Bulletin TAS
CAS Bulletin

2016/2

TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT

Bulletin TAS
CAS Bulletin
2016/2

Lausanne 2016

Table des matières/Table of Contents

Message from the CAS Secretary General

With more than 600 procedures registered by the CAS – a figure never reached so far -, the creation for the first time of a CAS Anti-Doping Division (CAS ADD) on the occasion of the Rio 2016 Olympic Games (13 cases registered), alongside the "classic" CAS ad hoc Division (28 cases registered), 2016 is a record year for the CAS in many aspects. The number of mediation procedures also increased in 2016 with a total of 10 mediations registered.

In order to maintain an open and active list of CAS members, and also to slightly increase it due to the current workload, 24 new CAS arbitrators and 2 new mediators have been appointed by the ICAS.

This year, the International Council of Arbitration for Sport (ICAS) was also pleased to note that the German Federal Tribunal (GFT), like the Swiss Federal Tribunal a few years ago, recognized that the CAS was a genuine arbitration tribunal. Importantly, the GFT emphasized the fact that the arbitration clause in favour of CAS does not constitute an abuse of a dominant position in the sense of German law and that the existence of a mandatory list of arbitrators (constituted by the ICAS), regardless of its number of "representatives" of federations and of athletes, does not affect the equality of the parties.

Further to the successful experience of the CAS Anti-doping Division in Rio, the ICAS is now working on its regulations to include the International Federations in the CAS ADD procedure during the Olympic Games 2018 in Pyongchang (South Korea). The objective is to reduce the number of internal procedures related to the same facts and the same athletes. The amended CAS ADD Rules will continue to guarantee a double degree of jurisdiction.

Still on a regulatory level, the ICAS has amended a few provisions of the Code of Sports-related Arbitration. The changes have been made, as a matter of clarification, in order to codify the existing practice of the Court. The most important amendment is at Article R32 (filing of written submissions, compliance with the time limits). The ICAS has also decided to review the table of fees for arbitrators and has increased the basic hourly fee from CHF 250.- to CHF 300.-, noting that the last increase occurred 12 years ago. All amended rules are applicable to new cases filed at the CAS on or after 1 January 2017.

Regarding the "leading cases" selected for this issue, if they mostly remain football-related, some relevant doping cases have been included, at a time when the number of procedures related to doping at CAS is regularly increasing following the publication of the so-called McLaren Report commissioned by WADA in relation to Russian athletes.

In the area of football, for the first time the case Racing Club Asociación Civil v. FIFA deals with the issue of bridge transfer. In both cases Club Samsunspor v. FIFA and Liga Deportiva Alajuelense v. FIFA, the CAS panels address the issue of disciplinary sanction for non-compliance with a FIFA decision. In Zohran Bassong & RSC Anderlecht c. FIFA, the scope of the exceptions to the principle of the ban of international transfer of minor players is examined. The case Fovu Club de Baham v. Canon Sportif de Yaoundé deals with various issues related to the sanction applicable to a club having fielded an ineligible player. Lastly, in David Martin Nakhid v. FIFA, several matters related to the FIFA presidential election are analysed.

Turning to doping, the case WADA v. Martin Johnsrud Sundby & FIS addresses the question of the inhalation of a prohibited substance in excess of the "use threshold" and without a Therapeutic Use Exemption

(TUE) whereas the case Tomasz Hamerlak v. IPC contemplates the issue of the responsibility and intent of an athlete regarding the use of supplements. The cases ROC, Lyukman Adams et al. v. IAAF and ROC v. IPC - both linked to the Russian doping program - are respectively dealing with the validity of the IAAF rules providing for the ineligibility of athletes affiliated to a suspended federation to participate in international competitions and to the validity of the decision of the International Paralympic Committee to suspend the Russian Paralympic Committee. Finally, the well-known Sharapova case (Maria Sharapova v. ITF) is about the length of the sanction applicable to the athlete having used Meldonium.

In other sports areas, the case British Swimming et al. v. FINA deals with the recognition of a world record despite the absence of anti-doping control whereas in Horse Sport Ireland & Cian O'Connor v. FEI, the principles applicable to field of play decisions are examined in the light of specific and unfortunate facts.

With regard to the above-mentioned Sharapova case, we are pleased to publish an article prepared by Despina Mavromati, Counsel to the CAS, entitled "Application of the 2015 WADA Code through the example of a recent CAS Award". Furthermore, an interesting analysis on time limits applicable before the CAS written by Pauline Pellaux, Counsel to the CAS, is also included in this issue.

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

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

Articles et commentaires
Articles and Commentaries

Application of the 2015 WADA Code through the example of a recent CAS Award (Sharapova v. ITF)

Despina Mavromati*

I. Introduction

Maria Sharapova, a top-level professional tennis player (the Athlete) had tested positive (Adverse Analytical Finding, AAF) for *Meldonium* after the Australian Open Tournament on 26 January 2016 and after an out-of-competition test some days later, on 2 February 2016. *Meldonium* is a prohibited, non-specified substance included at S4 in the "Prohibited List" since 1 January 2016. On 7 March 2016, the Player publicly announced her unintentional Anti-Doping Rule (ADR) violation (by ingesting *"Mildronate"*) through a press conference.[1] The Independent Tribunal (the Tribunal) appointed by the International Tennis Federation (ITF) imposed a two-year ineligibility period on the Athlete (the Decision). The Athlete appealed against this decision to the Court of Arbitration for Sport (CAS) and the latter issued an award reducing her sanction to fifteen months. The case drew, due to the Athlete's reputation and top-level performance, much public and media attention. Beyond the publicized character of the case, however, the CAS award offers interesting findings regarding the application of the 2015 WADA Code by the CAS as well as some other procedural and substantive issues that are worth reviewing.

II. The ITF Independent Tribunal Decision

On 6 June 2016, the Independent Tribunal appointed by the ITF (the "Tribunal") issued a decision,[2] imposing a two-year ineligibility period on the Athlete (starting on 26 January 2016) based on Articles 10.2.1 (a) and 10.10.3(b) of the ITF Anti-Doping Programme (TADP).[3] The Tribunal applied Art. 2.1 TAPD for the finding of *Meldonium* in

* Managing Counsel / Head of Research and Mediation at the Court of Arbitration for Sport. Many thanks go to Paul David QC for interesting comments to a previous draft of this paper (posted on SSRN on 13 October 2016).

[1] CAS 2016/A/4643, *Sharapova v. ITF* pars. 6-8 (CAS award available at http://www.tas-cas.org/fileadmin/user_upload/Award_4643__FINAL__internet.pdf).

[2] Decision of the Independent Tribunal appointed by the ITF of 6 June 2016, available at http://www.itftennis.com/news/231175.aspx ; see a comment on the decision in the WADA Commentary http://wadc-commentary.com/sharapova/ (posted on 10 June 2016); see also Tom Rudkin, Maria Sharapova: Key facts of the ITF doping decision and her chances on appeal, http://www.lawinsport.com/articles/item/maria-sharapova-key-facts-of-the-itf-doping-decision-and-her-chances-on-appeal (posted on 7 July 2016).

[3] In these pages, all the mentioned Rules of the ITF Anti-Doping Programme (TADP) should be considered as identical to the respective provisions of the 2015 WADA Code (WADC) unless otherwise specified.

Athlete's sample (on 26 January and 2 February 2016). Under Art. 10.2.1(a), it imposed a two-year ineligibility period (first anti-doping violation) finding that the contravention of the anti-doping rule was not intentional because the athlete *"did not appreciate that Mildronate contained a substance prohibited from 1 January 2016"* (i.e. *Meldonium*).[4] However, the Tribunal found that the athlete bore sole responsibility for the ADR violation and had significant fault *"failing to take any steps to check whether the continued use of this medicine was permissible"* and concealing her use of *Mildronate*.[5]

III. The CAS Award and the application of the 2015 WADC

A. Procedural Issues: Power of Review of the CAS Panel and Applicable Law

The CAS Panel disagreed with the conclusions of the Tribunal's decision. Based on its full power of review, it reduced the sanction to fifteen months.[6] However, the full power of review does not extend to the findings decided in the appealed decision that were not subsequently contested by the respondent, e.g. through a counterclaim.[7] In this respect, the Panel took the respondent's position that the second AAF (on 2 February 2016) was due to the remnants of *Mildronate* found in the first AAF (on 26 January) and thus did not consider the second AAF for the purposes of the CAS award.[8] Furthermore, the non-intentional character of the offence[9] and the taking of *Mildronate* without intent to enhance her performance were not re-discussed in this case,[10] since these issues were already decided in the appealed decision.

The Panel proceeded to an interpretation of Art. R57 CAS Code under the 2015 WADC.[11] By referring to previous CAS jurisprudence, it held that, the full power of review of CAS Panels means that these *"would not easily 'tinker' with a well-reasoned sanction, i.e. to substitute a sanction of 17 or 19 months' suspension for one of 18"*.[12] This is also in line with Art. 12.6.6 TAPD (and the respective Art. 13.1.2 of the 2015 WADC) according to which *"In making its decision, CAS need not give deference to the discretion exercised by the body whose decision is being appealed."*[13]

Another interesting procedural issue regarding the application of the 2015 WADC is the applicable law applying subsidiarily to a doping-related case. Under Art. 1.7 WADC, Swiss law applies subsidiarily to the provisions of the WADC. However, Art. 12.6.4 of the ITF TAPD foresees the subsidiary application

---

[4] *Mildronate* is the brand name of the substance *Meldonium*. The Athlete supported that she could not know that *Mildronate* was not the name of the substance but the brand name containing the prohibited substance. See also the analysis made by WADA Science Director in CAS 2016/A/4643, *Sharapova v. ITF*, para. 28: *"The substances are normally included in the Prohibited List on the basis of their "International Nonproprietary Names (INN)" (or "generic names") when assigned to pharmaceuticals by the World Health Organization (WHO), and not of their "brand names"*.

[5] CAS 2016/A/4643, *Sharapova v. ITF*, pars. 10 f.

[6] CAS 2016/A/4643, *Sharapova v. ITF*, para. 61, 63 & 100. The full power of review provided in Art. R57 CAS Code means that the panel has full power to review the facts and the law, without being limited by the facts established and the appreciation made by the previous instance. See Mavromati D./ Reeb M., *The Code of the Court of Arbitration for Sport – Commentary, Cases and Materials*, Wolters Kluwer 2015, p. 505 ff.

[7] The arbitral tribunal should not decide beyond the matters submitted, otherwise it risks to violate the principle of *ne ultra petita* under Art. 190(2)c of the Swiss Private International Law Act (PILA).

[8] CAS 2016/A/4643, *Sharapova v. ITF*, para. 4-6.

[9] CAS 2016/A/4643, *Sharapova v. ITF*, par. 101. The presence of intentionality would have *de facto* excluded the mitigation of the sanction based on Art. 10.5.2 TAPD, see also Rigozzi / Haas / Wisnosky / Viret, *Breaking down the process for determining a basic sanction under the 2015 World Anti-Doping Code*, Int Sports Law J (2015) 15, p. 14; p. 47.

[10] CAS 2016/A/4643, *Sharapova v. ITF*, para. 92 (par. 24 of the Tribunal's decision).

[11] CAS 2016/A/4643, *Sharapova v. ITF*, para. 62.

[12] CAS 2011/A/2518, *Kendrick v. ITF*, para. 10.7, with reference to CAS 2010/A/2283, *Bucci v. FEI*, par. 14.36.

[13] CAS 2015/A/4163, *N. Dobud v. FINA*, para. 59.

of English law. Notwithstanding the arguments raised by the Athlete (on the need to have uniform application of doping rules based on Art. 1.7 WADC), the Panel strictly applied Art. R58 CAS Code and the "applicable regulations" (which in this case were the TAPD). It therefore held that Art. 12.6.4 TAPD contained an express choice of law and applied English law (even though there was subsequently no need to have recourse to English law for the purposes of this award).[14]

B. The degree of fault: Qualification of Non-Significant Fault under the 2015 WADC

The CAS Panel essentially dealt with two issues: the degree of fault and the (appropriate) length of the sanction. In her appeal brief, the Athlete accepted that she had some degree of fault / negligence with the baseline sanction being two years (Art.10.5.2). The Athlete further supported that her degree of fault was small and the sanction should thus be reduced to one year (the minimum provided for in Art. 10.5.2 TAPD), and even less because any period exceeding eight months *"would be disproportionate"*.[15]

As seen above, the Panel did not question the non-intentional character of the offence:[16] this was also accepted by the Tribunal in its decision on the grounds that the Athlete *"did not appreciate that Mildronate contained a substance prohibited from 1 January 2016."* The issue of *"intentionality"* is a complex one under the 2015 WADC. Although the 2015 WADC does not explicitly require to establish the origin of the substance, this is an important factual element for the consideration of the athlete's fault under Art. 10.2.3 (the Athlete had established the origin of the substance in this case). The Tribunal made use of its flexibility under the WADC and reviewed all objective and subjective circumstances in order to decide that the ADR violation was non-intentional.[17]

In what constitutes the major difference between the CAS Award and the Tribunal's decision, the two conditions for the application of Art. 10.5.2 (No Significant Fault, NSF) were found to be met, and therefore a baseline sanction of two years was found to be applicable.[18] Said provision required the Athlete to show – by the balance of probabilities – how the substance entered her body (which was also accepted by the Tribunal's Decision, i.e. through the ingestion of *Mildronate*) and that she had no significant fault or negligence.

This second criterion (NSF) was analysed by employing some CAS awards that were raised by the parties,[19] notwithstanding the case-specific character and the relative value of the previous CAS jurisprudence (in particular

[14] CAS 2016/A/4643, *Sharapova v. ITF*, par. 71f. It must be noted that this is not the case with all federations' regulations, see e.g. the Doping Control Rules (DCR) of FINA, Art.13.2.1: *"In cases arising from participation in an International Competition or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court"*. See CAS 2015/A/4163, *Niksa Dobud v. FINA*, para. 63.

[15] CAS 2016/A/4643, *Sharapova v. ITF*, para. 44.

[16] CAS 2016/A/4643, *Sharapova v. ITF*, para. 37 (the Athlete's arguments), para. 11 (the Tribunal's decision) and par. 101.

[17] Rigozzi / Haas / Wisnosky / Viret, *Breaking down the process for determining a basic sanction under the 2015 World Anti-Doping Code*, in Int Sports Law J (2015) 15:3, p. 27.

[18] CAS 2016/A/4643, *Sharapova v. ITF*, para. 78f, 84-86. According to the comment to Art. 10.5.2 WADC, *"it may be applied to any anti-doping rule violation, except those Articles where intent is an element of the anti-doping rule violation (e.g., Articles 2.5, 2.7, 2.8 or 2.9) or an element of a particular sanction (e.g., Article 10.2.1) or a range of Ineligibility is already provided in an Article based on the Athlete or other Person's degree of Fault"*.

[19] CAS OG 06/001, *WADA v. USADA, USBSF & Lund*; CAS 2013/A/3327, *ITF v. Cilic*; CAS 2005/A/921, *FINA v. Kreuzman*. The panel also referred to some other cases: CAS 2004/A/690, *H. v. ATP*; CAS 2005/A/830, S. v. FINA; CAS 2005/A/847, *Hans Knauss v. FIS*; CAS OG 04/003, *FAW v. UEFA*; CAS 2006/A/1025, *Puerta v. ITF*; CAS 2008/A/1489&1510, *WADA v. Despres, CCES & Bobsleigh Canada Skeleton*; CAS 2009/A/1870, WADA v. J. Hardy; CAS 2012/A/2701, *WADA v. IWWF & Rathy*; CAS 2012/A/2747, *D. de Goede & Dopingautoriteit*; CAS 2012/A/2804, *Kutrovski v. ITF*; CAS 2012/A/3029, *WADA v. West & FIM*.

when the awards were decided with respect to previous versions of the WADC).[20] The awards that discussed the issue of "significant fault" were therefore taken into consideration, confirming that all previous interpretations on the NSF can still be used as guidelines under the 2015 WADC.[21]

In order to have the period of ineligibility reduced for NSF, the TAPD require that the circumstances from deviating from the athlete's duty of "utmost caution" are truly exceptional.[22] The first criterion thus to analyse is the one of "utmost caution", which is used for the qualification of No Fault or Negligence, and means that the athlete must establish *"that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. (…) the Athlete must also establish how the Prohibited Substance entered his or her system"*. Since the criterion of utmost caution is used for No Fault or Negligence, the bar should not be set too high for accepting NSF (which by definition entails an element of fault, even if not significant). Therefore, the deviation from the duty to exercise "utmost caution" should not automatically exclude the application of Art. 10.5.2.

As we will also see in more detail below, the *Cilic* jurisprudence (which was decided under the 2009 WADC) was a guide for the Panel. Said jurisprudence shows that an athlete could follow all steps in order to make sure that the substance taken is not prohibited, but it is not reasonable to expect athletes to do so "in each and every circumstance", otherwise the NSF provision would be meaningless.

Even if there was a reference to the *Cilic* case in the *Sharapova* award,[23] we must note that there are some substantial (factual) differences between the two cases (and also between the 2009 and the 2015 WADC). The *Cilic* award was about a specified substance (*Niketh*amide, see Art. 10.4 of the 2009 WADC), while the case at hand involved a non-specified substance (*Meldonium*). In the *Cilic* case the three categories of fault varied within the 0 to 24-month range, while under Art. 10.5.2 of the 2015 WADC the minimum sanction cannot go below twelve months. However, and as noted by commentators,[24] the 2015 WADC reserves a more favourable regime for non-Specified Substances and approaches the regulation that existed in the 2009 WADC for specified substances (based on the degree of fault).

C. Delegation by Athletes of elements of their Anti-Doping obligations and NSF

A very important issue that was examined by the Panel for determining the Athlete's NSF was the one of delegation by the Athlete to a third person / company of elements of her anti-doping compliance obligations. Both parties referred to a previous CAS case (decided under the previous version of the WADC) that dealt with a similar issue. According to this case, athletes may delegate elements of their anti-doping obligations and, *"if mistake later arises, the fault to be assessed is not that made by the delegate but the fault made by the athlete in his/her choice"*.[25] The issue at hand was the Athlete's choice of IMG and her agent, Mr Eisenbud, to perform anti-doping compliance services, even though under Art. 2.1.1 TADP it is the Player's personal duty to ensure that

[20] CAS hearing Panels have developed a rich jurisprudence on what constitutes no significant fault since the inception of the WADC in 2003, see also Rigozzi / Haas / Wisnosky / Viret, *Breaking down the process for determining a basic sanction under the 2015 World Anti-Doping Code*, in Int Sports Law J (2015) 15, p. 4.

[21] CAS 2016/A/4643, *Sharapova v. ITF*, para. 82.

[22] See the comment to Art. 10.5.1 and 10.5.2 (of the 2009 WADC); see also CAS 2012/A/3029, *WADA v. West & FIM*, para. 45.

[23] Before the *Sharapova* award, another Panel referred to the *Cilic* jurisprudence (albeit for a specified substance), see CAS 2016/A/4371, *Lea v. USADA*, para. 80 ff.

[24] See also M. Viret / E. Visnowski, on the *Cilic* Award http://wadc-commentary.com/*Cilic*/

[25] CAS 2014/A/3591, *Al Nahyan v. FEI*, para. 177.

no prohibited substance enters his/her body.

It was found that there was no fault in the Athlete's choice to rely on *"the services of one of the largest and best resourced sports managements firms and of Mr Eisenbud, who had advised her since she was 11 years old"*. Moreover, it was found to be reasonable to believe that *Mildronate* was the name of the substance and not of the brand name (*Meldonium*).

The Panel thus seemed to extend the application of previous CAS jurisprudence (under the previous version of the WADC) in equine-doping cases to the delegation by athletes of their anti-doping obligations to third persons and differentiated between the delegate's fault and the fault of the athletes in their choice.[26] Interestingly, it adopted the Respondent's version about what constitutes significant fault (in essence, delegation of the anti-doping obligations to a non-experienced person) to reach the conclusion that it was reasonable for the Athlete to rely on the services of a renowned sports management firm.[27] In this respect, it was acknowledged that *"checking a substance against the Prohibited List is not an action for which specific anti-doping training is required"* and therefore the fact that the Athlete's agent had no medical or anti-doping training did not render him an insufficiently qualified delegate. [28]

The Panel further found that the Athlete's *"reduced perception of the risk"* of using *Mildronate* was justified because she had been taking the substance for ten years without problems, (as was accepted by the Tribunal's decision) there was no performance-enhancing purpose (equally accepted by the Tribunal) and no specific warning had been issued by anti-doping organizations as to the change of status of *Meldonium*. Overall, the Panel took into consideration the totality of circumstances and this should, again, remain a finding tailored to the specific conditions of the case.

Although the aforementioned arguments weighted in favour of the Athlete, it was found that she committed some fault by entirely relying upon her agent and failing to check whether the substance she was taking for ten years was not included in the prohibited list:[29] The Athlete failed to supervise the actions performed by her agent (delegate). Such behaviour showed some degree of fault but was not sufficient as to exclude the qualification of a NSF.

It must be noted that the Al Nahyan award concerned a rider and his horse, i.e. the adoption of the WADC (the FEI specific rules) in the particular context where the person responsible (the rider) is responsible for the horse (not his/her own body) but an animal which is taken care of by third parties. As it was noted in the Al Nahyan case *"the application of the strict liability rule in equine sport can pose imputation issues which differ from typical non-equine doping violations in which the doping of the athlete's own body is the object of the rule violation"*. This means that it is generally easier to accept delegation for riders in the context of equine sport than it is for individual athletes, even if it is arguably possible to say that entrusting compliance to third parties can provide a basis to claim NSF. In any event, it is not sure that a future panel will follow the same path, especially if the parties do not agree to refer to it, since in this case the Al Nahyan approach

[26] CAS 2016/A/4643, *Sharapova v. ITF*, para. 40 (the Athlete's submissions) and para. 85 (the Panel's findings).

[27] In CAS 2014/A/3591, Al Nahyan v. FEI, para. 239 the Panel found that the rider had *"employed experienced staff to look after his horses who were properly instructed to carry out their obligations"*. In another case (CAS 2015/A/4190, *M. Shafi v. FEI*, para. 54, the Panel found that the rider had not at all shown due diligence.

[28] See CAS 2016/A/4643, *Sharapova v. ITF*, para. 56 (the Respondent's position: *"a player who delegates his/her anti-doping responsibilities to another is at fault if he/she chooses an unqualified person as her delegate, if he/she fails to instruct him properly or set out clear procedures he/she must follow in carrying out his task, and/or if he/she fails to exercise supervision and control over him/her in the carrying out of the task"*) and para. 86 (the Panel's findings).

[29] CAS 2016/A/4643, *Sharapova v. ITF*, para. 89.

was applied because both *"parties agreed (…) to follow the approach indicated by Al Nahyan"*.[30]

It is also open to question whether the approach of delegation by athletes of elements of anti-doping control and the responsibility for their choice are strictly speaking compatible with the wording of Art. 3.1.2 TAPD, under which *"It is the responsibility of each Player and each Player Support Personnel to be familiar with the most current version of the Prohibited List"* and this obligation is expected to be made, as a rule, by the athlete personally.[31] Another question is whether a panel faced with a similar case would reach the same conclusion on the degree of fault and the length of the sanction by not accepting the delegation test (i.e. judging the Athlete not for her choice but rather for her acts / omissions). In this particular case, however, both parties agreed to follow this path and the Panel seemed to take into account the totality of circumstances (see also the determination of the length of the sanction below), holding that the Athlete's delegation of her anti-doping obligations to a third person was not sufficient as such to exclude the application of NSF.[32]

D. Determination of the length of the sanction under Art. 10.5.2 of the 2015 WADC

Upon establishing that Art. 10.5.2 TAPD was applicable, the Panel went on to determine the length of the sanction (based on the "degree of fault").[33] Under the relevant provision, the baseline sanction is 24 months and it is possible, based on the totality of circumstances, to reduce the sanction to twelve months.[34] As seen above, the *Cilic* jurisprudence was used as guidance.[35] Since the Athlete had some degree of fault under NSF (Art. 10.5.2), the relevant measure of fault was whether the Athlete was reasonable in selecting IMG to support her in her anti-doping obligations.

Although this criterion was found by the Panel to have been met and was also analysed under the degree of fault above, the Athlete was found to have failed to monitor or supervise in any way the delegate's actions and omissions: Such failure automatically excluded the application of the minimum range of the doping sanction under Art. 10.5.2 TAPD (twelve months). A further criterion that was taken into account in order to

[30] CAS 2016/A/4643, *Sharapova v. ITF*, para. 56 ii (the Respondent's agreement to follow the Al Nahyan approach) and par. 85. It must also be noted that the Tribunal's decision also indirectly referred to the issue of delegation but not to the Al Nahyan case, see the Decision para. 60.

[31] CAS 2016/A/4643, *Sharapova v. ITF*, para. 88 iii. To note, however, that his was said by the Panel in a different context, i.e. to support the Panel's view that the obligation to be in conformity with the Prohibited List does not entail an in-depth anti-doping training and specific medical knowledge.

[32] See also CAS 2014/A/3591, *Al Nahyan v. FEI*, para. 175: the Panel admitted that in two other cases (CAS 2013/A/3124, *Alabbar v. FEI* and CAS 2013/A/3318, *Stroman v. FEI*) the riders could not hide behind the failures of professionals like an athlete could not hide behind the failure of his doctor or coach, but in these cases the riders were found to be personally at fault and could not qualify for the NSF test. See also Marjolaine Viret, Taking the Blue Pill or the Red Pill: Should Athletes Really Check their Medications against the Prohibited List Personally? In: Asser International Sports Law Blog (blog posted on 26 October 2016). See also Tom Rudkin, A review of the CAS panel's decision to reduce Sharapova's doping ban, in the LawInSport blog: http://www.lawinsport.com/sports/item/was-cas-right-to-reduce-sharapova-s-doping-ban-a-review-of-sharapova-v-itf?category_id=152 (blog potsed on 17 November 2016).

[33] The 2015 WADC amended the 2009 WADC regime where the assessment of fault was based on the same factors although the sanctions were different between Art. 10.4 and 10.5.2 of the 2009 WADC. Under the 2015 WADC, the applicable sanction ranges based on the "degree of fault", see N. Goodfellow, *The flexibility of sanctions under the 2015 WADA Code*, Published 01 May 2015 http://www.lawinsport.com/blog/littleton-chambers/item/the-flexibility-of-sanctions-under-the-2015-wada-code

[34] CAS 2016/A/4643, *Sharapova v. ITF*, para. 97 (a).

[35] See also CAS 2016/A/4371, *Lea v. USADA* (albeit this case was about a specified substance), para. 79 ff. It must be noted that in this case, both the previous instance (AAA) and the parties referred to the *Cilic* award.

exclude the minimum level of sanction was the non-disclosure by the Athlete of taking *Mildronate*. The *Sharapova* case was therefore differentiated from other previous CAS awards, where the athletes had disclosed on their anti-doping control forms their use of the prohibited substance.[36] In conclusion, after taking into consideration the totality of circumstances, the appropriate sanction was found to be fifteen months.[37] In essence, the Panel was somehow guided by the *Cilic* jurisprudence in the categorization of the different degrees of fault (light, medium and significant) but did not apply them strictly,[38] not least because of the differences between the two provisions and the different ranges of sanctions provided in the respective provisions (i.e. Art. 10.4 of the 2009 WADC and 10.5.2 of the 2015 WADC).[39]

It must also be noted that the Athlete's arguments to further reduce the sanction to less than twelve months by applying principles of proportionality were swiftly rejected. Beyond the fact that the 2016 TAPD (like the 2015 WADC) do not foresee such possibility in their Art. 10.5.2, the approach to sanctions foreseen in the WADC (on which the TAPD is based) has been found to be proportional. Also, the Athlete had failed to cite specific other cases that could justify a further reduction of her sanction in the particular case.[40]

IV. Concluding remarks

In the *Sharapova* case, the CAS Panel started its analysis with two basic assertions: the ADR violation was non-intentional and the Athlete did not seek to enhance her performance by taking the prohibited substance (as found in the Tribunal's decision). The case therefore did not deal with these two (important, under the 2015 WADC) issues but took over the Tribunal's Decision and the parties' positions in this respect.

In essence, the Panel applied the test made in another CAS procedure (to which both parties agreed to refer for their case) that the delegation by an athlete of her anti-doping obligations was not sufficient as such to exclude the application of NSF under Art. 10.5.2 TAPD. Similar to the Tribunal's Decision, however, and in order to exclude the application of the minimum level of sanction under Art. 10.5.2 (i.e. twelve months), the Panel found that the Athlete bore some fault for failing to monitor and check whether the continued use of this medicine was permissible and for not disclosing the use of *Mildronate*. The CAS jurisprudence that was rendered under the previous versions of the WADC, especially when it comes to the qualification of non-significant fault, of the degree of fault but also the determination of the length of the sanction, was used as a guidance. First and foremost however, the Panel made use of its increased flexibility and applied Art. 10.5.2 TAPD tailored to the specific facts of the case.[41] More generally, we could say that the 2015 WADC offers hearing panels with more flexibility in order to proceed to a fact specific analysis of the case and the precedential value – not only of the Sharapova award but of most cases - is limited to the facts of the case, serving merely as examples of the considerations that can be pertinent.

[36] See CAS OG 06/001, *WADA v. USADA, USBSF & Lund*, para. 1.3.

[37] CAS 2016/A/4643, *Sharapova v. ITF*, para. 98.

[38] Had the Panel applied the three degrees of fault by analogy to the 12 month-range (light, medium, significant), the exclusion of the "minimum degree of fault" referred to in the award (CAS 2016/A/4643, *Sharapova v. ITF*, para. 98) would mean a sanction of 16 to 20 months (by analogy to the *Cilic* jurisprudence and the three categories from a reprimand to 24 months).

[39] See CAS 2013/A/3327, *ITF v. Cilic*, para. 70.

[40] CAS 2016/A/4643, *Sharapova v. ITF*, para. 99.

[41] Rigozzi / Haas / Wisnosky / Viret, *Breaking down the process for determining a basic sanction under the 2015 World Anti-Doping Code*, in Int Sports Law J (2015) 15:3, p. 32.

Délais, notifications et autres prescriptions de forme importantes devant le TAS

Pauline Pellaux*

Résumé: La computation des délais et le respect de certaines prescriptions formelles peut revêtir une importance capitale sur l'issue d'un procès. Cette présentation vise à rappeler les principes essentiels à la computation des délais devant le Tribunal arbitral du sport ("le TAS"), les prescriptions formelles à respecter et les conséquences du manquement de certains des délais jalonnant toute procédure devant le TAS.

I. Introduction

[1] La présente contribution est une retranscription de la présentation effectuée lors du séminaire organisé par la Fédération Suisse des Avocats (FAS) et le Tribunal Arbitral du Sport (TAS) les 2 et 3 septembre 2016 à Lausanne.[1] Il m'avait alors été demandé d'évoquer la question des *"Délais, notifications et autres prescriptions de forme importantes devant le TAS"*. Ce sujet s'étant avéré plus vaste qu'initialement escompté, j'ai limité mon examen à la computation des délais, aux principales exigences formelles prescrites par le

* Conseillère, Tribunal Arbitral du Sport, 1200 Lausanne, Suisse, pauline.pellaux@tas-cas.org, http://www.tas-cas.org

[1] Merci à mes collègues du TAS, qui ont attiré mon attention sur les sentences pertinentes dans le cadre de cette contribution. Merci tout particulièrement à Andrea Zimmermann et à Estelle de La Rochefoucauld pour leurs précieux conseils et le temps qu'elles m'ont consacré.

Code de l'arbitrage en matière de sport (le Code)[2] et aux conséquences du non-respect de certains délais. Par ailleurs, la jurisprudence du TAS présentée ci-après ne prétend pas à l'exhaustivité.

II. La computation des délais

A. Cadre réglementaire

[2] La disposition clef pour la computation des délais est l'article R32(1) du Code aux termes duquel :
"Les délais fixés en vertu du présent Code commencent à courir le jour suivant celui de la réception de la notification effectuée par le TAS. Les jours fériés et non ouvrables sont compris dans le calcul des délais. Les délais fixés en vertu du présent Code sont respectés si les communications effectuées par les parties sont expédiées le jour de l'échéance avant minuit, heure du lieu où la notification doit être faite. Si le dernier jour du délai imparti est férié ou non ouvrable dans le pays où la notification doit être faite, le délai expire à la fin du premier jour ouvrable suivant".

Les passages essentiels de cet article seront repris dans les paragraphes suivants.

B. Le champ d'application de l'article R32(1)

[3] *"Les délais fixés en vertu du présent Code"*, c'est le début de la première et de la troisième phrase de cet article qui en délimite la portée. Sont ainsi clairement couverts par cette disposition, par exemple, le délai pour déposer sa réponse dans le cadre d'une procédure d'appel, pour désigner ou récuser un arbitre ou pour déposer un mémoire dont la production a été sollicitée par la Formation.[3]

[4] Malgré l'apparente limpidité de cette disposition, elle est sujette à interprétation pour la computation d'un des délais essentiels devant le TAS, le délai d'appel. L'article R49 du Code[4] ne fixe en effet ce délai qu'en l'absence de délai déterminé par les règles de la fédération concernée. Si les Formations arbitrales se sont ainsi parfois expressément référées à l'article R32(1) quand elles appliquaient le délai de 21 jours de l'article R49, elles se sont, sans surprise, parfois expressément référées au droit suisse[5] lors de la computation d'un délai d'appel déterminé par des règles fédératives, le droit suisse pouvant alors être pertinent en tant que droit procédural voire de droit de fond.[6] Lorsque le choix de l'un ou de l'autre aurait pu avoir une incidence concrète, la pratique a toutefois presque toujours suivi les règles de l'article R32(1) étendant ainsi, sans même le souligner, le champ d'application de cette disposition aux délais d'appel fixés par d'autres règles que le Code.

C. Le dies a quo

[2] Dans sa version du 1 janvier 2016.

[3] La présente contribution ne contenant aucune section consacrée aux délais, il est utile de lister ici les principales dispositions les fixant ou en prévoyant la fixation : Article R34 : 7 jours dès la connaissance de la cause de récusation pour récuser un arbitre ; article R37(3) : 10 jours ou moins pour se prononcer sur une requête de mesures provisionnelles ; articles R38(3)/R48(3) bref et unique délai fixé par le Greffe du TAS pour compléter la requête d'arbitrage/déclaration d'appel ; article R39(1) : délais fixés au défendeur par le Greffe du TAS pour s'exprimer sur le nombre d'arbitres/nommer un arbitre et déposer une réponse ; article R41.3 : 10 jours suivant la connaissance de l'existence de l'arbitrage mais avant l'audience ou, en l'absence d'audience, avant la clôture de la procédure écrite pour déposer une requête d'intervention ; article R44.1 : délais fixés par la Formation pour le dépôt du mémoire, du contre-mémoire et, si les circonstances l'exigent, de la réplique et de la duplique ; article R49 : en l'absence de délais fixés par les règles de la fédération concernée, 21 jours dès réception de la décision faisant l'objet de l'appel pour déposer la déclaration d'appel ; article R51 : 10 jours dès l'expiration du délai d'appel pour déposer le mémoire d'appel ; article R53 : 10 jours suivant la réception de la déclaration d'appel pour nommer un arbitre ; article R55 : 20 jours suivant la réception du mémoire d'appel pour déposer la réponse ; article R64.2 : délais fixés par le Greffe du TAS pour payer les avances de frais.

[4] Article R49: "*En l'absence de délai d'appel fixé par les statuts ou règlements de la fédération, de l'association ou de l'organisme sportif concerné ou par une convention préalablement conclue* […]"

[5] Voir Mavromati, Les délais dans le Code de l'Arbitrage en matière de Sport, Bulletin TAS/CAS Bulletin, 1/2013, p. 6, Mavromati/Reeb, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, Wolters Kluwer, Law & Business, 2015, p. 429, no 97 et les références citées.

[6] Sur ce point, voir infra.

1. Le texte du Code

[5] *"Les délais fixés en vertu du présent Code commencent à courir le jour suivant celui de la réception de la notification effectuée par le TAS"*,[7] la suite de la première phrase de cette disposition détermine ainsi le *dies a quo*.[8]

[6] Par ailleurs, bien que plusieurs dispositions du Code prévoient qu'un acte doit être effectué dans un certain nombre de jours *"dès la réception de la décision faisant l'objet de l'appel"*[9] ou d'un mémoire notifié par le TAS,[10] les délais, y compris les délais d'appel fixés par d'autres règlementations, ont presque toujours été comptés à partir du jour suivant celui de la réception, le principe de l'article R32(1) étant ainsi tacitement appliqué.

[7] Dans une sentence rendue il y a plusieurs années, une Formation avait, il est vrai, conclu à l'irrecevabilité d'un appel déposé le 21ème jour d'un délai au motif que l'Appelant avait commencé son décompte le jour suivant la réception de l'appel.[11] Cette interprétation est toutefois exceptionnelle et, vu la constante pratique du TAS depuis lors, ne devrait plus guère être suivie.

[8] Enfin, même si l'autonomie des fédérations n'est expressément réservée que pour la détermination de la durée du délai d'appel, plusieurs fédérations ont également déterminé un autre *dies a quo*, ce dernier pouvant, par exemple, être la date de réception du dossier complet relatif à la décision appelée.[12]

2. La notion de réception

[9] Pour établir le *dies a quo,* la notion de réception est déterminante. Elle peut, en principe, être définie comme étant l'entrée dans la sphère de contrôle du destinataire de la communication (ou de son représentant légal), le destinataire devant toutefois avoir eu une possibilité (raisonnable) de prendre connaissance de la décision.[13] La prise de connaissance effective n'est donc pas nécessaire, mais elle peut s'avérer suffisante, comme nous le verrons ci-après.

[10] La personne informée de la prise d'une décision à son encontre serait ainsi bien avisée d'entreprendre, sans délai, toutes les démarches utiles à son obtention.

3. L'envoi à une autre personne que le destinataire

[11] Si l'envoi d'une décision ou autre communication au représentant légal du destinataire va de soi, l'envoi d'une décision à

[7] Les mises en évidence ont toutes été ajoutées.

[8] Soulignons que le Code rejoint ici aussi le droit suisse (cf. par exemple, article 142(1) du Code de procédure civile fédérale (CPC)). Par ailleurs, le *dies a quo* du délai pour le dépôt du mémoire d'appel est indépendant de cette disposition puisque cet acte doit, selon les termes de l'article R51, être effectué "[d]*ans les dix jours suivant l'expiration du délai d'appel*".

[9] Article R49(1).

[10] Voir, par exemple, l'article R53: "*l'intimé désigne un arbitre dans les dix jours suivant la réception de la déclaration d'appel*" ou l'article R55(1) : "*Dans les vingt jours suivant la réception de la motivation de l'appel, la partie intimée soumet au Greffe du TAS une réponse*".

[11] CAS 2002/A/399, sur ce point voir également Rigozzi/Hasler, Time limit for Appeal, in: Manuel Arroyo (Ed.), Arbitration in Switzerland, The Practitioner's Guide, Wolters Kluwer. 2013, p. 1004, no 12.

[12] Voir, par exemple, les articles 13.2.3(2) lit. F et 13.2.3(3) lit. f du Code mondial anti-dopage (ci-après "CMA") qui prévoient que la date limite dans laquelle l'AMA doit déposer son appel au TAS sera la plus éloignée entre ces deux échéances : (a) "*vingt et un jours après la date finale à laquelle toute autre partie à l'affaire aurait pu faire appel"* ou (b) "*vingt et un jours après la réception par l'AMA du dossier complet relatif à la décision"*.

[13] Voir Haas, The *"Time Limit for Appeal"* in Arbitration Proceedings before the Court of Arbitration for Sport (CAS), in Schields VZ, Zeitschrift für Schiedsverfahren, German Arbitration Journal, Volume 1/2011, p. 8 et la sentence CAS 2004/A/574, consid. 60 "*As a basic rule, it is unanimously recognised by the Swiss legal doctrine and the Swiss Tribunal Federal that under Swiss law a decision or other legally relevant statement are notified, if a person had the opportunity to obtain knowledge of the content irrespective of whether such a person has in fact obtained knowledge (ATF 118 II 44; Huguenin, Obligationenrecht, Allgemeiner Teil, Zurich et al. 2004, note 166). Thus, the relevant point in time is when a person receives the decision and not when it obtains actual knowledge of its content"*, notamment citées dans les affaires 2006/A/1153 (consid. 40) et CAS 2007/A/1413 (consid. 51).

un autre intermédiaire n'est pas rare et peut être source de difficultés.

[12] Le cas le plus fréquent est celui d'une fédération internationale qui, par pragmatisme, adresse les communications destinées à un club ou à un athlète via son club ou sa fédération nationale.

[13] Une communication adressée à un tiers ne pouvant en principe être considérée comme valablement notifiée,[14] les problèmes surviennent s'il ne peut être établi que l'intermédiaire n'a pas effectivement transmis le document à son destinataire.

[14] Confrontée à un cas dans lequel le club appelant concluait à l'annulation d'une décision de la FIFA le condamnant à payer une certaine somme d'argent à l'un de ses anciens joueurs, au motif qu'il n'avait jamais été proprement inclus dans la procédure et n'avait pas pu exercer ses droits de partie,[15] une Formation a annulé la décision appelée et renvoyé le dossier à la FIFA pour nouvelle décision.

[15] Préalablement, la Formation avait (i) rappelé que la notification d'une plainte était un élément crucial de procédure, également adopté par les règles de la FIFA ; (ii) jugé qu'il incombait à cette dernière de prouver que la plainte déposée à l'encontre du club lui avait été correctement communiquée et que cette preuve faisait défaut ; et (iii) mis en exergue les circonstances particulières du cas, essentiellement le refus trop formaliste de la FIFA d'accéder à une requête du club et de sa fédération visant à l'envoi du dossier, sans même avoir au moins préalablement cherché à établir que le club l'avait déjà reçu.[16]

[16] L'absence de preuve d'une notification à la personne concernée peut ainsi, sans surprise, conduire à l'annulation de la décision prise pour violation du droit d'être entendu de son destinataire. Une telle conséquence n'est toutefois pas automatique, loin s'en faut.

[17] Il convient d'analyser les circonstances de chaque cas. Parmi les éléments pertinents, on peut notamment citer les règles fédératives,[17] la bonne foi des parties et les circonstances de l'affaire, notamment les mesures prises par l'expéditeur pour trouver les coordonnées directes du destinataire ou de son représentant.[18]

[18] Au vu de ce qui précède, l'on ne peut qu'insister sur l'importance pour les parties appelantes ou demanderesses devant le TAS de faire tout leur possible pour indiquer l'adresse directe de la partie intimée sur leur acte introductif d'instance.[19] Conformément à l'article R31(1) du Code, le Greffe du TAS adressera en effet ses notifications et communications *"à l'adresse figurant dans la requête d'arbitrage ou la déclaration d'appel, ou à toute adresse indiquée ultérieurement"*. Or, s'il accepte en pratique d'ouvrir une procédure lorsque l'adresse indiquée est celle d'un intermédiaire, le TAS est lui aussi tenu de respecter le droit d'être entendu et une sentence rendue en l'absence de preuve de toute notification effective à la partie défenderesse pourrait être annulée par le Tribunal fédéral ou s'avérer inexécutable.

4. L'importance des règles fédératives et du principe de la bonne foi

[19] Si les règles fédératives et la bonne foi ont déjà été évoquées dans le contexte de la notification via un intermédiaire, les principes évoqués par la jurisprudence rendue dans ce

[14] CAS 2013/A/3135, consid. 24.

[15] CAS 2015/A/3938, consid. 53.

[16] CAS 2015/A/3938, consid. 107 à 117.

[17] Sur ce point, il convient de noter que, dans leur version 2015, le Règlement de la Commission du Statut du Joueur et de la Chambre de Résolution des Litiges de la FIFA prévoit, en son article 19 al. 3 que "*En l'absence de coordonnées directes, les décisions destinées aux parties à un litige, en particulier les clubs, sont adressées à l'association concernée, avec pour instruction de transmettre immédiatement les décisions à la partie concernée. Ces décisions sont réputées avoir été valablement notifiées à leur destinataire final quatre jours après la notification à l'association. Dans le cas où l'association ne se conformerait pas à l'instruction mentionnée ci-avant, une procédure disciplinaire pourra être ouverte en conformité avec le Code Disciplinaire de la FIFA*".

[18] Sur ce point voir notamment CAS 2013/A/3155, consid. 126 ss.

[19] Cf. articles R38 et R48 du Code.

cadre-là, et que nous verrons ci-après, ont une vocation beaucoup plus large. L'on devrait notamment toujours pouvoir attendre des fédérations qu'elles agissent selon leurs règles, mais leurs affiliés ne sont pas pour autant légitimés à se réfugier derrière ces dispositions.

[20] Confrontée à un cas de notification via une fédération nationale et après avoir insisté sur le fait que la notification d'une décision devrait toujours être effectuée de façon parfaitement conforme aux règles prescrites, une Formation a ainsi souligné que les vices de procédures, qui ont pu survenir lors de la notification, ne sauraient être retenus indéfiniment contre la fédération. La bonne foi exige d'une personne, qui devrait savoir qu'une décision a été prise sans qu'elle lui ait été formellement notifiée, de prendre toutes les mesures possibles pour en découvrir l'existence et/ou le contenu. A défaut, son appel pourrait être considéré comme tardif.[20] Se référant à divers ouvrages et à une jurisprudence antérieure du TAS,[21] la Formation a ainsi jugé que : *"a person has been properly notified of a decision or other legally relevant statement whenever that person has obtained knowledge of its content"*.[22]

[21] Cette approche stricte n'a toutefois pas toujours été suivie par le TAS et la doctrine ne paraît pas non plus unanime.[23]

5. Le silence des règles fédératives

[22] Cette problématique paraît moins délicate en cas de silence des règles fédératives. Confrontée à un appel dirigé à l'encontre d'une décision issue par une fédération dont les règles étaient muettes en matière de notification, une Formation du TAS a jugé qu'il convenait *"dans un tel cas de figure, d'entendre le terme «réception» comme visant le moment ou l'appelant a eu connaissance de ladite décision, quel que soit d'ailleurs le moyen par lequel il en a pris connaissance"*.[24]

[23] La Formation s'est toutefois, également dans un tel contexte, référée aux autres circonstances particulières du cas d'espèce, avant de déclarer l'appel irrecevable pour cause de tardiveté.

D. La computation des délais stricto sensu

[24] *"Les jours fériés et non ouvrables sont compris dans le calcul des délais"*, cet extrait de l'article R32(1) est limpide et similaire au droit suisse, le décompte des jours à proprement parler ne paraît dès lors pas devoir être source de difficultés, la détermination des jours fériés et non ouvrables étant toutefois pertinente dans le cadre de la détermination du *dies a quem* comme nous le verrons ci-après.

E. Le dies ad quem

[25] *"Les délais fixés en vertu du présent Code sont respectés si les communications effectuées par les parties sont expédiées le jour de l'échéance avant minuit, heure du lieu où la notification doit être faite. Si le dernier jour du délai imparti est férié ou non ouvrable dans le pays où la notification doit être faite, le délai expire à la fin du premier jour ouvrable suivant"*. Ces deux phrases de l'article R32(1) déterminent l'ultime moment auquel un délai est encore respecté.

[26] La première consacre le principe de l'expédition. Le droit suisse n'appliquant ce dernier qu'aux actes envoyés d'un bureau de poste suisse, il est important de souligner qu'il est, devant le TAS, également appliqué au délai d'appel. Les Formations du TAS ont ainsi tacitement étendu le champ d'application de l'article R32 aux délais d'appel fixés par d'autres réglementations que le Code.

---

[20] CAS 2010/A/2258, consid. 55.

[21] CAS 2004/A/574 et CAS 2006/A/1153.

[22] CAS 2010/A/2258, consid. 56. Sur cette question voir également CAS 2008/A/1528 & 1546, consid. 7.7.

[23] Par exemple, si Antonio Rigozzi et Erika Hasler estiment que cette approche ne devrait trouver application que dans des circonstances vraiment exceptionnelles, telles que l'abus de droit Rigozzi/Hasler, p. 1003, no 8 op. cit. fn. 11, Ulrich Haas relève qu'en cas de doute, les règles relatives à la transmission doivent être présumées déclaratives (c'est-à-dire comme devant exclusivement servir à des fins probatoires) et, qu'en conséquence, une décision est effectivement reçue quand bien même elle a été notifiée par d'autres moyens que ceux prescrits par les règles Haas, *Time Limit*, p. 8., op. cit. fn. 13.

[24] TAS 2015/A/4069, consid. 49.

[27] Quant à la seconde de ces phrases, elle vise à ce que chacun puisse bénéficier d'un délai plein et que la partie établie à l'étranger n'ait pas à envoyer ses communications par courrier la veille de l'échéance du délai pour pouvoir s'y conformer.

[28] Par conséquent, si le terme d'un délai est normalement le vendredi mais que la partie à laquelle ce délai avait été fixé réside dans un pays où les jours non ouvrables hebdomadaires sont les vendredi et samedi, elle devra envoyer son acte de procédure au plus tard le dimanche à minuit (selon son fuseau horaire). Les jours fériés et non ouvrables ainsi que le fuseau horaire de son domicile, ou de celui de son représentant, sont en effet pertinents.[25]

[29] Par ailleurs, l'article R32(2)[26] est également pertinent dans le cadre de la détermination du *dies ad quem*, car il en permet le report. A l'exception du délai d'appel, les délais fixés en vertu du Code sont en effet susceptibles d'être prolongés, sur demande.

[30] Plus la prolongation requise est longue et plus la procédure est urgente, plus la requête doit être justifiée. Elle doit en tout état de cause être toujours adressée au Greffe du TAS avant l'échéance du délai. A défaut, il ne s'agit plus d'une demande de prolongation mais de restitution. Bien que cette dernière ne soit pas prévue par le Code, elle est possible, le TAS étant garant de l'accès à la justice et du droit d'être entendu. Une restitution de délai est toutefois très difficile à obtenir, le requérant devant en principe démontrer qu'il était dans l'impossibilité d'agir dans le délai imparti et qu'il a réagi dès que cette impossibilité a pris fin.

III. Les prescriptions de forme

A. Cadre réglementaire

[31] Les prescriptions de forme à accomplir, dont certaines ont une portée générale alors que d'autres dépendent de l'acte de procédure concerné, sont disséminées au sein du Code.

[32] Il s'agit, pour l'essentiel, des règles relatives à la forme et à l'envoi des communications des parties (articles R29 et R32), du dépôt d'une procuration (article R30), du contenu des mémoires (articles R38, R39, R44.1, R48, R51, R55), de l'obligation de payer le droit de greffe (articles R38, R48, R64.1, R65.2) et, pour un grand nombre d'affaire, de l'obligation de payer des avances de frais (article R64.2).

[33] Si les conséquences du non-respect de certains délais relatifs au dépôt des mémoires seront adressées dans la section suivante, nous évoquerons très rapidement ici, les conséquences du non-respect de certaines autres prescriptions formelles.

B. Les prescriptions relatives à la forme et à l'envoi des communications émanant des parties

[34] Conformément aux articles R29(1) et R31(5) du Code, toutes les communications des parties doivent être adressées au Greffe du TAS dans la langue de l'arbitrage et par écrit, que ce soit par courrier, télécopie ou courriel.

[35] L'envoi des mémoires répond toutefois à des règles plus strictes, l'article R31(3) prévoyant qu'ils doivent être déposés par courrier *"en autant d'exemplaires qu'il y a d'autres parties et d'arbitres, plus un exemplaire pour le TAS, faute de quoi le TAS ne procède pas"*.

[36] Les annexes peuvent, elles, être déposées par courrier électronique, à condition qu'elles soient listées et clairement identifiables.[27]

[25] L'article R32 du Code intégrera prochainement une nouvelle formulation renforçant cette disposition, telle que décrite ci-dessus. Elle devrait entrer en vigueur en 2017.

[26] "*Sur requête motivée et après consultation de l'autre ou des autres partie(s), le/la Président(e) de la Formation ou, s'il/elle n'est pas encore nommé(e), le/la Président(e) de la Chambre concernée peut prolonger les délais fixés par le présent Règlement de procédure, à l'exception du délai pour le dépôt de la déclaration d'appel, si les circonstances le justifient et à condition que le délai initial n'ait pas déjà expiré. A l'exception du délai pour la déclaration d'appel, le/la Secrétaire Général(e) du TAS statue sur toute requête visant à obtenir une première prolongation de délai n'excédant pas cinq jours, sans consultation de l'autre ou des autres partie(s)*".

[27] Article R31(5) du Code.

[37] Un mémoire qui est adressé par télécopie ou mémoire électronique (à procedure@tas-cas.org) est, quant à lui, valablement déposé *"dès réception de la télécopie ou du courrier électronique par le Greffe du TAS mais à condition que le mémoire et ses copies soient également déposés par courrier le premier jour ouvrable suivant l'expiration du délai applicable"*.

[38] Sur la base de cette disposition, des mémoires déposés dans le délai imparti exclusivement par courriel ou par télécopie ont ainsi été déclarés irrecevables.[28]

[39] Enfin, les mémoires peuvent naturellement être déposés exclusivement par voie électronique *"aux conditions prévues par le guide du TAS sur le dépôt par voie électronique"*.[29] Le recours à l'*"e-filing*" n'est toutefois possible qu'avec l'accord de toutes les parties à l'arbitrage et qu'une fois la procédure initiée. La requête d'arbitrage et la déclaration d'appel devront ainsi, en tout état de cause, toujours être envoyées selon les modalités prescrites par l'article R31(3) du Code.

C. Contenu des mémoires, procuration, droit de greffe et avances de frais

1. Contenu des mémoires

[40] Les éléments que doivent contenir les différents mémoires produits au cours d'une procédure sont listés dans les dispositions relatives à l'acte concerné. Pour une procédure ordinaire, l'article R38 détermine ainsi les éléments de la requête d'arbitrage, l'article R39 ceux de la réponse et l'article R44.1 ceux du mémoire, du contre-mémoire voire, de la réplique et de la duplique. Pour une procédure d'appel, l'article R48 détermine les éléments de la déclaration d'appel, l'article R51 ceux du mémoire d'appel et l'article R55 ceux de la réponse.

[41] Il est important de souligner que les seuls actes contenant des éléments réellement obligatoires sont la déclaration d'appel et la requête d'arbitrage. Ces actes étant introductif d'instances, ils doivent contenir les éléments nécessaires à la mise en œuvre d'une procédure devant le TAS, à savoir : (i) le nom et l'adresse complète de la partie adverse ; (ii) la disposition règlementaire ou contractuelle fondant la compétence du TAS ; (iii) les indications utiles quant à la désignation des arbitres ; (iv) les prétentions du demandeur/de l'appelant et (v) une brève description des faits et moyens de droit, dans le cadre d'un arbitrage ordinaire, et une copie de la décision appelée dans le cadre d'un appel. La soumission de ces éléments est obligatoire et doit être accompagnée du versement du droit de greffe de CHF 1'000. A défaut, le Greffe du TAS ne procédera pas.

[42] Si le dépôt d'un mémoire en procédure ordinaire ou d'un mémoire d'appel est, lui aussi, obligatoire, ces actes ne contiennent pas d'éléments dont la soumission est obligatoire. Le demandeur ou l'appelant peut, en effet, simplement informer le Greffe du TAS, dans le délai imparti, que sa requête d'arbitrage vaut mémoire ou, respectivement, que sa déclaration d'appel vaut mémoire d'appel.[30]

2. Procuration

[43] L'article R30 du Code dispose que *"*[t]*oute partie représentée par un conseil ou une autre personne doit fournir une confirmation écrite d'un tel mandat de représentation au Greffe du TAS"*. Ni le moment auquel la procuration doit être déposée, ni les conséquences de la non-production d'un tel mandat ne sont toutefois prescrits par le Code. En pratique, le Greffe du TAS demandera souvent la production d'une procuration dans le courrier faisant suite au premier pli envoyé par un mandataire, mais la Formation peut naturellement en tout temps requérir la production d'un tel document.

[44] Confrontée à un cas dans lequel un prétendu mandataire n'avait pas été en mesure de soumettre une preuve de ses pouvoirs malgré plusieurs rappels, une Formation arbitrale avait ainsi jugée que l'appel était irrecevable et que le prétendu mandant n'était pas partie à la

[28] Voir, par exemple, CAS 2016/A/4372, consid. 3.9.

[29] Article R31(4).

[30] Sur le contenu des mémoires, voir également infra no [53].

procédure.[31] Cette obligation ne nous paraît par ailleurs pas purement formelle, car elle touche à l'existence même de l'acte prétendument déposé.

3. Droit de greffe et avances de frais

[45] Comme mentionné ci-dessus, lors de la soumission de leur requête d'arbitrage, respectivement déclaration d'appel, tant l'appelant que le demandeur doivent s'acquitter du droit de greffe de CHF 1'000.--, faute de quoi le TAS ne procédera pas.[32]

[46] Par ailleurs, dans toutes procédures couvertes par l'article R64 du Code,[33] les parties se verront invitées à s'acquitter d'avances de frais dans un certain délai. Passé ce délai, si l'une des parties n'a pas versé sa part, l'autre sera invitée à le faire à sa place et, *"en cas de non-paiement de la totalité de l'avance de frais dans le délai fixé par le TAS, la demande/déclaration d'appel est réputée retirée"*.[34]

[47] En l'absence de paiement dans le délai prescrit, le Greffe du TAS en prendra note et adressera un courrier aux parties les informant du prochain prononcé d'une ordonnance de clôture. Confronté à un cas dans lequel un appelant s'était, après réception de ce courrier mais hors du délai imparti, acquitté de l'avance de frais requise, le Président de la Chambre arbitrale d'appel du TAS avait clôturé l'arbitrage en application de l'article R64.1 du Code. A la suite d'un recours de l'appelant, le Tribunal fédéral avait eu l'occasion de confirmer que l'application de cette disposition en cas de paiement tardif ne constituait pas un cas de formalisme excessif et avait, partant, rejeté le recours déposé à l'encontre de la décision du TAS.[35]

IV. Les conséquences du non-respect de certaines dispositions relatives au dépôt des mémoires

A. Dépôt d'un mémoire incomplet

1. Requête d'arbitrage et déclaration d'appel

[48] Comme déjà évoqué,[36] la requête d'arbitrage et la déclaration d'appel doivent contenir les éléments mentionnés aux articles R38, respectivement R48, du Code et leur soumission doit être accompagnée du versement du droit de Greffe de CHF 1'000.--, faute de quoi le TAS ne procède pas.

[49] L'article R38 prévoit toutefois que *"*[s]*i les conditions ci-dessus ne sont pas remplies au moment du dépôt de la requête d'arbitrage, le Greffe du TAS peut fixer un unique et bref délai à la partie demanderesse pour compléter la requête"*, alors que l'article R48 prévoit que *"*[s]*i les conditions ci-dessus ne sont pas remplies au moment du dépôt de la déclaration d'appel, le Greffe du TAS fixe un unique et bref délai à la partie appelante pour compléter sa déclaration d'appel, faute de quoi le Greffe du TAS ne procède pas"*.

[50] Malgré le libellé légèrement différent de ces deux dispositions, le Greffe du TAS donnera en pratique toujours l'opportunité tant au demandeur qu'à l'appelant de régulariser un acte introductif d'instance incomplet.

[51] Si le Greffe du TAS usait toutefois de la discrétion que lui confère l'article R38 pour ne pas systématiquement octroyer un bref délai pour compléter la requête, une telle pratique ne serait guère préjudiciable au demandeur. En effet, aucune procédure n'étant ouverte par le Greffe lors du dépôt d'une requête d'arbitrage ou d'une déclaration d'appel incomplète, il ne semble y avoir aucun désistement d'instance et encore moins d'action. Demandeur et appelant

[31] CAS 2013/A/3227, consid. 44 à 46.

[32] Cf. articles R38, R48, R64.1 et R65.2 du Code.

[33] A savoir, toutes les procédures à l'exception des "*appels contre des décisions rendues par des fédérations internationales dans le cadre d'affaires disciplinaires*" (article R65), certaines d'entre elles pouvant par ailleurs également être payantes (article R65.4).

[34] Cf. article R64.2 du Code.

[35] Arrêt du Tribunal Fédéral du 20 février 2009, 4A_600/2008.

[36] Voir supra no [41].

paraissent dès lors libres de déposer un nouvel acte introductif d'instance.

[52] Le dépôt d'un acte incomplet ne suspendant toutefois pas les délais[37] et les déclarations d'appel étant souvent déposées peu avant l'échéance du délai d'appel, il est rare qu'une déclaration d'appel non complétée dans le délai de grâce octroyé par le Greffe puisse être suivie d'une déclaration d'appel portant sur le même objet, qui ne soit pas tardive.[38] Or, la tardiveté d'un appel a, dans la très grande majorité des cas,[39] des conséquences irrémédiables.

2. Autres mémoires

[53] Les autres mémoires ne contenant pas d'éléments obligatoires, ils ne peuvent être à proprement parler, incomplets.[40] En application des articles R44.1, R51 et R55 du Code, les parties se voient en effet donner l'opportunité de déposer, dans un certain délai, conclusions (qui peuvent ne pas être identiques à celles formulées dans l'acte introductif d'instance), argumentation et moyens de preuve. A défaut d'être soumis dans le délai prescrit, la conclusion, le moyen de preuve, voire l'argument concerné, pourrait être déclaré irrecevable pour cause de tardiveté.[41]

[54] L'article R56 du Code prévoit en effet que *"*[s]*auf accord contraire des parties ou décision contraire du/de la Président(e) de la Formation commandée par des circonstances exceptionnelles, les parties ne sont pas admises à compléter ou modifier leurs conclusions ou leur argumentation, ni à produire de nouvelles pièces, ni à formuler de nouvelles offres de preuves après la soumission de la motivation d'appel et de la réponse".*

[55] En procédure ordinaire, les règles sont un peu plus complexes: Si, selon l'article R44.1(1), des nouvelles conclusions peuvent être déposées, sans l'accord de l'autre partie, dans le mémoire et le contre-mémoire (mais non dans d'éventuelle réplique et duplique), de nouvelles pièces peuvent, elles, être jointes à tous les mémoires. Par la suite et, sauf entente entre les parties, la Formation pourra autoriser la production de nouvelles pièces en raison de circonstances exceptionnelles, mais non le dépôt de nouvelles conclusions.[42]

[56] Les circonstances exceptionnelles visées par les articles R56 et R44.1(2) ne sont en principe pas liées au litige en tant que tel mais aux motifs justifiant la tardiveté de la soumission, tels que, par exemple, l'inexistence d'une pièce au moment du dépôt d'un mémoire ou l'impossibilité qu'avait une partie de l'obtenir plus tôt.

[57] Les circonstances d'un litige ne sont néanmoins pas dépourvues de toutes pertinences dans ce contexte. Sur la base de l'article R44.3(2) du Code,[43] des formations du TAS ont en effet accepté au dossier des pièces portées à leur connaissance après le dépôt des mémoires. Or, dans l'exercice de leur pouvoir d'instruction, les formations peuvent tenir compte de toute circonstance et un moyen de preuve tardif pourrait ainsi être pris en

[37] En pratique, le Greffe du TAS précise très souvent dans son courrier invitant l'appelant à compléter sa déclaration d'appel que ce courrier ne suspend pas le délai de l'article R51 du Code.

[38] Le dépôt d'un nouvel appel portant sur le même objet n'est en effet possible, sous réserve de rares exceptions, que si le délai d'appel n'est pas déjà échu.

[39] Il y a en effet des situations, toutefois plutôt exceptionnelles, dans lesquels un appelant pourrait néanmoins avoir accès à la justice. Pour un panorama détaillé de ces différents cas de figure, voir notamment Haas, *Time Limit*, p. 10 à 13. op. cit. fn. 13.

[40] Voir supra no [42].

[41] Précisons ici que la mention d'un témoin ou d'un expert n'est pas suffisante, son nom doit être indiqué avec, pour un témoin, un bref résumé de son témoignage présumé et, pour un expert, la mention de son domaine d'expertise. Ainsi, la partie qui souhaite appeler un expert dans un certain domaine sans être certaine de l'identité de l'expert qui pourra comparaître ne devrait pas uniquement mentionner sa volonté d'appeler un expert dans le domaine concerné mais donner les noms des experts envisagés, quitte à, *in fine*, n'en appeler qu'un à l'audience.

[42] Voir les articles R44.1(2) et R44.1(1).

[43] Lequel octroie aux formations la possibilité de "*requérir la production de pièces supplémentaires, ordonner l'audition de témoins, commettre et entendre des expert(e)s ou procéder à tout autre acte d'instruction*" en tout temps si elles l'estiment "*utile pour compléter les présentations des parties".*

considération nonobstant l'absence de circonstances exceptionnelles justifiant qu'il n'ait pas été produit plus tôt.

[58] L'article R44.3(2) du Code ne saurait cependant être perçu comme un moyen au bénéfice des parties pour contourner l'article R56. Il ne leur octroie aucun droit mais confère une faculté discrétionnaire à la Formation. L'exercice de ce pouvoir dépendra souvent de la sensibilité des arbitres, qui jugeront librement de l'opportunité d'appliquer strictement la maxime des débats ou d'adopter, au contraire, un rôle plus inquisitoire.

[59] De même, si en pratique la partie adverse s'avère souvent relativement conciliante, il serait pour le moins téméraire de compter sur son accord.

[60] Afin d'éviter que l'issue d'un litige ne puisse ainsi dépendre de paramètres indépendants de leur volonté, il est fondamental pour les parties de soumettre des mémoires complets, contenant l'ensemble de leurs arguments, conclusions et moyens de preuves disponibles.

B. Dépôt d'un mémoire hors délai

1. Déclaration d'appel

- L'article R49 du Code

[61] Si la première phrase de l'article R49 du Code fixe le délai d'appel par défaut, les dernières phrases de cette disposition sont consacrées à la tardiveté d'une déclaration d'appel : *"Le/la Président(e) de Chambre n'ouvre pas de procédure si la déclaration d'appel est manifestement tardive et doit notifier cette décision à la personne qui l'a déposée. Lorsqu'une procédure est mise en œuvre, une partie peut demander au/à la Président(e) de Chambre ou au/à la Président(e) de la Formation, si une Formation a déjà été constituée, de la clôturer si la déclaration d'appel est tardive. Le/la Président(e) de Chambre ou le/la Président(e) de la Formation rend sa décision après avoir invité les autres parties à se déterminer".*

[62] Manifestement tardive, une déclaration d'appel n'est en principe pas suivie de l'ouverture d'une procédure arbitrale. Elle fait toutefois l'objet d'une "décision" et, bien que la lettre du Code ne le prévoie pas expressément, cette dernière est généralement précédée d'une interpellation de l'appelant.

[63] A réception des observations de l'appelant ou à l'échéance du délai imparti, le Président de Chambre se prononce.[44] S'il décide de ne pas ouvrir de procédure, cette décision ne peut plus être contestée devant le TAS. S'il décide d'ouvrir une procédure, cette décision, limitée au caractère manifestement tardif de l'appel, ne lie ni la Formation, ni le Président de Chambre, qui, interpellé par une autre partie, pourrait être appelé à se prononcer à nouveau.

[64] Après consultations des parties, la Formation ou le Président de Chambre reverront librement si l'appel est, ou non, tardif. Dans l'affirmative, la procédure sera "clôturée". Si cette conséquence est mentionnée à l'article R49 du Code, cette disposition laisse la place aux interrogations car, comme l'a souligné le Tribunal fédéral, "[s]*avoir si la tardiveté du dépôt de l'appel entraîne l'incompétence du TAS ou simplement l'irrecevabilité, voire le rejet, de ce moyen de droit est une question délicate"*.[45] La réponse à cette question paraît dépendre, au moins pour partie, de la nature du délai d'appel, qui sera examinée ici.

- La nature du délai d'appel

[65] La procédure d'appel devant le TAS est une procédure atypique qui a fait l'objet de nombreuses discussions. Le TAS étant alors, la plupart du temps, le premier organe véritablement juridictionnel à se prononcer sur le fond, il ne s'agit pas d'un appel au sens strict.[46]

[44] Le caractère manifeste ou non de la tardiveté ne dépend pas du nombre de jour de retard mais des éventuelles questions à résoudre. Si le *dies ad quem* est clairement établi, un appel déposé avec une heure de retard peut être manifestement tardif, alors qu'un appel déposé plusieurs semaines après la notification d'une décision peut ne pas être manifestement tardif si, par exemple, la régularité de la notification peut être sujette à caution.

[45] Arrêt 4A_488/11, consid. 4.3.1

[46] Voir sur ce point notamment Rigozzi, L'arbitrage international en matière de sport, Helbing &

L'appel au TAS était d'ailleurs, à tout le moins à l'origine, un substitut à une action portée devant les cours étatiques de première instance sur la base de l'article 75 du Code civil suisse (CCS) qui autorise tout sociétaire à *"attaquer en justice, dans le mois à compter du jour où il en a eu connaissance, les décisions auxquelles il n'a pas adhéré et qui violent des dispositions légales ou statutaires"*.

[66] La question s'est alors posée de savoir si le délai d'appel visait à limiter la durée de validité de la clause arbitrale ou la durée dans laquelle une action peut-être déposée.[47] Dans la première hypothèse, la Formation saisie d'un appel tardif devrait, sur requête[48], se déclarer incompétente, une telle déclaration étant par ailleurs susceptible de bénéficier à une cour étatique, dont l'expiration de la clause arbitrale aurait fait "renaître" la compétence. Dans la seconde hypothèse, la Formation devrait, d'office, se déclarer compétente mais rejeter la demande en raison de la perte de son droit d'action par l'appelant. La forclusion étant, en droit suisse, une question de fond, l'appel devrait alors, quand le droit suisse est applicable, être rejeté.[49]

[67] Malgré une jurisprudence parfois hésitante, la seconde hypothèse, soutenue tant par la doctrine[50] que par le Tribunal fédéral,[51] paraît

Lichtenhahn, 2005, p. 552, no 1079 et les références citées.

47 Sur cette question voir notamment Haas, *Time Limit*, p. 2 à 4 op. cit. fn 13, Rigozzi/Hasler, pp. 1008 à 1009, no 21 à 23 op. cit. fn 11, Fumagalli, Review of CAS jurisprudence regarding jurisdiction and admissibility, p. 23 à 25, Mavromati/Reeb, pp. 430 à 432, no 100 à 103, op. cit. fn. 5.

48 La partie procédant au fond acceptant tacitement la compétence d'un tribunal, ce n'est dès lors en principe qu'en cas de défaut que la tardiveté d'un appel devrait être revue d'office.

49 Comme le relève Ulrich Haas, la forclusion est, dans d'autres régimes juridiques, traitée comme une question procédurale, Haas, p. 3 op. cit. fn. 13.

50 Haas, *Time Limit*, p. 3, op. cit. fn 13, Rigozzi/Hasler, p. 1008, no 22, op. cit. fn 11, Fumagalli, p. 24, op. cit. fn. 47.

51 Arrêt 4A_488/2011 du 18 juin 2012, dont le considérant 4.3.1 mérite d'être presqu'intégralement reproduit ici *:* "*Sans doute le reproche fait à un tribunal arbitral de n'avoir pas respecté la limite de validité temporelle de la convention d'arbitrage ou un préalable obligatoire de conciliation ou de médiation a-t-il trait aux conditions d'exercice de la compétence, plus précisément à la compétence ratione temporis, et relève-t-il, comme tel, de l'art. 190 al. 2 let. b LDIP (...). Force est, toutefois, d'observer que ce principe jurisprudentiel vise essentiellement l'arbitrage typique ou usuel, qui prend sa source dans une relation contractuelle et se caractérise par l'existence d'une clause arbitrale dont il convient de rechercher la portée dans le temps. En revanche, il est douteux qu'il vaille aussi pour l'arbitrage atypique, tel l'arbitrage sportif, et qu'il envisage en particulier l'hypothèse dans laquelle la compétence du tribunal arbitral résulte du renvoi aux statuts d'une fédération sportive prévoyant une procédure d'arbitrage pour régler les litiges de nature disciplinaire. En ce domaine, le Tribunal fédéral a déjà jugé que le point de savoir si une partie est recevable à attaquer la décision prise par l'organe d'une fédération sportive sur la base des règles statutaires et des dispositions légales applicables ne concerne pas la compétence du tribunal arbitral saisi de la cause, mais la question de la qualité pour agir, c'est-à-dire un point de procédure à résoudre selon les règles pertinentes dont le Tribunal fédéral ne revoit pas l'application lorsqu'il est saisi d'un recours contre une sentence arbitrale internationale (arrêts 4A_428/2011 du 13 février 2012 consid. 4.1.1 et 4A_424/2008 du 22 janvier 2009 consid. 3.3). Un auteur s'est penché plus avant sur la question examinée ici. Il signale le résultat insatisfaisant auquel conduirait la transposition au délai d'appel prévu par l'art. R49 du Code du principe général voulant que le dépassement du délai convenu par les parties entraîne l'incompétence du tribunal arbitral (en l'occurrence, le TAS) et, par ricochet, la compétence des tribunaux étatiques: en bref, l'application de ce principe aurait pour conséquence qu'après l'expiration du délai d'appel de vingt et un jours fixé par cette disposition, les décisions des fédérations sportives dont le siège est en Suisse pourraient être portées devant les tribunaux suisses jusqu'à l'échéance du délai d'un mois prévu par l'art. 75 CC; une telle conséquence serait sans doute contraire à l'esprit de l'arbitrage international dans le domaine du sport, en ce qu'elle ne permettrait pas de faire en sorte que les sportifs soient jugés de la même manière et selon les mêmes procédures; elle occasionnerait, en outre, des complications difficilement surmontables. Aussi, pour cet auteur, le délai d'appel devant le TAS doit-il être considéré comme un délai de péremption dont l'inobservation entraîne, non pas l'incompétence de cette juridiction arbitrale, mais la perte du droit de soumettre la décision entreprise à tout contrôle juridictionnel et, partant, le déboutement de l'appelant (ANTONIO RIGOZZI, Le délai d'appel devant le Tribunal arbitral du sport: quelques considérations à la lumière de la pratique récente, in Le temps et le droit, 2008, p. 255 ss; le même, L'arbitrage international en matière de sport, 2005, nos 1028 ss). Semblable opinion apparaît convaincante prima facie. Au demeurant, s'il suffisait à une partie d'attendre l'expiration du délai d'appel de l'art. R49 du Code pour saisir les tribunaux étatiques suisses, cette partie serait en mesure de*

s'être aujourd'hui clairement imposée ; le but du délai d'appel étant d'assurer la sécurité juridique.

[68] Or, plusieurs formations du TAS ont, après avoir admis leur compétence, encore récemment déclaré irrecevables, et non pas mal fondés, des appels tardifs.[52] Nonobstant ce qui précède, elles ne nous paraissent pas avoir tort.

[69] En effet, la procédure d'appel devant le TAS nous semble aujourd'hui suffisamment mûre pour se détacher de son ancrage historique et l'analogie la plus pertinente n'est peut-être plus avec l'article 75 CCS mais avec le recours de droit civil.[53] Le délai d'appel pourrait ainsi être vu comme un véritable délai d'appel, dont le non-respect entraîne l'irrecevabilité du recours tout en mettant un terme définitif au litige et en conférant à la décision appelée un caractère définitif et exécutoire.

[70] Une telle "solution", aurait en outre l'avantage de résoudre la question de la tardiveté de l'appel sur le plan procédural et d'avoir ainsi une jurisprudence uniforme sur ce point, la solution retenue n'étant alors en tout état de cause plus dépendante du droit applicable au fond.

- Délai d'appel et nullité de la décision appelée

[71] Le délai d'appel est-il également applicable aux décisions nulles ou la nullité peut-elle être évoquée en tout temps, comme c'est le cas dans le cadre d'une action portée devant les tribunaux suisses à l'encontre d'une décision associative?[54]

[72] Cette question est sensible et a donné lieu à une jurisprudence apparemment contradictoire.[55]

[73] Une première formation a relevé que rien dans le texte de l'article R49 ne laisse supposer qu'il ne soit applicable qu'aux décisions annulables et non aux décisions nulles. Faisant partie intégrante des règles procédurales choisies par les parties, cette disposition doit s'appliquer indépendamment du fait que d'autres délais pourraient exister devant les cours étatiques, comme, par exemple, l'article 75 CCS tel qu'interprété en droit suisse. La Formation a ainsi jugé que la caractérisation d'une décision comme annulable ou nulle était sans pertinence sur la recevabilité d'un appel devant le TAS.[56]

[74] Une seconde formation du TAS a, elle, tacitement validé la thèse inverse. Après avoir rappelé le régime applicable en droit suisse, elle a relevé qu'aucun élément au dossier ne démontrait que la décision appelée était en l'espèce entachée d'erreurs substantielles. Sur la

court-circuiter la juridiction arbitrale sportive par sa seule inaction".

[52] Voir, par exemple, CAS 2010/A/2258, CAS 2014/A/3611 ou TAS 2015/A/4069.

[53] Cet éloignement de l'article 75 CCS est notamment illustré par l'évolution de la jurisprudence sur la légitimation passive dans le cadre d'appel contre des décisions rendues par des fédérations exerçant non pas un pouvoir disciplinaire mais un pouvoir "quasi-juridictionnel" dans le règlement de litiges entre leurs membres, voir sur ce point notamment Haas, Standing to appeal and standing to be sued, in: Michele Bernasconi (Ed.), International Sport Arbitration 6th Conference CAS & SAV/FSA, Lausanne 2016, Weblaw, à paraître, Simon, La partie intimée dans la procédure d'appel devant le TAS, in: M. Bernasconi & A. Rigozzi (Ed.), Sport Governance, Football Disputes, Doping and CAS Arbitration, Weblaw, 2009, p. 157 et de La Rochefoucauld, Standing to be sued, a procedural issue before the Court of Arbitration for Sport*;* Bulletin TAS/CAS Bulletin, 1/2010, p. 55.

[54] Le régime applicable en droit suisse a été décrit comme suit par une formation: "*Under Swiss association law, decisions which are null and void are challengeable at any point in time irrespective of the 21-day time limit of Article R49 of the Code and of the one-month time limit of Article 75 of the Swiss Civil Code. However, the situation is different depending on whether the decision is vitiated by procedural flaws or by manifest errors of law. In the first case, the decision is only voidable and must be challenged within the applicable time limit. In the second case, the decision is null and void and can be contested at any time. However the infringement of substantive law must be particularly serious (Judgement of the Swiss Federal Court 4C_57/2006 at 3.2 of 20 April 2006; FOËX B., in Commentaire romand, Code civil, vol. I, 2010, N. 36 et seq., p. 543, ad art. 75 CC). A decision is only voidable when it does not respect the Statutes*" (CAS 2013/A/3148, consid. 137).

[55] Sur ce point voir notamment Haas, p. 6 op. cit. fn 13, Rigozzi/Hasler, p. 1009, no 24 op. cit. fn. 11, Mavromati/Reeb, p. 436, no 115 op. cit. fn 5, et Fumagalli, p. 25, op. cit. fn 47.

[56] CAS 2011/A/2360 & 2392, consid. 96 à 99.

base de ce constat, elle a conclu à la tardiveté de l'appel.[57]

[75] Si la première de ces jurisprudences garantit la sécurité juridique, elle pourrait laisser craindre qu'une décision violant l'ordre public soit "immunisée" par l'écoulement du temps et qu'une personne puisse être affectée par une décision, nonobstant sa nullité.

[76] Deux garde-fous paraissent toutefois à même d'écarter ces craintes. Premièrement, cette jurisprudence laisse expressément ouverte la question de la contrariété à l'ordre public.[58] Deuxièmement, si elle écarte la possibilité d'un contrôle abstrait de la légalité d'une décision après l'expiration du délai d'appel, elle rappelle que la nullité d'une décision peut toujours être revue dans un cas concret.[59]

2. Mémoire d'appel et mémoire

[77] Le dépôt d'une déclaration d'appel remplissant les critères de l'article R48 dans le délai d'appel[60] et le paiement du droit de greffe et des éventuelles avances de frais sont des conditions nécessaires mais non suffisantes à la recevabilité d'un appel et la poursuite d'un arbitrage. En effet, selon les termes de l'article R51 du Code, *"*[d]*ans les dix jours suivant l'expiration du délai d'appel, la partie appelante soumet au Greffe du TAS un mémoire* [… ou informe…] *par écrit le Greffe du TAS* […] *que la déclaration d'appel doit être considérée comme mémoire d'appel. L'appel est réputé avoir été retiré si la partie appelant ne se conforme pas à ce délai".*

[78] Sur la base de cette disposition, une formation du TAS a ainsi jugé qu'aucune suite ne devait être donnée à l'appel déposé par un club qui avait informé le Greffe du TAS que sa déclaration d'appel valait mémoire d'appel, un jour après l'échéance du délai fixé par l'article R51.[61]

[79] Dans le cadre d'une procédure ordinaire, l'article R44.5(1) du Code dispose également que *"*[s]*i la partie demanderesse ne dépose pas son mémoire conformément à l'article R44.1 du présent Code, la requête d'arbitrage est réputée retirée".*

[80] Relevons ici que si ces deux dispositions sont a priori équivalentes,[62] les conséquences concrètes de leur non-respect devraient être bien moins sévères en procédure ordinaire. En effet, si le non-respect tant de l'article R51 que de l'article R44.5(1) paraît devoir être interprété comme un désistement d'instance et non comme un désistement d'action, une nouvelle requête pourrait, tant que le droit matériel n'est pas périmé, toujours être déposée[63], alors que le l'expiration du délai d'appel devrait très souvent faire obstacle au dépôt d'une nouvelle déclaration.[64]

3. Réponse

[57] CAS 2013/A/3148, consid. 137 (cité supra à la note de bas de page 54), 143 et 144.

[58] CAS 2011/A/2360 & 2392, consid. 97.

[59] "*in a case where an association's decision were null and void, it would not become materially valid merely because the time limit in R49 of the CAS Code has expired. Instead, the member would only be procedurally barred from filing a principal action against said decision. However, nothing would prevent the same member to avail himself in a different context of the fact that the decision is null and void"* (CAS 2011/A/2360 & 2392, consid. 97). Pour une approche plutôt critique de cette jurisprudence, voir Rigozzi/Hasler, p. 1009, no 24, op. cit. fn. 11, pour une approche plutôt favorable, Fumagalli, p. 25, op. cit. fn. 47.

[60] Ou, le cas échéant, dans le délai de grâce octroyé par le Greffe du TAS, cf. supra no [49].

[61] Cf. CAS 2014/A/3482.

[62] L'on notera ici que, contrairement à l'article R51, cette disposition ne prévoit pas l'obligation d'indiquer dans le délai fixé pour le dépôt du mémoire que la requête d'arbitrage vaut mémoire. Comme relevé par Michael Noth, l'article R44.5(1) ne doit dès lors s'appliquer que "*where the request for arbitration is not comprehensive and cannot be considered as the statement of claim as well. In the event of any doubts, the court must require the necessary clarifications from the claimant"* (Noth, Article R44: Procedure before the Panel, in: Manuel Arroyo (Ed.); Arbitration in Switzerland, The Practitioner's Guide, Wolters Kluwer, 2013, pp. 967-975pp. 974-975, no 40).

[63] Voir en ce sens, Noth, p. 975, no 40, op. cit fn. 52, qui estime qu'un tel retrait ne devrait pas avoir de *res judicata effect* et Rigozzi, p. 532, no 1037, op. cit. fn. 46. Cette thèse est par ailleurs également celle qui a récemment été soutenue par une Formation du TAS dans une ordonnance confidentielle, et donc non publiée.

[64] Sur ce point, voir supra no [52].

[81] Consacrés au "défaut" du défendeur, respectivement de l'intimé, les articles R44.5(2) et R55(2) du Code, prévoient qu'en cas de non dépôt de la réponse, *"la Formation peut néanmoins poursuivre la procédure d'arbitrage et rendre une sentence"*.

[82] Bien que, le Code fasse ici *a priori* mention d'une faculté, et non d'une obligation, il semble inconcevable qu'une formation puisse, sur cette base, refuser de poursuivre une procédure. En pratique, un tel cas de figure n'a jamais eu lieu, et nonobstant la formulation de cette disposition, la formation qui refuserait de continuer une procédure au seul motif que la partie adverse, dûment informée, n'a pas déposé de réponse, risquerait de commettre un déni justice ; la partie appelante ou demanderesse étant, *de facto*, privé de son "droit au juge".

[83] Si la partie défenderesse ne s'exprime sur le fond d'un litige ni par écrit ni oralement,[65] elle fera véritablement défaut et la formation devra d'office examiner sa compétence.

[84] S'il est généralement admis que la partie défaillante n'a pas tacitement consenti à la compétence d'un tribunal arbitral, a-t-elle tacitement reconnu les faits allégués par la partie demanderesse? La doctrine paraît répondre par la négative,[66] mais quelques formations du TAS ont, dans des affaires purement contractuelles, adopté une approche un peu plus nuancée. Se référant, par analogie, à l'article 150(1) du CPC, elles ont estimé que les faits non contestés n'avait en principe pas à être prouvés[67] mais elles ne les ont toutefois considérés comme établis qu'à la lumière des différents éléments de preuve apportés par la partie demanderesse.

V. Conclusions

[85] Ce panorama des prescriptions formelles imposées par le Code illustre, sans surprise, que si toutes ne sont pas d'importance égale, elles revêtent souvent une importance fondamentale.

[86] Leur non-respect est en effet susceptible d'entraîner l'irrecevabilité d'un appel ou d'une demande, voire la perte d'un procès au fond.

[87] De telles conséquences résultent parfois expressément du Code, qui prévoit qu'en cas de non-conformité une procédure ne sera pas initiée[68] ou que l'acte introductif d'instance sera réputé retiré,[69] mais elles peuvent aussi être plus indirectes, comme lors de l'irrecevabilité, pour cause de tardiveté, d'un moyen de preuve, qui aurait été déterminant.

[88] Si de telles conséquences ne sont pas toujours inévitables ou irrémédiables, elles le sont souvent, et les parties devraient ainsi consacrer autant de soin au respect des règles formelles qu'au développement de leur argumentation au fond.

[89] Elles ne devraient, enfin, jamais compter sur la "bienveillance" des autres parties ou des arbitres ; les premières ayant souvent des intérêts opposés aux leurs et les seconds étant les garants du juste équilibre entre, d'une part, le droit d'être entendu et l'interdiction du formalisme excessif[70] et, d'autre part, le principe de l'égalité de traitement et la prédictibilité.[71]

---

[65] Sur ce point tant l'article R44.5(3) que l'article R57(5) disposent que «[s]*i l'une des parties, ou l'un de ses témoins, bien que régulièrement convoqué(e), ne se présente pas à l'audience, la Formation peut néanmoins tenir l'audience et rendre une sentence"*.

[66] Noth, p. 975, no 41, op. cit. fn 52, Mavromati/Reeb, p. 340, no 51, op. cit. fn. 5.

[67] Ces quelques sentences ont toutefois toutes été rendues dans le cadre de procédures arbitrales ordinaires et donc confidentielles.

[68] Cf. articles R38(3) et R48(3) du Code.

[69] Cf. articles R44.5(1) et R51(1) du Code.

[70] Relevons ici que, selon le Tribunal fédéral, le formalisme n'est excessif que *«lorsque la stricte application des règles de procédure ne se justifie par aucun intérêt digne de protection, devient une fin en soi, complique de manière insoutenable la réalisation du droit matériel ou entrave de manière inadmissible l'accès aux tribunaux*" et que «*les formes procédurales sont nécessaires dans la mise en œuvre des voies de droit, ne serait-ce que pour assurer le déroulement de la procédure conformément au principe de l'égalité de traitement*" et "*la partie intimée est en droit d'attendre du tribunal arbitral qu'il applique et respecte les dispositions de son propre règlement de procédure"* (Arrêt 4A_600/2008 consid. 5.2.2).

[71] Cette dernière est particulièrement importante en droit du sport, des tiers étant souvent susceptibles d'être directement affectés par les décisions rendues.

Jurisprudence majeure*
Leading Cases

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

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

CAS 2014/A/3536
Racing Club Asociación Civil v. Fédération Internationale de Football Association (FIFA)
5 May 2015

Football; Bridge transfers; Competence of FIFA Disciplinary Committee to decide on violations of FIFA Regulations on the Status and Transfer of Players; Burden of proof in cases of bridge transfers; Good and bad faith in the context of bridge transfers; FIFA's responsibility as rule maker;

Panel
Mr Lars Hilliger (Denmark), President
Mr Efraim Barak (Israel)
Ms Margarita Echeverría Bermúdez (Costa Rica)

Facts

Racing Club Asociación Civil (the "Appellant" or the "Club") is an Argentine football club, headquartered in Buenos Aires, Argentina. The Appellant is a member of the Asociación del Fútbol Argentino (the "AFA"), which in turn is affiliated with the Fédération Internationale de Football Association (the "Respondent" or "FIFA").

On 2 August 2010, the Argentine professional football player F. (the "Player") and the Argentine football club Club Atlético Vélez Sarsfield ("Vélez") entered into an employment contract, valid until 30 June 2012.

On 11 July 2012, the Player entered into a new employment contract with the Uruguayan football club Institución Atlética Sud América ("Institución"), valid as from the date of the signing until 30 June 2017.

On 20 July 2012, the Appellant and Institución concluded a transfer contract (the "Transfer Contract"), under which the Player was definitively transferred from Institución to the Appellant. The two clubs agreed on the payment of an amount of USD […] from the Appellant to Institución (the "Transfer Fee").

On the same date, the Appellant and the Player concluded an employment contract (the "Employment Contract"), valid from the date of signing until 30 June 2014.

On 23 July 2012, the transfer of the Player to Institución was registered in the FIFA Transfer Matching System (the "TMS"). On 3 August 2012, the transfer of the Player from Institución to the Appellant was registered in the TMS and remained in the status *"Closed. Awaiting payments"*. No proof of payment was ever uploaded in the TMS with regard to this transfer.

In the course of August 2012, the Argentine Tax Authorities and the AFA decided that a number of players involved in similar transfers, including the Player, would not be allowed to play for their respective clubs during the national championship until their respective contractual and financial situations had been clarified and, if needed, re-regulated. On 28 August 2012, the Appellant, the Player and Institución agreed on a *"definitive and consensual"* rescission (the "Rescission Agreement") of the Transfer Contract. Moreover, and having in mind that by that time no payments had been made under the Transfer Contract, the parties agreed that they had *"nothing to claim from each other"*.

On 7 June 2013 – after having granted the Appellant the right to defend itself against allegations of violations of the FIFA Regulations on the Status and Transfer of Players (the "Regulations") - disciplinary proceedings were opened against the Appellant for an apparent violation of Articles 3 and 9.1 of Annex 3 of the Regulations.

On 14 August 2014, the FIFA DC rendered its decision (the "Decision") and declared the Appellant guilty for a violation of Article 9.1 par. 2 and Article 3 par. 1 of Annexe 3 of the Regulations for having participated in the transfer of the Player, which was found to have been conducted through the FIFA Transfer Matching System (TMS) for illegitimate purposes in terms of the FIFA regulations and for not having acted in good faith in the context of said transfer.

The FIFA DC, having first confirmed its competence, noted that the two transfers of the Player took place within a very short period of time; that at no time it was intended that the Player would effectively play for Institución and that, therefore, these transfers had no sporting nature. The FIFA DC, taking into account the chronological development of the transfers, considered that the transfer of the Player to Institución would not make sense if his subsequent transfer to the Appellant was not already planned. Accordingly, it found that the two *"parts of the operation"* could not be considered as separate matters with no correlation between them. It was found that it was clear from the start how the transfers should be developed and, as a logical consequence, this fact was known to all parties involved; this led the FIFA DC to conclude that the Appellant was involved in the operations carried out and, from such fact, derived its liability. With regards to the termination of the Transfer Contract, the FIFA DC found the way the rescission took place remarkable, in particular the fact that when the involved clubs rescinded the contract, the parties stipulated that they had nothing to claim from each other. In other words, Institución agreed that the Player would stay with the Appellant and, at the same time, renounced the payment of the Transfer Fee originally agreed. As a consequence, from the FIFA DC's point of view, the way the Transfer Contract was rescinded corroborated the above-mentioned considerations, in particular that it was never intended that the Player would play for Institución, but only for the Appellant. The FIFA DC found that while the operations were conducted through the TMS, this has happened without sporting objectives and therefore without legitimate purposes in the sense of the Regulations. The Appellant was considered to have known the absence of sporting grounds to transfer the Player via Institución but to have nevertheless actively participated in the transfer. The FIFA DC concluded that the Appellant had deliberately participated in conducting a transfer through the TMS, using the system to give a "sporting appearance" to the transfer and had therefore used the TMS fraudulently.

The Appellant was sanctioned by an amount of CHF 15,000 and was further warned as to its future conduct. The FIFA DC also imposed the costs and expenses of the proceedings in the amount of CHF 2,000 on the Appellant.

On 26 March 2014, the Appellant filed a Statement of Appeal against the Decision with the CAS in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code").

A hearing was held on 27 October 2014 in Lausanne, Switzerland.

Reasons

1. To start with the Panel studied the competence of the FIFA DC to decide on violations of the Regulations insofar as the Appellant had asserted that the FIFA DC would only be competent to sanction violations of substantive rules set out in the FDC and that neither the Regulations *"nor the TMS"* had created new substantive law. The Appellant concluded that the FIFA DC lacked competence to impose sanctions for alleged infringements of the Regulations.

   FIFA argued that as a private association registered under Swiss law it had the right to impose sanctions on persons subject to its jurisdiction. Pointing out to Article 76 of the FDC, FIFA further underlined that the FIFA DC was authorised to sanction any breach of FIFA regulations which did not come under the jurisdiction of another legal body. Further that insofar as the sanctioning of a breach of the Regulations did not come under the competence of any other body, the FIFA DC was competent to decide on infringements of those regulations. According to FIFA this was *inter alia* corroborated by the contents of Article 62 of the FIFA Statutes and Article 25 paragraph

3 of the Regulations, the latter of which stipulated that disciplinary proceedings for violations of these regulations shall, unless otherwise stipulated herein, be in accordance with the FDC.

With reference to, *inter alia*, the regulations referred to by FIFA the Panel found that the FIFA DC was competent to render the Decision and dismissed the allegation of lack of competence.

2. In the following the Panel addressed the question of burden of proof in cases of bridge transfers, acknowledging at the outset that while it was undisputed by the Parties that the standard of proof applicable shall be the *"comfortable satisfaction"* of the Panel, the present case was never-the-less the first case in which a decision imposing sanctions on a club due to violations committed in the framework of a *"bridge transfer"* was appealed to CAS.

   The Panel then clarified that it adhered to the principle established by CAS jurisprudence (*e.g.* CAS 2003/A/506, para. 54; CAS 2009/A/1810 & 1811, para. 46 and CAS 2009/A/1975, para. 71ff) according to which in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, *i.e.* the party in question must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. Taking further into account that the applicable standard of proof in disciplinary matters is the "comfortable satisfaction" (*e.g.* CAS 2009/A/1920 & CAS 2011/A/2426), the Panel pointed out that FIFA, acting as the sanctioning authority, must actively substantiate its allegations regarding any possible disciplinary violation with convincing evidence and to the comfortable satisfaction of the Panel, bearing in mind the seriousness of the allegations. Further in case of bridge transfers it was FIFA's burden of proof to show that the club to whom a player was ultimately transferred as a result of a bridge transfer would have gained an economic benefit from participating in the bridge transfer; in the present case – as argued by the Appellant - FIFA had not met this specific burden of proof. The Panel further found that the only violation of the TMS rules that had been established and proven to its comfortable satisfaction was the mere fact that once the agreement between the clubs was cancelled, the Appellant did not amend the data in the TMS, and did not upload to the TMS the information that the transfer fee was not paid to Institución. The Appellant was found to have violated Article 9.1 paragraph 2 of Annex 3 of the Regulations as the data that remained in the system was untrue.

3. Thereupon the Panel turned to the question of good or bad faith in the context of the present bridge transfer, highlighting at the outset that according to the Regulations *"All users shall act in good faith"*.

   In this context FIFA argued that a person was considered in bad faith if (a) he knew, had to know or could know of the existence of (b) a legally incorrect situation. That it was clear that a legally incorrect situation existed and that therefore it was decisive whether or not the Appellant knew, had to know or could know that the TMS was used for illegitimate purposes in the context of the transfer of the Player. FIFA contented that it had been clearly established that the Appellant was aware of the way and reasons in/for which the transfer took place, and that it was also aware, or at least was supposed to be aware of the standards of the conduct demanded to all stakeholders using the TMS. In this context, even being aware of the implications of the transfer the Appellant went on to conduct the transfer and the registration of the transfer in the TMS. Conversely, the Appellant – alleging that the transfer of the Player to it did not have an illegitimate, but a sporting purpose insofar as the Player had joined the Appellant as an important member of the team – contended that contrary to the finding by the FIFA DC it had not been established that it had committed a regulatory violation. The Appellant further alleged that it had not been

aware that the Player's only objective with regard to the registration with clubs qualified as *"sporting fiscal paradises"* was to receive through these clubs amounts declared as transfer compensation, from which only the Player had a personal economic benefit, but not the Appellant. Furthermore that it had not acted in bad faith and insofar as the TMS User Handbook did not include any explanation related to the good faith concept within the TMS, the concept remained too wide and vague with the consequence that a sanction as severe as the one imposed on it could not be enforced. Lastly the Appellant argued that it had no intention to use the TMS to prevent the Argentine tax authorities from retracing the payments relating to the transfer of the Player; therefore the conclusion that the TMS had been affected wrongfully could not be accepted. The operation/transfers were clearly and correctly reflected in the TMS, allowing FIFA to conclude that it had in some of its instances a *"purely economic purpose"*.

The Panel held that sufficient evidence was available to prove that the Appellant was aware of the reason why the Player was not directly transferred to it; and that the Appellant, being aware of these circumstances, did not act in good faith and could not allege that the transfer via Institución was conducted exclusively on the basis of sporting interests, given that this venue of transfer actually involved an economic interest of a third party, *i.e.* the Player. At the same time, and in light of the fact that it had not been disputed that the Appellant also had a sporting interest in the transfer of the Player, the Panel found that insufficient evidence was available to prove that the Appellant should be assumed to not have acted in good faith in connection with the Player's transfer registration in the TMS. For instance, it had not been proven that the Appellant had registered misleading or false information in the TMS.

4. Lastly the Panel reflected on FIFA's responsibility as rule maker. In this context the Appellant argued that neither the FIFA Code nor the Statutes or any other FIFA regulation contained an express prohibition of transfers of players based on purely economic purposes and that the lack of regulations sanctioning such types of transfers precluded any sanction based on such a concept, under penalty of violating the basic principle governing disciplinary issues, *Nulla poena sine lega certa*. The Appellant further argued that according to Annexe 3 of the Regulations, it was for the FIFA Disciplinary Committee to impose sanctions derived from the use of the TMS, however *"… in accordance with the FIFA Disciplinary Code"*. However, the FDC in turn did not contain any provision making transfers with a purely economic purpose a violation; the only limits to transfers would be set forth in Article 5.3 of the Regulations, according to which: *"Players may be registered with a maximum of three clubs during one season. During this period, the player is only eligible to play official matches for two clubs. …"*. Further, FIFA had no right or capacity to analyse the reasons behind each hiring and had therefore set forth regulations limiting these transfers; therefore if the respective regulations were followed, no sanctions were to be imposed on the parties involved in the transfers.

The Respondent disagreed that the absence of a literal prohibition of *"bridge transfers"* in the FIFA regulations prevented the FIFA DC from rendering a decision in this respect. Indeed, this would disregard the freedom of interpretation of the norm generally granted to the FIFA bodies under the FIFA regulations, here the FIFA DC. The Respondent further contended that Annexe 3 of the Regulations would clearly establish that the violation of any provision of the Annexe was subject to sanctions. Furthermore, a number of provisions of the FIFA regulations - although not applicable to the present matter as such - make reference to the sporting integrity, presenting an unambiguous view of what falls within the scope of the Regulations in general terms. According to these regulations – setting out the framework within which the registration (and thus the transfer) of players must take

place - generally, due consideration should be given to the sporting integrity of competitions. Equally, when registering players, the sporting integrity of the competition had to be safeguarded, with the concept of sporting integrity to be interpreted even more broadly than a mere *"sporting reason"* of the transfer. Lastly the Respondent disagreed with the Appellant's interpretation according to which Article 5 paragraph 3 of the Regulations confirmed that transfers conducted for mere economic reasons were even expressly permitted by FIFA regulations. It claimed that conversely, it clearly followed from the regulations of FIFA that transfers for reasons that were not of a sporting nature were not permitted and should be considered illegitimate in terms of the Regulations.

The Panel highlighted that in view of the paramount importance of preventing and fighting bridge transfers when such transfers were conducted for the purpose of engaging in unlawful practices, such as tax evasion, or to circumvent the rules concerning, for instance, the payment of training compensation or solidarity contributions, or to assure third party's anonymity in relation to the relevant authorities in the football world, it entirely concurred with the Respondent that measures should be applied. It further held that FIFA was responsible for preparing a set of rules which, in a clear and transparent manner, regulate these matters and the consequences derived from committing such unlawful practices, in order for the parties involved, not least the players, in conformity with the principle of legality, to be provided with specific guidelines outlining how to act in the context of international transfers of players. However the current TMS rules did not satisfy these needs and neither represented an appropriate or effective tool for combating and/or sanctioning bridge transfers; moreover, the lack of a clear and specific set of rules did not justify the *"secondary use"* of the TMS rules for these purposes. The Panel clarified that in the present case, the FIFA DC grounded the imposed sanction on the fact that the Appellant had allegedly failed to meet its obligation to disclose the identity of the ultimate recipient of the agreed *"transfer compensation"*, underlining that apparently no legal grounds existed for sanctioning the Appellant for its "direct" participation in the bridge transfer. The Panel further criticized that professional football players were not covered by the concept of *"Users"* in relation to the TMS, and that therefore, within the scope of the current set of TMS rules it was not possible to sanction players for participating in bridge transfers and/or for the resulting improper registration in the TMS, even in a situation like the present one where it could not at least be denied that it was the Player who initiated the bridge transfer for personal gain.

Decision

The Panel therefore partially upheld the appeal filed by Racing Club Asociación Civil against the decision rendered by the FIFA Disciplinary Committee on 14 August 2013, set the 14 August 2013 decision aside and reduced the sanctions imposed on the Appellant to a reprimand.

CAS 2015/A/3903
Club Samsunspor v. Fédération Internationale de Football Association (FIFA)
4 May 2015

Football; Consequences of failure to request reasoned decision under Article 116 para. 1 FIFA Disciplinary Code; Scope of CAS review; Decisions without grounds under FIFA Disciplinary Code; Consequences of failure to request reasoned decision under Article 116 par. 1 FIFA Disciplinary Code;

Panel
Prof. Luigi Fumagalli (Italy), President
Mr Lucas Anderes (Switzerland)
Mr Hans Nater (Switzerland)

Facts

Club Samsunspor (hereinafter referred to as the "Club" or the "Appellant") is a Turkish football club with seat in Samsun, Turkey, affiliated to the Turkish Football Federation (hereinafter referred to as the "TFF"), which is a member of the Fédération Internationale de Football Association (hereinafter referred to as "FIFA" or the "Respondent").

On 26 April 2012, the Dispute Resolution Chamber of FIFA (hereinafter referred to as the "DRC") adopted a decision (hereinafter referred to as the "DRC Decision") in a dispute regarding an employment related matter between the Club and B. (hereinafter referred to as the "Player"), condemning the Club to pay to the Player the amount of USD 30,000 within 30 days as from the date of notification of this decision. The Club was further informed that in the event that the amount due was not paid within the stated time limit, interest will fall due as of expiry of the time limit and, upon request, the matter would be submitted to the FIFA Disciplinary Committee (hereinafter referred to as the "DC") for consideration and a formal decision. The terms of the DRC Decision were communicated to the Club on 8 May 2012.

In the absence of payment within the time limit granted, FIFA, by letter dated 27 November 2012, requested the Club to immediately pay the amount due to the Player, indicating again that in the absence of payment, the matter would be forwarded to the DC pursuant to Article 64 of the FIFA Disciplinary Code (hereinafter referred to as the "FDC").

On 8 April 2014, disciplinary proceedings were opened against the Club and the Club was requested to immediately pay the amount due. In a letter dated 29 April 2014, the Club was notified that a decision in its disciplinary case would be taken by the DC on 22 May 2014; however, in the event of payment of the outstanding amount by 13 May 2014 at the latest, the disciplinary case would not proceed. Following cancellation of the meeting of the DC scheduled for 22 May 2014, the decision on the Club's disciplinary case was postponed to 6 July 2014 and the Club was given another deadline to settle the outstanding debt, expiring on 23 June 2014.

On 6 July 2014, the DC adopted its decision (hereinafter referred to as the "DC Decision"). The Club was pronounced guilty of failing to comply with the decision passed by the DRC on 26 April 2012 and was therefore held in violation of art. 64 of the FDC. It was further ordered to pay a fine in the amount of CHF 5,000, within 30 days of notification of the DC Decision. The Club was further granted a final period of grace of 30 days as from notification of the DC Decision in which to settle its debt to the Player. Lastly it was informed that in case of non-payment within the granted deadline, the creditor might demand in writing from the DC Secretariat that three points be deducted

from the Club's first team in the domestic league championship and that once the creditor had filed this request, the points would be deducted automatically without a further formal decision having to be taken by the DC. Moreover, if the Club still failed to pay the amount due even after deduction of the points, the DC would decide on a possible relegation of the Club's first team to the next lower division. The terms of the DC Decision were communicated to the Club on 25 August 2014. The grounds of the DC Decision were not communicated to the Club, but the DC Decision included *"Notes"* reading as follows:

> *"Note relating the terms of the decision:*
>
> *The judicial bodies may decide not to communicate the grounds of a decision and instead communicate only the terms of the decision. Any request for the grounds of the decision must be sent in writing to the secretariat to the FIFA Appeal Committee, within ten days of receipt of notification of the terms of the decision (art. 116 par. 1 of the FIFA Disciplinary Code). Such a request does not affect the terms of the decision, which come into force with immediate effect (art. 106 of the Disciplinary Code).*
>
> *Note relating to the legal action:*
>
> *If a party requests the grounds of a decision, the motivated decision will be communicated to the parties in full, written form. The time limit to lodge an appeal, where applicable begins upon receipt of this motivated decision (art. 116 par. 2 of the FIFA Disciplinary Code)".*

On 5 November 2014, the Player informed the DC Secretariat that the Club had only partially paid (the amount of USD 10,000) the sum due (totalling USD 30,000 plus interest) and requested the application of the penalty imposed by the DC Decision. In response, the DC Secretariat informed the Player that the DC Secretariat might only order the implementation of the points' deduction upon receipt of the relevant explicit written request of the creditor. By letter of 3 December 2014, the Player expressly requested the application of the *"penalty of deduction of 3 points"*. As a result, on 17 December 2014, the DC Secretariat requested the Turkish Football Federation (hereinafter referred to as the "TFF") to immediately deduct three points from the Club's first team.

By letter of 29 December 2014 sent to the DC Secretariat the Club explained that it had failed to comply with the decisions on time due to administrative disorder. However on 27 December 2014, a new management had been appointed and from now on, the Club said that it would do its best to timely comply with FIFA rules and decisions. It further requested FIFA to withdraw the three points' deduction in consideration of these facts.

By letter of 7 January 2015, the Player confirmed receipt of payment and that no other receivable was outstanding; it further requested FIFA to disregard its earlier application for the deduction of the points from the Club's first team. On the same day, the Club repeated its request for the cancellation of the three points' deduction. Furthermore the TFF requested closure of the file in question.

By letter of 26 January 2015 (hereinafter also referred to as the "Letter of 26 January 2015"), the DC Secretariat informed the Club, the TFF and the Player that it had taken note of the payment of the entire outstanding amount to the Player and of both the requests by the Player to disregard his application for the deduction of the points and the Club's request to withdraw the deduction of the points. The DC Secretariat further noted that insofar as the outstanding amount due had only been paid after the deadline provided by the DC Decision of 6 July 2014 had elapsed, the Club's request to withdraw the points' deduction was rejected and that upon receipt of the relevant proof of the points' deduction, the disciplinary proceedings against the Club would be closed.

On 30 January 2015, the Club filed a statement of appeal with the CAS, pursuant to the Code of Sports-related Arbitration (hereinafter referred to as the "Code"), challenging the DC Decision *"in connection"* with the DRC Decision and the Letter of 26 January 2015.

A hearing was held on 22 April 2015.

Reasons

1. To start with the Panel addressed the question of the scope of its review in the present matter. In that respect, and in clarification of its requests submitted together with the statement of appeal, the Appellant confirmed that it did not challenge the findings contained in the DRC Decision. Rather its main challenge was directed to FIFA's request and persistence of the deduction of 3 points even after the Appellant had paid the amounts in full and even after the legal representative of the Player had requested FIFA to stop the execution. In fact, the appeal was directed not only against the DC Decision, in connection with the DRC Decision, but also against FIFA's letter of 26 January 2015, rejecting the Appellant's request to withdraw the deduction of three points. FIFA argued that an appeal against the Letter of 26 January 2015 would be inadmissible because such letter, requesting the implementation of the points deduction from the TFF, was a mere measure of execution of a final and binding decision adopted by the DC and that therefore, no application to the CAS could be lodged against it.

   The Panel decided that a claimant seeking the annulation of a letter containing a decision had to make a specific petition – *e.g.* in the form of a request for setting aside or for any other remedy – against that letter. In the absence of a specific request, CAS could not render a respective decision. The Panel concluded that it would only verify its jurisdiction and the admissibility of the appeal with respect to the object of the proceedings and as defined by the Appellant's request for relief, *i.e.* only with regard to the DC Decision.

2. FIFA further submitted that the appeal against the DC Decision was inadmissible, underlining that that decision was final and binding insofar as the Appellant had not requested for its grounds to be submitted, reason for which it was deemed to have waived its right to file an appeal against that decision. FIFA further pointed out that the appeal against the DC Decision was insofar inadmissible as it had only been filed on 30 January 2015 and therefore too late, as well beyond the 21 days deadline of notification of the decision to the Club, as foreseen by Article 67.1 of the FIFA Statutes. In this context FIFA took the position that the Club's argument that only on 29 December 2014 a new Executive Committee had been elected, and that the amounts due were paid immediately thereafter by the new management, was *"not substantiated"* and *"irrelevant"*, bearing in mind the extensive possibilities granted to the Appellant to settle its debts. In addition, the debtor's financial problems in meeting its obligations were not a *"relevant argument"*.

   The Panel agreed with FIFA's submissions on both counts; regarding the first point, it confirmed CAS' case law referred to by the Respondent in its answer and held that the duty following from Article 116.1 of the FDC to request the motivated reasons of a decision within 10 days of its notification in order to be able to appeal it before CAS did not infringe fundamental legal principles; thus little was required within the 10 day time frame – just to solicit a reasoned decision; futher the 10 day-deadline to request the

grounds of the decision did not shorten the deadline applicable for filing an appeal; lastly the articles providing for such a request of grounds served a legitimate purpose, *i.e.* to cope with the heavy caseload of FIFA, and contribute to the goal of an efficient administration of justice. Furthermore the Panel underlined that whereas the grounds of the DC Decision had not been communicated to the Club, the decision contained notes expressly and particularly warning the Club about the terms of Article 116 FDC; in that respact it was irrelevant for such purpose whether said warning had been contained in the operative part of the decision or in a different place. The Panel noted that in spite of such notes, the Appellant had not requested the grounds of the decision, but had filed an appeal with CAS against the *"non-grounded"* DC Decision. The Panel further dismissed the appeal as inadmissible because it had been filed too late.

3. Lastly the Panel held that notwithstanding the warning as to the consequences of not requesting the reasons, the Club had, for whatever reason (apparently its mismanagement, which, in the Panel's view, was absolutely irrelevant and could not constitute a valid excuse of any kind), not requested the grounds of the DC Decision. The inactivity of the Club led to the fact that the DC Decision became final and binding.

Decision

The Panel therefore dismissed the appeal as inadmissible, both insofar as it had been filed too late and because in light of the Club's failure to request its grounds, the DC Decision had become final and binding.

CAS 2015/A/4162
Liga Deportiva Alajuelense v. Fédération Internationale de Football Association (FIFA)
3 February 2016

Football; Request of disciplinary sanction for non-compliance with a FIFA decision; Qualification of a letter as a decision; Exhaustion of all internal remedies; Standing to sue and standing to appeal; Nature of enforcement proceedings according to Art. 64 FIFA Disciplinary Code; Relevance of foreign insolvency proceedings in the context of Art. 64 FIFA Disciplinary Code; Exceptions to the prohibition of enforcement proceedings once insolvency proceedings have been initiated;

Panel
Prof. Ulrich Haas (Germany), President
Mr José Juan Pintó (Spain)
Mr Ricardo de Buen Rodríguez (Mexico)

Facts

Liga Deportiva Alajuelense ("LDA" or the "Appellant") is a Costa Rican football club based in Alajuela. FIFA (or the "Respondent") has its seat in Zurich (Switzerland) and enjoys legal personality under Swiss law.

On 14 February 2011, the Spanish football club Real Zaragoza S.A.D. ("RZ") entered into an employment contract with the player D. (the "Player"). On 7 June 2011, the Appellant filed a claim against RZ for the payment of the amount of EUR 580,000.00 for training compensation relating to the transfer of the Player to RZ with the FIFA Dispute Resolution Chamber (the "FIFA DRC").

With judgment dated 13 June 2011, the Commercial Court of Zaragoza (the (Insolvency Court") declared RZ to be in voluntary insolvency proceedings and, as a consequence, opened the insolvency proceedings over RZ's assets. On 24 August 2011, FIFA informed the Appellant about the decision issued by the Insolvency Court on 13 June 2011. Furthermore, FIFA advised the Appellant that it had, in principle, no authority to interfere with the insolvency/administration procedure – including voluntary administration procedure – over the estate of a club and that, as a consequence, FIFA was not in a position to further deal with the request for training compensation filed by the Appellant.

With judgment dated 9 May 2012, the Insolvency Court approved the early creditor's arrangement proposal filed by RZ, setting out the terms and the conditions for the payment of the credits admitted. By the same judgment, furthermore, the Insolvency Court lifted the administration of RZ's estate.

On 4 June 2012, the Appellant filed with the FIFA DRC a further claim against RZ for the payment of the amount of EUR 580,000.00 for training compensation for the transfer of the Player to RZ. On 25 April 2014, the FIFA DRC passed a decision (the "First Decision") by means of which RZ was ordered to pay in favour of the Appellant the amount of EUR 487,500.00. Furthermore, the First Decision advised RZ that a failure to comply with the obligation at stake would entail, upon the Appellant's request, that the case be submitted to the FIFA Disciplinary Commission (the "FIFA DC").

On 27 May 2014, RZ informed the FIFA DRC that it had requested the Insolvency Court to modify the list of creditors admitted in its insolvency procedure and to include the amount owed to the Appellant in the list of creditors.

On 30 July 2014, the Appellant sent a letter to the FIFA Player's Status & Governance

Department (hereinafter the "FIFA PSD") and to the FIFA DRC, informing them that as of that date the First Decision had not been complied with. The Appellant requested that a final deadline for the payment of the amount be set pursuant to Article 64 (1) (b) of the FIFA Disciplinary Code (the "FDC"). On 8 August 2014, the FIFA PSD, on behalf of the FIFA DRC, urged RZ to immediately pay the amounts due to the Appellant and advised RZ that in the absence of such payment, the case would be submitted to the FIFA DC for consideration.

On 14 August 2014, the Real Federación Española de Fútbol (the "RFEF") forwarded, on behalf of RZ, a letter to the FIFA PSD. The letter explained that the insolvency administrators had agreed to include the Appellant's claim in the list of creditors and that judicial approval of such decision by the Insolvency Court was outstanding, but expected to be granted.

On 25 August 2014, LDA informed FIFA of the persisting lack of payment by RZ and requested FIFA to submit the matter to the FIFA DC. On 22 September 2014, the FIFA PSD informed LDA and RZ that the matter had been submitted to the FIFA DC for consideration and decision.

On 24 September 2014, RZ – via the RFEF – informed FIFA of the decision issued by the Insolvency Court on 23 September 2014, in which the latter authorized the inclusion of the Appellant's claim in the list of creditors as "ordinary and subordinate" creditor.

On 21 October 2014, 21 January 2015, 24 April 2015 and 8 July 2015, LDA requested the FIFA DC to issue a disciplinary decision against RZ. On 8 July 2015, the Deputy Secretary of the FIFA DC sent a letter to the Parties informing them that in view of the Insolvency Court's decision dated 23 September 2014 to include the Appellant's claim in the list of creditors, the FIFA bodies were not, "in principle", in a position to further deal with the case (the "Appealed Decision").

On 4 August 2015, the Court of Arbitration for Sport (the "CAS") acknowledged receipt of a Statement of Appeal filed on 29 July 2015 by LDA against the Appealed Decision. The Appellant requested the CAS Panel to *"annul"* the Appealed Decision and to issue a new one granting RZ a final deadline for the payment of the amounts indicated in the First Decision and warning RZ that, in case of non-compliance, deduction of points, relegation to a lower division or a transfer ban would be applied.

Reasons

1. The Parties disagreed on whether the communication sent by the FIFA constituted a "decision" within the meaning of Article R47 of the CAS Code. In particular, the Respondent submitted that the FIFA letter had a purely informative character and, thus, could not be qualified as an appealable decision.

   The Panel found that whether or not a letter qualified as a "decision" depended on its contents. The form of the communication had no relevance for the determination whether there existed a decision or not. In particular, the fact that the communication was made in the form of a letter did not rule out the possibility that it constituted a decision subject to appeal. As to the issue of the *animus decidendi* in the letter, what was relevant was the objective effect of a decision on its addressee, and not the subjective intent of the authority which rendered the decision. The decisive criteria, thus, was whether or not the act in question impacted upon the legal situation of the appellant. If that was the case (independent of what the intentions of the relevant sports organisation were), there

should be access to justice for the person concerned.

In the case at hand the Appealed Decision stated that FIFA was not in a position to further deal with the case, therefore clearly ruling on the admissibility of the Appellant's request for relief, denying such admissibility and thus, objectively affecting the Appellant's legal position with regard to the right of the latter to pursue the enforcement of its claim against RZ. The Panel concluded that notwithstanding the fact that the Appealed Decision was dressed in the form of a letter, it was in substance an appealable decision within the meaning of Article R47 of the CAS Code.

2. FIFA also contended that the Appellant did not react to the Appealed Decision in any way (*e.g.* requesting the opening of formal disciplinary proceedings, requesting additional explanations for the letter or filing further submissions) but rather decided to directly file an appeal with the CAS. The Panel noted, however, that FIFA failed to concretely indicate the legal basis on which a corresponding duty/faculty of the Appellant may be inferred. It held that the proceeding at the outcome of which the Appealed Decision was issued was covered and contemplated by Article 64 FDC, *i.e.* the proceedings set in motion in the case of failure *"to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA"*. For the Panel, it was also clear that, once such proceedings were initiated, they might not necessarily end up with the imposition of a sanction, for example when the FIFA DC refused to entertain the request filed by a party on the basis of the lack of jurisdiction or lack of authority to further deal with the case. Such decisions, even though they did not impose a sanction and might not formally be issued by the FIFA DC, qualify as decisions *"passed in accordance with Article 64"* pursuant to Article 64 (5) FDC. They should therefore be considered as a *"final decision"* issued by the FIFA DC within the meaning of Article R47 of the CAS Code, against which no further internal remedies are available.

3. On the merits, the first question to solve for the Panel was whether in the case at stake the Appellant could request CAS to order the FIFA DC to institute or impose sanctions against the judgment debtor, as Article 64 FDC primarily provides for a disciplinary measure. The Panel found that the term "standing to *sue*" describes the entitlement of a party to avail itself of a claim. In general, it suffices for the standing to sue that a party invokes a right of its own. However, regarding the "standing to *appeal*", additional requirements apply. In particular, the appealing party must be affected by the decision it appeals. A party has standing to appeal if it can show sufficient legal interest in the matter being appealed. In this respect the appealing party must show that it is aggrieved, *i.e.* that it has something at stake. Although normally one member of the FIFA family does not have a claim against FIFA to have a sanction imposed on a fellow member, in the case of Article 64 FDC, the prevailing opinion appears to grant the creditor a right to *"assistance with enforcement"*, *i.e.* a right to institute disciplinary proceedings against the judgment debtor. This follows from the fact that the enforcement procedure according to Article 64 FDC is a (natural) continuation of the procedure before the FIFA DRC. Thus, the right of access to justice does not only cover a party's right to bring a case for the determination of the parties' rights and obligation before the FIFA DRC, but also before the competent organs of enforcement of FIFA. Therefore, the creditor, in principle, has a right to request

FIFA to initiate enforcement proceedings against the judgment debtor.

4. Regarding the nature of the proceedings contemplated by Article 64 FDC, the Panel found that both the CAS jurisprudence and the Swiss Federal Tribunal have defined it to be mainly disciplinary. As a further confirmation the Panel noted that under Article 64 FDC the fine for the failure to comply with an award is to be paid to FIFA: in other words, compliance is first due to FIFA. Furthermore, the criterion to determine the amount of the fine is not what is necessary for the judgment debtor to succumb but rather how serious the failure to comply with the order to make payment or effect performance is. It is therefore the seriousness of the breach of the respective obligation which decides the extent of the (disciplinary) fine.

5. The Appellant submitted that the insolvency proceedings could not affect the Appellant's claim, since the Appellant was not informed of these proceedings and never intervened in the bankruptcy proceedings in Spain. In any case, in consideration of the Swiss private international law, the relationships between FIFA and its members/affiliates should be exclusively governed by FIFA Regulations and Swiss law without reference to the laws at the place of the individual members and/or affiliates.

   The Panel found that foreign insolvency proceedings were not irrelevant in the context of enforcement proceedings according to Article 64 FDC. Article 107 (b) FDC, in principle, assumes the recognition of foreign insolvency proceedings. It is within the autonomy of FIFA to recognize or take into account foreign insolvency proceedings independently of whether or not a special recognition procedure has been initiated before Swiss courts in respect of foreign insolvency decisions, as Article 166 et seq. of the Swiss Federal Code on Private International Law (PILA) which provides for that particular recognition procedure is directed at domestic state courts and authorities only and does not, therefore, conflict with the (automatic) recognition of foreign insolvency proceedings by FIFA. The underlying rationale of Article 107 (b) FDC is that if the insolvency debtor can no longer manage or dispose of his assets as of the opening of insolvency, then it is not possible for fault to be attributed to him and therefore a sanction for non-compliance with the payment obligation cannot be imposed on him.

6. In continuation, the Panel held that exceptions applied to the abovementioned principles. According to the Panel, Article 107 (b) FDC did not totally forbid enforcement proceedings according to Article 64 FDC in case insolvency proceedings had been initiated. Instead, Article 107 (b) FDC provides that the closing of the disciplinary proceedings is a matter of a balance of interests, since it is at the discretion of the FIFA DC (*"may close"*). Under national law, only creditors who acquired their claim prior to the opening of insolvency are subject to the (enforcement) restrictions. If, on the other hand, the case concerns the enforcement of a claim that arises after the insolvency proceedings were opened, *i.e.* if the debt is incumbent on the estate, no restrictions under insolvency law usually apply with respect to the enforcement of the claim. There is, therefore, no reason not to make the FIFA enforcement system available for obligations incumbent on the estate, since these debts are preferential debts, which under national law can as a general rule be pursued against the bankrupt's estate because they are not subject to the principle of equal treatment of creditors.

In the case at hand, the Panel found that the FIFA DC had not exceeded the margin of discretion when issuing the Appealed Decision. The Panel held that there was no (sporting or other) reason why the Appellant should be treated preferentially in the case at hand, as the claim for training compensation arose once the transfer of the Player to RZ was completed, prior to the opening of the insolvency proceedings. Thus, the Insolvency Court was right in qualifying the Appellant as an ordinary creditor. The Panel further found that the fact that ordinary creditors were affected by an insolvency proceeding and suffered considerable discounts on their unsecured debts was not a special feature of Spanish insolvency law, but a common feature of most insolvency laws around the globe. Although some possibility of recourse existed, in the case at hand, the Appellant chose not to use it. The Panel concluded that proceedings before CAS were not the appropriate forum to amend decisions of the Insolvency Court that the Appellant chose not to challenge.

Decision

The Panel, therefore, found that in this case and given the specific circumstances surrounding it, FIFA was correct in closing the procedure, *i.e.* to discontinue the enforcement of the First Decision according to Article 64 FDC. Consequently, the Panel dismissed the appeal.

TAS 2015/A/4178
Zohran Ludovic Bassong & RSC Anderlecht c. Fédération Internationale de Football Association (FIFA)
2 février 2016

Football; Transfert international d'un joueur mineur; Exception à l'interdiction de transfert d'un joueur mineur dans le cas d'un déménagement des parents; Caractère non-exhaustif de la liste des exceptions à l'interdiction de transfert d'un joueur mineur; Intérêt supérieur du joueur mineur;

Formation

Me Olivier Carrard (Suisse), Président
Me Bernard Hanotiau (Belgique)
Me Jean-Paul Burnier (France)

Faits

Zohran Ludovic Bassong ("le Premier Appelant" ou "le Joueur") est un joueur de football amateur de nationalité canadienne né le 7 mai 1999 à Toronto, Canada. Le RSC Anderlecht ("le Second Appelant" ou "le Club") est un club professionnel de football qui milite au sein de la "Jupiler Pro League" (1ère division belge) et est affilié à l'Union Royale Belge des Sociétés de Football – Association (ci-après: "l'URBSFA"). La Fédération Internationale de Football Association ("l'Intimée" ou "la FIFA") est une association de droit suisse, ayant son siège à Zurich, Suisse.

Le 23 juillet 2013, le Joueur a quitté le Canada afin de s'établir en Belgique. Peu avant, la garde du Joueur avait été confiée à ses grands-parents domiciliés à Gilly, en Belgique, jusqu'au 30 août 2017, *"date du retour définitif de Zohran Ludovic Bassong à la résidence de ses tuteurs légaux"*, soit au domicile de ses parents.

Peu après l'arrivée du Joueur en Belgique, sa grand-mère a déclaré, dans une convention écrite, vouloir devenir sa tutrice officieuse. Ladite convention a été entérinée par décision datée du 6 janvier 2014 par le Tribunal de la jeunesse de Tournai (Belgique). Il résulte de cette décision que la démarche de la grand-mère du Joueur visait à *"offrir au jeune une prise en charge dans le milieu familial élargi pour qu'il puisse progresser dans la pratique du football dans le cadre d'études qui n'existent pas au Canada"*.

Le 9 janvier 2014, l'URBSFA a entré dans le système de régulation des transferts (ci-après "TMS") une demande d'approbation international pour le Joueur, au nom de son club affilié, le Royal Mouscron-Peruwelz, en invoquant comme raison le déménagement des parents du Joueur pour des raisons étrangères au football.

Le 18 janvier 2014, le Juge Unique de la Sous-Commission du Statut du Joueur ("le Juge Unique") a rejeté ladite demande au motif que le Joueur s'était rendu en Belgique sans être accompagné de ses parents et uniquement avec ses grands-parents à qui les parents du Joueur avaient confié la garde.

En janvier 2015, la mère du Joueur a quitté le Canada pour s'établir en Belgique. Selon ses explications, son déménagement s'inscrivait dans le contexte d'une procédure de recouvrement de la nationalité belge qu'elle avait décidé d'entreprendre, seules les personnes ayant leur résidence principale en Belgique depuis au moins douze mois sur base d'un séjour légal ininterrompu pouvant demander ce recouvrement. Directrice générale d'une société, la mère du Joueur bénéficiait d'une "mise à disposition" de son employeur afin de lui permettre de poursuivre ses démarches. Durant cette période, elle continuait de percevoir une rémunération, son emploi de directrice générale étant garanti. Le père du Joueur est quant à lui demeuré au Canada où il occupe un poste de directeur dans le secteur

bancaire.

Le 15 juin 2015, l'URBSFA a soumis, au nom du Second Appelant, une nouvelle demande d'approbation de transfert international pour le Joueur dans le TMS en invoquant comme raison le déménagement des parents du Joueur pour des raisons étrangères au football.

Le 16 juillet 2015, le Juge Unique a rejeté la demande d'approbation préalable à la demande de Certificat International de Transfert (ci-après: "CIT") du Joueur au motif que sur la base des documents à disposition, il ne pouvait être établi sans aucun doute que la mère du Joueur avait déménagé en Belgique pour des raisons totalement étrangères au football.

Le 17 août 2015, les Appelants ont déposé au TAS une déclaration d'appel tendant à réformer la décision du Juge Unique *"en autorisant RSCA (via l'URBSFA) à solliciter le Certificat International de Transfert de Monsieur Z. BASSONG auprès de la Fédération canadienne de Football afin de permettre au joueur dont question d'être qualifié et enregistré définitivement au sein de RSCA et de pouvoir participer à toute compétition officielle dans laquelle évoluerait le RSCA et telle qu'organisée par l'URBSFA dans les catégories d'ages U17 et U21 (saison 2015/2016)".*

Considérants

1. L'art. 19 du Règlement sur le Statut et le Transfert des Joueurs ("RSTJ") interdit en principe le transfert international d'un joueur âgé de moins de dix-huit ans (art. 19 al. 1 RSTJ, *a contrario*). Toutefois, l'art. 19 al. 2 RSTJ énonce trois exceptions. Pour la Formation arbitrale, la première question à résoudre était de savoir si le joueur remplissait les conditions pour bénéficier de l'une de ces exceptions, en l'occurrence l'art. 19 al. 2 let. a RSTJ qui s'applique lorsque les parents du joueur s'installent dans le pays du nouveau club pour des raisons étrangères au football.

   Dans le cas d'espèce, il s'agissait de déterminer si l'installation de la mère du Joueur en Belgique était due à des raisons étrangères au football ou non. La Formation a souligné que la protection de l'art. 19 al. 2 let. a RSTJ visait notamment le cas où le joueur mineur suivait ses parents partis à l'étranger pour des raisons personnelles, mais non celui où les parents d'un mineur suivaient leur enfant à l'étranger dans le but de l'intégrer dans un club. Or, à la lumière des éléments du dossier, la Formation ne pouvait que constater que l'installation de la mère du Joueur en Belgique était largement postérieure à celle de son fils. Ainsi, la situation du Joueur ne correspondait en aucun cas à celle d'un mineur ayant suivi ses parents partis s'installer dans un pays étranger. Il s'ensuivait que le Joueur ne pouvait pas être mis au bénéfice de l'exception visée à l'art. 19 al. 2 let. a RSTJ, indépendamment des raisons ayant conduit sa mère à venir s'installer en Belgique.

2. Le joueur ne pouvant bénéficier de l'exception visée à l'art. 19 al. 2 let. a RSTJ, il s'agissait ensuite de savoir si la liste d'exceptions contenues à l'art. 19 al. 2 RSTJ était exhaustive. La Formation a rappelé que dans l'affaire CAS 2008/A/1485, il avait été décidé que la liste des exceptions figurant à l'art. 19 al. 2 RSTJ n'était pas exhaustive. Ce caractère non-exhaustif avait été confirmé dans l'affaire TAS 2012/A/2862.

   La Formation a en outre constaté que la jurisprudence interne de la FIFA confirmait le caractère non-exhaustif de la liste des exceptions. Une note de synthèse produite par l'Intimée à la demande des Appelants précisait en effet que si un club estimait que des circonstances très particulières ne répondant à aucune des exceptions prévues dans le RSTJ justifiaient l'enregistrement d'un joueur

mineur, il pouvait soumettre une demande officielle par écrit à la FIFA pour qu'elle considère le cas spécifique et rende une décision formelle. Il ressortait en outre de la note de synthèse que l'appréciation de ce type de demande se faisait *"au cas par cas"*, ce qui expliquait qu'il n'était *"pas possible de spécifier davantage les éléments nécessaires à l'acceptation d'une exception autre que celle prévue par l'art. 19, al. 2 du règlement"*.

3. La question qui se posait logiquement alors était de savoir si le Joueur pouvait être mis au bénéfice d'une exception non écrite. Après avoir rappelé que l'interdiction du transfert international de mineurs avait pour objectifs de protéger la sécurité des joueurs mineurs et d'éviter toute forme d'abus liés à leur condition de jeunes footballeurs, la Formation a considéré qu'à la lumière de l'ensemble des circonstances du cas d'espèce, de tels risques étaient en l'occurrence inexistants. La famille Bassong disposait en effet d'attaches sérieuses avec la Belgique, une partie de la famille de la mère du Joueur y résidant d'ailleurs. En outre, même si la FIFA avait émis des doutes quant au projet d'installation des parents du Joueur en Belgique, les explications fournies à cet égard lors de l'audience s'étaient révélées convaincantes. Le père du Joueur avait notamment exposé qu'il allait rejoindre son fils et son épouse à moyen terme. Le Joueur était par ailleurs scolarisé dans une école offrant une filière sport-étude et obtenait de bons résultats scolaires. Enfin, la situation économique aisée de ses parents, tous deux directeurs, tendait à exclure le risque d'une exploitation commerciale du Joueur.

   Pour la Formation, si une application stricte de la règlementation en matière de transfert international de mineurs était primordiale, il n'en demeurait pas moins qu'une application mécanique de l'art. 19 RSTJ pouvait, dans certains cas particuliers, se révéler contraire à l'intérêt supérieur du mineur.

   En l'espèce, bien que le Joueur ne puisse pas bénéficier de l'exception prévue à l'art. 19 al. 2 let. a RSTJ, son bien-être et son développement personnel militaient en faveur de l'approbation de la demande de transfert. Il se justifiait par conséquent de faire une exception non prévue par l'art. 19 al. 2 RSTJ au principe fixé à l'art. 19 al. 1 RSTJ.

Décision

La Formation a donc admis l'appel interjeté par Zohran Ludovic Bassong et RSC Anderlecht le 17 août 2015 contre la décision rendue le 16 juillet 2015 par le Juge Unique de la Sous-Commission du Statut du Joueur, a annulé ladite décision et a admis la demande faite par l'URBSFA, au nom du RSC Anderlecht, pour l'approbation préalable à la demande de CIT pour le Joueur.

CAS 2015/A/4189
British Swimming, Adam Peaty, Francesca Halsall, Jemma Lowe and Chris Walker-Hebborn v. Fédération Internationale de Natation (FINA)
17 March 2016

Aquatics (swimming); Recognition of world records; Discretion of the Honorary Secretary of FINA in the evaluation of an application for a world record recognition; CAS power of review;

Panel
Prof. Luigi Fumagalli (Italy), President
Mr Michele Bernasconi (Switzerland)
Mr Dirk Reiner Martens (Germany)

Facts

Mr Adam Peaty, Ms Francesca Halsall, Ms Jemma Lowe and Mr Chris Walker-Hebborn (the "Swimmers") are English competitive swimmers who represented British Swimming at major international events (British Swimming and the Swimmers are jointly referred to as the "Appellants"). The Fédération Internationale de Natation ("FINA" or the "Respondent") is the world governing body for the aquatic sports.

In the period between 18 and 24 August 2014, the 32nd European Swimming Championships were held in Berlin (the "Championships"). The Championships were organized by the Ligue Européenne de Natation (the "LEN"), which is the continental swimming organization for Europe recognized by FINA.

On 19 August 2014, the British relay team composed of the Swimmers won the 4x100m Mixed Medley Relay swimming event (the "Relay Competition") with the time of 3:44.02, i.e. the best time that far achieved in the world. After the Relay Competition, the Swimmers underwent doping controls. On 20 August 2014, British Swimming, submitted to LEN a FINA World Record Application Form for the recognition of the world record.

On 22 August 2014, Mr Peaty won the semi-final of the 50m Breaststroke swimming event (the "Individual Competition") with the time of 26.62, i.e. the best time that far achieved in the world. Mr Peaty underwent a second doping control. On 23 August 2014, British Swimming submitted to LEN a second World Record Application Form.

Numerous correspondence among British Swimming, FINA and LEN between October 2014 and May 2015 resulted in the findings that, due to administrative difficulties and delays not attributable to the Swimmers and/or British Swimming, no EPO screening had been conducted on the samples that were taken from the Swimmers during the doping controls.

On 4 May 2015, Mr Cornel Marculescu (FINA Executive Director) sent to British Swimming a letter stating that, according to DC 5.3.2 of the FINA Doping Control Rules *"(…) No World Record shall be recognized without a negative doping test certificate for all Prohibited Substances or Prohibited Methods identified on the Prohibited List for which an analytical technique is available"* and that the laboratory responsible for the testing had now confirmed that *"[b]ecause there was no request for long-term storage of samples all of them were regularly discarded after the three month period as stipulated in the International Standard for Laboratories"*. Mr Marculescu concluded that *"[i]t is regretful that the usual procedure of asking for EPO screening after world records was not applied in this case. Therefore we are sorry that unfortunately we cannot consider the above mentioned World Records"*.

On 3 June 2015, British Swimming wrote to Mr Paolo Barelli (FINA Honorary Secretary) a

letter stating that Article 12.13 of the FINA Technical Swimming Rules ("SWR"), according to which *"[a]pplications for World Records must be made on the FINA official forms (see next page) by the responsible authority of the organizing or management committee of the competition and signed by an authorized representative of the Member in the country of the swimmer, certifying that all regulations have been observed including a negative doping test certification (DC 5.3.2). The application form shall be forwarded to the Honorary Secretary of FINA within fourteen (14) days after the performance"* had not been properly applied and asking him to exercise the power given to him by Article 12.18 SWR which provides that *"[i]f the procedure of SW 12.13 has not been followed, the Member in the country of a swimmer can apply for a World Record in default thereof. After due investigation, the Honorary Secretary of FINA is authorized to accept such record if the claim is found to be correct"*.

On 17 June 2015, Dr Cees-Rein Van Den Hoogenband (LEN, Chairman of the Medical Committee), sent an email to Mr Frischknecht (LEN), as follows: *"It is clear that the German Doping control officer did not make a request for EPO testing. […] At the form it is clearly mentioned that it concerned a World Record so it must be a mistake of the DCO"*. The same day, Mr Frischknecht (LEN) answered as follows: *"[…] My opinion is that, considering all the facts – apparently, no one played any deliberate foul in the whole process … and as such, the Athlete (above all) should be completely exonerated of the (wrong) 'interpretation' consequences"*. As a result, Dr Van Den Hoogenband (LEN) sent a message to Mr Marculescu (FINA) which reads as follows: *"[…] 1. The DCO at the EC Berlin made a mistake by not asking for EPO testing after a World Record. Doping testing in Berlin was done by the German Anti Doping Agency under supervision of LEN. So we, the Medical Commission of LEN likes to apologise too. 2. The athlete had two other tests during the EC which showed no abnormalities (no EPO testing done). […]"*.

The Chairman of the Doping Control Review Board of FINA (the "DCRB") established a recommendation to be presented at the next meeting of the FINA Bureau in the following terms: *"I note that while a WR was obtained during the course of the LEN Championships the organizing body failed to ensure that the doping controls applied at the time included an analysis for EPO. It is my view that to penalize a swimmer for an administrative oversight by an organizing committee is unfair. On the other hand the protection of other competitors mandates that appropriate action be taken to ensure that no doping has taken place. […]"*.

On 22 July 2015, the Bureau of FINA met in Kazan, Russian Federation, to discuss, *inter alia*, the issue of the recognition as world records of the results achieved by the Swimmers at the Championships. The minutes of the meeting read, in the pertinent portions, as follows: *"Details of these two World Records – an individual and a relay during the European Championships in Berlin (GER) were presented to the FINA Bureau by the FINA Honorary Secretary, recalling that the EPO tests were not performed. It appears that the athletes have completed all the procedure and acted in good faith. Based on the information received, the Bureau recommended, in accordance with the FINA rules, not to recognize these two World Records"*.

On 9 August 2015, FINA sent a letter to British Swimming containing the answer to the application of British Swimming dated 3 June 2015 (the "Decision") as follows: *"[…] According to FINA Rule SW 12 the FINA Honorary Secretary presented the case to the FINA Bureau […], and after an exchange of opinions with the Bureau, the Honorary Secretary confirmed that the FINA rule will be followed in this case. Consequently, due to the lack of EPO screening for the doping tests performed following these World Records we regret to inform you that the above-mentioned World Record Applications have not been approved"*.

At the FINA World Championships held in Kazan in the period between 24 July and 9

August 2015 (the "2015 WC"), the abovementioned potential world records were beaten by Mr Peaty in the 50m Breaststroke competition and by the team of Great Britain in the 4x100m Mixed Medley Relay competition.

On 28 August 2015, British Swimming and the Swimmers filed a statement of appeal with the CAS to challenge the Decision. A hearing was held in Lausanne on 15 December 2015.

Reasons

1. In essence, the Appellants submitted that the FINA Honorary Secretary, in issuing the Decision, had failed to exercise properly the power granted him by Article SW 12.18 SWR, which, in the circumstances, should have led to the recognition of the Potential World Records as world records.

   The Panel underlined that it was common ground between the parties that, for that recognition, only one condition was not satisfied: the existence of a negative doping test for EPO. The only possibility for the Swimmers to have their Potential World Records recognized as world records therefore consisted in the application of Article SW 12.18 SWR.

   In the Panel's opinion, the wording of Article SW 12.18 SWR underlined that the "discretion" granted by the provision in the evaluation of an application for a world record recognition could only be exercised by the Honorary Secretary of FINA in light of the circumstances of the case, as properly investigated, and on the basis of a proper justification: in other words, the decision to be rendered could not be based on the exercise of a capricious and unlimited discretion, but had to be proper and reasonable.

2. Two questions arose in that context: the first was whether a CAS panel had the power to review the discretion exercised by the Honorary Secretary of FINA pursuant to Article SW 12.18 SWR; the second was whether this Panel, having that power, had to exercise it in the present case.

   Answering to the first question, the Panel noted that pursuant to the applicable FINA regulations, CAS has jurisdiction to hear *"disputes between FINA and any of its Members"*: In the absence of an express limitation in the arbitration clause, such disputes can also regard a decision rendered by the Honorary Secretary of FINA and therefore also the exercise of the discretion provided by such rule. The Panel, then, underlined that pursuant to Article R57 of the CAS Code, a CAS panel hears *de novo* the case leading to the decision appealed from, and that, in the exercise of its *de novo* review, it can issue a new decision replacing the decision challenged, or annul the challenged decision and refer the case back for a new decision by the entity which rendered the decision set aside. In other words, under the CAS rules, a CAS panel has the power to review the discretion exercised by the Honorary Secretary of FINA and can issue an award replacing the decision issued by the Honorary Secretary of FINA. The fact that the Honorary Secretary of FINA enjoys some discretion is not *per se* an obstacle. Far from excluding or limiting the power of a CAS panel to review the facts and the law involved in the dispute heard, the CAS jurisprudence according to which the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence, only means that a CAS panel *"would not easily 'tinker' with a well-reasoned*

sanction, i.e. to substitute a sanction of 17 or 19 months' suspension for one of 18".

Coming to the second question, the Panel found that, contrary to the conclusions of the Honorary Secretary of FINA, the Potential World Records had to be recognized as world records for several reasons. Firstly, the absence of a negative doping test certificate did not *per se* justify a denial of an application under Article SW 12.18 SWR. In fact, if an EPO test had been performed, no question of application of Article SW 12.18 SWR would have arisen, and no need to resort to the exercise of a discretion by the Honorary Secretary of FINA would have existed, since all conditions would have been satisfied and the Potential World Records could be recognized as world records on the basis of the ordinary procedure governed by Article SW 12.13 SWR. Secondly, no fault could be found on the Appellants' side, which prevented the recognition of the Potential World Records as world records. In fact, it was the responsibility of LEN to ensure the conduct of doping tests; the Swimmers could rely on a high-level organization (the European continental swimming organization) for the proper conduct of such tests at a major international competition (the Championships) at which, considering the participation of top competitors, the setting of new world records could be reasonably expected; the fact that the Swimmers *"completed all the procedure and acted in good faith"* was recognized by the FINA Bureau; substantial delays were caused by LEN, and also by FINA. Thirdly, the absence of the Swimmers' fault, and the possible stigma that could fall on them, however deserving no blame, if the Potential Word Records were not recognized, led to the conclusion that the interest of the Swimmers to have the Potential Word Records recognized prevailed in the specific case over the interest of FINA not to recognize them. Lastly, the impact of the recognition of the Potential Word Records on the world records subsequently set by other athletes at the 2015 WC appeared to be no reason to deny that the Potential Word Records, at the time they were achieved, constituted the new world records.

Decision

In light of the foregoing, the Panel held that the appeal brought by British Swimming and the Swimmers was to be granted: the Decision was set aside and the Potential World Records were recognized as world records. All other motions or prayers for relief were dismissed.

CAS 2015/A/4208
Horse Sport Ireland (HIS) & Cian O'Connor v. Fédération Equestre Internationale (FEI)
15 July 2016 (operative part of 4 January 2016)

Equestrian; Field of play decision; Appeal to CAS of field of play decisions; Field of play doctrine; Importance of respecting field of play decisions; Limits of review of field of play decisions; Ultra vires;

Panel
Mr Jeffrey Benz (USA), President
Prof. Philippe Sands QC (United Kingdom)
Mr Nicolas Stewart QC (United Kingdom)

Facts

Horse Sport Ireland (the "First Appellant") is the governing body for equestrian sport in Ireland.

Mr O'Connor (the "Second Appellant" or "the rider") is an Irish equestrian athlete who was a member of the Irish team during the FEI European Jumping Championship 2015.

The Federation Equestre Internationale (the "FEI") is a Swiss law association established in accordance with Articles 60 et seq. of the Swiss Civil Code. Headquartered in Lausanne, Switzerland it functions as the International Olympic Committee-recognized international federation for the several equestrian sport disciplines, including jumping.

At the FEI European Jumping Championship 2015 held in Aachen on 21 August 2015, the rider and his horse Good Luck were coming up to a corner on the course when an arena crew member, wearing a bright yellow shirt, strayed onto the course and ran across their path. The errant crew member came close to being hit by the rider and his horse and had to take evasive action by jumping into a flower bed to avoid being hit. The incident was followed by an audible noise of the crowd; according to the Appellants, rider and horse were significantly distracted, had to approach the next obstacle with a deviation in their prepared plan and as a result, knocked down the next obstacle, obstacle 11, incurring four penalty points.

The competition was being refereed by a Ground Jury of five members, three of whom were in a high tower overlooking the course, with one of them manning a bell. Under Article 233.1 of the FEI Jumping Rules 2015 (the "JRs"), if the Ground Jury member in charge of the bell felt that the rider was *"not able to continue his round for any reason or unforeseen circumstances"*, he was to ring the bell to stop the round. The Ground Jury member did not consider that the Second Appellant was not able to continue, because when the interference happened, *"it was some way before the next jump and the horse was not committed to a jump yet"*.

The Athlete was the only rider of the 40 riders competing in the team event in Round 2 of the Team Final to knock down the front pole of obstacle 11. According to the Appellants, by the standards of the competition, it was an easy fence for the rider and his horse to clear. They otherwise jumped a clear round.

As a result of the four penalty points incurred at obstacle 11, the rider finished the Round in 21st place instead of 12th, effectively removing any chance of winning a medal in the Individual Competition. In addition, the Irish team finished the Team Final in 7th place, 0.38 points behind Spain, and as a result the Spanish team qualified for the 2016 Olympic Games instead of Ireland.

Immediately after the round, the Appellants

filed a Protest with the Ground Jury against an alleged failure to ring the bell and interrupt the ride before obstacle 11, following the interference of the arena crew member. The Ground Jury rejected the Protest on the basis that *"[a]s the athlete continued his round the GJ saw no reason to stop him by ringing the bell. According to art. 233 of the Jumping Rules, the athlete had the opportunity to stop voluntarily due to unforeseen circumstances beyond his control. However the athlete chose not to do so"*.

The Appellants then appealed to the Appeal Committee, which was present at the venue and heard the appeal immediately. In a decision handed down in the early hours of the following morning, *i.e.* on 22 August 2015, the Appeal Committee decided to give *"value to the Ground Jury's decision in hearing the Protest and does not believe that it should replace its judgment call with that of the Ground Jury on a matter which is directly related to or is at least most closely related to a field of play decision. The Appeal Committee cannot say that the Ground Jury's decision was capricious or arbitrary or so unreasonable that it should replace it with a different judgement call by the members of the Appeal Committee"*. It also decided that the Appellants' complaints about the procedure followed by the Ground Jury [see in more detail below] were *"cured by this Appeal which has examined all evidence, given Mr O'Connor a full and complete right to be heard and confirmed the decision taken"*. It therefore rejected the appeal.

On 11 September 2015, completed on 17 September 2015, the Appellants filed a statement of appeal against the decision of the Appeal Committee of 22 August 2015 ("the Appealed Decision"), in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code").

A hearing was held on 16 December 2015 at the CAS Court Office in Lausanne, Switzerland.

Reasons

1. To start with the Panel addressed the question of the admissibility of the appeal. Whereas the Appellants were of the view that the appeal was admissible because it was timely filed and met all other procedural requirements in accordance with the relevant rules, the FEI considered the appeal not to be admissible because it violated the field of play doctrine established in a long line of CAS cases.

   The Panel decided that the question whether or not a decision classified as field of play decision might be appealed to the CAS was not an issue of admissibility of the CAS appeal, but rather a question of the merits of the respective appeal. It further found that the relevant rules for filing the appeal had apparently been followed and therefore determined that the appeal was admissible.

2. In light of the fact that the current appeal resulted from a decision that had initially been taken at the venue on the night of the incident in question, the Panel first of all acknowledged that under the applicable rules (Article 233.3 of the JRs), the Ground Jury member charged with ringing the bell had discretion to make the call whether or not to ring the bell based on what he observed. In the absence of a signal on the part of the Second Appellant that he was unable to continue his round under normal circumstances, the Ground Jury member in question was entitled to decide not to ring the bell, even if another individual might, faced with a similar situation, have taken a different decision; the Panel underlined that such is the essence of a field of play decision. It then went on to recall the principles of the field of play doctrine, referring to BELOFF/BELOFF, *"The Field of Play"*, Halsbury Laws of England,

Centenary Essays, page 148, and underlining that according to CAS jurisprudence, it is the rules of the game that define how a game must be played and who should adjudicate upon the rules. Furthermore, the referee's *bona fide* exercise of judgment or discretion was beyond challenge other than in so far as provided by the rules of the game themselves. The Panel, citing CAS 2004/A/704, paras 3.13, 4.8, 4.10; CAS 2008/A/1641, para 25 and CAS 2010/A/2090, para 44, further pointed out that strong sporting-based principles were underlying this field of play doctrine, including the need for finality and to ensure the authority of the referee and match officials, the arbitrators' lack of technical expertise, the inevitable element of subjectivity, the need to avoid constant interruption of competitions, the opening of floodgates and the difficulties of rewriting records and results after the fact. It concluded by stating that it was widely recognised that the respective decisions were best left to field officials as they were specifically trained to officiate the particular sport and were best placed, being on-site, to settle any question relating to it.

3. The Panel then turned to the question whether and to what extent field of play decisions were open to review by the CAS. In this context, whereas the Appellants requested the Panel to quash the Appealed Decision, the Respondent maintained that both decisions of the Ground Jury as well as the Appealed Decision were field of play decisions and as such, even if wrong, could not be disturbed absent proof of bad faith or corruption. The Respondent underlined that no such allegation had been made in the present case as the Appellants had not suggested that any of the members of the Ground Jury or the Appeal Committee had acted in bad faith or corrupt; only that they had been mistaken. The Respondent therefore requested dismissal of the appeal.

   Underlining to start with that the principle of respecting field of play decisions was one of the defining characteristics of the *lex sportiva*, as a sport specific rule that guides much of sports competition at a fundamental level, the Panel found that decisions taken by match officials enjoyed a *"qualified immunity"*; that accordingly, for CAS to review a field of play decision, there had to be more than that the decision was wrong or one that no sensible person could have reached; put differently, field of play decisions were not open to review on the merits. Citing CAS OG 02/007; CAS 2004/A/704, para 3.17; CAS 2004/A/727, at paras 10 and 11; CAS 2008/A/1641, para 37; CAS OG 02/007, para 16, the Panel held that rather, CAS might interfere only if the person requesting the review established that a field of play decision was tainted by fraud, bad faith, bias, arbitrariness or corruption. Furthermore, whether the accusation was one of fraud, bad faith, arbitrariness or corruption, the person requesting the review should demonstrate evidence of preference for, or prejudice against, a particular team or individual cf. CAS 2004/A/704, CAS 2004/A/727 and CAS 2008/A/1641. However, whereas the Appellants had suggested that the decisions under challenge were arbitrary, they had not met their burden of proof as no evidence was before the Panel to show that either the decisions of the Ground Jury or the Appealed Decision were made in bad faith or prejudice, or that they were arbitrary.

4. With reference to CAS 2000/A/305, the Panel further underlined that the field of play doctrine only permits review of field of play decisions in so far as the rules of the game – as in the present case - themselves provide. Accordingly, if the applicable rules

did not provide for any review after the event or match has finished, such silence had to be respected by the CAS. Furthermore, the Panel found that it was established CAS jurisprudence that in cases as the present one, where a decision rendered by the match officials during the competition was reviewed by an appeals body immediately after, or even proximate to the competition, the respective decision rendered by the appeals body was also only open to review by CAS under the limitations of the field of play doctrine (CAS 2004/A/727; CAS 2010/A/2090). The Panel emphasised that it entirely concurred with that jurisdiction stating that otherwise, the post-match review provided for in the rules would lead to a complete end run around the field of play doctrine. Moreover, if those types of appeal decision did not enjoy the benefit of limited review, sports bodies would be forced to write out of their rule books any mechanism for post-match review of the original match official's decision, to ensure that the *"qualified immunity"* his or her decision enjoys was maintained. The Panel concluded that accordingly, the decision by the Ground Jury on the Protest as well as the Appealed Decision enjoyed qualified immunity under the field of play doctrine, as much as the initial decision by the Ground Jury.

5. Lastly, the Panel held that the Appellants' claim that the decision of the Ground Jury following their Protest was *ultra vires* insofar as the Ground Jury had *"purported to rule on the legitimacy of its own omission to act"* (*i.e.*, by ringing the bell to stop the round), was incorrect both as a matter of fact and law. The Panel considered that as a matter of fact – contrary to what the Appellants suggested - the people hearing the appeal (*correct* : the Protest) were not *"the same people who were charged with ringing the bell during the round"*. Rather, under Article 203 of the JRs, the decision to ring the bell was under the responsibility of <u>one</u> member of the Ground Jury, rather than a joint decision made by all members of the Ground Jury. Accordingly, taking into account that the Ground Jury at the event consisted of five members, upon the Protest by the Appellants, four other Ground Jury members had – afresh - reviewed the decision of the Ground Jury member in charge of the bell. The Panel further held that as a matter of law, no general requirement of a mechanism for review of a match official's field of play decision after a sporting event existed. However in the present case, the rules expressly provided for the review to be done by the Ground Jury, without excluding any member of the Ground Jury from being involved in that review. Accordingly the jury in question was not acting *ultra vires*.

Decision

The Panel, concluding that the field of play doctrine was applicable to the case at hand and that it prevailed, dismissed the appeal and confirmed the Appealed Decision.

TAS 2015/A/4229
Fovu Club de Baham c. Canon Sportif de Yaoundé
1er juillet 2016

Football; Sanction contre un club pour avoir aligné un joueur irrégulièrement qualifié; Principe *lex specialis derogat legi generali*; Principe de hiérarchie des normes; Qualité pour défendre dans une requête de réintégration dans un championnat;

Formation
Prof. Gérald Simon (France), Arbitre unique

Faits

Fovu Club de Baham ("l'Appelant" ou "Fovu") est un club de football affilié à la Fédération camerounaise de football (FECAFOOT), ayant son siège à Yaoundé au Cameroun et participant au Championnat professionnel organisé par la Ligue Nationale de Football Professionnel du Cameroun ("LFPC" ou "la Ligue"). Canon Sportif de Yaoundé ("l'Intimé" ou "Canon") est un club de football affilié à la FECAFOOT, ayant son siège à Yaoundé au Cameroun et participant au Championnat professionnel organisé par la Ligue.

Le 15 mars 2015 a eu lieu un match à l'occasion de la 6ème journée du championnat camerounais de football de Ligue 1 entre l'Appelant et l'Intimé. Avant le début de la rencontre, des réserves ont été formulées par Fovu concernant la régularité de la qualification du joueur de Canon évoluant sous le nom de Jean Calvin Kohn. Fovu alléguait que ce joueur était en réalité licencié dans le club amateur Conquérants Sportifs de Mékong ("Conquérants»). Malgré ces réserves, le match s'est disputé avec la participation du joueur Jean Calvin Kohn au sein de l'équipe du Canon. Le score final a été de 1-1.

Le lendemain, l'Appelant confirmait les réserves de qualification par courrier déposé auprès de la Commission d'Homologation et de Discipline de la LFPC ("la Commission d'Homologation"). Le 24 avril 2015, la Commission d'Homologation a décidé d'homologuer le résultat de la rencontre, sans se prononcer sur les réserves formulées par Fovu.

Le 6 mai 2015, l'Appelant a saisi la Commission de Recours de la FECAFOOT, sur le fondement de l'article 36 du Règlement du Championnat professionnel de Ligue 1 pour la saison 2014/2015, en vue d'obtenir l'annulation de la décision de la Commission d'Homologation et, par voie de conséquence, d'une part, la suspension du joueur Jean Calvin Kohn et, d'autre part, l'octroi de la victoire pour Fovu et la perte du match pour Canon par pénalité. Le 18 août 2015, la Commission de Recours a admis la recevabilité de la demande de Fovu et, sur le fond, considérant que le joueur Kohn avait frauduleusement porté les couleurs de Canon lors du match du 15 mars, a ordonné la suspension du joueur pour deux ans et la perte du match en question pour Canon Sportif de Yaoundé par pénalité.

Le 31 août 2015, l'Intimé a déposé une requête aux fins d'arbitrage en référé sportif auprès de la Chambre de Conciliation et d'Arbitrage du Comité National Olympique du Cameroun ("CCA" ou "la Chambre d'Arbitrage"), demandant l'annulation de la décision de la Commission de Recours du 18 août. Le 17 septembre 2015, la CCA a annulé la décision de la Commission de Recours, considérant que cette dernière était incompétente pour se prononcer sur cette affaire. En conséquence, la CCA a confirmé l'homologation du résultat du match du 15 mars 2015.

A la suite de cette sentence, la Commission d'Homologation a établi le classement final du Championnat de Ligue 1 pour la saison 2014/2015, publié le 28 octobre 2015. Par l'effet de la confirmation de l'homologation du match du 15 mars, Canon Sportif de Yaoundé était classé à la 15ème place, permettant son maintien en Ligue 1 pour la saison suivante, tandis que Fovu Club de Baham, classé à la 16ème place, figurait parmi les trois équipes reléguées en Ligue 2.

Le 3 octobre 2015, l'Appelant a déposé une déclaration d'appel à l'encontre du Canon Sportif de Yaoundé, demandant l'annulation de la sentence de la CCA du 17 septembre, la confirmation de la décision de la Commission de Recours du 18 août et la condamnation de l'Intimé à supporter les frais d'arbitrage et d'avocat.

Le 12 novembre 2015, la LFPC a formulé une demande d'intervention à cette procédure arbitrale. Le 4 décembre 2015, l'Appelant et l'Intimé ayant déclaré ne pas s'opposer à la demande d'intervention de la LFPC, le greffe du TAS, au vu de l'accord des parties, a confirmé que la Ligue était "Seconde Intimée" dans ce litige. Le 11 mars 2016, la LFPC a informé se retirer de la procédure, ce dont l'Arbitre Unique a pris acte le 1er avril.

Le 8 avril 2016, une audience s'est déroulée au Tribunal Arbitral du Sport à Lausanne.

Considérants

1. Pour annuler la décision de la Commission de Recours, la CCA avait considéré qu'au regard de l'article 75 al. 3 des statuts de la FECAFOOT, tout litige opposant les clubs au cours du championnat organisé par la LFPC relevait d'abord de la Commission d'Homologation, que la Commission d'Appel de la LFPC qui statuait en second ressort, et que la Commission de Recours ne statuait qu'en dernier ressort lorsque la décision lui était déférée. Elle en avait conclu qu'en saisissant directement la Commission de Recours, Fovu et par la suite la Commission de Recours avaient violé les statuts de la FECAFOOT et le principe du double degré de juridiction.

Pour l'Arbitre unique, la combinaison de l'article 75 al. 3 des statuts de la FECAFOOT et de l'article 119 al. 2 du Code disciplinaire de la FECAFOOT énonçant que c'est la Commission d'Appel de la LFPC qui est *"compétente pour connaître en deuxième ressort des décisions rendues par la Commission d'Homologation"* semblait donner raison à l'interprétation de la CCA. A son avis toutefois, des raisons de droit et de fait conduisaient à écarter cette analyse.

En droit tout d'abord, l'article 36 al. 1 du Règlement du Championnat Professionnel de Ligue 1 pour la saison 2014/2015 énonçait clairement la compétence de la Commission de Recours pour connaître des décisions de la Commission d'Homologation, sans que cette compétence soit subordonnée à un appel préalable devant la Commission d'Appel de la LFPC. Pour l'Arbitre unique, la contradiction entre ces textes sportifs devait être tranchée en application du principe *lex specialis derogat legi generali*. En l'espèce, il ne faisait pas de doute que le Règlement du Championnat de Ligue 1 applicable à la saison en cours constituait la "loi spéciale" pour les différents clubs engagés et que c'est au regard en premier lieu de ce Règlement que les différents droits et obligations des différents participants à ce Championnat étaient établis. De même, lorsqu'une règle de procédure, telle que celle que fixe l'article 36 al. 1 du Règlement, déterminait un régime de compétence différent de celui des textes constitutifs, il convenait de considérer qu'il s'agissait d'une procédure

dérogeant spécialement aux règles de procédure générales instituées par ailleurs.

2. Dès lors d'ailleurs que l'objet du Règlement du Championnat était de définir le régime des relations qui unissent les différents participants à ce Championnat, et en particulier les modalités de contestation du déroulement et de l'homologation des matchs, il était logique sinon naturel que lesdits participants se réfèrent d'abord aux termes de ce Règlement plutôt que de rechercher des règles ayant un objet plus général comme c'est le cas des statuts ou du code disciplinaire d'une fédération sportive. Pour l'Arbitre unique, c'était également la raison pour laquelle les dispositions statutaires ne pouvaient pas primer sur celles du Règlement du Championnat en raison du principe de hiérarchie des normes: le Règlement ayant un objet différent de celui des statuts, il ne pouvait pas être regardé comme un règlement d'application subordonné aux statuts. Les dérogations instituées par le Règlement étaient liées aux particularités du Championnat et, de ce fait, parfaitement admissibles.

   A ces considérations juridiques s'ajoutait une constatation de fait: il ressortait que bien que prévue dans les statuts de la FECAFOOT (2012), la Commission d'Appel n'avait, à l'époque des faits, pas d'existence effective, ce qui signifiait qu'elle n'aurait en tout état de cause pas pu être saisie d'un recours contre une décision de la Commission d'Homologation. L'Arbitre unique a estimé que le motif qui avait conduit la CCA à déclarer l'irrecevabilité du recours de l'Appelant tombait dès lors de lui-même.

3. L'Arbitre unique a également relevé que la Commission de Recours, dans sa décision du 18 août 2015, était la seule instance à s'être prononcée sur le fond de l'affaire puisque la Commission d'Homologation avait homologué le match litigieux sans se prononcer sur les réserves émises par l'Appelant et que la CCA s'était bornée à annuler la décision de la Commission de Recours pour incompétence sans réexaminer le fond. Dans un souci d'efficacité et conformément à la discrétion conférée par l'article R57 du Code du TAS, l'Arbitre unique a estimé qu'il était plus opportun d'examiner si la décision rendue par la Commission de Recours était par ailleurs fondée.

   En l'espèce, l'Arbitre unique a considéré que l'Intimé n'avait ni contredit les éléments de fait sur lesquels la Commission de Recours s'était fondée pour établir la réalité de la falsification de l'identité du joueur, ni fourni la preuve que ces éléments de fait étaient erronés. Or, d'après les textes de la FECAFOOT, la sanction prévue à l'égard du club dans lequel avait évolué le joueur irrégulièrement qualifié était un match perdu par pénalité, son adversaire bénéficiant des 3 points de la victoire et ce indépendamment de la bonne ou mauvaise foi du club l'ayant aligné. Il en découlait que, si la CCA n'avait pas annulé la décision de la Commission de Recours et rétabli le point que l'Intimé avait perdu par pénalité, l'Appelant aurait bénéficié des 3 points de la victoire et, au classement final du Championnat de Ligue 1, aurait compté un total de 40 points (37+3), ce qui l'aurait fait figurer au 15ème rang et premier des clubs non relégables, tandis que Canon aurait au contraire figuré à la 16ème place avec un total de 38 points (39-1) et relégué de ce fait en Ligue 2. En conséquence, la sentence de la CCA devait être annulée et la décision de la Commission de Recours de la FECAFOOT confirmée.

   Selon l'Arbitre unique, il n'était pour autant pas possible, comme le demandait

l'Appelant, de le réintégrer dans le Championnat de Ligue 1 de la saison en cours. L'Arbitre unique a en effet relevé que le litige n'opposait pour parties que les deux clubs de Fovu et de Canon, dès lors que la LFPC s'était retirée de la procédure dans laquelle elle avait été initialement admise en tant que Seconde Intimée. La LFPC, non désignée comme partie intimée par l'Appelant qui avait choisi de diriger son recours exclusivement contre Canon, avait donc la qualité de tiers à la procédure. Or, la demande de l'Appelant d'être réintégré dans le Championnat de Ligue 1 pour la saison en cours avait pour effet d'obliger la LFPC à prendre les mesures correspondantes à cette demande alors que, à part son devoir moral de respecter les sentences du TAS en vertu de ses Statuts, la LFPC ne pouvait être, en tant que tiers, juridiquement obligée par la sentence du TAS de prendre une décision conformément à la demande de l'une des parties.

En outre, réintégrer Fovu en Ligue 1 en cours de saison aurait entraîné de profonds bouleversements des championnats tant de Ligue 1 que de Ligue 2 incompatibles avec le principe de sécurité juridique. L'Arbitre unique a donc relevé que la seule réparation possible du préjudice subi par l'Appelant était fort probablement d'ordre financier, mais qu'en l'absence de toute conclusion subsidiaire visant à l'octroi d'une éventuelle indemnité et de toute autre partie défenderesse que le club intimé, il ne pouvait qu'inviter l'Appelant à s'adresser aux autorités camerounaises compétentes pour statuer sur une demande de cette nature.

Décision

Admettant partiellement l'appel déposé par Fovu Club de Baham, l'Arbitre unique a annulé la sentence arbitrale rendue par la CCA et a confirmé la décision de la Commission de Recours de la FECAFOOT.

CAS 2015/A/4233
World Anti-Doping Agency (WADA) v. Martin Johnsrud Sundby & Fédération Internationale de Ski (FIS)
11 July 2016

Skiing (ski cross); Doping (salbutamol); Inhalation of a prohibited substance in excess of the "use threshold" and without a TUE; Range of sanction applicable to the use of a specified substance; Assessment of the degree of fault;

Panel
Prof. Luigi Fumagalli (Italy), President
Mr Michael Beloff QC (United Kingdom)
Ms Jennifer Kirby (United Kingdom)

Facts

The World Anti-Doping Agency ("WADA" or the "Appellant") is a Swiss private-law foundation. created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms.

Mr Martin Johnsrud Sundby (the "Athlete" or the "First Respondent") is an international level Norwegian cross-country skier. The Athlete is registered with the Norwegian Ski Federation ("NSF"), which is affiliated to the Fédération Internationale de Ski ("FIS").

This case is about an athlete who took, upon medical advice, a medicine in a dosage leading to the adverse analytical findings in the samples he provided. The question to be decided concerns in essence whether such dosage is or is not allowed by the applicable anti-doping rules, adopted by FIS on the basis of the World Anti-Doping Code (the "WADC") and the consequences of such finding. It was not suggested by WADA (or by FIS) that the Athlete intentionally cheated or intentionally broke the rules. As is well known, however, the anti-doping rules require strict observance.

On 13 December 2014, the Athlete underwent an in-competition doping control, performed under the authority of FIS, in Davos, Switzerland. On that occasion the "Davos Sample" was taken.

On 8 January 2015, the Athlete underwent another in-competition doping control again performed under the authority of FIS in Toblach, Italy. On this second the "Toblach Sample" was taken; the Davos Sample and the Toblach Sample are hereinafter referred to as the "Samples".

The presence of salbutamol detected in the Samples was greater than the measure of 1,000ng/mL (corresponding to 1.0 µg/mL) allowed by the lists of prohibited substances and methods published by WADA for 2014 and 2015 (respectively, the "Prohibited List 2014", the "Prohibited List 2015" and jointly the "Prohibited Lists") in category *"S.3 Beta-2 Agonists"*, and the decision limit of 1,200 ng/mL (corresponding to 1.2 µg/mL) (the "DL") according to the WADA Technical Document – TD2014DL on the Decision Limits for the Confirmatory Quantification of Threshold Substances.

Therefore, the Laboratory reported to FIS adverse analytical findings (the "AAFs").

On 3 February 2015, the NSF informed the FIS that the Athlete (i) waived his right to request the opening and analysis of the B-samples, (ii) requested a hearing before the FIS Doping Panel, and (iii) indicated that further comments would be submitted in writing prior to the hearing.

On 11 February 2015, in a procedural order No 1, the Chairman of the FIS Doping Panel decided, *inter alia* to order the Athlete to

undergo a pharmacokinetic study to prove that the test results of the Samples were the consequence of the use of the therapeutic inhaled dose up to the maximum of 1,600 µg/24h.

On 9 August 2015, the hearing took place before the FIS Doping Panel.

On 4 September 2015, the FIS Doping Panel issued the following decision (the "Decision"):

> *"1. The FIS Hearing Panel finds that the abnormal results of the analyses of the samples provided by the athlete Martin Johnsrud Sundby NOR in Davos SUI on 13 December 2014 (sample number 3782813) and in Toblach ITA on 8 January 2015 (sample number 3782808) do not constitute an Anti-Doping Rule Violation and no further consequences shall apply to the Athlete.*
>
> *(…)*

On 12 October 2015, WADA filed a statement of appeal with the Court of Arbitration for Sport (the "CAS"), pursuant to Article R47 of the Code of Sports-related Arbitration (the "Code"), to challenge the Decision.

On 25 and 26 May 2016, pursuant to notice given to the parties in a letter of the CAS Court Office dated 29 January 2016, a hearing was held in Lausanne.

Reasons

These proceedings concern the Decision rendered by the FIS Doping Panel, which held that the AAFs did not constitute anti-doping rule violations and therefore did not apply any sanction to the Athlete. The Decision, in fact, is challenged by the WADA and defended by the Athlete: the former seeks to have it set aside; the latter requests the Panel to confirm it. FIS, on the other hand, while not formally challenging the Decision, rendered by one of its disciplinary bodies, criticizes its reasoning and conclusion.

In relation to such dispute, a number of issues have been raised by the parties. In essence, two main issues are before this Panel:

i. whether the Athlete committed an anti-doping rule violation; and

ii. what are the consequences of the Panel's findings in this respect.

1. The first question to be addressed by the Panel concerns the issue whether the AAFs show the anti-doping rule violation contemplated by Article 2.1 of the FIS ADR.

   It is in fact undisputed that the Samples contained salbutamol, a specified prohibited substance falling in category S3 of the Prohibited List, in a measure exceeding the amount of 1,200 ng/mL. However, the Athlete contended that this finding was the result of the use of a therapeutic inhaled dose of salbutamol lower than the maximum allowed of 1,600 µg per day.

   In this regard, the debate between the parties was as to whether the reference to *"inhaled salbutamol"* and to *"therapeutic inhaled dose"* (the "Two Phrases") contained in Section S.3 Beta-2 Agonists of the Prohibited Lists (the "β2A Provision") (i) describes salbutamol as *"delivered"*, *i.e.* which was, with the use of the inhaler, *"available for inhalation"* after all dispersions in the container, in the equipment or in the air (the Athlete's position), or (ii) points to the *"labelled"* dose, *i.e.* the *"nominal"* dose described by the manufacturers as contained in the original vessel (the WADA and FIS position).

   Under the Prohibited Lists, the general rule

is that all Beta-2 Agonists are prohibited, unless covered by an exception. As a matter of principle, an exception to a general rule is to be narrowly construed. The relevant exception for the purposes of this appeal is to *"inhaled salbutamol"* (maximum 1,600 µg over 24 hours). Therefore, only use by inhalation is permitted (as distinct from administration by ingestion or injection). The use of inhalation to administer salbutamol is a necessary but not a sufficient element to engage the exception. In the Panel opinion, the expression *"therapeutic inhaled dose"* only describes the mechanics of administration. Further, it is also necessary not to exceed the *"use threshold"* (maximum 1,600 µg over 24 hours) which refers to the maximum dose that can be taken by inhalation, *i.e.* the *"labelled"* or *"nominal"* dose. Considering that the Athlete admittedly used a nebulizer to inhale salbutamol and that the smallest dose available by nebulizer exceeds the *"use threshold"* for said substance, the Athlete has accordingly by virtue of that fact alone admitted the violation at issue here. As a consequence, pharmacokinetic studies were irrelevant to the issue of liability of the Athlete.

The Panel accordingly found that the Athlete, who did not have a valid TUE to cover his use of salbutamol at Davos and Tobach, committed an anti-doping rule violation under Article 2.1 of the FIS ADR.

2. To start with, in the Panel opinion, the Athlete is considered to have committed a single anti-doping rule violation: more specifically, the adverse analytical finding regarding the Toblach Sample does not produce the consequences established for a second anti-doping rule violation by Article 10.7 of the FIS ADR 2015. FIS in fact did not establish (and actually did not even claim) that the anti-doping rule violation evidenced by the Toblach Sample was committed after notice had been given to the Athlete regarding the adverse analytical finding in respect of the Davos Sample: both AAFs were in fact jointly notified on 23 January 2015, well after the competition in Toblach.

Whatever edition of the FIS ADR applies (2014 or 2015), the Panel has to exercise its discretion in setting the appropriate sanction, and more specifically in defining the proper measure of the ineligibility period (if any) to be imposed. As mentioned, in fact, under the FIS ADR, the violation committed by the Athlete is sanctioned *"at a minimum"* with *"a reprimand and no period of ineligibility from future competitions"* and *"at a maximum"* with *"two years' of ineligibility"*. The closing sentences of Article 10.4 of the FIS ADR 2014 and of Article 10.5.1.1 of the FIS ADR 2015 make clear that the measure of the sanction depends on the assessment of the Athlete's fault. In that respect, the Panel noted that it is a principle under the WADC, on which the FIS ADR are modelled, that the circumstances to be considered in the assessment of the Athlete's fault *"must be specific and relevant to explain the athlete's … departure from the expected standard of behavior"* (footnote to Article 10.4 of the WADC, edition 2009).

The Panel noted that in CAS 2013/A/3327&3335 (*Marin Cilic*), some principles applicable to the determination of the length of the sanction when Article 10.4 WADC (or provisions corresponding thereto) applied were summarized. More specifically, the Panel recognised the following degrees of fault:

i. significant degree of or considerable fault

ii. normal degree of fault

iii. light degree of fault.

In *Cilic*, then, applying these three categories to the possible sanction range of 0-24 months contemplated by Article 10.4 WADC, the Panel arrived at the following sanction ranges:

iv. significant degree of or considerable fault: 16-24 months, with a "standard" significant fault leading to a suspension of 20 months;

v. normal degree of fault: 8-16 months, with a "standard" normal degree of fault leading to a suspension of 12 months;

vi. light degree of fault: 0-8 months, with a "standard" light degree of fault leading to a suspension of 4 months.

This Panel agreed with *Cilic*: in order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities. The objective element should be foremost in determining into which of the three relevant categories a particular case falls. The subjective element can then be used to move a particular athlete up or down within that category.

Having regard to all of the circumstances of the case, that is in light of its objective and subjective elements, and especially the fact that there was medical justification for the Athlete's use of salbutamol, the Panel came to the conclusion that the Athlete's degree of fault was light and accordingly warranted the imposition of a sanction shorter than the standard measure for such cases, in this instance of two months ineligibility.

Decision

The Panel held that the appeal brought by WADA was to be upheld. The Decision was to be set aside and replaced by a decision (i) finding the Athlete responsible for an anti-doping rule violation and (ii) suspending the Athlete for a period of two months, starting on the date on which this CAS award was issued.

CAS 2015/A/4279
David Martin Nakhid v. Fédération Internationale de Football Association (FIFA)
18 January 2016 (operative part of 14 December 2015)

Football; Elections to the presidency of the international federation; Interpretation of Article 13 para. 2 of the Electoral Regulations for the FIFA Presidency; Priority of Electoral Regulations for the FIFA Presidency over FIFA Statutes; Invalidity of letters of support presented by one member association for more than one candidate;

Panel
Mr Jacques Radoux (Luxembourg), President
Ms Svenja Geissmar (Germany)
Mr Bernhard Welten (Switzerland)

Facts

Mr David Martin Nakhid (hereinafter also the "Appellant") is a national of Trinidad & Tobago and a former professional international football player. After retirement from playing professional football, he established the "David Nakhid International Football Academy". Having acquired his football coach license from UEFA in 2011, he coached several clubs in Lebanon between 2011 and 2015. Mr Nakhid applied as a candidate for the presidential election of the Fédération Internationale de Football Association (hereinafter the "Respondent" or "FIFA") on 26 February 2016.

By letter of 24 September 2015, received by FIFA on 1 October 2015, the Trinidad & Tobago Football Association declared its public support for Mr Nakhid's candidacy for the FIFA President's office.

On 2 October 2015, the Ad-hoc Electoral Committee of the FIFA (hereinafter the "AHEC") requested the Appellant to officially state his intention to run for the FIFA presidential election in a written letter, to be submitted to the AHEC by 12 October 2015. It further informed Mr Nakhid of the prerequisites to be eligible for admission as a candidate for the office of FIFA President, in particular the prerequisite of having been proposed as a candidate. Lastly the AHEC drew Mr Nakhid's attention to the applicable provisions, in particular Article 24 para. 1 of the FIFA Statutes (hereinafter the "Statutes") and Article 13 of the Electoral Regulations for the FIFA Presidency (hereinafter the "Electoral Regulations").

On 3 October 2015, the FIFA general secretariat received letters of support for Mr Nakhid from the Antigua Barbuda Football Association and from the Guyana Football Federation.

On 9 October 2015, the Appellant submitted his candidacy letter for the office of FIFA President. He also provided declarations from two clubs confirming that he had played an active role in organized football as required by Article 24, para. 1 of the Statutes and Article 13, para. 1 of the Electoral Regulations.

On 20 October 2015, another candidate for the FIFA Presidential Elections, Mr Jérôme Champagne, submitted to the AHEC a letter of support for himself by the U.S.V.I. Soccer Association Inc.. That letter of support was signed by Mr Hillaren Frederick, President U.S.V.I. Soccer Association Inc., as well as Mr Keithroy Cornelius, General Secretary, of the U.S.V.I. Soccer Association Inc. and addressed to *"Mr Markus Kattner, Acting Secretary-General, FIFA, FIFA Strasse 20, CH 8044 Zurich — Switzerland"*.

On 22 October 2015, the Appellant requested confirmation that the AHEC had received 5 nominations by FIFA member associations in support of his candidacy, namely from the Trinidad & Tobago Football Association, the Guyana Football Federation, the Antigua/Barbuda Football Association, the U.S.V.I. Soccer Association Inc. and the St. Lucia Football Association. In reply the AHEC acknowledged receipt of letters of support from the three associations first mentioned by the Appellant; it further declared not having received letters of support from the two other associations.

On 23 October 2015, the Appellant provided the AHEC with letters of support for himself by the St. Lucia Football Association and by the U.S.V.I. Soccer Association Inc. On 24 October 2015, the latter letter was also directly provided to the AHEC by the U.S.V.I. Soccer Association Inc.

On 26 October 2015, the deadline for submission of candidatures for the election of the FIFA President expired. On 28 October 2015, the AHEC decided that the Appellant was not admitted as a candidate for the election as he did not meet the requirements stipulated in Article 24, para. 1 of the Statutes and Article 13, para. 1, c) of the Electoral Regulations, requiring, amongst others, a candidate to present declarations of support from at least five member associations. Indeed, as the U.S.V.I. Soccer Association Inc. had not only submitted a letter of support for the Appellant, but had also submitted a letter of support for Mr Champagne, both letters of support had been declared invalid in accordance with Article 13, para. 1, c) of the Electoral Regulations. This left the Appellant with only four valid declarations of support. The Appellant was informed of the decision on the same day.

On 2 November 2015, upon request by the Appellant, the AHEC provided the former with a copy of the two support letters by the U.S.V.I. Soccer Association Inc.

On 6 November 2015, in reply to a request by the Appellant for a copy of the AHEC's correspondence with Mr Champagne in relation to the U.S.V.I. Soccer Association Inc. letters, the AHEC provided the Appellant with the e-mails by which it had received the two letters of support in question. One of these emails had been sent by the U.S.V.I. Soccer Association Inc. on 24 October 2015, the other one had been sent by Mr Champagne himself, on 20 October 2015.

On 13 November 2015, the Appellant filed his statement of appeal with the Court of Arbitration for Sport (hereinafter the "CAS"), pursuant to Article R47 of the Code of Sports-related Arbitration (hereinafter the "CAS Code"). He alleged violations of the Electoral Regulations and its related principles of fair, equitable and transparent process of the election.

A hearing took place on 11 December 2015 at the CAS headquarters in Lausanne, Switzerland.

Reasons

1. Having to start with confirming its jurisdiction with regard to the matter at stake as well as the admissibility of the appeal, the Panel addressed the Appellant's claim that the AHEC had violated Articles 13, para. 2 of the Electoral Regulations and Article 24, para. 1 of the Statutes by cancelling the two support letters that had been submitted by the U.S.V.I. Soccer Association Inc. for two different candidates for the FIFA presidential election. In this respect, the Appellant argued that the cancellation of the support letters submitted by any FIFA Member to

more than one candidate, in accordance with Article 13, para. 1, c) of the Electoral Regulations, supposed the validity of such letters. Furthermore, according to Article 13, para. 2 of the Electoral Regulations, in order to be valid, a letter of support from a member association for a candidate to the office of President had to be notified personally and directly by this member association to the FIFA general secretariat. However the letter of the U.S.V.I. Soccer Association Inc. in support of Mr Champagne had been submitted by Mr Champagne himself and not directly by the U.S.V.I. Soccer Association Inc.. Therefore it had not been submitted in accordance with the conditions set out by Article 13, para. 2 of the Electoral Regulations and Article 24, para. 1 of the Statutes, and could not be considered a valid letter of support by a FIFA member. Consequently, the letter of support for Mr Nakhid's candidature, directly submitted by the U.S.V.I. Soccer Association Inc. to the AHEC, was the only valid support letter issued by this FIFA member. Accordingly, the AHEC had received five valid letters of support for the Appellant's candidature with the consequence that his candidature fulfilled all the conditions stipulated in the Electoral Regulations. Therefore, the decision rendered by the AHEC on 28 October 2015 should be annulled.

The Respondent submitted that the clear and precise wording of Article 13, para. 1, c) of the Electoral Regulations, in particular its last sentence, would not leave room for any interpretation. That rule had been established exactly for the purpose of preventing discussions on the validity of letters of support as well as on the question of which candidate would benefit from the support of such member association in case a member association submitted more than one letter of support. The Respondent further submitted that the wording of Article 13, para. 2, of the Electoral Regulations – *i.e.* the fact that members *"must"* notify the FIFA general secretariat of *"candidatures"* for the office of FIFA President - would not support the conclusion that only personally submitted letters of support could be admitted. Rather, Article 24, para. 1 of the Statutes and Article 13, para. 2 of the Electoral Regulations only set forth restrictions for *"candidatures"* (which can only be notified to the FIFA general secretariat by members and not by any other entities or persons), but not for letters of support. Furthermore, insofar as the letter from the U.S.V.I. Soccer Association Inc. in support of Mr Champagne was signed by the President and the General Secretary of the U.S.V.I. Soccer Association Inc. and was further addressed to the Acting Secretary-General of FIFA, it was the FIFA member that notified the FIFA general secretariat in compliance with Article 13, para. 2 of the Electoral Regulations. Thus, the letter of support from the U.S.V.I. Soccer Association Inc. for Mr Champagne could not be considered as *per se* invalid. It only became invalid based on and in accordance with Article 13, para. 1, c) of the Electoral Regulations, because the U.S.V.I. Soccer Association Inc. submitted letters of support for more than one person.

The Panel – disagreeing with the Appellant's interpretation of Article 13 para. 2 of the Electoral Regulations - considered that from the clear wording of the rule in question it followed that the obligation to directly notify - if any - concerned the *"candidature"* for the office of FIFA President, not the five letters of support required for a candidature to the office of President to be admissible. The Panel held that its interpretation that the scope of application of Article 13, para. 2 of

the Electoral Regulations was strictly limited to the notification of the candidature was confirmed by the wording of Article 13, para. 1, b) of the Electoral Regulations, according to which the *"candidate shall have been proposed by a member association"*. This interpretation was furthermore in line with the text of let. c) of the same provision according to which *"the candidate shall present declarations of support from at least five member associations"* and being *"proposed as a candidate by a member association shall be understood as a declaration of support"*.

2. The Panel further addressed the Appellant's argument regarding its interpretation of Article 13, para. 1, c) of the Electoral Regulations. According to the Appellant's interpretation, the requirement of personal submission of the announcement of support by a FIFA member is a condition *sine qua non* of the validity of any support letter. The Appellant submitted that this interpretation was confirmed by the fact that it was reiterated in Article 24, para. 1 of Statutes, according to which members shall notify the FIFA general secretariat, in writing, of a candidature for the FIFA presidency at least four months before the start of the Congress, *"together with the declarations of support of at least five members"*. The Appellant, contented that the Statutes were the most prominent text of the FIFA regulations.

   The Panel considered that its own interpretation of Article 13, para. 1, c) [as elaborated above under 1.] was not contradicted by Article 24, para. 1 of the Statutes. In this respect, the Panel further held that the later provision, as part of the Statutes, had to be considered as *lex generalis* in relation to the rules set out in the Electoral Regulations, in particular Article 13, para. 1, c), which constituted the *lex specialis* governing the election for the office of President of the FIFA.

3. The Panel thereupon addressed the last argument by the Appellant for the annulment of the decision of 28 October 2015. The Appellant argued that the AHEC had violated the principles of integrity and transparency as well as its obligation to ensure a correct managing and supervision of the process of the election. The Appellant claimed in this regard that the AHEC, in order to respect the obligations set out in Article 8, c) of the Electoral Regulations, should have informed both of the candidates having benefited from the support of the U.S.V.I. Soccer Association Inc. of the duplication of the latter's support letter.

   The Respondent, conversely, took the position that whereas Article 8, para. 1, c) of the Electoral Regulations empowered the AHEC to issue *"instructions for the application of the FIFA Electoral Regulations as necessary before and during the entire electoral process"*, it did not oblige it to inform potential candidates that they might not be fulfilling the necessary requirements. Accordingly, the AHEC did not inform either the Appellant or Mr Champagne of the duplication of the letters of support in question. The AHEC had therefore acted in an ethical and fair manner, treating both individuals concerned – as well as all other candidates – equally. Lastly, according to the Respondent, due to the precise wording of Article 13, para. 1, c) of the Electoral Regulations, the AHEC did not have any margin of discretion but had to declare both letters of support submitted by the U.S.V.I. Soccer Association Inc. invalid. Thus, in light of the clear and precise legal basis for the AHEC's decision, the appeal should be dismissed.

Concerning the Appellant's argument that under the Statutes, the Code of Ethics and the Electoral Regulations, the AHEC was obliged to inform the candidates benefitting from the support of the same member association about the duplication of the said support, and that the violation of such obligation were to be sanctioned by the annulment of the decision taken by the AHEC pursuant to Article 13, para. 1, c), (last sentence) of the Electoral Regulations, the Panel held that if this would be accepted, the latter provision would be deprived of its effectiveness. However, legal provisions have to be interpreted in a way as to safeguard their effectiveness, reason for which the Panel did not agree with the interpretation suggested by the Appellant. The Panel further underlined that insofar as candidatures as well as letters of support could be submitted until a certain deadline, it could not be excluded that two letters of support from the same member association were received at the very end of the said deadline, making it *de facto* impossible for the AHEC to inform the candidates in due time (*i.e.* before the end of this deadline) of a possible duplication of support by a member association, imposing an obligation on the AHEC which it could not effectively respect. Therefore, this interpretation was rejected.

The Panel further found that the duties of the AHEC, as set out in Article 8, para. 1 of the Electoral Regulations, in particular under let. c) of this provision, could not be interpreted as requiring the AHEC to issue all kinds of specific instructions to each individual candidate rather than setting out general guidelines designed to assure the good application of the provisions of the Electoral Regulations. Rather it was the candidates' duty to check that all the conditions, as stated in Article 13 of the Electoral Regulations, were met. Indeed, if the AHEC was to be considered as having such an obligation, the responsibility for assuring that a candidate fulfilled all the criteria and respected all the deadlines would be shifted from the candidate to the AHEC, leaving the latter solely responsible for the infringements attributable to the said candidates. Lastly the Panel found that in light of the clear wording of Article 13, para. 1, c), last sentence, providing that if *"a member association presents declarations of support for more than one person, all its declarations shall become invalid"*, the AHEC did not have any margin for assessment regarding the treatment of these letters. The AHEC had to declare void both letters of support submitted by the U.S.V.I. Soccer Association Inc. In conclusion the Panel determined that the decision rendered by the AHEC on 28 October 2015 was consistent with Article 13, para. 1, c) of the Electoral Regulations.

Decision

The Panel therefore dismissed the appeal by Mr. Nakhid on all grounds, including the latter's request for compensation.

CAS 2016/A/4439
Tomasz Hamerlak v. International Paralympic Committee (IPC)
4 July 2016

Athletics (long distance, marathon); Doping (stanozolol metabolites - Exogenous Anabolic Androgenic Steroids (AAS); Personal responsibility of the athlete and involvement of the coach and the federation in the distribution of supplements; Proof of the source of the prohibited substance; Athlete's intent and burden of proof; Athlete belonging to a Registered Testing Pool as an argument for the question of intent / lack of intent; Sporting relevance of the specific promotional race as an argument for the question of intent / lack of intent;

Panel
Prof. Michael Geistlinger (Austria), President
Ms Sylvia Schenk (Germany)
Prof. Richard McLaren (Canada)

Facts

Tomasz Hamerlak (the "Athlete" or "Appellant") is a Polish athlete competing in the IPC Athletics (long distance – marathon). He competes on the international level, including participation in the Paralympic Games.

The International Paralympic Committee (the "IPC" or "Respondent") is the global governing body of the Paralympic Movement. Its purpose is to organize the Summer and Winter Paralympic Games and act as the International Federation for among others Athletics.

On 8 July 2015, while the Appellant stayed in Lausanne for a promotional 1500 m race on the day before the IAAF Diamond League Meeting, he was tested out-of-competition by Anti-Doping Switzerland upon request and under authority of the IPC. Anti-Doping Switzerland collected an A and B urine and a blood sample. The Appellant signed two Doping Control forms without additional comments and without indication of any medications and/or supplements taken. The samples were analysed by the WADA accredited laboratory in Lausanne.

On 30 July 2015, the laboratory reported to IPC an Adverse Analytical Finding for stanozolol metabolites. This substance is classified under SA1.1a Exogenous Anabolic Androgenic Steroids (AAS) on the 2015 WADA List of Prohibited Substances. It is not a Specified Substance and prohibited in and out of competition. The IPC's review did neither reveal any TUE for this substance, nor a departure from the applicable WADA International Standards.

On 19 August 2015, IPC notified the Appellant through the National Olympic Committee of Poland of the Adverse Analytical Finding and informed him, that he was given a mandatory provisional suspension as from 19 August 2015, and about his rights according to the IPC Anti-Doping Code ("IPC-Code").

On 26 August 2015, the Appellant provided the IPC with an explanation letter, where he indicated a list of dietary supplements he was using and stated that the only supplement he had changed in his daily routine was AAKG by BiotechUSA. All supplements were provided to him by the Polish Association for Disabled through his coach. He waived his right to have the B sample opened and did not ask for the laboratory documentation package, but started a process of testing AAKG.

On 16 September 2015, the WADA accredited laboratory of Warsaw informed the Appellant

that the supplement AAKG Shock did not contain stanozolol or any of its metabolites.

The Appellant before the IPC Anti-Doping Committee argued orally and in writing that he never took stanozolol intentionally, that it would be illogical to use the substance in his sport in general and, given the fact that he was already qualified for the Paralympic Games in Rio, that the relevant competitions on his schedule had already successfully taken place, the competition season was closed and the promotion competition in Lausanne was not in his discipline marathon, in particular.

On 27 December 2015, the Anti-Doping Committee of the IPC found that a violation of art. 2.1 IPC Code (Presence of a Prohibited Substance or its Metabolites or Markers) has been proven, that there were no grounds to apply arts. 10.4 (No Fault or Negligence), 10.6.1 (Substantial Assistance) or 10.6.3 (Prompt Admission). Also the application of art. 10.5.2 (No Significant Fault or Negligence, erroneously quoted as 10.5.1.2. in the appealed decision), was excluded pointing at the Appellant's long experience, the fact that no contaminated product could be established by the Appellant and that he did not exercise due caution using so many supplements. Thus, a period of four (4) years ineligibility was imposed with credit given to the period of provisional suspension already served by the Appellant. If applicable, the results in competitions subsequent to sample collection obtained were pronounced as disqualified as per art. 10.8 IPC Code (the "Appealed Decision").

On 3 February 2016, the Athlete filed his statement of appeal against the Respondent with respect to the Appealed Decision in accordance with Article R47 et seq. of the Code of Sports-related Arbitration (the "Code").

In his appeal brief, the Appellant made the following requests for relief:
That the Appeal is admissible;
That the challenged decision is set aside and this Court rules on merits of the case by finding that:
The sanction imposed by IPC Anti-Doping Committee on the Appellant was excessive;
The Appellant has proved the lack of intention in infringement of anti-doping regulations, what results in finding the Article 10.2.2 IPC Anti-Doping Code of being the basis for imposing the penalty of Appellant, and
The Appellant proved that in this particular case his fault was neither significant, nor he is guilty of negligence, what results in possibility of shortening the period of penalty of ineligibility up to the half of the period of that penalty imposed on the basis of Article 10.2.2 IPC Anti-Doping Code and on that basis to impose the penalty of 12-months of ineligibility from the day of 19th August 2015 until 18th August 2016;

In his answer brief, the Respondent made the following requests for relief:
Dismiss the appeal brought by the Appellant;
Upholds the IPC's decision of 27 December 2015;
Orders that the Appellant bear the costs of this arbitration, if any; and
Orders that each of the parties bear their own legal and other costs.

Reasons

1. The Appellant did not dispute that he committed a violation of art. 2.1 IPC Code (Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample) due to the fact that metabolites of the prohibited substance stanozolol were found in his urine sample taken out-of-competition on 8 July 2015.

Both parties agreed that, as for the sanction to be imposed on such anti-doping rule violation, art 10.2 IPC Code would apply. Such provision must be understood in the light of art. 2.1.1 of the IPC Code, the first two sentences of which rule that it *"is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples"*. The personal responsibility of the Athlete laid down by the above rules makes mute any effort of the Appellant to justify his behaviour by arguing that he acquired the supplements, he considered to be the source of the prohibited substance, through his coach and upon the coach's recommendation from his federation. Even if the involvement of the coach and the federation in buying and distributing supplements to athletes was risky and rather doubtable, their involvement could not exculpate the Appellant.

2. The Appellant undertook a series of actions in order to find out the source of the prohibited substance assuming that it originated from one of the supplements or a cream he used or meat he ate. The Appellant had, however, to admit that he could not provide any proof as to the origin of stanozolol found in his body's specimen. To try to find the origin could not repair the failure of such efforts.

3. Moreover, the Panel considered the issue of the Athlete's intent. According to art. 10.2.1.1 of the IPC Code, the burden of proof lies with the Athlete. The Appellant failed to establish by the applicable standard of proof, which is at a balance of probability, that the anti-doping rule violation was not intentional.

4. The argument that the Appellant belonged to the relevant Registered Testing Pool subject to the respective whereabouts commitments and, due to his excellent sportive results, had to undergo frequent doping controls and that it would have been senseless, therefore, for him to take a prohibited substance was found to be true for all athletes on a Registered Testing Pool. However, irrespective of such obligation and experience of all top-level athletes, belonging to a Registered Testing Pool would not protect against taking prohibited substances and such argument was found to have no evidentiary relevance for the question of intent or lack of intent as to the commitment of an anti-doping rule violation.

5. Furthermore, the argument that the promotional race was not a race in the discipline of marathon, but only in 1500 m, and, thus, was of no sportive relevance for a marathon sportsman, was found to be irrelevant for the question of intent or lack of intent

The Panel, therefore, held that the Appellant could not demonstrate that the use of stanozolol happened without intent. All that he could present were mere speculations and assumptions. In the Panel's view, the Appellant acted risky by taking a long list of supplements, knowing from scientific articles he himself quoted, that they may be contaminated. Besides, the number and kind of supplements, indicated by the Appellant, was changed by him in the course of the proceedings, a fact, which shakes reliability and credibility of the Appellant.

Decision

The Panel held that art. 10.2.1, and not art. 10.2.2 IPC Code had to be applied. Therefore, the IPC Anti-Doping Committee had correctly applied art. 10.2.1 of the IPC Code. The Panel

confirmed the sanction of four (4) years ineligibility imposed on the Appellant, according to art. 10.8 of the IPC Code.

Arbitration CAS 2016/A/4643
Maria Sharapova v. International Tennis Federation (ITF)
30 September 2016

Tennis; Doping (Meldonium, S4 - Hormone and Metabolic Modulators); CAS jurisprudence as guidance to future Panels in doping-related cases; No Significant Fault and deviation from the duty of exercising the "utmost caution"; Parties' agreement to follow the approach that athletes are permitted to delegate elements of their anti-doping obligations; Athlete's personal duty to ensure that no prohibited substance enters his/her body and delegation of activities ensuring regulatory compliance; Length of the sanction imposed based on the degree of fault;

Panel
Prof. Luigi Fumagalli (Italy), President
Mr Jeffrey Benz (USA)
Mr David Rivkin (USA)

Facts

Maria Sharapova (the "Player" or the "Appellant") is a top-level professional tennis player of Russian nationality born on 19 April 1987. The Player has been a resident in the United States of America since 1994, and has competed regularly on the WTA Tour since 2001. She is one of only ten women to hold the Career Grand Slam, having won four Grand Slam events in a single discipline. She also won the silver medal in women's singles at the 2012 Summer Olympic Games in London.

The International Tennis Federation ("ITF" or the "Respondent") is the International Olympic Committee-recognized international sports federation for the sport of tennis, and has its headquarters in London, United Kingdom. One of the objects and purposes of the ITF is to promote the integrity of tennis and to protect the health and rights of tennis players. To these ends, the ITF, a signatory to the World Anti-Doping Code (the "WADC") established by the World Anti-Doping Agency ("WADA"), adopted the Tennis Anti-Doping Programme (the "TADP") to implement the provisions of the WADC.

On 26 January 2016, at the Australian Open Tournament (the "Tournament") in Melbourne, Australia, the Player underwent a doping control test in accordance with the TADP, version 2016. On 2 February 2016, the Player underwent an out-of-competition anti-doping test in Moscow, Russia. On 2 March 2016, the Player was informed by the ITF that the A sample collected from her at the Tournament had tested positive for the presence of Meldonium at the concentration of 120 µg/ml. Meldonium is a prohibited, non-specified substance included at S4 (Hormone and Metabolic Modulators) in the list of prohibited substances (the "Prohibited List") since 1 January 2016 promulgated by WADA. The Player was also informed that such adverse analytical finding (the "AAF") constituted an anti-doping rule violation under Article 2.1 of the TADP (the "ADRV"), that she had the right to have her B sample analysed, as well as of the possible consequences of the ADRV. At the same time, the Player was advised, in accordance with Article 8.3.1(a) of the TADP, that she was *"Provisionally Suspended until this matter is resolved, with effect from 12 March 2016"*.1

The case of the Player was referred to an independent tribunal constituted under Article 8.1.1 of the TADP. On 6 June 2016, the Independent Tribunal appointed by the ITF to hear the Player's case (the "Tribunal") issued a decision (the "Decision"), holding that:

"(1)An anti-doping rule violation contrary to article

2.1 of the TADP was committed by Maria Sharapova as a result of the presence of Meldonium in the samples collected from her at the Australian Open on 26 January 2016 and out of competition in Moscow on 2 February 2016;

(2) Under article 9.1 the player is automatically disqualified in respect of her results in the 2016 Australian Open Championship, forfeits 430 WTA ranking points and prize money of AUS$281,633 obtained in that competitions;

(3) Under article 10.2 the period of ineligibility to be imposed is 2 years;

(4) Under article 10.10.3(b) the period of ineligibility shall commence on 26 January 2016."

On 9 June 2016, pursuant to Article R47 of the Code of Sports-related Arbitration (the "Code"), the Player filed a statement of appeal with the Court of Arbitration for Sport (the "CAS") challenging the Decision.

The statement of appeal contained the following "Main Requests":

"4.2.1 Ms Sharapova requests that CAS rule as follows:

4.2.1.1 That her appeal of the ITF's decision to sanction her under Article 2.1 of the Programme is admissible.

4.2.1.2 That the decision of the ITF be set aside.

4.2.1.3 That Ms. Sharapova's sanction be eliminated, or, in the alternative, reduced.

4.2.1.4 That the ITF shall bear all costs of the proceeding including a contribution toward Ms. Sharapova's legal costs. …"

In its answer to the appeal, the Respondent requested the Panel:

"… to reject the Appellant's plea of No [Significant] Fault or Negligence, and her plea for a reduction on proportionality grounds, and instead to reject the appeal and leave the decision of the Independent Tribunal undisturbed.

… to order the Appellant to pay a contribution towards the ITF's legal fees and other expenses in this matter."

Reasons

1. The issue whether an athlete's fault or negligence is "significant" has been much discussed in the CAS jurisprudence, and chiefly so with respect to the various editions of the WADC. Even if all the CAS cases offer guidance to this Panel, all those cases are very *"fact specific"* and no doctrine of binding precedent applies to the CAS jurisprudence. Indeed, the TADP itself, while defining the conditions for the finding of NSF, stresses the importance to establish it *"in view of the totality of the circumstances"*, and therefore paying crucial attention to their specificities.

2. A period of ineligibility can be reduced based on No Significant Fault (NSF) only in cases where the circumstances justifying a deviation from the duty of exercising the *"utmost caution"* are truly exceptional, and not in the vast majority of cases. However, the *"bar"* should not be set too high for a finding of NSF. In other words, a claim of NSF is (by definition) consistent with the existence of some degree of fault and cannot be excluded simply because the athlete left some *"stones unturned."* As a result, a deviation from the duty of exercising the *"utmost caution"* does not imply per se that the athlete's negligence was *"significant"*; the requirements for the reduction of the sanction under Article 10.5.2 of the TADP can be met also in such circumstances.

   An athlete can always read the label of the product used or make Internet searches to ascertain its ingredients, cross-check the ingredients so identified against the

Prohibited List or consult with the relevant sporting or anti-doping organizations, consult appropriate experts in anti-doping matters and, eventually, not take the product. However, an athlete cannot reasonably be expected to follow all such steps in each and every circumstance. To find otherwise would render the NSF provision in the WADC meaningless.

3. Second, the parties agreed before this Panel to follow the approach indicated by a previous CAS jurisprudence, i.e. that athletes are permitted to delegate elements of their anti-doping obligations. If, however, an anti-doping rule violation is committed, the objective fact of the third party's misdeed is imputed to the athlete, but the sanction remains commensurate with the athlete's personal fault or negligence in his/her selection and oversight of such third party or, alternatively, for his/her own negligence in not having checked or controlled the ingestion of the prohibited substance. In other words, the fault to be assessed is not that which is made by the delegate, but the fault made by the athlete in his/her choice. As a result, as the Respondent put it, a player who delegates his/her anti-doping responsibilities to another is at fault if he/she chooses an unqualified person as her delegate, if he/she fails to instruct him properly or set out clear procedures he/she must follow in carrying out his task, and/or if he/she fails to exercise supervision and control over him/her in the carrying out of the task. The Panel also concurs with such approach. In light of the foregoing, the Panel found that the Player's fault was not significant.

4. Even though, under the TADP, it is the athlete's personal duty to ensure that no prohibited substance enters his/her body and it is the responsibility of each player to be familiar with the most current edition of the Prohibited List, nothing prevents a high-level athlete focused on demanding sporting activities all over the world, from delegating activities aimed at ensuring regulatory compliance and more specifically that no anti-doping rule violation is committed.

5. The relevant measure of fault here is whether the Player was reasonable in selecting IMG to assist her in meeting her anti-doping obligations. The Panel has already determined that her decision was reasonable. Where the Player fell short, however, was in her failure to monitor or supervise in any way whether and how IMG was meeting the anti-doping obligations imposed on an athlete when IMG agreed to assist her. She failed to discuss with Mr Eisenbud what needed to be done to check the continued availability of Mildronate (as opposed to the procedure to check new substances she was prescribed), to put him in contact with Dr Skalny to understand the nature of the Skalny products, to understand whether Mildronate was the name of the product or the substance, and whether he had made the necessary confirmation each year that the product had not been added to the Prohibited List. It cannot be consistent with the relevant precedents and the WADC that an athlete can simply delegate her obligations to a third party and then not otherwise provide appropriate instructions, monitoring or supervision without bearing responsibility; such a finding would render meaningless the obligation of an athlete to avoid doping. In addition, unlike Lund, Ms. Sharapova did not disclose on her anti-doping control forms her use of the prohibited substance, a factor that clearly weighed heavily in the mind of the CAS Panel in Lund for the Panel to reach its conclusion of one year.

Decision

The Panel, based upon its de novo review of this entire matter, found that the appeal was to be partially granted, and reduced the period of ineligibility to fifteen (15) months, starting on 26 January 2016.

CAS 2016/O/4684
Russian Olympic Committee (ROC), Lyukman Adams et al. v. International Association of Athletics Federations (IAAF)
10 October 2016 (operative part of 21 July 2016)

Athletics; Validity and enforceability of IAAF regulations regarding eligibility for the Olympic Games; Validity of rule 22.1 (a) IAAF Competitions Rules; Validity of rule 22.1 A IAAF Competition Rules; Lack of entitlement of a NOC to nominate ineligible athletes to compete at the Olympic Games; Entry of an eligible athlete as a representative of his national federation or as "neutral athlete";

Panel
Prof. Luigi Fumagalli (Italy), President
Mr Jeffrey Benz (USA)
Judge James Robert Reid QC (United Kingdom)

Facts

The Russian Olympic Committee ("ROC") is the National Olympic Committee for the Russian Federation recognized as such by the International Olympic Committee ("IOC") under and for the purposes of the *Olympic Charter*. The other claimants are 68 individual athletes (the "Claimant Athletes of Russian nationality, affiliated to the Russian athletics federation (ARAF, now RusAF), a member of the International Association of Athletics Federation.

The International Association of Athletics Federation (the "IAAF") is the world governing body for track and field, recognized as such by the IOC. One of its responsibilities is the regulation of track and field, including, under the World Anti-Doping Code ("WADC"), the running and enforcing of an anti-doping programme consistent with the WADC. The IAAF is also subject to the provisions of the *Olympic Charter*.

On 9 November 2015, an independent commission ("IC") presided over by Richard Pound QC submitted a report to the President of the World Anti-Doping Agency ("WADA"). Amongst several recommendations, the report recommended that WADA should immediately declare ARAF to be non-compliant with the WADC.

On 13 November 2015, the IAAF Council provisionally suspended ARAF with immediate effect. At the same time, it was decided that in order to regain full membership ARAF would need to satisfy a list of criteria, to be verified by a task force specifically appointed for such purpose (the "Taskforce").

On 17 June 2016, the IAAF Council decided not to reinstate RusAF to IAAF membership. The consequence was that Russian athletes remained ineligible under IAAF rules to compete in international competitions, including the 2016 Olympic Games in Rio de Janeiro, Brazil (the "Rio Olympic Games" or the "2016 Olympic Games").

On the same day, the IAAF Council passed a rule amendment to the effect that if there were any individual athletes who could clearly and convincingly show that they were not tainted by the Russian system because they had been outside the country, and subject to other, effective anti-doping systems, including effective drug-testing, then they should be able to apply for permission to compete in International Competitions, not for Russia but as a neutral athlete. In this respect, the IAAF implemented a new rule in its Competition Rules, namely Rule 22.1A, and a new definition of *"Neutral Athlete"*.

The pertinent provisions of the Competition Rules (the Contested Rules) state as follows:

> *DEFINITIONS*
>
> *Neutral Athlete*
>
> *As specified in Rule 22.1A, an athlete who is granted special eligibility by the Council to compete in one or more International Events in an individual capacity and who satisfies at all relevant times any conditions to such eligibility specified by the Council. All provisions in the Rules and Regulations that are applicable to athletes shall apply equally to Neutral Athletes, unless expressly stated otherwise; (…)*
>
> *RULE 22 Ineligibility for International and Domestic Competitions*
>
> *1. The following persons shall be ineligible for competitions, whether held under these Rules or the rules of an Area or a Member. Any athlete, athlete support personnel or other person:*
>
> *(a) whose National Federation is currently suspended by the IAAF. This does not apply to national competitions organised by the currently suspended Member for the Citizens of that Country or territory;*
>
> *[...]*
>
> *1A. Notwithstanding Rule 22.1(a), upon application, the Council (or its delegate(s)) may exceptionally grant eligibility for some or all International Competitions, under conditions defined by the Council (or its delegate(s)), to an athlete whose National Federation is currently suspended by the IAAF, if (and only if) the athlete is able to demonstrate to the comfortable satisfaction of the Council that:*
>
> *(a) the suspension of the National Federation was not due in any way to its failure to protect and promote clean athletes, fair play, and the integrity and authenticity of the sport; or*
>
> *(b) if the suspension of the National Federation was due in any way to its failure to put in place adequate systems to protect and promote clean athletes, fair play, and the integrity and authenticity of the sport, (i) that failure does not affect or taint the athlete in any way, because he was subject to other, fully adequate, systems outside of the country of the National Federation for a sufficiently long period to provide substantial objective assurance of integrity; and (ii) in particular the athlete has for such period been subject to fully compliant drug-testing in- and out-of-competition equivalent in quality to the testing to which his competitors in the International Competition(s) in question are subject; or*
>
> *(c) that the athlete has made a truly exceptional contribution to the protection and promotion of clean athletes, fair play, and the integrity and authenticity of the sport.*
>
> *The more important the International Competition in question, the more corroborating evidence the athlete must provide in order to be granted special eligibility under this Rule 22.1A. Where such eligibility is granted, the athlete shall not represent the suspended National Federation in the International Competition(s) in question, but rather shall compete in an individual capacity, as a "Neutral Athlete".*

On 2 July 2016, the parties entered into an *"Arbitration Agreement"* (the "Arbitration Agreement" under which they agreed to submit the dispute, which had arisen between them as to a number of issues, to arbitration at the Court of Arbitration for Sport ("CAS") pursuant to Article R38 of the Code of Sports-related Arbitration (the "Code"), for adjudication according to an expedited procedure.

On 19 July 2016, a hearing took place before the CAS Panel at the Maison de la Paix, Chemin Eugene-Rigot 2, 1202 Geneva,

Switzerland.

Reasons

In essence, the issues to be decided by the Panel regard the legality of the application in the present circumstances of the Contested Rules, and their consequences with respect to the 2016 Olympic Games.

1. *Was IAAF Competition Rule 22.1(a) valid and enforceable in the circumstances of the present dispute?*

   The Claimants did not take issue with Rule 22.1(a) itself, but rather with its application in the present circumstances. They wanted an exception to the rule for doping cases, so that the ineligibility for the athletes affiliated to a suspended national federation, a member of the IAAF, would not apply if the suspension was imposed for the federation's failure to ensure an effective doping control system.

   Rule 22.1(a) IAAF Competition Rules imposes ineligibility on athletes affiliated to a suspended federation member of the IAAF. The rule affects the eligibility of athletes to enter into international competitions. The Panel found that it was therefore an eligibility rule of general application, not specific to doping cases, and not a sanction. In this respect, it would also apply for instance to athletes who are members of a federation that failed to pay its membership dues.

   The Panel further reminded that according to the World Anti-Doping Code (WADC), international federations were mandated to require as a condition of membership that the rules of their National Federations (NF) were in compliance with the Code. It is a fundamental principle of the law of associations in all applicable jurisdictions that members of associations have an obligation to satisfy the requirements for membership in the association and if they fail to do so those members may have their association membership adversely affected. Therefore, contrary to the claimant's submissions, the Panel considered that the rule which suspends member federations which are not in compliance with the WADC was consistent with said Code.

   Furthermore, contrary to the claimant's allegation, the Panel found that the rule was clear: as to the argument that the length of ineligibility was indeterminate; that was a simple consequence of the fact that it was contingent on the RusAF being reinstated. That did not make it uncertain. It was certain that once the RusAF was reinstated the athletes would no longer be ruled ineligible by Rule 22.1(a); What is more, because Rule 22.1(a) was not a sanction, it did not have to pass any test of proportionality. In any event, the Rule was a proportionate means of encouraging NFs to comply with the IAAF's rules i.e. to put in place an adequate system to protect and promote clean athletes, fair play and integrity of sport; There was also no discrimination on the grounds of nationality as the Rule applied to any NF; Finally, the Panel underlined that a clear rule could not be contrary to the parties legitimate expectations if it had been in existence for many years. Consequently, the Panel found the rule valid and applicable to athletes affiliated to a federation suspended for failing to ensure an effective doping system.

2. *Was IAAF Competition Rule 22.1A valid and enforceable in the circumstances of the present dispute? In particular (but without limitation), could IAAF Competition Rule 22.1A validly and/or lawfully exclude Russian track and field athletes from International Competition?*

The Panel considered that Rule 22.1A IAAF Competition Rules was a permissive rule in the sense that it did not impose ineligibility but on the contrary, it allowed eligibility to be regained for athletes affiliated to a suspended NF, if specific conditions were satisfied. As a result, it could not be construed as a sanction. Contrary to the claimants' assertion, it could not, therefore, be considered inconsistent with the WADC or disproportionate.

Furthermore, as the Rule was an inclusionary rule which created an opportunity, not a bar, any uncertainty about its retroactive application i.e. regarding the definition of a *"sufficiently long period"* for an athlete to be subject to an *"adequate system"* in order to regain eligibility, did not help the athletes in having the application of the rule set aside in a given case. The Panel considered that it would also not assist any athletes for the rule not to be applied, since they would not, in any case, regain eligibility. It would only have the effect of harming any other athletes who satisfied Rule 22.1 A(b). Moreover, the Panel found that a rule which applied to any athlete of any suspended federation did not infringe any right to equal treatment. Finally, athletes' legitimate expectations could not be breached by Rule 22.1A as the rule provided another route to eligibility, one which could be pursued even though the NF had not been reinstated in accordance with the reinstatement conditions.

Consequently, the Panel held the rule valid and enforceable.

3. *Under the Olympic Charter, was the ROC entitled to nominate and was the IOC entitled to accept the entry of Russian track and field athletes to compete at the Rio Olympic Games even if they were not eligible to participate under IAAF Competition Rule 22.1(a) and 22.1A?*

According to the *Olympic Charter,* NOCs have the right to enter competitors to the Olympic Games. However, Rule 40 of the *Olympic Charter* restricts participation in the Olympic Games to those who comply with the *Olympic Charter* and the WADC, including the conditions of participation established by the IOC, *"as well as the rules of the relevant IF as approved by the IOC"*. Therefore, the NOCs can only exercise their right to send personnel to the Olympic Games if they comply with the rules of the relevant International Federation ("IF") because *otherwise* they would be contravening Rule 40 of the *Olympic Charter*. As a result, the ROC could not enter into the 2016 Olympic Games athletes who did not comply with the IAAF's rules, including those athletes who were not eligible under Competition Rules 22.1(a) and 22.1A.

Furthermore, in the absence of the IOC to the proceedings before the CAS, the Panel had no jurisdiction to determine whether the IOC was entitled to accept or refuse the entry of Russian track and field athletes to compete at the Rio Olympic Games if they were not eligible to participate under IAAF Competition Rule 22.1(a) and 22.1A.

4. *Under the Olympic Charter, if any Russian track and field athletes were eligible to compete at the Rio Olympic Games under IAAF Competition Rule 22.1A, was the ROC entitled to have them compete as representatives of Russia, or would they only participate in an individual capacity, not representing any country?*

The Panel found that, under the *Olympic Charter*, if there were any Russian track and field athletes eligible to compete at the 2016 Olympic Games under IAAF Competition Rule 22.1A, the ROC was entitled to enter them to compete as representatives of

Russia. In support of this finding, the Panel noted that under the *Olympic Charter* it was not for an IF to determine whether an athlete, eligible for entry to the Olympic Games, had to compete as a *"neutral"* athlete, or as an athlete representing his/her NOC. In the context of the *Olympic Charter*, and for such purposes, the fact that a national federation was suspended was irrelevant: the federation's suspension did not prevent an athlete from being entered into the Olympic Games as a representative of his/her NOC.

The Panel underlined however that the finding that the ROC was entitled, under the *Olympic Charter*, to enter into the Olympic Games as representatives of Russia any Russian track and field athletes who were eligible to compete under IAAF Competition Rule 22.1A did not mean that the IOC was bound to accept such designation. As noted, in fact, the IOC declined to participate in this arbitration. Therefore, the Panel had no jurisdiction to determine whether the IOC was entitled to accept or refuse the entry as representatives of Russia or in an individual capacity any Russian track and field athletes who were eligible to compete at the Rio Olympic Games under IAAF Competition Rule 22.1A.

Decision

IAAF Competition Rules 22.1(a) and 22.1A were valid and enforceable in the circumstances of the present dispute.

Under the Olympic Charter, the ROC was not entitled to nominate the entry of Russian track and field athletes to compete at the 2016 Olympic Games in Rio if they were not eligible to participate under IAAF Competition Rules 22.1(a) and 22.1A.

As the IOC was not a party to the present procedure, the CAS Panel had no jurisdiction to determine whether the IOC was entitled to accept or refuse the entry of Russian track and field athletes to compete at the 2016 Olympic Games in Rio if they were not eligible to participate under IAAF Competition Rules 22.1(a) and 22.1A.

Under the Olympic Charter, if any Russian track and field athletes were eligible to compete at the 2016 Olympic Games in Rio under IAAF Competition Rule 22.1A, the ROC was entitled to enter them to compete as representatives of the Russian Federation.

As the IOC was not a party to the present procedure, the CAS Panel had no jurisdiction to determine whether the IOC was entitled to accept or refuse the entry as representatives of the Russian Federation or as *"neutral athletes"* of any Russian track and field athletes who were eligible or not eligible to compete at the 2016 Olympic Games in Rio under IAAF Competition Rule 22.1A.

CAS 2016/A/4745
Russian Paralympic Committee (RPC) v. International Paralympic Committee (IPC)
30 August 2016 (operative part of 23 August 2016)

Paralympics; Validity of an IPC's decision to suspend a member organization; Failure of the national Paralympic Committee to comply with its anti-doping obligations; Regularity of the disciplinary process leading to a membership suspension; Proportionality of the suspension from membership of a national organization;

Panel
Judge Annabelle Bennett (Australia), President
Mr Efraim Barak (Israel)
Prof. Ulrich Haas (Germany)

Facts

The National Paralympic Committee of Russia (the "RPC" or the "Appellant") is the national Paralympic committee representing the Russian Federation. Its members are Russian sports and physical fitness organisations registered as legal entities, other legally registered Russian public-interest organisations and citizens of the Russian Federation. The RPC is a member of the International Paralympic Committee.

The International Paralympic Committee (the "IPC" or the "Respondent") is the global governing body of the Paralympic Movement. Its purpose is notably to organise the summer and winter Paralympic Games. Unlike the International Olympic Committee (IOC), the IPC's members include the national Paralympic committees (NPCs), Organisations of Sport for the Disabled, International Paralympic sports federations (IFs) and regional Paralympic organisations.

On 18 July 2016, the report commissioned by the World Anti-Doping Authority (WADA) from Professor Richard McLaren as the Independent Person was released (the "IP Report"). The IP Report reported that the Russian Government had developed, implemented and controlled a State-run doping program over a period from at least late 2011 until August 2015. The report also stated that Russian athletes from Paralympic sport benefitted from this program.

By letter dated 22 July 2016, the IPC notified the RPC that it had opened suspension proceedings against it, based on a list of seven, non-exhaustive facts that it believed were established according to the IP Report (the "Letter").

By letter dated 29 July 2016, the RPC commented and objected to the seven, non-exhaustive list of facts mentioned in the IPC letter dated 22 July 2016.

By letter dated 3 August 2016, the RPC provided its answers to the follow-up questions posed by the IPC on 1 August 2016.

After a further exchange of emails between the parties and after sending the RPC a warning, as well as hearing the RPC in writing and orally, the IPC, on 7 August 2016, suspended the membership of the RPC with immediate effect due to its asserted inability to fulfil its IPC membership responsibilities and obligations, in particular its obligation to comply with the IPC Anti-Doping Code and the World Anti-Doping Code (the "WADA Code") (the "Decision"). As a consequence of that suspension, by the application of article 9.6 of the IPC Constitution, the RPC could not enter athletes in competitions sanctioned by the IPC,

relevantly, the upcoming Paralympic Games in Rio.

On 11 August 2016, the parties entered into a written "Arbitration Agreement", signed on behalf of the parties. The Arbitration Agreement provided – *inter alia* – for a procedural timetable.

On 15 August 2016, the Appellant filed an expedited Statement of Appeal serving as its Appeal Brief with the Court of Arbitration for Sport (the "CAS") challenging the IPC suspension decision.

The parties filed detailed submissions and also presented evidence. At the hearing, the parties agreed that the issues should be considered under the following headings:

- Whether there has been a violation of the RPCs membership obligations;
- Whether the IPC complied with the correct procedures as set out in art. 1 of the Policy to effect the suspension of the RPC; and
- Whether the decision to suspend the RPC, with the consequential effect on Russian Paralympic athletes, was proportionate.

Reasons

1. The first challenge by the RPC was to the IP Report itself, which it *"contested in full"* and to the weight that it should be accorded. The RPC also emphasised that there was no conclusion expressed in the IP Report as to any involvement by the RPC in the State-sponsored system of doping therein described.

   The Panel underlined that while the IP Report did not refer to any particular athlete, the McLaren affidavit included evidence not present in the IP Report.

   The RPC made submissions as to the McLaren affidavit, including that it was *"not proven"* and that it was *"one-sided"*. However, such challenges were not substantiated. According to Swiss procedural law, a valid contestation of facts needs to be specific, i.e. it must be directed and attributable to an individual fact submitted by the party bearing the burden of proof (ATF 117 II 113, E. 2; ATF 115 II 1, E. 4; see also SFT 4A_299/2015, E. 2.3; DIKE-ZPO/LEU, 2011, Art 150 no 59). The challenges made by the Appellant were generic in nature and did not meet this threshold. Furthermore, Professor McLaren's evidence was given by sworn affidavit. The RPC decided not to cross-examine him although given the opportunity to do so and the RPC called no evidence to rebut his evidence. Thus, the Panel considered that Professor McLaren's evidence standed uncontradicted.

   In the McLaren affidavit, Professor McLaren repeated what he described as the "Key Findings" of the IP Report, made beyond reasonable doubt:

   1. *The Moscow Laboratory operated, for the protection of doped Russian athletes, within a State-dictated failsafe system, described in the report as the Disappearing Positive Methodology.*
   2. *The Sochi Laboratory operated a unique sample swapping methodology to enable doped Russian athletes to compete at the Games.*
   3. *The Ministry of Sport directed, controlled and oversaw the manipulation of athlete's analytical results or sample swapping, with the active participation and assistance of the FSB, CSP, and both Moscow and Sochi Laboratories.*

It is undisputed that the RPC accepted the obligations imposed on it as a member of the IPC. The IPC Rules provide for suspension based on breach of membership obligations. Those obligations include the specific obligation under Article 20.1 of the WADA Code to adopt and implement anti-doping policies and rules for the Paralympic Games which conform with the WADA Code.

In this respect, the obligation vigorously to pursue all potential anti-doping rule violations within its jurisdiction and to investigate cases of doping (Article 20.4.10), are not passive. The IPC Constitution and IPC Anti-Doping Code make compliance with those obligations a condition of each NPC's membership of the IPC. These obligations are those of the RPC and remain so within its jurisdiction, whether or not there is delegation to other bodies such as RUSADA, the accredited WADA laboratory or WADA itself as the world-wide international organisation responsible for fighting doping. Still, on a national level and within the structure of the IPC as stipulated in the Constitution, the RPC is the responsible entity having the obligation to the IPC as well as to the IPCs' members to ensure that no violations of the anti-doping system occur within Russia.

The existence of the system as described in the IP Report and in the McLaren affidavit means that the RPC breached its obligations and conditions of membership of the IPC.

2. The RPC asserted that it was not given due warning as provided under Article 3.1.2.1 of the IPC Policy on Suspension of IPC Member Organisations (the "Suspension Policy").

   On 22 July 2016, the IPC sent a letter to the RPC entitled: Notice regarding formal opening of IPC membership suspension proceedings against the Russian Paralympic Committee. As the IPC pointed out, there is no requirement under Article 3.1.2.1 of the IPC Suspension Policy to provide two separate notifications. Therefore, the notification letter was the "official warning", and it complied with the requirements of Article 3.1.2.1.

   What is more, the parties recognised that the Suspension Policy had difficulty of application in circumstances where the deadlines were imposed upon the parties by external parties and external circumstances i.e. the imminent commencement of the Paralympic Games and the magnitude of the deficiencies to be remedied by the NPC. Thus, by entering into an arbitration agreement, the parties answered the practical difficulties arising in these unusual circumstances and therefore agreed upon a proceeding different to that provided in the IPC applicable disciplinary process. Within the framework of such, an agreed *"taylor made"* legal mechanism, the parties also agreed that: *"in accordance with the IPC Policy on Suspension of IPC Member Organisations (the "Suspension Policy"), the IPC provided the RPC with a full opportunity to present its case to the IPC, both in writing and in person".*

   Therefore, the Panel found that the RPC did not established that the IPC failed to comply with the procedural provisions of the Suspension Policy.

3. The RPC did not challenge the IPC's right, as an international federation, to suspend a member federation or to place conditions on membership. The RPC's case was, in essence, that the IPC decision to suspend it from membership, with the consequence that no Russian Paralympic athlete was eligible to compete in the Paralympic Games in Rio, was unwarranted and

disproportionate. The RPC contended that the IPC could have adopted a *"softer measure"* that still permitted clean Russian athletes to compete in the Paralympic Games in Rio. It also submitted that a blanket prohibition was not justified, as it had not been established that all para-athletes nominated by the RPC had ever been implicated in doping. The RPC also contented that it did not know what was happening and that it had no control over those involved in the system described by Professor McLaren.

The IPC said that the assertion of lack of knowledge by the RPC did not relieve the RPC of its obligations but made matters worse.

The matter for review by this Panel was not the legitimacy of a *"collective sanction"* of athletes, but whether or not the IPC was entitled to suspend one of its (direct) members. The fact that the suspension of the RPC reflexively affected the Russian para-athletes insofar as they derived a legal position from the RPC was a logical and natural consequence of the simple fact that the IPC Constitution allowed for legal persons (representing the sport in a specific geographical area) to obtain membership.

As was confirmed in CAS OG 16/09, *Russian Weightlifting Federation v. International Weightlifting Federation*, an international federation might, in appropriate circumstances and in accordance with its Rules, suspend a member federation based on a breach of its Anti-Doping Policy and based on the *"reliable information"* of the IP Report. In the present case, there had been a breach of the IPC Anti-Doping Policy and of the RPC duties and obligations in this respect. Furthermore, the IPC had before it reliable information from Professor McLaren in the IP Report as well as the subsequent information provided by him to the IPC as set out in the McLaren Affidavit.

On this basis, the Panel found that the testing of Russian Paralympic athletes had not complied with the WADA Code. The damage caused by the systemic, non-compliance was substantial. The RPC had a non-delegable responsibility with respect to implementing an anti-doping policy in conformity with the WADA Code in Russia. The RPC could not delegate the consequences where other bodies within Russia acting as its agent implemented a systemic system of doping and cover-up.

The Panel considered that the IPC took an action which it believed was necessary, as explained in its submissions, *"to enforce the core and crucial obligations of its members on which fair competition depends"*. In that regard, in light of the extent of the application of the system described by Professor McLaren and his findings of the system that prevailed in Russia, made beyond reasonable doubt, the Decision to suspend the national federation was not disproportionate. The RPC pointed to the consequences for the athletes but considering the matter in dispute in, and the parties to, this arbitration, such consequences followed from the suspension, as has happened in the case of other suspensions of NFs.

Moreover, the recent actions by the federation –remedial steps- did not have sufficient weight to affect the proportionality of the decision. Finally, it followed from the explicit wording of the IOC applicable guidelines that the IOC was not opposed to (but rather mandated) the exclusion of a member federation on the condition that there was a proper provision within the statutes and regulations of the international federation to provide for such an exclusion.

Decision

The appeal filed by the Russian Paralympic Committee on 15 August 2016 against the decision rendered by Governing Board of the International Paralympic Committee on 7 August 2016 is dismissed.

Jugements du Tribunal Fédéral*
Judgements of the Federal Tribunal

* Résumés de jugements du Tribunal Fédéral suisse relatifs à la jurisprudence du TAS
Summaries of some Judgements of the Swiss Federal Tribunal related to CAS jurisprudence

Judgement of the Swiss Federal Tribunal 4A_246/2014
15 July 2015
A. SA. (Appellant) v. B., C., et al. (Respondent)*

Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of 7 March 2014

Extract of the facts

A. SA (hereafter: A.) is a professional football club based in X. [name of city omitted] and affiliated with L. Federation (hereafter: L.). Between June 2010 and September 2011, A. entered into employment contracts with each of the nine following professional football players, all domiciled in Y. [name of country omitted]: B. (hereafter: Player 1), C. (hereafter: Player 2), D. (hereafter: Player 3), E. (hereafter: Player 4), F. (hereafter: Player 5), G. (hereafter: Player 6), H. (hereafter: Player 7, I. (hereafter: Player 8) and J. (hereafter: Player 9). These contracts had the peculiarity that they tied the payment of the full monthly salaries to the condition that the players play 70% of the total number of minutes of the matches played by the Club during the month under consideration. On March 13, and April 3, 2013, the players filed several requests with the Dispute Resolution Chamber of L. (hereafter: the DRC) with a view to obtaining payment of the unpaid salaries and to obtain a finding that they had validly terminated their employment contracts for cause.

In a decision of April 23, 2013, the DRC upheld the right of the players to terminate their employment contracts as of the same date and ordered the Club to pay various amounts to each player as unpaid salary.

A. appealed these decisions to the Appeal Committee of L. (hereafter: the Committee). On June 4, and July 11, 2013, the latter found that the appeals filed on July 18, 2013, against the decisions concerning Players 1 to 7 were late. It reduced in part the amount awarded to Player 8 as unpaid salary and confirmed the decision concerning Player 9.

The Club seized the Court of Arbitration for Sport (CAS) of several appeals against all decisions issued by the Committee. The cases were consolidated. By letters of January 14, and 17, 2014, A. submitted settlement agreements signed with Players 6 and 9 according to which, they waived their claims and withdrew from the proceedings. In an award of March 7, 2014, the Sole Arbitrator appointed closed the cases concerning Players 6 and 9, rejected A.'s appeals concerning the seven other players and confirmed the decisions of the Committee in this respect.

On April 16, 2014, A. (hereafter: the Appellant or the Club) filed a civil law appeal. Arguing a violation of the rule ne infra petita (Art. 190(2)(c) PILA2), of its right to be heard (Art. 190(2)(d) PILA), and of procedural public policy (Art. 190(2)(e) PILA), it submitted that the Federal Tribunal should annul the award under appeal.

Extract of the legal considerations

1. In a first argument, based on Art. 190(2)(c) PILA, the Appellant submits that the Arbitrator failed to decide one of the claims.

According to case law, failure to issue a decision is a formal denial of justice. The federal law here adopted the second ground for appeal contained at Art. 36(c) of the Swiss Arbitration Concordate. By claims

* The original decision is in French

("Rechtsbegehren", "chef de la demande", "determinate conclusioni"), one means the claims or the submissions of the parties. What is referred to here is the incomplete award, namely when the Arbitral Tribunal failed to decide one of the submissions made by the parties.

Appellant does not have any sufficient present interest to obtain the annulment of the award under appeal in this respect. This is because if the Club were to be placed in actual difficulty due to its former dispute with Players 6 and 9 in the framework of separate disciplinary proceedings initiated by L., it would be in a position to resolve the matter simply by producing the settlements in question. The Appellant's position would not be different in this respect if the Arbitrator had annulled the two decisions of the Committee and if L. had initiated disciplinary proceedings against the Club nonetheless. In short, for the CAS, the formal annulment of the decisions of the Committee would have no direct and substantive impact on the Appellant's situation, so that the argument under review, the admissibility of which is more than doubtful, should be rejected anyway.

The pertinent procedural facts, which bind this Court, show that the Appellant gives to its letters of January 14, and 17, 2014, a scope going well beyond that which was held by the Arbitrator. The latter saw therein an indication by the Club that Players 6 and 9 were withdrawing from the proceedings which K. expressly confirmed as representative of all Players in the CAS. Therefore, when he took notice at § 1 of the operative part of the award that the cases concerning Players 6 and 9 were terminated and struck off the case list, the Arbitrator did not decide infra petita at all.

2. In a second argument divided into three parts, the Appellant argues a violation of its right to be heard.

The right to be heard in contradictory proceedings within the meaning of Art. 190(2)(d) PILA does not, admittedly, require an international arbitral award to be reasoned. However, it imposes upon the arbitrators a minimal duty to examine and handle the pertinent issues. This duty is breached when, due to oversight or by a misunderstanding, the arbitral tribunal does not take into consideration some statements, arguments, evidence, and offers of evidence submitted by one of the parties and important to the decision to be issued. If the award completely overlooks some apparently important elements to decide the dispute, it behooves the arbitrators or the respondent to justify the omission in their observations as to the appeal. It behooves them to demonstrate that, contrary to the claimant's assertions, the items omitted were not pertinent to decide the case at hand or, if they were, that they were refuted by the arbitral tribunal implicitly. However, the arbitrators are not obliged to discuss all arguments invoked by the parties, so they cannot be found in violation of the right to be heard in contradictory proceedings for failing to refute, albeit implicitly, an argument objectively devoid of any pertinence.

Moreover, the arbitrators may exceptionally have an obligation to ask the views of the parties when they consider basing their decision on a provision or a legal consideration which was not discussed in the proceedings and the pertinence of which the parties could not anticipate.

In the first part of the argument under review, the Appellant states that before the CAS it demonstrated that it had not validly been notified of the DRC decisions concerning Players 1 to 7 before June 13, 2013, and that consequently, the appeals it sent to the Committee on the 18th of the same month were filed within the five day time limit contained in the regulations of L.. Yet, according to the Appellant, the award under appeal does not mention this issue at

all. And, the Appellant adds that if the Arbitrator had taken into account the fact that the appeals concerning Players 1 to 7 had wrongly been declared inadmissible by the Committee, it would have had a satisfactory demonstration demonstrating why the payment slips for Players 1 to 7 were not produced to the Committee.

The passage of the award it quotes shows, at least implicitly, that through its representative M., the Appellant had the opportunity to explain at the hearing the reason for which the payment slips were allegedly not available in the two previous jurisdictions. The first part of the Appellant's argument concerning the right to be heard is therefore unfounded.

In the second part of the same argument, the Appellant criticizes the Arbitrator for not addressing the issues it raised in connection with Player 2 on the one hand and with Players 1 and 3 on the other hand.

As to Player 2, the Appellant argued that from August 2012 to January 2013, the Player was injured and had to undergo surgery and played no official games, thus failing to meet the requirement on which the payment of his salary depended and that he did not demonstrate that he should have received it despite his inability to work and that his medical expenses should have been borne by the Club. This is why the Appellant paid him nothing for the period and disputed owing him anything.

As to Players 1 and 3, the Appellant claims to have challenged the computation of their salaries and quotes the topical passages of its appeal brief. Yet, here as well, the Arbitrator failed to examine the arguments submitted in that brief even though they related to an essential element, namely the amount of the salary claims of these two players.

The Appellant's double argument as to a violation of the right to be heard stated in this second part appears founded. It is indeed striking to note that the CAS does not address it in its answer, as opposed to what it does for the other arguments. One actually seeks in vain the passage in the award under appeal in which the Arbitrator rejected the Appellant's arguments, particularly the one concerning Player 2, which is expressly mentioned in the chapter of the award devoted to stating the positions of the parties. Yet, the argument concerning this Player was specific and challenged the very existence of the Player's claim based on his inability to work. The Arbitrator should have indicated at the very least if he considered that, in case of inability to work due to injury, the clause of the employment contract subjecting the monthly compensation of the Player under the condition that he would play a specific percentage of the total number of minutes played by the Club in the games of the month under review. He also should have addressed the issue as to who should bear the medical costs, specifically raised by the Appellant.

The third argument concerns the Arbitrator's refusal to take into consideration the payment slips that the Appellant submitted to him in order to demonstrate that with the exception of Player 2, to whom it claims owing nothing, the players received their entire salaries during the period under consideration.

The Appellant submits that in its appeal brief it explained that it would usually make advance salary payments to its Players throughout the year against the signature of payment slips and that at the end of the season, it would compute the balance they were owed on the basis of the minutes played by each of them. It would also have stated that the late production of the payment slips could be explained because the documents were requested in the framework of a tax investigation and were consequently not available to the Club during the proceedings in the DRC. It adds that the evidence could not be submitted to the Committee for Players 1 to 7 because it did not address the

appeals concerning these Players due to late filing.

According to the Appellant, the Arbitrator merely rejected the evidence on the basis of Art. 317 of the Swiss Code of Civil Procedure (CCP; RS 272) and Art. R57 of the Code of Sport Arbitration (hereafter: the Code) because the Appellant did not validly explain why the payment slips could not be produced in the first or second jurisdiction. In doing so, he would have deprived the Appellant of essential evidence that could demonstrate that the players had received their entire salaries during the determining periods, thus violating its right to submit evidence. The Arbitrator's reasoning was even more incomprehensible as to Player 8 because the payment slips concerning him were produced before the Committee.

The Appellant argues in vain that it was surprised. The Arbitrator's reference to Art. 317 CCP appears somewhat singular indeed in a dispute between a football club of [name of country omitted] and players of [citizenship omitted] domiciled in Y. However, the Arbitrator also applied Art. 57(3) of the Code, which is sufficient to justify the refusal to admit the exhibits at issue into evidence and can be compared as a matter of principle to the aforesaid provision of Swiss procedural law. Yet, it is obvious that the existence of this provision, which is an essential element of the rules governing appeal proceedings in the CAS, could not be ignored by the Appellant, which was assisted by a lawyer specializing in sport disputes. In any event, the Arbitrator held that the exhibits in dispute – namely the payment slips produced by the Appellant – could not establish the fact in dispute, namely the payment of the entire salaries due to the players because the payments allegedly made according to these exhibits did not appear to correspond to the amounts due pursuant to the contracts between the parties. Moreover, he refused to admit that, according to the employment contracts, the Appellant was free to pay various amounts when it could avail itself of the necessary funds and provided it could. In his view, moreover, it was not possible to establish a direct relationship between the payments made and the respective employment contracts of the players on the basis of the exhibits submitted. These are alternate reasons sufficient to justify the refusal to take into account the payment slips produced by the Appellant if they had been produced in a timely manner. Such alternate reasons relate to an assessment of the evidence in advance and consequently bind the Federal Tribunal. The Appellant seeks in vain to challenge it in its appeal brief and merely submits arguments in this respect without connection to the violation of public policy.

3. In a final argument, the Appellant submits that the award under appeal violates procedural public policy for being deprived of an arbitrator with full power of review.

According to the Appellant, the right to an arbitrator with full power of review would be part of procedural public policy to the extent that it constitutes one of the elements of the right to a fair trial guaranteed in particular by Art. 6(1) EHRC. As the internal jurisdictional bodies of L. cannot be likened to an independent and impartial tribunal, the appeal to the CAS was the only way for the Appellant to see its case decided by a tribunal meeting these requirements. Yet, in the case at hand, the Arbitrator gave Art. 57(3) of the Code a restrictive interpretation, leading to the rejection of evidence because it concerned exhibits that should have been produced in the jurisdictional bodies of the sport federation involved, which was tantamount to refusing to exercise his full power of review and therefore deprive the Appellant of the right to appear before an independent and impartial judge.

Art. 6(1) ECHR does not prevent the creation of arbitral tribunals with a view to

adjudicate certain disputes of a financial nature between litigants as long as the waiving of their right to a tribunal in favor of arbitration is free, legal, and unequivocal. Once this dispute resolution mechanism has been validly chosen, a party to the arbitration agreement may not validly submit, in the framework of a civil law appeal to the Federal Tribunal against an arbitral award, that the arbitrators violated the ECHR even though its principle may occasionally be used to implement the guarantees it invokes on the basis of Art. 190(2) PILA (last case quoted, at 3.1.2). Moreover, the parties have the right to organize the arbitral procedure as they wish, particularly with reference to a set of arbitration rules (Art. 182(1) PILA) as long as the arbitral tribunal guarantees equal treatment and their right to be heard in contradictory proceedings (Art. 182(3) PILA). This is what they did in the case at hand by submitting to the CAS jurisdiction, which made the Code applicable ipso iure (see Art. 27(1) of the Code) including its Art. 57(3). Therefore, no matter what the Appellant claims, the concept of procedural public policy referred to by Art. 190(2)(e) PILA cannot encompass an obligation for the Arbitral Tribunal to address any case submitted to arbitration with full power of review. Once the state proceedings had been regularly waived, it is perfectly conceivable and admissible that the parties would agree directly or through their submissions to a set of arbitration rules and limit the power of review of the Arbitral Tribunal, whether as to the subject of its review and/or its depth.

Be this as it may – and as the CAS rightly points out in its answer – one does not see why the refusal to take into account evidence not submitted according to the procedural rules applicable would be tantamount to limiting the power of review of the Arbitral Tribunal. Consequently, the Arbitrator did not at all disregard Art. 190(2)(e) PILA by rejecting the payment slips at issue to decide the dispute between the parties because of late submission.

This being so, the appeal at hand must be upheld in part, as the Arbitrator violated the Appellant's right to be heard in the matters concerning Players 1, 2, and 3.

Decision - The partial annulment of the arbitral award

Case law and legal writing recognize the possibility of partial annulment, irrespective of the fact that an appeal against an international arbitral award may only seek its annulment (see Art. 77(2) LTF, ruling out the applicability of Art. 107(2) LTF) if the issue challenged is independent from the others.

This case law may be applied to the case at hand by analogy, insofar as it involves nine cases concerning a salary dispute between an employer and each of the nine players in its employment who sued separately in the DRC, the cases being consolidated in appeal to be dealt with together. Therefore, numbers 2, 3, and 5 of the dispositive part of the award under appeal shall be annulled insofar as they concerned the cases between A., L., and the players 1 to 3. The same shall apply to number 4 of the dispositive part of the award, which leaves the entire costs of arbitration to the Club. It is indeed possible that in the new award the CAS may find in favor of one of the three players, entirely or in part, or even in the favor of the three of them, which would call for the expenses to be divided accordingly.

Judgment of the Swiss Federal Tribunal 4A_222/2015
18 January 2016
X. (Appellant) v. United States Anti-Doping Agency (USADA) & World Anti-Doping Agency (WADA) (Respondents)*

Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of 11 March 2015

Extract of the facts

X., a citizen of Belgium domiciled in Spain, was active as sports manager of several professional cycling teams, American teams in particular, until October 2012. He is a member of the Belgian Cycling Federation (hereafter: the RLVB). The Union Cycliste Internationale (UCI), of which the RLVB is a member, is an association under Swiss law consolidating the national cycling federations. In order to combat doping in this sport, it adopted Anti-Doping Rules (hereafter: ADR). Each year from 2005 onwards, X. filled in and signed a form to apply for the license, on the basis of which the UCI issued him a license. It included the following text: *"The holder submits to the regulations of the UCI, and of the national and regional federations, and agrees to the anti-doping controls and blood tests administered there, as well as to the exclusive jurisdiction of the CAS"*.

The United States Anti-Doping Agency (USADA) is the American agency combating doping. It adopted a protocol organizing the operations of anti-doping controls and dispute resolution in case of positive results (hereafter: the USADA Protocol). The system set up by the USADA provides for a first arbitration before a panel of the American Arbitration Association (AAA) with a possible appeal to the Court of Arbitration for Sport (CAS) in Lausanne.

The World Anti-Doping Agency (hereafter: WADA) is a Swiss law foundation based in Lausanne. Its purpose is in particular to promote the fight against doping in sport at the international level. WADA adopted the World Anti-Doping Code (WADC; reference is made hereafter to the 2009 version of the Code, a revised version of which came into force on January 1, 2015).

On June 28, 2012, USADA wrote to X. and to five other individuals, including the American cyclist Lance Armstrong, to inform them that it had discovered sufficient evidence of repeated violations of anti-doping rules since at least January 1, 1999; and at least as to the sports manager, that it was considering imposing sanctions in this respect and that they had the choice either to accept them or, in the negative, to challenge them in the framework of the arbitral procedure provided under the USADA Protocol.

In a letter of July 12, 2012, X. answered the USADA and challenged not only the proposed sanctions but moreover the very jurisdiction of this body to impose them upon him and he stated in particular that his forced appearance before the AAA arbitral tribunal should not be interpreted as a waiver of the rights he had under the UCI Rules.

Upon request from the USADA on July 30, 2012, a three-member Arbitral Tribunal was constituted under the aegis of the AAA (hereafter: the AAA Tribunal). Upon request from the defendants, it agreed to bifurcate the proceedings and to handle various issues

* The original decision is in French

first, including jurisdiction. On June 12, 2013, the AAA Tribunal issued a decision entitled "Procedural Order No. 2" in which it provisionally assumed jurisdiction as to X., a doctor and a trainer of cycling teams. In substance, it held that the sport manager, as holder of a UCI license, agreed to the application of the ADR and therefore accepted the possibility that he would be involved in an arbitration under the anti-doping rules of a body discovering the breaches in dispute, such as the USADA. Seized of an appeal filed by X. on August 2, 2013, the CAS found the matter incapable of appeal in a decision of December 16, 2013, due to the provisional nature of the opinion expressed by the AAA Tribunal in its procedural order.

Whereupon, the AAA Tribunal addressed the merits of the matter. In particular, it held a hearing on the merits on December 16 and 19, 2013. X. did not participate and did not submit any evidentiary material for fear that they may end up in the hands of another professional cyclist (Floyd Landis) and/or with the United States of America's Department of Justice, who may have used them in the framework of a monetary claim called Qui Tam initiated by them against him and concerning USD 90 million, the confidentiality of the arbitral proceedings not being respected, in his opinion.

Upon closing the investigation, the AAA Tribunal issued its final award on April 21, 2014. As to jurisdiction, it simply confirmed its provisional decision contained in the June 12, 2013, provisional order. As to the merits, it found X. guilty of violating rules 2.7 and 2.8 of the WADC and banned him for 10 years, namely from June 12, 2012 to June 11, 2022.

On May 12, 2014, X. appealed the final award of the AAA Tribunal to the CAS. In parallel, one of the two other defendants and WADA also appealed the award and the three cases were consolidated. Upon request by X., the CAS agreed to address the issue of jurisdiction as a preliminary issue. According to its appeal brief of June 4, 2014, the Appellant invited the CAS to annul the award of the AAA Tribunal for lack of jurisdiction.

A three-member Arbitration Panel (hereafter: the Panel) was constituted by the CAS on August 19, 2014. On March 11, 2015, the CAS Secretariat sent the following letter to the parties:

Dear Sirs,

Following the telephonic hearing held on 2 March 2015 in respect of the substantive issue of USADA'S results management jurisdiction and the AAA's disciplinary authority over Messrs. X., [...] and [...], the Panel, having deliberated, has decided that USADA had results management jurisdiction and the AAA the disciplinary authority over Messrs. X., [...] and [...].

The present decision is a partial decision on a substantive issue and not a preliminary decision on the jurisdiction of CAS within the meaning of Article 190 of the Swiss Private International Act. The reasons for the Panel's decision will be included in its Final Award, together with its findings on the remaining substantive issues. (…)

William STERNHEIMER - Managing Counsel & Head of Arbitration.

On April 24, 2015, X. (hereafter: the Appellant) invoked Art. 190(2)(b) PILA4 and filed a civil law appeal with the Federal Tribunal.

Extract of the legal considerations

1. The civil law appeal is admissible against an award only

The civil law appeal mentioned at Art. 77(1)(a) LTF in connection with Art. 190-192 PILA is admissible against an award only. The appealable decision may be a final award, putting an end to the arbitration on meritorious or procedural grounds, a partial award, addressing part of a claim in dispute

or one of the various claims in dispute, or putting an end to the proceedings with regard to one of the joint defendants, or, as the case may be, a preliminary award adjudicating one or several preliminary issues as to the merits or the procedure. However, a mere procedural order that can be modified or rescinded during the proceedings is not capable of appeal. The same applies to provisional measures, as referred to at Art. 183 PILA. The procedural decisions of the arbitral tribunal, such as an order staying the arbitration temporarily, are procedural orders incapable of appeal; however, they may be referred to the Federal Tribunal when the arbitral tribunal issuing them has implicitly made a decision as to its jurisdiction, in other words, when in doing so, it necessarily issued an interlocutory decision on jurisdiction (or as to the regularity of its composition if it was challenged) within the meaning of Art. 190(3) PILA. Moreover, the appealable decision may not necessarily be issued by the Panel appointed to decide the case in dispute; it may also originate from the president of an arbitration Division of the CAS, or even by the general secretary of the arbitral tribunal. Moreover, the decisive element to assess the admissibility of the appeal is not the name of the decision under appeal but rather its content.

2. Preliminary award on a jurisdictional defense

When an arbitral tribunal rejects a jurisdictional defense in a separate award, it issues a preliminary award (Art. 186(3) PILA), irrespective of the label given. Pursuant to Art. 190(3) PILA, such a decision may be appealed to the Federal Tribunal only on the ground of irregular composition (Art. 190(2)(a) PILA) or a lack of jurisdiction (Art. 190(2)(b) PILA) of the arbitral tribunal. Art. 186(3) PILA states that, as a rule, the arbitral tribunal decides on its jurisdiction in a preliminary award. This provision does indeed state a rule, yet without any mandatory and absolute character as its violation is without sanction. The arbitral tribunal may depart from it if it considers that the jurisdictional defense is too tied to the facts of the case to be adjudicated separately from the merits. Indeed, as it has to examine all issues on which its jurisdiction depends without reservation when it is challenged, it may not resort to the theory of double pertinence because one cannot compel a party to suffer that such an arbitral tribunal adjudicates the rights and obligations in dispute which is not covered by a valid arbitration agreement.

3. Character of the decision under appeal

Even from a purely formal point of view, in particular as to the manner in which it was communicated to the interested parties, the decision under appeal is peculiar indeed if compared with the awards the CAS usually issues. It is a mere letter by which a CAS legal counsel on the one hand advises the addressees of the decision taken by the Panel after a conference call on March 2, 2015, as to two issues in dispute – the competence of the USADA to administer the results and the disciplinary authority of the AAA Tribunal as to the Appellant, among other individuals – whilst also noting that the reasons for the decision would be included in the final award and, on the other hand, giving them ten days on behalf of the Panel to agree on a procedural calendar with a view to handling the other issues on the merits. Contrary to what is stated at Art. 59(1) of the Code of Sport Arbitration, the letter contains no reasons and was not signed by the Chairman of the Panel. Admittedly, the atypical nature of the decision under appeal is not sufficient to rule out that the Panel, whilst communicating the decision in an unusual form, already had definitively decided its own jurisdiction. Similarly, the fact that the decision was issued by the Panel and not by the legal counsel appears clearly from the wording of the letter at issue, no matter what the Respondents say, as the counsel merely communicated its content to the interested

parties. That being said, the manner of communication of the decision in dispute is an element to be taken into account in determining whether or not there is a preliminary award on jurisdiction within the meaning of Art. 186(3) PILA in the case at hand.

The content of the March 11, 2015, letter is another element that must be taken into account. Indeed, the Panel itself qualifies the decision in dispute in the letter as a partial decision on a substantive issue while excluding the possibility that it was preliminary decision on jurisdiction pursuant to Art. 190 PILA. That the Federal Tribunal is not bound by this qualification is obvious. Yet, in the face of an unreasoned decision, this Court may not totally disregard the opinion of the author of the decision as to its legal nature either because, until proof of the contrary, the Panel is best placed to provide clarifications as to the scope of the decision it issued, irrespective of the label it gave it. In this respect, the Appellant's argument that the qualification adopted by the Panel, *"is manifestly an attempt to avoid an appeal at this stage,"* is unfounded. Quite to the contrary, it appears from the exceptional circumstances germane to the case at hand that the Panel could have good reasons to definitively decide the issue of its own jurisdiction with the merits of the case. Be this as it may, its decision to address the issue with the merits escapes any sanction as has already been seen.

4. CAS awards in appeals against decisions by the jurisdictional bodies of sport federations

As a rule, when the CAS issues a decision as an appeal body, it is in appeals concerning decisions issued by the jurisdictional bodies of sport federations. Such jurisdictional bodies are not real arbitral tribunals and their decisions are mere embodiments of the will of the federations concerned; in other words, they are acts of administration and are not judicial acts. This also applies to the decisions taken by the jurisdictional bodies of FIFA. In rare cases, the CAS may also address appeals against real awards issued by arbitral tribunals created by sport federations. Such an instance of double arbitration (the overlap of two arbitral jurisdictions) – goes against the classical doctrine according to which there is *"no arbitration on arbitration"*, but Swiss law took into account that the existence of arbitral appeals in domestic arbitration (Art. 391 CPC) – is a characteristic of the decision-making procedure instituted by the anti-doping American agency by means of the USADA Protocol.

5. Preliminary or interlocutory award settling a substantive issue definitively

The Panel actually issued a preliminary or interlocutory award by which it settled a substantive issue definitively. The preliminary issue was whether the USADA had jurisdiction to administer the results concerning the Appellant and, as a corollary, whether or not the AAA Tribunal had disciplinary authority over the Appellant and the other individuals involved in the first instance arbitration procedure. As to the preliminary nature of the issue in dispute, it consisted of leading the CAS to annul the final award in the negative, without being obliged to address the substance of the dispute, namely, the existence of violations of anti-doping rules upheld by the AAA Tribunal and the admissibility of disciplinary sanctions inflicted by this Arbitral Tribunal upon the individuals under investigation by the USADA.

The Panel could not issue this preliminary or interlocutory award without admitting, at least implicitly on the basis of a prima facie review, that it had jurisdiction to do so. The Appellant's procedural conduct and in particular his submission that the Panel annul the award of the AAA Tribunal, was such as to give it confidence that its own jurisdiction was not really challenged by this Appellant. However, for whatever reason, the Panel

decided to accept jurisdiction provisionally only with a view to address the issue formally and definitively only in its future final award. This is how the sentence in the letter of March 11, 2015, can be understood, stating that the decision thus communicated was not a preliminary award on jurisdiction within the meaning of Art. 190 PILA and that the reasons for the decisions would be included in the final award. In doing so, the letter at issue is similar to the one issued in another case adjudicated by the Federal Tribunal.

6. The decision to address the issue with the merits instead of abiding by the general rule of Art. 186 (3) PILA

The decision to address the issue with the merits instead of abiding by the general rule of Art. 186(3) PILA is a matter of opportunity. As such, it is without sanction. One may perhaps reserve instances of blatant abuse of such faculty. Yet, the case at hand has nothing to do with an assumption of this kind, as the Appellant appeared to have accepted the jurisdiction of the CAS in its appeal writings and that, in any event, there was room for careful consideration by the Panel, in particular because both the authority of the anti-doping organization to administer the results and the jurisdiction ratione personae of both the AAA Tribunal and the CAS as to the Appellant depended upon the existence of an arbitration agreement between the Appellant and the USADA. Therefore, it is in the well-understood interest of all parties to the dispute to wait for the notification of the final award in order to examine, only once, the arguments that the Appellant and the other parties involved may submit in a possible appeal against the aforesaid award.

To sum up, the Appellant's argument of lack of jurisdiction within the meaning of Art. 190(2)(b) PILA in the preliminary or interlocutory decision of the Panel, which the CAS legal counsel notified to the parties in his letter of March 11, 2015, is inadmissible because the aforesaid decision does not definitively settle the issue of the jurisdiction of the CAS. This decision of inadmissibility ipso jure renders moot the stay of enforcement granted by decision of the presiding judge of October 8, 2015.

Therefore, the Federal Tribunal pronounces that the matter is not capable of appeal.

Judgement of the Swiss Federal Tribunal 4A_510/2015
8 March 2016
X. (Appellant) v. Y. (Respondent)*

Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of 24 August 24, 2015

Extract of the facts

On January 26, 2010, Y., a professional football club of [name of country omitted], and X., a [name of country omitted] professional football club, entered into a contract (hereafter: the Contract) concerning the transfer by the former to the latter of A. (hereafter: the Player), a [citizenship omitted] professional player who was also a signatory of the aforesaid contract. As a counterpart, X. paid the amount of USD 500'000 to Y. and undertook to pay half the income of a future transfer of the Player to a third club, which would take place before December 31, 2011, (Art. 3 of the Contract). Art. 8 of the Contract prevented X. from lending or transferring the Player before that date without the written agreement of Y. Should this prohibition be breached, X. should pay an amount of USD 2'000'000 as a penalty to Y. According to Art. 9 of the Contract, the employment contract to be concluded between X. and the Player should include a clause stating that in case of breach of the Contract by the Player without cause, the latter would be bound to pay compensation of USD 2'000'000 to be divided between the two clubs. Finally, should the anticipated termination of the employment relationship be attributable to X., it would pay an amount of USD 1'500'000 to Y. to compensate the loss of the indemnity that Y. could have hoped to receive in case of a future transfer of the Player (Art. 10 of the contract). On January 19, 2011, X. asked Y. to authorize early termination of the Player's employment contract or his temporary transfer to Z., a [nationality omitted] professional club, due to the Player's personal situation. The following day, Y. categorically rejected this request and indicated to X. that it would invoke the penalty clause should the Player be transferred. At the end of January 2011, X. loaned the Player to Z., whereupon Y. enquired of Z. the reasons for doing so and filed a complaint with the Players' Status Committee of the Fédération Internationale de Football Association (FIFA).

In a decision of December 10, 2013, the Single Judge of the Committee rejected the claim, holding that Y. did not prove undergoing any real, specific damage, despite the breach of the contract attributable to X.

Seized of an appeal by Y., the Court of Arbitration for Sport (CAS) investigated the matter and held a hearing on July 16, 2015, whereupon a three-member Panel issued an award on August 24, 2015, pursuant to which the decision under appeal was annulled and X. was ordered to pay an amount of USD 1'500'000 to Y. In a nutshell, the Panel rejected each and every objection raised by X. to avoid the application of the penalty clause contained at Art. 8 of the contract. However, it held that the circumstances of the case at hand justified a reduction of 25% of the penalty set in the clause.

On September 23, 2015, X. (hereafter: the Appellant) filed a civil law appeal with the Federal Tribunal with a view to obtaining the annulment of the award at issue. It supplemented its appeal brief by an additional writing submitted on November 2, 2015. The Respondent submitted that the appeal should be rejected insofar as the matter is capable of

* The original decision is in French

appeal, pursuant to its answer of November 30, 2015.

In its answer of December 18, 2015, the CAS produced its file and submitted that the appeal should be rejected.

The Appellant did not file a reply.

Extract of the legal considerations

1. In a first argument based on Art. 190(2)(a) PILA, the Appellant argues that the CAS issued the award in violation of the rules concerning the impartiality and the independence of the Arbitrators.

The Appellant's argument relies on a factual premise that is not established, so the entire legal construction, laid on this hypothetical basis, collapses like a house of cards. Indeed, the Appellant assumes a mere hypothesis, namely that a member of the Panel informed the press or the other party of the outcome of the dispute. The CAS and the Respondent demonstrate convincingly in this respect in their respective answers, why the alleged fact cannot be considered as established. Their explanations show in particular that the information published in the article in dispute was wrong on several points, that no official source was mentioned and no reporter contacted the CAS to verify its accuracy. Moreover, as the CAS publishes a list of upcoming hearings on its website, any reporter could have heard of the dispute between the parties and their names, and then carried out his or her own investigation with various unofficial sources on the basis of this information with a view to obtaining some more specific information on any aspect of the case. This could also explain the mistake as to the amount that would be awarded to the Respondent.

Moreover, to remain in the realm of speculation, it would not be unimaginable for the 'leak' to have originated not from the Respondent as the Appellant suggests, but from the latter itself, seeing its case going badly after the hearing on July 16, 2015, and taking the necessary steps to allow itself the opportunity to obtain the annulment of the future award because the Panel could be seen to have breached its duty of confidentiality. In any event, nothing in the case at hand refutes the allegation of the Secretary General of the CAS, according to which on the one hand, the members of the Panel stated that they never communicated with anyone outside the CAS as to the case and on the other hand, the Secretariat of the CAS also abided by the confidentiality of the arbitral proceedings at all times. Finally, one must note that the Appellant's first reaction when it heard of the press article was not to question the impartiality or the independence of the Panel, as it merely invited the CAS to ensure that the future award should be communicated to the parties as a priority, before any information to the press. Be this as it may, it is acknowledged that the breach of the duty of confidentiality imposed upon the Arbitrators does not constitute, as a rule, a ground for appeal against an international arbitral award.

However, some authors reserve the possibility of an appeal with a view to invoking a violation of the principle of equal treatment of the parties within the meaning of Art. 190(2)(d) PILA if, due to an arbitrator's unilateral indiscretion during the proceedings, a party obtains information to its advantage in the evidentiary phase of the arbitration. The latter hypothesis is not to be considered in the case at hand. As to the one built up by the Appellant, which could be likened to the previous one as an *ultima ratio*, namely to claim that the Panel could have been tempted to adapt its award so that the amount awarded to the Respondent would not correspond to the amount announced in the press article, it is totally gratuitous and does not deserve any further consideration.

The Appellant's first argument is therefore unfounded.

2. Secondly, the Appellant invokes Art. 190(2)(e) PILA, and argues that the CAS violated procedural public policy due to the same facts stated in support of the previous argument.

In its supplementary appeal brief, the Appellant argues that the CAS violated substantive public policy by ordering it to pay an amount of USD 1'500'000 to the Respondent as a contractual penalty. In its view, the Panel disregarded Art. 163(3) CO, which requires the court to reduce the penalties that they deem excessive, and the case law on this issue. Specifically, in the Appellant's view, as the Panel held that it was not established that the fault he committed was serious or that the breach of contract caused any damage to the Respondent, it should have waived any penalty as the judge who issued the first instance decision did, or reduce the contractual penalty to its very minimum. Instead, it set the penalty at three times the transfer fee and thus issued an award without precedent in the CAS case law, which is deeply harmful to the notion of justice and fairness.

An award is contrary to substantive public policy pursuant to Art. 190(2)(e) PILA when it violates some fundamental principles of substantive law to such an extent that it is no longer consistent with the governing legal order and system of values; among such principles are in particular contractual trust, compliance with the rules of good faith, the prohibition of the abuse of rights, the prohibition of discriminatory or confiscatory measures, as well as the protection of incapable persons.

This case law applied to the circumstances of the case at hand calls for the following remarks.

First, it may be worth pointing out that the argument does not appear in the main appeal brief, even impliedly, which is somewhat surprising. Then, it must be recalled that according to case law, Art. 163(3) CO is indeed a public law provision, namely a mandatory provision that the court must apply even if the debtor of the contractual penalty did not specifically ask for a reduction of its amount. However, that notion of public policy has nothing to do with the public policy of Art. 190(2)(e) PILA. The Federal Tribunal emphasized this a long time ago by pointing out with regard to the mandatory rules, such as Art. 163(3) CO, that it does not behoove this Court to review the arbitral award as a court of appeal would do but only to sanction a violation of the prohibition of discriminatory or confiscatory measures ordered or covered by an arbitral tribunal. The Appellant obviously disregards these principles of case law when simply seeking to demonstrate that the Panel wrongly applied, or even applied arbitrarily, the provision drawn from the Swiss Code of Obligations. Moreover, as the Respondent demonstrates at n. 33 ff of its answer, the Appellant's summary of the Panel's reasons is biased and does not reflect its true meaning. Indeed, the Appellant outlines merely part of the reasons of the Arbitrators when emphasizing two points – the alleged absence of any damage to the Respondent and the fact that the fault it committed was not the most serious possible act – which it takes out of context, whilst omitting others, such as the intentional nature of the breach of contract by the Appellant, the preventive purpose of the penalty clause, or the fact that the bargaining power of both parties was not imbalanced as both were major professional clubs.

Finally and above all, the Appellant passes over in silence the fact that both clubs defined in clause 10 of the contract their interest in its performance because they agreed that, in case of a breach of the Player's employment contract by the Appellant, the latter owed compensation up to USD 1'500'000. Yet, this is the number that the Panel applied as the contractual penalty. This sheds a different light upon the Appellant's repeated assertion that the amount of the reduced contractual

penalty represented three times the transfer fee. Be this as it may, there is no sign of a violation of substantive public policy in the case at hand, within the restrictive meaning given to this concept at Art. 190(2)(e) PILA.

Therefore, the Federal Tribunal decides to reject the appeal at hand in its entirety.

Informations diverses
Miscellanous

Publications récentes relatives au TAS/Recent publications related to CAS

- NETZLE S., Meldonium und die Strafzumessung unter dem WADC 2015, Spurt 3/2016, p. 108
- PRÜTTING H., Das Pechstein-Urteil des BGH und die Krise der Sport-Schiedsgerichtsbarkeit, Spurt 4/2016, p. 143
- TSCHANZ/FELLRATH, Chronique de la jurisprudence étrangère, Revue de l'Arbitrage, 2015 n°4, p. 1193 et 1202
- VEDOVATTI M., Highlights of Swiss law for international arbitration on sports, Revista Aranzadi de Derecho de Deporte y Entretenimiento, Julio - Septiembre 2016, Núm. 52, p. 109
- ZIMMERMANN M., Rechtsprechung zur Solidarhaftung gemäs FIFA-Transfer-reglement: Die CAS-Entscheidung in der Mutu Saga, Spurt 4/2016, p. 148
- Binding nature of mediation provisions at arbitration level, ECA Legal Bulletin 6, Sep 2016, p.29
- Feedback from CAS, ECA Legal Bulletin 6, Sep 2016, p. 15
- Rechtsprechung, Sportschiedsgerichtsbarkeit, CAS: 4-Jahressperre für Umgehung einer Probenahme statt versäumter Kontrolle, Spurt 4/2016, p. 158
- Rechtsprechung, Sportschiedsgerichtsbarkeit, CAS: Unzuständigkeit mangels Ausschöpfung des Verbands-Rechtsweges, Spurt 5/2016, p. 209
- Tribunal Arbitral du Sport, Affaire Pechstein: le Tribunal fédéral allemand rend sa décision, Jurisport, numéro 166, juillet-août 2016, p.8
- Tribunal Arbitral, Revista Aranzadi de Derecho de Deporte y Entretenimiento, Abril - Junio 2016, Núm. 51, p.569
- Tribunal Arbitral, Revista Aranzadi de Derecho de Deporte y Entretenimiento, Julio - Septiembre 2016, Núm. 52, p. 543