.8
- Cambreleng Contreras J., Court of Arbitration for Sport (CAS), They are not my witnesses, *Football Legal*, # 16 – December 2021, p.129
- Crespo Ruiz-Huerta J., Recio De Mur M. & Campás Gené X., Russian invasion and soccer: The NO of the CAS to Provisional Measures, *Revista Aranzadi de Derecho de Deporte y Entretenimiento*, Núm.75, Abril – Junio 2022, p. 321
- Da Silva A., Sun Yang contre AMA devant le Tribunal Arbitral Suisse: leçons à tirer concernant la révision des sentences du TAS pour motif de récusation découvert tardivement, *Les Cahiers de Droit du Sport*, n°60 2022, p. 131
- David R., New FIFA Regulations for Football Agents Unveiled, *Football Legal*, # 16 – June 2022, p.199
- De Caldas Bezerra, Le Garrec G., Mandepanda Java S., Derogation from the Duty of Mitigation – An Analysis in light of CAS 2019/A/6533 & CAS 2019/A/6539, *Football Legal*, # 17 – June 2022, p.187
- Gradev G. & Chipeva M., Court of Arbitration for Sport (CAS), Critical Analysis of the *Daugavpils* award, *Football Legal*, # 16 – December 2021, p.133
- Gradev G. & Chipeva M., An unusual case on training compensation involving a national football association, *Football Legal*, # 16 – December 2021, p.155
- Gradev G., CAS Reinstated and Fined a Club whose license was Withdrawn by a National Association, *Football Legal*, # 17 – June 2022, p.179
- Gürtler J. & Kleiner J., Selected Case-Law of the Swiss Federal Tribunal in Football-Related Matters, *Football Legal*, # 16 – December 2021, p.122
- Gürtler J. & Kleiner J., Selected Case-Law of the Swiss Federal Tribunal in Football-Related Matters, *Football Legal*, # 17 – June 2022, p. 167
- Kretcetov E., Clubs must complete due diligence before engaging a football player, *Football Legal*, # 16 – December 2021, p.149
- La Porta S. & Primicerio L., The Discretion of CAS in Awarding Compensation after the Termination of a Contract between Professionals and Clubs for Overdue Payables, *Football Legal*, # 17 – June 2022, p.175
- Naranjo Acosta A., FIFA New Regulations for International Loan Transfers, *Football Legal*, # 17 – June 2022, p.192
- Reck A., Was Santiago Ramos Mingo a Professional Player? *Football Legal*, # 16 – December 2021, p. 153

- Reck A., CAS increases the Value of the Football Player *PONCE*, Football Legal, # 16 – December 2021, p.158
- Reck A., CAS 2021/A/7683 & 7686 Gaston Alexis Silva Perdomo v. Club Atletico Independente, Football Legal, # 17 – June 2022, p.190
- Sierra J.-A., Interpretation of Local Regulations – A Limit for CAS, Football Legal, # 16 – December 2021, p.126

