Bulletin TAS
CAS Bulletin
Boletín del TAS

2024/02

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

TRIBUNAL ARBITRAL DU SPORT/COURT OF ARBITRATION FOR SPORT/TRIBUNAL ARBITRAL DEL DEPORTE

Bulletin TAS
CAS Bulletin
Boletín del TAS

2024/2

Lausanne 2024

Table des matières/Table of Contents/Indice de Contenidos

Editorial

The Court of Arbitration for Sport (CAS) opened two temporary offices in Paris for the 2024 Olympic Summer Games (the Games) that were held from 26 July to 11 August 2024 in Paris (France). The CAS Ad Hoc Division, which resolves any legal disputes that arise during the Games, operates at every edition of the Summer and Winter Olympic Games since 1996, as well as at other major sporting events. The CAS Ad hoc Division guarantees free access to arbitration services conducted within a timeframe consistent with the competition schedule as decisions could be rendered within 24 hours in urgent matters.

The second temporary office was a section of the CAS Anti-Doping Division (CAS ADD) which adjudicates anti-doping-related matters arising during the Games as a first-instance authority. This structure, in operation since its inauguration at the Rio 2016 Olympic Games, handles doping cases referred to it by the International Testing Agency (ITA) in accordance with the International Olympic Committee (IOC) Anti-doping Rules. The CAS ADD became permanent, also outside the Olympic Games, in 2019.

Both offices were located within the Tribunal de Paris in the 17th arrondissement of Paris and operated from 16 July 2024 until 11 August 2024. It was the first time that CAS offices were hosted within the premises of a real tribunal during the Olympic Games.

It should be noted that as part of the Paris 2024 Olympics, the Paris Bar Association played a very important role by providing the sports movement with pro bono lawyers helping athletes to proceed before the CAS ad hoc divisions, and also in other situations outside a CAS context.

The CAS Ad Hoc Division in Paris was composed as follows: President, Mr Michael Lenard (USA); Co-Presidents, Dr Elisabeth Steiner (Austria) and Ms Carole Malinvaud (France). The arbitrators present in Paris (in alphabetical order) were the Hon. Dr Annabelle Bennett (Australia); Ms Carine Dupeyron (France); Ms Laila El Shentenawi (Egypt); Dr Hamid Gharavi (France/Iran); Mr Lars Hilliger (Denmark); Prof. LU Song (China); Mr Roberto Moreno (Paraguay); Prof. Philippe Sands (UK/France) and Ms Kristen Thorsness (USA). The arbitrators available remotely were Ms Raphaëlle Favre Schnyder (Switzerland); Dr Heiner Kahlert (Germany) and Dr Leanne O'Leary (UK/New Zealand).

The CAS ADD in Paris was composed as follows: President, Mr Ivo Eusebio (Switzerland); Deputy President, Mr David W. Rivkin (USA). The arbitrators present in Paris (in alphabetical order) were Mr John Boultbee (Australia); Prof. Matt Mitten (USA); Judge Martina Spreitzer-Kropiunik (Austria) and Judge Mark Williams (Australia). The arbitrators available remotely were Prof. Dr Jens Evald (Denmark/New Zealand) and Mr Markus Manninen (Finland).

During the Olympic Games, the CAS Ad Hoc Division dealt with twenty cases whereas the CAS ADD rendered two awards. A selection of awards rendered by the CAS Ad Hoc Division appears in this issue.

We are also pleased to publish in this Bulletin a "Review of Recent Jurisprudence in Doping Matters" written by Markus Manninen, CAS arbitrator. Still in the field of doping, the article co-written by Vladimir Novak, CAS arbitrator and Liam Rowley concentrates on the issue of whereabouts failure in CAS Jurisprudence. Finally, the article co-written by Matthieu Reeb, CAS Director General, and Despina Mavromati, CAS arbitrator, entitled "Arbitration and Olympism: the CAS ad hoc Divisions", focuses on the material and temporal jurisdiction of the CAS ad hoc Divisions during the Olympic Games.

As usual, because most CAS cases are football-related, this new issue of the Bulletin

includes a majority of selected "leading cases" related to football, namely ten football cases, two doping cases in speed-skating and weightlifting respectively and two governance cases in aquatics and boxing respectively.

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

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

Matthieu Reeb
CAS Director General

Articles et commentaires
Articles and Commentaries
Artículos y comentarios

Review of Recent Jurisprudence in Doping Matters: Substantial Assistance, Whereabouts Information, and Unidentified Transdermal Administration

Markus Manninen[1]

I. Introduction

Competitive sports demand not only physical prowess but also adherence to strict regulations. One significant component of these are anti-doping regulations, which have been largely standardised worldwide, with the primary responsibility placed on the World Anti-Doping Agency ("WADA"). WADA is consistently developing regulations related to doping control thereby striving to maintain fairness and integrity across all sports.

Despite the continuous development, it is impossible to make the regulations comprehensive and unequivocal in a way that an answer to every case-specific situation is readily available irrespective of the sport. The complexity of the anti-doping regulations and the diversity of real-life cases often necessitate testing and interpretation of the relevant provisions. The Court of Arbitration for Sport ("CAS") and its different divisions play a significant, if not a crucial role in maintaining the effectiveness and relevance of the legal framework on anti-doping. In this article, it is specifically the CAS jurisprudence that will be analysed from different angles.

The first part of the article focuses on the concept of "substantial assistance". It serves as a tool for disciplinary bodies to uncover additional

[1] Markus Manninen, Attorney-at-Law, CAS ADD Arbitrator. Partner at Hannes Snellman Attorneys Ltd, Helsinki, Finland, specialised in dispute resolution and sports law.

doping violations thereby enhancing the effectiveness of doping control. It also provides a mechanism for violators to mitigate their sanctions, thus adding a layer of complexity to the disciplinary process. This paper examines the criteria that need to be met for an individual's assistance to be deemed "substantial", and it further investigates to what extent the substantial assistance may alleviate the sanction. This involves a critical analysis of various factors, including the severity of the original violation, the significance of the assistance provided, and the potential implications for the overall integrity of the sport.

The second part of this article focuses on athletes' whereabouts information. The regulations regarding the whereabouts information are rather stringent for top-level athletes. The requirement to provide precise and timely information about their location for testing purposes can be burdensome, and penalties may result from providing insufficient information. The article explores the boundary between insufficient and sufficient whereabouts information in the light of a recent CAS case.

The third and final section focuses on contamination cases and, in particular, on transdermal administration. It addresses situations where an athlete who has tested positive attempts to demonstrate that the prohibited substance has entered their body accidentally, for instance, through skin contact. Such cases are relatively rare but particularly interesting and challenging. For instance, where the origin of the prohibited substance is not known with certainty, the question of when the evidence is sufficient to establish the lack of intent is a significant one.

[2] See WADC, comment to Article 10.7.1, p. 72.

[3] The provision on substantial assistance was already introduced in the WADC that entered into force in 2004. The scope of substantial assistance and its utilisation as a basis for mitigating sanctions has, like other provisions, developed over the years.

II. CAS 2021/A/8296: WADA v. FIFA & Vladimir Obukhov – Substantial Assistance

A. Introduction

"The cooperation of Athletes, Athlete Support Personnel and other Persons who acknowledge their mistakes and are willing to bring other anti-doping rule violations to light is important to clean sport".[2]

In order to foster clean sport and to encourage athletes and other individuals to disclose information they may have about potential doping offences committed by other persons, Article 10.7.1 of the World Anti-Doping Code ("WADC") allows a suspension of a part of the period of ineligibility where there has been "substantial assistance" in discovering or establishing WADC violations.[3] In other words, persons who have effectively assisted relevant disciplinary bodies[4] in anti-doping investigations may be treated more leniently when their own doping case is being handled, with eventually a shorter period of ineligibility than otherwise imposed.[5]

Setting conditions for substantial assistance requires careful balancing. On one hand, it is important that the benefits to individuals who have committed violations are not applied too lightly. On the other hand, the threshold should not be so high that the incentives are considered blatantly unreachable.

The challenges related to this balancing are also reflected in Article 10.7.1 of the WADC, which, being more than three pages long, explains the conditions for substantial assistance and provides guidance on its application. As the provision is rather broad and detailed, CAS has also repeatedly examined cases based on it.

When Article 10.7.1 of the WADC works as intended, it gives disciplinary bodies acting in universal doping control system a chance to

[4] According to Article 10.7.1 of the WADC, these include anti-doping organisations ("ADO") but also criminal authorities and professional disciplinary bodies.

[5] The maximum suspension is three quarters of the original period, whereas the minimum is not stipulated in the WADC. The assessment is done on a case-by-case basis.

uncover anti-doping rule violations ("ADRV") and other offences that would otherwise have remained unexamined thereby improving the integrity of clean sport.

In the following, I will examine some of the key legal implications of "substantial assistance" in the light of CAS award CAS 2021/A/8296 WADA v. FIFA & Obukhov.[6]

B. Facts

In 2013, Mr Obukhov, a then 21-year-old football player of Torpedo Moskow FC[7], underwent an out-of-competition test in Russia, after which the Russian national anti-doping organization reported a negative result in the Anti-Doping Administration & Management System ("ADAMS"). For a long period of time, the situation remained as such, and the player continued his professional career.

Then, eight years later, FIFA notified the player of a possible ADRV, after WADA's forensic investigations had showed that the prohibited substance in the sample had been covered up.[8] As a result, the player admitted his ADRV and expressed his will to provide substantial assistance.[9] Accordingly, a cooperation agreement was signed between the player and the FIFA Disciplinary Committee ("FIFA DC").[10]

In its follow-up decision, FIFA DC found that the player had provided complete and credible assistance regarding the team doctor's fraudulent medical routines and therefore *reduced* the period of ineligibility from two years to six months[11] as proposed by the player.[12] WADA appealed the decision before CAS arguing that there had been no substantial assistance, that FIFA had no competence over *reductions*, and that the reduction was in any case excessive. In the following, I will examine how CAS assessed the matter and how similar issues have been evaluated in general.

C. Conditions for Finding Substantial Assistance

1. Timing

First, the disciplinary body dealing with the case must be aware of the specific temporal window in which substantial assistance can be applied. If it is not open, the further formal and substantive conditions set out in the WADC do not need to be assessed in more detail. Article 10.7.1.1 of the WADC begins as follows:

"An Anti-Doping Organization with Results Management responsibility for an anti-doping rule violation may, prior to an appellate decision under Article 13 or the expiration of the time to appeal, suspend a part of the Consequences (…)"

Accordingly, if the first-instance disciplinary decision has been appealed and a decision on the appeal has been issued, the time limit for a finding of substantial assistance has definitively expired. If, on the contrary, no appeal has been lodged, the deadline for the potential applicability of substantial assistance is the same as the deadline for the appeal. The specific time limits for filing appeals for parties other than WADA are set out in the rules of each competent ADO. WADA's deadline is typically twenty-one days after the last day on which the other party could have appealed.[13]

2. Full Disclosure of Information and Full Cooperation Throughout the Proceedings

[6] The arbitral award is publicly available in the CAS database. See also CAS Bulletin 2022/02, pp. 131-135.
[7] In the 2013 season, the team played at the second highest tier in Russia ("The Russian First League").
[8] FIFA also notified simultaneously another former player of the Torpedo team for the same reasons.
[9] According to the player, the club's doctor had systematically given the players pills and injections claiming they were "vitamins". See CAS 2021/A/8296 para. 12.
[10] FIFA DC was the first instance investigating the case.
[11] I.e. 75%, being the maximum suspension.
[12] Pursuant to Section 1.3 of the cooperation agreement: "(…) *FIFA agrees to reduce the otherwise applicable period of ineligibility of two (2) years regarding the anti-doping rule violation committed by the Player, on the basis of substantial assistance, to six (6) months"* (CAS 2021/A/8296, para 23).
[13] See Articles 13.2.3.4 and 13.2.3.5 of the WADC. Pursuant to the latter, the alternative deadline for WADA to file an appeal is twenty-one days after WADA's receipt of the complete file relating to the decision.

The formal and material requirements for substantial assistance are based on Article 10.7.1. of the WADC and the WADC Appendix 1 (Definitions).

Firstly, the definition of substantial assistance[14] imposes two cumulative conditions on the athlete, relating to the extent of the information to be provided and how the athlete should act when providing substantial assistance. According to the definition, the athlete shall:

1. fully disclose in a signed written statement or recorded interview all information he/she possesses in relation to ADRVs, and

2. fully cooperate with the investigation and adjudication of any case related to that information.

The definition implies that the information to be submitted should encompass all relevant information related to potential doping offences in a written form. Accordingly, it is not adequate, for example, to provide a selected part of the information in one's possession.[15]

The latter requirement stipulated in the definition in turn underlines the fact that the individual should systematically provide the authorities with support, for example, by presenting a testimony at a hearing.[16] In other words, there is no room for a change of mind when one decides to give substantial assistance. Otherwise, the original consequences might take place.[17]

D. Substantial Assistance as an "Important Part" or a "Sufficient Basis" for Discovering or Establishing Violations

Furthermore, considering the material criteria of "substantial assistance", the minimum requirement for the outcome of substantial assistance is "*discovering or bringing forward*" an ADRV or other applicable offence.[18] As it is stated in the jurisprudence of CAS, this requirement is the *"cornerstone of the mechanism"*, as "[t]*here would otherwise be no incentive for an anti-doping authority to apply lesser sanctions, unless it received something in return, which contributes to fighting doping in sport*".[19]

This cornerstone is further elaborated in Appendix 1 ("Definitions") of the WADC pursuant to which the information provided as substantial assistance shall (1) comprise an important part of any case that is initiated or (2) form a sufficient basis on which a case could have been brought. Despite the elaboration, these alternative *sine qua non* conditions leave space for case-specific interpretation. Consequently, CAS has evaluated them several times, recently in, for instance, the Obukhov case.

When considering the so-called lower limit of the prerequisites mentioned above, CAS has consistently held that in order for substantial assistance to be found, *concrete* and *not merely speculative* information should be provided.[20] Moreover, it seems clear in the light of the jurisprudence that *simple indication of cooperation* which could *hypothetically* result in the discovery of an ADRV is not sufficient.[21] It may further be

[14] See WADC Appendix 1, Definitions.

[15] In Obukhov's case, it was agreed that "*FIFA retains the right to reinstate the otherwise applicable full period of ineligibility unless it is satisfied that the Player has provided total and frank disclosure of all of the facts surrounding the anti-doping rule violation committed by the individuals referred to in clause 1.2 above*." (CAS 2021/A/8296, para. 23).

[16] In Obukhov's case, it was agreed that "*The Player must fully cooperate with the investigation and adjudication of any case or matter relating to the information he provides, including, but not limited to, presenting testimony at a hearing if requested to do so by FIFA or a hearing panel. The Player hereby explicitly acknowledges that any refusal to fully cooperate, in particular to provide testimony will result in FIFA reinstating the otherwise applicable period of ineligibility of two (2) years.*" (CAS 2021/A/8296, para. 23).

[17] See Article 10.7.1.1 of the WADC: "*If the Athlete or other Person fails to continue to cooperate and to provide the complete and credible Substantial Assistance upon which a suspension of Consequences was based, the Anti-Doping Organization that suspended Consequences shall reinstate the original Consequences.*" According to said article, the decision to reinstate (or to not reinstate) suspended consequences is also an appealable decision.

[18] See Article 10.7.1.1 of the WADC.

[19] See CAS 2011/A/2678, para. 67.

[20] See CAS 2021/A/8296, para. 106.

[21] See e.g. CAS 2021/A/8296, para 105, and CAS 2011/A/2678, para. 73.

concluded that the concrete information given should (at least) either result in "discovering" an ADRV (or other relevant offence), irrespective of its subsequent "establishment"[22], or be considered sufficient to bring a case, even though the information, however important, might need *further corroboration* in order to secure a finding against another person.[23]

Put differently, it is not necessary that the information in itself is a sufficient basis for a conviction — i.e. to secure a finding of an ADRV or other doping offence — but only for bringing of a case. Considering the above, it is fairly safe to say that for an effective substantial assistance to be established, there should be a likelihood, and not necessarily a certainty, of a doping violation.[24]

The nature of the information and cooperation provided is evaluated more precisely on a case-by-case basis. If the minimum threshold described above is exceeded, their practical significance is then taken into consideration when assessing the quantum of the suspension.

In Obukhov's case, the CAS panel found that the player, in his declaration — to be read together with the statements given by four other individuals as well as by the similar events with respect to another former team member — gave relevant details of a practice of the team doctor and the illicit treatment the player was made to undergo around the date on which he provided the urine sample that tested positive.[25] The CAS panel then concluded that the statements given by the doctor himself to the FUR indirectly confirmed the credibility of the player's indications regarding the wrongful medical routine followed at the club. Subsequently, the player's declarations appeared to the panel to offer "*a sufficient basis on which a case could have been brought*" against the doctor.[26]

What is particularly important is the final note by the CAS panel, which states that: "*the fact that no case was eventually brought by FUR or FIFA goes beyond the Player's control and responsibility*". This is a logical conclusion of the definition of substantial assistance; it is generally enough if a case *could have been brought* on the basis of substantial assistance.[27] However, this does not directly mean that the threshold for substantial assistance is low. On the contrary, taking into account that there are several cumulative formal, procedural, and substantive criteria, the threshold for the establishment of substantial assistance seems to be rather high.

E. Consequences of a Finding of Substantial Assistance

1. Reduction or Suspension?

If substantial assistance is established, the disciplinary body shall then consider the extent to which the assistance has contributed to combating doping, non-compliance with regulations, and/or other forms of dishonesty related to sports. The evaluation criteria are set out in Article 10.7.1.1 of the WADC as follows:

"The extent to which the otherwise applicable period of Ineligibility may be suspended shall be based on the seriousness of the anti-doping rule violation committed by the Athlete or other Person and the significance of the Substantial Assistance provided by the Athlete or other Person to the effort to eliminate doping in sport, non-compliance with the Code and/ or sport integrity violations".

Before stepping any further, it is important to note the word "suspend". In Obukhov's case,

[22] For which additional elements, such as a hearing of the accused, may be needed.
[23] See CAS 2021/A/8296, para. 106.
[24] See CAS 2021/A/8296, para. 104.
[25] See CAS 2021/A/8296, para. 107. The evidence included a letter from 4 May 2021 regarding the former team doctor of FC Torpedo Moscow, written statements from the player's former teammates confirming the player's claims and a letter of the Football Union of Russia ("FUR") dated 14 May 2021 regarding international investigations.
[26] Ibid.
[27] In Obukhov's case, the CAS panel raised an important point that requiring that substantial assistance be recognised only if the information is "irrefutable" or determinative in itself of a finding of an anti-doping rule violation would exclude the possibility to identify different degrees of "significance" of such substantial assistance (see CAS 2021/A/8296 para. 104).

FIFA DC *reduced* the player's ban. WADA argued in its appeal that FIFA ADR (like other WADA-compliant anti-doping rules) only allow FIFA DC to "suspend" a portion of the ineligibility period.[28] The decision of the first instance in this case is not exceptional as disciplinary bodies and CAS panels have over the years also *reduced* the otherwise applicable period of ineligibility on the basis of substantial assistance.[29] However, in the WADC 2021 framework, suspension and reduction have different meanings[30] — and not purely in a semantic way as was argued by FIFA and the player in the follow-up proceedings before CAS.[31] To rephrase the foregoing, unlike reduction, suspension leaves the door open for more severe sanctions (i.e. the original consequences) if the person's behaviour changes during the proceedings. Suspension is therefore *conditional* in nature. So, indeed, as it was found by the CAS panel in Obukhov's case, the power of discretion of disciplinary authorities is limited to suspensions.[32]

2. The Criteria for Determining the Quantum of the Suspension

In determining the quantum of the suspension under Article 10.7.1 of the WADC, the first-instance disciplinary bodies enjoy a rather wide discretionary power.[33] This means that if the case is appealed to CAS, this discretion should be afforded deference. As was stated in CAS 2017/A/5000, a CAS panel must limit its amendments to cases of *gross and evident disproportion* to the offence.[34] Also for this reason, the CAS jurisprudence concerning substantial assistance is limited, which narrows down the possibility for far-reaching conclusions regarding the assessment of the quantum of potential suspension.

Seriousness of the Doping Offence

As stated in Article 10.7.1.1 of the WADC, the *"seriousness of the anti-doping rule violation committed by the Athlete"* and the *"significance of the Substantial Assistance provided by the Athlete"* are the factors to be evaluated when it comes to the measure of the benefit to be granted to the person providing substantial assistance.[35]

When assessing the seriousness of the offence, it is necessary to consider where the original consequence (without substantial assistance) falls within the applicable range of consequences. The length of the period of ineligibility serves as a direct indicator of how serious the offence should be considered in comparison to other doping offences within the anti-doping system. The more severe the penalty scale of the offence in question and the sanction imposed on the basis thereof are, the more serious the offence should also be considered when assessing the potential suspension.

In the assessment of the seriousness of the violation, the degree of fault of the individual who committed the offence also plays a role. The seriousness varies from an intentional violation to slight negligence. Detailed regulations exist regarding the assessment of an individual's degree of fault. These have been further clarified in numerous CAS and other cases.[36]

---

[28] See CAS 2021/A/8296, para. 112: *"(…) Article 20 of the 2012 FIFA ADR clearly indicates that the FIFA Disciplinary Committee may "suspend" a portion of ineligibility imposed. In other words, the FIFA Disciplinary Committee, if it wished the Player to serve only 6 months of ineligibility, had to impose a sanction of 24 months, and suspend a portion of such period corresponding to 18 months. The Decision, to the extent it directly imposed a reduced sanction, has to be corrected*."

[29] See e.g. CAS 2005/A/847, CAS 2007/A/1368, CAS 2011/A/2678.

[30] For instance, the terms are separately mentioned in the heading of Article 10.7 as follows: "*Elimination, Reduction, or Suspension of Period of Ineligibility or Other Consequences for Reasons Other than Fault"*.

[31] See CAS 2021/A/8296, para. 68.

[32] See CAS 2021/A/8296, paras. 111 and 112.

[33] See CAS 2009/A/1817 & 1844 para. 67.

[34] However, the parties should bear in their mind that this does not exclude or limit CAS's power to review the facts and the law applicable to the case (see Article R57 of the CAS Code).

[35] The third element being *"no more than three-quarters of the otherwise applicable period of Ineligibility may be suspended"* as per Article 10.7.1 of the WADC.

[36] As an example, it can be mentioned here that the recreational use of substances classified as doping agents, which does not enhance athletic performance, and the inadvertent use of contaminated dietary supplements are generally not considered serious doping offences. Conversely, repeated intentional use of non-specified substances is typically regarded as a severe doping violation.

"Significance" of Substantial Assistance

As noted above, the provisions concerning substantial assistance in the WADC provide that an individual must disclose all information related to doping violations in its entirety and fully cooperate in any investigation related to such information. Furthermore, the provided information must be credible and form at least an essential part of a case or a proceeding being initiated. The contemporary edition of the WADC does not contain any other explicit provisions facilitating the assessment of the significance of assistance.

However, in the 2009 version of the WADC, there was an accompanying comment that provided further clarification and guidance on this matter. The comment in question was also applied by the CAS panel as a guideline in the Obukhov case. It reads as follows:

"Factors to be considered in assessing the importance of the Substantial Assistance would include, for example, the number of individuals implicated, the status of those individuals in the sport, whether a scheme involving Trafficking under Article 2.7 or administration under Article 2.8 is involved and whether the violation involved a substance or method which is not readily detectible in Testing. The maximum suspension of the Ineligibility period shall only be applied in very exceptional cases. –– As a general matter, the earlier in the results management process the Substantial Assistance is provided, the greater the percentage of the otherwise applicable period of Ineligibility may be suspended".[37]

In light of the above, it can be argued that the evaluation of the *significance* of the substantial assistance has two elements. The first element is the seriousness of the violations revealed through substantial assistance. In this assessment, it is pertinent to evaluate factors such as the number of individuals implicated in the revealed offence, the prominence of these individuals within sports or otherwise, the seriousness of the disclosed violations, and the significance of the sport or event involved. The second element is the importance of the evidence that constituted substantial assistance. When evaluating this aspect, it is essential to assess whether the actions constituting substantial assistance sparked the investigation or merely provided supplementary information to an existing inquiry and whether the same information could have been obtained from other sources.

Joint Assessment of the Criteria

After separately evaluating the two criteria presented above, the disciplinary bodies form a final view on the potential suspension of the consequences of an ADRV. Since the provision concerning substantial assistance treats the above-mentioned two criteria equally (i.e. without prioritising either one of them), it would be reasonable to consider their weights as equal in the overall assessment of the quantum of the suspension.

Consequently, a consistent approach suggests that the lesser the offence committed by the contributing individual and the more significant the substantial assistance are, the longer the suspension should be, thereby extending to the maximum suspension allowed by the regulations, namely 75 per cent of the otherwise imposed period of ineligibility. Conversely, if the individual's own violation is serious and the substantial assistance, though deemed substantial, is relatively minor, the suspension should be proportionally shorter compared to the otherwise specified period of ineligibility. Even in such cases, the suspension may still be considerable if the underlying period of ineligibility is exceptionally long.
However, it is necessary to bear in mind that minimal contribution does not justify any mitigation. Given the diversity of factual circumstances, disciplinary bodies may also need flexibility to deviate from the outlined approach in individual cases, allowing one criterion to carry greater weight than the other. At the same time, however, the disciplinary bodies must be consistent and treat individuals equally.

F. Conclusion

[37] WADC 2009, Comment to Article 10.5.3.

In Obukhov's case, the CAS eventually found that even though qualifying as substantial assistance, the information provided by the player did not lead to any ADRV being imposed or charged and therefore proved to be of little significance. Thus, according to the CAS arbitral tribunal, the case of the player was not "very exceptional" and did not support the maximum allowable suspension of 18 months. Nonetheless, the CAS held that the player promptly provided and obtained all of the information within his knowledge and control, thereby fulfilling one of the conditions of a benefit to an athlete from such cooperation. Furthermore, the information concerned the practice of a doctor, i.e. of an individual having peculiar responsibilities within a football club, and it exposed a potential violation that could have involved a number of other players and individuals. In the light of the foregoing, the CAS decided that the otherwise applicable ineligibility period of two years was to be suspended in a measure of twelve months. Thus, the quantum of the suspension was fifty per cent of the original ban.[38]

The Obukhov case is a welcome addition to the relatively limited number of arbitral awards on substantial assistance. It provides useful instruments to the future application of Article 10.7.1 of the WADC. The case also confirms that granting suspensions of consequences on ADRVs should be carefully considered and moderate, however without forgetting the incentive for individuals to provide substantial assistance. In total, more significant suspensions could lead to positive results in anti-doping work.

III. CAS 2021/A/8391: Andrejs Rastorgujevs v. International Biathlon Union (IBU) — Whereabouts Information

A. Introduction

The possibility of testing athletes, sometimes completely unexpectedly, outside of competitions is an integral part of an effective anti-doping system. As already stated in CAS 2006/A/1165, "*the relevant authorities take the provision of whereabouts information extremely seriously as they are a vital part in the ongoing fight against drugs in the sport*".[39]

Athletes belonging to a so-called Registered Testing Pool ("RTP") are required to provide continuous whereabouts information for anti-doping bodies.[40] The whereabouts information, which is usually submitted via the electronic system ADAMS, is used by ADOs to locate athletes for effective out-of-competition doping control.

The obligation to submit whereabouts information is based on Article 5.5. of the WADC and is codified in more detail in WADA's International Standard for Testing and Investigations ("ISTI").[41] The whereabouts filing requirements for athletes are rather comprehensive and onerous, including, for instance, details of the athlete's address and competitions, as well as a 60-minute time slot for each day when the athlete will be available and accessible for testing.[42] Omitting the above-mentioned filing obligations may constitute a

[38] See CAS 2021/A/8296, paragraphs 116-120.

[39] CAS 2006/A/1165, Ohuruogu v. UK Athletics Ltd, para. 21..

[40] These athletes are normally the highest priority athletes for an ADO. Examples of athletes usually belonging to the RTP are Olympic or Paralympic athletes, athletes ranked highly in their sports, athletes who compete in sports that are of a high national priority or those who compete regularly at the highest level of international competition, such as world championships. For further details see e.g. Article 4.8.6.1 of the International Standard for Testing and Investigations ("ISTI") as well as Appendix I of the WADC, definition for RTP, p. 175.

[41] According to Article 5.5 of the WADC: *"Athletes who have been included in a Registered Testing Pool by their International Federation and/or National Anti-Doping Organization shall provide whereabouts information in the manner specified in the International Standard for Testing and Investigations and shall be subject to Consequences for Article 2.4 violations as provided in Article 10.3.2."*

[42] The strenuousness of the whereabouts requirements has been recognised in legal practice and literature. See in this regard, e.g. CAS 2006/A/1165, para. 21 and CAS 2022/A/9033 paras. 147 and 174; Trainor, "The 2009 WADA Code: A More Proportionate Deal for Athletes?" in *Entertainment and Sports Law Journal*, 2010, 8(1), p. 36 and 39; Marshall & Hale, "Will The New WADA Code Plug All The Gaps? Will There Be By-Catch?" in *International Sports Law Journal*, Vol 8, Issue 1-2, p. 39. Over the years, the whereabouts requirements have also received criticism

filing failure[43] or a missed test where the athlete has been unavailable for testing at the location and time specified in the 60-minute time slot identified in their whereabouts filing.[44]

Pursuant to Article 2.4 of the WADC, any combination of three missed tests and/or filing failures, as defined in the ISRM, within a twelve-month period constitutes an ADRV. In such a case, the sanction may be a period of ineligibility from one to two years.[45] Therefore, the athletes should act diligently in fulfilling their whereabouts information duties.

In the following, I will assess in more detail what kind of information is sufficiently precise and accurate to be considered a proper whereabouts information in the light of CAS 2021/A/8391 Andrejs Rastorgujevs v. International Biathlon Union (IBU).

B. Facts[46]

In September 2020, Mr Andrejs Rastorgujevs, a world-class Latvian biathlete, was in his biannual training camp in the Eastern Alps of Italy. He had been providing whereabouts information for the purpose of out-of-competition testing since 2013. In 2020, the athlete belonged to the RTP and had already accumulated two whereabouts failures in the past twelve months (one missed test and one filing failure). Therefore, a third failure would potentially lead to sanctions.

The location of the athlete's training camp was Passo Stelvio area, and he also stayed in the hotel called Hotel Passo Stelvio. For the duration of his training camp, the athlete submitted the following information regarding his overnight accommodation's address: *"Passo Stelvio, Passo Stelvio, Italy"*.

Fairly soon after this, in October 2020, the International Testing Agency ("ITA", on behalf of the IBU) sent an email to the athlete and requested explanations for an apparent filing failure in failing to provide a sufficient and accurate whereabouts information to enable the ITA to locate him for testing during his training camp. Following a review of the athlete's explanations and investigation of the matter, the ITA found that the athlete's actions, or rather the failure to act, constituted a third whereabouts failure within twelve months. Therefore, IBU issued a notice of charge and decision on provisional suspension.

The matter was then referred to the CAS ADD for adjudication.[47] CAS ADD found that the athlete had committed an ADRV and sanctioned him with a period of ineligibility of eighteen (18) months.

The athlete appealed the decision to CAS. He submitted that the whereabouts filing between 8 and 28 September 2020 regarding Passo Stelvio, Italy, should be found sufficient. Therefore, no ADRV had in fact occurred, and the provisional suspension imposed on him should be lifted. He argued, among other things, that he had during previous stays in Passo Stelvio indicated the same address information to ADAMS, and there had not been any problems.

---

from the athletes, and they have also been assessed by the European Court of Human Rights (see Federation Nationale des Sydicats Sportifs (FNASS) and others v. France - 48151/11 and 77769/13, Judgment 18 January 2018).

[43] See Article 3.3 of the ISTI and Article B.2.1 of the International Standard for Results Management ("ISRM"). The first one provides for the definition of filing failure, whereas the latter sets the cumulative requirements for the establishment of filing failure.

[44] See Article 3.3 of the ISTI and Article B.2.4 of the ISRM. The first one provides for the definition of missed test, whereas the latter sets the cumulative requirements for the establishment of a missed test.

[45] Article 10.3.2 of the WADC provides as follows: *"For violations of Article 2.4, the period of Ineligibility shall be two (2) years, subject to reduction down to a minimum of one (1) year, depending on the Athlete's degree of Fault. The flexibility between two (2) years and one (1) year of Ineligibility in this Article is not available to Athletes where a pattern of last-minute whereabouts changes or other conduct raises a serious suspicion that the Athlete was trying to avoid being available for Testing."*

[46] The facts presented herein are essentially based on the arbitral award CAS 2021/A/8391 that is publicly available online e.g. at https://www.biathlonintegrity.com/wp-content/uploads/2022/11/Arbitral-Award-CAS-8391.pdf. See also CAS Bulletin 2023/01, pages 89-93.

[47] CAS 2021/ADD/18 Andrejs Rastorgujevs v. International Biathlon Union & 2021/ADD/19 International Biathlon Union v. Andrejs Rastorgujevs.

Consequently, one of the topical questions that had to be evaluated by CAS was whether the athlete's location submitted to ADAMS was sufficiently precise to satisfy the criteria set out by the IBU ADR, ISTI and applicable CAS jurisprudence.[48]

C. Requirements for a Sufficient Whereabouts Filing

1. Relevant Requirements in Anti-Doping Regulations

The more detailed requirements for whereabouts filings are listed in Article 4.8.8 of the current ISTI. In the following, the focus is on the location information requirements.

According to Article 4.8.8.2(c), whereabouts filing should contain *"[f]or each day during the following quarter, the full address of the place where the Athlete will be staying overnight (e.g., home, temporary lodgings, hotel, etc.)".*

The requirement regarding the athlete's location is complemented by Article 4.8.8.5 of the ISTI, which states as follows: *"It is the Athlete's responsibility to ensure that they provide all of the information required in a Whereabouts Filing as outlined in Articles 4.8.8.2 and 4.8.8.3 accurately and in sufficient detail to enable any Anti-Doping Organization wishing to do so to locate the Athlete for Testing on any given day in the quarter at the times and locations specified by the Athlete in their Whereabouts Filing for that day, including but not limited to during the 60-minute time slot specified for that day in the Whereabouts Filing".*

In other words, and as further elaborated in paragraph (a) of the article, the information must be of such a nature that a Doping Control Officer ("DCO") arriving on site (even hypothetically) for an out-of-competition test would be, without difficulties, able to find the location, to gain access to the location, and to find the athlete at the location with no advance notice to the athlete. If any of these steps fails, the result could be a filing failure and/or where the circumstances so warrant, evasion of sample collection.

It should be stressed that it is not necessary for the ADO to always make an "on-the-spot check" of the accuracy of the information submitted by athletes to ADAMS. Instead, it may equally be sufficient for the competent authority to determine from the information itself that it is insufficient.[49]

It is also noteworthy that pursuant to Article 4.8.14.3 of the ISTI the athletes are allowed to delegate, by mutual agreement, the task of filing their whereabouts information to a third party, such as a coach or a manager. However, the athletes remain ultimately responsible for the accuracy and completeness of the information and for being available for testing.[50] Thus, a defence on the grounds that the failure was caused by a third party should generally not succeed. CAS has emphasised this basic principle in a recent case concerning Mr Mikael Ymer, a Swedish tennis player, who argued that he had assumed that any discrepancy between his actual and declared whereabouts would be corrected by his agent or by the tennis authorities.[51]

---

[48] The ISTI has since been updated. When analysing the provisions of the ISTI in general in this chapter, reference is made to the version that has been in force since the beginning of 2023. In the quotations concerning the Rastorgujevs case, references are made to the articles of the ISTI in force at that time.

[49] See ISTI Comment to Article 4.8.8.5 (a). The comment also notes that: *"Where an Athlete does not know precisely what their whereabouts will be at all times during the forthcoming quarter, they must provide their best information, based on where they expect to be at the relevant times, and then update that information as necessary in accordance with Article 4.8.8.5."*

[50] Article 4.8.14.4 of the ISTI. CAS has held in CAS 2016/A/4643 Maria Sharapova v. ITF (para. 85) that an athlete must delegate the relevant tasks to a qualified person, instruct the delegate properly or set clear procedures he/she must follow in carrying out the delegated tasks, and exercise supervision and control over the delegate in the carrying out of the tasks.

[51] See CAS 2022/A/9033, para. 148: *"The Panel must make it clear that delegation to assist in complying with the whereabouts requirements is not tantamount to delegating the athlete's responsibility to comply with those requirements. The athlete remains personally responsible, and cannot delegate the requirement to comply, just as, more generally, reliance on a doctor or on the athlete's entourage cannot do away with the athlete's obligation to comply with the antidoping regulations."* For athletes' ultimate responsibility in delegation situations, see also CAS

The cumulative criteria for the definitive establishment of a filing failure are laid down in Article B.2.1 of the ISRM. These include requirements for authorities to inform the athletes of their inclusion in the RTP and the consequent filing requirements as well as the potential consequences of filing failures. Similarly, the authorities are required to provide the athletes with notice of the prior filing failures and an opportunity to avoid a subsequent one before pursuing any further action against them.[52]

With respect to the accuracy of the whereabouts information, significant information is recorded in the comment to Article B.2.1(b) of the ISRM. According to said comment, an athlete fails to comply with the requirement to make whereabouts filing (i) where they do not make any such filing, or where they fail to update it as required by Article 4.8.8.6 of the ISTI; (ii) where the filing or update does not contain all of the required information; or (iii) where they include information in the original filing or the update that is inaccurate (e.g. an address that does not exist) or insufficient to enable the ADO to locate them for testing.

Finally, according to the last criterion, the athlete's failure to file must be at least negligent. The athletes are presumed to have committed the failure negligently upon proof that they were notified of the requirements yet did not comply with them. Put differently, after being evidently notified, an unintentional mistake by an athlete can lead to sanctions.

2. Drawing the Line Between Sufficient and Insufficient Location Information in Practice

Although the list of requirements regarding sufficient and accurate whereabouts information is quite extensive, the anti-doping rules themselves ultimately provide very few practical examples of what information should be considered insufficient and what should not. This is understandable as the circumstances are varying, and the resolution should be left to overall assessment conducted on a case-by-case basis. Nonetheless, it is worth noting that comments to ISTI Articles offer two scenarios where the provided information is not considered sufficient. Namely, as per the Comment to 4.8.8.5 (a):

"(…) declarations such as 'running in the Black Forest' are insufficient and are likely to result in a Filing Failure. Similarly, specifying a location that the DCO cannot access (e.g., a "restricted-access" building or area) is likely to result in a Filing Failure".[53]

Regarding the latter scenario, however, the ISTI Guidelines for Sample Collection provide that if the testing attempt takes place at a residential address or location with gated or security access, the athletes should also give specific information on how the sample collection personnel can reach the athlete. This might include an access code or specific instructions on how to access a building with security personnel in attendance.[54] Thus, in contrast to what the above comment in ISTI suggests, an athlete could potentially avoid a filing failure or a missed test if they provide sufficiently detailed access instructions to a "restricted-access" building. However, it is important to note in this context that the cited ISTI guideline is at most at the third level of legal sources, and relying on it for the sufficiency of submitted whereabouts information should be approached with caution.

Turning back to the Rastorgujevs case, the relevant location for doping control purposes was, or at least should have been, his hotel accommodation in Italy. As noted above, the athlete had submitted the following address information to ADAMS: "Passo Stelvio, Passo Stelvio, Italy". By this the athlete meant that he stayed in a hotel called "Passo Stelvio" in Passo Stelvio area in Bormio *commune*.

2017/A/5015 FIS v. Therese Johaug & NIF and CAS 2017/A/5110 Therese Johaug v. NIF, paras. 195-200 and decisions referred therein (CAS 2014/A/3591 and CAS 2016/A/4643).

[52] See Articles B.2.1(a) and (c) of the ISRM and the related comment to the latter.

[53] The same comment is also repeated in Comment to Article B.2.1(b) of the ISRM.

[54] 2021 Code Implementation Support Program – Guidelines for Sample Collection, version 2, 1 January 2023, p. 25.

After having analysed the case, the CAS concurred with the CAS ADD and held that the word 'hotel' had a particular significance in the case.[55] The CAS indicated that the wording of the information provided by the athlete left completely open where he in fact stayed in the Passo Stelvio area. According to the CAS, the athlete might have been staying at any of the other hotels in the mountain pass or elsewhere in Passo Stelvio area. The CAS added that the athlete had a fair opportunity also to fill sections "More information" and "Additional information" to be precise and accurate but he did not use it.[56] The CAS ADD, which had arrived at the same conclusion, equally emphasised the significance of the word "hotel" in its decision. Moreover, the CAS ADD noted that the documents provided by the athlete himself suggested that the hotel where the athlete stayed was, without exception, called officially Hotel Passo Stelvio.

In addition to the inaccuracies in the athlete's whereabouts filing, also other factors influenced the assessment of the degree of the athlete's negligence. The CAS noted that he had already been notified on 26 November 2019 that "Passo Stelvio" was not a sufficient address for whereabouts purposes. He had also been explicitly told in April 2019 that he should be as precise as possible when giving his address and not assume that the DCO would call him to find him.[57]

For these reasons, the CAS found that the athlete had acted negligently as he had not, despite notifications and previous whereabouts failures, eliminated in advance all possible difficulties that a DCO might encounter at the specific location and had not complied with the duty to be diligent in filling in the information on the place of residence with sufficient precision for the DCO to be able to locate it without any particular effort. Therefore, CAS found that a general indication "Passo Stelvio, Passo Stelvio" did not provide the information required by the ISTI and was not sufficient to locate the Athlete for testing.

IV. 2022/ADD/53: International Weightlifting Federation (IWF) v. Vicky Annett Schlittig – Unidentified Transdermal Administration

A. Introduction

The basic ADRV is a "presence" violation, i.e. a situation considered under Article 2.1 of the WADC where prohibited substance(s) or its metabolite(s) or marker(s) are found to be present in an athlete's sample. The provision embodies the principle of strict liability, consistently upheld by CAS, meaning that it is not necessary that intent, fault, negligence, or knowing use on the athlete's part be demonstrated to establish an ADRV.[58]

There is no room to deviate from a finding of an ADRV when the presence of a prohibited substance is established. However, the disciplinary system allows the reduction or elimination of a sanction in certain circumstances.

As stipulated in Article 10.2.1 of the WADC, the period of ineligibility for a presence violation shall be four years, where the ADRV does not involve a specified substance or a specified method, unless the athlete can establish that the ADRV was not intentional.[59] In addition, an athlete's degree of fault is considered in determining the consequences of their ADRV under Article 10 of the WADC.[60] For example, if there is *no fault or negligence* on the part of the

[55] CAS stated in para. 145 the following: *"The indication that the geographical name of Passo Stelvio should refer to a "hotel" is significant because, although Passo Stelvio is primarily known as a mountain pass and could indicate that the building on the mountain pass itself is a "hotel", there are several hotels (6) and other facilities in the whole area of Passo Stelvio, which is primarily known as a mountain pass, and the filed information did not indicate that the building on the pass itself is "the" hotel."*

[56] See CAS 2021/A/8391 para. 144.

[57] CAS 2021/A/8391 para. 138-139.

[58] See Article 2.1.1 of the WADC and the comment therein.

[59] See Article 10.2.3 of the WADC for the definition of the term "intentional" in the context of Article 10.2 of the WADC.

[60] See Articles 10.5 and 10.6 of the WADC. See Comment to Article 2.1.1 of the WADC.

athlete, the period of ineligibility shall be eliminated.

The definition for no fault or negligence requires *"[t]he Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule"*. Importantly, "*[e]xcept in the case of a Protected Person or Recreational Athlete, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered the Athlete's system"*.[61]

Also, a series of CAS cases has held that an athlete must establish the source of the substance and how the substance entered their body to be entitled to a finding of lack of intent.[62] Only in very exceptional circumstances, athletes may benefit from a reduced sanction without establishing the source. In CAS case 2022/ADD/53 International Weightlifting Federation (IWF) v. Schlittig, this rare exception was applied. In the following, I will assess this case and related jurisprudence in more detail.

B. Facts[63]

Vicky Annett Schlittig is an elite German weightlifter. She has been competing in international events since 2019.

The athlete participated in the 2021 IWF European Junior Championships held in Rovaniemi, Finland. On 26 September 2021, she was selected for an in-competition doping control that eventually turned out to be positive for dehydrochloromethyl-testosterone ("DHCMT"), a potent anabolic steroid and a non-specified substance in the 2021 WADA Prohibited List.

The ITA informed the athlete that she had committed an ADRV under Article 2.1 of the IWF Anti-Doping Rules ("IWF ADR") and issued a formal "Notice of Charge" against her. However, the athlete first observed that in the samples, there were no typical long-term metabolites present, unlike in all comparable DHCMT cases in the last three years. Secondly, the detected value was close to the minimum threshold suggesting that the substance was metabolised immediately before it was collected and would not have provided any performance-enhancing effects. Thirdly, the athlete submitted that she was subjected to doping tests immediately before and after 26 September 2021 and tested negative in both cases. Finally, and most interestingly, the athlete submitted that the form of the substance in her sample suggested that it could potentially have resulted from a transdermal transfer. She noted that there were several opportunities for contact between her and other athletes, coaches, and support staff of other nationalities during the competition, which could be the source of origin of the metabolite. The athlete was of the opinion that she bore no fault or negligence. The ITA referred the matter for adjudication to the CAS ADD.

C. Potential Sources of Contamination in Case Law

As noted above, it has been widely held in CAS jurisprudence that, in accordance with WADC's definition of "no fault of negligence", the main rule is that an athlete must establish the source of the substance and how it entered their system to benefit from a finding of no fault or negligence.

The CAS jurisprudence has seen a plethora of sources and different routes on how prohibited substances have been unintentionally administered by athletes. Very common are

[61] See Appendix 1 of the WADC, definition for "No Fault or Negligence".

[62] See for instance, CAS 2017/A/5248, para. 55; CAS 2017/A/5295, para. 105; CAS 2017/A/5392, para. 63; and CAS 2018/A/5570, para. 51.

[63] For the facts of the case, see the following news articles: *"The ITA notifies German weightlifter Vicky Schlittig of an apparent anti-doping rule violation"*, 22 November 2021, available at https://ita.sport/news/the-ita-notifies-german-weightlifter-vicky-schlittig-of-an-apparent-anti-doping-rule-violation/. *"German doping case faces spectacular turn"*, 11 September 2022, available at https://www.sportschau.de/investigativ/geheimsachedoping/gewichtheben-turinabol-verhandlung-englisch-100.html. *"How the empire strikes back against a young German weightlifter"*, 17 October 2023, available at https://www.sportschau.de/doping/dopingcase-vicky-schlittig-english-100.html.

cases where the source is a *medicine* or *supplement*, prescribed or not. However, as far as the athlete voluntarily chooses to ingest the product, they bear the consequences arising from their failure to exercise the required duty of care. Sometimes products are mislabelled or contaminated, but sometimes athletes' explanations have been found fabricated.

Similarly, there are numerous cases where a prohibited substance has been in the *food* or *drink* consumed by an athlete. These include meat contamination cases: it is common knowledge that in some countries, like China and Mexico, clenbuterol and other growth agents are used for the fattening of cattle for which reason residues may also end up in the human body when the meat is consumed.[64] There are also examples of cases where the prohibited substance has entered the athlete's body through tap water due to inadequate water purification infrastructure.[65]

Moreover, the CAS has also confirmed that a close contact with another person may lead to an entry of a prohibited substance into one's body. For example, other person's saliva has been confirmed as a source of a prohibited substance. Already in 2009 Richard Gasquet, a professional French tennis player, successfully invoked a kiss with a woman who admitted having taken cocaine.[66] In 2016, Shawn Barber, a Canadian pole vaulter, gave a doping sample containing cocaine just weeks before the Rio Olympics. However, he was allowed to compete as he established that the substance entered his system because of a kiss with a woman who had used cocaine.[67] In both cases, the women testified having used cocaine and kissing the athletes afterwards. This made it easier for the athletes to establish, by a balance of probabilities, that the administration of the substance was caused without fault or negligence.

The success of these kind of assertions is much dependent on the circumstances of the individual case, as in other cases under Article 2 of the WADC.

D. Exceptions: Unidentified Source of a Prohibited Substance

As the above shows, it is possible to have the sanction eliminated or reduced when the source of the prohibited substance is established. However, it has also been repeatedly confirmed by the CAS that the lack of fault can also be constituted without establishing the origin of the prohibited substance.

In CAS 2016/A/4534, a Peruvian swimmer Mauricio Fiol Villanueva was found to have committed an ADRV as his samples contained stanozolol. The athlete presented a theory of contaminated horse meat, which did not persuade the panel.[68] Besides this, there was no evidence upon which the athlete could rely to discharge his burden of proving lack of intent. Hence, the panel stated, *"All that was left were his protestations of innocence, the character evidence given by his coach, the lie detector test, the hair sample analysis and his bare assertion that his recent improvements in terms of times for his events achieved prior to the Pan-Am Games were the product of superior conditioning"*. The panel had to assess whether such matters could be used to successfully prove unintentionality.

The panel weighed the evidentiary issues carefully when assessing whether the establishment of the source of the prohibited substance in an athlete's sample is a *sine qua non* of proof of absence of intent or not. As an argument in favour of proving the source, the panel referred, inter alia, to a previous CAS case according to which said precondition "*is important and necessary; otherwise an athlete's degree of diligence or absence of fault would be examined in relation to circumstances that are speculative and that could be partly or entirely made up. To allow any such speculation as to the circumstances, in which an athlete ingested a prohibited substance would undermine the strict liability*

[64] See for instance, CAS 2021/O/7977 World Athletics v. Shelby Houlihan; CAS 2016/A/4563 WADA v. Elsalam.
[65] See for instance, CAS 2014/A/3487 Veronica Campbell-Brown v. IAAF.
[66] See CAS 2009/A/1926, ITF v. Richard Gasquet & CAS 2009/A/1930 WADA v. ITF & Richard Gasquet.
[67] The case was handled by the Sport Dispute Resolution Centre of Canada with a case number SDRCC DT 16-0249.
[68] See CAS 2016/A/4534, paras. 38-39.

rules underlying (…) the [WADC], thereby defeating their purpose".[69] Despite this, the panel found factors supporting the opposite view more compelling. The important contra factor was that the applicable anti-doping rules did not expressly require the establishment of the source of the prohibited substance. And, if ambiguous in this respect or otherwise, the provisions of the relevant disciplinary code must in principle be construed *contra proferentem*.[70]

Further, the panel referred to legal literature where it is stated that while the origin of the substance can be expected to represent an important, or even critical, element, panels are offered flexibility to examine all the objective and subjective circumstances of the case and decide if a finding that the violation was not intentional is justified.[71] Based on these and other factors, the panel ended up using a fitting metaphor of the limited scope of the exception: *"Where an athlete cannot prove source it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him"*.[72] In this specific case, the panel dismissed Villanueva's appeal.

After the Villanueva case, the CAS has adopted the same reasoning in corresponding matters, and found that in extremely rare cases, an athlete might be able to demonstrate lack of intent even where they cannot establish the origin of the prohibited substance. The panels have envisaged the theoretical possibility that they might be persuaded by an athlete's simple assertion of their innocence when considering not only their demeanour, but also their character and history.[73] One award emphasises that *"in all but the rarest cases the issue is academic"*[74].

It can be concluded that while the establishment of the source of the prohibited substance in an athlete's sample is not a *sine qua non* of proof of absence of intent, an athlete's chances of successfully proving their innocence in these cases are extremely limited.

E. ADD Award in the Schlittig Case

Returning to the Schlittig case, the athlete ultimately passed through the above-described narrowest of corridors as the ADD found that she bore no fault on the positive sample containing DHCMT metabolite.

The ADD seems to have relied heavily on the expert testimonies. Firstly, the ADD found that based on the consensus of both parties' expert witnesses, the exclusive detection of DHCMT in low or trace amounts, without the presence of associated metabolites, indicated that the transdermal application occurred within a few hours to a few days before 26 September 2021.

The ADD then noted that the expert witnesses agreed that the two negative tests, one taken twenty days before and the other eight days after the positive test, strongly indicated that any pharmacological manipulation of DHCMT would not have enhanced performance as DHCMT requires regular administration accompanied by physical exertion. The athlete's expert also indicated that the detection of DHCMT metabolite differed significantly from all other DHCMT doping cases in the last three years at the German doping analysis institute. In the light of the above observations, the ADD was convinced that this was an exceptional case where the prior and subsequent negative tests and the low/trace amounts of DHCMT indicated probability of *inadvertent transdermal administration*.

As the ADD found that transdermal administration was possible, it had to analyse whether the athlete's suggestions of potential sources of origin exceeded the threshold of balance of probabilities. The evidence presented

[69] See CAS 2016/A/4534, para. 36 where the panel refers to the following cases and paragraphs: CAS 2013/A/3124 at para. 12.2; quoting with approval CAS 2006/A/1130, at para. 39.
[70] See CAS 2016/A/4534, para. 35 and 37.
[71] See CAS 2016/A/4534, para. 35 and Antonio Rigozzi & Ulrich Haas "Breaking Down the Process for Determining a Basic Sanction Under the 2015 World Anti-Doping Code", in *International Sports Law Journal*, 2015, 15:3-48).
[72] See CAS 2016/A/4534, para. 37.
[73] See CAS 2016/A/4676 Arijan Ademi v. UEFA, para. 72; CAS 2016/A/4919 WADA v. Nasir Iqbal, para. 66; CAS 2019/A/6313 Jarrion Lawson v. IAAF, para. 50.
[74] See CAS 2016/A/4919, para. 66.

by the athlete in this respect did not refer to a specific situation, but to the various human contacts that occurred over many days during the competition. The athlete testified that in her flight from Helsinki to Rovaniemi on 23 September 2021, she sat alongside numerous athletes, coaches, and support staff from different countries. Then, upon arrival in Rovaniemi, they were transported to a COVID testing station in a crowded bus. Further, on the following days she had significant contact with other athletes during the bus transportation, weigh-in, training, lunches, and dinners. The athlete submitted that in these circumstances, the contacts during the competition likely resulted in a transdermal transfer of DHCMT.
Based on the scientific facts as well as the athlete's testimony and evidence as to the close contacts that occurred during the few days before the ADRV, the ADD deemed that it was probable that the athlete was subjected to inadvertent, transdermal administration of DHCMT that was not intentional. The ADD decided that no period of ineligibility would be imposed on the athlete.[75]

F. Final Remark

When drafting this article, the case is still under consideration by the CAS Appeals Arbitration Division. The future arbitral award has a potential of being a landmark human contact contamination case.

[75] https://www.sportschau.de/doping/dopingcase-vicky-schlittig-english-100.html.

Arbitration and Olympism: the CAS ad hoc Divisions
History, characteristics and overview of the procedural particularities and the jurisdiction of the CAS ad hoc Divisions at the Olympic Game*

Matthieu Reeb and Despina Mavromati**

This paper aims to provide a brief introduction to the fascinating world of the Court of Arbitration for Sport (CAS) ad hoc Division (exclusive of the CAS ad hoc Anti-Doping Division, CAS ADD), through an overview of its history, of the procedural particularities and a focus on the material and temporal jurisdiction of the CAS ad hoc Divisions during the Olympic Games.

I. The history and characteristics of the CAS ad hoc Divisions

The CAS was created in 1984, at a time when the number of sports-related disputes was very limited. At the end of the eighties/beginning of the nineties, the Olympic Games have considerably evolved: the ineligibility of professional athletes has been lifted step by step and the Games have entered a new commercial era. Although no prize money has ever been awarded to Olympic athletes (which is still the case in 2024), the participants in the Olympic Games have been more and more demanding with respect to regulations and legal issues in general, considering the economic impact of an Olympic medal for their career.

In 1994-1995, as the Olympic Games Atlanta 1996 were approaching, the International Olympic Committee (IOC) noted the risk that claims filed by Olympic participants (or potential participants) before civil courts in the USA or elsewhere, including the risk of urgent injunctions, could possibly affect the application of the Olympic Charter and the operations of the Olympic Games. Furthermore, given the short duration of the Games (17 days), it was desirable that any dispute connected to the Games be settled during the same period. As a consequence, the newly appointed Foundation Board of CAS (the International Council of Arbitration for Sport, ICAS) decided to establish a special tribunal able to provide all participants in the Games with free access to justice rendered within time limits that keep pace with the Olympic competitions.

In 1996, the ICAS then created a temporary "CAS ad hoc Division" with the task of settling finally and within a 24-hour time-limit any disputes arising during the Olympic Games in Atlanta. This ad hoc Division was composed of two co-presidents and twelve arbitrators who were in the Olympic city throughout the Games and available at any time. To ensure easy access to the ad hoc Division for all those taking part in the Olympic Games (athletes, officials, coaches, federations, etc.), a special procedure was

* This article has also been published on the Paris Journal of International Arbitration 2024, n° 1. Special number, Arbitrage et Jeux Olympiques.
**Matthieu Reeb is Director General, Court of Arbitration for Sport (CAS); Despina Mavromati is Attorney-at-law, BianchiSchwald LLC; UEFA CFCB Member and CAS Arbitrator.

created for that purpose, which was simple, flexible and free of charge. The slogan "Fair, fast and free" was adopted on that occasion. A total of six cases were submitted to the first CAS ad hoc Division in Atlanta. Since Atlanta 1996, CAS ad hoc Divisions have operated at each edition of the Summer and Winter Olympic Games.

In 2024, the 15th CAS ad hoc Division will be established on the occasion of the Olympic Games Paris 2024. The ad hoc Division will be hosted in the Tribunal de Paris, in the North-West of the city, and will be able to use one or two of the approximately 80 hearing rooms of the Tribunal. In order to guarantee a speedy communication between the CAS ad hoc Division and the parties (athletes, National Olympic Committees (NOC), the IOC, the International Testing Agency (ITA) and the International Federations), a list of major contacts is prepared in advance of the Olympic Games and specific information is provided to all NOC Chefs de Mission. A shortlist of local pro bono lawyers is also constituted in order to assist athletes who would not have the financial means to retain the services of legal counsel. Unlike the arbitral procedures of the CAS in Lausanne, the procedures of the CAS ad hoc Division attract the interest of media and are often publicized.

In Paris, the little sister of the CAS ad hoc Division, the CAS ADD will also have an office in the Olympic city. Unlike the CAS AHD, the CAS ADD is a permanent court with a temporary office in Paris comprising a President, 4 arbitrators and dedicated staff. The CAS ADD, which was created in 2016 and became a permanent court in 2019, deals with first instance doping cases, thus substituting for the anti-doping panels of the IOC and of some International Federations. The CAS ADD decisions may then be challenged before the CAS ad hoc Division or the CAS Appeals Division in Lausanne.

II. The CAS ad hoc Division procedure - essential procedural particularities

In a nutshell, the proceedings before the CAS ad hoc Division are governed by the CAS Arbitration Rules for the Olympic Games (the ad hoc Rules), which are issued by the CAS supervising board, namely, the ICAS, as per S6.8 of the Code of Sports-Related Arbitration (the CAS Code). Even though they are part of the CAS Code, and panels may use the CAS Code for guidance in case of lacunae, procedures before the CAS ad hoc Divisions are governed exclusively by the ad hoc Rules. The key characteristic and the main objective of the ad hoc Rules is to ensure a fair and time-effective procedure.

Similar to the CAS, the arbitration procedure is set into motion by an application of an individual or a federation.[1] Such application is filed directly with the ad hoc Division Court Office, most often by using the standard form that is also available online. The particularity at this stage is that the application is served on the respondent but also on other potentially interested parties indicated by the applicant, most often together with the notice of a hearing, if the case is very urgent and if the panel is already constituted.

The panel constitution is different from the CAS in the sense that the parties – for obvious reasons of urgency - do not appoint an arbitrator, as the entire Panel is appointed by the ad hoc Division President.[2] Ad hoc arbitrators are still fully bound by the duty of independence and impartiality as per Article 12 of the ad hoc Rules and their independence is confirmed when the ICAS establishes the list of the CAS ad hoc arbitrators, but also through a specific statement of independence prior to their appointment on a particular case. Challenges are possible similar to any arbitration proceedings.[3]

[1] Article 10 of the ad hoc Rules.
[2] Article 11 of the ad hoc Rules.
[3] Pursuant to Article 12 of the ad hoc Rules.

Provisional measures are possible through the same criteria as in Article R37 of the CAS Code, namely, risk of irreparable harm, chances of success to the merits and balance of interests of the parties. This is stipulated in Article 14 of the ad hoc Rules (*"Stay of Decision Challenged and Preliminary Relief of Extreme Urgency"*). The procedure is more flexible and always tailored to the needs of the specific dispute, with other interested parties (e.g., national teams or federations potentially affected by the decision) being granted the opportunity to be heard, depending on the urgency of the case.

The *de novo* review of CAS appeal proceedings is equally present in the ad hoc Rules and foreseen in Article 16 (*"The Panel's Power to Review"*), however, the law applicable to the merits is "*the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate*".[4] Other than in commercial arbitration proceedings, the general principles that most often apply to some extent in CAS proceedings (in particular relating to disciplinary or eligibility matters) are essentially based on criminal or administrative law, e.g. *lex mitior*[5] or *nulla poena sine lege*.[6] In practice, the ad hoc panels systematically apply the Olympic Charter, with Swiss law applying on a subsidiary basis in order to fill any gaps in the rules.[7]

The major particularity of the ad hoc Divisions is obviously the speed of the proceedings, with the time limit to render a decision being 24 hours following the filing of the application.[8] It is possible to extend such limit depending on the circumstances, the urgency and the complexity of the case, through an extension by the President of the ad hoc Division. Article 20 of the ad hoc Rules provides that, in some complex cases or where there are no longer reasons to issue the decision immediately, the panel may decide to refer the entire case – or part of it, or even combined with an order for provisional measures - to the CAS in Lausanne.[9]

III. Selected jurisdictional issues related to the CAS ad hoc Division

Arbitration clause in favor of the CAS ad hoc Division

Similar to the CAS procedures, CAS ad hoc procedures require a valid arbitration clause in favor of the ad hoc Division. The key provision establishing the jurisdictional scope of the ad hoc Division is found in Article 1 of the ad hoc Rules that reads as follows:

"Application of the Present Rules and Jurisdiction of the Court of Arbitration for Sport (CAS)

The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games. In the case of a request for arbitration against a decision pronounced by the IOC, an NOC, an International Federation or an Organizing Committee for the Olympic Games, the claimant must, before filing such request, have exhausted all the internal remedies available to her / him pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective."

Article 1 refers to Rule 61 of the Olympic Charter, which provides for the exclusive jurisdiction of the CAS ad hoc Divisions for *"(…) any disputes arising during the Olympic Games (…)"*. The clause is very broad and may include any issues related to qualification, commercial restrictions,

[4] As per Article 17 of the ad hoc Rules.
[5] CAS 2022/A/8651, award of 14 June 2023, at 94.
[6] CAS 2021/ADD/38, award of 3 January 2023, at 110.
[7] CAS OG 22/011, award of 30 March 2022, at 59.
[8] Article 18 of the ad hoc Rules.
[9] CAS 2004/A/704, award of 21 October 2004; CAS 2008/O/1640, award of 10 February 2009, at 2.6; CAS 2008/A/1641, award of 6 March 2009.

disciplinary issues, unsportsmanlike issues or technical matters.[10] As seen above, the CAS ADD is dedicated to the doping-related disputes and other issues related to the World Anti-Doping Code (WADC).[11]

In turn, the arbitration clause of Rule 61 of the OC becomes binding over the various individuals that participate in the Olympic Games through their signature of the "*Entry form for the Olympic Games"* (Entry Form) which must be signed by all the participants. An example is shown from the Tokyo Olympic Games Entry Form, which also includes verbatim Rule 61 of the Olympic Charter printed on the back of the form, and reads as follows:

"5. Arbitration: the Court of Arbitration for Sport is exclusively competent to finally settle all disputes arising in connection with the participation in the Games which have not been resolved by sports governing bodies.
Unless otherwise agreed in writing by the IOC, any dispute or claim arising in connection with my participation at the Games, not resolved after exhaustion of the legal remedies established by my NOC, the International Federation governing my sport, Tokyo 2020 and the IOC, shall be submitted exclusively to the Court of Arbitration for Sport ('CAS') for final and binding arbitration in accordance with the Arbitration Rules for the Olympic Games, and the Code of Sports-related Arbitration. The seat of arbitration shall be in Lausanne, Switzerland and the language of the procedure English. The decisions of the CAS shall be final, binding and non-appealable, subject to the appeal to the Swiss Federal Court. I hereby waive my right to institute any claim, arbitration or litigation, or seek any other form of relief, in any other court or tribunal, unless otherwise agreed in writing by the IOC."

Article 1 of the ad hoc Rules
This provision has been the object of numerous ad hoc panel decisions and provides for the material scope of ad hoc jurisdiction *("disputes covered by Rule 61 of the Olympic Charter")*, the temporal scope of the ad hoc jurisdiction *("arising during the Olympic Games or during a period of ten days preceding the Olympic Ceremony of the Olympic Games")* and, finally, the requirement to have exhausted internal remedies, which is subject to some exceptions but will not be further examined in this article.[12] The aforementioned numerous requirements led a CAS panel to hold that the ad hoc panel is a *"a tribunal of limited jurisdiction"*, as it requires not only the material scope but is also limited in time and the parties must have exhausted internal remedies.[13]

Interpretation of the arbitration agreement of Article 1 of the ad hoc Rules
From a procedural point of view, and in line with CAS and commercial arbitration practice, it is also possible to bifurcate the procedure and decide on the jurisdictional issue first.[14] It must be noted that the seat of the arbitration is always in Lausanne, Switzerland, irrespective of the venue of the Olympic Games.[15] This means that the validity of the arbitration agreement will be determined based on Article 178 of the Swiss Private International Law Act (PILA). This also means that the ad hoc awards are challengeable before the Swiss Federal Tribunal based on Article 190 Swiss PILA, insofar as they are rendered by an arbitral tribunal that has its seat in Switzerland. Article 7 of the Entry Form also provides that the conditions for participation of athletes in the Olympic Games shall be interpreted in accordance with Swiss law, without reference to its conflict of law rules.

[10] See Wenjun Yan, 2023, Case Analysis on the CAS Ad Hoc Division Decisions for the 2022 Beijing Winter Olympics, Laws 12:11, p. 1.
[11] See Article A1 of the CAS ADD Rules.
[12] CAS OG 22/004, award of 4 February 2022, at 63; see also CAS OG 20/013, award of 8 August 2021, at 6.3-6.7.
[13] CAS OG 22/002, award of 28 January 2022, at 5.6; see also CAS OG 06/001, award of 10 February 2006, at 5.
[14] CAS OG 12/003, award of 29 July 2012, p. 7.
[15] Article 7 of the ad hoc Rules.

Material scope of Article 1 of the ad hoc Rules and Rule 61 of the Olympic Charter

The material scope of Article 1 of the ad hoc Rules does not raise any particular difficulties and not often leads to disputed cases before the ad hoc Division.[16] The jurisdictional scope of the CAS ad hoc Division must further be distinguished from the one of the Ad Hoc Anti-Doping Division (CAS ADD) that operates during the Olympic Games since 2016.[17]

In the *Valieva* case *(OG 22/008, 009, 010, award of 17 February 2022)*, the Panel dealt with an appeal against a Russian Anti-Doping Agency (RUSADA) decision to lift a provisional suspension initially imposed on the athlete, by the ITA, after a positive test that was performed in December 2022 with the results not received until 7 February 2022 (i.e., *during* the Beijing Olympic Games). The Panel upheld its jurisdiction because the dispute related to the Olympic Games, in the sense that the provisional suspension automatically prohibited the athlete from participating in all sports. As such, the connecting factor for the CAS ad hoc jurisdiction was the dispute itself and not the authority that rendered the appealed decision; it was irrelevant that RUSADA had not acted as an authority of the Olympic Games or was not listed among the sports authorities of Article 1 of the ad hoc Rules. It was further deemed irrelevant that the suspension was not specifically aimed at the participation of the Athlete in the Olympic Games. Similarly, a decision to exonerate an athlete from anti-doping charges and allow such athlete to participate in the Olympic Games is clearly *"in connection with"* the Olympic Games.[18]

Personal scope of Article 1 of the ad hoc Rules

To the extent that the arbitration clause is acquired through Rule 61 of the Olympic Charter and the Entry Form, the ad hoc Division cannot have jurisdiction *ratione personae* over an individual or entity that is not bound by the Olympic Charter or any other rule that provides for the CAS and CAS ad hoc jurisdiction.[19]

Jurisdiction vs. determination of the "field of play" decisions

At this point we should differentiate the material scope of jurisdiction from the so-called "field of play" doctrine, whereby field of play decisions (e.g., a referee's decision determining the first athlete to cross the finish line) cannot be reviewed by the ad hoc Division, unless the applicant can establish bad faith or arbitrariness. In those cases, even though the CAS ad hoc Division has jurisdiction based on Rule 61 of the Olympic Charter, the ad hoc panel will in principle not review the decision.[20] Therefore, the determination of whether or not a decision is a field of play decision pertains to the merits of the case and must be distinguished from the jurisdictional issue [21]

Temporal jurisdiction of Article 1 of the ad hoc Rules

Apart from the material scope enshrined in Article 1 of the ad hoc Rules and Rule 61 of the Olympic Charter, the most particular limitation of the ad hoc Division's scope is the jurisdiction *ratione temporis*. In this context, one must determine what constitutes a "dispute" that arose during the Olympic Games or during the ten days preceding the Olympic Ceremony. In turn, it is necessary to determine the starting point of said dispute. Ad hoc panels have employed the definition given by the International Court of Justice (ICJ) whereby *"A dispute is a disagreement on a point of law or fact, a conflict of legal views or of*

[16] CAS OG 12/003, award of 29 July 2012, para. 25.
[17] CAS AD 16/001, award of 14 August 2016, at 14 ff. See Article A1 of the CAS ADD Rules.
[18] CAS OG 16/025, award of 21 August 2016, at 5.6.
[19] CAS OG 12/006, award of 1 August 2012, at 3; CAS OG 12/003, award of 29 July 2012, at 22.
[20] CAS OG 12/010 of 11 August 2012, at 7; CAS OG 20/015, award of 5 August 2021, at 7.3 f.; see also CAS 2004/A/727, at 28.
[21] CAS OG 20/010 & 20/011, award of 2 August 2021, at 41; see also CAS OG 16/027; CAS 2015/A/4208.

interests between two persons".[22] In that particular case, the panel retained as the starting point of the dispute the moment when the IOC sent a letter with a list of athletes and officials that did not include the applicants in that case.[23]

For the term *"decision"*, ad hoc panels generally employ the same definition used by CAS panels and the Swiss Federal Tribunal whereby a decision must contain a ruling intending to affect the legal situation of the addressee of the decision or other parties.[24] In this respect, a letter whereby *"Nomination depending inter alia on the decision of the Swiss Federal Tribunal"* cannot be considered as a "decision" not to nominate the athlete that can be brought to the ad hoc Division.[25]

The matter of temporal jurisdiction was addressed among others in a decision from the Beijing Olympic Games, relating to a dispute between two Russian mogul skiers and their national federation against the International Skiing Federation (FIS).[26] In this "Covid-related" case, the skiers could not take part in the World Cup stages in Canada and the USA because their national vaccine was not recognized in those countries. As a result, they could not reach the required quotas for their participation in the OG. Even though FIS initially informed the NOC in question that it would try to ensure that the athletes would get fair chances to participate (without guarantee), it subsequently reminded the NOC that the quota allocations were decided by the IOC.

In their application before the ad hoc Division, the threshold matter was to determine when *"the dispute arose"* as the decisive criterion for the temporal jurisdiction of the ad hoc Division. By using a literal definition of the word "arise", the ad hoc panel found that the dispute had in fact "arisen" on 17 January 2022 when the FIS published its allocation list and rejected the skiers' argument that the "final decision" by the FIS only came on 26 January, when the FIS advised the ROC to address these issues directly with the IOC.[27] In those cases where there is a doubt regarding the jurisdiction of the CAS or the ad hoc Division, a parallel application before both tribunals could arguably be an alternative.

In other cases, ad hoc panels have found that the date of the "decision" may arise later, if it is necessary for the applicant to wait until the full case file and necessary documentation in order to determine whether there is a dispute related to said decision. This is the case when the decision is not self-explanatory and requires clarifications[28] or when the decision is published on the website but the applicant receives explanations of the decision some days later.[29] It is also important for any explanation to be given within the 10-day period, whereas the delay to file the application cannot be used by the party concerned in order to *"make a mockery"* of the CAS ad hoc Rules.[30]

Objections to the temporal jurisdiction of the CAS ad hoc Division

It seems more accurate to consider the *ratione temporis* element of Article 1 of the ad hoc Rules as a jurisdictional issue rather than an admissibility issue.[31] To the extent that the temporal issue is linked to jurisdiction and in

[22] PCIJ, The Mavrommatis Palestine Concessions, Serie A, n° 2, August 30th 1924, Rec. p. 11.
[23] CAS OG 18/005 of 9 February 2018, with references to CAS OG 14/003, award of 13 February 2014, at 5.22.
[24] E.g. CAS OG 18/005 of 9 February 2018 at 5.17; CAS 2020/A/7590 & 7591, award of 23 December 2021 at 71 ff.; Scherrer/ Bräger (eds.) in: Basler Kommentar ZGB I, 7th ed. Basel 2022, ad Article 75 at 3.
[25] CAS OG 10/004, award of 18 February 2010, at 8-9.
[26] CAS OG 22/02, award of 28 January 2022.
[27] CAS OG 22/02, award of 28 January 2022, at 5.15.
[28] CAS OG 20/006 & 20/008 of 27 July 2021 at 5.10 ff.
[29] CAS OG 06/002, award of 12 February 2006, at 13; see however CAS OG 12/002, award of 26 July 2012, at 9.
[30] CAS OG 14/003, award of 13 February 2014 at 5.27.
[31] CAS OG 18/005 of 9 February 2018 at 5.5.

accordance with the *"Einlassung"* doctrine of Article 186 para. 2 PILA and Article 15 of the ad hoc Rules *("Any defence of lack of jurisdiction of the Panel must be raised at the stsart of the proceedings or, at the latest, at the start of the hearing")*, the panel can enter into the merits if there is no objection raised by the parties.[32]

IV. Conclusion – towards an adoption of the CAS ad hoc model by other major competitions?

All in all, the CAS ad hoc Divisions during the Olympic Games operate through an innovative and flexible set of procedural rules that aim at balancing procedural fairness and extreme urgency in the resolution of time-sensitive disputes, offering real value to athletes and federations. The procedure has several particularities tailored to the needs of the expedited procedure, whereas the temporal scope of jurisdiction of the CAS ad hoc Divisions has been a threshold issue in numerous CAS awards rendered during the Olympic Games, that have refined and interpreted Article 1 of the ad hoc Rules in conjunction with Rule 61 of the Olympic Charter.

Apart from the CAS ad hoc Divisions at the Olympic Games, the CAS currently operates ad hoc divisions during the Asian Games (with presence of the arbitrators on-site) but also during the FIFA World Cup, the UEFA Euro and the FIBA World Cup (with arbitrators acting remotely). Besides the undeniable benefits of having a delegation on-site and ready to issue decisions on an urgent basis, in order for such a structure to be worth organizing, sporting competitions should have the size and the potential to generate a certain number of disputes for financial justification. Other institutions also organize ad hoc panels for other, smaller competitions.[33]

[32] CAS OG 22/001 & OG 22/003, award of 1 February 2022, where the IOC only objected to the standing of the applicant.

[33] For example, the London-based sports dispute resolution organization Sport Resolutions operates remote ad hoc panels during the Commonwealth Games, the Rugby League World Cup or the Billie Jean King Cup in tennis, while UEFA ad hoc CEDB and Appeals Body have delegations present on-site during the UEFA Euro tournament.

Whereabouts Failure in CAS Jurisprudence

Vladimir Novak and Liam Rowley*

I. Introduction

Anti-doping rules ensure athletes compete on a level-playing field and in alignment with fundamental values of sport. Enforcement of these rules—both *in and out of* competition—is therefore critical. Whereabouts filings play a key role in enabling Anti-Doping Organizations ("ADOs") to perform controls on *out of* competition athletes. [1] This article investigates the whereabouts failure concept in the decisional practice of the Court of Arbitration for Sport (the "CAS").

II. Background

Pursuant to WADA Code, whereabouts failure is defined as "*any combination of three missed tests[2] and/or filing failures[3] […] within a 12-month period[4] by an Athlete in a Registered Testing Pool*".[5] National anti-doping codes typically mirror this definition (and in case of conflict, the text of the WADA Code anyway prevails).[6]

A Registered Testing Pool is the highest tier pool of International and National level athletes, established by an International Federation for a particular sport and/or a National Anti-Doping Organization, to perform no advance notice testing (*i.e.*, "*sample collection that takes place with no advance warning to the Athlete and where the Athlete is continuously chaperoned from the moment of notification through Sample provision*".[7]).[8]

The location details include personal points of contact (e.g., home address, email, phone number), overnight accommodation, regular activities (e.g., training, work, study), competition schedules and locations, and a daily one hour time slot for when the athletes would be available for testing.

Missed test is defined as "*A failure by the Athlete to be available for Testing at the location and time specified in the 60-minute time slot identified in his/her Whereabouts Filings for the day in question […]*".[9]

---

* Dr. Vladimir Novak is an arbitrator at the Court of Arbitration for Sport and an associate at Cleary Gottlieb Steen & Hamilton LLP, Brussels. Liam Rowley is an associate at Cleary Gottlieb Steen & Hamilton LLP, Brussels. The views expressed are the authors' own, and they bear sole responsibility for any error or omission.

[1] Provide Whereabouts | World Anti Doping Agency (wada-ama.org).

[2] [2] CAS 2020/A/7528, para. 5(d).

[3] *Ibid.*

[4] According to WADA, "*The International Standard for Results Management*", Annex B.1.2, the 12-month period "*starts to run on the date that an Athlete commits the first Whereabouts Failure being relied upon in support of the allegation of a violation of Code Article 2.4".*

[5] Art 2.4 WADA.

[6] CAS 2013/A/3241.

[7] *See* World Anti-Doping Code, International Standard for Results Management, Section 3.5.

[8] *See* International Testing Agency, "Testing FAQ".

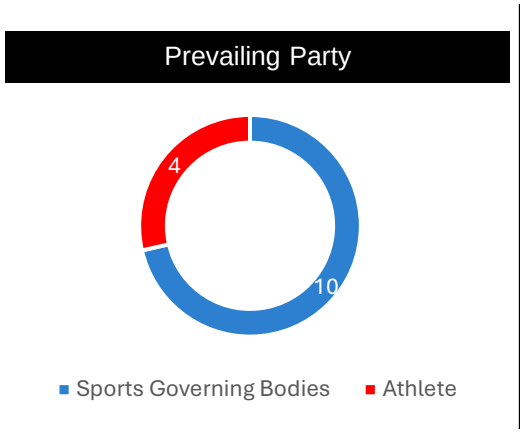
[9] *See* World Anti-Doping Code, International Standard for Results Management, Section 3.6.

Filing failure is defined as "*A failure by an Athlete (or a third party to whom the Athlete has delegated the task) to make an accurate and complete Whereabouts Filing that enables the Athlete to be located for Testing at the times and locations set out in the Whereabouts Filings or to update the Whereabouts Filings where necessary to ensure it remains accurate and complete…*".[10]

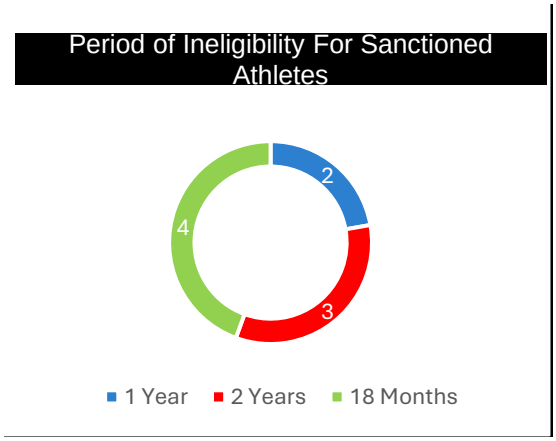
The sanction for athletes committing a whereabouts failure is a period of ineligibility of one to two years, "*depending on the Athlete's degree of Fault*".[11] As stated by the CAS, "*the anti-doping rules are necessarily strict in order to catch athletes that do cheat by using drugs and the rules therefore can sometimes produce outcomes that many may consider unfair. This case should serve as a warning to all athletes that the relevant authorities take the provision of Whereabouts Information extremely seriously as they are a vital part in the ongoing fight against drugs in sport*".[12]

III. Trends

The authors have analysed 14 published CAS cases dealing with a whereabouts failure offence. They show the following trends:
Sport governing bodies prevailed in the vast majority of analysed cases.[13] Sport governing bodies prevailed in around 70% (10 out of 14) of the identified cases, leading to the imposition of periods of ineligibility for athletes and fines for clubs.

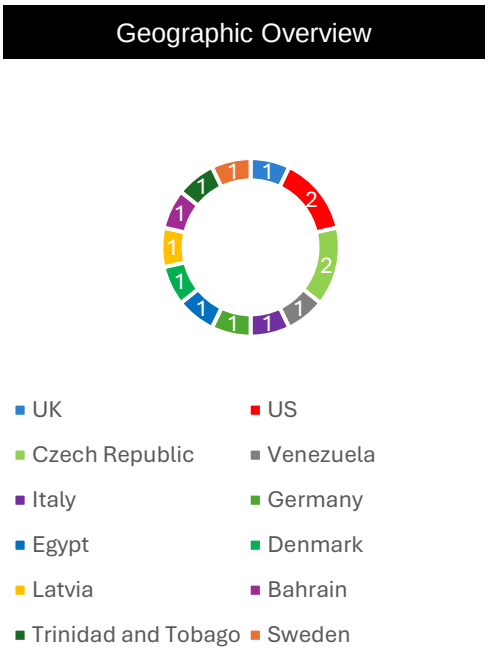


The most common period of ineligibility for sanctioned whereabouts failures is 18 months.[14] Out of the 14 analysed cases, 9 led to the imposition of a period of ineligibility on athletes. Of the 9 cases, the minimum one-year ineligibility period was imposed in 2 cases, the maximum ineligibility period of two years was imposed in 3 cases, and a "middle ground" 18-month period of ineligibility was imposed in the remaining 4 cases.

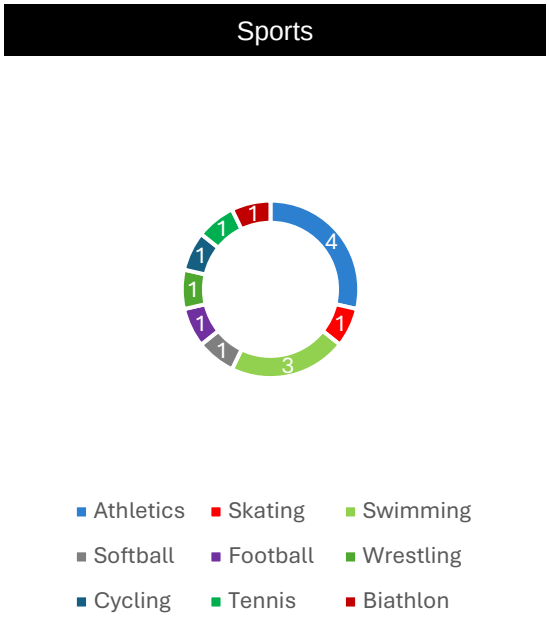


[10] *Ibid.*
[11] Art 10.3.2 WADA
[12] CAS 2006/A/1165, para. 21
[13] A partially upheld appeal in favor of a sport governing body or to the detriment of the athlete and/or the sports organizations supporting them was counted as a 'win' for the sport governing body in the statistics.
[14] The sanctions for whereabouts failures have evolved overtime. In 2006, CAS 2006/A/1165, Christine Ohuruogu v. UK Athletics Limited (UKA) & International Association of Athletics Federations (IAAF), is the Court stated in paragraph 14 that: "*The WADA Code allows a ban of between three and 24 months for the doping offence […]. The Panel also notes that the evidence submitted to it by the IAAF shows that WADA is in the process of revising the WADA Code and the current proposition is that there should be an amendment to impose a minimum sanction of 12 months on athletes who miss three tests*". Under the current WADA rules, the sanction for athletes that fail to provide accurate whereabouts details is a period of ineligibility of one to two years.

The analysed cases covered a wide range of countries. As shown below, a whereabouts failure in CAS jurisprudence is a global issue, though most cases relate to athletes from Europe.



The analysed cases covered a wide range of sports. As shown below, a whereabouts failure in CAS jurisprudence relates to a wide range of sports, with athletics and swimming in the lead.



IV. CAS Findings

The analyzed 14 CAS cases reflect a diverse set of facts and circumstances. The authors consider the following findings most notable:

The whereabouts obligation applies for as long as an athlete is included in a Registered Testing Pool

Athletes included in a Registered Testing Pool are *always* responsible for ensuring accurate and complete whereabouts filings.[15] For instance, in Fédération Internationale de Natation ("FINA") v. Czech Swimming Federation ("CSF") & Zofie Kvackova,[16] and FINA v. CSF & Zdenek Frantisák,[17] the CAS panel found that once an athlete is included in the national Registered Testing Pool list, and absent any official statement or notification that this athlete was removed from that list, the athlete must comply with the whereabouts requirements even if that athlete is no longer a member of the national team.

[15] CAS 2011/A/2499; CAS 2015/A/4210.
[16] CAS 2009/A/1831.
[17] CAS 2009/A/1832.

Standard of proof & burden of proof

The relevant standard of proof in all whereabouts failure cases is greater than a mere balance of probability, but less than proof beyond a reasonable doubt standard.[18] It is for the sport governing body to establish that an anti-doping rule violation has occurred,[19] after which the burden shifts to the athlete to prove otherwise.

In WA v. Salwa Eid Naser & WADA,[20] the CAS Panel noted that there is "*jurisprudence to the effect that a DCO's recollection of events is presumed to be correct, unless substantial counter-evidence can be presented to rebut it (see CAS 2019/A/6302, para. 68 and CAS 2016/A/4700, para. 57)*".[21] That said, the latter case referenced Christian Coleman v. World Athletics,[22] which found more generally that "*it is a matter for the Panel to form a view on the evidence and to weigh it according to its context and circumstances*".[23]

Relevant test for a whereabouts "filing failure"

In Karam Gaber v. United World Wrestling,[24] the CAS Panel clarified that "*a whereabouts filing must be sufficiently accurate and detailed to enable any anti-doping organization to locate the athlete for testing on any given day in the quarter at the times and locations specified by the athlete in his whereabouts filing for that day, which includes but is not limited to, the 60-minute time slot. In particular, the athlete must provide sufficient information to enable the DCO to find the location, to gain access to the location, and to find the athlete at the location. Indicating a location which the DCO cannot access, such as a restricted-access club, is likely to result in a filing failure*" (emphasis added).[25]

In Christian Coleman v. World Athletics,[26] the CAS Panel found that "*the athlete is required to be present at the location specified by him or her and not somewhere else, even if that somewhere else if a five-minute drive away*".[27]

In Andrejs Rastorgujevs v International Biathlon Union,[28] the athlete received a prior warning that his entry was insufficient to locate him, having only stated that he would be in Bromio at "Passo Stelvio, Italy," while leaving the "More Information" and "Additional Information" sections left blank.[29] The CAS found that even though the athlete was previously successfully tested at that location and received correspondence at the address indicated in ADAMS,[30] the information in the whereabouts form was not as detailed as possible, nor sufficient to locate the athlete for testing purposes.

Relevant test for a whereabouts "missed test"

In Christian Coleman v. World Athletics,[31] the CAS laid down a 5-prong test to establish a *missed test*:[32]

a. *"One, that when the Athlete was given notice that he had been designated for inclusion in the Registered Testing Pool, he was advised that he would be liable for a Missed Test if he was unavailable for Testing during the 60-minute time*

[18] CAS 2007/A/1318.
[19] CAS 2007/A/1318; CAS 2009/A/1831; CAS 2009/A/1832.
[20] CAS 2020/A/7526 & CAS 2020/A/7559.
[21] *Ibid.*, para. 134.
[22] CAS 2020/A/7528.
[23] *Ibid.*, para. 141.
[24] CAS 2015/A/4210.
[25] *Ibid.*, 8.7.
[26] CAS 2020/A/7528.
[27] CAS 2020/A/7528, para. 156.
[28] CAS 2021/A/8391.
[29] The athlete argued that his poor knowledge of English hindered his understanding of the relevant provision and warnings. Although this was dismissed, the CAS clarified that: "*if (unlike this Appellant) an athlete is not confident of understanding such obviously important communications, it is their responsibility to seek help from someone who can explain it to them*" (CAS 2021/A/8391, paras. 139 & 154).
[30] The CAS clarified that the athlete had been successfully tested because the DCO noticed the Latvian license plate outside of the hotel and called the athlete. In regards to the correspondence, the CAS stated that the letters were delivered by a mail employee with local knowledge of the area, which a DCO would not have.
[31] CAS 2020/A/7528.
[32] *Ibid.*, para. 122.

slot specified in his Whereabouts Filing at the location specified for that time slot;

b. *Two, that a DCO attempted to test the Athlete by visiting the Athlete's […] location and time specified by the Athlete in his Whereabouts Filings for that day;*

c. *Three, that during that specified 60-minute time slot, the DCO did what was reasonable in the circumstances (given the nature of the specified location) to try to locate the Athlete, short of giving the Athlete any advance notice of the test;*

d. *Four, that the Athlete has been given notice of the earlier unsuccessful attempts at testing the Athlete […];*

e. *Five, that the Athlete's failure to be available for testing at the specified location […] during the specified 60-minute time slot was at least negligent; and, for these purposes, there is a rebuttable presumption that the Athlete has been negligent upon proof of the matters set out at subparagraphs (a) to (d) above. This presumption is rebuttable by the Athlete if he can establish that any failure on his part […] was not caused (or contributed to) by his negligence".*

Athletes cannot rely on a delegation "shield"

An athlete subject to a whereabouts obligation has a duty to ensure that whereabouts filings are accurate and complete.[33] This duty stays with the athlete even if delegated to a third party. For example, in Karam Gaber v. United World Wrestling,[34] the athlete's wife had been urgently hospitalized in a different city and the third party in charge of updating his whereabouts had failed to do so. The CAS determined, in line with ISTI Annex I, Article I.6.4,[35] that the athletes holds ultimate responsibility for the accuracy of the whereabouts filings, including for any failures of their delegates.[36]

Similarly, in Albert Subirats v. FINA,[37] the CAS confirmed that while an athlete may choose to delegate filings of his whereabouts to a third party, the athlete remains responsible regardless of the level of negligence of the third party. In that case, the athlete had always submitted his whereabouts information to the Venezuelan Swimming Federation ("VSF") (*i.e.*, third party delegate), which had typically forwarded these to FINA on time. However, the VSF failed to do so timely in Q1 2010, Q4 2010, and Q1 2011, thus leading to the athlete being found to had committed 3 filing failures on account of the VSF's negligence.

Athletes must be properly notified

Sport governing bodies and ADOs are obliged to make accurate notifications to the athlete that they have committed a whereabouts filing failure.[38] For example, if an ADO notifies an athlete's whereabouts filing failure to the athlete's national federation, it must ensure that the athlete *actually* receives the communication from the national federation. If not, the athlete cannot be declared to have committed a filing failure.[39] In FINA v. CSF & Zofie Kvackova,[40] and FINA v. CSF & Zdenek Frantisák,[41] the file did not contain any evidence of formal written warnings sent to the athletes at issue and, therefore, the CAS Panel found that it was more likely than not that the federation did not transmit the warnings to the athletes.

---

[33] CAS 2011/A/2499; CAS 2015/A/4210.
[34] CAS 2015/A/4210.
[35] Ibid., 7.14., ISTI Annex I, Article I.6.4: "*each Athlete in a Registered Testing Pool remains ultimately responsible at all times for making accurate and complete Whereabouts Filings, whether he/she makes each filing personally or delegates the task to a third party. It shall not be a defence to an allegation of a Filing Failure that the Athlete delegated such responsibility to a third party and that third party failed to comply with the applicable requirements*".
[36] *Ibid.*, 7.14.
[37] CAS 2011/1/2499.
[38] CAS 2011/A/2499; CAS 2009/A/1831; CAS 2009/A/1832.
[39] CAS 2011/A/2499.
[40] CAS 2009/A/1831.
[41] CAS 2009/A/1832.

Moreover, an athlete cannot be notified of a subsequent whereabouts failure if that athlete was not notified of the previous alleged failure(s).[42] For example, in Albert Subirats v. FINA, FINA notified the Appellant's three filing failures to the VSF by letters of 25 February 2010, 11 November 2010, and 2 February 2011. However, the VSF only notified the athlete on the occasion of the third failure—on 2 February 2011. In finding the notifications deficient, the CAS Panel reasoned that "*the athlete must be informed adequately so that he or she has a true opportunity to correct the filing deficiencies that have emerged*".[43]

Defenses and justifications

In addition to invoking the responsibility and/or negligence of delegates (which, as explained above, was consistently rejected by the CAS), athletes have relied on various types of defenses and justifications:

In Christian Coleman v. World Athletics,[44] the CAS indicated that "*an emergency or unforeseen outing of some sort (an urgent trip to the doctor, for example), or a family situation or crisis*"[45] could be considered a justifiable defence for a missed test.

In Anthony Labello v. International Skating Union[46] ("ISU"), the ISU claimed that the athlete failed to submit his required quarterly whereabouts on three occasions. The athlete did not deny these claims and was sanctioned in the first instance proceedings. On appeal to the CAS, the athlete raised new exculpatory evidence—a facsimile of a fax sent to the ISU with the athlete's whereabouts information in the relevant period at issue. The CAS Panel found that the ISU failed to establish that the document at issue was forged or artificially created and, therefore, ruled that it was more likely than not that the whereabouts form was transmitted and received on time.

In Karam Gaber v. United World Wrestling,[47] the CAS Panel found that the athlete assisting his wife during her hospitalization was not a justifiable and exceptional circumstance shielding him from liability for a whereabouts failure because that athlete was able to notify a third party in charge of his whereabouts filing that he had changed location, but the third party failed to update the whereabouts filing.

In Andrejs Rastorgujevs v IBU, the CAS clarified that "*The purpose of [a] discretionary phone call is not to invite the Athlete for testing, but to potentially confirm that the Athlete is not present*", and that "*the absence of such a call does not constitute a defence to the assertion of a Missed Test; nor does it allow an athlete to say that an otherwise deficient filing of an address is repaired by the availability of a telephone call by a DCO*".[48] This was also confirmed in Christian Coleman v. World Athletics,[49] where the CAS dealt with the athlete's argument that he was expecting a call based on past experience with the DCO,[50] and found that "*the athlete is required to be present at the location specified by him or her and not somewhere else, even if that somewhere else if a five-minute drive away*".[51]

In Bayer 04 Leverkusen v. Union of European Football Associations,[52] the CAS found that a club's failure to report whereabouts changes of its players on time due to events that cannot be attributed to the Acts of God or *force majeure* doctrines, but solely to administrative confusion, are insufficient to relieve such club from liability.

Sanctions

[42] CAS 2011/A/2671.
[43] *Ibid.*, para. 11.
[44] CAS 2020/A/7528.
[45] *Ibid.*, para. 188(a).
[46] CAS 2007/1/1318.
[47] CAS 2015/A/4210.
[48] CAS 2021/A/8391, para. 164.
[49] CAS 2020/A/7528.
[50] The CAS did accept that it was "*right to take account of the Athlete's own particular experience in this respect because it is fair to say that such experience had an influence on the Athlete's decision […] to be away from home during the specified time slot*" (CAS 2020/A/7528, para. 180).
[51] CAS 2020/A/7528, para. 156.
[52] CAS 2012/A/2762.

As explained above, whereabouts failure offences are subject to a period of ineligibility from one to two years. In determining the exact period, the CAS considers the athlete's behavior and intent,[53] and a range of factors, notably: (i) the athlete's experience; (ii) whether the athlete is a minor; (iii) any special considerations such as impairment; (iv) the degree of risk that should have been perceived by the athlete; and (v) the level of care and investigation exercised by the athlete in relation to what should have been the perceived level of risk.[54]

In ITF v. Mikael Ymer,[55] the CAS referred to "*the hypothetical experienced tennis player, a threshold that can reasonably be expected to be met by all athletes, who are included in the IRTP, who is acutely aware of the risk of ineligibility at the third whereabouts violation within a 12-month period*".[56] In this case, the athlete was sanctioned with an 18-month period of ineligibility.

In WADA v. Comitato Olimpico Nazionale Italiano ("CONI") & Alice Fiorio,[57] the CONI National Anti-Doping Tribunal reduced the athlete's sanction from one year to six months on account of no significant fault or negligence of the athlete. On appeal, the CAS Panel found that Article 2.4 WADA Code already included a 1-2 year range of sanctions depending on the athlete's fault and, therefore, reducing the sanction below the minimum one year period based on the athlete's degree of fault would mean that mitigating circumstances would be counted twice. Accordingly, in case of a whereabouts offence, a minimum 1 year period ought to be imposed.

In Union Cycliste Internationale ("UCI") v. Alex Rasmussen & National Olympic Committee and Sports Confederation of Denmark ("DIF"; Dansk Idraetsforbund),[58] the CAS panel found the athlete showed a patent disregard of his whereabouts obligations, and thus commanded a sanction much higher than the minimum one year period. On the other hand, the CAS acknowledged that there was no suggestion (let alone evidence) that the athlete committed the whereabouts failures to hide from testing. In balancing between these considerations, the CAS Panel deemed a proportionate sanction to be in the middle of the range—18 months.

In Andrejs Rastorgujevs v IBU, the CAS considered the athlete's significant experience with IBU doping control procedures, his fault with regards to his first two whereabouts failures, and his negligence with regards to his third whereabouts failure, in particular in light of the warning he had received. The CAS noted that if the first instance sanction were a two-year period of ineligibility, it would unlikely had been reduced, but "*in the absence of any specific appeal requesting an increase of the sanction, the Panel shall uphold the 18-month ban*".[59]

V. Conclusion

The CAS' decisional practice on whereabouts failure is continuously evolving. The cases are highly fact specific and typically decided on a case-by-case basis with few to no references to precedents. All in all, federations have thus far prevailed in the vast majority of appeals before the CAS, with most sanctions typically set above the minimum one-year period of ineligibility.

[53] CAS 2011/A/2671.
[54] CAS 2020/A/7528, para. 168(e).
[55] CAS 2022/A/9033.
[56] *Ibid*., para. 174.
[57] CAS 2013/A/3241.
[58] CAS 2011/A/2671.
[59] CAS 2021/A/8391, para. 172.

Jurisprudence majeure*
Leading Cases
Casos importantes

* Nous attirons votre attention sur le fait que la jurisprudence qui suit a été sélectionnée et résumée par le Greffe du TAS afin de mettre l'accent sur des questions juridiques récentes qui contribuent au développement de la jurisprudence du TAS.
We draw your attention to the fact that the following case law has been selected and summarised by the CAS Court Office in order to highlight recent legal issues which have arisen, and which contribute to the development of CAS jurisprudence.
Llamamos su atención sobre el hecho de que la siguiente jurisprudencia ha sido seleccionada y resumida por la Secretaría del TAS con el fin de poner de relieve las recientes cuestiones jurídicas que han surgido y que contribuyen al desarrollo de la jurisprudencia del TAS.

CAS 2021/A/7736 Qarabağ FC v. Union des Associations Européenne de Football (UEFA)

16 November 2023

Football; Disciplinary dispute; Allegedly illegally obtained evidence; UEFA's jurisdiction; Disciplinary powers of UEFA over its members; Club's liability for its employee's misconduct under the strict liability principle; Requirements of a fair disciplinary proceeding; Strict liability under article 8 of the UEFA DR; Sanctions under the UEFA DR

Panel

Mrs Leanne O'Leary (United Kingdom), President
Mr Emin Özkurt (Turkey)
Mr Benoît Pasquier (Switzerland)

Facts

Qarabağ FC (the "Appellant" or the "Club") is a professional football club situated in Baku, Azerbaijan. It is affiliated to the Association of Football Federations of Azerbaijan (the "AFFA"), which, in turn, is a member of UEFA. It plays in the Azerbaijani Premier League which is the top professional league in Azerbaijan.
The Union des Associations Européennes de Football (the "Respondent" or "UEFA") is the association of European member football associations incorporated under Swiss law with its registered office in Nyon, Switzerland. UEFA is the governing body of European football and is recognised as such by the Fédération Internationale de Football Association.

On 20 October 2020, the UEFA Executive Committee decided that because of the conflict between Azerbaijan and Armenia over the disputed region of Nagorno-Karabakh, and attendant safety and security concerns, UEFA competition matches would not be played in Azerbaijan and Armenia. Instead, matches involving those countries, or clubs from those countries, would be played at alternative neutral venues until further notice.

On 29 October 2020, the Appellant played a UEFA Europa League home match against the Spanish club, Villarreal CF, in Istanbul, Turkey.

On 30 October 2020, the Appellant's then press officer, Mr Nurlan Ibrahimov posted the following message on his Facebook page in Azerbaijani (the "Facebook Post"), which read as follows:
"We must kill Armenians. Their children, women, and elderly – it doesn't matter: we must kill as many of them as we can. We must not pity them or feel sorry for them. If we don't kill them, they will kill us and our children, just like they have been doing for more than 120 years. It is necessary to restore Difai and even create a group of killers. We must bring up Abdullah Chatlis, and we must dig them out of the ground and punish them like Israel. Legally negotiating with them is not going to work. Turkey tried for so many years and it didn't work; in the end it behaved towards them in a language they understood and they wised up.
We must kill them so they don't dare to attempt strikes against our lands like Ganja and Barda. Let them know if they hit 1 of us, 100 of us will hit back –we must hit back. Don't let anyone talk to me about humanism or about not being like them. Fire burns the place where it falls. You can't put out the fire of a father who has buried his baby in a grave in Ganja or Barda by not acting like them…We must kill them to the very last one…To the very last one…".

On 1 November 2020, the Appellant published a statement on its website (the "First Statement") which read, in part: *"We would like to state that Qarabagh football club abides by Fair-Play and No Racism and other Rules and Principles of Uefa, while at the same time standing firm in supporting territorial right and integrity of Azerbaijan.* […]*".*

On 2 November 2020, and pursuant to Article 31.4 of the UEFA Disciplinary Regulations (the "UEFA DR"), UEFA

appointed an Ethics and Disciplinary Inspector (the "EDI") to investigate the circumstances surrounding the Facebook Post.

Also on 2 November 2020, the Appellant published a second statement on its website (the "Second Statement"), which read, in part:

"Nurlan Ibrahimov, the head of the Press Service of our Club, who was underwent psychological trauma by the news and images of the death of the innocent Azerbaijani civilians including children and women as a result of ballistic missile strikes by the Republic of Armenia to the Ganja and Barda cities of Azerbaijan, in the position of our state related to the nation of the aggressive hostile state and the principles of the "Qarabag" Football Club on his Facebook page.

We would like to note that the statements written by Nurlan Ibrahimov on the Facebook social media, which he could not control his emotional feelings against the cruelty and regretted later and deleted, do not reflect the official position of "Qarabag" Football Club and are not endorsed by our Club.

For the reason of the wrongdoing of N.Ibrahimov makes legal liability according to the legislation of the Republic of Azerbaijan, administrative proceedings have been instituted against Nurlan Ibrahimov by prosecutor authorities of the Republic of Azerbaijan and case has been sent to Court in order to get court hearing, consequently the Court has imposed an penalty to N.Ibrahimov. Additionally, according to the Internal Discipline Codex of our Club, the wrongdoing of Nurlan Ibrahimov will be heard in the Discipline Commission and imposed a relevant discipline penalty.[…]*"*

Around 2 November 2020, the Club suspended Mr Ibrahimov, before eventually terminating his employment contract.

On 3 November 2020, the Chairman of the UEFA Control, Ethics and Disciplinary Body ("the UEFA CEDB") provisionally banned Mr Ibrahimov from exercising any football-related activity with immediate effect until the UEFA CEDB had completed its investigation and adjudicated on the matter.

On 6 November 2020, the UEFA EDI provided a report that discussed the Club's liability under Article 8 of the UEFA DR for Mr Ibrahimov's misconduct and requested that the UEFA CEDB, *inter alia*, open disciplinary proceedings against Mr Nurlan Ibrahimov for violent, racist, discriminatory and genocidal conduct.

On 9 November 2020, disciplinary proceedings were commenced against Mr Ibrahimov and the Club, which Mr Ibrahimov and the Club defended.

On 25 November 2020, the UEFA CEDB concluded that Mr Ibrahimov had breached Articles 11.1, 11.2 (incidents of a non-sporting nature) and 14.1 (racist behaviour) of the UEFA DR. It also concluded that under Article 8 of the UEFA DR, the Club was responsible for Mr Ibrahimov's racist behaviour under Article 14.1 and that the Club's response to Mr Ibrahimov's behaviour breached Article 11.2(b) of the UEFA DR. The UEFA CEDB sanctioned Mr Ibrahimov (life ban from exercising any football-related activity) and fined the Appellant EUR 100,000 for the violation of Articles 11(2) (b) and 14(1) DR.

On 7 December 2020, the Club lodged an appeal with the UEFA Appeals Body and the UEFA Appeals Body rejected the appeal and confirmed the UEFA CEDB decision on 27 January 2021 (the "Appealed Decision").

On 19 February 2021, The Club filed a Statement of Appeal with the Court of Arbitration for Sport (CAS) against the Appealed Decision.

Reasons

The main dispute in these proceedings relates to the disciplinary sanction imposed by the UEFA CEDB against the Club for its liability due to an employee's misconduct.

The Club argued, *inter alia*, that the UEFA CEDB had no jurisdiction on this matter as the comments by Mr Ibrahimov were not a

"sport-related issue". Additionally, the Appellant held that the Facebook Post was published by Mr Ibrahimov on his personal Facebook account, and that the Club strongly expressed its disagreement with it and against racism. The Club also held that compared to alleged similar cases, the UEFA did not treat the Appellant equally and that the sanction imposed on the Club was against the principle of proportionality. Finally, the Appellant held that the principle of strict liability could only apply if there was no one upon which to impose a sanction and since UEFA had already punished Mr Ibrahimov, it had *"no place"* to sanction the Club under the rule of strict liability.

UEFA was of the opinion that the seriousness of the offence committed by Mr Ibrahimov must be kept in mind when assessing the Appellant's responsibility. Furthermore, the Respondent argued that Article 2.1 applies to any breach of UEFA's Statutes, regulations, directives, or decisions regardless of whether the incident occurred on or off the pitch. UEFA further held that the principle of strict liability was set out in Article 8 of the UEFA DR. Member associations and clubs are responsible for the conduct of their players, officials, members, supporters, and any other person exercising a function at a match at the request of the club, therefore all criteria were present under Article 8 of the UEFA DR to trigger the Club's responsibility for Mr. Ibrahimov's conduct.

1. Allegedly illegally obtained evidence

The Club wanted to exclude social media content submitted as evidence by UEFA in these proceeding as it considered that those evidence had been illegally obtained.

On its hand, UEFA held that the Facebook Post was made publicly available by Mr Ibrahimov on his Facebook account and circulated widely on social media and print media and was therefore in the public domain.

The Panel underlined that arbitral tribunals were not bound by the same rules of evidence as criminal and civil courts, and that, in any event, Swiss law does not prohibit outright the admission of illegally obtained evidence in legal proceedings. In any case, the Panel highlighted that the admission of illegally obtained evidence would not breach procedural public policy, if the need to discover the truth in a proceeding outweighed the protection of the right that was allegedly infringed.

The Panel observed that even if it were to consider that the Facebook Post was illegally obtained, the balance of interests lied firmly with the admission of the social media content and that the application to exclude the evidence should be rejected as the Appellant waited almost two months after the relevant evidence were fled to make an application to exclude these (for a post, the Club had been aware of since end of 2020). The Panel considered that the delay with challenging the admissibility of the evidence for two and a half years demonstrated a lack of interest on the Appellant's part of defending its position on this basis.

2. UEFA's jurisdiction

The Appellant disputed UEFA's jurisdiction to bring the disciplinary proceedings in the present case because Mr Ibrahimov's misconduct was not "sport-related".

UEFA held that it had jurisdiction as Mr Ibrahimov's discriminatory conduct fell within the material, territorial and temporal scope of the UEFA DR.

The Panel observes that UEFA's disciplinary jurisdiction is set out in Articles 2, 3 and 4 of the UEFA DR and defined in terms of material, personal and temporal scope. The Panel observed that a Club official breached the UEFA DR, that pursuant to Article 3.1(b) of the UEFA DR, the Club may be subject to disciplinary proceedings, and that on the day that Mr Ibrahimov's misconduct occurred, the Club was a member of AFFA, which in

turn is affiliated to UEFA, was also a participant in a UEFA club competition, and fell within UEFA's jurisdiction. On that basis, the Panel found that the material, personal and temporal scope of the UEFA DR were satisfied and UEFA had jurisdiction to bring disciplinary proceedings against the Club.

3. Disciplinary powers of UEFA over its members

The Club held that due to the "principle of territoriality", UEFA breached such principle when it commenced disciplinary proceedings as the competent organisation to prosecute the disciplinary offence was AFFA and not UEFA.

UEFA rejected the Appellant's contentions and submitted that the supranational dimension of the Facebook Post was clear, that it had the power and obligation to intervene, and that it was not obliged to request or wait for one of its member associations to bring disciplinary proceedings before commencing its own proceedings.

The Panel recalled that a national association under UEFA membership must have in place disciplinary rules and a disciplinary procedure to sanction misconduct that occurs within its jurisdiction. However, the Panel was of the opinion that despite the applicability of disciplinary rules of a national association and pursuant to Articles 2 and 29 of the UEFA DR, UEFA clearly retained an overriding jurisdiction to prosecute *a serious violation of its statutory objectives* if the national association failed to prosecute or prosecutes the misconduct in an inappropriate manner. In this case, the Panel took note that there was no evidence that AFFA contemplated or commenced proceedings against the Club.

4. Club's liability for its employee's misconduct under the strict liability principle

The Appellant denied that it was liable for Mr Ibrahimov's conduct and submitted that it was not responsible for the Facebook Post. Additionally, the Club held that the principle of strict liability applies only in cases where the person who committed the prohibited conduct cannot be identified, which was not the case here.

UEFA mainly submitted that the Club was liable because the criteria of Article 8 had been established and UEFA's disciplinary bodies rightfully made use of their power of discretion to hold the Appellant responsible for Mr Ibrahimov's misconduct.

The Panel observed that the principle of strict liability under Article 8 of the UEFA DR. was an important mechanism that assisted UEFA to achieve its statutory objectives, protected UEFA's reputation and protected the reputation of football generally. The Panel underlined that the strict liability principle complied with the principle of fairness and public policy.

The Panel took note that the Club was bound by the same rules of conduct as Mr Ibrahimov, and Article 8 of the UEFA DR clearly provided that the Club may be subject to disciplinary measures *if an official breaches a rule of conduct to which the Club is also bound even if the Club can show that it was not at fault or negligen*t. The Panel determined that in light of the purpose of Article 8 and applying a literal interpretation of the wording contained in it, even though the Club had no involvement in publishing the Facebook Post, the Club was liable for Mr Ibrahimov's misconduct as he was an official of the Club at the time his misconduct occurred.

5. Requirements of a fair disciplinary proceeding

The Club asserts that UEFA's disciplinary bodies *"created subjective criteria for punishing a Club under Article 8"* by introducing the requirement for the Club's reaction to the prohibited conduct to be *"immediate, harsh, strict and strong"*, which is not defined anywhere in the UEFA DR and breaches the principle of *nulla poena sine lege*.

UEFA CEDB did not find the Club liable on the basis of strict liability for Mr Ibrahimov's misconduct under both Article 11.2(b) and 14.1 of the UEFA DR, but instead found the Club liable on the basis of strict liability for Mr Ibrahimov's misconduct under Article 14.1, and directly liable for misconduct under Article 11.2(b) of the UEFA DR because its reaction to Mr Ibrahimov's misconduct required a *"quicker, harsher and stricter reaction",* which was confirmed by the Appeals Body.

The Panel recalled that a fair disciplinary procedure requires that a club knows all allegations that it was required to defend in advance of any hearing so that it can properly prepare its case. The Panel observed that the UEFA EDI's Report discussed the Club's liability in terms of Article 8 of the UEFA DR only and the Club's response to Mr Ibrahimov's conduct as relevant to the issue of sanction and that the UEFA letter dated 9 November 2020, informing the Club that disciplinary proceedings had been initiated, expressed the allegations against the Club as *"incidents of a non-sporting nature Article 11(2)(b) in connection with 11(1) DR and Article 14(1) DR"* but did not mention Article 8 of the UEFA DR. The Panel took note that the Club had defended all proceedings on the basis that the allegation against it was one of strict liability; UEFA had presented its case to this Panel on the basis that the allegation against the Club was one of strict liability.

The Panel finds that UEFA did not clearly communicate to the Club, in advance of the determination by the UEFA CEDB, that in addition to responding to an allegation that it was responsible under Article 8 of the UEFA DR for Mr Ibrahimov's conduct, the Club was also facing an allegation that its own response to Mr Ibrahimov's conduct fell below the basic rules of decent conduct and breached Article 11.2(b) of the UEFA DR, in as many words. Fairness is an underlying principle of all disciplinary proceedings, and the Panel considered that even though the facts may have sustained it, holding the Club directly liable under Article 11.2(b) of the UEFA DR was procedurally unfair because the allegation was not clearly communicated in advance.

However, the Panel explained that this determination had no practical consequence in the present proceedings because of the Panel's *de novo* power of review, and the Panel's findings regarding strict liability.

6. Strict liability under article 8 of the UEFA DR

The Appellant held that strict liability principle applies only if the perpetrator of the prohibited conduct cannot be identified.

As the Respondent submitted, and the Panel was of the opinion that Article 8 of the UEFA DR holds a national association or club liable for conduct committed by certain listed people or entities, namely: *a member, player, official, supporter or any other person exercising a function on behalf of the national association or club*.

While ordinarily those people or entities will be identifiable, the Panel held that in certain situations, and despite the best investigative efforts, the person or entity who committed the prohibited conduct may not be identifiable. The Panel was of the opinion that UEFA may still seek to hold the club or national association accountable under Article 8 of the UEFA DR for the prohibited conduct of unidentifiable third parties provided the third party falls within the list set out in Article 8 of the UEFA DR.

7. Sanctions under the UEFA DR

The Club held that the fine of EUR 100,000 was disproportionate because the Appeals Body did not properly take into account mitigating factors and considered only aggravating factors.

UEFA disputed that the fine was disproportionate.

The Panel recalled that the numerous different disciplinary measures that may be

imposed on a club that are listed in Article 6.1 of the UEFA DR, and include a fine, and the playing of a match behind closed doors, amongst others. Regarding fines imposed against a club, the Panel recalled that it must not be less than EUR 100 or more than EUR 1,000,000 (UEFA DR, Article 6.3). The Panel underlined that recidivism was specifically expressed to be an aggravating circumstance in Article 25.2 of the UEFA DR.

On this matter, the Panel underlined that while it should not interfere lightly with UEFA's disciplinary bodies' exercise of discretion, it considered that established CAS jurisprudence (CAS 2015/A/4338, para. 51; CAS 2018/A/5977, para 178; and CAS 2017/A/5003, para 274) confirmed that it is not prevented from doing so.

The Panel recalled that in cases in which a club or national association was held liable under the principle of strict liability for an official's misconduct, UEFA's disciplinary bodies, had the discretion to apply a sanction.

When determining the sanction, the Panel took note that both UEFA disciplinary bodies placed significant weight on the Club's immediate response to the Facebook Post, specifically the fact that the Club delayed issuing a statement and that when it did, the First and Second Statements did not condemn outright the content of the Facebook Post. The Panel was of the opinion that as the Facebook Post was a horrendous statement, it should have been the Club's responsibility to condemn the Facebook Post outright, in the clearest possible terms and distance the Club, its supporters and the sport of football from Mr Ibrahimov's views.

Finally, the Panel observed that within a range of EUR 100 to EUR 1,000,000 as available under Article 6.3 of the UEFA DR, the fine amount of EUR 100,000 falls towards the lower end. When considering the severity of the Facebook Post's content, the Club's actions in response, UEFA's statutory objective in Article 2(b) of the UEFA Statutes, its legitimate policy of adopting a zero-tolerance approach to discrimination, and racism in particular, the Panel concluded that the fine amount was proportionate and found no reason to interfere with the discretion of UEFA's disciplinary bodies to impose the sanction.

Decision

In light of the foregoing, the Panel determined that the Club was responsible under Article 8 of the UEFA DR for the misconduct of its official and that a sanction of a fine of EUR 100,000 was proportionate in the circumstances. The Panel, therefore, dismissed the appeal and confirmed the UEFA Appeals Body's decision.

CAS 2022/A/8598 Hungarian Football Federation (HFF) v. Fédération Internationale de Football Association (FIFA)
24 February 2023

Football; Disciplinary sanctions for misbehaviour of supporters; Bifurcation of the proceedings; Conditions for a statement of appeal; Admissibility of new exhibits; Failure to comply with the time limit for appeal; Interaction between relevant provisions; Proof of notification of a FIFA decision

Panel
Mr Hendrik Kesler (the Netherlands), President
Mr Attila Berzeviczi (Switzerland)
Mr Jan Räker (Switzerland)

Facts

The Hungarian Football Federation ("HFF" or the "Appellant") is the governing body of football in Hungary. It is a member of the Fédération Internationale de Football Association. Its headquarters are located in Budapest, Hungary.

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

On 2 September 2021, a football match was played between the representative teams of Hungary and England in Budapest, Hungary, in the context of the Preliminary Competition of FIFA World Cup Qatar 2022.

Various incidents involving the Appellant's supporters took place during the match, including alleged monkey chanting, racial slurs towards some English players, the throwing of various objects onto the pitch and the blocking of stairways in the stadium. These incidents were documented in the referee's and match commissioner's reports, and supported by various videos.

On 3 September 2021, disciplinary proceedings were opened against the HFF with respect to potential breaches of Articles 13 and 16 of the FIFA Disciplinary Code.

On 8 September 2021, the English Football Association ("The FA") lodged a formal complaint in relation to the racist abuse directed at two if its players and assistant coach.

On 20 September 2021, the FIFA Disciplinary Committee passed a decision in this matter. It sanctioned the Appellant with a closure of its stadium for the next two FIFA World Cup qualifiers, the second match being probationarily suspended, and a fine of CHF 200,000.

On 13 October 2021, the Appellant filed an appeal against the FIFA Disciplinary Committee's decision with the FIFA Appeal Committee.

On 11 November 2021, the FIFA Appeal Committee issued the operative part of its decision ("the Appealed Decision"), which confirmed the findings of the FIFA Disciplinary Committee.

On 16 December 2021, the FIFA Appeal Committee purportedly communicated the grounds of its decision by email at 8:40pm. In its most recent submissions, the Appellant challenged, however, having received this email before 17 December 2021.

On 4 January 2022, the Appellant sent a letter dated 3 January 2022 to the CAS Court Office indicating that it *"intend[ed] to lodge an appeal"* against the FIFA Appeal Committee's decision of 11 November 2021.

On 7 January 2022, the Appellant filed a document entitled "Statement of Appeal" with the CAS Court Office against the Appealed Decision in accordance with

Articles R47 *et seq*. of the of the Code of Sports-related Arbitration (the "CAS Code").

On 20 January 2022, the Respondent sent a letter to the CAS Court Office stating that it intended to bifurcate the proceedings to address the admissibility of the appeal. This was followed by various exchanges of submissions.

On 17 February 2022, the Panel decided to assess the Respondent's request for bifurcation as a preliminary matter and hold a hearing, which took place two months later.

On 29 April 2022, the Appellant sent an unsolicited letter and additional exhibit regarding the launch of FIFA's new legal portal. Six days later, the Respondent contested the admissibility of these new documents.

Reasons

The main dispute in these preliminary proceedings concerned the admissibility of the appeal. In this context, the Appellant argued that it had proceeded timely, while the Respondent contested this view.

Other issues included the admissibility of documents lodged after the closure of the written submissions.

This led the Sole Arbitrator to examine the bifurcation of the proceedings, conditions for a statement of appeal, admissibility of new exhibits, failure to comply with the time limit for appeal, interaction between relevant provisions and proof of notification of a FIFA decision.

1. Bifurcation of the proceedings

The Panel stated by way of introduction that there was no consensus as to the legal basis that would allow it to bifurcate the proceedings to determine admissibility. It referred directly or by analogy to various provisions of the CAS Code, Swiss Civil Procedure Code and Federal Act on Private International Law.

The Panel noted that bifurcation was in any event widely recognised in CAS jurisprudence for reasons of procedural efficiency, if sought prior to any defence on the merits.

Consequently, the Panel confirmed its decision to tackle the issue of admissibility separately.

2. Conditions for a statement of appeal

The Appellant submitted that its letter of 3 January 2022 was in fact its Statement of Appeal. It was complemented with all missing documents "three days later".

The Respondent argued that this letter was a mere expression of intent, which did not fulfil the requirements of a statement of appeal and could not be completed.

The Panel recalled that a statement of appeal should include the name and address of the Respondent, the appealed decision and relevant regulations, request for relief, nomination of an arbitrator and payment of the CAS Court fee, pursuant to Article R48 of the CAS Code.

The Panel observed that CAS' practice to grant a short deadline to the appellant to supplement an incomplete statement of appeal was in line with the jurisprudence of the Swiss Federal Tribunal. It specified, however, that it did not allow an appellant to complete a simple declaration of intent and convert it into a statement of appeal to safeguard the applicable time limit.

The Panel found that the Appellant's letter merely stated that an appeal would be lodged later. It did not contain any clear determination or exhibits, and was followed by a document entitled "statement of appeal" four days later.

The Panel concluded that the Appellant's letter could not be qualified as a statement of appeal, nor become one after being complemented by further documents and information.

3. Admissibility of new exhibits

The Appellant submitted a media release published by FIFA on 25 April 2022 regarding the launch of its new legal portal, by which it sought to demonstrate the inadequacy of the previous handling of proceedings and email notification.

The Respondent challenged the admissibility of this document on the grounds that it was late. It added that its new legal portal was only intended to modernise the handling of proceedings, irrespective of the validity of email communications.
The Panel recalled that the parties are, in principle, not authorised to produce new exhibits after the submission of the appeal brief and answer before the CAS, in light of article R56 CAS Code. Exceptions to this rule include the existence of exceptional circumstances or well-known facts that are publicly available from an official source.

The Panel decided to admit this document to the file due to its new, publicised nature, while agreeing with FIFA that it was not decisive for the resolution of the dispute.

4. Failure to comply with the time limit for appeal

The Panel spontaneously pointed out that the respect of the time limit for appealing to CAS was not a question of jurisdiction but rather a condition for the admissibility of the appeal. Failure to observe it does not lead to the lack of jurisdiction of the arbitral tribunal, but only to the inadmissibility of the appeal.

5. Interaction between relevant provisions

1. The Appellant contended that that the twenty-one-day deadline provided for by Articles R49 of the CAS Code and FIFA Statutes breached the one-month mandatory appeal period established under Swiss civil law, and should be extended accordingly. It also argued that the FIFA Disciplinary Code allowed for a suspension of deadlines during the Christmas break.

2. The Respondent emphasised that longer time limits and suspensions did not apply before CAS.

The Panel gave an extensive overview of the long-standing jurisprudence. It confirmed that the 21-day time limit provided for by article R49 CAS Code and FIFA Statutes took precedence over the longer time limit specified by Swiss law, by virtue of the autonomy of the parties to choose the law applicable to their dispute.

The Panel found that this time limit was not interrupted during judicial vacations or suspensions set by internal regulations, in view of the need for swift arbitration and hierarchy of norms.

6. Proof of notification of a FIFA decision

The Appellant argued that the Respondent failed to prove that it did receive the Appealed Decision on 16 December 2021, since the document that it presented was in fact a mere "proof of sending". Also, the Appellant opened the decision the following day according to its two witnesses, and was not supposed to check its email box outside office hours, in the absence of any prior warning.
The Respondent maintained that the FIFA Appeal Committee had duly notified the Appealed Decision by email on 16 December 2021 at 8:40 pm, as evidenced by the "delivery receipt" provided. Henceforth, the appeal filed by the Appellant on 7 January 2022 was inadmissible, as it fell outside the twenty-one-day period enshrined in the CAS Code and FIFA Statutes.
The Panel opined that FIFA could rely on the proof of dispatch generated by Microsoft to establish that its decision had been received

and notified by email, unless otherwise contradicted by solid evidence on file. Such was not the case here, since the Appellant failed to provide a screenshot of its email box and clear testimonies in that respect.

The Panel considered that the Swiss legislation and jurisprudence governing federal authorities' messaging platforms and postal mail was of no avail. They addressed different situations and could not be applied by strict analogy, given the principle of quasi-immediacy of email communications, the need for harmonised sports regulations and the recipient's obligation to retrieve its email box during ongoing proceedings.

The Panel concluded that FIFA was not required to send a warning or operate during the recipient's business hours, given its numerous procedures and different time zones of its members.

Decision

In light of the foregoing, the Panel declared the appeal inadmissible.

CAS 2022/A/8638 Mexican Swimming Federation (MSF) v. World Aquatics
31 March 2023

Aquatics; Governance: appointment of a Stabilization Committee; Rationale of a Stabilization Committee;Compliance with convocation requirements for setting up a FINA Bureau meeting; Autonomy of association; Legality of the decision to appoint a Stabilization Committee; Exceptional circumstances under Rule C 10.6 FINA Constitution; Right to be heard; Proportionality; Discretion under Rule C 10.6 FINA Constitution

Panel
Mr Peter Grilc (Slovenia), Sole Arbitrator

Facts

The Mexican Swimming Federation ("MSF" or the "Appellant") is the national federation, representing the highest instance in aquatic sports in the Mexican Republic, with its registered office in Mexico City, Republic of Mexico. The MSF is a member of FINA.

World Aquatics (formerly Fédération Internationale de Natation) ("FINA" or the "Respondent") is the international federation governing the sport of aquatics worldwide, with its registered office in Lausanne, Switzerland.

On 1 September 2020, FINA received a complaint in relation to the upcoming election for the MSF's members of the Board of Directors, alleging that in breach of the FINA Constitution, the MSF's statutes would be unfair and undemocratic amongst others since according to Article 81 of the current MSF Constitution (valid from 2014, the "2014 MSF Constitution") relating to the election of MSF's Board of Directors, it was required that candidacies hold at least two years' prior membership of the Board of Directors of MSF or one of its affiliated associations. Further the current MSF Constitution had never been submitted for approval to FINA, as provided for by the FINA Constitution.

On 2 and 3 September 2020, FINA reminded MSF of its obligation to seek prior approval from the FINA Bureau of any changes to its constitution prior to such changes coming into effect. MSF was further asked to provide amongst others a copy of the current constitution in Spanish, including certified English translation thereof and invited to comment on FINA's 1 September 2020 letter.

On 8 September 2020, the MSF provided FINA with its comments, but did not provide the requested documents.

On 15 September 2020, FINA provided the MSF with a Legal Memorandum on the matter repeating that MSF's statutes were subject to approval. Furthermore, FINA again requested a duly signed NF Constitution Compliance Form or, alternatively, confirmation that no such approval had been obtained, and advised MSF that the elections scheduled for 15 December 2020 should be postponed until the provisions of FINA Rule C 7.4 had been satisfied.

On 24 September 2020, FINA reminded the MSF of its 15 September 2020 request, asked to receive answers and the requested documents by 9 October 2020 and reserved the right to impose sanctions according to Article C 12 for a breach of Rule C 8.2.2 read conjointly with Article C 7.4 FINA Constitution.

On 21 October 2020, the MSF replied to FINA, without however providing the requested documents. It also inquired from FINA which version of its constitution had last been approved by FINA.

On 4 November 2020, FINA again reminded MSF that any change to the national rules must comply with FINA Article C 7.4,

subject to the approval of the FINA Bureau; that MSF had been granted two months to provide evidence that its 2014 Constitution had been approved prior to its adoption in 2014 and/or to provide a certified English translation of the existing MSF Constitution, but had failed to do so. It further informed MSF that according to an opinion from the FINA Legal Committee, Article 81 MSF Constitution was clearly not in accordance with good governance practice and that the FINA Bureau *"likely would not have approved"* such proposed amendments had they been presented for approval as required by FINA Rules. Further based on the foregoing, it had been decided to sanction MSF by a formal warning in the meaning of FINA Rule C 12.2 lit (a) for violation of its obligation to cooperate and that FINA would not recognize the results of future MSF elections until the FINA Bureau had approved the MSF Constitution.

On 12 November 2020, the Appellant submitted a certified translation of its 2014 Constitution.

On 20 November 2020, having analysed the 2014 MSF Constitution, FINA provided the MSF with a Legal Memorandum of the FINA Legal Committee of 19 November 2020, noting that no FINA Compliance Form had been presented concerning the 2014 MSF Constitution and no documentation had been identified in support that the 2014 version had been previously approved by FINA; the 2014 MSF Constitution would not comply with several FINA requirements for member constitutions, in particular Article 81 MSF Constitution, requiring that candidacies hold at least two years' prior membership of the Board of Directors of MSF or one of its affiliated associations. FINA pointed out its hope that MSF, when amending its constitution, reconsidered the language of Article 81 *"… to be less restrictive when outlining requirements for those seeking to become members of the Board od directors (again to establish greater transparency and best-of-class-governance)"*.

On 2 December 2020, following an extraordinary MSF board meeting, FINA was informed that MSF would perform a study on its constitution in order to elaborate a proposal about the changes.

On 29 January 2021, MSF, following a reminder by FINA of its previous requests, provided a draft of its constitution (though not in mark-up mode as requested).

On 1 February 2021, FINA again requested the MSF to provide the new draft including amendments in track change, in order to allow FINA to verify the proposed changes. Again FINA raised the issue of Article 81 MSF Constitution, stating that the proposed draft amendments did not foresee any change to this provision and warning MSF that without changes, the matter would be brought to the attention of the FINA Executive for an eventual breach of MSF's duties as FINA Member.

On 5 February 2021 and 16 February 2021 respectively, MSF provided FINA with a draft version of its proposed changes to the Constitution, in track changes, and the NF Compliance Form.

On 18 February 2021, FINA informed the MSF that Article 81 MSF Constiution *"while not perfect, had been improved"* and asked MSF to submit, after the extraordinary general congress of 25 February 2021, the clean text of the Constitution in order for FINA to approve the amendments of the MSF Constitution according to FINA Rule C 7.4.

On 2 March 2021, following a reminder, FINA received a Spanish version of the minutes of the MSF 25 February 2021 extraordinary General Assembly, referring notably to the approved constitutional changes. In the cover letter, MSF explicitly confirmed that the amendments had been made precisely as submitted to FINA before.

On 22 March 2021, FINA, based on its analysis of the Spanish text of the new Constitution, informed MSF that several

modifications had been identified between what had been presented to FINA at the beginning of February 2021 and what had eventually been modified by the extraordinary General Assembly of 25 February 2021, and that FINA had not been informed thereof. As a result, FINA asked that the proposed electoral General Assembly of 31 March 2021 be postponed, making clear that it would not recognize any of the Assembly's decisions; it furthered appointed a Bureau Liaison Person, Mr Juan Carlos Orihuela, member of the FINA Bureau and FINA Vice President, to further investigate the matter and recommend next steps.

On 14 April 2021, as a result of meetings between Mr Orihuela and representatives from the sports world of Mexico, including the MSF president, the Minister of Sports in Mexico ("CONADE"), as well as representatives of the Mexican Olympic Committee (MOC) aimed at helping MSF to implement a valid and compliant constitution and allow that democratic, transparent and valid elections could be carried out, a Binding Commitment Letter was agreed between FINA, MSF, CONADE and MOC, by which MSF undertook to comply with a roadmap in order to amend its constitution and to hold an electoral General Assembly. As a first step in this process MSF had to submit to FINA a new draft of its constitution, implementing the amendments as outlined in the Binding Commitment Letter. It was further agreed that only once FINA had communicated its final approval to the MSF, an ordinary election meeting could be held.

On 28 April 2021 and 23 May 2021, FINA reminded MSF of its obligations under the Binding Commitment Letter, mainly to provide FINA with a draft of the amended MSF Constitution.

On 9 June 2021, FINA informed MSF that while almost two months had passed since the signing of the Binding Commitment Letter, it had not yet provided an amended MSF Constitution and that therefore, on 4 June 2021, the FINA Bureau had decided to initiate proceedings that might lead to MSF suspension (FINA Rule C 12). The MSF was given the right to be heard in writing by 21 June 2021.

On 18 December 2021, a revision of the FINA Constitution was approved, including the introduction of a new Article C 10.6 allowing FINA to appoint a Stabilization Committee.

On 14 January 2022, the FINA Bureau discussed MSF's repeated failure to comply with FINA's good governance standards and decided to implement an independent Stabilization Committee in accordance with FINA Rule C 10.6, to ensure that MSF adhered to the required standards of good governance and transparency.

On 17 January 2022, FINA notified the MSF of its decision to implement the Stabilization Committee (the "Decision"). According to FINA, such measure had become necessary as a means of last resort, prior to a possible suspension of MSF because of MSF's repeated failure to comply with good governance standards. MSF was informed that the Stabilization Committee would run all day-to-day operations of MSF, conduct the proper and necessary amendments of the MSF constitution and finally conduct new elections, based on the then amended and compliant new MSF constitution. It was made clear that the new elections would be open to all valid participants, *i.e.* all provinces and clubs who had been duly registered with MSF within the last two years, and that the transition should be conducted without any detriment to the athletes.

On 20 January 2022, MSF objected to the imposition of the Stabilization Committee based on formal and material reasons.

On 21 January 2022, FINA objected to the MSF's position that the setting up of the Stabilization Committee would be null and void, warned it of breachingany FINA Rules and athe decision rendered by the FINA

Bureau, reserved the right to impose further disciplinary sanctions and requested cooperation by MSF with FINA and the Stabilization Committee.

On 4 February 2022, MSF filed a Statement of Appeal, serving as Appeal Brief, with the CAS with respect to the Decision rendered by the FINA Bureau on 17 January 2022.

Reasons

1. Rationale of a Stabilization Committee

The Sole Arbitrator first addressed the question as to whether, as strongly argued by the Appellant but contested by the Respondent, the establishment of the Stabilization Committee was to be classified as a santion and whether therefore, the right to impose the Stabilization Committee was limited by the prohibition of abuse of rights as provided by Article 2 Swiss Civil Code ("SCC") and by the principle of legality, with the result that it had to be based on a specific and clear legal provision allowing members to assess the consequence of behavior in conflict of superordinate statutes.

The Sole Arbitrator noted that while the setting up of a Stabilization Committee might be perceived as a sanction due to its significant external interference with the association's functioning, independence, freedom and autonomy, the mere fact that such measure was taken externally did not qualify it as a sanction. This as amongst others, while the establishment of the Stabilization Committee was regulated in Rule C 10.6 FINA Constitution ("Title 10 Suspension and Termination of Membership"), the sanctions available to FINA to impose on subordinated associations in case of breach of laws and statutes were uniformly regulated in Title 12 ("12 Sanctions") FINA Constitution.

Furthermore, the purpose of setting up a Stabilization Committee was not to sanction, *i.e.* to react to an identified violation, but to act in order to cooperate and help the organization to achieve a certain result. The setting up of a Stabilization Committee being a standard measure of internal governance and a mechanism to remediate a flawed situation within a member and to grant institutional support; the rationale of a Stabilization Committee being to intervene in case of serious issues over governance. At stake in the present proceedings the harmonisation of MSF's rules with the FINA rules.

In conclusion, given that the setting up of a Stabilization Committee did not constitute a sanction, the adoption of the decision establishing a Stabilization Committee was not limited by the prohibition of abuse of rights as provided by Article 2 SCC.

2. Compliance with convocation requirements for setting up a FINA Bureau meeting

The Sole Arbitrator thereupon turned to the Appellant's argument that the Decision was null given that formal conditions had not been complied with insofar as, in violation of Rule C 17.15.2 FINA Constitution, the FINA Bureau - in principle empowered under Rule C 10.6 FINA Constitution to appoint a Stabilization Committee under certain. In response the Respondent submitted that no FINA Bureau member had questioned the validity of the decisions taken at the occasion of the said meeting.

Taking note that while the relevant minutes of the FINA Bureau meeting in question were partially blacklined in accordance with Rule C 17.15.7 FINA Constitution due to confidentiality reasons, the Sole Arbitrator also noted that the Appellant had not objected to the authenticity of the minutes, that it was established that the required quorum of 14 was met according to Rule C 17.15.4 FINA Constitution. Further the proposal to adopt the Decision was approved unanimously, and tthe minutes did not indicate any concerns about convocation or compliance with the provisions of Rule C 17.15 FINA Constitution.

Consequentlythe Sole Arbitrator found that the Respondent had sufficiently demonstrated that the convocation requirements for the meeting were met. Therefore, the Bureau meeting in question was duly convened and the Decision taken at the meeting was in accordance with Rule C 17.15 *et seq.* FINA Constitution.

3. Autonomy of association

The Appellant argued that the setting up of the Stabilization Committee was insofar in violation of its autonomy of association as the Respondent, as superordinate association, had dismissed members of an elected board of directors of the Appellant at its own discretion, and had therefore deprived the Appellant of the right to handle its own business. The Sole Arbitrator underlined that in accordance with the fundamental Swiss legal principle of freedom of association ("Vereinsautonomie"), an association such as FINA had the right to freely organise itself and establish its own regulatory system. It was thus free to establish the provisions it deemed convenient regarding its organisation and membership. This freedom of association included not only the right to create own rules, but also the right to apply and enforce these associative rules, and these rights were only limited by the requirement of due respect under Swiss law and, in particular, by personality rights.

In conclusion, the Sole Arbitrator found that as under Rule C 10.6 FINA Constitution, FINA *"… may under exceptional circumstances …"* at its discretion appoint a Stabilization Committee, it had to be determined whether that requirement had been met.

4. Legality of the decision to appoint a Stabilization Committee

Prior to starting its assessment of the validity of the decision to appoint the Stabilization Committee, the Sole Arbitrator underlined that for this exercise, a CAS Panel had to a) balance between the very wide discretional power of FINA under Rule C 10.6 FINA Constitution and the clear will of the association, accepted by its members, to leave it to FINA to decide if indeed the circumstances at stake met the undefined requirements of the term "exceptional circumstances"; b) take into account that the appointment of a Stabilization Committee deprived the member of its powers and therefore was one of the most severe measures FINA could adopt; c) take into account the specific effect of the appointment of the Stabilization Committee, the specific powers conferred on the Stabilization Committee and whether the committee entered into the management of the member association with certain limitations as to scope and time; d) take into account any limitations provided for by the FINA Constitution itself and as provided in the Decision.

The Sole Arbitrator further addressed the Appellant's argument that on 9 June 2021, when the Respondent had announced the prospect of imposing sanctions in accordance with Article C 12 FINA Constitution, the FINA Constitution valid at that time did not foresee the possibility of the establishment of a Stabilization Committee – the legal basis for this right, Article C 10.6 FINA Constitution, having only been validly introduced into the FINA Constitution later, on 18 December 2021– and that therefore, the principle *nullum crimen nulla poena sine previa lege* was infringed. Underlining that formally, on 14 January 2022, when the FINA Bureau adopted the Decision and set up the Stabilization Committee, FINA Rule C 10.6 was already in force, the Sole Arbitrator found that, in this regard, the appointment of the Stabilization Committee was in accordance with the principle of legality.

5. Exceptional circumstances under Rule C 10.6 FINA Constitution.

The Sole Arbitrator examined the Appellant's argument that the requirement of "exceptional circumstances" under Rule C

10.6 FINA Constitution had not been fulfilled given that this could only be found in case of repetitious infringements lasting over a long period of time (such as 7,5 years, *cf. CAS 2018/A/5888*), which was not the case here. Conversely, the Respondent maintained that there had been countless failed attempts of MSF stretching over a period of one year and a half to adopt and approve (by both FINA and MSF's general assembly) a new constitution, in line with clear legal obligations. However, even after signing the Binding Commitment Letter in April 2021, the Appellant failed to cooperate. All this constituted exceptional circumstances, resulting in an unacceptable situation which FINA could not ignor.

The Sole Arbitrator, noting that "exceptional circumstances" present an undetermined legal concept not defined as such in FINA's Constitution, the existence of which had to be established by FINA as the association invoking them, held that exceptional circumstances were those which were not comparable to normal situations, which mitigate a potentially hazardous occurrence. The existence of exceptional circumstances was to be assessed on a case-by-case basis and might be constituted by a breakdown of trust. They should be "truly exceptional" and insofar related to a situation where they were understood as a "last resort" for one of the parties. To be taken into account in the evalutation was *e.g.* the length of time during which a situation of non-compliance with the FINA Constitution (*here*: lack of harmonization of the MSF constitution with the FINA Constitution) had existed prior to the decision to appoint a Stabilization Committee, as well as the efforts of cooperation and assistance provided by FINA in order to remedy the situation, prior to the appointment of the Stabilization Committee. Also to be taken into consideration were the acts, omissions or non-cooperation of the member association which had prevented, or at least hindered, the harmonization of the MSF constitution with the FINA Constitution. Against this backdrop, taking specifically into account all the events and facts that occurred between 1 September 2020 and 17 January 2022, the whole context of the case and the conditions in which the Decision was adopted, notably also that already the 2014 MSF Constitution had not been submitted for approval to the FINA Bureau as required by the FINA Constitution, the amendment of the constitution in 2020 until the establishment of the Stabilization Committee, as well as the assistance and various opportunities granted by FINA to MSF during the period of one year and a half, the Sole Arbitrator found that the circumstances of the case were to be considered "exceptional circumstances" as required by Rule C 10.6 FINA Constitution and that FINA was therefore right in its assessment of the situation.

6. Right to be heard

According to the Appellant, it was not granted the right to be heard in 2022 on the occasion of the appointment of the Stabilization Committee, resulting in an unlawful appointment of such committee. This was contested by the Respondent who also pointed out that the *de novo* review in CAS Appeal Proceedings would cure any possible deficiencies, if any, of previous proceedings.

At the outset, the Sole Arbitrator underlined that given that the appointment of a Stabilization Committee did not qualify as a sanction, but as an administrative measure envisaged by the FINA Constitution, in order to adopt this measure, no controversial procedure was required in which the addressee of the measure would have to be previously heard. Accordingly, the decision to appoint such a committee could not be held null and void for failure to guarantee the right to be heard. Furthermore, as argued by FINA; any possible deficiencies of previous proceedings would have been cured by the *de novo* review adhered to by the Sole Arbitrator in the present CAS Appeal Proceedings. Therefore, the Sole Arbitrator dismissed the Appellant's argument that its right to be heard had been violated with regard to the

taking of the Decision.

7. Proportionality

The Appellant argued that when the decision to appoint the Stabilization Committee was taken, the principle of proportionalty had been disregarded because the sanction was not suitable to achieve the pursued objective or to support its achievement. Conversely, the Respondent contended that the Appellant's allegation of violation of the principle of proportionality was the result of a misconception based on the premise that the setting up of a Stabilization Committee was a sanction and that other (milder) sanctions might be applied.

The Sole Arbitrator underlined that as the decision to appoint a Stabilization Committee was not a sanction, but an administrative measure envisaged by the FINA Constitution, proportionality of a respective decision was not established by comparing the Decision taken under Rule C 10.6 with the arsenal and range of different sanctions listed in Rule C 12 FINA Constitution. Accordingly, a reference to the principle of proportionality was excluded. Even if the principle of proportionality was interpreted in its broadest sense possible, as meaning that *"… the measures applied in a decision must be appropriate and limited to what is necessary to achieve the pursued regulatory objective"*, and in the search for the *"regulatory objective"*, it could be taken into account that it had been established that the more lenient options available under Rule C 12.2 FINA Constitution, namely a (a) warning and (b) a fine, would not have secured the objective given amongst others the duration of the breach and the limited amendments adopted by the Appellant of its constitution prior to the appointment of the Stabilization Committee. Consequently, the Decision was not arbitrary or disproportionate, no defect or deficiency could be found which would render it void, the measure itself not exceeding the limits of proportionality. Therefore, also under this aspect the Decision was found valid and lawful.

8. Discretion under Rule C 10.6 FINA Constitution

Finally, the Sole Arbitrator noted that while the Appellant had not contested that the measure which resulted in the setting up of the Stabilization Committee remained within the permissible limits of discretion, the Respondent had insisted that the Decision did not exceed these limits. The Sole Arbitrator retained again that exceptional circumstances in the meaning of Rule C 10.6 FINA Constitution had been fulfilled and that according to Rule C 10.6 FINA Constitution, the FINA Burea was therefore entitled to apply discretion to set up the Stabilization Committee. Furthermore, that in circumstances where both conditions were met, the FINA Bureau had acted with sufficient restraint and did not exceed the limits of its discretion. The Sole Arbitrator underlined that the sequence of events constituting the exceptional circumstances which prompted FINA to adopt such measure may be taken into account, as well as the fact that the Stabilization Committee - instead of the association's governing body, *i.e.* its Board of Directors – had only been established for a limited period of time, and that despite the appointment of the Stabilization Committee, the organisation of MSF and its functioning had been fully preserved.

Decision

In light of the foregoing, the Sole Arbitrator dismissed the appeal.

CAS 2021/A/8230 Real Betis Balompié S.A.D. v. SSC Napoli S.p.A.
29 June 2023

Football; Transfer (training compensation); Calculation of training compensation; Explicit wording on an agreement regarding training compensation; Burden of proof; Clarity of clause in employment contract

Panel

Mr Bernhard Welten (Switzerland), President
Mr Mark Hovell (United Kingdom)
Mr José Juan Pintó (Spain)

Facts

Real Betis Balompié S.A.D. (the "Appellant" or "Real Betis") is a football club with its registered office in Sevilla, Spain. The club is a member of the Royal Spanish Football Federation (the "RFEF") which in turn is affiliated to the Union of European Football Associations (the "UEFA") and the Fédération Internationale de Football Association (the "FIFA").

SSC Napoli S.p.A. (the "Respondent" or "Napoli") is a football club with its registered office in Napoli, Italy. The club is a member of the Italian Football Federation (the "FIGC") which in turn is affiliated to the UEFA and the FIFA.

On 1 February 2018, Real Betis and A., born on 3 April 1996 (the "Player") closed an employment contract valid from the date of signature until 30 June 2023 (the "Employment Contract"). With this Employment Contract, the Player became a professional player.

Between 21 June 2018 and 2 July 2018, the Parties exchanged several emails including drafts of transfer agreements in relation to the Player.

On 4 July 2018, Napoli deposited an amount of EUR 30,000,000 in the account of La Liga in favour of Real Betis.

On 6 July 2018, the Player was deregistered by the RFEF and the International Transfer Certificate (the "ITC") was delivered to the FIGC.

On 10 July 2018, Real Betis confirmed having received the payment of EUR 30,000,000.

On 13 July 2018, the Player was registered by the FIGC for Napoli.

On 18 September 2018, Real Betis contacted Napoli and asked for the payment of the training compensation pursuant to Article 20 and Annexe 4 of the FIFA Regulation on the Status and Transfer of Players ("RSTP") in the amount of EUR 595,000 as well as the solidarity contribution pursuant to Article 21 of the RSTP in the amount of EUR 1,275,000.

On 9 October 2018, Napoli fully rejected Real Betis' requests.

On 10 October 2019, Real Betis reiterated its requests to receive training compensation and solidarity payment in relation to the transfer of the Player.

On 21 October 2019, Napoli confirmed the payment of the solidarity contribution to Elche CF and its rejection of Real Betis' requests.

On 5 August 2020, Real Betis lodged a claim with the FIFA Dispute Resolution Chamber (the "FIFA DRC"). It requested FIFA to

order Napoli to pay Real Betis the amount of EUR 595,000 plus interest as overdue training compensation as regards the Player.

In essence, Napoli requested FIFA to dismiss the claim filed by Real Betis or, subsidiarily, to reduce the sum to be granted to Real Betis.

On 11 March 2021, the FIFA DRC issued the operative part of its decision in the matter, rejecting Real Betis' claim.

On 23 July 2021, FIFA notified the 11 March 2021 decision with the reasons (the "Appealed Decision").

On 13 August 2021, Real Betis filed its Statement of Appeal with the Court of Arbitration for Sport (CAS) against the Appealed Decision, in accordance with the Code of Sports-related Arbitration (the "CAS Code").

Reasons

The main dispute in these proceedings concerned whether the training compensation requested from Real Betis must have been paid on top of the compensation already paid by Napoli for the transfer of the Player.

Real Betis argued that, based on Articles 1 and 2 of Annexe 4 of the RSTP, it was entitled to receive training compensation from Napoli as the Player was 22 when he was transferred in July 2018. In addition, it alleged that the execution of Article 5 of the Employment Contract relating to the Spanish Real Decreto was a transfer within the meaning of Article 20 and Article 1 of Annexe 4 of the RSTP and, as a consequence, Real Betis was entitled to receive training compensation. Furthermore, it argued that Real Betis clearly indicated to Napoli that training compensation was not included in the buy-out fee and that the latter tried to find a way to attempt avoiding the payment of the training compensation. Moreover, Real Betis alleged that the buy-out fee and the training compensation are based on different reasons: the first is based on the Real Decreto and the second is based on the RSTP. Napoli had to pay the full buy-out fee in order to get the Player out of the Employment Contract and, as such, the buy-out fee was net of any solidarity contribution/training compensation.

For its part, Napoli argued that the payment of the buy-out fee foreseen in the Employment Contract can be considered as termination under the activation of a right recognized to the Player by the Spanish law. No contractual breach occurred, it was an early mutual termination between Real Betis and the Player. In the negotiations before paying the buy-out fee, Napoli tried to have a transfer agreement in place with Real Betis, confirming the amount stipulated in the Employment Contract. However, Real Betis tried to abuse its position and get further payments not stipulated in the Employment Contract. In this sense, Real Betis started a new discussion with Napoli instead of giving an interpretation of the clause in the Employment Contract. It was Real Betis drafting the buy-out clause of the Employment Contract without mentioning training compensation and solidarity contribution. Napoli disagrees with Real Betis' allegation that the buy-out fee is a net amount. As the present transfer happened under the FIFA regulations, solidarity contribution and training compensation are included in the transfer compensation which is the buy-out fee in the present matter.

This led the Panel to examine which were the applicable FIFA Regulations, as well as the wording and interpretation of the Article 5 of the Employment Contract agreed between Real Betis and the Player, which relied on the *"Real Decreto 1006/1985, de 26 junio, por el que se*

regula la relación laboral especial de los deportistas profesionales" in Spain.

1. Calculation of training compensation

The Panel acknowledged that Article 5 of the Player's Employment Contract with Real Betis corresponded to Article 16 of the Real Decreto and that it concerned the termination of the employment relationship.

In making its assessment of the case, the Panel considered Articles 13 and 16 of the Real Decreto, as well as Article 20 and Annexe 4 of the FIFA RSTP.

Article 2 of Annexe 4 RSTP states that training compensation is due when (i) a player is registered for the first time as a professional, or (ii) a professional is transferred between clubs of two different associations (whether during or at the end of his contract) before the end of the season of his 23rd birthday.

The Panel acknowledged that, in the present matter, no exception of the duty to pay training compensation pursuant to Article 2 para. 2 of Annexe 4 RSTP was applicable. In July 2018, the Player moved as a professional from Real Betis to Napoli. Therefore, Article 2 para. 1 lit. ii. of Annexe 4 RSTP was applicable.

Pursuant to the applicable provisions and the FIFA commentary, which is summing up the FIFA jurisprudence, only Real Betis as the Player's last training club could ask for a training compensation. The conditions set in the RSTP regarding the training compensation were fulfilled, giving Real Betis the general right to ask for such training compensation to be paid by Napoli as the Player's new club.

2. Explicit wording on an agreement regarding training compensation

The Panel concluded that, *in casu*, Article 5.1 of the Employment Contract was formally based on the Real Decreto. However, the effect of this provision is the same as for 'classical' buy-out clauses agreed upon between the former club and a player. Article 5.1 of the Employment Contract granted the Player the right (mandatory under the Real Decreto) to terminate the Employment Contract early by paying the amount of EUR 30 million to Real Betis. This Article 5.1 of the Employment Contract explicitly stated that it did not matter if it was the Player or a third party, e.g., Napoli as the new club, paying this buy-out fee. This further confirmed that Article 5.1 of the Employment Contract can be considered as a buy-out clause, independently of its basis in the Real Decreto.

The Panel acknowledged that in Article 5.1 of the Employment Contract there were no references to additional payments, like e.g., training compensation or solidarity contribution being made. Even if the Parties were not able to find a consensus to close a transfer agreement, Article 5.1 of the Employment Agreement had to be considered Real Betis' offer to the Player to early terminate the Employment Contract against the payment of EUR 30 million. This offer was accepted by the Player and Napoli by paying the requested amount for the Player to La Liga in favour of Real Betis. As a fact, there was no transfer agreement agreed and signed by all three parties involved, but instead, there was a first agreement between Real Betis and the Player (the Employment Contract) then there was the second agreement between the Player and Napoli (the new employment contract) and as a consequence indirectly there was an agreement between Real Betis and Napoli in relation to the buy-out fee of EUR 30 million for the Player's move.

The main dispute between the Parties was if the training compensation for Real Betis shall be paid by Napoli on top of the compensation of EUR 30 million paid pursuant to Article 5.1 of the Employment Contract. The Panel believed the wording of Article 5.1 of the Employment Contract was clear and generally no interpretation was needed. On the other hand, Article 5.1 of the Employment Contract did not contain any wording in relation to the training compensation.

The Panel held that it remained uncontested between the Parties that the Player's move from Real Betis to Napoli in July 2018 was a transfer, even if this happened outside of so-called standard transfers based on transfer agreements. As a consequence, the compensation of EUR 30 million stated in Article 5.1 of the Employment Contract has to be considered as a buy-out fee, regardless of its basis being the Real Decreto respectively Article 5.1 of the Employment Contract. The amount of this buy-out fee does not matter in relation to a training compensation as the training compensation is, pursuant to Article 5 para. 1 of Annexe 4 RSTP, calculated based on the costs of training of the new club. In other words, the training compensation is not a percentage of the compensation paid for the player's transfer, and, therefore, differs from the calculation of the solidarity contribution.

To summarise, the Panel held that in the present case the Parties did not sign any transfer agreement for the Player; therefore, no direct waiver of Real Betis as the former club to Napoli exists in relation to the training compensation related to the Player. Further, Real Betis and the Player did not agree on any waiver neither; Article 5.1 of the Employment Contract does not show any wording in this relation. As Real Betis and the Player did not include any wording in Article 5.1 of the Employment Contract regarding the training compensation and no other communication by Real Betis was filed in the present procedure in relation to an explicit waiver for the training compensation, the Panel had to find an answer to the Parties' dispute in looking in the FIFA and CAS jurisprudence.

3. Burden of proof

The Panel deemed that, since Real Betis appealed the DRC decision and claimed for the training compensation to be paid on top of the transfer compensation agreed in Article 5.1 of the Employment Contract, it was up to Real Betis to evidence that training compensation was payable by Napoli on top of the compensation stated in Article 5.1 of the Employment Contract.

In that respect, the majority of the Panel held that Real Betis did not discharge its burden of proof to show that its real intent of Article 5.1 of the Employment Contract was to receive the training compensation for the Player on top of the compensation of EUR 30 million and Napoli agreed to this. Not having discharged its burden of proof, the Panel, in following the FIFA and CAS jurisprudence, believed the training compensation of the Player had to be considered as being included in the compensation of EUR 30 million paid by Napoli.

4. Clarity of clause in an employment contract

The Panel was of the opinion that for Spanish clubs it would be easy to avoid any discussion about the training compensation to be paid on top of the compensation agreed by the former club and a player by adding one sentence to the Employment Contract, e.g.: For international transfers, the training compensation based on the RSTP shall be paid in addition to the before stated compensation.

Decision

In light of the foregoing, the Panel dismissed the appeal. It retained that the decision issued by the FIFA Dispute Resolution Chamber on 11 March 2021 should be upheld.

CAS 2022/A/8747 KF Tirana v. Tim Vayrynen & Kuopion Palloseura
13 November 2023

Football; Termination of the employment contract with just cause by the player; Admissibility of the Answer; Duty to send a formal default notice pursuant to Article 14bis RSTP; Financial difficulties of the club; Relation between termination based on Article 14bis RSTP and termination based on Article 14 RSTP; Just cause for termination based on Article 14 RSTP; Additional compensation

Panel
Mr Fabio Iudica (Italy), Sole Arbitrator

Facts

KF Tirana (the "Club" or the "Appellant") is a professional football club affiliated with the Albanian Football Association (the "FSHF"). Mr Tim Vayrynen (the "Player" or the "First Respondent") is a Finnish professional football player, born on 30 March 1993. Kuopion Palloseura (the "New Club" or the "Second Respondent") is a professional football club based in Kuopio, Finland, and which is affiliated with the Football Association of Finland (the "SPL").

On 21 January 2021, the Player signed an Individual Employment Contract with the Club as a professional to be valid from 1 January 2021 until 30 June 2022 (the "Employment Contract"). Article 8.1 of the Employment Contract provided for a remuneration of EUR 60,000 net for season 2020/2021 and EUR 120,000 net for season 2021/2022 in monthly salaries of EUR 10,000 net. In addition, the Employment Contract also provided for bonus payments as well as accommodation allowance. Pursuant to Article 12 of the Employment Contract: *"1. The Player can terminate the agreement with just cause with the Club noticing in writing fifteen (15) days prior, (…)"*.

On 8 April 2021, the Player's Agent wrote an e-mail to the Club' General Director, reminding that the Club had outstanding payments. On the same date, the Club replied to the Agent's e-mail, acknowledging the relevant outstanding payments (stating that the delay was due to an alleged *"pending issue with our bank accounts"*) and stating that the arrears would be settled by 5 May 2021.

On 19 May 2021, a meeting took place between the Player and the Club where the Club initiated discussions with the Player proposing the mutual termination of the Employment Contract. On 23 May 2021, upon request by the Club, the Player trained with the Club's U21 team. On 24 May 2021, the Agent wrote a new e-mail to the Club by which he requested clarification about a "financial proposal" apparently formulated by the Club. At the same time, the Agent informed the Club that *"the player will not accept to play with the under 21 squad; he will instead be available for selection for the 1st team for the last match of the season"*.

On 25 May 2021, the Club issued a disciplinary decision (Decision No. 8) against the Player and imposed a fine of EUR 3,000 on him based on the facts that *"the Player did not accept to play in the official match dated 21/5/2021 KF APOLONIA – KF TIRANA"* and that *"the Player did not appear nor notify the club of his absence in the official match dated 24/05/2021 KF TIRANA U21-KF KUKESI U21"*.

On 27 May 2021, the Player left the country and never returned to the Club.

On 28 May 2021, the Club issued a new disciplinary decision (Decision No. 9) against the Player, which imposed a fine of EUR 2,000 on him based on the facts that *"the player did not*

appear nor notify the club of his absence in the official training sessions on the date 25, 26, 27 May 2021" and that *"the player did not appear nor notify the club of his absence in the friendly match dated 27/05/2021 KF TIRANA – ALBANIA U19"*.

On the same day, the Agent wrote an e-mail to the Club, urging it to settle the outstanding salaries as well as to cancel the fines, and warning it that failure to do so would result in *"a lawsuit to FIFA"*.

On 29 May 2021, the Club sent an e-mail to the Player claiming that the latter had failed to attend the training session scheduled on that day. On 2 June 2021, the Club wrote a new e-mail to the Player urging him to come back to resume training within 3 days, failing which he would be considered liable of breaching the Employment Contract as well as the FIFA Regulations on the Status and Transfer of Players (the "RSTP").

On 3 June 2021, the Player replied to the Club through his legal counsel, claiming that the Club had committed multiple violations of the Employment Contract towards the Player such as, *inter alia*, failing to pay the amount of EUR 50,000 corresponding to outstanding salaries and, after the Player's refusal to agree on the premature termination of the Employment Contract, intimidations and blackmail (such as, *inter alia*, demotion to the youth team, threats of defamation and disciplinary sanctions), as a consequence of which he was forced to leave the country. Finally, the Player's counsel informed the Club of the unilateral termination of the Employment Contract by the Player based on just cause under Article 12 of the Employment Contract as well as Article 14 and 14bis of the FIFA RSTP. The Player also gave the Club a deadline until 18 June 2021 to settle its obligations towards him, in the absence of which he would lodge a claim before FIFA.

On 17 June 2021, the Club rejected the Player's allegations and challenged the unilateral termination of the Employment Contract. With regard to the Player's outstanding salaries, the Club acknowledged its default of payment, making reference to some financial difficulties, but considered that the amounts requested by the Player were excessive. Finally, the Club requested the Player to come back and resume work by 22 July 2021. The Club failed to make the requested payment within the relevant deadline of 18 June 2021 set by the Player.

On 22 June 2021, the Player granted the Club a final time-limit of 7 days, failing which he would start proceedings before FIFA, which he did on 16 July 2021 as the Club had failed to meet the new deadline of 29 June 2021 set by the Player.

On 3 July 2021, the Player signed an employment contract with the New Club, to be valid from 1 August 2021 until 30 November 2022, for a monthly salary of EUR 7,000 gross plus housing allowance and bonus (the "New Employment Contract").

In his claim filed before the FIFA DRC on 16 July 2021, the Player maintained that, besides failing to pay his monthly salaries for a prolonged period, the Club had forced him to prematurely terminate the Employment Contract due to a series of intimidating and abusive behaviours, giving him just cause for termination on the basis of Article 14 of the FIFA RSTP.

On 27 January 2022, the FIFA DRC rendered the Appealed Decision. The FIFA DRC noted that the Club did not dispute that the equivalent of 4 monthly salaries of the Player amounting to EUR 40,000 had remained unpaid. After examining the applicable FIFA regulations and jurisprudence with respect to the conditions to be met for a player to have just cause for termination, the FIFA DRC

found that in the present case, the criteria under Article 14bis of the FIFA RSTP were not met, in consideration of the absence of the required default notice. However, it was undisputable that the Club had substantially breached its main obligation to pay the Player's remuneration while demonstrating that it was not genuinely interested in the Player's services by demoting him to the youth team. Moreover, the FIFA DRC found that the Club had not followed any specific disciplinary proceeding or due process when imposing the fines on the Player. As a consequence, the FIFA DRC believed that at the time of termination, on 3 June 2021, *"it could not reasonably be expected from the player a continuation of the contractual relationship with the club"*; therefore, the Player was found to have just cause for termination based on Article 14 of the FIFA RSTP.

With regard to the consequences of such termination, it was established that the Player was entitled to his outstanding remuneration (EUR 40,000) plus interest, as well as a compensation for breach. As for the latter, considering the absence of a compensation clause in the Employment Contract, the FIFA DRC turned its attention to Article 17(1) of the FIFA RSTP. Therefore, the FIFA DRC concluded that the amount of EUR 130,000 (i.e., the residual value of the Employment Contract from the date of termination until its natural expiry date), served as the basis for calculation of the relevant compensation for breach. In consideration of the employment contract concluded by the Player with the New Club, it was found that the Player was able to mitigate his damages by EUR 77,000 (EUR 7,000 x 11 monthly instalments), which amount was deducted from the starting amount of compensation; in addition, pursuant to Article 17(1) lit ii) of the FIFA RSTP, the FIFA DRC awarded an additional compensation of three monthly salaries (EUR 30,000), considering that the termination took place due to overdue payables by the Club. Therefore, the Appealed Decision ordered the Club to pay an amount of EUR 83,000 as compensation for breach, plus interest.

On 22 March 2022, the Appellant filed an appeal with the CAS against the First Respondent, the Second Respondent and FIFA with respect to the Appealed Decision. On 29 November 2022, a hearing took place in the present case, by videoconference.

Reasons

1. Admissibility of the answer

It was undisputed by the Parties that although the First and the Second Respondent had timely submitted their Answers to the CAS Court Office via e-mail, both had failed to timely provide a hard copy of their Answers by courier delivery to the CAS Court Office, or to file their submissions via the CAS E-filing Platform, in accordance with Article R31 of the CAS Code and further to the CAS Court Office instructions in this regard. Both Respondents had confirmed having transmitted their Answers by e-mail only due to an alleged misunderstanding about the correct way of filing submissions with the CAS Court Office but neither had invoked any exceptional circumstance or any objective impossibility for not complying with Article R31 of the CAS Code.

The Sole Arbitrator determined that there was no valid justification for either of the Respondents as to their failure to comply with the requirements of Article R31 of the CAS Code with respect to the filing of their Answers. Accordingly, the Answers submitted by the Respondents via e-mail were not admitted to the case file. On the other side, the Sole Arbitrator also held that in accordance with the general principle of the parties' right of defence, irrespective of the failure to file their Answer in accordance with the

procedural requirements of the CAS Code, the Respondents still had the right to orally provide their statements of defence, albeit strictly limited to responding to the Appellant's arguments in the Appeal Brief, during the hearing.

2. Duty to send a formal notice pursuant to article 14 bis RSTP

The Appellant claimed that it was the Player who had breached the Employment Contract, and that the Player had failed to put the Club on prior notice. As a consequence, the First Respondent was not entitled to terminate the Employment Contract according to Article 12 of the Employment Contract and Article 14bis of the FIFA RSTP.

In this respect, the Sole Arbitrator reminded that the Player had sent, for the first time on 8 April 2021, a letter from his Agent, in which the Club was warned of the failure to pay his salaries, and that the Club had subsequently acknowledged its debt towards the Player and reassured the Agent that the relevant amount would be settled by 5 May 2021. In addition, a second letter of warning was also notified to the Club by the Agent on 28 May 2021, after the unsuccessful expiry of the time limit of 5 May 2021 indicated by the Club.

The Sole Arbitrator recalled that in order to unilaterally terminate an employment contract based on the provision of Article 14bis of the FIFA RSTP, a player was indeed required to send a formal default notice to the club granting the latter at least 15 days to comply with its financial obligations towards the player and that the purpose of sending a formal warning to the club was to draw the club's attention to the fact that its conduct was not in accordance with the contract and to allow it to remedy the default with a view to preserve the contractual relationship between the parties.

In the present case, the Sole Arbitrator was satisfied that the Club had been fully aware of its default towards the Player and moreover, between the first warning on 8 April 2021 and the date of termination, i.e., 3 June 2021, had almost 2 months in order to make the outstanding payments but had failed to do so. For that reason, the Sole Arbitrator held that the 15-days requirement had been met by the Player in the present case. The Club had even more than 15 days to cure its default of payment but had not shown any diligence towards the fulfilment of its obligations.

3. Financial difficulties of the club

The Club admitted its default of payment of the Player's salaries in the amount of EUR 40,000, but alleged that it was due to exceptional financial difficulties during the course of the Employment Contract.

The Sole Arbitrator recalled that a club's financial difficulties were not considered to be justified reasons for not paying a player's salary, which is the main obligation deriving from the employment contract, and that in any event, the Club had not provided any evidence of its allegations in this respect.

4. Relation between termination based on Article 14 bis RSTP and termination based on Article 14 RSTP

In passing, the Sole Arbitrator reminded that failure by a player to comply with the requirement to send a formal final warning to the club in accordance with Article 14bis of the FIFA RSTP (*quod non*, see para. 2 above) did not necessarily prevent him/her from terminating the employment contract. Indeed, if the persistent failure of the club to comply with its obligations caused an irreversible damage to the relationship of trust between the parties that did not allow the player to rely on the continuation of the contractual

relationship, the latter had a just cause for termination on the basis of Article 14 of the FIFA RSTP. This was the case here, as explained below.

5.Just cause for termination based on Article 14 RSTP

For the Sole Arbitrator, the chain of the subsequent events showed that in the period between the first letter of warning and the date of termination of the Employment Contract, not only had the Club persisted in its failure to fulfil the relevant payments, but it had also engaged in discussions with the Player where it had proposed to the Player the mutual termination of the Employment Contract. Furthermore, soon after the Player's refusal to accept the mutual termination, the Player had been requested to train and play with the U21 team, for which the Club had not provided any valid reason; as the Player had not accepted such a decision, the Player had been imposed disciplinary sanctions.

The Sole Arbitrator observed that the Club was not entitled to assign the Player to the U21 team, as the Employment Contract confirmed that the Player was signed by the Club in order to play with the first team. Therefore, in the Sole Arbitrator's view, the Player was not obliged to accept his assignment to the U21 team, which also meant that the imposition of disciplinary sanctions for this reason was unlawful.

In consideration of these circumstances, the Sole Arbitrator held that the Club's failure to pay the Player's salaries in the amount of EUR 40,000 (which is almost 70% of the Player's receivables for the first sporting season) since the beginning of their contractual relationship, together with the Club's failure to comply with the promise of payment put forward in its reply to the Agent's letter of 8 April 2021, along with the decision of the Club to assign the Player to the second team with no valid reasons and the decision to impose disciplinary sanctions on him without any guarantee of due process, was a clear indication that the breach had reached such a level of seriousness that the Player could not trust in the fulfilment by the Club of its financial obligations or that the Club was trying to force the Player to accept different contractual terms or to leave, therefore giving the latter just cause for termination (at least) on the basis of Article 14 of the FIFA RSTP.

6. Additional compensation

For the Sole Arbitrator, although it had been established that the Player had just cause to terminate the Employment Contract on the basis of Article 14 of the FIFA RSTP, it was undisputed that the Club was, *inter alia*, for failure to pay the Player's outstanding salaries, which had mainly contributed to building just cause for the Player's unilateral termination, thus falling within the scope of Article 17(1) lit. ii of the FIFA RSTP.

In this respect, the Sole Arbitrator held that Article 17(1) lit. ii of the FIFA RSTP clearly established a direct and automatic entitlement to the additional compensation provided for in case of early termination of the contract being due to overdue payables. However, Article 17(1) lit. ii of the FIFA RSTP did not require that the employment contract be terminated on the basis of Article 14bis of the FIFA RSTP, nor was it requested that overdue payables be the only cause for termination. For the Sole Arbitrator, this corroborated his decision that additional compensation was applicable to the present case.

Further, the Sole Arbitrator dismissed the Appellant's requests that the entire value of the New Employment Contract, i.e also housing allowance and bonus payments, be deducted from the amount of compensation to be awarded to the Player. With regard to the

housing allowance, the Sole Arbitrator noted that when assessing the residual value of the Employment Contract in order to determine the basis for calculation of the compensation for breach, the FIFA DRC had not considered any accommodation allowance. As a consequence, the Sole Arbitrator believed that no deduction applied with respect to housing allowance under the New Employment Contract either. With regard to match bonuses, the Sole Arbitrator observed that the Appellant had not proved that the Player actually met the conditions in order to obtain payment of the relevant bonuses.

Decision

Based on all the above, the Sole Arbitrator confirmed the Appealed Decision in its entirety.

CAS 2022/A/8802 Nijat Rahimov v. International Weightlifting Federation (IWF) & CAS 2022/A/9048 IWF v. Nijat Rahimov
20 September 2023

Weightlifting; Doping (use of a prohibited method); Legal interest to appeal; Urine substitution; Liability of the athlete for the use of a doppelgänger; Application of Article 2.5 instead of Article 2.2 of the WADA Code; Departure from testing standards; Conditions to establish a substance use violation

Panel
Mr Hans Nater (Switzerland), President
Mr Jeffrey Benz (USA)
Mr Romano Subiotto KC (United Kingdom)

Facts

Mr Nijat Rahimov (the "Athlete" or "Mr Rahimov") is an elite weightlifter and 2016 Olympic Gold Medallist. The Athlete has competed in international weightlifting events since 2009. In 2013, the Athlete tested positive for two prohibited anabolic androgenic steroids and was sanctioned by the IWF for a period of two years. Following the expiration of his period of ineligibility on 19 June 2015, the Athlete changed his nationality to compete for Kazakhstan.

The Athlete won the gold medal in the men's 77 kg category at the 2015 IWF World Championships in Houston, USA. On that occasion he was subjected to an in-competition doping control where a urine sample no. 1582115 ("the World Championship sample") was collected from him by the United States Anti-Doping Agency ("USADA") on behalf of the IWF. No prohibited substances were subsequently detected in that sample.

Between March and July 2016, the Athlete was subject to target-testing performed by the National Anti-Doping Organisation of Hungary ("HUNADO") on behalf of the IWF:
- On 15 March 2016 a urine sample no. 3986455 (the "15 March 2016 sample") was supposedly collected from the Athlete in the presence of the Athlete's coach and Kazakhstan national team coach, Mr Victor Ni, during an out-of-competition testing mission at a training centre in Almaty, Kazakhstan. The sample revealed no prohibited substances. Nineteen other Kazakhstan weightlifters also provided samples during that visit by HUNADO.

- On 10 June 2016, a urine sample no. 3987560 (the "10 June 2016 sample") was supposedly collected from the Athlete in the presence of the Kazakhstan national team Head Coach, Mr Alexey Ni, during an out-of-competition testing at a training centre in Almaty, Kazakhstan. The sample revealed no prohibited substances. Seven other Kazakhstan national team weightlifters also provided samples during that visit by HUNADO. The HUNADO doping control officer ("DCO") reported that the coaches had brought a person other than the Athlete to the sample collection for the Athlete.

- On 17 July 2016, a urine sample no. 4045254 (the "17 July 2016 sample") was supposedly collected from the Athlete in the presence of the Athlete's coach and Kazakhstan national team coach, during an out-of-competition testing at the Kazzhol Hotel in Almaty, Kazakhstan. The sample revealed no prohibited substances. Six other Kazakhstan national team weightlifters also provided samples during that mission.

On the day of each of these testing missions, the Athlete was registered in his ADAMS Whereabouts Information to be located at his

home address between 8 a.m. and 9 a.m., some 500 m from the national training centre of Almaty, Kazakhstan.

On 18 July 2016, a urine sample no. 3950218 (the "18 July 2016 sample") was supposedly collected from the Athlete by and under the authority of the Kazakhstan National Anti-Doping Organisation ("KAZ-NADO") during an out-of-competition doping control for athletes selected to compete in the 2016 Olympic Games to be held in Rio de Janeiro, Brazil. The 18 July 2016 sample revealed no prohibited substances.

On 10 August 2016, the Athlete won the gold medal and broke the Olympic and world records in the men's 77 kg category at the 2016 Olympic Games in Rio de Janeiro, Brazil. After the competition he was subjected to an in-competition doping control where a urine sample no. 6222194 ("the Olympic sample") was collected from him by the International Olympic Committee. The Olympic sample revealed no prohibited substances.

In September 2019, the World Anti-Doping Agency ("WADA") Intelligence & Investigation Department ("WADA I&I") initiated an investigation known as "Operation Arrow" into the existence of urine substitution at the time of sample collection in the sport of weightlifting. As part of that investigation, negative samples provided by weightlifting athletes since 1 January 2012 were, where available, subjected to DNA testing to discover whether any of these negative samples supposedly provided by a particular athlete were in fact provided by another person, as indicated by differences in the DNA between the various samples attributed to that athlete.

In respect of the Athlete, the World Championship sample, the 10 June 2016 sample and the Olympic sample existed and were available for DNA analysis. However, the 15 March 2016 sample, the 17 July 2016 sample and the 18 July 2016 sample (the "additional samples") had been discarded and were therefore not available for DNA testing. A comparison of the DNA analyses of the World Championship sample and the Olympic sample, indicated that they came from the Athlete. A comparison of the DNA analysis of the 10 June 2016 sample indicated that that sample came from another person, that is to say, not the Athlete.

Since DNA analysis was not possible for the additional samples, WADA I&I had the Athlete's Biological Passport ("ABP") examined to analyse the steroid profile data recorded from those samples. Dr Hans Geyer, the Director of the Athlete Passport Management Unit of the Cologne WADA-accredited laboratory, concluded in an Expert Report dated 27 March 2021 that the testosterone/epitestosterone ratios of the 15 March 2016 sample, the 17 July 2016 sample and the 18 July 2016 sample showed similar low testosterone/epitestosterone as the 10 June 2016 sample, being ratios below the lower individual reference limit of the athlete and therefore atypical for the Athlete. Dr Geyer concluded that the 15 March 2016 sample, the 17 July 2016 sample and the 18 July 2016 sample originated from other individuals.

On 18 January 2021, the International Testing Agency ("ITA") served, on behalf of the IWF, a Notice of Charge on the Athlete. On 3 March 2021, the Athlete advised the ITA he was challenging the asserted anti-doping rule violation (the "ADRV"). On 10 March 2021, the ITA advised the Athlete that the matter would be referred to the CAS Anti-Doping Division ("CAS ADD"). On 22 March 2022, the CAS ADD rendered an Award (the "CAS ADD Award") in which the Athlete was found to have committed an Anti-Doping Rule Violation of Use of a Prohibited Method pursuant to Article 2.2 of the IWF Anti-

Doping Rules and sanctioned with a period of ineligibility of eight years.

On 12 April 2022, the Athlete filed an appeal before the CAS with respect to the CAS ADD Award. On 22 September 2022, a hearing was held at the headquarters of the CAS in Lausanne, Switzerland.

Reasons

1. Legal interest to appeal

The Athlete submitted that the IWF lacked any procedural legal interest to request the Panel to order that the Athlete had committed an ADRV for use of one or more Prohibited Substances, and that, as a result, its appeal should have be declared inadmissible. The IWF acknowledged that it had filed an appeal as a matter of principle, and that the Panel's finding on this issue would not impact the sanction to be imposed on the Athlete. In the Athlete's view, this showed that the IWF lacked any legal interest.

The Panel's found that the IWF, like any federation, had a clear interest in fair sport and that by pursuing all possible ADRVs, even if there was no impact on sanction, it was merely working on fulfilling its essential mission. Therefore, the IWF had a sufficient procedural legal interest in the present appeal. That finding did not mean, however, that the Panel had determined the merits of the appeal filed by the IWF.

2. Urine substitution

The Athlete submitted that, since it was uncontested between the Parties that he was not present at the doping controls of 15 March 2016, 10 June 2016 and 17 July 2016 and that the Doping Control Forms ("DCF") signed at these doping controls were in fact signed by a person that was not the Athlete, there was no urine collected from him at these doping controls, and it was therefore materially impossible that his urine had been substituted. In the Athlete's view, urine substitution for the purpose of establishing the use of a Prohibited Method M2 referred to the scenario where the concerned athlete provides a urine sample, which is later altered by being substituted with another sample; the facts of the present case manifestly fell outside of the scope of the application of Prohibited Method M2.

The Panel found that definition of the term *"Physical and Chemical Manipulation"* under class M2 of the WADA Prohibited List did not exclude the substitution of an athlete's urine at the time of sample collection through the substitution of the provider of the sample (a *doppelgänger*). More specifically, the definition did not *per se* require that urine substitution necessarily referred to the action of replacing the urine that was already collected with other urine. Substituting samples could occur through replacing or altering the urine contained in a bottle by other urine or by replacing the bottle containing the urine with another bottle. As from there, there was no reason not to consider that it had been the drafters' intention to prohibit the method consisting in replacing the human vessel containing the urine by another human vessel providing another urine. This in addition to including in the definition other accepted methods of urine substitution. Moreover, the use of the terms *"including, but not limited to"* clearly meant that *"Tampering, or Attempting to Tamper, to alter the integrity and validity of Samples collected during Doping Control"* could take different forms and that the scope of physical manipulation methods was potentially wide.

3. Liability of the athlete for the use of a doppelgänger

The IWF contends that Article 2.2 of the IWF ADP provided for the strict liability of the

athlete for the use of Prohibited Methods and that it was therefore not required to demonstrate that the Athlete had actual or constructive knowledge of the likelihood that his sample would be provided by someone else.

The Panel recalled that, in a previous case, it had been decided that the conditions to be met for an athlete to be found guilty for use of a Prohibited Method through sample substitution were driven by the need to avoid the scenario where *"a third party who is entirely unconnected with the athlete, and in respect of whom the athlete has no knowledge or control, later substitutes the content of the athlete's sample"*. In the Panel's view, this *ratio* equally applied in the present case where the Athlete argued that he had not been notified directly of the doping controls and therefore could – at least theoretically – not have had knowledge of the fact that a doppelgänger would present himself *in lieu* of the Athlete at such doping controls.

As a result, the Panel considered that an athlete was liable for the use of a doppelgänger at doping controls where he was supposed to be tested if (a) he had committed some act or omission that facilitated the use of a doppelgänger; and (b) if he had done so with actual or constructive knowledge of the likelihood that substitution would occur. In the present case, as for (a) the Athlete had intentionally filed false Whereabouts Information, making the DCO believe that he was training in Almaty and was available to be tested that day in Almaty, while he was actually training in a training centre in Tekeli (some 300 km away). For the Panel, by providing misleading Whereabouts Information and not attending the doping controls on 15 March 2016, 10 June 2016, 17 July 2016 and 18 July 2016, the Athlete had allowed for sample substitution to occur. Moreover, as for (b), the Panel was of the view, based on the evidence on record, that the coaches were orchestrating the sample substitution using a doppelgänger at the doping controls *in lieu* of the Athlete, and that the Athlete, as a professional high-level athlete who had formerly been found to have committed a doping offense and was in the preparation phase for the 2016 Olympic Games in Rio in a sport under close scrutiny for doping cases, was clearly – or at least ought to have been – aware of the likelihood of frequent doping controls. It was just not credible that the Athlete had been unaware of the doping controls and of the presence of doppelgängers (as acknowledged by his coach) at the doping controls.

4. Application of Article 2.5 instead of Article 2.2 of the WADA Code

Considering the Athlete's involvement and knowledge of the sample substitution process through the use of doppelgängers, the Panel rejected the Appellant's argument that the IWF should have considered charging the Athlete under Article 2.5 instead of Article 2.2 of the IWF ADP. The Panel recalled that the Comment to Article 2.5 of the WADA Code explained that this article prohibits conduct which subverts the doping control process but which would not otherwise be included in the definition of Prohibited Methods. As urine substitution was a prohibited method under Article 2.2 of the WADA Code in connection with M2.1 of the Prohibited List, recourse to Article 2.5 of the WADA Code was excluded in such case.

5. Departure from testing standards

The Athlete contended that HUNADO had failed to notify him personally of the sample collection as well as to report to WADA that the samples had not been provided by the Athlete and to conduct prompt investigations about the identity issue. As a result of these gross departures from the ISTI, especially in the notification process and the review of the

sample provider's identity, these tests could not have adverse consequences for him.

In the Panel's view, even if it were demonstrated that the Athlete was not notified of the doping controls that took place on 15 March 2016, 10 June 2016, 17 July 2016 and 18 July 2016, it had not been established that such failure to notify the Athlete could reasonably have caused the sample substitution through the use of doppelgängers. The Athlete had to have been aware of the sample substitution enterprise and the likelihood of the use of doppelgängers at those doping controls; he had also facilitated the sample substitution through the use of misleading information in his Whereabouts Information, which had led HUNADO to assume he was available in Almaty on the days they were testing there. The same applied with respect to the other alleged departures from testing standards by HUNADO. Even if justified – an issue that could remain undecided – the Panel was of the view that, in the context of the present matter where the Athlete ought to have known about the sample substitution enterprise and the likelihood of the use of doppelgängers at his doping controls and had facilitated such use, possible departures from testing standards – even considered together – could in any case not have caused the ADRV.

6. Conditions to establish a substance use violation

The IWF submitted that the Athlete's samples substitution through the use of doppelgängers provided compelling inferential evidence that he had also committed an ADRV consisting of the use of a prohibited substance, because the use of a prohibited substance was the only explanation for the Athlete's use of a prohibited method of urine substitution in this case.

The Panel held that, whilst it might have seemed possible or even probable that the absence of the Athlete from the four testing sessions, and the use of someone else in his place, had been to enable him to benefit from ingesting prohibited substances undetected, it was not comfortably satisfied to draw that inference in the absence of any other evidence. Moreover, the facts that the Athlete had already committed an ADRV in the past, that he had performed extraordinarily well at the 2016 Olympic Games and thereafter experienced a significant drop-off – even combined – were not convincing enough for the Panel to be comfortably satisfied that the Athlete had used Prohibited Substances in the present matter. In short, to establish a substance use violation, anti-doping organisations had to provide more than mere speculation about use; they had to be able to show what had been used and that it was present in samples, even if undetected, when those samples had been collected, and that the substance used was prohibited in or out of competition as the case may be.

Decision

Based on all the above, the Panel found that the Athlete had committed an ADRV of Use of a Prohibited Method under Article 2.2 of the IWF ADP, for which a period of ineligibility of four years was to be imposed under Article 10.2 of the IWF ADP, but that the ADRV of Use of a Prohibited Substance under Article 2.2 of the IWF ADP had not been established. As a result, since the Athlete had already received a two-year suspension for the use of anabolic steroids on 18 November 2013, and therefore the ADRV referred to above was the Athlete's second ADRV, the period of ineligibility had to be *"twice the period otherwise applicable to the second anti-doping rule violation treated as if it were a first violation, without taking into account any reduction under Article 10.6"* in application of Article 10.7.1 (c) of the

IWF ADP – that is to say a period of ineligibility of eight years.

CAS 2022/A/8881 Iván Santiago Diaz v. MŠK Žilina
28 November 2023

Football; Employment-related dispute; Choice of law and applicable law; Ambiguous choice of law provision in employment contract with an international dimension; Validity of waiver of remaining salaries and duress under Article 21 SCO; Ascertainment of content of foreign law

Panel
Mr András Gurovits (Switzerland), Sole Arbitrator

Facts

Mr Iván Santiago Diaz (the "Appellant" or the "Player") is a professional football player of Argentinian nationality.

MŠK Žilina, a.s. (the "Respondent" or the "Club") is a professional football club in Slovakia which is affiliated with the Fédération Internationale the Football Association ("FIFA"), the governing body of football headquartered in Zurich, Switzerland.

On 16 September 2017, the Player and the Club (the "Parties") entered into a 'Contract on Professional Performance of Sport' (the "Contract") with a duration from 1 October 2017 until 31 December 2020. Pursuant to Article II para. 2) let. c of the Contract, the Player was to receive a basic monthly salary of EUR 10'000 net in the period from 1 July 2019 until 31 December 2020. The salary was payable on the 15th day of each following month.

Article VI para. 3) let. a of the Contract provided that in *"case the Player fails to meet the obligations arising from the Contract as well as in case of weak and reckless performance of the Player"* the Club has the right to *"1. decrease the basic monthly salary after the prior written notice from the Club, 2. Decrease the basic monthly salary up to 50% for the breach of conditions stated in the article IV sec. 1 of the present contract, 3. Reclassify the Player to the B team of the club with adequate decrease of the basic monthly salary"*. Pursuant to Article VI (3) (b) of the Contract, the Club was, under the aforementioned conditions, also entitled to *"terminate the present contract with immediate effect in accordance with § 42 sec. 1 of the act no. 440/2015 Coll. On Sport"*.

By letter dated 11 August 2020, the Club informed the Player *"that as a consequence of your reclassification to the B team of the Club as of 01 July 2020 your monthly salary as July 2020 will be reduced by 50%"*.
On 21 January 2021, the Player lodged a first claim with the FIFA Dispute Resolution Chamber (the "FIFA DRC") requesting payment of EUR 30'000 net corresponding to half of his salaries between July 2020 and December 2020.

On 8 March 2021, the Player signed a document headed 'Reconciliation of Receivables' (the "Reconciliation of Receivables") which was drafted on the Club's letterhead. It provided, among others: *"2) The Player re-acquired amateur status on 18 February 2021 and would like to be registered with new club ŠKF Sereď […] although the Player and the new club would like to file second official request for registration of the Player with Registration Department of the Slovak FA, the Club informed the Player that it shall confirm such request only after the Player signs and confirms content of this letter of Reconciliation of Receivables. 3) Provided that the Club confirms the request of the new club and the Player for his registration in the new club, this reconciliation comes into effect and upon which any and all rights, obligations and duties arising from the Contract due to the Player by the Club including any and all monetary*

obligations are fulfilled, and the Player has no further demands or receivables due from the Club".

On 12 March 2021, the Player withdrew his first claim before the FIFA DRC.

On 17 September 2021, the Player lodged his second claim before FIFA, requesting payment of EUR 30'000 net corresponding to half of his salary between July 2020 and December 2020, plus 5% late payment interest.

On 24 March 2022, the FIFA DRC held that on 8 March 2021, the Player had signed a document, pursuant to which he had validly waived his entitlement for outstanding salary payments. The Player had not provided sufficient evidence which supported his contention that he had been under straitened circumstances when signing the waiver and that the Club could have blocked the Player's registration with a new club based on the regulations of the Slovak Football Association ("SFA"). In conclusion, the FIFA DRC found that the Player had waived his entitlement, and, as a consequence, rejected the Player's claim (the "Decision").

On 16 May 2022, the Appellant filed a Statement of Appeal with the CAS with respect to the Decision rendered by the FIFA DRC on 24 March 2022.

Reasons

1. Choice of law and applicable law

The Appellant argued that the FIFA Statutes and Regulations and, subsidiarily, Swiss law shall be the law applicable on the merits in the present case. The Respondent, on the other hand, was of the opinion that the laws of the Slovak Republic shall be applicable.

In light of the Parties' disagreement, the Sole Arbitrator commenced with some general observations on the determination, in CAS proceedings, of the applicable law on the merits. The starting point for determining the applicable law on the merits – first and foremost – was the *lex arbitri*, *i.e.*, the arbitration law at the seat of the arbitration. Since according to Article S1 and Article R28 CAS Code of Sports-related Arbitration (the "Code"), the CAS has its seat in Switzerland, Swiss arbitration law applied. According to Article 176 para. 1 of the Swiss Federal Act on Private International Law ("PILA"), the provisions of Chapter 12 PILA, governing international arbitration proceedings, shall apply if the place of residence and/or domicile of at least one party was outside Switzerland at the time of the execution of the arbitration agreement. This prerequisite was fulfilled in the case at hand. In continuation, Article 187 para. 1 PILA provides – *inter alia* – that *"the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected"*. According to the legal doctrine, the choice of law made by the parties could be tacit and/or indirect, by reference to the rules of an arbitral tribunal. By agreeing to arbitrate a dispute according to the CAS Code, the parties had entered into a choice-of-law agreement, and had also agreed to submit to the conflict-of-law rules contained therein. The conflict-of-law provision in the Code is Article R58, which, essentially, provides that the dispute shall be decided first and foremost according to the *"applicable regulations"*. In CAS appeal proceedings against decisions by FIFA judicial bodies the applicable regulations within the meaning of Article R58 of the Code are the regulations of FIFA. Article 56 para. 2 of the FIFA Statutes provides that in case of an appeal before the CAS, the CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.

2. Ambiguous choice of law provision in employment contract with an international dimension

The Sole Arbitrator further noted that the Respondent referred to Article IX para 1) of the Contract and argued that the laws of the Slovak Republic should apply. The Sole Arbitrator, noting that while indeed the clause referred to by the Respondent referred to the laws of the Slovak Republic, at the same Article IX para. 1) of the Contract also provided that the *"contractual parties agree that their mutual rights and obligations shall be exercised under the regulations of Slovak Football Association, UEFA and FIFA"*. Hence the choice of law provision under the Contract was contradictory and did not allow for a clear conclusion as to the Parties' will in respect of the applicable law, as contended by the Appellant. Considering that Article IX para. 1) of the Contract did not allow for a clear conclusion as to the Parties' will in respect of the applicable law, the Sole Arbitrator held that taking into account the statutory framework of FIFA regarding disputes between clubs and players with respect to employment contracts with an international dimension, the FIFA Statutes and Regulations shall also apply in the matter at hand and, as foreseen in the FIFA Statutes, Swiss law shall apply subsidiarily.

3. Validity of waiver of remaining salaries and duress under Article 21 SCO

Thereupon the Sole Arbitrator turned to the main questions in the present proceedings, *i.e.* whether by signing the Reconciliation of Receivables, the Player had signed a waiver of his claims against the Club. The Player contested that he had signed a waiver arguing that the document signed was merely a "statement of untrue facts" in that the Club had failed to pay 50% of his salary for the last six months of his Contract; and whether in case the above was to be answered in the affirmative, whether the Reconciliation of Receivables was valid or whether it would violate Article 21 para. 1 Swiss Code of Obligations ("SCO") and was therefore null and void as contended by the Player.

Analysing in particular para. 3 of the Reconciliation of Receivables, providing that *"… any and all rights, obligations and duties arising from the Contract due to the Player by the Club including any and all monetary obligations are fulfilled, and the Player has no further demands or receivables due from the Club"*, the Sole Arbitrator determined that indeed, that declaration had to be understood, under the given circumstances, as that the Player confirmed to waive his claims for payments that were due under the Contract. The Sole Arbitrator further noted that the Reconciliation of Receivables was executed on 8 March 2021, *i.e.* more than two months after expiry of the Contract and that at that date, all the Player's alleged claims for unpaid salaries had fallen due. Further, the waiver was conditional upon the Club confirming the Player's registration with the new club. The Club having undisputedly confirmed the registration, this latter condition was fulfilled. Accordingly, the Sole Arbitrator held that by signing the Reconciliation of Receivables, the Player had signed a waiver.

Thereupon the Sole Arbitrator turned to the issue of the validity of the waiver and the Player's argument that he had found himself in straitened circumstances caused by the regulations of the SFK under which any registration of an amateur player has to be confirmed by his former club and any silence or non-action of the former club is deemed a rejection of the application; that these circumstances and the resulting vulnerability of the Player were exploited by the Club in order to force the Player to sign the Reconciliation of Receivables. Further, there was a clear disparity between performance by the Player and consideration by the Club in that the Player had to waive a claim of EUR 30'000 while he

did not receive anything in return except what should have been given to him anyway, *i.e.* consent to the registration with the new club, and thus free and unhindered access to a new employment. The Player contented that accordingly, all requirements of Article 21 para. 1 SCO were fulfilled.

The Sole Arbitrator, referring to the long-standing practice of the Swiss Federal Tribunal, underlined that duress in the meaning of Article 21 SCO required a manifest disparity between performance and consideration; in addition, the party concerned must have been in straitened circumstances and the other party must have exploited the vulnerability of such party. The Sole Arbitrator noted that on 8 March 2021, when signing the Reconciliation of Receivables, the Player was without contract, and that it was undisputed that at that time, the Player had an offer to join a new club, but that his registration with the new club required a confirmation by the Respondent. However, following the termination of the Contract, the Club – in circumstances where it did not have, and had not raised any claims against the Player, and without having any reasons to refuse the Player's registration with a new club - requested the Player to sign, prior to providing the necessary confirmation of the Player's registration, the 'Reconciliation of Receivables' which expressly stated that the Club would not provide its confirmation of the Player's registration with the new club unless the Player waived his claims against the Club for all unpaid salaries under his former contract. The Sole Arbitrator found that the Club's conduct represented a textbook example for "duress" within the meaning of Article 21 SCO. Noting finally that the Player had complied with the one-year period for challenge set out in Article 21 para. 2 SCO, the Sole Arbitrator found that, as a consequence, the Reconciliation of Receivables was invalid.

4. Ascertainment of content of foreign law

Finally, and in light of the dispute between the Parties regarding the applicable law, the Sole Arbitrator developed that in case foreign law was applicable to a specific case, pursuant to Article 16 PILA, the Panel may request the parties to co-operate in ascertaining the relevant content of the law applicable to the merits, and that in case of failure by the parties to establish said content, Swiss law applied. In this context, the Sole Arbitrator, noting that in the present proceedings, the CAS Court Office had expressly requested the Parties to provide their positions on the applicable law to this dispute, held that if indeed foreign law in the meaning of Article 16 PILA, *i.e.* here the laws of the Slovak Republic, would have been applicable, the conditions under Article 16 PILA had been satisfied. Furthermore, the scope and purpose of the respective provisions on duress under Article 21 SCO and Paragraph 39a of the Slovak Civil Code, as explained by the Appellant and uncontested by the Respondent, were, indeed, similar, with the consequence that the Reconciliation of Receivables would have to be held invalid, even if the laws of the Slovak Republic were to apply instead of Swiss law. Accordingly, the result would be the same had the laws of the Slovak Republic been applicable.

Decision

In light of the foregoing, the Sole Arbitrator upheld the appeal, set aside the Decision of the Dispute Resolution Chamber of FIFA rendered on 24 March 2022 and ordered the Club to pay the Player the amount of EUR 30'000 net, including interest as of the respective due dates of the respective unpaid salaries.

CAS 2022/A/8963 Al-Faisaly Club v. Alexander Merkel & Gazişehir GFK
14 June 2023

Football; Contractual dispute – termination of the employment contract; Poor sporting performance; Abusive conduct under article 14(2) of the FIFA RSTP; Compensation for breach of the contract under article 17(1) of the FIFA RSTP; Duty to mitigate - abuses

Panel
Mr Michele Bernasconi (Switzerland), President
Mr Khaled Banaser (Saudi Arabia)
Mr Efraim Barak (Israel)

Facts

Al-Faisaly Club (the "Appellant" or "Al-Faisaly") is a professional football club with its registered office in Harma al Majma'a, Saudi Arabia. Al-Faisaly is registered with the Saudi Arabian Football Federation (the "SAFF"), which in turn is affiliated to the *Fédération Internationale de Football Association* ("FIFA").

Mr Alexander Merkel (the "First Respondent" or the "Player"), is a professional football player of German and Kazakh nationalities.

Gazişehir Futbol Kulübü (GFK) A.Ş. (the "Second Respondent" or "Gazişehir") is a professional football club with its registered office in Gaziantep, Turkey. Gazişehir is registered with the Turkish Football Federation (the "TFF"), which in turn is also affiliated to FIFA.

On 24 August 2020, Al-Faisaly and the Player concluded the Employment Contract, valid as from 15 September 2020 until 14 July 2022. Pursuant to the Employment Contract, the Player was, *inter alia*, entitled to i) sign-on fees of USD 400,000 net in both the first and the second season, due on 30 September 2020 and 31 August 2021 respectively; ii) EUR 63,637 net as 11 monthly salaries from 15 September 2020 until 14 August 2021; and iii) EUR 72,728 net as 11 monthly salaries from 15 August 2021 until 14 July 2022

According to the Player, during the 2021/22 pre-season training camp, Al-Faisaly verbally notified him that it was not interested in his services anymore. He added that on 25 July 2021, Al-Faisaly signed another (foreign) football player who played the same poisition as the Player and as such taking one of the foreign players spot (8/7).

According to the Player, on 6 August 2021, he was excluded from the first team of Al-Faisaly for reasons not related to his professional qualities. On 8 August 2021, the counsel for the Player sent a letter to Al-Faisaly in which he requested to be reinstated in the first team immediately and to be registered with Al-Faisaly's list for the Saudi Arabia League (season 2020/2021).
On 11 August 2021, Al-Faisaly offered the Player to terminate the Employment Contract and provided a draft agreement to the Player who sent back an amended draft on the same day, however, no agreement was reached.

On 16 August 201, Al-Faisaly terminated the Employment Contract via a "Termination Notice" in which it argued that the "*head coach were not positive about your performance during the preparation camp of this sportive season"* and that despite the best efforts of Al-Faisaly to find a suitable termination agreement, the Player had been unwilling to accept anything but the total value of his contract. Al-Faisaly held that this was proof of the Player's bad faith and

that therefore it was justified to terminate the contract due to abusive behaviour (article 14 (2) of the FIFA Regulations on the Status and Transfer of Players).

Following this, the Player's Counsel contested the termination and the Player signed a new employment contract with Gazişehir valid from the date of signing (19 August 2021) until 31 May 2023, plus an option to extend it until 31 May 2024 (the "Gazişehir Contract"). In accordance with the Gazişehir Contract, the Player was, *inter alia*, entitled to a guaranteed remuneration of EUR 115,000 net (EUR 100,000 salary and EUR 15,000 lump sum payment) for the season 2021/22 and EUR 565,000 net (EUR 550,000 salary and EUR 15,000 lump sum payment) for the season 2022/23.

On 30 September 2021, the Player lodged a claim against Al-Faisaly before the FIFA Dispute Resolution Chamber (FIFA DRC) maintaining that Al-Faisaly had no just cause to terminate the Employment Contract on 16 August 2021, claiming EUR 63,637 net as outstanding salary over the month of July 2021, EUR 31,818.50 net as outstanding salary over August 2021 *pro rata* and compensation for breach of contract in an amount of EUR 1,200,008 net, plus interest. The Player also requested the FIFA DRC to impose sporting sanctions on Al-Faisaly. Al-Faisaly lodged a counterclaim in front of the FIFA DRC, maintaining that it had just cause to terminate the Employment Contract and claiming compensation for breach of contract in an amount of USD 1,200,000. Al-Faisaly also requested the FIFA DRC to impose sporting sanctions on the Player.

On 21 April 2022, the FIFA DRC rendered its decision (the "Appealed Decision") partially accepting the claim of the Player (and rejecting the counterclaim of Al-Faisaly). It ordered Al-Faisaly to pay EUR 63,637 and EUR 31,818.50 net, plus interest as outstanding remuneration and EUR 1,100,008 net, pus interest as compensation for breach of the contract. The grounds were communicated to the Parties on 30 May 2022.

On 16 June 2022, Al-Faisaly filed a Statement of Appeal dated 15 June 2022 with the Court of Arbitration for Sport ("CAS"), challenging the Appealed Decision, in accordance with Articles R47 and R48 of the 2021 edition of the Code of Sports-related Arbitration (the "CAS Code"). In this submission, Al-Faisaly named the Player and Gazişehir as respondents.

Reasons

The main dispute in these proceedings concerned the existence of a just cause of unilateral termination of the Employment Contract by Al-Faisaly within the meaning of Article 14 (2) of the FIFA RSTP, and the financial consequences thereof.

Al-Faisaly challenged the Appealed Decision before the CAS, claiming i) that it had just cause to terminate the Employment Contract; ii) that the Player should not be awarded compensation, but that instead Al-Faisaly should be awarded compensation for breach of contract from the Player and iii) that this case should be sent back to the FIFA DRC for the imposition of sporting sanctions on the Player. Subsidiarily, Al-Faisaly requested for the amount of outstanding compensation to be reduced.

The Player requested the Appealed Decision to be confirmed as the Employment Contract had been terminated without just cause and that the alleged poor performance of the Player could not justify a termination and that termination should be *ultima ratio*.

The Second Respondent held that it signed the employment contract with the Player following

the unilateral termination by Al-Faisaly and never negotiated with the Player prior to the termination.

1. Poor sporting performance

Al-Faisaly terminated the Employment Contract due to the *"the drop of [the Player's] technical level and showing la moubalat [sic] to improve your performance",* and *"pushing the club, by your behaviour, to terminate the [Employment Contract] and take the full contract value with bad faith".* Al-Faisaly maintained that the behaviour of the Player qualified as "abusive conduct" in the sense of Article 14(2) FIFA RSTP and that the actions of the Player generally constituted a just cause to terminate the employment relationship.

The Player, on the other hand, held that he did not breach any of his contractual obligations, that a drop of sporting performance could not qualify as a just cause for termination and that he did not act in an abusive manner aimed at forcing Al-Faisaly to terminate the Employment Contract.

The Panel underlined that given that Al-Faisaly terminated the Employment Contract, the burden of proof in establishing that such premature termination was justified lied with Al-Faisaly.

Regarding the alleged drop in sporting performance of the Player, the Panel held that argument in principle (and citing CAS 2016/A/4846) could not constitute a "just cause" to terminate an employment contract. Additionnally, the Panel found that, in this particular case, no drop in the performance of the Player had been established, for instance, Al-Faisaly did not present any technical report demonstrating such drop in the Player's technical level.

Fruthermore, the Panel argued that even if such drop in performance had been established, this would have not been a valid basis for Al-Faisaly to terminate the Employment Contract without notice. For such reason to be considered, at the very least a strong and abusive lack of dedication on the side of the Player would be required.

Consequently, the Panel was of the opinion that the alleged drop in the Player's sporting performance had not been proven and that, in any event, it would not have justified the termination of the Employment Contract by Al-Faisaly.

2. Abusive conduct under article 14 (2) of the FIFA RSTP

Al-Faisaly held that the behaviour of the Player during the termination agreement negotiation period accounted to an abusive conduct as the Player insisted on receiving the entire remaining value of the Employment Contract and would otherwise not agree with an earlier termination of the Employment Contract. Allegation that was contested by the Player.

The Panel observed that in accordance with the FIFA Commentary on the RSTP (the "FIFA Commentary", edition 2021) on article 14(2) of the FIFA RSTP, *"A player's conduct can also qualify as abusive within the meaning article 14 paragraph 2. One potential example might occur if a player wishes to leave their club prematurely to join a new club, but their current club refuses to release them. […] Just as a player alleging abusive conduct by a club is responsible for proving that the misconduct took place, the burden of proof in respect of alleged abusive conduct by a player lies with the club".*

The Panel recalled that in support of its assertion, the Appellant only relied on the correspondence exchange between it and the Player during the termination agreement negotiation period. On this, the Panel found

that insisting on the performance of the Employment Contract and only conditionally agreeing to an earlier termination thereof cannot be considered as "abusive behaviour" in the context of Article 14(2) FIFA RSTP. On the opposite, the Panel considered that the Player was acting in accordance with the principles of contractual stability and *pacta sunt servanda* by insisting on the full performance of the Employment Contract. The Panel underlined that for an employing club, to argue that a player acted with bad faith because he was not prepared to waive any of his contractual entitlements was, quite frankly, inacceptable.

Additionally, the Panel did not find any evidence of any negotiations having taken place between the Player and Gazişehir before Al-Faisaly terminated the Employment Contract. In any case, the Panel was of the opinion that considering the stance taken by Al-Faisaly (provided the Player with a draft termination agreement), it was probably clear for the Player that his employment relationship with Al-Faisaly was coming to an end. It would therefore not have been unreasonable for the Player to explore contingency options. Al-Faisaly's allegations in this respect may have been relevant had the Player terminated the Employment Contract, but such decision was a unilateral decision taken by Al-Faisaly.

With all this in mind, the Panel found that Al-Faisaly did not have just cause to terminate the Employment Contract on 16 August 2021.

3. Compensation for breach of the contract under article 17(1) of the FIFA RSTP

In light of the previous conclusions, the Panel had to assess, *inter alia,* whether any compensation for breach of contract was to be paid.

The Panel recalled that the amount of compensation for breach of contract to be paid by Al-Faisaly to the Player was to be determined on the basis of Article 17(1) FIFA RSTP.

The Panel took due note of previous CAS jurisprudence establishing that the purpose of Article 17(1) FIFA RSTP was to reinforce contractual stability by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player (CAS 2008/A/1519-1520, para. 80, with further references to: CAS 2005/A/876, p. 17; CAS 2007/A/1358, para. 90; CAS 2007/A/1359, para. 92; confirmed in CAS 2008/A/1568, para. 6.37).

In respect of the calculation of compensation in accordance with Article 17(1) FIFA RSTP and the application of the principle of *"positive interest"*, the Panel took note that :"*When calculating the compensation due, the judging body will have to establish the damage suffered by the injured party, taking in consideration the circumstances of the single case, the arguments raised by the parties and the evidence produced. Of course, it is the injured party that requests compensation who bears the burden of making, as far as possible, sufficient assertions and who bears as well the burden of proof.* […]*The principle of the "positive interest" shall apply not only in the event of an unjustified termination or a breach by a player, but also when the party in breach is the club. Accordingly, the judging authority should not satisfy itself in assessing the damage suffered by the player by only calculating the net difference between the remuneration due under the existing contract and a remuneration received by the player from a third party. Rather, the judging authority will have to apply the same degree of diligent and transparent review of all the objective criteria, including the specificity of sport, as foreseen in art. 17 FIFA Regulations" (*CAS 2008/A/1519-1520).

With this in mind, the Panel was of the firm opinion that CAS panels have a considerable

discretion in determining the amount of compensation to be paid.

4. Duty to mitigate – abuses

The Panel noted that it was undisputed between the Parties that the residual value of the Employment Contract amounted to EUR 1,200,008 net, as this was the amount payable to the Player by Al-Faisaly between the moment of termination until the Employment Contract would have expired on 14 July 2022. Because Al-Faisaly terminated the Employment Contract without just cause, it deprived the Player of such income, which therefore comprise damages for the Player.

It was also undisputed that following the termination of the Employment Contract, the Player signed with Gazişehir, valid as from 19 August 2021 until 31 May 2023. In accordance with the Gazişehir Contract, the Player was entitled to a guaranteed remuneration of EUR 115,000 net (EUR 100,000 salary and EUR 15,000 lump sum payment) for the season 2021/2022 and EUR 565,000 net (EUR 550,000 salary and EUR 15,000 lump sum payment) for the season 2022/2023.

On this point, the Appellant was of the firm belief that the payment schedule provided in the Gazişehir Contract had been decided by the Player and Gazişehir in bad faith, as the difference in salary between the first and the second year was very large.

The Panel noted that during the hearing, the counsel for Gazişehir indicated that the division of salary between the first and the second year of the Gazişehir Contract was made upon the request of the Player.

When assessing the Player's objective damages, the Panel analysed that the Appealed Decision took into account the salary the Player was entitled to receive under the Gazişehir Contract during the period of overlap between the Employment Contract and the Gazişehir Contract and applied a mitigation of EUR 100,000. The Panel found that an argument could have been made that also the lump sum payment (EUR 15,000) was to be considered as mitigation as it was a guaranteed payment, but noted that since Al-Faisaly did not challenge this, only the amount of EUR 100,000 should in principle be deducted from the amount of compensation otherwise payable to the Player by Al-Faisaly.

However, the Panel observed that in accordance with Article 337c (2) of the Swiss Code of Obligations (SCO), the duty to mitigate damages was not to be limited to the effective mitigation, but also to amounts intentionally failed to be earned by the Player. Citing CAS 2016/A/4605, the Panel found that the Player was therefore generally required to not intentionally forego any salary during the remaining term of the Employment Contract to fulfil his duty to mitigate his damages in good faith.

The Panel observed that, while a certain increase in salary over the course of an employment contract is common practice and not indicative of abuse, the difference between the salary under the first and the second season of the Gazişehir Contract was inexplicably large. In addition, the difference had been requested by the Player.

The Panel therefore underlined that one must be mindful of potential exploitation by football players involved in employment-related disputes to create a disbalance between the overall value of a new employment contract and the salary payable during the period covered by the original

employment contract of the player's previous club that was terminated early.

Based on all the above, and also considering the discretion afforded to it under Article 17(1) FIFA RSTP to take into account subjective elements in determining a reasonable and fair amount of compensation for breach of contract, the Panel was satisfied to accept that while the Player mitigated his damages with EUR 100,000 by concluding the Gazişehir Contract, he intentionally failed to earn at least a salary of EUR 200,000 over the first season. Accordingly, the Panel concluded that the amount of EUR 200,000 shall be deemed to correspond to the total of the mitigated damages.

Decision

In light of the foregoing, the Panel partially upheld the appeal. It retained that the decision issued by the FIFA Dispute Resolution Chamber on 21 April 2022 should be confirmed saved for the amount of compensation awarded, modified as followed: *"EUR 1,000,008 (one million and eight Euros) net as compensation for breach of contract plus 5% interest p.a. as from 30 September 2021 until the date of effective payment"*.

CAS 2022/A/9170 Royal Antwerp Football Club (FC) v. Wydad Athletic Club (AC)

25 July 2023

Football; Contractual dispute; CAS panels' margin of discretion to exclude evidence that was already available before the first instance; Interpretation of a contractual clause on the basis of art. 18 of the Swiss Code of Obligations (CO); Subsidiary recourse to the principle of interpretation *"in dubio contra proferentem"/"in dubio contra stipulatorem"*; Reallocation of the procedural costs of the proceedings before the FIFA Players' Status Chamber (FIFA PSC);

Panel

Prof. Ulrich Haas (Germany), Sole Arbitrator

Facts

Royal Antwerp Football Club N.V. ("Antwerp FC" or the "Appellant") is a Belgian company operating a professional football club with its registered offices in Antwerp, Belgium. [It] is affiliated to the Royal Belgian Football Association, which is a member of the Union of the European Football Associations ("UEFA") and of the Fédération Internationale de Football Association ("FIFA").

Wydad Athletic Club ("Wydad AC" or the "Respondent") is a Moroccan football club with its registered offices in Casablanca, Morocco. [It] is affiliated to the Royal Moroccan Football Federation, which is a member of the Confederation of African Football ("CAF") and of FIFA.

On 29 August 2021, Wydad AC made an offer to Antwerp FC regarding the loan of the player [G.] (the "Player") for the 2021/2022 season. This offer – *inter alia* – included a bonus of *"100,000 EUR Champions league"* (sic).

On 31 August 2021 at 18:13 CEST, Antwerp FC sent a draft of the loan agreement to Wydad AC. Clause 5 of this draft provided the payment of the following bonus: *"If Wydad Athletic Club qualifies for the group stage of the UEFA Champions League during the 2021-2022 season:* ***EUR 100,000***". On the same day at 18:16 CEST, Wydad AC sent an executed version of the loan agreement to Antwerp FC in which Clause 5 was amended in its relevant part as follows: *"If Wydad Athletic Club wins the CAF Champions League during the 2021-2022 season:* ***EUR 100,000***". Still on the same day at 18:34 CEST, Antwerp FC asked Wydad AC to sign the draft that it had sent to Wydad AC at 18:13 CEST because the executed version previously sent by Wydad AC at 18:16 CEST did not mention the intermediary in Clause 14. Finally, at the same day at 23:14 CEST, Wydad AC sent an executed version of the loan agreement to Antwerp FC which stated in Clause 5 that Wydad AC shall pay a bonus of EUR 100,000 if it wins the 2021/2022 UEFA Champions League. On 4 September 2021, Antwerp FC and Wydad AC entered into the final version of the loan agreement (the "Loan Agreement"). Clause 5 of the Loan Agreement which provided for certain bonus payments read [*inter alia*] as follows: *"If Wydad Athletic Club wins the UEFA Champions League during the 2021-2022 season:* ***EUR 100,000***".

Furthermore, Clause 11 of the Loan Agreement stipulated: *"Parties agree to fully and effectively defend, indemnify and keep indemnified, any other party, on demand, from and against any and all claims, liabilities, costs, expenses, damages, losses or judgments (including any legal costs or other professional costs or expenses) suffered or incurred by that party as a result of a breach by the defaulting party of any term of this agreement".*

On 30 May 2022, Wydad AC won the

2021/2022 CAF Champions League finale. On 1 June 2022, Antwerp FC issued an invoice to Wydad AC for [*inter alia*] the *"Conditional Transfer Fee (bonus)"* in the amount of EUR 100,000 for the *"Winner of Champions League during the 2021-2022 season""*.

On 7 July 2022, Antwerp FC filed a (second) claim before the FIFA PSC against Wydad AC requesting (this time) *inter alia* the payment of [*inter alia* EUR 100,000]. On 16 August 2022, the FIFA PSC rendered its decision (the "Appealed Decision"), the operative part of which reads:

"1. The claim of the Claimant, R. Antwerp F.C., is partially accepted.

2. The Respondent, Wydad Athletic Club, has to pay to the Claimant, the following amount(s):
EUR 50,000 as outstanding remuneration plus 5% interest p.a. as from 31 March 2022 until the date of effective payment (…)".

According to the grounds of the Appealed Decision, the Single Judge dismissed the Appellant's claim with regard to the bonus payment because of the Appellant's failure to prove the underlying facts. In addition, the Single Judge held that the claim for the bonus payment for Wydad AC allegedly winning the title of the 2021/2022 CAF Champions League was lacking a clear contractual basis, as Clause 5 of the Loan Agreement refers to the UEFA Champions League as condition for the bonus payment.

On 28 September 2022, Antwerp FC filed an appeal against the Appealed Decision with the Court of Arbitration for Sport (the "CAS"). In its Appeal Brief, the Appellant requested as follows:

"(ii.) to set aside paragraphs 1, 2, 3 and 8 of the Appealed Decision of the FIFA Players' Status Chamber passed on 16 August 2022 (Ref.: FPSD-6653), and to replace them as follows: (…).

> *2. The Respondent, Wydad Athletic Club, has to pay to the Claimant, the following amount(s): (…).*
>
> *- EUR 150,000 as outstanding remuneration plus 5% interest p.a. as from 7 June 2022 until the date of effective payment (…).*

(iv.) to order WYDAD ATHLETIC CLUB to reimburse R. ANTWERP FC its part of the procedural costs of the procedure before the FIFA PSC in the amount of USD 18,750 (cf. Clause 11 of the loan agreement)".

In its Answer, the Respondent requested [*inter* alia] as follows:

"1. The appeal filed by the Appellant, Club ***Royal Antwerp Football Club,*** *against the Decision taken by FIFA PSC on 17 Aout 2022 to be dismissed".*

Reasons

The dispute in these proceedings was related to the application of Clause 5 and 11 of the Loan Agreement. In order to support its allegation that it was owed a payment by Wydad AC on the basis of said Clause 5, the Appellant submitted evidence in this CAS proceeding, which it had not filed during the proceeding before the FIFA PSC. This led the Sole Arbitrator to have first examined the admissibility of such evidence before turning his attention to the substance of the two disputed claims.

1. CAS panels' margin of discretion to exclude evidence that was already available before the first instance

Article R57 (3) of the CAS Code provided for an exception to the *de novo*-power of the Sole Arbitrator. The provision, however, accorded

the Sole Arbitrator with a wide margin of discretion whether to exclude evidence that was already available at the first instance. The provision was interpreted restrictively in CAS jurisprudence (RIGOZZI/HASLER, in Arroyo (ed.) Arbitration in Switzerland, 2nd ed. 2018, Art. 57 CAS Code no 11 *et seq.*) and is designed for cases only in which:

"(i.) the party requesting the exclusion of evidence that was not presented in the first instance (non-arbitral) proceedings will have to establish (i) not only that the new evidence was already available or could reasonably have been discovered at the first instance level, but also (ii) why admitting the evidence would constitute an abuse of process".

In the present case, the Sole Arbitrator found that the Appellant did not withhold the evidence in the FIFA PSC proceeding in bad faith. To the contrary, the Appellant's submissions showed that it considered the Respondent's sporting success in the 2021/2022 season to be a well-established fact which did not require the filing of corroborating evidence. Thus, the filing of the relevant evidence before the CAS did not constitute an abusive behavior by the Appellant. Therefore, fairness required that the Sole Arbitrator considered the new evidence in the context of these CAS proceedings.

2. Interpretation of a contractual clause on the basis of art. 18 CO

The Appellant's submitted in support of its appeal against the Appealed Decision in connection with the interpretation of Clause 5 of the Loan Agreement:

- It is true that Clause 5 of the Loan Agreement referred to *"UEFA"* instead of *"CAF"* Champions League. However, it was necessary to consider the Parties' real intention at the time of the conclusion of the Loan Agreement.

- Under Swiss law, a contract had to be interpreted in the first place in accordance with the so-called *"principle of will"* (subjective interpretation) as laid down in Article 18 para. 1 of the Swiss Code of Obligations (CO).

- Only if the common will of the parties could not be determined, the contract had to be interpreted based on the *"principle of good faith"* in the light of all circumstances of the case (objective interpretation). Accordingly, a declaration of intent was to be understood as the way the other party could and did, in good faith, understand it. Therefore, Wydad AC could not reasonably interpret in good faith the condition as referring to the UEFA Champions League. Reference to the CAF Champions League was the only sensible interpretation.

- According to the principle of *"ut res magis valeat quam pereat"*, an interpretation, which made the contract lawful or effective, had to apply if there was a doubt about the meaning of a contractual term. *In casu,* the parties did not intend to make the bonus payment conditional on Wydad AC winning the UEFA Champions League, as Wydad AC was not even eligible to participate in it. At the time of the execution of the Loan Agreement, Wydad AC was registered for the participation in the CAF Champions League. Thus, the Parties clearly intended to make the respective bonus conditional on Wydad AC's winning of the CAF Champions League.

- Moreover, this interpretation was also corroborated by the Parties' pre-contractual discussions.

The Respondent's submissions could be summarised as follows:

- The Loan Agreement was drafted by the Appellant and sent to the Respondent only for signing without any change or modification. During the whole contractual period of the Loan Agreement, the Appellant never asked the Respondent to modify or clarify Clause 5 of the Loan Agreement.

- The Appellant included a bonus in the amount of EUR 100,000 for the winning of the UEFA Champions League in the Loan Agreement and requested the Respondent to pay this amount although it did not win this title. There was no contractual basis for claiming any payment related to Wydad AC's winning of the CAF Champions League.

- The Respondent never had the intention to pay the Appellant an additional amount for winning the CAF Champions League. *"It's absurd that the respondent pays 150.000 EUR as a loan transfer and accept also to pay 150.000 EUR as conditional fees"*.

Since the Parties disputed the meaning of Clause 5 of the Loan Agreement, the Sole Arbitrator found that it was necessary to interpret this clause in the light of all the circumstances of the present case in order to decide its real meaning. Such interpretation had to be made in accordance with the subsidiarily applicable Swiss law considering that the FIFA regulations did not contain any rule regarding the interpretation of player contracts.

Article 18 CO provides as follows: *"When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement"*. Article 18 CO has been applied and interpreted by the CAS in many cases. For instance, the panel in CAS 2019/A/6525 at para. 67 stated the following: *"(WIEGAND, in Basler Kommentar, No. 7 et seq., ad Art. 18 CO, decisions of the Federal Tribunal of 28 September 1999, ATF 125 III 435, and of 6 March 2000, ATF 126 III 119) the primary goal of interpretation is to ascertain the true common intention (consensus) of the parties. Where a factual consensus cannot be proven, the declarations of the parties must be interpreted pursuant to the principle of good faith in the sense in which they could and should have been understood, taking into account the wording, the context as well as all circumstances"*.

At first sight, it seemed that the wording of Clause 5 of the Loan Agreement clearly reflected the Parties' intention. There was no dispute about the unambiguous literal meaning of the term UEFA Champions League as such.

However, the Sole Arbitrator was not having to stop his analysis by a purely literal interpretation. In this regard, reference was made to SFT 127 III 444 para. b) where the Swiss Federal Tribunal (SFT) held the following (free translation): [i]t derives from Article 18 para. 1 CO that the meaning of a text, even a clear one, is not necessarily determining and that the purely literal interpretation is on the contrary prohibited. [I]t can result from the conditions of the contract, from the objectives sought by the parties or from other circumstances that the text of such contractual clause does not convey exactly the content of the agreement that was concluded. Consequently, even in case the terms used in a contract have a clear literal (*i.e.*, unambiguous) meaning, the adjudicatory body must assess whether or not the parties truly wished to attribute such meaning to the terms used. This is also confirmed by *inter alia* other SFT's decisions (SFT 131 III 287; SFT 5A_677/2011, E. 3.2; SFT 4A_370/2010, E. 5.3; SFT BGE 128 III 212; SFT 5C.87/2002, E. 2.2; KuKo-OR/WIEGAND/HURNI, Art. 18 N. 30; BK-OR I/WIEGAND W., Art. 18 N. 25

and 37 with further references).

Only in the very limited circumstances in which there was no objective grounds to think that the plain text did not reflect the parties' will, there was no reason to depart from it (SFT 136 III 188 E. 3.2.1; BK-OR I/WIEGAND W., Art. 18 N. 25). Doubts that the wording used by the parties in the contract truly reflected their will could have arisen from a multitude of different circumstances, such as the drafting history of the agreement, its purpose, or the overall content of the contract.

The Sole Arbitrator noted that Wydad AC is affiliated to the Royal Moroccan Football Federation which in turn is a member of CAF but not of UEFA. With regard to the eligibility of clubs in the UEFA Champions League, Article 3 of the Regulations of the UEFA Champions League states that *"UEFA member associations (hereinafter associations) may enter a certain number of clubs for the competition* [UEFA Champions League] *through their top domestic championship"*. Accordingly, only clubs of UEFA member associations could participate in the UEFA Champions League. Hence, Wydad AC could under no circumstances have participated in the 2021/2022 UEFA Champions League. Already this fact alone was sufficient to raise doubts that the wording used by the Parties truly reflects their intentions when executing the Loan Agreement. It simply made no sense to agree on a bonus payment if the condition precedent for the bonus payment could never be fulfilled.

That the Parties mistakenly referred to *"UEFA"* in the Loan Agreement also followed from the history of the agreement. The first offer for the Player's loan was made by Wydad AC. Therein, Wydad AC offered the payment of a bonus in the amount of EUR 100,000 for the winning of the champions league. Wydad AC did neither refer to *"UEFA"* nor to *"CAF"*. However, the competition intended by the Appellant must have been – from an objective standpoint of a reasonable person – a competition that Wydad AC was eligible to participate in, *i.e.*, the CAF Champions League. This understanding was supported also when looking at the first executed version of the Loan Agreement by Wydad AC. When the latter received the draft from Antwerp FC it amended the wording of Clause 5 substituting the term *"UEFA"* with *"CAF"*. Thereby, Wydad AC unequivocally showed its intention to offer a bonus payment for the winning of the CAF Champions League.

It is true that the final version signed by the Parties again referred to the *"UEFA Champions League"*. However, this was not due to the fact that the Parties wanted to modify the Loan Agreement with respect to the bonus payments. Instead, Antwerp FC explained that it insisted on Wydad AC signing the original version of the Loan Agreement, because it provided a clause regarding the intermediary involved in the transfer that was missing in the first executed version by Wydad AC. The Parties, thus, by using the old draft did not want to change the bonus payment scheme.

Finally, the Sole Arbitrator also took note of the context in which the *"Champions League"* bonus was embedded. All the other bonuses mentioned in Clause 5 of the Loan Agreement referred to competitions which took place in the country respectively continent where Wydad AC has its registered seat and in which Wydad AC was in principle entitled to participate in. Thus, there was no reason to assume that the Parties intended to refer to any other championship than the CAF Champions League. This finding was further corroborated by Antwerp FC's behavior after the execution of the Loan Agreement. Antwerp FC promptly sent an invoice for the bonus of EUR 100,000 to Wydad AC after the latter won the 2021/2022 CAF Champions League. It was also telling that Wydad AC never objected to

such claim (before the initiation of these CAS proceedings).

In conclusion, the Sole Arbitrator found that the reference to the UEFA Champions League in Clause 5 of the Loan Agreement did not truly reflect the Parties' will. Instead, the circumstances of this case showed that the Parties' mutual intention was to agree on a bonus payment for Wydad AC's winning of the CAF Champions League.

3. Subsidiary recourse to the principle of interpretation *"in dubio contra proferentem"/"in dubio contra stipulatorem"*

The Respondent pointed to the fact that it was the Appellant who drafted the Loan Agreement and that, therefore, doubts as to its contents had to be construed to the Appellant's disadvantage.

It was true that Swiss law applied the *contra proferentem/contra stipulatorem* principle in the context of contract interpretation (BSK-OR/WIEGAND W., 7th ed. 2020, Art. 18 no. 40). However, the scope of application of this principle was rather restricted, since it only came into play if an ambiguity persisted in case all other means of interpretation failed (4A_327/2015 or CAS 2017/A/5172 with references).

In casu the Sole Arbitrator found that the parties' intention when executing Clause 5 of the Loan Agreement were clear and that, therefore, there was no room for the application of the principle.

4. Reallocation of the procedural costs of the proceedings before the FIFA PSC

The Appellant requested that the Respondent be ordered to reimburse the Appellant its share of the procedural costs of the FIFA PSC proceedings in the amount of USD 18,750.

The Respondent argued that the decision passed by the FIFA PSC was based only on the documents provided by the Appellant, as the Respondent did not participate in the FIFA PSC proceeding. The Appellant failed to have submitted substantial evidence to prove its claims. The FIFA PSC already determined the procedural costs that each party had to bear.

In view of the contents of Article 25 (5) of the Procedural Rules Governing the Football Tribunal and having considered the outcome of this case, the Sole Arbitrator found that the Respondent should bear the costs of the previous instance. This was all the more true in light of Clause 11 of the Loan Agreement.

The costs incurred by the Appellant before the FIFA PSC were the *"result of a breach by the defaulting party of any term of this agreement"*, since the Respondent defaulted on its obligation. Thus, the Appellant was forced to initiate proceedings before FIFA. The Sole Arbitrator found that the causal link required according to Clause 11 of the Loan Agreement was not interrupted by the Appellant's procedural omission to have adduced evidence in support of its claim before the FIFA PSC. Consequently, no. 8 of the operative part of the Appealed Decision had to state that the costs of the proceedings in the total amount of USD 20,000 had to be borne by the Respondent. It was unclear whether the Appellant had paid any of the procedural costs to FIFA so far. No evidence was provided by the Appellant to this effect. Should the Appellant have paid already any portion of the procedural costs incurred before the FIFA PSC to FIFA, it was entitled to the respective reimbursement by the Respondent.

Decision

The appeal filed on 28 September 2022 by Royal Antwerp Football Club N.V. against the

decision of the FIFA Player Status Chamber of 16 August 2022 is partially upheld. The decision of the FIFA Player Status Chamber of 16 August 2022 is confirmed, save for points n. 2 and n. 8, which are amended as follows:

"2. The Respondent, Wydad Athletic Club, has to pay to the Claimant the following amount(s) (…);

- *EUR 100,000 as outstanding bonus plus 5% interest p.a. from 7 June 2022 until the date of effective payment; and (…);*

8. The final costs of the proceedings in the amount of USD 25,000 are to be borne by the Respondent [Wydad Athletic Club]*".*

Should Royal Antwerp Football Club N.V. have paid any of the procedural costs incurred before the FIFA Player Status Chamber to FIFA, Royal Antwerp Football Club N.V. was entitled to reimbursement from Wydad Athletic Club of the paid amounts.

CAS 2023/A/9371 A.S. Roma v. Sporting Clube de Portugal, award of 27 October 2023

27 October 2023

Football; Training compensation; Relevance of national regulations; Transfers within the European Union; Genuine interest in the player's services; Bridge transfer

Panel

Mr Manfred Nan (the Netherlands), President
Mr Jacopo Tognon (Italy)
Mr Benoît Pasquier (Switzerland)

Facts

A.S. Roma S.p.A (the "Appellant" or "Roma") is a professional football club with its registered office in Rome, Italy. It is registered with the Italian Football Federation, which in turn is affiliated to the Fédération Internationale de Football Association ("FIFA").

Sporting Clube de Portugal – Futebol, SAD (the "Respondent" or "Sporting") is a professional football club with its registered office in Lisbon, Portugal. It is registered with the Portuguese Football Federation, which in turn is also affiliated to FIFA.

On 26 September 2014, Mr E. (the "Player"), born on 1 January 2004, was registered as an amateur with the Italian Football Federation for his affiliated club Roma. His contract was due to expire on 30 June 2023.

On 30 June 2021, Roma sent a letter to the Player. It invited him to attend the next training session for the 2021/2022 season, and expressed its willingness to continue working with him, *"keeping alive the option of offering* [*him*] *a professional contract at a later stage"*. In June 2021, the Player and Sporting concluded an employment contract.

On 10 January 2022, the Player was registered as a professional football player with Sporting.

On 1 June 2022, Roma sent a letter to Sporting requesting it to pay training compensation in an amount of EUR 129,947.68, on the basis that it had registered the Player during the calendar year of his 17th birthday.

On 14 June 2022, Sporting rejected Roma's request, submitting that Roma *"failed to satisfy the burden to prove of its genuine and bona fide interest in retaining the Player's services, notably considering that it was already in a position to offer the Player a professional contract and decided not to do it"*.

On 24 August 2022, Roma filed a claim against Sporting before FIFA Dispute Resolution Chamber (the "FIFA DRC"), requesting payment of training compensation in the amount of EUR 159,865.48, plus 5% interest *per annum* as from 10 January 2022 until the date of effective payment.

On 19 September 2022, Sporting requested that Roma's claim be dismissed.

On 9 November 2022, the FIFA DRC issued the operative part of its decision (the "Appealed Decision"), which rejected Roma's claim and ordered it to pay the costs of the proceedings.

On 20 December 2022, the FIFA DRC communicated the grounds of the Appealed Decision to the Parties.

On 10 January 2023, Roma filed a Statement of Appeal against the Appealed Decision with the Court of Arbitration for Sport (the "CAS") in accordance with Articles R47 et seq. of the Code of Sports-related Arbitration (the "Code").

On 25 January 2023, the Player signed an employment contract with Delfino Pescara 1936 ("Pescara"), in the third tier of Italian league.

Reasons

The main dispute in these proceedings concerned Roma's claim for training compensation following the transfer of his player to Sporting. It involved conflicting views as to the applicable regulations and the existence of an entitlement to compensation.

This led the Panel to examine the relevance of national regulations. It then undertook to address the specific conditions governing transfers within the European Union, with a focus on the existence of a genuine interest in the player's services and absence of a bridge transfer.

1. Relevance of national regulations

The Parties concurred that the FIFA Regulations on the Statutes and Transfer of Players (RSTP) should primarily apply. They disagreed, however, as to the relevance of Italian regulations, which provided for a specific type of registration for young players.

The Panel pointed out that international disputes relating to training compensation should be assessed in light of the RSTP in force at the time of the disputed events. It specified that there was no scope for the direct application of domestic regulations.

The Panel concluded that the present matter should be decided based on the RSTP (August 2021 edition), in force at the time of the Player's professional registration.

2. Transfers within the European Union

The Parties agreed that the payment of training compensation was, in principle, due when the registration of a player occurred during the calendar year of his 23rd birthday. They noted, however, that transfers within the European Union may be subject to stricter conditions, and reached different conclusions as to their applicability and fulfilment in this case.

The Panel recalled that Article 6(3) of Annex 4 RSTP governed international transfers between clubs within the European Union. It then undertook to interpret this provision in view of CAS jurisprudence and the RSTP Commentary.

The Panel found that under this provision, a former club is only entitled to training compensation if it offered the relevant player an employment contract, or if it can otherwise justify that it had a genuine interest in his services. This may exceptionally be the case if national legislation does not permit young players to sign a professional contract, and if the club is purely amateur or prohibited from placing its players under contract.

The Panel observed that Roma did not offer an employment contract to the Player, nor was it prevented from doing so. In particular, Italian regulations expressly provide for this possibility for players over 16 years old under the qualification *"giovani di serie"*.

3. Genuine interest in the player's services

The Appellant submitted that it had expressed a genuine interest in retaining the services of the Player in its letter of 30 June

2021, whereas the Respondent contested this view.

The Panel considered that this letter merely served to invite the Player to attend his first training and keep alive the option of offering him a professional contract at a later stage. It was not sufficient to prove the existence of a genuine interest, in the absence of further negotiations.

4. Bridge transfer

The Appellant suggested that a "bridge transfer" had been concluded in favour of Pescara, with the ultimate goal of circumventing Italian regulations.

The Panel acknowledged that training compensation may potentially have been awarded in these circumstances. It specified, however, that such claim should have been directed against Pescara and be supported by solid evidence, which was clearly not the case.

The Panel concluded that the conditions for granting training compensation were not satisfied.

Decision

In light of the foregoing, the Panel dismissed the appeal. It retained that the decision issued by the FIFA DRC on 9 November 2022 should be upheld.

CAS 2023/A/9423 World Anti-Doping Agency (WADA) v. Polish Anti-Doping Agency (POLADA) & Natalia Maliszewska
5 September 2023

Speed skating (short track); Doping (whereabouts failure); Definitions of whereabouts failure and missed test; Whereabouts filings requirement for athletes in Registered Testing Pool; Concept of "negligent behaviour"; Strict interpretation of the 60-minute time slot for testing

Panel
Mrs Annett Rombach (Germany), Sole Arbitrator

Facts

The World Anti-Doping Agency ("WADA" or the "Appellant") is a private law foundation constituted under Swiss law in 1999 to promote and coordinate at international level the fight against doping in sport on the basis of the World Anti-Doping Code (the "WADC" or the "Code"). WADA has its registered seat in Lausanne, Switzerland, and its headquarters in Montreal, Canada.

The Polish Anti-Doping Agency ("POLADA" or the "First Respondent") is the National Anti-Doping Organisation ("NADO") for the country of Poland, recognized as such by WADA. Its registered seat is in Warsaw, Poland.

Ms. Natalia Maliszewska (the "Athlete" or the "Second Respondent") is a Polish short track speed skater. She is included in the Registered Testing Pool ("RTP") of POLADA.

On 12 January 2022, following an erroneous residence data submitted by the Athlete in WADA's Anti-Doping Administration and Management System ("ADAMS"), POLADA notified the Athlete of its decision to record a filing failure (the "First Filing Failure").

On 24 October 2022, POLADA notified the Athlete of another potential filing failure, concerning the days between 16 and 22 October 2022. The Athlete was invited by POLADA to explain the circumstances that caused the failure to correctly enter her residence data in ADAMS. On 14 November 2022, POLADA notified the Athlete of its decision to record a second filing failure (the "Second Filing Failure"). In its decision, POLADA explained that this was the Athlete's second filing failure within a 12-month period and that any combination of three (3) missed tests and/or filing failures in such period would constitute an Anti-Doping Rules Violation (ADRV).

Between 18 and 20 November 2022, the ISU Junior Challenge International Skating Competition ("Competition") was held in the ice-skating facility ("Ice-Skating Facility") in Bialystok, Poland. The Ice-Skating Facility was the usual training location of the Athlete's club. The Athlete is a member of the Polish national team. The Athlete's home address is also in Bialystok, Poland. The distance between the Ice-Skating Facility and the Athlete's home is 1.9 km, which takes about 5 minutes by car. Due to the Competition, the Athlete's training schedule was subject to change.

On 19 November 2022, the Athlete's evening training session (7:00 pm to 8:30 pm) was rescheduled on short notice to the morning, 6:30 am to 8:00 am. The President of the Athlete's Club informed the coach of the Polish national team about this change in the evening of 18 November 2022. The coach, in turn, sent a text message to the Athlete, who

allegedly read the message in the middle of the night, between 2 am and 3 am.

As an athlete belonging to the RTP of POLADA, the Athlete was required to specify in her Whereabouts filings for each day per quarter one specific 60-minute time slot where she would be available at a specific location for testing (see Art. 4.8.6.2 b) of the WADA International Standard for Testing and Investigations 2021 (ISTI). The Athlete had specified the time window between 7 am and 8 am at her home address for the day of 19 November 2022. It is undisputed that the Athlete failed to update her Whereabouts information in ADAMS after she had learnt about the training time change. Hence, ADAMS still indicated that the Athlete would be available for testing at her home address in Bialystok, Poland between 7 am and 8 am on 19 November 2022, when – in reality – the Athlete was training 1.9 km away at the Ice-Skating Facility during that time.

On 19 November 2022, at 7:00 am, Ms. Paulina Rapalski, Doping Control Officer (the "DCO"), tried to locate the Athlete for testing at her indicated home address. The DCO rang the intercom at the Athlete's front door several times but did not receive any reply. The DCO proceeded to the Athlete's apartment and knocked at the door several times without any response. At approximately 7:55 am and 7:59 am, the DCO called the Athlete on her cell phone, without answer. At approximately 8:00 am, the Athlete returned the DCO's call and confirmed that she was on her way back home from the Ice-Skating Facility and would be available for testing in a few minutes. The DCO called her supervisor, and both agreed that the DCO would wait for the Athlete and allow her to undergo the doping test. The Athlete arrived at home at around 8:10 am. A urine sample and a blood sample were taken from her, which did not reveal the presence of any prohibited substance. Subsequently, the DCO created an Unsuccessful Attempt Report in which she explained the events.

On 23 November 2022, the POLADA informed the Athlete that she may have committed a missed test (the "Missed Test") in respect of the circumstances of her doping control on 19 November 2022. The Athlete was invited to either accept the Missed Test or to explain why she did not accept it. On 24 November 2022, the Athlete submitted her explanations on the Missed Test to POLADA, including a statement from her Club. She explained that the control was conducted, that she complied with the principles of the doping control and was assured by the DCO that "*there was nothing to worry about*". She further explained that as someone with already two warnings, she was aware of the possible consequences of avoiding a test and would not have done that.

On 30 November 2022, POLADA delivered to the Athlete its decision to record a Missed Test ("POLADA Decision") and on 7 December 2022, the Athlete filed a request for the administrative review of the POLADA Decision.

On 14 December 2022, the POLADA Disciplinary Panel handed down its decision ("Appealed Decision") in which it considered that *"the explanations provided by athlete Natalia Maliszewska are found to be reasoned and her appeal is considered grounded."* The Disciplinary Panel held that *"the situation in which the athlete found herself as well as her explanations […] make it possible to conclude that it was not her negligence that caused not updating her whereabouts data and not providing new data on the place where the athlete will be available for testing in the indicated 60-minute time slot on the said date.[…]"* It further held that the doping control did take place on the same date, at the place indicated by her and that "*therefore, the situation cannot be classified as a missed test".*

On 7 February 2023, WADA filed a Statement of Appeal with the Court of Arbitration for Sport (CAS) against the Appealed Decision, in accordance with the Code of Sports-related Arbitration (the "CAS Code").

Reasons

WADA held that the Athlete should have been found to have committed a Missed Test as defined in the International Standard for Results Management (ISRM) that should have been registered by POLADA.

POLADA agreed with WADA and held that its Disciplinary Panel fully ignored the provisions of the ISRM and based the Appealed Decision solely on the ISTI. The POLADA Disciplinary Panel ignored the wording and sense of Article 4.8.8.5 c) of the ISTI.

The Athlete argued that it would be unfair to hold her liable for a potential ADRV, especially since the Athlete actively and in good faith cooperated with the DCO who agreed to wait for her to take the sample despite the *"slight"* expiry of the time window. The Athlete further held that she had not received proper training on her Whereabouts responsibilities.

1. Definitions of whereabouts failure and missed test

As the main question focused on the question of whether the Athlete's actions constituted a Missed Test linked to a failure of the Athlete related to her Whereabouts obligations, the Sole Arbitrator found it important to point out the relevant regulations for that purpose.

The Sole Arbitrator firstly underlined that in accordance with article 2.4 of the POLADA ADR, *"the following constitute anti-doping rule violations: […] 2.4 Whereabouts Failures by Athlete - Any combination of three (3) missed tests and/or filing failures, as defined in the International Standard for Results Management, within a twelve-month period by an Athlete in a Registered Testing Pool".*

3. On what consisted in a Missed Test, the Sole Arbitrator took time to underline that Article 2.4 of the POLADA ADR references the ISRM for the definition of a "Missed Test" as follows: *"A failure by the Athlete to be available for Testing at the location and time specified in the 60-minute time slot identified in their Whereabouts Filing for the day in question, in accordance with Article 4.8 of the International Standard for Testing and Investigations and Annex B.2 of the International Standard for Results Management".*

The Sole Arbitrator recalled that to that purpose, article B.2.4 of the ISRM provided that an athlete can only be declared to have committed a missed test where the results management authority can establish each of the following:

"a) That when the Athlete was given notice that they had been designated for inclusion in a Registered Testing Pool, they were advised that they would be liable for a Missed Test if they were unavailable for Testing during the 60-minute time slot specified in their Whereabouts Filing at the location specified for that time slot; b) That a DCO attempted to test the Athlete on a given day in the quarter, during the 60-minute time slot specified in the Athlete's Whereabouts Filing for that day, by visiting the location specified for that time slot; c) That during that specified 60-minute time slot, the DCO did what was reasonable in the circumstances (i.e. given the nature of the specified location) to try to locate the Athlete, short of giving the Athlete any advance notice of the test; […] *d)* […] *and e) That the Athlete's non-availability for Testing at the specified location during the specified 60-minute time slot was at least negligent.* […]".

2. Whereabouts filings requirement for athletes in Registered Testing Pool

On the obligations of athletes regarding Whereabouts filings, the Sole Arbitrator held that those were onerous as they required to make quarterly whereabouts filings setting out, for the following quarter, the address of where they will be staying overnight, as well the address of each location at which they will train, work or conduct any other regular activity together with the usual timings. She further underlined that athlete were required to specify a 60-minute time slot between 5am and 11pm each day where they will be available for to submit to testing.

The Sole Arbitrator explained that in accordance with Article 4.8.6.3 of the ISTI, testing was not limited to the 60-minute time slot provided by the Athlete, but that testing could be carried at any time, but that within the 60-minute time slot, the athlete must be available at the specific location entered into the ADAMS system for such slot.

The Sole Arbitrator took note that the ISTI recognized that whereabouts filings may become inaccurate and required updating as per its Article 4.8.8.6 which provided that *"the Athlete shall file the update as soon as possible after they become aware of the change in circumstances, and in any event prior to the 60-minute time slot specified in their filing for the relevant day"*.

3. Concept of "negligent behaviour"

WADA held that the Athlete failed to rebut the presumption of negligence and was therefore negligent under Article B.2.4 e) of the ISRM.

The Sole Arbitrator noted that the Appealed Decision found that the Athlete's failure to update her Whereabouts filing was not negligent.

The Athlete held that she did not commit a Missed Test as she rebutted the presumption of negligence under Article B.2.4 e) of the ISRM.

Following the arguments of the parties, the Sole Arbitrator had to address two legal issues in order to find whether or not the Appeal is justified, i.e. (i) whether the Athlete rebutted the presumption of negligence under Article B.2.4 e) of the ISRM.

On this point, the Sole Arbitrator recalled the content of Article B.2.4 e) of the ISRM which provided that *"e) That the Athlete's non-availability for Testing at the specified location during the specified 60-minute time slot was at least negligent. For these purposes, the Athlete will be presumed to have been negligent upon proof of the matters set out at sub-Articles B.2.4 (a) to (d). That presumption may only be rebutted by the Athlete establishing that no negligent behavior on their part caused or contributed to their failure (i) to be available for Testing at such location during such time slot, and (ii) to update their most recent Whereabouts Filing to give notice of a different location where they would instead be available for Testing during a specified 60-minute time slot on the relevant day"*.

The Sole Arbitrator held that in order to rebut the presumption of negligence provided by Article B.2.4 e9 of the ISRM, the Athlete was required to establish that no negligent behaviour on her part caused or contributed to her failure (i) to be available for testing at her nominated location during her nominated time slot, and (ii) to update her most recent Whereabouts filing to give notice of a different location where she would instead be available for testing during the specified time slot on the relevant day.

On the meaning of the expression "negligent behaviour", the Sole Arbitrator referred to some CAS awards (CAS 2022/A/9031 & 9137) which stated that it should not simply be treated synonymously with the definition of "fault" contained in the WADA Code but

rather that "negligence" should be given its ordinary meaning, being a failure to observe the duty of care expected of a reasonable athlete placed in a similar situation. The Sole Arbitrator took note that such analysis required taking into account i) the obligations placed on athletes in relation to the Whereabouts scheme and; ii) the particular facts and circumstances of the case, including information known by the athlete or reasonably available to him/her.

Applying this standard to the present case, the Sole Arbitrator found that the Athlete failed to rebut the presumption of negligence because she failed to demonstrate that she undertook every conceivable effort to avoid the Missed Test.

The Sole Arbitrator noted that during the hearing, the Athlete had provided contradicting excuses in this regard, which did not satisfy the Sole Arbitrator. In particular, the argument of not thinking about the necessity of a required address change, even if such change is prompted by short notice events, is no valid excuse for experienced professional athletes, especially since the Athlete had full awareness about the two Whereabouts failures already recorded against her, and her knowledge that a third Whereabouts failure would potentially trigger an ADRV. The Sole Arbitrator underlined that not remembering her duty to file the update *"as soon as possible after* […] *becom[ing] aware of the change in circumstances"* (Article 4.8.8.6 of the ISTI), did not meet the standard of care required to be met by professional athletes like the Second Respondent in the specific situation with two prior filing failures on record. When circumstances change, athletes always have to consider the respective consequences for their Whereabouts filings, particularly in light of the fact that it only takes a few minutes to make required changes via a (mobile) application.

The Sole Arbitrator was of the strong opinion that Athletes needed to know the rules, and not knowing them was no excuse *per se*. Especially in light of her sensitive situation with two Whereabouts failures already recorded against her, the Sole Arbitrator underlined that Athlete should have investigated the scope of her filing duties, by reading the relevant rules, or by requesting individual anti-doping education proactively.

Therefore, the Sole Arbitrator concluded that the Athlete had clearly failed to take every conceivable effort to avoid the Missed Test and that under these circumstances, the Sole Arbitrator had no choice but to reject the notion that the presumption of negligence had been rebutted.

4. Strict interpretation of the 60-minute time slot for testing

The Sole Arbitrator took note that the Athlete also argued that she was not liable for the Missed Test because she successfully provided a sample at the precise location recorded in her Whereabouts filings, only a few minutes after the expiry of the designated time window.

WADA argued that the requirements of a Missed test were met and that the fact that a doping test was later carried out was not relevant in the assessment of a Missed test.

On this matter, the Sole Arbitrator emphasized that the rules were clear and did not leave any room for interpretation and that Article 4.8.6.3 of the ISTI contained a mere clarification that testing by anti-doping agencies was not limited to the 60-minute time slot but may also be carried out at other times during the day. However, from the Sole Arbitrator's point of view, such clarification did not dilute athletes' particular duties during the 60-minute time slot.

The Sole Arbitrator explained that from Article 4.8.9.1 of the ISTI, it was clear that athletes in an RTP *"must specifically be present and available for Testing […] during the 60-minute time slot specified for that day in their Whereabouts Filing, at the location that the Athlete has specified for that time slot"*. As highlighted in Article 4.8.8.5 c) of the ISTI, *"an Athlete is not available for Testing during their specified 60-minute time slot at the location specified for that time slot for that day, they will be liable for a Missed Test even if they are located later that day and a Sample is successfully collected from them"*.

While the Sole Arbitrator was mindful that the consequences of the required strict application of the rules could be harsh on athletes, she was of the opinion that the present case was an illustrative example for that as the Athlete submitted to testing at the recorded location only 10 minutes after the expiry of the time slot, and the sample she provided was clean.

However, the Sole Arbitrator strongly emphasized that Whereabouts failures could not be undone through ex post demonstrations of (real or hypothetical) clean samples as this would put the entire reporting system at risk. In any case, the Sole Arbitrator reminded that the potentially harsh effects of the strict system were mitigated by the fact that it takes three Whereabouts failures within one year to constitute an ADRV. Furthermore, the Sole Arbitrator took note that Article 10.3.2 of the WADC in general and Article 10.3.2 of the POLADA ADR in particular allowed to reduce the period of ineligibility down to one year depending on the circumstances.

As a result of all of the above, the Sole Arbitrator found that the Athlete's failure to be present for testing at the location registered in her Whereabouts filing between 7 am and 8 am on 19 November 2022 constituted a Missed Test

Decision

In light of the foregoing, the Sole Arbitrator upheld the appeal. She set aside the decision rendered by the POLADA Disciplinary Panel on 14 December 2022 and found that Natalia Maliszewska had committed a Missed Test on 19 November 2022 as defined in the ISRM. The Sole Arbitrator ordered the POLADA to record the Missed Test.

CAS 2023/A/9501 Dansk Boldspil-Union, FC Nordsjaelland & Batuhan Zidan Sertdemir v. Fédération Internationale de Football Association (FIFA)
5 September 2023 (operative part of 15 May 2023)

Football; Request for an exemption of the validation exception in respect of the transfer of a minor player (art. 14 of the Annexe 3 RSTP); Admissibility of the appeal and criteria of a decision; Stranding to sue; Duty of FIFA to notify its regulations and responsibility of FIFA's stakeholders in this respect; Hierarchy of norms and requirement imposed on clubs to confirm a player's registration; Grounds for FIFA to grant an exemption form the validation exception; Excessive formalism

Panel
Ms Anna Bordiugova (Ukraine), Sole Arbitrator

Facts

The Dansk Boldspil-Union, (the "First Appellant" or the "DBU") is an association with its registered offices in Brøndby, Denmark, which supervises and is responsible for the sport of football in Denmark. The DBU is affiliated to the *Fédération Internationale de Football Association* ("FIFA").

FC Nordsjælland A/S (the "Second Appellant", "FCN" or the "Club") is a football club with its registered office in Farum, Denmark. FCN is registered with the Dansk Boldspil-Union.

Mr. Batuhan Zidan Sertdemir (the "Third Appellant" or the "Player") is a Danish professional football player currently employed by FCN.

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

The Player joined the FCN academy some time in 2017, at the age of 12. In 2020, at age of 15, he was promoted to the FCN U-19 team.

On 1 July 2021, FIFA issued Circular Letter # 1763 "Regulations on the Status and Transfer of Players – categorisation of clubs, registration periods, and international transfers of minor players" (hereafter "2021 Circular" or "Circular Letter 1763") which, inter alia, stated:

"3. Administrative procedure for the international transfer of minor players

We would like to clarify certain aspects of the administrative procedure governing the international transfer of minor players.

As you may know, where an international transfer of a minor player is due to take place, two separate procedures must be conducted in TMS:

- *The relevant association must submit a minor application (cf. art. 19 par. 4 of the Regulations).*
- *A transfer instruction must be processed in accordance with Annexe 3 to the Regulations.*

Following a technical update to TMS (release 10.2), transfer instructions related to the international transfer of a minor player may be confirmed by the clubs concerned at any time. Doing so no longer depends on the status of the relevant minor application (thus revoking the procedure described in FIFA circular no. 1587 of 13 June 2017).

Regardless of the above, the new association's ability to request an International Transfer Certificate (ITC) for a minor player remains dependent on the status of the associated minor application.

Therefore, a club intending to register a minor player must comply with all its obligations prior to the end of the applicable registration period (subject to the exceptions under art. 6 par. 1 of the Regulations), as per the applicable provisions of Annexe 3 to the Regulations.

Independently from the relevant minor application, in accordance with art. 19 par. 4 (a) of the Regulations, a club intending to register a minor player shall undertake the following actions prior to the end of the applicable registration period:

(i) enter a transfer instruction (cf. art. 4 par. 2 read with art. 8.2 par. 1 of Annexe 3 to the Regulations);

(ii) provide all compulsory data (cf. art. 4 par. 3 read with art. 8.2 par. 1 of Annexe 3 to the Regulations);

(iii) upload all mandatory documents to support the information entered (cf. art. 4 par. 4 read with art. 8.2 par. 1 of Annexe 3 to the Regulations);

(iv) confirm the relevant transfer instruction (cf. art. 4 par. 4 read with art. 8.2 par. 1 of Annexe 3 to the Regulations); and

(v) where applicable, resolve any matching exceptions (cf. art. 4 par. 5 read with art. 8.2 par. 1 of Annexe 3 to the Regulations).

For clubs that are not registered in TMS, these actions must be completed by their association, if the minor player will be registered as an amateur (cf. art. 1 par. 6 of Annexe 3 to the Regulations).

Associations remain responsible for requesting an ITC in a timely manner (cf. art. 8.1 par. 2 of Annexe 3 to the Regulations) upon notification of a decision approving a minor application. Where an approval decision is notified to an association after the end of the applicable registration period, the association may be entitled to request the ITC outside that registration period.

(…)".

In July 2021, the Player was transferred from FCN to Bayer 04 Leverkusen Fußall GmbH ("Bayer").

On 30 January 2023, FCN and Bayer concluded a transfer agreement for the permanent transfer of the Player's registration to FCN. On the same day, the Player signed a termination agreement with Bayer.

On 31 January 2023, the Player and FCN entered into an employment contract valid as of the same day until 31 December 2025.

On that day the Player was still a minor (aged 17 and 361 days), therefore, FCN entered a transfer instruction in the FIFA Transfer Matching System ("TMS") and uploaded all the relevant documents.

The DBU created a "minor case" and submitted the application for approval of the FIFA Players' Status Chamber (the "PSC").

On 16 February 2023, the DBU requested the International Transfer Certificate ("ITC") for the Player from the Deutscher Fußball-Bund ("DFB").

On the same date, the DBU's TMS manager submitted a correspondence to FIFA requesting the approval of and intervention enabling ITC request for the Player, namely a special exemption from the *"validation exception"* in TMS, i.e. FIFA's intervention giving the possibility to proceed with requesting the ITC for the Player. In its letter, the DBU mentioned twice that the transfer instruction was created and confirmed by FCN before the registration period ended.

On 17 February 2023, FIFA informed the DBU that it "[...] *is not in a position to grant [the] request for the special exemption from the "validation exception" in TMS"*, because *"Art. 10 par. 7 of Annexe 3 to the RSTP [...] stipulates, inter alia, that all data relating to the transfer instruction allowing the new association to request an ITC shall be entered and confirmed into the TMS by the club wishing to register the player during one of the registration periods*

established by that association"; and because the transfer instruction was confirmed by FCN *"only after the end of [the DBU's] latest registration period".*

On 1 March 2023, the DBU submitted another correspondence to FIFA where the DBU highlighted, having conducted an internal investigation, that the 2021 Circular was sent by FIFA only to the DBU's general email box, but that this email was not forwarded to the DBU's TMS department, thus it remained unaware of the new administrative procedure, introduce by the said 2021 Circular. DBU once again requested FIFA to reconsider its position and grant a special exemption related to the registration of the Player.

On 3 March 2023, FIFA replied, reiterating its previous position and stated that *"after a careful analysis of the documentation and information on file, the Chairperson of the [PSC] confirmed that the provisions of Annexe 3 to the RSTP regarding the obligation to enter and confirm the relevant transfer instruction in TMS within the relevant registration period were not respected [...]"* and that *"the present decision is final and subject to the legal remedies foreseen by article 57 of the Statutes"* (the "Appealed Decision").

On 16 March 2023, the Appellants filed a joint Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the Appealed Decision, in accordance with Articles R47 and R48 of the 2023 edition of the CAS Code of Sports-related Arbitration (the "CAS Code").

Reasons

1. Admissibility of the appeal and criteria of a decision

The appeal arbitration procedure according to Article R47 *et seq.* of the Code is only available for disputes whose subject matter concerns an appeal against a "decision". This follows from Article R47 of the CAS Code.

There is abundant CAS jurisprudence in relation to what constitutes a *decision* within the meaning of Article R47 of the Code (CAS 2004/A/659; CAS 2004/A/748; CAS 2005/A/899; CAS 2008/A/1633; CAS 2013/A/3148; CAS 2014/A/3744 & 3766). According thereto the characteristic features of a *decision* may be described as follows:

a. the term "decision" must be construed in a large sense;

b. the form of the communication in question is irrelevant for its qualification;

c. in principle, for a communication to be qualified as a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties;

d. a decision is a unilateral act, sent to one or more determined recipients that is intended to produce or produces legal effects.

In view of the above criteria and in the absence of disagreement between the Parties as to whether the FIFA letter of 3 March 2023 constituted a decision, the Sole Arbitrator found that such letter indeed qualified as a *decision* within the above meaning, since the latter produced legal effects, affecting the legal situation of the Appellants.

2. Standing to sue

Under Swiss law, the question of standing to sue or be sued must be reviewed *ex officio*. The Swiss Federal Tribunal (SFT) had held that the question of who has standing to sue wss a question of the merits implying that if the appellant's standing to sue wss denied, then the appeal, albeit admissible, should be dismissed

(cf. ATF 128 II 50, 55; ATF 126 III 59 c. 1a; ATF 123 III 60c 3a).

The standing to sue of the Club and the Player might appear questionable in view of the prayers for relief as put before the Sole Arbitrator, namely – *"To grant the DBU's request for an exemption of the validation exception in respect of the transfer of the Player from Bayer Leverkusen to FCN".*

However, the Sole Arbitrator observed that the Respondent did not object to the Appellants' standing to sue, and, in view of the provisions of Article 57 of the FIFA Statutes, which does not specifically indicate/limit the individuals/entities which are entitled to lodge an appeal to CAS and does not limit the circle of individuals/entities entitled to appeal to CAS, and keeping in mind that the sole arbitrator in a similar case CAS 2017/A/5063 came to the same conclusion, the Sole Arbitrator concluded that there was no need to tackle this issue at the matter at hand.

3. Duty of FIFA to notify its regulations and responsibility of FIFA's stakeholders in this respect

The Parties disputed the correctness and appropriateness of the way in which FIFA informed its member associations of the Circular Letter 1763, which clarified certain aspects of the administrative procedure governing the international transfer of minor players.

Whereas the Appellants argued that this Circular Letter was improperly communicated only to DBU to its general email and was not also separately emailed to the DBU's TMS manager personal email, FIFA argued that the general email of an association wss a proper mean of communication and that, in addition, the said circular letter was also published in TMS Help Center, accessible to all TMS users, where it should have been retrieved by the DBU TMS manager.

Pursuant to FIFA Statutes (Articles 8(3), 11(4) and 15(1)(a)), national associations, their affiliated clubs, independently one from the other, by their participation in organized football undertake to abide by FIFA Statutes and its regulations and to keep themselves constantly informed on all updates of those documents.

For FIFA to demand fulfillment of the above obligations, the new rules only take effect once they have been communicated and the associations and their members had a chance to obtain knowledge of the contents of the new rules i.e. when the new rules entered in the association's sphere of control.

In this respect, the Panel observed that notification of documents and regulations, adopted by FIFA, via general email and simultaneous publication on its website was a very longstanding practice and an appropriate mean of communication. The Panel also deemed that the FIFA TMS Help Center that was accessible to all TMS users and contained a "Document Library" and a "FAQ" sections was a specific tailored instrument of obtaining TMS related knowledge. It was aimed at giving fast and direct access to all updates needed to TMS users to perform their duties of curiosity as per article 6(2)(h) of the Annex 3 FIFA RSTP and operate TMS diligently.

Agaisnt this backgroung, the Panel found that absent any valid reason for the association's failure to fulfil its duty to obtain knowledge of the relevant FIFA communications and forwarding it to its TMS department and further to its clubs, the association acted negligently. Therefore, independently one from the other, FCN and DBU TMS users had to have been aware of the Circular Letter 1763 and the administrative procedures introduced

therein i.e. a valid transfer instruction – upload documents and confirm the transfer instruction without delay before the end of the registration period, thus actually sending it to FIFA for further processing.

4. Hierarchy of norms and requirement imposed on clubs to confirm a player's registration

The Sole Arbitrator observed that there was abundant CAS jurisprudence regarding the force of FIFA Circular Letters – *"FIFA's Circular Letters are not regulations in a strict legal sense. However, they reflect the understanding of FIFA and the general practice of the federations and associations belonging thereto. Thus, these Circular Letters are relevant for the interpretation of the FIFA Regulations. However, FIFA's Circular Letters cannot be allowed to take precedence over the clear and specific wording of FIFA's regulations and a Circular cannot amend, override, change or contradict the FIFA Regulations* (see CAS 2020/A/7144, 2016/A/4448).

Thus, in light of the principle of the hierarchy of the laws, a circular that contradicted the wording of the RSTP adopted later should not be relied on. Notably, the applicable August 2021 or October 2022 version of the RSTP required the transfer instruction to be confirmed by a club before the registration period ended, whereas there was no such strict demand in the previous versions. Without confirmation, the transfer could not be processed because it was not brought to the attention of FIFA. Non-confirmation meant that the national association could not proceed with the ITC request. Annexe 3 RSTP did not make any difference between the transfer of an adult or a minor player.

5. Grounds for FIFA to grant an exemption form the validation exception

The Sole Arbitrator, therefore, had to determine whether in the matter at stake, there was an issue, that prevented the transfer of the Player from proceeding to the next status, namely to ITC request.

Article 14 of the Annexe 3 RSTP lists cases when a validation exception may be triggered: *a) The player is less than 18 years old and the corresponding minor application has not yet been accepted; b) The new club is serving a ban on registering new players; c) The new club and/or the former club has exceeded the loan limitations; d) The date of the ITC request is outside the new association's registration period, and no exception under art. 6 par. 1 of these regulations applies; or e) The ITC request has been rejected by the former association and the rejection has been disputed by the new association".*

The non-confirmation of the transfer instruction by a club is not an exception foreseen by RSTP. Moreover, no valid issue that prevented the club from confirmation, beside its own negligence, was brought to the attention of FIFA by the relevant national association. The association's own negligence leading to the club's lack of proper knowledge necessary to operate in TMS could not be accepted as an excuse and considered exceptional.

6. Excessive formalism

The Sole Arbitrator further noted that the Appellants claimed that FIFA's refusal to register the Player was an act of excessive formalism, because only "one box was not ticked" in TMS, i.e. "confirm" box.

Pursuant to the Swiss Federal Tribunal: *"excessive formalism takes place when strictly applying the rules is justified by no interest worthy of protection, becomes an end in itself and complicates in an untenable way the application of material law"* (4A_600/2008).

Due to their own fault DBU and FCN failed in following properly the registration process as prescribed by Articles 7(d) and 10.7, 10.8 of the Annexe 3 of the RSTP and clarified in details by the Circular Letter 1763 dated 1 July 2021, which both DBU and FCN should have been aware of well before proceeding with the transfer of the Player. Both had 19 months to do so. The transfer instruction was not "confirmed" in time, i.e. within the registration period. A seven-day delay could not be viewed as purely formalistic minor mistake. By not confirming the transfer instruction FCN had actually never sent/notified it to FIFA. The confirmation of the transfer instruction was not a mere administrative formality "to tick a box", but indeed a condition for the validity of the transfer request. This principle made it possible to rule out the reproach of excessive formalism. The confirmation of the transfer instruction was not made dependent on the approval of the transfer of a minor player by FIFA by any provision of Annexe 3 RSTP.

Decision

In light of the foregoing, the Panel dismissed the appeal.

CAS 2023/A/9757 International Boxing Association (IBA) v. International Olympic Committee (IOC)
2 April 2024

Boxing; Governance: withdrawal of the IOC's recognition of the IBA as the IF for the sport of boxing; Nature of the arbitration (international or domestic); Extent of the principle of autonomy of Swiss associations; Legal basis for the withdrawal of recognition; Right to be heard; Abuse of a dominant position by the IOC; Violation of IBA's personality right; Assessment of the IBA's satisfaction of the IOC's condition with respect the recognition

Panel

Mr James Drake KC (United Kingdom), President
Mr Jeffrey Benz (USA)
Mr Patrick Lafranchi (Switzerland)

Facts

The International Boxing Federation (the "IBA" or the "Appellant") is a non-governmental not-for-profit organisation, with its registered office in Lausanne, Switzerland, formerly recognised by the IOC as the international federation ("IF") governing the sport of boxing.

The International Olympic Committee (the "IOC" or the "Respondent") is the world governing body of Olympic sport, with its registered office in Lausanne, Switzerland. The IOC is incorporated as an association pursuant to Articles 60 *et seq.* of the Swiss Civil Code (the "SCC") and is governed by the Olympic Charter (the "Olympic Charter"). The general meeting of the IOC members is known as the IOC Session. It is the IOC's supreme organ.

The IBA has suffered a long history of allegations of corruption and bout manipulation dating back, at the least, to corrupt behaviour by boxing referees at the Olympic Games in Seoul 1998, and the IOC and the IBA have had a long history of interaction since then to eradicate corrupt behaviour within the sport of boxing.

Following the OG Rio 2016, several allegations were levelled at the IBA in relation to the corrupt conduct of IBA senior staff and IBA referees and judges in the OG Rio 2016 (and in previous Olympic Games in Athens Sydney and London).

At that time:
- The IBA's own investigation committee concluded that there was a *"bad culture"* within the IBA that was driven by *"power, fear and lack of transparency"*.
- The IOC Executive Board (EB) requested the IBA to undertake steps to address serious concerns related to its governance and financial stability. The IOC EB requested a financial audit, an independent review, and changes to the rules relating to referees and judges.

On 6 December 2017, the IOC EB suspended the IOC's financial contributions to the IBA until the IBA's problems over governance and finances were resolved.

On 12 December 2017, the IOC told the IBA that, at the meeting of the IOC EB the previous week, the IOC EB expressed its concerns regarding governance and financial stability at the IBA and set forth several *"expected steps"* on which the IBA was asked to submit a full report by 31 January 2018. These steps included (a) governance, (b) financial and (c) changes to the referees and judges to ensure sporting integrity.

On 27 January 2018, the IBA elected Mr Rakhimov as interim president. Mr Rakhimov was designated by the US Department of Treasury as a member of an international crime syndicate.

On 31 January 2018, the IBA submitted its 2018 IBA Progress Report to the IOC.

On 7 February 2018, the IOC EB decided to maintain its suspension of the IBA's funding and opened an investigation into the governance of the IBA to be conducted by the IOC Chief Ethics and Compliance Officer (IOC CECO).

On 25 April 2018, the IBA submitted a further report to the IOC, by which the IBA provided further information as to its actions in the fields of governance, finance, and refereeing and judging.

On 3 May 2018, the IOC informed the IBA that it had decided to maintain its suspension of funding and noted that there remained several key areas requiring further information. The IOC also forth a few actions which the IBA was required to do by 6 July 2018 in relation, inter alia, to governance, finance, and refereeing and judging.

On 6 July 2018, the IBA submitted a progress report in response to the IOC request of 3 May 2018.

On 20 July 2018, the IOC decided to maintain its suspension of the IBA's funding. In an annex to its letter to the IBA, the IOC set forth several actions which the IBA was required to do by 12 November 2018 including on governance, finance, and refereeing and judging.

On 2-3 November 2018, the IBA elected Mr Rakhimov (the individual appearing on the US Government sanctions list because of alleged involvement in criminal activity) as president.

On 3 December 2018, the IOC informed the IBA that it had decided to establish an inquiry into the IBA: (a) to analyse and investigate the IBA's progress with respect to various matters including governance, finance, and refereeing and judging; and (b) to make a recommendation on potential measures and sanctions in accordance with the Olympic Charter.

On 21 May 2019, the IOC Inquiry Committee issued the IOC Inquiry Report. It concluded that:

i. There was a *"continuous disregard of basis governance standards in breach of the Olympic Charter and the IOC Code of Ethics"*.
ii. There were insufficient safeguards to ensure the sustainable and fair management of refereeing and judging.
iii. The IBA was over-indebted and it was impossible to confirm that it was operating as a going concern.

The IOC Inquiry Committee recommended that *"such an accumulation of risks would justify the withdrawal of the recognition"* of the IBA as an IF by the IOC but, in the interest of the sport of boxing and its athletes, the IOC should suspend the IOC's recognition of the IBA *"until sustainable improvements have been made in the areas of governance, ethics, refereeing and judging as well as financial stability and going concern"*.
Based on the IOC Inquiry Report, the IOC EB recommended to the IOC Session to suspend the IOC's recognition of the IBA, and the IOC Session thus decided that the IOC should withdraw the IBA's recognition as an IF. The decision was made pursuant to Rules 3.7, 18.2.8, 18.2.11 and 25 §2 of the Olympic Charter. Of these, Rule 25 §2 provides as follows:
"The statutes, practice and activities of the IFs within the Olympic Movement must be in conformity with the

Olympic Charter, including the adoption and implementation of the World Anti-Doping Code as well as the Olympic Movement Code on the Prevention of Manipulation of Competitions. Subject to the foregoing, each IF maintains its independence and autonomy in the governance of its sport".

On 15 November 2021, the 'Governance Reform Group' (GRG) engaged by the IBA issued its GRG Recommendations setting out the steps required to be taken by the IBA.

On 26 November 2021, the IBA Board adopted the GRG Recommendations.

On 9 December 2021, the IOC Executive Council (EC) issued the IOC Letter saying, in terms, that the IOC was *"tasking"* the IOC DG and the IOC CECO with defining a *"roadmap"* in consultation with the IBA with respect to three areas of concern:

a. Finance: *"With regard to finance, to increase financial transparency and sustainability including through diversification of revenues".*
a. Sporting integrity: *"With regard to the credibility of the boxing competitions, to change its R&J process to ensure its integrity under the monitoring of* [Price Waterhouse Coopers] *PwC, including a monitoring period for AIBA's own competitions ahead of the Olympic Games Paris 2024".*
b. Governance: *"With regard to governance, to ensure the full and effective implementation of all the measures proposed by Professor Haas and his team* (the GRG's Recommendations)*, including the change of culture".*

It was said within the IOC Letter of 9 December 2021 that *"should the above-mentioned conditions be met by AIBA to the satisfaction of the IOC, the suspension of AIBA's recognition could be lifted in 2023".*

In fact, the IOC's three long-standing areas of concern with respect to the IBA had been discussed at some considerable length in the IOC DG/ CECO Interim Report dated 8 December 2021 on which the IOC Letter of 9 December 2021 was based. The following elements bear repeating:

a. As to finance:
   i. The IOC acknowledged that sponsorship revenue from Gazprom had facilitated the repayment of the Benkons debt but that there remained a contingent liability to First Commitment International Trade (FCIT) in the amount of USD 18.9 million.
   ii. There was no *"real"* financial transparency since the IBA had declined to share its sponsorship contract with Gazprom, despite the IOC's willingness to enter into a Non-Disclosure Agreements (NDA) in that respect.
   iii. The IBA's reliance on a single source of sponsorship revenues presented a problem. For its long-term sustainability, the IBA should have a more diversified revenue stream.
   iv. The IBA's reliance on a state-owned sponsor also raised concerns in relation to conflict of interest and autonomy.
   v. The IOC will continue to monitor the IBA's financial situation.

b. As to refereeing and judging:
   i. PwC performed an audit of the IBA Men's World Championships in Belgrade and highlighted risks related to the potential for human interference in the refereeing and judging process.
   ii. The IOC put in place refereeing and judging processes for the OG Tokyo 2020 in a way that preserved the credibility of the results, which processes were supported by most of the athletes National Federations (NFs).
   iii. The IOC therefore encouraged the IBA to change its own refereeing and judging processes to ensure the integrity of its competitions.

iv. PwC would monitor the IBA's refereeing and judging processes ahead of the OG Paris 2024.

c. As to governance:
   i. The IOC acknowledged the improvements in this area, as reflected in the ASOIF survey.
   ii. However, the GRG Recommendations still needed to be fully implemented and the IBA was encouraged to implement the GRG Recommendations fully and effectively.

The IBA well understood this, as is made clear by, amongst other things, its response to the IOC Letter of 9 December 2021 in which the IBA recognised that it *"has only been able to make […] progress on the key issues of sporting integrity, financial integrity and governance reform because we have been working to a clear roadmap, that we look forward to developing further with the IOC"*. In the end, the IBA accepted that these conditions were indeed part of the so-called roadmap.

Moreover, following the IOC Letter of 9 December 2021, the IOC made it clear to the IBA as early as 21 January 2022 that *"the final assessment of the situation"* was to take place in 2023 i.e. the Cut-off Date.

On 22 June 2023, the IOC Session decided to withdraw the IOC's recognition of the IBA as the IF for the sport of boxing (the "Appealed Decision").

On 27 June 2023, the IBA filed a Statement of Appeal with the CAS against the IOC with respect to the Appealed Decision.

Reasons

The IBA contented that the IOC Comprehensive Report did not prove the IBA's non-compliance and sought to have the Appealed Decision *"annulled and set aside in full"*.

The IOC sought the dismissal of the appeal and the upholding of the Decision of the IOC Session of 22 June 2023 because, according to the IOC, the IBA had failed to demonstrate to the IOC's satisfaction that it had fulfilled any of the cumulative IOC Conditions at the time of the Cut-off Date.

1. Nature of the arbitration (international or domestic)

At the outset the Appellant made the submission that this appeal was a domestic arbitration governed by Part 3 of the Swiss Code of Civil Procedure (CPC) and not an international arbitration governed by Chapter 12 of the Swiss Private International Law Act (PILA).

In this regard, the Panel noted that, under Article 176 para. 1 of the PILA, an arbitration was domestic, and thus subject to Part 3 CPC, if the seat of the arbitral tribunal was in Switzerland and if, at the time when the arbitration agreement was entered into, both parties were domiciled or habitually resident in Switzerland. However, the CAS Panel also noted that pursuant to CPC Article 353 para. 2, *"The parties may exclude the application of this Part* [3] *by making an express declaration to this effect in the arbitration agreement or a subsequent agreement, and instead agree that the provisions of the Twelfth Chapter of the PILA apply. (…)"*. The Panel found this provision paramount for issues relating to disputes with a sports background, as the international sporting community has a vested interest in the uniform application of the PILA as the *lex arbitri*. The Panel concluded that contrary to the reference to the CAS in the Olympic Charter which was not sufficient grounding, a clause to opt into Chapter 12 of the PILA set forth in the Order of Procedure signed by both parties fulfilling the requirements set out in Articles 353 para. 2

juncto 358 CPC was a valid agreement between parties having both their seat in Switzerland.

2. Extent of the principle of autonomy of Swiss associations

The Panel primarily noted that the Appealed decision was made by the IOC session and that the IOC was formed as an association and was governed by Title Two, Chapter Two of the Swiss Civil Code (SCC). Pursuant to the principle of autonomy of Swiss associations, the latter had a discretionary right with respect to their membership.

Rule 3.7 pf the Olympic Charter provides: *"Recognition by the IOC may be provisional or full. Provisional recognition, or its withdrawal, is decided by the IOC Executive Board for a specific or an indefinite period. The IOC Executive Board may determine the conditions according to which provisional recognition may lapse. Full recognition, or its withdrawal, is decided by the Session …".*

The Panel held that the use of the word *"may"* in Rule 3.7 of the Olympic Charter granted the IOC a discretionary power to grant or withdraw recognition. It also concluded that this discretionary power was an essential element of the very nature of the IOC as a Swiss association, with a constitutional freedom of association, and thus with a broad measure of autonomy with respect to with whom it decided to associate and on whom, in this context, it decided to confer the status of IOC recognition. The relevant legal bases were to be found at the confluence of Article 28 (protection of legal personality) and Article 72 (exclusion of an association's member) SCC.

3. Legal basis for the withdrawal of recognition

The IBA argued, in its written submissions, that there was no legal basis for the decision withdrawing its recognition. It argued that, while Rule 59 of the Olympic Charter provided for the withdrawal of recognition if there was a violation of the Olympic Charter, the IOC made no mention of any such violation, and this was not a disciplinary matter. The IOC instead relied on Rule 3.7 of the Olympic Charter, but that provision simply identified the power of the IOC Session to withdraw recognition and did not provide any legal basis to do so.

For its part, the IOC contended that the legal basis on which the IOC decided to withdraw its recognition of the IBA was Rule 3.7 of the Olympic Charter. It was said that Rule 3.7 provided that: (a) the IOC was empowered to withdraw the recognition given to IFs; (b) any such withdrawal was to be decided by the IOC Session, as was the case here; and (c) all details of recognition procedures were determined by the IOC EB, as was the case here with the IOC Letter of 9 December 2021 and the subsequent correspondence.

The Panel held that the IOC Session, as the supreme body of the IOC, was clearly free to accept or reject the recommendations made by the IOC Executive Board. In the absence of any basis or evidence to support the contention that the IOC's withdrawal of recognition of a member was not a decision freely taken by the IOC Session in accordance with its constitutional powers, this allegation could not be accepted. What is more, generally boards such as the IOC Session should necessarily act on the basis of recommendations made by one of their constituent body members.

4. Right to be heard

The IBA complained that the IOC did not respect its right to be heard in that it was not allowed the opportunity of addressing the IOC Session in person in the meeting at which the Appealed Decision was made.

The Panel recalled that the right to be heard was a fundamental right, protected by the Swiss Constitution (Article 29(2)) and also by Articles 182 and 190 of PILA. It is a legal principle which must be respected by federations when taking their decisions and within their internal proceedings. However, the Panel stressed that the right to be heard did not include the right to present one's case orally but was complied with where a party had been afforded a number of opportunities over an extended period of time to make its case. This was the case for the IBA that was offered many opportunities to present its case over several years.

5. Abuse of a dominant position by the IOC

The IBA argued that pursuant to the provisions of the Swiss Legal Act on Cartels and other restraints of Competition (*"Loi fédérale sur les cartels et autres restrictions à la concurrence"*) (LCart): (a) the IOC held a dominant position in the relevant market; (b) the IOC's withdrawal of the IBA's recognition was an abuse of that dominant position; and (c) the said decision was not justifiable by legitimate business reasons.

Article 2(2) of LCart provides that *"This Act applies to practices that have an effect in Switzerland, even if they originate in another country"* (*"La présente loi est applicable aux états de fait qui déploient leurs effets en Suisse, même s'ils se sont produits à l'étranger"*). This is consistent with Article 137(1) of PILA which provides that *"Claims based on a restraint of competition are governed by the law of the state in whose market the restraint has direct effects on the injured party"*.

In this case, it was certainly the position that the IOC and the IBA have their seats in Switzerland, but it was not at all clear to the Panel how the Appealed Decision gave rise to an effect in Switzerland so as to bring the matter within the LCart. The Panel was prepared, however, to proceed on the basis that the Appealed Decision has had an effect on the IBA and that, because the IBA was situated (and seated) in Switzerland, the Appealed Decision has had an effect in Switzerland.

The Panel stressed that to establish an abuse of dominant position by the IOC, the IBA should first establish that the IOC held a dominant position in the relevant market. Insufficient or incorrect definition of the relevant market made it impossible to conclude that a dominant position existed in that market. What is more, holding a dominant position was not *per se* unlawful. Rather, a dominant undertaking's refusal to deal with another market participant was unlawful if, and only if, such behaviour was unlawful. Therefore, the Panel held that the IBA should also show that the IOC had abused its dominant position by acting exploitatively in the exercise of its dominant position. In this respect, an IOC's obstruction i.e. an IOC's intent to hinder competition should be established. The Panel observed that in any event, even if the IOC was found to have abused its dominant position by withdrawing the relevant IF's recognition, its conduct would still be lawful if it was objectively justified by legitimate business reasons.

6. Violation of IBA's personality right

The next ground of challenge argued for by the IBA was that the Appealed Decision violated the IBA's personality rights. It was said that Article 28 of the SCC prohibited infringements of personality rights by third parties and that the IOC's withdrawal of recognition infringed the IBA's personality rights, in particular its right to development and economic fulfilment in professional sport.
As a matter of Swiss law, protection against attacks on personality rights is governed by

Article 28 of the SCC, which provides as follows:
"1 Any person whose personality rights are unlawfully infringed may petition the court for protection against all those causing the infringement.
2 An infringement is unlawful unless it is justified by the consent of the person whose rights are infringed or by an overriding private or public interest or by law".

The Panel recalled that personality rights might be invoked by natural and legal persons. A very significant part of the role of an IF, namely representing the sport at Olympic level, would be immediately lost upon withdrawal of recognition. An IF would also suffer an economic contraction from the loss of recognition, that follows, if nothing else, from the loss of IOC fundings. The issue for consideration therefore was whether, pursuant to Article 72 SCC that concerns "exclusion" of a member, the IOC had good cause to withdraw the IBA's recognition and whether, that outweighed the IBA's interest to protect its personality rights associated with recognition.

The Parties approached this question by way of an assessment of whether the conditions set by the IOC in relation to the IBA's recognition were met, the IBA arguing that the conditions were met by the IBA, the IOC arguing that they were not. On this basis, the IOC argued, in effect, that its withdrawal of recognition was for an important reason, namely the failure on the part of the IBA to satisfy the conditions set by the IOC for recognition.

It was on that basis therefore that the Panel had to assess whether the IBA did satisfy the conditions set by the IOC with respect to recognition.

7. Assessment of the IBA's satisfaction of the IOC's condition with respect the recognition

The Panel stressed that pursuant to Article 72 SCC, a decision of the IOC to withdraw the recognition of an IF was justified by an overriding interest on the part of the IOC to ensure that those IFs on which it conferred recognition complied with the conditions articulated by the IOC for such recognition i.e. in the case at hand finance, sporting integrity (as to referees and judges), and governance.

The Panel agreed with the finding of the IOC Comprehensive Report that the IBA did not satisfy the requested conditions:

i) The IBA did not meet the condition related to finance in that it did not *"increase financial transparency and sustainability including through diversification of revenues"*, as at the date of the Appealed Decision;

ii) The IBA did not meet the condition related to sporting integrity i.e. changes to its referee and judging processes. By denying the audit company the ability to assess whether the changes implemented by the IBA were sufficient to ensure the integrity of its competitions, the IBA created the circumstances where the IOC was not able to satisfy itself that the improvements put in place by the IBA were sufficient to ensure the integrity of the IBA's competitions.

iii) As at the date of the Appealed Decision, the IBA had not fully and effectively implemented the GRG Recommendations, including the change of culture, which was an expressly stated necessary condition of continued recognition by the IOC.

It followed as well that, in the Panel's view, these three matters amounted to important reasons that justified the IOC's decision to withdraw recognition pursuant to Article 72 of the SCC; or, put another way, the IOC's decision to withdraw recognition was, pursuant to Article 28 of the SCC, justified by

an overriding interest on the part of the IOC to ensure that those IFs on which it conferred recognition complied with the conditions articulated by the IOC for such recognition. It followed therefore that the impairment of the IBA's personality rights was not unlawful but justified.

Decision

In light of the forgoing, the Panel dismissed the appeal and confirmed the decision of the IOC Session of 22 June 2023.

Sélection de sentences arbitrales rendues par la Chambre ad hoc du TAS pendant les Jeux Olympique de Paris 2024

Selection of arbitral awards rendered by the CAS Ad Hoc Division during the Olympic Games Paris 2024

Selección de laudos arbitrale dictados por la División Ad Hoc del TAS durante los Juegos Olímpicos de París 2024

CAS OG 24/05 Livia Avancini v. World Athletics (WA), CAS OG 24/06 Max Batista v. WA and CAS OG 24/07 Hygor Bezerra v. WA

1 August 2024 (operative part of 26 July 2024)

Athletics; Qualified athlete's eligibility to participate to the OG despite their federations' failure to comply with additional testing requirement; CAS jurisdiction; Interpretation of Article 15.5.1(c) of the WA ADR; Determination of the existence of "truly exceptional circumstances" as per Article 15.5.1(c) of the WA ADR; CAS interference with the exercise of discretion of a sports governing body

Panel

The Hon. Annabelle Bennett (Australia), President
Mr Hamid Gharavi (France/Iran)
Prof. Roberto Moreno Rodríguez Alcalá (Paraguay)

Facts

The Applicants were:
a. Livia Avancini
b. Max Batista
c. Hygor Bezerra

The Respondent was World Athletics (WA).

The Interested Parties were:
a. International Olympic Committee (IOC)
b. Brazilian Olympic Committee (COC)
c. Brazilian Athletics Federation (CBAt)
d. Natalia Duco
e. Chilean Olympic Committee (CHOC)
f. Chilean Athletics Federation (CHAF)
g. Bence Venyercsán
h. Hungarian Athletics Federation (HAF)

These consolidated procedures involved three different applications by three athletes – a shot-putter, a race walker and a sprinter (the "Applicants"). The facts relevant to the determination of these Applications are common insofar as they affect the Applicants.

On 20 December 2022, the World Athletics Eligibility Rules Road to Paris 2024 were released ("the WA Eligibility Rules"). The WA Eligibility Rules provided that the qualification period for individual events for the Paris Olympic Games 2024 would start on 31 December 2022 (for combined events and relays) and on 01 July 2023 (for individual events), and end on 30 June 2024.

On 23 January 2024, the Federal law of Brazil establishing the public budget for the Brazilian government was officially published. The budget of the *Autoridade Brasileira de Controle de Dopagem* ("the ABCD") was provided for in this law.

On 29 February 2024, the Athletics Integrity Unit ("the AIU") and WA informed the Brazilian Athletics Federation's ("CBAt") that, in view of the failure of the CBAt to meet its testing obligations for 2022, there had been a decision of the Council of WA ("the Council Decision") that:
Pursuant to Article 47.2 (aa) of the Constitution and Anti-Doping Rule 15.6.4, Council resolved to impose the following additional testing obligations (as set out in paragraphs 1 and 2 below) on the following Category 'B' Member Federation: Brazil for the period starting from the effective date of this resolution (i.e. 08 March 2024) through to the conclusion of the Paris 2024 Olympic Games (i.e. The XXXIII Olympic Games, Paris-St-Denis, which is currently scheduled to conclude on 11 August 2024). The obligations relate to athletes who are not part of the Athletics Integrity Unit's Registered Testing Pool and are as follows:
1. Save as otherwise approved in the absolute discretion of the Athletics Integrity Unit's Board in truly exceptional circumstances, no athlete may participate as part of the National Team in the Paris 2024 Olympic Games unless:
a. in the 10 months prior to 4 July 2024, they have undergone at least three no notice out-of-competition tests (urine and blood) including (if they compete in

any of the middle-distance events from 800m upwards, a long distance event, a combined event or a race walk event) at least one Athlete Biological Passport test and one EPO test;
b. the three no notice out-of-competition tests have been conducted at least 3 weeks apart;
c. the first of the three no notice out-of-competition tests has been conducted no later than 19 May 2024; and
d. all three no notice out-of-competition tests have been conducted under the authority of an Anti-Doping Organization and the results recorded by the relevant entity in ADAMS
2. The relevant Member Federation shall ensure that all their Athletes are aware of this eligibility requirement.
(emphasis added)

Following the Council Decision, the CBAt identified a priority group of 102 athletes based on criteria established pursuant to the AIU directives ("the Additional Testing Requirements"), which included two of the Applicants, Ms Avincini and Mr Batista. The ABCD then started testing the athletes included in this group. The testing was conducted based on the ABCD's understanding that the Additional Testing Requirements mandated at least three out-of competition tests of urine and of blood, that is, six tests for each athlete.

On 10 June 2024, following a discussion with a Peruvian National Athletics Federation official, the CBAt consulted the AIU Compliance Manager. The Manager clarified that only three tests were sufficient to meet the requirements, that is, that the relevant parts of the Council Decision should be understood as requiring "urine or blood" tests not "urine and blood".

On 27 June 2024, Mr Batista and Mr Bezerra qualified for the Paris Olympic Games 2024. On 5 July 2024, Ms Avancini qualified for the Paris Olympic Games 2024 by way of the reallocation process.

On 3 July 2024 CBA submitted three petitions to WA/AIU in which it applied for an exception to the testing requirements under Rule 15 of the WA Anti-Doping Rules ("the WA ADR", 2024) due to *"truly exceptional and objectively proven circumstances"* citing, *inter alia*, its interpretation of the Additional Testing Requirements and the consequences of that interpretation on the ability to comply with those requirements in the allotted time.

On 6 and 7 July 2024, the AIU Board rejected the first three applications submitted by the Applicants.

On 15 July 2024, CBAt sought a reconsideration of the above decisions of 6 July and 7July 2024, which request was accepted by WA.

On 16 July 2024, the CBAt sent an email to all three Applicants, informing them of the 6 July 2024 and 7 July 2024 decisions by the AIU Board, which rejected the requests for an exception based on Rule 15.5.1(c) of the WA ADR.

On 23 July 2024, between 16h00 and 16h21 (Paris time), the Applicants filed three different Applications with the CAS Ad Hoc Division against the Respondent with respect to the first decisions. Thereafter, the President of the Ad Hoc Division decided to consolidate the three procedures opened by the CAS Ad Hoc Division.

WA informed the Panel that the quota places allocated to Ms Avancini and Mr Batista had been reallocated to Ms Ducó and Mr Venyercsan, who were then joined as interested parties, together with their national federations and national Olympic Committees.

On 24 July 2024, the AIU Board issued three decisions ("the Decisions") in which it rejected the three second applications for exemption pursuant to Rule 15.5.1(c) of the WA ADR. In each decision the AIU Board expressly stated:
For the avoidance of doubt the present decision incorporates by reference the AIU Board's decision of

[7 July 2024], which is now without separate force and effect.*
In each decision, the AIU Board rejected the claim that there were any *"truly exceptional circumstances"* justifying the application of the exemption and effectively rejected, one by one, all bases advanced for an excuse for failing to meet the Additional Testing Requirements.

On 24 July 2024 at 20h57 (Paris time), the Applicants filed an amended, consolidated Application with the CAS Ad Hoc Division against the Respondent with respect to the Decisions.

On 26 July 2024 at 7h30 (Paris time) a hearing was held.

Reasons

1. CAS Jurisdiction

Rule 61.2 of the Olympic Charter relevantly provides as follows:
"61 Dispute Resolution
[...]
2. Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration".
Article 1 of the CAS Arbitration Rules for the Olympic Games (hereinafter referred to as the "CAS Ad Hoc Rules") provides as follows:
"*Article 1. Application of the Present Rules and Jurisdiction of the Court of Arbitration for Sport (CAS)*
The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games.
In the case of a request for arbitration against a decision pronounced by the IOC, an NOC, an International Federation or an Organising Committee for the Olympic Games, the claimant must, before filing such request, have exhausted all the internal remedies available to him/her pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective".

The Panel concluded that it did have jurisdiction. WA did not expressly challenge the jurisdiction of the Panel. It was the IOC and Ms Duco and not the Respondent to the Amended Application, WA, that challenged jurisdiction. The Respondent merely cross referenced the IOC'S challenge at the hearing and declared that it would leave the matter in the hands of the Panel.

The basis of the challenge to jurisdiction was that the dispute did not arise within the mandated ten-day period before the Opening Ceremony. This was based on the assertion that the Applicants were well aware of a dispute about their eligibility well prior to 16 July.

In fact, there was an ongoing discussion between the CBAt and WA but the Athletes were only informed that WA had rejected their request for an exemption under Rule 15.5.1(c) of the WA ADR in the decisions of 6 and 7 July when that fact was notified to them on 16 July 2024, i.e. within the ten-day period. Furthermore, the Amended Application represented an appeal from the Decisions of 24 July 2024. Thus, the Athletes first took steps to exhaust internal remedies.

Moreover, by agreeing to reconsider the earlier decisions and, indeed, by incorporating them and declaring them of no separate effect, WA provided another step in the exhaustion of internal remedies, which acted to bring the relevant decision within the required time. In fact, on 23 July 2024, WA informed the Applicants, after the filing of the original Applications that it was WA's

* For Applicant 1; for Applicants 2 and 3, this should be read as 6 July 2024.

view that any action by the Applicants should not have been taken in respect of the decisions of 5 and 6 July 2024 but should await the reconsideration that resulted in the decisions of 24 July 2024, well within the ten-day time frame before the Opening Ceremony on 26 July 2024.

In view of the above, the Panel found that it had jurisdiction to hear the Amended Application

2. Interpretation of Article 15.5.1(c) of the WA ADR

The Panel believed, on its face, the words of Article 15.5.1(c) of the WA ADR, specifically *"at least three no notice out-of-competition tests (urine and blood)",* could be reasonably construed as requiring at least three no notice out-of-competition tests for urine and three no notice out-of-competition tests for blood. Objectively, this construction was available and could reasonably be adopted and applied by the ABCD. It could be said that the availability of this construction of this phrase could have arisen because of the drafting by WA.

The Panel accepted that the ABCD did interpret and understand the Additional Testing Obligations to require six tests per athlete, three of urine and three of blood. The fact that the ABCD obtained an extra US $60,000, apparently from the CBAt, to fund this extra work provided some support for this interpretation, as significant resources, additional to those available, were considered necessary by the ABCD in order to comply with the requirements.

From the available evidence, the Panel was satisfied that it was more likely than not that the ABCD fully intended to comply with the Additional Testing Requirements for all athletes qualified and accepted into the Brazilian team for the Paris Olympic Games and applied all available resources (including the additional $60,000 obtained from CBAt) to that end. The Panel accepted that the application of available resources to testing based on the legitimate interpretation of the Additional Testing Requirements was the material reason why full testing was not carried out on the Applicants within the limited period during which the required further governmental resources could not be secured as the yearly budget had by then been allocated. On the evidence before the Panel, it accepted that it was more likely than not that, were if not for the interpretation by the ABCD, the Additional Testing Requirements would have been completed for the Applicants.

3. Determination of the existence of "truly exceptional circumstances" as per Article 15.5.1(c) of the WA ADR

Rule 15.5.1(c) of the WA ADR allows for an exemption in *"truly exceptional circumstances* However, neither the wording of, nor the Comment to this rule limits this phrase to what would, legally or practically, amount to a case of impossibility. Nor does it require impossibility.

The Comment does state that there must be an "objective" reason. Thus, a merely "subjective" reason, such as a lack of diligence or due care, is not sufficient for its application.

In this case, the interpretation of the Additional Testing Requirements and the consequences of that interpretation constituted, in the view of the Panel, "an extraordinary objective reason" which then, because of the matters referred to above, such as the direction to provide urine and blood tests, the timing of the notification of the Additional Testing Requirements and ensuing resourcing issues, together amounted to "a truly exceptional circumstance". It was this combination of events that led to the fact that these three Athletes were not tested in accordance with those requirements.

The Panel noted the submission that this case departed from another award (CAS OG 20/012) as to the characterisation of "exceptional circumstances". However, the

Panel observed that a characterisation of what constitutes exceptional circumstances or truly exceptional circumstances necessarily involves an assessment of the particular facts in a particular case. Hence, while analogous reasoning might be helpful, a determination of the assessment of factual matters required a case by case analysis of this fact-sensitive rule.

4. CAS interference with the exercise of discretion of a sports governing body

The Panel accepted that, as submitted by WA, CAS case law made it clear that the CAS does not lightly interfere with the exercise of discretion of a sports governing body. There was no suggestion here that the decisions being reviewed were arbitrary or made in bad faith, or contrary to due process being afforded the Athletes in the making of those decisions. However, this was not a case limited to the review of an exercise of discretion but a determination, based upon the evaluation of evidence and submission, concerning the construction, and application, of a Rule, and the Comment to that rule, in the WA ADR.

Decision

The amended application filed by Livia Avancini, Max Batista and Hygor Bezerra on 24 July 2024 is upheld.

The decisions rendered by the Athletics Integrity Unit's Board on 23 July 2024 concerning each individual Applicant are set aside.

The Applicants are entitled to participate in the Paris 2024 Olympic Games.

CAS OG 24/09 Canadian Olympic Committee(COC) & Canada Soccer v. FIFA & New Zealand Football & New Zealand Olympic Committee Inc. & Fédération Française de Football & Comité National Olympique et Sportif Français & Federación Colombiana de Fútbol & Comité Olímpico Colombiano
7 August 2024 (operative part of 31 July 2024)

Football; Proportionality of the sanction imposed on a national team for the use of a drone for spying a rival team; Applicable standard of assessment; "Grossly" dispoportionate nature of the sanction

Panel
Mr Roberto Moreno (Paraguay), President
Prof. Philippe Sands KC (United Kingdom)
Ms Laila El Shentenawi (Egypt)

Facts

The Applicants were:
a. Canadian Olympic Committee
b. Canada Soccer

The Respondents were:
a. Fédération Internationale de Football Association
b. New Zealand Football
c. New Zealand Olympic Committee Inc.
d. Fédération Française de Football
e. Comité National Olympique et Sportif Français
f. Federación Colombiana de Fútbol
g. Comité Olímpico Colombiano

The Interested Party:
a. International Olympic Committee (IOC)

On 24 July 2024, a representative of New Zealand Football wrote to FIFA reporting an incident which occurred in the team's training session of 22 July 2024. According to this communication, after about one hour from the commencement of the training session, the team noticed a drone hovering high above the pitch. They stopped training and informed an onsite security who alerted the police. The police were able to locate the person flying the drone and took him into custody.

The person filming the training session with a drone turned out to be a staff member from the Canada women's football team, Mr Joseph Lombardi. Mr Lombardi was part of the Canadian delegation and his relationship with Canada Soccer was not disputed.

Mr Lombardi had filmed with a drone the training sessions of Canada's rival New Zealand on two occasions: on 20 and 22 July 2024.

Mr Lombardi pleaded guilty before the French criminal authorities and was later issued an 8-month suspended prison sentence.

On 24 July 2024, New Zealand Football filed a formal complaint with the FIFA Disciplinary Committee.

On 24 July 2024, the FIFA Disciplinary Committee opened disciplinary proceedings against Canada Soccer, Ms Priestman (the team's coach), Ms Mander (assistant coach) and Mr Lombardi for the potential breach of Article 13 of the FIFA Disciplinary Code (FIFA DC, 2023 Edition), and Article 6.1 of the Regulations Olympic Football Tournaments Games of the XXXIII Olympiad Paris 2024 Final Competition (the "ROFT Paris").

On 27 July 2024, the Chairperson of the FIFA Disciplinary Committee referred the matter to the FIFA Appeal Committee (the "FIFA AC").

On 27 July 2024, the FIFA AC issued its decision in the case, sanctioning Canada Soccer, Ms Priestman, Ms Mander and Mr Lombardi.

The sanction relevant for these proceedings is the sanction imposed on Canada Soccer (the FIFA AC Decision):

a) The Canadian Soccer Association is ordered to pay a fine to the amount of CHF 200,000. The fine is to be paid within 30 days of notification of the present decision.
b) Six (6) points are automatically deducted by FIFA from The Canadian Soccer Association's Women's representative team's standing in Group A of the OFT.

The FIFA AC Decision found that Canada Soccer breached Article 13 of the FIFA DC and Article 6.1 of the ROFT Paris. These provisions respectively establish that:

FIFA DC: 13. Offensive behaviour and violations of the principles of fair play
1. Associations and clubs, as well as their players, officials and any other member and/or person carrying out a function on their behalf, must respect the Laws of the Game, as well as the FIFA Statutes and FIFA's regulations, directives, guidelines, circulars and decisions, and comply with the principles of fair play, loyalty and integrity.
2. For example, anyone who acts in any of the following ways may be subject to disciplinary measures: a) violating the basic rules of decent conduct; b) insulting a natural or legal person in any way, especially by using offensive gestures, signs or language; c) using a sports event for demonstrations of a non-sporting nature; d) behaving in a way that brings the sport of football and/or FIFA into disrepute; e) actively altering the age of players shown on the identity cards they produce at competitions that are subject to age limits.
ROFT Paris 6.1:
The member associations that qualify for the Tournaments (the "Participating Member Associations") agree, in collaboration with the respective NOC, to comply with and ensure that every player, coach, manager, official, media officer, representative, guest and any other person carrying out duties throughout the final competition, and for the entire stay in the host countries, on behalf of a Participating Member Association (hereinafter "Delegation Member") complies with these Regulations, the Laws of the Game, the FIFA Statutes and FIFA's other regulations, in particular the FIFA Disciplinary Code, the FIFA AntiDoping Regulations, the FIFA Code of Ethics and the FIFA Equipment Regulations, as well as with any other FIFA circular letters, regulations, guidelines, directives and/or decisions
According to the FIFA AC Decision, the breach in question – the deployment of a drone used to spy on another team — was inconsistent with principles of i) fair play, ii) security and safety, and iii) reputation.

On 29 July 2024, at 10h00 (Paris time), the Applicants filed an application with the CAS Ad Hoc Division with respect to the FIFA AC Decision of 27 July 2024 (the "Application").

On 30 July 2024 at 15h00 (Paris time) an in-person hearing was held.

Reasons

The Applicants asked the Panel to address one aspect of the FIFA AC Decision of 27 July 2024 i.e. the deduction of six points, in respect of the Canadian team's performance in the Group stage of the competition. In these proceedings the Applicants did not seek to appeal the other sanctions imposed (inter alia, the fine of CHF 200'000).

The Applicants recognized the seriousness of Mr Lombardi's conduct *"and does not*

seek to challenge liability". It insisted, however, that it *"cannot be right that the players be punished by mere association"*.

Accordingly, the issue to be addressed by the Panel in these proceedings is discrete: is the six-point deduction sanction proportionate to the violation of the rules that has occurred, and if not, should the points deduction be reduced or eliminated.

The Panel noted that the case appeared to be "unprecedented" in the technical sense: it was not aware of any precedent involving spying with drones during the Olympic Games nor any such specific type of case before CAS, and no such precedent was presented by any party in these proceedings.

1. The applicable standard of assessment

The Applicants claimed that the Decision should be set aside because the sanction was "grossly disproportionate".

From the earliest stage of development of the case law, CAS panels have followed the position of Swiss law according to which a decision made within an association's discretionary power is presumed to be valid and effective unless a threshold has been crossed; a CAS Panel can only interfere with the discretionary decision of an association in case of misuse of its discretion (e.g., TAS 2001/A/330). This was subsequently refined and confirmed in other rulings: *"only if the sanction is evidently and grossly disproportionate in comparison with the proved rule violation and if it is considered as a violation of fundamental justice and fairness, would the panel regard such a sanction as abusive and, thus, contrary to mandatory Swiss law"* (CAS 2005/A/1001, citing CAS 2005/C/976 & 986 approvingly; see also CAS 2014/A/3467). In a more recent case, which cites other precedents, it was said that *"the Panel should only review the applied sanction if the latter is considered 'evidently and grossly disproportionate' to the offence"* (see e.g. CAS 2014/A/3467; CAS 2016/A/4840; CAS 2018/A/5800, paras. 72ff). *"When reviewing such sanction, the Panel should always have regard and deference to the expertise of the association which imposed the sanction"* (CAS 2022/A/8651). Finally, other recent cases have fully confirmed this jurisprudential tendency (e.g., CAS 2022/A/8731 or CAS 2022/A/8692).

The Panel held that the applicable standard was, as the main jurisprudential line held, one of *"evidently and grossly"* disproportionate.

2. *"Grossly"* dispoportionate nature of the sanction

The question to be answered by the Panel was whether the sanction of six-points deduction imposed by the FIFA AC Decision was "evidently and grossly" disproportionate, as the principal line of the jurisprudence requires.

The Applicants argued that the Decision was "grossly" disproportionate and, although they did not directly addressed the issue of it being "evidently" disproportionate, they did aver that it was a *"poorly reasoned scapegoating exercise, that lacks any nuance"*.

The Panel considered that, in relation to points deduction, the Appealed Decision might be said to be harsh. The fact that the points deduction was harsh, however, did not necessarily meant that it might be said to be grossly disproportionate. This was even more so where it was not disputed that the actions were serious and of great gravity, unprecedented, and took place in what is the most important international multi-sports event in the world, that is, the Olympic Games. The Applicants expressed their strong disagreement with

the sanction; but disagreement cannot be equated with arbitrariness, as another precedent has noted: arbitrariness was not found where there was a mere disagreement with a specific sanction, *"but only if the sanction concerned is to be considered as evidently and grossly disproportionate to the offence"* (CAS 2014/A/3562, cited approvingly in CAS 2022/A/8731). Given the gravity and characteristics of the offence in this case, the affirmation that the sanction was *"grossly disproportionate"* should be based on a clear arbitrariness – i.e., absence of reasoning— which was not found in this decision.

The Panel thus submitted that it was not possible to read the FIFA AC Decision and categorize it as a "grossly" or "evidently" disproportionate sanction, which constituted an abuse of the power or discretion, or even shocking. The decision was not an exercise of pure arbitrary power but purported to contain a logic and reasoning according to the circumstances of the case. The offence was, as has been noted, serious and unprecedented, and the sanction was within the measures provided by the FIFA DC which provided for more severe sanctions.

Moreover, having recognized its own liability, it was not open to Canada Soccer to then complain about the consequences of its actions on its players, a matter for which it was also fully responsible.

Decision

The application filed by Canadian Olympic Committee and Canada Soccer on 29 July 2024 was dismissed.

CAS OG 24/14 Marta Vieira da Silva, Comitê Olímpico do Brasil (COB) & Confederação Brasileira de Futebol (CBF) v. FIFA
16 August 2024 (operative part of 6 August 2024)

Football; March suspension imposed on a player due to a serious 'foul play' during a match; CAS jurisdiction; Consequence of the qualification of the challenged decision as a field of play decision

Panel
Ms Laila El Shentenawi (Egypt), Sole Arbitrator

Facts

The First Applicant was Marta Vieira da Silva ("Player").

The Second Applicant was Comitê Olímpico do Brasil ("COB").

The Third Applicant was Confederação Brasileira de Futebol ("CBF").

The Respondent was Fédération Internationale de Football Association ("FIFA").

The Interested Party was the International Olympic Committee ("IOC").

The First, Second and Third Applicants are hereinafter jointly referred to as the "Applicants".

The Applicants and the Respondent are jointly referred to as the "Parties".

On 31 July 2024, a match was played between the teams of Brazil and Spain in the context of the Women's Olympic Football Tournament in the Games of the XXIII Summer Olympics, Paris ("Match").

During the Match, an incident occurred between the Player and a player from the Spanish team resulting in the Player being sent off in the minute 45+6.

The referee characterised in his report the incident as a type "H" offence, *i.e.*, a serious foul play, stating that:

"Player nr.10 Brazil was sent off min 45+5 for serious foul play. For a tackle where she endangering the safety of her opponent, with a high foot and showing studs". (Referee's Report, Match No 17, Page 2/8)

Similarly, the Match Commissioner indicated in his report that:

"In the 45th+6 of the first half the player No 10 MARTA of Brazil was sent off for a serious foul play". (Commissioner's Report, Match No. 17, Page 4/8)

On 1 August 2024, the Secretariat of the FIFA Disciplinary Committee informed Applicants that the incident constituted a potential breach of Article 14.1(e) of the FIFA Disciplinary Code ("FDC") and the proposed sanction in accordance with Article 58 of the FDC was a two-match suspension including an automatic suspension following her sending off during the Match. The CBF rejected the proposed sanction on behalf of the Player and the matter was referred to the FIFA Disciplinary Committee for a decision.

On 2 August 2024, the FIFA Disciplinary Committee issued its decision on case FDD-19032 ("Decision") stating the following:
"The Respondent, Marta Vieira da Silva, is suspended for two (2) matches, including the automatic match suspension which shall be served during the match France v. Brazil to be played on 3 August 2024 in the frame of Women's Olympic Football Tournament Paris 2024. The remaining

suspension will be served during the next official match of the representative team of Brazil, irrespective of the competition, in accordance with art. 69 par. 1 and 2.e of the FIFA Disciplinary Code ".
The Decision further stated that:
"According to art. 61(1)(c) of the FDC, read together with arts. 47(2) and 50(3) of the FIFA Statutes, this decision is final and binding and may not be appealed to the FIFA Appeal Committee or the Court of Arbitration for Sport (CAS).

On 5 August 2024, at 15h22 (Paris time), the Applicants filed an Application with the CAS Ad hoc Division against the Respondent with respect to the decision.

On 6 August 2024, at 10h00 (Paris time) a hearing was held via videoconferencing.

Reasons

1. CAS Jurisdiction

The Applicants contended that the jurisdiction of the CAS was based on, *inter alia*, the Olympic Charter, the CAS Arbitration Rules for the Olympic Games and the arbitration clause contained in the entry form for the Paris Olympic Games 2024, signed by the Player. On the other hand, the jurisdiction of the CAS was challenged by the Respondent on the ground that, *inter alia,* the sanction was limited to the suspension of two matches (including the automatic match suspension which was served during the match France v. Brazil) which did not meet the requirements provided for under Article 50.3(b) of the FIFA Statutes 2024 i.e. that CAS will not deal with appeals arising from *"suspensions of up to four matches or up to three months…"*, and, therefore, did not allow the Applicants to appeal the Decision.

Rule 61.2 of the Olympic Charter provides as follows:

"61 Dispute Resolution

[...]

2. Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration".

Article 1 of the CAS Arbitration Rules for the Olympic Games (hereinafter referred to as the "CAS Ad hoc Rules") provides as follows:

"*Article 1. Application of the Present Rules and Jurisdiction of the Court of Arbitration for Sport (CAS)*

The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games.

In the case of a request for arbitration against a decision pronounced by the IOC, an NOC, an International Federation or an Organising Committee for the Olympic Games, the claimant must, before filing such request, have exhausted all the internal remedies available to him/her pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective".

The arbitration clause contained in the entry form for the Paris Olympics 2024 and signed by the Player states the following:
"ARBITRATION

The Court of Arbitration for Sport is exclusively competent to finally settle all disputes arising in connection with my participation in the Games Unless otherwise agreed inwriting by the IOC, any dispute or claim arising in connection with my participation at the Games, not resolved after exhaustion of the legal remedies established by my NOC, the International Federation governing my sport, Paris 2024 and the

IOC, shall be submitted exclusively to the Court of Arbitration for Sport ("CAS") for final and binding arbitration in accordance with the Arbitration Rules for the Olympic Games, and the Code of Sports-related Arbitration. The seat of arbitration shall be in Lausanne, Switzerland and the language of the proceedings English. The decisions of the CAS shall be final, binding and non-appealable, subject to the action to set aside to the Swiss Federal Tribunal. I hereby waive my right to bring any claim, arbitration or litigation, or seek any other form of relief, including request for provisional measures, in any other court or tribunal, unless otherwise agreed in writing by the IOC".

The Regulations for the Olympic Football Tournaments Games of the XXXIII Olympiad Paris - Final Competition (December 2023) states in Article 9:

"… 9.3 The Participating Member Associations and Delegation Members acknowledge and accept that, once all internal channels have been exhausted at FIFA, their sole recourse shall be to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, unless excluded or if the decision is declared final, binding and not subject to appeal. Any such arbitration proceedings shall be governed by the CAS Code of Sports-related Arbitration".

The Sole Arbitrator observed that the arbitration clause contained in the Olympic charter and confirmed in the entry form for the Paris Olympics 2024 was drafted in broad terms and included any dispute that arose during the Olympic Games to be resolved by arbitration. Such arbitration jurisdiction was binding on all Parties.

The same was confirmed in CAS jurisprudence OG 20-010&011 that held that jurisdiction was given to the CAS with respect to disputes arising out of or in connection with the Olympic Games by the Olympic Charter and not by the rules of the various International Federations, which could not, therefore, limit that jurisdiction. Likewise, in CAS 2008/A/1641 the Panel clarified that *"the "field of play" decision doctrine, do not directly interfere with the arbitration clause, drafted in broad terms in the Olympic Charter. Article 59 of the Olympic Charter sets a principle which cannot be derogated from by an International Federation, through its internal rules: jurisdiction to CAS, with respect to disputes "arising out of, or in connection with, the Olympic Games", is given by the Olympic Charter, and not by the rules of the various International Federations, which cannot, therefore, limit it. A different solution, on a more general level, would contradict the spirit of the orderly administration of the Olympic Games, in a single context of legal remedies available for the settlement of disputes to the exclusion of State jurisdiction, underlying the very setting up of the OG Division".*

In view of the above, the Sole Arbitrator considered that the CAS Ad hoc Division had jurisdiction to hear the matter at stake.

2. Consequence of the qualification of the challenged decision as a field of play decision

The Applicants submitted that the incident did not fell under Article 14.1(e) of the FDC as it did not amount to a serious foul play. According to the Applicants, the Player was not carless or reckless and had no intention to harm anyone. Furthermore, the opponent did not suffer any injury and continued playing in the Match. Moreover, the Player mitigated the situation by apologising and accepting the sending off immediately. The Applicants claimed that the incident should be categorised as "unsporting behaviour" and not "serious foul play". Accordingly, they claimed that the relevant article to be applied on the incident was Article 14.1(b) rather than Article 14.1(e) of the FDC. By applying Article 14.1(b) the suspension might be reduced to 1 match *(including the automatic suspension already served in the match of 3 August 2024 against the French National Team) in connection with her sending off in the Match, authorising her participation in Brazil's next match*

against Spain on 6 August 2024 at 21:00 (Paris time)". The Respondent argued that the Decision was correct.

In analysing the merits of this case, the Sole Arbitrator shall apply the *"applicable regulations"* which, include the FIFA Statutes. Article 50.3(b) of the FIFA Statutes provide that CAS will not deal with appeals arising from *"suspensions of up to four matches or up to three months…"*. The Applicants did not challenge the two-match suspension but, rather, the underlying determination of the applicability of Article 14.1(e) of the FDC. However, the natural consequence of this challenge was, in fact, to challenge the two-match suspension since he nexus was direct and could not be separated.

Pursuant to CAS jurisprudence, for a CAS Panel to overturn a field of play decision, there must be direct evidence that establishes, to a '*high hurdle*', bad faith or bias (CAS OG 00/013; CAS OG 16/028), or, for example, that the decision was made as a consequence of corruption (CAS OG 00/013) or arbitrarily (CAS OG 12/010). CAS arbitrators are not, unlike on-field judges, selected for their expertise in the sport and do not review the determinations made on the playing field concerning the *"rules of the game"* in circumstances where there was no fundamental violation of the Respondent's own rules (CAS OG 00/013).

In any event, as the case concerned discussions connected to field of play and the Applicants did not argue – and consequently failed to establish – that one of the special circumstances mentioned above applied to this case, the Sole Arbitrator did not see how Article 14.1(b) would apply instead of Article 14.1(e) of the FDC, as proposed by the Applicants.

The Sole Arbitrator found that the appeal should be dismissed considering that the suspension was below 5 matches.

Decision

The Applicants' application filed on 5 August 2024 shall be dismissed.

CAS OG 24-15 Federation Romanian Gymnastics (FRG) and Ana Maria Bărbosu v. Donatella Sacchi and Fédération Internationale de Gymnastique (FIG) & CAS OG 24-16 FRG and Sabrina Maneca-Voinea v. Donatella Sacchi and FIG

14 August 2024 (operative part of 10 August 2024)

Football; Violation of the one-minute rule contained in Article 8.5 of the FIG Technical Regulations providing for the submission of an inquiry with respect to the Difficulty Score of a gymnast; Scope of the field of play doctrine; Interpretation of Article 8.5 of the FIG Technical Regulations; Nature of the panel's review regarding the violation of Article 8.5 of FIG Technical Regulations; Consequence of the lack of compliance with Article 8.5 of the FIG Technical Regulations; Application of the fair play principle

Panel

Mr Hamid G. Gharavi (France/Iran), President
Prof. Philippe Sands KC (United Kingdom)
Prof. Song Lu (China)

Facts

The Applicants were:

a. The Federation Romanian Gymnastics (FRG), the national-governing body for gymnastic in Romania;

b. Ms. Ana Maria Bărbosu and;

c. Ms. Sabrina Maneca-Voinea, both Romanian artistic gymnasts.

Collectively referred to as "Applicants".

The Respondents were:

a. Ms. Donatella Sacchi, President of the Women's Artistic Gymnastics Technical Committee within the FIG;

b. The Fédération Internationale de Gymnastique (FIG), the international governing body for gymnastics.

Collectively referred to as "Respondents".

The Interested Parties were:

a. The Romanian Olympic and Sports Committee (ROSC);

b. Ms. Jordan Chiles, an U.S. American artistic gymnast;

c. The United States Olympic & Paralympic Committee (USOPC),

d. USA Gymnastics, the national governing body for gymnastic in the United States of America;

e. The International Olympic Committee (IOC).

Collectively referred to as "Interested Parties".

On 5 August 2024, at around 14h23 (all times indicated in this Award are Paris time), the Women's Floor Exercise Final of the Olympic Games was held in Paris at the Bercy Arena. Nine (9) gymnasts participated in the final, including Ms. Bărbosu, Ms. Maneca-Voinea and Ms. Chiles.

Ms. Ana Bărbosu was the fifth gymnast to perform her routine. She was awarded a total score of 13.7000, broken down as follows: Difficulty Score ("D Score") of 5.800, Execution Score ("E Score") of 8.000 and a penalty of 0.1.

Ms. Sabrina Maneca-Voinea was the eighth gymnast to perform her routine. She was

awarded a total score of 13.700, broken down as follows: D Score of 5.900, E Score of 7.900 and a penalty of 0.1.

Ms. Jordan Chiles was the ninth gymnast to perform her routine. Ms. Chiles was awarded a total score of 13.666, broken down as follows: D Score of 5.800, and E score of 7.866. Ms. Chiles was awarded 5th place.

It was undisputed that 1 minute and 4 seconds after the publication of Ms. Chiles' initial score on the scoreboard, Ms. Chiles' coach, Ms. Cecile Canqueteau-Landi, submitted a verbal inquiry as to Ms. Chiles' D Score.

Following the inquiry submitted on behalf of Ms. Chiles, her D Score was revised to 5.900. This had the effect of revising her total score to 13.766.

Based on the above, the final results of the Women's Floor Exercise Final were as follows: Ms. Chiles was awarded 3rd place (with a score of 13.766), Ms. Bărbosu 4th place (with a score of 13.700) and Ms. Maneca-Voinea 5th place (with a score of 13.700).

The following day, on 6 August 2024, at 10:04, the FRG, through its General Secretary, filed two separate Applications, naming Ms. Donatella Sacchi alone as the sole Respondent. The Applications challenged the scores awarded to Ms. Bărbosu, Ms. Maneca-Voinea and Ms. Chiles. The Applications named only the ROSC as the Interested Party.

On 6 August 2024 at 17:01, the CAS Ad Hoc Division notified the Application to Ms. Sacchi and the ROSC. The CAS Ad Hoc Division, acting *ex officio,* identified as further Interested Parties Ms. Chiles, USOPC and US Gymnastics, and notified a copy of the Application to them.

On 7 August 2024 at 10:42, the CAS Ad Hoc Division informed the Parties and Interested Parties that the two proceedings had been consolidated in accordance with Article 11 of the CAS Arbitration Rules for the Olympic Games (the "Ad Hoc Rules").

In the same communication, the attention of the Parties and Interested Parties was drawn to the disclosure made by Dr. Hamid Gharavi in his Independence and Acceptance form, namely the fact that he acts as counsel for Romania in investment arbitrations before ICSID (Cases ARB/20/15, ARB/22/13 and ARB/16/19). No objection to the appointment of Dr. Gharavi as President of the Panel was received by any Party or Interested Party, either within the deadline for raising objections fixed by the CAS Ad Hoc Division, or at any time during the proceedings, including at the hearing or up to the issuance of the dispositive part of the award.

On 10 August 2024, at 08:30, the hearing in this matter was held, virtually.

At the outset of the hearing, the Parties were requested whether they had any objection as to the constitution of the Panel. All Parties declared that they were satisfied with the composition of the Panel and had no objection.

At the end of the hearing, the Parties were reminded that they had confirmed at the outset of the hearing not to have any objection to the constitution of the Panel. They were then invited to confirm that they had no objection to the way the arbitration was conducted, and to confirm that their right to be heard had been respected. All the parties so confirmed.

Reasons

1. Scope of the field of play doctrine

The Respondents advanced the 'field of play' doctrine or principle to counter all claims and submit that it should dispose of the entirety of these proceedings.

The Panel agreed that the 'field of play' doctrine was well-established and settled as a cornerstone principle of sports and CAS case law and stated that it will not depart from this principle.

According to the field of play principle, if a decision is demonstrated to be a *"decision made on the playing field by judges, referees, umpires and other officials, who are responsible for applying the rules of a particular game,"* (CAS 2021/A/8119), the same should not be reviewed by the Panel. This wise principle seeks to avoid a situation in which arbitrators are asked to substitute their judgment for that of a judge, referee, umpire or other official, on a decision taken during a competition that relates to a sporting activity governed by the rules of a particular game.

In casu, the Panel had no difficulty in concluding that the decision to apply a penalty of 0.1 point to Ms. Maneca-Voinea should be treated as falling within the 'field of play' principle. Accordingly, it fell outside the scope of review of the Panel.

The Panel considered that the decision as to whether a 0.1 deduction was appropriate to be a textbook example of a 'field of play' decision, one that did not permit the arbitrators to substitute their views for that of the referee. It warranted the non-interference of CAS as it entailed the exercise of judgment by the referee, based on expertise in the 'field of play'. Whether the judgment was right or wrong, it could not be reviewed.

For these reasons, the challenge was dismissed, as was the Application with respect to Ms. Maneca-Voinea.

2. Interpretation of Article 8.5 of the FIG Technical Regulations

Article 8.5 of FIG Technical Regulations, provides that a gymnast's coach can submit an inquiry with respect to the D Score provided that the request is
"made verbally immediately after the publication of the score or at the very latest before the score of the following gymnast/athlete or group is shown […]
For the last gymnast or group of a rotation, this limit is one (1) minute after the score is shown on the scoreboard. The person designated to receive the verbal inquiry has to record the time of receiving it, either in writing or electronically, and this starts the procedure".

Article 8.5 further provides that *"Late verbal inquiries will be rejected".*

Ms. Chiles was the last gymnast to participate, so the one-minute rule applied. The Panel found that Article 8.5 was clear and unambiguous from all relevant perspectives. The one-minute time limit is set as a clear, fixed and unambiguous deadline, and on its face offers no exception or flexibility. Despite arguing that Article 8.5 should be interpreted and applied with a degree of flexibility, the Respondents offered no evidence or practise to support the existence of any exception or tolerance to the application of the rule. In the view of the Panel, the words 'one minute' in Article 8.5 mean one minute, no more and no less.

The impact of non-compliance with the one-minute rule of Article 8.5 is similarly clear and unambiguous, namely that the *"Late verbal inquiries will be rejected* ". These words make it clear that compliance is intended to be mandatory and strict, and to be sanctioned by a rejection if violated. No room is afforded for any exercise of discretion. This is understandable, as the rule applies only to *"the last gymnast or group of a rotation,"* with the aim

of ensuring a prompt closure and finality of the competition, to avoid a situation of extended uncertainty as to who may have finished in what order in the competition.

3. Nature of the panel's review regarding the violation of Article 8.5 of FIG Technical Regulations 2024

Article 8.5 of FIG Technical Regulations 2024 envisages a mechanism or arrangements to monitor compliance with the one-minute rule: it provides that the *"person designated to receive the verbal inquiry has to record the time of receiving it, either in writing or electronically, and this starts the procedure"*.

It appeared on the basis of the evidence that no one on behalf of FIG was in place to monitor the compliance with its mandatory one-minute rule. The verbal inquiry made on behalf of Ms. Chiles was reviewed by Ms. Sacchi on the assumption that it had been submitted on a timely basis, without the same having been checked and without any possibility of a violation being flagged. There was here a manifest default in the arrangements: there was no monitoring system in place to allow the referee to know whether the request for an inquiry was filed in a timely manner.

Against this factual background, the Panel found that the review of the compliance with Article 8.5 of the FIG Technical Regulations, did not fall within the 'field of play' doctrine. Indeed, the Panel was not being requested to interfere, or to substitute its judgment for that of a referee. It was not interfering with a judgment call of any referee or official on the ground, and it was not correcting a refereeing mistake or an error of judgment. Rather, it was ruling on the basis of a default by the FIG, a complete failure to put in place an arrangement or mechanism to monitor and apply an important rule that it had adopted to protect the athletes and the public. Therefore, the Panel upheld the challenge of the inquiry for violation of the one-minute rule contained in Article 8.5 of FIG Technical Regulations.

4. Consequence of the lack of compliance with Article 8.5 of the FIG Technical Regulations

On the basis of the evidence before it, it was not disputed that the one-minute rule of Article 8.5, which the Panel found to be mandatory and not subject to any tolerance, was violated. And it was, in the case at hand, completely disregarded, having not been monitored or checked. There was no arrangement or mechanism in place to check whether the rule had been applied or complied with. It followed that the inquiry should be determined to be without effect.

The Panel found that such failure was tantamount to an error of law or *de facto* arbitrariness in the process or equivalent mischief: the FIG had simply failed to put in place or implement a system to safeguard and apply its own mandatory, clear, and unambiguous rule, one which was admitted and in any event proven to have been violated.

5. Application of the fair play principle

As to the Applicants' request to apply the 'fair play principle' and award the 3rd place to Ms. Chiles, Ms. Maneca-Voinea and Ms. Bărbosu, the Panel found that the Applicants failed to demonstrate the application of the 'fair play principle' in support of the relief sought. Admitting such a request would, as set out by the IOC at the Hearing, require the Panel to apply principles of equity, whereas the Panel was required to apply rules of law, unless the Parties had agreed otherwise, which in this case they had not. Therefore, it remained that the allocation of three bronze medals in this Event would be impossible with the strict

application of the FIG Rules save if the Parties agreed for a consent award to this effect, which FIG opposed.

Based on the foregoing, the Applicants' request was dismissed.

Decision

The application filed by Federation Romanian Gymnastics and Ms. Ana Bărbosu on 6 August 2024, in its amended version of 8 August 2024, was partially upheld.

The inquiry submitted on behalf of Ms. Jordan Chiles in the Final of the Women's Floor exercise was raised after the conclusion of the one minute deadline provided by Article 8.5 of the 2024 FIG Technical Regulations and was determined to be without effect.

The initial score of 13.666 given to Ms. Jordan Chiles in the Final of the Women's Floor exercise shall be reinstated.

The Fédération Internationale de Gymnastique shall determine the ranking of the Final of the Women's Floor exercise and assign the medal(s) in accordance with the above decision.

All other requests were dismissed.

The application filed by Federation Romanian Gymnastics and Ms. Sabrina Maneca-Voinea on 6 August 2024, in its amended version of 8 August 2024, was dismissed**.**

CAS OG 24/17 Vinesh Phogat v. United World Wrestling & IOC

16 August 2024 (operative part 14 August 2024)

Wrestling; Athlete's failure to comply with the weigh-in for a category; Nature of a decision to eliminate an athlete who fails the weigh-in for a category; Application of strict compliance with the weight categories; Interpretation of the applicable rules; Consequences of failing the weigh-in as provided by the Rules; Distinction between ineligibility and sanction; Consequences of the failed weigh-in for the purpose of proportionality; Reallocation of medal

Panel

The Hon. Dr Annabelle Bennett AC SC (Australia), Sole Arbitrator

Facts

The Applicant was Vinesh Phogat (the "Athlete" or "the Applicant").

The First Respondent was United World Wrestling ("UWW").

The Second Respondent was the International Olympic Committee ("IOC").

The Interested Party was the Indian Olympic Association ("IOA").

The Applicant, Ms Vinesh Phogat, is a female Indian wrestler. She was due to compete in the final of the 2024 Olympic Games in Paris on 7 August 2024, in the category of Women's Freestyle 50 kg. Had she competed, the Athlete would have won either the silver or the gold medal.

At 7h30 (Paris time) on 6 August 2024, an official weight verification (a "weigh-in") was conducted on the Athlete, with the result being 49.9 kg.

The Athlete fought three competitions on that day, that is on 6 August 2024. There is no dispute that she was qualified as being under 50 kg for these competitions.

For the purposes of the final, a second weigh-in took place on the morning of 7 August 2024. The Athlete's weighed in at 150 g over the weight limit of 50 kg. As permitted by the United World Wrestling International Wrestling Rules 2023 ("The Rules"), she repeated that weigh-in after another 15 minutes and her weight was 100 g over the 50 kg limit. UWW's evidence was that the machine used for weighing was calibrated each morning by Paris Olympic officials.

On the morning of 7 August 2024, at 9h11 (Paris time), the Athlete received a disqualification letter issued by a delegate of the UWW stating that she was over the 50 kg weight and thus had failed the second weigh-in (the "Appealed Decision").

There was no dispute that the Applicant was above the weight limit. Her case was that the amount of excess was 100 g and that a tolerance should apply as this was a small excess and explicable for reasons such as drinking water and water retention, in particular during the pre-menstrual phase.

The Appealed Decision was made pursuant to Article 11 of the Rules, which relevantly provides:

[…]

If an athlete does not attend or fail the weigh-in (the 1st or the 2nd weigh-in), he will be eliminated of the competition and

ranked last, without rank *(Exception: cf. Article 55 – Medical Service Intervention).*

On 7 August 2024, at 16h45 (Paris time), the Applicant filed an Application with the CAS Ad hoc Division against the Respondents with respect to the Appealed Decision, naming the IOA as the Interested Party.

The Applicant's requested for relief that the challenged decision and all its effects be set aside*; and* that she remained eligible and qualified to be awarded her silver medal.

The First Respondent's requested that the proceedings should be declared moot and terminated; the Appeal filed by Ms Vinesh Phogat inadmissible; *and* dismissed.

The Second Respondent's requested that any request for a second silver medal should thus be dismissed.

The Interested Party submitted that *"the disqualification of the Applicant be revoked and a silver medal be awarded to her".*

Reasons

The Competition Procedure is set out in Chapter 3 of the Rules, which includes Article 11 – Weigh-In. The following requirements, as set out in Article 11, are worth noting (with original phrasing):

- For all competitions, the weigh-in is organized each morning of the concerned weight-category.
- The second morning of the concerned weight-category only the wrestlers who participate in the repechages and finals have to come for the weigh-in. This weigh-in will last 15 minutes.
- The only uniform allowed for the weigh-in is the singlet. […] No weight tolerance will be allowed for the singlet.
- Throughout the entire weigh-in period (15 minutes), the wrestlers have the right, each in turn, to get on the scale as many times as they wish.
- The referees responsible for the weigh-in must check that all wrestlers are of the weight corresponding to the category in which they are entered for the competition.
- If an athlete does not attend or fail the weigh-in (the 1st or the 2nd weigh-in), *"he will be eliminated of the competition and ranked last, without rank".*

Also relevant to this case is Article 8 of the Rules, headed Competition System, which provides, relevantly (with original phrasing):

- Each weight category is organized in two days. The draw takes place the day before the beginning of the category concerned at the latest.
- The medical control and a first weigh-in will be held the morning of the concerned weight category. The qualified athletes for the finals and repechages will be weigh-in again the second morning of the concerned weight category. No more weight tolerance will be allowed for the second weigh-in.
- 2 kg weight tolerance is allowed for World Cup, UWW Ranking Series Tournaments and for the International Tournaments (Except UWW Ranking Events).

1. Nature of a decision to eliminate an athlete who fails the weigh-in for a category

UWW submitted that the issue presented *"is a pure field of play decision"* and, therefore, the Application was inadmissible. The Sole Arbitrator did not agree. This was not a decision during competition, such as that of an umpire or referee. This was a decision that

an athlete was not eligible to compete in a weight category because she was not within the mandated weight. Thus, a decision to eliminate an athlete who failed the weigh-in for a category was not a field of play decision but a decision as to eligibility.

2. Application of strict compliance with the weight categories

Under the Rules, Women's Wrestling is divided into weight categories.

The Sole Arbitrator insisted that the Rules provided for strict compliance with the weight categories. Thus, the only uniform to be worn was the singlet and no weight tolerance was given for that item, i.e. the athlete should ensure that her weight, including the singlet, was below the 50 kg limit. While a 2 kg weight tolerance was allowed for International Tournaments, the Rules stated that *"no more weight tolerance will be allowed for the second weigh-in"*, being the weigh-in for the finals. This should be construed as providing that there was no weight tolerance for the second weigh-in; that is, the maximum weight for category 1 was 50 kg.

The Sole Arbitrator also considered that the Rules were not to be construed by reference to those that apply in other sports or to previous versions of the Rules; this case concerned the application of the applicable version, which reflected a policy which was not challenged. What was in issue was the application of the Rules. It is not uncommon that limits are set and applied, not only as in the Rules but also in many sports where very small differences exist between winning and losing, being eligible and ineligible, being in or out.

3. Interpretation of the applicable rules

The Sole Arbitrator considered necessary to interpret the Articles by a consideration of the words, of the context of the words in the Article and in the context of the Rules as a whole. The interpretation is a question of law and the process of construction does not include imposing a meaning that the words or phrases do not bear (OG 04/17).

The IOA, but not the Athlete, argued that Article 8 did allow a 2 kg tolerance, as such tolerance was allowed for International Tournaments. Article 8 provides in part: *"2 kg weigh tolerance is allowed for World Cup, UWW Ranking Series Tournaments and for the International Tournaments"*. The argument was that this meant that a 2 kg weight tolerance was allowed for the Olympic Games, as an International Tournament. If so, the Athlete was within the weight category.

However, the Rules distinguish, in usage, between *"international competitions"* which, for example in Article 7, include a reference to the Olympic Games and *"International Tournaments"*.

Article 8, which provides allowance for the 2kg tolerance does not do so by reference to international competitions but to *"the International Tournaments"*. These words follow a reference to *"UWW Ranking Series Tournaments"*. It was clear that there was a distinction between "competitions" and "Tournaments". The UWW website refers to International Tournaments and a calendar for those events. This does not include the Olympic Games, which are separately identified. This latter fact was not determinative but assisted in understanding whether "International Tournaments", undefined in the Rules, was used as a term of art in the field of wrestling and whether it was intended to include the Olympic Games.

Article 8 itself states that *"no more weight tolerance will be allowed for the second weigh-in"* immediately preceding the statement that a 2 kg tolerance was allowed for certain events,

including *"the International Tournaments"*. This suggests that International Tournaments is a class of events and does not equate to international competitions which, as submitted by the IOA, the Olympic Games is. This is supported by the immediately preceding reference to the World Cup which is also an international competition and would not need separate reference if International Tournaments included any international competition.

The Sole Arbitrator concluded that, taking all these matters into account, the preferred construction of *"the International Tournaments"* in Article 8 of the Rules, as used in that Article, does not include the Olympic Games and that the Athlete was not entitled to that tolerance on her second weigh-in.

4. Consequences of failing the weigh-in as provided by the Rules

Article 11 of the Rules provides that, if an athlete does not attend or fail the weigh-in (the 1st or the 2nd weigh-in) he will be *"eliminated of the competition and ranked last, without rank"*.

The Applicant submitted that this was inequitable and too severe. The Applicant also submitted that the provision should be read as providing for elimination **or** ranking last **or** being left without rank. The word used is "and", not "or". The Applicant then sought the application of general principles of equity and that she should not be deprived of the rights that had accrued prior to her failed second weigh-in, for which she had been eligible. This, she submitted, applied to entitle her to a silver medal and all rankings and scores and points, as to which she had a *"legitimate expectation"*. She finally submitted that the UWW was estopped from denying these rights.

The Sole arbitrator held that Swiss Law provides that the application of general principles of equity requires consent of the parties, in that they must authorise the Sole Arbitrator to do so (PILA Article 187(2)). Yet, neither the UWW nor the IOC consented to, or authorised, such an approach. Moreover, it is not the prerogative of CAS Panels or Sole Arbitrators to rewrite federation rules.

The Sole Arbitrator stressed that Article 11 of the Rules specifically provides for elimination from the competition and being ranked last without rank. The Sole Arbitrator also added that pursuant to the Rules a two-day event is one competition, not two separate competitions. Therefore, the Sole Arbitrator confirmed that after the Athlete failed the second weigh-in, another athlete competed in the Athlete's place in the final and was awarded the silver medal. Similarly, other athletes were awarded the bronze medal upon the elimination of the Athlete. Ther Rules are clear as to the weight limit and are the same for all participants. There is no tolerance provided for – it is an upper limit. It is clearly up to the athlete to ensure that they remain below the limit.

Finally, reading the Rules as a whole, the Sole Arbitrator concluded that the use of the word *"he"* was not intended to exclude female wrestlers from the application of the Rules or of Article 11; rather it was the use of a pronoun intended to cover all wrestlers, male and female. Therefore, the consequences of failing the weigh-in, as provided in Article 11 of the Rule, applied to a female wrestler and thus, to the Applicant.

5. Distinction between ineligibility and sanction

The Athlete and the IOA argued that a finding of ineligibility was necessarily a

sanction because of its consequences for the Athlete.

The Sole Arbitrator recalled that CAS jurisprudence had long drawn a distinction between eligibility and sanction. A sanction is a penalty for wrongdoing whereas eligibility results from a requirement not being fulfilled and does not include any stigmatisation. The Sole Arbitrator did not accept that Article 11 of the Rules imposed a sanction for failing a weigh-in. It denoted the consequences of an athlete being rendered ineligible to compete during a competition, which resulted in elimination from the competition.

6. Consequences of the failed weigh-in for the purpose of proportionality

The Sole Arbitrator observed that there was no discretion provided in the Rules, which she was bound to apply. Neither Article 11 nor the Rules provide for any mitigation of the consequences of a failed weigh-in, nor for any discretion in their application.

7. Reallocation of medals

The Applicant sought an order that all the effects of her failure to pass the second weigh-in be set aside and that she be given a silver medal.

Based on Article 8 of the Rules, the IOC's position contented that the Applicant was not entitled to claim that she ranked second, either instead of or alongside the silver medal awardee.

The Sole Arbitrator observed that the power to award medals rests with the IOC. The silver medal and the bronze medals had been awarded and there was no provision in the Rules for the awarding of a second silver medal. The Applicant had not established a basis under the Rules for her Application to set aside the effects, as set out in Article 11 of the Rules, of her accepted failure to pass the second weigh-in.

Decision

In view of the above considerations, the Applicant's Application filed on 7 August 2024 shall be dismissed.

Jugements du Tribunal fédéral*
Judgements of the Federal Tribunal
Sentencias del Tribunal federal

* Résumés de jugements du Tribunal Fédéral suisse relatifs à la jurisprudence du TAS
Summaries of some Judgements of the Swiss Federal Tribunal related to CAS jurisprudence
Resúmenes de algunas sentencias del Tribunal Federal Suizo relacionadas con la jurisprudencia del TAS

4A_256/2023, 6 novembre 2023
Fédération Équatorienne de Football c. Fédération Péruvienne de Football et Fédération Chilienne de Football (A et FIFA parties intéressées)

Recours contre la sentence rendue le 17 avril 2023 par le Tribunal Arbitral du Sport (TAS 2022/A/9175 et TAS 2022/A/9176)

Pas de violation du principe de *res judicata* en cas de recours devant les tribunaux nationaux suivi d'une procédure disciplinaire devant la FIFA

Extrait des faits

La Fédération Internationale de Football Association (FIFA), association de droit suisse ayant son siège à Zurich, est l'instance dirigeante du football au niveau mondial. En cette qualité, elle a édicté un Règlement de la Coupe du Monde de la FIFA 2022.

La Coupe du Monde 2022 s'est déroulée en deux phases: la compétition préliminaire et la compétition finale. La première phase visait notamment à désigner les quatre équipes nationales de la Confédération Sud-américaine de Football qui se qualifieraient directement pour la phase finale de la Coupe du Monde au Qatar, ainsi que la cinquième sélection sud-américaine qui affronterait une équipe affiliée à la Confédération Asiatique de Football, lors d'un match de barrage, en vue d'accéder à la compétition finale.

Durant la phase éliminatoire, la sélection équatorienne a aligné le footballeur A._____ (ci-après: le joueur ou le footballeur) à plusieurs reprises, notamment lors de deux rencontres qu'elle a remportées face à l'équipe nationale chilienne. A l'issue de cette compétition préliminaire, l'équipe équatorienne s'est classée quatrième avec 26 points, devant le Pérou (cinquième avec vingt-quatre points), la Colombie (sixième avec vingt-trois points) et le Chili (septième avec dix-neuf points).

Le 8 mai 2012, le joueur a été enregistré pour la première fois en Équateur par le club B._____ (ci-après: B._____). Entre 2012 et 2022, il a évolué sous les couleurs de diverses équipes de football équatoriennes. Le 31 juillet 2015, l'une d'entre elles a résilié son contrat en raison de doutes entourant sa véritable nationalité.

Le 31 août 2015, la Direction générale du registre de l'état civil équatorien a ouvert une enquête en vue d'examiner les données relatives à l'identité du joueur. Lors de ses investigations, elle a constaté que le numéro de l'acte de naissance du joueur figurant dans le registre de l'état civil équatorien se référait, en réalité, à un autre individu. Interpellé à ce sujet, le service de l'état civil colombien a indiqué que le joueur n'apparaissait pas dans son propre registre, mais qu'il existait en revanche un dénommé "A._____", né le (...). Interrogé sur ce point par les autorités équatoriennes, le joueur a précisé que ses parents, sa soeur et son frère, prénommé C._____, avec lequel il n'avait aucun contact, étaient tous de nationalité colombienne. Au terme de son enquête, la Direction générale du registre de l'état civil équatorien a estimé qu'il n'était pas possible de conclure que le joueur possédait un acte de naissance différent de celui mentionné dans le registre équatorien.

En janvier 2017, la Fédération Équatorienne de Football (FEF) a retiré le joueur de sa sélection des moins de 20 ans (U-20) en raison de doutes entourant sa véritable identité.

Le 4 janvier 2018, la FEF a décidé de suspendre le club B._____ à cause de son

implication dans plusieurs affaires de falsifications d'identité de joueurs de football.

En décembre 2018, la Direction générale du registre de l'état civil équatorien a mené de nouvelles investigations et a abouti à la conclusion que l'acte de naissance du joueur avait été falsifié, raison pour laquelle ce dernier ne pouvait pas se voir attribuer un certificat d'identification (" identification document " [ID]), faute de document attestant de son identité.

Le 26 décembre 2018, D._____, qui dirigeait alors la commission d'enquête de la FEF, a rendu un rapport au terme duquel il a conclu que le joueur ne s'appelait pas (...), qu'il n'était pas né en Équateur en (...) et qu'il ne possédait pas la nationalité équatorienne. Sur la base dudit rapport, la FEF a ouvert une procédure disciplinaire à l'encontre du joueur et l'a suspendu provisoirement. Elle a finalement mis un terme à ladite procédure en novembre 2020.

En janvier 2021, le joueur a introduit une action en *habeas data* (" Habeas Data Action "), auprès d'un tribunal étatique équatorien, à l'encontre du registre de l'état civil équatorien aux fins de débloquer son certificat d'identification dans le registre de l'état civil équatorien.

Le 4 février 2021, le tribunal saisi a fait droit à la demande et a ordonné qu'un nouveau certificat de naissance soit établi en faveur du joueur.

Saisie d'un appel formé par le registre de l'état civil équatorien, la Cour de justice de la province de Guayas a confirmé la décision attaquée en date du 24 avril 2021.

Le 13 mai 2022, la Direction générale du registre de l'état civil équatorien a établi un nouveau certificat confirmant les données personnelles du joueur, notamment son nom (A._____), son lieu de naissance (province de Guayas en Équateur), sa date de naissance (...) et son numéro d'identité. Ledit document précisait que l'intéressé était un ressortissant équatorien.

En septembre 2022, un journal britannique a rendu public l'enregistrement sonore d'une conversation entre D._____ et le joueur. Au cours de cet échange, le footballeur révélait notamment qu'il était né en (...) et non pas en (...), que son véritable nom était A._____ et qu'il avait autrefois franchi la frontière en provenance de la Colombie pour venir jouer en Équateur en vue de gagner de l'argent.

Le 5 mai 2022, la Fédération Chilienne de Football (FCF) a demandé à la FIFA d'initier une procédure disciplinaire à l'encontre de la FEF et du joueur. Elle estimait que ce dernier était en réalité un ressortissant colombien qui ne pouvait pas évoluer sous les couleurs de la sélection équatorienne et que la FEF avait utilisé un certificat de naissance falsifié pour l'aligner dans son équipe.

Le 11 mai 2022, la Commission de discipline de la FIFA a ouvert une procédure disciplinaire à l'encontre de la FEF. La Fédération Péruvienne de Football (FPF) et la FEF ont été invitées à se déterminer, mais pas le joueur.

Le 10 juin 2022, la Commission de discipline de la FIFA a rejeté les accusations visant la FEF et a mis un terme à la procédure disciplinaire.
Statuant en appel le 15 septembre 2022, la Commission de recours de la FIFA a débouté la FCF et la FPF et a confirmé la décision entreprise.

Le 28 septembre 2022, la FCF et la FPF ont interjeté appel séparément contre cette décision auprès du Tribunal Arbitral du Sport (TAS), lequel a ordonné la jonction des causes. Elles ont notamment produit un acte de naissance ainsi qu'un certificat de baptême attestant qu'un dénommé A._____ était né le (...) à U._____, en Colombie.

Après avoir tenu une audience à Lausanne en date des 4 et 5 novembre 2022, la Formation,

composée de trois arbitres, a rendu sa sentence finale le 17 avril 2023. Admettant partiellement les appels, elle a annulé la décision attaquée, a jugé que le joueur n'avait pas qualité pour défendre, a reconnu la FEF coupable de violation de l'art. 21 du Code disciplinaire de la FIFA (ci-après: CDF) pour avoir utilisé un document contenant de fausses informations et lui a infligé une déduction de trois points lors de la phase préliminaire de la prochaine édition de la Coupe du Monde de la FIFA ainsi qu'une amende de 100'000 fr.

Le 19 mai 2023, le joueur a formé un recours en matière civile aux fins d'obtenir l'annulation de la sentence précitée.

Par arrêt du 19 juin 2023, le Tribunal fédéral a déclaré le recours irrecevable, faute pour l'intéressé d'avoir un intérêt digne de protection à l'annulation de la décision attaquée (cause 4A_258/2023).

En date du 19 mai 2023, la FEF (ci-après: la recourante) a également saisi le Tribunal fédéral d'un recours en matière civile au terme duquel elle a conclu à l'annulation de ladite sentence.

Invitée à répondre au recours, la FPF (ci-après: l'intimée n. 1) n'a pas réagi. De son côté, la FCF (ci-après: l'intimée n. 2) a conclu au rejet du recours dans la mesure de sa recevabilité.

La FIFA a formulé de brèves observations sur le recours tout en renonçant à prendre formellement position sur le sort de celui-ci.

Le joueur a conclu à l'admission du recours.

Le TAS a exposé les raisons qui militaient, à son avis, pour le rejet du recours.

La recourante a déposé une réplique spontanée.

Extrait des considérants

(…)

5.
Dans un premier moyen, la recourante, invoquant l'art. 190 al. 2 let. c LDIP, reproche à la Formation d'avoir statué *ultra petita*.

5.1. L'art. 190 al. 2 let. c LDIP permet d'attaquer une sentence, notamment, lorsque le tribunal arbitral a statué au-delà des demandes dont il était saisi. Tombent sous le coup de cette disposition les sentences qui allouent plus ou autre chose que ce qui a été demandé (*ultra ou extra petita*). Eu égard au principe rendu par l'adage *a maiore minus*, il est évident qu'un tribunal arbitral ne statue ni *ultra* ni *extra petita* en accordant moins à une partie que ce qu'elle demandait (arrêt 4A_314/2017 du 28 mai 2018 consid. 3.2.2).

5.2. Pour étayer son grief, l'intéressée fait valoir que les deux intimées ont demandé au TAS de prononcer des sanctions disciplinaires déterminées à son encontre, lesquelles tendaient à son exclusion de la Coupe du Monde 2022. Les intimées cherchaient en effet à prendre sa place dans le cadre de ladite compétition. La FIFA a quant à elle conclu au rejet des appels formés devant le TAS. Dans ces circonstances, la recourante estime que la Formation ne pouvait pas lui infliger une sanction disciplinaire en relation avec la prochaine édition de la Coupe du Monde. Elle souligne du reste que les intimées ne disposaient d'aucun intérêt à obtenir le prononcé d'une telle sanction.

5.3. Le reproche que la recourante adresse au TAS, sur la base de l'art. 190 al. 2 let. c LDIP, est dénué de tout fondement. En effet, contrairement à ce que laisse entendre l'intéressée, la Formation était saisie de conclusions tendant notamment à l'exclusion de la recourante de l'édition 2026 de la Coupe du Monde respectivement au prononcé de sanctions disciplinaires appropriées (sentence, n. 87 et 89). Dès lors, en infligeant à la recourante une sanction disciplinaire moins sévère que celle requise par l'une des parties, la Formation n'est manifestement pas

sortie des limites assignées à son pouvoir décisionnel et, partant, n'a en aucun cas statué *ultra petita*.

Pour le reste, la recourante ne saurait être suivie lorsqu'elle affirme que les intimées ne disposaient d'aucun intérêt digne de protection à ce que la Formation prononce la sanction litigieuse. En argumentant de la sorte, l'intéressée formule une critique qui ne s'inscrit pas dans le cadre tracé par l'art. 190 al. 2 let. c LDIP. Cette disposition vise en effet à sanctionner le comportement d'un tribunal arbitral qui statue au-delà des conclusions qui lui sont soumises, mais n'a pas vocation à régler le point de savoir si une partie disposait effectivement d'un intérêt digne de protection à l'admission de ses conclusions prises lors de la procédure arbitrale. Au demeurant, on peut légitimement mettre en doute l'affirmation péremptoire de la recourante selon laquelle les intimées n'avaient aucun intérêt digne de protection à ce que le TAS inflige à la recourante une pénalité de trois points lors de la prochaine édition de la Coupe du Monde, dans la mesure où les sélections nationales concernées seront en concurrence directe pour obtenir leur qualification pour la phase finale de ladite compétition.

6.

Dans un second moyen, la recourante fait grief à la Formation d'avoir enfreint l'ordre public procédural de l'art. 190 al. 2 let. e LDIP en ne tenant pas compte de l'autorité de la chose jugée attachée aux décisions judiciaires rendues par les autorités équatoriennes.

6.1.

6.1.1. Il y a violation de l'ordre public procédural lorsque des principes fondamentaux et généralement reconnus ont été violés, ce qui conduit à une contradiction insupportable avec le sentiment de la justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un État de droit (**ATF 132 III 389** consid. 2.2.1).

6.1.2. Selon la jurisprudence, un tribunal arbitral viole l'ordre public procédural s'il statue sans tenir compte de l'autorité de la chose jugée d'une décision antérieure ou s'il s'écarte, dans sa sentence finale, de l'opinion qu'il avait émise dans une sentence préjudicielle tranchant une question préalable de fond (**ATF 140 III 278** consid. 3.1; **136 III 345** consid. 2.1).
L'autorité de la chose jugée vaut également sur le plan international et gouverne, notamment, les rapports entre un tribunal arbitral suisse et un tribunal étatique étranger. Si donc une partie saisit un tribunal arbitral ayant son siège en Suisse d'une demande identique à celle qui a fait l'objet d'un jugement en force rendu entre les mêmes parties sur un territoire autre que la Suisse, le tribunal arbitral, sous peine de s'exposer au grief de violation de l'ordre public procédural, devra déclarer cette demande irrecevable pour autant que le jugement étranger soit susceptible d'être reconnu en Suisse en vertu de l'art. 25 LDIP, les dispositions spéciales des traités internationaux visés à l'art. 1er al. 2 LDIP étant réservées (**ATF 141 III 229** consid. 3.2.2; **127 III 279** consid. 2b; **124 III 83** consid. 5a). Cependant, un jugement étranger reconnu ne peut avoir en Suisse que l'autorité qui serait la sienne s'il émanait d'un tribunal étatique suisse ou d'un tribunal arbitral sis en Suisse. Ainsi, quand bien même, selon la loi de l'État d'origine (*lex loci decisionis*), l'autorité s'étendrait aux motifs sous-tendant ledit jugement, elle ne sera admise en Suisse que pour les chefs de son dispositif (**ATF 141 III 229** consid. 3.2.3; **140 III 278** consid. 3.2). Un tribunal arbitral sis en Suisse doit donc déterminer l'autorité d'une décision antérieure à l'aune de la *lex fori*, c'est-à-dire des principes développés par le Tribunal fédéral en matière d'autorité de la chose jugée, sauf disposition contraire d'un traité international (arrêt 4A_530/2020 du 15 juin 2021 consid. 6.3).

6.1.3. L'autorité de la chose jugée interdit de remettre en cause, dans une nouvelle procédure, entre les mêmes parties, une

prétention identique qui a été définitivement jugée. Il y a identité du litige quand, dans l'un et l'autre procès, les parties soumettent au tribunal la même prétention, en reprenant les mêmes conclusions et en se basant sur le même complexe de faits (**ATF 142 III 210** consid. 2.1; **139 III 126** consid. 3.2.3; **136 III 123** consid. 4.3.1; arrêt 4A_394/2017 du 19 décembre 2018 consid. 4.2.3). L'identité du litige doit s'entendre d'un point de vue non pas grammatical mais matériel, si bien qu'une nouvelle prétention, quelle que soit sa formulation, aura un objet identique à la prétention déjà jugée si elle apparaît comme étant son contraire ou si elle était déjà contenue dans celle-ci (**ATF 139 III 126** consid. 3.2.3), telle la prétention tranchée à titre principal dans le premier procès et revêtant la qualité de question préjudicielle dans le second (**ATF 123 III 16** consid. 2a).

(…)

6.2. Dans la sentence attaquée (n. 9-45), la Formation commence par relater les faits pertinents à ses yeux pour éclaircir la situation personnelle du joueur, en faisant notamment référence aux décisions rendues par les autorités judiciaires équatoriennes en date des 4 février 2021 (le jugement de première instance) et 24 avril 2021 (le jugement d'appel). Elle expose ensuite les arguments avancés par les parties (sentence, n. 87-96) et relève notamment que les intimées soutiennent que l'action judiciaire introduite en Équateur par le joueur visait à débloquer sa carte d'identité personnelle, et que les autorités étatiques équatoriennes n'ont ainsi pas statué sur la véracité des informations figurant dans les papiers d'identité de l'intéressé.

Examinant ensuite la question de sa compétence pour connaître du litige divisant les parties, la Formation observe que la recourante a invoqué deux motifs d'incompétence. Selon l'intéressée, le point de savoir s'il y a eu falsification ou non du certificat de naissance du joueur relève de la compétence exclusive des autorités équatoriennes, tandis que la question ayant trait à sa nationalité a déjà été examinée et tranchée par les tribunaux équatoriens. S'agissant du premier motif d'incompétence, le TAS relève que la FIFA a édicté sa propre réglementation concernant la contrefaçon et la falsification de documents d'identité. Le fait que l'État équatorien dispose de normes légales visant à lutter contre l'établissement de faux documents d'identité ne prive pas la FIFA du droit d'exercer son pouvoir disciplinaire vis-à-vis de ses membres en vertu des règles qu'elle a édictées. En d'autres termes, les deux corpus de règles sont autonomes et peuvent parfaitement coexister. En ce qui concerne le second motif d'incompétence, la Formation relève que l'objection soulevée par la recourante est infondée. En effet, le problème qu'elle doit résoudre est celui de savoir si le joueur et la fédération nationale concernée ont respecté les règles adoptées par la FIFA visant à déterminer si un footballeur est en droit d'évoluer sous les couleurs d'une sélection nationale donnée. Autrement dit, le TAS est tenu d'apprécier la "nationalité sportive" du joueur, qui est un concept relevant du droit du sport. Le fait que la nationalité juridique du footballeur concerné constitue un facteur important pour déterminer sa "nationalité sportive" est une question de fait, n'affectant pas la compétence du TAS, mais qui est pertinente pour statuer sur le fond de l'affaire (sentence, n. 97-107).

S'agissant du droit applicable (sentence, n. 116-119), la Formation indique qu'elle appliquera la réglementation édictée par la FIFA, et singulièrement le CDF; à titre subsidiaire, elle se référera au droit suisse.

Passant à l'examen des mérites des appels formés devant elle (sentence, n. 128-237), la Formation se réfère notamment à l'art. 21 CDF, lequel a la teneur suivante:

" 21. Contrefaçon et falsification
1. Toute personne qui, dans le cadre d'une activité liée au football, crée un faux titre, falsifie un titre ou utilise un titre faux ou falsifié est sanctionnée d'une amende et d'une

suspension d'au moins six matches ou d'une période de 12 mois au minimum.
2. Une association ou un club peut être tenu (e) responsable d'une contrefaçon ou falsification commise par l'un de ses officiels et/ou joueurs."

Constatant que les termes de "titre falsifié" ne sont pas définis dans la réglementation édictée par la FIFA, la Formation interprète cette notion à la lumière du texte de l'art. 251 du Code pénal suisse, lequel vise à réprimer l'infraction de faux dans les titres. Elle relève que le droit suisse, à l'instar d'autres ordres juridiques, consacre la notion de faux intellectuel, lequel désigne un titre dont le contenu ne correspond pas à la réalité. Sur la base de cette interprétation, elle retient que la terminologie de "titre falsifié" employée à l'art. 21 CDF vise également la situation dans laquelle un document d'identité est formellement authentique mais renferme de fausses informations. La Formation souligne qu'il n'est pas contesté que le passeport équatorien du joueur est authentique, dans la mesure où il a été délivré par l'État équatorien. Le litige porte uniquement sur le point de savoir si certaines données figurant dans ledit document telles que le prénom ainsi que la date et le lieu de naissance du joueur sont erronées. Sur la base des preuves à sa disposition, la Formation considère que le passeport équatorien du footballeur contient effectivement de fausses indications. Elle estime que le joueur est en réalité né à U._____, en Colombie, le (...), sous le nom de A._____. Pour aboutir à pareille conclusion, elle se fonde sur un faisceau d'éléments concordants. A cet égard, elle relève notamment que le joueur a reconnu, lors d'un entretien enregistré avec D._____, qu'il n'était pas né en Équateur le (...) mais bien le (...) et qu'il était originaire de Colombie. Elle observe que ces informations coïncident avec celles figurant dans le certificat de naissance colombien de A._____. La Formation note aussi que l'inscription du joueur dans le registre de l'état civil équatorien n'apparaissait pas avant 2012, date à laquelle il a été enregistré pour la première fois au sein de la FEF par le club B._____, lequel a par la suite été suspendu en raison de son implication dans plusieurs affaires de falsification de documents d'identité de footballeurs. Elle observe également que la FEF a elle-même nourri des soupçons quant à la véracité des informations figurant dans les papiers d'identité du joueur, puisqu'elle l'a retiré de sa sélection U-20 en 2017 et qu'elle a initié une procédure disciplinaire à son encontre à la suite de la publication du rapport établi par D._____. La Formation souligne en outre que le joueur n'a pas du tout participé à la procédure arbitrale, nonobstant le fait qu'il avait été invité à plusieurs reprises à témoigner, et observe que la recourante n'a pas véritablement incité le footballeur à le faire (sentence, n. 196-204).

Le TAS rejette, par ailleurs, les raisons avancées par la fédération équatorienne en vue de démontrer qu'elle n'a pas enfreint l'art. 21 CDF. Il estime, en particulier, que l'exception tirée de l'autorité de la chose jugée ne saurait être invoquée efficacement en l'espèce, dès lors que le critère de la triple identité n'est pas satisfait. La Formation souligne notamment que l'objet des procédures introduites devant les autorités judiciaires équatoriennes et celui de la procédure arbitrale sont différents et que les parties aux diverses procédures ne sont pas les mêmes. Au terme de son analyse, elle considère que la recourante a bel et bien enfreint l'art. 21 CDF (sentence, n. 205-210).

La Formation précise encore que sa sentence n'est pas opposable au joueur - lequel n'est pas partie à la procédure arbitrale -, et indique ce qui suit sous n. 211 de sa sentence:

"For the sake of completeness, the Panel wishes to remark that the present decision does not produce *res judicata* effects towards the Player as he has been excluded from this arbitration on account of his lack of standing to be sued, due to the fact that no disciplinary proceedings have ever been started by FIFA against him... Therefore, provided that the statute of limitations and all other procedural requirements are satisfied, FIFA might

determine *ex officio* to open a disciplinary case against the Player where he would then have the right to defend himself, bring any evidence and convince the competent disciplinary bodies that the information on his Ecuadorian passport is accurate. The findings related to the Player's identity in this arbitration are *incidenter tantum* and do not affect the rights of the Player in a possible subsequent disciplinary proceeding before FIFA and in a possible appeal to the CAS".

La Formation souligne, enfin, que le joueur pouvait valablement disputer des rencontres pour la sélection équatorienne lors de la phase qualificative de la Coupe du Monde 2022, puisqu'il détenait un passeport équatorien valide et authentique, nonobstant le fait que certaines indications contenues dans celui-ci étaient fausses. Le footballeur, qui est certes né en Colombie en (...), a en effet acquis valablement la nationalité équatorienne (sentence, n. 218 s.).

6.3. Dans ses écritures, la recourante fait valoir que les jugements rendus par les autorités équatoriennes [autorité judiciaire équatorienne de première instance et d'appel, jugements du 4 février 2021 et du 24 avril 2021 respectivement] ont définitivement réglé un aspect décisif du présent litige, à savoir l'authenticité des données d'état civil du joueur.

(…)

De l'avis de la recourante, la conclusion de la Formation selon laquelle le passeport du joueur serait un faux intellectuel car il contiendrait des données d'état civil erronées serait manifestement inconciliable avec les deux décisions précitées rendues par les tribunaux équatoriens. Se référant à un avis de droit, établi par deux avocats équatoriens spécialistes du droit constitutionnel, qu'elle a produit lors de la procédure arbitrale, l'intéressée expose que la décision statuant, comme en l'espèce, sur une action en *habeas data*, est un jugement constitutif revêtu de l'autorité de la chose jugée. A cet égard, elle fait valoir que le statut juridique du joueur apparaissant dans le registre de l'état civil équatorien a été modifié, passant d'invalide à valide. Les décisions judiciaires précitées déploieraient ainsi des effets *erga omnes*, raison pour laquelle le TAS aurait dû tenir compte de l'exception de la chose jugée, dans la mesure où l'objet des diverses procédures concernées portait sur l'authenticité des informations contenues dans l'acte de naissance du joueur. Dans ces conditions, la recourante estime que la Formation a méconnu l'autorité de la chose jugée attachée aux décisions rendues par les tribunaux équatoriens et, partant, rendu une sentence incompatible avec l'ordre public procédural au sens de l'art. 190 al. 2 let. e LDIP.

6.4. Semblable argumentation n'emporte point la conviction de la Cour de céans.

Pour les motifs indiqués ci-après, point n'est besoin d'approfondir la question de savoir si, comme le soutient la recourante, les décisions rendues par les tribunaux équatoriens doivent effectivement être qualifiées de jugements constitutifs ni d'examiner si le critère de l'identité des parties impliquées dans les diverses procédures est rempli, nonobstant le fait que le TAS a considéré que le footballeur concerné ne revêtait pas la qualité de partie à la procédure d'arbitrage.

Contrairement à ce que soutient la recourante, il n'apparaît pas que l'objet du litige soumis au TAS et celui des procédures judiciaires équatoriennes étaient identiques, raison pour laquelle l'une des conditions nécessaires à l'admission de l'exception de la chose jugée n'est pas réalisée. Il appert, en effet, que la présente affaire est une procédure de nature disciplinaire diligentée à l'encontre de la recourante tandis que l'action en *habeas data* introduite par le joueur en Équateur tendait à débloquer les informations relatives à l'identité de ce dernier bloquées dans le registre de l'état civil équatorien. Autrement dit, la demande formée par le footballeur auprès des autorités équatoriennes visait à éviter le préjudice qu'il subissait du fait dudit blocage et à supprimer la mention " carte d'identité bloquée "

figurant dans le registre de l'état civil équatorien. Il n'existait ainsi aucune identité au niveau de l'objet des litiges soumis respectivement aux autorités judiciaires équatoriennes, d'une part, et au TAS, d'autre part.

Comme l'expose du reste de façon convaincante l'intimée n. 2, les tribunaux équatoriens ont dû se prononcer sur la question afférente au blocage de l'accès aux données d'identité du footballeur sur la seule base de son acte de naissance enregistré dans le registre de l'état civil équatorien. Les autorités judiciaires équatoriennes n'ont en revanche pas été amenées à trancher la question de la véracité des informations relatives à l'identité du joueur. Ceci ressort implicitement du chiffre 3.3 du dispositif de la décision rendue le 24 avril 2021 par l'autorité d'appel équatorienne, puisque le maintien des informations personnelles figurant au registre de l'état civil équatorien était ordonné, en substance, jusqu'à ce que l'authenticité de l'acte de naissance du joueur ait pu être vérifiée. Dans ces conditions, le TAS n'a pas enfreint l'autorité de la chose jugée attachée aux jugements équatoriens en examinant si certaines informations figurant dans le passeport du joueur étaient fausses.

Pour le reste, c'est en vain que la recourante fait valoir que la sentence attaquée affecterait la nationalité même du footballeur et soutient que les arbitres auraient prononcé la "fausseté des documents d'identité du joueur". La Formation a en effet expressément précisé que la sentence entreprise n'était pas opposable au joueur (sentence, n. 211) et a souligné que l'intéressé possédait effectivement la nationalité équatorienne et qu'il détenait un passeport équatorien authentique, nonobstant le fait que certaines indications contenues dans celui-ci étaient fausses (sentence, n. 218 s.). Enfin, conformément à l'adage "nul ne plaide par procureur", la recourante ne peut pas davantage être suivie lorsqu'elle s'emploie à démontrer que la sentence querellée a des conséquences très graves pour le footballeur.

Décision

Au vu de ce qui précède, le recours doit être rejeté.

4A_430/2023, 23 février 2024
A. c. B.

Recours en matière civile contre la sentence rendue le 6 juillet 2023 par le Tribunal Arbitral du Sport (CAS 2022/A/8571)

Litige en matière de droit du travail lié au football de "dimension internationale" et clause en faveur de la compétence des juridictions étatiques an application de l'article 22 b) RSTJ. Dans le cas d'un désengagement de la compétence FIFA/TAS selon l'article 22b) RSTJ, le TAS doit interpréter l'accord en question et établir si la clause inclut une jurisdiction alternative ou exclut la compétence de la FIFA. La volonté des parties qui veulent exclure la compétence d'une jurisdiction étatique doit être claire afin de reconnaître le recours à un tribunal arbitral.

Extrait des faits

Le 6 août 2020, B._____ (ci-après: le club), club de football professionnel membre de la Fédération Hongroise de Football (ci-après: FHF ou MLSZ) elle-même affiliée à la Fédération Internationale de Football Association (FIFA), a conclu un contrat de travail avec le joueur de football russe A._____ (ci-après: le joueur ou le footballeur). L'art. 49 dudit contrat prévoyait ce qui suit:

"The Parties agree that they shall make efforts to settle their possible dispute in amicable way by negotiations. If these efforts fail - in cases determined by the rules of MLSZ or FIFA - the Parties may turn to the organizational units with MLSZ or FIFA scope of authority, in case of labour dispute to the Administrative and Labour Court having competence and scope of authority, and in all other disputes arising out of their legal relationship the Parties stipulate the exclusive jurisdiction of the Sport Standing Arbitration Court based on the Article 47 of the Sports Law. The number of arbitrators is three; the procedure is determined by the Procedural Rules of the Arbitration Court".

Le 31 janvier 2021, le club a fait savoir au joueur qu'il évoluerait dans son équipe de réserve et que son salaire serait réduit de 50 % conformément à l'art. 47 du contrat conclu par les parties.

Le 10 février 2021, le footballeur a écrit au club afin de contester sa décision.

Le 18 mai 2021, le joueur a mis le club en demeure de lui payer le solde de ses salaires de janvier à avril 2021 et a demandé à pouvoir réintégrer la première équipe. Il s'est vu opposer une fin de non-recevoir.

Le 11 juin 2021, le footballeur a résilié son contrat de travail.

Le 23 juin 2021, le joueur a assigné le club devant la Chambre de Résolution des Litiges (CRL) de la FIFA en vue d'obtenir le paiement d'arriérés de salaires ainsi que le versement d'une indemnité pour rupture du contrat de travail, intérêts en sus.

Le défendeur a soulevé l'exception d'incompétence de la CRL, en se prévalant de l'art. 49 du contrat conclu par les parties.

Statuant le 3 novembre 2021, la CRL a partiellement fait droit aux conclusions prises par le demandeur. Elle a condamné le défendeur à payer divers montants au joueur.

Le 5 janvier 2022, le club a appelé de cette décision auprès du Tribunal Arbitral du Sport (TAS). En substance, il a fait valoir que la CRL n'était pas compétente pour connaître du présent litige, celui-ci devant au contraire être tranché par la juridiction étatique hongroise.

Le joueur a conclu au rejet de l'appel.

Par sentence du 6 juillet 2023, l'arbitre a admis l'appel, annulé la décision entreprise et dit que la CRL n'était pas compétente pour connaître du litige divisant les parties.

Le 7 septembre 2023, le joueur (ci-après: le recourant) a formé un recours en matière civile aux fins d'obtenir l'annulation de la sentence précitée.

Extrait des considérants

(…)

5.
Dans un unique moyen, le recourant, invoquant l'art. 190 al. 2 let. b LDIP, soutient que le TAS s'est déclaré à tort incompétent pour trancher le fond de l'affaire et a nié indûment la compétence de la CRL pour connaître de la présente affaire.

5.1. Saisi du grief d'incompétence, le Tribunal fédéral examine librement les questions de droit, y compris les questions préalables, qui déterminent la compétence ou l'incompétence du tribunal arbitral (**ATF 147 III 107** consid. 3.1.1; **146 III 142** consid. 3.4.1). Il ne revoit cependant l'état de fait à la base de la sentence attaquée - même s'il s'agit de la question de la compétence - que si l'un des griefs mentionnés à l'art. 190 al. 2 LDIP est soulevé à l'encontre dudit état de fait ou que des faits ou des moyens de preuve nouveaux (cf. art. 99 al. 1 LTF) sont exceptionnellement pris en considération dans le cadre de la procédure du recours en matière civile (**ATF 144 III 559** consid. 4.1; **142 III 220** consid. 3.1; **140 III 477** consid. 3.1; **138 III 29** consid. 2.2.1).

5.2. La convention d'arbitrage est un accord par lequel deux ou plusieurs parties déterminées ou déterminables s'entendent pour confier à un tribunal arbitral ou à un arbitre unique, en lieu et place du tribunal étatique qui serait compétent, la mission de rendre une sentence à caractère contraignant sur un ou des litige (s) existant (s) (compromis arbitral) ou futur (s) (clause compromissoire) résultant d'un rapport de droit déterminé (**ATF 148 III 427** consid. 5.2.2; **147 III 107** consid. 3.1.2; **142 III 239** consid. 3.3.1; **140 III 367** consid. 3.1; **138 III 29** consid. 2.2.3). Il importe que la volonté des parties d'exclure la juridiction étatique normalement compétente au profit de la juridiction privée que constitue un tribunal arbitral y apparaisse (**ATF 148 III 427** consid. 5.2.2; **142 III 239** consid. 3.3.1).

S'agissant du fond, la convention d'arbitrage est valable, selon l'art. 178 al. 2 LDIP, si elle répond aux conditions que pose soit le droit choisi par les parties, soit le droit régissant l'objet du litige et notamment le droit applicable au contrat principal, soit encore le droit suisse. La disposition citée consacre trois rattachements alternatifs *in favorem validitatis*, sans aucune hiérarchie entre eux, à savoir le droit choisi par les parties, le droit régissant l'objet du litige (*lex causae*) et le droit suisse en tant que droit du siège de l'arbitrage (**ATF 129 III 727** consid. 5.3.2).

En droit suisse, l'interprétation d'une convention d'arbitrage se fait selon les règles générales d'interprétation des contrats. A l'instar du juge, l'arbitre ou le tribunal arbitral s'attachera, tout d'abord, à mettre au jour la réelle et commune intention des parties (cf. art. 18 al. 1 CO), le cas échéant empiriquement, sur la base d'indices, sans s'arrêter aux expressions et dénominations inexactes dont elles ont pu se servir. Constituent des indices en ce sens non seulement la teneur des déclarations de volonté, mais encore le contexte général, soit toutes les circonstances permettant de découvrir la volonté des parties, qu'il s'agisse des déclarations antérieures à la conclusion du contrat, des projets de contrat, de la correspondance échangée, voire de l'attitude des parties après la conclusion du contrat. Cette interprétation subjective repose sur l'appréciation des preuves. Si elle s'avère concluante, le résultat qui en est tiré, c'est-à-dire la constatation d'une commune et réelle intention des parties, relève du domaine des faits et lie, partant, le Tribunal fédéral. Dans le cas contraire, celui qui procède à

l'interprétation devra rechercher, en appliquant le principe de la confiance, le sens que les parties pouvaient et devaient donner, selon les règles de la bonne foi, à leurs manifestations de volonté réciproques en fonction de l'ensemble des circonstances (**ATF 142 III 239** consid. 5.2.1 et les références citées).

5.3. Dans la sentence querellée, l'arbitre, appliquant la réglementation adoptée par la FIFA et le droit suisse à titre subsidiaire, observe que le litige porte sur des rapports de travail et qu'il revêt une dimension internationale puisqu'il oppose un club de football hongrois à un footballeur de nationalité russe. Elle se réfère ensuite à l'art. 22 let. b du Règlement du Statut et du Transfert des Joueurs (RSTJ; édition février 2021) édicté par la FIFA, lequel a la teneur suivante:

"Art. 22 Compétence de la FIFA
Sans préjudice du droit de tout (e) joueur, entraîneur, association ou club à demander réparation devant un tribunal civil pour des litiges relatifs au travail, la compétence de la FIFA s'étend:
(...)
b) aux litiges de dimension internationale entre un club et un joueur relatifs au travail; les parties susmentionnées peuvent cependant opter, de manière explicite et par écrit, pour que de tels litiges soient tranchés par un tribunal arbitral indépendant établi au niveau national dans le cadre de l'association et/ou d'une convention collective; toute clause d'arbitrage doit être incluse directement dans le contrat ou dans une convention collective applicable aux parties. Le tribunal arbitral national indépendant doit garantir une procédure équitable et respecter le principe de représentation paritaire des joueurs et des clubs".

L'arbitre relève que la CRL est en principe compétente pour connaître des litiges relevant du domaine du travail. Les parties peuvent toutefois convenir contractuellement de soumettre de tels litiges aux tribunaux étatiques. L'arbitre estime qu'il lui appartient dès lors de déterminer si les parties, en adoptant l'art. 49, ont voulu exclure la compétence de la CRL pour trancher les litiges en matière de travail. Examinant les termes de cette clause contractuelle, elle souligne que celle-ci opère une distinction au niveau de l'autorité juridictionnelle compétente en fonction de la nature du litige concerné. Ainsi, un tribunal étatique ("Administrative and Labour Court") est exclusivement compétent pour trancher les litiges dans le domaine du travail, tandis que les parties peuvent saisir la CRL dans les cas visés par les règles de la FIFA ou de la FHF ne relevant pas dudit domaine. En adoptant l'art. 49, les parties ont écarté la compétence des organes juridictionnels de la FIFA fondée sur l'art. 22 let. b) RSTP et, dans le même temps, ont opté clairement et exclusivement en faveur de celle de l'autorité judiciaire étatique ("Administrative and Labour Court"). Cet accord clair et sans équivoque entre les parties de soumettre exclusivement les litiges en matière de travail au tribunal étatique en question doit être respecté. Par conséquent, la CRL s'est déclarée, à tort, compétente pour connaître du litige divisant les parties.

5.4. Dans ses écritures, le recourant critique le résultat de l'interprétation de la clause topique opérée par l'arbitre. A cet égard, il lui reproche d'avoir considéré que le tribunal étatique concerné ("Administrative and Labour Court") jouissait en l'occurrence d'une compétence exclusive pour trancher les litiges en matière de travail. Procédant à sa propre interprétation de l'art. 49 du contrat de travail, il estime que les parties pouvaient en l'occurrence saisir alternativement le tribunal étatique en question ou la CRL. Pour étayer sa thèse, l'intéressé se réfère notamment à une sentence rendue le 12 décembre 2019 par le TAS dans une affaire impliquant un club hongrois dans laquelle l'arbitre avait conclu à l'existence de compétences alternatives (TAS 2018/A/6016). Il soutient en outre que l'intimé n'aurait pas contesté ce point de vue devant le TAS.

5.5. Tel qu'il est présenté, le grief ne saurait prospérer.

A la lecture de la sentence entreprise, il appert, en effet, que l'arbitre désignée par le TAS a visiblement réussi à mettre à jour la réelle et commune intention des parties puisqu'elle a constaté que les parties, en concluant l'art. 49, avaient choisi de soumettre les litiges en matière de travail à la compétence exclusive d'une autorité judiciaire hongroise *("... when agreeing on Article 49, the Parties opted out of Article 22 lit. b) of the FIFA RSTP [RST] and, at the same time, clearly and exclusively opted in Article 22 of the FIFA RSTP in favour of the jurisdiction of the Administrative and Labour Court"*; sentence, n. 83) et a retenu l'existence d'un accord clair et non équivoque entre les parties à cet égard ("... clear and unequivocally agreement between the Parties to refer employment-related decision exclusively to Administrative and Labour Court."..; sentence, n. 84). Or, de telles constatations relatives à la volonté des parties relèvent du domaine des faits et lient, partant, le Tribunal fédéral lorsqu'il est saisi d'un recours en matière civile dirigé contre une sentence arbitrale internationale. Aussi est-ce en vain que le recourant se borne à proposer sa propre interprétation de la clause litigieuse. L'intéressé perd en effet de vue que si le Tribunal fédéral conserve la faculté de revoir l'état de fait à la base de la sentence attaquée, ce n'est qu'à la condition que l'un des griefs mentionnés à l'art. 190 al. 2 LDIP soit soulevé à l'encontre dudit état de fait ou que des faits ou des moyens de preuve nouveaux soient exceptionnellement pris en considération dans le cadre de la procédure du recours en matière civile. Or, on cherche en vain, dans l'acte de recours, un grief de ce genre, qui aurait été dûment invoqué et motivé.

Force est par ailleurs de constater que la thèse du recourant selon laquelle son adversaire n'aurait pas contredit son interprétation de l'art. 49 du contrat de travail est infirmée par le contenu même de la sentence attaquée. Il appert, en effet, que l'intimé a soutenu, devant le TAS, que la compétence du tribunal étatique concerné était exclusive (sentence, n. 50).

A titre superfétatoire, on relèvera que les critiques formulées par le recourant ne suffisent pas à établir que l'arbitre aurait enfreint l'art. 190 al. 2 let. b LDIP. Le résultat auquel a abouti l'arbitre apparaît en effet juridiquement défendable. Une autre formation arbitrale du TAS a du reste retenu une solution identique dans une affaire hongroise similaire jugée en novembre 2022 (TAS 2021/A/7775). Comme l'expose de manière convaincante le TAS, les clauses attributives de compétence dans ladite affaire et la présente cause avaient la même teneur dans le texte original hongrois, seule la traduction anglaise de celles-ci présentant quelques nuances. Saisi d'un recours dirigé contre la sentence rendue dans l'affaire TAS 2021/A/7775, la Cour de céans a considéré que l'interprétation de la clause contractuelle topique opérée par les arbitres ne prêtait pas le flanc à la critique (arrêt 4A_2/2023 du 6 octobre 2023 consid. 3.4). Il ne saurait en être autrement ici.

Décision

Au vu de ce qui précède, le recours doit être rejeté dans la mesure de sa recevabilité.

4A_442/2023, 11 janvier 2024
A. c. Agence Mondiale Anti-Dopage et Russian Anti-Doping Agency

Recours en matière civile contre la sentence rendue le 13 juillet 2023 par le Tribunal Arbitral du Sport (CAS 2021/A/8263 et CAS 2021/A/8381)

Célérité de la procédure devant le TAS et violation de l'ordre public procedural.

Extrait des faits

Le 6 août 2015, A._____ (ci-après: le lutteur), lutteur professionnel de nationalité russe, a fait l'objet d'un contrôle antidopage hors compétition. Le laboratoire de Moscou, accrédité par l'Agence Mondiale Antidopage (AMA), a procédé à l'analyse de l'échantillon d'urine fourni par l'athlète qui s'est révélée négative.

A la demande de l'AMA, le laboratoire de Lausanne a réexaminé, en avril 2020, l'échantillon fourni par le lutteur et y a décelé la présence d'un stéroïde anabolisant qui figure sur la liste des substances interdites établie par l'AMA.

Le 19 mai 2020, l'Agence antidopage russe (Russian Anti-Doping Agency; RUSADA) a officiellement reproché au lutteur d'avoir enfreint la réglementation antidopage édictée par elle et l'a suspendu à titre provisoire.

Statuant le 27 mai 2021, la Commission disciplinaire antidopage de RUSADA a blanchi le lutteur.

En date des 26 août et 4 octobre 2021, RUSADA et l'AMA ont chacune déposé un appel auprès du Tribunal Arbitral du Sport (TAS) contre cette décision.
Le 17 mai 2022, l'arbitre unique désigné par le TAS a ordonné la jonction des deux procédures d'appel.

Après avoir tenu une audience le 6 octobre 2022, l'arbitre a rendu sa sentence finale le 13 juillet 2023. Admettant les appels, il a reconnu le lutteur russe coupable d'avoir violé la réglementation antidopage adoptée par RUSADA, a prononcé sa suspension pour quatre ans à compter du prononcé de la sentence (sous déduction de la période de suspension provisoire effectivement subie par lui), et a ordonné la disqualification de tous les résultats obtenus par l'athlète entre le 6 août 2015 et le 5 août 2019, sanction impliquant notamment le retrait de l'ensemble des titres, points et prix gagnés par l'intéressé durant cette période. Les motifs qui étayent cette décision seront examinés plus loin dans la mesure utile à la compréhension des griefs dont celle-ci est la cible.

Le 13 septembre 2023, le lutteur (ci-après: le recourant) a formé un recours en matière civile, assorti d'une demande d'effet suspensif, aux fins d'obtenir l'annulation de la sentence précitée.

Invitées à répondre au recours, l'AMA (ci-après: l'intimée n. 1) et RUSADA (ci-après: l'intimée n. 2) ont conclu au rejet du recours.

Dans ses observations sur le recours, le TAS a également proposé le rejet de celui-ci.

Extrait des considérants

(…)

5.

Dans un premier moyen, le recourant, invoquant l'art. 190 al. 2 let. e LDIP, reproche à l'arbitre d'avoir enfreint le principe de célérité et, partant, d'avoir violé l'ordre public procédural.

5.1. Il y a violation de l'ordre public procédural lorsque des principes de procédure fondamentaux et généralement reconnus ont été violés, conduisant à une

contradiction insupportable avec le sentiment de la justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un État de droit (**ATF 141 III 229** consid. 3.2.1; **140 III 278** consid. 3.1; **136 III 345** consid. 2.1).

5.2. Pour étayer son grief, le recourant fait valoir que, selon l'art. R59 al. 5 du Code de l'arbitrage en matière de sport (ci-après: le Code), dans sa version applicable à la présente procédure, le dispositif de la sentence doit être communiqué aux parties dans les trois mois suivant le transfert du dossier à l'arbitre. L'intéressé relève que ledit délai peut être prolongé par le TAS sur requête de l'arbitre, ainsi que le prévoit expressément l'art. R59 al. 5 du Code. Il concède en outre lui-même que ce délai est très rarement respecté en pratique et qu'il est fréquemment prolongé spontanément par le TAS. En l'occurrence, le recourant observe que l'arbitre a reçu le dossier des deux causes jointes le 10 mai 2022 et qu'il a rendu sa sentence le 13 juillet 2023. Il souligne que le TAS a prolongé à huit reprises le délai dans lequel l'arbitre devait rendre sa sentence et indique *"avoir du mal à comprendre pourquoi l'arbitre a mis neuf mois et une semaine suivant la tenue de l'audience... pour communiquer sa décision..."*. L'intéressé se plaint en outre de ce que le TAS ne lui a jamais communiqué les raisons pour lesquelles ces diverses prolongations de délai avaient été accordées à l'arbitre, alors même qu'il en avait fait la demande par pli du 25 mai 2023.

5.3.

5.3.1. Dans plusieurs arrêts, le Tribunal fédéral s'est demandé dans quelle mesure la violation du principe de célérité pouvait être assimilée à une atteinte à l'ordre public procédural (arrêts 4A_22/2023 du 16 mai 2023 consid.7.3.2; 4A_668/2020 du 17 mai 2021 consid. 4.2). Il a toutefois renoncé à pousser plus avant l'examen de cette question dès lors que dans le cas concret, le TAS n'avait pas enfreint ledit principe (arrêts 4A_22/2023, précité, consid.7.3.2; 4A_668/2020, précité, consid. 4.2). La même conclusion s'impose ici, pour les motifs exposés ci-dessous.

5.3.2. Pour apprécier si une cause a été jugée dans un délai raisonnable, il convient de tenir compte de l'ensemble des circonstances du cas concret et, singulièrement, de l'étendue et de la complexité de l'afaire, tant au niveau factuel que juridique, de la nature de la procédure et de son enjeu pour le justiciable, ainsi que du comportement des parties et de celui du tribunal (arrêts 4A_22/2023, précité, consid. 7.3.2; 4A_412/2021 du 21 avril 2022 et les références citées).

En l'espèce, comme le relève l'intimée n. 1 sans être contredite par son adversaire, la procédure conduite par le TAS présentait une certaine complexité puisqu'elle a notamment impliqué la jonction de deux procédures initialement distinctes et l'audition de nombreux experts scientifiques. Par ailleurs, le recourant a lui aussi contribué à l'allongement de la durée de la procédure, car il a lui-même requis plusieurs prolongations de délai. Quoi qu'il en soit, eu égard à l'ensemble des circonstances, la durée de la procédure, que l'on apprécie celle-ci globalement à compter de la saisine du TAS ou depuis l'audience arbitrale tenue le 6 octobre 2022, n'apparaît pas déraisonnable et ne conduit nullement à une contradiction insupportable avec le sentiment de justice. Au demeurant, force est de constater que l'intéressé ne s'est jamais véritablement plaint d'une éventuelle lenteur de la procédure. Tout au plus s'est-il borné à demander, lorsqu'il a reçu la septième prolongation de délai en mai 2023, des précisions relatives aux motifs expliquant un nouveau report du délai. Le recourant n'a en revanche rien trouvé à redire à la nouvelle prolongation de délai octroyée le 26 juin 2023. A le supposer recevable, le moyen considéré ne peut dès lors qu'être rejeté.

(…)

Décision

Au vu de ce qui précède, le recours doit être rejeté dans la mesure de sa recevabilité.

4A_112/2024, 3 juillet 2024
Fédération Internationale d'Haltérophilie c. A

Recours en matière civile contre la sentence rendue le 18 janvier 2024 par le Tribunal Arbitral du Sport (CAS 2023/A/9398 et CAS 2023/A/9493)

Droit d'être entendu (Article 190 al.2 let. d LDIP); argument de surprise infondé; le champ d'application rationae temporis de la réglementation topique d'une organisation sportive ne s'étend pas au delà de la période au cours de laquelle une personne a eu une position au sein de l'organisation.

Extrait des faits

Le 23 juin 2021, l'Agence de contrôles internationale (International Testing Agency [ITA]), agissant sur délégation de la Fédération internationale d'haltérophilie (FIH) dont le siège est à Lausanne, a notifié au ressortissant turc A._____ - lequel présidait alors la Fédération européenne d'haltérophilie (FEH) - l'ouverture d'une procédure disciplinaire à son encontre en raison d'éventuelles violations du règlement antidopage adopté par la FIH. En substance, il était reproché au prénommé, qui avait présidé la Fédération turque d'haltérophilie (FTH) de décembre 2003 jusqu'au 25 janvier 2013, d'avoir antidaté un document établi en janvier 2013 au 5 novembre 2012 afin d'éviter que des sanctions disciplinaires pour cause de violation de la réglementation antidopage ne soient prononcées contre une vingtaine d'haltérophiles turcs et contre la FTH.

Dans le cadre de la procédure disciplinaire dirigée contre lui, A._____ a produit, en date du 25 septembre 2021, un nouveau moyen de preuve censé démontrer l'absence de manipulation du document litigieux.

Le 1er octobre 2021, A._____ s'est vu accuser d'avoir commis une nouvelle infraction à la réglementation antidopage. Il lui était reproché d'avoir fait usage d'un moyen de preuve falsifié le 25 septembre 2021.

Le 21 octobre 2021, l'ITA, agissant au nom de la FIH, a assigné A._____ devant la Chambre antidopage du Tribunal Arbitral du Sport (CAD TAS).

Après avoir tenu une audience le 17 mars 2022, la CAD TAS a rendu sa décision le 3 janvier 2023. Admettant partiellement la requête introduite auprès d'elle, elle a reconnu le prénommé coupable d'avoir enfreint la réglementation antidopage au motif qu'il avait antidaté un document au 5 novembre 2012, altérant ainsi le processus de gestion des résultats de nombreux contrôles antidopage positifs. En ce qui concerne la seconde infraction reprochée, la CAD TAS a certes estimé que le défendeur avait produit un moyen de preuve falsifié en septembre 2021. A son avis, il ne s'agissait toutefois pas d'une violation distincte de la réglementation antidopage, mais d'une circonstance aggravante en relation avec la première infraction commise en 2013.

Le 24 janvier 2023, A._____ a appelé de cette décision auprès de la Chambre arbitrale d'appel du TAS (CAA TAS) aux fins d'obtenir son annulation.

La FIH a soumis un appel joint ("cross-appeal") à la CAA TAS afin que le prénommé soit également reconnu coupable d'avoir enfreint, en septembre 2021, la réglementation antidopage édictée par elle.

Les deux causes enregistrées sous des numéros distincts ont été jointes le 20 mars 2023.

La Formation désignée par le TAS, comprenant trois membres, a tenu une

audience par vidéoconférence le 22 août 2023.

Par sentence finale du 18 janvier 2024, la Formation a admis l'appel interjeté par A._____, a annulé la décision attaquée et dit que ce dernier n'avait pas commis d'infraction à la réglementation antidopage adoptée par la FIH. Les motifs qui étayent cette décision seront examinés plus loin dans la mesure utile.

Le 19 février 2024, la FIH (ci-après: la recourante) a formé un recours en matière civile aux fins d'obtenir l'annulation de ladite sentence.

Extrait des considérants

(…)

2.
Le recours en matière civile est recevable contre les sentences touchant l'arbitrage international aux conditions fixées par les art. 190 à 192 de la loi fédérale sur le droit international privé du 18 décembre 1987 (LDIP; RS 291), conformément à l'art. 77 al. 1 let. a LTF.

Le siège du TAS se trouve à Lausanne. L'une des parties au moins n'avait pas son domicile en Suisse au moment déterminant. Les dispositions du chapitre 12 de la LDIP sont donc applicables (art. 176 al. 1 LDIP).

(…)

5.
Dans un unique moyen divisé en deux branches, la recourante, invoquant l'art. 190 al. 2 let. d LDIP, reproche à la Formation d'avoir enfreint son droit d'être entendue.

5.1. Le droit d'être entendu, tel qu'il est garanti par les art. 182 al. 3 et 190 al. 2 let. d LDIP, n'a en principe pas un contenu différent de celui consacré en droit constitutionnel (**ATF 147 III 379** consid. 3.1; **142 III 360** consid. 4.1.1 et les références citées). Dans le domaine de l'arbitrage, chaque partie a le droit de s'exprimer sur les faits essentiels pour la décision, de présenter son argumentation juridique, de proposer ses moyens de preuve sur des faits pertinents et de prendre part aux séances du tribunal arbitral (**ATF 147 III 379** consid. 3.1; **142 III 360** consid. 4.1.1). Le droit d'être entendu est une garantie constitutionnelle de caractère formel, dont la violation entraîne en principe l'annulation de la décision attaquée, indépendamment des chances de succès du recours sur le fond. Le droit d'être entendu n'est toutefois pas une fin en soi; il constitue un moyen d'éviter qu'une procédure judiciaire ne débouche sur un jugement vicié en raison de la violation du droit des parties de participer à la procédure. Lorsqu'on ne voit pas quelle influence la violation du droit d'être entendu a pu avoir sur la procédure, il n'y a pas lieu d'annuler la décision attaquée (arrêts 4A_491/2017 du 24 mai 2018 consid. 4.1.2 et 4A_247/2017 du 18 avril 2018 consid. 5.1.3).

Le tribunal arbitral n'est pas tenu d'aviser spécialement une partie du caractère décisif d'un élément de fait sur lequel il s'apprête à fonder sa décision, pour autant que celui-ci ait été allégué et prouvé selon les règles (**ATF 142 III 360** consid. 4.1.2).

Le droit des parties d'être interpellées sur des questions juridiques n'est reconnu que de manière restreinte. En règle générale, les tribunaux arbitraux apprécient librement la portée juridique des faits et ils peuvent statuer aussi sur la base de règles de droit autres que celles invoquées par les parties. A titre exceptionnel, il convient d'interpeller les parties lorsque le tribunal arbitral envisage de fonder sa décision sur une norme ou une considération juridique qui n'a pas été évoquée au cours de la procédure et dont les parties ne pouvaient pas supputer la pertinence (**ATF 130 III 35** consid. 5 et les références citées; arrêt 4A_146/2023 du 4 septembre 2023 consid. 8.2). Au demeurant, savoir ce qui est imprévisible est une question d'appréciation. Aussi le Tribunal fédéral se montre-t-il restrictif dans l'application de

ladite règle pour ce motif et parce qu'il convient d'avoir égard aux particularités de ce type de procédure en évitant que l'argument de la surprise ne soit utilisé en vue d'obtenir un examen matériel de la sentence par l'autorité de recours (arrêts 4A_146/2023, précité, consid. 8.2; 4A_716/2016 du 26 janvier 2017 consid. 3.1).

C'est le lieu de rappeler que le grief tiré de la violation du droit d'être entendu ne doit pas servir, pour la partie qui se plaint de vices affectant la motivation de la sentence, à provoquer par ce biais un examen de l'application du droit de fond (**ATF 142 III 360** consid. 4.1.2).

5.2.

5.2.1. Dans la première branche du moyen considéré, la recourante se plaint d'une violation de son droit d'être entendue en lien avec l'établissement des faits. A cet égard, elle observe que la Formation a retenu que l'intimé aurait démissionné de son poste de président de la FEH le 27 juin 2021 et constaté que la production par ce dernier d'un moyen de preuve falsifié au cours de la procédure disciplinaire avait eu lieu le 25 septembre 2021, soit près de trois mois après son prétendu départ de la FEH. Or, à son avis, le fait que l'intimé aurait quitté ses fonctions le 27 juin 2021 ne ressortirait nullement du dossier. L'intéressée expose avoir tout au plus indiqué, en passant, dans le cadre de sa réponse déposée devant la CAA TAS, que l'intimé s'était "mis en retrait" de son poste de président de la FEH "en juin 2021" ("a position from which he stepped down in June 2021"), sans jamais prétendre qu'il aurait démissionné, ce qui était du reste confirmé, selon elle, par la pièce qu'elle avait offerte au soutien de cette allégation. Elle fait également valoir que l'intimé n'avait pas davantage allégué avoir démissionné de la présidence de la FEH en juin 2021 et qu'il avait même laissé entendre le contraire dans son mémoire d'appel au TAS. La recourante souligne aussi que la CAD TAS n'avait pas davantage retenu que l'intimé aurait quitté ses fonctions au sein de la FEH. Elle produit en outre une pièce nouvelle, à savoir un courriel de l'intimé envoyé en décembre 2021, en vue de démontrer que l'intéressé n'avait pas démissionné de son poste de président de la FEH mais s'était simplement "mis en retrait". La recourante fait ainsi grief à la Formation de ne pas avoir offert aux parties la possibilité de débattre de cette question factuelle centrale. Elle relève, en outre, que la date du 27 juin 2021, laquelle correspondait selon la Formation au moment où l'intimé aurait démissionné de son poste de président de la FEH, n'avait jamais été évoquée au cours de la procédure d'arbitrage, raison pour laquelle les arbitres ont nécessairement dû s'appuyer sur des éléments étrangers au dossier.

5.2.2. L'argumentation présentée par la recourante n'emporte point la conviction de la Cour de céans.

Comme le relèvent à juste titre l'intimé et le TAS dans leurs observations sur le recours, la recourante avait expressément allégué ce qui suit dans son mémoire de réponse et d'appel joint adressé le 10 mars 2023 au TAS:

"16. Mr A._____... is the former President of the Turkish Weightlifting Federation [FTH]... between 2004 and 2013, IWF [FIH] Vice-President from 2009 to 2013, Secretary General of the European Weightlifting Federation ("EWF" [FEH]) between 2013 and 2021 and President of the EWF from April until June 2021.
(...)
35. From April 2012, Mr A._____ was also Secretary General of the European Weightlifting Federation and Chairman of the EWF Medical Committee until he was elected President of the EWF in April 2021, a position from which he stepped down in June 2021".

L'intimé n'a pas contredit de telles allégations dans son mémoire de réponse à l'appel joint. Il n'a ainsi pas soutenu qu'il était toujours président de la FEH. Dans ces circonstances, force est d'admettre que la Formation pouvait légitimement retenir que l'intimé avait quitté son poste de président de la FEH

en juin 2021. La teneur de l'allégué 16 reproduit ci-dessus, et singulièrement les termes "former" et "from April until June 2021" ne laissent pas de place au doute à cet égard. Aussi est-ce en vain que l'intéressée fait valoir que certaines pièces figurant au dossier et la décision rendue par la CAD TAS faisaient état de ce que l'intimé avait en réalité conservé son poste de président de la FEH après le mois de juin 2021. La recourante joue également sur les mots lorsqu'elle prétend que l'expression "stepped down" aurait en réalité signifié que son adversaire s'était uniquement mis en retrait mais en aucun cas que celui-ci avait démissionné. L'intimé démontre du reste, références à l'appui, que le verbe anglais "to step down" peut tout à fait signifier "démissionner" respectivement "quitter ses fonctions".

La tentative de la recourante de restreindre après coup la portée de ses propres allégations est ainsi vouée à l'échec. C'est également en vain que l'intéressée essaie de revenir sur les faits allégués par elle lors de la procédure d'arbitrage, en soumettant, pour la première fois devant le Tribunal fédéral, une pièce qu'elle aurait parfaitement pu produire devant le TAS. Cette pièce nouvelle est ainsi irrecevable en vertu de l'art. 99 al. 1 LTF, l'exception à laquelle se réfère la recourante n'entrant pas en ligne de compte, comme le relève à bon droit l'intimé.

La recourante fait enfin grand cas de ce que la date du 27 juin 2021 retenue par la Formation, censée correspondre au moment auquel l'intimé aurait démissionné de son poste de président de la FEH, ne figure nulle part au dossier. Les parties concèdent certes qu'une date précise n'avait pas été alléguée au cours de la procédure. L'intimé fait toutefois valoir, preuve à l'appui, que cette information avait été relayée par la presse. Quoi qu'il en soit, le point de savoir si la Formation était en droit de retenir une telle date ou si elle aurait au contraire dû constater que l'intimé ne présidait plus la FEH depuis juin 2021 ("until June 2021") comme l'avait allégué la recourante n'était manifestement pas de nature à influencer le résultat auquel a abouti la Formation. Pour justifier la solution retenue par elle, cette dernière a en effet souligné que les faits reprochés à l'intimé en relation avec la production d'un document falsifié lors de la procédure disciplinaire le visant s'étaient déroulés le 25 septembre 2021, soit plusieurs mois après la fin de son mandat à la tête de la FEH en juin 2021. Que l'intimé ait quitté ses fonctions le 27 ou le 30 juin 2021 importe dès lors peu, eu égard aux considérations émises par les arbitres.

5.3.

5.3.1. Dans la seconde branche du moyen examiné, l'intéressée reproche à la Formation d'avoir fondé sa décision sur une argumentation juridique imprévisible sans avoir interpellé préalablement les parties sur ce point. A son avis, celles-ci ne pouvaient pas supputer la pertinence du motif selon lequel l'intimé n'aurait plus été assujetti à la réglementation de la recourante après juin 2021, raison pour laquelle les faits reprochés à l'intimé, survenus en septembre 2021, ne pouvaient pas constituer une infraction à ladite réglementation.

5.3.2. Tel qu'il est présenté, le grief ne saurait prospérer.

En tant qu'elle soutient qu'il était clair pour les parties que l'intimé n'avait pas démissionné de sa fonction de président de la FEH fin juin 2021, la recourante assoit sa critique sur des faits qui ne ressortent pas de la sentence attaquée et qui est, partant, inadmissible.

L'intéressée ne saurait être suivie lorsqu'elle plaide l'effet de surprise. Il appert, en effet, que l'intimé a toujours contesté que les règles antidopage adoptées par la recourante s'appliquaient à lui. Cette problématique était dès lors l'un des enjeux cruciaux de cette procédure. Certes, le point de savoir si la démission de l'intimé excluait l'application, à l'égard de ce dernier, de la réglementation de la recourante pour des faits survenus postérieurement n'a pas été débattu spécifiquement par les parties dans leurs

mémoires respectifs. De là à en conclure que celles-ci ne pouvaient en aucun cas envisager que la Formation examinerait, sous toutes ses coutures, le champ d'application *ratione temporis* de la réglementation topique édictée par la recourante, il y a un pas qu'il n'est pas possible de franchir ici.

C'est également en vain que la recourante se plaint, en substance, de ce que la Formation aurait fondé sa décision sur l'art. 7.7 de sa réglementation antidopage, disposition qui viserait, à son avis, exclusivement l'hypothèse dans laquelle la personne visée par une procédure disciplinaire en matière de lutte antidopage prend sa retraite. A la lecture de la sentence attaquée, il appert, en effet, que la Formation a uniquement fait référence à ladite norme pour confirmer le résultat auquel elle avait déjà abouti au terme de son analyse de la réglementation topique, comme l'atteste le passage suivant de la décision entreprise:

"99. Therefore, the alleged acts underlying the Second Charge occurred when Mr. A._____ was neither (a) a board member, director or officer of the IWF, nor (b) a board member, director or officer of a National Federation, nor (c) an Athlete or Athlete Support Personnel. He ceased to be bound by the 2021 IWF ADR on the day after he left his office at the EWF. The scope section of the 2021 IWF ADR, however, only covers current officials, not past ones who stepped out of the IWF (or any other organization to which the IWF ADR applies). There is no indication in the IWF ADR that the temporary scope of such regulation shall extend beyond the period in which the individual holds a position within the organization. The fact that the Second Charge occurred as part of the pending disciplinary proceedings for the First Charge (which undisputedly relates to incidents which happened when Mr. A._____ held positions at the IWF and TWF) does not change this analysis. The IWF brought the Second Charge as a separate case based on separate facts created after Mr. A._____ had left the EWF.
100. This finding is corroborated by Article 7.7 of the 2021 IWF ADR (...)". (passage mis en gras par la Cour de céans).

Pour le reste, il saute aux yeux que la recourante, sous le couvert d'une prétendue violation de son droit d'être entendue, se borne à critiquer le raisonnement tenu par les arbitres et tente d'inciter le Tribunal fédéral à se prononcer sur le fond du litige, ce qui n'est pas admissible. Il convient, enfin, de rappeler que le point de savoir si la motivation fournie par la Formation est cohérente et convaincante ne ressortit pas au droit d'être entendu et échappe à la cognition du Tribunal fédéral (arrêt 4A_300/2023 du 9 octobre 2023 consid. 6.3).

Décision

Le recours est rejeté dans la mesure où il est recevable.

4A_264/2024, 12 septembre 2024
International Boxing Association v. Comité International Olympique

Recours en matière civile contre la sentence rendue le 2 avril 2024 par le Tribunal Arbitral du Sport (CAS 2023/A/9757)

Droit d'être entendu (Article 190 al. 2 let. d LDIP); le fait de savoir si le retrait de la reconnaissance d'une fédération internationale par le CIO est fondé sur une base légale ne relève pas du droit d'être entendu; à défaut de preuve de l'existence d'un comportement abusif de la part du CIO, la prétendue violation du droit d'être entendu causée par l'absence de prise en compte de la définition de "marché concerné" figurant dans la LCart, ne peut avoir d'influence sur le sort du litige.

Extrait des faits

Le Comité International Olympique (CIO) est une association de droit suisse dont le siège se trouve à Lausanne. La Charte olympique, qui régit son action, lui confère notamment la mission de diriger le Mouvement olympique. A ce titre, le CIO peut reconnaître au titre de fédérations internationales (FI) des organisations internationales non gouvernementales qui gouvernent un ou plusieurs sports sur le plan mondial.

International Boxing Association (ci-après: l'IBA), autrefois connue sous le nom d'Association Internationale de Boxe Amateur (AIBA), est une organisation non gouvernementale, à but non lucratif, dont le siège est à Lausanne. Elle était reconnue jusqu'au 22 juin 2023 par le CIO en qualité de FI régissant la boxe au niveau international.

A l'issue des Jeux Olympiques de Rio 2016, plusieurs membres de l'IBA et divers médias ont fait état d'allégations de corruption en relation avec la conduite adoptée par des cadres supérieurs de l'IBA et des arbitres au cours de ladite compétition ainsi que lors de précédentes éditions des Jeux Olympiques.

Le comité d'enquête spécial institué par l'IBA chargé de mener des investigations sur les faits en question a conclu à l'existence d'une culture caractérisée par le pouvoir, la peur et le manque de transparence régnant au sein de ladite fédération sportive. La commission exécutive du CIO a quant à elle demandé à l'IBA de prendre des mesures pour répondre aux graves préoccupations liées à sa gouvernance et à sa stabilité financière. A ce titre, elle a notamment sollicité la mise en oeuvre d'un audit financier ainsi que des changements dans les règles gouvernant l'action des arbitres de boxe.

Le 6 décembre 2017, le CIO a suspendu ses contributions financières à l'IBA jusqu'à la résolution de ses problèmes de gouvernance et de finances.

Le 27 janvier 2018, A._____ a été nommé en tant que président intérimaire de l'IBA. A cette époque, les autorités américaines considéraient le prénommé comme l'un des dirigeants du crime organisé (...), spécialisé dans la production de stupéfiants dans les pays d'Asie centrale.

Le 12 novembre 2018, le CIO a décidé d'ouvrir formellement une enquête dirigée contre l'IBA et a nommé une commission d'enquête chargée notamment d'analyser les mesures prises par l'IBA en matière de gouvernance, d'éthique, de gestion financière et d'arbitrage, d'enquêter et d'évaluer ces domaines de préoccupation majeure et d'émettre une recommandation au CIO concernant d'éventuelles mesures et sanctions à prendre.

Le 28 mars 2019, B._____, qui était alors membre du comité exécutif de l'IBA et qui est désormais son président, a écrit au CIO

afin de lui proposer de rembourser lui-même toutes les dettes de ladite fédération sportive.

Le 21 mai 2019, la commission d'enquête du CIO a rendu un rapport, dans lequel elle a mis en avant divers problèmes concernant l'IBA et a formulé diverses recommandations.

A la suite de la publication dudit rapport, le CIO a décidé d'instituer un "groupe de travail sur la boxe" afin d'organiser le tournoi de boxe aux Jeux Olympiques de Tokyo 2020. Elle a également créé une commission spéciale de surveillance ayant pour mission de superviser les agissements de l'IBA dans certains domaines.

Le 26 juin 2019, la Session du CIO - laquelle est l'assemblée générale des membres de ladite organisation - a décidé de suspendre la reconnaissance de l'IBA.

Le 11 juin 2021, l'IBA a mandaté une société dirigée par le Prof. Richard McLaren en vue d'enquêter sur les manquements qui lui étaient reprochés. Ladite société a rendu trois rapports publiés respectivement les 30 septembre 2021, 10 décembre 2021 et 22 juin 2022, dans lesquels elle a pointé du doigt une série de problèmes, et notamment des cas de corruption et de manipulations de combats de boxe.

Le 30 juin 2021, l'IBA a aussi chargé un groupe d'experts d'analyser sa gouvernance. Ce dernier a publié deux rapports en date des 15 novembre 2021 et 25 août 2022. Il a notamment estimé que la fédération sportive concernée se trouvait toujours en situation de crise. Il a émis une série de recommandations aux fins d'améliorer la gouvernance de l'IBA.

Le 9 décembre 2021, le CIO a indiqué à l'IBA qu'elle devait adopter une série de mesures dans le secteur financier, ainsi qu'en matière de gouvernance et d'intégrité du sport. Elle lui a également fait savoir qu'elle avait décidé, à ce stade, de ne pas inclure la boxe au programme des Jeux Olympiques de Los Angeles 2028. Elle a toutefois précisé qu'elle pourrait revoir cette décision en 2023 si l'IBA démontrait, d'ici là, avoir réglé les problèmes actuels entourant sa gouvernance, sa viabilité financière et l'intégrité de son processus d'arbitrage lors des compétitions de boxe.

Le 6 avril 2023, le CIO a rendu un nouveau rapport dans lequel il constatait l'existence de points potentiellement non conformes à la Charte olympique s'agissant de l'organisation de l'IBA. Le même jour, il a invité l'IBA à se déterminer sur ledit rapport et l'a informée que la Session du CIO pourrait lui retirer sa reconnaissance. L'IBA s'est déterminée le 5 mai 2023 sur ledit rapport.

Le 2 juin 2023, le CIO a publié un nouveau rapport, dont la conclusion était la suivante:

"Despite the various chances given to the IBA, including the Road Map 2021 to 2023, to address the various concerns with actual, effective evolution, the IBA was unable to provide the elements which would have allowed the lifting of its suspension. Therefore, it is not possible to reach any conclusion other than to confirm the analysis made by the IOC Session in 2019, which was at no time contested by the IBA, on the necessity to withdraw the IOC's recognition of the IBA. Effectively, the situation has become so serious that the only proportional conclusion is to withdraw the IOC's recognition of the IBA pursuant to the Olympic Charter".

Le 22 juin 2023, la Session du CIO, suivant la recommandation émise par la commission exécutive du CIO, a retiré sa reconnaissance de l'IBA, a décidé de maintenir la boxe lors des Jeux Olympiques de Paris 2024 dans l'intérêt des athlètes et a décidé que l'IBA n'organiserait pas les compétitions de boxe lors de l'édition suivante des Jeux Olympiques.

Le 27 juin 2023, l'IBA, se fondant sur la clause d'arbitrage insérée dans la Charte olympique, a contesté la décision prise le 22 juin 2023 auprès du Tribunal Arbitral du Sport (TAS).

La Formation désignée par le TAS, comprenant trois membres, a tenu une audience le 16 novembre 2023.

Par sentence finale du 2 avril 2024, la Formation a rejeté l'appel formé par l'IBA et a confirmé la décision entreprise. Les motifs sur lesquels repose ladite sentence ne seront examinés plus loin que dans la mesure utile à la compréhension des critiques dont celle-ci est la cible.

Le 7 mai 2024, l'IBA (ci-après: la recourante) a formé un recours en matière civile aux fins d'obtenir l'annulation de la sentence précitée.

Extrait des considérants

(…)

2.

2.1. L'art. 77 al. 1 LTF distingue l'arbitrage international (let. a) de l'arbitrage interne (let. b). Selon l'art. 176 al. 1 de la loi fédérale sur le droit international privé du 18 décembre 1987 (LDIP; RS 291), qui utilise un critère formel pour décider de l'internationalité d'un arbitrage, l'arbitrage est international si le siège du tribunal arbitral se trouve en Suisse et si au moins l'une des parties n'avait, au moment de la conclusion de la convention d'arbitrage, ni son domicile, ni sa résidence habituelle en Suisse. A contrario, l'arbitrage est interne lorsque le tribunal arbitral a son siège en Suisse et que le chapitre 12 de la LDIP n'est pas applicable (art. 353 al. 1 du Code de procédure civile suisse [CPC; RS 272]). Les parties ont toutefois la possibilité de faire un *opting out*, c'est-à-dire d'opter pour l'application de la troisième partie du CPC, à l'exclusion du chapitre 12 de la LDIP, lorsque l'arbitrage revêt un caractère international, et vice versa (cf. art. 176 al. 2 LDIP et art. 353 al. 2 CPC).

2.2. En l'occurrence, le siège du TAS se trouve à Lausanne et les deux parties au litige ont leur siège en Suisse. Il s'agit donc à l'évidence d'un arbitrage interne. Comme l'expose la recourante, sans être contredite par son adversaire, les parties ont toutefois choisi de soumettre le litige qui les divise à l'application des dispositions du Chapitre 12 de la LDIP, lorsqu'elles ont signé l'ordre de procédure du TAS. Dans ces circonstances, le recours dirigé contre la sentence entreprise ne peut être formé que pour l'un des griefs énoncés limitativement à l'art. 190 al. 2 LDIP.

(…)

5.

Dans un unique moyen, divisé en deux branches, la recourante, invoquant l'art. 190 al. 2 let. d LDIP, reproche à la Formation d'avoir enfreint son droit d'être entendue en omettant d'examiner certains arguments qu'elle avait avancés au cours de la procédure arbitrale.

5.1. La jurisprudence a déduit du droit d'être entendu, tel qu'il est garanti par les art. 182 al. 3 et 190 al. 2 let. d LDIP, un devoir minimum pour le tribunal arbitral d'examiner et de traiter les problèmes pertinents. Ce devoir est violé lorsque, par inadvertance ou malentendu, le tribunal arbitral ne prend pas en considération des allégués, arguments, preuves et offres de preuve présentés par l'une des parties et importants pour la sentence à rendre (**ATF 142 III 360** consid. 4.1.1 et les références citées). Il incombe à la partie soi-disant lésée de démontrer, dans son recours dirigé contre la sentence, en quoi une inadvertance des arbitres l'a empêchée de se faire entendre sur un point important. C'est à elle d'établir, d'une part, que le tribunal arbitral n'a pas examiné certains des éléments de fait, de preuve ou de droit qu'elle avait régulièrement avancés à l'appui de ses conclusions et, d'autre part, que ces éléments étaient de nature à influer sur le sort du litige (**ATF 142 III 360** consid. 4.1.1 et 4.1.3). Si la sentence passe totalement sous silence des éléments apparemment importants pour la solution du litige, c'est aux arbitres ou à la partie intimée qu'il appartiendra de justifier cette omission dans leurs observations sur le

recours. Ceux-ci pourront le faire en démontrant que, contrairement aux affirmations du recourant, les éléments omis n'étaient pas pertinents pour résoudre le cas concret ou, s'ils l'étaient, qu'ils ont été réfutés implicitement par le tribunal arbitral (**ATF 133 III 235** consid. 5.2).

C'est le lieu de préciser que le grief tiré de la violation du droit d'être entendu ne doit pas servir, pour la partie qui se plaint de vices affectant la motivation de la sentence, à provoquer par ce biais un examen de l'application du droit de fond (**ATF 142 III 360** consid. 4.1.2 et les références citées).

5.2.

5.2.1. Dans la première branche du moyen considéré, la recourante soutient que la Formation aurait omis de se prononcer sur son argument selon lequel les motifs permettant de prononcer un retrait de la reconnaissance d'une FI sont énoncés exhaustivement à la règle 59 de la Charte olympique, ladite norme prévoyant une procédure disciplinaire particulière pour pouvoir procéder à un tel retrait. Elle avait ainsi soutenu que le retrait de sa reconnaissance, qui n'était en l'occurrence pas fondé sur l'un des motifs visés par la règle 59 de la Charte olympique, ne reposait sur aucune base juridique valable. Or, à son avis, la Formation n'aurait pas examiné cette question.

5.2.2. L'argumentation présentée par la recourante n'emporte nullement la conviction de la Cour de céans.

A la lecture des critiques formulées par l'intéressée, il est flagrant que celle-ci confond visiblement le Tribunal fédéral avec une cour d'appel et qu'elle ne cherche, en vain, qu'à refaire le procès devant la Cour de céans, en exposant une nouvelle fois le point de vue juridique qu'elle avait défendu devant le TAS. Sous le couvert d'une prétendue violation de son droit d'être entendue, elle s'en prend exclusivement à la motivation des arbitres et tente ainsi, en pure perte, d'obtenir un examen matériel de la sentence par l'autorité de recours, ce qui n'est pas admissible.

Quoi qu'il en soit, il apparaît, à la lecture de la sentence querellée, que la Formation a bel et bien pris en considération l'argumentation développée par la recourante, mais qu'elle l'a rejetée, à tout le moins implicitement, en aboutissant à la solution retenue par elle. Le TAS a, en effet, correctement exposé la position défendue par la recourante sur le problème considéré (cf. sentence, n. 125 ss et 332). S'il a certes reconnu implicitement que la décision attaquée n'avait pas été prise sur la base de la règle 59 de la Charte olympique, il a toutefois estimé que la mesure prononcée reposait bel et bien sur une base légale, à savoir les art. 28 et 72 du Code civil suisse (CC; RS 210; sentence, n. 338). A cet égard, la Formation a jugé que la question à résoudre était de savoir si l'intimé disposait, en vertu de l'art. 72 CC, d'une raison importante ("good cause"; sentence, n. 375) de retirer la reconnaissance de la recourante, question à laquelle elle a répondu par l'affirmative (sentence, n. 457-459). Autrement dit, elle a visiblement considéré que, contrairement à ce que soutenait la recourante, le retrait de sa reconnaissance ne devait pas nécessairement reposer sur l'un des motifs visés par la règle 59 de la Charte olympique mais pouvait être prononcé pour d'autres raisons, en vertu de l'art. 72 CC. Elle a donc écarté, à tout le moins de manière implicite, la thèse défendue par la recourante. Quant à savoir si pareille conclusion était fondée ou non, ce n'est pas un problème qui relève de la violation du droit d'être entendu et qui pourrait être examiné par la Cour de céans à ce titre.

5.3.

5.3.1. Dans la seconde branche du grief examiné, la recourante prétend que la Formation, au moment de se prononcer sur la violation alléguée de la loi fédérale sur les cartels et autres restrictions à la concurrence (LCart; RS 251), n'aurait pas tenu compte de la définition de "marché concerné" et des

jurisprudences européennes citées par elle au cours de l'audience arbitrale. Si la Formation avait effectivement tenu compte de ces éléments, elle aurait dû, selon la recourante, admettre le caractère abusif du comportement adopté par l'intimé.

5.3.2. Semblable reproche tombe à faux.

Force est d'emblée de relever que la recourante tente, une nouvelle fois, d'inciter le Tribunal fédéral, par une voie détournée, à revoir l'application du droit opérée par les arbitres. Il va sans dire qu'une telle démarche est inadmissible.

Quoi qu'il en soit, la lecture de la sentence entreprise permet de constater que la Formation a bel et bien tenu compte des arguments avancés par la recourante. La Formation a, en effet, consacré plusieurs pages de sa sentence à résumer la thèse prônée par l'intéressée selon laquelle l'intimé jouirait d'une position dominante sur le marché concerné (sentence, n. 133-140). Au moment d'analyser cette problématique, elle a jugé que la recourante n'avait pas suffisamment délimité la notion de marché au sens de la LCart (sentence, n. 352). Or, contrairement à ce que semble sous-entendre la recourante, le simple fait que les arbitres n'aient pas fait mention des décisions de justice citées par cette dernière au cours de l'audience, ne signifie pas encore qu'ils les auraient ignorées. En tout état de cause, la violation du droit être entendu de la recourante, fût-elle avérée, n'a manifestement eu aucune influence sur le sort du litige. En effet, même à supposer que la Formation n'ait pas tenu compte de la définition de marché concerné proposée par la recourante au cours de l'audience et des jurisprudences européennes invoquées par elle, il apparaît que les arbitres ont considéré que l'intéressée avait échoué à établir l'existence d'un comportement abusif de la part de l'intimé (sentence, n. 355). Par surabondance, la Formation a considéré que le retrait de la reconnaissance de la recourante opéré par l'intimé pourrait être justifié par des raisons commerciales légitimes (sentence, n. 356).

Décision

Le recours est rejeté dans la mesure où il est recevable.

4A_346/2024, 2 septembre 2024
A. c. B.

Recours en matière civile contre la décision rendue le 15 mai 2024 par le Tribunal Arbitral du Sport. (2024/A/10278)

Les exigences formelles prévues par l'Article 31 al 3 du Code de l'arbitrage en matière de sport constituent une condition de validité du dépôt de la déclaration d'appel.

Extrait des faits

Par décision du 4 avril 2024, la Chambre de Résolution des Litiges de la Fédération Internationale de Football Association (FIFA) a condamné le club de football professionnel turc A._____ (ci-après: le club), affilié à la Fédération Turque de Football elle-même membre de la FIFA, à payer au footballeur B._____ 180'000 euros (EUR) à titre d'arriérés de salaire et 106'250 EUR à la suite de la rupture prématurée du contrat de travail conclu par les parties.

Par courrier électronique du 3 mai 2024, le club a adressé une déclaration d'appel au Tribunal Arbitral du Sport (TAS) aux fins de contester cette décision.

Le 10 mai 2024, le TAS a accusé réception dudit courriel et a attiré l'attention de l'appelant sur l'art. R31 al. 3 du Code de l'arbitrage en matière de sport (ci-après: le Code), lequel énonce ce qui suit:

"La requête d'arbitrage, la déclaration d'appel et tout autre mémoire écrit, imprimé ou sauvegardé sur support numérique, doivent être déposés par courrier au Greffe du TAS par les parties en autant d'exemplaires qu'il y a d'autres parties et d'arbitres, plus un exemplaire pour le TAS, faute de quoi le TAS ne procède pas. S'ils sont transmis par avance par télécopie ou par courrier électronique (...), le dépôt est valable dès réception de la télécopie ou du courrier électronique par le Greffe du TAS mais à condition que le mémoire et ses copies soient également déposés par courrier, ou téléchargés sur la plateforme de dépôt en ligne du TAS, le premier jour ouvrable suivant l'expiration du délai applicable, comme mentionné ci-dessus".

La décision attaquée ayant été notifiée à l'appelant le 12 avril 2024, le TAS a indiqué que le délai d'appel expirait le 3 mai 2024 et que la déclaration d'appel, transmise par courrier électronique, aurait également dû être déposée par courrier ou téléchargée sur la plateforme de dépôt en ligne du TAS le premier jour ouvrable suivant l'expiration du délai applicable, à savoir le 6 mai 2024. L'appelant n'ayant obtenu en l'occurrence un accès à la plateforme de dépôt en ligne du TAS que le 7 mai 2024, il aurait dû télécharger son mémoire sur ladite plateforme le 8 mai 2024 au plus tard, ce qu'il n'avait pas fait. Dans ces conditions, le TAS a imparti un délai de trois jours à l'appelant pour établir qu'il avait effectivement envoyé sa déclaration d'appel par courrier en temps utile, faute de quoi il n'entrerait pas en matière.

Par courrier électronique du 13 mai 2024, le club a confirmé avoir procédé à l'envoi de sa déclaration d'appel par courrier le 6 mai 2024, date à laquelle il aurait remis son mémoire en mains propres à une société dénommée C._____. Il a annexé à son courriel les documents suivants:

- une pièce, intitulée "Certificate of Custodianship", datée du 6 mai 2024, censée attester la prise en charge par C._____, le même jour, de documents juridiques destinés au TAS, signée par D._____;
- une quittance du versement de 129,50 EUR opéré le 6 mai 2024 par l'avocat du club, Me E._____, en faveur de C._____;

- un document daté du 6 mai 2024 et signé par les deux prénommés dans lequel C._____ accusait réception d'un envoi destiné au TAS.

Le 14 mai 2024, le TAS a indiqué avoir bien reçu les documents en question mais a estimé que ceux-ci ne permettaient pas d'établir que la déclaration d'appel avait bel et bien été expédiée par courrier le 6 mai 2024. Il a précisé qu'il entrerait en matière seulement lorsqu'il aurait reçu la déclaration d'appel en question et pu vérifier la date d'envoi effective de celle-ci.

Le 15 mai 2024, le TAS a accusé réception de la déclaration d'appel originale transmise par courrier. Soulignant que cet envoi pris en charge par le transporteur DHL mentionnait le 13 mai 2024 en tant que date d'expédition - laquelle correspondait au demeurant à la date à laquelle l'appelant avait transmis au TAS divers documents par voie électronique censés démontrer que la déclaration d'appel avait été remise le 6 mai 2024 à C._____ -, l'institution d'arbitrage a considéré que seule la date d'expédition du 13 mai 2024 attestée par le système électronique de suivi des envois de DHL était déterminante. Dans ces conditions, le TAS a fait savoir à l'appelant qu'il n'entrerait pas en matière sur l'appel, en raison du non-respect de l'art. R31 du Code, respectivement du dépôt manifestement tardif de l'appel.

Le 14 juin 2024, le club (ci-après: le recourant) a formé un recours en matière civile aux fins d'obtenir l'annulation de la décision du 15 mai 2024.

Extrait des considérants

(…)

2.
Le recours en matière civile est recevable contre les sentences touchant l'arbitrage international aux conditions fixées par les art. 190 à 192 de la loi fédérale sur le droit international privé du 18 décembre 1987 (LDIP; RS 291), conformément à l'art. 77 al. 1 let. a LTF.

Le siège du TAS se trouve à Lausanne. L'une des parties au moins n'avait pas son siège en Suisse au moment déterminant. Les dispositions du chapitre 12 de la LDIP sont donc applicables (art. 176 al. 1 LDIP).

3.
Le recours en matière civile visé par l'art. 77 al. 1 let. a LTF n'est recevable qu'à l'encontre d'une sentence, qui peut être finale (lorsqu'elle met un terme à l'instance arbitrale pour un motif de fond ou de procédure), partielle, voire préjudicielle ou incidente. En revanche, une simple ordonnance de procédure pouvant être modifiée ou rapportée en cours d'instance n'est pas susceptible de recours. Est déterminant le contenu de la décision, et non pas sa dénomination (**ATF 143 III 462** consid. 2.1).

En l'occurrence, le TAS a refusé d'entrer en matière sur l'appel, en raison du non-respect des exigences de forme prévues par l'art. R31 al. 3 du Code. Il ne s'agit ainsi pas d'une simple ordonnance de procédure susceptible d'être modifiée ou rapportée en cours d'instance mais bel et bien d'un acte qui s'apparente à une décision d'irrecevabilité clôturant l'affaire pour un motif tiré des règles de la procédure. Peu importe que la décision querellée revête ici la forme d'une lettre et qu'elle émane du Greffe du TAS plutôt que d'une formation arbitrale (arrêts 4A_580/2022 du 26 avril 2023 consid. 3.1; 4A_416/2020 du 4 novembre 2020 consid. 2.2; 4A_556/2018 du 5 mars 2019 consid. 2.2; 4A_238/2018 du 12 septembre 2018 consid. 2.2).

Pour le reste, qu'il s'agisse de la qualité pour recourir, du délai de recours ou encore des conclusions prises par l'intéressé, aucune de ces conditions de recevabilité ne fait problème en l'espèce. Rien ne s'oppose donc à l'entrée en matière. Demeure réservé l'examen de la recevabilité de l'unique moyen invoqué par le recourant.

(…)

5.

5.1. Dans un unique moyen, l'intéressé se plaint d'un "formalisme excessif constitutif d'un déni de justice formel au sens de l'art. 190 al. 2 let. c LDIP". Soulignant que l'art. R31 al. 3 du Code exige l'envoi de la déclaration d'appel "par courier", sans autres précisions, il estime que la partie qui interjette un appel auprès du TAS peut choisir le transporteur de son choix, sans qu'il soit nécessaire que ce dernier utilise un système permettant d'assurer la traçabilité des envois. Le recourant précise que la seule circonstance déterminante est de savoir quand l'expéditeur a remis au transporteur l'acte destiné au TAS. A son avis, le TAS aurait fait preuve de formalisme excessif en ne retenant pas qu'il avait remis sa déclaration d'appel à l'entreprise C._____ le 6 mai 2024.

5.2. Dans plusieurs arrêts, le Tribunal fédéral a évoqué la possibilité que le formalisme excessif puisse éventuellement être assimilé à une violation de l'ordre public au sens de l'art. 190 al. 2 let. e LDIP et, singulièrement, de l'ordre public procédural. Il n'a toutefois pas tranché cette question (arrêts 4A_254/2023 du 12 juin 2023 consid. 5.2 et les références citées; 4A_54/2019 du 11 avril 2019 consid. 4.1). Il n'a en revanche jamais laissé entendre que le formalisme excessif pourrait entrer dans les limites du cadre tracé par l'art. 190 al. 2 let. c LDIP. Or, dans son mémoire de recours, l'intéressé formule exclusivement ses critiques relatives à un prétendu formalisme excessif sous l'angle de l'art. 190 al. 2 let. c LDIP, sans justifier ce choix, au lieu de rattacher le grief qu'il invoque au motif de recours évoqué par la jurisprudence, à savoir l'art. 190 al. 2 let. e LDIP. Le moyen considéré apparaît ainsi, à première vue, irrecevable. Point n'est toutefois besoin de pousser plus avant l'examen de cette question, pour les motifs exposés ci-après.

Force est de relever que l'intéressé se plaint, à tort, d'un déni de justice formel, puisque le TAS n'a pas refusé de statuer sur le cas qui lui était soumis. L'institution d'arbitrage a simplement considéré qu'elle ne pouvait pas procéder respectivement entrer en matière sur l'affaire car l'intéressé ne l'avait pas saisie valablement, étant donné qu'il n'avait pas respecté les exigences formelles prévues par l'art. R31 al. 3 du Code.

Le recourant ne peut pas davantage être suivi lorsqu'il reproche au TAS d'avoir fait preuve de formalisme excessif. Il sied de rappeler que le Tribunal fédéral a déjà eu l'occasion de préciser que le TAS ne faisait pas montre d'un formalisme excessif en sanctionnant par une irrecevabilité le vice de forme que constituait l'envoi d'une déclaration d'appel par simple télécopie ou courrier électronique (arrêts 4A_54/2019, précité, consid. 4.2.2; 4A_238/2018, précité, consid. 5.5). Si l'art. R31 al. 3 du Code permet certes de déposer par avance une déclaration d'appel par télécopie ou par courrier électronique, la validité de ce dépôt est toutefois subordonnée à la condition que l'écriture soit aussi transmise par courrier ou téléchargée sur la plateforme de dépôt en ligne le premier jour ouvrable suivant l'expiration du délai applicable, étant précisé qu'une telle exigence ne saurait être reléguée au rang de simple formalité administrative mais constitue bel et bien une condition de validité du dépôt de l'acte en question (arrêts 4A_54/2019, précité, consid. 4.2.2; 4A_238/2018, précité, consid. 5.6). En l'occurrence, le TAS a estimé, sur la base des pièces que lui avait remises l'intéressé, que ce dernier n'avait pas démontré avoir effectivement expédié sa déclaration d'appel, par courrier, en temps utile. Contrairement à ce que sous-entend le recourant, le TAS n'a jamais laissé entendre qu'une partie ne pouvait pas faire appel au transporteur de son choix, respectivement que celui-ci devait impérativement disposer d'un système de traçabilité des envois. Il a seulement considéré qu'il appartenait à la partie souhaitant interjeter un appel auprès de lui d'établir la date à laquelle elle avait effectivement remis sa déclaration d'appel au

transporteur, et a estimé que le recourant n'avait pas réussi à démontrer avoir accompli pareille démarche en temps utile. Sous le couvert du moyen tiré de la violation de l'art. 190 al. 2 let. c LDIP, le recourant ne fait, en réalité, rien d'autre que s'en prendre à l'appréciation des moyens de preuve disponibles opérée par le TAS. Ce faisant, il échoue manifestement à établir que le TAS se serait rendu coupable de formalisme excessif, étant précisé ici que la solution retenue par ladite institution arbitrale n'apparaît nullement critiquable.

Décision

Le recours est rejeté dans la mesure de sa recevabilité.

Informations diverses
Miscellanous
Información miscelánea

Sélection de publications récentes relatives au TAS /Selected recent CAS publications/ Selección de publicaciones recientes del CAS

- Bärtsch P., La prevue dans les litiges de dopage, Les Cahiers de l'Arbitrage 2024 – 1; The Paris Journal of International Arbitration; Numéro special JO, p.239

- Buy F., Marmayou J.-M., Poracchia D., Rizzo F., Droit du sport, 7e edition, novembre 2023, LGDJ, p. 220 – 233

- Bydzovsky P., The status of transgender and intersex athletes in international sports federations, The International Sports Law Journal, Volume 23, Number 3, September 2023, p. 357

- Coccia M. et Colucci M., International Sports Justice, Sport Law and Policy Center 2024

- Crespo Ruiz-Huerta J. et González Iglesias, The CAS and the awards on the war in Ukraine that affect Russia, Revista aranzi de derecho de deporte y entretenimiento, Num. 81, Octubre – Deciembre 2023, p. 185 – 194

- Diakité A. et Marquis L., La Lex olympica ne peut se satisfaire de critères de qualification pour les jeux Olympiques discriminatoires, Les Cahiers de droit du sport, no. 64, 2024, p. 62 – 66

- Donnellan L. et Kornbeck J., Athlétisme et hyperamdrogénie CEDH 11 juillet 2023, req. n°10934/21, aff. Semenya c/Suisse, Jurisport, no. 249, Février 2024, p. 33 – 36

- Duval A., The international skating union ruling of the CJEU and the future of CAS arbitration in transnational sports governance, The International Sports Law Journal, Volume 23, No. 4; December 2023, p.467

- Ernes G., Les Phryges, en guise de contestation de la justice sportive, Le tribunal Arbitral du Sport, Les Cahiers de Droit du Sport, No. 65, 2024, p. 103

- Favre Schyder R., Jurisdiction of the CAS Ad hoc Division: Exhaustion of legal remedies, Les Cahiers de l'Arbitrage 2024 – 1; The Paris Journal of International Arbitration; Numéro special JO, p. 51

- Garcia B., Down with the politics, up with the law! Reinforcing EU law's supervision of sport autonomy in Europe, The International Sports Law Journal, Volume 23, No. 4; December 2023, p. 416

- Garcia Caba M., Again, on racism and sports discipline in football: commentary on the award of the Court of Arbitration for Sports 2022/A/9250 Club Atlético Boca juniors v. Conmebol, Revista aranzi de derecho de deporte y entretenimiento, Num. 83, April – Junio 2024, p. 149

- Hessert B., Substantial Assistance in doping proceedings Spurt, 4/2024 p. 274

- Hülsköttter T., Europäisches Recht auf Konfrontationskurs mit dem Sitz des CAS, Spurt, 2/2024, p. 78

- James M., Human rights and the Olympic Charter, The International Sports Law Journal, Volume 23, Number 3, September 2023, p.267

- Latty F., Oracles et perspective: les grandes décisions de la chambre ad hoc du TAS pour les Jeux olympiques de Paris 2024, Les Cahiers de l'Arbitrage 2024 – 1; The Paris Journal of International Arbitration; Numéro special JO, p. 57

- Le Bescond De Coatpont M., Affaires ESL et ISU: quelles conséquences pour les fédérations sportives?, Les Cahiers de droit du sport, no. 64, 2024, p.116 – 188

- López Moreno F., To be or not to be: Analysis of the CAS Award in the Byron Castillo case, Revista aranzi de derecho de deporte y entretenimiento, Num. 82, Enero – Marzo 2024, p. 195

- Mavromati D., Selected Swiss Federal Tribunal Judgments in 2023 in Annulment Proceedings against CAS Awards, ASA Bulletin, Volume 42, No. 1, 2024

- Mestre A. M., Charte Olympique: la principale source Mondiale du droit du sport, Les Cahiers de droit du sport, no. 64, 2024, p. 7 – 11

- Modi T., To what extent is rule 50 of the Olympic Charter valid? Balancing freedom of expression and the mythical political neutrality of sport, The International Sports Law Journal, Volume 23, Number 3, September 2023, p. 368

- Müssnich F. A. M., Guilty until proven innocent? Challenges faced by the CAS Ad hoc Divisions to assess the eligibility of Russian athletes to compete in the Rio 2016 Olympic Games, Les Cahiers de l'Arbitrage 2024 – 1; The Paris Journal of International Arbitration; Numéro special JO, p. 35

- Pittet L., Pouvoir du tribunal arbitral d'examiner une creance oppose en compensation, Note sur l'arrêt du Tribunal federal 4A_420/2022, ASA Bulletin, Vol. 42, No.42, 2024, p. 274

- Pérez Lavado M., Commentary on the CAS award, case of Sara Castillo Martinez v. World Skate, Revista aranzi de derecho de deporte y entretenimiento, Num. 82, Enero – Marzo 2024, p. 207

- Perruchoud M., Application of Swiss law and influence of Swiss protection of legal personality in international sport: a necessity to ensure equality of treatment among competitors?, The International Sports Law Journal, Volume 23, Number 3, September 2023, p. 340

- Rigozzi A., Aspects notables et évolutions probables de la jurisprudence du Tribunal federal Suisse portant sur les sentences du Tribunal Arbitral du Sport, Les Cahiers de l'Arbitrage 2024 – 1; The Paris Journal of International Arbitration; Numéro special JO, p. 205

- Reeb M. and Mavromati D., History, characteristics & overview of the procedural particularities and the jurisdiction of the CAS Ad hoc Divisions at the Olympic Games, Les Cahiers de l'Arbitrage 2024 – 1; The Paris Journal of International Arbitration; Numéro special JO, p. 23

- Roberts C., Field of plays case, Les Cahiers de l'Arbitrage 2024 – 1; The Paris Journal of International Arbitration; Numéro special JO

- Soria F., Comment on the award TAS 2020/7184 "Club atlético Lanús c. Club Atlético Rosario Central, Revista aranzi de derecho de deporte y entretenimiento, Num. 81, Octubre – Deciembre 2023, p.195 – 199

- Subiotto R., L'impact du droit européen de la concurrence sur le pouvoir de contrôle des fédérations sportives sur leur sport et le role du Tribunal Arbitral du Sport, Les Cahiers de l'Arbitrage 2024 – 1; The Paris Journal of International Arbitration; Numéro special JO, p. 255

- Thiery S., La politique européenne du sport n'est pas pour demain: quelques brèves observations après le rendu des décisions Superleague et Royal Antwerp

Les Cahiers de droit du sport, no. 64, 2024, p. 113 - 115

- Tschanz P.-Y. et Spoorenberg F., Chronique de jurisprudence étrangère, Revue de l'Arbitrage, 2023 – no. 4, p. 1103 - 1127

- Viret M., Saugy M., Botrè F., Creating equality through differentiation in doping control, The International Sports Law Journal, Volume 23, Number 3, September 2023, p. 293

- International News, Swiss Federal Tribunal, Football Legal, no. 19, 2023/2, p. 100

- International News, Court of Arbitration for Sport, Football Legal, no. 19, 2023/2, p. 119

- Rechtsprechung, Keine nationale Geltung der FIFA – Regeln über sportliche Rechtsnachfolge, Spurt, 6/2023, p. 472

- Rechtsprechung, Suspendierung des Russischen NOK durch das IOC, Spurt 3/2024, p. 212 – 216

- Special Report, Navigating Specific Legal Clauses in Club-to-Club Player Transfers, Football Legal, no. 19, 2023/2, p. 5