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Editorial

For the current four-year term 2023-2026, the ICAS members have been appointed in accordance with the new Article S4 of the Code of Sports-related Arbitration, adopted earlier this year and providing for the appointment of 22 members instead of 20. The extension of ICAS to 22 members was decided in order to allow a larger representation of football stakeholders, considering that football is by far the sport generating the most cases at CAS. All ICAS members are jurists, and includes five Olympians. With one position still to be filled by the IOC, the ICAS is currently made up of 12 men and 9 women. The full list can be found on the CAS website <https://www.tas-cas.org/en/general-information/news-detail/article/the-international-council-of-arbitration-for-sport-icas-composition-for-the-term-2023-2026/>

On 31 May 2023, the ICAS members elected for the 2023-2026 term voted unanimously to elect the following members to the following positions for the relevant cycle:

President: Mr John Coates AC (Australia), re-elected.

Vice-Presidents: Mr Michael Lenard OLY (USA), re-elected; Dr Elisabeth Steiner (Austria), re-elected; Mr Antonio Arimany (Spain), new.

At the ICAS meeting of 2 December 2022, the ICAS members voted to amend Article S6.2 of the Code of Sports related Arbitration so that for the 2023-2026 cycle onwards, ICAS will be composed of three, rather than two, Vice-Presidents. Mr Antonio Arimany, Secretary General of World Triathlon, was elected for the first time to the third Vice-President position. Mr Arimany was appointed to ICAS by the Association of Summer Olympic International Federations (ASOIF).

Appeal Division: Ms Corinne Schmidhauser OLY (President) (Switzerland), re-elected; Dr Elisabeth Steiner (Deputy President), re-elected.

Ordinary Division: Ms Carole Malinvaud (President) (France), re-elected; Prof. Giulio Napolitano (Deputy President) (Italy), re-elected.

Anti-Doping Division: Mr Ivo Eusebio (President) (Switzerland), re-elected; Mr David W. Rivkin (Deputy President) (USA), re-elected.

ICAS Board

Pursuant to Article S7 of the CAS Statutes, the ICAS Board is now composed of the President, three Vice Presidents, the President of the Ordinary Arbitration Division and the President of the Appeals Arbitration Division. This means that for the 2023-2026 term it will be composed of John Coates, Michael Lenard, Elisabeth Steiner, Antonio Arimany, Corinne Schmidhauser, Carole Malinvaud.

Furthermore, the composition of the ICAS commissions was also decided during the same meeting:

- Challenge Commission chaired by Justice Ellen Gracie Northfleet (Brazil) and composed of the three Division Presidents and the three Deputy Presidents (excluding the President and Deputy of the Division concerned by the specific procedure for challenge). The Challenge Commission shall handle the petitions for challenge raised against CAS arbitrators.

- Membership Commission chaired by Ivo Eusebio (replacing former ICAS member Judge Monique Jametti, Switzerland) and composed of Ms Tricia Smith OLY (Canada), and the three Division Presidents. The Membership Commission shall review the lists

of CAS arbitrators and mediators, as well as the candidatures of potential new CAS members.

- Athletes' Commission (formerly Legal Aid Commission) chaired by Michael Lenard, composed of Mr Louis Everard (Netherlands), Ms Silja Kanerva OLY (Finland), and Ms Tricia Smith. The purpose of the Athlete's Commission is to determine requests for legal aid and safeguards the interests of athletes within ICAS.

The new guidelines on legal aid established by the ICAS are published on the CAS website and are applicable to any CAS arbitration procedure initiated from 1 February 2023. Accordingly, a new specific legal aid fund for football-related disputes exclusively financed by FIFA was created i.e. the Football Legal Aid fund (FLAF). The FLAF will be available to natural persons, including agents with a FIFA license, without sufficient financial means to otherwise proceed at the CAS. The FLAF may be also exceptionally granted to football clubs which are in a difficult financial situation, under specific conditions. The general ICAS legal aid will continue to be financed by the Olympic Movement as a whole to assist natural persons from Olympic sports other than football.

We are pleased to publish in this issue three articles in English, namely, "A synthesis on COVID 19" co-written by Mark Hovell, CAS arbitrator, and Rustam Sethna, respectively partner and associate for Mills & Reeve, an Overview of the Appeal Procedure before the CAS written by Dr. Despina Mavromati, CAS arbitrator, and, "A Systematic Review of CAS Decisions in Football Matters in 2020-2021"

co-written by Dr. Vladimir Novak, CAS arbitrator, Alice Roux and Margo De Bondt, respectively associates and stagiaire for Cleary Gottlieb Steen & Hamilton LLP, Brussels.

This new issue of the Bulletin includes eight football cases among the thirteen "leading cases" selected. The non-related football jurisprudence selected relates to doping, corruption and governance.

Finally, summaries of the most recent judgements rendered by the Swiss Federal Tribunal (SFT) in connection with CAS decisions have been enclosed in this Bulletin. Of particular interest is the decision 4A_420/2022 translated into English which addresses the limits in the FIFA PSC jurisdiction to hear set-off claims for damages against contractual claims in football transfer disputes. This judgment is the subject of a short commentary by Dr. Despina Mavromati. Likewise, interestingly, the SFT judgement 4A_246/2022 rendered in French affirms the compatibility of football rules on sports succession with public policy. Lastly, in the French SFT judgement 4A_434_2022, the question arises as to whether an award of agreement between the parties can be the subject of an ordinary appeal to the Federal Court.

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

Matthieu Reeb
CAS Director General

Articles et commentaires
Articles and Commentaries
Artículos y comentarios



The CAS' Covid-19 Jurisprudence in Football

Mark Hovell and Rustam Sethna*

- I. Introduction
 - II. Force majeure and *clausula rebus sic stantibus*, generally
 - III. Key elements of the CAS' Covid Jurisprudence
 - A. Force majeure provision in contract
 - B. Financial evidence and club expenditure
 - C. FIFA CFRI and salary reductions
 - D. Timing
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-

I. Introduction

The passage of time since the start of the Covid-19 pandemic, coupled with the fact that the CAS is the appellate body for international football contractual disputes from the FIFA Football Tribunal, has seen the emergence of a distinct body of jurisprudence from the pandemic.

Briefly, this 'Covid jurisprudence' addresses situations where debtors (mainly football clubs) seek to rely upon the unpredictable and unprecedented pandemic to relieve themselves from their legal or contractual obligations towards creditors (mainly players, coaches and other clubs). Principally, arguments have featured the doctrines of *force majeure* and *clausula rebus sic stantibus*, but also, the application of FIFA's Covid-19 Guidelines, known as the Covid-19: Football Regulatory Issues (the "FIFA CFRI").

Whilst these doctrines and the FIFA CFRI exist to assist clubs whose ability to fulfil obligations towards creditors were genuinely and directly impacted by Covid, their practical application seemed to be at odds with the well-

established *pacta sunt servanda*, a principle that recognises the sanctity of a contract, and one which has underpinned CAS jurisprudence for decades.

As a result, we have seen a body of Covid jurisprudence that overwhelmingly favours creditors. This is not to suggest that the law is set up to unduly favour creditors. In fact, many clubs were able to defer, reduce or otherwise settle payments with creditors out of court or via a collective bargaining process, as the FIFA CFRI recommended. However, those clubs that sought to rely on Covid-19 at the CAS (whether at the ordinary or appeals division) were rarely successful.

This article seeks to explore common themes that have emerged from a cross-section of published 'Covid jurisprudence'¹. In doing so, it will explore why debtor clubs are generally unsuccessful and the areas in which various Panels and Sole Arbitrators have typically found the evidence to be lacking.

II. Force majeure and *clausula rebus sic stantibus*, generally

* Mark Hovell is partner, Mills & Reeve LLP & CAS Arbitrator; Rustam Sethna is Associate, Mills & Reeve LLP

¹ As made available by FIFA or the CAS.

Under Swiss law – given its significance in international football disputes at the CAS² – there is no statutory definition of *force majeure*. However, the substance of the principle is captured at Article 119 of the Swiss Code of Obligations (the “SCO”), which provides that:

“1. An obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor.

2. In a bilateral contract, the obligor thus released is liable for the consideration already received pursuant to the provisions on unjust enrichment and loses his counter-claim to the extent it has not yet been satisfied.

3. This does not apply to cases in which, by law or contractual agreement, the risk passes to the obligee prior to performance”.

Similarly, the doctrine of *clausula rebus sic stantibus* was developed in Swiss jurisprudence to enable a judge to amend a contract when the circumstances under which that contract was concluded have changed so much that the continuation of the contract in its present form cannot be expected. The doctrine has its roots in general principles of fairness and good faith, based on Article 2 of the Swiss Civil Code³. Therefore, a party will successfully invoke the doctrine of *clausula rebus sic stantibus* where⁴:

1. The change in the contractual relationship is caused by new, unforeseeable and inevitable circumstances; and

2. The performance is so excessively burdensome for one party that it cannot be demanded in good faith.

At the start of the pandemic, there was limited jurisprudence on the application of these principles in the sporting context. Analogies were made with cases relating to the 2013 Egyptian civil war⁵ and the 2014 Ebola epidemic⁶ amongst others, and opinions⁷ were shared on how these might apply in the Covid context.

However, the CAS has yet to see a debtor that has successfully invoked *force majeure* or *clausula rebus sic stantibus*.

III. Key elements of the CAS' Covid Jurisprudence

A. *Force majeure* provision in contract

In CAS 2021/A/7673 & 7699⁸, the Sole Arbitrator noted that “[i]n the absence of a *force majeure* clause in the [relevant contract], Swiss statutory law applies”.

When a party invokes a defence of “impossibility” to perform a contract, the legal consequences of non-performance will depend on whether such impossibility or hinderance is temporary or permanent and whether one of the contractual parties is at fault.

The respective Sole Arbitrators in CAS 2021/A/7673 & 7699⁹ and CAS 2021/A/8277¹⁰ summarised the position under

² Article R45 and R58 of the CAS Code for Ordinary and Appeal Arbitrations, respectively, and Article 57 of the FIFA Statutes.

³ Article 2 of the Swiss Civil Code states that: “Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations”.

⁴ CAS 2021/A/7673 Club Olimpia de Paraguay v. FC Dynamo Kyiv; CAS 2021/A/7699 FC Dynamo Kyiv v. Club Olimpia de Paraguay, awards of 12 October 2021.

⁵ CAS 2014/A/3463 & 3464 Alexandria Union Club v. Juan José Sánchez Maqueda & Antonio Cazorla Reche, award of 26 August 2014

⁶ TAS 2015/A/3920 Fédération Royale Marocaine de Football c. Confédération Africaine de Football, award of 17 November 2015.

⁷ See, for example, N. De Marco (2020), “Covid-19: Sport and the Law of Frustration and Force Majeure”, LawInSport. Available online:

<https://www.lawinsport.com/topics/item/coronavirus-sport-the-law-of-frustration-and-force-majeure>

⁸ Op cit., note 6.

⁹ Op cit., note 6.

¹⁰ CAS 2021/A/8277 Yeni Malatyaspor FK v. A., award of 27 April 2022.

Swiss law, where an impediment to perform a contract is only temporary. In this scenario, a creditor has the option to either:

- a. Set an appropriate time limit for subsequent performance or ask the court to set such time limit (Article 107 SCO); or
- b. Insist on performance without delay, under certain circumstances (Article 108 SCO); or
- c. Waive performance and claim damages (Article 107(2) SCO); or
- d. Terminate the agreement and demand return of any performance already made.

Notably, Article 97 SCO presumes that the debtor was at fault and the extent of a debtor's liability will depend in particular upon how much (or little) the debtor stands to gain from the transaction.

CAS 2021/A/7673 & 7699 concerned the transfer of a player from FC Dynamo Kyiv to Club Olimpia de Paraguay for USD 5,000,000, pursuant to a transfer agreement between the two clubs.

Here, the debtor club pleaded impossibility of performance due to Covid-19, but accepted that its *"impossibility to perform its side of the contract [was] only limited in time"*. This was not a *force majeure* argument *per se*, but rather the Sole Arbitrator noted that for the debtor to be successful, it needed to cumulatively establish that *"a) it was objectively impossible for it to perform its contractual obligations in a timely manner, b) because of the Pandemic, c) there is a causal link between the Pandemic and its failure to fulfil its side of the Transfer Agreement and d) it is not at fault"*.

In CAS 2021/A/8277¹¹ the Sole Arbitrator highlighted that if the impossibility was permanent, Article 119 of the SCO (reproduced above) would apply.

Notably, the FIFA DRC has, given effect to a mutually agreed upon *force majeure* clause in an employment contract¹². Specifically, the decision found the following:

"[...] In this regard, the DRC Judge held that the parties mutually agreed in the contract on a salary equivalent to 25% "of the contract value per year divided for 12 months" in case of force majeure.

[...] Therefore, the DRC judge concluded that the COVID-19 pandemic triggered the application of [...] the contract to the employment relationship between the Claimant and the Respondent.

[...] As a result the DRC judge decided that the Claimant should receive 25% of his salary for the months of April, May and June 2020".

On the other hand, debtors were not granted immunity from performance merely because the relevant contract contained a *force majeure* clause. This was demonstrated in CAS 2021/A/8079¹³.

Here, the employment contract between an Indian club and Portuguese player contained a clear definition of '*Force Majeure*'. This included *"any act, event or circumstance beyond the reasonable control [...] which effects the performance of its obligations [...] including but not limited to fire, flood, explosion, war, riots, acts of Government Authorities [...] or any events or circumstances analogous to the foregoing"*.

The employment contract further stated that in the event of *force majeure*, *"the Party whose performance is affected [...] shall promptly notify the other Parties of the existence and cessation of such event."*

¹¹ Op cit., note 12.

¹² Paulo Sergio Moreira Goncalves (Portugal) v. Bali United (Indonesia), decision of the DRC Judge, passed on 29 September 2020.

¹³ CAS 2021/A/8079 SC East Bengal v Jaime Santos Colado, award of 31 August 2022.

The Parties shall take all reasonable steps within their power to recommence performance of the Agreement following an event of Force Majeure after it expires or is no longer in effect”.

However, one of the reasons why that club’s appeal failed, was because this contractual provision only sought to address the ‘temporarily impossible’ situations referred to above. It did not entitle the club to terminate the contract.

Thus, distinguishing CAS 2021/A/8079¹⁴, a party seeking to rely upon a *force majeure* clause in a contract ought to prove (amongst other things):

- a. That Covid-19 (or the relevant event) was included within the meaning of *force majeure* for the purposes of that contract; and
- b. That the contract enabled the club to immediately terminate and cease paying the creditor, rather than simply ‘pausing’ its obligations whilst the *force majeure* event continued.

B. Financial evidence and club expenditure

Perhaps the most common but least successful argument run by debtor clubs looking to avoid liability under their respective agreements was the disproportionate impact that Covid-19 had on its finances. This in turn, as further argued, made it impossible for debtor clubs to perform their obligations under a relevant contract.

In principle, this argument has stood up to judicial scrutiny in the past. For example, the Swiss Federal Tribunal has found that performance would be excessively

burdensome in cases where a party was able to prove a 52.33% loss of revenue due to war (in a context unrelated to Covid)¹⁵.

However, clubs raising these arguments at the CAS in the Covid context, have always failed to substantiate the losses they claim to have suffered, thereby failing to discharge their burden of proof.

- a. In CAS 2021/A/7673 & 7699¹⁶, Club Olimpia de Paraguay argued that *“the abrupt suspension of the sportive season in Paraguay had a negative impact to all football clubs. Like in many other places in the world, clubs faced cuts in sponsors payments and TV rights, as well as no income for ticketing match day revenue, merchandising, etc. Olimpia suffered a 60% reduction in its annual incomes in 2020 as the economic report shows”*. However, the Sole Arbitrator found this to be a *“mere declaration, not supported by any documentary evidence”*.
- b. In CAS 2020/A/7346, 7347 & 7348¹⁷, Neimenggu Zhongyou FC of China sought to argue that it was *“suffering financial difficulties which were exacerbated by the impact of [Covid-19], which is affecting its ability to pay the outstanding amounts and the transfer ban may lead to the Club’s bankruptcy because it may mean a proposed takeover of ownership may not take place”*. Again, the Sole Arbitrator held that the club had *“failed to adduce any supporting evidence, instead just simply states its position without any independent corroboration”* and that *“financial problems referred to by [the club] cannot excuse its failure to comply”*.
- c. Similarly, Turkish club Yeni Malatyaspor FK¹⁸ in CAS 2021/A/7727 simply asserted that it lacked financial resources because its revenues sharply declined during the 2019-

¹⁴ Ibid.

¹⁵ ATF 48 II 249.

¹⁶ Op cit., note 6.

¹⁷ CAS 2020/A/7346 Neimenggu Zhongyou Football Club v. FIFA; CAS 2020/A/7347 Neimenggu

Zhongyou Football Club v. FIFA; and CAS 2020/A/7347 Neimenggu Zhongyou Football Club v. FIFA, award of 22 October 2021.

¹⁸ CAS 2021/A/7727 Yeni Malatyaspor FK v. Issiar Dia, award of 8 November 2021.

20 season due to the pandemic. The Sole Arbitrator found that this had no connection with the club's failure to fully perform the relevant agreement. In CAS 2021/A/7799¹⁹, involving the same club, the Sole Arbitrator noted that it *“did not submit any evidence to prove that the financial effect of COVID-19 pandemic on the EURO/TL Exchange rate and the temporary suspension of sports activities caused serious financial difficulties to the [club], and, furthermore, the [club] did not prove that there has been a 30% decrease in seasonal revenues which consequently affected its ability to make the payments.”*

- d. The Sole Arbitrator in 2021/A/7888²⁰ expressly stated that that *“external economic factors”* did not justify non-compliance of financial obligations assumed by a contracting party and that the appellant club *“did not submit any evidence to prove that the financial effect of Covid-19 [and] the temporary suspension of sports activities caused serious financial difficulties to the [club] that effected its possibility to make payments”*.
- e. In CAS 2021/A/8014²¹ the Sole Arbitrator did not consider a Chinese club's arguments about the economic effect of the pandemic as they were *“entirely unsubstantiated by any evidence”*.

Therefore, the general conclusion drawn is that whilst the Covid surely impacted all clubs' finances, parties generally struggled to justify how (relatively) short-term drops in revenue had derailed a club's financial planning to such an extent that the performance of a contract as originally envisaged was no longer possible. In other words, clubs were required to show real financial disruption and a total lack of financial resources that made it impossible to fulfil its payment obligations towards a creditor. This

needed to be more than a general economic difficulty in abstract terms.

The seemingly obvious but key takeaway from this jurisprudence is that without concrete evidence of actual and specific financial loss suffered, parties attempting to absolve themselves of a financial obligation would struggle to fulfil their burden of proof to the requisite standard.

C. FIFA CFRI and salary reductions

Equally common were arguments relating to the application of the FIFA CFRI, where clubs sought to vary the terms under an agreement, on the basis that it was allegedly done in accordance with the FIFA CFRI.

In summary, the FIFA CFRI encouraged clubs to collaboratively find a solution with players/coaches for any period where the competition was suspended due to Covid-19. Unilateral decisions to vary contracts were therefore required to be in “good faith, reasonable and proportionate” or alternatively, permissible if member association/league regulations allowing for this were permitted by national law and collectively agreed among social partners (e.g. a players' union, coaches association)²².

Factors to be considered when determining the reasonableness of a unilateral variation under the FIFA CFRI were:

- “a) the economic situation of the club;*
- b) the proportionality of any salary amendment;*
- c) the net income of the employee after salary amendment;*
- d) whether the decision applied to the entire squad or only specific employees; and*

¹⁹ CAS 2021/A/7799 Yeni Malatyaspor v. Mitchell Glenn Donald, award of 1 February 2022

²⁰ CAS 2021/A/7888 Yeni Malatyaspor FK v. Fabian Cedly Farnolle, award of 1 February 2022.

²¹ CAS 2021/A/8014 Shanghai Shenhua FC v. FIFA, award of 14 January 2022.

²² See: CFRI FAQs, page 7. Available online: www.legal.fifa.com.

e) whether the club in good faith had attempted to reach a mutual agreement with its employee(s)."

FIFA separately went on to clarify that these principles were *"listed in the preferred order in which FIFA believes clubs and employees should address variations to an employment agreement during any period when a competition is suspended"*.

However, in CAS 2021/A/7680²³, the Sole Arbitrator noted that the list of criteria set out in the CFRI is "not exhaustive", and in that case, found that other criteria did not *"speak in favour of the [club]"*. In this case, the club sought to unilateral reduce the player's salary, retroactively. This, it was observed, was *"not in light of a due care process which is to be expected from a club dealing with such delicate matters"*.

That being said, in cases that reached the CAS, a majority of clubs either failed to act collaboratively or proportionately (or both) and failed to satisfy the conditions set out above.

In CAS 2021/A/7878 & 7916²⁴ the CAS Panel observed that for players to know whether a unilateral 50% reduction was justified, the club should have produced a financial report at the time of varying the contract. This report could have highlighted the effects of the pandemic and reasons why the club sought to reduce the player's salary by 50% rather than a more modest sum.

This theme of information sharing and transparency was also echoed by the Panel in another case, which noted the need for rationale behind any unilateral reduction of salaries, and the need to explain and justify the reduction to the player(s) concerned.

It appears that clubs sought to rely on the FIFA CFRI as their 'silver bullet' whereas in reality, the conditions set out by it place the burden on clubs to provide evidence that is more cogent.

D. Timing

Another factor in determining whether a debt was the result of Covid-19, is timing. Looking at the specific facts and circumstances of each case, Panels and Sole Arbitrators have considered when an obligation to pay arose and how that fitted within the trajectory of the pandemic.

For instance, CAS 2021/A/8014²⁵ concerned an appeal by a Chinese Club against a decision of the FIFA Disciplinary Committee which sought to enforce a previous CAS decision against the club. Whilst FIFA's enforcement decision was issued in March 2021, the underlying decision requiring the club to pay the player in the first instance, related to a debt from 2019 – well before the pandemic. The Sole Arbitrator observed that *"almost two years [had] elapsed without [the club] having paid any sum to the creditor and it appear[ed] that [the club] was trying by all means to delay the payment"*. Similarly, the Sole Arbitrator in CAS 2021/A/7680²⁶ also observed the fact that the salaries had been outstanding to the player long before the pandemic broke out.

Panels and Sole Arbitrators have also looked unfavourably upon clubs who on one hand, claim to have been 'financially brought to their knees by Covid', whilst continuing to pay large sums in transfer fees to recruit new players, at the expense of cherry picking those already on its books. Clearly, there was an element of clubs conveniently falling back on the pandemic when it suited them, for example, when a player or coach was surplus to

²³ CAS 2021/A/7680 Ittihad FC v Aleksander Prijovic, award of 11 April 2022.

²⁴ CAS 2021/A/7878 Naim Slihi v. Al Ettifaq Club & CAS 2021/A/7916 Al Ettifaq Club v. Naim Slihi.

²⁵ Op cit., note 23.

²⁶ Op cit., note 25.

requirements from a tactical perspective. It is of course established jurisprudence at the CAS that termination of contracts on these grounds is unlawful and therefore without just cause.

Panels and Sole Arbitrators have seen through these arguments, particularly when made at a time when society was recovering from the pandemic, fans were back in stadiums thereby generating matchday revenue often at pre-pandemic levels, thereby aiding budget and cash flow issues and as a result, increasing spending to near pre-pandemic levels.

On 5 May 2023, the World Health Organisation declared that Covid-19 was no longer a 'Public Health Emergency of International Concern'. Whether debtor clubs continue to use the pandemic to excuse themselves from fulfilling a contractual obligation remains to be seen, but it is certain that the further we are from the lockdowns and suspensions of leagues etc, the more unlikely that such arguments would be successful.

IV. Conclusion

As the CAS does not operate on the doctrine of precedent, the jurisprudence reviewed above is only of persuasive value. However, the consistency in these decisions cannot be ignored, and it is clear that the CAS' Covid jurisprudence has set a high bar for debtors seeking to justify their failure to comply with contractual obligations. Ultimately, the CAS will usually respect a commercial agreement between parties, in accordance with the principle of *pacta sunt servanda*.

An Overview of the Appeal Procedure before the CAS

Despina Mavromati*

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Abstract

The Court of Arbitration for Sport (CAS) was created in 1984 and has evolved into an independent arbitral tribunal and the “supreme court” of sports-related disputes at the international level, administering several hundred of cases every year. The CAS functions predominantly as an appellate tribunal, reviewing decisions rendered by the internal tribunal of sports federations. The appeal mechanism of the CAS differs from commercial arbitration in many aspects. This article presents an overview of the procedural particularities of the CAS appeal procedure following the amendment of the CAS Code in November 2022, from the outset of the

arbitration through the issuance of the final award and beyond.

I. Introduction

The Court of Arbitration for Sport (CAS) is an international arbitral institution specialized in sports disputes and seated in Lausanne. It administers several hundred of sports-related disputes every year.¹ Created by the IOC President Juan Antonio Samaranch in 1984, the CAS has gone through several procedural and institutional amendments and reforms to improve its dispute resolution mechanism, adapt to the needs of its users and guarantee its institutional independence from its various stakeholders.²

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¹The CAS registered a record 996 procedures in 2021, see the ICAS 2021 Annual Report and Financial Statements,

p. 17 (www.tas-cas.org). From the total of procedures, 796 were appeal procedures, 147 ordinary procedures, 15 ad hoc procedures, 29 decided by the CAS Anti-Doping Division and 9 mediation procedures.

² <https://www.tas-cas.org/en/general-information/history-of-the-cas.html>

Since the “Paris Reform” in 1994,³ the CAS is overseen by the International Council of Arbitration for Sport (ICAS), which is tasked with safeguarding the independence of the CAS and the rights of the parties.⁴ The year 1994 also marked the creation of two arbitration divisions within the CAS, namely, the Ordinary Arbitration Division and the Appeals Arbitration Division; the former deals with disputes of sole instance very similar to the ones dealt in commercial arbitration, while the latter is in charge of disputes arising from decisions rendered by sports federations and is the focus of this article. In addition to these two divisions, the CAS is also composed of the Anti-Doping Division (since 2020),⁵ operates the CAS Ad hoc Divisions during the Olympic Games as well as other major events, and has a Mediation Division.⁶ The main set of rules for CAS appeal proceedings is the CAS Code of Sports-Related Arbitration (the CAS Code), which was last updated in November 2022.

The appeals proceedings of the CAS have some important differences compared to commercial

arbitration. Since in most cases the arbitration clause is inserted in the rules of the sports federation as a statutory clause, it may be that in some instances (e.g., in disciplinary cases and especially in doping-related matters under the World Anti-Doping-WADA Code) the arbitration agreement is not based on the consent of both parties but is rather imposed on the athletes and other individuals. This very issue was at the heart of the *Pechstein* saga⁷ that went before the European Court of Human Rights (ECtHR)⁸ and the German courts.⁹ In essence, the ECtHR held that the arbitration clause in such *forced arbitration* is valid so long as it complies in full with the principles of Art. 6 of the European Convention on Human Rights (the Convention), which requires among others the independence of the hearing authority.¹⁰ In the same judgment, the ECtHR confirmed that the CAS complies with the requirements of structural and personal independence and is thus a sufficiently independent arbitral tribunal in the light of Art. 6 of the Convention.¹¹

³ The Paris Reform was triggered by the well-known *Gundel* judgment of the Swiss Federal Supreme Court (SFT) in 1993 (119 II 271), in which the SFT drew the attention of the CAS to the numerous institutional and financial links that existed between the IOC and the CAS.

⁴ Art. S2 and S6 CAS Code.

⁵ The CAS ADD acts as the substitute of the internal instance of the international federations and is therefore not a “true arbitral tribunal”, see SFT 4A_232_2022 of 22 December 2022, at 5.3.

⁶ Art. S1, S2 and S3, S14 and S20. The CAS mediation procedure is governed by a separate set of rules (CAS Mediation Rules, last version of 2016).

⁷ The *Pechstein* saga includes several arbitral – and court proceedings: two CAS awards (one before the CAS Appeals Division in Lausanne -CAS 2009/A/1912, *Claudia Pechstein v. ISU* & CAS 2009/A/1913 *DESG v. ISU*, award of 25 November 2009- and one before the CAS Ad Hoc Division in Vancouver -OG 10/004, *Claudia Pechstein v. DOSB* & IOC, award of 18 February 2010); two SFT judgments (SFT 4A_612/2009 of 10 February 2010 and Request for revision SFT 4A_144/2010 of 28 September 2010); before the German courts (LG München of 26 February 2014, 37 O 28331/12; before the OLG München, partial decision of 15 January 2015, U 1110/14 Kart; before the Bundesgerichtshof of 7 June 2016, KZR 6/15; and before the German Federal Constitutional Court

(BVerfG), Judgment of 3 June 2022, 1 BvR 2103/16); and before the ECtHR (Judgment of 2 October 2018, *Mutu and Pechstein v Switzerland* (Applications 40575/10 and 67474/10) (the *Pechstein* ECtHR Judgment).

⁸ On the various ECtHR judgments and other decisions related to the CAS see Despina Mavromati, *CAS through the lens of the European Court of Human Rights and other tribunals*, in James Nafziger/ Thomas Stoel (eds.), *Handbook on International Sports Law*, Elgar Publishers, 2nd ed. 2022, pp. 196-241. On the ECtHR *Pechstein* Judgment Antonio Rigozzi, *Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond*, in Ch. Müller/S. Besson/A. Rigozzi (Eds), *New Developments in International Commercial Arbitration 2020*, Stämpfli 2020, pp. 77-130.

⁹ The BVerfG remanded the case to the OLG München, albeit only with respect to the denial to grant a public hearing. See Rüdiger Morbach, *The Pechstein Saga Continues: The German Federal Constitutional Court Grants Another Round on the Rink*, in Kluwer Arbitration Blog, 27 July 2022.

¹⁰ The complex issue of the CAS jurisdiction in appeal proceedings falls outside the scope of this article.

¹¹ See the *Pechstein* ECtHR Judgment, paras 138 ff. The findings of the *Pechstein* judgment regarding the jurisdiction of the CAS and the public hearing were partially reproduced in the BVerfG Judgment. The SFT has repeatedly confirmed the structural independence of

In the following pages, we will navigate through some specific issues related to the appeal proceedings, from the filing of the statement of appeal until the issuance of the final award and beyond, focusing on procedural particularities that counsel without previous experience in sports arbitration should be mindful of when involved in CAS appeal proceedings.

II. General Issues in the Appeal Proceedings

A. Tasks and Role of the CAS Appeals Division President

Each CAS Division has its own Division President and a Deputy President appointed by the ICAS from among its 22 members.¹² The President of the Appeals Division (the AD President) has several duties and powers, including, but not limited to the issuance of any procedural orders before the constitution of the panel (e.g., orders on language,¹³ orders on joinder and intervention,¹⁴ orders on the consolidation of the proceedings, orders on the request for interpretation¹⁵ and termination orders¹⁶). Most importantly, the AD President decides on the request for provisional measures (incidentally also on the CAS jurisdiction on a *prima facie* basis) if the panel has not yet been constituted; this happens in most cases, since the request must be filed along with the introductory submission of the statement of appeal.¹⁷ Another very important task of the AD President is to appoint the panel

chair or the sole arbitrator, but also of the respondent's arbitrator (if the latter fails to do so) and the confirmation of the constitution of the panel.¹⁸

Furthermore, the AD President decides on requests for expedited proceedings, on the confidentiality of the proceedings and may (theoretically) suggest conciliation to the parties.¹⁹ In other words, the AD President ensures the overall smooth coordination of the proceedings until the constitution of the panel. Thereafter, the AD President may grant an extension for the issuance of the award upon request by the panel chair (Art. R59), however, most of the AB President's powers are transferred to the panel chair / sole arbitrator who issues appropriate directions for the conduct of the hearing and subsequent orders.²⁰

B. Notifications and E-filing platform

CAS arbitration is institutional arbitration. As such, all notifications and communications should go through the CAS Court Office in Lausanne.²¹ The rule is that all formal submissions, including the statement of appeal, appeal brief, the answer, arbitral awards and various orders, must be notified by registered mail or in a form permitting proof or receipt.²² If filed by registered mail, the exhibits to the various submissions can be sent by email, which is also the standard way of communication for the

the CAS since 2003, SFT 4P.267/2002 of 27 May 2003 (129 III 445, *Lazutina / Danilova*) and SFT 4A_260/2017 of 20 February 2018 (144 III 120, *Seruing*). See also the more recent SFT 4A_644/2020 of 23 August 2021, SFT 4A_10/2022 of 17 May 2022 and 4A_232_2022 of 22 December 2022, at 6.6.2 and 6.7. The latter judgment equally confirmed the sufficient independence of the two CAS Divisions (i.e. the CAS ADD and the CAS Appeals Division) from each other, not least through the separate lists of arbitrators.

¹² Art. S6 (2) CAS Code. ICAS was composed of 20 members up until the last amendment CAS Code.

¹³ Art. R29 CAS Code. CAS 2020/A/6753, *Wydad Athletic Club v. S. Diarra & Ujpest 1885 Futbal Kft*, award of 14 May 2021, para. 45.

¹⁴ Art. R41.2 CAS Code.

¹⁵ Art. R63 CAS Code.

¹⁶ Art. R64.1, R65.2. A termination order may be challenged as an award before the SFT, ATF 4A_582/2009 of 13 April 2010, X. SA (Bulletin ASA 2010, p. 598), at 3.3.

¹⁷ Art. R37 and Art. R48 CAS Code.

¹⁸ Art. R54 CAS Code.

¹⁹ Art. R52, R43 and R42 CAS Code, respectively.

²⁰ See among others Art. R57 CAS Code.

²¹ Art. R31 CAS Code.

²² See e.g. SFT 4A_556/2018 of 5 March 2019, at 4.5.2 and 6. However, the parties can send all exhibits to their various submissions via e-mail, see R31 CAS Code.

remaining correspondence between the CAS and the parties.²³

However, and particularly since the outbreak of the Covid-19 pandemic, parties have been increasingly using the CAS e-filing platform since the CAS no longer requires the consent of both parties for its use.²⁴ It is important to note that the e-filing platform can only be activated after the filing of the introductory submission to the CAS, i.e. after acquiring the case number for the arbitration proceeding in question. The e-filing is therefore more useful for the secondary stages of the proceedings, specifically, from the filing of the appeal brief and beyond.

C. Choice of the Language of the Proceedings

The CAS official languages are French, English and (since 2021) Spanish.²⁵ While the majority of proceedings is conducted in English, there has been a steady increase of proceedings conducted in Spanish, mostly in football-related matters. The main criterion for the choice of the procedural language is the language in which the decision appealed against was drafted.²⁶ If the parties cannot agree on a common language, the President of the Panel or the AD President will issue an order determining such language. Notwithstanding the choice of language, it is more and more common to opt for hybrid solutions, i.e. the choice of one language for the proceedings while the filing of

submissions and exhibits is in another language without the need to translate them, as long as all parties agree and the arbitrators understand such language.²⁷ It is also possible (even though rare in practice) to opt for non-official language.²⁸ Finally, the parties can express themselves in any other language during the hearing so long as they bear the interpretation costs.

The choice of the language is a technical albeit important issue that can have a wider impact on the cost and duration of the proceedings (for example, if translations and interpreters are needed in complex cases) but also on the choice of the arbitrator: since a large majority of arbitrators are English-speaking, the choice of a non-English language may significantly decrease the pool of available arbitrators.²⁹

D. Choice of the Arbitrators and Challenge Proceedings

Similar to commercial arbitration, the choice of the arbitrators and the appointment of the panel is a crucial procedural step in CAS proceedings. The particularity of CAS is that it operates through a mandatory list of arbitrators compiled by the ICAS Membership Commission.³⁰ There is a “general list” of CAS arbitrators who can serve on both ordinary and appeal proceedings and other special

²³ E.g. requests for extension, other procedural requests and logistical matters.

²⁴ See the CAS Emergency Guidelines – Art. R31 para. 4 CAS Code. See also the Guidelines for the CAS e-filing platform available on the CAS website.

²⁵ Art. R29 CAS Code.

²⁶ Provided that the decision was drafted in a CAS official language. Generally, procedural orders are not published. CAS 2019/A/6483, *Wydad Athletic Club v. CAF & Espérance Sportive de Tunis*, order of 18 October 2019, p. 3. See Despina Mavromati / Matthieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*, Wolters Kluwer (2015), pp. 75 ff.

²⁷ Art. R29 CAS Code in fine. CAS 2018/A/5796, *A. Abdelhak v. IHF*, award of 27 December 2018, para. 16.

See also CAS 2018/A/5751, *New Stars de Donau v. Deportivo Niefang, FEGUIFUT & CAF*, award of 11 January 2019, para. 39. See TAS 2006/A/1095, *FC Zurich c. SFL & FC Sion*, sentence du 9 mai 2007, para. 15.

²⁸ See the ICAS 2021 Report and Financial Statements (English amounted to a 80.5%, Spanish 9.4% and French 9.3%). Another language was used only to a 0.8% of the CAS procedures.

²⁹ See the CAS list <https://www.tas-cas.org/en/arbitration/liste-des-arbitres-liste-generale.html>. See also CAS 2018/A/6040, *Club Atlético Boca Juniors v. CONMEBOL & Club Atlético River Plate*, award of 4 February 2020, para. 42.

³⁰ Art. S6 para. 4 CAS Code. See also the ICAS 2021 Report and Financial Statements.

lists.³¹ Once on the general list, arbitrators cannot act as either counsel or experts before the CAS.³² There has been criticism but also praise on the mandatory list of the CAS, which aims at ensuring expertise in sports-related matters and increasing costs and time efficiency.³³

Another specific list that exists as part of the CAS general list is the “football list”, comprising individuals with expertise in football-related matters, which amount to the large majority of CAS appeal proceedings.³⁴ The CAS Code provides that in football-related matters, the AD President appoints an arbitrator from such list, unless the parties agree otherwise or there are exceptional circumstances.

In any event, parties to an appeal procedure can only appoint an arbitrator from the general list of arbitrators. It is also possible for the parties to agree on a sole arbitrator, or the AD President may subsequently decide this for the parties, if the parties fail to agree on the panel composition, and after taking into account the circumstances of the case.³⁵ The choice of the arbitrator is a crucial element to be filed along with the statement of appeal or within the time limit set by the AD President, failing which the appeal is deemed withdrawn.³⁶

Reasons that speak in favor of a sole arbitrator mostly relate to the limitation of the budget and the lack of factual and legal complexity of the case. In all other cases, it is advisable to opt for a panel of

three arbitrators. In accordance with the CAS Code, each party appoints one arbitrator (along with the statement of appeal for the appellant ten days after receipt of the statement of appeal by the respondent)³⁷ and the panel chair is appointed by the AD President.

The choice of a party-appointed arbitrator is not an easy task for counsel; apart from the due diligence check and the initial filter depending on the language of the proceedings, it is advisable to look for previous experience and CAS awards and explore the types of cases in which the arbitrator-to-be-appointed was involved, but also the parties that appointed her/him. *Ex parte* communication prior to the arbitrator’s appointment (e.g., for discussion on conflicts, or on whether such arbitrator could feel well placed to deal with the particular case) should not be allowed. However, such conduct is not explicitly prohibited, either. In all cases, upon their appointment by the parties, arbitrators must fill out the “*Arbitrator’s Declaration of Independence and Impartiality*” form, in which they must fully disclose any reasons likely to put any doubts on their independence / impartiality; they must equally confirm that they have the qualifications and availability to expeditiously deal with the case.³⁸

The appointment of the arbitrator by the opposing party is an even more sensitive matter. Counsel must conduct a full due diligence check as soon as the name of the arbitrator becomes known and in any event upon the full disclosure by such arbitrator

³¹ There is a subcategory of the general list called “football list”, see <https://www.tas-cas.org/en/arbitration/list-of-arbitrators-football-list.html>

³² See the “double-hat” prohibition in Art. S18 CAS Code. Arbitrators on the CAS Anti-Doping list cannot sit as arbitrators in CAS Appeals procedures.

³³ Antonio Rigozzi /William McAuliffe, *Sports Arbitration, The European, Middle Eastern and African Arbitration Review* 2013, p. 16.

³⁴ Out of the 996 procedures registered in 2021, 796 were in appeal proceedings, see the ICAS 2021 Annual Report and Financial Statements, p. 17.

³⁵ Art. R50 CAS Code. Such circumstances relate mostly to the disputed value and the complexity of the case. See

Despina Mavromati / Matthieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*, Wolters Kluwer (2015), pp. 442 ff.

³⁶ Art. R48 and Art. R50 CAS Code. The consequence of the non-appointment of an arbitrator by the respondent is that the AD President may decide in lieu of such party, see Art. R53 CAS Code.

³⁷ Art. R53 CAS Code.

³⁸ Art. R33 CAS Code. Lack of availability or lack of a good command of the language of arbitration may theoretically lead to the removal of the arbitrator from the case as per Art. R35, even though this provision is rarely used in practice.

through the arbitrator's declaration of independence form. This "*devoir de curiosité*" lies with the parties' counsel, as repeatedly held by the SFT.³⁹ Another important element is the time limit for filing potential objections to the appointment of the opposing party's arbitrator. This limit remains seven days after the ground for challenge has become known, notwithstanding the respective amendment in the general legal framework established by the Swiss Private International Law Act (PILA).⁴⁰ The SFT considers that the starting point for the "knowledge" of the grounds likely to raise doubts as to the arbitrator's independence starts to run from the moment the party / its counsel obtained that knowledge, assimilating therefore knowledge of the party's counsel to the knowledge of the party.⁴¹

The ICAS Challenge Commission decides on the petition for challenge after consulting with the parties and the arbitrators.⁴² The reasoned decision is not open to an immediate challenge but can be challenged before the SFT along with the award.⁴³

Notwithstanding the ongoing duty of disclosure, the SFT has held that failure to disclose ongoing new appointments does not equal lack of independence unless the opposing party can establish deliberate concealment, which may be quite difficult in practical terms.⁴⁴

Another interesting issue arising in CAS appeal proceedings is the repeated appointments of certain arbitrators by international sports federations, for

example, FIFA that is very often involved in appeal proceedings as co-respondent. This is especially true in appeals against decisions rendered by its dispute-resolution bodies.⁴⁵ In most cases, FIFA is a "passive" respondent, and is not actively involved in the case since it is only named as co-respondent (i.e. the body that issued the decision appealed against). The SFT has held that, in terms of counting of the previous appointments of arbitrators as per the IBA Guidelines, only direct appointments should count (consolidated proceedings should not be considered as multiple appointments). At the same time one should distinguish between appointments as panel chair by the AD President from the appointments by the parties.⁴⁶

All the above considerations in terms of conflicts check and due diligence equally apply to both parties for the appointment of the panel chair that is made by the AD President. If the parties accept such appointment or fail to file a petition for challenge within the given time limits, the AD President will proceed to the confirmation of the panel. Only from this moment is the constitution of the panel deemed to be complete.⁴⁷ Since its last modification in November 2021, the CAS Code explicitly added certain criteria for selection of a panel chair or sole arbitrator (expertise, diversity, equality and turnover of arbitrators).⁴⁸

E. Filing Fee, Procedural Costs and Legal Aid

independent of the international federations or the IOC) and the three Division President (except for the one who is in charge of the matter). Approx. 10% of the challenges are accepted, see the ICAS 2021 Report and Financial Statements, p. 19.

³⁹ SFT 4A_520/2021 of March 4, 2022, at 5.3.

⁴⁰ SFT 4A_520/2021 of March 4, 2022, at 5.5.

⁴¹ Football-related proceedings amount to almost 80% of the appeal procedures before the CAS, see the ICAS 2021 Annual Report and Financial Statements, p. 19.

⁴² SFT 4A_520/2021 of March 4, 2022, at 5.5.

⁴³ Art. 54 para. 5 CAS Code. See 4A_282/2013, of 13 November 2013, at 5.1.1, 5.3.3 and 5.3.4.

⁴⁴ Art. R54 CAS Code.

³⁹ 4A_234/2010 of 29 October 2010, at 3.4.2; see 4A_110/2012, of 9 October 2012, at 2.2.2 (31 ASA Bull 174, 2013); see however the limits of the duty of diligence in SFT 4A_318/2020 of 22 December 2020 (Request for revision of the award CAS 2019/A/6148, Sun Yang), at 6.5.

⁴⁰ See the new Art. 180a para. 1 PILA (applicable since 2021) which provides for 30 days "*unless the parties have agreed otherwise (...)*". Art. R34 CAS Code is applied as *lex specialis*.

⁴¹ SFT 4A_520/2021 of March 4, 2022, A v. FIFA, at 5.4.2.

⁴² Art. S7 para. c and Art. R34 CAS Code. The Challenge Commission is composed on the Chair (ICAS Member

Along with the filing of the statement of appeal, the appellant must pay a non-refundable Court Office fee of CHF 1,000. This amount is considered for the final amount of costs.⁴⁹

Apart from the filing fee, the CAS Court Office fixes the advance of costs at an early stage of the proceedings. Both parties (or by the appellant paying for both parties) will have to pay the full amount for the proceedings to continue.⁵⁰ Since some appeals may be of purely dilatory nature and in order to avoid engaging into unnecessary legal fees, counsel for the respondent may request a time limit for the filing of the answer after the payment of the advance of costs by the appellant.⁵¹ It bears noting that the CAS arbitrators do not normally receive an advance of costs by the CAS but they are paid after the finalization of the CAS proceedings and the issuance of the arbitral award. This difference from commercial arbitration may be explained by the fact that the CAS appeal proceedings are generally much quicker than commercial arbitration proceedings.

A particularity of the CAS appeal proceedings is some types of cases are free of charge, namely appeals against decisions rendered by international federations in proceedings of “exclusively” disciplinary nature.⁵² According to the CAS Code, “free of charge” means that the parties will not have

to pay the fees and costs of the CAS arbitrators (who are paid according to the CAS fee scale available online) and the various administrative costs of the CAS. The parties still need to pay the CAS Court Office fee of CHF 1,000 and the costs of the parties’ counsel, witnesses, experts and interpreters, if applicable.⁵³

Along with the award, the panel may decide to order a contribution to legal fees and other expenses at its discretion and even without specific request from the parties. However, it will take into consideration the conduct of the parties, the complexity of the proceedings, and other factors.⁵⁴

Apart from the procedure under the conditions listed in the CAS Code, it is possible for natural persons lacking the financial means to request financial aid from the Legal Aid Fund which is financed by the Olympic Movement. Such fund operates according to the Legal Aid Guidelines⁵⁵ and is administered by a dedicated ICAS Commission known as the Legal Aid Commission.⁵⁶ Legal aid is possible for all types of procedures (ordinary, appeal and anti-doping) for natural persons who lack sufficient means to cover the procedural costs.⁵⁷ They cover the procedural costs, the advance of costs, a counsel from the CAS pro bono list,⁵⁸ possible travel and accommodations costs for the party concerned,

⁴⁹ Art. R64.1 CAS Code.

⁵⁰ Art. R64.2 CAS Code. The consequence of not paying the advance of costs is the withdrawal of the appeal procedure. This seems harsher than in commercial arbitration (e.g. Art. 37 (6) ICC Rules 2021) where the claimant gets a new deadline to pay the advance of costs. In any event, the SFT has held that Art. R64.2 CAS Code and its consequences do not violate the prohibition of excessive formalismo (cf. SFT 4A_692/2016 of 20 April 2017, at 5.2).

⁵¹ Art. R55 para. 3 CAS Code.

⁵² Art. R65.1 CAS Code. The decisions that are “exclusively” of disciplinary nature do not include decisions related to sanctions as a consequence of a dispute of an economic nature, e.g. the numerous appeals to the CAS from clubs sanctioned for the non-payment of their dues / not respecting CAS decisions, see CAS

2019/A/6129, *US Citta di Palermo v. FIFA*, award of 30 October 2019.

⁵³ Art. R65.2 and R65.3 CAS Code.

⁵⁴ Art. R65.4 CAS Code. Cf. the SFT 4A_600/2010 of 17 March 2011, at 4.2: this judgment was rendered before the amendment CAS Code which gave the discretion to the panel to order a contribution to legal fees and other expenses even without the request by the parties.

⁵⁵ See the Guidelines on Legal Aid before the Court of Arbitration for Sport as from 1 November 2020.

⁵⁶ See Art. S7 para. 2 (b) CAS Code. The Legal Aid Commission is chaired by the ICAS President (currently Mr. John Coates) and four ICAS Members. Approx. 70% of the requests for legal aid are accepted, see the ICAS 2021 Report and Financial Statements, p. 19.

⁵⁷ Art. 5 of the Guidelines.

⁵⁸ Art. 5 para. 2 of the Legal Aid Guidelines and Art. S18 CAS Code.

and any witnesses, experts, interpreters or pro bono counsel.

Since the last modification of the CAS Code in November 2022, the CAS Code also provides for a separate legal aid fund financed by football stakeholders specifically for football-related disputes.⁵⁹ The CAS legal aid system has been challenged by some individuals as not being sufficient to cover the proper representation of the parties in disciplinary proceedings and particularly as a means to invalidate the arbitration agreement. On at least two occasions, the SFT has confirmed that legal aid falls outside the scope of domestic (and international) arbitration. In a judgment post-Pechstein, the SFT has held that the CAS legal aid mechanism complies with the right of access to justice.⁶⁰

III. Main stages of the CAS Appeal Proceedings

A. Filing of the Statement of Appeal and Time Limits

It is important to note that the general time limit to file an appeal against a decision of an international federation is twenty-one (21) days from the receipt of the challenged decision.⁶¹ However, this being a

⁵⁹ Art. S6 para. 9 CAS Code

⁶⁰ SFT 4A_166/2021 of 22 September 2021, at 5.5.2 ff. The SFT held that it is not necessary to provide for the same legal aid guarantees to a state court to guarantee the right of access to justice. Prior to the ECtHR Pechstein Judgment, the SFT had already dismissed a similar claim by an athlete in disciplinary proceedings who supported that the arbitration agreement should be invalidated for lack of financial means, see SFT 4A_178/2014 of 11 June 2014.

⁶¹ Art. R49 CAS Code. To the extent that the appeal to the CAS replaces the challenge procedure of the associations' decisions under Art. 75 CC (which provides for one month), the time limit of 21 days has been criticized as being too short and thus invalid, see Scherrer/ Bräger, ad Art. 75 ZGB, para. 23, in Geiser / Fountoulakis (eds.), *Basler Kommentar Zivilgesetzbuch I*, 7th ed., 2022, Helbing Lichtenhahn.

⁶² Art. 51 para. 1 of the FIFA Statutes (2022); see Art. 8.3 of the ITF Independent Tribunal Procedural Rules.

general time limit, counsel is advised to look into the specific rules of the federation for a confirmation, since the latter constitutes a *lex specialis* provision compared to the time limit set out in the CAS Code. Almost all sports federations have adopted the same time limit.⁶²

While all other time limits can be extended upon request and prior to their expiry,⁶³ the time limit to file the statement of appeal cannot be extended for reasons of legal certainty. Counsels are therefore advised to opt for a very short statement of appeal so as not to miss the deadline and then file a request for extension for the filing of the appeal brief if there are reasons for such request (e.g., preparation of additional expert reports, need to translate an important volume of documents, health reasons or other). As a rule, a first request for extension for up to ten days can be decided – and will usually be granted – by the CAS Director General without consulting with the other party.⁶⁴

Other requirements for the appeal include the exhaustion of internal remedies, the qualification of the decision as an “appealable decision” (as opposed to a simple letter of information)⁶⁵ and the existence of an arbitration clause providing for such appeal.⁶⁶ The statement of appeal is the introductory document notifying the CAS

⁶³ Art. R32 and cf. to Art. R49 CAS Code. Time limits begin from the day after the notification by the CAS is received (with non-working days and holidays included in the calculation). Time limits end if the communication is sent before midnight (time zone of the party sending the notification or the primary legal counsel in case of representation). On the communications see also “Notifications and E-Filing Platform” above.

⁶⁴ Art. R32 CAS Code. This rule was adopted shortly after the outbreak of the Covid-19 pandemic (through the [CAS Covid-19 Emergency Guidelines](#)) and was incorporated in the CAS Code shortly afterwards.

⁶⁵ The CAS follows Swiss case law for the qualification of the appealable decision, while the denomination of such document by its drafter is not decisive, see CAS 2020/A/7590, *HCF v. ICF*, CAS 2020/A/7591 *RCF v. ICF*, award of 23 December 2021, paras 71-75.

⁶⁶ Art. R47 CAS Code. See Despina Mavromati / Matthieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*, Wolters Kluwer (2015), pp. 379 ff.

Secretariat and the other party/ies of the CAS appeal proceedings. It is however important to comply with all requirements and add all elements listed in the CAS Code and duly pay the CAS Court Office filing fee.⁶⁷ If the statement of appeal is incomplete, the CAS Court Office will only grant one short time extension (generally three days) to complete the statement of appeal, failing which the CAS will not open the case.⁶⁸

It is also important to clearly depict the respondent(s) in the appeal proceedings: in football disputes, there is a difference between the so-called “horizontal” disputes (disputes between two parties – players or clubs – in which the FIFA dispute resolution bodies merely act as the tribunal and have no stake at the outcome of the case)⁶⁹ and the “vertical” disputes,⁷⁰ (most often disciplinary or ethics-related decisions rendered by FIFA where the appeal should be addressed directly against it).⁷¹ In case of doubt, FIFA / another sports federation whose dispute resolution body issued the decision appealed against should be named as respondent even though it may eventually not participate in the proceedings. The same applies to parties who are affected by the outcome of the decision appealed against, particularly in disciplinary decisions.⁷²

B. Request for Provisional Measures

⁶⁷ Art. R48 and R64.1 / R65.1 CAS Code. The power of attorney for the parties which are represented, even though necessary, is not one of the elements of Art. R48 CAS Code, see CAS 2015/A/3959, *CD Univ Católica & Cruzados SADP v. Genoa Cricket & FC*, award of 27 November 2015, para. 132 f.

⁶⁸ The case will not be opened, meaning that there will not be a docket number nor the need for a termination order. The time limit to complete the statement of appeal is granted to avoid excessive formalism. The requirements are however strict and the SFT has confirmed the legality of the consequences of their non-respect, see SFT 4A_600/2008 of 20 February 2009 (for the failure to pay the advance of costs in time). See SFT 4A_324/2021 of 3 August 2021 and SFT 4A_416/2020 of 4 November 2020.

⁶⁹ CAS 2016/A/4837, *S. N. Barquero v. FC Rubin Kazan*, award of 19 December 2017, para. 119 with references to

Of relevance in appeal proceedings is the possibility to request – and be granted – interim relief, to the extent that the appeal to the CAS does not have a suspensive effect.⁷³ The decision on provisional measures will be rendered by the AD President or by the panel, if it has already been constituted. In very urgent cases, the AD President will decide without consulting the other party/ies. In any event, the AD President performs a *prima facie* control of the CAS jurisdiction, which is not binding on the panel. The three conditions that must be met are the same as in the SFT / civil proceedings and include the risk of irreparable harm, the likelihood of success on the merits, and the balance of interests between the parties.⁷⁴ If filing a request for provisional measures along with the statement of appeal, it is recommended to elaborate the facts and legal arguments at this stage so as to allow the AD President to assess the likelihood of success of the appeal.

C. Filing of the Appeal Brief and the Answer

Most often, the appeal procedure includes only one round of submissions, namely the filing of the appeal brief and the answer brief. The importance of this filing lies in the fact that, after this stage, the parties are no longer authorized to amend or supplement their arguments and requests for relief unless all parties agree or the panel chair so decides

CAS 2014/A/3489 & 3490, *S.E. Palmeiras v. D. Filbo & Panathinaikos FC*, Award of 10 November 2014, para. 175.

⁷⁰ CAS 2017/A/5359, *Persepolis Football Club v. Rizespor Futbol Yatirimlari*, award of 29 May 2018, para. 66 f. and para. 72 f. See also CAS 2016/A/4836, *R. G. Riancho v. FC Rubin Kazan*, award of 19 December 2017, para. 124 f.

⁷¹ On the distinction between horizontal and vertical disputes in terms of consensual and forced arbitration see also SFT 4A_600/2020, of January 27, 2021.

⁷² CAS 2020/A/6713, *N. H. da Silva v. FIFA*; award of 26 May 2021, para. 57.

⁷³ This is in line with the rules of most federations, Art. 57 para. 4 FIFA Statutes (2022).

⁷⁴ Art. R37 CAS Code. CAS 2022/A/8709, *Football Union of Russia (FUR) v. UEFA et al.*, order on provisional measures of 8 April 2022.

on the basis of exceptional circumstances.⁷⁵ The SFT has repeatedly confirmed the wide power of the panel to accept or refuse new evidence based on the CAS Code so that it is very difficult to successfully challenge the panel's refusal to submit new evidence before the SFT.⁷⁶ In view of the importance of these submissions and the limited time set to file the appeal brief (10 days) or the answer (generally 20 days)⁷⁷ it is not unusual to request an extension.⁷⁸ It is noteworthy that counterclaims are not authorized in appeal proceedings but only in ordinary proceedings.⁷⁹

The appeal brief and the answer brief must both contain all facts and legal arguments upon which they build their case along with the final requests for relief. The answer brief is also the last stage in which the respondent may file its objections to CAS jurisdiction.⁸⁰ Importantly, any witnesses that the parties wish to call to a potential hearing must be clearly listed, along with a summary (3-4 lines) of their expected testimony. Such summary aims at informing the panel and counter party of the respective testimony and must organize the hearing and the examination / cross-examination of witnesses. The panel can also evaluate the pertinence of such witnesses' potential testimony and either request additional information or refuse the hearing of a witness for irrelevance.⁸¹

⁷⁵ Art. R51, Art. R55 and R56 CAS Code. The latter provision is limited to "new arguments" and new requests for relief and does not include the reaction to the respondent's answer or the response to any procedural objection (e.g. jurisdiction or admissibility) raised with the answer.

⁷⁶ SFT 4A_478/2017 of 2 May 2018, at 3.3.1; see also SFT 4A_274/2013 of 5 August 2013, at 3.2.

⁷⁷ Art. R51 and Art. R55 CAS Code, respectively.

⁷⁸ Art. R32 CAS Code.

⁷⁹ Art. R39 CAS Code. A party can however issue a cross-appeal provided that it acts within the time limit specified in the CAS Code (Art. R49 CAS Code and the relevant provision of the federation's rules).

⁸⁰ Art. R55 para. 5 CAS Code; thereafter, the *Einlassungsdoktrin* applies and it is no longer possible to raise jurisdictional objections. It must be noted that the submission on a possible request for provisional measures does not equal acceptance of jurisdiction, see SFT 4A_564/2020 of 7 June 2021, at 6.3.2.

D. Evidentiary Procedure and Hearing

After the filing of the answer and unless the parties have agreed on a second round of submissions, the panel asks the parties whether they wish to have a case management conference. This used to happen on a case-by-case basis but is now codified in the CAS Code.⁸² This is a welcome development. Similar to commercial arbitration, the case management conference aims at filtering down the issues at stake and dealing with procedural issues or the scheduling of the hearing.

Another important stage of the proceedings is the issuance of the order of procedure, which summarizes the major elements of the arbitration procedure and must be signed by all parties.⁸³ Since this document systematically deals with important issues such as the jurisdiction of the CAS, the panel's power of review,⁸⁴ the constitution of the panel / the number of arbitrators,⁸⁵ the determination of the arbitration proceedings as international (falling under the PILA) or domestic (falling under the Swiss Code on Civil Procedure, CCP), the parties must carefully read the terms and add any reservations / raise any objections as needed.⁸⁶

⁸¹ This does not happen often and is subject to the risk of violating the parties' right to be heard under Art. 182 para. 3 and Art. 190 para. 2 (d) PILA.

⁸² Art. R56 CAS Code. This is also a general practice in other sports case management organizations, e.g. Sport Resolutions in London, England and is a standard practice in commercial arbitration e.g. the ICC.

⁸³ There is however no specific consequence in case of the non-signing of such order of procedure.

⁸⁴ SFT Judgment 4A_102/2016 of 27 September 2016, at 3.3 (*Essendon*).

⁸⁵ SFT 4A_282/2013, of 13 November 2013, at 5.1 and 5.3.3. The parties had agreed on a three-member panel (pursuant to the arbitration agreement) but subsequently signed the order of procedure (indicating a sole arbitrator) without reservations.

⁸⁶ SFT 4A_540/2018 of 7 May 2019 (*Valcke*), at 4.1 and 4.5. Even though proceedings should have been domestic under the CCP (since both parties – Mr. Valcke and FIFA were in Switzerland), the parties subsequently signed an

The oral hearing is optional, but a panel will most likely accept to hold a hearing upon request by one of the parties.⁸⁷ The directions and a tentative hearing schedule are usually set shortly before the hearing upon consultation with the parties. While hearings are generally not public, the CAS Code was amended after the judgment in the Pechstein case to allow a hearing without the consent of both parties upon certain conditions.⁸⁸

As per the CAS Code and the PILA, the panel has a wide margin of discretion regarding the administration and assessment of the evidence, subject to Art. 182 para. 3 PILA. This has led to the development of a unique mixture of common law and civil law traditions when it comes to evidentiary issues before the CAS. This is also attributed to the fact that the CAS arbitrators, appointed on an ad hoc basis by the parties and the CAS, stem from different countries and continents with different legal cultures.

In this respect, the panel may request additional evidence from the parties at any time or appoint experts. The use of a Redfern Schedule or other similar methods to filter requests for the production of documents happens in certain factually complex cases.⁸⁹ While the CAS has no such power as to

force the other party to produce information,⁹⁰ it may logically draw adverse inferences from the denial of such party to do so. Also, while the PILA allows the assistance of a state court for the taking of evidence, this is rarely used in practice.⁹¹

Experts and Witness Statements in CAS Arbitration

Similar to international arbitration proceedings, experts are frequently used in CAS proceedings as part of the evidentiary procedure, particularly in doping-related disputes or match-fixing cases.⁹² The range of issues largely depends on the nature of the proceedings (i.e., contractual, disciplinary and, more specifically doping-related disputes). It included specific areas of a foreign “national” law⁹³ but also forensic expertise (including graphology),⁹⁴ or medical and laboratory expertise.⁹⁵ In CAS arbitrations there is a predominant use of party-appointed experts. The examination of experts falls largely within the panel’s discretion, which however consults with the parties and their counsel and may involve hot tubbing or traditional expert examination.⁹⁶

order of procedure indicating the application of the 12th chapter of the PILA without reservations to this effect. The SFT held that the opting-out was valid and pointed out the lack of diligence of the applicant.

⁸⁷ Art. R57 CAS Code.

⁸⁸ Art. R57 CAS Code: the provision requires a request by a physical person (i.e. not a club), a matter of disciplinary nature subject to several exceptions (e.g. morals, public order, national security, minors, or if the proceedings relate to legal or technical questions), cf. SFT 4A_486/2019 of 17 August 2020, at 4.3. The conditions are analogous to the ones of the ECtHR, see ECtHR, *Guide on Article 6 of the European Convention on Human Rights*, 31 August 2022, p. 61. Before the modification CAS Code, the public hearing required the consent of both parties.

⁸⁹ CAS 2019/A/6274, *I. Henriques et al. v. IOC*, award of 3 February 2020, para. 28.

⁹⁰ Art. R44.3 CAS Code.

⁹¹ CAS 2019/A/6148, *WADA v. S. Yang & FINA*, award of 28 February 2020 (annulled and replaced by the CAS 2019/A/6148 of 22 June 2021, paras. 70, 72 and 103).

⁹² CAS 2020/O/6689, *WADA v. Russian Anti-Doping Agency*, award of 17 December 2020, e.g. para. 531. Experts are frequently used in “typical” procedures involving an anti-doping rule violation under the WADA Code, CAS 2014/A/3488, *WADA v. J. Lallukka*, award of 20 November 2014; in match-fixing cases, see CAS 2018/A/6075, *I. Labuts v. Football Association of Ireland (FAI)*, award of 17 July 2020.

⁹³ CAS 2009/A/1801, *Aris Thessaloniki FC v. D. Bajevic*, award of 17 March 2009.

⁹⁴ CAS 2020/A/6899 & 6930, *Cádiz FC & M. Mbaye v. FIFA & Watford FC*, award of 1 July 2021, para. 66.

⁹⁵ CAS 2018/O/5822, *LAAF v. RUSAF & M. Ponomareva*, award of 11 April 2019, para. 9.

⁹⁶ CAS 2018/O/5794 & 5797, *C. Semanya v. LAAF*, award of 30 April 2019, para. 466; see also Doriane Coleman / Jonathan Taylor, *Experts in the Hot Tub at the Court of Arbitration for Sport*, Vol 104, No 2, pp. 40-45.

If the panel intends to appoint an expert, it shall consult the parties with respect to the appointment and terms of reference of any expert. Such expert must, prior to an appointment, immediately disclose any circumstances likely to affect her / his independence with respect to any of the parties.⁹⁷

Issues related to the Burden and the Standard of Proof

Generally, parties must adduce the evidence to establish the issues that they rely on in accordance with the general rule of Article 8 Swiss Civil Code (CC).⁹⁸ The burden of proof pertains to the merits of the dispute so that the general provision of Article 8 CC applies in all cases where Swiss law is applied to the merits.⁹⁹ In fact, several rules of international sports federations have transposed the general provision of Article 8 CC into their own rules / specify who bears the burden of proof.¹⁰⁰ In disciplinary proceedings, the federation / prosecuting authority acting on behalf of the federation bears the burden to establish the violation.¹⁰¹ The same rules also include presumptions – refutable or irrefutable – that aim at facilitating the discharge of the burden of proof.¹⁰²

⁹⁷ Even though all experts must be independent by the parties, the SFT has acknowledged that the evidentiary power of panel-appointed experts compared to party-appointed experts, see SFT 4A_274/2012 of 19 September 2012, para. 3.2.1

⁹⁸ CAS 2020/A/7175, *Al-Arabi Sporting Club v. J. I. Martínez*, award of 29 January 2021, para. 37 with references.

⁹⁹ Antonio Rigozzi / Brianna Quinn, *Evidentiary Issues before CAS, in International Sports Law and Jurisprudence of the CAS*, 4th CAS & SAV/ FSA Conference Lausanne 2012, Berne 2014, p. 15.

¹⁰⁰ Art. 49 FIFA Code of Ethics (2020), whereby the burden of proof regarding breaches of provisions rests on the Ethics Committee; see also Article 3.1 WADA Code (2021), which provides for the comfortable satisfaction of the hearing authority that an anti-doping rule violation occurred “bearing in mind the seriousness of the offence”.

¹⁰¹ E.g. Art. 18 of the FIG Code of Discipline, which also provides for the (lower) standard of the “balance of probabilities”.

The standard of proof largely depends on the specific issue at stake, with the regulations of international federations and WADA providing for specific standards. Generally, the two typical standards applicable in CAS cases are the “balance of probabilities” (that a matter is more likely to have occurred than not) and the standard of “comfortable satisfaction” (a standard lower than the criminal standard of “beyond reasonable doubt” but higher than the one of balance of probabilities).¹⁰³ The standard of comfortable satisfaction has been explicitly added as the applicable standard of proof in numerous provisions, including the FIFA Code of Ethics, the WADA Code and other regulations and it is accepted that it is a “variable standard”, bearing in mind the seriousness of the offence.¹⁰⁴ The same standard has been applied in match-fixing proceedings even though it was not explicitly provided for in the applicable rules.¹⁰⁵

To the extent that specific issues regarding evidence are not further regulated in the CAS Code or the PILA, Art. 168 CCP applies by analogy. The latter provides that, generally in civil procedures, the admissible means of

¹⁰² See Antonio Rigozzi, / Brianna Quinn, op. cit. p. 15.

¹⁰³ FIFA used to include in the FIFA Code of Ethics the standard of « personal conviction » which seemed similar to the one of comfortable satisfaction, see CAS 2011/A/2426, *A. Adamu v. FIFA*, award of 24 February 2012, para. 88; see also CAS 2017/A/5086, *M. J. Chung v. FIFA*, award of 9 February 2018, para. 136 and references. Article 48 of the FIFA Code of Ethics in its 2020 version has abandoned the concept of “personal conviction” and explicitly provides for the “comfortable satisfaction” standard of the Ethics Committee.

¹⁰⁴ CAS 2017/A/5379, *A. Legkov v. IOC*, award of 23 April 2018, para. 702 ff.

¹⁰⁵ CAS 2010/A/2172, *O. Oriekhov v. UEFA*, award of 18 January 2011, para. 53; CAS 2009/A/1920, *FK Pobeda et al. v. UEFA*, award of 15 April 2010, para. 85. Other federations have however adopted the standard of the balance of probabilities as the general standard, Art. 5.1 of the ITF Independent Tribunal Procedural Rules (2019).

evidence include testimony, physical records, inspection, expert opinions, written (witness) statements and the questioning of the parties during the evidentiary hearing. In practice, the evidence typically brought before the CAS includes witness statements, expert opinions (depending on the procedure) and the examination of witnesses / parties during the hearing. Some regulations may also include specific provisions as to the evidentiary measures and their admissibility.¹⁰⁶ However, CAS panels generally have wide discretion regarding the appreciation of the evidence. In all cases, this discretion is limited by the principle of public policy.¹⁰⁷

CAS panels have also dealt with the issue of inadmissible evidence under Swiss law (e.g., polygraph evidence), which may still be admissible under circumstances.¹⁰⁸ Some federations' rules on evidence explicitly foresee that the disciplinary authority is not bound by a rule of law related to admissibility of evidence before a court of law or statutory tribunal.¹⁰⁹ Any unlawfully obtained evidence has also been discussed and its admissibility depends on a number of factors, including the legitimate interests at stake and the nature of the infringement.¹¹⁰ Accordingly, using as evidence recordings / filming without consent was found

to infringe personality rights but they may still be admissible if justified through a predominant public or private interest.¹¹¹ The SFT has confirmed the admissibility of such evidence when it pursues a legitimate objective (e.g. the fight against match-fixing).¹¹² It is further possible to hear anonymous or protected witnesses under specific circumstances.¹¹³ Finally, some situations may require a lower degree of evidence when a party has difficulties in discharging its burden of proof.¹¹⁴

E. The Scope of the Panel's Review

A milestone principle of the CAS appeal procedure is the full power of review of the hearing panel.¹¹⁵ This extends to the facts and the law of the case and has a dual practical consequence: the panel may “cure” procedural deficiencies occurred in the previous instance (so that a party cannot invoke such irregularities as a sole argument to reverse the appealed decision) and has various possibilities to decide: it can annul the previous decision and issue a new decision, or refer the case back to the previous instance. In contrast, the SFT has held that there is no right to a dual degree of jurisdiction.¹¹⁶

Another element of the appeal procedure is that the parties may bring new evidence and amend their requests for relief, which however – and logically –

¹⁰⁶ Art. 2.1, 3.2 and 6.1 of the WADA Code (2021) according to which the anti-doping rule violation is established through an adverse analytical finding found in a WADA-accredited laboratory. However, the WADA Code is quite general for other facts related to anti-doping rule violations which may be established by “all reliable means” (Article 3.2 WADA Code 2021).

¹⁰⁷ Cf. Art. 184 PILA, Art. 190 (2) (b) and (e) PILA.

¹⁰⁸ CAS 2011/A/2384 & 2386, *UCI v. A. Contador Velasco* & *RFEC* and CAS 2011/A/2386, award of 6 February 2012, para. 240-242, para. 240.

¹⁰⁹ Art. 18 (in fine) of the FIG Code of Discipline (2021). It is evident, however, that notwithstanding this provision, evidence cannot be admitted if it infringes public policy.

¹¹⁰ CAS 2011/A/2425, *A. Fusimalobi v. FIFA*; SFT 4A_362/2013 of 27 March 2014, at 3.2.2.

¹¹¹ CAS 2011/A/2425, *A. Fusimalobi v. FIFA*, award of 8 March 2012, para. 80 ; see CAS 2011/A/2426, *A. Adamu v. FIFA*, award of 24 February 2012, para. 75.

¹¹² SFT 4A_362/2013 of 27 March 2014, at 3.2.2.

¹¹³ CAS 2019/A/6388, *K. Keramuddin v. FIFA*, award of 14 July 2020, para. 125. The FIFA rules have also explicit rules on the admissibility of anonymous or protected witnesses, see Articles 44-46 FIFA Code of Ethics (2020) and Articles 38-39 of the FIFA Disciplinary Code (2019).

¹¹⁴ This is mostly in cases of match-fixing where it is very difficult for the prosecuting authority to discharge its burden, see CAS 2018/A/5734, *KS Skënderbeu v. UEFA*, award of 12 July 2019, para. 180, with references to CAS 2009/A/1920, *FK Pobeda et al. v. UEFA*, award of 15 April 2010.

¹¹⁵ See generally See Despina Mavromati / Matthieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*, Wolters Kluwer (2015), pp. 503 ff.

¹¹⁶ SFT 4A_200/2021 of 21 July 2021, at 5.2.

cannot go beyond the scope of the decision appealed against.¹¹⁷ Another limitation (albeit not frequently used in practice) is the discretion of the panel to exclude new evidence if it was available to them or could have been discovered by them before the challenged decision was rendered.¹¹⁸ The CAS Code explicitly provides for this possibility. Therefore, if the panel considers that the conditions of Art. R57 para. 3 CAS Code have been met and refuses such additional evidence, this refusal should arguably escape the subsequent control by the SFT (unless it falls within Art. 190 para. 2 (e) PILA)

F. The Notification of the Arbitral Award, Recognition and Enforcement

As in most arbitration proceedings, the award is rendered by a majority decision, failing which by the president only. The award is signed, written and contains brief reasons. Prior to its notification to the parties, it is proofread by the CAS Director General, a process that has been challenged before the SFT, the German *Bundesgerichtshof*¹¹⁹ and the ECtHR¹²⁰ but found to be considered as non-problematic in terms of due process – and analogous to the practice in commercial arbitration.

The award (whose operative part may be notified to the parties before the grounds in urgent cases) can only be challenged before the SFT based on Art. 190 para. 2 PILA. Notwithstanding the wording of the CAS Code allowing for the exclusion of challenge before the SFT (pursuant to the analogous provision in the PILA), the SFT has held that such rule is not enforceable in cases where the

exclusion clause is found in the rules of the federation and is therefore imposed on the athlete.¹²¹

The grounds for challenge are logically identical in both commercial – and sports arbitration. However, the SFT has issued judgments of principle in which it somehow adapted its judgments to the particularities of sports arbitration, in particular with respect to the “*bienveillance*” in the interpretation of the arbitration agreement by reference.¹²² It has also dealt with some specific scenarios such as the challenge before the SFT of the jurisdiction of the previous instance (rather than the CAS).¹²³ Moreover, it has acknowledged the specificities of repeated appointments in sports arbitration.¹²⁴ It has however refused to create a notion of public policy specifically tailored to sports arbitration.¹²⁵ Furthermore, the ECtHR has held that the limited control of CAS awards by the SFT is justified, also in view of the *de novo* review by the CAS.¹²⁶ Through the years, the SFT has helped the CAS shape and amend some of its procedural provisions and has also rendered some leading judgments in international arbitration more generally.¹²⁷ Generally, the success rates of the setting aside proceedings remain very low.

While there is a time limit for the finalization of the award (three months from the transfer file to the panel), the duration will eventually depend on the case complexity and the conduct of parties’ counsel. The rules allow for an extension of “*a maximum of*

¹¹⁷ CAS 2010/A/2090, *NF & A. v. IF*, award of 7 February 2011, para. 7.22

¹¹⁸ Art. R57 para. 3 CAS Code.

¹¹⁹ See the Judgment of the German Swiss Supreme Court (*Bundesgerichtshof*) of 7 June 2016, KZR 6/15.

¹²⁰ See the Pechstein ECtHR Judgment, para. 158. The ECtHR endorsed the position of the SFT 4A_612/2009 of 10 February 2010, at 3.3.

¹²¹ Cf. Art. R59 CAS Code and Art. 192 PILA. See the *Cañas* judgment of the SFT 4P.172/2006 of 22 March 2007, at 4.1.1.

¹²² SFT 4A_460/2008 of 9 January 2009 and SFT 4P.172/2006 of 22 March 2007 at 4.3.2.3.

¹²³ The SFT held that such challenge cannot fall within the jurisdictional challenge of Art. 190 para. 2 (b) PILA but only within the (limited) review of Art. 190 para. 2 (e) PILA. See also SFT 4A_232/2022 of 22 December 2022.

¹²⁴ SFT 4A_520/2021 of March 4, 2022, at 5.5.

¹²⁵ SFT 4A_312/2017 of 27 November 2017 at 3.3.2 and references.

¹²⁶ Judgment of 3 September 2019, *Erwin Bakker v Switzerland* (Application 7198/07) at 47.

¹²⁷ SFT 4A_558/2011 of 27 March 2012 (substantive public policy), SFT 4A_490/2010 of 13 April 2010 (procedural public policy), SFT 4A_318/2020 of 22 December 2020 (constitution of the arbitral tribunal).

*four months after the closing of the evidentiary proceedings...*¹²⁸

CAS awards in appeal proceedings are public unless both parties agree to keep them confidential, which is practically difficult. This has led to an important volume of CAS awards being published on the CAS database available online.¹²⁹ All other elements of the case file remain confidential and the arbitrators are not allowed to disclose details of the file pending and after the case.¹³⁰

Most of CAS appeal proceedings are international arbitration proceedings, i.e., governed by the 12th Chapter of PILA, however in some cases the Swiss Code on Civil Procedure (CCP) may apply.¹³¹ In any event, the Order of Procedure signed between the parties will be decisive on this point, determining the level of review by the SFT.¹³²

Generally, CAS awards are recognized and executed abroad as per the New York Convention (NYC58). Another – albeit indirect – way of ensuring execution of the CAS award in Switzerland is through the freezing of funds in Switzerland, particularly for cases where FIFA or UEFA distribute funds to a debtor club. The major particularity of sports arbitration lies however in the fact that sports federations have a very efficient self-enforcing mechanism, imposing disciplinary sanctions for non-compliance with a CAS award.¹³³

IV. Concluding Remarks

The CAS is an international arbitral institution specialized in sports disputes, administering several

hundred cases every year. Originally created by the IOC in 1984, it has become independent from the IOC and other stakeholders through several institutional reforms and procedural amendments. The SFT, state court judgments as well as the ECtHR have recognized this independence.

As an arbitral institution seated in Lausanne, the CAS falls within the general scope of the 12th Chapter of the Swiss PILA and its procedures are governed by the CAS Code. The CAS predominantly deals with disputes as an appeals instance against decisions rendered by the internal tribunals of sports federations. CAS appeal procedures demonstrate numerous particularities compared to commercial arbitration that include – but are not limited to – the arbitration clause included in the rules of a sports federation (which, particularly in doping-related matters has been qualified as forced arbitration), to a mandatory list of arbitrators, its free disciplinary proceedings and its legal aid fund. While its evidentiary system is a unique mixture of civil law and common law practices, CAS panels regularly follow soft law tools common in commercial arbitration, such as the IBA Guidelines. A further particularity of the CAS procedures relates to the efficient self-enforcement mechanism established by the rules of sports federations.

On the basis of CAS awards, the SFT has rendered several important judgments that have an impact not only on sports arbitration but on international arbitration more generally. However, and even though the SFT has accepted the particularities of sports arbitration with respect to the arbitration

¹²⁸ Art. R59 CAS Code.

¹²⁹ See <https://jurisprudence.tas-cas.org/Help/Home.aspx>. Similarly, several international federations or organizations (e.g. FIFA, WADA, etc.) systematically publish the awards in appeal proceedings in which they were parties.

¹³⁰ Art. R59 CAS Code. See also See Despina Mavromati / Matthieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*, Wolters Kluwer (2015), pp. 559 ff.

¹³¹ SFT 4A_600/2016 of 29 June 2017 (*Platini*), at C.b.a.

¹³² SFT 4A_540/2018 of 7 May 2019, at 4.1 and 4.5.

¹³³ Art. 15 of the FIFA Disciplinary Code (2019) and Art. 58 para. 1 of the FIFA Statutes (2021). The world of sports is strongly self-regulated and provides for self-enforcement mechanisms. In this context, FIFA has recently launched the FIFA Clearing House which acts as “an intermediary for the payment of training rewards in the football transfer system that fall due pursuant to the RSTP and performs all required Compliance Assessments in their execution”, see Art. 1.3 of the FIFA Clearing House Regulations (2022).

clause by reference, it does not seem willing to adopt a specific notion of public policy or adapt the other grounds of annulment to the particularities of sports arbitration.

A Systematic Review of CAS Decisions in Football Matters in 2020-2021

Vladimir Novak, Alice Roux, Margo De Bondt*

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-

I. Introduction

There has been a proliferation of football matters before the Court of Arbitration for Sport (the “CAS”) in recent years, “*proportionally more [...] than any other sport*”.¹ Indeed, based on the published CAS jurisprudence database, football cases accounted for c. 70% of the CAS published decisions in 2020-2021² compared to c. 55% in 2018-2019.³

The authors undertook a systematic review of the published decisions in the 2020-2021 period contained in the CAS jurisprudence database⁴ to draw up statistical decision-making trends presented in Section II and notable substantive and procedural findings

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presented in Section III. Section IV concludes.

II. Decision-Making Trends

A systematic review of the *published* football matters in the 2020-2021 period shows the following decision-making trends:

Almost all appeals led to a decision on the merits. The CAS proceeded to rule on the merits in c. 94% (130 out of 139) of the published decisions. The CAS declined jurisdiction in one case and found eight matters inadmissible, in particular due to missed deadlines. It cannot be excluded that there were additional decisions declining jurisdiction that were not included in the CAS jurisprudence database, though it is unlikely

¹See ICAS 2021 Annual Report and Financial Statements (https://www.tas-cas.org/fileadmin/user_upload/ICAS_Annual_Report_Financial_Statements_2021.pdf).

² 139 out of 195 published decisions.

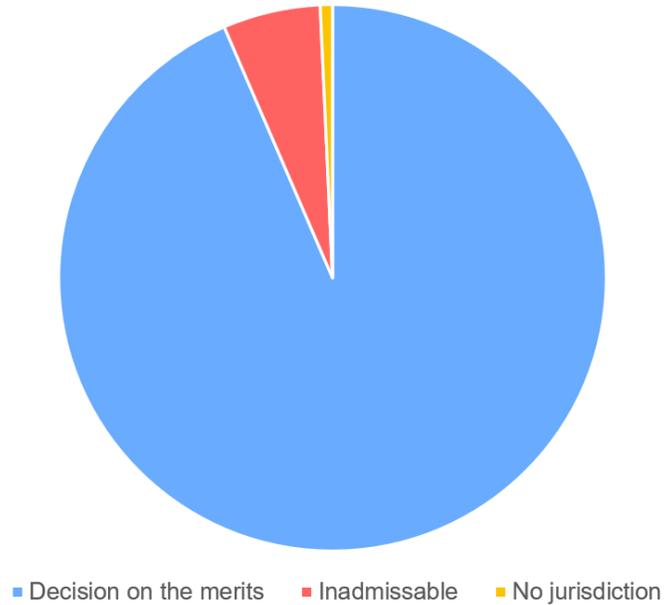
³ 180 out of 320 published decisions.

⁴ 139 decisions based on the adoption date.

that any such matters would materially alter a clear trend of ruling on the merits in the vast

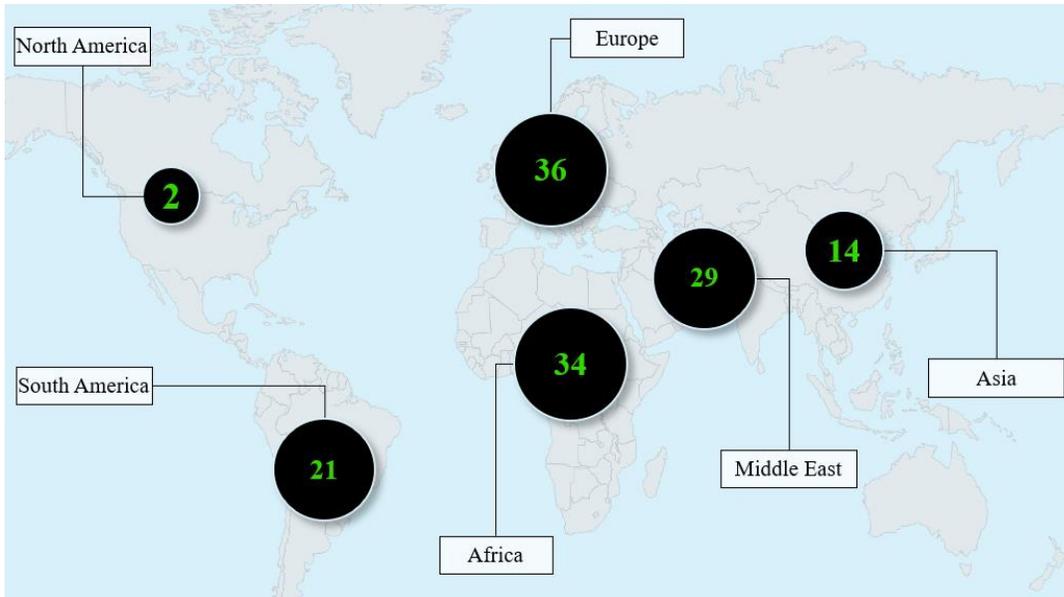
majority of cases before the CAS.

CAS Published Football Decisions (2020-2021)



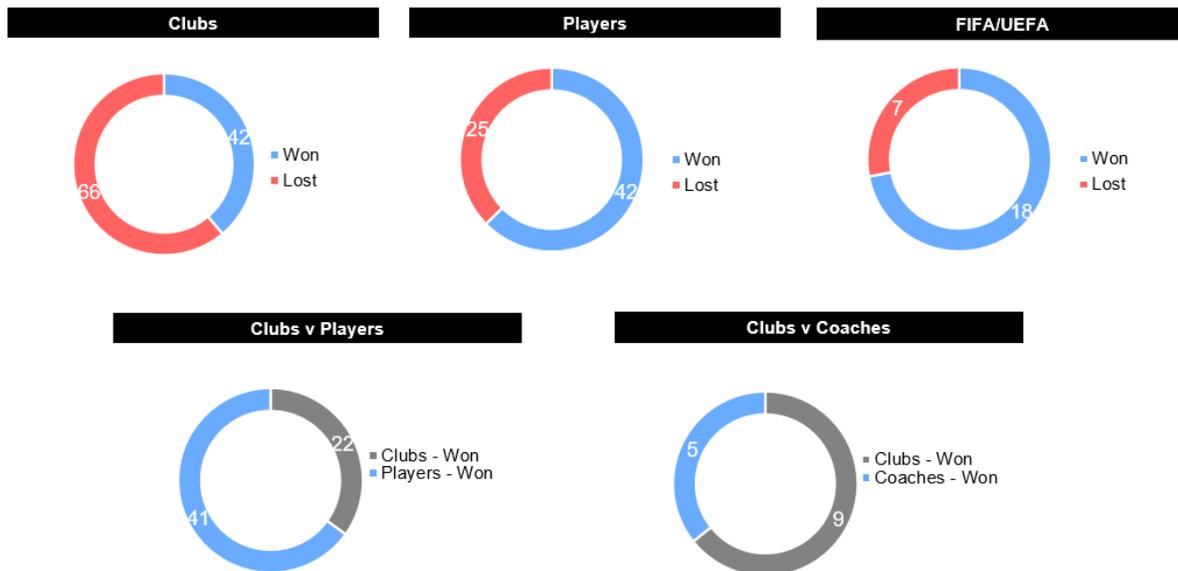
Two-thirds of the matters were brought by appellants from Europe, Africa, and the Middle East.¹⁶⁴ Europe accounted for c. 25% (36 out of 139) of the appeals, closely followed by Africa and the Middle East with c. 24% (34 out of 139) and c. 20% (29 out of 139) of the appeals respectively. South America accounted for c. 15% (21 out of 139) and Asia for c. 10% of the appeals. North American appellants were almost absent before the CAS with just 1% of the appeals (2 out of 139).

¹⁶⁴ In three matters, the identity of the appellant was redacted in the published version of the decision. The regional designation was based on principal appellant.



Clubs were involved in eight out of every ten matters. 108 out of 139 cases involved clubs, in particular in disputes with players/coaches (other parties included FIFA/UEFA, national federations/associations/leagues, and referees). The following outcome trends are notable:¹⁶⁵

- FIFA/UEFA prevailed in c. 72% of their matters.
- Players prevailed in c. 63% of their matters.
- Clubs prevailed in c. 39% of their matters.



III. Notable Findings

The 139 published football decisions in the 2020-2021 period concerned a variety of

¹⁶⁵ Partially upheld appeal was counted as a 'win' in the statistics.

contractual and regulatory matters. The authors conducted a systematic review of these cases and identified and summarized the following notable findings, organized into topics of: (a) termination/compensation; (b) personality rights; (c) contractual exchanges/negotiation; (d) sanctions; (e) regulatory matters; (f) legal principles; and (g) procedure.

A. Termination/compensation

- A player has *just cause* to terminate a contract due to non-payment of wages for at least two months, provided the club received a notice of default with a time period to fulfil the financial obligations (CAS 2021/A/7959; CAS 2021/A/7958; CAS 2021/A/7793; CAS 2020/A/7292). However, the outstanding amount may not be “insubstantial” (CAS 2019/A/6533).
- “Good cause” to terminate exists when the fundamental terms and conditions which formed the basis of the contractual arrangement are no longer respected. The same does not apply in relation to “auxiliary” terms and conditions (CAS 2019/A/6452).
- If a player terminates a contract for non-payment of wages and then signs a new contract, the value of the new contract for the period corresponding to the remaining term of the prematurely terminated contract shall be deducted from its residual value (CAS 2021/A/7793; CAS 2020/A/6954; *see also* CAS 2020/A/6798). However, the reduction is not automatic in case a player received a higher remuneration under their former contract than under their new contract (CAS 2019/A/6578).
- If a player adopted a pattern of unprofessional behaviour that is not of such gravity as to constitute *just cause* for termination, it can nevertheless be taken into account by the CAS as a mitigating

factor when deciding on the extent of compensation due to the player for the unjustified termination (CAS 2019/A/6452).

- “Intention” in failure to pay termination-related compensation is irrelevant (CAS 2020/A/7012).
- Liquidated damages clauses that disproportionately favour one party are generally invalid (CAS 2020/A/7187; CAS 2020/A/7011; *see also* CAS 2020/A/7007 and CAS 2019/A/6514), though a mere disparity between the amounts of damages set out in a liquidated damages clause does not necessarily lead to the invalidity of the clause (CAS 2019/A/6246). There is no excessive commitment when a player contractually agrees to a liquidated damages clause entitling him to receive the remaining salaries of the employment contract in case of termination (CAS 2019/A/6533).
- Where no bonus scheme was set up and there was no indication of the conditional nature of the bonus, a player is entitled to the payment of the whole bonus sum even if he was unable to play for most of the season (CAS 2020/A/6959).
- Unless *poor results* of the team are specifically agreed between a club and a coach as “just cause” for termination, such circumstances do not reach the level of gravity required to justify the early termination of the agreement. Even if agreed, the “poor results” threshold will need to be clearly defined to trigger just cause for termination (CAS 2020/A/6798).
- A player cannot waive all entitlements deriving from work already performed and work to be performed under an employment contract (CAS 2020/A/6961; CAS 2020/A/6727).
- A club that makes the issuance of the

International Transfer Certificate conditional upon the conclusion of a settlement agreement under which the player waives their entitlement to claim outstanding remuneration and compensation for breach of contract is exploiting the player's straitened circumstances, which is not permitted (CAS 2020/A/6727).

- Obligations deriving from a "pre-contract" are not as strict as in a definite employment contract; the damages incurred in case of a breach of a "pre-contract" are therefore generally lower because it remains possible that a definite agreement will not be reached (CAS 2020/A/6748).

B. Personality rights

- Access to training and ability to compete with fellow teammates in the team's official matches is a fundamental right under an employment contract, the violation of which may provide just cause for termination (CAS 2020/A/7370).
- Just cause for early termination may also arise if the club does not place the player in a position to perform the agreed work, by not registering him with the national federation and thus preventing him from being qualified to play matches (CAS 2020/A/6954; CAS 2020/A/6770; CAS 2020/A/6950).
- The employer's duty to protect the employee's "personality" rights includes an obligation not to employ a coach in a different/less interesting position (CAS 2020/A/7175).

C. Contractual exchanges/negotiation

- The player can communicate with the club via the club's e-mail address registered on the Transfer Matching System. It is the exclusive responsibility of the clubs to

ensure that the addresses are valid, up-to-date, and regularly consulted (CAS 2020/A/7292).

- WhatsApp messages sent by the player to the club to discuss the payment deadline amount to informal exchanges, which hold no clearly identifiable expressions of intentions to extend the payment deadline, and therefore do not have any legal effect on the club's payment obligations vis-à-vis the player (CAS 2020/A/6867).
- The alleged representation power must first be analysed from the point of view of the addressee to whom said representation powers would have been granted *i.e.*, from the agent's perspective acting on behalf of the principal. Only if no such representation power can be found at internal level can one analyse the alleged representation power by looking at the relationship between the agent and the third party to see whether the third party could in good faith rely on the representation power of the agent (CAS 2020/A/6962).
- Where a person without authority enters into a contract on behalf of a third party, rights and obligations do not accrue to the latter unless that party ratifies the contract (CAS 2019/A/6468).

D. Sanctions

- Sanctions must be proportionate and justified. Turning autonomy into arbitrariness is not acceptable (CAS 2020/A/6920).
- Whenever an association uses its discretion to impose a sanction, CAS shall demonstrate a certain degree of deference to the decision-making bodies of such association, especially in the determination of the appropriate sanction. It is only when the sanction is disproportionate that the CAS must be free to say so and apply the

appropriate sanction (CAS 2019/A/6665; CAS 2019/A/6344; CAS 2018/A/6072; CAS 2019/A/6239).

- Clubs are *strictly* liable “*for incidents of any kind*” based on the conduct of their supporters (CAS 2020/A/6920), though a club’s specific conduct may be relevant in the assessment of the proportionality of the sanction (CAS 2018/A/6040).
- Sporting sanctions must be imposed on any club found to have induced a breach of contract during the protected period (CAS 2020/A/6796).
- A player does not have standing to request that sporting sanctions be imposed on a club; it is solely within FIFA’s prerogative to determine so (CAS 2018/A/6044; see also CAS 2018/A/6002).
- The imposition of sporting sanctions is warranted when the only plausible reason explaining the player’s decision to unilaterally terminate their employment contract with their previous club is to be able to immediately sign a more lucrative contract with a new club (CAS 2019/A/6337).

E. Regulatory matters

- Candidates for membership in FIFA Council are under no obligation to disclose sanctions that do not concern a violation of the FIFA Code of Ethics (CAS 2021/A/7685).
- Candidates for the president of a national association should be of irreproachable behaviour and in possession of a high spectrum of norms and values, including full integrity. The undisputed existence of a final decision by an ethics body of the national association, which reprimanded said person for inappropriate public remarks during a radio broadcast, establish

a lack of the requisite integrity (CAS 2019/A/6517).

- International transfer of players is only permitted if the player is over the age of 18 unless exceptions have been established to accommodate certain reasonable circumstances that would not affect the minors, among others, in socio-economic, educational, cultural, family and psychological terms. This is decided based on the weight of the “football factor” within the whole range of reasons and the overall circumstances of the matter and the player’s registration should only be refused if the “football factor” is the prevailing element in the decision to change countries (CAS 2020/A/7503).
- Clubs are prohibited from entering into contracts which enable other parties to acquire the ability to influence, in employment and transfer-related matters, the independence, policies or teams’ performances of those clubs. This applies to both direct and indirect influence and requires consideration of the context wherein this influence takes place (CAS 2020/A/7008). However, the influence must be “material”, which is to be assessed on a case-by-case basis (CAS 2020/A/7417).
- It is widely recognised that in cases where payments are accepted by an official without a legitimate reason, no further proof is required with regards to the occurrence of an improper influence on the decision-making and making – any kind of reward renders the relevant advantage unlawful or improper (CAS 2019/A/6665; CAS 2019/A/6344).
- Absence of the Video Assistant Referee (VAR) in a game does not constitute a violation of the principle of equality of chances as both teams are affected in the same way (CAS 2019/A/6483).

- A bridge transfer occurs when a club is used as an intermediary in the transfer of a player from one club to another *e.g.*, to circumvent the payment of training compensation and has three main characteristics: (1) it is made for no apparent sporting reason; (2) there are three clubs involved: (i) the club where the player was firstly registered, (ii) the “bridge club”, usually a club of a lower level, (iii) the final club of destination; and (3) the player is engaged with the bridge club for a short period of time and often does not play any match for such club (CAS 2019/A/6639).

F. Legal principles

- The principle of *exceptio non adimpleti contractus* is generally not applicable within employment agreements as the Swiss Code of Obligations provides an exhaustive list of the grounds under which a party may withhold its contractual employment obligations due to the breach of the other party (CAS 2020/A/7400).
- The *ne bis in idem* principle does not prevent a judicial body from imposing multiple sanctions for the same violation within a single proceeding (CAS 2020/A/7369).
- In accordance with the *non ultra petita* principle, a CAS panel must adhere to the specific parameters of the party’s request for relief and is unable to substitute an alternative relief irrespective of whether it would be correct based on the evidence (CAS 2020/A/6916; CAS 2020/A/6889; CAS 2020/A/6950).
- Financial damage is never considered as “*irreparable harm*” because such damage may be remedied by means of financial compensation (CAS 2020/A/6796).
- The principle of *venire contra factum proprium* provides that when a conduct of one party

has led to legitimate expectations of another party, the first party is barred from changing its course of action to the detriment of the second party (CAS 2020/A/6861).

- Discretion of a competent body to adjust the sanction mentioned in the applicable rules is not inconsistent with the general principle *nulla poena sine lege certa* (CAS 2019/A/6393).
- The estoppel principle protects the legitimate expectation of a person that places reliance upon a representation made by another person (CAS 2019/A/5824).
- The principle of *electa una via non datur recursus ad alteram* allows a party to opt for state court adjudication, though once such option is exercised, the possibility to refer the same case to sport adjudication bodies is precluded (CAS 2019/A/6626; see also CAS 2019/A/6569).
- The principle of *non reformatio in peius* serves to protect an appellant from receiving a higher sanction on appeal than at the lower instance, but does not preclude the imposition of a sanction on a party that was acquitted of liability by the lower instance body (CAS 2018/A/6040).
- Derogating from the prohibition of retroactive legislation is only possible if: (i) retroactivity is expressly provided for by law; (ii) it is reasonably limited in time; (iii) it does not lead to shocking inequalities; (iv) it is justified by relevant reasons (*i.e.*, it responds to a public interest more worthy of protection than the private interests at stake); and (v) it respects acquired rights (CAS 2020/A/7444).
- The *res judicata* effect only goes as far as the panel that issued the decision in question wanted to decide on the matter in dispute. Issues that the first panel deliberately left undecided are not covered by the *res judicata*

effect (CAS 2019/A/6483). The types of decisions that enjoy *res judicata* effects are defined by law and not by the parties' autonomy; there is no provision in Swiss law that confers *res judicata* effects on decisions of association tribunals (CAS 2019/A/6483).

- The principle of *contra proferentem* or *contra stipulatorem* is an option of last resort *i.e.*, if the intention of the parties cannot be established by any other method of interpretation (CAS 2019/A/6337).

G. Procedure

- The standing to challenge a decision of an association may extend to "indirect" members in the case of "umbrella associations" provided such members have an interest in the action, which is to be interpreted broadly (CAS 2021/A/7637).
- A request that goes beyond a mere statement of defence and is directed at altering the operative part of an appealed decision, and which would have the effect of prejudicing the position of the appellant qualifies as a counterclaim/cross-appeal, which is not allowed before the CAS. If a potential respondent wishes to challenge a decision, it must file an independent appeal with the CAS within the applicable appeal time limit (CAS 2020/A/7605; CAS 2020/A/7397; CAS 2019/A/6626).
- Procedural defects at the lower instance proceedings can be cured, and are therefore moot, by virtue of the proceedings before the CAS (CAS 2020/A/7567; CAS 2020/A/7007; CAS 2019/A/6344; CAS 2019/A/6187).
- If an appellant has filed an amended Statement of Appeal with the sole purpose of including a respondent as a party in the proceedings, it cannot simply withdraw its appeal against that respondent once the

latter has taken an interest in the case and in the meantime raised issues that need to be addressed by the CAS panel (CAS 2020/A/7252).

- After the submission of the Appeal Brief and of the Answer, the parties may submit further evidence if they so agree or if the President of the CAS panel consents on the basis of exceptional circumstances, such as if the new (untimely) evidence contains a fact which is a *real novum*. The fact that an appellant could not anticipate the submission by one of the respondents of a "legal expert report" does not constitute an exceptional circumstance that would justify a request for production of its "own" legal rebuttal opinion (CAS 2020/A/6994; CAS 2020/A/6993; CAS 2020/A/6992; CAS 2020/A/6991; CAS 2020/A/6990).
- It is not for the CAS to reallocate the costs of the proceedings before previous instances (CAS 2020/A/6994).
- The CAS Code does not grant CAS panels a power to review decisions taken by the President or Deputy President of the CAS Appeals Division (CAS 2020/A/7272).
- Where an appellant's prayers for relief expressly/directly seek against a third party that was not named as respondent in the appeal proceedings, or directly affect said third party in its legal position and interests, the latter should be brought as necessary respondent in the arbitration proceedings. By failing to do so, the appellant deprives said third party of its right to be heard (CAS 2020/A/6713).
- A CAS panel is not prevented from considering transcripts of examination of witnesses in a criminal proceeding abroad, even if the individuals concerned are not witnesses in the CAS proceedings (CAS 2019/A/6665; CAS 2019/A/6344).

- The fact that there is not only one anonymous witness statement on file but five separate, coherent, consistent and reliable witness statements from anonymous witnesses who were subject to cross-examination is relevant (CAS 2019/A/6388).
- If neither party is domiciled in the European Union (EU) and there is no close proximity between the matter at hand and EU law, then EU law is not applicable (CAS 2020/A/6393).
- CAS panels do not consider themselves bound by prior decisions of the FIFA DC or the CAS, as each matter requires a case-by-case assessment (CAS 2020/A/7092; CAS 2018/A/6072).
- A party that has filed submissions in time has validly filed its submissions, even if the package then takes weeks to arrive or even if it never arrives but is lost in transit (CAS 2018/A/5998).
- A party seeking the production of documents in the custody or under the control of the other party has the duty to demonstrate, with specificity, whether these documents are likely to exist and to be relevant. A request that is too generic, explorative in nature and not directly relevant for the specific case goes too far, within the meaning of being a “fishing expedition”, and must be dismissed (CAS 2019/A/6533).
- If a relevant CAS award has been adopted (even if not yet published) and has come to the attention of a CAS panel in another pending procedure, that panel is bound to take it into account, provided the parties of the pending procedure are afforded the opportunity to submit their comments on the award (CAS 2019/A/6514).
- Requests for extensions may not be made,

and therefore not granted, after the expiration of a deadline. However, a respondent’s failure to submit an answer does not mean that the CAS panel must blindly accept the position of the appellant(s) (CAS 2019/A/6463).

- Allowing post-hearing video-recorded examination of the witnesses would violate the applicable rules of the proceeding, in particular Article R51 of the CAS Code (CAS 2019/A/6388).

IV. Conclusion

Given the exponential growth of football and recent changes in the regulatory landscape, football cases will likely continue to feature prominently in the CAS workload for the foreseeable future. It remains to be seen whether clubs— appearing in >80% of the CAS football matters in 2020-2021 but prevailing in less than 40% of the cases—will materially improve their success rate in the coming years. It likewise remains to be seen whether appellants from North America and Asia will increase their participation rate before the CAS, which was far below appellants from the other continents.

The CAS proceedings are legally not subject to a *stare decisis* doctrine. Findings in previous cases do, however, form a *persuasive* precedent, which is often followed in similar circumstances. Indeed, many of the findings in Section III are not necessarily football-specific and could guide future CAS panels in resolving various contractual and regulatory issues.

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 2020/A/7180

Rangers Football Club Limited v. Carlos Alberto Peña Rodríguez

20 September 2022

Football; Termination of the employment contract with just cause by the club; Standard of proof in breach of contract disputes; Duty of care and loyalty towards the parent club during a loan period; Premature termination as ultima ratio; Period of reflection; Compensation due under Article 17 of the FIFA RSTP

Panel

Prof. Luigi Fumagalli (Italy), President

Mr Wouter Lambrecht (Belgium)

Mr Manfred Nan (The Netherlands)

Facts

On 7 June 2017, the Scottish professional football club Rangers Football Club Limited (“Rangers” or the “Appellant”), playing in the Scottish Premiership (“SPL”) and affiliated with the Scottish Football Association (“SFA”), acquired Carlos Alberto Peña Rodríguez (the “Player” or the “Respondent”), a Mexican professional football player, from Club Deportivo Guadalajara (a club from the *Liga MX*, the first division of Mexico) for a transfer fee of USD 3.3 million.

On 16 June 2017, following the completion of a medical examination, the Parties signed the employment contract until 31 May 2020 (the “Rangers Employment Contract”).

On 3 January 2018, the Respondent was loaned out to the Mexican club Cruz Azul until 3

January 2019. The loan was free with an option for Cruz Azul to definitely purchase the Respondent’s registration rights for a fixed transfer fee of USD 2.5 million. Pursuant to the loan agreement (the “Cruz Azul Loan Agreement”), the Mexican club agreed *inter alia* to: (i) “keep Rangers informed at all times of the progress of the Player and of any problems or potential problems related to the Player” (Clause 2.5); (ii) obtain consent from Rangers for any surgical procedures (Clause 2.6); and (iii) not sub-loan the Respondent to a third club (Clause 3).

On 11 May 2018, Cruz Azul sent a letter the Respondent (with the Appellant in copy), in which it: (i) notified him that his employment contract (the “Cruz Azul Employment Contract”) was terminated with immediate effect “since the player ha[d] been involved in public scandals in recent times, related to his abusive consumption of alcohol in public places and/ or during work hours” (the “Cruz Azul Termination Letter”); and (ii) instructed him to immediately report to the Appellant. On the same day, Cruz Azul sent a letter to the Appellant (with the Respondent in copy), in which it notified the Appellant of the same.

On 15 May 2018, the Appellant wrote to Cruz Azul about the “purported” termination of the Cruz Azul Loan Agreement, declaring: “We are surprised that this is the first time we have heard from you regarding such matters [about scandals in April 2018 involving the Player’s alcohol abuse] ...” and recalling that only Rangers had the right to terminate the loan agreement early.

On 16 May 2018, Cruz Azul and the Respondent signed an agreement to terminate by “mutual agreement” the Cruz Azul Employment Contract (the “Cruz Azul Termination Agreement”). Recital 2 of this agreement stipulates that the termination was “on the grounds that the Player had

been involved in recent public scandals relating to alcohol abuse by him in public places and/or during working hours...”.

On or around 29 May 2018, the Respondent entered a rehabilitation clinic.

On 5 June 2018, the Appellant, Cruz Azul and the Respondent signed a “*Variation Deed*” in order to lift the restriction of Clause 3 of the Cruz Azul Loan Agreement to allow Cruz Azul to sub-loan the Respondent to another club of the *Liga MX*, Club Necaxa (“Necaxa”), which wished to offer him an employment agreement subject to the following conditions: (i) that the Respondent would go daily to a rehab center; (ii) that for any misconduct the Respondent would incur a fine of 1 month’s salary; and (iii) that such misconduct would lead to the early termination of the contract.

On 6 June 2018, the Mexican Clubs and the Respondent then signed the “Sub-Loan Agreement” under which the Respondent was sub-loaned to Necaxa for the remainder of the loan period agreed to by the Appellant and Cruz Azul, *i.e.*, until 3 January 2019 (the “Necaxa Sub-Loan Agreement”). The Appellant was not a party to this agreement. Under the Necaxa Sub-Loan Agreement, Necaxa assumed each and all of the rights and obligations of Cruz Azul under the Cruz Azul Loan Agreement.

On 31 October 2018, Necaxa and the Respondent signed an agreement to terminate by “*mutual agreement*” and for “*mutual benefit and interest*” the Respondent’s employment relationship (the “Necaxa Termination Agreement”).

On 20 November 2018, Necaxa sent a letter to Cruz Azul, reporting that notwithstanding the

help and support of two different groups specialized in Alcoholics Anonymous (AA), the Player’s teammates, the coaching staff and the medical service of the Club, the Respondent had four relapses between 2 July 2018 and 3 November 2018. Cruz Azul forwarded this letter to the Appellant on 26 November 2018. In the transmission letter, dated 22 November 2018, Cruz Azul also made reference to: (i) some press articles reporting certain “*scandals*” occurring at the end of April and May 2018 related to the Respondent’s alcohol abuse; and (ii) a public interview in which the Respondent “*acknowledg[ed] that his alcohol illness goes back even before the [Cruz Azul] Loan Agreement*”.

On 6 December 2018, Mr Dickson (Director of Finance and Administration at Rangers) sent a letter to Cruz Azul requesting it to obtain from Necaxa further details on each of the four relapses reported in Necaxa’s letter of 20 November 2018. He also asked for information regarding the Respondent’s contractual situation with Cruz Azul and Necaxa, and details of why Cruz Azul and Necaxa terminated the loan, respectively the sub-loan of the Respondent. On the same day, Mr Dickson sent a letter to Mr Necochea (the player agent’s partner) requesting that he or the Respondent provide the full details of the Respondent’s discussions with the Mexican Clubs concerning his issues with alcohol and the treatment provided to him, including an explanation as to why he withdrew from his treatment program. Mr Necochea replied to Mr Dickson on the same day, stating that the Player had “*ended his loans with both Cruz Azul and Necaxa in the best of terms*”. The next day, on 7 December 2018, Mr Dickson replied to Mr Necochea, expressing the Appellant’s concern that (i) the information he had provided was inconsistent with the reports received from the Mexican Clubs suggesting that the Respondent

had been dismissed for misconduct related to alcohol abuse, and (ii) if in fact the Respondent's contract had been terminated by Necaxa prematurely due to alcohol abuse, this would make it the second time in a span of less than 6 months that that happened.

On 14 December 2018, the Appellant received a compilation of various local press reports on the Respondent and the incidents related to alcohol abuse. Also on 14 December 2018, the Respondent travelled to Glasgow and asked for a meeting which was granted to him on the same day. The meeting was attended by Mr Stewart Robertson (Managing Director of Rangers), Mr Dickson, Mr de la Torre and the Respondent.

Later that same day, Mr Necochea – as had been agreed at the meeting – replied to Mr Dickson's letter of 7 December 2018. Mr Necochea explained that: (i) the Respondent had ended his loan with Necaxa because the team had failed to qualify for the playoffs; (ii) since the end of the loan with Necaxa he had been staying with his family in León, Mexico; (iii) he had been training with a personal trainer to stay in shape; (iv) he had been working with a personal coach to keep himself motivated and focused on his career; (v) he had not taken any alcohol tests during his loan period with the Mexican Clubs, but would be willing to take any exam required by the Appellant; and (vi) the last time he had any drinks was during vacation at a family reunion.

On 17 December 2018, Mr Dickson sent letters to the Mexican Clubs urgently requesting further details of the circumstances that led both clubs to terminate the Respondent's employment contracts.

On 18 December 2018, the Appellant sent a detailed letter to Mr de la Torre (the player's

agent) informing him that it believed the Respondent had acted in persistent and/or material breach of the Rangers Employment Contract by repeatedly misleading the Appellant, "*set[ting] out in detail the grounds, of which we are aware to date, for the termination of the Playing Contract for gross misconduct*". However, it informed Mr de la Torre that before taking its decision, it wished to hear the Respondent's side of the story by 20 December 2018. More specifically, in this letter, the Appellant began by summarizing the meeting of 14 December 2018. In particular, the Appellant recalled that Mr de la Torre had stated that "*Carlos did not have a drink[ing] problem*" and had entered a rehabilitation clinic to clear his name but "*[i]n fact, Carlos considered it as something of a 'holiday'*". The Appellant further expressed its concern that Mr Necochea's letter of 14 December 2018 claiming that the Respondent had "*left both clubs in the best of terms and completed his loan successfully*" was inconsistent with the documents it had received from the Mexican Clubs. The Appellant also cited certain press articles reporting the Respondent's alcohol abuse and informed the Respondent that the aforementioned articles, as well as the information provided by the Mexican Clubs, were entirely inconsistent with his false assertions in Mr Necochea's letter of 6 December 2018 and with the Respondent's "*dismissive attitude*" and "*denials of any such problems*" at the meeting of 14 December 2018.

On 19 December 2018, the Respondent replied to the Appellant's letter by declaring: "*... I have had problems with alcohol since before moving to Rangers I want to make it clear that many of the stories that were released at the time in the press are totally false or from a very different perspective from what they really were I went into rehabilitation clinic to have professional treatment of the problems that I had and this was a big help for me to be in a position 100% mentally and*

physically.... I am committed to Rangers. ... I am prepared to undergo any medical or physical tests however many times you consider it necessary.... I hope you can consider this letter as my formal commitment to this institution and take into account my version of events”.

On 2 January 2019, Necaxa, by means of an email, answered Mr Dickson’s letter of 17 December 2018, including a letter dated 31 December 2018, stating that: (i) the Respondent’s employment relationship with Necaxa had been prematurely terminated “*as a consequence of the Player’s repeated alcohol problem*”; (ii) the Necaxa Sub-Loan Agreement, however, had not been prematurely terminated – it had expired at the end of the Liga MX season in November 2018; (iii) before joining Necaxa, the Respondent had attended an alcohol treatment center in Culiacan, Sinaloa, Mexico for three weeks, after which Necaxa thought he was ready physically and mentally to resume his career; (iv) Necaxa did not field the Respondent much because he had arrived at “*a considerably low level*” and it took him time to reach a good enough level to play in the Liga MX; and (v) the Respondent’s “*off field incidents obviously had a lot to do with him not playing as much as we would have liked, it affected [his] physical condition more than his mental ability*”. Necaxa also provided information about the four alcohol-related relapse incidents mentioned in its letter of 20 November 2018 to Cruz Azul.

It was upon receipt of this letter from Necaxa that the Appellant explains it considered to have had all the evidence necessary to take a decision. Rangers concluded that the Respondent was in breach of his primary obligation to a professional football club, was in breach of numerous clauses of the Rangers Employment Contract, and had broken the duty of trust and confidence he owed to the club. According to the Appellant, it considered the other options available (a written

warning, a period suspension and a maximum fine of four week’s salary) but found them to be inappropriate considering the circumstances and that it would send the wrong message to the club’s employees, fans and the commercial partners. Before finalizing the decision, the directors sought to consult with the Appellant’s Chairman and Vice-Chairman, which they did on 4 January 2019. On 7 January 2019, once approved by the Chairman and Vice-Chairman, the Appellant terminated the Rangers Employment Contract.

Following that termination, the Respondent signed on 15 March 2019 a contract with the Polish second-division club Klub Pilarski GKS Tychy S.A. (“GKS Tychy”) until 20 June 2020. However, the Respondent only remained with GKS Tychy until 31 December 2019, at least from a registration point of view, and was entitled to PLN 32,740 (approx. GBP 6,562) for his time there, as determined by the Dispute Resolution Chamber (“DRC”). After his time with GKS Tychy, the Respondent went on to join the Mexican second-division club Correcaminos de la UAT, under a contract from 1 January 2020 to 31 May 2020 worth MXN 2.5 million (approx. GBP 100,000). From there, the Respondent joined the Mexican development league club Club Veracruzano de Fútbol Tiburón in 2020, and then the Salvadorian first-division club, Club Deportivo Futbolistas Asociados Santanecos (C.D. FAS) in 2021.

On 12 March 2019, the Respondent filed a claim with the FIFA DRC against the Appellant alleging that Rangers terminated his employment contract without just cause and requesting [...] plus interest as compensation. In response, the Appellant filed a counterclaim alleging that the club had terminated the employment contract with just cause and requesting at least GBP 4

million plus interest as compensation. The dispute before the FIFA DRC also had as parties GKS Tychy and Correcaminos de la AUT.

On 9 April 2020, the FIFA DRC passed its decision (the “Appealed Decision”), in which it held, by majority, that the Appellant did not have just cause to terminate the Rangers Employment Contract. The majority reasoned that, first of all, the incidents occurring during the Respondent’s time in Mexico could not be relied upon by the Appellant to terminate the Rangers Employment Contract, because said contract had been suspended while the Respondent was on loan with Cruz Azul and on sub-loan with Necaxa. Second, during the period of 3 to 7 January 2019, when the Cruz Azul Loan Agreement and Necaxa Sub-Loan Agreement had expired, there were no wrongdoings committed by the Respondent. The majority added that, in any case, the Respondent’s “*deeds*” in Mexico were not comparable or as severe as, for instance, a criminal act leading to the Respondent’s incarceration. Moreover, the Appellant could have imposed more lenient measures than the termination of the Rangers Employment Contract to ensure the Respondent fulfilled his contractual duties. The majority also observed that the Appellant simply relied on the information provided by the Mexican Clubs and “*fell short of concluding a fully comprehensive investigation*”. Based on the unjustified termination of the Rangers Employment Contract, the FIFA DRC decided to award the Respondent [...] pursuant to Article 17.1 of the FIFA Regulations on the Status and Transfer of Players (“RSTP”).

On 18 June 2020, the Appellant filed a statement of appeal challenging the Appealed Decision before the Court of Arbitration for Sport (“CAS”).

Reasons

1. Standard of proof in breach of contract disputes

It was undisputed by the Parties that each of them bore the burden of proving the specific facts and allegations on which it relied. They were only in disagreement as to what was the standard of proof.

The Panel first noted that neither the FIFA RSTP nor the FIFA Procedural Rules were setting the standard of proof in a breach of contract dispute. It then recalled that when the regulations of a sports organization did not provide the applicable standard of proof, it was the CAS to determine it, and that, when dealing with breach of contract disputes, CAS panels had in several occasions applied the standard of “comfortable satisfaction”, which falls in between “beyond a reasonable doubt” and “balance of probabilities” on the standard of proof spectrum. Accordingly, the applicable standard of proof to apply in the present case was “comfortable satisfaction”.

2. Duty of care and loyalty towards the parent club during a loan period

The Parties disputed whether the events occurring while the Respondent was on loan with the Mexican Clubs could be taken into account by the Appellant in deciding whether to terminate the Respondent’s employment contract and, in turn, by the Panel in determining whether there was just cause for termination.

The Panel recalled that according to the FIFA Commentary, during the period that the player is

on loan, the effects of the employment contract with the club of origin are suspended, i.e. the club of origin is not obliged to pay the player's salary and to provide him with adequate training and/or other privileges or entitlements as foreseen in the contract. For the Panel, this meant, on the other side, that while the Respondent was on loan, his primary obligation of rendering his services as a professional footballer to the Appellant under the Rangers Employment Contract was suspended. However, the Panel also found that not all of the Respondent's duties and obligations under the Rangers Employment Contract were suspended as a result of the loan. Unless otherwise agreed, the suspended obligations for a loaned player were the primary ones (i.e., payment and provision of services), not the subsidiary ones like the duty of care and loyalty, which requires the employee to carry out the work assigned to him with due care and to loyally safeguard the employer's legitimate interests, in accordance with Article 321a(1) of the Swiss Code of Obligations (SCO). There was in fact no mention in either the FIFA Commentary or elsewhere in the FIFA RSTP that during a loan all rights and obligations of the club towards the player or vice-versa are suspended. Therefore, as the player continues during the loan period to owe his parent club (the club of origin) the duty of loyalty and care, the parent club, in principle, has the right to consider events occurring during that time in determining whether it has just cause to terminate the employment contract upon the end of the loan period. For the Panel, it would indeed be irrational if a parent club, who still holds, in principle, a legitimate interest in a loaned player, had no right to terminate an employment relationship when during the loan period the player commits a serious offense that causes the parent club to consider in good faith that it cannot resume the employment

relationship after the loan period.

With regard to the case at hand, the majority of the Panel found that the Respondent, in violation of his duty of care and loyalty under the Rangers Employment Contract and Swiss law, had been dishonest towards the Appellant on fundamental matters related to his health and well-being and circumstances surrounding the early termination of his employment relationship with the Mexican Clubs. More specifically, the Respondent had been dishonest by: (i) denying that he had any problems with alcohol; (ii) downplaying the nature of his rehab stay of late May/early June 2018; (iii) denying that his employment contracts with the Mexican Clubs were both terminated for misconduct related to alcohol abuse; and (iv) not being upfront about the reported incidents related to alcohol abuse while on loan in Mexico. For the majority of the Panel, the violation was sufficiently severe to reasonably lead the Appellant to lose confidence in resuming its employment relationship with the Respondent upon expiration of the loan period, in particular because, irrespective of whether the breach concerned aspects of his private life, it affected directly his relations with the Appellant and regarded a matter (the Respondent's health and well-being) that was fundamental to providing his services.

3. Premature termination as ultima ratio

In the majority of the Panel's opinion, it would have been different if the Respondent had been open about the problems with alcohol and expressed his commitment to taking all the necessary steps to get better (e.g., accepting to go to rehab in a less relaxed manner). Instead, the Respondent had not admitted his problem until he had been informed by the Appellant that it was considering whether to terminate the

Rangers Employment Contract, i.e., until he felt he had no other option than to do so.

While endorsing the well-established CAS jurisprudence according to which the premature termination of an employment contract was an *ultima ratio*, such that if more lenient measure or sanctions can be imposed by an employer to ensure the employee's compliance with his contractual obligations of his contractual duties, such measures should be implemented before terminating the employment contract, the majority of the Panel, however, considered that, *in casu*, a more lenient measure or sanction would not have been sufficient to rebuild the Appellant's lost confidence in the Respondent or establish a belief that he would act honestly for the remainder of the employment relationship.

In light of the foregoing, the Panel held, by majority, that the Appellant had just cause to terminate the Rangers Employment Agreement based on the Respondent's breach of the duty of care and loyalty. For the avoidance of doubt, the Panel underlined that the finding of just cause was strictly on the basis of the Respondent's breach of duty and care of loyalty, and not on the basis of the incidents that occurred while the Respondent was in Mexico. Indeed, while the Panel was comfortably satisfied by the Respondent's admission that some incidents related to alcohol abuse had occurred, there was insufficient evidence to determine which of them had occurred and whether they and/or their consequences (i.e., the termination of two employment contracts while out on loan) constituted just cause to terminate the Rangers Employment Contract. As a final point on this issue, the majority of the Panel wished to remark that since the finding of just cause was based solely on the Respondent's breach of his duty of care and loyalty, it was also irrelevant that, after

already having committed his repeated acts of dishonesty, the Respondent had declared in his letter of 19 December 2020 that he had been successfully treated in a rehabilitation clinic and that he was "*committed to Rangers*" and "*prepared to undergo any medical or physical tests however many times you consider necessary*". At that point, the dishonesty held to be sufficiently severe to justify the termination of the Rangers Employment Contract had already been committed.

4. Period of reflection

The Respondent was arguing that the Appellant had not complied with the short period of reflection to terminate the employment relationship, which was generally of two to three working days under Swiss law. According to the Respondent the Appellant had waited too long, i.e. 19 days after receiving the Respondent's letter of 19 December 2018, to communicate the termination of the Rangers Employment Contract.

The Panel endorsed that in terminating an employment agreement, the principle of (reasonably) immediate reaction had to be followed. However, it noted that the FIFA Regulations did not set a specific time limit for an employer to communicate the unilateral termination of a contract to an employee. It recalled that under Swiss law, the party prepared to put an immediate end to the employment agreement on the grounds of a just cause only had a short period of reflection, after which it had to be assumed that the said party had chosen to continue the contractual relationship until the expiry of the agreed period. A period of reflection of two to three business days was a maximum, and an extension of a few days was tolerated only under exceptional circumstances, for example if a decision had to be taken in a

legal entity following an internal process. Only working days had to be considered when analyzing the general reflection period. The latter only started once the time required to conduct an investigation (*à charge comme à décharge*) had come to an end, allowing the employer to fully understand the facts based on which it would take the decision to terminate (or not). This reflection period had also to be distinguished from the notification period, which meant that a decision had to be taken within what was the general reflection period and that it could be communicated, be it without delay, shortly afterwards.

Considering the above elements, the Panel observed that the Respondent was not due back to the Appellant until 3 January 2019; until then, he continued to be under loan to Cruz Azul and sub-loan to Necaxa, hence softening the principle of immediate reaction. Therefore, it was from this date onwards, i.e. Thursday, 3 January 2019, that one had to assess whether the principle of immediate reaction had been respected. In this respect, the Panel observed that on 3 January 2019, the day after the Appellant had received the last piece of information from Necaxa and the day on which the loan of the Respondent had expired, Rangers' directors concluded that the Rangers Employment Contract had to be terminated, then followed internal process by running their decision by their Chairman and Vice-Chairman for approval, and once approved communicated their decision on 7 January 2019, i.e., 3 business days from the date on which the Respondent's loan period ended and 3 business days from the date on which the Appellant had finished its investigation. In the opinion of the Panel, this period of reflection was consistent with Swiss law, CAS jurisprudence and the principle of immediate reaction, which due to the specific

circumstances in the case-at-hand could have been more than two or three business days.

5. Compensation due under Article 17 of the FIFA RSTP

As the majority of the Panel had found that the Appellant had just cause to terminate the Rangers Employment Contract with the Respondent, the Panel then had to address the financial consequences of such termination, if any.

The Panel first started with recalling that a party who terminates a contract with just cause pursuant to Article 14 of the FIFA RSTP is entitled to compensation from the breaching party under Article 17.1 of the FIFA RSTP, which determines the financial consequences of a premature termination of a contract. The list of criteria set out in Article 17.1 of the FIFA RSTP is illustrative and not exhaustive. Other objective factors can and should be considered, such as the loss of a possible transfer fee and the replacement costs, provided that there exists a logical nexus between the breach and loss claimed. In the analysis of the relevant criteria, the order by which those criteria are set forth by Article 17.1 of the FIFA RSTP is irrelevant and need not be exactly followed by the judging body. It is for the judging authority to carefully assess, on a case-by-case basis, all the factors and determine how much weight, if any, each of them should carry in calculating compensation under Article 17.1 of the FIFA RSTP. In particular, while each of them may be relevant, any of them may be decisive on the facts of a particular case. While the judging authority has a "wide margin of appreciation" or a "considerable scope of discretion", it must not set the amount of compensation in a fully arbitrary way, but rather in a fair and

comprehensible manner. At the same time, as the CAS Code sets forth an adversarial rather than inquisitorial system of arbitral justice, a CAS panel has no duty to analyze and give weight to any specific factor listed in Article 17.1 of the FIFA RSTP or set out in the CAS jurisprudence if the parties do not actively substantiate their allegations with evidence and arguments based on such factor. In calculating compensation for an unjustified, unilateral termination of a contract under Article 17.1 of the FIFA RSTP, the “positive interest” principle must apply.

The first factor to be considered was the “acquisition costs”, i.e. the fees and expenses paid or incurred by the Appellant when acquiring the Respondent’s services, as amortized over the term of the Rangers Employment Contract. The remaining unamortized portion of such costs, in fact, could be considered as a loss, caused by the early termination of the Rangers Employment Contract.

The second factor was the “remuneration element” giving an indication as to the value of the Respondent’s services. Although the “nominal” value of the services of the Respondent at the time of the termination of the Rangers Employment Contract and for its remaining duration, could have been an amount calculated on the basis of the Respondent’s average remuneration under the Rangers Employment Contract plus the Respondent’s post-termination salary under the Tychy and Correcaminos contracts for the period originally covered by the Rangers Employment Contract, divided by two, the Panel found that such average “nominal” value did not correspond to the actual “sporting” value of the Respondent’s services, which was, in the opinion of the Panel, closer to the nominal values contained in the subsequent employment contracts signed by the

Respondent than to the one contained in the Rangers Employment Contract. Indeed, the Panel observed that on 3 January 2018, only 6.5 months after arriving to the Appellant, the Respondent had been loaned out for free to Cruz Azul with a purchase option lower than the transfer fee the Appellant had agreed to pay. This already indicated a decline in the value of the services of the Respondent. Then, during the Respondent’s loan period, the value of his services had dropped even further as his contract with Cruz Azul had been prematurely terminated for alcohol-related incidents following which the Respondent had signed with Necaxa a contract which had also been terminated prematurely. Further, the value of the Respondent’s services, in both economic and sporting terms, had continued to drop, as shown by the fact that the Respondent had resorted to playing for a second-division Polish club, GKS Tychy, and then in leagues far inferior from a sporting standpoint than the SPL (i.e., the lower divisions in Mexico and the first division in El Salvador), and this for salaries that were insignificant compared to the yearly salary agreed-upon with the Appellant. The Panel also observed that the Appellant had shown little or no interest in the Respondent when he had been out on loan in Mexico and that it had taken no action to ensure that it was protecting its investment, which, as the Panel saw it, implied that the value of the Respondent, for the Appellant, had significantly declined.

Another factor to be considered was any loss that the Appellant might have suffered because of the Respondent’s breach of contract, derived from its inability to secure a fee for a transfer of the Respondent. While acknowledging that the CAS, in line with Swiss employment law on loss of earnings, had held that the loss of a transfer fee could indeed be considered as a compensable

damage provided that there was a necessary logical nexus between the breach of contract and the lost opportunity to realize that profit, the Panel held that there was no lost earning to take into account in the present case as no evidence had been adduced that the Appellant had actually suffered such a lost opportunity.

The Appellant was also claiming that the Respondent's residual salary gave an indication of the value of the services lost to the Club. The Panel however held that considering the factual background leading to the termination of the Rangers Employment Contract, the Respondent's residual salary had, *in casu*, to be considered an expense saved, to be deducted from the fees and expenses incurred by the Appellant. Accordingly, the salary earned by the Respondent while with the Appellant had to be taken into account as a saving in the determination of any compensation.

In light of the foregoing, taking into account also the "specificity of sport", which is not an additional head of compensation, nor a criterion allowing an *ex aequo et bono* decision, but a correcting factor which allows the Panel to take into consideration other objective elements (chiefly of sporting nature) which are not envisaged under the other criteria of Article 17 of the FIFA RSTP, *in casu* the very limited "sporting" impact suffered by the Appellant from the loss of the Respondent, the Panel unanimously concluded, that the Appellant had not incurred any damages from the Respondent's breach of the Rangers Employment Contract. The Appellant, in not having to pay the Respondent's residual salary, had saved an amount equal to or more than the combined value of the fees and expenses it had incurred and the services of the Respondent.

Decision

In light of the foregoing, the Panel held that the Appellant had terminated the employment contract with just cause but that it was not entitled to any damages under Article 17.1 of the RSTP as a result of said termination. Therefore, the appeal filed by Rangers Football Club Limited was partially upheld.

CAS 2020/A/7196

AEL Podosfairo Dimosia LTD v. Dossa Momade Omar Hassamo Junior

16 May 2022

Football; Termination of contract; Exception of the collective bargaining agreements validly negotiated by employers' and employees' representatives at domestic level in accordance with national law; Recognition and binding effect of grace periods contained in collective bargaining agreements validly negotiated by employers' and employees' representatives at domestic level in accordance with national law;

Panel

Mr Gareth Farrelly (United Kingdom), Sole Arbitrator

Facts

AEL Podosfairo Dimosia LTD (the “Appellant” or the “Club”), is understood to be the registered company name of AEL Limassol FC, a Cypriot football club identified as respondent in the appealed decision and which currently plays in the first division of the Cyprus Football Association (“CFA”), with which it is affiliated. The CFA is affiliated with the Fédération Internationale de Football Association (“FIFA”).

Mr Dossa Momade Omar Hassamo Junior (the “Respondent” or the “Player”) is a professional football player of Portuguese nationality.

On 28 May 2019, an employment contract was concluded between the Club and the Player (the “First Employment Contract”) for the 2019/2020 as well as the 2020/2021 football seasons (although this is referred to as the First

Employment Contract for the purposes of this Award, the Parties had already signed at least one contract for previous seasons, including the 2018/2019 football season – referred to as the “Previous Employment Contract” as and where applicable).

In accordance with Clause 2.1 of the First Employment Contract, the provisions of a Standard Employment Agreement negotiated between the CFA and the Cyprus Football Players Association (“PASP”) regulate the First Employment Contract between the Parties.

In accordance with Clause 2.2 of the First Employment Contract - *“The terms of the standard employment contract constitute an integral part of the present contract having full and direct implementation”*.

In accordance with Clause 2.3 of the First Employment Contract - *“in case of conflict, the terms of the standard employment agreement shall take precedence over the terms of the present contract”*.

The Parties signed the Standard Employment Agreement, which was attached as an appendix to the First Employment Contract regulating the Parties’ employment relationship in accordance with Cypriot national law and the CFA’s Regulations.

On the same date, the Parties also agreed to sign a Protocol Agreement in order to settle the amount of EUR 65,000 which was outstanding from the 2018/2019 season in relation to the Player’s Previous Employment Contract. It was agreed that the said amount would be paid by the Club to the Player in ten monthly instalments of EUR 6,500 commencing on 31 August 2019 until 31 May 2020. Whilst an acceleration clause was included in the Protocol Agreement for a failure to pay on the agreed dates, there was no termination clause.

On 7 November 2019, the Player sent a notice to the Club through his legal representative in relation to his unpaid salaries for the months of September 2019 and October 2019, putting the Club in default for a period of 15 days in accordance with Article 12bis and Article 14bis of the FIFA Regulations on the Status and Transfer of Players (“RSTP”). Furthermore, the Player put the Club in default, with the same notice period of 15 days, in relation to the outstanding amounts concerning the Protocol Agreement, *i.e.* for each payment since August 2019.

On 24 November 2019, the Player unilaterally terminated the First Employment Contract with the Club because of the non-payment of the salaries for September 2019 and October 2019. On 26 November 2019, the Club paid the Player his salaries for the outstanding months of September 2019 and October 2019. On the same date, the Club also paid the Player the instalment of EUR 6,500 for the month of September 2019, as per the terms of the Protocol Agreement.

On 25 December 2019, the Player lodged a claim against the Club in front of the FIFA Dispute Resolution Chamber (“DRC”) claiming the outstanding amount of the Protocol Agreement and also compensation for termination of the First Employment Contract with just cause in accordance with Article 17 of the FIFA RSTP. On 8 May 2020, the FIFA DRC issued its decision (the “Appealed Decision”) without having considered the Club’s position, and with the following operative part:

- “1. The claim of the Claimant, Dossa Momade Omar Hassamo Junior [the Player], is partially accepted.*
- 2. The [Club], has to pay to the [Player] the amount of EUR 222,000, plus interest at the rate of 5% p.a. as follows:*

- on the amount of EUR 52,000 as from 1 October 2019 until the date of effective payment;*
 - on the amount of EUR 170,000 as from 25 December 2019 until the date of effective payment.*
- 3. Any further claim lodged by the [Player] is rejected”.*

On 22 June 2020, the Club filed a Statement of Appeal with the Court of Arbitration for Sport (“CAS”) in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (2019 edition) (the “Code”). The Appellant’s main submission as to the substance of the dispute was that the Respondent terminated the First Employment Contract without just cause because he did not provide the Club with the proper notice period of 30-days further to the Standard Employment Agreement to cure the outstanding salary payments.

Reasons

1. Exception of the collective bargaining agreements validly negotiated by employers’ and employees’ representatives at domestic level in accordance with national law

As a starting point, the Sole Arbitrator noted that was not in dispute that the Appellant had failed to pay the Respondent his salaries for the months of September 2019 and October 2019, in line with the First Employment Contract, and that the Appellant had failed to pay the Respondent the amounts due under the Protocol Agreement.

As a result of the Appellant’s failure to pay the instalments under the Protocol Agreement on the due dates, that being 30 September 2019 and 31 September 2019, the Sole Arbitrator found that the Respondent was entitled to receive the full amount due under the Protocol

Agreement, *i.e.* EUR 52,000.00. In addition, the Respondent was granted interest of 5% *per annum* per Article 104 of the Swiss Code of Obligations, as of 1 October 2019, that being the date on which the remaining payments became payable, until the date of effective payment.

In turning to the issue whether the Respondent terminated the First Employment Contract with or without just cause, the Sole Arbitrator noted that the Appellant sought to rely on Article 14bis of the FIFA RSTP (edition 2019), which states that:

- “1. In the case of a club unlawfully failing to pay a player at least two monthly salaries on their due dates, the player will be deemed to have a just cause to terminate his contract, provided that he has put the debtor club in default in writing and has granted a deadline of at least 15 days for the debtor club to comply with its financial obligation(s). Alternative provisions in existence at the time of this provision coming into force may be considered.*
- 2. For any salaries of a player which are not due on a monthly basis, the pro-rata value corresponding to two months shall be considered. Delayed payment of an amount which is equal to at least two months shall also be deemed a just cause for the player to terminate his contract, subject to him complying with the notice of termination as per paragraph 1 above.*
- 3. Collective bargaining agreements validly negotiated by employers’ and employees’ representatives at domestic level in accordance with national law may deviate from the principles stipulated in paragraphs 1 and 2 above. The terms of such an agreement shall prevail”.*

2. Recognition and binding effect of grace periods contained in collective bargaining agreements validly negotiated by employers’ and employees’ representatives at domestic level in accordance with national law

In particular, the Appellant claimed that under the terms of Article 9.2.2 of the Standard Employment Agreement, the Respondent was only entitled to terminate the First Employment Contract in the event that the Club *“failed to pay any due payables or other benefits, allowances or bonuses due to the Player within 30 days since the date that the Club had been put in default in writing by the Player”*.

The Respondent, for his part, further relied on Article 18 (6) of the FIFA RSTP which states that: *“Contractual clauses granting the club additional time to pay to the professional amounts that have fallen due under the terms of the contract (so-called “grace periods”) shall not be recognised. Grace periods contained in collective bargaining agreements validly negotiated by employers’ and employees’ representatives at domestic level in accordance with national law shall, however, be legally binding and recognised. Contracts existing at the time of this provision coming into force shall not be affected by this prohibition”*.

The Respondent failed to acknowledge or address Article 14bis (3) of the FIFA RSTP.

Indeed, Clause 2.1 of the First Employment Contract reads that *“[t]he present contract is regulated by the provisions of the Standard Employment Contract, as these have been agreed between the Cyprus Football Association (CFA) and the Cyprus Footballers’ Union (PASP) and as these provisions have been codified in Annex 1 of the CFA Registration and Transfer of Players Regulations”*. The Standard Employment Agreement is thus a collective bargaining agreement for the purposes of Article 14bis (3) of the FIFA RSTP.

Additionally, Clause 2.2 of the First Employment Contract reads that *“the terms of the Standard Employment Contract constitute an integral part of the present contract having full and direct implementation”*.

With regard to the termination of the contract, the Standard Employment Contract sets out the provisions by which the Player shall be entitled to terminate the Employment Agreement in writing to the Club, as follows:

“9.2 The Player shall be entitled to terminate the Employment Agreement in writing to the Club if the Club:

9.2.1 Shall be guilty of serious or persistent breach of the terms and conditions of this Contract,

9.2.2 Fails to pay any due payables or other benefits, allowances or bonuses to the Player within 30 days since the date that the Club has been put in default in writing by the Player”.

The Sole Arbitrator noted that the Standard Employment Agreement had been negotiated and agreed between the CFA and the PASP. Article 9.2.2 of the Standard Employment Agreement required the Respondent to give 30 days notice to the Appellant before he would be entitled to terminate the First Employment Contract, which he failed to do. He was thus not entitled to terminate the First Employment Contract at that time with just cause.

Furthermore, on 26 November 2019, the Appellant paid the outstanding salaries to the Respondent. This payment was within the 30-day notice period, since the Respondent had put the Appellant in default on 7 November 2019. Therefore, further to the terms of Clause 9.2.2 of the Standard Employment Agreement, the Respondent was not entitled to terminate the First Employment Contract with just cause as the Appellant had paid the outstanding salaries within 30 days.

In light of the foregoing, the Sole Arbitrator ruled that the Appellant was entitled to compensation for the Respondent's termination of the First Employment Contract

without just cause. In this respect, the Sole Arbitrator noted that neither the First Employment Contract nor the Standard Employment Agreement contained provisions that addressed compensation in the event of termination without just cause by any party. Therefore, in order to calculate the compensation owed by the Respondent to the Appellant, the Sole Arbitrator turned to Article 17 (1) of the FIFA RSTP.

The Sole Arbitrator considered a number of the non-exhaustive factors set out in Article 17 (1) of the FIFA RSTP. The Sole Arbitrator was aware that the Respondent had not signed with another club since terminating the First Employment Contract with the Appellant. The Respondent was with the Club for a number of years, captaining the side and also winning honours. It is noted that the Appellant did not pay the Respondent's salaries on time. The Appellant also failed to pay the instalments as due to the Respondent under the Protocol Agreement, which is difficult to reconcile given that the Protocol Agreement, by its very nature, concerned a failure on the part of the Appellant to pay the Respondent monies due to him under the Previous Employment Contract. The acceleration clause in the Protocol Agreement was no doubt negotiated and agreed based on the previous conduct of the Appellant. Furthermore, the Appellant failed to engage with the Respondent in any meaningful way and ignored any and all correspondence from the Respondent's representatives. It cannot be said that the Appellant had acted in good faith with respect to the payments at issue in this arbitral proceeding, or as well it seemed with respect to previous salary payments.

Therefore, the Sole Arbitrator determined that the termination of the First Employment Contract by the Respondent did not comply with the applicable terms of the Standard Employment Agreement. As per Article 17 (1)

(i) of the FIFA RSTP, the Appellant was entitled to receive the entire remaining value of the First Employment Contract, from the date of termination of 24 November 2019 until its natural expiration date 31 May 2021, *i.e.* EUR 170,000.00. Furthermore, the Appellant's interest claims of 5% were granted from the date of termination, that being 24 November 2019, until the date of effective payment.

Decision

The appeal filed by AEL Podosfairo Dimosia LTD against the decision issued by the FIFA Dispute Resolution Chambers on 8 May 2020 was partially upheld. The decision issued by the FIFA Dispute Resolution Chamber on 8 May 2020 was set aside with regard to paragraph 2, which was replaced as follows by this arbitral Award: "*AEL Podosfairo Dimosia LTD (AEL Limassol) shall pay Dossa Momade Omar Hassamo Junior EUR 52,000.00 (fifty-two thousand Euros) corresponding to the amount due under the Protocol Agreement plus interest of 5% per annum as from 1 October 2019 until the date of effective payment. Dossa Momade Omar Hassamo Junior shall pay AEL Podosfairo Dimosia LTD (AEL Limassol) EUR 170,000.00 (one hundred and seventy thousand Euros) corresponding to the remaining value of the 28 May 2019 employment contract plus interest of 5% per annum as from 24 November 2019 until the date of effective payment*". All other motions or prayers for relief were dismissed.

CAS 2020/A/7259

Aris Football Club v. Fédération Internationale de Football Association (FIFA)

1 September 2022

Football; Disciplinary dispute: Failure to comply with a non-financial decision (transfer ban); Composition of the FIFA Disciplinary Committee panel; Notification of FIFA decisions; Enforceability of a FIFA Disciplinary Committee decision regarding a transfer ban; Implementation of a transfer ban; Violation of article 15 FIFA Disciplinary Code; Legal basis for sanctioning a club for lack of compliance with a transfer ban

Panel

Ms Anna Bordiugova (Ukraine), President

Mr Rui Botica Santos (Portugal)

Mr Lars Hilliger (Denmark)

Facts

Aris Football Club (“Aris FC” or the “Appellant”, or the “Club”) is a Greek professional football club, member of the Hellenic Football Federation (“HFF”), which in turn is affiliated to the Fédération Internationale de Football Association.

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

In 2013, the FIFA Dispute Resolution Chamber (the “FIFA DRC”) and the FIFA Players’ Status Committee (the “FIFA PSC”), respectively, rendered four decisions (the “2013-Decisions”),

pursuant to which the Greek football club P.A.E. O Aris Thessalonikis (the “Old Aris”) was ordered to pay certain outstanding amounts to four of its creditors (three players and a football agent). These outstanding amounts were never paid by the Old Aris. This appeal is brought by Aris FC, sporting successor of the Old Aris, against the decision rendered by the FIFA Disciplinary Committee (the “FIFA DisCo”) on 28 April 2020 (the “Appealed Decision”), regarding an alleged offence under Article 15 of the FIFA Disciplinary Code (the “FDC”), namely failure to comply with a non-financial decision – i.e. violation of the ban from registering new players, either nationally or internationally, imposed on the Appellant by FIFA for failure to comply with four decisions issued by the FIFA DisCo in 2019 (the “Aris Decisions”) passed in accordance with the same Article 15 FDC, ordering the Appellant to comply with the 2013-Decisions.

On 1 January 2020, the transfer window in Greece opened and in view of the Appellant’s non-compliance with Aris Decisions within the deadline granted (i.e., 30 days from the notification to the Club, this is, 27 November 2019), the above-mentioned transfer ban which was already automatically imposed on the Appellant was validated.

On 3 January 2020, the Club loaned from FC Olimpiacos player Fiorin Durmishaj (the “Player”) and registered him (i.e., effectuated a national transfer).

On 10 January 2020, the FIFA DisCo Secretariat recommended to HFF to withdraw the registration of the Player.

On 13 January 2020, the Appellant fielded the Player in a league match.

Based on the response from the FIFA DisCo, the HFF submitted the matter to the HFF Players Status Committee (the “HFF PSC”) and on 17 January 2020, HFF PSC rendered a decision, by which it withdrew the registration of the Player.

On 20 January 2020, the Club filed an appeal against this decision to HFF Court of Arbitration for Football (the “HFF CAF”).

On 23 January 2020, the HFF CAF overturned the HFF PSC decision and confirmed the registration of the Player with the Appellant.

On 28 April 2020, the FIFA DisCo rendered the Appealed Decision and found the Appellant to have breached Article 15 FDC i.e. for non-compliance with the disciplinary sanction applied, namely – violation of the transfer ban.

On 10 July 2020, the Club filed a Statement of Appeal with the CAS against FIFA challenging the Appealed Decision.

Reasons

The Panel noted that it was called by the Appellant to decide whether there was a violation of Article 15 FDC committed by the Appellant and, if answered positively, if the Appealed Decision was legally sound for being pronounced with violation of principle of legality based on preceding assessment of whether the Respondent had complied with the applicable rules and regulations during the decision making process, and, especially, whether the imposed sanction had the necessary legal basis and was adequate, necessary and proportionate to the violation.

1. Composition of the FIFA Disciplinary Committee panel

The Panel, at the outset, needed to address the issue raised by the Club, namely the alleged “problematic” composition of the FIFA DisCo panel, which rendered the Appealed Decision. Thus, the Appellant pointed that the member of the FIFA DisCo, who rendered, sitting alone, three out of four Aris Decisions participated as a member of the panel in the proceedings, which led to the Appealed Decision.

The Panel noted that while raising this criticism, the Appellant did not come to any conclusion as to the consequences of such alleged “irregularity”. The Panel further observed that the Appellant did not refer to any provision of FIFA Rules Governing the Procedures of the Players’ Status Committee and the Dispute Resolution Chamber (the “Rules”), which would prohibit a member of the FIFA DisCo to sit on a case where the same party is involved, however the subject matter is different, notwithstanding the cases are intertwined. Moreover, there were two other FIFA DisCo members participating in rendering the Appealed Decision. Therefore, this alleged issue had no legal basis and did not influence the validity of the Appealed Decision.

2. Notification of FIFA decisions

The Appellant substantially criticized the way FIFA notified its communications what allegedly caused late delivery of the relevant communications by the HFF to the Appellant leading to the violation of Article 15 FDC with which the Appellant was charged.

Indeed, in accordance with Article 50 FDC: “All communications concerning an association, club or individual (including notifications of proceedings against

them and the issuing of the decisions taken by the FIFA judicial bodies) are addressed to the association or club concerned, which must then, if applicable, inform the club or the individual in person. All such communications by FIFA or the FIFA judicial bodies take the form of emails sent by the secretariat". [emphasis added by the Panel.]

Further, in accordance with Article 44.4 FDC: *"Decisions and other documents intended for players, clubs and officials are addressed to the association concerned on condition that it forwards the documents to the parties concerned. In the event that the documents were not also or solely sent to the party concerned, these documents are considered to have been communicated properly to the ultimate addressee the day after receipt of the document by the respective association. Failure by the association to comply with the aforementioned instruction may result in disciplinary proceedings in accordance with this Code"*.

This system of communications' notification is implemented by FIFA for a long time ago.

As much as it can be criticized, it is only in extremely rare cases where such communications are not delivered to their addressee or delivered late, what causes procedural problems for the latter. Such late delivery of a notification or its non-delivery, however, shall be proven by an addressee in order to justify its relevant procedural claims or failures. The Panel observed that this was not the case here, as will be demonstrated below.

3. Enforceability of a FIFA Disciplinary Committee decision regarding a transfer ban

The Panel observed that, as underlined by FIFA, in accordance with Article 51.4 FDC *"Only the parties to which a decision is addressed can request the motivation"*. It is obvious that in the case at hand

the Aris Decisions were addressed to the Appellant that did not put forward any defence in all four proceedings, request the grounds of those decisions or appeal them. The Appellant has to be responsible for its own procedural choices. Thus, there should be no further discussion as to the enforceability of the Aris Decisions. Those FIFA decisions were final and binding. These CAS appeal proceedings do not concern the subject matter of Aris proceedings (i.e., whether Aris FC is the sporting successor of "Old Aris").

4. Implementation of transfer bans

The Appellant claimed that Aris Decisions were notified by the HFF three weeks later (from the date they were passed) and were never sent by FIFA directly to the Club's email and, allegedly for such reason, the Appellant was not aware of the imposition of the ban from registering new players when it requested the registration of the Player.

However, the Appellant did not deny that it was notified of the Aris Decisions on 27 November 2019. The Club had the possibility either to request their grounds within 10 days from the next day of notification and to appeal, which it decided not to do, or to comply with the Aris Decisions within 30 days from their notification, which it also did not do. Therefore, the Appellant was at least aware as of 28 November 2019 that a ban from registering new players would automatically be imposed on it after expiration of 30-days grace period and would be validated with the next transfer window. There was therefore no need for any further notification neither from FIFA, nor from HFF.

The Panel further noted that in accordance with Annex 3 to FIFA Regulations on Status and

Transfers of Players, all TMS users shall check it with regular intervals on daily basis. Therefore, it was the Appellant's duty to check its TMS profile – had it done so it would have also been aware (reminded) of the transfer ban implementation.

The Panel, therefore, concluded that the Club could not have been reasonably unaware of being banned from effectuating transfers on national and international level.

5. Violation of article 15 FIFA Disciplinary Code

The Appellant additionally claimed that the registration of the Player happened due to the fault of the HFF, who actually authorized and proceeded with the registration, when instead it should have refused such a request knowing that there was a national transfer ban imposed onto the Appellant. The Club concluded that, therefore, it was not in fault and did not commit any violation of Article 15 FDC. Even if it did commit a violation – it was not, anyway, intentional.

As a starting point, the Panel noted that Article 15 FDC does not distinguish between forms of fault (intent or negligence) in order to determine if the violation took place. In accordance with Article 8 FDC infringements are punishable regardless of whether they have been committed deliberately or negligently. The fact that the HFF erroneously proceeded with the registration of the Player did not change the legal position of the Appellant – it was the Appellant who ignored clear resolution of the Aris Decisions and proceeded with requesting the registration of the Player, being the only party interested in such a registration.

The arguments, brought forward by the Appellant should therefore be dismissed under Article 8 of the Swiss CC as unproven.

For all the above reasons the Panel was not comfortably satisfied that there were grounds to consider the Appealed Decision ill-grounded with respect to the violation by the Appellant of Article 15 FIFA DisCo. As such, the Panel concluded that the Club was in breach of Article 15 FDC.

6. Legal basis for sanctioning the club for lack of compliance with a transfer ban

It is well established that a sport governing body may impose disciplinary sanctions upon its members if they violate the applicable rules and regulations. The power to impose such sanctions is based upon the freedom of associations to regulate their own affairs (see CAS 2008/A/1583 & 1584; CAS 2012/A/2912). The *corpus delicti* of the violation committed by the Appellant was clearly established by Article 15.1 FDC, namely – failure to comply with final non-financial decision passed by a body of FIFA.

Since the transfer ban was violated, there was no retroactive way to “comply” with the ban anymore, even if the registration of the Player was cancelled; this would not eliminate or heal the violation already committed at the relevant time. In these circumstances another grace period of 30 days would have no meaning at all, whereas the fine would not have any punishing and preventive effect. Thus, the Panel concurred with FIFA that the sanction should have been increased.

However, the Panel further observed that Article 15 FDC does not foresee any sanction, as applied by FIFA DisCo to the Appellant in the Appealed

Decision – namely, the ban from registering new players for a certain amount of registration periods – as there was no legal basis for that sanction to be applied to the Appellant under the circumstances of the case at hand. It appeared that the Club, in effect, could not be sanctioned as it was pursuant to the Appealed Decision under Article 15 FDC for the violation it committed. Indeed, para. 1.c), second sentence of Article 15 FDC foresees deduction of points or relegation to a lower league in case of “persistent” failure to comply with a decision, or in case of “repeated” offences. However, a club’s violation characterized by FIFA as a “new breach” is not covered by the provision which additionally, was not referred to as basis for sanctioning the club in the appealed decision. Moreover, the reference to “*other disciplinary sanctions being reserved*” in para. 3 of Article 15 FDC is not a sufficient legal basis for applying different sanctions than the ones mentioned in para. 1, but is only making it clear, that, e.g., if a transfer ban is lifted because of the debtor’s payments of an outstanding amount to a creditor, that does not mean that a possible fine imposed on the same debtor is also lifted.

Accordingly, the Panel was left with no option but to grant the Club one of its requests for relief, i.e., to set aside the sanction, because the sanction imposed by the FIFA DisCo in the Appealed Decision, namely transfer ban for two entire consecutive periods, had no legal basis as there was no connection between the incriminated behaviour and the sanction imposed under Article 15 FDC.

Decision

The Panel partially upheld the appeal filed by the Club – it confirmed the violation, however,

canceled the sanction because it had no legal basis.

Football; Termination of a contract by a player without just cause; Refusal to undertake a medical test; Joint liability of the new club; Inadmissibility of counter-claims

Panel

Mr Marco Balmelli (Switzerland), Sole Arbitrator

Facts

CD Saprissa (“Saprissa” or the “Appellant”) is a professional football club based in Costa Rica. Nantong Zhiyun FC (“Nantong” or the “First Respondent”) is a professional football club based in China.

Román Rubilio Castillo Álvarez (the “Player” or the “Second Respondent”) is a professional football player from Honduras.

On 29 December 2019, the Player and Nantong entered into an agreement named “*employment pre-contract*”, valid as from 3 January 2019 until December 2021, *i.e.* for 3 years. Pursuant to this contract, the Player was entitled to a fixed annual remuneration of USD 400,000 net. This included the payment, for the first year, of USD 50,000 within 5 days following the signature and of USD 350,000 within 12 months with an average monthly salary of USD 29,167.

On 9 January 2020, the Player flew to China where he was received by Nantong as his new club. One day later, he was presented to the team

and underwent medical examinations, as well as an “*intense*” football training. He then refused to undergo any further test or examination to confirm his physical condition and contractual engagement, arguing that he had already signed a valid contract. Thereto, the President of Nantong responded that, given the Player’s position, he would receive flight tickets to return to his country.

On 21 January 2019, the Player unilaterally terminated the contract in writing. He asserted that Nantong had breached its contractual obligations. He also referred to Article 18(4) of the FIFA Regulations on the Status and Transfer of Players (“FIFA RSTP”), in accordance with which “*the validity of a contract may not be made subject to a successful medical examination and/or the grant of a work permit*”.

On 24 January 2019, Nantong retorted that the Player had failed the medical examinations and that he was requested to go to the city of Kunming, China, to undergo further medical and sporting tests. Thereafter, it sent a formal notice, stating that it unilaterally terminated the contract, in view of the Player’s absence.

On 8 June 2020, the Player lodged a claim against Nantong before the FIFA Dispute Resolution Chamber (“FIFA DRC”) for breach of contract. As a compensation for this alleged breach, he requested to be awarded the amount of USD 1,200,000 (3 x USD 400,000), namely the equivalent to the whole residual value of the contract.

Nantong lodged a counterclaim for an alleged termination without just cause and requested compensation in the amount of “*no less than USD 1,200,000*”.

Sapriisa, as the new club of the Player, was invited to present its comments in this procedure, but failed to provide its position. On 25 February 2021, FIFA DRC issued its decision (the “Appeal Decision”), in which it recognised the existence of a valid employment contract. It partially accepted the Player’s claim and Nantong’s counterclaim. It ordered Nantong to pay the Player USD 50,000 as outstanding remuneration, but found the Player liable to pay Nantong USD 218,000 as compensation for breach of contract without just cause. It held that Sapriisa, as an intervening party, was jointly and severally liable for the payment of the compensation due by the Player, under penalty of an international transfer ban. On 15 March 2021, Sapriisa filed a Statement of Appeal with the Court of Arbitration for Sport (CAS) against the Appealed Decision in accordance with the Code of Sports-related Arbitration (the “CAS Code”).

Reasons

When an employment contract is terminated early, clubs and players regularly come into conflict over the existence of just cause, the amount of outstanding remuneration and compensation for breach of contract. The situation is further complicated when a third-party club comes into the picture.

The Appellant primarily argued that it was unlawfully included in the Appealed Decision as it was never formally, and in accordance with FIFA regulations, introduced as a party in the proceedings before FIFA DRC. It claimed that it was never made a respondent in those proceedings, neither by Nantong nor by the Player, and that, consequently, there would be no basis for its inclusion.

Accordingly, the main issue at stake revolved around FIFA’s ability to *ex-officio* make the Appellant jointly liable in this case, based on Article 17(2) of the RSTP, which governs third-party clubs’ entitlements and responsibilities. The underlying issue, which resurfaced in the First and Second Respondents’ reply briefs, concerned the Player’s right to terminate his employment contract and seek compensation following Nantong’s demands that he undergoes medical and sports tests.

This led the Sole Arbitrator to address the conditions under which the Player could refuse to undergo a medical examination and benefit from the alleged joint liability of his new club. He then examined the admissibility of counterclaims.

1. Refusal to undertake a medical examination

The Sole Arbitrator noted that the First and Second Respondents had devoted numerous developments to the issue of medical examination, in order to justify, respectively deny, the existence of just cause for the termination of their contract.

The Sole Arbitrator recalled that Article 18(4) of the RSTP provides that the validity of an employment contract between a player and a club cannot be made conditional upon the successful completion of a medical examination. He stated that this article does not necessarily imply, based on FIFA practice, that a player may simply refuse to undergo a medical examination or sporting test after the conclusion of a pre-employment contract. On the contrary, early termination of the contract by the player for this reason may be considered to be without cause.

The Sole Arbitrator found that this issue did not require a final decision. This was mostly a matter for a separate appeal, which the Player had admittedly filed, but had allowed to lapse by failing to pay the advance of costs.

2. Joint liability of the new club

The Appellant submitted that it could not be held liable for any potential compensation, since it was not named as a party in the original claim, whereas the First and Second Respondents held the opposite view.

The Sole Arbitrator observed that Article 17(2) of the RSTP allows the injured club to claim compensation not only from the player who wrongfully terminated the contract, but also from his new club, which may be held jointly and severally liable for his conduct. He also analysed FIFA Procedural Rules, the course of the FIFA proceedings, the conditions of formal notification as a party and other provisions of Swiss procedural and substantive law. He noted that FIFA procedural rules included general provisions on due process and notification, that the initial claim was exclusively directed against the Player, and that Saprissa was invited to present its position but was never duly notified of its participation as a party. He ultimately drew parallels with the Swiss Civil Code of Procedure and the Swiss Code of Obligations, which gave the sole discretion to the injured party to decide from whom it wanted to direct its claim and request compensation.

The Sole Arbitrator concluded that FIFA regulations did not empower the FIFA's DRC to extend the proceedings and the resulting liability to the Appellant.

3. Inadmissibility of counterclaims

The First Respondent requested an amount of USD 1,200,000 as a compensation for damages.

The Sole Arbitrator declined to rule on the Player's claims. He held that, in the absence of a valid separate appeal, these claims should be considered as counterclaims and thus ruled inadmissible in accordance with CAS longstanding practice.

Decision

In light of the foregoing, the Sole Arbitrator partially upheld the appeal. He retained that the decision issued by the FIFA DRC on 25 February 2021 should be annulled insofar as it held the Appellant jointly and severally liable for the amounts due, and declared the Player's counterclaims inadmissible.

CAS 2021/A/7914

César Domingo Mendiondo López v.
Hapoel Tel Aviv FC & FIFA

7 November 2022

Football; Request to initiate disciplinary proceedings for failure to comply with a CAS award; Res judicata; Reasons warranting a stay of the proceedings; Relationship between enforcement (art. 15 FDC) and main (art. 24ter RSTP) proceedings in sporting succession; Nature of the matter in dispute; Autonomy of the parties to derogate from the competence of the FIFA adjudicatory bodies; Effects of sporting succession

Panel

Prof. Ulrich Haas (Germany), Sole Arbitrator

Facts

On 9 March 2015, César Domingo Mendiondo López (the “Appellant”), a Spanish football coach, signed an employment contract (the “Employment Contract”) with the club Hapoel Tel-Aviv FC (the “First Respondent”). The activities of “Hapoel Tel Aviv FC” are managed by a company named Poalei Tel Aviv Holdings Ltd. The Hapoel Tel-Aviv FC is the trading name of a professional football club, whose set of rights, assets and liabilities were held at the time by a company called Harel Holdings Ltd. (“Harel Holding”).

The Employment Contract contained the following dispute resolution clause in clause 8:

“The parts, with independence of any jurisdiction that would correspond to them due of their condition and/or

nationality and, very particularly, with express renounce to submitting the questions derived from this agreement to the courts dependent on the Israeli football League and/or on the Israel’s football Federation and to the courts of Israel’s Justice, agree that any question derived from the application, interpretation, application and/or execution of this agreement will be solved by the Arbitral Court of the Sport (TAS/CAS), that depends of the Olympian International Committee, based in Lausanne, in conformity with its normative of procedure, being applied to the controversy the International sports regulations of the FIFA and of the UEFA and of the Private Swiss Law, promising itself the parts to respect and to fulfil strictly the resolution that could be dictated by the Arbitral Court of the Sport (TAS/CAS), and renounce expressly both parts to be applied to the controversy the law and the legal forecasts of their countries of residence and/ or nationality, that is to say, Spanish and/or Israeli”.

On the 4 September 2015, Harel Holding terminated the Employment Contract with the Appellant.

On 22 October 2015, the Appellant filed a Request for Arbitration before the CAS against Hapoel Tel Aviv FC. The proceedings were managed by the CAS Ordinary Division and docketed under the reference CAS 2015/O/4261.

On 22 June 2016, the sole arbitrator in the above procedure issued an award (the “CAS Award”), *inter alia*, ruling that: “1. (...). 2. Hapoel Tel-Aviv [Harel Holdings] is ordered to pay Mr Cesar Domingo Mendiondo Lopez, the amount of EUR 1,991,629’63 +5% of interest per annum from 15 October 2015”. Harel Holdings failed to pay the Appellant the abovementioned amount.

In December 2016, insolvency proceedings were opened over the estate of Harel Holdings. Two

offers were submitted for the acquisition of the football club (previously owned by Harel Holdings). The District Court in Tel Aviv-Jaffa on 4 January 2017, decided – *inter alia* – that the bid presented by a group named “Nissanov Group” was to be preferred over the other bid. The Nissanov Group operates via the legal entity Poalei Tel Aviv Holdings Ltd. The latter acquired – with the consent of the Court – certain rights and assets of Harel Holdings and continued to operate the football club (previously owned by Harel Holdings).

The Appellant filed his claim arising from the CAS Award with the liquidators of Harel Holdings. The latter approved the debt of the Appellant and included the debt in the List of Creditors and claims of Debt. The insolvency proceedings are still pending. As of this moment in time no proceeds have been paid to the Appellant out of the insolvent estate.

On 24 January 2020, the Appellant sent an email to the First Respondent referring to the CAS Award and asking for compliance with its findings within 10 days, failing which he would have “*no alternative but to seek redress before the competent judicial bodies*”.

On 17 September 2020, the Appellant filed a claim against the First Respondent before the FIFA Players’ Status Committee (“PSC”). Therein, the Appellant requested the PSC to determine as follows: “1. (...); 2. *To determine the Respondent (managed by the “Nissanov Group”) being:* 2.1. *the sporting successor of the original debtor Hapoel Tel-Aviv FC (managed by “Harel Holdings”);* 2.2. *liable for the debts incurred by the original debtor Hapoel Tel-Aviv FC (managed by “Harel Holdings”) towards the Coach, particularly but not exclusively for the amounts awarded to him in the CAS award.* 3. (...).”

On 16 October 2020, the Appellant sent an email to the FIFA Disciplinary Committee (“DC”) containing in attachment the email that he had sent to the First Respondent on 24 January 2020 and asking “*for your most valuable assistance*”.

On 21 October 2020, FIFA opened disciplinary proceedings against the First Respondent for the potential breach of Article 15 of the FIFA Disciplinary Code (“FDC”) (failure to respect decisions).

On 26 October 2020, FIFA informed the First Respondent and the Appellant that, in accordance with Article 72 par. 2 of the FDC (2019 edition), the DC was not able to intervene in the matter as the CAS ordinary proceedings had already started in October 2015, therefore, prior to the entry into force of the 2019 edition of the FDC. Thus, the disciplinary proceedings against the First Respondent were closed.

On the same date, i.e., on 26 October 2020, the Appellant sent a letter to the PSC advising the latter that he had not received any news in relation to his claim filed on 17 December 2020.

On 27 November 2020, the Appellant sent a further reminder and again referred to his correspondence dated 17 September and 26 October 2020, requesting the PSC: (i) to send the parties a written confirmation that the statement of claim had been duly received, and (ii) to send the claim to the First Respondent, while providing the latter with a time limit to reply pursuant to the provisions of Articles 6.3 and 9.3 of the Rules Governing the Procedures of the Players’ Status Committee and the Dispute Resolution Chamber.

On 12 January and 22 March 2021, the Appellant again insisted on the initiation of proceedings.

On 7 April 2021, FIFA replied to the Appellant as follows (“Appealed Decision”): “*In this context, we have noted that according to clause 8 of the employment contract concluded between you and Hapoel Tel Aviv FC ‘any question derived from the application of this agreement will be solved by Arbitral Court of the Sport (TAS/CAS)’. In this regard and in accordance with the cited clause 8, you have filed a Request for Arbitration with the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, asking for a declaration that the club had terminated the contract without just cause. To this end, we make reference to the Award rendered in case no. CAS 2015/O/4261 (...) and, in particular, to the fact that CAS declared itself competent and decided on the dispute. Therefore, it is clear that the parties of the reference agreed that any dispute deriving from said employment contract should exclusively be decided by CAS and, as a result, the Players’ Status Committee is not competent*”.

On 9 April 2021, the Appellant again sent a letter to the PSC requesting “*FIFA to continue adjudicating on the case at hand with Ref. No. FPSD-2110 and to issue a formal decision by the competent body of the FIFA. (...) [A]ny further silence from the FIFA DRC in relation to the present proceedings with Ref. No. FPSD-2110 shall be considered a denial of justice (...). As a result, the Coach shall be left no other resort but to consider the FIFA letter of 7th of April 2021 with Ref. No. FPSD-2110 as a decision and appeal it before the Court of Arbitration for Sport*”.

On 28 April 2021, the Appellant filed a Statement of Appeal against the Appealed Decision with the CAS. In its Appeal Brief filed on 25 October 2021, the Appellant sought, *inter alia*, the following relief: “*1. to accept this appeal against the decision (...) with the Ref. Nr. FPSD-2110, (...); 2. to annul the Decision challenged (...) and issue a new decision, replacing the Decision, in the following terms: (i) to determine Hapoel Tel-Aviv Football Club*

(managed by the “Nissanov Group”) being: the sporting successor of the original debtor Hapoel Tel-Aviv FC (managed by “Harel Holdings”); and liable for the payment of the debts incurred by the original debtor Hapoel Tel-Aviv FC (managed by “Harel Holdings”) towards the Coach, particularly for the amounts awarded to him in the CAS award of 22 June 2016 in arbitration proceedings with a reference No. CAS 2015/O/4261”.

Reasons

1. Res judicata

According to the First Respondent the claim at stake had already been finally disposed of in the CAS Award and, therefore, could not be relitigated. Furthermore, both Respondents were submitting that the matter at stake could not be adjudicated by the Sole Arbitrator because it had been decided by the DC on 26 October 2020. The latter decision had become final and binding since the Appellant had not appealed it to the CAS.

The Sole Arbitrator started with recalling some findings of the jurisprudence and legal literature about the plea of *res judicata*. According to the positive effect the parties to the decision that has *res judicata* effect can rely on the findings of said decision in subsequent proceedings. The negative effect of *res judicata* consists of preventing a new forum to reconsider an issue already previously decided. The question of *res judicata* is, in principle, a procedural question that is governed by the *lex fori*, i.e., Swiss law. Under Swiss law, the negative effect of *res judicata* can be invoked if the claim at issue is identical to the one that has already been adjudicated with final effect. There is identity within the above meaning in case there is both identity of the parties and of the subject matter. The subject matter of the dispute is determined by the

individualized claims and by the facts invoked in support of it.

Applying those criteria, the Sole Arbitrator found that the subject matter underlying the CAS Award was not identical with the matter in dispute as the parties involved in both proceedings were different. While the proceeding underlying the CAS Award has been directed against Harel Holdings, the present matter was directed – *inter alia* – against Poalei Tel Aviv Holdings Ltd. Although both entities may have had the same trading name, from a legal standpoint they were different entities and, therefore, different parties. Furthermore, FIFA had not been a party in the proceedings underlying the CAS Award.

Also, the decision of the DC dated 26 October 2020 had no bearing on the present proceedings. The Sole Arbitrator recalled that only certain adjudicatory decisions enjoyed *res judicata* effects, such as court decisions or true arbitral awards, but not decisions by association tribunals. And even the concept of *res judicata* would be applied by analogy to decisions of an association tribunal, the competence of the Sole Arbitrator would not be affected as under Swiss law, the *res judicata* effect of an award was limited to decisions on the merits by which the arbitral tribunal resolves the dispute before it in whole or in part. The decision of the DC, however, had not adjudicated the merits of the case before it. Instead, the DC decision had refused to adjudicate the matter because it had qualified the Appellant's request (to initiate enforcement/disciplinary proceedings against the First Respondent) as inadmissible. Therefore, there was no room to apply the concept of *res judicata* even by analogy. As a result, the CAS had jurisdiction to adjudicate the matter before it.

2. Reasons warranting a stay of the proceedings

The First Respondent was submitting that the case should have been stayed or dismissed because of *lis pendens*, since the insolvency proceedings in Israel were still pending and the Appellant had filed his claims arising from the CAS Award in the insolvency proceedings over the estate of Harel Holdings. The First Respondent had also filed nine appeals against decisions of the FIFA DC between January and April 2020; the appeals had been consolidated in a single proceeding before CAS and all dealt with the question whether Poalei Tel Aviv Holdings Ltd was liable for debts incurred by Harel Holdings because of alleged sporting succession. Since some of the question raised in this procedure were like the questions raised in the consolidated proceedings, the present proceedings should be stayed to await the outcome of the consolidated procedures.

The Sole Arbitrator noted that Article 186(1bis) of the Swiss Private International Law Act accorded wide discretion to the Sole Arbitrator whether to stay the proceedings. In addition, the provision was only applicable in case the parallel proceedings had an identical matter in dispute. This, however, was not the case here. The enforcement of the Appellant's claim in the insolvency proceedings was directed against Harel Holdings (and not against Poalei Tel Aviv Holdings Ltd). Thus, there was no identity of parties to begin with. In the consolidated proceedings before the CAS the claims of the creditors were directed against Poalei Tel Aviv Holdings Ltd. However, the creditors in said consolidated proceedings were different from the Appellant in the case at hand. Thus, also insofar there was no identity of parties.

Although independently of *lis pendens*, there were other reasons that could also warrant a stay of the proceedings, any suspension of the arbitration could result in a delay or denial of justice. In view of these negative effects of a stay, in case of doubt priority was to be given to the principle that the proceedings must be conducted within reasonable time. Therefore, an arbitral tribunal seated in Switzerland was to suspend the arbitration in exceptional circumstances only, i.e., either based on specific statutory provisions or for other compelling reasons, for example if the legal existence or the capacity of a party was affected, or if questions needed to be clarified which were important for the outcome of the case but lied outside the jurisdiction of the arbitral tribunal. In the opinion of the Sole Arbitrator, no such reasons existed in the case at hand. The matter was ripe for decision and he did not need to await the outcome of the other proceedings (before the Israeli Court or the CAS) to decide the matter at hand. Consequently, the Sole Arbitrator decided not to suspend the proceedings.

3. Relationship between enforcement (art. 15 FDC) and main (art. 24ter RSTP) proceedings

The Respondents were claiming that the Appellant had “circumvented” the applicable rules, because the latter had proceeded based on Article 24ter RSTP against the First Respondent before the PSC even though the DC had dismissed his claim to enforce the CAS Award against the First Respondent.

In the opinion of the Sole Arbitrator, whether the Appellant’s “maneuver” could have been qualified as a “circumvention” depended on the relationship between the proceedings underlying Article 15 FDC (“enforcement proceedings”) and Article 24ter RSTP (“main proceedings”). If

the creditor held a decision or an award against the original debtor, was the creditor in such case free to choose whether to lodge a new main proceeding against the alleged sporting successor (Article 24ter RSTP) or to initiate enforcement proceedings (based on Article 15 FDC) against the alleged sporting successor? Could he/she even do so concurrently?

The Sole Arbitrator observed that absent any specific provision in the FIFA regulations, “enforcement proceedings” based on Article 15 FDC and “main proceedings” based on Article 24ter RSTP against an alleged sporting successor could not be coordinated via *lis pendens* (in case of simultaneous proceedings) or *res judicata* (in case of subsequent proceedings), because in enforcement and main proceedings the matter were different, different procedural rules applied and different adjudicatory bodies were competent. Furthermore, the decisions of the PSC and the DC were independently appealable to the CAS. To prevent contradictory decisions, which was neither in the interest of the parties nor in the interest of good administration of justice, there needed to be some kind of coordination between both proceedings. Otherwise, a creditor – e.g. – who would have failed in the enforcement proceedings, because the DC had not qualified the “new club” as a sporting successor of the original debtor, could have relitigated the question of sporting succession via Articles 24ter, 22 RSTP. *Vice versa*, the “new club” that would have been found to be a sporting successor in the enforcement proceedings could have filed a request for negative declaratory relief that he was not a sporting successor before the PSC/DRC.

However, if, as in the present case, the DC had not decided on the substantive issue of sporting succession but had dismissed the request for

enforcement as inadmissible for procedural reasons, main proceedings initiated before the PSC could not be considered a circumvention of the rules, nor did they lack a legitimate reason.

4. Nature of the matter in dispute

The Parties were in dispute whether the claim filed by the Appellant fell within the competence of the PSC. According to Article 22(1) lit. c) RSTP, the PSC is competent if the case is an employment-related dispute of an international dimension involving a coach. It was undisputed that Appellant was a coach and that the dispute had an international dimension. What appeared questionable, however, was whether the dispute was “employment-related”.

In the opinion of the Sole Arbitrator, in order to qualify the nature of the dispute at hand one needed to look at the core or substance of the dispute, i.e., whether it originated in an employment relationship. The Sole Arbitrator found that this was the case since it was the employment contract between the Appellant and the original debtor (Harel Holdings) that was giving the present litigation its character. The issue of sporting succession, on the contrary, was of “secondary importance” and did not change the nature of the dispute. This also could be seen in the wording of Article 24ter RSTP from which it followed that a claim against the (alleged) sporting successor could be pursued as if the latter was the original debtor, i.e., that the alleged sporting successor “*step[ped] into the procedural shoes of the original debtor*”. This, however, was only possible, if the claim against the sporting successor was of the same nature as the claim against the original debtor. Thus, sporting succession – as e.g., in cases of legal succession, legal or contractual assumption of debt – did not change the nature of the matter in dispute.

5. Autonomy of the parties to derogate from the competence of the FIFA adjudicatory bodies

The Employment Contract entered into by the Appellant provided in Article 8 that “... *any question derived from the application, interpretation, application and/or execution of this agreement will be solved by the Arbitral Court of the Sport (TAS/CAS)*”. Was it available to the Parties to oust the jurisdiction of the FIFA adjudicatory bodies as a first instance and to refer any dispute arising from the employment relationship directly to the CAS?

The Sole Arbitrator explained that the introductory sentence of Article 22(1) RSTP stated that it was within the parties’ autonomy to derogate from the competence of the adjudicatory bodies of FIFA. While this provision only referred to a jurisdiction clause conferring competence to state courts, the autonomy of the parties was not confined to jurisdiction clauses. If, as Article 22(1) lit. c) RSTP explicitly stated, the parties could refer a dispute to a national arbitral tribunal, nothing prevented them from opting out from Article 22 RSTP also in favour of the CAS.

6. Effects of sporting succession

Although the dispute resolution clause (clause 8 of the Employment Contract) obviously bound the parties to the Employment Contract (Harel Holdings and the Appellant), the question at stake, however, was whether clause 8 of the Employment Contract also covered the dispute between the Appellant and the First Respondent.

The Sole Arbitrator recalled that, as previously stated, the effects of sporting succession were akin to a legal assumption of debts. The sporting

successor was liable for a creditor's claim arising from an employment contract as if he had been a party to the contract. In Swiss law in case a person assumed a foreign debt such person was bound to a dispute resolution clause in the original contract. Thus, e.g. the SFT had decided that the assumption of an external debt lead to the transfer of ancillary rights within the meaning of Art. 178 para. 1 of the Swiss Code of Obligations from the debtor to the assignee. The arbitration agreement was such an ancillary right. It followed that it was binding on the receiving party, with certain exceptions. This was self-evident in the case of a privative repossession, since it implied a succession by particular title in the capacity of passive subject of the obligation, a new debtor taking the place of the old one. A similar effect had also been recognised in the case of the cumulative assumption of a debt, even though in this case there was no change of debtor, but the intervention of a second debtor who became a joint and several debtor alongside the original debtor.

In the opinion of the Sole Arbitrator, whether the assumption of debt was contractual or statutory was not material in order to extend the scope of the dispute resolution clause. According to Swiss law, also a partner of simple partnership (who by law assumes the debts of the partnership) was bound by the dispute resolution clause contained in a contract between the partnership and a third person. Since the sporting successor did not enter into a separate obligation vis-à-vis the creditor but became the passive subject of the guaranteed debt of the sporting predecessor, the scope of the original dispute resolution clause also extended to the alleged sporting successor. It followed from the above, that the Employment Contract derogated from Article 22 et seq. of the RSTP and that as a consequence the PSC was not competent to

adjudicate the Appellant's claim.

Decision

In light of the foregoing, the Sole Arbitrator found that the PSC had rightly rejected to adjudicate the Appellant's claim and that therefore the Appellant's claim had to be dismissed.

CAS 2021/A/7975

Franco Feitt v. Professional Tennis Integrity Officers (PTIOs)

24 August 2022

Tennis; Match-fixing; Time limit to file an appeal; Applicable law and *tempus regit actum*; De novo power of review by CAS and its limits; Curing effect of *de novo* review; CAS power to review admission made in first instance proceedings; Modification of requests for relief submitted with Statement of Appeal; *Ultra petita*; Article R56 CAS Code; CAS power of review of first instance decisions on sanctions; Proportionality of sanction (lifetime ban) in light of violations committed; Substantial Assistance under Section H.6 Tennis Anti-Corruption Program (TACP) as mitigating circumstance; Proportionality of financial penalty in addition to lifetime ban

Panel

Prof. Massimo Coccia (Italy), President
Mr Ricardo de Buen (Mexico)
Mr Nicholas Stewart QC (United Kingdom)

Facts

Mr Franco Feitt (the “Appellant” or the “Player”), is a professional tennis player of Argentinian nationality and a member of the Association of Tennis Professionals (“ATP”).

The Professional Tennis Integrity Officers (the “Respondent” or “PTIOs”) are four individuals, appointed to prosecute the offences set forth under the Tennis Anti-Corruption Program (“TACP”), after investigations carried out by the Tennis Integrity Unit (“TIU”). On 1 January

2021, the International Tennis Integrity Agency (“ITIA”) has replaced both the PTIOs and the TIU.

The TACP has the purpose of defending and maintaining the integrity of tennis and protecting against any improper impact on the results of professional tennis matches, including match-fixing.

All tennis players (including the Player) participating in the professional tennis events listed in Appendix 1 to the TACP are bound to abide by the TACP.

On 22 June 2020, the TIU approached the Player, requesting his cooperation in order to assess some potential violations of the TACP.

From 1 July 2020 to 7 August 2020, the TIU held three interviews with the Player (collectively, the “Interviews”).

On 1 December 2020, the PTIOs sent a notice of charge to the Player (the “Notice”), charging him with 17 offences under the applicable versions of the TACP (collectively the “Charges”), which were grouped as follows (the “Grouped Charges”):

- “1. Two breaches of section D.1.b of the TACP, by facilitating a third party to bet on a professional tennis event*
- 2. Five breaches of section D.1.d of the TACP, by contriving or attempting to contrive the outcome of professional tennis matches.*
- 3. Ten breaches of section D.1.e of the TACP, by soliciting another player not to use his best efforts in an event.*
- 4. One breach of section D.2.a.i, by failing to report a corrupt approach.*

5. One breach of section D.2.a.ii, by failing to report knowledge or suspicions of the commission of Corruption Offenses by third parties”.

The Notice also specified the following:

- (i) the Charges related “to a significant number of tennis matches that took place between 2014 and 2018 with a particular focus in May 2018”;
- (ii) the TIU had obtained evidence implicating the Player with “a known corruptor named Grigor Sargsyan, albeit better known to you as ‘Gregory’ or ‘Grego’” and also “in the receipt of funds for match-fixing”;
- (iii) the Anti-Corruption Hearing Officer (the “AHO”) appointed pursuant to the 2020 TACP to whom the matter was referred could impose sanctions on the Player based on Section H TACP, which included “(i) a fine of up to \$250,000 plus an amount equal to the value of any winnings or other amounts received by such Covered Person in connection with any Corruption Offense [...] (iii) with respect to any violation of Section D.1, clauses (d)-(j) and Section D.2, ineligibility for participation in any event organized or sanctioned by any Governing Body for a maximum period of permanent ineligibility”;
- (iv) the Player could send his response to the Notice to the AHO.

On 20 December 2020, the Player replied to the Notice stating, in the relevant part, that one of the accusations against him “is not true” and that he does “... not want to be charged with a fine that does not correspond to me”.

On 14 January 2021, the Player sent an email to the AHO and the PTIOs’ Counsel specifying “the things I agree or disagree in order to help the AHO” and commenting on the Grouped Charges as follows:

“1. Agree

2. Disagree

3. Disagree

4. Agree

5. Disagree”.

On 29 January 2021, following a respective request by the PTIOs, the Player provided a specific answer by reference to each of the 17 individual charges. He admitted to 9 out of 17 Charges (the “Admitted Charges”). The Admitted Charges as set out in the Notice include eight offences under Section D.1 TACP (the “Corruption Charges”) and one violation of a reporting obligation under Section D.2.a TACP (the “Non-Reporting Charge”). The facts surrounding the Admitted Charges were summarised in the Notice as follows:

(i) Corruption Charges

(a) Charges nos. 2, 3, 5, 6 and 7 for breaching Section D.1.d of the applicable versions of the TACP by “contriving or attempting to contrive the outcome of professional tennis matches” (the “D.1.d Charges”):

(b) Charges nos. 9, 13 and 14 for breaching Section D.1.e TACP by “soliciting another player to not use his best efforts in an event” (the “D.1.e Charges”). The D.1.e Charges are disputed by the Player in this CAS proceeding.

(ii) Non-reporting Charge: Charge 4 for breaching Section D.2.a TACP by “failing to report a corrupt approach” with reference to an unidentified tennis match that took place in late 2016, for which the Player was corruptly approached by Mr Agustin Moyano.

On 15 March 2021, the PTIOs, in their submission on sanctions, requested that, for the Admitted Charges, the Player be sanctioned with a lifetime ban and a fine amounting to USD 100,000.

On 7 April 2021, the Player expressed his disagreement with the proposed sanction, as he considered that *“the seriousness of [his] actions were not so great as for a life suspension”* [sic].

On 12 April 2021, the AHO rendered his decision (the “Appealed Decision”). The Appealed Decision imposed on the Player (i) a lifetime ban from the sport of professional tennis *“in relation to any event organised or sanctioned by any Governing Body”*; and (ii) a fine amounting to USD 25,000, for committing nine violations of the applicable versions of the TACP.

In a nutshell, the AHO considered that the Player had admitted to nine Charges, namely eight Corruption Charges and one Non-Reporting Charge, and the PTIOs intended to proceed only in respect of said Charges. As regards the Corruption Charges, the AHO held that:

The D.1.e TACP Charges concern the most serious violations, since they involve other players bound by the TACP as “Covered Persons”. For this kind of offence, a lifetime ban has been consistently held appropriate by the AHO and upheld by the CAS.

Further, in the past, offences under Section D.1.d TACP had been sanctioned by the AHO with lengthy bans and at times with lifetime bans; considering that in the AHO decision of 2020 concerning the player X, the player was sanctioned with a four and a half-year ban for one offence; if said sanction is multiplied by the number of D.1.d TACP Charges admitted by the Player in the present

case (*i.e.* five), a ban close to a lifetime ban is inevitable, for these violations alone;

In the AHO decisions of 2020 concerning the three other players, the players were sanctioned with a lifetime ban and had two to three charges under Section D.1.e TACP and four to eight charges under D.1.d TACP;

Regarding the Non-Reporting Charge, the AHO recalled that reporting is crucial in the fight against match-fixing and that previously, a non-reporting offence had been sanctioned with a ban of up to a year.

As aggravating factors the AHO found, amongst others, that the offences concerned a four-year period of time and that the D.1.e TACP Charges involved a criminal organisation that targeted professional tennis and three other players, meaning that the Player was involved both as a corrupted person and as a corruptor of other players.

Finally, the AHO considered that the fact that the Player regretted his action and had acted in violation of the rules because he needed money in order to play tennis was a mitigating factor, as was the fact that he cooperated with the PTIOs and accepted some Charges, thereby avoiding the necessity to proceed with a hearing. Notwithstanding the fact that a lifetime ban was imposed on the Player, it was appropriate to add a fine, as the latter represented a further deterrent and disgorges some of the gains that the Player obtained illegally.

On 11 May 2021, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the “CAS”) in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the “CAS Code”) with respect to the Appealed Decision.

Reasons

This appeal is brought by Mr Feitt against the Appealed Decision rendered on 12 April 2021 by the AHO. The Appealed Decision imposed on Mr Feitt: (i) a lifetime ban from the sport of professional tennis “*in relation to any event organised or sanctioned by any Governing Body*”; and (ii) a fine amounting to USD 25,000, for committing nine violations of the applicable versions of the TACP.

1. Time limit to file an appeal

To start with, the Panel addressed the admissibility of the appeal, highlighting that while the applicable deadline to file the appeal was twenty business days from receipt of the Appealed Decision, it was not clear as to when exactly the Appealed Decision was notified to the Appellant. The Panel noted that the Respondent had however made an express representation to the Appellant regarding the specific deadline to appeal to the CAS and that accordingly, the Parties can be considered to have expressly stipulated the exact date to be taken as time limit to appeal.

2. Applicable law and *tempus regit actum*

Regarding the applicable law the Panel noted that while the Admitted Charges spanned a period between 2015 and 2018, the Notice was issued in 2020 and the CAS appeal had been filed in 2021. That further, the charges were brought under the TACP, and that new versions of the TACP had been issued on a yearly basis between 2015 and 2021, leading to the question as to which of those versions was applicable. Relying on the principle of *tempus regit actum* (or principle of non-retroactivity), the Panel held that the substantive aspects of the alleged disciplinary

offences were to be adjudicated based on the rules that were in force at the time the respective offence was committed, subject however to the principle of *lex mitior*. That conversely, any procedural rule applied immediately upon its entry into force and governs any subsequent procedural act, even in proceedings related to facts that occurred beforehand.

3. *De novo* power of review by CAS and its limits

In the following, the Panel addressed the Respondent’s argument that requests by the Appellant were inadmissible in that they were made for the first time during the hearing and therefore remained outside of the scope of the Panel’s review as per Article R57 of the CAS Code. The Panel held that while Article R57 of the CAS Code provides a CAS panel with the power to adjudicate the case *de novo* - a power which, according to constant CAS jurisprudence, has to be construed as almost unfettered - that power of review finds a limit in the objective and subjective scope of the decision being appealed against. That further, the scope of review may not extend beyond the requests submitted by the Parties as this would constitute a violation of the prohibition against deciding *ultra petita* enshrined in Article 190 of the Swiss Private International Law Act (the “PILA”). The Panel noted that in order to determine said requests, in accordance with Swiss law, one must look exclusively at the Parties’ prayers for relief.

4. Curing effect of *de novo* review

Also in the context of the CAS *de novo* review the Panel noted that the Appealed Decision mentioned that “*Neither party requested a hearing*”. The Panel found that, although the Appellant was not entirely clear in his communication to the PTIOs and the AHO, he had mentioned that

he intended to discuss the Charges at a hearing in the first instance, and that he was denied such opportunity. Nonetheless, the Panel held – relying on the longstanding jurisprudence of CAS panels on this matter – that the respective procedural flaw is cured by the present CAS appellate proceedings and the Panel’s power to decide *de novo* under Article R57 of the CAS Code. Indeed, the Appellant has had a full opportunity to be heard and to contest the Admitted Charges he did not agree to. Therefore, the Panel concluded that the aforementioned circumstance could not be relied upon in order to reduce the applicable sanction.

5. CAS power to review admission made in first instance proceedings

Analysing further the question of the admissibility of the Appellant’s requests for relief, the Panel noted that the Appealed Decision hinged on the Player’s admission to eight Corruption Charges as well as one Non-Reporting Charge (together the Admitted Charges). The Panel underlined that the fact that the Appealed Decision was based on conduct that had been previously admitted by the Appellant would not entail that the Panel is prevented from reviewing said admission. This insofar as a confession presents a mere piece of direct evidence, which has been evaluated by the prosecuting body as well as the first instance judicial body, and is therefore later on part of the Panel’s scope of review in the CAS proceedings. The Panel highlighted that in the course of CAS proceedings, an accused individual is always entitled to totally, or partially, retract a confession, the resulting question being one of plausibility of such retraction, not of its admissibility. Accordingly, a new, and possibly different, evaluation of the facts and the evidence – even if it led to the conclusion that,

e.g., a violation has not been committed or must be recharacterized – remains within the boundaries of the objective scope of the decision appealed against.

6. Modification of requests for relief submitted with Statement of Appeal

Further in the context of the admissibility of the Appellant’s requests for relief made at the hearing the Panel pointed out that the Respondent, when objecting to the admissibility of such requests, had focussed on the Appellant’s motions for relief set forth in his Statement of Appeal, disregarding the relief sought in his Appeal Brief. In order to resolve this objection, the Panel noted that the Appellant, already in his Appeal Brief, had modified its requests for relief initially submitted in the Statement of Appeal, and that the requests made during the hearing did not exceed the requests for relief made in the Appeal Brief. The Panel underlined that according to constant CAS jurisprudence, Article R51 of the CAS Code does not preclude an appellant from modifying, in the Appeal Brief, its motions for relief initially put forward in the Statement of Appeal, on condition however that the principle of equal treatment of the parties and their right to be heard be preserved. In this vein, given that in CAS appeals proceedings, a respondent’s answer is always filed after the Appeal Brief, a respondent would not be affected by an appellant’s variation of its motions for relief in the Appeal Brief. The Panel concluded that accordingly, the requests in question were not first made at the hearing and consequently, they did not exceed the Appellant’s requests for relief and, thus, did not violate the prohibition of *ultra petita*.

7. *Ultra petita*

Remaining with the principle of *ultra petita*, the Panel, for the sake of completeness, noted that the prohibition to rule *ultra petita* is not violated if a CAS panel merely came to a different legal qualification of the facts of a case than the first instance judicial body. That rather, according to the Swiss Federal Tribunal, the principle of *jura novit curia*, also applicable to arbitration, requires arbitrators to apply the law *ex officio*, without being limited to the grounds advanced by the parties. A CAS panel may therefore entertain grievances that have not been invoked, as this is not dealing with a new, or a different claim, but only a new qualification of the facts of the case.

8. Article R56 CAS Code

Thereupon the Panel turned to the Respondent's argument that the Appellant – by presenting, for the first time at the hearing, new requests as to the D.1.e TACP Charges - had violated Article R56 of the CAS Code, according to which the parties' arguments and requests cannot be supplemented or amended after the written submission phase. To start with, the Panel noted that the Appellant's arguments at the hearing stemmed from the analysis of the arguments and evidence submitted by the Respondent in its Answer. The Panel underlined that indeed, given that under Article R56 of the CAS Code, following the respondent's Answer, no further written submissions are available to the parties, the only option for an appellant to reply and comment on arguments and evidence provided by the respondent in its Answer is at the hearing. That accordingly, Article R56 of the CAS Code could not be interpreted in such a restrictive manner that after the written submission phase, the parties' arguments and requests could not be supplemented or amended. Rather, since the

CAS Code does not explicitly provide for a second round of written submissions, the appellant must be allowed some latitude to reply at the hearing. To hold otherwise would mean that, under Article R56 of the CAS Code, all parties to CAS appeals proceedings would always be restricted, in their oral statements, to repeat exactly the content of their written briefs submitted prior to the hearing, which would essentially render all oral pleadings at hearings meaningless and unnecessary. In principle and in practice, at a hearing, parties are permitted to expand on their written submissions, provided however that they remain within the scope of their case, as established in their prior submissions. Finally, the Panel found that the Appellant's arguments as to the D.1.e TACP Charges, although they were presented for the first time at the hearing, could not have caught the Respondent by surprise and that in conclusion, they do not constitute a violation of Article R56 of the CAS Code or of the Respondent's right to be heard.

9. CAS power of review of first instance decisions on sanctions

Turning then to the sanctions imposed on the Appellant in the first instance proceedings, the Panel noted that while the Appellant contended that the sanctions imposed on him are disproportionate, the Respondent was of the view that the sanctions had to be confirmed as appropriate, even if there was a recharacterization or annulment of the D.1.e TACP Charges. The Panel recalled the principle that whilst a hearing before the CAS is a *de novo* hearing, a CAS panel shall only review the measure of the sanction imposed by the first instance body to determine whether the sanction imposed is evidently and grossly disproportionate to the offense.

10. Proportionality of sanction (lifetime ban) in light of violations committed

As regards the specific arguments raised by the Appellant against the proportionality of the lifetime ban imposed on him, the Panel noted that while the Appellant acknowledged that an ineligibility period amounting to a lifetime ban is considered as an appropriate starting point for violations of Section D.1.e. TACP, he contended that said ban does not apply to the present case, as: (i) the most serious charges, the D.1.e TACP Charges, were contested and should be recharacterized and/or set aside; and that in any case, (ii) the Appellant's level of fault is lower than that of other players in previous AHO and CAS cases ruling on violations of Section D.1.e TACP and justifies a reduction of said period of ineligibility. The Appellant further contended that violations of Section D.1.d TACP and of reporting obligations are less serious than violations of Section D.1.e TACP and do not deserve a lifetime ban.

Disagreeing with the Appellant the Panel held that in principle, a breach of Section D.1.d of the TACP (contriving any aspect of a tennis match) is not significantly less serious than a breach of Section D.1.e of the TACP (facilitating another player to contrive any aspect of a tennis match), stating that both are forms of match-fixing. Furthermore the Panel - noting that the Appellant had been involved in contriving the outcome of several tennis matches over a period of several (four) years and that such activity had had an international reach as ITF tournaments in several countries were concerned – found that such conduct had to be qualified as constituting a most severe violation of the TACP in that it constituted a threat to the public's perception as to the authenticity of the results and accordingly,

presented a most serious threat to the integrity of sport. That consequently, such conduct deserved to be sanctioned with an ineligibility period at the highest end of the spectrum provided for under Section H.1.a of the TACP.

11. Substantial Assistance under Section H.6 Tennis Anti-Corruption Program (TACP) as mitigating circumstance

While the Appellant argued that in the Appealed Decision, his willingness to assist the investigations was regarded as mitigating factor, the Respondent contended that “Substantial Assistance” under Section H.6 of the TACP is not a mitigating factor *per se* but rather a separate process for which an individual can apply. That however no such application had been made in the present case.

Agreeing with the Respondent, the Panel underlined that in order for a reduction of the sanction under Section H.6 TACP on Substantial Assistance to apply, the person concerned first had to make a specific application in that respect, and the AHO had to initiate a procedure to consider said application. Further that the final decision on the possible reduction of the sanction due to Substantial Assistance remained completely at the discretion of the AHO. That however, in the absence of a specific application for Substantial Assistance as required by Section H.6 TACP, said provision is not applicable in the present appeal. Having analysed and dismissed further arguments presented by the Appellant as to mitigating factors, the Panel held that in the absence of any mitigating factors, in the present case a lifetime ban is appropriate and proportionate to the violations committed by the Appellant.

12. Proportionality of financial penalty in addition to lifetime ban

Finally, the Panel addressed the Appellant's argument that in case the lifetime ban was maintained, there should be no additional fine since, as acknowledged in CAS case law, the life ban in itself has a severe financial impact on a player and therefore it is inappropriate to impose a fine in addition to the ban. Conversely, the Respondent argued that the fine imposed on the Appellant should not be annulled or reduced as, under the TACP, there is no restriction to the imposition of a fine in cases in which a violation also deserves a lifetime ban. Furthermore, the imposition of a fine constitutes a deterrent and is aimed at the repayment of the sums earned through the match-fixing activities. The possibility to impose a fine alongside a life ban is crucial especially in case of older players, as they have little to no interest in continuing tennis activities and thus, if a fine could not be imposed, by a mere life ban they would not be discouraged and could be inclined to maximise their profits from match-fixing before forcibly retiring due to said ban. The Respondent further pointed out that according to most recent CAS jurisprudence, even in cases in which a lifetime ban was imposed, annulling a fine is inappropriate in case the individual financially profited from fixing tennis matches, it being correct to disgorge at least part of said profits.

Following the Respondent's line of argument the Panel held that while a lifetime ban may have a considerable economic impact on a professional player, it may still be appropriate to impose, in addition, a financial penalty on the player in circumstances where, as in the present case, the player has benefited (financially or otherwise) from the charges found guilty of. Therefore, the Panel concluded that the imposition of a fine is

appropriate in the present case and, considering the earnings admitted in the Interviews, the amount of USD 25,000 is not disproportionately high and offsets part of the Player's illegal profits.

Decision

In light of the foregoing, the Panel dismissed the appeal filed on 11 Mai 2021 by Mr Franco Feitt against the decision rendered by the Anti-Corruption Hearing Officer (AHO) on 12 April 2021 and confirmed the decision of 12 April 2021.

CAS 2021/A/8054

FC Hamrun Spartans v. Union des Associations Européennes de Football (UEFA)

30 November 2022

Football; Disciplinary disputes; Standing to be sued – indirectly affected parties; Eligibility to participate in a competition; Interpretation of a rule; Period of ineligibility (commencement)

Panel

Mr Francesco Macrì (Italy), Sole Arbitrator

Facts

Hamrun Spartans (the “Appellant” or the “Club”) is a professional football club affiliated with the Malta Football Association (the “FFM”), which in turn is affiliated with the Union des Associations Européennes de Football.

Union des Associations Européennes de Football is the governing body of European football, based in Nyon, Switzerland (the “Respondent” or “UEFA”).

Following the end of the 2020-2021 Maltese Premier League (“MLP”), the Malta Football Association (“MFA”) Executive Committee declared the Appellant the new Maltese champions. As such, the Club qualified on sporting merits to the UEFA Champions League (the “UCL”) in the application of the 2021/2022 UEFA Champions League Regulations (the “UCLR”).

On 10 May 2021, the Appellant submitted the Admission Criteria Form (the “ACF”) for the 2021/2022 UEFA Club Competitions. The Club attached a letter dated 10 May 2021, informing that on 31 July 2013, the Club was charged with corrupt practice by the MFA as two of the Club’s committee members were “*accused of having been involved in an activity aimed at arranging or influencing the outcome of matches at a national level*”.

On 13 August 2013, the MFA imposed a fine on the Club of EUR 10,000, a 7 points deduction for the season 2013/2014 and a relegation to the 3rd tier division. Additionally, the Club was “*banned [by the MFA] from participating in International Competition for five (5) years*” (the “Decision”).

With the same letter, the Club submitted that the Decision had already the effect of preventing the Club from participating in a UEFA Clubs’ competition: “*Indeed, in terms of the MFA sanction-imposed way back in 2013 not only was the Club ineligible to participate for one (1) football season but for a whole period of five (5) years*”

On 25 May 2021, the UEFA General Secretary referred the ACF to the Chairman of the UEFA Control, Ethics and Disciplinary Body (“CEDB”), according to Article 4.07 UCLR. Furthermore, the UEFA General Secretary requested that a UEFA Ethics and Disciplinary Inspector (“EDI”) investigate the admission of the Club to the 2021/22 UCL competition.

On the same day, the Club was informed of the opening of the UEFA Ethics and Disciplinary Inspector’s (the “EDI”) investigation.

On 31 May 2021, the UEFA Control, Ethics and Disciplinary Body chairman apprised the Club that the Inspector had submitted his report.

Furthermore, the Club was also informed that, given the urgent circumstances of the case, the Chairman of the UEFA Control, Ethics and Disciplinary Body decided to refer the matter directly to the UEFA Appeals Body, in virtue of what is laid down in Article 50 (3) of the UEFA Statutes and Article 29 (3) of the UCLR.

The EDI Report submitted that the Club should have been declared ineligible to participate in the 2021/2022 competition for which it qualified and sought admission under the administrative measure provided by Article 4.02 UCLR.

On 9 June 2021, the Club was notified of the decision of the UEFA Appeals Body (the “Appealed Decision”), which declared: *“Hamrun Spartans F.C. ineligible to participate in the 2021/2021UEFA Champions League”*.

As a direct consequence of the Appealed Decision, Hibernians F.C. (which had finished in second place behind the Appellant in the MPL) was effectively promoted from the UEFA Europa Conference League (“UECL”) 2021/22 to the UCL 2021/22. Furthermore, three Maltese clubs were scheduled to participate in the UECL 2021/22: Birkirkara F.C., Gzira United and Mosta F.C. The latter achieved its place in the UECL 2021/22 as a direct consequence of the Appealed Decision.

On 19 June 2021, the Appellant filed a Statement of Appeal against the Appealed Decision with the Court of Arbitration for Sport (the “CAS”) in accordance with Articles R47 et seq. of the Code of Sports-related Arbitration (the “Code”).

Reasons

1. Standing to be sued – indirectly affected parties

The Respondent objected that the Appellant failed to name as respondents other Clubs which may be impacted by the present procedure, namely those Maltese Club qualified for the UEFA competitions in place of the Club.

The Sole Arbitrator stressed that, as the Appeal was brought in time, the Appealed Decision was not binding, and the other Maltese clubs had not yet acquired the right to participate in the UECL Q1.

Furthermore, the Sole Arbitrator recalled that CAS Jurisprudence already dealt with this matter as a question of standing to sue or to be sued: *“The question of standing to sue or to be sued is a matter of substantive law. Under Swiss law it is well established that a party must have a current interest worthy of protection that can be addressed or rectified by the claims or appeal being made.”* (CAS 2016/A/4787). Additionally, he underlined that the question of standing to be sued *“must be resolved on the basis of a weighting of the interests of the persons affected by said decision”*. (CAS 2015/A/3910, para. 138).

The Sole Arbitrator then observed that it was undisputed that the present case was – in principle – of a disciplinary nature, and UEFA, having issued the disciplinary measure in question, had standing to be sued in respect of the Appellant’s request to set aside such a measure.

With regard to the other Maltese clubs, the Sole Arbitrator considered that they derived their rights in the UEFA competitions competition solely from UEFA as the major event organiser and sport governing body of European club football.

The Sole Arbitrator concluded that these other clubs were only indirectly affected in the case at hand, consequently, UEFA was the best suited to solely defend the participants' shared interests in this competition.

2. Eligibility to participate in a competition

The Appellant submitted that the UEFA Appeals Body made a wrong and unlawful application of its discretionary power for applying sanctions against the charged clubs. The Appellant held that such discretionary power should have specific evaluation standards complying with principles of proportionality to the offence.

On its hand, the Respondent held that its margin of discretion has been recognized by long-standing CAS jurisprudence and results from the Federation's autonomy as an association under Swiss law and consequently, that the Appellant could not ask CAS to order UEFA to apply its discretion in the way that the Appellant deemed most convenient for its interests.

On this issue, the Sole Arbitrator determined that it is undisputed that sports associations, like UEFA, have disciplinary powers over their members under Swiss law, even if such controls are not unlimited.

On that point, the Sole Arbitrator underlined that Swiss law gives the members of an association extensive autonomy, including choosing who else to admit to membership of the association itself. The right of a Swiss association to regulate and determine its affairs is considered essential (BGE 97 II 108).

The Sole Arbitrators stressed that UCLR rules, particularly Art. 4.01's provision did not appear

prima facie unfair; rather, it stands its footing on the UEFA associated clubs' willingness to avoid any unlawful activity providing a specific sanction if a club is found guilty of such violation. And this sanction is provided for the UEFA's organised competitions, and only UEFA bodies can impose as the associated clubs themselves entrusted them. Therefore, in principle, it cannot be replaced by other sanctions provided by the national football federations.

The Sole Arbitrator concluded that the competence to decide on the admission or exclusion of clubs from UEFA competitions is exclusively UEFA's, as the organiser of such competitions.

3. Interpretation of the UCLR

The Sole Arbitrator noted that as stated by the CAS Panel in CAS 2010/A/2071, *"the interpretation of the statutes and rules of a sport association has to be rather objective and always to start with the wording of the rules, which falls to be interpreted. The adjudicating body – in this instance the Panel – will have to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax. In its search, the adjudicating body will have further to identify the intentions (objectively construed) of the association which drafted the rule"*.

4. Period of ineligibility – commencement

The Appellant submitted that between 2013 and 2018, the Club had the effective chance to participate in UEFA's competitions by taking part of the National Maltese Cup which is a tournament entitling its winning club to join the UEFA Europa League. According to the Appellant, the five-year ban imposed on the Club has been effectively served between the

2013/14 and 2017/18 seasons, meaning the Club would become eligible to participate in the 2021/22 UCL competition.

The Respondent argued that the Appellant wrongly identified the possibility to compete for participation in UEFA competition with the effective qualification that would trigger the ban provided by Art. 4.02 UCLR.

The Sole Arbitrator reminded that Art. 4.02 UCLR provides that “*the national or international sporting body, arbitral tribunal or state court*” decision must have the “*effect of preventing*” the Club from participating in a UEFA club competition.

The Sole Arbitrator considered that the wording of such provision was straightforward and did not need to require any further interpretation where the “*effect of preventing*” undoubtedly means something that concretely happened, not only potentially.

The Sole Arbitrator confirmed that a sanction was enforced against the Appellant from its National Federation, but this disciplinary punishment was limited to the national competition. Moving to a “European level”, the Sole Arbitrator was of the opinion that it was clear that MFA five-year ban was technically never enforced against the Club.

Indeed, the Sole Arbitrator was unable to identify a single year or UEFA club competition at any stage since 2013 that the Appellant would have qualified for on sporting merit, but which it was “prevented” from participating in as a consequence of the MFA decision in 2013.

Therefore, the Sole Arbitrator concluded that he could not consider that the sanction had been enforced in its entirety and that the UEFA was

right in sanctioning the Club in accordance with the UCLR.

In his Final Remarks, the Sole Arbitrator, underlined that he was aware that a significant lapse of time had passed since the investigation of the wrongdoing of the Club and that the sanction of one-year ineligibility was imposed by UEFA, seven years later. Therefore, the Sole Arbitrator considered that the result, in light of the particular circumstances of the case, was not satisfactory.

However, the Sole Arbitrator noted that he was bound to the regulations provided by UEFA in light of the association’s right to autonomy.

For this reason, the Sole Arbitrator was eager to purport a broader understanding of the provision at stake, namely Art. 4.02. In order to avoid situation like the present, the Sole Arbitrator trusted that the next regulations of UEFA Competitions could also provide for a limit of time within which a club may be declared ineligible to participate in UEFA Competitions for wrongdoings occurred in the past.

The Sole Arbitrator believed that such period of prescription would avoid that, after a considerable period of time, a club that has shown serious intentions in continuing the sporting activity may still suffer from the mistakes of the past, especially where these errors, as in the present case, have been completely overcome and eliminated.

Decision

The Sole Arbitrator dismissed the appeal filed by the Club and confirmed the decision of the UEFA Appeals Body.

CAS 2021/A/8312

Portuguese Kickboxing and Muaythai Federation v. World Association of Kickboxing Organizations (WAKO)

23 November 2022

Kickboxing and Muaythai; Governance; Calculation of deadline to file Appeal Brief; Role of arbitral tribunal in reviewing decision by an international federation to expel member federation; Legal basis for expulsion of member federation; *De novo* review under Article R57 of the CAS Code and prohibition of *ultra petita*; Scope of review of decision to exclude a member federation under Article 72 of the SCC; Lack of arbitrariness or abusiveness of decision to expel member federation

Panel

Ms Annett Rombach (Germany), Sole Arbitrator

Facts

The Portuguese Kickboxing and Muaythai Federation (the “Appellant” or “FPKMT”) is a private entity, constituted in the form of a non-profit association. Until a resolution of 12 November 2020 by the WAKO Board of Directors to expel it, FPKMT was a full member of the World Association of Kickboxing Organizations (“WAKO” or “Respondent”).

WAKO is the governing body of kickboxing worldwide. It is organized in the form of an association incorporated pursuant to Articles 60 *et. seq.* of the Swiss Civil Code (the “SCC”), *i.e.* under Swiss Law.

In July 2020, and as a result of numerous complaints about FPKMT from Portuguese members, clubs and athletes, the WAKO Board of Directors set up an *ad-hoc* commission (the “*Ad-Hoc* Commission”), to review the situation in Portugal and to address certain material aspects, amongst others compliance of FPKMT’s Statutes with certain principles set forth in the WAKO Statutes.

On 22 August 2020, and upon request by the WAKO President to prepare an official report, the *Ad-Hoc* Commission sent its report, entitled “Review of the situation in Portugal National Federation FPKMT - Conclusion” (the “Report”), to the WAKO Board of Directors. The *Ad-Hoc* Commission, in a nutshell, found that there was suspicion of bad management at various levels. And that, in particular, the Statutes of the FPKMT were not aligned with the WAKO Statutes and overall not in compliance with good governance. On this basis, the *Ad-Hoc* Commission recommended to provisionally suspend the FPKMT from WAKO membership until the various accusations could be clarified. Furthermore, the Report recommended that Appellant’s Statutes be restructured, created to be transparent and democratic and aligned with WAKO and good governance principles of democracy and transparency.

On 3 September 2020, WAKO informed the FPKMT of the appointment of the *Ad-hoc* Commission and of the results of the Report. FPKMT was further informed of the initiation of the suspension procedure under Article 15 of the WAKO Statutes on the basis of the perceived non-compliance of certain articles of its Statutes and Electoral Regulations. A 15-day deadline was set to the Appellant to respond to the allegations.

On 17 September 2020, FPKMT refuted the findings of the Report, stating, in the relevant part, that its Statutes were compliant with Portuguese laws as they had been approved by all relevant sport's authorities. Acknowledging that the FPKMT Statutes should respect WAKO Statutes, FPKMT argued that "... *they cannot go against the law in its own country, being the latter the one that should prevail*".

On 21 September 2020, following appointment by the WAKO Board of Directors, a Portuguese law firm rendered a legal expert opinion (the "First Legal Opinion") on the conformity of FPKMT's Statutes and Electoral Regulations with WAKO's Statutes. This First Legal Opinion found that the FPKMT Statutes were neither compliant with the WAKO Statutes nor with the rules of the International Olympic Committee and that the decision to suspend FPKMT as a member of WAKO was legally founded.

On 29 September 2020, a second legal expert opinion by another Portuguese law firm concluded that the FPKMT Statutes, infringed the WAKO Statutes and that there was possibility of successfully defending that such regulations did not comply with WAKO Statutes, since (i) they contravened the general principle of good governance, (ii) lacked a transparent and impartial electoral system, and hence, (iii) did not promote the values included in the Olympic Charter.

At a meeting on 30 September 2020, the WAKO Board of Directors resolved to suspend FPKMT as a member of WAKO in accordance with Article 15 of the WAKO Statutes.

On 1 October 2020, the FPKMT was notified of the suspension decision. Specifically, the letter to

FPKMT referred to the two legal opinions by the independent Portuguese law firms. The letter further referred to Article 4 of the FPKMT Statutes, which allows FPKMT to affiliate with other (national or international) associations, the provisions governing the appointment of the Electoral Commission, and the term limits for persons mandated to sit in FPKMT's bodies. FPKMT was further invited to remedy the situation in the following manner:

"(i) Within 5 days from the date hereof, FPKMT shall send a written communication to WAKO by confirming its willingness to remedy the situation that has caused the suspension in compliance with the indications of WAKO herein;

(ii) Within 20 days from the date hereof, FPKMT shall provide to WAKO a draft of a revised Statutes and Electoral Regulations ..."

Specific details were provided to FPKMT regarding the necessary amendments to the FPKMT Statutes and the FPKMT Electoral Regulations.

On 15 October 2020, WAKO informed FPKMT that while reasonable deadlines had been provided to FPKMT to remedy the cause of the suspension as detailed in the letter of 1 October 2020, such deadlines had been so far disregarded by FPKMT. In the event WAKO did not receive a draft of the revised Statutes and Electoral Regulations by 21 October 2020, the WAKO Board of Directors would take a resolution to exclude FPKMT from WAKO.

On 21 October 2020, FPKMT sent a letter to WAKO, addressing the various non-compliance complaints in respect of its Statutes and Electoral Regulations notably stating that "FPKMT was willing to remove Article 4 of its Statutes". FPKMT argued that other changes

were not warranted, alleging again that FPKMT's Statutes and Electoral Regulations were in full compliance with Portuguese law and WAKO's Statutes.

On 1 November 2020, WAKO provided FPKMT with a draft proposal for revised Statutes and Electoral Regulations relating to Articles 4 and 41 of the FPKMT Statutes, and to most of the Articles in the Electoral Regulations. WAKO indicated that this was its final attempt to amicably remedy the situation.

On 11 November 2020, FPKMT reiterated its position reflected in previous letters and rejected the arguments raised by WAKO as justification for the envisaged exclusion.

On 12 November 2020, the WAKO Board of Directors resolved to exclude FPKMT as a member of WAKO, in reliance on Article 16 of the WAKO Statutes (the "Decision").

On 18 November 2020, WAKO notified FPKMT of its exclusion. FPKMT was further informed that it would be given the opportunity to present its arguments against the exclusion decision during the next WAKO General Assembly, to be held virtually on 13 December 2020.

On 12 December 2020, the International Sport Kickboxing Association (the "ISKA"), another sports federation which promotes kickboxing, admitted FPKMT as its new member.

On 13 December 2020, WAKO's General Assembly took place. Two representatives of FPKMT (including a legal advisor) were granted 15 minutes to present arguments in favour of FPKMT's position that it was to remain a member of WAKO absent any grounds for an

exclusion. After the discussion, the WAKO General Assembly ratified the decision to expel FPKMT from WAKO.

On 15 December 2020, WAKO informed FPKMT that the WAKO General Assembly had ratified the decision of the WAKO Board of Directors to expel FPKMT as a member of WAKO. In the same letter, FPKMT was informed that WAKO had discovered that FPKMT, in violation of the WAKO Statutes, had become a member of a competing federation, *i.e.* of ISKA.

On 12 January 2021, FPKMT appealed the Decision before the WAKO Arbitration Board.

On 19 August 2021, the WAKO Arbitration Board dismissed FPKMT's appeal (the "Appealed Decision"), finding notably that according to the two legal opinions, the statutes and electoral regulations of FPKMT did not comply with WAKO's statutes and infringed the general principle of good governance and transparency established in Article 13 of WAKO Statutes. Since the cause of the suspension was not corrected and further remained unchallenged by FPKMT, the relevant organs of WAKO had no choice but to apply Article 16 § 1 of the WAKO Statutes and pronounce the exclusion of FPKMT. Furthermore, WAKO found that there was no room to consider that WAKO had abused its right to expel after having suspended FPKMT in this matter, as there was not only a clear statutory rule, but a forum to materially contest the grounds of the prior suspension. Finally, WAKO asserted that the decision to exclude FPKMT did not result in an unjustified violation of FPKMT's personality rights.

On 17 September 2021, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the “Code”), the Appellant filed an appeal with the CAS against the Appealed Decision of 19 August 2021, directed against the Respondent.

Reasons

The subject of the present case is FPKMT’s expulsion from WAKO on account of allegations of bad governance stemming from the purported non-compliance of FPKMT’s Statutes and Electoral Regulations with important governance principles of WAKO’s Statutes.

1. Calculation of deadline to file Appeal Brief

The Sole Arbitrator first addressed the question of the admissibility of the Appeal. In this context the Respondent submitted that the Appeal Brief was filed late, *i.e.* outside the 10-day time limit set forth in Article R51 of the Code. The Respondent argued that the Appeal Brief had been filed on 28 September 2021, while the ten-day deadline prescribed by Article R51 of the Code had already expired, because the appeal had already been filed on 17 September 2021, *i.e.* 11 days earlier.

The Sole Arbitrator dismissed the Respondent’s argument given that pursuant to Article R51 of the Code (“*ten days following the expiry of the time limit for the appeal*”), the starting date for calculating the 10-day deadline for filing the Appeal Brief is not the date of the actual filing of the statement of appeal, but the date on which the deadline for filing the appeal expires. That therefore, the date of the actual filing of the appeal (17 September 2021) is irrelevant.

2. Role of arbitral tribunal in reviewing decision by an international federation to expel member federation

Thereupon, and prior to entering the analysis of the merits of the dispute, Sole Arbitrator recalled that the role of an arbitral panel in reviewing a decision to expel a member of an international federation is limited to verifying the legal basis underlying such decision. It is not for the CAS panel to determine whether one entity or another (*i.e.* here the FPKMT or FNKDA) is a more suitable national member federation. Rather, the CAS panel has to identify the legal basis for the expulsion and the scope of review under the applicable law where the international federation expelling its member is based. On the basis of these initial clarifications, the CAS panel thereupon has to assess the lawfulness of the expulsion.

3. Legal basis for expulsion of member federation

Turning then to the analysis of the legal basis relied upon by the WAKO for its decisions, the Sole Arbitrator noted that while the decision to expel the Appellant was based on Article 16 para. 1 of the WAKO Statutes, *i.e.* on the Appellant’s (alleged) failure “to remedy the cause of the suspension”, the suspension decision, in turn, rested on the alleged “*serious violation of the Statutes, regulations or decisions of WAKO or its bodies*” (Article 15 para. 1 lit. b) WAKO Statutes). The Sole Arbitrator further held that in case the rules of an international federation foresee specific and express statutory provisions governing the question of the expulsion of a member federation (here: Article 15 and Article 16 para. 1 WAKO Statutes), those provisions principally trump the otherwise applicable law (here, Swiss law) governing the expulsion of a member from

an association, in particular Article 72 of the SCC.

4. *De novo* review under Article R57 of the CAS Code and prohibition of *ultra petita*

Addressing then the Appellant's argument that according to Article R57 of the Code, the CAS has the full power to review the facts and the law of the case *de novo*, *i.e.* in an unrestricted manner, the Sole Arbitrator underlined that while the core premise of Article R57 of the Code entails that a CAS panel's scope of review in respect of the appealed decision is basically unrestricted and that the CAS panel has full power to review the facts and the law *de novo*, such *de novo* power of review is not without limits. That rather, that it is on the one hand limited with regard to the appeal against and the review of the appealed decision, both objectively and subjectively. The Sole Arbitrator specified that accordingly, in case a motion was neither object of the proceedings before the previous authorities, nor in any way dealt with in the appealed decision, due to the prohibition to act *ultra petita*, the CAS panel does not have power to decide on it and the motion must be rejected. Accordingly, and with regard to the present case, the Sole Arbitrator held that in light of the fact that the Appellant had not, in the first instance proceedings leading to the Appealed Decision, challenged or appealed the WAKO decision to suspend it, and had limited its appeal to CAS at the decision to expulse it, the Sole Arbitrator may not review the earlier suspension decision. Consequently, the suspension decision principally stays unaffected even if the expulsion decision was set aside.

5. Scope of review of decision to exclude a member federation under Article 72 of the SCC

Remaining with the question of the scope of the *de novo* review, the Sole Arbitrator recalled that such review is also determined by the relevant statutory legal basis. That specifically, the CAS panel's review of a decision to exclude a member federation is limited materially in accordance with the applicable standards under the applicable law. That in case the association taking the exclusion decision (here: WAKO) is based in Switzerland, the scope of the judicial review is governed by Swiss law, specifically Article 72 of the SCC and the corresponding jurisprudence and legal doctrine. The Sole Arbitrator underlined that on the one hand, under Article 72 of the SCC, a decision to exclude a member federation is subject to an unlimited review as regards the procedure that led to the exclusion, and that in case of a violation of the prescribed procedure, in case there is at least the possibility that the violation had an influence on the decision, the decision must be set aside. On the other hand, the scope of review in respect of the substantive cause of the expulsion depends on the basis of the exclusion: according to the Swiss Federal Tribunal, if no reasons are provided (*i.e.* the expulsion is not based on statutorily defined reasons, Article 72 (3) of the SCC), the exclusion is only valid for good cause, and a court or arbitral tribunal principally has the full power of review in respect of the good cause requirement (with certain limitations, however, when it comes to the exercise of discretion by the association). Conversely, under Swiss law, exclusion decisions based on statutorily defined reasons (Article 72 (2) of the SCC) - such as exclusions based on specific grounds (*e.g.* insolvency, criminal conviction, non-payment of due debts) included in the statutes of the federation and exclusions based on generic grounds (*e.g.* damage to the reputation or interests of the association) included in the statutes of the federation - may

in principle not be challenged based on the reasons. Rather, the intention of the Swiss legislator, *i.e.* to equip associations with the largest possible freedom to regulate their power to exclude a member, must be given effect also by a CAS Panel required to apply Swiss law. Specifically, the review of the material legality of the expulsion is limited to a) as to whether the decision is abusive in the sense that it is entirely untenable or arbitrary (so-called “*Verbot des Rechtsmissbrauchs*”); and b) as to whether the decision results in a violation of the excluded member’s personality rights (Article 28 of the SCC) that weighs so heavily that the association’s fundamental right to exclude a member must stand back.

Given that the exclusion of the FPKMT by the WAKO was based on a specific, and statutorily defined, reason – *i.e.* that FPKMT had (allegedly) failed to remedy the cause of its suspension in accordance with Article 16 (1) of the WAKO Statutes - it may only be reviewed in a rather limited manner. Consequently, even if the reasons of the expulsion decision were unlawful, this would not automatically result in the expulsion decision to be “abusive” or a “violation of personality rights”. Furthermore, a (full) incidental review of the suspension decision in proceedings challenging the expulsion decision would undermine the central premise under Swiss law that the expulsion for a specific reason may not be reviewed materially.

6. Lack of arbitrariness or abusiveness of decision to expel member federation

To start with the Sole Arbitrator examined whether the formal requirements for the expulsion decision according to Article 16 of the WAKO Statutes were met, and affirmed this question. Thereupon the Sole Arbitrator turned

to the question of the material legality of the expulsion decision and underlined again that under the applicable standard of review, the grounds for an expulsion in case of a statutorily defined reason shall principally not be reviewed and that therefore, there was no room for a full incidental review of the Appellant’s arguments against the legality of the suspension decision. That accordingly, the Appellant’s arguments that (i) the WAKO Statutes did not contain any provision allowing the WAKO Board of Directors to order a national federation, under the sanction of exclusion, to amend its Statutes and Electoral Regulations, and (ii) that moreover, at all times, FPKMT’s Statutes and Regulations have been in full compliance not only with Portuguese law, but also with the Respondent’s Statutes, and (ii) that therefore, from the beginning, the basis for the exclusion was inexistent, leading to the exclusion being, for lack of any cause, unlawful, could not be entertained in the present proceedings.

That rather, the Sole Arbitrator’s mandate was limited to consider whether WAKO’s decision to expel FPKMT was either abusive, or whether the decision resulted in an unjustified violation of FPKMT’s personality rights; the Sole Arbitrator highlighted that even if the decision to suspend FPKMT was unlawful, for one or the other reason, this would not automatically result in the expulsion decision to be “abusive” or a “violation of personality rights”.

Turning to Article 16 para. 1 of the WAKO Statutes, the basis for the Appellant’s expulsion, the Sole Arbitrator noted that the concerned member may be expelled if it “*fails to remedy the cause of the suspension within a reasonable deadline*”. That this requirement was fulfilled in that it was undisputed that, despite having been granted ample and repeated opportunity – in total six

weeks from the first instructions to remedy the cause of suspension until the exclusion decision - the Appellant had not implemented the changes it was requested to make to its Statutes and Electoral Regulations and therefore had not remedied the alleged cause of the suspension. The Sole Arbitrator found that as a result, the specific reason for an expulsion – failure to remedy the cause of the suspension – had clearly materialized when WAKO decided to expel FPKMT.

That furthermore, there were no special circumstances which would render the decision to expel FPKMT abusive, or which tainted the decision as being an unjustified violation of FPKMT's personality rights. This as on the one hand, there were no indications that the suspension decision was evidently wrong, arbitrary or discriminatory - the Respondent had sought legal advice from two firms in Portugal to establish that FPKMT's Statutes did not conform with WAKO's Statutes, and the Appellant had not raised any issues that the legal opinions could be incorrect. On the other had there was no evidence that it would have been impossible to implement the statutory and regulatory changes requested by WAKO, or that such changes would have been overly burdensome. The Sole Arbitrator noted that WAKO had even made concrete proposals as to how the required changes could be implemented. In conclusion the Sole Arbitrator found that it was neither arbitrary or abusive to request a reasonable number of statutory changes that are central to WAKO's overall aim to have its members' statutes and regulations be in line with good governance principles. Nor was it arbitrary or abusive to use the power to expel a member which disregards any requests for a remedial of the cause of a pending suspension,

when such member does not even take legal action against the suspension.

Finally, regarding the question of a violation of FPKMT's personality rights, to start with the Sole Arbitrator, siding with the Appealed Decision, found that the standard would be to consider whether the exclusion of a member from an association could be detrimental to the member federation's commercial or economic development and whether such damage caused by an expulsion would outweigh or not the association's interests. The latter's, *i.e.* here WAKO's interest, being that, in the interest of good governance, no member which does not abide by fundamental rules set forth in WAKO's Statutes remains within WAKO. As regards the Appellant, the Sole Arbitrator underlined that FPKMT did not provide any grounds or arguments which would point to its existence being jeopardized by an exclusion from WAKO. That to the contrary, even prior to the WAKO General Assembly, FPKMT had affiliated itself to another organization, in contravention of WAKO's rules, showing that the existence of FPKMT would not appear to be endangered *per se* by an exclusion from WAKO. Accordingly, no issue relevant to FPKMT's personality or core existence would appear to be at stake.

Decision

In light of the foregoing, the Sole Arbitrator decided to dismiss the appeal filed on 17 September 2021 by the Portuguese Kickboxing and Muaythai Federation (FPKMT) against the decision rendered by the Arbitration Board of the World Association of Kickboxing Organization (WAKO) on 19 August 2021 and to confirm the decision rendered by the WAKO Arbitration Board on 19 August 2021.

CAS 2021/A/8391

Andrejs Rastorgujevs v. International Biathlon Union (IBU)

26 August 2022

Biathlon; Doping (Missed test, filing failures); Sufficiently precise information provided as Whereabouts Filing; Inclusion of previous Whereabouts Failure in the assessment of an athlete’s next Whereabouts failure; International Standard for Results Management (ISTI Rules) and concept of shared responsibility; Telephone call by a Doping Control Officer (DCO) to an athlete

Panel

Prof. Peter Grilc (Slovenia), President

Mr Reto Annen (Switzerland)

Mr Nicholas Stewart QC (United Kingdom)

Facts

Mr Andrejs Rastorgujevs (the “Athlete” or the “Appellant”) is an international-level Latvian biathlete, three times Olympic Games participant, World Championships participant (2011-2021) and a three-time European Champion. He has been subjected to permanent doping controls and had not breached the ADR until the breach that gave rise to the ADD Award under appeal here

International Biathlon Union (the “IBU” or the “Respondent”) is the international governing body of biathlon. Its registered seat is Salzburg, Austria.

On 17 September 2021, an Arbitral Award (the “ADD Award”) was delivered by the Anti-Doping Division of the Court of Arbitration for

Sport (“CAS ADD”) finding an anti-doping violation (“ADRV”, three Whereabouts Failures within a 12-month period) committed by the Athlete pursuant to Article 2.4 of the IBU Anti-Doping Rules (“IBU ADR”). In the ADD Award the Sole Arbitrator partially upheld the Request for Arbitration filed by the IBU and sanctioned the Athlete with a period of ineligibility of eighteen months commencing on 11 March 2021, rendering all competitive results obtained by the Athlete from 1 July 2020 until the date on which the CAS ADD decision entered into force to be disqualified, with all resulting consequences including forfeiture of medals, points, and prizes.

By his Statement of Appeal and Appeal Brief, the Appellant requested recognition that his whereabouts filing for the period between 8 September 2020 and 28 September 2020 regarding Passo Stelvio (Italy) was sufficient under International Standard for Results Management (“ISTI”), Article B.2.1.(b) of Annex B, with the result that he had not committed an anti-doping rule violation pursuant to Article 2.4 of the IBU ADR, and annulment of the ADD Award of 17 September 2021.

The IBU maintained in the present proceedings that the Athlete had breached those rules and that the sanctions imposed by the ADD Award should be upheld.

Reasons

1. Sufficiently precise information provided as Whereabouts Filing

The legal basis is the ISTI 3.2. (Defined terms specific to the International Standard for Testing and Investigations), in which a filing failure by

the Athlete is defined as a *“failure by the Athlete (...) to make an accurate and complete Whereabouts Filing that enables the Athlete to be located for Testing at the times and locations set out in the Whereabouts Filing or to update that Whereabouts Filing where necessary to ensure that it remains accurate and complete, all in accordance with Article I.3 of the International Standard for Testing and Investigations”*.

Following the Comment to I.3.6(b) ISTI the athlete failed to comply with the requirement to make Whereabouts Filings *“(iii) where he/she includes information in the original filing or the update that is inaccurate (e.g., an address that does not exist) or insufficient to enable the Anti-Doping Organization to locate him/her for Testing (e.g., ‘running in the Black Forest’)”*.

Article I.3.6(d) ISTI, provides *“that the Athlete’s Failure to Comply was at least negligent. For these purposes, the Athlete will be presumed to have committed the failure negligently upon proof that he/she was notified of the requirements yet failed to comply with them. That presumption may only be rebutted by the Athlete establishing that no negligent behaviour on his/her part caused or contributed to the failure”*.

The Panel considered those provisions in the light of the fact, that on 12 April 2019 the athlete was also explicitly told that he should be as precise as possible when giving his address and not assume that the DCO would call him to find him (*“Be as precise as possible (...) do not expect a phone call! Please supply entrance pass codes to buildings and give clear directions to the buildings/rooms”*). Further, the Athlete was informed in the proceedings concerning the first Whereabouts failure of October 2019 that the information in ADAMS had been deficient.

Even if it was accepted that the above provisions of the ISTI were written in legal language that

might be alien to the average athlete, the Appellant was warned in non-complex, non-legal language which was easily understood by an athlete. During the proceedings, it was claimed by the Athlete that his poor knowledge of English hindered his understanding of the relevant provisions, notifications, and warnings, in particular his communication with the ITA and the IBU. The Panel did not accept that claim, as it had itself seen the evidence of a video of the Athlete taken in Passo Stelvio, showing his spoken English at a level where he could not have had any serious difficulty with reading and understanding the ITA notification of 26 November 2019 and other documents presented to him by the ITA and the IBU. The Panel added that if (unlike this Appellant) an athlete was not confident of understanding such obviously important communications, it was their responsibility to seek help from someone who could explain it to them.

In the present case, the Athlete committed two clear and, in the view of the Panel, serious violations of Art. 2.4 IBU ADR in October 2019 and on June 17, 2020. On both dates, he could not be found at the specified location at all but was somewhere else altogether. These violations are undisputed. After these two clear violations and the subsequent warnings received, it can be assumed that the Athlete was (or at least should have been) sensitized regarding ADAMS and the associated rules.

Article I.3.4 ISTI states unambiguously that it is the Athlete’s responsibility to ensure that all the information required in a Whereabouts Filing is accurate and in sufficient detail to enable any ADO wishing to do so to locate the Athlete for testing. More specifically, the Athlete must provide sufficient information to enable a DCO

to find the location, to gain access to the location, and to find the Athlete at the location.

ISTI Article I.3.1(d) requires an athlete to provide, for each day during the quarter, the full address of the place where they will be staying overnight specifically indicating home, temporary lodgings, hotel, *etc.*. Therefore a general indication “*Passo Stelvio, Passo Stelvio*” did not provide the information required by ISTI Article I.3.1(d). The Athlete did not use the opportunity to be precise and accurate, also leaving blank both sections “*More information*” and “*Additional Information*”. The indication that the geographical name of Passo Stelvio should refer to a “*hotel*” was significant because, although Passo Stelvio is primarily known as a mountain pass and could indicate that the building on the mountain pass itself is a “*hotel*”, there were several hotels (6) and other facilities in the whole area of Passo Stelvio, which was primarily known as a mountain pass, and the filed information did not indicate that the building on the pass itself was “the” hotel.

By doing so, the athlete had not eliminated in advance all possible difficulties that the DCO might encounter at the specific location chosen by the athlete (*e.g.* if the location were a hotel room, the hotel concierge would have to be alerted, which is one of the criteria set by case law in relation to the accuracy of the entry) and had not complied with the duty to be diligent in filling in the information on the place of residence with sufficient precision for the DCO to be able to locate it without any particular effort.

In view of the above, the Panel considered that the entry in ADAMS for the period 20 to 28 September 2020 was not in compliance with ISTI Article 1.3.1. and was not sufficient to

locate the Athlete for testing between 8 September and 28 September 2020.

2. Inclusion of previous Whereabouts Failure in the assessment of an athlete’s next Whereabouts failure

The Appellant took the position that the ITA warning regarding the First Failure had a significant impact on his understanding and conduct regarding the sufficiency, correctness, and completeness of the filing in September 2020. Within the context, the Athlete interpreted the “*warning*” as referring to the fact that he was not in the location indicated in the ADAMS, not that the filed location itself was somehow insufficient and disabled the ADO from locating the Athlete for testing. The Respondent did not recognise this link and the context as relevant.

The Panel carefully read the warning in the ITA notification letter of 26 November 2019 and analysed its text. It was written when the ITA/IBU did not yet know that the Athlete had not even been in Italy on the relevant dates, so the Athlete could not reasonably have understood the letter as directed to that point. The first, 5-line paragraph was clearly saying that the file information had been insufficient and ended with: “*The only information in your ADAMS account is: Passo Selvio, Italy*”. That was a particularly clear warning that even if the Athlete had been in Passo Selvio, the filed information was insufficient.

The 26 November 2019 letter was sufficiently clear, and the Athlete’s grasp of the English language was sufficiently strong, for the Panel to conclude that he should have understood that the address he had filed in ADAMS did not meet the requirements of the IBU ADR and ISTI. This made his Third Whereabouts Failure more

blameworthy, as he simply continued to file the same address which he had already been told was inadequate. Even if the Athlete had misunderstood that letter in the way he claimed, that would in no way have relieved or diminished his responsibility to make a complete and sufficient filing of his exact location in Passo Selvio in September 2020.

3. International Standard for Results Management (ISTI Rules) and concept of shared responsibility;

In the ADD Award, a 6-month reduction of the suspension had been considered as “*appropriate*”, reflecting the Sole Arbitrator’s view of a relatively low degree of fault on the part of the Athlete and his treating responsibility as shared between the Athlete and the IBU.

The Appellant claimed that the case law supported the concept of shared responsibility for Whereabouts Failures. As from para. 4 of the decision CAS 2007/A/1318, the ultimate responsibility for providing whereabouts information rested with each Athlete, “*however, it shall be the responsibility each Member to use its best efforts to assist the ISU in obtaining whereabouts information as requested by the ISU*”.

The Appellant’s suggested options for assisting the athlete seemed to be (i) a warning that the entry was not locatable and a request to correct the deficiency, or (ii) a phone call asking for further clarification. The first option is not within the ISTI rules and clearly not contemplated as a responsibility of the anti-doping organisations. The second option is exceptional, as Article I.4.3(c) and Comment to Article I.4.3(c) state that the call is discretionary, *i.e.* of an optional nature. Either option would erode the fundamental purpose of the ISTI

Rules, which is to place responsibility squarely on the athlete and to enable control that the athlete cannot respond to by preparing for it in advance or possibly avoiding it.

The Panel also could not accept the argument put forward at the hearing that shared responsibility was justified by the fact that the ADAMS computerised system ought to pick up and alert the athlete to such deficiencies in the notified address. This amounted to an unsupported assertion that ADAMS should be programmed to include a whole extra element so as to spot a filing deficiency and trigger a response to help athletes where they had failed to file information complying with the rules. To substantiate such an extreme assertion would require expert evidence to show that it was technologically feasible to design a system that could recognise the many ways in which an address might be insufficient and alert the athlete; and, even more importantly, that it was in some way a failure of responsibility by the anti-doping organisations not to have introduced such an element into ADAMS, ISTI and the relevant anti-doping rules. The Panel found this part of the Appellant’s argument far-fetched and completely unrealistic. It was the Panel view that athletes must use and comply with the system as it is.

The Panel did not see any events or circumstances which placed any responsibility on the IBU/ITA for any of the Athlete’s three Whereabouts failures. On this point, the Panel did not agree with the ADD Award in the finding of shared responsibility. There were no deficiencies and nothing misleading in the actions and communications by the IBU/[ITA]. The burden of accurately entering the information into ADAMS was solely on the Athlete and the three failures were entirely the

Athlete's responsibility. The concept of shared responsibility had no application to the present case.

4. Telephone call by a Doping Control Officer to an athlete

This issue of a telephone call is a closely connected with the issue of a previous warning and the issue of shared responsibility.

The starting point is clearly the discretionary nature of the telephone call (Comment to Article I.4.3(c) ISTI). In the light of the provisions of the ISTI and case law, a telephone call is merely an option arising from the discretion of the DCO and in no way rises to the level of a reasonable expectation on the part of the Athlete arising from any obligation to make such a telephone call in case of uncertainty or doubt.

Requiring a phone call to be placed to locate the athlete would give him advance notice of the test, which would remedy otherwise defective Whereabouts information. The purpose of discretionary phone call is not to invite the Athlete for testing, but to potentially confirm that the Athlete is not present. A warning by the IBU not to expect a phone call further cramps the room for manoeuvre of the athlete in relying on such a call. Relying on the same Comment to Article I.4.3(c) ISTI, the Panel's view was that the absence of a phone call did not give the athlete a defence to the assertion of a Missed Test; nor did it allow an athlete to say that an otherwise deficient filing of an address was repaired by the availability of a telephone call by a DCO.

Further, WADA ISTI Guidelines for Implementing an Effective Testing Programme (Version 1.0 October 2014; p. 53/54) is based on

the DCO having the possibility of making a phone call (*"the DCO may telephone the Athlete to advise him/her"*). Following Guidelines, *"[s]uch a call is not mandatory however, nor should it be used to invite the Athlete for Testing, but rather to potentially further validate that the Athlete is not present"*. The Panel further relied on para. 118, 119 of the awards in CAS 2020/A/7528 and on para. 128 of the award in CAS 2020/A/7526 & 7559.

Consequently, in the light of the provisions of the ISTI and case law, a telephone call was merely an option arising from the discretion of the DCO and in no way rose to the level of an expectation on which an athlete could or should rely to repair deficiencies in the address given in his Whereabouts filing.

Decision

The appeal filed by Mr Andrejs Rastorgujevs against the Award of the Anti-Doping Division of the Court of Arbitration for Sport of 17 September 2021, was dismissed. The Award of the Anti-Doping Division of the Court of Arbitration for Sport of 17 September 2021 was confirmed. All other motions or prayers for relief were dismissed.

CAS 2021/A/9078

ŠK Slovan Bratislava v. UEFA

24 August 2022

Football; Disciplinary sanction against a club imposed by UEFA; Jurisdiction of the UEFA Appeals Body; Procedural flaws & CAS de novo power of review; Interpretation of Article 14 of the UEFA Disciplinary Regulations; Display of a flag with a Nazi symbol; Proportionality of cumulative sanctions; Lighting fireworks and throwing objects

Panel

Prof. Ulrich Haas (Germany), Sole Arbitrator

Facts

ŠK Slovan Bratislava (the “Appellant” or the “Club”) is a professional football club affiliated to the Slovakian Football Association (“SFA”) that in turn is affiliated to the Union des Associations Européennes de Football. It was the champion of Slovakia in the 2021/2022 season.

Union des Associations Européennes de Football (the “Respondent” or “UEFA”) is the continental football federation governing the sport of football in Europe. It is the organizer of the UEFA Champions League and the UEFA Europa League.

On 20 July 2022, the Appellant played an away football match against a Hungarian club, Ferencvárosi TC, in the second qualifying round of the 2022/2023 UEFA Europa Champions League.

Various incidents involving the Appellant’s supporters took place during the match, including the display of a flag representing the German national socialist party until 1935, the lighting of fireworks and the throwing of objects. These incidents are documented in reports from the UEFA Match delegate, the UEFA Security officer and the Football Against Racism in Europe (“FARE”) observer. Moreover, they are not factually disputed by the Parties.

On 21 July 2022, UEFA informed the Club that it had opened disciplinary proceedings for potential violations of Articles 14 and 16 of the UEFA Disciplinary Regulations (“DR”). It enclosed the reports of the UEFA match officials, a picture of the contentious flag and a video showing Appellant’s fans igniting bengals and fireworks. The letter also invited the Appellant to file its statement within a deadline of six days upon receipt.

After the disciplinary proceedings were opened, UEFA received the report from the FARE observer.

On 27 July 2022, the Appellant submitted its statement in the disciplinary proceedings.

On 26 July 2022, the chairman of the UEFA Control, Ethics and Disciplinary Body decided to refer the case directly to the UEFA Appeals Body for a decision, in accordance with Article 29(3) DR.

On 28 July 2022, the UEFA Appeals Body issued the operative part of its decision in the matter (the “Appealed Decision”). It sanctioned the Appellant with a fine of €40,000, the partial closure of its stadium at the next UEFA competition match and a suspended ban on selling tickets abroad for the racist behaviour of

its supporters. It imposed further fines of €13,000 and €25,000 respectively for lighting fireworks and throwing of objects.

On 3 August 2022, the UEFA Appeals Body notified the Appealed Decision with grounds to the Appellant.

On the same date, the Appellant filed a Statement of Appeal against the Appealed Decision with the Court of Arbitration for Sport (the “CAS”) in accordance with Articles R47 et seq. of the Code of Sports-related Arbitration (the “Code”).

Reasons

The main dispute in these proceedings concerned the racist and discriminatory nature of the flag displayed by the ŠK Slovan Bratislava’s supporters within the meaning of Article 14 DR. In this context, the Appellant argued that the flag did not convey xenophobic ideas and should in any case not be punished by a combination of disciplinary measures, while the Respondent contested this view.

Other issues of contention included the competence of the UEFA Appeals Body, the respect for the rights of the defence and the lighting of fireworks and throwing of objects.

This led the Sole Arbitrator to examine the jurisdiction of the UEFA Appeals Body, the alleged procedural flaws in the first instance proceedings, the interpretation of Article 14 DR and its application to the case, the proportionality of cumulative sanctions, as well as the lighting of fireworks and throwing of objects.

1. Jurisdiction of the UEFA Appeals Body

The Appellant submitted that the possibility of empowering the chairman of the UEFA Appeals Body pursuant to Article 34 of the UEFA Statutes was limited to the instances in which he was called upon to decide a dispute on appeals. In turn, the Respondent contended that this solution would be nonsensical.

The Sole Arbitrator recalled that Article 34(1) and (2) of the UEFA Statutes addressed the general case of the UEFA Appeals Body acting as an appeals body. He noted, however, that these provisions designated the specific persons who may act on its behalf. Consequently, he held that even in the case where the chairman “sitting alone” decided the dispute, the decision would be that of the UEFA Appeals Body.

The Sole Arbitrator then observed that Article 34(3) of the UEFA Statutes allowed the UEFA Appeals Body to act in the first instance in urgent cases, and was further implemented by various provisions in the DR.

The Sole Arbitrator concluded, on the basis of a systematic and purposive interpretation of those provisions, that the chairman of the UEFA Appeals Body was entitled to intervene alone both in the first instance and appeal proceedings. Beyond this legal reasoning, he emphasised that any other interpretation would lead to illogical outcomes.

2. Procedural flaws & CAS de novo power of review

The Appellant claimed that the Appealed Decision was issued with grounds only eight days before its next home match, which prevented it from filing a comprehensive and well-founded appeal with CAS. It also asserted

that its right to be heard had been violated, as the UEFA Appeals Body had based its decision, *inter alia*, on the FARE observer's report, which had not been made available to the Parties in the first instance proceedings. The Respondent, again, rejected the validity of these objections.

The Sole Arbitrator did likewise. He pointed out that the Appellant could not complain about the short deadlines imposed by the UEFA Appeals Body, since it had himself consented to the time schedule, had not requested an extension of the deadlines or a stay of the sanctions, and had filed well-researched submissions. He took a less peremptory view on the absence of the observer's report from the case file, noting that the facts to which it referred were not in dispute and did not deviate from the other reports, but had not been commented by the Parties. He considered that such flaw may potentially amount to a violation of the Appellant's right to be heard, but would in any event be healed by CAS' de novo power of review.

3. Interpretation of Article 14 DR

The Appellant argued that the UEFA Appeals Body had misinterpreted Article 14 DR, which implied an objective assessment based on the perceptions of the majority of the general public. The Respondent countered that such an assessment presupposed knowledge of the legal and historical context and the totality of the circumstances.

The Sole Arbitrator stated that Article 14 DR aimed to sanction football clubs whose supporters offend human dignity in any way. He recalled that the question of whether a certain behaviour meets the requirements of this provision must be determined in the light of the objective circumstances of the case and the so-

called "reasonable onlooker" test. He clarified that such test did not refer to an average person of a particular constituency, but to a reasonable person who assessed - ex post - the facts presented to him in the light of all available and obtainable information. He emphasised that this strict stance was justified by the need to deter and punish hidden and disguised hatred messages which, by definition, are more difficult to detect.

The Sole Arbitrator then applied this test to the case at hand, in order to definitively decide the issue of the alleged racist and discriminatory nature of the flag unfurled by the Club's supporters.

4. Display of a flag with a Nazi symbol

The Appellant submitted that the flag used by its supporters was at most inspired by the German empire's flag before 1935, and did not intend to express radical right-wing sentiments. It referred, in support, to various German administrative court decisions refusing to ban the use of this flag at street demonstrations for reasons of public order and safety, as well as the inaction of the UEFA bodies so far. On the contrary, the Respondent underlined that the symbol in question was directly connected to Nazi ideology and of a racist nature, and caused consternation whenever it was displayed.

The Sole Arbitrator stated that the motives of the ŠK Slovan Bratislava's fans to use such flag as template for displaying attachment and fanship with their club appeared rather obscure to begin with. He then reviewed the historical use of this font, and observed that it was strongly associated with the Third Reich.

Against this background, the Sole Arbitrator found that the flag was an insult to human dignity and should be strongly opposed. He held that it was a substitute for the use of Nazi symbols, and that its disguised message made it even more pernicious. He concluded that the fact that it was not always sanctioned by UEFA in the past, and even tolerated by state judgements in relation to freedom of assembly and/or expression, did not change this finding.

5. Proportionality of cumulative sanctions

The Appellant argued that the cumulative sanctions imposed on it for racist behaviour were disproportionate, and unfair when compared to similar infractions. The Respondent found the sanctions to be adequate and consistent with practice, and requested that they be upheld.

The Sole Arbitrator noted that Article 14 DR provided for a minimum of a partial stadium closure and a fine, and additional sanctions, including playing matches behind closed doors, a stadium closure, the forfeiting of a match, the deduction of points and/or disqualification, if the circumstances required it.

The Sole Arbitrator emphasised the Appellant had a previous record for violations under this provision. He thus confirmed that the imposition of a fine, together with the closure of a stadium sector during the next competition match and a suspended ban on selling tickets to away supporters, was proportionate.

6. Lighting fireworks and throwing objects

The Appellant argued that the heavy fines imposed on it for lighting fireworks and throwing objects was disproportionate, since

they exceeded the standardised sanctions and/or failed to take mitigating factors into account. The Respondent, again, stuck to its position.

The Sole Arbitrator recalled that the UEFA Appeals Body had applied the standard fine for lighting fireworks of €500 to each of the 26 fireworks used, resulting in a total fine of €13,000, regardless of the fact that it was an away game. It increased the standard fine of €18,125 for throwing dangerous objects to €25,000, due to the injury of one supporter.

The Sole Arbitrator considered that the penalties provided for lighting of fireworks and throwing objects may also be adapted to the circumstances, notwithstanding the standardised nature of UEFA's sanctions catalogue. He held that an away game was not a mitigating factor, that personal injury was an aggravating factor, and confirmed the amounts established in the first instance.

Decision

In light of the foregoing, the Sole Arbitrator dismissed the appeal. He retained that the decision issued by the UEFA Appeals Body on 28 July 2022 should be upheld.

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_246/2022

1er novembre 2022

A. SA c. B.

Recours en matière civile contre la sentence rendue le 26 avril 2022 par le Tribunal Arbitral du Sport (CAS 2020/A/7543)

Compatibilité des règles de football en matière de succession sportive avec l'Ordre Public

Extrait des faits

Le 31 décembre 2008, le footballeur de nationalité brésilienne B. (ci-après: le joueur) a assigné le club... C. devant la Chambre de Résolution des Litiges (CRL) de la Fédération Internationale de Football Association (FIFA) en vue d'obtenir le paiement de salaires dus en vertu du contrat de travail conclu par les parties le 27 juin 2008.

Statuant le 18 décembre 2012, la CRL a condamné le club défendeur à verser au demandeur la somme de 400'000 euros, intérêts en sus, dans les trente jours. Ladite décision n'a pas été attaquée et est devenue définitive.

Le 16 juillet 2014, le Secrétariat de la Commission de discipline de la FIFA a ouvert une procédure à l'encontre du club précité en raison du non-paiement des sommes dues au joueur selon la décision rendue par la CRL.

Le 14 janvier 2015, la Commission de discipline a suspendu la procédure après avoir été informée par la Fédération X. de Football que le club en question n'était plus affilié à celle-ci en raison de la procédure d'insolvabilité ouverte à son encontre.

Le 2 décembre 2019, le joueur a demandé à la Commission de discipline d'ouvrir une procédure disciplinaire à l'encontre de A. SA vu sa qualité de successeur sportif du club C. Le 24 juin 2020, la Commission de discipline a donné suite à cette requête.

Par décision du 22 octobre 2020, la Commission de discipline a reconnu A. SA coupable de n'avoir pas respecté la décision rendue le 18 décembre 2012 par la CRL et lui a imparti un dernier délai de grâce de 30 jours pour s'acquitter du montant de 400'000 euros, intérêts en sus, dû au joueur, sous peine de se voir imposer automatiquement une interdiction d'enregistrer de nouveaux joueurs, tant au niveau national qu'international.

Le 25 novembre 2020, A. SA a appelé de cette décision auprès du Tribunal Arbitral du Sport (TAS).

Au terme de la sentence du 26 avril 2022, l'appel a été rejeté et la décision attaquée confirmée.

Le 27 mai 2022, A. SA (ci-après: le recourant) a formé un recours en matière civile, assorti d'une requête d'effet suspensif, en tête duquel il conclut à l'annulation de la sentence précitée.

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. Selon l'art. 76 al. 1 let. b LTF, la partie recourante doit avoir un intérêt digne de protection à l'annulation de la décision attaquée. L'intérêt digne de protection consiste dans l'utilité pratique que l'admission du recours apporterait à son auteur, en lui évitant de subir un préjudice de nature économique, idéale, matérielle ou autre que la décision attaquée lui occasionnerait (**ATF 137 II 40** consid. 2.3). L'intérêt doit être actuel, c'est-à-dire qu'il doit exister non seulement au moment du dépôt du recours, mais encore au moment où l'arrêt est rendu (**ATF 137 I 296** consid. 4.2; **137 II 40** consid. 2.1). Le Tribunal fédéral déclare le recours irrecevable lorsque l'intérêt digne de protection fait défaut au moment du dépôt du recours. En revanche, si cet intérêt disparaît en cours de procédure, le recours devient sans objet (**ATF 137 I 23** consid. 1.3.1 et les références citées).

3.2.

3.2.1. Dans sa réponse, l'association intimée expose, sans être contredite par le recourant, que ce dernier a versé à l'intimé, postérieurement au dépôt de son recours, le montant dû selon la décision rendue le 18 décembre 2012 par la CRL, ce qui a eu pour effet de mettre un terme à la procédure disciplinaire visant le recourant. Dans la mesure où ledit paiement aurait été effectué sans la moindre réserve de la part du recourant, l'association intimée est d'avis que l'intérêt digne de protection de l'intéressé a disparu en cours de procédure, raison pour laquelle le recours serait devenu sans objet.

3.2.2. Le recourant conteste vivement ce point de vue. Il fait tout d'abord valoir qu'il n'a pas procédé audit versement sans la moindre réserve. Il soutient, ensuite, qu'il n'a pas eu d'autre choix que de payer l'intimé, faute de quoi il aurait disposé d'un effectif de joueurs insuffisant, étant donné qu'il se serait trouvé dans l'impossibilité de recruter de nouveaux

éléments. Se référant à un arrêt rendu par le Tribunal fédéral (4A_604/2010 du 11 avril 2011 consid. 1.2), il prétend que la sanction prononcée à son encontre par la Commission de discipline, entérinée par le TAS, a déployé ses effets jusqu'au moment du paiement, raison pour laquelle il conserve un intérêt résiduel au recours tendant à faire constater les vices affectant la sentence attaquée. Enfin, l'intéressé soutient que rayer la présente cause du rôle reviendrait à le priver du droit à un procès équitable.

3.2.3. L'association intimée rétorque que le recourant n'a jamais été contraint de payer le montant qu'il a versé à l'intimé et qu'il est erroné de soutenir que le club n'aurait pas eu d'autre choix que de procéder de la sorte. Elle fait en outre valoir que la jurisprudence citée par le recourant n'est pas transposable à la présente espèce. A cet égard, elle observe que le recourant n'a même pas allégué que l'interdiction de transfert dont il a été brièvement l'objet lui aurait causé un quelconque préjudice.

3.3. On peut légitimement se demander si le recourant conserve un intérêt actuel, pratique et concret à ce que la sentence attaquée soit annulée, vu le paiement opéré par ses soins postérieurement au dépôt de son recours.

Dans la sentence entreprise, le TAS a confirmé la décision rendue par la Commission de discipline au terme de laquelle celle-ci avait reconnu le recourant coupable de n'avoir pas respecté la décision rendue le 18 décembre 2012 par la CRL et lui avait accordé un délai de grâce de trente jours pour s'acquitter de sa dette à l'égard de l'intimé, sous la menace de se voir imposer automatiquement une interdiction d'enregistrer de nouveaux joueurs, tant au niveau national qu'international. Dès lors qu'il a payé son dû, le recourant ne court plus le risque d'une telle sanction. Il n'a donc, en

principe, plus d'intérêt actuel à faire annuler la sentence en tant qu'elle confirme la validité de la fixation du délai de grâce et lui indique la conséquence liée au non-respect de ce délai. Cela étant, il conserve néanmoins un intérêt à l'annulation de la sentence incriminée. Il appert, en effet, que l'intéressé a effectivement été interdit de recruter de nouveaux joueurs durant la période comprise entre la fin du mois de mai 2022 et le 8 juillet 2022, date à laquelle il a procédé au paiement d'un montant de 400'000 euros en faveur de l'intimé. Il en découle que le recourant n'a pas pu recruter de nouveaux joueurs durant une certaine période alors même que le marché des transferts était ouvert depuis le 14 juin 2022. Il sied, par ailleurs, de relever que le recourant n'était pas partie à la procédure à l'issue de laquelle la CRL a alloué un montant de 400'000 euros à l'intimé. Aussi, s'il s'avérait que c'est à tort que le TAS a confirmé la décision de la Commission de discipline au terme de laquelle celle-ci avait reconnu le recourant, en sa qualité de successeur sportif du club débiteur du montant dû à l'intimé, coupable de n'avoir pas respecté la décision rendue par la CRL, le recourant pourrait tenter d'obtenir, par la suite, le remboursement du montant qu'il a versé par hypothèse, indûment, à l'intimé.

Eu égard aux circonstances tout à fait particulières de la présente cause, il y a dès lors lieu d'admettre que le recourant conserve, en dépit des dénégations de l'association intimée et du paiement intervenu, un intérêt à l'annulation de la sentence querellée.

[...]

5.

Dans un moyen qu'il convient d'examiner en premier lieu, le recourant se plaint de diverses violations de son droit d'être entendu (considérant 5)

5.1. La jurisprudence a déduit du droit d'être entendu, tel qu'il est garanti par les art. 182 al. 3 et 190 al. 2 let. d LDIP, un devoir minimum pour le tribunal arbitral d'examiner et de traiter les problèmes pertinents. Ce devoir est violé lorsque, par inadvertance ou malentendu, le tribunal arbitral ne prend pas en considération des allégués, arguments, preuves et offres de preuve présentés par l'une des parties et importants pour la sentence à rendre. Il incombe à la partie soi-disant lésée de démontrer, dans son recours dirigé contre la sentence, en quoi une inadvertance des arbitres l'a empêchée de se faire entendre sur un point important. C'est à elle d'établir, d'une part, que le tribunal arbitral n'a pas examiné certains des éléments de fait, de preuve ou de droit qu'elle avait régulièrement avancés à l'appui de ses conclusions et, d'autre part, que ces éléments étaient de nature à influencer sur le sort du litige (**ATF 142 III 360** consid. 4.1.1 et 4.1.3). Si la sentence passe totalement sous silence des éléments apparemment importants pour la solution du litige, c'est aux arbitres ou à la partie intimée qu'il appartiendra de justifier cette omission dans leurs observations sur le recours (**ATF 133 III 235** consid. 5.2; arrêts 4A_542/2021 du 28 février 2022 consid. 5.1; 4A_618/2020 du 2 juin 2022 consid. 4.2). C'est le lieu de rappeler que le grief tiré de la violation du droit d'être entendu ne doit pas servir, pour la partie qui se plaint de vices affectant la motivation de la sentence, à provoquer par ce biais un examen de l'application du droit de fond (**ATF 142 III 360** consid. 4.1.2).

5.2. Pour étayer son grief, le recourant expose que l'arbitre aurait omis d'examiner un certain nombre d'arguments et de moyens de preuve en lien avec le principe de la succession sportive et son application à la présente espèce. A cet égard, il fait valoir que l'arbitre aurait ignoré trois arguments pertinents et les moyens de preuve y relatifs. Celui-ci n'aurait,

premièrement, pas pris en considération les nombreux éléments avancés dans le mémoire d'appel visant à démontrer que c'était en réalité un autre club (D.) qui était le véritable successeur sportif de C. Deuxièmement, l'arbitre n'aurait pas tenu compte de ce que le recourant n'est, de l'avis de la Fédération X. de Football, pas le successeur sportif de C. Enfin, troisièmement, il n'aurait pas pris en considération les arguments pourtant décisifs tendant à démontrer que l'intimé n'avait pas fait preuve de la diligence requise dans le cadre de la procédure de faillite du C. aux fins de recouvrer le montant que ce dernier lui devait, raison pour laquelle le recourant devait être exonéré de toute responsabilité à l'égard de l'intimé. A en croire le recourant, l'arbitre aurait vraisemblablement statué différemment s'il avait tenu compte de l'ensemble des éléments précités.

5.3. Tel qu'il est présenté, le grief examiné ne saurait prospérer. Il saute d'emblée aux yeux que l'intéressé, sous le couvert du moyen pris de la violation répétée de son droit d'être entendu, s'en prend, en réalité, à l'appréciation des preuves à laquelle l'arbitre s'est livré pour en tirer la conclusion à laquelle il a abouti et tente ainsi d'obtenir, de manière détournée, un contrôle matériel de la sentence, ce qui n'est pas admissible. En tout état de cause, la lecture de la sentence entreprise permet de constater que l'arbitre a rejeté, ne serait-ce que de manière implicite, les éléments prétendument décisifs auxquels fait allusion le recourant. L'arbitre a en effet correctement résumé l'argumentation du recourant selon laquelle ce dernier n'était pas le successeur sportif de C., puisqu'il s'agissait en réalité d'un tiers. Il a en outre exposé la thèse prônée par l'intéressé en vertu de laquelle l'intimé n'aurait prétendument pas fait preuve de la diligence requise au moment de faire valoir ses droits dans la procédure d'insolvabilité menée à l'encontre de C. Lors de l'examen des mérites de l'appel qui

lui était soumis, l'arbitre a commencé par énoncer le texte de l'art. 15 al. 4 du Code disciplinaire de l'association intimée (édition 2019; ci-après: CD), lequel a la teneur suivante:

“Le successeur sportif d'une partie coupable de non-respect d'une décision doit également être considéré comme telle et ainsi soumis aux obligations établies par le présent article. Les critères permettant de déterminer si une entité peut être considérée comme le successeur sportif d'une autre entité sont notamment le siège, le nom, la forme juridique, les couleurs de l'équipe, les joueurs, les actionnaires ou parties prenantes ou propriétaires, et la catégorie de compétition concernée”.

Après avoir souligné que les critères mentionnés à l'art. 15 al. 4 CD ne sont pas exhaustifs, l'arbitre a procédé à un examen attentif des circonstances du cas d'espèce pour aboutir à la conclusion que le recourant devait bel et bien être considéré comme le successeur sportif de C. Pour aboutir à cette solution, il a notamment relevé que le recourant:

- avait un nom quasiment identique à celui de l'ancien club;
- se présentait publiquement, notamment sur son propre site internet, comme étant le même club que le C;
- utilisait le même logo, évoluait sous les mêmes couleurs et arborait le même maillot que l'ancien club;
- avait recours au même nom de domaine que l'ancien club;
- avait disputé ses rencontres à domicile dans le même stade que celui de l'ancien club jusqu'à sa démolition (sentence, n. 111-119).

Sous n. 120 de sa sentence, l'arbitre a en outre indiqué ce qui suit:

“The arguments as raised by the Appellant that premises, ownership, license football teams, and legal entities are different are fully noted and taken into account by the Sole Arbitrator. However, these arguments will not prevail over the significant number of elements on the other side, as summed up above, that point toward the existence of sporting succession. (...) In addition, whether a club is operated through a different legal entity does not bear relevance on whether a sporting succession has taken place (...). It is undeniable that, by identifying itself as the exact same club that had earned popularity in... for almost a century, the Appellant has benefited from a pre-existing fan base, commercial value, and a legacy that an actual new club could have never obtained from one day to another”.

Il résulte de ce qui précède que l'arbitre a rejeté, à tout le moins de manière implicite, la thèse selon laquelle ce serait en réalité une autre équipe de football, à savoir D., qui aurait succédé sportivement à C. Il appert également de la motivation retenue par l'arbitre que celui-ci n'a de toute évidence pas jugé décisive la circonstance selon laquelle la Fédération X. de Football ne considérerait prétendument pas le recourant comme le successeur sportif de l'ancien club.

C'est également en vain que le recourant dénonce une violation de son droit d'être entendu au motif que l'arbitre n'aurait pas tenu compte des arguments avancés par lui et des pièces qu'il avait produites aux fins de démontrer que l'intimé n'avait pas fait preuve de la diligence requise en vue de faire valoir ses droits dans la procédure de faillite visant C. Il ressort de la sentence attaquée que l'arbitre a considéré, à tort ou à raison, que l'intimé n'était pas tenu de produire sa créance dans la faillite de l'ancien club, puisque les prétentions qui étaient en l'occurrence fondées sur un contrat de travail devaient, en vertu du droit de

l'insolvabilité..., être inscrites d'office dans l'état de collocation. L'arbitre a en outre constaté que l'administrateur de la faillite de l'ancien club avait parfaitement connaissance de la créance de l'intimé à l'encontre du failli. Aussi a-t-il écarté la thèse selon laquelle l'intimé aurait dû produire sa créance dans la faillite et considéré, à tout le moins de manière implicite, que ce dernier ne pouvait pas se voir reprocher une quelconque forme de négligence sous prétexte que sa créance ne figurait pas dans l'état de collocation établi dans le cadre de la faillite (sentence, n. 125-134). Pour le reste, la tentative de l'intéressé visant à démontrer que le contrat conclu par l'intimé avec l'ancien club ne saurait être qualifié de contrat de travail est vouée à l'échec. Il s'ensuit le rejet du grief examiné dans la mesure de sa recevabilité.

6. Dans un second moyen, le recourant soutient que la sentence attaquée contreviendrait à l'ordre public matériel (art. 190 al. 2 let. e LDIP) (considérant 6)

6.1. Une sentence est incompatible avec l'ordre public si elle méconnaît les valeurs essentielles et largement reconnues qui, selon les conceptions prévalant en Suisse, devraient constituer le fondement de tout ordre juridique (ATF 144 III 120 consid. 5.1; 132 III 389 consid. 2.2.3). Tel est le cas lorsqu'elle viole des principes fondamentaux du droit de fond au point de ne plus être conciliable avec l'ordre juridique et le système de valeurs déterminants (ATF 144 III 120 consid. 5.1). Qu'un motif retenu par un tribunal arbitral heurte l'ordre public n'est pas suffisant; c'est le résultat auquel la sentence aboutit qui doit être incompatible avec l'ordre public (ATF 144 III 120 consid. 5.1).

6.2. Le recourant débute sa démonstration d'une prétendue contrariété à l'ordre public matériel en détaillant, sur le plan juridique, le

mécanisme de la succession sportive prévu par l'art. 15 al. 4 CD, en vertu duquel le successeur sportif est tenu de répondre des dettes de l'ancien club et de supporter les conséquences d'un éventuel défaut de paiement. A en croire l'intéressé, la sentence attaquée consacrerait une violation grave et nette de divers principes et droits fondamentaux. Tout d'abord, la figure juridique de la succession sportive revient à faire fi de l'indépendance d'entités juridiquement distinctes et ce, même en l'absence, d'une quelconque forme d'abus de droit. Ensuite, la sentence entreprise est contraire au principe " pas de peine sans loi ", puisque les faits permettant de fonder la succession sportive se sont déroulés avant l'entrée en vigueur de l'art. 15 al. 4 CD. Le recourant prétend que la sentence est contraire aux principes les plus fondamentaux, notamment celui de l'interdiction de l'arbitraire, puisqu'elle confirme la décision lui enjoignant de se conformer à la décision rendue par la CRL avant même que sa qualité de successeur sportif n'ait été établie. Enfin, l'intéressé est d'avis que la sentence querellée porte une atteinte inadmissible à sa liberté économique.

6.3. Semblable argumentation n'empêche pas la conviction de la Cour de céans.

6.3.1. Force est tout d'abord de relever que le recourant ne démontre pas que le non-respect éventuel du principe de l'indépendance juridique des sujets de droit pourrait représenter une violation de l'ordre public matériel au sens de l'art. 190 al. 2 let. e LDIP. En tout état de cause, l'intéressé ne fait rien d'autre que se plaindre de ce que la réglementation édictée par l'association intimée prévoit qu'une entité juridique peut être tenue de répondre des engagements d'une personne juridique distincte même en l'absence de tout abus de droit de la part du successeur sportif. En soutenant que seule l'existence d'un tel abus

de droit devrait justifier la mise en oeuvre du mécanisme de la succession sportive, il semble vouloir calquer les règles édictées par une association privée sur le principe de la transparence ("*Durchgriff*") consacré en droit suisse. Ce faisant, il méconnaît d'une part le principe de l'autonomie de l'association, garanti par l'art. 63 CC, en vertu duquel celle-ci dispose d'une large autonomie dans l'établissement et l'application des règles qui régissent sa vie sociale et ses relations avec ses membres (ATF 134 III 193 consid. 4.3). Amené à se prononcer sur le grief tiré d'une prétendue contrariété à l'ordre public matériel d'une sentence rendue dans une affaire de succession sportive, le Tribunal fédéral a du reste précisé qu'une association pouvait en principe, en vue d'atteindre son but, édicter des dispositions réglementaires instaurant des sanctions visant à assurer le respect des obligations pesant sur ses membres (arrêt 4A_616/2021 du 1er avril 2022 consid. 5.5). D'autre part, le recourant n'établit nullement en quoi l'application d'une règle prévoyant des conditions distinctes de celles permettant la mise en oeuvre du principe de la transparence en droit suisse aboutirait en l'occurrence à une sentence dont le résultat serait incompatible avec l'ordre public matériel.

6.3.2. Le recourant, qui dénonce une violation du principe de la légalité ("*pas de peine sans loi*"), ne démontre pas davantage que celui-ci relèverait de l'ordre public matériel visé par l'art. 190 al. 2 let. e LDIP. A cet égard, il sied de rappeler que le Tribunal fédéral ne s'est jamais formellement prononcé sur le point de savoir si le principe *nulla poena sine lege*, qui domine l'interprétation de la loi pénale, fait partie ou non de l'ordre public matériel (arrêts 4A_462/2019 du 29 juillet 2020 consid. 7.1; 4A_600/2016, précité, consid. 3.3.4.2; 4A_488/2011 du 18 juin 2012 consid. 6.2 et les références citées). Quoi qu'il en soit, le présent grief, à le supposer recevable, ne

saurait prospérer. Force est tout d'abord de souligner que le recourant n'a visiblement jamais soulevé pareil moyen lors de la procédure arbitrale. Aussi ne saurait-il réparer pareille omission, en faisant valoir ce grief, pour la première fois, devant le Tribunal fédéral. En tout état de cause, l'intéressé fait l'amalgame entre la sanction susceptible d'être prononcée en cas de non-respect d'une décision rendue par un organe juridictionnel de l'association intimée et le statut de successeur sportif. Le mécanisme de la succession sportive ne constitue pas, à proprement parler, une sanction mais un principe en vertu duquel le successeur sportif est tenu de répondre des divers engagements et obligations du club auquel il a succédé. En l'occurrence, la sanction pouvant être infligée à un club en cas de refus de se conformer à une décision existait déjà au moment des faits litigieux, puisqu'elle était prévue par l'art. 64 al. 1 de l'ancienne édition du CD. Quant au mécanisme de la succession sportive, si celui-ci a certes été codifié à l'art. 15 al. 4 de l'édition 2019 du CD, il avait déjà été consacré depuis plusieurs années par la jurisprudence du TAS (cf. à cet égard, VITUS DERUNGS, *Insolvency of Football Clubs and Sporting Succession: Financial Claim Proceedings before FIFA and the Court of Arbitration for Sport*, 2022, n. 115). Le recourant concède du reste lui-même, dans son mémoire de recours, que le mécanisme en question trouvait sa source dans ladite jurisprudence lorsque les faits pertinents ont eu lieu. Dans ces conditions, il est malvenu de venir soutenir, pour la première fois devant le Tribunal fédéral, qu'il n'était ni prévisible ni compréhensible pour lui d'anticiper les sanctions susceptibles d'être prononcées à son encontre.

6.3.3. Le recourant ne peut pas davantage être suivi lorsqu'il prétend que la sentence attaquée est contraire aux principes les plus fondamentaux, notamment celui de la

prohibition de l'arbitraire, dans la mesure où elle valide la décision disciplinaire lui imposant de verser une certaine somme d'argent à l'intimé avant même que sa qualité de successeur sportif n'ait été établie. L'intéressé fait en effet fausse route lorsqu'il semble vouloir assimiler la prétendue violation du principe de l'interdiction de l'arbitraire à une contrariété à l'ordre public au sens de l'art. 190 al. 2 let. e LDIP, dès lors que l'incompatibilité de la sentence avec l'ordre public est une notion plus restrictive que celle d'arbitraire (**ATF 144 III 120** consid. 5.1; arrêts 4A_318/2018, précité, consid. 4.3.1; 4A_600/2016, précité, consid. 1.1.4). Au demeurant, l'association intimée fait valoir, à juste titre, que le recourant a eu tout loisir de faire valoir ses arguments devant les instances précédentes aux fins de démontrer qu'il ne pouvait pas être assimilé à un successeur sportif de C.

C'est également en vain que l'intéressé dénonce une atteinte inadmissible à sa liberté économique. Pour qu'une restriction de la liberté économique puisse être considérée comme excessive au sens de la jurisprudence du Tribunal fédéral, il faut qu'elle livre celui qui s'est obligé à l'arbitraire de son cocontractant, supprime sa liberté économique ou la limite dans une mesure telle que les bases de son existence économique sont mises en danger (arrêt 4A_312/2017 du 27 novembre 2017 consid. 3.1 et les références citées). Or, force est de constater que la sentence attaquée n'entraîne pas de telles conséquences pour le recourant. Celui-ci conserve effectivement le droit de déployer ses activités économiques. Il ne s'expose du reste, en l'état, à aucune sanction de la part de l'association intimée puisqu'il a d'ores et déjà versé le montant qui était dû à l'intimé. Par ailleurs, on ne discerne pas en quoi la sentence attaquée aurait pour effet de livrer le recourant à l'arbitraire de l'association intimée. L'argumentation du

recourant selon laquelle la sentence attaquée porterait atteinte à son avenir professionnel puisqu'elle donnerait l'impression aux tiers qu'il serait un mauvais payeur ne permet pas davantage de qualifier le résultat auquel a abouti l'arbitre de contraire à l'ordre public matériel. Pour le reste, la position du recourant n'est, contrairement à ce qu'il prétend, pas comparable à celle du footballeur brésilien Matuzalem, lequel s'était vu menacer d'une suspension illimitée de toute activité footballistique pour le cas où il ne paierait pas une indemnité supérieure à 11 millions d'euros,

intérêts en sus, à son ancien club à bref délai (ATF 138 III 322). La situation est sensiblement différente en l'espèce puisque la sentence attaquée n'a pas pour effet d'empêcher l'intéressé d'exercer son activité économique normalement.

Décision

Le recours est rejeté dans la mesure où il est recevable.

4A_420/2022

30 March 2023

Cardiff City Football Club Limited v. SASP Football Club de Nantes

Appeal against the arbitral decision by the Court of Arbitration for Sport of 26 August 2022 (CAS 2019/A/6594)

Limits in the FIFA PSC jurisdiction to hear set-off claims for damages against contractual claims in football transfer disputes

Introductory note and translation of the Tribunal Federal judgement from French to English by Despina Mavromati¹

This case relates to the international transfer of the Argentinean football player Emiliano Sala to FC Cardiff (“**Appellant**”) from FC Nantes (“**Respondent**”, jointly referred to as the “**Parties**”) in January 2019 and his tragic plane crash which occurred shortly afterwards. The SFT judgment essentially relates to the scope of the arbitration clause between the parties to a transfer agreement but also to the interpretation of the scope of disputes that can be decided by the FIFA dispute resolution bodies and, subsequently, by the CAS.

The Parties had agreed on a transfer price of EUR 17,000,000, to be paid in three installments, with the first installment of EUR 6,000,000 payable within five days after the registration of the player with FC Nantes. Hours after the finalization of the transfer agreement with the FIFA Transfer Matching System (“**TMS**”), the player tragically died in a plane crash over the English Channel.

FC Nantes filed a claim before the FIFA Players Status Chamber (“**PSC**”) requesting payment of the first instalment, but FC Cardiff argued that FC Nantes was liable for the circumstances that led to the player’s death, thus it intended to claim set-off for damages against the claims raised by FC Nantes. The FIFA PSC upheld FC Nantes’ claim and held that it had no jurisdiction to hear the claim for damages.

FC Cardiff appealed against the FIFA PSC decision to the CAS which dismissed the appeal. The CAS panel bifurcated the procedure and decided, as preliminary matters, the validity of the transfer contract, the PSC and CAS had jurisdiction to hear the claim for damages, and the possibility to extinguish a contractual claim by a set-off tort claim. After declaring that the transfer had already taken place before the player’s accident, the panel held that neither the FIFA PSC nor the CAS had jurisdiction to rule on a claim of extra-contractual nature (i.e., the claim that FC Nantes was responsible for the player’s death).

In the subsequent appeal to the SFT, the Appellant invoked a violation of Art. 190 (2) (b) of the [Federal Act on Private International Law](#) (“**PILA**”) considering that the CAS panel had erroneously interpreted the arbitration agreement enshrined both in the contract and in the FIFA regulations. In a very interesting analysis, the SFT reiterated the various

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principles of statutory interpretation applying to the regulations of large sports federations, such as FIFA.

This note discusses the key findings in the SFT judgement. An English translation of the SFT judgement can also be viewed below.

Interpretation of the contractual agreement by the CAS and the SFT

The SFT confirmed the CAS panel's view that its own jurisdiction could not go beyond the jurisdiction of the FIFA PSC. Even though Art. 377 para. 1 [Swiss Code of Civil Procedure](#) ("CPC") provides for the right of the panel to deal with a counterclaim for damages, there were no reasons that justified the concurrent ruling on claims based on the transfer agreement and on (the unrelated) set-off against a tort claim (at 5.3). Notwithstanding the broad formulation of the arbitration agreement in the transfer contract ("*Any dispute arising out of or in connection with this transfer agreement...*"), the contract did not extend to the clearly distinct set-off claim for damages based on the plane crash (at 5.4.3).

Interpretation of the FIFA Regulations

Refraining from rendering a general judgment, and while acknowledging that it is in principle possible to invoke a claim for a set-off in international arbitration for indirectly related claims (cf. 4A_482/2010), the SFT then dismissed the Appellant's arguments on the interpretation of the arbitration agreement based on the FIFA Regulations. In fact, and even though the latter reserve the possibility to file a counterclaim (asserting a set-off claim), the FIFA dispute resolution bodies are not "true" arbitral tribunals and, as such, they are not bound by the arbitration provisions enshrined in the Swiss Code on Civil Procedure (at 5.5.4).

Accordingly, the jurisdiction of the CAS panel in appeal could not be broader than that of the association's tribunal that had first ruled on the matter (in this case, the FIFA PSC). After analyzing the pertinent FIFA regulations, the CAS – and the SFT – confirmed that the possibility to file a counterclaim before the FIFA PSC could not *bind* the latter to rule on any claim for damages raised in this context (at 5.5.5).

Employing various instruments of statutory interpretation, the SFT further confirmed the limited material scope of the FIFA PSC jurisdiction, which does not extend to ruling on civil disputes of football stakeholders that are unrelated to football. The timely limits for the rendering of the FIFA decisions along with a cap on the procedural costs were also considered in order to conclude that FIFA did not intend to include the hearing of complex and unrelated set-off claims by its dispute resolution bodies and, subsequently, by the CAS (at 5.5.5.4).

Other grievances: violation of the parties' right to be heard and of material public policy

FC Cardiff further raised the issue of a violation by the CAS panel of the principle of equality of the parties for refusing to adjourn the hearing of its expert witness. Such plea was swiftly dismissed by the SFT to the extent that the panel had included the expert report in the file and that such report was found to have no influence on the outcome of the proceedings. The SFT equally dismissed all other pleas on violation of the Appellant's right to be heard, holding that the panel had rejected – at least implicitly – the various arguments raised by the Appellant (at 7).

Finally, the SFT thoroughly dismissed the Appellant's claim for violation of public policy alleging the Panel's refusal "*to examine (or even*

investigate) acts of corruption” (at 8.2.2). After reiterating the very restrictive scope of substantive public policy, the SFT held that such violation could only be admitted if the corruption had been established but the Panel still refused to take it into account, which was clearly not the case (judgment 4A_532/2014 of January 29, 2015, at 5.1).

Conclusion

Overall, this is an interesting and thorough judgment rendered by the SFT that highlights the specificities of sports arbitration with respect to the scope of the arbitration agreement but also delves into the jurisdictional scope of the FIFA decision-making bodies, which draw the limits of the subsequent jurisdiction of the CAS.

English Translation²

Extracts of the facts

On July 20, 2015, SASP Football Club de Nantes (hereinafter: FC Nantes), a football club playing in the French first division championship, member of the Ligue de Football Professionnel (LFP) and the Fédération Française de Football (FFF), itself affiliated to the Fédération Internationale de Football Association (FIFA), entered into an employment contract with Argentine striker Emiliano Raul Sala Taffarel (hereinafter: the player or footballer), the term of which was set at June 30, 2020.

On January 18, 2019, Cardiff City Football Club Limited (hereinafter: CCFC), an English company managing a football club based in Cardiff, a member of the Football

Federation of Wales (FGF), which was then playing in the First Division of the English league, submitted the player to a medical examination. At the end of the examination, the parties signed a three-and-a-half year employment contract expiring on June 30, 2022. The next day, FC Nantes and the player signed a document, entitled “Termination Agreement”, under which the parties agreed, under certain conditions, to terminate the employment contract that bound them.

On January 19, 2019, FC Nantes sent CCFC a countersigned copy of the Player Transfer Agreement (hereinafter: the Transfer Agreement). According to this contract, the transfer amount consisted of a fixed amount of EUR 17,000,000, to be paid in three instalments, - the first instalment of EUR 6,000,000 to be paid within five days after the registration of the player with CCFC, the other two instalments to be paid on January 1, 2020 and January 1, 2021 respectively. Both clubs publicly announced the player’s transfer on the same day.

On January 21, 2019, at 12:00 p.m. (Swiss time), the legally autonomous entity managing the English Premier League informed CCFC that it could not endorse the player’s contract of employment because the signing bonus clause in the contract required certain amendments. On the same day, at 6:30 p.m. (Swiss time), the FGF confirmed that it had received the player’s ITC and registered it with CCFC, with the status of the transfer in the FIFA Transfer Matching System (TMS) now being “Closed — awaiting payment”. At 9:08 p.m. (Swiss

² The decision 4A_420/2022 was issued in French. The full text is available at the website of the Federal Tribunal, www.bger.ch.

The English translations & introductory notes of the Federal Tribunal judgment in sports arbitration cases are drafted by Dr. Despina Mavromati and are available at www.lawinsport.com

time), the player's agent, C., agreed to the changes in the employment contract, including the signing bonus. At 9:35 p.m. (Swiss time), CCFC sent an e-mail to the Premier League notifying them of the changes. The Premier League did not respond and later confirmed that they had never registered the player in the English Premier League.

During the night of January 21-22, 2019, at an undetermined time after the e-mail was sent, the player tragically died in a plane crash over the English Channel. The other occupant of the plane, the pilot D., also died in the air crash.

On February 26, 2019, FC Nantes brought an action against CCFC before the FIFA Players' Status Committee (PSC), seeking payment of EUR 6,000,000 plus interest, which is the first instalment of the compensation fixed in the transfer contract. The defendant raised the lack of jurisdiction. It argued, among other things, that the circumstances that led to the player's death were attributable to FC Nantes, which is why it intended to set off the amount of the claim for damages resulting from the footballer's death against the claims raised by the plaintiff. In its decision of September 25, 2019, the FIFA PSC ordered the defendant to pay FC Nantes the sum of 6,000,000 euros, with interest at 5% per annum, under penalty of a ban on the registration of new players. It further declared itself incompetent to hear the claim for damages raised the defendant.

On October 4, 2021, the Panel decided to split the proceedings and to examine, as a preliminary matter, whether the transfer contract entered into by the parties was valid (i), whether the FIFA PSC and CAS had jurisdiction to hear the Appellant's claim for damages in compensation (ii), and whether, according to the law applicable in

the case, a claim of a contractual nature could be extinguished through a claim in tort (iii).

The Panel dismissed the appeal with its award dated August 26, 2022.

The Panel then examined whether it had jurisdiction to rule on the claim of an extra-contractual nature made by the Appellant, who claimed that the other party was responsible for the death of the player and therefore liable for the resulting damages (Award, n. 102-190). The Court considered that the FIFA PSC and the CAS Appeals Division did not have the competence to rule on the tort claim asserted by the Appellant (Award, n. 189 et seq.).

Having settled these issues, the Panel turned to the merits of the appeal (Award, n. 312-389). In order to determine whether the Transfer Agreement had come to an end, the Panel first reproduced the text of Clause 2.1 of the Transfer Agreement, which reads as follows (Award, n. 313):

"This Transfer Agreement is conditional upon:

2.1.1. the player successfully completing medical examination with [CCFC];

2.1.2. FC Nantes and the Player agreeing all the terms of a mutual termination of FC Nantes contract of employment with the Player;

2.1.3. the mutual termination of FC Nantes contract of employment with the Player is registered by the LFP;

2.1.4. the LFP and the FAW [FGF] have confirmed to [CCFC] and FC Nantes that the Player has been registered as a [CCFC] player and that the Player's International Transfer Certificate [ITC] has been released".

Examining successively the conditions provided for in Art. 2.1 of the transfer contract, the Panel considered that they

were all fulfilled before the death of the player, for which reason FC Nantes was entitled to the payment of the first instalment of the agreed transfer compensation (Award, n. 333-389).

On September 26, 2022, CCFC (hereinafter: the Appellant) filed an appeal in civil matters, with an request for suspensive effect, in order to obtain the annulment of the above-mentioned award.

Extract of the legal considerations

[...]

5.

In a first plea, the Appellant, invoking Art. 190 para. 2 let. b LDIP, maintains that the Panel wrongly refused to admit its jurisdiction to rule on the claim for damages that it had put forward.

[...]

5.4.

5.4.1. In support of its plea of violation of Art. 190 para. 2 let. b LDIP, the Appellant maintains, first of all, that the claim that it has set off falls within the scope of the arbitration clause provided for in Art. 8.2 of the transfer contract. Stressing that the interpretation of the scope of an arbitration agreement must be carried out in accordance with the ordinary rules of Art. 18 para. 1 of the Swiss Code of Obligations (CO; SR 220), it argues that the parties, when they provided for a broadly formulated arbitration clause, intended to submit to an arbitral tribunal all claims arising out of - or directly related to - the contracts governed by their agreement. According to the Appellant, who refers to the opinion expressed by certain authors, there is thus a presumption that an arbitration clause which is not of a restrictive

nature also covers extra-contractual claims arising from the contract containing the clause. It then insists on the broad wording of the arbitration agreement inserted in Art. 8.2 of the Transfer Agreement, which reads as follows: *“Any dispute arising out of or in connection with this Transfer Agreement shall be subject to the jurisdiction of the FIFA Dispute Resolution Chamber... and on appeal (or in the event that FIFA declines jurisdiction) to the Court of Arbitration for Sport...”*.

Thus, it claims that the facts surrounding the Respondent’s tort liability are undoubtedly related to the Transfer Agreement. In its opinion, the Panel should have concluded that the claim for set-off fell within the scope of the arbitration clause entered into by the parties. The Appellant then seeks to demonstrate that the reasoning of the arbitrators, which in its opinion was guided by reasons of expediency, does not stand up to scrutiny.

5.4.2.

In Swiss law, the interpretation of an arbitration agreement is governed by the general rules of contractual interpretation. Like a judge, the arbitrator or arbitral tribunal will first of all try to ascertain the real and common intention of the parties (cf. Art. 18 para. 1 CO), if necessary empirically, on the basis of surrounding elements, without stopping at any inaccurate expressions or names they may have used. In this sense, evidence is not only the content of the declarations of intent, but also the general context, i.e., all the circumstances that make it possible to discover the will of the parties, whether it is a question of declarations made prior to the conclusion of the contract, draft contracts, correspondence exchanged, or even the attitude of the parties after the conclusion of the contract. This subjective

interpretation is based on an assessment of the evidence. If it is conclusive, the result, i.e. the finding of a common and real intention of the parties, is a matter of fact and is therefore binding on the Federal Court. If this is not the case, the interpreter will have to determine, by applying the principle of trust, the meaning that the parties could and should have given, according to the rules of good faith, to their mutual expressions of intent in the light of all the circumstances (BGE 142 III 239, para. 5.2.1 and references cited; judgment 4A_174/2021 of July 19, 2021, para. 5.2.3). If it is not disputed, as in the present case, that an arbitration agreement exists, there is no reason to resort to a particularly restrictive interpretation. On the contrary, the parties' willingness to have the dispute decided by an arbitral tribunal must be taken into account (BGE 138 III 681, JdT 2013 II 452 at 4.4; 128 III 675, JdT 2004 170 at 2.3). If an arbitration agreement is drafted in such a way that it also covers disputes arising "in connection with" the contract, it must be concluded, according to the parties' stated intention, that they intended to submit to the exclusive jurisdiction of the arbitral tribunal all claims arising out of or directly affecting the state of affairs governed by the contract (BGE 138 III 681, Journal of Administrative Law 2013 II 452, § 4.4).

5.4.3.

The first part of the Appellant's argument does not convince the Federal Tribunal. The wording of the arbitration clause is certainly not restrictive, in the sense that it covers not only disputes that may arise out of the transfer agreement, but also those that are only related to this agreement ("in connection with"). That there is a chronological link between the death of the player and the transfer agreement is undeniable, as the death would not have

occurred if the transfer agreement had not been executed. However, the same connection would also exist if the player had bought his own plane ticket to his new club by an ordinary flight. In this case, however, it is clear from the findings of the Panel that the transfer contract was executed before the player's death and that this contract did not impose on the Respondent the obligation to arrange the flight on which the player died. In these circumstances, the Appellant cannot be followed when it claims that the claim for damages has a tortious basis and relates to the consequences of the flight in question, which took place after the transfer contract was executed, and therefore falls within the scope of the arbitration agreement concluded by the parties, since the organization of the flight was independent of the contractual obligations set out in the transfer contract.

In a landmark decision published in ATF 138 III 681, the Federal Court, called upon to rule on the material scope of an arbitration clause with a wording similar to that of the present case, certainly held that, when an arbitration agreement is worded in such a way that it must also cover disputes arising in connection with the contract, this is to be understood, according to the rules of good faith, as meaning that the parties did not intend that claims arising under several legal headings from their relationship governed by the contract should be the subject of proceedings conducted on the one hand before the Arbitral Tribunal and on the other hand before the State authorities. This being the case, it appears that the tort claim asserted by the Appellant for compensation due to the consequences of the aviation accident in January 2019 is, on the basis of the findings of the Panel, clearly distinct from the

Respondent's claim for payment under the Transfer Agreement. In other words, the claim for damages does not relate to the relationship governed by the transfer contract. It should also be noted that the interested party bases its demonstration on facts that are not apparent from the contested award, in particular when it asserts that the transfer had not been finalized at the time of the accident or when it maintains that it was B., acting as the Respondent's sports agent, had organized and booked the flight on which the player and the pilot tragically died before the transfer contract was signed.

5.5.1.

In a second part of its argument, the Appellant claims that the CAS should have recognized, according to the FIFA regulations, the competence of the FIFA PSC and, consequently, its own competence to recognize the claim for damages in the present case. In this respect, it argues that Art. 17 RSTP expressly reserves the possibility of filing a counterclaim and therefore allows a party to assert a claim by way of set-off. It also states that no statutory or regulatory provision of FIFA limits in any way the right of a party to file counterclaims, which is why there is no reason to exclude the jurisdiction of the FIFA PSC and, consequently, that of the CAS to examine the claim that it has filed by way of set-off. The Appellant furthermore argues that the Panel should in any case have declared itself competent to rule on the claim asserted in compensation, by virtue of the principle according to which "*the judge of the action is the judge of the exception*", or by applying, by analogy, Art. 377 para. 1 CPC. Referring to the decision 4A_482/2010 of February 7, 2011, it observes that the Federal Court has recognized that the trend is towards the

generalization of the said principle in international arbitration. It then argues that there is no evidence to suggest that the parties intended to exclude the claim for damages in the present case from the jurisdiction of the FIFA PSC and the CAS. In the meantime, the arbitral tribunal was obliged to declare itself competent to examine a claim for set-off, as it was obliged to interpret article 377 paragraph 1 CPC. In the alternative, it tries to show that any exceptions to the application of Art. 377 para. 1 CPC could not be taken into account in this case. Alternatively, it argues that the CAS should have accepted jurisdiction even if Art. 377 para. 1 CPC was a potestative norm.

5.5.2.

It should be emphasized at the outset, and once and for all, that it is not for the Federal Tribunal to rule on the jurisdiction of an arbitral tribunal located in Switzerland to decide on a claim for set-off brought before it in the context of an international arbitration. It would indeed be illusory to hope to be able to lay down, on this point, general rules of jurisprudence, applicable to all conceivable situations and for any type of arbitration (commercial, sports, investment, etc.). The only question to be resolved here is that of knowing whether, in the present case, the CAS has violated Art. 190 para. 2 LDIP by denying the jurisdiction of the FIFA PSC - and consequently its own - to recognize the claim for set-off asserted by the Appellant. It is not disputable that, in principle, it is possible for the Respondent to invoke a claim for set-off in an international arbitration and to require, under certain conditions, that the arbitral tribunal take it into consideration and examine its merits (cf. *CHRISTOPH ZIMMERLI, Die Verrechnung im Zivilprozess und in der Schiedsgerichtsbarkeit*, 2003, p. 25 f.; *LUC*

PITTET, Compétence du juge et de l'arbitre en matière de compensation, 2001, p. 303; FLORA STANISCHEWSKI, Die Verrechnung im Zivilprozess unter der Schweizerischen Zivilprozessordnung, 2020, n. 159; HEIDI KERSTINJAUCH, Aufrechnung und Verrechnung in der Schiedsgerichtsbarkeit, 2001, p. 163; POUURET/BESSON, Comparative law of international arbitration, 2nd ed. 2007, n. 325; KAUFMANN-KOHLER/RIGOZZI, International arbitration, 2015, n. 3.149; BERGER/MOSIMANN, in Commentaire bernois, Internationale Schiedsgerichtsbarkeit, 2023, no. 74 ad Art. 186 LDIP; PIERRE-YVES TSCHANZ, in Commentaire romand, Loi sur le droit international privé, 2011, no. 58 ad Art. 187 LDIP; COURVOISIER/JAISLI-KULL, in Commentaire bernois, Internationales Privatrecht, 4th ed. 2021, no. 85 ad Art. 186 LDIP; BERGER/KELLERHALS, International and domestic Arbitration in Switzerland, 4th ed. 2021, no. 526 ff; MARCO STACHER, in Commentaire bernois, Schweizerische Zivilprozessordnung, vol. III, 2014, no. 2 ad Art. 377 CPC; GABRIEL/MEIER, Set-off defenses in arbitration - Conclusions from a Swiss civil law perspective, in Indian Journal of Arbitration Law 2017 p. 67; PHILIPP HABEGGER, in Commentaire bâlois, Schweizerische Zivilprozessordnung, 3rd ed. 2017, no. 4 ad Art. 377 CPC; more nuanced: GIRSBERGER/VOSER, International arbitration, 4th ed. 2021, no. 421a). The Federal Court has long recognized this, notably in an obiter dictum to the decision 4A_482/2010, where it noted the following: *“In the same vein and with respect to set-off, the trend is towards the generalization of the principle, rendered by the adage ‘the judge of the action is the judge of the exception’, according to which, to use the text of Art. 21 para. 5 of the Swiss Rules of International Arbitration, the arbitral tribunal has jurisdiction to*

hear a set-off exception even if the relationship which forms the basis of the claim invoked as set-off does not fall within the scope of the arbitration agreement or a choice of forum clause... “(at 4.3.1).

In Switzerland, Art. 377 para. 1 CPC, which is inspired by the solutions adopted by the arbitration rules of various Swiss chambers of commerce (Message of 28 June 2006 on the Swiss Code of Civil Procedure, FF 2006 p. 7007), codifies from the outset the rules of arbitration of the Swiss Chamber of Commerce. It is true that, in its jurisprudence, the principle of the right to a fair hearing is not always applied. It is true that in its case law, the Federal Tribunal has on several occasions applied the rules of the CPC concerning Swiss domestic arbitration to international arbitration. However, it has only done so by analogy, which already calls for a certain caution in applying the conditions laid down by this provision for domestic arbitration to international arbitration. This caution is all the more justified since the last amendment of the LDIP in the field of international arbitration, which came into force on January 1, 2021, was aimed at improving legal certainty and clarity, The Federal Council emphasized the desire expressed during the consultation process to maintain a dualism between international and domestic arbitration. In this respect, it emphasized that Chapter 12 of the LDIP provides for the most liberal and succinct rules possible, while the more dense and detailed rules of Part III of the CPC are intended to make the procedure more predictable for the parties (Message of 24 October 2018, FF 2018 p. 7165).

[...]

5.5.4.

According to the constant jurisprudence of the Federal Court, the decision rendered by the jurisdictional body of a sports association, even if this body is called an arbitral tribunal, constitutes in principle only a simple expression of will issued by the association concerned (ATF 148 III 427, para. 5.2.3; 147 III 500, para. 4; 119 II 271, para. 3b; decision 4A_344/2021 of January 13, 2022, para. 5.2, and the references cited therein). The Court of Appeal also had the opportunity to clarify that the FIFA PSC does not constitute an arbitral authority, but only the internal jurisdictional body of a private association (BGE 148 III 427 at 5.2.4; judgment 4A_344/2021, supra, at 5). It thus appears that the jurisdictional bodies of FIFA do not constitute real arbitral tribunals, as the party concerned expressly acknowledges in its appeal (Appeal, n. 134). Thus, in this case, the FIFA tribunal was not obliged to apply Art. 377 CPC, which regulates the question of whether an arbitrator is competent to rule on a claim for set-off, irrespective of whether the aforementioned provision is applicable *mutatis mutandis* in international arbitration (see, among others, *TARKAN GÖKSU*, Schiedsgerichtsbarkeit, 2014, no. 611; *GASSER/RICKLI*, “The Arbitration of the Swiss Confederation”). The appellant cannot be followed either when it argues that the so-called “universal” principle according to which “the judge of the action is the judge of the exception” should be applied in this case, since the FIFA PSC is precisely not an arbitral tribunal and the proceedings conducted by it cannot be qualified as arbitral proceedings. The case law has certainly recognized that it is in principle incumbent upon the judicial authority responsible for ruling on the principal claim to rule on the existence of the claim invoked in compensation (ATF 124 111207 c. 3b/bb; 85 II 103 at 2b; 63 II

133 at 3c), while sometimes reserving certain exceptions to this principle (ATF 85 11 103 at 2c). In an isolated decision, the Federal Court also indicated that the tendency was to generalize the principle in the field of arbitration (decision 4A_482/2010, supra, para. 4.3.1). However, it must be emphasized once again that the FIFA PSC is neither a state authority nor an arbitral tribunal, but only the jurisdictional body of a private law association. In addition, it is not possible to simply transpose a principle of Swiss civil procedure - which is otherwise not enshrined in the LDIP or the CPC except in matters of internal arbitration (cf. Art. 377 CPC) - to disputes submitted to the dispute resolution body of a private association.

5.5.5.

In this case, the CAS rightly emphasized that, insofar as it was called upon to rule in the present case as an appeal body, its own competence to examine the claim invoked implied that the FIFA PSC had itself been competent to hear such a claim. In other words, the jurisdiction of the appeal court could not be broader than that of the court of the association concerned which had first ruled on the matter.

The answer to the question at issue thus depended, in reality, on whether the FIFA regulations governing, in particular, the powers and jurisdiction of the FIFA PSC, as well as the procedures conducted before it, required this court to declare itself competent to examine the claim asserted in compensation by the appellant, which the Panel denied. It should be recalled here that an association under Swiss law enjoys, by virtue of the principle of the autonomy of the association guaranteed by Art. 63 CC, a large degree of autonomy in the establishment and application of the rules governing its social life and its relations with

its members (ATF 134 III 193, para. 4.3; decision 4A_246/2022 of November 1, 2022, para. 6.3.1). In order to solve the controversial problem, it is therefore necessary to interpret the topical rules laid down by the association concerned.

5.5.5.1.

According to the jurisprudence of the Federal Court, the statutes of a major sports association, such as FIFA, in particular the clauses relating to questions of jurisdiction, must be interpreted according to the rules of interpretation of the law (judgments 4A_618/2020 of June 2, 2021, para. 5.4.3; 4A_462/2019 of July 29, 2020, para. 7.2 and the references cited). The same applies to the interpretation of rules of a lower level than the statutes of a sports association of this importance (judgments 4A_314/2017 of May 28, 2018, at 2.3.1; 4A_600/2016 of June 29, 2017, at 3.3.4.1). In this case, the interpretation relates to rules that were issued by the world football governing body. Therefore, they must be interpreted in accordance with the methods of statutory interpretation.

5.5.5.2.

The interpretation begins with the letter of the law (literal interpretation), but this is not the decisive factor: it must also restore the true scope of the norm, which also derives from its relationship with other legal provisions and its context (systematic interpretation), from the aim pursued, in particular the interest protected (teleological interpretation), as well as from the will of the legislator as it results in particular from the preparatory work (historical interpretation). The judge will depart from a clear legal text insofar as the other methods of interpretation mentioned above show that this text does not correspond in all respects to the true

meaning of the provision in question and leads to results that the legislator could not have intended, that offend the sense of justice or the principle of equal treatment. In short, the Federal Supreme Court does not favor any particular method of interpretation and does not establish a hierarchy, but is inspired by a pragmatic pluralism in order to seek the true meaning of the norm (BGE 142111 402, para. 2.5.1 and the references cited therein).

5.5.5.3.

[...]

5.5.5.4.

It appears from this overview of the various rules enacted by FIFA that these do not expressly settle the question whether the FIFA PSC is necessarily bound to rule on any opposing claim for damages, regardless of the legal nature thereof. Art. 17 of the Rules of the PSC, which concerns the issue relating to the advance of the costs of procedure, certainly mentions the possibility of filing a counterclaim before the FIFA PSC. On the other hand, it in no way sets the conditions to which the filing of a counterclaim is subject, neither rules on the fate of the opposing claims for damages and their processing by the FIFA PSC.

It can hardly be disputed that it is possible for the defendant to bring a counterclaim or to invoke claims by way of set-off before the FIFA PSC that the latter would have had the competence to examine if these had been submitted to it by this same party, as plaintiff, by means of a direct action for payment. However, we cannot retain, on the basis of a purely literal argument of Art. 17 of the Rules of the PSC, that the mere allusion to a “counterclaim” would mean that the FIFA PSC would be absolutely

bound to rule on any claim invoked in compensation before it.

A systematic interpretation of the rules enacted by FIFA confirms that the FIFA PSC does not have of unlimited jurisdictional competence but that it has, on the contrary, competences limited to certain legal aspects related to the field of football. It must indeed be clearly seen that the FIFA PSC is a body of the governing body of football at world level, which has as its statutory purpose to establish rules and regulations governing football and related matters, and to ensure that they are enforced (Art. 2 let. c of the Articles of Association) but is not intended to settle civil disputes dividing football stakeholders unrelated to enforcement issues in football. Art. 46 par. 1 of the Statutes also provides that the FIFA PSC establishes and ensures that the RSTP and that its jurisdiction is determined therein. However, Art. 1 RSTP, titled “Scope” specifies, in its first paragraph, that the said regulation establishes universal rules and binding rules regarding the status of players and their qualification to participate in organized football, as well as their transfer between clubs belonging to different associations. It thus appears that the jurisdictional mission assigned to the FIFA PSC is to ensure compliance with the provisions of the RSTP, in accordance with Art. 1 RSTP, within the limits of its competences provided for by Art. 22 RSTP. It is also worth observing that FIFA wished to create specialized jurisdictional bodies, since it decided to distribute the football-related disputes, depending on their type, between the FIFA PSC and the Dispute Resolution Chamber of FIFA.

The teleological interpretation of the rules adopted by FIFA also confirms that the governing bodies settlement of disputes

instituted within it are not intended to hear any claim raised by one football team against another, whether by way of action or exception. As the Panel rightly pointed out, the dispute resolution mechanism established by the FIFA aims not only to ensure compliance by its members with the rules laid down by it, but also enables it to ensure the uniform application of the provisions governing football in the interest of all actors in this sport. However, FIFA’s role as “football policeman” cannot go beyond the borders of this sport, because its task does not consist precisely in settling disputes totally unrelated to the regulations adopted in relation to football governance. In other words, the FIFA PSC cannot hear any dispute dividing two football clubs, but only of those which fall within the scope application of the RSTP. Moreover, such an interpretation is corroborated by the association which adopted the said regulations, since FIFA indicates the following on page 375 of its published RSTP Commentary, 2021 edition:

“Besides disputes between clubs relating to training compensation and the solidarity mechanism, FIFA is also competent to hear other disputes arising between clubs affiliated to different member associations. Once again, the international dimension is the key element in determining jurisdiction. The dispute concerned must also fall within the general scope of the Regulations for FIFA to hear it (...)” (emphasis added).

Contrary to what the Appellant maintains, it is not clear why the 2021 edition of the RSTP’s comment would not be relevant for the interpretation of the 2018 edition of the RSTP, since the relevant provisions of the RSTP, namely Arts. 1 par. 1 and 22 lit. f RSTP, have not undergone any modification. It also appears that the procedural rules applicable before the FIFA

PSC were designed with a view to ensuring a rapid and inexpensive resolution of disputes. Art. 25 par. 1 RSTP states, in effect, that the FIFA PSC must in principle render its decision within sixty days. The costs themselves may not exceed 25,000 fr. (Art. 25 par. 2 RSTP and 18 of the Rules of the PSC). However, the objective pursued by the FIFA tending to guarantee the parties a quick and inexpensive settlement of disputes among them would be compromised if we accepted that the FIFA PSC was required to rule on any claim invoked, including when it has no connection with the football regulations. It must indeed be seen that the FIFA PSC, in its capacity as a judicial body specializing in monitoring compliance with certain aspects of the football regulations, has neither the necessary expertise nor sufficient means, in particular in terms of investigative measures, to rule, as in this case, on legally complex tort claims, with foreign elements, unrelated to the provisions of the RSTP or to the interests of the governing body of football. Capping costs to a relatively low amount of 25,000 fr. constitutes an additional element demonstrating that the FIFA PSC is not intended to examine claims requiring the implementation of various expertise in the aeronautical field for the purpose of elucidating the causes of an air crash. The requirement provided for by the RSTP according to which a case submitted to the FIFA PSC must be dealt with quickly would further not be satisfied if the plaintiff, whose claims were ready to be decided at the moment of the referral to the FIFA PSC, saw the rendering of its decision significantly postponed due to the fact that its opponent invoked claims in compensation, unrelated to the football regulations.

In these circumstances, it cannot be accepted that the Appellant could validly invoke a claim for damages based on a claim that the FIFA PSC did not have jurisdiction to examine whether it had been submitted to it by this same party, as plaintiff, by means of a direct action in payment brought against the Respondent.

5.5.6.

In view of the foregoing, the Panel's finding in holding that the FIFA PSC had rightly denied its jurisdiction to rule on the claim for damages must be upheld. It follows that the grievance based on the violation of Art. 190 par. 2 lit. b LDIP is dismissed.

6.

In a second plea, the Appellant, invoking Art. 190 par. 2 lit. d LDIP, accuses the Panel of violating the principle of the equality of the parties.

6.1.

According to case law, the equality of the parties implies that the procedure be settled and conducted so that each party has the same opportunity to present its case (ATF 142 III 360 at 4.1.1).

6.2.

In support of its grievance, the Appellant argues that the Panel refused, without justification, to adjourn the hearing of its expert in English law, E., even though it decided to hear the Respondent's expert. In its opinion, the hearing of E. was likely to influence the outcome of the dispute, to the extent that the expert had to specify whether English law permitted the invocation in set-off of a claim having a tort basis for the purpose of opposing the payment of a transfer fee.

6.3.

As presented, the grievance must be dismissed.

It must first be noted that the Panel recounted, in detail, the procedural steps in connection with the hearing of E. and the reasons why it had decided not to adjourn the hearing for such expert (Award, n. 248-269). On the basis of the facts found by the arbitrators, it does not appear that the Appellant would not have benefited from the same possibilities as its opponent to present its case, as evidenced by the convincing demonstration made by the Respondent (Answer, n. 44-52). The CAS recalls moreover, quite rightly, that a written report by expert E. was placed in the arbitration file, so that the Panel was able to take into consideration the opinion of this expert.

In any event, it should be noted that the violation invoked by the Appellant had no influence on the outcome of the proceedings. The arbitrators only discussed the arguments of English substantive law on a purely subsidiary basis (“On a purely subsidiary level “; Award, n. 176). The Panel, moreover, indicated the following, under n. 268 of its Award: “268. (...) The Panel further notes that - at the end of the day - the testimony of Mr E. QC is not material for the outcome of this case, since the Panel has found that, for procedural reasons, the FIFA PSC [FIFA PSC] had no mandate to adjudicate CCFC’s set-off claim...”.

7.

In a third plea, divided into several branches, the Appellant complains of various breaches of its right to be heard (Art. 190 para. 2 let. d LDIP).

7.1.

Jurisprudence has deduced from the right to be heard a minimum duty for the arbitral

tribunal to examine and address relevant issues. This duty is breached when, through inadvertence or misunderstanding, the arbitral tribunal does not take into consideration allegations, arguments, evidence and offers of evidence presented by one of the parties and important for the award to be made. It is incumbent on the so-called party aggrieved to demonstrate, in its appeal against the award, how an inadvertence on the part of the arbitrators prevented from being heard on an important point. It is up to it to establish, on the one hand, that the court arbitrator failed to consider some of the factual, evidentiary or legal evidence that it had regularly advanced in support of its conclusions and, on the other hand, that these elements were likely to influence the fate of the dispute (ATF 142 III 360 at 4.1.1 and 4.1.3). If the Award completely ignores elements apparently important for the resolution of the dispute, it is up to the arbitrators or the respondent party to justify this omission in their observations on the appeal. They can do this by showing that, contrary to the Appellant’s assertions, the omitted elements were not relevant to resolving the case concrete or, if they were, that they were implicitly refuted by the arbitral tribunal (ATF 133 III 235 at 5.2). Moreover, the grievance alleging violation of the right to be heard should not serve, for the party which complained of defects affecting the reasoning of the award, thereby causing an examination of the application of the substantive law (ATF 142 III 360 at 4.1.2 and the references cited).

7.2.

7.2.1.

In the first limb of the plea in question, the interested party maintains that the Panel breached its right to be heard by failing to examine the question of its jurisdiction

ratione materiae arising of the arbitration clause contained in the transfer contract.

This criticism is flawed. The Panel has, in fact, referred to the aforementioned argument under n. 111 of the disputed Award. When examining the question of the jurisdiction of the FIFA PSC - and, therefore, of its own jurisdiction - to decide on the claim for damages, it indicated that there was no link between the claim and the opposing claim for damages (“... *The set-off claim is not linked to the breach of contract. The only arguable nexus is the crude and obvious causal one: if there had been no transfer, then there would not have been a plane crash. However, there is no substantive link between the two matters...*”; Award, n. 172). The Panel also held that the transfer contract had been executed before the player’s departure by plane and that this contract did not impose on the Respondent the obligation to organize the flight during which the player perished (Award, n. 186 f.). In view of the foregoing, it is admitted that the arbitrators rejected, at least implicitly, the thesis that the claim for damages fell within the scope of the arbitration clause inserted in the transfer contract, which moreover corresponds to the conclusion reached by the Federal Court (see at 5.4.3 above).

7.2.2.

In the second part of the grievance examined, the Appellant again complains, but this time in terms of an infringement of its right to be heard, the refusal to postpone the hearing of its expert E.. Such criticism is unfounded and we can repeat here, *mutatis mutandis*, the considerations already issued in connection with the violation of the principle of equality of the parties invoked by the Appellant (see at 6.3 above).

7.2.3.

In the third and last limb of the plea in question, the Appellant maintains that the Panel allegedly violated its right to be heard by deciding to split the proceedings in order to deal with three issues determined, to then take a decision on a point outside the framework of the separate instruction of these three legal questions, namely the examination of allegations of acts of corruption around the conclusion of the transfer contract. Such an argument does not convince the Federal Court. In this case, the decision of bifurcate the proceedings was worded as follows (Award, n. 61):

“The Panel has decided to bifurcate the proceedings and, therefore, to preliminarily deal with the following legal issues on the merits:

(i) If the transfer agreement entered into by the Parties is valid (with all conditions preceding being complied with);

(ii) If the CAS / FIFA PSC [FIFA PSC] is competent to decide on the set-off with a damage claim;

(iii) Under the applicable law - as a matter of principle - a claim for transfer fee can be set-off against a wrong claim. “

The Appellant cannot be followed when it claims, in essence, that the allegations of corruption allegedly related to a separate theme, were intended to be tackled later and for its own sake. Possible facts of corruption clearly fell within the first of the three questions supposed to be the subject of a prior separate examination, i.e. that relating to the validity of the transfer contract. In these conditions, the Appellant cannot reasonably maintain that it could not have expected to substantiate such allegations and plead them during the arbitration hearing, especially since it was itself that had put forward this argument in order to conclude that the transfer contract was void.

8.

In a fourth and final plea, the Appellant argues that the award under appeal would be contrary to the public policy referred to in Art. 190 par. 2 lit. and LDIP.

8.1.

An award is incompatible with public policy if it disregards the essential values and widely recognized which, according to the conceptions prevailing in Switzerland, should form the basis of any legal order (ATF 144 III 120 at 5.1; 132 III 389 at 2.2.3). There is a procedural and a substantive public policy.

8.1.1.

An award violates substantive public policy when it violates fundamental principles of substantive law to the point of no longer being reconcilable with the determining legal order and system of values (ATF 144 III 120 at 5.1; 132 III 389 at 2.2.1). It does not constitute a breach of public policy when one of the grounds of the arbitral tribunal breaches public policy; it is rather the result of the award which must be incompatible with public policy (ATF 144 III 120 at 5.1). The incompatibility of the award with public policy, referred to in Art. 190 par. 2 lit. e LDIP, is a more restrictive notion than that of arbitrariness (ATF 144 III 120 at 5.1; judgments 4A_318/2018 of March 4, 2019, at 4.3.1; 4A_600/2016, cited above, at 1.1.4). According to case law, a decision is arbitrary when it is manifestly untenable, seriously disregards a standard or a clear and undisputed legal principle, or shockingly offends the sense of justice and equity; it is not enough that another solution appears conceivable, or even preferable (ATF 137 I 1 at 2.4; 136 1316 at 2.2.2 and cited references). For an incompatibility with public policy, it is not enough that the

evidence was misjudged, that a finding of fact was manifestly false or a rule of law has been clearly violated (judgments 4A_116/2016 of December 13, 2016 at 4.1; 4A_304/2013 of March 3, 2014 at 5.1.1; 4A_458/2009 of June 10, 2010 at 4.1). The annulment of an international arbitration award for this ground of appeal is extremely rare (ATF 132 III 389 at 2.1).

8.1.2.

There is a violation of procedural public policy when fundamental principles and generally recognized have been violated, leading to an unbearable contradiction with the feeling of justice, of such that the decision appears incompatible with the values recognized in a State governed by the rule of law (ATF 141 III 229 at 3.2.1; 140 III 278 at 3.1; 136 III 345 at 2.1). According to consistent case law, procedural public policy, within the meaning of Art. 190 par. 2 lit. e LDIP, is only a subsidiary guarantee that cannot be invoked only if none of the grounds of Art. 190 par. 2 lit. a-d LDIP can be applied (ATF 138 III 270 at 2.3)

8.2.

8.2.1.

The interested party argues, first, that the award under appeal enshrines a violation of the order procedural public, because it would contravene the adversarial principles (right to be heard and equality of parties) and procedural fairness, in relation, on the one hand, to the scope of the division of the procedure, and, on the other hand, with the hearing of its expert E..

As presented, the argument based on Art. 190 par. 2 lit. e LDIP, whose admissibility is more than doubtful, must be dismissed. It consists, in fact, exclusively of a presentation, from another angle, of the criticisms made previously in support of

other grievances. In doing so, the Appellant disregards the subsidiary character of the guarantee of procedural public policy. There is therefore no need to consider the criticisms formulated by the Appellant in respect of the violation of procedural public policy which overlap with those who have already been discarded previously.

8.2.2.

Secondly, the Appellant seeks the annulment of the Award on the grounds that it would be incompatible with material public policy, inasmuch as the Panel would have refused “to examine (or even to investigate) acts of corruption”.

Such an argument does not stand up to scrutiny. According to case law, the violation of substantive public policy for corruption can only be admitted if a case of corruption is established, but the Arbitral tribunal refused to take it into account in its award (judgment 4A_532/2014 of January 29, 2015, at 5.1 and cited references). However, that is clearly not the case here. Under n. 387 of its award, the Panel indeed indicated that the Appellant had certainly alluded to acts of corruption but had not sufficiently substantiated its related allegations. Such a conclusion, based on an assessment of the evidence that this Federal Court cannot review, excludes the possibility of blaming the CAS of having disregarded public policy by ordering the payment of the first installment of the transfer. It is also in vain that the Appellant accuses the Panel of having violated substantive public policy, by refusing to suspend the procedure until the closure of investigations carried out by another authority over these corruption charges. In the absence of sufficiently substantiated allegations from the appellant, the Panel could, in fact, refuse to accede to its

request for a stay of proceedings, it being specified that such a decision was not, in this case, of an imperative nature.

Decision

In view of the foregoing, the appeal can only be dismissed to the extent it is admissible.

4A_434/2022

13 décembre 2022

A1 et consorts c. B1 et consorts

Recours contre la “sentence d’accord-parties” rendue le 23 août 2022 par le Tribunal Arbitral du Sport (TAS 2021/A/8338).

Une sentence d’accord parties peut-elle faire l’objet d’un recours ordinaire devant le Tribunal fédéral?

Extrait des faits

La Fédération X. de Football est la fédération nationale qui dirige le football dans l’État X. Elle est membre de la Fédération Internationale de Football Association (FIFA).

La présente affaire s’inscrit dans le contexte beaucoup plus large des difficultés que traverse la Fédération X. de Football depuis 2013 et qui sont à l’origine de nombreux litiges, le Tribunal Arbitral du Sport (TAS) ayant déjà enregistré plusieurs procédures en rapport avec ceux-ci. Les élections organisées par la Fédération X. de Football en 2013, en vue du renouvellement de ses instances fédérales et départementales, constituent le point de départ de ces querelles intestines, plus précisément l’annulation de ces élections par la Chambre de Conciliation et d’Arbitrage (CCA) du Comité National Olympique et Sportif de X. (ci-après: la CCA/CNOSC).

Dans ces circonstances, la FIFA s’est vue contrainte d’intervenir, ce qu’elle a fait en décidant de suspendre la Fédération X. de Football et de nommer un Comité de Normalisation chargé de gérer les affaires courantes de la fédération et d’organiser de nouvelles élections. Les activités déployées par ledit Comité ont toutefois été systématiquement annulées, raison pour laquelle la FIFA a été contrainte de constituer

un second Comité de Normalisation (ci-après: CDN) pour une durée de six mois jusqu’au 28 février 2018, qui avait notamment pour mission d’identifier les délégués de l’Assemblée générale de la Fédération X. de Football et des ligues régionales afin d’organiser l’élection d’un nouveau Comité Exécutif de la Fédération X. de Football.

Le 12 décembre 2018, le Président et les membres du Comité Exécutif de la Fédération X. de Football ont été désignés par une assemblée générale électorale.

Le 15 janvier 2021, le TAS a annulé les décisions relatives à l’adoption des nouveaux statuts de la Fédération X. de Football et a également annulé les élections du 12 décembre 2018 du Président et des membres du Comité Exécutif de la Fédération X. de Football. Il a en revanche refusé de réintégrer les membres de l’assemblée générale de la Fédération X. de Football élus en 2009, parmi lesquels figuraient notamment toutes les personnes physiques mentionnées dans le *rubrum* du présent arrêt. Dans sa sentence, il a néanmoins indiqué qu’il appartenait aux “organes actuellement en place” de finaliser le processus d’adoption des nouveaux statuts, ce qu’a confirmé la FIFA par courrier du 16 janvier 2021.

Du 2 au 4 février 2021, 51 personnes dont le nom figurait sur la liste des membres de l’assemblée générale de la Fédération X. de Football de 2009 ont convoqué une session extraordinaire afin d’élire un “Comité Exécutif Provisoire” et de remplacer les personnes élues le 12 décembre 2018.

Le 24 février 2022, D., élu le 11 décembre 2021 en qualité de Président de la Fédération X. de Football, a tenu une réunion de concertation avec 44 membres de l'assemblée générale de la Fédération X. de Football de 2009, au cours de laquelle ceux-ci ont notamment reconnu et pris acte de son élection.

Le 28 mars 2022, une assemblée générale de la Fédération X. de Football de 2009 s'est tenue en présence de 44 membres et de 12 membres représentés. Au cours de celle-ci, il a notamment été décidé ce qui suit:

“Résolution N o 6:

A l'unanimité des membres présents et représentés, l'Assemblée Générale de 2009 reconnaît la légitimité de l'assemblée générale ayant adopté les statuts et les textes de 2021. Elle valide en conséquence lesdits Statuts et textes subséquents de la Fédération X. de Football adoptée (sic) le 13 juillet 2021 conformément aux prescriptions de la FIFA afin de lever définitivement l'équivoque sur les textes applicables en matière de football dans l'État X.

Résolution N o 7:

A l'unanimité des membres présents et représentés, l'Assemblée Générale a décidé d'accompagner le Président D. dans sa politique d'apaisement, de réconciliation et de réforme du football X. Elle prend par conséquent acte de son élection à l'issue de l'Assemblée Générale électorale tenue le 11 décembre 2021.

Résolution N o 8

A l'unanimité des membres présents et représentés, l'Assemblée Générale a décidé de se désister de toutes les procédures pendantes devant les juridictions nationales et internationales en l'occurrence le Tribunal Arbitral du Sport (TAS) dans les procédures TAS 2021/A/8338; TAS 2021/A/8456.

(...)

Elle interdit enfin qu'un membre de l'Assemblée Générale de 2009 puisse agir

individuellement au nom et pour le compte de l'Assemblée Générale de 2009 dans les procédures en cours devant le TAS (...).”

Le 31 mars 2022, les parties à la procédure conduite par le TAS ont signé une convention reconnaissant la légitimité de l'assemblée générale de la Fédération X. de Football du 13 juillet 2021 ainsi que l'élection de D. à la présidence de la Fédération X. de Football.

Le 8 juin 2022, le TAS a fait droit à la requête en restitution de délai de l'appelante pour payer l'avance de frais complémentaire et a imparti un nouveau délai à l'appelante pour verser ladite avance de frais.

Le même jour, le TAS a avisé les parties qu'une “sentence d'accord parties” serait rendue dans la présente procédure à réception du paiement de l'avance de frais.

Le 9 juin 2022, le conseil de A1. et consorts a indiqué au TAS que ses mandants n'avaient pas adhéré à la convention passée le 31 mars 2022 et qu'ils sollicitaient, partant, une reconsidération de la décision de rendre une “sentence d'accord parties”. La demande de reconsidération a été rejetée le même jour par le TAS.

Le 13 juin 2022, A1. et consorts ont estimé que si le TAS venait à confirmer que sa décision d'accorder la restitution de délai requise n'était justifiée que par “l'accord de la majorité des intimés”, cela consacrerait notamment une violation de l'ordre public procédural.

Le 16 juin 2022, l'arbitre s'est estimé suffisamment renseigné pour rendre une “sentence d'accord parties” sans tenir au préalable une audience.

Le même jour, A1. et consorts ont indiqué qu'une telle sentence ne leur serait pas opposable, dès lors qu'ils n'avaient pas signé la convention passée le 31 mars 2022.

Le 22 juin 2022, le TAS a confirmé avoir reçu le solde de l'avance de frais.

Le 23 août 2022, l'arbitre unique désigné par le TAS a rendu une "sentence d'accord parties", en application de l'art. R56 al. 2 du Code de l'arbitrage en matière de sport (ci-après: le Code), au terme de laquelle il a ratifié la convention conclue entre les parties le 31 mars 2022 et a dit que la procédure arbitrale était terminée et rayée du rôle.

Le 30 septembre 2022, A1. et consorts (ci-après: les recourants) ont formé un recours en matière civile aux fins d'obtenir l'annulation de ladite sentence.

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. En l'occurrence, l'arbitre a rendu une décision, intitulée "sentence d'accord-parties", au terme de laquelle il a ratifié la convention conclue le 31 mars 2022 et a rayé la cause du rôle.

3.2. Dans leur mémoire de recours, les intéressés font valoir que l'acte attaqué est une décision finale sur le fond contre laquelle un recours en matière civile au Tribunal fédéral est ouvert. Il convient d'examiner le bien-fondé de cette affirmation.

3.3.

3.3.1. 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 (arrêt 4A_222/2015 du 28 janvier 2016 consid. 3.1.1 avec une référence à l'**ATF 116 II 80** consid. 2b), 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 136 III 200** consid. 2.3.1; arrêt 4A_596/2012 du 15 avril 2013 consid. 3.3). 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 142 III 284** consid. 1.1.1; arrêt 4A_222/2015, précité, consid. 3.1.1).

3.3.2. Selon le droit suisse de procédure civile, la transaction judiciaire elle-même, en tant qu'acte juridique des parties, met fin au procès (**ATF 139 III 133** consid. 1.2; arrêts 4A_640/2016 du 25 septembre 2017 consid. 2.5; 4A_254/2016 du 10 juillet 2017 consid. 4.1.1). Le tribunal se borne à en prendre acte; il ne rend pas de décision judiciaire, même si, formellement, il raye la cause du rôle. Une décision de radiation de la cause du rôle, au sens de l'art. 241 al. 3 du Code de procédure civile du 19 décembre 2008 (CPC; RS 272), est dès lors un acte n'ayant qu'une portée déclaratoire (**ATF 139 III 133** consid. 1.2; arrêts 4A_640/2016, précité, consid. 2.5; 4A_254/2016, précité, consid. 4.1.1). L'invalidité de la transaction judiciaire ne peut être invoquée, notamment pour vices du consentement (art. 23 ss CO), que par la voie de la révision (art. 328 al. 1 let. c CPC; **ATF 139 III 133** consid. 1.3; arrêt 4A_254/2016, précité, consid. 4.1.1). La décision de radiation au sens de l'art. 241

al. 3 CPC n'est en revanche pas susceptible d'un recours ordinaire, hormis sur la question des frais de la procédure (ATF 139 III 133 consid. 1.3).

Jugeant cette solution insatisfaisante, le Conseil fédéral, dans son Message du 26 février 2020 relatif à la modification du code de procédure civile suisse, a toutefois proposé de créer une voie de recours contre une décision de radiation du rôle prise sur la base de l'art. 241 al. 3 CPC. Dès lors qu'il n'existe aucun moyen de droit permettant de contester une transaction, un acquiescement ou un désistement d'action, hormis celui de la révision (art. 328 al. 1 let. c CPC), l'instauration d'une voie de recours à l'encontre de la décision judiciaire de radiation du rôle permettrait à la partie concernée d'invoquer les vices conduisant à la nullité de la transaction (Message du 26 février 2020 relatif à la modification du code de procédure civile suisse [Amélioration de la praticabilité et de l'application du droit], FF 2020 p. 2670 s.).

3.3.3. En matière d'arbitrage interne, l'art. 385 CPC dispose que lorsque les parties mettent fin au litige pendant la procédure d'arbitrage, le tribunal arbitral leur en donne acte, sur requête, sous la forme d'une sentence. Cette disposition s'inspire de l'ancien art. 34 du concordat sur l'arbitrage du 27 mars 1969 (CA). La formulation de l'art. 385 CPC vise à inclure toute forme de règlement du litige par les parties (l'acquiescement, le désistement ou la transaction). Ainsi, le tribunal rend sur requête une sentence constatant que les parties ont mis fin au litige. A cet effet, le tribunal arbitral incorpore dans le dispositif de la sentence arbitrale la partie de la transaction réglant le litige ou y constate l'acquiescement ou le désistement (Message du 28 juin 2006 relatif au code de procédure civile, FF 2006 p. 7009).

Selon l'art. 396 al. 1 let. c LDIP, une partie peut demander la révision d'une sentence

entrée en force en faisant notamment valoir que la transaction judiciaire n'est pas valable. Plusieurs auteurs estiment que la révision est la seule voie de droit à disposition de la partie souhaitant contester la validité de la transaction, la sentence prenant acte de l'existence d'une telle transaction n'étant pas susceptible d'un recours en matière civile au Tribunal fédéral (PHILIPPE SCHWEIZER, in Commentaire romand, Code de procédure civile, 2e éd. 2019, no 8 ad art. 385 CPC; TARKAN GÖKSU, in Code de procédure civile, Petit commentaire, Chabloy et al. [éd.], 2020, no 5 ad art. 385 CPC; GASSER/RICKLI, Schweizerische Zivilprozessordnung, Kurzkomentar, 2e éd. 2014, no 3 ad art. 385 CPC; BRUNNER/STEININGER, in Schweizerische Zivilprozessordnung, Brunner et al. [éd.], 2e éd. 2016, no 8 ad art. 385 CPC; d'un avis contraire: MATTHIAS WIGET, Vergleich, Klageanerkennung und Klagerückzug vor Schiedsgerichten, 2007, p. 90 s.; DANIEL GIRSBERGER, in Commentaire bâlois, Schweizerische Zivilprozessordnung, 3e éd. 2017, no 16 ad art. 385 CPC; FELIX DASSER, in Kurzkomentar ZPO, 3e éd. 2021, Oberhammer et al. [éd.], no 8 ad art. 385 CPC; BAECKERT/WALLMÜLLER, Rechtsmittel bei Beendigung des Verfahrens durch Entscheidsurrogat [Art. 241 ZPO], in PCEF 2014-2015 p. 27; FORNARA/COCCHI, in Commentario pratico al Codice di diritto processuale civile svizzero, Trezzini et al. [éd.], 2e éd. 2017, no 9 ad art. 385 CPC; MICHAEL LAZOPOULOS, in Commentaire bernois, Schweizerische Zivilprozessordnung, 2014, no 38 ad art. 385 CPC; PLANINIC/ERK-KUBAT, in ZPO Kommentar, Gehri et al. [éd.], 2e éd. 2015, no 5 ad art. 385 CPC).

3.3.4. Après ce bref survol des moyens de droit à disposition d'une partie souhaitant remettre en cause une transaction judiciaire conclue dans le cadre d'un procès civil ordinaire ou d'un arbitrage interne soumis aux règles du CPC, il sied de relever que la

LDIP ne règle nullement la question des succédanés ou ersatz de décision que sont les actes des parties mettant fin à la procédure sans décision, tels la transaction, l'acquiescement ou le désistement. L'absence de base légale dans la LDIP ne signifie toutefois pas que les parties ne peuvent pas mettre fin au litige qui les divise par une transaction (BERGER/KELLERHALS, *International and Domestic Arbitration in Switzerland*, 4e éd. 2021, n. 1540; MARKUS WIRTH, in *Commentaire bâlois, Internationales Privatrecht*, 4e éd. 2021, no 55 ad art. 189; LAZOPOULOS, *op. cit.*, no 5 ad art. 385 CPC; DIETER GRÄNICH, in *Kommentar zur Schweizerischen Zivilprozessordnung [ZPO]*, Sutter-Somm et al. [éd.], 3e éd. 2016, no 2 ad art. 385 CPC; RONNIE BETTLER, *Der gerichtliche Vergleich nach Art. 241 ZPO*, in *PJA* 2018 p. 1491). Rien n'empêche ainsi *a priori* les parties de demander au tribunal arbitral qu'il rende une sentence entérinant les termes de leur accord (PIERRE-ANDRÉ MORAND, *La transaction*, 2016, n. 661). Certains auteurs soutiennent que la LDIP contient une lacune sur ce point qu'il convient de combler en appliquant l'art. 385 CPC par analogie (TARKAN GÖKSU, *Schiedsgerichtsbarkeit*, 2014, n. 1769 et les références citées). D'autres font valoir que le point de savoir si un tribunal arbitral peut rendre une sentence constatant l'existence d'une transaction conclue par les parties, souvent qualifiée de "sentence d'accord parties" (*Schiedsspruch mit vereinbartem Wortlaut; consent award* ou *award on agreed terms*), dépend du droit régissant la procédure d'arbitrage (art. 182 LDIP; WIGET, *op. cit.*, p. 39 s.; LE MÊME, *Der Schiedsspruch mit vereinbartem Wortlaut im schweizerischen Schiedsgerichtsrecht*, in *PCEF* 2010 p. 248; GABRIELLE NATER-BASS, *Praktische Aspekte des Vergleichs in Schiedsgerichtsverfahren*, in *Bull. ASA* 2002 p. 430; IRMA AMBAUEN, *Eine Gegenüberstellung im Kontext der Opting-out-Möglichkeiten - Unter besonderer Berücksichtigung der zwingenden Bestimmungen, der Schiedsfähigkeit und der*

Anfechtbarkeit von Schiedssprüchen, 2016, n. 237; WIRTH, *op. cit.*, no 55 ad art. 189 LDIP). A cet égard, il sied de relever que de nombreux règlements d'arbitrage internationaux réservent expressément cette possibilité (cf. art. 33 du règlement d'arbitrage de la Chambre de commerce internationale; art. 36 al. 1 du règlement suisse d'arbitrage international; art. 36 al. 1 du règlement d'arbitrage de la Commission des Nations Unies pour le droit commercial international; art. 26.9 des règles d'arbitrage de la London Court of International Arbitration [LCIA Rules]; art. 56 al. 2 du Code).

S'agissant des éventuelles voies de droit permettant de remettre en cause une sentence entérinant une transaction conclue par les parties dans le cadre d'un arbitrage international soumis aux règles de la LDIP, plusieurs auteurs sont d'avis qu'un recours en annulation fondé sur l'art. 190 LDIP est possible (WIGET, *op. cit.*, p. 89 s. et les références citées; ANDREAS BUCHER, *Die neue internationale Schiedsgerichtsbarkeit in der Schweiz*, 1989, n. 337; STEPHEN BERTI, *Rechtsmittel gegen Schiedsentscheide nach IPRG*, in *Schiedsgerichtsbarkeit*, Andreas Kellerhals [éd.], 1997, p. 348; HORVATH/FISCHER/PRANTL, in *Praxishandbuch Schiedsgerichtsbarkeit*, Hellwig Torggler et al. [éd.], 2e éd. 2017, n. 1331; BERGER/KELLERHALS, *op. cit.*, n. 1548; RÜEDE/HADENFELDT, *Schweizerisches Schiedsgerichtsrecht nach Konkordat und IPRG*, 2e éd. 1993, p. 271; PFISTERER/SCHNYDER, *Internationale Schiedsgerichtsbarkeit*, 2e éd. 2020, p. 143; KARL SPÜHLER, *Der gerichtliche Vergleich*, 2015, p. 53 s.). Certains auteurs estiment que les griefs susceptibles d'être invoqués dans le cadre d'un recours dirigé contre une sentence entérinant un accord transactionnel sont toutefois limités (SPÜHLER, *op. cit.*, p. 57). D'autres soulignent qu'un recours en annulation ne permettra de toute manière pas au Tribunal

fédéral d'examiner si la transaction a été valablement conclue (BERGER/KELLERHALS, op. cit., n. 1555). Un auteur est d'avis qu'une sentence d'accord parties ne peut pas faire l'objet d'un recours en annulation fondé sur l'art. 190 al. 2 LDIP, puisque le dispositif de ladite sentence correspond à l'accord des parties, raison pour laquelle celles-ci n'ont par conséquent aucun motif de contester le contenu de la sentence (MORAND, op. cit., n. 680).

3.3.5. On peut raisonnablement s'interroger sur le point de savoir si un recours en annulation fondé sur l'art. 190 al. 2 LDIP dirigé contre une sentence ne faisant qu'entériner l'accord transactionnel conclu par les parties est effectivement recevable. Il est vrai qu'un tel acte revêt formellement la forme et les caractéristiques d'une sentence arbitrale. Cela étant, il peut paraître quelque peu paradoxal, de prime abord, d'admettre qu'un recours en annulation de la sentence soit possible dans un tel cas en matière d'arbitrage international - domaine dans lequel les règles particulières qui régissent le recours au Tribunal fédéral sont en principe plus restrictives que celles applicables au recours en matière civile dirigé contre un arrêt cantonal de dernière instance - alors que la jurisprudence considère qu'il n'existe aucune voie de recours, hormis celle de la révision, à l'encontre d'une décision par laquelle le juge étatique suisse prend acte de la transaction passée par les parties et raye la cause du rôle.

Il faut également bien voir qu'en matière d'arbitrage interne, le législateur a expressément prévu un cas de révision permettant de remettre en cause une sentence arbitrale au motif que le désistement d'action, l'acquiescement ou la transaction judiciaire n'est pas valable (art. 396 al. 1 let. c CPC). D'aucuns jugent que ce moyen de droit est exclusif, raison pour laquelle tout recours en annulation fondé sur l'art. 393 CPC dirigé contre une sentence d'accord

visée par l'art. 385 CPC n'entrerait pas en ligne de compte. La LDIP ne règle pas cette question et ne prévoit pas de cas de révision similaire à celui de l'art. 396 al. 1 let. c CPC. On peut dès lors légitimement se demander s'il faut y voir là un indice de la volonté du législateur d'exclure toute possibilité de remettre en cause une transaction passée dans le cadre d'une procédure arbitrale internationale que ce soit par la voie du recours ou par celle de la révision ou s'il s'agit là, au contraire, d'une preuve supplémentaire de ce qu'un recours en annulation fondé sur l'art. 190 al. 2 LDIP est également ouvert dans un tel cas pour attaquer une sentence entérinant une transaction passée les parties. Cela étant, point n'est besoin d'approfondir ici l'examen de la question qui vient d'être évoquée du moment que le présent recours, fût-il recevable, devrait de toute façon être rejeté pour les motifs indiqués plus loin.

[...]

6. Invoquant en premier lieu le motif de recours prévu par l'art. 190 al. 2 let. b LDIP, les recourants soutiennent que le TAS n'était pas compétent pour rendre la sentence attaquée (considérant 6)

6.3. Tel qu'il est présenté, le grief ne saurait prospérer. C'est en vain que les intéressés soutiennent que le TAS n'était pas compétent pour rendre la sentence attaquée. Il ressort, en effet, des constatations de fait opérées par l'arbitre que l'appelante a requis et obtenu une restitution de délai pour verser l'avance de frais supplémentaire exigée par le TAS. Or, l'intéressée s'est exécutée en temps utile. Dans ces conditions, la restitution de délai et le paiement effectué dans le respect du délai imparti ont fait échec à la fiction irréfragable de retrait de l'appel. Pour le reste, les recourants font fausse route lorsqu'ils tentent de soutenir que le TAS ne pouvait pas fonder sa compétence sur la clause d'arbitrage insérée dans la convention passée le 31 mars 2022. La compétence du TAS reposait en

effet sur la réglementation édictée par la Fédération X. _____ de Football. C'est également en pure perte que les recourants font valoir que les prétentions visées par la procédure arbitrale étaient exorbitantes de l'objet de la convention précitée, dès lors que l'arbitre a constaté que les parties à la procédure avaient toutes expressément accepté que ladite convention soit incorporée à la sentence querellée.

7.

En deuxième lieu, les recourants dénoncent diverses violations de leur droit d'être entendus (art. 190 al. 2 let. d LDIP) (considérant 7)

7.1 (...) le grief tiré de la violation du droit d'être entendu ne doit pas servir, pour la partie qui se plaint de vices affectant la motivation de la sentence, à provoquer par ce biais un examen de l'application du droit de fond (**ATF 142 III 360** consid. 4.1.2). Or, le Tribunal fédéral a souligné le caractère appellatoire marqué du mémoire de recours soumis à la Cour de céans.

[...]

7.3. (...), l'argumentation développée par les recourants n'emporte pas la conviction de la Cour de céans. N'en déplaît aux intéressés, l'arbitre a visiblement considéré qu'il pouvait faire droit à la demande de restitution de délai présentée par les recourants, vu non seulement l'absence d'opposition de la part des intimés mais également l'accord exprès signifié par les intervenants à la procédure. Ce faisant, il a rejeté, à tout le moins de manière implicite, les arguments avancés par les recourants tendant à démontrer que les conditions d'octroi d'une restitution de délai n'étaient pas remplies. Qu'il l'ait fait à juste titre ou non importe peu sous l'angle du moyen pris de la violation du droit d'être entendu des recourants.

C'est également en vain que les intéressés, sous le couvert d'une atteinte à leur droit

d'être entendus, se plaignent de ce que l'arbitre ne pouvait pas rendre une sentence d'accord parties. L'arbitre a en effet retenu que la décision de se désister de toutes les procédures arbitrales pendantes devant le TAS, adoptée lors de la session de l'assemblée générale de la Fédération X. de Football de 2009 tenue le 28 mars 2022, s'imposait à tous les membres de celle-ci, à l'instar de la convention signée le 31 mars 2022. Il a aussi indiqué que les parties à la procédure avaient accepté que ladite convention soit incorporée à la sentence attaquée. Il appert ainsi que l'arbitre a établi que la convention litigieuse liait tous les membres de l'assemblée générale de la Fédération X. de Football de 2009, y compris ceux qui avaient manifesté ultérieurement leur opposition à celle-ci, et que les parties à la procédure avaient consenti à ce que cette convention soit intégrée à la sentence querellée. Il s'agit là de constatations de fait qui lient le Tribunal fédéral, qu'elles soient fondées ou non. Aussi les recourants tentent-ils en pure perte de les remettre en question en proposant une appréciation différente des pièces ressortant du dossier de l'arbitrage. C'est également en vain que les intéressés prétendent que l'arbitre aurait procédé à de telles constatations en faisant fi des arguments qu'ils avaient avancés aux fins de démontrer qu'ils n'avaient personnellement ni manifesté leur volonté de se retirer de la procédure ni accepté le prononcé d'une sentence entérinant la convention conclue le 31 mars 2022 en application de l'art. R56 al. 2 du Code. A la lecture de la sentence attaquée, il appert, en effet, que l'arbitre a considéré que les intervenants n'agissaient pas en leur nom propre mais bel et bien au nom de l'assemblée générale de la Fédération X. de Football de 2009. Or, la majorité de ses membres avait décidé de se désister de la procédure et de conclure une convention transactionnelle, dont l'art. 3, reproduit dans la sentence attaquée, prévoyait notamment ce qui suit:

“Les parties requièrent respectueusement l’auguste Tribunal Arbitral du Sport (TAS) qu’il ratifie la présente convention (...)”.

Sur la base de ce qui précède, l’arbitre a visiblement considéré que les parties au litige avaient clairement manifesté leur intention que la convention litigieuse soit incorporée à la sentence. Il a ainsi rejeté, à tout le moins de manière implicite, la thèse des recourants selon laquelle l’accord individuel de tous les membres de l’assemblée générale de la Fédération X. de Football élus en 2009 ayant pris part à la procédure était nécessaire pour rendre une sentence d’accord parties fondée sur l’art. R56 al. 2 du Code. Quant à la circonstance selon laquelle le CNOSC n’était pas partie à ladite convention, il l’a visiblement jugé, à tort ou à raison, non décisive et, partant, a considéré qu’elle ne faisait pas obstacle au prononcé d’une sentence d’accord parties, ce qui apparaît défendable, dès lors que le CNOSC a en l’occurrence joué, *mutatis mutandis*, le même rôle que celui qui est dévolu d’ordinaire, dans une procédure cantonale, à un tribunal de première instance dont le jugement est soumis à la juridiction d’appel compétente.

Pour le reste, il saute aux yeux que les recourants, lorsqu’ils se plaignent, sous le couvert d’une prétendue violation de leur droit d’être entendus, de ce que l’arbitre n’aurait prétendument pas contrôlé la bonne foi de l’accord transactionnel, s’en prennent exclusivement à la motivation du TAS et tentent d’obtenir un examen matériel de la sentence par l’autorité de recours, ce qui n’est pas admissible. Quoiqu’il en soit, il ressort de la sentence attaquée que l’arbitre a bel et bien examiné cette question, puisqu’il a considéré que rien n’indiquait que la convention litigieuse n’aurait pas été conclue de bonne foi entre les parties ou qu’elle était contraire à l’ordre public. C’est à tort que les intéressés qualifient pareille motivation de formule stéréotypée ne revêtant pas plus de valeur qu’une simple clause de style, étant précisé que les recourants ne sauraient obtenir des

considérations précises sur chaque détail du raisonnement tenu par l’arbitre. C’est dès lors en pure perte que les intéressés se lancent, sur près de sept pages, dans une démonstration appellatoire visant à démontrer que l’issue du litige aurait été différente si l’arbitre n’avait pas omis de respecter son devoir de contrôle.

**8.
En troisième et dernier lieu, les recourants font valoir que la sentence entreprise serait incompatible avec l’ordre public (art. 190 al. 2 let. e LDIP) (considérant 8)**

[...]
8.2.1 (...) [L]e moyen pris de l’incompatibilité avec l’ordre public, au sens de l’art. 190 al. 2 let. e LDIP et de la jurisprudence y afférente, n’est pas recevable dans la mesure où il tend uniquement à établir la contrariété de la sentence attaquée à une norme juridique. Aussi est-ce en vain que les intéressés se livrent à une critique purement appellatoire aux fins de démontrer que l’assemblée générale de la Fédération X. de Football de 2009 tenue le 28 mars 2022 n’aurait pas été convoquée conformément aux règles édictées par la Fédération X. de Football.

Force est par ailleurs de relever que l’arbitre est parvenu à dégager la réelle et commune intention des parties puisqu’il a constaté que celles-ci avaient toutes accepté que la convention passée le 28 mars 2022 soit incorporée dans la sentence entreprise, ce qui est du reste corroboré par le texte même de la clause 3 de ladite convention reproduite dans la sentence querellée. Ce faisant, l’arbitre a procédé à une interprétation subjective de la volonté des parties, dont il a tiré la conclusion que les intéressés s’étaient mis d’accord quant à l’issue de la procédure. Or, l’interprétation subjective relève du domaine des faits, si bien qu’elle lie le Tribunal fédéral (ATF 142 III 239 consid. 5.2.1). Au demeurant, ressortirait-elle au droit que le Tribunal fédéral ne pourrait pas non plus la

revoir dans le cadre de l'examen du grief fondé sur l'art. 190 al. 2 let. e LDIP. C'est dès lors en pure perte que les recourants critiquent certaines constatations de fait opérées par l'arbitre en soutenant qu'ils n'auraient jamais consenti à ce que celui-ci rende une sentence d'accord parties, étant précisé que, même à supposer que les constatations de fait en question fussent manifestement fausses, ce qui n'est pas établi, cela ne suffirait pas à taxer la sentence entreprise de contraire à l'ordre public.

Enfin, c'est à tort que les recourants soutiennent que le non-respect de l'art. R56 al. 2 du Code serait constitutif d'une contrariété à l'ordre public procédural. Ce faisant, ils perdent de vue que le Tribunal fédéral, lorsqu'il statue sur un recours en matière d'arbitrage international, n'est pas compétent pour vérifier le respect des règles ou principes procéduraux exorbitants des motifs énumérés limitativement à l'art. 190 al. 2 LDIP, étant précisé que l'application manifestement erronée d'une règle de procédure n'est pas constitutive d'une violation de l'ordre public procédural au sens de l'art. 190 al. 2 let. e LDIP, sauf lorsqu'il s'agit d'une violation d'une règle essentielle pour assurer la loyauté de la procédure, ce que ne démontrent nullement les intéressés (arrêts 4A_416/2020 du 4 novembre 2020 consid. 3.1; 4A_612/2009 du 10 février 2010 consid. 6.3.1).

[...]

Décision

Au vu de ce qui précède, le recours doit être rejeté dans la mesure de sa recevabilité.

Informations diverses
Miscellaneous
Información miscelánea



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